The Planning Inspectorate
Yr Arolygiaeth Gynllunio

Inspector Training Manual | Index






How to use the Inspector Training Manual

The Inspector Training Manual provides practical advice to new Inspectors and serves as a source of continuing professional development for existing Inspectors.

This training material does not constitute Government policy or guidance; nor does it seek to interpret Government policy. In addressing policy issues, you will be expected to have regard to the most up-to-date policy and guidance produced by the relevant Government department. In the event that there appears to be a discrepancy between this material and national policy / guidance, any national policy and guidance will be conclusive.

The Inspector Training Manual is made up of 'living documents'. Please always ensure that you are referring to the most up-to-date version. Any revisions to this material will include an e-mail alert to 'All Inspectors' and subsequently, the version held in the Knowledge Library should be regarded as the current and up-to-date material.

The chapters are catalogued in the Knowledge Library under their relevant headings and in alphabetical order for the themed chapters only. Alternatively, for ease of navigation, you can access the chapters from this Index, by using the links below.

Please be aware of the geographical relevance of each chapter - the relevance of each chapter to England and / or Wales has been specified in this Index (below) and also within each chapter.

Please also note that we have included all the current remaining Procedure Guides and Case Law & Practice Guides for completeness, and ease of accessibility. It is our ambition that these will be reviewed and considered for inclusion in future updates to the Inspector Training Manual.

The Knowledge Centre will be considering what further material would be appropriate to include in the Training Manual, as an ongoing process.

When holding events, and writing decisions / reports, it is important that Inspectors continue to refer to the original policy source – as the Inspector Training Manual is not the source of any guidance.

Our publication policy is to disclose the Inspector Training Manual if requested by an external customer, but not to publish the material externally on a website.

If you have any queries about this training material, please e-mail the Knowledge Centre.

The Knowledge Centre

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The Planning Inspectorate

Role of the Inspector

Updated to reflect December 2023 Framework (NPPF)
What's new since the last version: Changes highlighted in yellow made 07 September 2023: • Updated references to PINS Conflict of Interest policies
Other recent updates • 14 November 2022: New paragraphs 36 and 37 in relation to Inspector Specialisms

Contents

The Planning Inspectorate

1. The Planning Inspectorate is an Executive Agency of the Department for Levelling Up, Housing and Communities (DLUHC).

2. We report to the Secretary of State for Levelling Up, Housing and Communities under the terms of an Agency Framework Document.

3. We are responsible for a wide variety of work, including:

    - Planning, enforcement and listed building appeals
    - Applications which have been 'called-in' by the Secretary of State or Welsh Ministers
    - National Infrastructure Applications/Developments of National Significance
    - Development plan examinations
    - Rights of Way and other specialist casework
    - Work for other government departments (including the Departments for Environment, Food & Rural Affairs and Transport)

4. Our purpose and vision are as follows:

    Purpose (from Strategic Plan 2019 - 2024 and The Planning Inspectorate Annual Report and Accounts 2018/19)
    The Planning Inspectorate deals with planning appeals, national infrastructure planning applications, examination of local plans and other planning and specialist casework in England and Wales, delivering impartial decisions, recommendations and advice to customers in a fair, open and timely manner.

    Vision (From Strategic Plan 2019 - 2024)
    To provide a customer-focused, professional centre of excellence as trusted, independent and innovative planning experts, meeting the Government's objectives at a local and national level whilst working with others to improve the planning system.

    Values – Openness, Fairness and Impartiality.

5. This Training Manual Chapter is mainly aimed at Inspectors carrying out planning and appeals casework. However, guidance on the 'Franks' Principles', natural justice, human rights and the Code of Conduct also applies to other casework.

The Planning Inspector and the Secretary of State

6. Some Inspectors are employed by the Planning Inspectorate (salaried Inspectors) and others are appointed on a contract basis to work on specific cases (Planning Appeal Decision Suppliers (PADS).

7. Inspectors carry out two main roles for the Secretary of State (in terms of planning applications and appeals):

   - **'Transferred casework'** – This is where you are appointed by the Secretary of State to determine appeals. You are not acting as their delegate in any legal sense, but are required to exercise your own independent judgement, within the framework of national policy as set by government (See paragraph 21 of Suffolk Coastal District Council v Hopkins Homes Ltd [2017] UKSC 37). You must have the same regard to the Secretary of State's policies as they would. Schedule 6 of the 1990 Act provides the authority for planning appeals to be determined by Inspectors[1]. Most appeals are 'transferred'.

   - **'Secretary of State casework'** - This includes applications which are 'called-in' under section 77 of the 1990 Act (See Procedural Guide: Called-in planning applications – England) and appeals which are 'recovered' by the Secretary of State (under Schedule 6 of the Act)[2]. In both cases you write a report with recommendations and the final decision is made by the Secretary of State. You are the Secretary of State's representative and must write your report and make recommendations in the context of the Secretary of State's policies.

8. Given these roles, it is not appropriate for you to comment on, question or criticise the Secretary of State's policies.

9. When appointed by the Secretary of State, each Inspector is technically a tribunal and the decision-making process is quasi-judicial in character. Inspectors are governed by relevant Acts of Parliament, Statutory Instruments and case law.

10. Consequently, there should be no evidence or policy before the inspector which is not also available to the parties. Each Inspector must exercise impartial judgment and must not be subject to any improper influence, nor appear to be subject to such influence.

The 'Franks' Principles

11. The key guiding principles for Inspectors and all who work within PINS are openness, fairness and impartiality. These principles formed the basis of the recommendations of the 'Franks' Committee on Administrative Tribunals and Enquiries which was chaired by Sir Oliver Franks in 1957.

Openness means that you must not get secret briefings. All policy and evidence should be available to the parties just as it is to the Inspector.

[1] Schedule 14 of the Act applies to footpath and bridleway orders. Different legislation applies to some other types of casework – for example, Schedule 3 of the 1990 (Listed Buildings and Conservation Areas) Act, Schedule 15 of the Wildlife and Countryside Act 1981 and Schedule 6 of the Highways Act 1980 (public rights of way)

[2] The criteria used to decide if an appeal should be recovered can be found in the government's *Planning Practice Guidance* (Reference ID: 16-005) and in *PPW in Wales* (Paragraph 3.7.3)

Fairness means that all parties with an interest in a decision are given adequate notice of the proceedings, have a proper opportunity to state their case and to reply to the representations of others.

Impartiality means that you must maintain a high level of integrity and objectivity when facing the issues and evidence before you. You should come to a case with an open mind. You must be impartial and unbiased and must be seen to be so. You must not be subject to any improper influence or seen to be subject to such influence.

Natural Justice and 'Wednesbury' Reasonableness

12. You should apply the rules of natural justice. These can be seen as a duty to act fairly and without bias.

13. Decision makers also have a duty to act reasonably. This derives from *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223. This judgment makes it clear that a decision is unlawful where the decision maker:

    - takes into account factors that ought not to have been taken into account, or
    - fails to take account of factors that ought to have been taken into account, or
    - takes a decision that was so unreasonable that no reasonable authority would ever consider taking it.

14. The Courts have defined unreasonable/irrational decisions as:

    - "beyond the range of responses open to a reasonable decision maker". (*R v Ministry of Defence ex p Smith* [1996] QB 517)
    - What the term "irrationality" generally means in administrative law is a decision which does not add up – in which, in other words, there is an error of reasoning which robs the decision of logic (*R v. Parliamentary Commissioner, ex parte Balchin (No. 1)* [1998] 1 PLR 1, per Sedley J at p. 13E-F)

Human Rights and Equality

15. The Human Rights Act 1998 (HRA) enshrines most of the fundamental rights and freedoms in the European Convention on Human Rights (ECHR).

16. Article 6.1 of the ECHR provides that 'in the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing, ... by an independent and impartial tribunal established by law.'

17. In the case of *Bryan v UK* (44/1994/491/57), at the European Court of Human Rights in 1995, the Court found that the proceedings before the Inspector ensured a fair hearing but the fact that the Secretary of State could, at any time before the determination of the appeal, revoke the Inspector's power to decide it was enough to deprive the Inspector of the requisite appearance of independence. However, the provision for remedies available by way of High Court challenge satisfied the requirements of Article 6.1 and there was no violation of the Convention.

18. The judgment of the House of Lords in *R v Secretary of State for Environment, Transport and the Regions, ex p Holding and Barnes*, 2001, (often referred to as the Alconbury case) confirmed that the planning system as a whole, including the right to judicial review, complied with the Article 6 requirement for a fair hearing before an independent and impartial tribunal.

19. It is unlawful for a public authority to act in a manner which is incompatible with the Human Rights Act, and you must have human rights in mind when making decisions. You should also be aware of your responsibilities in relation to the Public Sector Equality Duty (PSED) under the Equality Act 2010. If your actions and decisions are based on the Franks Principles, the Code of Conduct and the advice on 'natural justice and fairness' in 'The approach to decision making' this will help you comply with the HRA and PSED.

20. Further advice is also provided in 'Human Rights and Equality' chapter of the ITM.

Code of Conduct

21. The Planning Inspectorate's Code of Conduct sets out the conduct expected of inspectors. You should familiarise yourself with the Code and abide by it when dealing with appeals. However, if you have any doubts as to whether your conduct might be in conflict with the Code, you should seek advice from your line manager.

Civil Service Code

22. You must also comply with the Civil Service Code and PINS Human Resources policy which can be found in the Staff Handbook on the Intranet. In particular, you should be aware of the policies on personal conduct, security and private interests.

Apparent bias

23. Inspectors should avoid giving the impression that they have made up their mind on an issue or are favourably disposed to any party. The Courts have decided the relevant test is whether 'a fair-minded observer to conclude that there was a real possibility that the tribunal was biased'[3]. This requires a '"look at all the circumstances as they appear from the material before it, not just at the facts known to the objectors or available to the hypothetical observer at the time of the decision."'[4].

24. In *Satnam Millenium Ltd v SOSHCLG & Warrington BC* [2019] EWHC 2631 (Admin) the Court accepted that different Inspectors have different styles and levels of formality. The judge noted that 'Although it would avoid some problems if Inspectors were [automatons], it could create others at an inquiry with feelings running high and large numbers of the public attending. This was all very much part of a legitimate judgement about how to run a difficult Inquiry in those venues, with the facilities, and participants there were.'[5] The judge also noted 'I cannot see that a degree of

[3] *Porter v Magill* [2001] UKHL 67
[4] *National Assembly for Wales v Condron [*2007] 2 P&CR 4 Richards LJ at [50]
[5] See paragraph 234 of Satnam Millenium Ltd v SOSHCLG & Warrington BC [2019] EWHC 2631 (Admin)

chattiness, or avoidance of the appearance of being rude, such as others may adopt, is indicative of a possibility of bias', although Inspectors should ensure the same level of formality is applied to all participants[6].

25. At inquiries or hearings other than a general greeting, discussions on procedure should be avoided. If you are approached by any party outside the formal session, you should make clear that any queries should be made in open session. Directing, loudly, a person to the LPA, the appellant or a Programme Officer often makes sense since they can more likely help.

26. Ensuring fairness also applies at site visits. Here there will be practical difficulties of ensuring that any comments made by participants pointing out features are heard by all parties. If somebody wishes to point something out, stop, ensure that all parties are present/represented and then proceed.

Procedures for determining appeals[7]

27. There are three procedures for dealing with appeal casework:

- Written representations;
- Hearings;
- Inquiries.

28. You should be aware of the relevant rules and regulations[8], including in particular:

- The Town and Country Planning (Hearings Procedure) (England) Rules 2000
- The Town and Country Planning Appeals (Determination by Inspectors) (Inquiries Procedure) (England) Rules 2000
- The Town and Country Planning (Appeals) (Written Representations Procedure) (England) Regulations 2009
- The Town and Country Planning (Section 62A Applications) (Written Representations and Miscellaneous Provisions) Regulations 2013 and The Town and Country Planning (Section 62A Applications) (Hearings) Rules 2013[9]

[6] Ibid paragraph 251.
[7] Where statutory procedural rules exist and a rule expressly refers to a particular type of event or action without giving the Inspector discretion as to how that event or action should be dealt with, the Inspector has no discretion to depart from or dispense with it. See paragraph 49 of the High Court judgment in *Turner v SSCLG & Others* [2015] EWHC 375 (Admin).
[8] In Wales, use the Welsh Regulations and procedural rules. These are available in the Wales Knowledge Library.
[9] Where applications are made directly to the Secretary of State - in local authority areas where the authority has been designated for not adequately performing their function of determining applications.

29. Appeal procedures are set out in the following documents which are available on GOV.UK or via the Knowledge Library[10]:

- Procedural Guide: Planning appeals – England[11]
- Procedural Guide: Called-in planning applications – England
- Procedural Guide: Enforcement appeals – England
- Procedural Guide: Certificate of lawful use or development appeals - England

30. Further guidance to those taking part in planning and enforcement appeals is also available on GOV.UK.

31. You can expect the procedural matters relating to an appeal to be properly and expertly undertaken by office-based staff. Nevertheless, you do need to be alert to any potential defects in procedure before or after you receive the appeal file.

Changing the procedure for determining an appeal

32. The 2023 LURA amended Schedule 6 of the 1990 Act which initially only allowed the administrative branch of PINS to determine the procedure by which appeals are decided. s.131 now enables an appointed inspector, rather than a case officer, to change the procedure for determining an appeal under s.319A of the Act. The criteria for determining appeals are set out in Criteria for determining the procedure. It is important that appeals are dealt with by the most appropriate procedure in order that the evidence can be properly understood and, where necessary, tested. Under s319A, introduced by the Business and Planning Act 2020, the options to conduct events by one or more procedures can be followed – See Explanatory Notes paragraphs 164-167.

33. When allocated a case you should consider whether it is an appropriate one for you to determine, and whether the procedure is likely to be suitable. In most cases the team leader/case officer will make the initial procedure decision based on the published criteria, the nature of the case and the matters at issue. Where this differs from the appellant's choice of procedure the reasons for the determined procedure will be included in the start letter. However, where the team leader/case officer are unsure of the most appropriate procedure they will, on occasion, contact the Inspector to obtain your view. If you consider that you need the views of any of the parties before you can recommend type of procedure then you should contact your case officer confirming what information is required and by when[12]. If you feel that an appeal should follow a different procedure from that requested by the appellant, then

[10] Welsh versions of these procedural guides are available on GOV.Wales.
[11] The Procedural Guide – Planning appeals – England applies to planning appeals, householder development appeals, minor commercial appeals, listed building appeals, advertisement appeals and discontinuance notice appeals. It also applies to appeals against non-determination. For more information see GOV.UK.
[12] See Inspector & Case Officer/Team Leader Responsibilities.

you should discuss this with your Case Officer and provide reasons for this so that these can be included in the start letter.

34. If on your first review of the case after it has started, or at any time as the case progresses, you consider that the appeal procedure should be changed, you will need to consider if the parties should have the opportunity to comment on the proposed change of procedure. Where sufficient information has been provided it is not likely that you will need to consult the parties however if further clarification is need then, as above, you should contact your case officer confirming what information is required and by when. Your Case Officer can then notify the parties of a change in procedure if required.

Specialisms

35. During the course of an appeal, the Case Officer will assess a number of factors that will allow them to match an appeal to an appropriately experienced Inspector, a process which is known as 'allocation'. Some of these factors will require the appeal to be allocated to an Inspector with a particular specialism(s). For example, proposals that would affect the setting of a Grade I or II* listed building will need to be allocated to an Inspector with the Historic Heritage specialism. Where time allows, it is advisable to do a quick review of your new casework as soon as possible to satisfy yourself it has been appropriately allocated to you.

36. Further details of allocation, including the specialism allocation table can be found within the 'Allocation Guide' on the intranet.

Challenges and complaints

37. Planning appeals can be challenged in the High Court[13]. However, the Courts will only be concerned with the legality of the decision and not with the planning merits of the case. There are four potential outcomes following a challenge:

    - The challenge is withdrawn;
    - The challenge is successfully defended;
    - The challenge is successful;
    - The Planning Inspectorate decides not to defend the decision and so 'submits to judgment'.

38. In the latter two outcomes the Court will quash the decision and it will be returned to the Secretary of State for redetermination. The Court has no power to replace the Inspector's decision with its own. If you are dealing with a redetermined appeal see the advice in 'The approach to decision making' chapter of the ITM.

39. Complaints can be made to the Planning Inspectorate or to the Ombudsman (although the Ombudsman will normally refer the complainant to the Planning

[13] Further guidance can be found in the ITM: High Court Challenges.

Inspectorate if our own complaints process has not been exhausted). Some complaints can be made pre-decision. However, even if a complaint is upheld, the original decision will still stand.

Preclusions from Casework

Conflicts of Interest

40. You should have regard to the detailed guidance that is provided in the PINS 'Conflict of Interest' Policy'. It currently covers the following areas:

- the process for identifying potential conflicts of interest;
- property interests (such as geographic);
- financial interests;
- concurrent work;
- previous work and/or employment or other unpaid activities;
- political interests;
- membership of organisations and societies;
- interests of families and close associates;
- gifts, benefits and hospitality;
- sanctions.

41. It is good practice to review the need to retain general preclusions every year as part of your engagement with your line manager.

42. Before seeking or accepting any official position in a professional institution, you should obtain the prior approval of your line manager. If you subsequently act on behalf of a professional institution, given your roles in relation to the Secretary of State, it is not appropriate for you to comment on, question or criticise the Secretary of State's policies.

43. You must register any interest in Freemasonry with PINS Human Resources. PINS maintains a record of Inspectors who are and who are not members of the Freemasons and of those who have declined to provide this information. If an Inspector makes a false declaration, he or she will be deemed to have committed a serious disciplinary offence. The record should be kept up to date to note changes. If asked at an inquiry or hearing, you should provide the information yourself. If asked at an accompanied site visit, you should refer the questioner to PINS Human Resources, where details of the information are kept.

Involvement in PINS' casework in a private capacity

44. As an individual you are entitled to make representations on local plans, NSIP schemes and planning applications/appeals. However, in doing so, you should:

    - not use your position as an Inspector to influence a decision or outcome;
    - avoid putting yourself in a position where a decision-maker (such as the LPA) or others might reasonably perceive that you have sought to use your position as an Inspector to influence a decision or outcome;
    - consider carefully whether making a representation or objection on a plan, NSIP or application/appeal might constrain your future ability to carry out PINS casework (for example because it might bring into question your ability to impartially consider similar issues elsewhere when carrying out your own casework);
    - ensure that you do not discuss any case you are making representations about with the PINS decision maker, their manager or any other PINS staff who might be involved in the case.

45. You should also be careful about taking on any role advising others about how they might make representations as this could also raise legitimate concerns and perceptions about conflicts of interest.

46. If you are uncertain about the application of this advice in relation to a particular situation, you should discuss it with your line manager. Ultimately however, it is your personal responsibility to ensure you comply with the Civil Service Code of Conduct, PINS Code of Conduct and any relevant advice in the ITM.

47. Where you are involved in an appeal as an appellant or third party:

    - Salaried Inspectors should notify their Professional Lead. PADS should notify CMU.
    - In the case of PADS, the case will be allocated to a Salaried Inspector.
    - In the case of Salaried Inspectors working in England, the case will be allocated to an inspector working for the Welsh Government. If in Wales, the case will be allocated to an English inspector.

48. Where a PADS is involved in an appeal as part of their private practice, you should announce at the inquiry or hearing that the PADS has carried out work for the Inspectorate[14]. In written representations cases, the Inspectorate will inform the main

[14] Where anyone in the office has declared an interest in a case the same arrangements apply.

parties in writing[15]. This does not alter the standing instruction that PADS should not advertise or promote themselves on the basis that they have undertaken such work.

49. You should consider whether your relationship with the PADS is such that the impartiality of your decision could be affected or questioned. If that is a possibility, you should inform your line manager and Team Leader immediately and the case will be reallocated.

50. Where the business partner or colleague of a PADS appears at the inquiry or hearing, you will need to make an announcement only if the PADS themself has been involved in the appeal scheme.

Gifts and hospitality

51. This is covered in the Staff Handbook and is also referred to in the Conflict of Interest Policy.

52. The underlying principle is that you must not accept gifts or hospitality or receive any other benefits which might be seen to compromise your personal judgement or integrity. Consequently, you should never accept gifts or hospitality from anyone connected with an appeal or other casework. This includes accepting offers of a cup of tea or coffee on a site visit. It is best to decline any such offers politely while being sensitive to any cultural norms.

53. If you are in any doubt over whether the receipt of a gift, hospitality or other benefit, by you or your family could breach this principle – discuss the matter with your line manager and/or Professional Lead and/or Governance. The Staff Handbook provides further information.

54. If you are offered or accept a gift or hospitality, it may need to be reported in the Gifts and Hospitality Register kept by Governance. The 'Acceptance of Gifts, Benefits and Hospitality' provides further guidance.

Contact with the parties.

55. Your only direct contact with the parties should be during the site visit, hearing and inquiry. Outside of these events any necessary contact should be made in writing through the Case Officer or Team Leader. If any party tries to contact you or engage you in conversation outside these events you should politely decline.

56. If any party attempts to entice you to make a decision in their favour you should report this as soon as possible to your line manager.

Social networking websites

57. PINS policy on social networking websites is set out in the Staff Handbook, Annex M. In summary:

[15] Where anyone in the office has declared an interest in a case the same arrangements apply.

- do not identify that you work for PINS;
- do not conduct yourself in a way that could be detrimental to PINS or could cause people to question your impartiality;
- do not allow interaction on a website to damage working relationships between staff or with stakeholders;
- you should not assume that any entries made on a social networking site will remain private.

Annex A: Planning Decisions during Elections

Background

This annex provides general guidance on the handling of planning and other casework during the short pre-election period in those areas where an election is being held. Inspectors will be notified via Knowledge Updates on the Intranet of any upcoming by-elections, local elections, general elections and the pre-election periods that will apply.

Action

In England and Wales all civil servants are disqualified from election to Parliament and must therefore resign from the Civil Service before standing for election. There are also restrictions on political activity (such as canvassing) by civil servants in some grades, as set out in Chapter 5 of the Staff Handbook. Any queries regarding acceptable political activity should be sent to HR Advice email box.

The Cabinet Office has produced Election Guidance for civil servants which Inspectors should be aware of. As activities of the UK Government could have a bearing on election campaigns, all civil servants should ensure they conduct themselves in accordance with the Civil Service Code. In particular, they should ensure public resources are not used for political purposes and they do not undertake activities that could call their political impartiality into question.

During pre-election periods, it is important that we continue with business as usual, while being sensitive to the possibility of influencing the outcome of the election either in any constituency or, more broadly, across the country. Consequently, particular care should be exercised during that period in relation to the announcement of sensitive decisions. Further guidance on handling casework during the pre-election period is set out below.

Inspectors should be particularly alert during this period to prevent candidates or others seeking to use public inquiries, hearings or examinations as a platform to make electioneering points. They should be especially mindful of cases or examinations where MPs or candidates have made direct representations. Decisions, reports or advisory letters in those cases **must not** be issued, given the potential that the outcome could be used during the campaign period and so call into question PINs impartiality and reputation.

In England

Secretary of State Casework (including Call-ins, Recovered Appeals, NSIP and Specialist Casework)

For casework where we make a recommendation/report to the Secretary of State it will be for the Secretary of State to consider the implications of any decision released during this period of sensitivity, so reports should be submitted as usual. However, if Inspectors working on this casework wish to discuss any concerns, they should contact one of the Professional Leads (PfLs) for Planning, or their IM.

As National Infrastructure Examinations are required to comply with a statutory time limit, once the Preliminary Meeting has been notified and the Examination Timetable has been set the examination is expected to run to the published timetable. If you have concerns about arrangements for any event or the status of any Interested Parties (IPs) (such as

where MPs are/are not standing in the election or there are other candidates registered) then please discuss these with the PfL for National Infrastructure.

Transferred Appeals

Routine work will continue according to the normal programme/target and decisions submitted for despatch in the usual way, subject to the considerations set out in paragraphs 3 and 4 above. If, in an Inspector's judgement and following advice from their IM and their PfL, a decision may give rise to local or wider electoral sensitivities as described below(or any case referred to in paragraph 5), the decision must be held back and **not issued**. In such cases Inspectors should advise their case officers accordingly.

Matters which may give rise to sensitivities may include, though not exclusively, where there has been a local campaign or where the decision raises controversial issues like inappropriate and/or unauthorised development in the Green Belt; major green field housing; renewables; or any case where an emerging Neighbourhood Plan is referred to in evidence.

If an Inspector is any doubt about how to proceed they should consult with their IM and their PfL (whether allowing or dismissing) to establish the position. It is important that Inspectors consider this matter very carefully having regard to the Cabinet Office guidance as well as the content of this note.

Where the IM/PfL agrees a decision should be held back, the decision should be held **by the Inspector** until the period of sensitivity is over. Case officers are aware of these arrangements and will ensure that any decisions held back are promptly issued once sent in by Inspectors after the election.

We will not proactively write to any individual party when a decision is held back. However, when a general election occurs, a message is placed on PINS' webpages on the GOV.uk website explaining the position and, if contacted about specific cases, case officers should relay the website message.

Local Plan Examinations

All local plan examinations are proposed to continue during the pre-election period (including scheduled hearing sessions and consultation on main modifications) and new examinations will also begin.

However, given we are now in the pre-election period and in order to avoid making announcements that could be politically sensitive, the Planning Inspectorate will not be issuing any letters regarding the soundness or legal compliance of local plans, or final reports (including for fact check[16]), until after the election.

[16] The fact check report is the version of the report the Planning Inspectorate sends to the LPA to check for factual errors or inconsistencies. The final report is issued after this process has been completed.

In Wales

Inspectors should speak to the Director for Wales about any decisions or reports that raise sensitive issues (see paragraph 4 above).

The Planning Inspectorate

The approach to decision-making
Part 1 – Constructing the decision

Updated to reflect December 2023 Framework (NPPF)

What's new since the last version

Changes highlighted in yellow made 1 December 2023:

- Update to the section on Overlapping Permissions to provide detail of the Hillside Supreme Court Case

Other recent updates

- Amendment to paragraph 275 regarding description of development when dealing with an approval of reserved matters
- Updated section on "Amended plans and proposals" from Paragraphs 91 - 100
- Paragraph 243 added following the judgment on *Schneck* concerning material considerations on fallback
- Updated section on Validity
- New paragraphs 31 & 32 regarding wider benefits of a proposal

Contents

The Decision

Introduction

1. This chapter is in two parts; Part 1 informs on the factors and issues to take into account, and good practice, in terms of the corporate approaches to be followed, when crafting the decision. Part 2 is concerned with policy and guidance that will need to be incorporated into the assessment.

2. Inspectors make their decisions on the basis of the evidence before them. Consequently, they may, where justified by the evidence, depart from the advice given in this section.

3. There may be occasions where the evidence before you on a particular point or matter is inconclusive. Where this occurs, a level of judgement will be required based on the balance of probabilities having consideration to the facts and circumstances of the case[1]. Any findings should be expressed bearing this principle in mind.

What makes a good appeal decision?

4. A check list for producing robust appeal decisions is provided in *Annex 2*. In summary, you should aim to ensure that your decision is:

   - well-reasoned - so it is clear why the decision has been reached;
   - based on the evidence before you;
   - well-structured;
   - succinct – does it deal only with those matters necessary to the decision and omit unnecessary detail?
   - free from factual and typing errors;
   - written using simple expressions and short sentences avoiding the use of jargon.

The main parts of a decision

5. The main components of a decision are as follows:

[1] In the case of *Woodland Trust v SSLUHC & Anor*, the Inspector erred in their reasoning that conclusive proof was required to establish that an ancient woodland had met the definition in the NPPF

Banner heading

Reference numbers and factual details about the appeal (*see section on Banner Heading and details of the case for more information*).

Decision (and conditions if allowing)

This is your formal decision and usually comes first. If the conditions are lengthy, they can go in an annex.

Procedural matters/Preliminary matters (if any are necessary

This will usually only be necessary if you have to clarify how you have dealt with the appeal.

Main issue(s)

This is where you define the main issue(s) on which your decision will turn. They will usually reflect the disagreement between the appellant and the LPA (and in some cases with interested parties).

Reasons

This is where you set out your reasoning on each main issue before reaching a conclusion on it and on the development plan (and any relevant national planning policy). You should then deal with any 'other matters' which are relevant to the appeal. If you are allowing the appeal, you must give reasons for any conditions that you are imposing and explain why you are not imposing any other suggested conditions.[2] You will also need to deal with any planning obligations.[3]

Conclusion

This is where you reach an overall conclusion on the appeal and carry out any necessary balancing of harm and benefits.

Use of headings

6. It is best practice to use the standard template headings of 'Decision', 'Main Issue(s)' and 'Reasons'. However, if there is just one straightforward main issue this could be set out under your 'Reasons' heading. Other than this it is for you to decide whether further headings/sub-headings would help those using your decision. If you use sub-headings – make sure they are consistent in style.

[2] See '*Conditions*' for further advice
[3] See '*Planning Obligations*' for further advice

Development plan, material considerations and national planning policy

7. The development plan is the basis on which appeal decisions are made:

   "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." (Planning and Compulsory Purchase Act 2004, s38(6)).

8. The government's Planning Practice Guidance[4] advises that the scope of what can constitute a material consideration is very wide. Indeed, the courts have concluded:

   In principle … any consideration which relates to the use and development of land is capable of being a planning consideration. Whether a particular consideration … is material in any given case will depend on the circumstances (*Stringer v Minister of Housing and Local Government [1970] 1 W.L.R. 1281*).

9. Some material considerations, for instance relevant and up-to-date national planning policy, may carry great weight. Other material considerations may carry less weight.

10. The courts have confirmed that Inspectors need to make their decisions (on planning appeals and on listed building consent appeals) on the basis of the development plan and national policy which are in place at the time of their decision - rather than at the time of the event or any earlier stage. Where relevant policy has changed it is likely that you will need to offer the parties the opportunity to comment[5].

11. In some cases material considerations might lead you to determine other than in accordance with the plan. Other considerations may not be so central to your decision, but could, nevertheless, be material to it and must be dealt with. Some, which have little weight, could be dealt with very briefly and some may have so little bearing that they need not be mentioned at all. Determining which points fall into which categories is vital to producing a good decision.

12. Unless you are very sure, avoid making pronouncements about what is, or is not, a material consideration. Ultimately, it is for the courts to decide if something is a material consideration. However, the weight, if any, which should be given to a particular consideration is a matter for the decision maker's discretion.[6] Consequently,

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[4] *ID 21b-008-20140306 ('What is a material planning consideration?'*) – but in Wales, see *Planning Policy Wales (PPW)* section 3.1

[5] *Cheshire East BC v SSCLG 2013 EWHC 892 (Admin) [20 March 2013]* - "The NPPF came into effect after the public inquiry in this case, but before the Inspector's decision. The Inspector gave the parties an opportunity to make submissions on its effect in this case, and he applied the NPPF in determining the appeal. He was right to do so."

[6] *Tesco Stores Ltd v Secretary of State for the Environment & Ors [1995] UKHL 22 (11 May 1995)*

it is best to give a clear indication of why the particular matter has not been sufficient to outweigh your other findings or to be determinative (if that is your conclusion).

13. Further good practice advice on the development plan, supplementary planning documents and national planning policy can be found in Part 2 of this Chapter, and on some commonly occurring material considerations later in Chapter 1.

Coverage

14. It is important to decide what to leave in and what to leave out in order to achieve a sound, proportionate and concise decision.

15. The House of Lords judgement on *South Bucks DC v Porter states*:

"The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principal important controversial issues", disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications."

16. You have three main choices when faced with an issue, argument or concern:

- deal with it as a 'main issue';
- deal with it as an 'other matter';
- leave it out.

17. Ensure that:

- You have dealt only with what is essential
- Your decision is proportionate in length - given the nature of the proposal and the issues to which it gives rise? (Is it as short as it can be and no longer than it needs to be?)

18. The following sections provide further good practice advice on what to cover in your decisions.

Main issues

Identifying main issues

19. The main issues are the essence of the disagreement between the parties and the matters on which your decision will turn.

20. Correctly identifying the main issues will help ensure that your reasoning will lead logically to your conclusions.

21. The LPA's reasons for refusal will normally be your starting point and the main issues in dispute will usually be clear from them. The LPA's statement of case may help to clarify the concerns set out in the reasons for refusal.

22. In appeals against non-determination there will be no formal reasons for refusal. However, the LPA should have made any concerns clear in its appeal statement / full statement of case. See section on *Failure cases (appeals where the LPA did not make a decision)* for further information.

23. Although most main issues in appeal decisions will derive from the reasons for refusal, this is not always the case. For example:

- In some appeals, exceptionally, the LPA or an interested party may have introduced an additional concern during the appeal process. This may be justified by a change of circumstances since permission was refused. However, regardless of why it has been presented at this stage, you will need to carefully consider how to address the concern, particularly if you intend to allow the appeal. If it is a substantive matter then it should be a main issue. If it is not substantive, then you can treat it as an 'other matter'.

- Concerns raised by interested parties (and which are not shared by the LPA) can often be dealt with as 'other matters' and sometimes not at all (see 'other matters' below). However, if you consider the matter raised is significant and likely to be determinative you may feel that it justifies being a main issue. If so, would this approach come as a surprise to the main parties and should you provide them with an opportunity to comment? See 'obtaining evidence'.

- Sometimes, a particular reason for refusal may lack substance/significance. If so, could you deal with it more briefly in your 'other matters' section?

- You may come across cases where the LPA no longer has a concern about a particular reason for refusal and so does not intend to defend it. If there are no objections from interested parties on this subject you may be able to deal with this in a preliminary note. However, if there are objections from interested parties, it is likely that you will need to consider them in your reasoning, particularly if you are allowing the appeal. It may be possible to deal with the concerns as an 'other matter'. However, they could form a 'main issue' if of substance.

- Sometimes the benefits argued by an appellant could form a main issue, particularly if the weight to be attached to them is critical and the degree of benefit

is contested by the LPA. An example might be housing supply or the need for a particular type of development.

Framing main issues

24. Well-defined issues are the key to clear focussed reasoning. They are the matters on which your decision will turn.

    Check - are your main issues:

    - written in a simple, straightforward way?
    - short - avoiding long sentences with sub-clauses?
    - neutral – to avoid any suggestion that you have determined the outcome before considering the merits of the cases? So, for example: 'The effect of the proposed development on the character and appearance of the area' rather than: 'Would the significant bulk of the building harm the character of the area?'
    - framed in such a way that they allow you to evaluate all the relevant arguments? - ie do your main issues and your reasoning correlate?
    - clear and specific about the alleged harm? For example: 'the effect on the living conditions of neighbouring residents at 4 Main Street with particular regard to overlooking and loss of daylight' – but avoid long winded main issues - if there are a number of dwellings and different concerns you may just need to refer to 'the effect on the living conditions of neighbouring residents.'
    - focused on the practical consequences of the development, rather than any technical or semantic points? – For instance, if there is an argument about whether the scheme amounts to 'over-development' or `backland development' – try to look at the underlying concern. For example, in such cases might the substantive concern be about character and appearance or living conditions.

25. When framing your main issues have you made sure:

    - that you have dealt with any topic that leads to the appeal being dismissed as a 'main issue'. An issue which leads to an appeal being dismissed cannot logically be regarded as a less important 'other matter'? and
    - that the main concerns you have identified each form a separate main issue (for instance, character and appearance, living conditions etc)?

26. Have you avoided:

    - using vague expressions such as 'amenity' which may be open to different interpretations?
    - making presumptions? For example don't refer to the effect on the rural character of the area if the parties disagree over whether it is rural;

- solely using compliance with development plan policy as a main issue? Instead try to establish the purpose of the policy and the underlying concern of the LPA. For example, if a policy seeks to limit housing in rural areas – might the underlying aim be to protect the 'character of the countryside, to support the vitality of settlements or to avoid an over-reliance on the car'?

27. Examples of the phrasing of some main issues are provided in Paragraph 215.

Other matters

28. It is quite common for a large number of matters to be raised in addition to those which you have identified as main issues. You will need to decide how to deal with these 'other matters'. In doing so you should take a proportionate approach. See 'South Buckinghamshire':

    "The reasons need refer only to the main issues in the dispute, not to every material consideration

29. If you identify something as an 'other matter' this indicates that it has not had a significant bearing on your decision to allow or dismiss the appeal – ie it has not been determinative. Consequently, when you decide to cover something as an 'other matter' or 'other consideration' it should be dealt with more briefly than a 'main issue'.

30. Regardless of the overall outcome of the appeal you need to address losing parties' submissions on other considerations where they are material, and come to a conclusion on why they are not determinative, otherwise it could be suggested that your decision is flawed. This is because:

    - a losing appellant may be justifiably concerned if you have not addressed potential benefits (for example, that an extension might improve living accommodation) or the existence of similar developments locally or an alleged fallback position – because it could be argued that your balancing of factors, for and against the proposal, was flawed.[7]

    - a losing neighbour or the LPA might argue that, if only you had concluded on some alleged harm, you might have dismissed the appeal rather than allowed it.

31. The parties may refer to wider benefits in support of a proposed scheme including social, economic and environmental benefits. Some of these benefits will only be temporary lasting for the duration of construction works while others will be retained permanently. The benefits could be specific to the proposed scheme (for example the provision of a community centre or works to address existing highway safety) or they could be more general (for example construction jobs) meaning that the same benefits could apply to any proposed scheme that is similar in size or nature.

[7] This could also include arguments raised in favour of a proposal by interested parties

32. More general benefits should not be routinely discounted as they will add support in favour of a proposed scheme. However, the level of detail provided may affect the weight that can be attached, and each benefit will need to be considered on a case by case basis.

33. There is no need to conclude on or even mention winning parties' other considerations unless you have substantive evidence on the matter.[8] This is because:

- having already concluded in respect of the main issues, a finding on these matters could make no difference to your decision.

- if you are dismissing the appeal on the basis of your main issues – and you then go on to conclude on other considerations advanced against the proposal – could you be unnecessarily fettering future decision making at a local level? If the appellant decides to pursue a revised application, might such matters properly be for the LPA to consider in the first instance?

34. Never conclude in your 'other matters' that there is harm which adds to the reasons to dismiss an appeal. This must always be a main issue.

Issues that have not been raised by any parties

35. Exceptionally, it may occur to you that there is an issue or matter that has not been raised as a concern by anyone (including where you may consider departing from the matters agreed in a Statement of Common Ground)[9]. If so consider the following:

- does your concern raise an issue of such fundamental importance that you could not reasonably ignore it? For example, is there potential for the issue to alter the outcome of the appeal – i.e. might you be minded to dismiss the appeal solely for that reason?

- if so, you would, in the interests of natural justice, need to raise the matter proactively and provide the main parties (and possibly interested parties) with an opportunity to comment. The concern would then need to be dealt with as a main issue. If the issue was raised after an inquiry or hearing had closed you would need to consider re-opening it. Unless on its own it warrants a change of procedure (which is unlikely) particularly careful consideration needs to be given to such a matter if it arises in written representations casework to ensure that the manner in which it is raised is neutral.

[8] If such a matter has been discussed at length you may wish to indicate briefly why it has not been central to your decision.

[9] See paragraphs 23 and 25 in *Claire Engbers v SSCLG & South Oxfordshire DC [2015] EWHC 3541 (Admin)*.

- When you decide to seek comments from the parties on matters not previously raised, you should ensure the reasons why you are seeking comments are clear, whilst avoiding giving any impression of pre-determination. You should ensure that the parties are given a reasonable amount of time to comment depending on the facts and circumstances.

Reasoning

36. The Town and Country Planning (Inquiries Procedure) (England) Rules 2000 (rule 18) and the Town and Country Planning (Hearings Procedure) (England) Rules 2000 (rules 15-16) contain an express duty on the Secretary of State or his Inspectors to provide reasons when issuing an appeal decision.

37. Unlike the rules governing appeals dealt with at public inquiries and at hearings, the Town and Country Planning (Appeals) (Written Representations Procedure) (England) Regulations 2009 do not include a specific duty to give reasons for a decision on a written representations appeal in England. However, case law has established that there is nevertheless such a requirement in practice: 'the duty to give reasons here derives either from the principles of procedural fairness applied in the statutory context of a written representations appeal or from the legitimate expectation generated by the Secretary of State's long-established practice of giving reasons in such cases, or both'[10].

38. Inspectors decisions are subject to challenge in the courts. In *St Modwen Developments Ltd v SSCLG [2017] EWCA Civ 1643*, Lord Justice Lindblom helpfully set out the principles on which the court will act in a section 288 challenge. These "seven familiar principles" were first laid out in *Bloor Homes East Midlands Ltd. v Secretary of State for Communities and Local Government [2014] EWHC 754 (Admin)*, but were reiterated in paragraph 6 of St Modwen with some additional commentary by the Court of Appeal in paragraph 7. Whilst clearly they will need to be applied to the facts and circumstances of an individual case, they explain what is expected in an Inspector's decision and what is not expected in law. They should therefore be borne in mind at all times when approaching decision-making. In summary the principles cover how decisions are construed; the need for intelligible and adequate reasons; that weight is for the decision maker; the importance of the correct interpretation and application of policy; the implications of misunderstanding of policy; the assumption that Inspectors are familiar with national policy and the importance of consistency in decision-making. Some of these matters are covered in the paragraphs below.

39. The courts may also find that decisions are an error of law due to mistakes of fact. Whilst not a precise code, a finding of unfairness will arise if there has been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter; the fact or evidence must have been uncontentious and objectively verifiable; the claimant must not have been responsible for the mistake and the

[10] *Julia Martin v SSCLG & Others [2015] EWHC 3435 (Admin)* – see paragraph 51

mistake must have played a material (but not necessarily decisive) part in the reasoning of the decision-maker[11].

40. The Supreme Court in *Dover DC v CPRE Kent, CPRE Kent v China Gateway International Limited [2017] UKSC 79* held that where there is a legal requirement to give reasons, what is needed is an adequate explanation of the ultimate decision, and that the essence of the duty is whether the reasoning provided by the decision-maker leaves room for genuine doubt as to what has been decided and why. *Verdin v SSCLG & Cheshire West and Chester BC & Winsford Town Council [2017] EWHC 2079* also discusses the need for there to be adequate and intelligible reasons in planning decisions.

41. The courts have also confirmed that a legally relevant consideration is something that the decision-maker is empowered or entitled to take into account. These therefore include considerations that are expressly or implicitly required to be applied by legislation or by a policy or whether, on the facts of the case, the matter was so obviously material, that it was irrational not to have taken it into account (see para 99 in *R (Client Earth) v Secretary of State for Business, Energy and Industrial Strategy [2020] EWHC 1303 (Admin)*) . Therefore, Inspectors should ensure that considerations that are required to be addressed by legislation, policy, or are so obviously material are expressly considered in their decisions.

42. Your reasoning should take you logically to your conclusions on each of the main issues and any 'other matters' (where it is necessary to reach a conclusion on them) and then to your overall conclusions. All reasoning should be 'reasonable' in the Wednesbury sense (see the *'Role of the Inspector'* chapter for more detailed explanation). It should also be rational and not be "[…] a decision which does not add up - in which, in other words, there is an error in reasoning which robs the decision of logic" (per Sedley J in *R v Parliamentary Commissioner for Administration, ex-parte Morris and Balchin [1997] JPL 917* at 927)). Such a decision is likely to be regarded by the courts as irrational.

43. When drafting your reasoning:

- have you dealt with each issue separately and in turn?
- are your findings and conclusions clearly based on reasoning and not on assertion? Reasoning is where the final view on an issue follows on from your analysis – words and phrases like 'because', due to', 'as a result', 'consequently' and 'accordingly' usually indicate that some reasoning has been applied;
- is it clear from your decision that you have understood the arguments put to you and how you have dealt with conflicting expert evidence?

[11] *E v Secretary of State for the Home Department [2004] EWCA Civ 49*

- have you addressed all the main arguments raised by the losing party (or parties) in relation to a specific main issue?

- have you considered that simply because a party says that something is a material consideration, it does not mean that it necessarily should be regarded as such by the decision maker if it cannot reasonably be said to be one? It would risk the decision being unlawful if an "immaterial" consideration were taken into account.

- have you assessed whether any material considerations (if before you) might lead to a different conclusion from that indicated by the development plan?

- have you considered if a dismissal could be avoided by imposing conditions?

- has your reasoning been expressed with tact? How will it be received by those reading it? Have you avoided (whether overt or implied) criticism of the parties, local and national policies, the nature of the locality or other developments that have been drawn to your attention?

- are your issues logically ordered? It can be best to start with issues where you are concluding that there would be harm or where there is an issue of principle - for example, relating to the location of development or housing need.

- change need not result in harm, contrary often to the representations from interested parties.

- Have you interrogated the evidence to identify any contradictions or inconsistencies and explained how you have resolved the issue? Note that where a decision turns on a matter of fact it is sensible to cross-check that fact against all of the evidence base that has been submitted. It may be necessary to consult the parties when a contradictory matter of fact cannot be satisfactorily resolved.

44. In addition, for hearings and inquiries have you:

- made it clear in your reasoning whether the hearing or inquiry revealed any significant differences from the written representations made beforehand?

45. In your reasoning, have you avoided:

- introducing problems, issues or evidence which would come as a surprise to the parties?

- wavering / appearing irrational? Your reasoning should not appear to head broadly in one direction only to conclude the opposite;

- re-opening discussion on a matter or issue which you have already concluded on?

- exaggerating the harm or the benefits of a scheme?

- making 'helpful comments' indicating that a proposal which is to be dismissed would be made acceptable if certain amendments were made? Such comments go beyond your remit and might fetter the judgement of future decision makers. It

should, however, be clear from your reasoning why what is before you is not acceptable. It is then for the parties to decide whether or not this leaves scope for a different approach in the future;

- stating that a particular matter 'adds to your concerns'. This is because it could be unclear to the parties whether, without that 'additional concern', the appeal would have been allowed or dismissed. Overall it is best practice to consider whether a particular concern would result in substantive, significant or material harm – or not.

- Using the term 'reduced weight'. In the case of *Daventry DC v SSCLG* the judge considered that the Inspector erred in law by using this term, as it was not sufficiently precise. Para 52 of the judgment states, "the term 'reduced' is not sufficiently clear – it begs the question reduced from what to what?" Terms such as 'limited' 'moderate' or 'substantial' are more precise and specific.

46. Conclusions – have you:

- reached a clear conclusion on each main issue? It is best practice to conclude against the main issue as you defined it;

- made sure you have very clearly identified what the harm would be if you are dismissing?

- resolved tensions between conflicting policies and come to an overall conclusion on compliance with the development plan as a whole?

- if necessary when paragraph 11 d) applies, made explicit your findings, on the presumption in favour of sustainable development12?

- where statutory presumptions apply, eg to do no harm to the setting of listed buildings or conservation areas, demonstrably applied that presumption separately from the normal balancing exercise?

- where concluding that there is harm in respect of some main issues but not others – made it clear that, despite this, the harm identified is sufficient to justify dismissing the appeal (if that is so)?

- concluded on whether any alleged benefits would outweigh any harm that you have identified? (to avoid a challenge that you have not taken relevant matters into account);

- concluded on the development plan as a whole.

[12] See ATDM Part 2 and paragraphs 17-27 of *the Housing Chapter*

- reached an overall conclusion on the appeal? For example, the template suggests: “For the reasons given above, I conclude that the appeal should be allowed/dismissed.”

47. When concluding – have you avoided:

- relying on a ‘catch all’ conclusion such as “and having regard to all other matters raised”? Although there is nothing wrong about such wording, it will not protect the decision from a successful challenge or complaint if you have overlooked something central, i.e. a main controversial matter, in your reasoning.

Clarity and concise decision writing

48. Try to make your decision as concise and clear as possible so that is easy to read and capable of being understood by all parties to the appeal.

49. When reviewing a draft of your decision:

- is it in a logical order? (structure is important – for complicated cases it can be helpful to start your writing-up by preparing an outline of how you intend to structure your reasoning)
- does it include everything essential?
- have you included anything that is unnecessary? (if so, remove it)
- does the reasoning take you to a logical conclusion?
- are all the sentences and paragraphs easy to follow - or are any long and convoluted?
- have you repeated yourself?
- have you used plain English and avoided jargon?
- Is anything you’ve written ambiguous or unclear?
- Have you used short sentences and paragraphs?

50. The introduction of non-essential or extraneous material increases the risk of errors and can make it harder for the reader to pick out the essential points. Consider the following:

- the decision is addressed to the parties to the case, who are well aware of the relevant facts, their arguments, the physical characteristics of the site and its surroundings and the details of the proposals. Do you need to recite these things back to them?
- can any essential references to the characteristics of the site, area and planning history be woven into your reasoning? Are these references as brief as possible?

- how much detail do you need to go into about national policy, development plan policy and Supplementary Planning Documents? As long as there is no disagreement over policy interpretation, would a reference to the relevant policy number and a brief indication of what it relates be sufficient? Can you bring in references to policy after your conclusions on a specific issue or is the issue one where policy references are best woven into your reasoning or explained upfront?

- have you included any material which is not relevant to your reasoning? For example, have you described features to which you make no further reference?

- is your reasoning unnecessarily detailed?

- are any references to sections of Acts essential?

- have you over-used any phrases such as “in my view” and “I consider” - the parties will know that you are the author of your decision.

Procedural/Preliminary matters

51. In many appeals there will be no need to cover any points. It is for you to decide whether you cover any procedural matters in a separate section before you define the main issues, or, at the start of your reasoning. It depends on what works best in terms of explaining your decision.

52. However, you should always set out the basis on which you have considered the appeal if this is in dispute or might otherwise be unclear. This might involve explaining:

- **the nature or scope of the proposal** - for example, if this is disputed or unclear or the description of the proposed development has been amended during the application or appeal process (see paragraph 214 for more information)

- **the plans on which your decision is based** - for example, if revised plans have been provided during the appeal process or if there is disagreement about relevant plans (see paragraphs 90-95 for more information).

- **banner heading -** any significant variations to matters set out in the heading. For example, the description of development or the site address (see paragraph 214 for more information)

53. Other matters which you might need to deal with include:

- **outline applications** – which matters are reserved for subsequent approval and whether any details shown on the plans are for indicative/illustrative purposes only;

- **reserved matters appeal** – which matters/details are before you (and which are not if this is disputed or unclear);

- **appeals against conditions** – the type of appeal, the background and what the appellant is seeking (see ‘Appeals against conditions’ for more advice);

- **appeals against non-determination (including from non-validation notices[13])** - the LPA's objections to the proposal (or its views on what further information needs to be provided);
- arguments that the proposal, or part of it, does not need planning permission;
- **application for costs** – has been dealt with in a separate decision;
- **redetermination** – your approach following a successful High Court Challenge;
- **validity of the** application**/appeal** – your approach.
- doubt about whether the application decision is a grant or refusal – detailed below.

54. In the circumstance described in the final bullet point above, where there is doubt about whether the application decision is a grant or refusal, the test is what a reasonable person reading it would conclude (see *Newark & Sherwood District Council v SSCLG [2013] EWHC 2162 (Admin),* confirmed also in *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd [1997] 1 EGLR 57).* This means that there is an element of judgment to be applied. An example of this might be when the decision states that "Planning permission has been granted" but also attaches a reason for refusal and no conditions.

55. Where the conclusion is reached that the decision is a grant of permission there is no right of appeal under s78(1) and the appeal should be turned away. If a case officer raises any doubt about the nature of the decision notice during the early stages of the appeal, they should bring it to your attention. Whilst appeals can be turned away at any stage, it would give the parties greater certainty about the nature of the decision notice if reasoning is set out in a formal appeal decision and a confirmation given that no further consideration will be given to the appeal.

56. It should also be noted that a LPA has no power to withdraw an issued decision and issue a corrective notice without issuing a formal revocation, as confirmed by *Gleeson Developments Limited v SSCLG & ors [2014] EWCA Civ 1118*. Therefore, if we receive an amended decision notice it is of no standing and should be disregarded, except in the circumstance where the notice is invalid by virtue of failing to meet the requirements set out in article 35 of the DMPO 2015.

57. It is also the case that where an LPA has issued a decision that is, in your judgement, an approval, any resolution to refuse permission submitted to the appeal should be considered immaterial.

58. In summary, the approach is:

[13] *Planning Practice Guidance ID14-053-20140306* ('What steps are available to an applicant in cases where the local planning authority has served a non-validation notice?')

- to be valid, a decision must include all of the required elements, which are set by the relevant statute (here, the DMPO). If the decision is missing required elements, it will not be valid, so a second decision can be reissued to correct it.

- there is no power for decisions to be withdrawn and reissued (Gleeson). Decisions can only be withdrawn by using the statutory procedure which involves the payment of compensation (ss97-100 TCPA)

- if the decision notice is not clear, the test becomes what a reasonable person reading it would conclude it means (Carradine, Mannai)

- in interpreting the decision, extrinsic evidence can be used to help the reader interpret it (Ashford)

Obtaining evidence

59. Generally, it is the responsibility of the parties to put relevant arguments, information, policies and guidance before you. Your decision or recommendation must flow from the evidence before you, and not from any external source. However, you can bring your own general expertise and common sense to bear in interpreting and weighing the evidence.

60. There may be occasions where you may not have all the evidence or information necessary to reach a soundly reasoned decision. For example:

    - do you have copies of all the development plan policies that have been relied on? Do you have copies (or sufficient extracts) of relevant SPDs and any other documents that have been referred to, such as appeal decisions? If not, it is best to ask the case officer to obtain copies early on in the appeal process.

      It remains the clear expectation that in the absence of the relevant development plan policies case officers will pursue these with the LPA. There may be limited times when the LPA fails after repeated requests from the case officer to provide copies of the relevant development plan policies in a timely manner (or at all). As development plan policies are publicly available, it is reasonable for Inspectors / APOs / RTPI Apprentices to look them up on the LPA's website. This approach should, however, be taken only with policies that have been referred to explicitly in the LPA's decision and / or the appeal evidence (including any policies used to justify planning conditions) and that have not been provided to you already. If this approach is taken Inspectors must restrict themselves strictly to the relevant policies expressly before you. Additionally, the case officer should be informed to avoid further requests for copies of policies being sent to the LPA;

    - is there any firm evidence that there are any other policies or documents that have not been referred to by the main parties but which could be of significance? Have there been any material changes of circumstance which you are aware of (for example policy changes or relevant appeal decisions)? If so, the parties should be asked to provide them and, if necessary, given the opportunity to comment.

- if one of the parties has supplied additional evidence after the event, have you considered whether it is material and so should be accepted?[14]

- where the effect of an Article 4 Direction is an issue, but the LPA have not provided a copy with their statement, the Inspector should contact their Case Officer, asking the Case Officer to request a copy. After obtaining a copy, the Inspector should consider whether any of the parties should be given the opportunity to comment on the effect of the Article 4 Direction.

- have you got enough information about potential impacts on persons who share a relevant protected characteristic to comply with the Public Sector Equality Duty?[15]

- have you got enough information to comply with Human Rights legislation and case law?[16]

61. It is usually acceptable to refer to the Secretary of State's own guidance/policy (for example, a reference to the NPPF[17] where relevant to the issues before you). However, in doing so you should consider:

- have you avoided making an unexpected reference to a fundamental point of which the parties are unaware? Be particularly careful when dealing with unrepresented appellants who should not be expected to be as familiar with government policy as LPAs and professional agents.

62. Advice on what to do if the parties provide, or seek to provide, late evidence is provided in the section '*Late representations and evidence'*.

Natural justice - fairness

63. You need to make sure that the interests of the parties are not prejudiced. It is, therefore, essential that you correctly identify when it is appropriate to go back to the parties. Furthermore, simply because a matter has been raised briefly by someone does not automatically mean that you may consider it without seeking the views of other parties. Consider:

- have all the parties had a fair opportunity to comment on a matter which might be a determining issue - "fair crack of the whip"? (see *Poole, R (on the application of) v SSCLG t & Anor [2008] EWHC 676 (Admin)* (14 March 2008))

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[14] *Wainhomes (South West) Holdings Ltd v SSCLG [2013] EWHC 597 (Admin) (25 March 2013)*

[15] Please see the *Human Rights and Equality* chapter for more information.

[16] Please see the *Human Rights and Equality* chapter for more information.

[17] In Wales, see Planning Policy Wales and TANs

- are you in danger of relying on evidence which has not been seen by the parties or which one party may not have had the chance to comment on?[18]

- would the parties reasonably expect you to place significant weight on the matter? For example, if the main parties have agreed that the matter is not disputed (particularly when contained in a Statement of Common Ground), if the matter has not been raised by anyone or it has only been mentioned in passing by an interested party? In these circumstances, might your reliance on the matter come as a surprise?

- on a site visit, you may be asked by one of the parties to view other similar developments locally, even though they have not been referred to previously. If you are minded to rely on what you have seen you should ensure that the main parties have had the chance to comment first on its relevance to their case.

- Remember that ultimately responsibility for whether a matter put to the Inspectorate is something of which account should be taken lies with the Inspector. In this context the Wainhomes case[19] identifies that the decision as to whether submitted material "out of time" should be seen and taken into account by the Inspector lies with the Inspector or an appropriate person to whom s/he has delegated that responsibility. Case officers and their managers will have considered any such material and will have advised you of anything that has been rejected but it is essential that you, as decision maker, apply the "natural justice" principle if you consider that there is a risk that the rejected document could contain / represent a relevant material consideration.

64. If you intend to write back to the parties it is always good practice to provide the case officer with the wording of any letter or e-mail.

Consistency

65. If Inspectors reach significantly different conclusions about obviously similar cases this can undermine confidence in the appeal process.

66. Consequently, consistency in the planning process is important and like cases should be decided in a like manner. A previous appeal decision is capable of being a material consideration where the previous decision is sufficiently closely related to the issues that regard should be had to it. Although you are entitled to disagree with an earlier decision (whether on the same site or elsewhere) if there are sound reasons for so

[18] The case of *Ashley, R (on the application of) v SSCLG & Ors [2012] EWCA Civ 559 (29 March 2012)* concerned residential development which was permitted at appeal. The reasoning in the appeal was based on expert acoustic assessment which was provided by the appellant after the appeal had been made and neighbours notified. The Court of Appeal decided that this was unfair and in breach of natural justice. This was because an interested party, who objected to the development because of concerns about noise and disturbance, was unaware of the assessment and so was denied the opportunity to comment on it. However, the risk of this scenario occurring should be reduced following the changes to appeal procedures introduced in England in October 2013.

[19] *Wainhomes (South West) Holdings limited v SSCLG [2013] EWHC 597 (Admin)*

doing, you should only do so where you have demonstrably had regard to it and given substantiated (which does not necessarily mean elaborate) reasons for departing from it, having regard to the importance of consistency.[20]

67. If you intend to come to a decision that would be different to a previous Inspector in respect of a similar proposal/issue:

- have you given clear reasons why you are reaching a different decision? For example, has there been a material change in circumstances or is the evidence before you materially different? You should not simply be reaching a different personal view on the same or similar evidence and if you have been presented with other appeal decisions, it's unlikely to prove sufficient, in the event of a challenge, to say that you have dealt with the appeal on its own merits.

68. If you are dealing with a revised scheme following an earlier appeal decision, have you:

- identified any material changes which have been made to the scheme?
- explained whether they would overcome the concerns identified by the previous Inspector?

69. To help ensure consistency, where possible, case officers will link similar appeals (for example, if on the same site) or chart them to the same Inspector so they 'travel together' (if in the same area). However, if this is not possible and you become aware that a similar appeal on the site or in the area is being dealt with by a different Inspector, you will need to decide what action to take. Consider the following:

- discuss the matter with your Case Officer – is there any scope for both appeals to be dealt with by the same Inspector?
- if not, the case officer should be asked to copy whichever decision is made first to the parties in the 2nd appeal in order to provide them with an opportunity to comment on whether it has a bearing on their cases;
- whatever action you take, you should not discuss your case with the other Inspector. This could be seen as improper influence by someone who is not the appointed Inspector. Any such liaison should be via the GM.

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[20] *Fox Strategic Land and Property Ltd v SSCLG & Anor [2012] EWHC 444 (Admin) (02 March 2012)*

St Albans City & District Council v SSCLG [2015] EWHC 655 (Admin)

N Wiltshire DC v SSE (1993) 65 P. & C.R. 137

St Albans City & District Council v SSCLG [2015] EWHC 655 (Admin)

70. You should only refer to another appeal decision if the parties are aware of it. If not, you should give them the chance to comment.

71. Note, that whilst a previous appeal decision might be material to the case in hand, it should not be accepted as 'correct' without a critical review of the circumstances, which may have updated matters of particular relevance. Inspectors should therefore take care in reaching their own view.

72. Case officers will try to add copies of appeal decisions issued in the last 3 months to the appeal file where they relate to similar developments in the same area. It should be clear from the INT 12 form that such decisions have not been submitted by the parties. Consider:

    - if you decide these appeal decisions are relevant and you intend to rely on them you should provide the parties with an opportunity to comment on their relevance (if they have not already done so).

Proof reading, editing, and typing conventions

73. Your decisions should be well presented, and visually consistent with other Inspectors' decisions.

74. Typographical errors and poor editing and, in particular, poor or ambiguous punctuation or syntax, can undermine the credibility and / or affect the meaning of decisions. In some cases it can undermine the reasoning. Have you developed a thorough approach to proof reading that will help ensure your decisions are clear, concise and error free?

75. Further advice on proof reading is provided in *Annex 1*.

Advice on citations

76. When citing court judgments, use the neutral or court citation where available. This can be found on the Westlaw case transcript and it will have the following convention:

    Party v Party [Year of judgment] Court abbreviation Judgment no. for that year

77. Refer to the Secretary of State for Housing, Communities and Local Government as 'SSHCLG'. If there is more than one party on one side of a case, use '&' to separate their names.

    Elmbridge BC v SSHCLG & Giggs Hill Green Homes [2015] EWHC 1367 (Admin)

78. If the case has received a judgment from the Court of Appeal (CoA), add the CoA neutral citation after the High Court neutral citation, separating the two references with a comma. Similarly, if the case has received a judgment from the Supreme Court, add the UKSC neutral citation after the CoA neutral citation. Older UKSC cases will have the citation UKHL when the Supreme Court was titled 'House of Lords'.

Miaris v SSCLG & Bath and NE Somerset Council [2015] EWHC 1564 (Admin), [2016] EWCA Civ 75

79. Publication citations would follow the neutral citation (if given) and be separated by semi-colons. More than one citation may be given:

Henry Boot Homes Ltd v Bassetlaw DC [2002] EWCA Civ 983; [2003] JPL 1030

Burdle & Williams v SSE & New Forest RDC [1972] 1 WLR 1207; 116 SJ 507; 3 All ER 240; 24 P&CR 174; 70 LGR 511; JPL 759

80. The year should always be cited first, in square brackets. In the Journal of Planning & Environment Law (JPL), the cited year will be that of the report. In publications like Planning and Compensation Reports (P&CR), the year cited will be that of the Court judgment but the citation will include a Volume number. A case decided in 1991 but not reported in JPL or P&CR until 1992 would be cited as:

[1992] JPL page…

[1991] 70 P&CR page… where 70 is one of the volumes produced in 1992.

81. If authorities are cited to you, relevant extracts should be supplied, but you may also try to get copies. The main sources are:

Knowledge Library: Court Judgments
Knowledge Centre
Encyclopaedia of Planning Law & Practice (*Westlaw*)
Journal of Planning & Environment Law (*Westlaw*)

82. Key findings from judgments are also set out in:

The *Enforcement, Enforcement Case Law* and other Inspector Training Manual chapters
Case Law Updates (July 2007 to present)
Enforcement Briefings (June 2010 – December 2015)
Knowledge Matters (from October 2014 to present)

83. Listed below are commonly-used abbreviations:

All ER All England Law Reports
JPL Journal of Planning & Environment Law
LGR Local Government Reports
P&CR Planning and Compensation Reports
SJ Solicitors Journal
WLR Weekly Law Reports

Seeking advice

84. When you are appointed to determine an appeal, you are solely responsible for what is decided. Whilst pre-issue quality assurance by colleagues is endorsed by the Courts, your reasoning, judgment and conclusions on an appeal must not result from a discussion or consultation with another Inspector, manager or anyone else within PINS[21].

85. However, if a novel matter arises which is not covered in the Training manual, it may be appropriate to seek:

- legal advice – for example, in respect of opposing legal views on complex legal matters or where interpretation of the planning acts, related legislation and case law is required;
- best practice advice on a particular point, procedural matter or on the application of planning policy.

86. When seeking advice:

- it is your responsibility to decide how the appeal should be dealt with and what decision should be reached.
- in respect of legal advice, the purpose should be to add to your knowledge of the law.
- advice between a lawyer and client is privileged and so will not be disclosed to the parties. However, it is important that any such advice is properly recorded (ie in writing).

87. Salaried Inspectors – any requests for legal advice must be made via a Professional Lead[22]. They may know if the issue has arisen before and so be able to answer your question. Policy advice may be sought direct from the Knowledge Centre. Where a matter is novel, the advice given will then be assimilated into the relevant section of the Training Manual.

88. Non-Salaried Inspectors – you must initially contact the Contract Management Unit (CMU).

89. If a decision on the planning merits cannot properly be decided without a complicated or difficult legal issue being decided upon first, then jurisdiction might need to be

[21] *Billy Smith vs SSCLG and South Bucks DC [2014] EWCH 935 (Admin)* confirmed that it is legitimate for an Inspector's decision to be read for quality assurance purposes. The key to this is in ensuring that the Inspector takes the decision and the reader (or mentor as referred to by the Judge) does not interfere in his or her judgment:

[22] In Wales, contact WG lawyers via the Director

recovered by the Secretary of State[23]. If this possibility arises consult with a Professional Lead.

90. Finally, the ITM refers to multiple approaches to our work, case law and perspectives. Inspectors will need to reach a rational and reasoned decision rather than relying solely on any one piece of advice within it without reference to other elements. In light of this the ITM should NOT be referenced or quoted from in decisions.

[23] Welsh Ministers

General principles and standard approaches

Procedural matters and other scenarios

Amended plans and proposals

91. The *'Procedural Guide – Planning Appeals – England'* advises that if an appeal is made the appeal process should not be used to evolve a scheme.

92. Consequently, in most cases you will be considering the appeal on the basis of the scheme and the plans which were before the LPA when it made its decision.

93. It is not unusual for revised plans to have been submitted to the LPA before it made its decision. It is not necessary to explain that such plans were submitted unless there is some disagreement or uncertainty that you need to resolve.

94. If revised plans and/or other proposed amendments are submitted with the appeal or during the appeal process then you will need to consider whether to accept them and you will need to explain your approach. You will also need to, separately, consider the procedural test, outlined below. The long-standing principles set out in *Bernard Wheatcroft Ltd v SSE [JPL 1982 P37]* are often cited in casework. It held "The main, but not the only criterion … is whether the development is so changed that to grant it would deprive those who should have been consulted on the changed development of the opportunity of such consultation.". However, the more recent judgment in *Holborn Studios Ltd v The Council of the London Borough of Hackney [2017] EWHC 2823 (Admin)* subtly refined these principles as the judge found that the test in Wheatcroft was "flawed" because it conflated two tests which must be considered **separately**: 1) a substantive test and 2) a procedural test.

    - The **substantive** test is whether the proposed amendment(s) involves a "substantial difference" or a "fundamental change" to the application. If so, and it would ultimately result in a "different application", then it is unlikely that the amendment could be considered as part of the appeal. It is also possible that a series of small, incremental proposed amendments to a scheme could result in a "substantial difference" or a "fundamental change".

    - The **procedural** test is whether the proposed amendment(s) would cause unlawful procedural unfairness to anyone involved (in the appeal) and, if so, whether such unfairness could be cured, for example by re-consultation.

95. On this point the judge said "In considering whether it is unfair not to re-consult, in my judgment it is necessary to consider whether not doing so deprives those who were entitled to be consulted on the application of the opportunity to make any representations that, given the nature and extent of the changes proposed, they may have wanted to make on the application as amended [para 79]".

96. He went onto say "I do not accept that the test for whether re-consultation is required if an amendment is proposed to an application for planning permission is whether it involves a "fundamental change" and involves a "substantial difference" to the

application or whether it results in a development that is in substance different from that applied for … In my judgment it is preferable to ask what fairness requires in the circumstances [para 80]".

97. In considering whether to accept revised plans and whether re-consultation on the proposed amendments is required:

- Are you clear about the precise differences between the amended and original proposals?
- Have you applied the ~~'Wheatcroft Principles'~~ tests in *Holborn Studios Ltd*?
- Bear in mind that, in some cases, even apparently minor changes could materially alter the nature of an application and potentially prejudice the interests of interested parties.
- A helpful test can be to consider whether such changes might usually be considered acceptable if sought by means of a condition (for example changes to the details of a landscape scheme).

98. If you are allowing an appeal on the basis of the amended plans (whether submitted with the appeal, during the appeal process, before the LPA made its decision or before an appeal was made against non-determination):

- Have you made sure you have referred to the correct plans in the 'plans condition or in the formal Decision if the development has already been carried out?

99. When carrying out an accompanied site visit in written representation casework, remember to:

- Clarify with the parties which plans were before the LPA when it made its decision or were before LPA when the appeal was made if it is an appeal against non-determination and which, if any, were provided with the appeal or during the appeal process. If any uncertainty remains after the site visit you will need to seek clarification in writing.

100. Advice on dealing with amended proposals is also provided in the 'Hearings' and 'Inquiries' chapters.

Late representations and evidence

101. In written representations cases you should, wherever possible, make your decision using the information and evidence provided on file. Rule 16(1) of the Written Representations Procedure Regulations 2009 provides the authority to do this. However, there may be circumstances where it is necessary to accept or to seek evidence/information after the final deadlines have passed.

102. The appeal start letter sets out the appeal timetable including a link to the procedural guide. It clearly indicates that information outside of the normal time limits will usually

be disregarded unless there are exceptional circumstances. Such circumstances may include:

- A material change in circumstances (for example, a newly adopted or emerging policy)
- A relevant decision that has been made on another appeal
- New, or changes to, legislation, Government policy or guidance that is relevant to the appeal
- Where it would be in the interests of natural justice.

103. Any new information or evidence should only be accepted where it is evident that it would not have been possible to submit it within the prescribed time limits set out in the appeal timetable.

104. In the case of *Akhtar v SSCLG & LB of Barking and Dagenham* it was held that the Inspector had been entitled to refuse to accept the appellant's representations that had been submitted out of time without very good reason. In this case, it was considered that there had been no material change to the appellant's case and that all of the 'late' evidence submitted could have been produced earlier in accordance with the timetable. Furthermore, the Regulations and Procedural Guide make it clear that information submitted outside of the normal time limits could be disregarded. It is important for the effective and efficient administration of appeals that there are time limits for submission of documents that should be abided by unless there is a very good reason.

105. However, do not reject information or evidence simply because it is late. In the case of *Wainhomes v SSCLG*, the Judge found that the Inspector had failed to properly exercise their discretion whether to take into account two appeal decisions by other Inspectors, which had been decided after the close of the Inquiry but before the decision was issued. It was held that these decisions dealt with the same issues as those before the Inspector but could not have been provided any earlier. This established the principle that a decision-maker ought to take into account all matters which might cause them to reach a different conclusion, together with their obligation to have regard to material considerations up to the time of their decision.

106. In another similar case, of *Wiltshire Council v SSCLG & others*, the Court found that, in both the appeals considered, late evidence on the Core Strategy final report should have been taken into account. In one of the appeals in this case, the judge exercised discretion not to quash the decision but stated that the Inspector was clearly in error.

107. Sometimes the case officer will ask whether you wish to accept late evidence. There is no need to accept late evidence unless there are exceptional circumstances, even if you have seen it. Before you decide whether to accept late representations or evidence you need to know what it is and why it is said to be relevant. If a consideration could be material to the decision a conscious and informed decision

must be taken as to whether to admit it. Reliance on the simple fact of it being "late" and/or that no more evidence is required will be unlikely to stand legal scrutiny.

108. There may be other circumstances where you consider that further evidence or information is essential beyond that which has been provided by the parties. In such circumstances:

    make your request in writing via the case officer.

    if, on an accompanied site visit, you should indicate to the parties that additional information is required on a factual matter arising from the site visit. You should also inform the case officer immediately so that the document is not turned away. An additional safeguard is to ask the party to label the material "as requested by the Inspector". It is best to ask the case officer to confirm such requests in writing.

    see 'Obtaining evidence' in 'The approach to decision making' for examples of circumstances where you might need to seek further evidence.

109. If you are aware that written statements have been sent back because they were out of time – consider:

    Do you have sufficient evidence to reach a robust and well-reasoned decision? Take particular care where the LPA decision was against officer recommendation. If the statement is turned away there may be little or no evidence to justify the LPA's reasons for refusal. If you have insufficient evidence, advise the case officer that the statement should be accepted.

110. Remember:

    you must consider whether the parties should be given the chance to comment on any late representations/evidence which have been accepted. Do not base your decision on evidence which a party has not seen or should have been given the opportunity to comment on. Check for any relevant correspondence on the file.

111. Advice can also be found in the 'Hearings', 'Inquiries' and 'Site Visits' chapters.

Arguments that the proposal, or part of it, does not need planning permission

112. It may be argued that the proposed development which is before you does not require planning permission. However, the question of whether or not permission is required does not affect the validity of the appeal. Consequently, unless the appellant withdraws the appeal you should decide it on its merits.

113. When considering the merits of the proposed development, bear in mind that any claim that the development is or would be lawful may be a material consideration – particularly to weigh against any harm identified. You should consider the evidence submitted by the parties and decide what weight you attribute to the claim but be clear that your conclusions are for the purposes of the current appeal only and do not

prejudice any future application for a lawful development certificate and/or, where relevant, any enforcement proceedings .

114. If a person wishes to ascertain whether an existing or proposed use or development is or would be lawful, the correct approach is for them to make an application under section 191 or 192 of the 1990 Act for a certificate of lawful use or development. There is a right of appeal against any decision of a LPA to refuse to issue an LDC, or against any failure of the LPA to determine an LDC application. Accordingly, you should generally address any claim that development subject to a s78 appeal does not require planning permission as a procedural matter at the start of your decision – whether or not you need to return to the point in your reasoning. Appropriate wording might be:

    "Within the context of an appeal under section 78 of the Act it is not within my remit to formally determine whether the proposed development requires planning permission as claimed/raised/questioned by the appellant. [However, I shall consider the evidence as to whether permission is required so far as it is material to this appeal. If the appellant wishes to ascertain whether the [development] [is] [would be] lawful, they may make an application under section [191] [192] of the Act".

115. If you reach the view yourself that the proposed development would not require planning permission, it would normally be unwise to raise this where the parties have not done so. Speak to your IM or SIT if you feel that the matter should be raised for some exceptional reason.

116. Please note further advice on lawfulness is provided in the section on Fallback below.

117. It might also be argued that a specific part of the scheme does not require planning permission. However, you are required to consider the scheme as a whole.

Validity

118. Planning Appeal validity will normally be identified and resolved by our Planning Validation or Casework Teams long before an appeal reaches an Inspector. However, on rare occasions a validity issue might go unnoticed, be raised late in proceedings or need to be considered by the Inspector and concluded upon within the appeal decision.

119. If the LPA has concerns about validity, it will usually make us aware by sending us copies of correspondence it had with the applicant at application stage or by referring to the matter in its appeal statement. However, very occasionally some validity issues are not picked up by the LPA, and so PINS needs to be vigilant. Either way, where validity has been raised, or is in question, it will need to be addressed.

120. Advice in relation to enforcement and other casework validity are covered in their respective chapters.

121. In terms of planning legislation, under s79(1) of the T&CPA 1990 the Secretary of State has discretion to:

(a) Allow or dismiss the appeal

(b) Reverse or vary any part of the decision of the LPA (whether the appeal relates to part of it or not)

And may deal with the application as if it had been made to him in the first instance.

122. Furthermore, s79(6) gives discretion to decline to determine an appeal or proceed with its determination if it emerges during the appeal process that planning permission could not have been granted by the LPA. This may include applications for planning permission that have not been validly made.

123. *R v Secretary of State for the Environment, Transport and the Regions ex parte Bath and North East Somerset District Council [1999] 1 WLR 1759* established that the LPA is not the sole arbiter of the validity of planning applications and when they have failed to validate an application for planning permission, an applicant can appeal to have the issue of validity resolved by the Secretary of State. This was also confirmed in *Maximus Networks Ltd v SSHCLG & Others [2018] EWHC 1933 (Admin).*

124. In the case of *Geall v SSE (199) 78 P. & C. R. 264* the Judge held that 'an invalid planning application cannot be the foundation for any jurisdiction in an appeal'. An Inspector can only consider the merits of an application and determine the appeal if they are satisfied that a valid planning application has been made. Whether the LPA has validated the application and issued a decision letter is not determinative and the Inspector must consider and reach a view on validity themselves. If an application is invalid, the Secretary of State has no jurisdiction to determine any appeal and it must be turned away as invalid.

125. Whilst not limited, such examples may include failure to comply with the requirements of the GPDO, cases where the appeal was made owing to a fee dispute and it is concluded that the requisite fee has not been paid, or the LPA accepting the wrong type of application such as an outline application being submitted when a full planning application would be required.

126. In terms of appeals, the most common reason for invalidity will be the failure of the appellant to supply all of the documentation required to comply with article 37 of the DMPO within the statutory timeframe.

127. Other possible reasons may include, the appeal being submitted on the wrong appeal form, or the appellant failing to serve notice of the appeal on the relevant landowner(s).

128. Not all instances must result in the appeal being deemed invalid and turned away. There is discretion to allow an appeal to proceed notwithstanding a failure to comply with the statutory requirements, although as confirmed in the "Maximus Judgment", this discretion should only be exercised following full regard to all the circumstances, such as the nature of the failure, the remedy, the lapse of time, the effect on other parties and the public and whether any prejudice has been caused to any of the parties. For example, if it transpires the appellant did not notify a landowner of the application, then the matter can sometimes be rectified by asking them to do so

properly at appeal stage – unless there was evidence to suggest it was not simply an oversight but something more calculated or a reckless disregard for the process (see *Main v Swansea City Council 1985 WL 310967*). The extent and nature of the failure to comply with the requirements will therefore be a factor to consider but will vary from case to case depending on the facts presented.

129. If in doubt, please discuss with your Inspector Manager or contact the Knowledge Centre.

Outline applications

130. The power to grant outline planning permission is contained in s92 of the 1990 Act and Article 5 of The Town and Country Planning (Development Management Procedure) (England) Order 2015[24]. These allow the LPA to grant permission subject to a condition specifying reserved matters for the authority's subsequent approval.

131. The DMPO defines outline permission as a planning permission "for the erection of a building". It is important to remember that the outline permission is the planning permission and will therefore permit whatever is contained in the description of development. If this is specific in relation to, for example, a particular number of houses then that amount of development will be permitted in the event that the appeal is allowed.

132. The five 'reserved matters' as defined in the 2015 Order are:

- **Access**[25] - in relation to reserved matters, means the accessibility to and within the site, for vehicles, cycles and pedestrians in terms of the positioning and treatment of access and circulation routes and how these fit into the surrounding access network; where "site" means the site or part of the site in respect of which outline planning permission is granted or, as the case may be, in respect of which an application for such a permission has been made;

- **Appearance** – means the aspects of a building or place within the development which determines the visual impression the building or place makes, including the external built form of the development, its architecture, materials, decoration, lighting, colour and texture;

- **Landscaping –** in relation to a site or any part of a site for which outline planning permission has been granted or, as the case may be in respect which an application for such permission has been made, means the treatment of land (other than buildings) for the purpose of enhancing or protecting the amenities of the site and the area in which it is situated and includes - (a) screening by fences, walls or other means; (b) the planting of trees, hedges, shrubs or grass; (c) the

[24] In Wales, the Town and Country Planning (Development Management Procedure) (Wales) Order 2012 (SI 2012/801)

[25] Under Article 5(3), where access is a reserved matter, the outline application must state the area or areas where access points to the development proposed will be situated.

formation of banks, terraces or other earthworks; (d) the laying out or provision of gardens, courts, squares, water features, sculpture or public art; and (e) the provision of other amenity features;

- **Layout** - means the way in which buildings, routes and open spaces within the development are provided, situated and orientated in relation to each other and to buildings and spaces outside the development;

- **Scale** - except in the term 'identified scale', means the height, width and length of each building proposed within the development in relation to its surroundings.

133. There is some overlap between access and layout, i.e., under access there is inclusion of accessibility **within the site** and the positioning of **circulation routes**, and under layout there is provision of **routes within the development**. Your decision should therefore make clear what is approved and what is not. However, there is no legislative requirement that all the matters within the definition of any of the reserved matters must be included in the outline application if they are not reserved. Specific advice about dealing with access is set out below.

134. Further information about the scope of the reserved matters and the use of conditions is provided in 'Conditions' chapter.

Scope of application and illustrative or indicative plans

135. When dealing with appeals involving outline applications, the starting point is to establish which matters are reserved and which matters are included within the application. This should normally be clear from the original application form. Indeed, the way the application was made should be treated as decisive and reflected in the appeal decision, unless there has been a subsequent adjustment agreed between the parties. If, for any reason, it is not clear which matters are reserved and which are not, then clarification should be sought. It is good practice to confirm which matters are within the scope of the appeal in a preliminary paragraph.

136. Very often plans are submitted for illustrative purposes in respect of matters that are reserved to indicate how a site could be developed. They will usually have been provided to demonstrate that an acceptable detailed scheme could be advanced at the reserved matters stage. However, these plans are not part of the formal proposal and must not be treated as such.

137. In *Crystal Property (London) Ltd v SSCLG & LB Hackney* EWCA Civ 1265 [2016] all matters were reserved although the description of development specified the proposed storey height and the quantum of development. The submitted drawings were not marked as illustrative or indicative but the Court of Appeal found that they could only be sensibly understood as having that purpose (paragraph 29). Therefore, it is not essential for drawings to be annotated in this way if they relate to matters that are reserved. This underlines the importance of establishing at the outset which matters are reserved and which are not.

138. The PPG[26] says that "…where details have been submitted as part of an outline application, they must be treated by the LPA as forming part of the development for which the application is being made. Conditions cannot be used to reserve these details for subsequent approval. The exception is where the applicant has made it clear that the details have been submitted for illustration purposes only". This advice relates to a scenario where a matter is not reserved. Any plans submitted that show details of this matter form part of the application and must be considered as such. The only exception is if it is specifically stated that those details are illustrative and therefore not part of the application.

139. If the status of any of the submitted plans is in dispute or very unclear, then the views of the main parties may need to be sought. However, what is included on the original application forms the basis for settling any uncertainty. On the authority of 'Crystal Property', in cases where all matters are reserved, then any plans will be illustrative and there will normally be no need to confirm this with the parties (although see advice below regarding access).

140. The 'Crystal Property' judgment also provides some guidance on the approach to be taken when dealing with outline applications when some matters are part of the proposal and some are not. Paragraph 39 says:

    "In this case, as is plain from the inspector's conclusions, he was not satisfied that a building of the floorspace proposed could be accommodated on the site in accordance with the policy. He did not have to speculate about the possible merits of some other, hypothetical proposal for the site. It was not up to him to redesign the development to comply with Policy DTC-CA 01, or to try to work out for himself how much floorspace an acceptable scheme might comprise. His task was to consider the merits of the development actually proposed in this application for outline planning permission, a building whose height and massing were shown in the illustrative drawings. And that is what he did."

141. Evidently the amount of information submitted with an outline appeal will vary depending on which, and how many, matters have been reserved. In every case the principle of the development and the matters that are included should be considered in the usual way against the development plan and other material considerations. The key consideration is whether an acceptable development as described in the proposal could be devised based on the evidence provided including any illustrative or indicative plans. For matters that are reserved the mere absence of those details should not be a reason to dismiss the appeal.

142. As part of the assessment any illustrative or indicative plans may therefore be useful in providing, or failing to provide, evidence that an acceptable scheme is capable of being devised at the reserved matters stage. However, care should be taken not to imply that those plans have been relied upon or that they represent the only way that the site could be developed. For example, if layout was reserved and there was an

[26] 005 Reference ID: 21a-005-20190723

objection on overlooking grounds then you would need to consider whether reasonable levels of privacy could be achieved based on the nature of the site, the relationship with adjoining properties and the proposed amount of development as well as any guidance given by the illustrative or indicative plans. The reasoning for any findings should be clearly explained without giving the impression that any illustrative or indicative plans are formally part of the appeal.

Dealing with access in outline applications

143. Paragraph 5 (3) of the 2015 Order says, "Where access is a reserved matter, the application for outline planning permission must state the area or areas where access points to the development proposed will be situated."

There are therefore various scenarios which may arise but which need to be treated differently:

- Wholly outline proposals, with all matters reserved (including access). These can be permitted but the Order requires that the access point(s) to the site from the highway must be clearly shown or described. If this has not been submitted, you need to ask for it from the appellant and get the LPA's view on it.

- Outline proposals with the point of access to the site shown, with the details of the junction including sight lines, radii and so on, but nothing covering circulation routes within the site. If allowing such a scheme, you are approving one element of 'access' in the DMP definition. So access cannot remain as a reserved matter, but you may need to impose a separate condition requiring the circulation routes within the site to be submitted for approval.

- Outline proposals with the point of access to the site shown in detail and the circulation routes within the site also forming part of the proposal (perhaps as part of a parameters plan). In that case you need to be aware that you would be permitting both access to the site and the internal circulation routes.

Checklist for dealing with outline applications

144. Have you:

- Explained that the proposal has been made in outline and established which (if any) of the reserved matters are before you and which are reserved for future consideration? This should be clear from the application form and/or statements. You must deal with any matters for which approval is sought at the outline stage, but you must not expressly deal with any of the reserved matters.

- Checked that the matters reserved for future consideration on the application form did not change during the LPA's consideration of the application? If this has happened it should be clear from the LPA or appellant's written statements and in any correspondence between them.

- Clarified how you are dealing with any submitted plans? You must be clear which plans would form the basis of the planning permission and which are for illustrative or indicative purposes only.

- Treated any illustrative or indicative plans correctly? They are not the same as plans accompanying a full application. The appellant is not tied to such plans and there may be alternative ways of developing the site. This should be taken into account when considering the suitability of the proposal and care should be taken not to elevate the status of illustrative plans through the reasoning.

Reserved matters applications

145. These follow the refusal by the LPA to approve details of reserved matters which have been submitted to them following an outline application.

146. When considering such appeals:

    - Have you made sure that you have selected the correct template ('appeal against a refusal to grant consent, agreement or approval to details required by a condition of a planning permission')?

    - Remember that planning permission has already been granted at the outline stage. An application for approval of Reserved matters is not an application for planning permission. Whatever might be argued by the parties, you can only consider the acceptability of the reserved matters which are before you. There is no scope to reconsider matters which were dealt with (or should have been dealt with) at the outline stage.

    - Have you checked that the application for reserved matters is consistent with the terms of the outline permission? For example, a reserved matters application for 4 dwellings would not be consistent with an outline permission for 3 dwellings. If the reserved matters application is inconsistent you will need to consider dismissing the appeal on the basis that the submitted details are not authorised by the outline permission. It is unlikely that you could deal with the appeal as though it were a full application because there could be a risk that interested parties might be prejudiced. This is because the application/appeal would have been advertised as a reserved matters application and not as a full application. Consequently, interested parties might be unaware that they would be able to comment on all matters (i.e. the proposal as a whole) and not just those which were reserved.

147. The Court of Appeal, in *R v City of York Council* [2019] confirmed that the statutory power under s96A of the 1990 Act to make non-material changes to a planning permission can be used to make non-material changes to conditional reserved matters approvals.

148. Though unusual, it is possible that an appeal against a refusal of a reserved matters application could be linked with an appeal against a refusal of an application for full planning permission (say for a slightly different scheme but relating to the same site). When determining such linked appeals care should be taken to ensure that the

reasoning underpinning the reserved matters appeal is distinguishable from that relating to the full application appeal. This is because in the case of the former the principle of development will have been established by the grant of outline permission, whereas in the latter it is open for consideration. By distinguishing between the two it will be clear to the appellant /LPA how each appeal was determined.

Split decisions (in appeal decisions)

149. You have the power under s79(1)(b) of the 1990 Act to split a decision on a s78 planning appeal - allowing one part of a scheme and dismissing the rest (though are not obliged to do so). The same power applies in S174 enforcement appeals in respect of ground (a). Additionally, section 22(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 offers a similar power in respect of listed building consent appeals made under section 20 of that Act.

150. If you are considering a split decision:

- Are you very sure that the two parts are clearly severable, both physically and functionally (i.e. could the part being allowed be capable of being built and then used for its intended purpose without the other part)?

- Could this result in any injustice to one of the parties? This would be unlikely if the merits of both parts have been considered through the appeal process and/or if there have been no objections to the part being allowed.

- Have you considered whether there are any EIA implications? For example, consider the impact that the partly approved development may have on any EIA screening decision taken by the LPA or Secretary of State. If there is doubt in this regard consider if a referral under Regulation 14 (2) of the EIA Regulations is necessary. Alternatively where an EIA has been undertaken and an ES is provided, consider if a partly approved scheme could result in new or different significant environmental effects beyond those currently assessed. For example, removal of development required to mitigate environmental harm. In these circumstances consider if a formal request for further information under Regulation 25 of the EIA Regulations may be necessary. If you have any doubts about the EIA implications you may wish to consult the Environmental Services Team.

151. If one of the parties requests that you consider a split decision:

- If you decide not to split it, have you made it clear that you have considered this option (unless you are intending to allow the appeal in full) and clearly explained why you have decided not to do so? These issues were explored in the case of *Coronation Power v SSCLG.*

152. If neither of the parties has requested that you consider a split decision:

- Have you concluded that one part is acceptable and the other is not? Are the two parts clearly severable? If so, a split decision would be a logical outcome. However, the power to issue a split decisions is discretionary.

153. If you issue a split decision have you:

- provided adequate reasoning for both parts of the proposed development and reached a clear conclusion on each?
- explained that the two parts are clearly severable?
- reached a formal decision on both parts? (the template provides example wording for split decisions)
- made sure that any conditions you have imposed are relevant to the part of the development you have allowed?

Split decisions (made by the local planning authority)

154. The Planning Practice Guidance states that in exceptional circumstances it may be appropriate for the LPA to use a condition to grant permission for only part of the development (i.e. to split a decision).[27] Appeals following such decisions are best dealt with under section 78 as being against the refusal of permission. Appeals in these circumstances are fairly rare.

155. In such cases the whole proposal is before you and you are not, therefore, restricted to dealing with only the elements which have concerned the LPA. This is because section 79(1)(b) allows that, on appeal under section 78, the Secretary of State "may deal with the application as if it had been made to him in the first instance". You will need to make this clear in your decision, particularly if it is argued that the appeal relates only to the part which was refused.

156. There have also been instances where an LPA has issued a split decision without the use of a condition. In such cases, you will need to write to the parties to acknowledge that the LPA has issued a split decision, but that you will be considering the matter afresh and follow the same procedures as above.

157. Although you have the power to reject the element permitted by the LPA, this must be exercised with caution. Consider:

- If you conclude that the element the LPA granted planning permission for is unacceptable (or if the proposal as a whole is considered unacceptable), the comments of the parties must be sought before a decision is issued.
- This will give the appellant the opportunity to withdraw the appeal and retain the permission as granted by the LPA.
- You should point out that, if the permission for that part of the development allowed by the LPA has already been implemented and the appeal is not withdrawn, the

[27] *ID 21a-013-20140306 ('Can conditions be used to limit the grant of planning permission to only part of the development proposed (a split decision)?').* This advice is not included in Planning Policy Wales or Circular 016/2014.

appellant risks losing the permission that has been granted and that, in such circumstances, the development will be unlawful and it will be for the LPA to decide whether it is appropriate to take enforcement action.

- If the appeal is not withdrawn you can proceed to make your decision.

Linked appeals (two or more appeals on the same site)

158. If two or more appeals are submitted, at the same time and on the same site, they will usually be linked. Each appeal must be considered as a separate entity. Consider the following:

    - Decide whether to deal with the appeals in one or more decision documents. Usually they can be dealt with in one – although very different proposals are sometimes best dealt with separately.

    - Check that you have amended the template to reflect that there is more than one appeal. For example, both appeal numbers should appear in the header at the top of each page.

    - Do you need a procedural matter to explain your approach? – for example:

    One decision document: 'As set out above there are two appeals on this site. They differ only in [e.g. the detail of the design of the proposed extensions]. I have considered each proposal on its individual merits. However, to avoid duplication I have dealt with the two schemes together, except where otherwise indicated.'

    Two or more decision documents: 'I have also dealt with another appeal (Ref:#) on this site. That appeal is the subject of a separate decision.'

Conjoined appeals (two or more appeals on separate sites)

159. Conjoined appeals (also commonly referred to as 'Travelling With' appeals) involve adjacent or nearby sites, common/overlapping issues etc. The intended purposes are to utilise Inspector resource efficiently and to try to ensure consistency of evidence and decision making, having caselaw in mind such as Fox Strategic Land. The appeals remain separate from one another but as they travel together, they are dealt with by the same Inspector, preferably at a joint hearing/inquiry. In considering whether a joint inquiry is appropriate you may wish to consider paras 2, 4 and 104 of the judgement in *South Oxfordshire DC v SSCLG and Cemex Ltd* which contains some commentary on the consistency implications of holding consecutive as opposed to joint inquiries. Each appeal must, of course, be considered as a separate entity and as a rule a separate decision document written for each. Consider the following:

    - Decide whether to deal with the appeals in one or more decision documents. Usually they should be dealt with in separate documents, albeit that, where appropriate, text concerning policy and conceivably other matters may be common to both/all:

- **Two or more decision (or SoS Report) documents**: This is the preferred approach and should always be used where the appeal sites are dispersed with different appellants and various different interested parties, and the reasoning on some matters is common but on others not.

- **One decision/Report document**: Only consider using this approach where the appeal sites adjoin, and the issues are clear and not complex. When doing so, adhere to the advice in *Hope and Lisa Taylor and Others v The Secretary of State for Communities and Local Government and North Warwickshire Borough Council [2012] EWHC 684 (Admin) (22 March 2012)* where the judge said the key question was "whether, on a fair reading of the decision letter, the Inspector has had regard to the considerations material to each site, has reached separate conclusions for each site, however expressed, and has not allowed the fact that the appeals were conjoined to obscure the need to reach different decisions on each if the merits of either case so warranted, and has given legally adequate reasons for his decisions on each site [paragraph 32] . . . He has properly divided the report into common and individual sections, the former dealing with issues common to both sites and the latter with the personal and planning considerations arising on each site separately. There is no improper confusion between the two. He draws the distinction between common and individual issues, both when setting out the evidence and in his appraisal in the overall balance and conclusions section of the letter. He expressly refers to the two developments and the two Appellants [paragraph 33].".

- If exceptionally you deal with the appeals in one decision/Report document, check that you have amended the template to reflect that there is more than one appeal (for example, both appeal numbers should appear in the header at the top of each page) and explained as a procedural matter your approach.

160. At joint hearings/inquiries evidence concerning policy and conceivably other matters may be relevant to all the cases. If there are two decision documents, which will be the norm, this will have to be clear in a procedural matter in each decision document and also reflected in appearances and document lists.

Failure cases (appeals where the LPA did not make a decision)

161. Section 78 of the 1990 Act provides that an applicant may appeal if the LPA has not given notice of its decision on the application within the statutory period (or within an extended period if agreed in writing). Such appeals are commonly known as 'failure cases' and are distinguished by the fact that there is no formal refusal notice.

162. The LPA will normally have set out any objections to the proposal in its statement, and might have put forward some putative concerns. Sometimes you will also be provided with a 'decision notice' which has been issued by the LPA after the appeal was lodged. This is not a formal 'decision', as jurisdiction transfers from the LPA once PINS has accepted the appeal. In either case it is good practice to briefly outline the LPA's main concerns. This can then lead into your main issues.

163. However, there may be occasions where the LPA have not provided any objections or evidence at all. Section 16(2) of The Town and Country Planning (Appeals) (Written Representations Procedure) (England) Regulations 2009 says;

"The Secretary of State may, after giving the appellant and the local planning authority written notice of the intention to do so, proceed to a decision on an appeal even though no written representations have been made within the relevant time limits by the local planning authority or any other third parties, if it appears that there is sufficient material to enable a decision on the merits of the case to be reached".

164. In such circumstances, you will need to decide whether there is enough evidence for you to reach a decision without prejudicing the parties or coming as a surprise to them.

165. If your decision is to dismiss, have you stated that you are dismissing the appeal and refusing planning permission? This is because there has not previously been a refusal of permission. Otherwise the proposal would remain open.

166. The general advice about defining main issues and dealing with other matters applies.

Notification

167. When determining an appeal it is essential to ensure that the correct notification has been carried out; this is regardless of under which provision it was lodged (refusal, non-determination or non-validated application). The requirements are the obligatory, minimum requirements designated by statute and there is no permissible deviation from them within the statutory framework, even if it was never accepted by the Council that the application was valid. Failure to comply with the requirements would leave your Decision open to challenge in the Courts.

168. It is expected that any deficiency in the correct notification will have been picked up and dealt with by the Casework team before it lands on your desk but you should still satisfy yourself that the necessary requirements have been met. If you are faced with a situation where you cannot be clear that the Council can vouch that it has complied with its requirements under Article 15 GDMPO 'Notification of Major Developments', in accordance with Article 33 of the 2015 Order and natural justice principles, you should consider if any arranged event needs to be postponed, including any adjustment to the appeal timetable, in order to allow for such to happen. In practical terms, this will most likely be in relation to ensuring that the site notice and press notice notifications have been carried out and a copy is on the file. If the Council has not carried out this duty, and it has not been picked up and addressed by the Casework Team, then you must request that this is carried out urgently.

169. If you have a case where this has not happened then you should ask your Case Officer to write to the LPA, cc the Appellant, and ask them to undertake the necessary notifications as a matter of urgency and to inform PINS when that has been done. This may result in new submissions which should be copied to the principal parties and treated in the normal manner by the casework teams according to the procedure being used for the appeal.

Appeals after the event ('retrospective applications')

170. Section 73A of the 1990 Act allows for the submission of "retrospective" applications.

171. Such development is often described by the parties as being for the 'retention of the building' or the 'continuation of the use'. However, you should avoid using these terms in your formal Decision, if you are allowing the appeal. This is because S55 of the 1990 Act describes 'development' as 'the carrying out of building etc. operations or the making of material changes of use' - and not as their 'retention' or 'continuation'. In other words, no distinction is made against proposals for development and those made retrospectively.

172. In these appeals have you:

- Made it clear that the development has already been carried out?
- Checked that the development that has been carried out is the same as that which has been applied for? If there are significant/material differences you will need to explain your approach. This might mean that you consider assessing the 'proposed' development as shown on the plans[28], rather than what has actually been built. However, minor changes which are required to make a proposal acceptable can sometimes be secured by condition.
- Used the correct tense. For example, 'has' rather than 'would' because the development has already taken place.
- Avoided criticising the appellant for carrying out development without first getting permission. Your role is to assess the proposal on its planning merits avoiding any suggestion of partiality.
- Avoided speculating on the prospect of success of any potential enforcement action? This is not a matter for you.
- If allowing, take care with the framing of conditions. You cannot use the phrase 'no development shall take place until'. See 'Conditions' for further information.

173. The government introduced a planning policy to make intentional unauthorised development in the Green Belt a material consideration that would be weighed in the determination of planning applications and appeals. This policy applies to all new planning applications and appeals, including non-Green Belt applications and appeals, received since 31 August 2015.

[28] In England under Article 7(1)(c) of the Town and Country Planning (Development Management Procedure) (England) Order 2015, and in Wales under Article 5(1)(c) of the Town and Country Planning (Development Management Procedure) (Wales) Order 2012, no plans are necessary to determine such appeals. But if plans have been submitted that show the development they should be taken into account.

Redetermination following a High Court Challenge

174. Challenges to planning appeal decisions are made under section 288 of the 1990 Act and challenges to enforcement appeal decisions are under section 289.

175. All redetermined appeal decisions should be sent to the office for pre-issue reading. However, check current reading policy.

176. The effect of a successful challenge under section 288 is that the decision is quashed and the appeal will be redetermined. The quashed decision may be incapable of having any legal effect, but it is nonetheless capable of being a material consideration (see following paragraph) and you would need to explain your reasons for any differences in your and the previous Inspector's reasoning. This principle was established in *Hoffman La Roche & Co AG v SSTI [1975] AC 295* and was reaffirmed in *Arun District Council v SSCLG [2013] EWHC 190*. The role of the new Inspector is, therefore, to redetermine the case. It is not to review the previous appeal decision.

177. It is possible that the main parties may agree with some of the conclusions reached by the first Inspector and this should be acknowledged in the redetermined decision. How you then deal with this will depend on the circumstances of the case. However, these matters are before you, as they would be in any appeal and, especially where they are agreed by the parties, they can be material considerations and, if so, you would need to explain your reasons for any differences in your and the previous Inspector's reasoning.

178. Although relating to a LPA decision rather than an appeal decision, the judge in *Davison v Elmbridge DC* [2019] EWHC 1409, set out 5 useful principles when considering the implications of a previously quashed decision:

    i) The principle of consistency is not limited to the formal decision but extends to the reasoning underlying the decision;

    ii) Of itself, a decision quashed by the Courts is incapable of having any legal effect on the rights and duties of the parties. In the planning context, the subsequent decision maker is not bound by the quashed decision and starts afresh taking into account the development plan and other material considerations;

    iii) However, the previously quashed decision is capable in law of being a material consideration. Whether, and to what extent, the decision maker is required to take the previously quashed decision into account is a matter for the judgment of the decision maker reviewable on public law grounds. A failure to take into account a previously quashed decision will be unlawful if no reasonable authority could have failed to take it into account;

    iv) The decision maker will need to analyse the basis on which the previous decision was quashed and take into account the parts of the decision unaffected by the quashing. Difficulties with identifying what exactly has been quashed and what has been left could be a reason not to take the previous decision into account (as with the cases of Arun and West Lancashire);

v) The greater the apparent inconsistency between the decisions the more the need for an explanation of the position.

179. In s288 cases you should add a final bullet point to the appeal details in the banner heading: “This decision supersedes that issued on []. That decision on the appeal was quashed by order of the High Court.”

180. In redetermining appeals afresh (‘de novo’) following a quashed decision under s288, parties to the appeal have an opportunity to present new representations on the case. PINS in its procedural start letters for redetermination appeals, invites parties to send further representations (including any statement of case and copies of any documents to which they intend to refer) covering any material change in circumstances (which would include any changes to the development plan position and new or altered material considerations which they think should or should no longer be taken into account), which may have arisen since the original appeal decision was issued; and to comment on the specific issue(s) upon which the appeal was quashed. The Inspector will also consider any relevant evidence previously submitted, unless it is expressly superseded by its originator during the redetermination process.

181. If an interested party played a significant role in the quashing of the original decision, e.g., they made the legal challenge, consider whether there is merit in sending them copies of the main parties’ further representations and allowing them chance to comment. It will not be necessary to do so routinely, nor is there any legislative need to do so; consider each case on its merits. If appropriate to do so, liaise with the case officer to arrange this

182. It is important to note that the Inspector is dealing with such planning appeals starting with a clean sheet. Under s79(1), in determining appeals, the Secretary of State “may deal with the application as if it had been made to him in the first instance” and is obliged to consider the current situation and have regard to the development plan and to all other material considerations. This includes having regard to any further material considerations arising since the date of the original decision. If, for example, the local plan or the NPPF had changed between the original Inspector decision and the redetermination, the Inspector would be expected to make the decision based on the latest version, not to cast his or her mind back to what the situation was at the time of the first appeal. If the evidence is potentially relevant to the case (in that it could be a material consideration in the Inspector’s redetermination), it should be taken into account. Where new evidence arises, it is therefore for Inspectors to consider whether it holds relevance to the case and others parties should be given an opportunity to comment.

183. There is a significant difference between s288 and s289 challenges. Under s289 the decision is not quashed following a successful challenge. The High Court Practice Direction states that *'where the court is of the opinion that the decision appealed against was erroneous in point of law, it will not set aside or vary that decision but will*

remit the matter to the Secretary of State[29] for re-hearing and determination in accordance with the opinion of the court'.

184. The matter of s289 remittals was considered by the court of appeal in

185. *R (on the application of Perrett) v SSCLG [2010]* and the judges affirmed that in these cases there should be a rehearing sufficient to enable the SoS to remedy the error identified by the court and to make a determination in accordance with the opinion of the court. In these cases, it will sometimes be necessary to scrutinise the judgment of the court or the consent order (if the SoS submits to judgment), particularly if the parties are not agreed as to the scope or method of redetermination.

186. Once representations have been received from the parties in accordance with the Procedure Rules, it is for the SoS[30] to decide how to go about the task of redetermination and what matters should be considered in reaching the further determination. In 'Perrett' the appellant challenged the Inspector's decision not to reopen the ground (d) appeal and to consider only ground (a) and (f), but the Judge agreed with the Inspector that it was within his power to do so.

187. In recovered appeals it should be noted that the first Inspector's report remains extant, even though the SoS decision has been quashed and must be redetermined.

188. Where a decision has been quashed, the procedures are set out in the relevant Rules.[31]

189. If the chosen procedure is a hearing or inquiry, you should make it clear you are re-opening the hearing or inquiry held earlier and that the case has to be re-determined because the previous decision was quashed by the High Court.

Confidential evidence

190. Sometimes evidence submitted by the parties, either with the planning application or at appeal, will be marked as confidential. In such cases you should make it clear to the parties (via the case officer or if necessary at the hearing/inquiry), that:

- there is no provision in the appeal regulations for representations to be treated as confidential. The relevant procedural rules require evidence sent to the Inspector as part of the appeal to be sent to certain persons. Generally evidence submitted

[29] In Wales, the Welsh Ministers

[30] In Wales, the Welsh Ministers

[31] Rule 20 of the Town and Country Planning Appeals (Determination by Inspectors) (Inquiries Procedure) (England) Rules 2000, Rule 19 of The Town and Country Planning (Inquiries Procedure) (England) Rules 2000, Rule 17 of The Town and Country Planning (Hearings Procedure) (England) Rules 2000 and Rule 20(3) of The Town and Country Planning (Appeals) (Written Representations Procedure) (England) Regulations 2009, or Welsh equivalents.

to the Inspector must be copied to the appellant, the LPA and any other statutory party.

- If they want the evidence to be taken into account, it must be made available for public inspection by the LPA. The hearing and inquiry procedural rules require the LPA to allow any person to visit their offices to inspect all the evidence they produce and receive as part of an appeal. This can be done by publication on a website, but it does not have to be32. It is for the LPA to determine whether or not it is necessary and reasonable to publish appeal documentation on their website in consideration of the circumstances of the case. PINS cannot control what happens to the information after it is received by the LPA or any other party, as part of the appeal. The written representations procedure rules do not contain a requirement to make the appeal documentation available for inspection, but the LPA may still choose to do so.

- If they want the evidence to remain confidential – you will not be able to take it into account (and it will be removed from the file).[33]

Sensitive personal information in decisions

191. See *Annex 5*, below.

Defamatory and unacceptable remarks

(also see *Annex 4* of this chapter – Guide to Defamation Law)

192. Defamation is a complicated area of law. It is very likely that immunity attaches to statements of evidence and material produced at a tribunal such as a planning appeal. Nevertheless, acting in your capacity as an appointee of a responsible public authority you should never:

    - make what could be regarded, outside the proceedings, as a defamatory remark in a decision (ie by writing something about a party which you do not know to be true and which could discredit their character or reputation)

    - report what could be regarded, outside the proceedings, as a defamatory remark made by one of the parties.

193. Consequently, you should exercise caution when using closing submissions as a basis for case summaries in Secretary of State[34] casework. Be careful to edit such

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[32] Rule 6(13) & 6(13)(A) of the Town and Country Planning Appeals (Determination by Inspectors) (Inquiries Procedure) (England) Rules 2000, Rule 6(13) & 6(13)(a) of The Town and Country Planning (Inquiries Procedure) (England) Rules 2000, Rule 6(6) & 6(6A) of The Town and Country Planning (Hearings Procedure) (England) Rules 2000.

[33] Exceptions may be made in the interests of national security and where a confidential annex to an EIA includes the location of protected species

[34] In Wales, Welsh Ministers

submissions carefully to avoid potential offence and any impression of lack of impartiality. If it is necessary to import closing submissions you could add a footnote to make it clear that the case you have set out is an edited version of the submissions.

Environmental Impact Assessment

194. In England, the process is governed by *The Town and Country Planning (Environmental Impact Assessment) Regulations 2017* ('the EIA Regulations')[35]. The Planning Practice Guidance[36] provides answers to questions about the purpose of EIA, what development is covered and relevant stages, processes and considerations.

195. Where a determination has been made that a proposal is not EIA development and it is disputed, or where it is argued by any parties that the screening opinion/direction is flawed, consider the validity of this position and whether there is new information likely to alter that determination. If you consider that there is new information available which is likely to alter the outcome then you must refer the question to Environmental Services Team (EST) and request a screening direction to be issued on behalf of the Secretary of State[37] (as appropriate). In making this request it is important to state the reasons that led you to that conclusion.

196. If you are determining an appeal/application where there is no screening opinion/direction and you think that a screening determination is needed you will need to ask EST to consider the need for a screening direction, before you issue your decision.

197. Any Environmental Statement (ES) will have been checked for adequacy in the office by EST and any pre-event submissions about adequacy will have been reviewed. Consequently, if, on the basis of your own judgement or prompted by submissions, you are contemplating issuing a letter under Regulation 25 of the EIA Regulations[38] (where you notify the appellant that further information is necessary), you should first speak to a Professional Lead.

198. The ES is a key component of the environmental information required for decision-makers. It presents the appellant's/applicant's assessment of the likely significant environmental effects associated with the proposed development. There is a statutory obligation on the decision-maker before issuing a decision to have regard to the

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[35] In Wales, *The Town and Country Planning (Environmental Impact Assessment) (Wales) Regulations 2017* (the 2017 Regulations (Wales)).

[36] In Wales, see section 6.2 of the *Development Management Manual* and *Circular 11/99*

[37] Regulation 14(2), *The Town and Country Planning (Environmental Impact Assessment) Regulations 2017* and in Wales Regulations 13 (2) of *The Town and Country Planning (Environmental Impact Assessment) (Wales) Regulations 2017*.

[38] In Wales, Regulation 24 of the 2017 Regulations (Wales).

environmental information[39] and particularly that contained within the ES (although not limited to this)[40]. There is also a duty to examine the environmental information and reach a reasoned conclusion, and to ensure that the decision specifically states that due regard has been taken.[41]

199. For relevant projects, Inspectors should as a matter of course address issues relating to the EIA screening stage. The Inspector's decision should clearly state the outcome of the EIA screening stage and confirm if the development is EIA development or not.

200. For EIA development, the Inspector's decision should state clearly that s/he has had regard to the ES and any other relevant environmental information. When writing decisions, Inspectors should seek to avoid the use of EIA terminology (e.g. such as 'significant', 'major' or 'moderate') which is used in relation to particular methodologies and, if used in a more general sense, may be easily misconstrued. In reporting impacts/effects, Inspectors should make it clear how they have determined likely harm and the judgements they have made. If the findings of the EIA are the basis on which a planning judgement is made, then direct reference to the relevant sections/paragraphs in the ES should be provided for the avoidance of doubt. If the Inspector disagrees with the findings of the ES then clear reasons to support this judgement should be provided including reference to any pertinent supporting information, e.g. technical guidance or expert witness statement.

201. The Inspector should ensure that any mitigation relied upon within the ES is secured, either through designing it into the development as 'inbuilt', 'embedded' or 'inherent' mitigation; or through other suitably robust means, including planning conditions as necessary.

202. Where an appellant has been notified by EST of the need to prepare an ES, but does not submit one, the Inspector can only determine the appeal by refusing permission.

203. Further advice is available in '*Environmental Impact Assessment'.*

Design and access statements

204. In England, Article 9 of The Town and Country Planning (Development Management Procedure) (England) Order 2015 requires that some applications must be accompanied by a design and access statement (DAS)[42]. This includes major development and certain developments in designated areas (eg dwelling houses and other development over a specific floorspace in Conservation Areas and World

[39] Regulation 3, *The Town and Country Planning (Environmental Impact Assessment) Regulations 2017*.

[40] Regulation 2(1), *The Town and Country Planning (Environmental Impact Assessment) Regulations 2017.*

[41] Regulation 26(1), *The Town and Country Planning (Environmental Impact Assessment) Regulations 2017.*

[42] In Wales, see SI 2012/801 Art 7: note the different requirements for information

Heritage Sites). DAS are intended to improve the quality of design and are a material planning consideration.

205. Note the increased emphasis on good design as set out in the latest version of the NPPF.

Temporary permissions

206. In *McCarthy, Sheridan and Others v SOS & South Cambridgeshire DC [2006] EWHG 3287* the court held that, in cases where the harm caused by a permanent development would justify refusal, the balance between the reasons for grant and reasons for refusal may be altered if the development is temporary. For example, the effect of a development on its surroundings must be reduced if it is limited to (say) 3 years rather than being permanent.

207. So, in cases where a temporary permission has been sought, have you made it clear that you have:

- carefully considered whether any harm is reduced because the development would be temporary rather permanent?
- carefully weighed any harm you have found against any benefits?
- and if you intend to allow the appeal, have you imposed a condition limiting the duration of the permission to the relevant period?

References to court proceedings

208. You will need to address court judgments where these have been raised. If case-law has not been raised – consider:

- Does the case law in mind merely support your approach? If so, there will be no need to refer to it (because, as a matter of fact, it supports your approach)
- If it is necessary to refer to case law, have you first considered giving the parties the chance to comment on its relevance

209. Court judgments are referenced in various ways. Make sure your reference is accurate and you should not refer to case law of which you may be aware but (with natural justice considerations in mind) which has not been referred to by the parties to support or illustrate your reasoning. It is sufficient that that case law exists and supports your judgment and there is no requirement that your decision should be didactic.

References to litigation permission hearing judgments

210. If, in evidence, a party provides legal submissions citing a litigation permission hearing judgment (which was delivered after the date of the *Practice Direction (Citation of Authorities) (a Direction dealing with civil litigation procedural matters)*) Inspectors must not rely on that judgment unless satisfied that the permission hearing judgment

contains an express statement that it purports to establish a new principle or to extend the present law.

211. If the permission hearing judgment was delivered before the date of the *Practice Direction (Citation of Authorities),* an indication that the judgment establishes a new principle or extends present law must be present in or clearly deducible from the language used in the judgment. If Inspectors have any doubt that this is the case they should seek legal advice before taking account of the permission hearing judgment in their determination of the appeal.

212. However, it must be borne in mind that a permission hearing judgment is not authoritative and does not create a legal precedent. Therefore, Inspectors must proceed with caution before (exceptionally) allowing one to be cited in their decision, especially if the Inspector's decision or recommendation might turn on that judgment. If in doubt, legal advice should be sought.

Measurements

213. Be careful when referring to measurements in your decision and only do so when they are critical and, ideally, have been provided by and agreed / not controversial between the parties. Have you considered:

- Are references to any measurements essential?
- If so, are precise measurements vital or can they be qualified by using terms such as 'about', 'approximately', 'more than', 'less than' etc.?
- Measurements taken by scaling off a plan may not be accurate (and so must be avoided).
- If you intend to rely on a measurement – has it been agreed by the parties? Alternatively, has it been referred to by one party or shown on a plan and not challenged by any other - or was taken on your site visit and agreed by the parties? If not, might one of the parties justifiably take issue with your use of the measurement?
- If you convert from imperial to metric ensure that you do so accurately.
- In the exceptional event that you perform your own calculations, you must have absolute certainty that the figures are correct, and check them thoroughly.
- When measuring structures, and in terms of their height above ground level, the terms "surface of the ground" and "immediately adjacent" are relevant (see *McGaw v Welsh Ministers & Council for the City and County of Swansea*).

Retention of notes

214. PINS destroys appeal files one year after the date of decision unless there has been a High Court Challenge or post-decision correspondence.

215. Inspector hearing / inquiry / site visit notes may be subject to formal requests for release. It is, therefore, important that you are aware of the retention policy for Inspector notes, as there is a possibility that we will have to release them.

216. The Inspectorate receives requests to release documents under the:

- Freedom of Information Act 2000, and
- Environmental Information Regulations 2004.

217. Section 32 of the FOI Act provides an exemption for the release of documents created by a person conducting an inquiry under a provision made in an enactment (such as the TCPA 1990). However, for casework falling under EIR, this exemption may not apply. Each case will be considered on its own merits.

218. You should, therefore, safely delete/destroy any documents when they are no longer required. This means you should retain your hearing / inquiry / site visit notes until the end of the challenge period (usually six weeks) following the issue of your decision or following the Secretary of State's decision (unless the appeal has been subject to a legal challenge – in which case your notes should be kept until completion of all legal action). Notes may be destroyed prior to the challenge period if you judge that they are unlikely to be of assistance in the event of a challenge.

219. You should also avoid writing anything that could bring the Inspectorate into disrepute, even in notes that you consider to be personal.

220. When destroying notes or files data protection policies must be complied with. It is not acceptable to dispose of documents containing personal or sensitive information as domestic waste or at a local recycling centre, because this will not be secure. You therefore have the following options:

Paper Copies

- If you are coming into TQH, dispose of them in one of the Shred-it containers in the office; or
- Post them to the Case Officer who will do the same. Details of how to arrange for parcels to be collected from your home may be found at: *https://intranet.planninginspectorate.gov.uk/task/book-a-courier/book-a-collection-from-home/*
- Secure a home shredder from PINS' Business Support Team

Electronic Copies

- Any such documentation stored on your laptop, tablet or elsewhere should be deleted
- Any memory stick or CD containing such documentation should be returned to the Case Officer for disposal

- Any email exchanges with the Case Officer should also be deleted.

More information about Inspectors responsibilities with regards to data protection can be found at: *https://intranet.planninginspectorate.gov.uk/task/handling-personal-data/*

221. If you leave PINS or retire you should return your appeal notes for all cases worked on in the last 3 months to Human Resources.

The person making the appeal is not the applicant

222. Ordinarily, only the applicant can make an appeal. However, they can instruct another person to represent them or to conduct the appeal.

223. In most cases this will have been resolved before the site visit, hearing or inquiry. However, if it has not been resolved you should continue with the event and take the following action:

- Written representations - ask the case officer to write to the appellant to secure authorisation from them

- Inquiry or hearing – ask the appellant to secure authorisation from the applicant – ideally before the event is closed.

224. The appeal would continue in the name of the applicant – it cannot be transferred to another person.

225. See paragraph 227 on the banner heading if the appellant has died.

Curtilage

226. The curtilage of a building is an area of land related to that building. It is not a use of land. So it is best to avoid describing a particular area of land as forming part of the curtilage of a building unless you are certain that it does. Instead you might refer to an area used for residential purposes or as a garden or grounds. Similarly avoid describing a proposal as being for a change of use to 'residential curtilage'. Use a different term such as 'residential purposes'. Further advice can be found in '*Enforcement*'.

Overlapping planning permissions

227. It is long settled in law that multiple planning permissions can exist on the same plot of land. Should you have an appeal before you where there is an extant permission on the land (whether implemented or not), there is nothing to preclude you from reaching a decision as it would be for the landowner to decide which permission to implement.

228. Where there are overlapping permissions, the implementation of one can affect the other, but not the granting of planning permission. It is perfectly valid for overlapping permissions to be granted with problems only being encountered where the implementation of one causes a conflict.

229. The Supreme Court Case of *Hillside Parks Ltd v Snowdonia National Park Authority* related to the relationship between sucsessive grants of planning permission for development on the same land, in particular, the effect of implementing one planning permission on another planning permission relating to the same site.

230. The Judgment reinforced the "Pilkington Principle" (*Pilkington v SSE & Lancashire CC)* "that a planning permission does not authorise development if and when, as a result of physical alteration of land to which the permission relates, it becomes physically impossible to carry out the development for which the permission was granted (without a further planning permission)".

231. It was stated that in the absence of a clear express provision, making it severable, "a planning permission is not to be construed as authorising further development if at any stage compliance with the permission becomes physically impossible".

232. Further key points from the Judgment include:

- in a multi-unit development, part completion is not unlawful and not subject to enforcement
- where implementing a later permission renders any of the earlier permission physically impossible, the earlier permission would then become unlawful for further development (unless the incompatibility is not material in the context of the scheme as a whole)
- permission which departed in a material way from that scheme would make it physically impossible and unlawful to carry out any further development
- the later permission can be seen as authorising a variation of an earlier permission if it covers the whole site

Commonly occurring 'other considerations'

Other developments and local authority or appeal decisions

233. Other developments and decisions are commonly put forward in an attempt to demonstrate that a precedent for a particular type of development has been set. Questions to consider include:

- Can you visit these developments/sites on your site visit? Generally it is best to allow time to do so if they are reasonably close to the appeal site and if locational details have been provided which allow you to find the sites without undue searching.

- What weight do they have as material considerations? How close are the sites to the appeal site? Do they provide a local context? Have they helped define the character of the area? How similar are they? Were the circumstances similar (if you know – often you will have little information on this)? Have there been any material changes in the area or to policy (although again you may not know)? Even if the development and circumstances are similar, do they provide an example that should inevitably be followed if harm would result?

234. Advice on dealing with previous Inspector's decisions can be found in the section on consistency.

Alternative Sites

235. Inspectors may receive representations maintaining that alternative sites exist which would better suit the appeal proposal. The High Court, in the case *of R (oao Brommell) v Reading BC* [2018] EWHC 3529 (Admin), held at para 52: "The task of the local planning authority is to consider the planning merits of the particular application for planning permission. Generally, land may be developed in any way which is acceptable for planning purposes and so planning law does not require the local planning authority to consider whether the proposed development would be more appropriately located at an alternative site. Exceptionally, the circumstances may be such that a potential alternative site is a material consideration which the local planning authority either must have regard to, or may have regard to, in the exercise of its planning judgment."

Fallback

236. The parties may present you with a 'fallback' position which indicates what might be done (whether by the applicant or otherwise) with the land without the express grant of planning permission if the appeal proposal does not go ahead. This may include previous extant planning permissions, the exercising of permitted development rights, the resumption of a lawful use, or long user of land where enforcement would now be time barred. A fallback position will normally be used to justify (or help justify) a proposal. In such cases it is likely to be argued that the alleged fallback would have similar or worse effects than the appeal proposal.

237. When presented with a fallback position, it is important to ensure that it has been clearly defined. If necessary, this may need to be clarified by the parties to avoid any misunderstanding.

238. However, there is no duty on an Inspector to consider whether hypothetical fallback positions might exist if they have not been put forward by the parties. The corollary is that if a fallback or alternative planning outcome has been put forward, even if accompanied by limited detail, then it will need to be addressed. This is especially if it is part of the case made by the losing party.

239. Various court cases have considered the concept of a fallback development as a material consideration. It is described in *Mansell v Tonbridge and Malling BC & others* [2017] EWCA Civ 1314 as "familiar". Paragraph 27 of that judgment by the Court of Appeal confirms that there should be a "real prospect" of a fallback development being implemented and that the decision-maker should exercise their planning judgment as to whether that would be the case depending on the particular circumstances. There is, for example, no legal requirement for a landowner or developer to say precisely how any available permitted development rights would be utilised.

240. In *Gambone v SSCLG* a two stage approach was set out, where a determination must first be made concerning whether the fallback position is a material consideration, before weight is ascribed. The following two questions should be considered:

    1) Is there greater than a theoretical possibility that the development might take place (the "real prospect" test)?

    2) If there is a greater than theoretical possibility, what weight should be ascribed?

241. The first stage of this exercise should be undertaken even when there is an extant planning permission in place. In the case of *R (Spedding) v Wiltshire Council [2022] EWHC 347 (Admin)*, the Judge held that although the long standing use was as a poultry farm, the use had ceased and as there was no evidence to conclude that the land would be used as such again, it could not be considered as a true fallback option.

242. In *R (SPVRG Ltd) v Pembrokeshire CC* [2022] EWHC 143 (Admin) it was argued that a 2016 permission could not be used as a fallback position because it was unimplementable. However, the judge held that although it may not be possible to implement a planning permission due to other restrictions or matters outside planning legislation, it does not mean that it cannot be considered as a fallback position. The weight to be attributed to a fallback in those circumstances would be a matter for the decision-maker.

- In order to determine the first stage of this exercise, you will need to consider: information on the nature and content of the alternative uses or operations in comparison to the appeal proposal, and evidence as to the likelihood of the alternative use or operations being carried on or carried out

- would the fallback be significantly more harmful than the appeal scheme or would the effect be similar or less harmful?

- if a genuine fallback exists is this a sufficient justification for a proposal which would cause significant harm (particularly if the degree of harm would be similar)?

243. In *Schneck v SSHCLG & West Berkshire DC* [2022] EWHC 3335 (Admin) the Court held that "the prospect of the fall back position does not have to be probable or even have a high chance of occurring; it has to be only more than a merely theoretical prospect. Although the possibility of the fall back position happening may be very slight, this is sufficient to make the position a material consideration.

244. You might conclude that a fallback would be more harmful than the appeal proposal and so would help justify it. If so, consider:

- Would there be a physical possibility that both the appeal proposal and the fallback could be carried out – thus negating the fallback argument?

- Would there be anything to prevent an extant permission being implemented as well as the appeal proposal? See the section on 'revoking' an existing planning permission in 'Conditions'.

- If critical to the decision would there be anything to prevent existing permitted development rights being exercised before the permission for the appeal scheme is implemented? A condition removing permitted development rights would only take effect once the permission is implemented. Consequently, this outcome could only be prevented by means of a S106 obligation - for example, in which the appellant covenants to forgo relevant permitted development rights immediately upon the issue of the planning permission.

245. A party may argue that an existing or potential use or development is lawful and / or would be permitted development notwithstanding that there is no Certificate of Lawfulness of Existing Use or Development (CLEUD) or of Proposed Use or Development (CLOPUD) under s191 or s192 TCPA 1990. In these circumstances it is not the role of the Inspector dealing solely with an application for planning permission to determine whether a use or operation is lawful in order to decide whether the appellant might be able to rely on permitted development rights as a fallback (see *Saxby v SSSE*. This can only be formally determined by a lawful certificate application). However, an Inspector should not simply ignore arguments over lawfulness in the absence of a CLEUD or CLOPUD. Rather the Inspector should carry out some assessment of the weight that should be ascribed to the evidence presented about the lawfulness of the use or operation. The absence of a CLEUD or CLOPUD is therefore not determinative of itself. Where a dispute arises in a written representations appeal as to the factual basis for a claim of lawfulness, the Inspector may need to consider inviting further written submissions from the parties in order to be able to attribute weight to the potential fallback. Alternatively, it may be necessary to convert it to an oral event. An inquiry (not a hearing) would be necessary if determining the facts would involve taking evidence on oath.

246. Clear reasoning will be required to explain the weight given to the alleged fallback position as part of the overall decision, especially if this is important to the outcome or

to deal with the case of the losing party. The weight to be attributed to potential fallback should be the main focus when considering such issues.

Precedent

247. Sometimes it is argued that, if the appeal were to be allowed, it would set an undesirable precedent which would make it difficult for the LPA to resist similar development elsewhere. Consider:

- Is there a reasonable prospect of similar development being repeated nearby? For example are there similar potential infill plots or houses that could be extended in the same way?
- If similar development were to be repeated, would the cumulative effect be harmful?

248. If you are allowing an appeal as an exception to policy – have you given clear reasons why you have reached this conclusion? This is so that your reasoning is clear and your decision is not seen as setting a generalised precedent.

Personal circumstances

249. It will sometimes be claimed that the personal circumstances of the appellant and their family, personal hardship or the difficulties facing a particular business justify, or help justify, a proposal. If so:

- Have regard to the Planning Practice Guidance [43] [44]
- Do such arguments outweigh any harm that you have found? Is the proposal for a permanent or a temporary development? Does this affect your assessment of the degree of harm (if any) that would result and your subsequent balancing of the issues?

Fear of some potential adverse effect

250. The courts have held that the fear of crime and adverse effects on health can be a material consideration. However, there must be some reasonable evidential basis for that fear. Unjustified fear motivated by prejudice can never be a material consideration. The precise weight to be given to the argument will be a matter for you but will clearly be dependent on the quality of the evidence – ie is there any firm

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[43] "However, in general they [the courts] have taken the view that planning is concerned with land use in the public interest, so that the protection of purely private interests such as the impact of a development on the value of a neighbouring property or loss of private rights to light could not be material considerations. "(*ID 21b-008-20140306* – 'What is a material planning consideration?')

[44] In Wales, see PPW section 3.1 and Circular 16/2014.

evidence that the proposal would be likely to materially increase the risk of, or fear of, crime?

251. The following court cases considered this issue:

- *West Midlands Probation Committee v SSE (1997)* - fear of crime was a material planning consideration.
- *Newport v SSW (1997)* – the fear of harmful effects on health was a material planning consideration.
- *Smith v* FSS *(2005)* - fear of crime was not justified.

Other common considerations

252. Many other arguments and concerns will arise in casework. Some examples of the questions you might ask are set out below - if you decide that they need to be covered in your decision.

- Property values – See the Planning Practice Guidance which states that "[the courts] have taken the view that planning is concerned with land use in the public interest, so that the protection of purely private interests such as the impact of a development on the value of a neighbouring property or loss of private rights to light could not be material considerations." (21b-010-130729).
- 'Right to a view' – It is useful to bear in mind the observations of Ousely J in The Queen on the Application of *Laura C and Others v London Borough of Camden, The Secretary of State for the Environment Transport and The Regions [2001] EWHC Admin 1116* on such matters:

"The private view from a window is not of itself regarded as a planning matter. There may well be a public interest in the protection of the character of an area which may be affected by a development and the impact on a view from a window may also be reflected in a wider loss of residential amenity; indeed in certain circumstances the change of view for an individual may have an impact to such an extent on the residential amenities enjoyed by the property that it does constitute a planning consideration. But normally a change of view from for example, a view over green fields to a view over a new housing estate, is not regarded as a planning consideration even though it may have a financial impact on the value of the houses which lose the view over hitherto open land. The operation of the planning system would have to change if such an impact is regarded as determining a civil right by reference to the value of the property, and yet cannot of itself be considered relevant."

- Damage to property - Is there any substantive evidence the appeal proposal would be likely to result in such damage and that, even if so, it would not be covered under separate legal rights?
- Disturbance during construction - For how long would this last? Would this be a temporary effect? How severe would any effects be? Could it be dealt with by condition limiting hours and/or requiring a construction method statement?

- Inadequate drainage system - Is there any firm evidence that it would not be feasible to adequately drain the proposed development?

- The planning officer recommended approval/pre-application discussions were favourable - Does this materially affect your consideration of the planning merits of the case? Planning authorities are not bound to accept the recommendations of their officers and your assessment should be based on an impartial assessment of the planning merits. If one party considers the other has behaved unreasonably they have the option of applying for costs.45

- Inadequate capacity in local services (eg doctors, schools) – Is there any firm evidence of local problems or that they would be materially exacerbated by the appeal proposal?

- Land ownership – An appellant does not have to own a site to seek planning permission. Is there evidence that any problems could not be properly dealt with under legislation dealing with private legal rights regarding land ownership?

- The issue is not relevant because it is covered by other legislation – Can you be sure of this? Has it been agreed by the parties? Do you know the scope of other legislation? Are the considerations the same as under the planning regime?

- Community Benefit Funds – A recent High Court judgment, *R (Wright) v Forest of Dean DC [2016] EWHC 1349 (Admin),* has found that financial contributions that relate to such funds are not usually material considerations, unless a relevant policy gives weight to them. Contributions should not be sought where they are not considered necessary to make the development acceptable in planning terms. In the context of wind development which requires community support, the use of a community benefit fund may help to increase community support, but this is an indirect consideration.

Examples of main issues

253. These are examples only. Your main issues must be carefully written to fit the case before you.

Best interests of the child

- See the *Human Rights and Equality* chapter, and also the *Gypsy and Traveller Casework* chapter.

Character and appearance

- The effect of the proposed extension on the character and appearance of [the building] and the surrounding area.

[45] In Wales, costs can only be sought in connection with hearings and inquiries.

- The effect of the proposal on the street scene along [street name].

Conservation Area/setting of a listed building

- See '*Historic Environment'* chapter

Living conditions – existing neighbours

- The effect of the proposed extension on the living conditions of the occupants of [property], with particular reference to [privacy/outlook/sunlight/daylight/potential for noise and disturbance].

- The effect of the proposed hot food takeaway on the living conditions of nearby residents, with particular reference to [noise and disturbance/cooking smells/availability of on-street parking].

Living conditions – future occupants of the development

- Whether the proposed development would provide acceptable living conditions for future occupants, with regard to [privacy/outlook/sunlight/daylight/the provision of private amenity space/internal space].

Highway safety

- The effect of the use of the proposed access on the safety of pedestrians, cyclists and drivers using [street name].

Flood risk

- Whether the proposed houses would be safe from flooding.

- Whether the proposal would comply with national planning policy which seeks to steer new development away from areas at the highest risk of flooding.

Vitality and viability of centres

- The effect of the proposed change of use on the vitality and viability of the [] centre.

Accessibility of services

- Whether occupants of the proposed development would have reasonable access to shops and services.

Financial contributions

- The effect of the proposal on the provision of [education/community/open space etc] in the area.

- Whether the proposal makes adequate provision for any additional need for [education/community/open space etc] arising from the development.

Human Rights

- See the '*Human Rights and Equality'* chapter.

Banner heading and details of the case

Introduction

254. It is important that you:

- select the correct template for the type of appeal (for example, planning application, advert, appeal against conditions, prior approval). This will help ensure the correct Act or Statutory Instrument is referred to. Note that different templates apply in Wales.

- carefully check that the details of the case are accurate in both the banner heading and the formal decision (if allowing).

The advice below relates specifically to appeals against the refusal of planning permission but the same principles apply to other types of appeals.

Qualifications and event and decisions dates

255. It is for you to decide which qualifications and professional memberships you wish to record. However, if you are a non-practising solicitor then the wording you should use in your decisions are, "Solicitor (non- practising)".

256. Where a hearing or inquiry lasts more than one day you can adjust the template so that it reads 'Hearing/Inquiry opened on []'.

257. You should not add the 'Decision date' – the case officer will do this when the decision is issued.

Appeal reference

258. The appeal reference should be taken from the cover of the appeal file.

Address

259. The address of the appeal site should be taken from the 'site address details' (or similar section) on the planning application form.

260. Do not take the address from the 'applicant name and address' section on the planning application form - or from the 'appeal site address' section onthe appeal form.

261. However, if the address given on the application form is misleading or incorrect, then you should use a correct address (sourced from the Decision Notice or appeal form if possible) – and then explain briefly why you have done so in a procedural paragraph. (If you need to check the accuracy of a post code the Royal Mail has an on line checker.)

262. If the address on the planning application form omits the postcode – it is helpful to add it (if provided).

Name of appellant(s)

263. The name of the appellant(s) should usually be taken from the planning application form.

264. Remember to include the Company name if one is given in addition to a named person.

265. If there were two applicants and only one is named on the appeal form, the appeal proceeds in the name of that one person only (ie they are the 'appellant').

266. If the applicant is not the appellant check the case file carefully – this will often have been picked up by the case officer – and it may be clear from file correspondence in what name the appeal is proceeding. If it is not clear – ask the case officer to seek clarification/agreement from the parties.

267. If the applicant has died, the role of the appellant can only be taken on by someone who has specific legal authority to do so (often the executor). You should contact the case officer who will have 'desk instructions' on the options available.

Name of the Council/LPA

268. This should usually be taken from the Decision Notice. When referring to authorities in London, remember to include the word 'Council' – for example: 'the Council of the London Borough of …'

Application reference number

269. This should be taken from the Decision Notice.

Date of the application

270. This should be taken from the 'declaration' part of the application form.

271. Do not use the date on the 'ownership certificates', the date given on the Decision Notice (which may be the date the application was received or registered by the LPA) or the date of the planning application given on the appeal form (which can often be the same as the date used by the LPA on the Decision Notice).

272. However, if there is no date on the planning application form (or it appears to be obviously incorrect) then you can use the date the application was registered/received by the LPA. Remember to change the wording in the banner heading/decision to reflect this.

273. If you cannot identify a suitable date, leave it out and state 'undated application'.

Date of refusal/decision

274. This should be taken from the LPA's Decision Notice.

The development proposed

275. The description of development in the banner heading should **always** come from the planning application form – and should generally be a direct quote. If you are dealing with an application for the approval of reserved matters, you should use the description of development from the outline permission. Where this could cause confusion for the reader, for example because the reserved matters being sought are part of a phased development, you should clarify what is being sought within a procedural paragraph.

276. However, it is acceptable to carry out **minor** corrections to punctuation or spelling. You can also insert a missing 'the' or 'a'. However, this is not essential, unless without it the meaning would be unclear. Other than this, it is not appropriate (or necessary) for the Inspector to 'tidy up' the description or to make any significant changes to it.

277. Bear in mind that the applicant / appellant sought specific permission for that which s/he described. If you allow the appeal having altered that description (without the parties' agreement) it is no longer necessarily what s/he applied for. Unless the description is actually inaccurate in some way, it is preferable to explain in a procedural matters paragraph the clarification that you think is necessary in light of whatever has prompted you to reach the view that you have and then ay that you have considered the appeal on that basis. The **only circumstances** in which a different approach would be justified would be:

- the description is inaccurate or wholly unclear (in which case you might be able to use the LPA's description instead – as long as this is accurate and clear)
- a revised description was agreed by the LPA and the appellant - and the application was determined on that basis (this will usually be where there has been some change to the proposed development – for instance a change in the number of houses proposed)
- you have determined the appeal on the basis of amended plans which necessitate a change to the description of development (if the Council determined the application on the basis of revised plans, has a revised description been agreed by the main parties? If you are accepting revised plans at appeal which necessitate a revised description have you very carefully considered whether this might amount to a substantial change to the proposal? Might it prejudice the interests of any parties? What was consulted on? See Annex 1 on 'amended plans and proposals for further advice.)
- it includes wording that is not a description of development (eg the address, terms like 'retrospective', 'retention' or 'resubmission' or phrases which address the purpose or merits of a case) – such words can be deleted.

- If there are uncertainties regarding the description of development, you should clarify this at the hearing, inquiry or, if necessary in written representations cases, by referral back to the parties.

278. You will need to explain in a procedural paragraph why you have used a different description in the formal decision from that on the application form/banner heading. For example:

    - For clarity - if the original description was inaccurate or wholly unclear.

    - To leave out the superfluous – for example, if you remove words which are not acts of development (e.g. 'retrospective/retention').

    - To explain that the proposal was amended before the LPA determined it (and to make clear on what basis you have determined the appeal).

279. It is advisable to check Section E of the appeal form. In some cases the appellant will quote an amended description used by the LPA. Sometimes the appellant will tick the box to indicate that the description has been amended from that given on the application form - but sometimes will not. If Section E indicates that the description has changed, you should generally use the original description in the banner heading and the revised description in the formal decision, if you are allowing and the change is **significant** (but remember to explain this in a procedural paragraph). However, if the change is not significant you can generally use the original description in both the banner heading and the formal decision (if allowing). Depending on the exact circumstances you might explain:

280. The description of development in the heading above has been taken from the planning application form. However, in Part E of the appeal form it is stated that the description of development has not changed but, nevertheless, a different wording has been entered. Neither of the main parties has provided written confirmation that a revised description of development has been agreed. Accordingly, I have used the one given on the original application.

281. If you wish to distance yourself from quirky wording - or if the wording you use in the formal Decision (when allowing) is different from that given in the banner heading – you can adjust the banner heading to say – for example: 'The development proposed was originally described as "……."

282. If you consider that the original description of development omits some particularly important feature or there might be some significant disagreement over the scope of the application you might explain this in a procedural paragraph as follows: "Notwithstanding the description of development set out above, which is taken from the application form, it is clear from the plans and accompanying details that the development comprises […]. The Council dealt with the proposal on this basis and so shall I.

283. Finally, remember that if the description of development in the banner heading and formal decision are different – explain briefly why in a procedural note.

Annex 1 - Proof reading

Are factual matters correct, including:

- those in the banner heading (including the date of site visit, appeal reference number, name of appellant etc)
- the appeal reference number in the header on page 2
- plans and documents (including development plans and supplementary planning documents)
- compass points, if used
- dimensions and distances
- place names and property numbers
- direct quotations

Have you considered:

- is it essential to use precise dimensions, compass points or quotations? The Courts would rarely criticise the lack of a reference to a specific dimension on the basis that you conducted a site visit and saw what you saw and will have assessed it in the light of the evidence put to you.
- if you have used abbreviations, did you explain them the first time - and are they used consistently?
- are there any 'missing words' (look out for missing 'not's which can reverse the intended meaning)
- is the format correct, have you any:
    - missing or repeated paragraph numbers;
    - non-standard gaps between paragraphs;
    - "orphaned" headings or signatures, unexpected bold or italic fonts?

Grammar, spelling, syntax and readability

- Is your use of tenses correct and consistent? (would/could/should if referring to a proposed development)
- Are your apostrophes in the right place? (Appellant's, or appellants' – be careful!)
- Is your use of commas and semi-colons correct? The misuse or abuse of either can materially affect the meaning of what you write.

- Are all spellings correct (use the spell-checker but don't rely on it)
- How does your decision read – try reading it out loud. Are all sentences clear, unambiguous and straightforward to follow? Is there any repetitious wording?
- Read as a whole – will the reader be able to understand why the matter was decided as it was and what conclusions were reached on the main issues?

Annex 2 - Check list for producing robust appeal decisions

Preparation – have you:

- fully understood the proposal (having examined the application forms, plans and any DAS)?
- fully understood the reasons for refusal and the LPA's case? (having read the LPA's statement of case, officer/committee report and final comments)?
- fully understood the appellant's case (from the statement of case and final comments)?
- read all letters from interested parties (appeal and application stage) and noted any issues raised?
- prepared a checklist of things to see on your site visit (including matters raised by the main and interested parties and any relevant local sites/developments)?
- asked the case officer to obtain any missing policies, SPD, plans or documents?
- identified any relevant Human Rights and / or Public Sector Equality Duty matters and if necessary sought further information regarding these (see the *Human Rights and Equality* chapter for more information)?

Site visit – have you

- checked the plans with the main parties when carrying out an ASV? (which are the ones the LPA made its decision on?)
- made sure you've seen everything you need to? (don't leave until you have done so)

The decision: have you

- got all the details in the heading correct? (be especially careful with appeal against conditions cases)
- covered any necessary matters in a procedural/preliminary section (eg outline development, amended plans, amendments to matters in the heading, changes in national or local policy, failure of a party to attend the SV, grounds for refusal in non-determination cases, arguments that planning permission is not required etc)?
- clearly defined the main issues in a specific and neutral manner?
- for each main issue:
- refreshed yourself on the correct approach by looking at relevant Inspector best practice advice?
- covered the relevant arguments made by the main parties?

- reached clear findings and justified them (ie reasoning rather than assertion)?
- reached a firm conclusion against the relevant issue (as you defined it)?
- reached a firm conclusion against the relevant development plan policies (and briefly and accurately summarised them)?
- reached a firm conclusion against the NPPF, the Planning Practice Guidance and SPD (where relevant)?
- covered any relevant Human Rights and / or Public Sector Equality Duty matters (see the *Human Rights and the Public Sector Equality Duty* chapter for more information)?
- concluded whether the proposal is or is not in accordance with the development plan, read as a whole, and provided clear reasons for coming to that view?
- if you are allowing - have you dealt with all the main points raised by the LPA and interested parties opposing the development?
- if you are dismissing - have you dealt with all the main points made by the appellant (including fallback positions and developments argued to set a precedent)?
- if necessary, have you balanced any findings that would weigh for and against the proposal in order to reach an overall conclusion?
- if allowing – have you:
- explained why you are or are not imposing any conditions suggested by the LPA and other parties?
- imposed all the conditions you have said you are going to (including those which flow logically from your reasoning)?
- checked that the conditions comply with paragraph 56 of the NPPF and 'Use of Planning Conditions' in the Planning Practice Guidance
- avoided imposing conditions that would be a surprise?
- dealt with any planning obligations in accordance with current guidance?
- said whether or not development plan policies are consistent with or in conflict with the NPPF and attributed weight to emerging development plan policies (where relevant)?
- reached a final conclusion on the appeal?
- ensured that the decision does not contain any sensitive personal data or other information that is sensitive in nature? If it is essential to include this information, *please refer to the advice above*.

Refining your decision - have you:

- included anything that would be a surprise? (If so, take it out – or alternatively, if it is critical, go back to the parties to seek their views)
- included anything you don't need to? If so, take it out. (you don't need to reiterate the cases put to you or cover all the arguments made by the 'winning' party if they are not material to your decision)
- made sure every sentence and paragraph serves a purpose? (delete any 'so what' sections or re-write them)
- made sure every sentence and paragraph is clear and unambiguous?
- made sure your reasoning has a logical flow and a coherent structure?
- made the decision as short as it can be?
- been tactful?

Checking your decision – have you:

- put your decision to one side and then come back to it fresh on a different day (subject to the target date allowing time for this)?
- checked all the main arguments are covered? (read through the cases one last time)
- ensured that any relevant Human Rights and / or Public Sector Equality Duty matters are sufficiently covered (see the *Human Rights and Equality* chapter for more information)?
- double-checked that the decision does not contain any sensitive personal data or other information that is sensitive in nature? If it is essential to include this information, *please refer to the advice above*.
- checked the tense is correct ('would' not 'will' unless retrospective)?
- checked all factual details are correct (including everything in the heading and street names, policy numbers, compass points and document titles)?
- checked grammar and punctuation are correct?
- checked any conditions imposed?
- read and re-read your decision (for readability, coherent structure, logical reasoning, internal consistency and accuracy)?

- ensured that before sending your decision to the case officer or to Checkmark that your decision refers to the most up to date plan?[46]

[46] Case officers will not check whether decisions refer to adopted plans.

Annex 3 - Reading (quality assurance) process

For English casework, the expectation is that Inspectors outside of training issue their own decisions without them being pre-issue read. They may, at times, nevertheless wish to submit parts of their decisions to their Inspector Manager for informal comment or advice. That process should continue as agreed between the Inspector and their manager and is unaffected by this guidance.

However, there may be a need for full pre-issue reading in some circumstances although this is a matter of discretion for the individual Inspector in consultation with their Inspector Manager (and Professional Lead, if necessary). The situations where this may arise include:

- Where the case raises novel or specialist issues particularly if they are unfamiliar to the Inspector, or where the outcome may have wider-reaching implications for the application of policy or where complex legal arguments have been made in enforcement casework;

- Where the case is a re-determination of a remitted or quashed decision especially if the Inspector is reaching a different decision to that of the previous Inspector, if the reasons given for submitting to judgment in the Consent Order are still in dispute and central to the outcome or if there are multiple controversial issues;

But these types of case **do not** need to be read before issue as a matter of course.

Where pre issue reading is necessary it should preferably be undertaken by the Inspector Manager or by another Inspector Manager if the Inspector's manager is unable to do so or is unavailable. However, if this is not possible or if the decision raises specialist issues outside of the experience of the Inspector Manager, then any decisions that need to be read should be submitted by Inspectors using the *Checkmark* system. There will be no need to use Checkmark for cases that are read by Inspector Managers.

Given the specific issues arising in the enforcement and specialist casework area and the potential high risk of challenge, Inspectors are advised to consult their line managers before submitting re-determination cases for issue.

All Secretary of State reports will be reviewed by the QA Panel;

Reading as part of any training or mentoring process is unaltered by the above.

Annex 4 - Defamation Law: Brief Overview

What is defamation law?

Defamation law is concerned with the protection of reputations.

What is a defamatory statement?

It's a false statement made by one individual against another in an attempt to discredit that person's character, reputation or credit worthiness and must be communicated to at least one other person.

Each publication of a defamatory comment is a fresh publication of the comment which means that publication on websites or copying of material onwards to other parties holds risk.

To break it down further:

- A spoken statement is slander
- A written statement is libel

What is Privilege?

The law recognises two kinds of privilege designed to protect freedom of speech (absolute and qualified). Such privilege provides protection (as a defence in a defamation action) for any defamatory statement made during the course of court proceedings. This protection may extend to quasi-judicial proceedings such as tribunals (see below)

Does privilege attach to statements made in the course of appeals/proceedings dealt with by PINS?

It may well apply:

The case of *Trapp v Mackie* [1979] 1 WLR established the criteria for deciding whether quasi-judicial status exists which are as follows;

- It is a tribunal recognised by law
- The nature of the issue is akin to an issue in court (civil and adversarial)
- The procedure is similar to that in law (governed by rules)
- The outcome is a binding determination

These criteria are all applicable to planning and related tribunals and therefore it may well be the case that evidence (either oral or written) irrespective of content may nevertheless have immunity in the (unlikely) event of a defamation action arising.

The following extract from judgment in the case of *White v Southampton University NHS Trust* [2011] is perhaps worth considering in the context of potentially defamatory correspondence:

It has long been recognised that one of the consequences of according immunity to such communications is that sometimes it can operate to protect a malicious informant. As was observed by Lord Simon of Glaisdale in *D v National Society for the Prevention of Cruelty to Children [1978] AC 171*, 233:

"…the rule can operate to the advantage of the untruthful or malicious or revengeful or self-interested or even demented police informants as much as of one who brings information from a high-minded sense of civic duty. Experience seems to have shown that though the resulting immunity from disclosure can be abused the balance of public interest lies in generally respecting it."

The Courts have also held that such immunity can be compatible with the Human Rights Act 1998.

Conclusions

It is arguable that privilege applies to evidence given in planning (and specialist casework) proceedings given the quasi-judicial status of such tribunals. However, such privilege would not apply to potentially defamatory statements made about individuals *outside* of tribunal proceedings

In addition;

As a responsible public authority PINS should remain vigilant to recognise and deal with potentially defamatory correspondence and statements submitted in appeals by following procedures such as those set out in desk instructions

A combination of the 1990 Act and secondary legislation provides some method of control by Inspectors over behaviour at proceedings

Disruptive behaviour can be dealt with under the Procedure Rules (for example Rule 15(9)) by way of exclusion from the proceedings

Delays caused by disruptive behaviour can be dealt with through costs awards

Professional standards apply to some witnesses and advocates thus (for example) bullying and aggressive behaviour may be the subject of complaint to the relevant governing body

Annex 5 - Sensitive personal information in decisions

1. Sensitive information must be processed in accordance with the *Data Protection Act 2018* (DPA18), which brought the General Data Protection Regulations (GDPR) into UK law. It protects individuals against the misuse of sensitive personal information. Publishing personal information on the internet is likely to be seen as particularly intrusive on an individual's right to privacy.

2. The Local Government Ombudsman (LGO) considered the publication of sensitive information in relation to a planning application determined before the GDPR came into force. The LGO found that the Council breached the DPA98 and the HRA98 by publicising sensitive personal information, including details of the names, ages, schools and medical conditions of children on a site.

3. In reaching this decision, the LGO accepted that it was necessary for the Council to obtain sensitive and personal information about the site occupiers' circumstances, so to reach an informed view on the development. But it was not necessary or proportionate to publish that information and put it in the public domain. The LGO found that the information could have been considered without being widely circulated, so as to reduce the interference with the occupiers' right to privacy.

4. In May 2017, the Information Commissioner's Office (ICO) considered a case where Basildon BC had published a statement in connection with a planning application that contained sensitive personal data, including the names, ages and health and disability issues of family members.47 It was possible to identify each person and their homes.

5. The ICO concluded that the publication of this sensitive personal data on the internet was in breach of the DPA98, in breach of the Council's own policy in relation to disclosure, and was likely to cause substantial damage and/or substantial distress to the persons affected. The ICO further found that the publication of sensitive personal data involving ethnic communities could lead them to legitimately fear how that might be used by hostile parties. Basildon BC was thus issued with a penalty, reduced on appeal to £75,000.

6. The GDPR and DPA18 provide protection in respect of the processing of information relating to criminal convictions, and 'special categories of personal data' which are defined as:

   Data revealing the racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership… genetic data, biometric data for the purposes of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation.

7. Some personal information is likely to be more sensitive, based on the potential harm or impact on the individual(s). For instance, information relating to children, including their name, age, address or school is likely to be seen to be more intrusive than that relating to an adult.

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1. [47] See *PINS Note 05/2017*

8. Since PINS publishes casework decisions, ideally without redaction, it is vital that Inspectors write decisions and reports in a manner which can be published. If sensitive personal data or information is submitted in casework, the publication of it could contravene the DPA18 and HRA98. Even if the information concerns a crucial or determining consideration, you must not refer to it in detail in the decision or report.

9. If personal information is relevant, you should simply refer to the documents or verbal evidence which set out the relevant information – and then describe the information in the most general terms. It would suffice to say, for example, that you have had regard to the letters submitted by the appellant concerning the medical/educational needs of the children, and then set out what weight you give to the evidence.

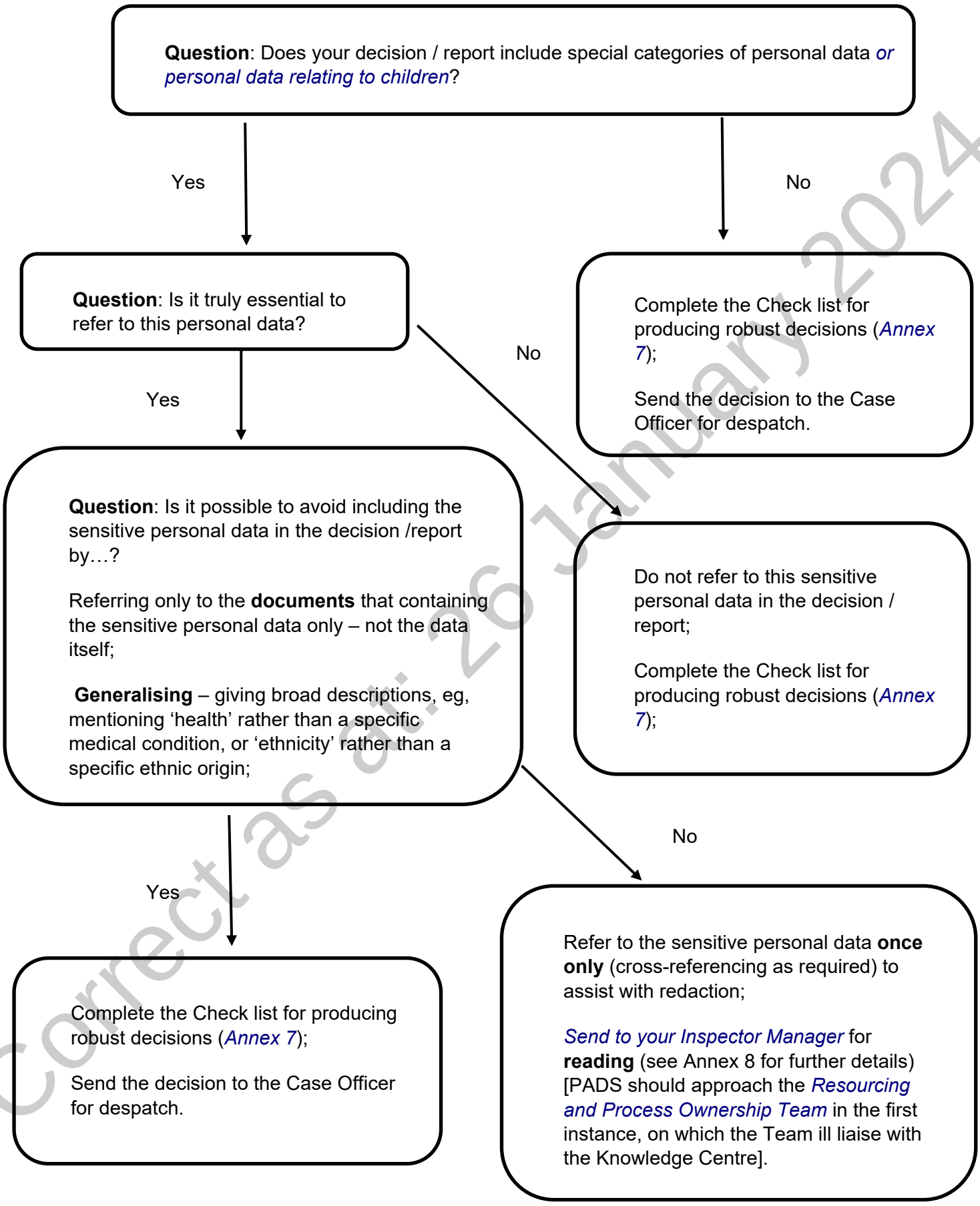
10. Following a data breach, stemming from an appeal decision which included an element of unnecessary material, you should be very careful not to refer to information which may imply the nature of the particular needs. For example, reference to special needs co-ordinators gives too much information about the personal circumstances of the child.

11. Bear in mind that it is not always possible to anonymise identities – and doing so would not, in any event, overcome the need to avoid giving details of sensitive personal information.

12. The onus is on the Inspector to check that their decision does not contain any special category of personal data, information relating to criminal convictions, or other information that is sensitive in nature.

13. If you are in doubt as to what comprises sensitive personal data, or consider it essential to refer to such information in your decision, seek advice from your SIT, SGL or mentor. Any such information should be set out in one place in the decision for ease of redaction.

14. The advice above is summarised in a flowchart below.



The Planning Inspectorate

The approach to decision making
Part 2 – National planning policy, the development plan, and other guidance

Updated to reflect December 2023 Framework (NPPF)
What's new since the last version Changes highlighted in yellow made 27 September 2022: • Revised section on Emerging Development Plans
Other recent updates • New paragraph 36, in reference to the judgment in 'Worthing Borough Council v SSLUHC & Anor' [2022] EWHC 2044 (Admin) and the need to expressly address relevant emerging policies if they have reached an advanced stage and any conflict with adopted policies in the overall balance.

Contents

Introduction

1. This document, part 2 of the chapter, advises on the policy input into decisions, explaining both the primacy of the development plan, and the relevance of the National Planning Policy Framework. The role of additional guidance is also highlighted.

National planning policy

2. The National Planning Policy Framework was first published in March 2012, and then updated in July 2018, February 2019, July 2021, September 2023 and, most recently, December 2023. It is often referred to as 'NPPF' or 'the Framework'.

   The Planning Practice Guidance was published by DCLG on 6 March 2014 as a web-based resource.

   https://www.gov.uk/government/collections/planning-practice-guidance

3. It is intended to reflect and support the NPPF. It was accompanied by a note explaining which documents have been deleted (including circulars and practice guides).

4. Other national planning policy and practice guidance may also be provided.

5. You should also be aware of Written Ministerial Statements. These can provide clarification on national policy and could be important material planning considerations if relevant to an appeal.

6. If draft national policy emerges it may be cited by the parties. If relevant, it may be a material consideration. However, be careful about the weight you afford it - consider:

   - Does it seek to significantly change existing relevant policy? What certainty is there that it will remain the same when finalised? Could change as a result of consultation?

The development plan

Background

7. Section 38 of the 2004 Act (as amended by the Localism Act 2011) defines the development plan (in England) as follows:

   - Outside Greater London – a) the regional spatial strategy for the region (if there is one), b) adopted development plan documents (taken as a whole) and c) neighbourhood development plans.

   - In Greater London – a) the spatial development strategy (currently the London Plan), b) adopted development plan documents (taken as a whole) and c) neighbourhood development plans.

8. In Wales, Section 38 of the 2004 Act defines the development plan as the adopted Local Development Plan (LDP). (Where an LDP is not in place, the development plan comprises the UDP and/or any older-style plan).

Regional Strategies

9. In 2010 the Government confirmed its intention to abolish Regional Strategies. This process was completed in the first half of 2013 and all Regional Strategies have now been revoked in full or in part. Where revoked, they no longer form part of the development plan.

10. Some Regional Strategies were not fully revoked and a limited number of policies have been saved until they are replaced by Local Plan policies. PINS Note 34/2012r6 provides further information.

Unitary Development Plans, Local Plans and Local development Frameworks

11. In the time before the Planning and Compulsory Purchase Act 2004 each unitary authority prepared a *Unitary Development Plan* (UDP). In the rest of the country there was a 2 tier system with County Councils preparing a *Structure Plan* and local authorities preparing a *Local Plan*. A regional dimension was provided by *Regional Planning Guidance*.

12. The 2004 Act replaced this with a system of *Regional Strategies* and, at a local authority level, of *Development Plan Documents* (DPDs). Local authorities were expected to prepare a *Core Strategy* (vision, objectives, strategy) before moving on to more detailed DPDs which might include *Development Management Policies*, *Site Allocations* and *Area Action Plans.* Local authorities also had to prepare a *Proposals Map* to illustrate the geographical application of DPD policies (although this was not, in itself, a DPD). The suite of DPDs would then form part of the *Local Development Framework* (LDF) for the area. In time, this collection of DPDs was intended to fully replace the previous Local Plan or UDP.

13. Following the planning reforms of 2012, LPAs should no longer prepare a suite of DPDs. Instead, the NPPF states that LPAs should produce a *Local Plan* for their area and that any additional DPDs should only be used where clearly justified. The Town and Country Planning (Local Planning) England Regulations 2012 also refer to a Local Plan. The '*proposals map*' is now known as the '*policies map'*.

14. As each development plan is adopted it should state which previous policies and plans it supersedes.

15. By April 2016 about 70% of all LPAs have adopted local plans. Consequently, until each LPA has adopted a post-2012 Local Plan, you may find that the development plan for a particular area comprises a mixture of some of the following: one or more DPDs, 'saved' policies in UDPs or pre-2004 Act Local Plans, 'neighbourhood plans' and, in a very few cases, retained RS and Structure Plan policies.

16. However, policies in old style Local Plans and UDPs will only form part of the development plan:

- as long as they have been "saved" by a Direction of the Secretary of State
- and provided that they have not been superseded by a DPD or post-2012 Local Plan.

17. The High Court judgement in the 'Cherkley'[1] case considered the status of the supporting text to saved policies in Local Plans. The judge concluded that the saving of certain listed policies had the effect in law of preserving all the supporting text. Although appropriate resort could be had to supporting text when interpreting and applying saved policies, the text should not be given the force of policy where, to apply it, would conflict with the policy itself. Although the Court of Appeal subsequently overturned the decision it nevertheless confirmed the High Court judge's findings on this point and added that if there were something in the supporting text that contained an additional criterion not referred to in the policy itself, it could not be said that such a criterion had the force of a policy – it did not trump the policy, as stated in paragraph 16 of the Court of Appeal's judgment.[2]

Casework considerations – the NPPF and development plan

18. The NPPF (in the section on implementation) advises that:

- its policies are material considerations which should be taken into account from the day of its publication.
- development plans may need to be revised, as quickly as possible, to take into account its policies.
- due weight should be given to relevant policies in existing plans according to their degree of consistency with the NPPF - the closer the policies in the plan to the policies in the NPPF, the greater the weight that may be given.
- policies should not be regarded as out-of-date simply because they were adopted before the NPPF.

19. Paragraph 11 provides that where there are no relevant development plan policies, or the policies which are most important for determining the application are out-of-date, permission should be granted unless "*The application of policies in this Framework that protect areas or assets of particular importance provides a clear reason for refusing the development proposed* " or "*Any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this framework taken as a whole*."

20. Whilst the presumption applies to all forms of development there is detailed advice about its application in the Housing chapter of the ITM.

[1] *Cherkley Campaign Ltd v Mole Valley DC v Longshot Cherkley Court Ltd* [2013] EWHC 2582 (Admin), 22 August 2013.

[2] *Cherkley Campaign Ltd, R (on the application of) v Mole Valley DC & Anor* [2014] EWCA Civ 567 (07 May 2014).

21. Following exploration as part of a High Court challenge, our advice is that paragraph 174a of the 2021 NPPF is not a restrictive policy, pursuant to paragraph 11d and footnote 7 thereto.

22. The courts have also considered the application of paragraph 14 of the 2012 NPPF (**now replaced by paragraph 11 of the NPPF**) and the presumption in favour of sustainable development. In *Cheshire East BC v SSCLG* [2016] EWHC 571(Admin) Mr Justice Jay explained that where the development plan is absent silent or out of date paragraph 14 of the 2012 NPPF guides decision makers on how tensions between the different dimensions of sustainable development (social, environmental and economic) should be reconciled. In these circumstances the application of paragraph 14 of the 2012 NPPF taught decision makers how to decide whether a proposal, if approved, would constitute sustainable development (paragraphs 19 – 26 of the judgment)[3].

23. In *East Staffordshire BC v SSCLG and Barwood Strategic Land* [2016] EWHC 2973 (Admin) the Court confirmed that where a plan is **not** absent silent or out of date the presumption means approving development that accords with it without delay. Development that is in conflict with such a plan cannot benefit from the presumption in favour of sustainable development[4]

24. Both of the above cases relate to the 2012 NPPF and should be treated as such and with caution. Nevertheless their main principles hold good in terms of how to apply the presumption in favour of sustainable development.

25. In dealing with casework – consider:

- The Planning Practice Guidance states that the NPPF "*must be taken into account where it is relevant to a planning application or appeal.*"[5] Nevertheless it is a material consideration and not statute. You will generally not need to expressly conclude against the NPPF if relevant development plan policies are consistent with it. However, it may assist your reasoning to do so. You can refer to the NPPF if the parties have not done so as Inspectors are expected to be familiar with national policy. On the other hand, you do not necessarily have to refer to the NPPF in every case.

- Has it been argued that a relevant policy is not consistent with the NPPF (and so is out of date[6]) or that 'reduced weight' should be given to a policy because of its

[3] In these circumstances there is no need for any separate assessment of sustainability as suggested in the case of William Davis v SSCLG [2013] EWHC (Admin)

[4] See paragraphs 9-27 of the Housing Chapter for further detail.

[5] 21b -006-20190315 (How must decisions on applications for planning permission be made?')

[6] The NPPF does not prescribe the weight to be given to policies deemed to be out-of-date. Weight is a matter for the decision maker, policies that are considered out of date in accordance with the NPPF can still be accorded weight and should not automatically be disregarded *Crane v SSCLG* [2015] EWHC 425 (Admin) and *Suffolk Coastal DC v Hopkins Homes Ltd and Richborough Estates Partnership LLP & Cheshire East v SSCLG* [2016] EWCA Civ 168 (see Housing chapter for further detail).

age[7]? If so, you will need to address this argument in your reasoning, particularly if it has been raised by the losing party. Inspectors should note that the use of the term 'reduced weight' in a decision should be avoided.

- What if the issue of consistency with national policy has not been raised? Are you satisfied that there is no obvious inconsistency between the development plan and the NPPF? If so, it is not necessary to refer to consistency or to paragraph 225 of the NPPF. Instead it will usually be sufficient to conclude against relevant development plan policies and, where relevant, the NPPF.

- Have you used the same terminology and applied exactly the tests as used in the NPPF or legislation (for example in paragraphs 225 and 11, eg approving proposals unless adverse impact significantly and demonstrably outweigh the benefits etc, not vice versa)? This helps show the parties, and the Courts where applicable, that you have considered these matters correctly.

26. A flowchart which summarises the approach and key issues when considering paragraph 11 of the NPPF is provided in the Housing chapter to assist.

27. Neither the NPPF nor any other national policy guidance can of itself provide that provisions of a development plan are no longer applicable[8] and you must apply address and conclude on development plan policies and s.38(6) in your decisions. The weight to be accorded to conflict with development plan policies deemed to be out of date in accordance with the NPPF is for the decision maker to judge in the circumstances of the case.[9]

Casework considerations – the development plan

28. In dealing with the development plan - consider:

- Do you have copies of all relevant (or potentially relevant) policies and supporting text? If not, ask the case officer to obtain them at an early stage.

- Is your decision based on the most directly relevant current development plan policies. Be careful, development plans which were emerging when the appeal was made may since have been adopted. They may delete policies in earlier development plans which have been relied on by the parties. Sometimes the parties will alert you to a policy change and LPAs are requested to do so - but it

[7] Age alone is not a sufficient basis for reducing the weight to be given to development plan policies, potentially even when the time period over which the Plan was designed to extend has elapsed, as NPPF paragraph 219 provides that "existing policies should not be considered out-of-date simply because they were adopted prior to the publication of this Framework". Inspectors need to apply NPPF paragraph 219 and analyse in what way, and to what extent, the policies were not consistent with the NPPF (*Daventry District Council v SSCLG and Gladman Developments Limited* [2015] EWHC 3459 (Admin) – see paragraph 39).

[8] "Section 38 provides for the status of the development plan, and section 38 cannot be altered by the Framework. Secondly, the Framework cannot of itself provide that provisions of a development plan are no longer applicable." (*South Northamptonshire Council v SSCLG, Robert Plummer* [2013] EWHC 4377 (Admin))

[9] Suffolk Coastal District Council v Hopkins Homes Ltd and Richborough Estates Partnership LLP & Cheshire East v SSCLG [2016] EWCA Civ 168

may not always happen. If there is any doubt it is best to check with the LPA via the case officer. An example might be where the evidence before you indicates that a plan was submitted for examination some time ago – is it possible that there is now an Inspector's Report, has there been (or is there shortly to be following, the Examiner's report) a referendum into a Neighbourhood Plan or has the plan been adopted? A national database of Local Plan progress can be found on the Portal[10]. However, although it is regularly amended it may not be fully up to date. [11].

- Have you demonstrated through your reasoning that you have understood and correctly applied the relevant policies? See *Tesco Stores Ltd v Dundee City Council* [2012] UKSC 13:

  "… policy statements should be interpreted objectively in accordance with the language used, read as always in its proper context." (paragraph 18)

  "As has often been observed, development plans are full of broad statements of policy, many of which may be mutually irreconcilable, so that in a particular case one must give way to another. In addition, many of the provisions of development plans are framed in language whose application to a given set of facts requires the exercise of judgment. Such matters fall within the jurisdiction of planning authorities, and their exercise of their judgment can only be challenged on the ground that it is irrational or perverse. Nevertheless, planning authorities do not live in the world of Humpty Dumpty: they cannot make the development plan mean whatever they would like it to mean." (paragraph 19)[12]

- When reaching your conclusion you should do so by reference to the specific wording of the policy itself rather than referring to perceived compliance with the **objectives** of a development plan policy.

- Are your references to policy as brief as they can be? Have you avoided setting out long free-standing summaries of policies? You may need to go into more detail if the interpretation, application or relevance of the policy is disputed. See the section on 'concise decision writing' for more advice.

- If you do need to quote from a policy have you made sure that the extract is as brief as possible and error-free?

[10]Check http://www.planningportal.gov.uk/uploads/pins/local_plans/LPA_Core_Strategy_Progress.pdf

and http://www.planningportal.gov.uk/uploads/pins/local_plans/other_plans.pdf

[11] Ouseley J. said in R. (on the application of Laura Cummins.) v Camden LBC [2001] EWHC (Admin) 1116 (paragraph 162), it may be necessary for an authority "in a case where policies pull in different directions to decide which is the dominant policy: whether one policy compared to another is directly as opposed to tangentially relevant, or should be seen as the one to which the greater weight is required to be given".

[12] The origin of the Humpty Dumpty quote is *Cranage Parish Council & Ors v First Secretary of State & Ors* [2004] EWHC 2949 (Admin) (9 December 2004)

- You do not need to state that the development plan has been adopted. However, if a plan has not been adopted or if there is a dispute about its status, you would need to make that clear.

29. Concluding on the development plan

- Your attention will often be drawn to a large number of policies. Have you been selective about which you need to refer to? You need only assess the proposal against policies which are relevant to the main issues[13]. However, in doing so you should deal with any relevant policies which have been raised by the **losing party** in support of their case, or are contained within a Statement of Common Ground or similar.

- Have policies been relied on which do not appear to be relevant? If so, it is good practice to briefly explain why, particularly if they are in the reasons for refusal (for example, there may be disagreement over which policies are relevant).

- Have you clearly stated how the proposal complies or fails to comply with the relevant main policies you have identified? It is helpful to use the same terminology because it helps show that you have correctly assessed the proposal against the policy. If there is a breach of a particular policy there may still be overall compliance with the plan[14]. You need to acknowledge and resolve tensions between policies where they exist[15].

- The key is to conclude against the development plan, as a whole.

- The approach is not mechanistic, and you do not have to explicitly refer to your statutory duty under s38(6)[16] but it is best practice to do so. It should be clear to any reader that you have discharged your statutory duty by consideration of the policies in the development plan relevant to the main issues. You should reach a conclusion on any tension between them through your planning balance leading to an overall conclusion, based on the evidence before you, on the development plan as a whole. See *Lark Energy Limited v SSCLG, Waveney District Council* [2014] EWHC 2006 (Admin) (20 June 2014) (paragraph 56) also *Tiviot Way Investments v SSCLG* [2015] EWHC 2489 (Admin) (Paragraph 30-31).

[13] *Tiviot Way Investments v SSCLG* [2015] EWHC 2489 (Admin) paragraph 27

[14] R v Rochdale Borough Council ex parte Milne [2000] EWHC 650 paragraph 49

[15] Ouseley J. said in R. (on the application of Laura Cummins.) v Camden London Borough Council [2001] EWHC (Admin) 1116 (paragraph 164), it may be necessary for an authority "in a case where policies pull in different directions to decide which is the dominant policy: whether one policy compared to another is directly as opposed to tangentially relevant, or should be seen as the one to which the greater weight is required to be given".

[16] *Gill v SSCLG* [2015] EWHC 2660 (Admin) Paragraph 22

Emerging development plans

30. Policies in emerging plans do not have the same statutory force as that accorded to policies in adopted development plans under s38(6) of the 2004 Act. They will nevertheless be material considerations.

31. Paragraph 48 of the NPPF gives advice when deciding how much weight should be given to relevant policies in emerging plans. Where it is necessary to do so, consideration should therefore be given to a) the stage of preparation of the emerging plan, b) whether there are unresolved objections and c) the degree of consistency of relevant policies with the NPPF. The importance of this was underlined in Woodcock Holdings Ltd. v Secretary of State [2015] where it was found that the Secretary of State had failed to apply these criteria (at paragraph 216 of the previous NPPF). Furthermore, that he failed to give reasons to explain how he had resolved the important planning issues raised by the parties in relation to an emerging neighbourhood plan.

32. With regards to paragraph 48 a) and b) it will be important to understand the position of the emerging local plan. Has it been submitted for examination under Regulation 19 of the Town and Country Planning (Local Planning) (England) Regulations 2012? If so, what stage has the examination reached? In particular, whether hearings have been held, whether the examining Inspector has made any interim findings, whether main modifications have been consulted on, whether representations have been made in response to them and whether the examining Inspector has submitted a report. An emerging plan may be at any of these stages before final adoption by the local planning authority.

33. If an emerging plan has not been submitted for examination and is at Regulation 18 stage then there will be a high degree of uncertainty that it will be submitted in the same form.

34. Further details about plan preparation and the role of the Inspector in the examination process are found in the chapter of the ITM on Local Plans.

35. It may also be necessary to establish the position as it specifically relates to the policies that are relevant to the appeal. For example, if the examining Inspector has advised the local planning authority about the main modifications which are needed to make the plan sound, or consultation on main modifications is taking place, it can be reasonably concluded that aspects of the plan which are not proposed to be changed, or are not the subject of main modifications, are very likely to be found sound. Moreover, one might reasonably conclude that plan preparation is at an advanced stage, that objections have been resolved and that the policies are consistent with the NPPF as per paragraph 48 c) (as this is a test of soundness).

36. On the other hand, if the Inspector has advised that main modifications are required to a relevant policy or if consultation on that main modification is on-going, or if the Inspector's report has not been issued, then there is likely to be a lot less certainty about the final form of the policy in question.

37. Overall, in deciding the weight to be given to an emerging policy, a reasonable question is "what is the likelihood of that policy being formally adopted as part of the development plan in its current form?". In making this assessment, the detail of any interim findings in relation to the wording of any relevant policy, and how critical that is

to the decision, will often be important rather than a 'broad brush' assessment of the stage that the plan as a whole has reached.

38. The judgment in Worthing Borough Council v SSLUHC & Anor [2022] EWHC 2044 (Admin) has reinforced the importance of considering emerging plan policies with regard to the stage they have reached. In that case, the Inspector examining the new local plan had issued a post-hearing advice letter. The appeal decision granting permission for major housing development in the countryside was quashed on the basis that key policies in the emerging plan were at a relatively advanced stage. These set out the overall spatial strategy and restricted development outside existing built-up areas in the countryside and coast. It was apparent from the post-hearing letter that the examining Inspector had no concerns about their drafting. The judge found that the emerging policies should have been expressly taken into account when assessing the proposal, weighing any conflict with them in the overall balance.

39. The judge in Worthing differentiated that case from West Oxfordshire District Council v Secretary of State [2018] EWHC 3065 (Admin) in the light of the facts in that particular case. In West Oxfordshire the emerging local plan had been of marginal importance at the inquiry and was not a principal important controversial issue. Furthermore, there was no issue arising under the emerging local plan, which was new and which was not covered by the existing local plan and the NPPF. By contrast, in Worthing the emerging local plan was a main issue and identified as such by the Inspector. The policies added a further dimension to consideration of the spatial strategy compared to the adopted plan. This was because they were formulated both before and after the publication of the NPPF in 2012.

40. In the Worthing judgment the emerging policies had been prepared with regard to the NPPF in terms of, amongst other things, housing land supply. They would replace policies that pre-dated the NPPF. Whilst the existing development plan policy was similar in restricting development in the countryside, the housing requirement for the Borough had increased in the interim. The emerging policies had been implicitly found sound by an examining Inspector as there was no advice in the post-hearing letter that the policies in question required main modifications. As the judge put it, these were not merely another layer of policy, which continued the effect of an existing policy, but the product of a new balancing exercise in the context of the NPPF. Those emerging policies should have been considered through a different lens to the existing policy, as the circumstances in which they came into existence were quite different.

41. In some cases the emerging policies may not significantly change the approach in the existing local plan and, therefore, they are likely to be of limited weight. Nevertheless, consideration may need to be given to whether that weight should be increased if the emerging policies perpetuate existing policies in the light of the NPPF. However, the situation will be different if the emerging policies seek to introduce a new or substantially altered policy test.

42. The extent to which emerging policies need to be dealt with in a decision will depend very much on the circumstances of the case and the degree to which they are relied on by the parties. In some cases it may not be necessary to say anything about them at all if, for example, they are just listed by the Council. In others, however, more detailed consideration may be required, especially if they are claimed to support the position of one of the parties. Sometimes, it will be possible to deal with the emerging policies in a short, preliminary section, having regard to paragraph 48 and setting out

the weight to be attached to them. At other times, where they are central to the decision, more detail will be required to explain the weight to be given to them.

43. If the emerging policies attract significant weight, then they should be conspicuously referred to and taken fully into account in any final balance. It is also advisable to refer to them by specific policy number.

44. Should it be apparent that the weight to be given to an emerging policy is crucial to the decision, but there is limited detail about its progress through the examination, then it may be necessary to seek further information and views from the parties.

45. The following checklist should be referred to if emerging policies are raised:

- Is it clear from the decision that the emerging policies are not part of the development plan?
- Are the emerging policies a principal controversial issue that need to be dealt with fully?
- What is the stage of the emerging local plan? Has the examining Inspector made any findings?
- Do the emerging policies differ significantly from adopted policies taking account of their production in relation to the NPPF?
- How much weight should be given to the emerging policies having regard to paragraph 48 of the NPPF? Have clear reasons been given for ascribing weight to them?

46. Before finalising the decision, you may need to check whether an emerging plan has now been adopted. It is important to determine the appeal against the current development plan and adoption may have occurred since the date the appeal was lodged and statements made. The information gathered, during your considerations, about its progress should give some indication of whether this is likely or not to have occurred.

Prematurity

47. It may be argued that an appeal proposal would be premature because it would undermine the plan-making process. Consider any such arguments against the advice in the Planning Practice Guidance[17] which answers the question "in what circumstances might it be justifiable to refuse planning permission on the grounds of prematurity?"[18]

[17] In Wales, see PPW section 2.6

[18] ID 21b-014-20140306 (`Determining a planning application', paragraph 014)

48. Again, in 'Woodcock Holdings Limited', the judge found that, with regard to the second ground of challenge[19], the Secretary of State failed to:

> "appreciate the limited scope of the examination of a neighbourhood plan and the implications this undoubtedly has for reliance upon prematurity in relation to that process as a reason for refusing planning permission."

49. Brandon Lewis Minister of State for Housing and Planning wrote to the Chief Executive of the Planning Inspectorate on 16 March 2016 confirming the government's commitment to neighbourhood planning. The letter requests that the issue of appeal decisions close to a referendum of a neighbourhood plan is avoided to prevent such decisions influencing the outcome of the referendum.

Supplementary Planning Documents and Guidance

50. The Glossary to the NPPF explains that Supplementary Planning Documents (SPD):

- add further detail to development plan policies but are not part of the plan
- can be used to provide further guidance on specific sites or particular issues
- are capable of being a material consideration

51. The Town and Country Planning (Local Planning) England Regulations 2012 set out what is needed in terms of public participation and adoption. They also require that policies in an SPD must not conflict with the adopted development plan.

52. Although SPDs were introduced in 2004 you may still encounter Supplementary Planning Guidance (SPG). These do not have the same statutory basis as SPD but, nevertheless, are capable of being material planning considerations.

53. Where SPD or SPG have been relied on consider:

- Do they add anything of specific relevance beyond what is set out in development plan policy? If not, it may be sufficient to conclude against any overall aims set out in the SPD/SPG.
- Have you demonstrated through your reasoning that you have had appropriate regard to any relevant SPD/SPG? Have you explained whether the proposal complies with any detailed guidance? If so, it is not necessary to set out what weight you have given to the SPD/SPG - unless this has been contested.
- SPD/SPG is often used to set out detailed 'requirements' (for example, relating to intervening distances between buildings or minimum room sizes). If a proposal fails to comply with this detailed guidance, have you explained whether or not this would result in any significant harm? The fact that a proposal falls short of what

[19] That the Secretary of State failed to take into account and apply his own policy on prematurity contained in the Planning Practice Guidance (see paragraphs 129-137 of the judgment in particular)

is sought may be an indication of harm. However, this is not necessarily an inevitable conclusion. You still need to apply your own judgement.

- Has the status of the document as SPD been questioned? In *R(OAO Wakil (t/a Orya Textiles) v Hammersmith and Fulham LBC* [2012] the adoption of a document which purported to be an 'SPD' was quashed because it had been wrongly characterised as an SPD rather than as a DPD. Accordingly, the relevant procedural and SA/EIA requirements had not been met. The judgment in R. (on the application of *RWE Npower Renewables Ltd) v Milton Keynes BC* [2013] EWHC 751) concerned a Wind Turbines SPD. The court concluded that a policy in the SPD was in conflict with the adopted development plan and so was contrary to Regulation 8(3) of the Town and Country Planning (Local Planning) (England) Regulations 2012.

- Does the SPD/SPG provide guidance on financial contributions? If so, you still need to consider whether any such contributions would comply with paragraph 57 of the NPPF and Regulation 122 of the Community Infrastructure Regulations 2010 where applicable. Look carefully at the SPD/SPG – does it provide up to date evidence which helps you assess compliance? See 'Planning Obligations' for more advice.

The Planning Inspectorate

Site Visits

Updated to reflect December 2023 Framework (NPPF)
What's new since the last version: Changes made 04 July 2023: • Clarification throughout of ASV-ARSV-USV and when to use with whom. • Various corrections to footnotes, paragraph numbering and Wales references removed
Other recent updates made 11 June 2021: • This version of the Site Visits chapter has been revised to take account of the powers open under s79(6A) to dismiss an appeal for undue delay.

Contents

Introduction

1. This advice relates to appeals carried out by the Written Representations procedure. Separate advice is provided in 'Hearings' and in 'Inquiries' – although most of the principles set out here apply.

2. Section 20 of the Business and Planning Act 2020 inserted s319A into the TCPA1990 to allow for determination to be considered by one or more types of procedure as appropriate, i.e. at a local inquiry, and/or at a hearing and/or on the basis of written representations – these are known as **Hybrid Events**

3. You should be aware of what the Procedural Guide – Planning appeals – England[1] and the Guide to taking part in planning, listed building and conservation area consent appeals proceeding by written representations say about site visits. The parties may read these and will have a legitimate expectation that you will follow what is said.

4. The *Procedural Guide(s)* explains that the purpose of the site visit in written representations casework is to enable the site and its surroundings to be viewed.

5. There are 3 types of site visit:

   - **Accompanied (ASV)** – where it is **only** possible for you to see everything you need to by going on to the appeal site and you need to be accompanied by representatives from the LPA and the appellant (the main parties). Third parties, which can include statutory consultees, local residents, interest groups and other persons, may also attend with the agreement of the appellant/landowner. This procedure also allows you to visit neighbouring land with the agreement of the landowner or occupier.

   - **Access Required (ARSV)** – where you carry out the site visit unaccompanied but with the permission of the appellant. The appellant's or agent's presence is required solely to provide access. This is the most common type of site visit in written cases.

   - **Unaccompanied (USV)** – where you can see everything you need to from a public area such as a road and so have no need to go on the appeal site or any other private land. Consequently, the appellant, LPA and third parties do not attend.

6. The ARSV procedure is the one mostly commonly used in Written Appeals, including Householder and Commercial appeals. See the separate advice covering this type

[1] The Procedural Guide – Planning appeals – England applies to planning appeals, householder development appeals, minor commercial appeals, listed building appeals, advertisement appeals and discontinuance notice appeals. It also applies to appeals against non-determination. The Procedural Guide –Called-in planning applications – England applies to all applications which are 'called-in'. Also see Procedural Guide - Enforcement appeals – England and Procedural Guide - Certificate of lawful use or development appeals – England. See the Planning Inspectorate's homepage on GOV.UK for more information.

of procedure in the ITM Chapter Householder, advertisement and minor commercial appeals.

7. It is for the parties to decide who should represent them, where required, and you should not expect a particular LPA officer or the appellant's agent to attend.

8. For most people the site visit will be the first, and possibly last, time they encounter an Inspector. Therefore, the way you conduct the site visit is extremely important.

9. Your site visit must be carried out in accordance with the Franks' Principles (openness, fairness and impartiality) and the Conflicts of Interest policy. The advice in this guide will help you do this and further information about the Code and the Franks' Principles can be found in the ITM Chapter 'Role of the Inspector'.

10. Your attire at all site visits should be smart and formal, regardless of whether you are expecting to meet someone or not. You should always take your PINS ID card and have a supply of "Calling cards". Make sure your car does not have any badges or stickers which might cause people to doubt your impartiality. For the same reason you should not wear ties or badges that identify an organisation or society.

Before the site visit

11. Your forthcoming programmes of written representation cases will be available to view in your worklist on Horizon and/or Mi-PINS. You should email the Case Officer as soon as possible with the dates and times when you intend to carry out ASV's and the 2-hour time slots for any ARSV's. It is also helpful to note the dates on which you intend to carry out USVs.

12. When timing site visit programmes:

- Make sure you leave enough time to conduct the site visit without being rushed and to travel safely to the next site visit. As a rough guide, a straightforward site visit relating to a smaller case (for example, a house extension) might usually take around 15-20 minutes.

- Check for any information provided by the Case Officer which indicates that you might need to allow more time for any site visits (for example if there are a large number of third party requests to view from neighbouring properties or the site is very large)[2].

- Tools such as Google Maps and Bing Maps can help you work out how long it will take to travel between sites. However, allow enough time to cope with potential traffic delays, your unfamiliarity with an area and finding somewhere to park.

- Allow for short winter days and longer journeys in rush hours and school traffic.

[2] Third party names and addresses will be added to the Horizon record for each appeal. These are displayed under the LPA, Agent and Appellant details.

- Try to work out where you will park if the site is in a city/town centre or any area where parking is likely to be restricted. Public transport can be the best solution in such areas.

- Check to make sure that the offered programme of visits is practical.

- Think carefully about how many site visits you can reasonably do in one day. If you have a programme of 8 or 9 visits, do you need to consider an overnight stay?

13. The parties may ask you to view the site at a particular time or day of the week but it is for you to decide if this is necessary. Is the case one where you could reasonably use your experience and judgement to assess the effects of a proposal even if you do not visit at the suggested time? If so, you must provide the Case Officer with a written explanation as to the reasons why. However, if the request can be easily accommodated into your programme, then it is good practice to do so.

14. If your visits are a long way from home, you will be given a full or half travel day. Arrange your site visits so you do not have to work an excessively long day. If necessary, book an overnight stay in a hotel and travel down the day before or split your site visits over two days.

15. When you first receive the case assignment – check the following and take up any problems with the Case Officer straightaway:

    - Is the time and date of the site visit what you arranged?

    - Do you have any potential conflicts of interest? (see ''Conflicts of Interest')

    - Is the case suitable for the Written Representations procedure? (see 'Role of the Inspector')

    - Have all third parties who wished to participate in the site visit been notified? If not, can this be rectified? – refer to the Notes section of Horizon[3].

    - Is there enough information to allow you to find the site (especially in rural areas)? – Google Maps and Bing Maps can be helpful.

    - Will it be obvious where you will meet the parties (for example if the site is large and has several entrances)?

    - Is it necessary to visit the site at a particular time of day? Has this been requested by any of the parties?

    - If the site has been arranged as USV is it likely that you will be able to see everything you need to? If not, can the visit be re-arranged as an ASV or ARSV but within the same programme?

[3] Third party notifications that are passed to the Case Officer after the site visit arrangements have been made will be forwarded separately to the Inspector.

16. Contact the Case Officer immediately if you are unable to carry out a site visit because of a conflict of interest, illness or you feel a change in procedure is required. Email the Case Officer explaining the circumstances.

17. The site visit is your opportunity to see the site and its surroundings and to assess the significance of what has been set out in the written representations.

18. Before you carry out the site visit – have you:

- Made sure you understand the proposal and the main issues and have identified the relevant plans?
- Made a list of everything you want to see on the site visit, including in the surrounding area – and anything you want to check with the parties (for example, in relation to physical features)?
- Made a note of any third parties who might be attending?
- Identified any missing documents (policies, conservation area plans, third party representations etc.) and asked the Case Officer to secure them?
- Got your clipboard, case files (or relevant extracts from them, including the plans), a contact number for the Case Officer, ID card, sat nav and maps?

Accompanied site visits

19. The Procedural Guide – Planning appeals – England states that:

> "In some circumstances we may deem it necessary for the Inspector or his/her representative to be accompanied by both the appellant (or agent) and a representative of the local planning authority and, where appropriate, interested people."

20. A site visit is not an opportunity for anyone present to discuss the merits of the appeal or the written evidence they may have previously provided. The Inspector or his/her representative should not, therefore, allow any discussion about the case with anyone at a site visit. The exception would be if it is an ASV where the Inspector or his/her representative may ask the invited parties to point out physical features that they have referred to in their written evidence.

21. You should always aim to arrive on time. However, if you are delayed:

- Are you able to contact the Case Officer so they can attempt to let the parties know your estimated arrival time?
- Will you still have time to see what you need at the site visit and to get to any subsequent sites safely and on time? If not, could you visit the site later in the day if the parties are willing to do so? Alternatively, do you need to cancel the site visit? When it is safe to do so, contact the Case Officer who will attempt to contact the parties.

22. If you arrive early:

- Wherever possible avoid waiting outside the site. If you have travelled by car, park around a corner or further down the street - unless parking on the appeal site is unavoidable – but, if so, seek the appellant's permission.

- Take the opportunity to look at the wider area and to visit any sites and developments which have been referred to by the parties.

23. When arriving for the site visit:

- Arrive exactly at the arranged time or just 1 or 2 minutes early.

- Try to arrive on your own. Inspectors and LPA officers seen arriving together has been identified by appellants as a perceived indication of unfairness and lack of impartiality.

- If the LPA representative is waiting alone outside the site, consider asking them to go on ahead to check if the appellant is on site.

24. At the start of the site visit:

- Introduce yourself.

- Check who is present – attempt to locate any missing parties you are expecting. It is good practice to make a note of the names of those present and who they are representing.

- If hands are shaken – make sure you shake hands with everyone (so you are seen to be fair and impartial).

- Explain that the purpose is for you to see the site and surroundings and that you cannot listen to any representations/discussion/arguments - but that the parties can point out physical features. If necessary, remind the parties of this during the site visit.

- Explain how you will deal with any requests from third parties to attend the site visit or view from their property (see below for more advice on this)

- Explain the order of your site visit (for example, when you will view from neighbouring properties, if you intend to carry out any part of the visit unaccompanied or if you have already visited other sites or locations unaccompanied).

- If you have already met the LPA representative or the appellant's agent at a previous site visit that day – make this clear to the other parties and explain that you have no other connection with that person.

25. During your preliminaries you should also:

- Confirm with the main parties that you have the plans on which the LPA made its decision and clarify the status of any other plans that you may have (for example, were any plans superseded before the LPA made its decision or submitted with the appeal). Look carefully at revised plan numbers, particularly if there have been a number of amendments.

- If there is a disagreement about the plans (such as which were before the LPA) ask the parties to resolve the matter between themselves. Do not take part in any discussions and physically distance yourself from the parties while any discussions are going on. If the parties cannot resolve the dispute, write to them via the Case Officer.

26. During the site visit:

- Be polite – but make sure you are also firm and authoritative.
- Never allow yourself to be left alone with any of the parties
- The parties do not need to follow you around. It can often be best to ask them to wait at a particular point while you see what you need to.
- Turn down all offers of hospitality.
- Politely avoid getting drawn into any conversations about the case or other matters - remarks that may seem harmless could be misrepresented (for example, avoid commenting on how lovely the site is or the view).
- You can ask the parties to confirm particular features which have been referred to in written statements (for example a particular property or tree or the location of a Conservation Area or Green Belt boundary) – but frame any questions neutrally.
- If it is necessary to check any measurements – ask the parties to do this and to agree the figure.
- Make sure you take into account any mobility difficulties of those attending.
- If the weather is poor, check that the parties are content that you continue. In extreme circumstances you may need to delay or abort the visit.

27. At the end of the site visit:

- Do not leave the site until you have seen everything you need to allow you to write a robust and well-reasoned decision.
- It can be helpful to ask the parties if they are content that you have seen everything and if there is anything else they wish to point out.
- Thank everyone and make sure you are the first to leave. Do not leave the site with anyone else.

Transport

28. Wherever possible, it is best to use your own transport to travel to any other sites that you have been requested to view. However, sometimes it may be more practical to accept a lift - for example if there are a number of sites and there are good reasons why the parties should accompany you.

29. There may also be occasions where the appellant will need to arrange transport - for example, where the site is very large or if it is a long distance away from any roads

and specialist 4x4 transport may be required. Where possible, it is best to arrange this in advance.

30. If you accept a lift, you should ensure that you are accompanied by someone representing the LPA and the appellant.

Representations and late evidence

31. You should firmly resist accepting any evidence or revised plans which you may be offered at the site visit. This is to avoid any accusations of unfairness. On the site visit, depending on the circumstances, you might advise that:

    - evidence should be submitted on time unless there are any exceptional circumstances
    - you cannot accept any evidence on site
    - if someone wishes to submit additional evidence they should be told to contact the Case Officer in writing, as soon as possible, to explain why late evidence is being submitted (however, you should not give any indication that it will be accepted)

32. There may be cases where you have identified beforehand that a plan or a document is missing (for example a full extract from the development plan or SPD). If so, in order to save time, you can request that the relevant party provides you and the other main party with the missing copy at the site visit. However, any such requests must be made via the Case Officer and documented in writing. You would also need to carefully explain this procedure to any third parties attending the site visit.

33. You can find further information in 'The approach to decision-making'.

Viewing the appeal site from a neighbouring property

34. Neighbours or interested parties will sometimes request that you view the appeal site from nearby land or buildings. Case Officers will aim to flag any such requests and then write to confirm when your site visit will take place. Check that none have been missed.

The Procedural Guide – Planning appeals – England states that:

"arrangements will be made with individual neighbours where it is considered to be necessary to view the site from their property."

35. The Guide to taking part in planning, listed buildings and conservation area consent appeals proceeding by written representations - England states that:

"At the appeal site visit, the Inspector or his/her representative will decide if it is necessary to view the site from your property" [such as a neighbouring property to the appeal site]. If so, he/she will visit your property and you will be required solely to provide access. Where both the appellant and an LPA representative (and, where appropriate, any interested person) were present at the appeal site visit they will accompany the Inspector or his/her representative during the visit to your property."

36. If you are satisfied that you can properly judge the effect of the proposal on neighbours from within the appeal site it is not essential that you visit neighbouring

sites (see *Hallinan v SSE and Barnet LBC* [1993] JPL 584). Unless there are compelling reasons not to, it is good practice to look at the site from nearby land or buildings if neighbours or third parties have specifically requested that you do so. If you have been asked to view from a large number of neighbouring properties, you may be able to agree to visit a representative sample. This should be arranged in writing, via the Case Officer, before the site visit date.

37. At the start of your site visit:

- Make sure third parties who have requested that you view from their property are present. If they are not present, go and ring their doorbell[4]/knock at their door.

- Note any requests to view and explain that you must be accompanied by a representative from the LPA and the appellant (to ensure fairness). Check that this is acceptable to the neighbour.

- If the neighbour refuses to allow the appellant or their agent onto their land – would they allow you to go on their land unaccompanied? Would the other parties be agreeable to this? Would the parties be able to have a clear view of you from the appeal site or the road?

- Explain when you will visit neighbouring properties although this should be after you have inspected the appeal site. You can then suggest that the neighbour returns to their property while you visit the appeal site itself.

38. You should not enter neighbouring land if the site owner/occupier or their representative is not present unless you have received advanced written authority to do so. Consequently, if they are absent you will need to consider:

- Can you see everything you need to from the appeal site (if necessary, go back onto the site to double check)? If you cannot see what you need to, the site visit will have to be re-arranged (through your Case Officer). Explain this to the main parties. In practice, this is likely to be a rare occurrence.

39. A 'calling card' is available for Inspectors to use where they have been asked to view the site from a property but the owner/occupier did not answer. The card is not meant to be used as a replacement for calling and clearly, if everyone who needs to attend the site visit is present, the Inspector will advise those present as to what s/he will do and where observations will take place from. Neither will the calling card replace any of the processes that are normally undertaken after an Inspector informs the office that s/he was unable to complete the site visit. A link to the card is here for salaried Inspectors.

[4] It is possible that an individual may rely upon a doorbell as an adaptive measure due to a sensory impairment – for example for a deaf person the doorbell may make lights flash, or a device vibrate.

Third parties who request to attend the site visit

40. The Guide for those taking part in appeals states that although the appellant and LPA may sometimes both need to be present, there is normally no need for other people to attend the site visit.

41. Nevertheless, it is not unusual for neighbours and other interested parties to ask to attend. Any such requests should be flagged on the file.

42. At the site visit explain that third parties can only go on the appeal site if the appellant agrees. This is because the site will usually be private property with no general right of access. In some cases there may also be health and safety or insurance reasons why it would not be appropriate for third parties to go on to the site. If the appellant denies access, you may need to explain to the third party that you have no power to compel access. You can also reiterate that the purpose of your site visit is to see the site and surroundings, that you cannot listen to any representations and that you will be accompanied by the LPA as well as the appellant. However, you can ask if the third parties would like to draw your attention to any physical features which they would like you to see while carrying out the visit.

Requests to view other sites in the area

43. Sometimes you will be asked to view other sites in the area, for example where it is argued that similar developments have been carried out. The extent to which you comply with such requests is for you to decide. However, it is good practice to visit sites that are reasonably close to the appeal site, if locational details have been provided which allow you to find them without undue searching.

44. When visiting other sites:

- See the advice in 'The approach to decision-making' (Part 1) on 'Natural justice – fairness' about what to do if the other site has not previously been referred to in evidence.
- Seek the agreement of the parties that you can visit these sites unaccompanied (or confirm that they are content that you carried out an unaccompanied visit before you visited the appeal site).
- Remember that you must view these sites from a public place.
- 'The approach to decision-making' (Part 1) also provides further advice about dealing with other developments and decisions as material considerations in your reasoning.

Failure of a party to attend

45. If one of the main parties fails to attend an accompanied site visit:

- Wait for about 5 minutes to see if they arrive.
- If they don't arrive, try to contact them to find out if they are on the way (via the Case Officer) or you can ask the main party who is present to try to contact them direct).

- Explain how long you can wait. You need to leave enough time to be able to arrive at your next site visit on time having travelled safely.

- Wait separately from any parties who are present. Make any necessary conversations as brief as possible and do not get drawn into any discussions.

46. If the missing party cannot be contacted or cannot attend or would not be able to arrive in time – consider the following options:

- **Could you carry out the visit unaccompanied** – i.e can you see everything you need to from public land? If so, explain this to those present and ask them to leave so you can carry out an unaccompanied visit

- **If the appellant is present** - you can go on to the appeal site provided they give their permission. However, you will need to carry out the visit without their presence with you so will need to ask the appellant to wait inside or leave the site. This will convert the visit to become an ARSV. You will also need to ask any third parties to leave

- **If the appellant is not present** - and you need to go onto the appeal site it is likely that you will need to abandon the site visit.[5] If so, inform the Case Officer with an email explaining the circumstances. However, in some cases, the appellant may give oral consent for you to go on the site over the phone (via the Case Officer or the LPA officer) – so allowing you to go onto the site unaccompanied. However, you should only exercise this option if you are certain that permission has been given and that it would be safe to go on the site unaccompanied. You will then need to ask the LPA and any other parties to leave.

- **Where the site visit is abandoned and requests have been made to view the appeal site from a neighbouring property** - you should explain to the third party (visiting any third parties if they are not present) that the site visit has been abandoned, and why, and that they will be advised of the new arrangements.

- **Post-event actions** - If you carry out the visit unaccompanied (ASV/ARSV to USV) or because there was a change in procedure from ASV to ARSV you must inform the Case Officer so they can make a note on the Horizon file.

47. If none of the parties attend:

- Check the file – are you in the right place at the right time? If you have the correct time/date, can the visit be carried out as a USV? If so, the Case Officer will need to write to the parties and explain what has happened; they should be given the opportunity to agree with that course of action, retrospectively, or they can request a further visit.

[5] See *R. (on the application of Tait) v SSCLG* [2012] EWHC 643 (Admin) - After considering the letter sent to the Claimant, PINS guidance and existing case law, the judge found that it was "clear practice" that when an accompanied site visit is undertaken there must be representatives from both parties and that the Claimant had a legitimate expectation that the Inspector would not undertake an accompanied site visit in her absence.

- Is there another entrance to the site where the parties might be waiting?

- Contact the Case Officer. Have there been any changes of which you are unaware? Are the parties on the way?

Appeal dismissed for undue delay

48. Section 79(6A) of the Town and Country Planning Act 1990 gives the Secretary of State the authority, after issuing a warning notice, to dismiss an appeal if the appellant is responsible for undue delay in its progress. It is intended that this power should only be used where an appellant/agent refuses to co-operate with us in processing the appeal or obstructs that process.

49. "Undue delay" is most likely to occur due to the appellant or their representative's failure to attend the arranged site visits without providing a satisfactory reason.

50. If at least 2 previous site visits have been abandoned (whether they were due to be conducted by you or a previous Inspector) due to the behaviour of the Appellant or their Agent, you should consider the reasons put forward for the delay. If you believe, on balance, that the delay is being caused unduly, wilfully or deliberately, you should contact your Case Office to enact the s79(6A) process.

51. The Case Officer, via the PCO Desk Instructions, has access to the suite of letters needed to complete the process before the appeal can be finally dismissed.

52. Further details are contained in Annex F to Inquiries chapter of the ITM (ITM Inquiries Chapter)

Unaccompanied site visits (USV)

53. The parties to the appeal will not attend and you will not normally be able to enter the appeal site because you will not have the appellant's agreement to do so. You would normally only view the appeal site and its surroundings from the road, a public right of way or some other public vantage point and would not normally go onto neighbouring sites. If you decide that you need to access a neighbouring site in order to reach a sound decision, you will need to abandon the site visit.

54. If you are unable to see everything you need to in order to reach a sound decision you will need to abandon the site visit. You should inform the Case Officer straightaway and if it is possible for you to keep the case you should do so, otherwise the case will be re-allocated to another Inspector.

55. If you are approached by the appellant or neighbours during the USV, briefly and politely explain the purpose of the visit, note that you cannot listen to any comments or representations and that it is necessary for you carry out the visit unaccompanied. Do not get drawn into conversation. If they wish to make their views known, explain that they should write to the Case Officer at PINS.

Taking photographs

56. It is up to you to decide whether you want to take photos to help you remember the site. However, make sure that taking photos does not distract you from looking carefully at what you need to see when you are on site. It should not be a substitute for your own observations and on-site assessment.

57. If you intend to take photos you should ask the parties first and make sure they have no objections. Tell the parties that it is only to help you picture the site as an aide-mémoire. If you do take any photos, they should be kept with your own notes as they could be the subject of a Freedom of Information request.

Health and safety when carrying out site visits

58. The PINS Policy statement on health and safety is as follows:

    'The Planning Inspectorate is committed to the protection of the health safety and welfare of all our employees, our customers, the public and all persons working under the control of the organisation. Securing this commitment is an important management objective that contributes to business performance.'

59. For salaried Inspectors information and advice is provided on the Intranet about 'health and wellbeing'. In particular, see the 'Health and Safety Training Guides'. This provides links to training modules and risk assessments relating to the conduct of site visits, driving safely for work and working remotely in safety.

60. The Inspector guidance explains that you should carry out a 'dynamic risk assessment' when undertaking site visits. This is because you have a responsibility to take reasonable care for your own health, safety and welfare as well as those around you who may be affected by your acts or omissions.

61. For PADS: their companies or, in the case of PADS who are sole traders – the PADS, themselves, have responsibility for managing their own health and safety. In deciding what measures are necessary PADS may wish to consider the guidance for salaried inspectors set out in the paragraphs that follow. Further information for PADS is provided in the *General Terms and Conditions* and in the *PADS Notes*.

62. Some key points to consider are set out below. When travelling to and from site visits:

    - Don't increase the risks from the normal hazards of driving by working or driving for excessive periods of time. A working period of 10 hours in a day is a reasonable maximum for Inspectors travelling to and from site visits by car. If you cannot carry out your site visits in one 10 hour day then book an overnight stay in a hotel and travel down the day before or split your site visits over two days.

    - Don't rush to get to site visits if you are late. Contact the Case Officer to let them know how late you may be so they can inform the parties. You should always drive safely.

    - Always consider postponing a journey when the weather is bad. If so, contact the Case Officer so that they can inform the parties.

    - If you feel it would be unsafe to use public transport or walk (perhaps because of an inner city or remote location or due to the time of day), it is reasonable to use a taxi and to ask the driver to wait until you have completed the visit. Remember to get a receipt.

    - If you use a hire car, take time to familiarise yourself with the controls and to adjust the driving position.

63. When carrying out the site visit:

- Be aware of any advance warning of potential risks which have been placed on Horizon for the appeal. Might you need any protective clothing/equipment (PPE)?

- If you visit a construction site, factory/warehouse, quarry, waste operations site, nursing home, hospital or similar, always report to the site office/reception and follow any health and safety instructions, including in respect of PPE.

- Consider any risks and how you might deal with them. For example, are there any hazardous buildings/structures? Is there any moving machinery or vehicles? Will you be checking visibility splays at a junction or working on a busy highway or one without pavements? Is there a possibility of animal attack? What are the ground conditions? Are there any issues relating to bio-security (for example, when visiting farms)[6]?

- Is any protective clothing necessary? Do you need a hard hat, high visibility jacket or safety shoes/boots. Salaried Inspectors can order these from PINS here.

- If you feel uncomfortable about the situation that you are entering into, do not carry on with the visit or that part of it. This might involve circumstances where you are being asked to climb scaffolding, stepladders or go onto unprotected roofs. Only carry out a site visit if you think it is safe to do so.

- Take shelter if the weather is bad.

64. When conducting site visits you will be working alone:

- Salaried Inspectors are provided with a lone worker protection system via a mobile handset. Guidance on its use can be found on the 'Health and Safety Training Guides' section on the Intranet.

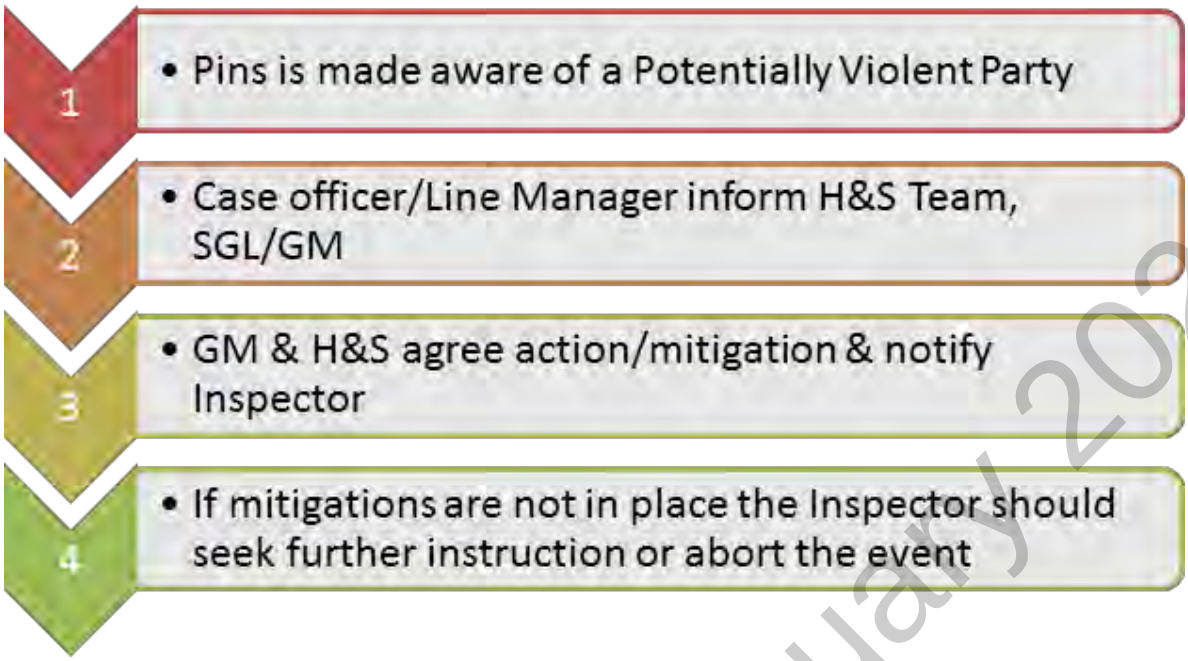
- It is good practice to tell someone at home where you are going and what time you expect to be back. If this is not possible consider asking someone else in PINS to fulfil this role. In addition, make sure you have phone numbers for your Case Officer/Team and your line manager.

65. All Inspectors, whether salaried or non-salaried, should always report accidents, dangerous occurrences or near misses to PINS. This can allow lessons to be learnt and may help prevent such problems arising in future. To report an accident or potential incident, salaried Inspectors should fill in the online form and inform your IM or SIT. PADS should inform CMU.

Potentially violent parties procedure

66. The Inspectorate's procedure on handling potentially violent parties is summarised in the diagram below:

[6] See the DEFRA publication on 'Biosecurity Guidance to Prevent the Spread of Animal Diseases'



67. The full procedure on handling potentially violent parties is provided in a flow chart, available via this hyperlink.

The Planning Inspectorate

Hearings

Updated to reflect December 2023 Framework (NPPF)

What's new since the last version

Changes highlighted in yellow made 12 December 2022:

- References to Attendance Lists removed

Contents

Introduction

1. Inspectors make their decisions on the basis of the evidence before them. Consequently, they may, where justified by the evidence, depart from the advice given in this guide.

2. This advice relates mainly to the conduct of hearings in planning, advertisement and listed building consent appeals, although the principles set out may have wider relevance.

3. Further advice on the conduct of enforcement (s174) and lawful development certificate (s195) hearings can be found in the 'Enforcement' chapter of the ITM.

4. Advice about hearings relating to applications made direct to the Planning Inspectorate in respect of underperforming authorities in England can be found in PINS Note 44/2013r1 and in 'Planning Applications Process: Section 62A Authorities in Special Measures'. Please note that there are differences in format and procedure when compared to s78 appeals.

Background

5. Hearings were introduced in 1982 as an alternative to public inquiries. They were originally known as 'informal hearings' and are sometimes still referred to in this way.

6. Hearings are *inquisitorial*. They can be thought of as a structured discussion which is led by the Inspector. The inquisitorial burden falls on the Inspector.[1]

7. In contrast, inquiries are *adversarial*. The parties present their cases to the Inspector and witnesses are subject to cross-examination. The inquisitorial burden mainly falls on the opposing party rather than the Inspector.

8. Despite the differences, hearings are, nevertheless, a formal and structured procedure.

Legislation and procedural guidance

9. The statutory rules governing hearings are contained in the Town and Country Planning (Hearings Procedure) (England) Rules 2000 (SI 2000/1626) (which have been amended on a number of occasions subsequently).

10. Procedural guidance can be found in 'Planning Appeals: Procedural Guide – England' and 'Guide to taking part in planning and listed building appeals proceeding by a hearing'.

Virtual / Blended / Hybrid Events

11. The Covid-19 pandemic and the associated need to avoid public gatherings and events necessitated the introduction of a range of types of events, with virtual and in-person as well as one or more types of procedure being used to determine a case. Whilst face-to-face or in-person events are now the usual business model again, the range of options allows the Inspector to ensure they are presented with all the necessary evidence in the best manner possible.

[1] See Dyason v SSE & Chiltern [1998].

Virtual Events – Section 78 of the Coronavirus Act 2020 provided the powers for regulations to hold 'remote' events where there are no physical attendees. Participants attend virtually via video conferencing or telephone.

Blended Events – where there may be a combination of physical attendees (in one or more locations) as well as a virtual element (where participants attend virtually via video conferencing or telephone)

Hybrid Events – Section 20 of the Business and Planning Act 2020 inserted s319A into the TCPA1990 to allow for determination to be considered by one or more types of procedure as appropriate, i.e. at a local inquiry, and/or at a hearing and/or on the basis of written representations Where a hybrid procedure is used to determine an appeal, use of the former 'bespoke' timetable may be used, which needs to be fair to all parties – see Procedure Guidance 6.3.

The Hearing process.

12. The hearing process is set out in the Rules and in the Planning Appeals: Procedural Guide – England. In summary, it is as follows:

Process	Timescale	Rule
Appellant's full statement of case, appeal form, all supporting documents and the draft statement of common ground	Provided with the appeal	Article 37(1) and (3) of SI 2015/595[2] Rule 6(1)
PINS gives notice that a hearing is to be held. The date of the notice is the 'starting date'	As soon as is practicable	Rule 3A
LPA send letter to interested parties[3] telling them any representations must be sent within 5 weeks of the start date	Within 1 week from the 'start date'	Rule 4(2)(b) and Rule 6(3)
LPA sends questionnaire and supporting documents to PINS and appellant	Within 1 week from the start date	Rule 4(2)(a)
Appellant sends full statement of case to each statutory party	As soon as practicable after the LPA have provided details of statutory parties as required by Rule 4(1)	Rule 6(1)
LPA sends full statement of case to PINS and statutory parties	Within 5 weeks of the start date	Rule 6(1A)
Appellant and LPA ensure agreed Statement of Common Ground is sent	Within 5 weeks of the start date	Rule 6A(1)(b)
Interested parties send any representations	Within 5 weeks of the start date	Rule 6(3)
LPA provides details about hearing arrangements and tells interested people	At least 2 weeks before the hearing	Rule 7(5)(b)
Appellant sends a copy of any draft planning obligation	At least 10 working days before the hearing	N.2.4 of *Procedural Guide - Planning Appeals – England*

[2] The Town and Country Planning (Development Management Procedure) (England) Order 2015.
[3] Any statutory parties and any other person who made representations about the application occasioning the appeal. The term 'statutory party' is defined in Rule 2(1)

Hearing takes place	Normally within 10 weeks of the start date, or the earliest date after which is practicable	Rule 7(1) states 'not later than 10 weeks after the start date, unless he [Secretary of State] considers such a date impracticable'
Inspector makes decision	The overall PINS targets are: 80% within 14 weeks 100% within 26 weeks	

Objectives

13. In accordance with the Planning Inspectorate's Conflict of Interest and the Franks Principles (See 'Role of the Inspector') you have three main objectives when holding a hearing:

    - To ensure that the evidence is thoroughly examined and tested to enable you to reach a reasoned decision or recommendation.
    - To ensure all parties and interested persons have a reasonable opportunity to participate and to have a fair hearing.
    - To manage the hearing in an effective and pro-active manner, making efficient use of time.

Changing the procedure for determining an appeal

14. The 2023 LURA amended Schedule 6 of the 1990 Act which initially only allowed the administrative branch of PINS to determine the procedure by which appeals are decided. s.131 now enables an appointed inspector, rather than a case officer, to change the procedure for determining an appeal under s.319A of the Act. The criteria for determining appeals are set out in Criteria for determining the procedure for planning, enforcement, advertisement and discontinuance notice appeals. It is important that appeals are dealt with by the most appropriate procedure in order that the evidence can be properly understood and, where necessary, tested. Under s319A, introduced by the Business and Planning Act 2020, the options to conduct events by one or more procedures can be followed – See Explanatory Notes paragraphs 164-167.

15. The Schedule 6 amendment allows an inspector to review the procedure directly and, where appropriate, to change it. Ideally, this should take place before the hearing opens. Inspectors have the power under Town and Country Planning (Hearing Procedure) (England) Rules 2000 to close hearing proceedings and arrange for an inquiry to be held instead if, after consultation with appellant and local planning authority, it appears to the Inspector that the hearings procedure is inappropriate.

16. Rule 11(3) states that if you decide that cross-examination is necessary, you should consider, after consulting the appellant and LPA, whether the hearing should be closed, then an inquiry held instead.

Who is entitled to appear at a hearing?

17. The appellant and any statutory party are entitled to appear at the hearing - Rule 9(1).

18. However, Rule 9(2) states that there is nothing in Rule 9(1) that shall prevent you from permitting any other person to appear and such permission shall not be unreasonably withheld. The starting point, therefore, is that you should be prepared to hear from anyone who attends. In doing so you should encourage collaboration between parties and the avoidance of repetition.

19. A person who is entitled to appear may do so on his own behalf or may be represented by another person - Rule 9(3).

Statement of common ground

20. Rule 6A requires the LPA and appellant to prepare an agreed Statement of Common Ground within 5 weeks of the start date.

21. Advice on the content, form and purpose of the statement is provided in Section 13 of the Planning Appeals: Procedural Guide – England. The aim is to ensure that the hearing focuses on the material differences between the LPA and appellant.

Preparation before the hearing

22. When the hearing is entered into an inspector's programme you should:

- Check that you should not be precluded from the case (See PINS 'Conflict of Interest Policy' and the advice in the Inspector Training Manual chapter on the Role of the Inspector)

- Check that the case grading and any specialism are within your competence. You should inform the Case Officer within 2 weeks of being notified that you have been scheduled to determine the case if it is **not** an appropriate case for you to determine, giving reasons why.

- Check that you are happy with the start time (usually 10am – although you can suggest a later start time – say 11am – if this would allow you to avoid the cost of an overnight stay).

- Sort out your travel arrangements and if necessary, book a hotel for the night before. The Case Officer will ensure that you are informed of the hearing arrangements within 2 working days of these being confirmed by the LPA and will update you promptly of any changes. If it is not clear from the file you can ask the case officer to check if the LPA will provide you with a parking space.

23. Depending on your individual preference, you may not need a paper file with all the documentation in and will be content to work predominantly electronically. If this is the case, consider what, if any documents, you may need in paper and let the Case Officer know so that only those documents are printed out. Remember that the screen size is limited, and if you are typing your notes that you may not be able to see what is being referred to at the same time, so you may need a paper set of, for example, certain plans or documents.

24. Any notes you make need to be retained after the decision has been issued in line with the timescales set out in 'the approach to decision making'.

25. At an early stage after your appointment, you should:

- Check that you have the letters of notification of the hearing – see paragraphs 73 to 77 below for more information on what to do if there are potential problems with the notification.

26. Nearer the day of the hearing carry out your detailed preparation:

- Read the documents systematically;
- Are there likely to be any procedural problems (such as complaints about the venue) – is it possible to resolve these in advance?
- Do you understand the proposal and know which are the relevant plans?
- Are any documents missing (appeal notification letters, development plan policies, SPD, Statement of Common Ground, conditions etc)? If so, request them via the case officer (see below regarding any Pre-hearing note). At this stage they may need to be e-mailed or brought to the hearing (or both).
- Has reference been made to a planning obligation? If it is missing then chase it up through the case officer.
- Who is likely to attend? Are any interested parties likely to want to speak?
- Are there any procedural matters on which you might need to seek clarification (the nature of the proposed development, amended proposals, revised plans, which matters are reserved etc)?
- Identify the main issues. This will help you structure the hearing. Start by looking at the reasons for refusal, the main parties' Statements of Case and the Statement of Common Ground. See 'The approach to decision-making' for further advice.
- Have any other matters been raised by interested parties? How will you deal with them? See 'The approach to decision-making' for further advice.
- Establish relevant development plan and national policy. Do you need to consider whether the former is consistent with the latter or whether policies are out-of-date? See 'The approach to decision-making' for further advice.
- Prepare an 'agenda' comprising a list of items that you want to cover at the hearing. It is up to you how detailed it is. This will depend on the nature of the case and what will be helpful to the parties and to you. See Annex 1 for examples. If you have time it is helpful to ask the case officer to send the agenda to the main parties before the day of the hearing.
- Prepare a list of questions you want to ask during the hearing in relation to procedural matters, main issues, other matters, conditions (and planning obligations, if relevant). These should be devised to help you gain a better understanding of the case and to test the evidence. Questions should be focused on the main issues and any relevant other matters. Do not raise unnecessary side issues.
- Prepare your opening and closing remarks (see Annex 2 for some examples)
- Prepare a list of features you want to see on the site visit (and add to it during the hearing, as necessary)

- Check the weather forecast and travel news before you set off in case there might be problems

27. When leaving home for the hearing make sure you have everything you need. See the checklist in Annex 3.

28. If you are intending to use your laptop/tablet ensure that it is fully charged in case there is no nearby power supply.

Pre-hearing note

29. If you have time it is often useful to send out a pre-hearing note to the main parties. This can set out the agenda for the hearing itself, including your initial identification of the main issues.

30. Such a note can also include queries you may have as to any procedural matters[4], amended plans, or missing documents so that the main parties can arrange for them to be responded to at the hearing more efficiently.

31. It is useful to ask the LPA to put this note on its website. Interested parties can often register for 'alerts' on LPA websites when new information is posted on a case so that they can also be made aware of it prior to the hearing.

Pre-hearing visit to the site and venue

32. It is good practice to carry out an unaccompanied site visit before the hearing. This can be done the day before the hearing, or on the morning before if you have time. Alternatively, you may be able to visit on an earlier day (for example, if you are carrying out site visits nearby).

33. Be discreet. You can only view the site from publicly accessible land. If you are approached by anyone explain your purpose as briefly as possible. Politely, but firmly, decline any attempts to involve you in conversation.

34. The advantages of a pre-hearing visit are that it can:

    1 show the parties that you know the site;
    2 help you to follow and understand site specific evidence;
    3 help you ask informed questions;
    4 ensure that you know where the site is and how to get there from the hearing venue.

35. However, pre-hearing site visits are not always essential - for example, if relevant features cannot be seen from public land, there are no issues regarding the wider area and you are confident of finding your way to the site.

36. When you are unfamiliar with the area, it can be helpful to visit the hearing venue beforehand so that you know how to find it and where to park.

[4] The Pre-Hearing Note could also be used to explain the process where a Hybrid procedure is followed.

The day of the Hearing[5]

37. Aim to arrive at the venue around 45 - 60 minutes before the hearing opens. This will allow you to:

- ensure the room is suitable for the hearing. Subject to there being sufficient room for the public the best option is a small committee or meeting room where all the participants can sit around a large table or series of tables. Council chambers are less suitable unless the arrangements allow the participants to sit reasonably close to each other. If the room is unsatisfactory, or requires furniture to be moved, return to the reception and request changes. 'The venue and facilities for public inquiries and hearings' on Gov.uk provides some excellent advice.

- check the room is suitable in terms health and safety requirements. See Annex 4 for a checklist. What are the procedures if an alarm should sound? You may be able to ask the person showing you to the room or at Reception. If they do not know, ask the Council when opening.

- check that the room will be accessible. See section 4 of 'The venue and facilities for public inquiries and hearings'. This explains that LPAs are responsible for ensuring that venues are accessible, but this does not absolve inspectors of responsibility. It states that if you consider the facilities to be unacceptable you will adjourn until a more accessible venue is provided.

- check that water will be available for all. You can accept the offer of tea/coffee if it has been provided for all participants.

- if you are intending to use your laptop/tablet ask for any necessary wi-fi codes and login your device. If this proves not possible set up your mobile phone as a 'hot-spot'. Find the nearest power socket and, subject to health and safety considerations relating to cables, ensure that there is a power supply to where you will be sitting.

- in the case of one day hearings, there is no requirement for LPAs to provide a retiring room during the hearing, although some may still do so. However, you can ask if there is somewhere you can wait away from the parties.

38. Once you have set out your papers and name plate it is best to leave the room so that you are not left alone with just one of the parties. If some of the participants arrive whilst you are setting up you should ask them to wait outside until you have finished. It is best to take your own notes with you. Avoid getting involved in any discussion. If anyone wants to engage you in conversation about the appeal, ask them to raise it once you have opened the hearing. However, you can deal with matters relating to the hearing venue.

Opening the hearing

39. Return to the room a few minutes before the hearing starts.

40. While you wait to formally open the hearing you can use the time to power up your laptop/tablet, check the main parties are present, distribute the agenda and encourage all those who intend to speak to sit around the table (or to sit where they will be able to participate).

[5] Some of this advice will clearly not be applicable to 'Virtual Events'.

41. Open the hearing at the appointed time. Use the clock in the room (if there is one and it is reasonably accurate).

42. Your opening should be delivered in a confident and purposeful manner. Look up and avoid undue reference to your notes/screen. The aim should be to set the scene for the discussion and to keep the opening as short as possible.

43. An example of an opening is provided in Annex 2. However, it is not prescriptive and can be adjusted to suit your own style and the case, provided that you cover the essential items. For Virtual Events example opening announcements can be found in the VE Documents and Guides section on PINS Intranet.

44. The standard hearing format is set out in the example agendas in Annex 1. It is usually best to deal with procedural and factual matters first before moving onto a discussion of the main issues, other matters and then conditions. Costs applications should be heard at the end.

45. The essential items to cover in your opening include:

- **Preliminary matters** – Check that everyone can hear you. Set out the appeal before you (address and description of development) and that you have been appointed by the Secretary of State;

- **Appearances** – take the names of those who intend to speak. It is not necessary to take the names of people who intend only to observe. However, if they subsequently decide to speak, you will need to remember to record their names so that they can be listed in your decision;

- **Housekeeping** – timing of breaks, emergency exits and procedures, make sure mobile phones will not disturb the proceedings (see below for more information);

- **Filming and recording** – you should ask if anyone intends to film or record the event (see separate section below for further information);

- **Notification letters** - make sure that you have a copy of the Council's letters of notification of (1) the appeal and (2) the time, date and place of the hearing. It is best to secure these at the start of the hearing before any discussion takes place (in case they were not sent or were incorrect and the hearing has to be adjourned). See below for further advice if there is a problem;

- **Representations** – note those you have received and, if necessary, allow the main parties to check they have the same copies;

- **Site visit** – make preliminary arrangements – see further advice below;

- **Conditions (and any planning obligation)** – explain that there will be a discussion about conditions (and planning obligations, if relevant) but that it will be without prejudice to the outcome of the appeal;

- **Costs** – explain that you are not inviting any costs applications but, that if there are any, they should be made at the venue before the site visit. Note any applications for costs already received. (see the Costs Awards ITM chapter). For further advice, see below;

- **Procedural matters** – seek clarification on anything which is uncertain (such as the description of development or, in outline applications, which matters are reserved);

- **Plans** – clarify which plans were before the LPA when it made its decision and the status of any other plans (superseded, illustrative or submitted with the appeal?). If revised plans were submitted with, or during the appeal process, you will need to explain how you intend to deal with them;

- **Late evidence** (if there is any) - explain your approach; are you accepting it? (see separate section below for further advice and Annex 1 of the Approach to Decision-Making ITM Chapter);

- **Main issues** – Rule 11(4) states that, at the start of the hearing, you will identify what are, in your opinion, the main issues to be considered and any matters on which further explanation is required. Ask the parties if they agree with your identification of the main issues. If there is disagreement, ensure any additional issues are added to the agenda where necessary;

- **Discussion** – make it clear to participants that the hearing will take the form of a structured discussion which you will lead and that there is no need for anyone to repeat comments which have already been covered by other participants[6];

- 'Procedural matters', 'Plans' and 'Late evidence' are best dealt with prior to main discussion. More information is provided on these issues below and in 'The approach to decision-making';

- Include adjustments to arrangements to accommodate for Virtual Events / Blended Events / Hybrid Events as necessary.

- **Virtual Events** – Requesting Technical Support During an event.

The 'inquisitorial burden'

46. In a hearing, the Inspector has responsibility for examining the evidence. At the end of the hearing you must be satisfied that all the points needed to make a properly informed decision have been adequately tested. See Dyason v SSE & Anor [1998]:

> "Planning permission having been refused, conflicting propositions and evidence will often be placed before an inspector on appeal. Whatever procedure is followed, the strength of a case can be determined only upon an understanding of that case and by testing it with reference to propositions in the opposing case. At a public local inquiry, the Inspector, in performing that task, usually has the benefit of cross-examination on behalf of the other party. If cross-examination disappears, the need to examine propositions in that way does not disappear with it. Further, the statutory right to be heard is nullified unless, in some way, the strength of what one party says is not only listened to by the tribunal but is assessed for its own worth and in relation to opposing contentions."
>
> "There is a danger, upon the procedure now followed by the Secretary of State of observing the right to be heard by holding a "hearing", that the need for such consideration is forgotten. The danger is that the "more relaxed" atmosphere could

[6] Guide to taking part in planning, listed building and conservation area consent appeals proceeding by a hearing – England (paragraph 13.5).

lead not to a “full and fair” hearing but to a less than thorough examination of the issues. A relaxed hearing is not necessarily a fair hearing. The hearing must not become so relaxed that the rigorous examination essential to the determination of difficult questions may be diluted. The absence of an accusatorial procedure places an inquisitorial burden upon an Inspector.”

47. However, while you have a duty to conduct an inquisitorial hearing, you are entitled to rely on the case put forward by a professionally represented appellant. There is no need for you to root out a case which an appellant had failed to put, especially when represented. (*Francis v First SoS & anor [2008]).* The same principle applies to the case put forward by the LPA.

A ‘fair crack of the whip’

48. It is important to make sure that everyone has the chance to consider and comment upon evidence which you might rely on in making your decision. Consequently, all potentially important issues should be identified and discussed at the hearing. If necessary, this may involve allowing an adjournment so that the relevant party (or parties) can consider their response. This could apply if:

- one party raises a new argument or introduces new evidence
- you raise an issue which is not contested or has not been mentioned or has only been mentioned in passing (and so which the parties could not reasonably expect you to rely on).

49. This was addressed in: *Castleford Homes Ltd v SSETR* [2001] as cited in *Van Dem Boomen & Anor, R (on the application of) v Ashford Borough Council & Anor* [2007]:

> “Did the claimant have a 'fair crack of the whip?' [ie a fair chance or opportunity]. Was the claimant deprived of an opportunity to present material by an approach on the part of the Inspector which he did not and could not have, reasonably have anticipated?”
>
> “It is obviously helpful if an Inspector does flag up issues which the parties do not appear to have fully appreciated or explored. The point at which a failure to do so amounts to a breach of the rules of natural justice and becomes unfair is a question of degree, there being no general requirement for an inspector to reveal any provisional thinking. It involves a judgment being made as to what is fair or unfair in a particular case.”

50. And also in *Edward Poole v SSCLG & Cannock Chase DC* [2008]:

> If a party to an inquiry reasonably believes that a matter which was in dispute has been dealt with by way of agreement in a statement of common ground, it may well be unfair to allow the apparently agreed issue to be reopened without giving the party a proper opportunity to address the issue, if necessary, by calling expert evidence.
>
> It is essential that Inspectors recognise that if they do intend to depart from what is the agreed position between the principal parties, it may be necessary to accede to applications for adjournments to enable the parties to address the (now disputed) issue or issues properly by way of expert evidence.

Running the hearing discussion

51. Some general points:

- Be authoritative, firm and proactive - make it clear from your demeanour and approach that you are in charge (but without appearing arrogant or dismissive).
- You should always lead the discussion – prevent the parties becoming involved in a dialogue between themselves as far as possible – however, you can allow one party to put a question to another if you feel this would be helpful.
- Cross examination should not be permitted, unless you consider it is required to allow a thorough examination of the main issues - Rule 11(2). However, in that case you may wish to consider whether the appeal should be heard by means of an inquiry.[7]
- Unrepresented appellants may not be familiar with hearings – you may need to take steps to ensure that they are engaged and are put at ease.
- Involve interested parties and make sure they can have their say (they may have concerns which are not shared by the LPA) – don't let the hearing become a 3 way event between the appellant, LPA and you – ask the main parties to explain any planning jargon or technical terms.
- Do not allow one party to dominate the proceedings.
- Maintain firm control – stop any distracting, disruptive or disrespectful behaviour quickly.
- Keep the proceedings moving on at a reasonable pace – encourage participants to focus on the matter at hand and politely halt any repetitious contributions.
- Seek to avoid any indication of apparent bias (see The Role of the Inspector).

52. In order to successfully take on the 'inquisitorial burden' consider the following:

- Try to get the parties to agree on factual matters and then focus on the key differences between them.
- Make sure you understand the evidence and the parties' position on it, particularly where it is technical or complex (for example noise, traffic, 5 year housing supply, financial viability) – seek clarification where necessary.
- Make sure you explore everything you might later rely on in your decision –you must raise any substantive matters that the main parties have not fully covered in their statements of case.
- If someone disagrees with an acknowledged expert on a subject – ask them to explain why they have reached that view.
- Ask the main parties to respond to important points made by the other party.
- If the LPA confirms that it no longer wishes to defend a reason for refusal – ask them to explain their reasons and allow interested parties to comment.

[7] See the section on 'Changing the procedure for determining an appeal' in 'Role of the Inspector' and paragraphs 14 to 15 above.

- Phrase your questions neutrally. Try to keep them short and simple. Only ask one question at a time.

53. You will be seeking to understand the impact and planning consequences, of a proposal. In doing so you will need to consider how the arguments made by the parties stand up when tested. The burden of proof generally lies with the party who made the point. Examples of questions you might ask include:

    - Which development plan policies are relevant? Are they consistent with the NPPF/PPG? Does the proposal comply with policy? What is the aim of the policy?

    - Would the proposal cause harm? For example - How should the character and appearance of the area be defined? Would the building fit in or would it appear incongruous in relation to its surroundings? Why? Where would it be seen from? Could any potential harm be overcome by conditions?

54. You should not:

    - make the case for any of the parties;

    - ask 'leading questions' (which indicate what the answer might be);

    - say anything that might indicate you agree with one party on a contested issue.

55. You will also need to deal with:

    - **Conditions** – these are usually best discussed as a separate item after the main issues and other matters have been dealt with (although they may also be directly relevant to the discussion about a particular main issue or other matter). You will need to consider whether the suggested conditions meet the 6 tests in paragraph 56 of the NPPF, even if they have been agreed by the main parties. Consider any conditions which have emerged during the hearing discussion or have been suggested by interested parties. Remember that for most appeals the written consent of the applicant to the imposition of pre-commencement conditions is required. See 'Conditions' ITM chapter and PINS Note 13/2018r2 'Pre-Commencement Conditions: S100ZA, Town and Country Planning Act' for further advice.

    - **Planning Obligations** – this could be covered either as a separate item or as an integral part of the issue to which it relates. You will need to assess whether the obligation complies with the 3 tests in paragraph 57 of the NPPF (and CIL Regulation 122 if relevant) and whether it would be effective. See 'Planning Obligations' for more advice.

56. There are two conventions which have previously been applied in hearings – that the appellant should have the last word and that the main parties should be invited to make final or closing comments. However, neither is specified as a requirement in the Rules or in Planning Appeals: Procedural Guide – England. You are not obliged to follow these conventions and you should only request this if it would be helpful.

Hearing site visits

57. Under Rule 12 you have two options:

- Leave the hearing open so that discussion can take place on site (ie adjourn the hearing in the venue and resume it on the appeal site).

- Close the hearing at the venue and conduct a conventional site visit.

58. You should only leave the hearing open and allow discussion at the site visit if all the following criteria are met:

    - A discussion on site would be helpful.

    - You can ensure that all parties present at the hearing would have the opportunity to attend the adjourned hearing (on the site) and that no party would be placed at a disadvantage – Rule 12(1)(a)&(b) *[for example, a party might be disadvantaged if they are unable to hear or participate in the discussion – you will need to ask if the appellant will let all relevant participants onto their land].*

    - The LPA, the appellant or any statutory party has not raised reasonable objections to it being continued at the appeal site – Rule 12(1)(c).

    - Conditions on site will be suitable for discussion and note taking (this may depend on the weather and noise environment).

59. Even if you do leave the hearing open it is best to advise the parties in your opening that they should make their main points at the hearing venue.

60. If the hearing is not adjourned to the appeal site, Rule 12(2) allows you to inspect the site during the hearing or after its close. Usually, you will visit the site after the hearing has closed. However, you might wish to visit it during the hearing if:

    - an earlier site visit is necessary to help you understand the discussion.

    - the hearing is unlikely to be completed before it goes dark (such as in mid-winter).

61. If you carry out a site visit during the hearing or after its close, Rule 12(3) requires that you ask the appellant and LPA whether they wish to be present.

62. Rule 12(4) requires that:

    - where you intend to carry out an accompanied site visit, you will announce the date and time during the hearing.

    - the site visit will be carried out in the company of the appellant and LPA (where either have requested they wish to be present).

    - at your discretion, you may also be accompanied by any other person entitled or permitted to appear at the hearing who is appearing or did appear at it.

Late evidence – before or during the hearing

63. Rule 11(9) states that you may allow any person to alter or add to their full statement of case. Rule 11(11) allows you to take into account any written representation or evidence or any other document received by you before the hearing opens or during it (provided that you disclose it at the hearing). Rule 11(7) allows you to refuse evidence where it would be irrelevant or repetitious. However, the Rule states that if you refuse to permit oral evidence, the person may submit the evidence in writing before the close

of the hearing. In line with the Inspector & Case Officer/Team Leader responsibilities, you should respond to any queries from the Case Officer as to whether late evidence received before the hearing should be accepted within 3 working days of the date of the query.

64. It is best to establish early on if anyone intends to submit new evidence or documents. If you do accept them, this allows everything to be copied and exchanged at the outset and any need for an adjournment to be considered. This will help avoid further disruptions to the hearing.

65. If you are offered late evidence, you will need to decide whether to accept it. The Planning Appeals: Procedural Guide – England provides advice and states that:

- late evidence will only be accepted "exceptionally" - 9.4.8.4 (this might for example, include, where relevant, a recent decision on a similar development, a recent appeal decision or a change in development plan or national policy. More advice is provided in 'The approach to decision-making')

66. Planning Appeals: Procedural Guide – England states that before deciding whether, exceptionally, to accept late evidence, you will require:

- an explanation as to why it was not received by PINS in accordance with the rules; and
- an explanation of how and why the material is relevant; and
- the opposing party's views on whether it should be accepted.

67. It goes on to state in E.9.4.8.4 that inspectors will refuse to accept late evidence unless fully satisfied that:

- it is not covered in the evidence already received; and
- it is directly relevant and necessary for their decision
- it would not have been possible for the party to have provided the evidence when they sent PINS their full statement of case; and
- it would be procedurally fair to all parties (including interested people) if the late evidence were taken into account.

68. If you accept late evidence, you should advise about the possibility of a costs application being made.

69. If you decide to accept late evidence, you will need to make sure that both you and the other main party (and potentially other interested parties) have the chance to read and understand it. You should seek the views of the parties on this. You have 3 main options:

1. If the new evidence is straightforward it may be possible to avoid adjourning or, alternatively, you and the parties may be able to read it during a short comfort break or over lunch.

2. If the evidence is more substantial, you might need to adjourn for a specific period (say 30 minutes) but still resume on the same day.

3. If the evidence is complex, substantial and/or technical you might need to adjourn to another day. This could be the case if one of the parties might reasonably wish to seek advice from an expert.

70. The same principles apply if an interested person requests that you accept late evidence.

Amended plans and proposals

71. If amended plans have been provided with the appeal or during the appeal process, you will need to decide whether you intend to determine the appeal on the basis of these plans or those which were before the Council when it made its decision. You should seek the views of the main parties and any interested persons.

72. You will need to decide if accepting the revised plans would deprive those who should have been consulted on the changed development of the opportunity of such consultation (the 'Wheatcroft Principles'). Further advice is provided in Annex 1 to 'the approach to decision-making', and Section 16 of the Planning Appeals: Procedural Guide – England.

Notification letters

73. There should be 2 notification letters: the first about the appeal and the second about the hearing. Check that the copies of the letters you receive from the LPA are correctly dated, relate to the appeal and have been sent to the correct people. If the second letter about the hearing is not on the file, get the Case Officer to check it was sent as this could avoid adjourning a hearing having travelled to it; re-scheduling may be necessary (see below).

74. Rule 4(2)(b) requires that:

> The local planning authority shall ensure that within 1 week of the starting date any (i) statutory party; and (ii) other person who made representations to the local planning authority about the application occasioning the appeal, has been notified in writing that an appeal has been made and of the address to which and of the period within which they may make representations to the Secretary of State.

75. Rule 7(5) states that:

> "The Secretary of State may in writing require the local planning authority to take one or both of the following steps – (a) not less than 2 weeks before the date fixed for the holding of a hearing, to publish a notice of the hearing in one or more newspapers circulating in the locality in which the land is situated; (b) to send a notice of the hearing to such persons or classes of persons as he may specify, within such period as he may specify."

76. If the correct notification has not taken place you will need to decide whether to adjourn the hearing to another date in order to allow it to be carried out. You will need to do this if you consider that there is a significant risk that the interests of an interested party would be prejudiced because they did not know about the appeal, only found out about the appeal 2 weeks before it was due to take place or were not notified or given little notice of the hearing. Seek the views of the parties at the hearing and consider the circumstances.

Note taking

77. You need to record the discussion and your notes will probably be the only record of what took place. However, you do not need to keep a word-by-word account. Instead focus on the main points made, particularly those which have not previously been set out in writing. If necessary, you can ask the parties to slow down or repeat a point if you wish to make sure you record it accurately.

78. You need to strike the right balance between engaging with the parties and taking notes.

79. A more thorough note will be needed if a costs application is made orally (see below).

80. Bear in mind that your notes may subsequently be disclosed, for example, if a request is made by one of the parties. See 'The Approach to Decision-making' on the retention of notes.

Costs applications

81. National guidance on the award of costs is provided in the Appeals section of the government's 'Planning Practice Guidance'. All costs applications must be formally made before the hearing is closed[8].

82. Regardless of whether you close the hearing before or after the site visit, any application for costs is best heard in the venue. It is not advisable to try and hear a costs application on site and it is best to avoid the inconvenience of having to return to the hearing venue.

83. If the costs application has been made in writing:

- does the applicant intend to add anything to it, orally?
- has the written application been provided beforehand to the other party and to you? If not, ensure copies are provided and, if necessary, allow an adjournment for both you and the other party to read it
- (if it was provided beforehand) has the other side responded to it in writing? If so, do they have any further response? If they have not prepared a written response, they should be given the opportunity to respond orally
- where both you and the parties have had adequate opportunity to read and understand the application and any response, these do not need to be read out

84. If the costs application is made, or added to, orally, the other side should be given the chance to respond and the applicant should then be given the chance to respond to any new points.

85. In some cases, it may be reasonable, in the interests of fairness, to allow an adjournment so that a response to a costs application can be prepared. That adjournment should usually be short in length given that the costs regime should be

[8] In England, see the Planning Practice Guidance ID 16-035-20161210 "All costs applications must be formally made to the Inspector before the hearing or inquiry is closed, but as a matter of good practice, and where circumstances allow, costs applications should be made in writing before the hearing or inquiry. Any such application must be brought to the Inspector's attention at the hearing or inquiry and can be added to or amended as necessary in oral submissions."

well understood and the response should usually be given by one of the hearing participants rather than by someone who had not previously been present.

86. If the costs application and response is made orally, you will need to take a full note. Ask the parties to proceed at a steady pace.

87. Clarify whether the application is seeking a full or partial award. If partial, then what for? Intervene to seek clarification if need be.

88. If both parties make applications these should be heard one after the other.

89. If the hearing is adjourned to another day, then any costs applications should be heard at the end of the resumed event.

90. For further advice on costs awards in planning appeals dealt with by hearings, please see Costs Awards.

Adjournments

91. Try to keep adjournments to the minimum necessary.

92. However, short adjournments may be necessary and can be helpful. For example:

- if it would be reasonable to allow a party to read new evidence and to prepare their response (or if you need to read it)
- to allow the parties to discuss and seek agreement on a particular matter

93. Adjournments may be requested by the parties or offered by you. Remember that unrepresented appellants may not be aware that they can ask for an adjournment.

94. All adjournments must be to a definite time and place. This should be announced before adjourning. After an adjournment the hearing is 'resumed'.

95. When you return home, e-mail the Case Officer (via the casework team mailbox) and the casework Team Leader (via their personal mailbox) at the same time. You should:

- include wording for the Case Officer to write to the parties to explain what has happened and what the next steps will be and;
- ask the casework Team Leader to adjust your programme to accommodate the reconvened date.

Closing the hearing

96. You may be asked when your decision will be issued. It is best to refer to the standard target time for that type of casework.

97. Before you leave the venue, it is good practice to check that everyone has said what they want to, that all matters have been covered and that you have received all necessary documents.

98. Remember to close the Hearing (either at the venue or the site visit).

After the hearing – late evidence or unforeseen circumstances

99. In transferred appeals, Rule 14(2) states that you may disregard any written representations, evidence or documents received after the hearing has closed. However, if, after the close of the hearing, you propose to take new evidence into account which was not raised at the hearing you shall afford those entitled to appear at the hearing with an opportunity to make written representations or to ask for the re-opening of the hearing – Rule 14(3). You should respond to any queries from the Case Officer as to whether late evidence received after the hearing should be accepted within 3 working days of the date of the query.

100. Rule 14(4) allows you to re-open the hearing if you think fit and states that you shall do so if requested by a person entitled to appear at the inquiry when the circumstances in Rule 14(3) apply.

101. In some cases, unforeseen issues may arise after the hearing has closed but before you have made your decision. This could include a change in national or local planning policy or a relevant appeal decision.[9] These issues may be brought to your attention by one of the parties or they may be apparent to you for other reasons. In either case, if the issue is one which might reasonably have a bearing on your decision, you should:

- accept the evidence offered (or proactively raise the issue) and allow the parties to comment in writing
- consider if the hearing should be re-opened.

102. The requirements in respect of non-transferred appeals are set out in Rule 15. Further advice about late representations and evidence can be found in The approach to decision-making.

After the hearing – writing your decision

103. Your approach to writing the decision is likely to be similar to cases considered by written representations. However, if a specific point was only raised at the hearing or if particular matters were agreed, then this should be mentioned.

104. At the end of your decision you will need to add lists of:

- any documents, plans and photos handed to you during the hearing as evidence.

105. The Council's letter(s) of notification should not be listed as documents

Rulings

106. You may be asked to make a ruling (although the party making the request may not use the term 'ruling'). This might, for example, be about whether you will accept new evidence or revised plans. If so, ask each party, in turn, for their views. Give yourself sufficient time to consider the points made. If necessary, adjourn for a short period. Keep a careful note of any discussion and the conclusions you reached.

107. It may not always be necessary to make a ruling at the hearing. For example, if there is an unresolved dispute as to whether an application is for 10 or 12 dwellings, it might

[9] In *Wainhomes v SSCLG* [2013] EWHC 597 the issue of 5 year supply was central. The Inspector declined to consider two recent appeal decisions. However, these decisions dealt with the same issues and might have caused the Inspector to reach a different conclusion. Consequently, they should have been taken into account.

be possible to examine both possibilities at the hearing and to resolve the dispute in your decision letter.

108. See ITM chapter on Inquiries for more information on rulings.

Legal representation

109. Rule 9(3) allows that a person who is entitled to appear may be represented by another person. It is up to the party to decide who represents them and this may be a solicitor or barrister. However, this should not affect how you run the hearing. If necessary, you can remind the parties that there will be no cross examination and that any questions should be put through you.

A main party is not present, or someone is taken ill

110. If one of the principal parties is not present at the appointed time, open the hearing. Establish who is there and explain the position. It is possible that the person is ill, that they have been delayed while travelling or that they have gone to the wrong venue.

111. If the appellant is missing, ask the LPA to try to contact them. If the LPA is not present, ask the appellant to try to contact them. If the appellant/LPA does not have the contact details, adjourn, phone the office and ask the Case Officer to try and contact the missing party.

112. Adjourn initially for 15-20 minutes. More than one adjournment may be needed to establish the position. If it is feasible, allow a reasonable period of time for the missing party to arrive so that the hearing can continue on the same day.

113. If there is no prospect of the missing person attending and you have no reason to believe that they have behaved irresponsibly, explain that you do not intend to continue with the hearing without one of the principal parties present (because to do so could be unfair).

114. In most cases the first preference will be to try to rearrange the hearing. Explain that you will not be able to arrange a new date as one of the main parties is missing and that the office will be in contact subsequently. Adjourn the hearing. When you return home, e-mail the Case Officer (via the casework team mailbox) and the casework Team Leader (via their personal mailbox) at the same time. You should:

- include wording for the Case Officer to write to the parties to explain what has happened and what the next steps will be and;
- ask the casework Team Leader to adjust your programme to accommodate a reconvened date.

115. If exceptionally, you consider that it might be possible to carry out the case by the written representations procedure, you should first seek the views of those present. If there is support for this view, and you consider it reasonable in the circumstances, close the hearing and carry out the site visit (but this will only be an option if the site visit can be done unaccompanied). On your return home, contact the Case Officer who will write to the parties.

116. If you consider that one of the parties has acted irresponsibly or unreasonably. Section 79(6A) of the Town and Country Planning Act 1990 gives the Secretary of State the authority, after issuing a warning notice, to dismiss an appeal if the appellant is

responsible for undue delay in its progress. It is intended that this power should only be used where an appellant/agent refuses to co-operate with us in processing the appeal or obstructs that process. – see the advice in the ITM Chapter on Inquiries.

117. If one of the principal parties falls ill during the proceedings, you may need to adjourn the hearing, including if necessary, to another day. This will depend on the severity of the illness and the demands of the event. The same will apply if you fall ill.

118. If the hearing is to be re-arranged, you should hear any application for costs at the end of the re-arranged hearing.

119. If you subsequently intend to complete the case by the written representations procedure, it is possible that before you close the hearing, one of the parties may indicate that they wish to make an application for costs. If so, you should hear this. You should then prepare a report on the costs application. The report and appeal file should be forwarded to the Costs and Decision Team when the appeal decision has been issued. The Costs and Decision Team will complete the costs process and make the costs decision.

Withdrawal of the appeal

120. If this happens on your arrival at the event you do not have to formally open the hearing. However, the withdrawal of the appeal must be confirmed to you there and then in writing. You should also ensure that any interested parties arriving for the hearing are made aware that it has been withdrawn.

121. If the hearing has opened, the appellant can withdraw the appeal verbally as long as it is announced to the hearing.

122. If the appeal is withdrawn during an adjournment to a different day the hearing can be closed in writing. You will need to make sure all parties are informed. However, if the appeal is withdrawn very close to the day of resumption, it may be necessary to resume the hearing briefly and then close it in person.

123. If any party seeks to apply for costs, refer them to the Award of Costs section of the Planning Practice Guidance[10]. This advises that any applications should be made to the Inspectorate's Costs and Decisions Team within 4 weeks of receiving confirmation that the appeal has been withdrawn.

Challenges to the validity of the appeal or application

124. Listen to the arguments put to you. Unless the interests of a party have been seriously prejudiced you should continue with the hearing. A breach of the Rules does not itself invalidate the proceedings or require redress. If no-one is at a disadvantage, the breach is unlikely to be serious.

125. If objections persist you may need to advise the person making them that, although you intend to continue with the hearing, they may also make their concerns known by writing to the office straightaway.

Filming and recording

126. The presumption is that filming and recording will be allowed. You should ask if anyone intends to film or record the event. If so, check that everyone is comfortable with this (for example, they may not wish to have their faces shown or voice recorded). If there are concerns, you can ask that filming/recording is restricted to certain angles. It is unlikely to be appropriate to film children or vulnerable adults even if no objections are raised. If filming/recording does take place, ask that it is carried out responsibly. If the Hearing is to be livestreamed or recorded the Inspector should advise participants and observers that hearing sessions are public events and that recording would only be published for training and quality purposes in occasional circumstances only. If the event is 'virtual' people can choose to turn their camera off should they be concerned about being filmed.

127. If filming or recording goes ahead, make sure that it is not disruptive or distracting, that it does not discourage anyone from participating and that there are no safety problems (for example, trip hazards or access obstructions). It is for you to decide whether filming or recording would be acceptable. However, the general principle is that it should be allowed.

128. If PINS receives a request to film or record beforehand, the Press Office will ensure that the case officer informs you that this is being proposed.

Video evidence

129. You may be asked to view video evidence (for example showing highway conditions or a virtual reality model of the proposed development). If so, you should make sure that all those at the hearing can see the recording and are able to comment on it.

Unacceptable remarks

130. You should issue a warning if anyone makes a potentially slanderous or discriminatory remark. See the Inspector Training Manual chapters on Human Rights and Equality and The Approach to Decision-making for more information. The advice in Annex 5 to this chapter, Managing Disruptive Parties, may also be relevant in this context.

Audibility, linguistic or literacy difficulties

131. If someone advises that they cannot hear the discussion, invite them to sit closer where they can clearly see you and the main parties. Ask the parties to speak up and to look up when speaking. If it seems that audibility will be a continuing problem, for example, if there are large numbers of people present, consider an adjournment so that microphones can be arranged.

132. Paragraph 14 of the 'The venue and facilities for public inquiries and hearings' states that venues should have an installed and operational hearing loop and that a sign language interpreter should be arranged if necessary.

133. Some participants may not have a good understanding of English or may have poor literacy skills. See the advice in the Inspector Training Manual chapter on Human Rights and Equality. This may involve finding someone who can assist the participant (sometimes referred to as a 'McKenzie friend').

Hearing evidence under oath or affirmation

134. There is no power for inspectors to take evidence on oath or under an affirmation at hearings. Where, at a hearing, it becomes clear that evidence on oath or under an affirmation is necessary to resolve disputed facts you will need to abort the hearing and arrange for an inquiry to be held. For further advice see 'Inquiries'.

Redetermination

135. Advice regarding the redetermination of an appeal can be found in the ITM chapter 'The approach to decision making part 1 – constructing the decision'.

Annex 1 – Agenda Examples

Agenda - examples

Example 1 (where fewer details are necessary)

Appeal ref []
Hearing [date]
Appeal by [appellant]
Proposed [development] at [site address]

1. **Preliminary matters**

   Plans

2. **Planning policy**

   Local Plan
   Policies LS1, LS3, EN1, EN6, EN7, EN8, EN11, EN15, EN16, TP1
   Consistency with the National Planning Policy Framework

3. **Main issues**

   1. The effect on the character and appearance of the area.

   2. The effect on flood risk.

   3. The effect in respect of noise, smell, light and water pollution

   4. The effect on highway safety

   5. The effect on protected species

4. **Other matters**

5. **Conditions and planning obligations (without prejudice)**

6. **Costs, closing and site visit**

Example 2 (where more detail is appropriate)

Appeal ref [**]
Hearing [date]
Appeal by [appellant]
Proposed [development] at [site address]

Matters for Discussion

1. **Introduction**

2. **Points of clarification:**

- Site address and description of the development.
- Clarification as to which buildings are which.

3. **Main Issues**

- Whether or not the proposal would be inappropriate development in the Green Belt.
- The effect of the proposal on the openness of the Green Belt.
- The effect of the proposal on the setting/significance of the nearby listed building.
- The effect of the loss of the lime tree.
- Whether any harm by reason of inappropriateness, and any other harm, would be clearly outweighed by other considerations. If so, would this amount to very special circumstances necessary to justify the proposal?

4. **Whether or not the proposal is inappropriate development in the Green Belt**

- Is development plan policy consistent with the NPPF?
- Does the proposal constitute limited infilling or partial/complete redevelopment of a previously developed site in accordance with sub-paragraph 145 g) of the NPPF?
- What is the extent of previously-developed land on the site?
- Is the land which currently contains no buildings previously-developed land?
- Does the proposal constitute the replacement of a building in accordance with sub-paragraph 145 d) of the NPPF
- Can a single building replacing more than one building be in accordance with sub-paragraph d)?
- Which buildings on the site are in the same use as the proposed building?
- Should ancillary buildings be counted as buildings to be replaced?
- Is there still disagreement over the size of [] and, if so, is this crucial to the determination of the appeal?

- Would the replacement be materially larger?

5. **Effect on the openness of the Green Belt**

6. **Effect on the setting/significance of the listed building**

7. **Effect of the loss of the lime tree**

   - Contribution to the character/appearance of the area?
   - Wildlife habitat contribution?

8. **Other considerations**

   - Demolition of 'unsightly' buildings
   - Potential for extension of existing buildings through permitted development rights
   - Are the circumstances of the development approved under Appeal Ref [] comparable to those of this case?

9. **Any other planning matters**

10. **Whether or not any other considerations clearly outweigh any harm to the Green Belt and any other harm**

11. **Conditions (without prejudice to the outcome of the appeal)**

12. **Cost Applications (if any)**

13. **Arrangements for Site Visit**

14. **Close**

Annex 2 – Example Opening and Closing

Hearing opening and closing - example

This opening covers all the matters that you might need to cover but does not need to be adhered to for every event and the exact wording can be adjusted. The aim is to conduct this part of the hearing in a business-like and professional manner and for it to be kept as short as possible so that it only covers essential matters.

Before opening

Is the venue suitable and accessible?
Do you know the fire escape procedures?

While waiting to open the hearing:

- check the main parties are present
- distribute the agenda
- encourage all those who intend to speak to sit around the table (or where they will be able to participate)

Introduction

Good morning. The hearing is now open.

My name is []

I am the Inspector appointed by the Secretary of State to conduct this Hearing and to determine the appeal by []

This appeal results from the decision of [LPA] to refuse planning permission for a proposal described as [] at []

This would be a good time to switch mobile phones off (or turn them to silent)

In the event of a fire alarm [note fire exits, evacuation routes, assembly point, fire alarm testing/drills]

Can everyone hear what I'm saying?

The hearing today will be a structured discussion which I shall lead based on an agreed agenda. The purpose is to enable all of you to put forward your points of view and to help me get the information I need to make my decision.

But before we start the discussion there are a few formalities I need to complete.

Appearances

Firstly, can I take the names of all those who wish to speak and their interest in the case:

For the appellants

For the LPA/Council[11]
[record name, position in organisation]

Does anyone else wish to speak?
[record name, interest in case and address]

Is anyone from the press present? – add names to list

[if anyone asks for a copy of the decision advise that it will be made available on the Planning Portal]

Filming/recording

Does anyone intend to film or record the event?

[If so] – does anyone have any objections to this? [if so, can they be resolved by restricting filming to certain angles?]

[If filming/recording takes place] – please make sure any filming or recording is carried out responsibly and does not interfere with the smooth running of the hearing

Notification letters

Can I have a copy of the Council's letters of notification

- of the appeal and
- confirming the date, time and location of the Hearing

[if not already provided & satisfactory]

[check – were the letters sent to those they should have been, in time – eg at least 2 weeks before the hearing – are the details of the date, time and venue correct?]

[If the letters cannot be provided, were not sent or are incorrect – consider whether the interests of any parties would be prejudiced – is it necessary to adjourn the hearing to allow the correct notification to take place?]

Representations

I have copies of representations made in response to the:

- appeal notification
- original planning application consultation and the appeal notification

I will take these into account in reaching my decisions

[if there is any doubt about whether the main parties have seen all of these – offer the opportunity to check them - eg during an adjournment]

Site visit

[11] Where the appeal is in a National Park, be careful to use the term 'Authority' rather than 'Council'

I've already been able to see the appeal site from [road] and so have a general awareness of the site and its surroundings [or refer to any specific features]

However, I will be making a site inspection later

[if necessary, to go on private land] I will need to be accompanied by a representative from the appellant and LPA.

[if not necessary to go on private land] – I will be able to visit the site unaccompanied.

[if interested parties are present] – Does anyone else wish to attend the site visit - other parties can attend the site visit – but will need permission from the appellant to go on the appeal site.

At this stage, my intention is to close the hearing here [to ensure interested parties can hear/participate and/or because conducting/recording discussion on site can be difficult]

If so, the site visit would be solely to enable me to see the site and surroundings. I will not be able to listen to any representations or discussions – therefore, it is important that you make any comments before we leave here.

[discuss any alternative arrangements – such as if the site visit needs to take place earlier in the day perhaps due to daylight issues]

Conditions

We will need to have a discussion about what conditions might be appropriate were I to allow the appeal.

This is standard procedure. It does not indicate that I have made up my mind on the case. Nor will the discussion affect the Council's position in relation to the proposal.

Is the list of conditions provided by the Council/in the Statement of Common Ground up-to-date?

Costs

I am not inviting any applications for costs – but if any are to be made this should be done here before the site visit [or alternatively note any receipt of written applications for costs or indications that a cost application will be made – and that you will deal with these later]

[if necessary, remind the parties of the power to initiate an award of costs but not necessary to include on every occasion]

Procedure [only if necessary because there are concerns about whether a hearing is a suitable procedure]

[if the criteria for an inquiry might apply – see the Criteria for determining the procedure for planning, enforcement, advertisement and discontinuance notice appeals or if large numbers of people are present]

[explore whether the procedure is appropriate with the parties]

[If I decide during the discussion that this procedure is not appropriate I will close the hearing and ask the office in Bristol/Cardiff to arrange for the appeal to be dealt with by means of an inquiry]

Main issues

[hand out agenda if not already circulated]

The agenda sets out what I regard to be the main issues [read out]

In addition, I shall wish to cover the following [highlight any procedural issues and other matters you want to cover]

Does anyone disagree or have any comments? [amend main issues, as necessary]

During the discussion I will invite contributions from one side and then the other [and then from any interested persons] – if you want to make a point or feel I am moving on before you have said all you want to please tell me.

I have read all the written statements – and so there is no need to repeat material – although you can draw my attention to something specific.

[There will be no formal presentation of cases or cross examination – unless I specifically agree to it]

Evidence

[deal with any late evidence]

All documents and evidence should already have been provided

Not inviting any – but if you intend to submit any, please tell me now

If anyone intends to submit further evidence - ask

- Is the material relevant?
- Why was it not received in accordance with the timetable [set in the Rules]?
- Are there any exceptional circumstances for it being provided now rather than with the statement of case?
- Seek the views of the other parties – have they seen the material?
- Would an adjournment be needed (how long, same day, different day)?
- If appropriate, warn about risk of costs application

Note, if necessary, that the other party could apply for costs and the Inspector could initiate costs [if the behaviour was unreasonable and led to unnecessary expense]

Plans

Clarify which plans were before the LPA when it made its decision.

Clarify the status of any other plans (superseded, illustrative, revised plans provided at appeal)

If revised plans submitted at appeal – decide whether to accept – ask:

- Would they materially change the proposal?
- Would any party be prejudiced – because they might have been denied an opportunity to comment having regard to Wheatcroft principles

Decide whether to accept or not

Timing

[deal with any issues relating to timing of hearing]

I will take a break mid-morning [and for lunch and mid-afternoon if still sitting]

Aim to finish no later than 5pm

Any questions

Are there any questions at this stage about the procedural side of the hearing?

Agenda

Start with agenda item 1

[before moving on to discuss 'any other matters' check that no one wishes to add anything in respect of the main issues]

[before moving on to discuss conditions – check that there are no further planning issues that anyone wants to raise]

Closing and site visit

Costs

Are there any applications for costs?

Listen to any costs applications:

- Is the application available in writing (if not already provided)?
- Explain procedure – application – response – final comments on any new points.
- Remind party they need to demonstrate unreasonable behaviour which has resulted in unnecessary expense.
- Note that references should be made to the guidance on the award of costs in the Appeals section of the government's 'Planning Practice Guidance' or Welsh Office Circular 23/93.
- Please proceed at a steady pace – need to take notes [If costs application made verbally].

- Seeking full or partial award?
- Allow the other party an adjournment to consider response if necessary [if the application is made verbally or a written application is added to].

or if the costs application has already been made in writing:

- Do you still wish to proceed with your written application for costs?
- Do you intend to add anything to the application?
- Allow the other party to respond.
- Any final response?

Site visit

I shall now make arrangements for the site visit.

[Accompanied or unaccompanied?]

Who will attend for:

- the appellant
- the council
- any interested parties?
    - interested parties need permission of appellant to go on appeal site

It seems to me we have completed the discussion – so I will close the hearing before going to the site – can I just check that the LPA and the appellant do not wish to be present - consequently:

- the purpose is for me to see the site.
- can point out physical features
- but will not listen to any further discussion of merits

[or]

It would helpful to continue the discussion on the site – so I will not close the hearing until the end of the site visit

Check how long to get to site?
Discuss any travel arrangements [if travelling with the appellant and LPA]
Confirm time and best place to meet
Deal with arrangements to visit any other sites
Confirm any parking arrangements
Any health and safety issues?

Before we leave may I have any outstanding documents

Thank you all for your contributions

The hearing is now closed
[or the hearing is now adjourned]

Annex 3 – Things to take

List of things to take

- Appeal documents
- Opening and questions
- Agenda (several copies)
- The Framework, Planning Practice Guidance, relevant Circulars etc
- Hearing Rules (SI 2000/1626)
- Procedural Guide - Planning Appeals – England
- GPDO England 2015 and DMPO England 2015 (if relevant)
- Name plate
- ID card
- Stationary (scale rule, pens, pencils, sharpener, post-its, notebook or pad)
- Up to date information on charted cases and holidays (in case of adjournment)
- Clipboard
- Laptop/tablet
- Power extension lead (if you are intending to use your laptop/tablet)
- Satnav and maps
- Hire car details
- Train tickets
- Hotel booking
- Bus/train timetables
- Red triangle, torch, de-icer etc
- Lone worker protection system (LWPS) mobile phone
- Personal protective equipment – (safety hat, high visibility jacket etc where necessary)
- Phone numbers – Case Officer, Team Leader, IM, Redfern
- Personal items (money, mobile phone, watch, overnight bag etc)

- Have you left details of your itinerary with someone (and given them a point of contact if they are unable to reach you)? See ‘Site visits’ for advice on health and safety when carrying out site visits.

Annex 4 – Health and Safety Checklist

Health and safety checklist

When arriving at the venue – check the following:

	Yes/no	Any comments
Arrangements for activating the fire alarm and contacting emergency services		
The sound of the alarm and if there are any different alarm signals		
The evacuation procedure from the hearing room, the location of fire exits, evacuation routes and assembly points		
Any planned fire alarm testing or fire evacuation drills		
The location of toilets		
Ensure persons attending at the start of each day are aware of the above		
Check that fire exists from the hearing room are not blocked by tables or chairs etc		

Annex 5 - Managing Disruptive Parties

Managing Disruptive Parties

1. As a responsible employer PINS has a duty of care to its staff. Our Customer Charter states that we expect all staff to be treated with courtesy and respect and warns that we will not tolerate rude or abusive behaviour. All staff are entitled to carry out their duties without fear of abuse or harassment.

2. Our decisions impact on people, their homes and communities and passions can run high. Much of what is set out here can be found in the Inspector Training Manual (ITM). The advice in the ITM and the training you received in conducting Hearings and Inquiries will enable you to deal with most situations. The purpose of this note is to advise on the steps to follow when these strategies fail and more serious action is required.

Powers

3. Rule 11 (8) of the Town and Country Planning (Hearings Procedure) (England) Rules 2000[12] empowers Inspectors to require participants at Hearings and Inquiries to leave if they are being disruptive[13]. The Inspector may refuse to allow the person who has been asked to leave to return or permit a return only on such conditions that the Inspector may specify. Rule 11 (10) allows the Inspector to proceed in the absence of any person entitled to appear at it.

4. Advice on what to do if a main party is absent can be found in the ITM. In brief, where you consider that a party's absence is as a result of unreasonable behaviour you may hear the cases of the other parties (including costs[14]) and, if possible, carry out an unaccompanied site visit. Where an accompanied visit is necessary, agree a time and date with the parties present giving time for the absent party to be notified.

5. S79(6A) of the Town and County Planning Act 1990, as amended by s18 of the Planning and Compensation Act 1991, states that:

> 'If at any time before or during the determination of such an appeal it appears to the Secretary of State that the appellant is responsible for undue delay in the progress of the appeal, he may -
>
> (a) give the appellant notice that the appeal will be dismissed unless the appellant takes, within the period specified in the notice, steps as are specified in the notice for the expedition of the appeal; and
>
> (b) if the appellant fails to take those steps within that period, dismiss the appeal accordingly'[15].

What is unreasonable/unacceptable behaviour?

[12] Also Rule 11 (8) of the Town and Country Planning (Enforcement) (Hearings Procedure) (England) Rules 2002 No 2684
Rights of Way: Rule 9(9) of the Rights of Way (Hearings and Inquiries Procedure) (England) Rules 2007
NSIP: Section 95 of the Planning Act 2008

[13] Any person required to leave may submit any evidence or other matter in writing before the close of the Hearing or Inquiry.

[14] Note that any costs decisions will be dealt with by the Costs and Decisions Team where a party is not present.

[15] Does not currently apply to enforcement cases.

6. Basically, anything which disrupts the smooth running of a Hearing or Inquiry and prevents you from focusing on the arguments or any other party from making their case. This could range from threats or shows of aggression to constant low-level interruptions, particularly if they are aimed at destabilising another party's attempt to make their case.

7. The ITM advises that the general principle is that filming and recording should be allowed. However, if you consider the way you or the event is being filmed or recorded to be intimidating you should ask that it stops. If the person recording refuses this constitutes unreasonable behaviour.

What to do about unreasonable/unacceptable behaviour?

8. As stated above your training will have equipped you to deal with most above. All these avenues should be explored before proceeding to the following stages. If a party's behaviour becomes disruptive you should:

   i. Explain why their behaviour is unreasonable and that if they continue you will adjourn to give them time to calm down/reflect. If necessary/appropriate you could set conditions for their return (see Rule 11 above). Explain that if you are forced to adjourn because of their unreasonable behaviour you have the power to instigate an award of costs against them.
   ii. That if they continue to behave unreasonably you will invoke your powers under Rule 11 (10) and have them removed.
   iii. That if they are removed, they may submit any evidence or other matter in writing before the close of the Hearing or Inquiry if they are a main party,
   iv. You will either hear the other parties cases and proceed to a decision or, if the excluded person attempts to thwart the proceedings by refusing to co-operate thereafter[16], dismiss the appeal under S79(6A).

   All the above needs to be properly documented in order that any subsequent complaint or challenge may be defended.

15. If a party refuses to leave, adjourn and request the Council to use its security team to accompany the disruptive person from the premises. If that is not possible or in the event of serious disruptive behaviour or threat activate your lone worker protection alarm or call 999[17].

Suggested text for requiring an Appellant/Agent or Advocate to leave an event

Appellant/Agent:

Mr/Ms X, I have asked you on 3 occasions now not to interrupt me/AN Other. If you do so again, I will exercise my powers under Rule 11(8) of the Town and Country Planning (Hearings Procedure) (England) Rules 2000 and require you to leave. I will consider whether to make an award of Costs against you/your client for unreasonable behaviour.

If relevant: [I will also take action to report your unreasonable behaviour to your Professional Institution.]

[16] For example by denying access to the site.
[17] Section 4(1)(a) of the Public Order Act 1986 states that a person is guilty of an offence if he uses towards another person threatening, abusive or insulting words or behaviour with intent to cause that person to believe that immediate unlawful violence will be used against him or another by any person, or to provoke the immediate use of unlawful violence by that person or another, or whereby that person is likely to believe that such violence will be used or it is likely that such violence will be provoked.

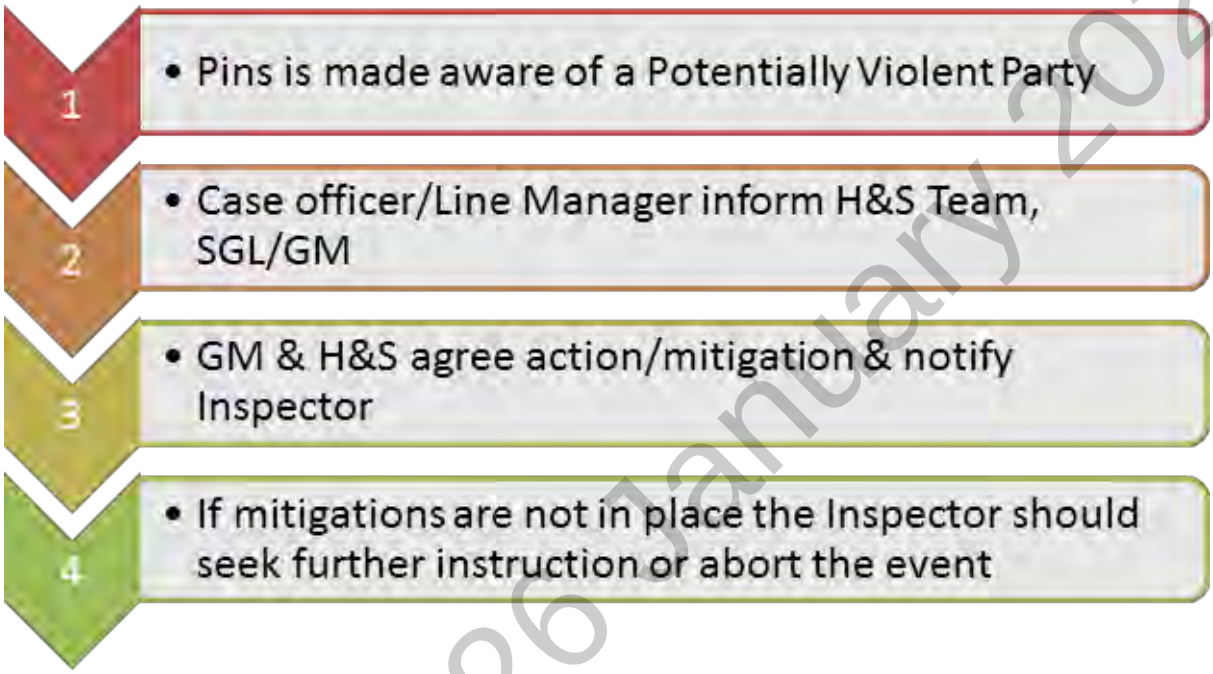
Barrister/Solicitor:

Mr/Ms X, I have asked you on 3 occasions now not to interrupt me/AN Other. If you do so again I will exercise my powers under Rule 11(8) of the Town and Country Planning (Hearings Procedure) (England) Rules 2000 and require you to leave. I will consider whether to make an award of Costs against your client for unreasonable behaviour. I will also take action to report your unreasonable behaviour to [The Bar Standards Board] [The Law Society].

Annex 6 - Potentially violent parties procedure

Potentially violent parties procedure

1. The Inspectorate's procedure on handling potentially violent parties is summarised in the diagram below:



2. The full procedure on handling potentially violent parties is provided in a flow chart, available via this hyperlink.

The Planning Inspectorate

Inquiries

Updated to reflect December 2023 Framework (NPPF)

What's new since the last version

Changes made 03 July 2023:

- Removed references to post event surveys as PINS no longer sends these out.

Other recent updates made 12 Dec 2022

- Removed references to attendance list as PINS no longer requires these to be used or kept. Responsibility for them has transferred to the LPA

Contents

Introduction

1. Inspectors make their decisions on the basis of the evidence before them and the circumstances of the inquiry. Consequently, they may, where justified by the evidence or to facilitate the smooth and fair running of the inquiry, depart from the advice given in this guide.

2. This advice applies to England only. It relates mainly to the conduct of inquiries in planning, advertisement[1] and listed building consent appeals although the principles have wider relevance. A new training manual for Wales is in preparation – until it is published, please see the previous version of this chapter for advice on inquiry procedures in Wales.

Further advice on the conduct of enforcement (s174) and lawful development certificate (s195) inquiries can be found in 'Enforcement' Training Manual chapter.

Background

3. Inquiries are mainly adversarial. The parties present their cases to the Inspector and witnesses are subject to cross-examination as appropriate. In this way some of the inquisitorial burden of challenging a party's case falls on the opposing party. This is in contrast to hearings where the inquisitorial burden falls squarely on the Inspector.[2] Where round table sessions form part of the Inquiry (see below) the burden is greater on the Inspector. In any case, you must arrange the inquiry in such a way as to ensure that you have sufficient information to arrive at a reasoned decision.

Legislation and procedural guidance

4. The statutory rules governing inquiries are:

Section 78 appeals determined by the Inspector - The Town and Country Planning Appeals (Determination by Inspectors) (Inquiries Procedure) (England) Rules 2000 (SI 2000/1625).

Section 77 and s78 appeals determined by the Secretary of State - The Town and Country Planning (Inquiries Procedure) (England) Rules 2000 (SI 2000/1624).

Section 174 and section 195 appeals determined by the Inspector – The Town and Country Planning (Enforcement) (Determination by Inspectors) (Inquiries Procedure) (England) Rules 2002 (SI 2002/2685).

Section 174 and section 195 appeals determined by the Secretary of State - The Town and Country Planning (Enforcement) (Inquiries Procedure) (England) Rules 2002 (SI 2002/2686).

[1] For advertisement appeals in England made before 6 April 2015 which have not been determined by that date the advertisement hearings are subject to the Town and Country Planning (Inquiries Procedure) Rules 1974. However, they are dealt with as hearings. See Annex 2 of the 'Advertisement appeals' TM chapter.
[2] See Dyason v SSE & Chiltern [1998] 75 P&CR 506.

5. These Rules have been amended on a number of occasions since 2000. It is, therefore, important to use consolidated versions.

6. References to the Rules in this document are to the 'Determination by Inspectors' Rules (SI 2000/1625 in England) unless otherwise stated.

Virtual / Blended / Hybrid Events

7. The Covid-19 pandemic and the associated need to avoid public gatherings and events necessitated the introduction of a range of types of events, with virtual and in-person as well as one or more types of procedure being used to determine a case. Whilst face-to-face or in-person events are now the usual business model again, the range of options allows the Inspector to ensure they are presented with all the necessary evidence in the best manner possible.

   Virtual Events – Section 78 of the Coronavirus Act 2020 provided the powers for regulations to hold 'remote' events where there are no physical attendees. Participants attend virtually via video conferencing or telephone – see PINS Guidance on Virtual Events.

   Blended Events – where there may be a combination of physical attendees (in one or more locations) as well as a virtual element (where participants attend virtually via video conferencing or telephone)

   Hybrid Events – Section 20 of the Business and Planning Act 2020 inserted s319A into the TCPA1990 to allow for determination to be considered by one or more types of procedure as appropriate, i.e. at a local inquiry, and/or at a hearing and/or on the basis of written representations

8. Procedural guidance can be found in:

   Procedural Guide - Planning Appeals – England applies to planning appeals, householder development appeals, minor commercial appeals, listed building appeals, advertisement appeals and discontinuance notice appeals. It also applies to appeals against non-determination. The Procedural Guide – Called-in planning applications – England applies to all applications which are 'called-in'.

9. Guidance is also available for those taking part in inquiries:

   Guide to taking part in planning, listed building and conservation area consent appeals proceeding by an inquiry – England.

The Rosewell Review

10. The report of the Independent Review of Planning Appeal Inquiries, chaired by Bridget Rosewell CBE, was published in December 2018. The Review applies to England only. Its aim was to make the use and operation of the inquiries procedure quicker and better. It made recommendations to reduce significantly the time taken to carry out planning inquiries process end to end, while maintaining the quality of decisions. In particular, it recommended that 90% of decisions in Inspector-determined inquiry appeals should be issued within 24 weeks of PINS receiving the appeal, and the other 10% within 26 weeks.

11. PINS has published an Action Plan which sets out the actions it has taken to implement the Rosewell recommendations.

12. From the Inspector's point of view the most significant changes are:

    - You are involved in the appeal process right from the start: you are appointed to the case within about a week of PINS receiving the appeal.
    - You prepare for and hold a case management telephone conference call with the main parties and any Rule 6 parties within seven weeks of the start date of the appeal.
    - You decide in advance (in consultation with the parties) how the main issues will be dealt with at the inquiry, whether by cross-examination, round-table discussion, or written representations. This may include asking a party to produce evidence to respond to third party concerns. Under s319A introduced by the Business and Planning Act 2020, the options to conduct events by one or more procedures can be followed – See Explanatory Notes paragraphs 164-167.

    More advice on each of these points is given below.

13. Also, in response to the Rosewell recommendations, PINS now sets the date(s) on which inquiries will take place, rather than relying on the parties to agree the date(s).

14. While the Procedural Guide for planning appeals (see para 8 above) incorporates relevant recommendations of the Rosewell review, the statutory inquiry procedure Rules have not been amended since the Rosewell report was published. Accordingly, the inquiry start letters sent out by PINS make it clear that appeals, while still being handled in line with the relevant procedure Rules, will be the subject of an accelerated approach.

The inquiry process.

15. The inquiry process in England is set out in the Rules and in the *Procedural Guide - Planning Appeals – England*. In summary, it is as follows[3]:

Timetable	Actions by interested persons	Actions by Appellant	Actions by Local Planning Authority
At least 10 days <u>before</u> appeal submission		Appellant sends notification of intention to submit an	LPA receives the appellant's notification of intention to

[3] This table reflects the process for most inquiries into appeals determined by Inspectors in England. Somewhat different processes apply to inquiries into appeals determined by the Secretary of State, and to enforcement appeals and household and minor commercial development appeals for which PINS has decided that an inquiry is necessary. There is also the Inquiry appeal process overview diagram. However, where a hybrid procedure is used to determine an appeal, use of the former 'bespoke' timetable may be used, which needs to be fair to all parties – see Procedure Guidance.

		appeal to PINS and the LPA	submit an appeal
Appeal received **PINS requests LPA to provide, within 1 working day, their view on the need for an inquiry and then determines the procedure**	Appellant sends the appeal form and all supporting documents, including a full statement of case, to PINS and the LPA For certain types of development, additional information may be required Appellant also provides a draft statement of common ground	Appellant sends the appeal form and all supporting documents, including a full statement of case, to PINS and the LPA For certain types of development, additional information may be required Appellant also provides a draft statement of common ground	LPA receives the appeal documents from the appellant
PINS issues a start letter setting out the start date and timetable for the inquiry and the name of the appointed Inspector **The inquiry date will normally be within 13-16 weeks from the start date**			

Within 1 week from the start date	Interested persons receive the LPA's letter about the appeal, telling them that they must send any representations to PINS within 5 weeks of the start date and that if any of them would wish to apply for Rule 6 status [JV – new guidance on R6 is currently being prepared – check on progress] they should do so immediately	Appellant and PINS receive a completed questionnaire and any supporting documents from the LPA	LPA sends the appellant and PINS a completed questionnaire and supporting documents Writes to interested people, telling them that they must send any representations to PINS within 5 weeks of the start date and that if any of them wish to apply for Rule 6 status they should do so immediately
Within 5 weeks from the start date (Only exceptionally will PINS accept late statements or representations)	Interested persons send their representations to PINS Any Rule 6 parties send PINS their full statement of case within 4 weeks of PINS requesting it [JV – who requests this and how is the request made? – is it via the Inspector or Major casework team?]		LPA sends PINS its full statement of case and the agreed statement of common ground For certain types of development, additional information may be required

Within 7 weeks from the start date	The Inspector holds a case management conference call to discuss the inquiry arrangements with the appellant, the LPA and any Rule 6 parties (it's also open to the Inspector to hold a PIM if required) The case management conference call also provides an opportunity for the parties to ask any procedural questions and for the Inspector to confirm the main issues and how the evidence will be dealt with.		
Within 8 weeks from the start date	Following the case management engagement, the inspector should issue clear directions to the parties about the final stages of preparation and how evidence will be examined.		
4 weeks before the inquiry	Any Rule 6 parties send PINS their proof(s) of evidence	Appellant sends PINS its proof(s)of evidence	LPA sends PINS its proof(s) of evidence It may put a notice about the inquiry in a local paper
At least 2 weeks before the inquiry	Interested persons receive details from the LPA about the inquiry arrangements	Appellant displays a notice on site giving details of the inquiry	LPA notifies interested persons about the inquiry arrangements
No later than 10 working days before the inquiry		Appellant sends PINS a draft of any planning obligation	
Inquiry held, normally within 13-16 weeks of the start date	Appellant, LPA, any Rule 6 parties and interested persons take part in or attend the inquiry		

Objectives

16. In accordance with the Planning Inspectorate's Code of Conduct and the Franks' Principles (See 'Role of the Inspector') you have three main objectives when holding an inquiry:

    - To ensure that the evidence is thoroughly examined and tested to enable you to reach a reasoned decision or recommendation
    - To ensure all parties and interested persons have a reasonable opportunity to participate and to have a fair hearing
    - To manage the inquiry in an effective and pro-active manner, making efficient use of time.

Before the inquiry

Who is entitled to appear at an inquiry?

17. The appellant, local planning authority and various other bodies[4] are entitled to appear at the inquiry – as set out in Rule 11(1).

18. However, Rule 11(2) states that there is nothing in Rule 11(1) that shall prevent you from permitting any other person to appear and such permission shall not be unreasonably withheld. The starting point, therefore, is that you should be prepared to hear from anyone who attends.

19. A person who is entitled to appear may do so on his own behalf or may be represented by another person - Rule 11(3).

Statements of case, proofs of evidence and statements of common ground

20. The appellant is required to provide their **full statement of case** (including full particulars, documents and evidence) when making their appeal.[5] The LPA must do the same within 5 weeks of the start date, and any Rule 6 parties must do so within 4 weeks of PINS requesting it.[6] Section 12 of the Procedural Guide - Planning Appeals – England provides more detail about what should be included. See also Rule 2(1) on "full statement of case".

21. **Proofs of evidence** are the documents which contain the evidence of specific witnesses:

    - Proofs of evidence should be provided 4 weeks before the inquiry - Rule 14(3)

[4] This includes certain other local authorities in the area, parish/community councils, 'Rule 6 parties' and statutory parties.
[5] See Article 37(3) of The Town and Country Planning (Development Management procedure) (England) Order 2015.
[6] Rule 6(1) & 6(6).

- A summary is required unless the proof is less than 1,500 words – Rule 14(2)

- If a summary is provided – only the summary should be read out at the inquiry (unless the Inspector permits otherwise) – Rule 14(5)

- Cross-examination can be on any part of the proof – even if only a summary is read out – Rule 16(7)

22. The case for the appellant, LPA and any Rule 6 party should already have been set out in full in their statement of case. Consequently, the main purpose of a proof of evidence is to allow expert witnesses to:

    - marshal previously-provided evidence in a way which is convenient to the presentation of their case at the inquiry

    - give their opinion on the evidence provided by other parties in their statements of case.

23. The Procedural Guide - Planning Appeals – England provides more advice about the contents of a proof, their length and the need for summaries

24. There is no reference in the Rules or the Procedural Guide to supplementary or **rebuttal proofs**. We do not encourage the provision of supplementary or rebuttal proofs. If these are offered or received less than 4 weeks before the inquiry, the case officer will check with you whether they should be accepted. If they are offered at the start of the inquiry, consult with the parties as to whether they should be accepted and, if necessary, adjourn to allow everyone to consider them. Costs applications relating to the receipt of such documents will be dealt with in the normal way. Bear in mind that rebuttal proofs can sometimes be helpful, particularly if they deal with points that could reduce the need for cross-examination and so reduce the inquiry time.

25. Rule 15 requires the LPA and appellant to provide an agreed **statement of common ground** within 5 weeks of the start date.

26. Advice on the content, form and purpose of the statement of common ground is provided in Section 13 to the Procedural Guide - Planning Appeals – England. The aim is to ensure that the inquiry focuses on the material differences between the cases of appellant and the LPA.

What to do when the inquiry is allocated to you

27. The name of the appointed Inspector is given in the inquiry start letter, which PINS aim to issue within a week of receiving the appeal. This means that the inquiry has to be allocated to you right at the start of the process. Before agreeing to take on the inquiry, you will need to:

    - Check that you should not be precluded from the case, for example, because one of the parties is a relative or a close associate (See PINS Conflict of Interest Policy);

    - Check that the case grading and any specialism(s) are appropriate and that the case is within your capabilities; and

- Check that you have sufficient time in your chart for preparation[7], holding the inquiry and then reporting.

28. As soon as possible after your appointment you should contact the case officer to set a date and time for the case management conference call, which must take place within seven weeks of the start date.

29. You should also double-check the venue for the inquiry (it is not always at the Council's offices), the date, start time, and sort out your travel arrangements. If necessary, book a hotel and ask the case officer to check if the LPA will provide you with a parking space.

Preparing for the case management conference call[8][9]

30. You will be charted time to prepare for the case management conference call. Your preparation time will usually be in the sixth week after the start date – as this will be the earliest possible time after the deadline for the LPA's statement of case and the agreed statement of common ground.

31. When preparing for the case management conference call, read the file systematically, considering the following:

    - Do you understand the appeal proposal and know which are the relevant plans?

    - Are any documents missing? (development plan policies, SPD, SoCG, list of conditions, appeal notification letters, the list of people notified by the LPA etc.) If so, request them through the case officer, or make a note to ask for them during the case conference call.

    - Are there any procedural matters on which you might need to seek clarification (e.g. the nature of the proposed development, amended proposals, revised plans, which matters are reserved etc).

    - Identify the potential main issues at this stage. Start by looking at the reasons for refusal, the parties' statements of case, and the statement of common ground. See 'The approach to decision-making' for further advice.

    - Have any other matters been raised by interested persons or parties (e.g. neighbours, MPs, statutory consultees)? Decide whether any of these should be treated as main issues, or as other matters you will consider. See 'The approach to decision-making' for further advice.

    - Establish relevant development plan and national policy. Is any clarification necessary? Do you need to consider whether the former is consistent with the latter? See 'The approach to decision-making' for further advice.

    - Are the "tilted balance" provisions of Framework paragraph 11(d) likely to be in play? If so, do the parties agree or disagree that paragraph 11(d) applies? If

[7] If you are unable to prepare for and carry out the case management conference, there may be scope for a colleague Inspector to carry out that element on your behalf.
[8] See Annexes M and N
[9] A similar approach applies to a Pre-Inquiry Meeting (PIM)

they disagree, will there be a need to hear evidence on five-year housing land supply, and/or on whether development plan policies are relevant, most important for determining the appeal, or out-of-date?

- Has reference been made to a planning obligation? (See 'Planning Obligations' for more information.) Have the parties started to think about conditions?

- Are there likely to be any procedural problems? (complaints about the venue, likely requests for postponements or adjournments.)

- Prepare a list of questions (on any procedural matters, the main issues and any other matters) that you would specifically like the parties to address. You should not raise any issue at the inquiry that will come as a surprise to the parties – make sure everything is covered in the conference call.

- Consider which of your main issues need to be dealt with through cross-examination, and if any would be more appropriately considered in a round-table discussion, or through written representations (this could also be done by calling appellant witness(es) to take questions from interested parties and the Inspector).

- Think about the running order for the inquiry. For main issues being dealt with through cross-examination, would it be more effective to group the witnesses by party (hearing all the witnesses for one party and then all the witnesses for the next), or topic based by main issue (hearing all the witnesses on the first main issue before moving on to the witnesses on the next main issue)? When is the best time to schedule any round-table sessions? Are any other persons likely to want to speak? Might they want to be heard early on?

- Consider asking the parties to give some thought as to the layout of the inquiry room for the round table sessions.

- Consider any adjustments that maybe required to accommodate Virtual events / Blended events / Hybrid events.

32. As part of your preparation you will need to prepare a pre-conference call note for the case officer to issue to the parties. The note should normally be issued at least three days before the date set for the conference call. An example is provided at Annex M1.

33. The pre-conference call note should set out all the matters concerning the inquiry arrangements that you wish to inform the parties about, or to discuss with them. As far as possible the note should provide clear guidance to the parties about those matters, while retaining the flexibility to alter your guidance in the light of the discussion. There may be some matters on which you need to have a discussion during the conference call before coming to a view.

34. You will also need to prepare an agenda for the conference call to be issued with your pre-conference call note. This will be a list of the matters to be discussed during the call, based on your note. See Annex M3 for an example agenda.

35. Along with your pre-conference call note and agenda, the case officer will send the parties instructions for how to dial into the conference call and a note on the etiquette for the call itself - see Annex N.

The case management conference call

36. The case management conference call takes place within seven weeks of the start date. The appellant, the LPA and any Rule 6 parties take part. You have discretion to invite others to participate if you consider it necessary.

37. The case officer will send you instructions in advance on how to dial into the conference call. On the day of the call they will make sure all the parties are on the line beforehand, and then contact you (by email or Teams depending on your preference) just before the start time and ask you to dial in. Once you are on the line the case officer will hang up and leave you in charge of the call.

38. The main purpose of the case conference call is to allow you to give clear indications to the parties about the management of the case and the presentation of evidence, so that the inquiry is conducted efficiently and effectively. It also enables you to seek the parties' views on any matters where that would help you to decide on the most effective way to run the inquiry.

39. The case conference call will usually cover the following topics:

    - Main issues
    - How the main issues will be dealt with at the inquiry
    - How the Inquiry will be carried out – a physical or virtual event, a blended event or a hybrid event
    - How conditions and planning obligations will be dealt with
    - Core documents
    - Inquiry venue
    - Inquiry running order / programme
    - Site visit
    - Timetable for submitting documents
    - Costs procedure

Include additional topics in the conference call as necessary.

40. It is best to prepare a speaking script for your use during the conference call, to ensure that you cover all the matters that you need to. An example script is provided at Annex M3.

41. When you have covered everything on the agenda and established that there are no outstanding matters, you should announce that the conference call is concluded and hang up immediately, leaving the other parties to hang up after you.

The Inspector's post-conference call note

42. You will need to issue a post-conference call note (alternatively known as "post-conference directions") via the case officer as soon as possible after the conference

call, confirming the agreed arrangements and the timetable for submitting documents. You should aim to do this within a few days after the conference call. An example is provided at Annex M5.

Pre-inquiry meetings

43. Rule 7(2) states that the Inspector shall hold a pre-inquiry meeting:

    - If it is expected that the inquiry will last for 8 days or more (unless it is unnecessary)
    - For shorter inquiries, if it is necessary, for instance where there are multiple parties.

44. In many cases the purpose of a pre-inquiry meeting can now be met by the case management conference call. Pre-Inquiry meetings and case management conference calls will both need to be arranged as virtual meetings where relevant.

45. The aim of a pre-inquiry meeting, where one is necessary, is to make the inquiry more effective by ensuring the procedure and programme is streamlined and that the issues are clarified. The meeting is purely procedural and does not go into the merits of the case.

46. The parties should be given at least 2 weeks' notice of the meeting – Rule 7(3).

47. More advice can be found in Annex D. An example of a pre-inquiry note can be found in Annex E.

Preparation before the inquiry

48. The proofs of evidence must be submitted at least 4 weeks before the inquiry opens. It is usually sensible to set the same (or an earlier) deadline for any other documents you may request during the case conference call.

49. Ensure you have sufficient time charted between the submission deadline for the proofs of evidence and the opening of the inquiry, to carry out your necessary preparation. At this stage you will need to:

    - Read the proofs of evidence thoroughly, noting down any questions which arise in your mind as you do so: you may need to raise the questions in the inquiry if they are not raised by the opposing party;
    - Consider if it would assist you to send out in advance, via the case officer, a list of questions that you would like the parties to address at the inquiry;
    - Prepare your opening and closing remarks, including a list of those who are likely to appear (see Annex A for an example);
    - Prepare a list of features you want to see on the site visit (and add to it during the inquiry, as necessary).
    - Make a list of everything you need to take with you to the inquiry – don't leave anything you will need behind!

Pre-inquiry visit to the site and venue

50. It is good practice to carry out an unaccompanied site visit before the inquiry. This can be done the day before or on the morning before you open (if there is time).

51. Be discreet. You can only view the site from public land. If you are approached explain your purpose as briefly as possible. Avoid getting involved in any conversation.

52. The advantages of a pre-inquiry visit are that it can:

- show the parties that you know the site and how it relates to its surroundings
- help avoid unnecessary explanation about the site
- help you to follow and understand site specific evidence
- help you ask informed questions
- ensure that you know where the site is and how to get there from the inquiry venue
- check that the site notice has been posted (especially if you know this might be an issue).

53. However, pre-inquiry site visits are not always essential (for example, if relevant features cannot be seen from public land or if the issues relate to policy only - and you are confident of finding your way to the site).

54. You may also find it helpful to visit the inquiry venue on the day before so that you know how to find it and, if necessary, where to park.

55. If you stay overnight, do not talk with any guests as they might be involved in the inquiry.

The day of the inquiry[10]

56. Aim to arrive at the venue around 45-60 minutes before the inquiry opens and report to reception. This will allow you to:

- Ensure the room and venue is suitable for the inquiry. Are you happy with the arrangements, including the position of the witness table? If the room is unsatisfactory or requires furniture to be moved, return to reception and request changes. See 'The venue and facilities for public inquiries, hearings and examinations' on Gov.uk which provides advice on the location of the venue and the layout of the inquiry room. Section 8 to that document provides a suggested layout for the inquiry room.
- Check the room is suitable in terms of health and safety requirements. See Annex C of this guide for a checklist.

[10] Some of this advice will clearly not be applicable to 'Virtual Events'

- Check that the room will be accessible. Section 4 of The venue and facilities for public inquiries, hearings and examinations explains that LPAs are responsible for ensuring that venues are accessible, but this does not absolve Inspectors of responsibility. It states that if you consider the facilities to be unacceptable you will adjourn until a more accessible venue is provided.

- Check that water will be available for all. You can accept an offer of tea/coffee if it has been provided for all participants.

- Check if you have a retiring room or, if not, where you can wait away from the parties. A retiring room allows you to avoid contact with the parties before the inquiry opens and in breaks. It is also somewhere you can work. Section 7 of 'The venue and facilities for public inquiries, hearings and examinations' says that one should be provided.

- Decide whether or not to use any PA system. Make sure you know how it works. However, the acoustics may only be apparent when the room is full so be prepared to adjust your approach.

57. Once you have set out your papers and nameplate it is best to leave the room so that you are not left alone with just one of the parties. Take your own notes with you. Avoid getting involved in any discussion. If anyone wants to engage you in conversation about the appeal, ask them to raise it once you have opened the inquiry. However, you can deal with matters relating to the inquiry venue (such as the layout of the room).

58. Return to the inquiry room a few minutes before the inquiry starts. Most Inspectors aim to enter at least 2 minutes before.

59. Check that:

- the layout you were happy with earlier has not been changed by others

- that there is enough seating for third parties

- that no-one has put placards up which need taking down

- get a feel for any disruptive behaviour

- any other matters that may need checking before you start.

60. While you wait to formally open the inquiry you can use the time to check the main parties are present and ask people to sit down.

Running the inquiry

The order of the inquiry

61. The Rules govern the procedures at an inquiry[11]:

[11] Note that there are specific differences relating to enforcement and LDC inquiries

Rule 16(1) - "except as otherwise provided in these Rules, the Inspector shall determine the procedure at an inquiry"

Rule 16(4) – the LPA shall begin and the appellant has the right of final reply (unless you determine otherwise) – other persons will be heard in such order as you determine.

Rule 16(5) - A person entitled to appeal shall be entitled to call evidence and the appellant, LPA and any statutory party shall be entitled to cross-examine persons giving evidence.

62. The inquiry will follow the running order agreed during the case management conference call and confirmed in your post-conference call note / directions. The following is a brief outline of a typical running order. More details on each stage are given in the next section.

63. All inquiries normally start with:

Inspector's opening announcements, including confirmation of the main issues and the running order agreed during the conference call, an indication of the site visit timing/representation, and identification of anyone present who wishes to speak during the inquiry.

Opening statements from the main parties – usually the appellant followed by the LPA and any Rule 6 party.

64. **The evidence is then heard using the method(s) agreed during the case management conference call**. As well as the formal presentation of evidence and cross-examination, these may also include round-table discussions led by the Inspector.

65. It is for the Inspector to decide when to **hear from anyone else present at the inquiry who wishes to speak**. When the running order permits, it is usually best to hear from anyone else opposed to the proposal after the LPA (and any Rule 6 party) has finished presenting its case, and before the appellant begins[12]. In this way the full case against the proposal is made before the appellant presents their case. This can help reduce repetition.

66. After all the evidence has been heard, the rest of the inquiry normally follows this order:

Discussion of conditions and planning obligations – by means of an Inspector-led, round-table discussion

Closing submissions – usually beginning with the LPA, followed by any statutory or Rule 6 parties, and ending with the appellant

[12] It is now common practice to hear interested parties who wish to speak after openings. It often helps those who work/have other commitments. It is also common to hear evidence on a topic-by-topic basis, so more unusual now to reach a point where all the evidence for one side has been presented to be followed by the evidence of the other. Although some Inquiries do still run that way.

Cost applications – if any

Inspector closes the inquiry

67. An indicative inquiry programme can be found at Annex B.

68. It is good practice to check that everyone has been heard before you move on.

Opening the inquiry

69. Open the inquiry at the appointed time. Use the clock in the room (if there is one and it is reasonably accurate).

70. Your opening should be delivered in a confident and purposeful manner. Look up and avoid undue reference to your notes.

71. An example of opening remarks is set out in Annex A. However, these are not prescriptive and can be adjusted to suit your own style and the case, provided that you cover the essential items.

72. The essential items to cover in your opening are set out below. You can vary the order. Many of these matters will have been covered in the case management conference call, but you need to explain them for the benefit of other persons who are present. If there is no-one present apart from those who took part in the case conference call, your opening can be much briefer, just covering the preliminary matters, filming and recording, notification to interested parties, final time estimates (earlier versions will have been submitted by the parties) and any other outstanding matters that need to be resolved.

    Preliminary matters – the appeal before you (appellant, site address and description of development) and that you have been appointed by the Secretary of State. Check that everyone can hear you. Note the emergency exits and procedures (see below for more information). Ask for mobile phones to be off or silent and that no calls are made/taken during the inquiry. State the timing of breaks.

    Appearances – for the benefit of others present, ask the advocates in turn to give their names, who is instructing them, and the witnesses they intend to call. Then ask if anyone else who is present wishes to speak. If anyone is speaking for an organisation ask them to give their position and their authority to speak / give evidence for the organisation. It is not necessary to take the names of people who intend only to observe. However, if they subsequently decide to speak, you will need to remember to record their names so that they can be listed in your decision. Clarify any qualifications if not already provided in written form. Check when others wishing to speak will be available.

    Filming and recording – you should ask if anyone intends to film or record the event (see separate section below for further information).

    Notification to interested parties – make sure that you have a copy of the LPA's letters of notification of (1) the appeal and (2) the time, date and place of the inquiry and the list of those to whom these were sent. (It is best to secure these before the start of the inquiry through the case officer before the Inquiry to pick up any issues.) See below for further advice if there is a problem.

Representations from interested parties – note those you have received and, if necessary, allow the main parties to check they have the same copies.

Case management conference call – explain that, in accordance with the Planning Inspectorate's Procedural Guide, you have held a case conference call with the main parties and any Rule 6 party, say when it took place, and briefly outline what was discussed.

Statement of common ground and proofs of evidence – note the full statement of cases and proofs you have received, any summaries. Are spare copies available that can be made available for other people who are present?

Plans – Confirm which plans were before the LPA when it made its decision and the status of any other plans (superseded, illustrative or provided with the appeal?). If revised plans were provided with, or during, the appeal process you will need to explain how you intend to deal with them. See 'The approach to decision-making' for more information.

Late evidence/documents (if there are any) explain your approach – are you accepting it? (see further advice on this below). You will need to list any documents accepted at the inquiry at the end of your decision. It is best to number them in sequence as you receive them, and keep a running list – further guidance can be found in Annex 1 of the Approach to Decision-Making ITM Chapter.

Procedure – explain the order of the inquiry and its format – such as opening statements, the process(es) by which the main issues are being dealt with, (formal presentation of evidence and/or round-table sessions), discussion on conditions (without prejudice) and any planning obligations, closing submissions, costs (noting that you have the power to initiate costs[13]) and site visit. Include adjustments to arrangements to accommodate for Virtual Events / Blended Events / Hybrid Events as necessary.

Time estimates – ask the advocates to supply estimates for evidence in chief and cross-examination. You can use the programme at Annex B to note them down. Will the inquiry be completed in the allotted time? Do you need to seek the assistance of the advocates to ensure it does? Explain about breaks for lunch etc. It can be helpful to outline a general timetable (a timetable is required for inquiries of 8 days or more – Rule 8(1)). You can ask for time estimates before the inquiry at the case conference call or through the case officer. Following this, you can also send out a draft timetable beforehand which can be discussed during your opening.

Main issues and any other matters – Rule 16(2) states that, at the start of the inquiry, the Inspector shall identify what are, in his or her opinion, the main issues to be considered and any matters on which further explanation is required. The main issues will have been agreed at the case management conference call but you should read them out if there are other persons present. Note that Rule 16(3) also allows other people who wish to speak to refer to any issue they consider relevant.

[13] See advice on the Inspector's initiation of an award of costs in the Cost Awards chapter of the Inspector Training Manual

Procedural matters – seek clarification on anything which is uncertain (for example the description of development or, in outline applications, which matters are reserved).

Commence – start with the opening statements for the appellant and LPA.

Virtual Events – Requesting Technical Support During an event.

General approach

73. Inquiries are more formal than hearings. When evidence is formally presented, witnesses are introduced by their advocates and there is a set procedure for giving evidence in chief, cross-examination and re-examination which is led by the advocates[14]. For Virtual Events – see 'Controlling the event' guidance.

74. However, it is important that you demonstrate that you are in charge of the proceedings. Avoid being tentative, passive or quiet. Clearly direct the transition between different stages of the inquiry – for example:

    "Mr A – you may now cross-examine Mrs B"

    "Mrs C – would you now call your 2nd witness"

    "We will now move on to the third main issue, which we are going to deal with in round-table format"

75. Although you must retain an appropriate degree of formality, you can smile and inject a degree of humour if you think it is appropriate but do so carefully and avoid referring to controversial subjects or making light of the issues at the inquiry.

76. It is for you to decide whether the advocates sit or stand during the inquiry. In a small venue, with a small number of people, it is usually best that they stay seated. However, in larger venues with more people attending it may be preferable for them to stand during the formal presentation of evidence so that people can see who is speaking.

77. Witnesses should generally be asked to sit at the witness table. However, see the advice below about interested persons.

78. Be prepared to intervene during the formal presentation of evidence. Careful interventions can assist your understanding of the arguments and may help reduce the length of an inquiry. For example, you might intervene:

    - To suggest a brief adjournment to allow the parties to reach agreement on a particular matter, if you feel that would be more productive than continuing the adversarial approach (for example, on conditions or technical matters).

[14] An advocate is usually a legal professional who presents or pleads a party's case - in planning inquiries they will often be either "(of) Counsel" or "King's Counsel" (the latter are known for short as "KCs" and colloquially as "silks"). Both are barristers, but a KC is more senior. Sometimes the appellant may act as their own advocate or their agent may be their advocate

Alternatively, you could ask them to do this during a slightly extended lunch break or overnight.

- To ensure the inquiry is run efficiently and effectively (see 'Your interventions' below).

- To ask your own questions (see 'Inspector's questions' below).

Opening statements

79. This is where the main parties (including Rule 6 parties) briefly outline their overall case. It sets the scene for what is to follow and can be particularly helpful to other persons who are present. Encourage brevity – 5-15 minutes should be enough for even the most complex of cases. They should not be used to recite or present evidence.

Formal presentation of evidence

80. For the formal presentation of evidence, witnesses may be grouped by party (i.e, all the witnesses for one party are heard, followed by all the witnesses for the next party), or by main issue (all the witnesses dealing with one main issue are heard before moving on to those dealing with the next main issue).

81. Irrespective of how they are grouped, the order in which witnesses are usually heard is: the LPA's witness(es) first, then the witness(es) for any Rule 6 party, and finally the witness(es) for the appellant. The same order applies whether witnesses are grouped by party or by main issue.

82. Each witness presents their evidence in the following sequence:

    - Examination-in-chief, led by the advocate for the party calling the witness

    - Cross examination by the advocate(s) for the opposing main party and by any opposing Rule 6 parties);

    - Any other questions to the witness (from others wishing to speak at the inquiry who are opposed to the party calling the witness);

    - Re-examination by the advocate for the party calling the witness.

    Examination-in-chief

83. This is where individual witnesses are taken through their evidence by their own advocate. Most witnesses prepare a proof of evidence. It is not necessary for the proof, or even a summary of it, to be read out in full. However, where there are members of the public or other parties present who have not seen the proofs, it can be helpful for important parts of the summary to be read out to provide context. Nevertheless, discourage the reading out of too much factual material.

84. The examination in chief has three purposes:

    - It allows the advocate to highlight key points in the witness's evidence

    - It helps make others who are present aware of the case in more detail

- It allows the witness to settle in before being cross-examined

Cross-examination

85. This is the key part of the adversarial inquiry process and the point at which the evidence of one party is tested by the advocate(s) for the opposing party/ies. Advocates may ask a series of questions that are intended to lead the witness for the opposing side towards a particular answer. The aim of the questioning may not always be clear at the outset and it is best to avoid intervening too early. However, the advocates have a duty to assist the inquiry, so be prepared to intervene when the questioning does not appear to be helping you. Consider asking – 'where is this going?'

Re-examination

86. This is where the advocate has the opportunity to ask questions of their own witness following their cross-examination by the opposing advocate. Generally, this will be used in an attempt to clarify matters or recover ground that may have been lost in cross-examination. However, it should only be directed at matters raised in cross-examination. It should not be used to introduce new points or ask leading questions (where the question suggests the expected answer). If it is, you should ask the witness's advocate to desist. Do not wait for an objection from the opposing advocate.

Round-table sessions

87. You will have agreed during the case management conference call which main issues are to be dealt with in round-table sessions. It is the Inspector's choice, taking the views of the parties into account (Guidance notes are attached as Appendix N3.) The format of a round-table sessions is similar to that of a s78 Hearing. The Inspector leads the discussion, inviting the participants to make contributions about the points on which the Inspector wishes to hear their views or to seek further information (including the submission of written representations). You should make sure that all participants have the opportunity to have their say on each point, and that the appellant has the final say.

88. The main parties, any Rule 6 parties, and any interested persons who have indicated a wish to speak may take part in round-table sessions. Advocates take part on the same basis as the other participants: they do not introduce witnesses or present evidence formally. It is for each party to decide whether their witness or their advocate (or both) is best placed to deal with a particular point.

89. The term "round-table" describes the format of the discussion rather than the physical layout of the room: in most inquiry rooms there will not be the opportunity to change the room layout. However, you should ensure that all those who want to take part, including interested persons, are seated in the front row (if you are in the Council chamber or a similar venue), or at the inquiry table. Participants speak from their seats: the witness table is not used.

90. The Inspector controls the discussion in much the same way as in a s78 hearing. Ensure that participants stick to the point under discussion and move on to the next point when everyone has had their say and you have all the information you need. At the end of the session, ask if anyone has any other points to make that they have not already covered, and if so, give the other participants the opportunity to respond. Make sure the appellant has the final say.

Conditions and obligations

91. You will also need to deal with:

    Conditions – these are usually best dealt with after all the witnesses and any others present have been heard, and by means of an Inspector-led round-table discussion involving the appellant, the LPA, any Rule 6 party and any others present who wish to be involved. You will need to consider whether the suggested conditions meet the tests in paragraph 56 of the Framework, even if they have been agreed by the main parties. Consider any conditions which have emerged during the inquiry, have been suggested by interested persons or which you wish to advance. Emphasise that the discussion is standard practice and does not indicate that you have made up your mind about the appeal. See 'Conditions' for further advice.

    Planning Obligations – also generally best considered by means of an Inspector-led round-table discussion - you will need to assess whether the obligation complies with the 3 tests in paragraph 57 of the Framework (and CIL Regulation 122 if relevant) and whether it would be effective (see Section 18 of the *Procedural Guide - Planning Appeals – England*.) Alternatively, if the obligation was central to a main issue, it may already have been discussed. However, you might have questions about its format, wording and effectiveness. See 'Planning Obligations' and Section 18 of the Procedural Guidance for more good practice advice.

Closing submissions

92. Invite each party who called witnesses to make a closing submission. It is usual to finish with the appellant. Generally, it should not be necessary to interrupt a closing submission. However, you should intervene if it appears that new evidence is being introduced or new points made or if anything is unclear.

93. You can ask the advocates before they start, or at any point during the inquiry, to cover any particular points in closing. You can also seek clarification at the end of their submission. This could be important if significant concessions were made in cross-examination.

94. If the inquiry lasts 8 or more days the closing submissions should be provided in writing - Rule 16(14). Written submissions are often provided in shorter inquiries and are invariably helpful. You can request them at the start, but you cannot require them. Sometimes you may be able to arrange the programme so that the advocates have time to prepare their closings in writing - for example, by arranging the site visit (which advocates do not normally attend) at the start of the final day.

95. Well-prepared closing statements can be very helpful when writing your decision as they will summarise the key points. Take careful notes if they are not submitted in writing, or if advocates depart from the script they have given you. If a reference is made to a legal judgment, try to secure a full reference and, if possible, a copy of the judgment.

96. You should not accept the offer of written versions of the closing submissions after the inquiry, whether this is offered in addition to, or instead of, closing submissions being given orally. This is because there is a risk that new points could be raised in the written versions, necessitating further exchanges between the parties. In addition, any others present would not be able to hear all of the closing submissions.

Costs applications

97. National guidance on the award of costs is provided in the Appeals section of the government's Planning Practice Guidance. Detailed advice is also provided in the ITM chapter on Costs Awards. All costs applications must be formally made before the inquiry is closed[15].

98. Before closing the inquiry ask if any party intends to apply for costs. To assist with timetabling there is no reason why you should not ask about the costs intentions of the parties during then case conference call and in your opening. However, you should always provide the formal opportunity at the end of the inquiry.

99. If a costs application has been made **in writing**:

    - Does the applicant intend to add anything to it, orally?
    - Has the written application been provided beforehand to the other party and to you? If not, ensure copies are provided and, if necessary, allow an adjournment for both you and the other party to read it
    - If it was provided beforehand, has the other side responded to it in writing? If so, do they have any further response? If they have not prepared a written response, they should be given the opportunity to respond orally.
    - If both you and the parties have had adequate opportunity to read and understand the application and any response, they do not need to be read out.

100. If the costs application is made, or added to, **orally**, the other side should be given the chance to respond and the costs applicant should then be given the final chance to respond.

101. In some cases it may be reasonable, in the interests of fairness, to allow an adjournment so that a response to a costs application can be prepared.

102. If the costs application and response are made orally, you will need to take a full note. Ask the parties to proceed at a steady pace.

103. Clarify whether the application is seeking a full or partial award. If partial, then what for? Intervene to seek clarification if need be.

104. If both parties make applications these should be heard one after the other. Start with the LPA.

105. If the inquiry is adjourned to another day, then any costs applications should be heard at the end of the resumed event.

[15] See the Planning Practice Guidance ID 16-035-20140306 "All costs applications must be formally made to the Inspector before the hearing or inquiry is closed, but as a matter of good practice, and where circumstances allow, costs applications should be made in writing before the hearing or inquiry. Any such application must be brought to the Inspector's attention at the hearing or inquiry, and can be added to or amended as necessary in oral submissions."

Closing the inquiry

106. After hearing the closing submissions but before closing the inquiry you should:

- Make arrangements for the site visit (and to any other sites)

107. In some rare cases you may accept that additional material can be provided after closing – for example a completed s106 agreement where all that is lacking are the signatures. If so, set a firm timetable for it to be received. You should also be clear about any opportunities for the parties to comment in writing on such material. Make it clear that if the material is not received on time, you will proceed to make your decision without it.

108. You may be asked when your decision will be issued. It is best to refer to the Rosewell targets. There is no requirement in the Rules or advice in the Procedural Guide that says you must specify a date.

109. Before you close the inquiry it is good practice to check that everyone has said what they want to, that all matters have been covered and that you have received all necessary documents. Thank everyone for their attendance and contributions. Do not leave anything behind.

110. You should formally close the inquiry before leaving the venue (unless you are due to resume the inquiry on another day, in which case it should be adjourned).

Site visit

111. Rule 17 provides that:

- You may make an unaccompanied site inspection before or during the inquiry without giving notice - Rule 17(1)

- You may visit the site in the company of the appellant, LPA and any statutory party during an inquiry or after its close and shall do so if requested by the appellant or LPA - Rule 17(2)

- If you intend to make an accompanied site inspection this must be announced – Rule 17(3)

112. Given the inquiry proceedings are based on the formal presentation and examination of evidence, it is not appropriate to allow discussion at the site visit (as you might with a hearing which has not yet been closed). Consequently, site visits are conducted in the same way as for written representations cases. The purpose is for you to see the site and surroundings. Explain that you cannot listen to any representations/discussion/arguments, but that the parties can point out physical features.

113. In many cases the site visit will take place after the inquiry has closed. However, it can sometimes be beneficial to visit the site during an adjournment – for example:

- Where visiting the site will help you understand the evidence

- In winter time when daylight hours are short (to help avoid the inquiry running onto an extra day)

- To allow the advocates time to prepare written closing statements

Be aware though that this may involve an adjournment of two hours or more, which might be inconvenient for others present who are not attending the site visit.

114. In cases where it is necessary for you to go onto the site, the visit will need to be accompanied. However, if the site is visible from a public place it may be possible to carry out an unaccompanied site visit – but only with the agreement of the parties.

115. If the visit is accompanied, representatives of both the appellant and LPA must be present. Interested persons may attend, although if the site visit is to go on private land, the permission of the landowner for them to do so will be required. Try to discourage large numbers from attending by explaining the purpose of the visit and asking for one or two representatives to be appointed.

116. If you travelled to the venue by public transport it may be expedient to accept a lift from one of the main parties. If so, you must ensure that representatives of both the appellant and the LPA travel with you in the vehicle. Explain this to any interested persons.

117. If the site visit reveals something that you feel is important but which was not discussed during the inquiry, you will need to seek the written views of the parties.

118. Some of the advice in the 'Site Visits' ITM Chapter is also relevant including on the conduct of the visit and about requests to view other sites in the area, taking photographs and health and safety.

Your interventions

119. You should intervene:

- To stop discourteous/disruptive behaviour by anyone to you or to any of the parties
- To control aggressive or bullying behaviour by an advocate
- Where the advocate is seeking to score points which are not directly relevant to your consideration of the planning merits of the case
- Where the witness is being evasive or is not answering the question
- To prevent repetitious questions or answers
- To prevent unhelpful or irrelevant questions
- To prevent questions which are outside the witness's expertise/knowledge
- To prevent questions and answers which seem calculated to annoy
- To stop cross-examination on legal matters if it does not appear to be assisting. Such matters are normally dealt with in submissions rather than through the cross-examination of a non-lawyer by an advocate
- To prevent leading questions during the examination-in-chief or re-examination – for example, the advocate should not be suggesting the answer to a question

which they are asking of their own witness. If necessary, ask the advocate to re-frame the question.

- To remind interested persons that this is their opportunity to ask a question of the witness – not to make a statement

120. Usually, a polite reminder will be effective. You will generally find that advocates will do their best to assist you.

121. Inquiries may be attended by large numbers of people who have strong feelings about the proposal. People may be unfamiliar with the planning system and inquiry procedures. They may be frustrated by having to wait to present their case. You may need to take active control:

    - Act very quickly to stop any disruption – including audible whispering, general conversation, gasps, applauding, booing or unsolicited comments. It will usually be enough to stress that you need quiet so that you can hear all the participants and that the procedures are designed to allow everyone to have their say.

    - If feelings are running high, you could amend the programme so that interested persons are allowed to speak first. This can help to defuse tension. However, you should seek the views of the main parties before doing this.

    - If things become heated, a short adjournment can sometimes help restore calm.

122. If the approaches outlined above are not successful you have the power to:

    - Refuse to permit irrelevant or repetitious evidence or cross-examination – Rule 16(6). However, be aware that the Rule states that if you refuse to permit oral evidence, the person may submit the evidence in writing before the close of the inquiry – so you need to tell them that.

    - Require a person behaving disruptively to leave, refuse to permit the person to return or permit them to return subject to conditions but you should allow any such person to submit any evidence in writing before the close of the inquiry - Rule 16(9) - so you need to tell them that.

    - Proceed with an inquiry in the absence of a person entitled to appear at it – Rule 16(11).

123. Only rarely will you find it necessary to give a formal warning or ask someone to leave. If you do, make a careful written note of the case reference, main parties, date, venue and a summary of the behaviour, warning and response (for future reference in the event of a complaint). If you have asked someone to leave and they refuse, or if disorderly behaviour is disrupting proceedings despite your best attempts to maintain control, you should contact building security in the first place. Your final option is for the police to be called, preferably by building security[16] and/or to adjourn to another day.

[16] Section 4(1)(a) of the Public Order Act 1986 relating to disorderly behaviour applies

Your questions

124. During the formal presentation of evidence, you can and should intervene to ask questions of a witness. This might be to seek clarification on a particular point or to address something that you feel has not been covered adequately. It is best to ask questions during the relevant part of the evidence-in-chief, or if not, at the end of it, so that the advocate can re-examine their witness if need be. Alternatively, you should offer the opportunity to re-examine.

125. You do not necessarily need to ask both main parties the same questions. However, you must ensure you are fair to both parties. Any questions you ask must be framed neutrally.

Adjournments

126. Rule 16(13) allows you to adjourn an inquiry.

127. Short adjournments may be necessary and can be helpful. For example:

- if it would be reasonable to allow a party to read new evidence and to prepare their response (or if you need to read it).
- to allow the parties to discuss and seek agreement on a particular matter – for instance, the wording of conditions.

128. All adjournments must be to a definite time and place. This should be announced before adjourning – Rule 16(13). For short adjournments it will usually be at a given time later the same day, or the next day, at the same venue.

129. After an adjournment the inquiry is 'resumed'.

130. An adjournment to another day will be necessary if the inquiry over-runs the time allocated for it. In some cases a change in circumstances or new evidence may also necessitate an adjournment to a different day, for example, if natural justice requires that parties are given adequate time to respond.

131. Wherever possible the resumption date should be early enough to enable the target date for issuing the decision to be met. You will need to ask the LPA about the availability of the venue, and check the parties' own availability, before setting the resumption date. You should stress to the parties the importance of meeting the target date in the light of the Rosewell recommendations. If necessary, you can also contact the PINS case officer or their team leader to discuss possible resumption dates before confirming the date to the parties at the event.

132. As with short adjournments, you should announce the date, time and venue for the resumption before adjourning the inquiry.

133. In exceptional circumstances it may not be possible to set a resumption date at the inquiry. Such a situation is highly undesirable because of the risk it poses to the target for issuing the decision. But if it is unavoidable, you would need to contact the case officer who will set the resumption date and issue a new site notice.

134. Try to keep adjournments to a minimum – any adjournment should be necessary or helpful. Depending on the circumstances it might be appropriate to warn about the risks of a costs application.

Note taking

135. You need to record the discussion and your notes may well be the only record of what took place. However, you do not need to keep a word-by-word account. Instead focus on the main points made, particularly those which have not previously been set out in writing. If necessary, you can ask the parties to slow down or repeat a point if you wish to make sure you record it accurately.

136. You need to strike the right balance between engaging with the parties (through eye contact) and taking notes. You also need to manage the event as a whole.

137. A more thorough note will be needed if a costs application or legal submission is made orally. Ask the parties to speak slowly so you can make a thorough note of what they say.

138. It can be helpful to record the start and finish times of the various stages of the inquiry. This allows you to monitor whether the advocates are sticking to their time estimates.

139. Be aware that your notes might have to be made available following a request from one of the parties (for example, in connection with a complaint or High Court challenge).

Conduct of the parties at the inquiry

Interested persons

140. Interested persons (often also called 'third parties' or 'interested parties') may not be able to stay for all the proceedings. You cannot expect them to be familiar with the inquiry process and the planning system or to have full knowledge of the case or to offer solutions or alternatives. Accordingly:

- You may need to hear from people out of the normal order – seek the agreement of the main parties.
- Try to ensure that people do not feel intimidated by the proceedings or any of the participants. It is your role to help ensure that they can get across their arguments. In some cases people may feel more comfortable speaking from where they are sitting rather than from the witness table.
- Ask if they are prepared to be cross-examined or to be asked questions by the main parties – inform them that that this will increase the weight that can be attached to their evidence (untested evidence carries less weight).
- You may need to help interested persons frame their questions.

141. There is nothing in the Rules to prevent an interested person making an opening statement or a closing submission. However, this will usually only be done by any Rule 6 parties and organisations/groups and is at the Inspector's discretion. Their opening statements will usually be heard after the main parties have opened, and their closing submissions before those of the appellant.

Rule 6 parties

142. Rule 6(6) allows the Secretary of State to require 'any other person' to provide a statement of case. In most cases Rule 6 status will have been sought by a third party who wishes to take an active part in the inquiry. There will be a letter on the file requiring a statement of case. To have Rule 6 status the third party must have complied with the requirement to provide a statement of case within 4 weeks of being required to do so. They will often be legally represented.

143. In most cases the Rule 6 party will prepare proof(s) of evidence and will take part in the same way as the appellant and LPA – i.e through the formal presentation of evidence, participation in any round-table sessions, and the making of opening statements and closing submissions.

144. You will need to adjust the standard running order to accommodate Rule 6 parties. If they are opposing the proposal:

- any opening statement and closing submission from a Rule 6 party would usually follow the LPA
- witnesses for a Rule 6 party would normally be heard after the LPA but before the appellant
- Rule 6 parties can cross-examine the appellant – usually after the LPA

145. Further advice is provided in the 'Guide to Rule 6 for interested parties involved in an inquiry – planning appeals and called-in applications – England'.

Discussion between an advocate and their witness

146. Once cross-examination of a witness has started, they should not be permitted to discuss evidence with their own advocate until their re-examination has been completed (for example, during breaks). Consequently, where possible, it is best to avoid adjourning over lunch or overnight where cross-examination has started but re-examination has not been completed. If this is not possible you should remind the witness of the need to avoid communicating with their advocate in the adjournment.

Who has the right to cross-examine?

147. Under Rule 16(5) only the appellant, the LPA and statutory parties[17] have the right to cross-examine persons giving evidence. However, in the interests of natural justice, Rule 6 parties should always be allowed to cross-examine and interested persons should normally be allowed to ask questions of a witness giving evidence for the side they oppose. Try to make sure that questions do not repeat those already put by the opposing advocate.

148. The convention is that statutory parties should normally be given the opportunity to present their case and cross-examine/ask questions before any other parties.

Can people ask a question of "their own side"?

149. Occasionally, Rule 6 parties or interested persons may want to ask a question of a witness who is on the same side as them. Although there is nothing in the Rules to

[17] The term statutory party is defined in Rule 2(1).

say that this should not be allowed, the general convention is that a witness should not be cross-examined by their own side. However, if there are fundamental differences between parties who are, nevertheless, seeking the same outcome to the appeal, it can be reasonable to allow questions. In some cases it may work best if any questions are put through you.

Advocates who are also witnesses

150. Sometimes professional persons may appear in a dual capacity as an advocate and as an expert witness. This should not normally present any difficulties. However, it is important to distinguish between the two roles and they should sit at the witness table when giving evidence. For obvious reasons, they will be unable to re-examine themselves.

Expert witnesses

151. The weight to be afforded to the evidence of an expert witness could depend on their qualifications and experience. This is because the evidence of an expert in a particular field should be well informed. However, it is the quality of the evidence that is of primary importance (and the degree to which it stands up to being tested under cross-examination).

Officers who disagree with their local authority

152. An LPA does not always accept the advice of its professional officers and, consequently, some decisions are made against the officers' recommendation.

153. In these circumstances, it is for the LPA to decide whether to call such officers as witnesses. If they do, it is reasonable for the opposing advocate to ask the officers questions about their own professional views and the advice they provided to the LPA. It will be for you to decide what bearing their answers have on the weight you attach to their evidence. It will usually be established that there is a distinction between their own professional view and their representation of the views of the authority at the inquiry.

154. However, in many such cases the LPA will employ a consultant or use a different officer or an elected member to give evidence instead.

Appearances by more than one authority

155. In areas where there are two tiers of local government, the authority responsible for dealing with the application is the local planning authority for the purpose of the Rules - Rule 2(1).

156. The other authority has a right to appear and give evidence at any inquiry into such a case - Rule 11(1)(c). However, they are not entitled to cross-examine witnesses and can only do so at the Inspector's discretion. This is because the other authority is not defined as a statutory party and so is not included in the list of parties entitled to cross-examine in Rule 16(5). However, if there are significant differences in the cases of the two authorities, the other authority should be allowed to cross-examine on these matters.

157. Cross-examination must be permitted if a refusal to allow it would result in a denial of natural justice to the authority. But any attempt to cover the same ground should be prevented if it is repetitious. Where there is no significant difference between the two

cases, you should make it clear that only one of the advocates will be allowed to cross-examine. This should be the one with the right to do so (for example the LPA).

158. Where any local authority has expressed in writing an adverse view which has been included in the LPA's statement of case, that local authority may be required to make a representative available at the inquiry (Rule 12). The representative may be called as a witness by the LPA. Alternatively, the authority may wish to present its own case, particularly if its evidence is contrary to that of the LPA.

Representatives of organisations

159. Check the position of anyone who states that they are representing an organisation. Do they have authority to represent the organisation? It can also be helpful to know the number of members and how the organisation arrived at their position on the appeal (for example, was there a vote at a meeting or a committee decision?).

Representatives of government departments

160. Where the Secretary of State or Historic England has given a direction[18] or the Secretary of State, another Minister of the Crown or a government department or certain other bodies have expressed a view about the application[19] the appellant, LPA or a person entitled to appear can apply in writing for a representative to appear at the inquiry – Rule 12(1).

161. Rule 12(2) states that in these circumstances the Secretary of State shall make a representative available. That person shall give evidence and be subject to cross-examination – Rule 12(3).

162. Rule 12(4) requires that the representative shall not be required to answer a question which is directed to the merits of government policy (although such questions can be asked – it is up to the representative to decide how or if they should respond).

163. The LPA may call such representatives as witnesses. Otherwise they should normally be called upon to give their evidence independently at an early stage in the proceedings.

164. To be taken into account, departmental evidence must be made available to the other parties. The departmental witnesses are required by Rule 12 to give evidence and to be subject to cross-examination to the same extent as other witnesses. The balancing of departmental views against other material considerations is a matter for the Secretary of State or the Inspector acting on his or her behalf.

165. Sometimes representatives of a government department attend the inquiry other than in pursuance of the above rule. They may then appear on their own or be called by a party. You should give them the same protection against questioning on the merits of government policy.

Assessors/specialist advisors

166. An Assessor is a specialist adviser, usually scientific or technical, selected to assist you by hearing, testing and weighing evidence of a specialised nature that may be

[18] Under Rule 4(2)(a) or (b).
[19] Under Rule 4(2)(c)

outside the normal experience of the Inspector but which may have an important bearing on the issues to be decided. See Annex I for more information.

Issues that might arise during or after the inquiry

What if a main party is not present?

167. If one of the main parties is not present at the appointed time - open the inquiry. Establish who is present by taking appearances and explain the position. It is possible that the person is ill, has been delayed while travelling or has gone to the wrong venue.

168. If the appellant is missing, ask the LPA to try to contact them. If the LPA is not present, ask the appellant to try to contact them. If the appellant/LPA does not have the contact details, adjourn, phone and ask the case officer to try and contact them.

169. Adjourn initially for 15-20 minutes. More than one adjournment may be needed to establish the position. If it is feasible, allow a reasonable period of time for the missing party to arrive so that the inquiry can continue on the same day.

170. If there is no prospect of the missing person attending and you have no reason to believe that the missing party has behaved irresponsibly, explain that you do not intend to conduct the inquiry without one of the main parties present (because to do so could be unfair) and will therefore have to adjourn it.

171. In most cases, the first preference will be for the inquiry to be rearranged. Explain that you will not be able to arrange a date to re-open as one of the main parties is missing and that the case officer will be in contact later. Adjourn the inquiry. When you return home, contact the case officer who will write to the parties.

172. If exceptionally, you consider that it might be possible to carry out the appeal by the written representations procedure (instead of rearranging the inquiry), you should first seek the views of those present. You will also need to be sure you can carry out the site visit unaccompanied, as you cannot make a visit accompanied by only one party. If there is support for this view and you consider it reasonable in the circumstances, close the inquiry and carry out the unaccompanied site visit. On your return home, contact the case officer who will write to the parties.

173. If you consider that one of the parties has acted irresponsibly or unreasonably – see the advice in Annex F.

174. If one of the main parties falls ill, you may need to adjourn the inquiry, if necessary, to another day. This will depend on the severity of the illness and the demands of the event. The same will apply if you fall ill.

175. If the inquiry is to be rearranged, you should hear any application for costs at the end of the rearranged inquiry.

176. If you intend to complete the case by the written representations procedure, it is possible that one of the parties may indicate that they wish to make an application for costs. If so, you should hear this before you close the inquiry. You should then prepare a report on the costs application. A copy of the report should be sent to the Costs Team mailbox. A note should also be placed on the appeal file to the effect that the appeal file and report should be forwarded to the Costs Team when the

appeal decision has been issued. The Costs Team will complete the costs process and make the costs decision.

What if the venue is not large enough?

177. No-one should be precluded from attending an inquiry even if they do not want to speak. If it becomes clear that the venue is not large enough, you will need to adjourn to allow the LPA to find a more suitable place to hold the inquiry – if at all possible on the same day. Open the inquiry and seek the views of the main parties.

178. Do not accept a suggestion that people should be admitted on a first come first served basis or that attendance should be prioritised in any way.

Rulings

179. You may be asked to make a ruling at any stage of the inquiry (although the party making the request may not use the term 'ruling'). This might for example, be about

- whether you will accept new evidence or revised plans
- whether a procedural problem may have led to unfairness which needs to be remedied
- whether the appeal or application is valid
- whether the inquiry should be adjourned for some reason

180. Ask the parties for their views. Hear from the party/ies making or supporting the request first, then from anyone opposing it. Ask any questions you may have. If necessary, adjourn for a short period to consider the points made. Keep a careful note of any discussion and the conclusions you have announced.

181. It may sometimes be advisable to prepare the ruling in writing during an adjournment and read it out to the parties. This would be appropriate where there are legal matters or complex issues on which the appeal may turn.

182. When considering a ruling, bear in mind the following:

- natural justice - the ruling should not put any party at a significant disadvantage
- your own interests - provided there is no breach of natural justice, a point may best be resolved on the basis of how you may best be helped
- a breach of the Rules does not itself invalidate the proceedings or require redress - if no-one is at a disadvantage, the breach is unlikely to be serious
- a breach of the Rules in the course of producing evidence does not render that evidence inadmissible – however, you may need to consider whether an adjournment may be necessary
- a simple common-sense ruling is more likely to be appropriate than one which is complex, or is based on complicated reasoning

- where possible it is best to reach a conclusion at the inquiry– however, in some circumstances it might be possible or preferable to ensure all possibilities are examined at the inquiry and then to resolve the dispute in your decision

- where a ruling is sought that affects the conduct of the inquiry, you must give clear guidance to the parties. It is essential that all concerned understand any ruling you give even if they are unhappy about its implications.

183. Try to be aware of the precise terms of any relevant legislation but seek the assistance of the advocates and invite them to address you on the relevant provisions. One important aspect is the extent to which the relevant Rules give you specific powers. Your ruling will carry greater weight if made in pursuance of such a power. In planning cases, the Rules make it clear that it is for you to determine the procedure except as provided otherwise in the Rules – Rule 16(1). Ensure that you are looking at the most recent amended version of the Rules (but check any transitional arrangements / commencement dates). It is essential that you study the Rules and act in accordance with them at all times. In addition to the appropriate Acts and Rules, any stated objectives of the legislation should be taken into account.

184. When a ruling has to be given, if a party persists in objecting, you should advise them that you intend to proceed with the inquiry but if they have a complaint, they should contact the Quality Assurance Unit. Alternatively, they would have the option of applying for judicial review or, once the decision had been issued, making a High Court challenge.

185. You should never say that a ruling has been based on instructions or advice from the office as you alone are in control of the inquiry proceedings and make any and all rulings.

What if the LPA no longer intends to defend a reason for refusal?

186. The LPA may announce at the start of the inquiry, or before it, that they no longer intend to defend a particular reason for refusal. Occasionally they may explain that they no longer have any objections to the proposal. Even though this may have been made clear in writing, it is helpful to ask the LPA to explain the reasons for their position, particularly if other people are attending the inquiry.

187. The LPA may state that it no longer intends to present any evidence on these matters, or at all. However, if you have questions or if there are interested persons who oppose the proposal on these grounds you may request that the LPA witness is made available to answer questions. If the issue is a technical one (e.g. traffic) it can be advantageous to hold a session where the expert witnesses for the LPA and appellant share the witness table and answer any questions from you and other parties in turn.

188. In these circumstances, the appellant may still want to present their evidence-in-chief on the subject, particularly if there are third-party objections. Similarly, they may wish to ask questions of interested persons opposing the proposal. You should allow this.

189. However, if the LPA declines to present evidence they should not be allowed to cross-examine the appellant. Essentially, therefore the evidence of the appellant will be un-tested – except by any questions that you or interested persons raise.

190. Where the LPA no longer intend to defend a particular reason for refusal or have any objections to the proposal, the appellant may decide to make an application for costs, or you may decide to initiate an award of costs.

What if there are no notification letter(s) or site notice?

191. There should be 2 notification letters – the first about the appeal and the second about the inquiry arrangements. Check that the copies of the letters and site notice you receive from the LPA are correctly dated, relate to the correct appeal and venue and have been sent to the right people. A site notice should also have been posted.

192. Rule 4(4)(b) requires that:

> The local planning authority shall ensure that within 1 week of the starting date any (i) statutory party; and (ii) other person who made representations to the local planning authority about the application occasioning the appeal, have been notified in writing that an appeal has been made and of the address to which and of the period within which they may make representations to the Secretary of State.

193. Rule 10(5) states that:

> The Secretary of State may[20] in writing require the local planning authority to take one or more of the following steps – (a) not less than 2 weeks before the date fixed for the holding of a inquiry, to publish a notice of the inquiry in one or more newspapers circulating in the locality in which the land is situated; (b) to send a notice of the inquiry to such persons or classes of persons as he may specify, within such period as he may specify; or (c) to post a notice of the inquiry in a conspicuous place near to the land …

194. If the correct notification has not taken place you will need to decide whether to adjourn the inquiry to another date in order to allow it to be carried out. However, you will only need to do this if you consider that there is a significant risk that the interests of any interested person or party could be prejudiced because they did not know about the appeal, only found out about the appeal 2 weeks before the inquiry was due to take place, or were not notified or given little notice of the inquiry. For example, were they deprived of the opportunity to attend or respond to evidence? Seek the views of the parties at the inquiry and consider the circumstances.

195. Be pragmatic. A breach of the Rules does not inevitably require an adjournment to carry out further publicity. You are looking to see whether any party has been unreasonably disadvantaged.

What if late evidence is offered at the inquiry?

196. Rule 16(10) states that you may allow any person to alter or add to their full statement of case. Rule 16(12) allows you to take into account any written representation or evidence or any other document received by you before the inquiry opens or during it (provided that you disclose it at the inquiry).

[20] Although the Rule uses the term 'may' in practice the Secretary of State will usually require these steps to have been taken to ensure adequate notification and publicity.

197. It is best to establish early on in the inquiry if anyone intends to submit new evidence or documents. This will allow all the documents to be copied in one go and the need for any adjournment to be considered (to allow the witnesses and you to read them). This can help avoid serial disruptions.

198. If you are offered late evidence at the inquiry you will need to decide whether to accept it. The 'Procedural Guide - Planning Appeals – England' provides advice and states that:

    - late evidence will only be accepted "in exceptional circumstances" – 9.4.8 (this might for example, include, where relevant, a recent decision on a similar development, a recent appeal decision or a change in development plan or national policy.

199. The 'Procedural Guide - Planning Appeals – England' advises in 9.4.8 that before deciding whether, exceptionally, to accept late evidence, you will require:

    - an explanation as to why it was not received by us in accordance with the rules; and
    - an explanation of how and why the material is relevant; and
    - the opposing party's views on whether it should be accepted.

200. The Procedural Guide advises that you will need to be satisfied that accepting the late evidence would be procedurally fair to all parties (including interested persons).

201. The Procedural Guide also makes it clear that if the Inspector accepts late evidence this may result in the need for an adjournment. Another party may make an application for costs or the Inspector may initiate an award of costs. This would be on the basis that the necessary adjournment had directly caused another party to incur expenses that would not otherwise have been necessary. If you intend to accept late evidence, therefore, you should advise about the possibility of a costs award being made, and make it clear that you are able to initiate a costs award even if the opposing party does not make a costs application. This will allow the party the opportunity to consider whether or not to submit the evidence.

202. In practice, Inspectors tend to accept late representations (whilst warning of the risk of costs and allowing an adjournment where necessary). In the context of an inquiry and before the evidence has been heard, it can be difficult to make an informed decision about the potential relevance of the representation to your decision. Consequently, acceptance can often be the most prudent action to take. In any event, the overriding consideration is to be fair to all parties.

203. If you decide to accept late evidence you will need to make sure that the other main party (and any other interested persons) have the chance to read and comment on it. You should seek the views of the parties on this. You have 3 main options:

    1. If the new evidence is straightforward it may be possible to avoid adjourning or, alternatively, you and the parties may be able to read it during a short adjournment or over lunch.

    2. If the evidence is more substantial, you might need to adjourn for a specific period (say 30 minutes) but still resume on the same day.

3. If the evidence is complex, substantial and/or technical you might need to adjourn to another day. This could be the case if one of the parties might reasonably wish to seek advice from an expert or if you need time to read and understand the new evidence.

204. The same principles apply if an interested person requests that you accept late evidence.

205. Keep a running list of any documents received.

Should I accept evidence after the inquiry has closed?

206. Rule 18(2) states that the Inspector may disregard any written representations, evidence or document received after the close of the inquiry. The intention of the Rule is to ensure that the parties provide evidence and documents, including s106 obligations on time. However, you should exercise this right with care. There may be occasions where you do need to accept late evidence (see the paragraph below).

207. In some cases important matters may arise after the inquiry has closed but before you have made your decision. This could include a change in national or local planning policy or a relevant appeal decision. A failure to take these into account could leave a decision vulnerable to challenge in the High Court.[21] Issues may be brought to your attention by one of the parties or they may be apparent to you for other reasons. In either case, if the issue is one which might reasonably have a bearing on your decision, you should:

- accept the evidence offered or proactively raise the issue - and allow the parties to comment in writing. Rule 18(3) states that if, after the close of an inquiry, you propose to take new evidence into account which was not raised at the inquiry you shall afford those entitled to appear at the inquiry with an opportunity to make written representations or to ask for the re-opening of the inquiry. You can give your views on the most appropriate method of handling the matter, but the inquiry must be re-opened if the LPA or appellant ask for it – Rule 18(4). Alternatively, you might decide the inquiry should be re-opened.

208. It is possible that immediately after closing you are asked to listen to someone who has not been heard. You can reduce the risk of this happening by double-checking before you close. However, if it does occur, and if everyone is still present, you can ask the parties if they agree to briefly re-opening the inquiry. However, if this is not possible then no further representations can be heard. You should ask the person who wanted to speak to send their representations to the case officer by a certain date and note on the file that further representations are expected.

Amended plans and proposals

209. If amended plans have been provided with the appeal or during the appeal process, you will need to decide whether you intend to determine the appeal on the basis of these plans or those which were before the LPA when it made its decision. In most cases this question will have been resolved during the case conference call. If,

[21] In Wainhomes v SSCLG [2013] EWHC 597 the issue of 5 year supply was central. The Inspector declined to consider two recent appeal decisions. However, these decisions dealt with the same issues and might have caused the Inspector to reach a different conclusion. Consequently, they should have been taken into account.

exceptionally, it arises at the inquiry, you should seek the views of the main parties and any interested persons. If at all possible decide on this at the start of the inquiry.

210. You will need to decide if accepting the revised plans would deprive those who should have been consulted on the changed development of the opportunity of such consultation (the Wheatcroft principles). Further advice is provided in Part 1 of 'The Approach to Decision-Making' ITM chapter and Section 16 of the 'Procedural Guide - Planning Appeals – England.'

Ensuring a 'fair crack of the whip'

211. It is important to make sure that everyone has the chance to consider and comment upon evidence which you intend to rely on. Consequently, all potentially important issues should be identified and discussed at the inquiry. If necessary, this may involve allowing an adjournment so that the relevant party (or parties) can consider their response. This could apply if:

- One party raises a new argument or introduces new evidence
- You raise an issue which is not contested or has not been mentioned or has only been mentioned in passing (and so which the parties could not reasonably expect you to rely on).

212. This was addressed in: Castleford Homes Ltd v SSETR [2001] as cited in Van Dem Boomen & Anor, R (on the application of) v Ashford Borough Council & Anor [2007]:

"Did the claimant have a 'fair crack of the whip?' [i.e a fair chance or opportunity] Was the claimant deprived of an opportunity to present material by an approach on the part of the Inspector which he did not and could not have reasonably have anticipated?"

"It is obviously helpful if an Inspector does flag up issues which the parties do not appear to have fully appreciated or explored. The point at which a failure to do so amounts to a breach of the rules of natural justice and becomes unfair is a question of degree, there being no general requirement for an Inspector to reveal any provisional thinking. It involves a judgment being made as to what is fair or unfair in a particular case. "

And also in Edward Poole v SSCLG & Cannock Chase DC [2008]:

"If a party to an inquiry reasonably believes that a matter which was in dispute has been dealt with by way of agreement in a statement of common ground, it may well be unfair to allow the apparently agreed issue to be reopened without giving the party a proper opportunity to address the issue, if necessary by calling expert evidence."

"… if an Inspector is to take a line which has not been explored, perhaps because a party has been under the misapprehension as to the true position of its opponents, …, fairness means that an Inspector give the party an opportunity to deal with it."

What if the appellant wishes to withdraw the appeal or application?

213. If this happens on your arrival at the event you do not have to formally open the inquiry. However, the withdrawal of the appeal must be confirmed to you there and then in writing. You should also ensure that any interested parties arriving for the inquiry are made aware that it has been withdrawn.

214. If the inquiry has opened, the appellant can withdraw the appeal orally as long as it is announced to the inquiry. However, it is best to ask for confirmation of withdrawal in writing.

215. If the appeal is withdrawn during an adjournment to a different day the inquiry can be closed in writing. You will need to make sure all parties are informed. However, if the appeal is withdrawn very close to the day of resumption, it may be necessary to resume the inquiry briefly and then close it in person. In either case, ensure that the case officer writes to all parties to confirm that the appeal has been withdrawn.

216. If any party seeks to apply for costs, refer them to the relevant section of the government's Planning Practice Guidance (it is under "Appeals") which advises that any applications should be made to the Planning Inspectorate by letter or application form (on the Planning Portal) within 4 weeks of receiving confirmation that the appeal has been withdrawn.[22]

What if the validity of the appeal or application is challenged?

217. Listen to the arguments put to you. Unless the interests of a party have been seriously prejudiced you should continue with the inquiry. A breach of the Rules does not itself invalidate the proceedings or require redress. If no-one is at a disadvantage, the breach is unlikely to be serious. If objections persist you may need to advise the person making them that, although you intend to continue with the inquiry, they should make their concerns known in writing to the case officer straightaway.

Requests for recovery of jurisdiction by the Secretary of State

218. In the case of a transferred appeal, you may be asked to refer the case to the Secretary of State. If so, note the arguments put forward and inform the parties that consideration will be given to seeking the Secretary of State's ruling as to whether jurisdiction should be recovered. After the inquiry, the matter must be brought to the attention of the office immediately so that a decision on recovery can be made.

Hearing evidence under oath

219. You have the statutory authority at an inquiry to take evidence on oath, or under an affirmation, or to require the person examined to make a declaration of the truth of the matter in respect of which he or she is being examined. Hearing evidence on oath is unlikely to be necessary at most s78 inquiries, although it may occur where factual evidence is disputed. However, it is more common in enforcement and LDC inquiries. Further advice is provided at Paragraphs 910 – 918 and Annex 3 of the 'Enforcement ITM Chapter'. For advice on oaths at virtual / blended / Hybrid events, see 'Advice on oaths at virtual and other inquiries

Withdrawal of a sole objection to an order

220. In the case of compulsory purchase and similar orders where you are told that a sole or sole-outstanding objection has been withdrawn, the inquiry should be opened in the usual way, bearing in mind that the inquiry is into the order itself and not merely the objection, that the inquiry has been advertised and that third parties may wish to

[22] Planning Practice Guidance paragraph 035 ID 16-035-20140306

be heard. The extent to which evidence needs to be given in support of the case stated by the LPA is a matter for your discretion in the light of the particular case. You will make a recommendation in the usual way.

Requests for a witness statement

221. You have the power under s250(2) of the Local Government Act 1972 to issue a witness summons. It is a power that is used very rarely and should be exercised with extreme caution and only as the very last resort. Instead this can normally be resolved by a clear request from you that the attendance of a particular person would be helpful. In any case, although you can compel someone to attend, you cannot require them to speak. Seek advice before you require attendance. For more information see Annex G.

Should I hear evidence in private?

222. Section 321 of the 1990 Act requires that inquiries are held in public – oral evidence shall be heard in public and documentary evidence shall be open to public inspection.

223. An exception to this is where public disclosure would be contrary to the national interest because it related to national security. In such cases the Secretary of State can direct the hearing of evidence in private (in 'camera'). If this arises seek guidance from a Professional Lead.

224. Commercial confidentiality or the privacy of individuals is not, on its own, a sufficient justification for an in-camera session. Such requests should be dismissed.

Should I allow filming and recording?

225. The presumption is that filming and recording will be allowed. You should ask in your opening if anyone intends to film or record the event. If so, check that everyone is comfortable with this (for example, they may not wish to have their faces shown or voice recorded). If there are concerns, you can ask that filming/recording is restricted to certain angles. It is unlikely to be appropriate to film children or vulnerable adults even if no objections are raised. If filming/recording does take place ask that it is carried out responsibly. Inquiries will either be live streamed or recorded where they are held virtually and in most cases this is arranged through the LPA. If they are to be livestreamed this should be arranged either prior to or at the CMC and the request should be made via the online request for support form. If the Inquiry is to be livestreamed or recorded, the Inspector should advise participants and observers that Inquiry sessions are public events and that the recording would only be published for training and quality purposes in occasional circumstances only. If the event is 'virtual' people can choose to turn their camera off should they be concerned about being filmed. Witnesses may be requested to keep cameras on when giving evidence to the Inquiry.

226. If filming or recording goes ahead, make sure that it is not disruptive or distracting, that it does not discourage anyone from participating and that there are no safety problems (for example, trip hazards or access obstructions. It is for you to decide whether filming or recording would be acceptable.

227. In exceptional circumstances, where there are factors which outweigh the public interest in allowing the inquiry to be filmed or recorded, it may be necessary for the Inspector to prevent or restrict such filming or recording. This would include situations where there is a danger to the safety of the individual. If the venue has restrictions on

filming in place, then confirmation will be needed before the inquiry that those restrictions can be lifted.

228. If PINS receives a request to film or record beforehand, the Press Office will ensure that the case officer informs you that this is being proposed.

Other issues that might arise

229. Advice on the following can be found in 'Hearings'

- The validity of the appeal or application is challenged
- Video evidence?
- Unacceptable remarks
- A participant cannot hear
- A participant cannot speak English or read.

230. And advice on the following can be found in 'The approach to decision-making':

- Requests for split decisions
- Confidential evidence
- Arguments that planning permission is not needed.

After the inquiry has closed

231. Once the inquiry has been closed and any subsequent written representations received, your approach to writing the decision is likely to be similar to cases considered by written representations. However, if an important point was only raised at the inquiry or if relevant matters were agreed or conceded, then this should usually be mentioned.

232. At the end of your decision you will need to add lists of:

- Any documents, plans and photos handed to you during the inquiry. The lists need to be comprehensive but it is not always necessary to refer to every individual document – for example – "bundle of documents submitted by Mrs #"

233. The LPA's letter(s) of notification should only be listed if it was provided at the inquiry, rather than before.

234. All documents received at the inquiry should be numbered and placed on the top right hand side of the file (unless bulk requires that they are placed in a separate folder).

Re-opened inquiries

Circumstances

235. Inquiries may be re-opened in the following circumstances:

- following a reference back to the parties - in transferred planning cases under Rule 18(4) or in non-transferred cases under Rule 17(7) of the Secretary of State Rules

- at the discretion of the Inspector (in transferred cases) or of the Secretary of State (in non-transferred cases)

- when a decision has been quashed by the High Court (re-determination)

236. The section above on 'Accepting evidence after the inquiry has closed' provides more advice.

Procedures at a re-opened inquiry

237. When **new evidence** is to be considered, someone representing the source of that new evidence will attend the re-opened inquiry to give the relevant evidence and submit to cross-examination directed to this evidence but not to any other points.

238. When a **new issue of fact** has caused the inquiry to be re-opened, the parties concerned will have been told what it is, and they will be entitled to bring any evidence that reasonably bears on it. It may or may not be necessary in this type of case for anyone to attend and give evidence, although you can explain how you would like to proceed. If anyone does appear, this will be on the terms set out in the preceding paragraph.

239. Rule 17(5) and (7) of SI 2000/1624 allows the Secretary of State to re-open an inquiry, but only before he has issued his decision. This is a rare occurrence and on past occasions the Secretary of State has written to the parties to explain why the inquiry is being re-opened. The full examination of the evidence already given that relates to the issue that led to re-opening will need to be permitted, and it may well be that further evidence of the issue will have to be considered. It should not, however, be necessary to hear all over again the evidence already given on the issue and in many cases it may well be that the inquiry will take the form of argument rather than evidence.

240. When re-opening the inquiry, you should emphasise that the proceedings are strictly limited to the consideration of the specific topic or matter that requires further examination.

241. Normally, the re-opened inquiry is taken by the original Inspector, but if not, new Inspectors should add that they have studied the documents, plans, etc, and read the Inspector's report of the original inquiry (if already published). This should help to shorten the proceedings.

242. After the opening announcement you should take the appearances in the usual way. The usual procedure at inquiries regarding the press, notification of the decision and the list of persons present should be complied with. Before any representations are heard, you should explain the procedure to be adopted and if there are any objections you should hear them and, if possible, resolve them by agreement. It may be relevant to invite the parties to consider what conditions, if any, might be imposed in relation to the matters discussed. The usual reference to applications for costs should be made.

243. You should say, where a departmental representative is present, that the representative, whose name should be given, is present to give evidence and answer questions.

244. The Rules regarding the previous submission of Rule 6 statements and proofs of evidence do not apply in a re-opened planning inquiry. However, the Case Officer will normally have written to the parties to require statements and proofs. If this has not been done you can set out a timetable for the receipt of evidence before the resumption. Consequently, it will not usually be necessary for the parties to read evidence out in full.

245. The body or person responsible for producing the new evidence or calling attention to the new issue should be asked to present their case first. This will normally be in the form of a statement which, usually, will have been circulated to the principal parties beforehand and is subject to examination in the usual way. The parties should then be heard in turn, followed by the interested persons, with the applicant or appellant being allowed the right of final reply. The inquiry should then be closed. An accompanied inspection of the site should be made if necessary.

Voluntary re-opening

246. Powers are also available to you to enable an inquiry to be re-opened voluntarily when not required by the rules. Inquiries should only be re-opened voluntarily in exceptional circumstances (for example if an issue is likely to be of particular concern to interested persons) as the point at issue can usually be dealt with by written representations. If you consider that a transferred inquiry should be re-opened, you should consult your Inspector Manager or Group Ops Lead. The Secretary of State may decide that a non-transferred inquiry should be re-opened in order that some factor, which was not discussed at the inquiry, can be taken into account.

Redeterminations

247. An inquiry may be re-opened for the redetermination of a case when the decision has been quashed by the court (High Court, Appeal Court or Supreme Court).[23]

248. The quashed decision is treated as if it had not been made and is incapable of having had any legal effect.

249. Procedure at the re-opened inquiry follows the normal sequence. In your opening announcement, you must make clear that you are re-opening the inquiry held earlier and that the case has to be re-determined as the previous decision was quashed by the court.

250. Because you must deal with the case 'de novo', all the original issues should be considered, as well as taking into account any new evidence or material changes since the first inquiry (such the emergence of new development plans or national planning policies). However, there may be scope for saving time in relation to matters unaffected by the court's decision and rehearsed extensively previously. Where this is the case you should carefully canvass this possibility with the parties and seek agreement. Ask them whether there are any parts of the original evidence which do not need to be reheard and obtain their agreement in advance. Make clear any areas where it has been agreed that it is unnecessary for further evidence to be given.

[23] Redetermined appeals can also be dealt with by means of a hearing or by written representations. See s319A of the 1990 Act and Rule 20.

251. For more information, see 'Redetermination following a High Court challenge' in 'The approach to decision making part 1 – constructing the decision'.

Long inquiries

252. Advice on the holding of long inquiries can be found in Annex H.

Call-in applications

253. Under s77 of the Town and Country Planning Act 1990 the Secretary of State may call in planning applications to be referred to him for a decision instead of being dealt with by LPAs. See Annex J for more information.

Annex A - Inquiry opening and closing[24]

Before opening

Is the venue and room suitable and accessible?

What are the fire escape procedures?

PA and sound loop

While waiting to open:

- check the main parties are present and seated where you might expect
- ensure you have appropriate paper/pens for note taking

Introduction

Good morning, the time is now 10 o'clock and the inquiry is open.

Can everyone switch off their mobile phones or set them to silent.

Can everybody hear me? *[if not please move closer]. If at any time anyone cannot hear please indicate and I will try and make arrangements so that you can.*

My name is [], I am a [chartered town planner] and I have been appointed by the Secretary of State to hold this inquiry.

The inquiry is into an appeal made by [], under s78 of the Town and Country Planning Act 1990 against the decision of [LPA[25]] to refuse planning permission for [] at []

[or the failure of [LPA] to give notice of their decisions within the prescribed period for …]

[note if anyone observing from the Planning Inspectorate]

Can the [LPA] please explain the emergency evacuation procedures?

Appearances

I shall now take the names of those who wish to speak. [*This part should only be necessary if members of the public are present, as it should otherwise have been covered in the case conference call*.]

<u>For the appellant</u>

advocate

[24] Opening in Virtual Inquiries or Hybrid Inquiries may need modifying to reflect the procedure.
[25] Where the appeal is in a National Park, be careful to use the term 'Authority' rather than 'Council'

[record name and whether King's Counsel/Counsel etc and who instructed by]

witnesses

[record name, clarify position in organisation and qualifications]

Check order of witnesses being called

For the LPA/Council

advocate

[record name and whether King's Counsel/Counsel etc and who instructed by]

witnesses

[record name, clarify position in organisation and qualifications if necessary]

Check order of witnesses being called

Anyone else?

Is there anyone else who would like to say something at the inquiry?

I need to know

- your name and address
- whether you are representing anyone or any group [and if you have authority to do so]
- whether you support or object to the proposed development
- any qualifications you want recording
- I assume you will be happy to answer questions on your evidence and to be cross examined?
- do you have any specific time restrictions?

If you speak, give evidence or ask questions during the inquiry your name will be listed in my decision letter.

If a large number:

- don't need to hear the same evidence twice – not an effective use of inquiry time
- consider nominating a representative/s who can deal with main points

Filming/recording

Does anyone intend to film or record the event?

If no-one else has objections to this, I have no objections, provided it does not become disruptive. If anyone does have a difficulty with this, please let me know now.

[If filming/recording takes place] – please make sure any filming or recording is carried out responsibly and does not interfere with the smooth running of the inquiry.

Notification letters

Can I have a copy of the Council's letters of notification

- of the appeal
- confirming the date, time and location of the inquiry and
- the list of those to whom the notification was sent

[if not already provided]

Has the Council notified all relevant parties and has the site notice has been posted?

[check – were the letters sent to those they should have been, in time – are the details of the date, time and venue correct?]

[If the letters cannot be provided, were not sent or are incorrect – consider whether the interests of any parties would be prejudiced – if they would be adjourn to allow the correct notification to take place. Be wary of offers to provide the letters later on in the inquiry]

Representations

I have copies of representations made in response to the:

- appeal notification
- original planning application consultation and the appeal notification

I will take these into account in reaching my decision

[if there is any doubt about whether the main parties have seen all of these – offer the opportunity to check them - e.g. during an adjournment – or consider giving out a list if you have one]

Case management conference call [*This part will only be necessary if members of the public are present*]

I held a case management conference call by telephone on [date] with representatives of the appellant and the Council [and any Rule 6 parties]. It was held to discuss the procedure for the inquiry and the merits of the appeal were not discussed. The conference call covered the following matters: [briefly list the matters that were discussed]

Proofs of evidence

I have received proofs of evidence [and summaries] from

Appellant

Council

[Rule 6 parties, if any – refer to them by name]

I have read all of these proofs and so I would expect them to be largely taken as read.

Are there any spare copies for interested parties?

[if for some reason, the main parties do not appear to have each other's proof, consider adjourning at the end of the opening]

Procedure

I shall follow the procedure in the 2000 Inquiry Procedure Rules [i.e The Town and Country Planning Appeals (Determination by Inspectors) (Inquiries Procedure) (England) Rules 2000]

Are the parties familiar with the procedures?

Short version – if all present are familiar [e.g. if there are no interested parties or members of the public present]

- Opening statements?
- Council's witnesses
- Appellant's witnesses
- [Rule 6 parties' witnesses]
- Order in which witnesses will be heard (e.g., grouped by party or by main issue)
- Any matters to be dealt with in round-table sessions
- Conditions/obligations
- Closing submissions
- Costs
- Site visit
- If lasting more than 1 day can material be left in the room overnight?

Full version (usually necessary if interested parties or members of the public are present)

1. When I have concluded my opening remarks, I will invite the appellant and the council to each make a brief opening statement, which should be no longer than [5-15 minutes – depending on case]. This will help everyone to understand the main arguments.

2. [Then I will hear from any third parties who need to leave early]

3. As agreed during the case conference call, the following main issues will be dealt with through formal presentation of evidence and cross-examination [list relevant

main issues], and the following main issues will be considered in round-table discussion sessions led by me [list relevant main issues].

4. For the main issues that are being dealt with by formal presentation of evidence, I will ask the Council to present their evidence first – so everyone can hear their objections to the proposal. We will hear from all the Council's witnesses in turn OR we will deal with the main issues one at a time, with the Council's witness going first for each main issue [as applicable].

5. The appellant's advocate will have the opportunity to cross-examine each of the Council's witnesses and the Council's advocate may then put some questions in re-examination.

6. There will be an opportunity for questions from any interested parties intending to speak in support of the proposal and I may also have some questions.

7. [The witness(es) for any Rule 6 parties [use name of R6 party] will give their evidence next, following the same procedure.]

8. It will then be helpful to hear from local residents (and any other interested parties) opposing the proposals. Those who give evidence will normally be expected to answer questions on their evidence from the appellant's advocate and again, I may also have some questions.

9. I will then ask the appellant to present their evidence in the same way (i.e case/evidence – cross-examination by the Council – re-examination by the appellant)

10. I will indicate when local residents and others who have indicated that they wish to speak and who oppose the proposal will be able to ask questions of the appellant's witnesses.

11. I will generally ask any questions I have during the evidence in chief or before re-examination. [or alternatively say that you may ask questions at any stage in the proceedings]

12. For the main issues that are being dealt with through round-table discussion, I will ask all the advocates and the witnesses for each main issue, together with anyone else who wishes to speak about the issue, to sit in the front row of seats / around the table. I will then lead a discussion on that main issue, inviting you to put your points to me and asking questions as necessary to inform my decision on the appeal.

13. When all the main issues have been dealt with, I will hear a discussion on conditions [and planning obligations]. This is standard procedure. It does not indicate that I have made up my mind on the case and does not weaken the Council's continued opposition to the proposal or the appellant's case that planning permission should be granted. Is the list of conditions /in the agreed statement of common ground up-to-date?

14. I am not inviting any applications for costs but if anyone intends to make an application for an award of cost this should be done here before I close the inquiry. [note any receipt of written applications for costs or indications that a cost application will be made]

15. In addition, I have a power to initiate an award of costs, whether or not any applications have been made by the parties, and, if I were to do this, it would follow a written process with the relevant party after the appeal decision is issued.

16. I will then hear closing submissions from the Council, [any Rule 6 parties – refer to by name] and the appellants [request closing submissions in writing beforehand whenever possible – generally for inquiries of 2 or more days - but only required by Rule 16(14) for inquiries lasting 8 or more days]

17. I have already visited the site on my own and am familiar with it and its surroundings. However, I will be making a site visit after I close the inquiry [I will need to be accompanied on the site visit by both main parties.] As the inquiry will have been closed, the site visit will be solely for me to see the site and surroundings – no discussion.

18. Any comments on this running order?

19. Request advocates sit all the time/stand all the time [usually sit unless standing necessary for audibility/visibility].

20. Please note the position of the witness table. This is where I will hear from the various witnesses at the relevant time.

21. If lasting more than 1 day can material be left in the room overnight?

Time estimates

This inquiry is scheduled for # days. I need to establish a programme to ensure that it runs efficiently.

Can I ask both [all the] advocates to advise me, as best they can, on their time estimates [note these on proforma] [alternatively, seek time estimates before the inquiry and then discuss them at the inquiry]

<u>The Council</u>

- Evidence in Chief of Council's witnesses
- Re-examination of Council's witnesses
- Cross examination of appellant's witnesses

<u>Rule 6 party (if any)</u>

- Evidence in Chief of own witnesses
- Re-examination of own witnesses
- Cross examination of opposing side's witnesses

<u>The Appellant</u>

- Evidence in Chief of appellant's witnesses
- Re-examination of appellant's witnesses

- Cross examination of the Council's witnesses

[assess timings – following introduction and openings likely to have about 4 to 4.5 hours on first day and about 5.5 hours on subsequent days if sitting from 10am to 5pm with 1 hour for lunch and mid-morning/mid-afternoon breaks of 15 minutes each – but consider earlier starts on subsequent days]

[if necessary, outline targets for what will be covered each day]

I will break for lunch around 1 o'clock with short breaks in the morning and afternoon. I will seek the assistance of the advocates in finding suitable times to break mid-morning and mid-afternoon and aim to finish at around 5pm.

Plans

Clarify which plans were before the LPA when it made its decision.

Clarify the status of any other plans (superseded, illustrative, revised plans provided at appeal)

If revised plans submitted at appeal – decide whether to accept – seek the views of participants:

- Would they materially change the proposal?
- Would any party be prejudiced – because they might have been denied an opportunity to comment

Documents

Secure any missing or final copies of documents (statement of common ground, planning obligations, conditions)

All documents and evidence should already have been provided – however, if you intend to submit any, please tell me now

If anyone intends to submit further evidence - ask

- Is the material relevant?
- Why was it not received in accordance with the timetable [set in the Rules]?
- Are there any exceptional circumstances for it being provided now rather than with the statement of case?
- Seek the views of the other parties – have they seen the material?
- Would an adjournment be needed (how long, same day, different day)?
- If necessary, warn about risk of costs application
- Decide whether to accept [see advice in main text]

Note that the other party/parties could apply for costs and the Inspector could initiate costs [if the behaviour is unreasonable and led to unnecessary expense]

Only exceptionally will material received after the close of the inquiry be taken into account

Main issues and other matters

The main issues as I see them are [].

Has anyone got any comments?

[Outline any specific questions you may have about the main issues, other matters or procedural matters.]

Commence

That concludes my opening remarks

Are there any queries about the procedure or other matters before we start?

In that case may I ask the appellant's advocate to make a short opening statement.

After all the evidence has been heard and the discussion on conditions and on any planning obligation(s) has taken place:

Costs applications

Are there any applications for costs?

Listen to any costs applications

- Is the application available in writing? (if not already provided)
- Explain procedure – application – response – final comments on any new points
- Remind party they need to demonstrate unreasonable behaviour which has resulted in unnecessary expense
- Note that references should be made to the relevant sections within the government's Planning Practice Guidance regarding costs (under "Appeals"
- Please proceed at a steady pace – need to take notes [If costs application made or added to orally]
- Seeking full or partial award?
- Allow the other party an adjournment to consider response if necessary [if the application is made verbally or a written application is added to]

or if the costs application has already been made in writing:

- Do you still wish to proceed with your written application for costs?
- Do you intend to add anything to the application?

- Allow the other party to respond
- Any final response

Site visit

I shall now make arrangements for the site visit.

[Accompanied or unaccompanied?]

Who will attend for:

- appellant
- Council
- Any Rule 6 or interested parties (or representatives)?
- Rule 6 and interested parties need permission of appellant/landowner to go on appeal site

I will close the inquiry here - consequently:

- Purpose is for me to see the site
- Can point out physical features
- But will not listen to any further discussion of merits

Check how long to get to site?

Discuss any travel arrangements [if travelling with the appellant and LPA]

Confirm time and best place to meet

Deal with arrangements to visit any other sites

Confirm any parking arrangements

Closing

Before we leave may I have any outstanding documents

Thank you all for your contributions

The inquiry is now closed

End of day adjournment

Suitable point to adjourn the inquiry

Can I have any additional documents

Run through check list of outstanding documents/work and who is responsible

Is it possible to leave material in this room overnight?

Inquiry is adjourned until [time, date, place]

Resumption on subsequent day

Good morning, the time is now 10 o'clock and I shall resume this inquiry into the appeal made by [] against the decision of [] to refuse planning permission for []

This is the second day of the inquiry

First the usual reminders:

- mobile phones off or silent
- aim to break for lunch around 1pm, finish if at all possible by 5pm with suitable breaks mid-morning and afternoon.

On the first day I heard from: []

In a moment I will hear from: []

Before I do

- does anyone else wish to speak today who has not already indicated that they wish to do so?
- are there any procedural or housekeeping matters?
- ask for any documents previously requested

Annex B - Indicative programme

1. Inspector's opening remarks

2. Appellants opening statement

3. Council's opening statement

4. Council's formal evidence

First witness

		Time estimate
1	Council's evidence in chief	
2	Cross examination (by appellant's advocate)	
3	Any interested party questions from supporters of proposal	
4	Inspector questions	
5	Re-examination (by Council's advocate)	
		Total -

Second witness

		Time estimate
1	Council's evidence in chief	
2	Cross examination (by appellant's advocate)	
3	Any interested party questions from supporters of proposal	
4	Inspector questions	
5	Re-examination (by Council's advocate)	
		Total -

[*If there are Rule 6 parties - insert additional boxes here for their witnesses*]

5. Interested parties (opposing proposal)

Hear (1) evidence, then generally (2) Appellant's questions and (3) Inspector questions.

1	
2	
3	

6. Appellant's formal evidence

First witness

		Time estimate
1	Appellant's evidence in chief	
2	Cross examination (by Council's advocate)	
3	Any interested party questions from those opposing the proposal	
4	Inspector questions	
5	Re-examination (by appellant's advocate)	
		Total -

Second witness

		Time estimate
1	Appellants evidence in chief	
2	Cross examination (by Council's advocate)	
3	Any interested party questions from those opposing the proposal	
4	Inspector questions	
5	Re-examination (by appellant's advocate)	
		Total -

7. Interested party evidence (supporting proposal)

Hear (1) evidence, then generally (2) Council's questions and (3) Inspector questions.

1	
2	
3	

8. Round-table sessions (if any)

Main issue X	
Main issue Y	
Main issue Z	

9. Conditions and planning obligations

10. Closing submissions

Generally, Council and any other parties (e.g. Rule 6) and then appellant

11. Costs applications

Any applications for costs

12. Site visit arrangements

13. Close inquiry

Annex C - Health and safety checklist

When arriving at the venue – check the following:

	Yes/no	Any comments
Arrangements for activating the fire alarm and contacting emergency services		
The sound of the alarm and if there are any different alarm signals		
The evacuation procedure from the inquiry room, the location of fire exits, evacuation routes and assembly points		
Any planned fire alarm testing or fire evacuation drills		
The location of toilets		
Ensure persons attending at the start of each day are aware of the above		
Check that fire exits from the inquiry room are not blocked by tables or chairs etc		

Annex D - Pre-Inquiry Meetings

Unless stated otherwise, the references in this Annex are to The Town and Country Planning Appeals (Determination by Inspectors) (Inquiries Procedure) (England) Rules 2000 (SI 2000 No 1625).

Background

1 The Rules (SI 2000/1625) apply to the following:

- appeals made under s78(1) or 78(2)
- appeals in relation to listed building consent.

2 Similar provisions in respect of pre-inquiry meetings (PIMs) are included in the CPO Inquiries Procedure Rules 2007[26] and the advice contained in this Annex is equally relevant in cases held under these Rules.

3 The Town and Country Planning (Inquiries Procedure) (England) Rules 2000 (SI 2000/1624) apply where the Secretary of State will determine an appeal made under s78 or in relation to listed building consent. Under Rule 5, special pre-inquiry procedures apply. These are used very rarely, and few Inspectors are likely to become involved with them. The main special features of the procedure are the serving by the Secretary of State of a statement of the matters which appear to him to be likely to be relevant; the preparation of outline statements (see definition in the rules) by the parties at an early stage; and publication in a newspaper of a notice of the PIM. The last measure enables unknown parties to come forward and register as participants; they are therefore able to play a full part in the inquiry from the earliest stages including the obligation to produce statements as required.

Arrangements

4 All inquiries (SoS or transferred) lasting 3 days or more, and all inquiries into a called-in application, will follow a bespoke timetable.

5 Under Rule 7(2)(a) of the 2000 Inquiries Procedure Rules for transferred inquiries a PIM will be arranged for all inquiries expected to last for 8 days or more, unless the Inspector does not consider one is needed. Rule 7(2)(b) enables an Inspector to hold a PIM for shorter inquiries if he or she considers it desirable. In practice these cases should be identified at an early stage, normally through the bespoke procedure, albeit in consultation with the Inspector. Similar arrangements apply for Secretary of State cases.

6 In practice, PIMs may be arranged for inquiries of 6 days or more. The decision whether or not to hold a PIM will take into account the particular circumstances of the case and the parties' views. As these cases will be following a bespoke inquiry timetable the date and time of the PIM will normally be fixed in consultation with you once the date of the inquiry has been set. Ideally the PIM will be scheduled between the receipt of the LPA's full statement of case and the receipt of proofs of evidence. Held at this juncture the PIM will be able to influence the nature and scope of the

[26] Compulsory Purchase (Inquiries Procedure) Rules 2007 (SI 2007/3617)

evidence to be presented at the inquiry and give adequate time for any subsequent informal or technical discussions between the parties.

7 If considered necessary, on transferred cases, you may serve notice of a statement of matters about which you wish to be informed under Rule 7(1). This should be done within 10 weeks of the starting date.

8 The PIM will be arranged to suit your programme and travelling arrangements, but a Monday afternoon has often been found to be suitable in the past. Your programme will be adjusted to accommodate PIMs, and to provide the necessary balance between inquiry and reporting time.

9 Preparing for, travelling to, holding the PIM and writing notes of the meeting afterwards usually involves at least three days' work. However, the time spent can result in a considerably more efficiently run inquiry, with the result that the normal ratio of sitting to reporting days may be able to be adjusted. In these circumstances therefore it is essential that you discuss with the office revised time allocations to reflect any time saving as soon as possible following the PIM.

Preparation

10 The PIM is intended to save time at the inquiry itself and to make it more effective. Streamlining the procedure and programme and clarifying the issues will help achieve these objectives. In turn the effectiveness of the PIM will depend largely on the care with which it is arranged.

11 All relevant parties, including those entitled to appear at the inquiry whose names appear on the file at the time, should be invited to the PIM. In cases where there is a lot of public interest consideration should also be given as to whether to request that public notice is given of the PIM to enable interested persons to also attend.

12 As soon as you are aware that a PIM has been arranged, you should contact the case officer, and the Programme Officer, if the parties have made arrangements for one, because speedy communication between them will be vital.

13 A preliminary step for you is to decide whether the list of invited participants should be extended. The additions could well include representatives of societies or groups who have made representations but have not indicated whether they intend to appear at the inquiry itself.

14 Another consideration would be whether or not further PIMs are required. Initially only one PIM will be arranged, and it will be for you to fix dates for any subsequent meetings. This eventuality can arise in the case of more complex inquiries, perhaps involving several developers, which require further technical meetings or for which it is necessary to meet again to finalise the programme. Also, where there is large-scale public interest it may be beneficial to have a further PIM to discuss procedural and programming matters.

Conduct of the meeting

15 Rule 7(4) of the 2000 Inquiries Procedure Rules requires that the Inspector shall preside at the PIM and shall determine both the matters to be discussed and the procedure to be followed. The Inspector also has the power to require any person present who, in his or her opinion, is behaving in a disruptive manner to leave.

16 The relative level of informality of a s78 hearing will often be appropriate for many smaller PIMs. However, a PIM can sometimes be large, and include non-participants who are nevertheless interested in the proceedings. In such cases a more formal approach will be needed to ensure the business is conducted efficiently. Nevertheless, you should not discourage questions, even from those not directly involved. A few minutes spent courteously and carefully explaining or ventilating some matter at the PIM can save hours or even days of preparation or inquiry time, and avoid potential frustration and acrimony.

17 Some Inspectors have found that it is useful to have copies of the "Guide to Rule 6 for interested parties involved in an inquiry – planning appeals and called-in applications" with them to hand out to any Rule 6 parties – especially if their advocate is not legally qualified.

18 A pre-inquiry function of the Inspector specifically mentioned in Rule 8 is the arrangement of the timetable for the inquiry. Because some participants, especially inexperienced ones, will not initially have a clear idea of their likely contribution to the inquiry, the PIM should not be launched straight into this topic. It is better for matters such as the main issues and the nature of the evidence likely to be called by the main parties to be discussed before timetabling is considered. The matters covered in that discussion will assist inexperienced participants in forming a realistic view about their contribution to the timetable.

Agenda for the PIM

19 As previously indicated the parties will be informed at an early date in general terms of the matters to be discussed at the PIM. The actual agenda however is a matter for you, having regard to the circumstances of the particular case. The following comments may be useful in preparing an agenda. It can also be useful to prepare a draft note outlining your expectations and a timetable (which can then be the basis of your formal note of the PIM).

1. Introduction

Introduce and explain the role of any Assistant Inspector, Assessor and/or Programme Officer at the outset. It may be sensible to clarify the details of the proposals under consideration, particularly if the scheme has undergone amendments subsequent to the initial application. It should be emphasised that the PIM is solely procedural in nature and that no discussion of the merits of the proposal will be heard, especially if there are a number of third parties present. Finally, you should explain to all parties that inability to attend or to be represented at the PIM in no way prejudices any right to make representations at the inquiry itself.

2. Inquiry Venue and Accommodation Arrangements

Check the adequacy and suitability of the accommodation for the numbers expected to attend the inquiry, particularly in its opening phase; the need for a public address system; the availability of a retiring room for the Inspector and of consultation rooms for the principal parties; the provision of photocopying and telephone facilities; etc. In long complex and/or particularly contentious inquiries where disruption might occur, or a high degree of media interest is expected the physical arrangements for the inquiry will need particularly careful consideration.

3. Inquiry Dates and Sitting Times

Rule 8(1) of the 2000 Inquiry Procedure Rules requires you to prepare a timetable for the inquiry if it is expected to last for more than 8 days (and it can also be helpful in shorter inquiries). Rule 8(3) enables the timetable to be varied during the inquiry as needs be. In considering the timetable it will also be necessary to address what would be a suitable order of case presentation, the possibility of hearing evidence on a topic basis and, for multi-appeal cases, the merits of dealing with policy or strategic issues at a plenary session.

It will also be necessary to assess the extent of public interest and make an estimate of the time interested persons are likely to need to present their evidence. The question of evening sessions may arise, particularly if a significant level of local interest is involved. In multi-appeal cases the possibility of dealing with policy and strategic issues (as opposed to site specific matters) at a plenary session may need to be addressed as well as the desirability of short opening statements being made by the principal parties on the first day of the inquiry.

4. Identification of the Main Issues and Areas of Agreement

The 2000 Rules require the Inspector to identify at the start of all inquiries what he or she considers to be the main issues.[27]

For longer inquiries the PIM presents the opportunity for these to be aired at an earlier stage in the process. At the PIM you should therefore identify what you see the issues as likely to be and invite comments from the parties. This exchange can have a considerable influence on the shape and form of the inquiry itself.

It also presents a good opportunity to focus the parties on what is needed in the agreed statement of common ground and to emphasise that they need to use the time before the inquiry to meet informally and to narrow further the issues for discussion. **Statements of common ground** should as a minimum cover matters such as the site and surroundings, planning history, relevant policies, and agreed conditions and planning obligations. In addition, where the case involves complex topics of evidence, the basic technical and statistical information underpinning those subject areas can usefully be agreed because, this helps the parties to clarify and refine the fundamental matters in dispute. Similarly it can be helpful for the parties to set out the areas on which they disagree. Section 13 of the *Procedural Guide - Planning Appeals – England* gives more guidance on these statements.

The PIM also offers an opportunity for you to draw to the parties' attention any deficiencies you have identified in the documentation and to give the parties initial notification of any matters on which you wish to be informed under Rule 7(1).

In cases where an Environmental Statement has been provided the PIM presents an opportunity to point out any deficiencies identified and ask the promoter to put in hand arrangements to make them good before the inquiry.

[27] Rule 16(2)

5. Nature and Format of Evidence

Arrangements for the receipt of proofs of evidence should cover written summaries of proofs as required by Rules 14(1) & 14(2). It needs to be stressed to the parties that Rule 14 requires summaries, where they are necessary, to be sent to the Inspector at the same time as the proofs of evidence and no later than 4 weeks before the inquiry. If written statements or summaries are to be read then arrangements for the public deposit of proofs of evidence need to be made for the benefit of interested parties. Parties should be reminded that legal submissions and, for inquiries expected to last for 8 days or more, closing submissions, will be required in writing before the close of the inquiry.

In cases, which can generate large amounts of detailed technical evidence (for example, about retail trade impact or highways and traffic matters), you should ask the case officer to dispatch letters setting out the key topics on which basic information needs to be presented to inform the issues in dispute, if this has not already been done. These letters should be sent out before the PIM to focus the parties on some of the matters that will be discussed at the PIM.

6. Listing, Numbering and Availability of Documents

Agree document numbering conventions.

It is generally helpful for proofs and documents to be numbered to identify the party originating the document; for documents to be numbered in sequence separately from proofs; for each party to keep a list of the documents they have sent and to give it to you at the end of the inquiry; for appendices to be kept separate from proofs and be indexed, tabulated and paginated; and for there to be a set of core documents. Documents should be bound in such a way that bindings can be undone quickly without damaging the document.

Time can be saved at the opening of the inquiry by asking the main parties to provide details of their professional witnesses in advance.

7. Inquiry Library

Arrangements can be made for the assembly of core documents and other relevant material such as application plans, proofs, appendices, and summaries, to form the basis of an inquiry library. Responsibility for its upkeep throughout the inquiry needs to be allocated amongst the main parties and arrangements made for its location during the inquiry. Arrangements also need to be made for the placing of inquiry material on deposit at the LPA's offices before the inquiry so that members of the public may see them.

After the pre-inquiry meeting

20 Immediately following the PIM, you, or any Programme Officer, should prepare notes of the meeting setting out the matters agreed, including procedural arrangements and inquiry timetable deadlines for receipt of proofs of evidence and documents. The file should then be returned to the case officer for the notes to be sent to the parties invited to the PIM and to anyone else who asked for a copy.

Annex E - Example of a pre-inquiry note[28]

(*This note relates to a called-in inquiry under s77 but can be appropriately adapted for other inquiries)*

Appeal Ref: Proposal & Address

INQUIRY PROCEDURE ADVICE NOTE

The Inspector has read the file and having regard to the matters on which the Secretary of State wishes to be informed sets out below the issues, which need to be addressed in evidence.

1. Issues to be addressed at the inquiry

The call-in letter will form the basis for this section.

2. Appearances

The Inspector should be notified of the names of the advocates and whom they propose to call within 4 weeks of the date of the inquiry *[insert a date]* by means of an email to the Planning Inspectorate. [if not already provided].

3. Venue, dates and times of sitting

The inquiry will open on [] and is expected to last for up to [] days.

The venue for the inquiry is []. The LPA should ensure that the venue is suitable for disabled access.

The inquiry will open at 1000 hours on the first morning and thereafter it will resume daily at 0930 hours. Normally, the inquiry will adjourn at about 1700 hours every day. A break for lunch will normally be for one hour at a convenient point and there will be mid-morning and mid-afternoon breaks of about 15 minutes each.

4. Accommodation and facilities at the inquiry

The Inspector should be provided with a retiring room and a parking space.

5. Inquiry procedure

The procedure at the inquiry will generally follow the 2000 Inquiry Procedure Rules. Whilst normally the LPA would present their case first, as the LPA are in support of the called-in application, the applicants will be invited to present their case first.

6. Programming the inquiry and inquiry timetable

[28] The Pre-Inquiry Note may need modifying to reflect a Virtual Inquiry or Hybrid Event and is an opportunity to agree the process should a Virtual or Hybrid procedure be used to determine the appeal(s).

The Inspector will wish to ensure that inquiry time is efficiently used. He/she asks that all advocates provide their estimates of the time they expect to take in evidence in chief and cross-examination. He/she requests that this information should be received no later than 2 weeks before the inquiry opens i.e *insert a date*. This will enable him/her to programme the inquiry before it opens and send the timetable to all parties in advance.

7. Form of evidence and opening and closing statements

A. Statements of common ground (SoCG)

Parties are referred to the advice in Section 13 of the *Procedural Guide - Planning Appeals – England*. The statement of common ground (SoCG) should have been received 6 weeks after the application was called-in. As it has not yet been received the Inspector requests that an SoCG be received by no later than [..]. The SoCG should cover all the matters set out in the relevant section of the Procedural Guide.

B. Proofs and summaries

The timetable for receipt is as set out in the Inquiry Procedure Rules i.e 4 weeks before the start of the inquiry, *insert a date*. This deadline applies to <u>all</u> participants at the inquiry.

Parties are reminded of the strict application of the Rules by the Planning Inspectorate – proofs received out of time will be returned.

There is no provision within the Rules for Rebuttal Proofs or Supplementary Proofs. However, where these may save Inquiry time arrangements will be made for their acceptance and circulation if the Inspector is notified in advance. Any such Supplementary or Rebuttal statements should be submitted at least 1 week before the Inquiry and marked for the attention of the Inspector.

Units of measurement should be in metric and all documents should be numbered and prefixed by something which identifies the author e.g. LPA 1. Appendices should be tabulated and paginated and filed separately from the proofs.

The Inspector will want 2 copies of each proof of evidence, one for submission to the Secretary of State and one for use at the inquiry, but only one copy of any appendices and the core documents. A copy of the proofs and documents should be available for each main party who intends to take part in the inquiry. A further copy should be available on the day of presentation of any evidence in case of any third party interest.

All proofs/documents should be numbered in sequence and a list kept by each main party to give to the Inspector on disc at the end of the inquiry.

C. Core Documents

The Inspector requests that all parties agree on a list of core documents (CD) to be referred to by those giving evidence. Appendices to evidence should contain only those documents not already included in the CD bundle. The CD list should be prepared by the Council and received by the Inspector on disc in MS Word at least 4 weeks before the inquiry i.e *insert a date*.

D. Opening and closing statements

Openings statements:

All main parties will be permitted to make an opening statement at the beginning of the inquiry. Opening statements are to be produced in writing and shall not exceed 15 minutes in length. The statement should be given a document number within the relevant parties' series.

Closing statements:

These are to be emailed to the Planning Inspectorate (in the form of an MS Word document). The Inspector will endeavour to make time within the programme to permit this. Closing statements should follow the issues set out and should provide a summary of the case to be put to the Secretary of State. In his/her report to the Secretary of State it is the Inspector's intention to use the closing submissions as the basis of his/her summary of a party's case.

Closing statements should be concise and written in a simple format – for example:

- Verdana 11 pt with consecutive paragraph numbers;
- use subheadings only where needed to maximise clarity
- references to documentary evidence to include relevant document number, page and paragraph (whether a core document, appendix to a proof or a proof)
- reference to oral evidence should give the day of the evidence, the name of the witness and whether given in evidence in chief, in cross-examination or in re-examination.

Subheadings should be in **bold** and sub-subheadings in *italics*. Minimal additional formatting should be used to avoid complications when the text is pasted into the report.

The Inspector recognises that closing submissions may be subject to some alteration and elaboration when given orally and so he/she should be supplied with a type written double spaced transcript, which he/she can annotate at the time and insert where appropriate into the text supplied on disc. The transcript should be given a document number within the relevant parties' series.

The co-operation of all parties with this advice will assist the Inspector in producing his/her report quickly.

8. Conditions and obligations

Conditions: Proposed conditions should be supplied by email to the Planning Inspectorate as part of the statement of common ground. Any alternative wording of, or additional, conditions proposed by any party should also be supplied on disc.

Planning obligations: The parties are reminded that any obligation that is proposed must be signed and sealed before the close of the inquiry. A draft of the proposed obligation should be received at least 10 days before the inquiry.

9. Site visits

The Inspector will look at the site and its surroundings informally before the inquiry but will carry out formal accompanied visits during or after the inquiry. If there are any other sites which any party consider he/she needs to visit a list should be given to the Inspector at the opening of the inquiry. This can be added to during the inquiry.

Annex F - Absence of a main party/irresponsible behaviour

1 If you have reason to believe that the appellant has behaved irresponsibly and has caused/is causing an undue delay in the process, the case of the LPA and those of any other parties present may be heard, as may any applications for costs. Where it is possible to make an unaccompanied site visit the inquiry should be closed. On such a visit particular care should be taken not to get into conversation with any person near or at the site or to trespass on private property.

2 If it is clear from the pre-inquiry site visit that an accompanied site visit is necessary, agree this with the LPA and any other parties who wish to be present and a time when they are available to attend the site. The date should be 4 to 6 weeks ahead to allow time for contact to be made with the absent party. The inquiry should then be closed.

3 You should contact the case officer with the relevant Site Visit details and inform them that you wish to invoke the process under section 79(6A). The Case Officer, following the PCO Desk Instructions (Here) will write to the parties telling them of the date and time that you will attend to visit the site. The letter will also draw the absent party attention to s79(6A) of the Town and County Planning Act 1990 as amended by s18 of the Planning and Compensation Act 1991. This applies to all appeals made under s78, regardless of procedure or site visit type, and indicates

If at any time before or during the determination of such an appeal it appears to the Secretary of State that the appellant is responsible for undue delay in the progress of the appeal, he may -

(a) give the appellant notice that the appeal will be dismissed unless the appellant takes, within the period specified in the notice, steps as are specified in the notice for the expedition of the appeal; and

(b) if the appellant fails to take those steps within that period, dismiss the appeal accordingly.

4 For example, in this case, the steps necessary to expedite the appeal will be for the appellant or his/her representative attending the site visit allowing the Inspector and the other parties onto the site. If the appellant fails to turn up to the site visit or fails to allow the Inspector onto the site, the site visit should be aborted and the file returned to the case officer so that the appropriate letters can be issued dismissing the appeal. In that event, any correspondence about costs that pre-dates the site visit should be considered in the report to Costs Branch. Any correspondence that post-dates the report should be directed to the Costs Branch.

5 **Section 79(6A) does not currently apply to enforcement cases.** In such cases, you will first determine whether the appellant has acted responsibly or irresponsibly. After closing the inquiry, if it is necessary to enter the site, arrange to meet the parties at the site and see if the appellant or anyone else with authority to allow entry is there and will let you in. If you and other parties are let in the site visit can take place. If not, abort the visit, return the file to the case officer and PINS will write to the appellant inviting further representations on the issue and the costs application if any. You will then determine the appeal on the basis of the evidence before you.

6 If the appellant has not allowed entry to check vital measurements, he/she has failed thereby to satisfy you on the balance of probability that his/her own asserted measurements (if any) are correct and accordingly has failed to discharge the onus

of proof which is on him/her to demonstrate that the development is lawful and the appeal dismissed with or without costs. However, s324 of the 1990 Act does provide for rights of entry.

7 Where an application for costs is made you will prepare a report for Cost Branch who will complete the process.

Annex G - Requests for a witness summons

General

1. The Inspector (not the Department or the Planning Inspectorate) has the power under Section 250(2) of the Local Government Act 1972 to issue a summons. It is a power that is used very rarely and should be exercised with extreme caution and only as the very last resort. A blank witness summons form can be found in Annex 2 of the ITM Chapter 'Enforcement.'

2. Parties applying for a summons should be made fully aware that they are required to pay out-of-pocket expenses, including compensation for loss of earnings where appropriate, to the witness they want to be summonsed. The party who applied for it must serve the summons and they are liable for any costs involved. If these responsibilities are accepted, you must then consider the case for issuing the summons.

3. Before issuing a summons you must be reasonably satisfied that:

   - the evidence to be given by the witness is likely to be material to the case
   - the witness is the appropriate person to give the evidence
   - they will not come unless a summons is served
   - the production of a sworn affidavit would not obviate the need for personal attendance.

4. If you decide that a summons ought to be issued the proceedings may have to be adjourned (to a fixed date) because the summons has to be drawn up and has to be signed by you personally. An alternative is to continue with the inquiry, hearing other evidence until the date on which summoned witnesses are required to attend. In either case, you will need to know the name and address of the person requesting the summons, the name and address of the person summoned (the witness) and what documents, if any, the witness may be asked to produce. You need to get written confirmation from the person requesting the summons that they are prepared to meet all justifiable costs.

5. You may, very exceptionally, find it necessary to issue a witness summons of your own volition to elicit information which has not been forthcoming from the case as presented by the parties and where the parties have declined your invitation to adduce further evidence. You should bear in mind that PINS will have to pay expenses to the witness. You should consult the office before embarking on this course.

6. If a witness fails to appear in response to a summons, the inquiry must be continued and the non-appearance reported to the office. The party who requested the summons may commence legal proceedings. However, it should be noted that if a witness does appear, and refuses to give evidence, he or she may be liable on summary conviction to a fine or imprisonment.

Attendance of representatives of government departments and local government officers

7. The main section on ‘Representatives of government departments’ outlines the circumstances in which representatives of government departments appear at inquiries under the inquiries procedure rules. The Rules make similar provision for the appearance of representatives of local authorities. In such circumstances, the issue of witness summonses to secure attendance does not arise. Nor should the issue of a witness summons be necessary to secure such attendance in other circumstances. Government departments generally undertake to provide a representative to give evidence if they are requested to do so by either party to an appeal.

8. The attendance of local government officers (otherwise than in pursuance of the inquiries procedure rules) should normally be secured by agreement and without recourse to a summons. Requests for attendance of a local government officer should be made to the employing authority. You should find out whether the evidence to be given is factual or concerns matters of expert opinion. In the latter case, the party who desires the attendance of the witness might reasonably be expected to engage some other suitably qualified person. You should be aware of the fact that some local authorities, like some government departments, may insist upon the issue of a summons to secure the attendance of their employees.

Annex H - Long inquiries

Pre-inquiry meetings

1 Under Rule 7(2) a pre-inquiry meeting (PIM) will normally be held for inquiries expected to last for 8 days or more. However, you are not precluded from arranging PIMs for shorter inquiries if you think it is desirable. A PIM enables time to be saved at the inquiry and helps to make it more effective but it will usually account for at least 3 days of your time (including preparation, travelling and issuing a follow-up letter) as well as an extra input of time from the parties' representatives.

2 A pre-inquiry note is at Annex E. The importance of thorough preparation cannot be over-emphasised; an effective PIM establishes your authority and gives the parties confidence in you, besides ensuring that the inquiry runs smoothly and efficiently. It is for you to determine the matters to be discussed and the procedure to be followed. You may require anyone behaving in a disruptive manner to leave the meeting.

3 In addition to these powers, when holding a PIM you should be aware of other specific powers such as sending to the parties a statement of matters about which information is sought (Rule 7(1)), and specifying the date for the receipt of proofs (Rule 8(4)), which you are able to exercise before an inquiry opens. You should study the Rules with care and ensure that you have an up to date copy with you at the PIM. If you are minded to exercise any of these powers (other than an unaccompanied pre-inquiry site visit allowed for by Rule 17(1)), consider carefully any relevant advice in the Procedural Guide and whether what you have in mind would cut across the normal administrative procedures. You must be satisfied that it is administratively practicable and ensure that the Procedure EO is notified as soon as possible of any action to be taken.

4 You should bear in mind that you do not have the power to postpone the date an inquiry is to open. That is a function for the Secretary of State, under rule 10 of the Inquiries Procedure Rules 2000. If faced with such a request at a PIM the parties should be advised to write to the Planning Inspectorate.

5 If faced with an inquiry where you consider a PIM would be of benefit but one has not been arranged, you should inform your Group Manager.

Programme officers

6 A Programme Officer may be appointed to assist you in the administrative and procedural aspects of a long inquiry, particularly one in which there are many participants.

7 The appointment of a Programme Officer will only happen exceptionally. However, it can be of considerable benefit to the Inspector. Therefore the parties to the inquiry should be encouraged to supply such an officer. However, discretion needs to be exercised if the impartiality of the Programme Officer is not to be questioned and the principles of natural justice prejudiced.

8 It is unlikely that a Programme Officer provided by the appellant or by one of the interested parties would be generally accepted as being impartial. Nor is it probable that such an officer would be able to attend at the inquiry venue for long periods before the opening of the inquiry. The LPA is clearly the most appropriate source. However, it would not normally be appropriate to appoint someone who previously

had been involved in the case. Someone associated with the LPA' planning department may be acceptable, subject to the following paragraph.

9 The Programme Officer upon appointment must be accepted and recognised by all as an officer of the inquiry responsible to and under the sole direction of the Inspector. During the pre-inquiry period and throughout the inquiry itself, the Programme Officer must be and must be seen to be completely impartial. You should make these points, at the PIM and at the opening of the inquiry, with some emphasis.

10 The extent to which you can delegate tasks will depend upon the individual capabilities of the Programme Officer, who ideally should be a calm discreet person and an able and thorough organiser, capable of working without supervision. It is essential that the Programme Officer is capable of dealing directly with the public. The principal duties should be solely related to administrative and procedural matters. In particular the Programme Officer could be responsible for:

- taking notes at the PIM and drafting a note for you to approve for circulation (although you may find it preferable to adapt any notes made before the PIM for this purpose).
- organising the inquiry programme, under your direction, in such a way as to secure the efficient running of the proceedings with as little inconvenience as possible to all the parties.
- ensuring that the necessary physical arrangements have been made for the inquiry - the layout of the inquiry room and the provision of photocopying facilities.
- dealing with pre-inquiry correspondence on programming and coordinating/advising on a day-to-day basis of times of attendance at the inquiry
- acting as a control co-ordinator for the receipt and distribution of proofs of evidence and ensuring that all documents received before and during the inquiry are properly recorded and distributed
- holding a master set and up-to-date schedule of all proofs of evidence and other documents
- preparing and keeping up to date the list of appearances and documents
- where a number of sites have to be visited after a long inquiry the Programme Officer may be able to plan the visits. This must be done under your direction, since you are responsible for compliance with the procedural rules.

11 The Programme Officer should be provided with a desk and a telephone outside the inquiry room, if possible near the main entrance.

Assistant Inspectors

12 Assistant Inspectors have been appointed in a number of very long inquiries. Although their status is not established by any reference in the Rules, no objection has been received to their appointment. An Assistant Inspector operates at all times under your authority, as responsibility for the running of the inquiry and the contents of the report must remain with the appointed Inspector. An Assistant Inspector assists you over the whole range of duties, both during the inquiry and in drafting the report. The Assistant is thus able to relieve the pressure on you during the inquiry and contribute to a significant reduction in the time taken to submit the report.

13 It is for you to decide what tasks an Assistant Inspector is given, but they may be asked, among other things to:

- follow the proceedings at all inquiry sessions conducted by you, taking notes and asking questions of the witnesses as appropriate
- conduct sessions of the inquiry on specific topics, on behalf of, and always in your presence
- maintain the master set of inquiry documents, ensure that they are correctly numbered and list them; and hand to you a copy of any document referred to
- draft parts of the report, including sections on particular topics

14 The Assistant Inspector should attend the PIM and, if possible, all sessions of the inquiry and all accompanied site visits. In the unlikely event of your becoming ill after the inquiry has been opened, it would thus be possible for the Secretary of State to appoint the Assistant Inspector in your place if this seemed appropriate in all the circumstances. In this way the need to re-start or re-open the inquiry could be avoided.

Planning Assistants

15 If you are provided with a Planning Assistant you should briefly introduce the Planning Assistant and explain his or her functions at the PIM and at the start of the inquiry. You should make it clear that the work undertaken by the Planning Assistant is not in substitution for your performance of your own function. You should also make it quite clear that irrespective of the help the Planning Assistant gives, you will consider all the evidence and representations and the reasons given for the decision or recommendation will be yours alone. As is the case with, for example, summary material supplied by LPAs or report drafts prepared by an Assistant Inspector, it is important that you should read the background material and be satisfied that the summary or draft is accurate and reasonable before adopting it as your own.

The inquiry

16 Long inquiries often create unusual situations. The opening tends to take longer than usual, but not so much longer if an effective pre-inquiry meeting has been held. The following matters may need to be covered in addition to the usual preliminary points:

- introduce and explain the role of the Assistant Inspector, Assessor, Planning Assistant and Programme Officer as appropriate. Announce the Programme Officer's telephone number and contact address.
- announce the fact that a PIM has taken place, emphasising that it was concerned only with the arrangements for the inquiry and that no evidence or representations were heard. Ensure that copies of the letter recording the points made at the PIM are available, particularly to those who were not present. It is often useful to include this letter or the notes of the PIM as an inquiry document, and you can then refer to it in the preamble to the report.
- if it has already been arranged at the PIM and displayed on the inquiry notice board, work out the programme in as much detail as practicable, taking into account the convenience of all parties. Third parties, particularly local residents, often find it difficult to attend all of the day-time sessions, so it is advisable to identify a particular session later in the programme when they will be heard.
- at the PIM you should have agreed a simple system for the numbering of documents, proofs etc. This should enable them to be kept in order and retrieved quickly and other documents added to the list as they are received, so that the list is continually updated. You should remind the parties of the agreed numbering system when you open the inquiry.

- establish the number of copies of statements and other documents required to be available for distribution at the inquiry. Again, this should have been covered at the PIM but can be confirmed if necessary at the inquiry.

17 The opening day, particularly the morning, usually has the highest attendance both of the public and the media. Although it must be a secondary consideration, if possible arrange the programme so that long and detailed discussion of preliminary matters is avoided. Not only does it give a good public impression of the inquiry process, but it also prevents restlessness and frustration, which can cause problems for you. Ways of achieving this include:

- when taking the appearances obtain the particulars of only the main parties at the inquiry; ask all others who are not already listed on the programme (if one has been prepared) to hand in names and addresses to the Programme Officer;
- if a PIM has not been held and the programme cannot be worked out quickly, defer it until after the lunch adjournment. It may be possible for the Programme Officer to sort out the problems of individual parties during the adjournment and prepare a draft programme for the Inspector's approval in the afternoon;
- provided it is not of major significance, defer any points about the terms of the application and exactly which plans and letters form part of it;
- announce the number of representations already received and ask for any further representations to be handed in but do not attempt to check that the principal parties have copies of them all. Ask the Programme Officer to prepare a list and to check this with the parties so that the position can be confirmed later in the inquiry.

18 At a major public inquiry with a lot of media and local interest it is particularly useful for all main parties represented by a professional advocate to give a short opening statement, one after the other before the evidence for the first party is heard. This helps all those present to understand what the inquiry is about. If a PIM has been held this can have been suggested and agreed then.

19 It is sometimes advantageous to organise the programme on a "topic" basis rather than the usual case-by-case sequence. This is particularly appropriate where there are a number of clearly defined issues with a considerable technical content; all the evidence on an issue can thereby be heard together, so helping you to absorb the evidence and saving the time of technical witnesses (and perhaps of the Assessor). But it is good practice to obtain the agreement of the parties to this course and to give them plenty of warning by raising it at the PIM. It can result in some untidiness; for instance a third party whose case centres on the issue in question but who wishes to mention other aspects may not be able to come back on a different day to complete his case. Even when a topic basis is adopted it is often advantageous to allow residents, at sessions organised specifically to hear members of the public, to deal with all relevant topics.

Evening sessions

20 Evening sessions may occasionally be necessary when it is impossible for people to attend an inquiry during the day. It should be remembered that countless tribunals nation-wide are held during the day and most people can usually arrange to be present at some time during the normal inquiry hours of a long inquiry. Both you and the parties need the evenings to prepare for the following day and evening sessions are particularly tiring and onerous. An evening session should therefore be an exceptional occurrence. If one is arranged there should only be one other morning or afternoon sitting on the same day.

21 An evening session needs to be carefully arranged and controlled. It is part of the inquiry and not a public meeting and all speakers must observe the normal rules of inquiries, addressing you rather than the public at large. You should make it clear, when the evening session is announced, that witnesses heard in the day sessions will not be available for cross-examination in the evening session. If possible the Programme Officer should collect a list of those wishing to speak in advance together with a brief outline of the points they wish to make; you should hear those listed first before asking if any others wish to speak. You should attempt to prevent repetition, but you should exercise discretion when the participants are inexperienced in such proceedings and wish to express genuine and deeply held views.

Joint inquiries and non-planning cases

22 Some joint inquiries are difficult to programme; such as a joint inquiry into an application for planning permission and a compulsory purchase order relating to the same site, where the relevant procedural rules cannot be strictly followed. In such cases you must be ready to decide what the programme should be if the parties cannot reach an acceptable agreement. It may be helpful to discuss this conflict of procedure with your Inspector Manager beforehand.

23 When considering the programme of an inquiry other than a s78 case, it should be remembered that the party that is asking the Secretary of State to do something should normally go first and end last. Thus, if the subject of the inquiry is the confirmation of an order, the order making authority should go first.

24 If the Secretary of State is making a proposal such as a modification or revocation order his representative should make his statement first. You should declare at the outset what variant of the Rules should be applied and ask the main parties to consent to it. One of the variants designed for the more complex housing cases may be useful for some order-making planning cases, particularly where there are many diverse objections. The procedures customarily followed in inquiries under the Highways Acts should not, however, be used in other types of case.

Controlling the pace of a long inquiry

25 You (and your Assistant Inspector, Assessor and Planning Assistant) must remain alert, receptive and temperate throughout the inquiry. This cannot be done if you fail to set a reasonable pace, as inquiries that go on for many weeks are tiring both physically and mentally. Unless you are blessed with an exceptional constitution, the self-discipline required more often entails limiting the hours worked rather than increasing them.

26 Sensible pacing starts before the inquiry opens and continues to the close including through the reporting period. It is suggested that:

- you should ensure that you have adequate time for preparation; your programme immediately before that should not include cases of significant size and all outstanding work should be completed if at all possible. (This includes any management tasks)
- the inquiry programme should be based on two 3-hour sessions a day, Tuesday to Thursday, and a shorter sitting day on Friday. Sessions may be extended by half an hour or so in order to keep up with the programme and exceptionally, Monday afternoon may be used for this purpose. Monday evenings can be useful for evening sessions, if necessary. But if an evening session is held on any other day, only one other inquiry session should be held on that day

- breaks in mid-session not exceeding 10 minutes can be valuable but must not be abused. It is essential that all parties return within the time specified by you
- it is essential to be realistic when estimating how long the various stages of the inquiry will take. The programme should put the participants under some pressure - which may have to be absorbed on occasion by modestly extended sessions - but not too much. If gaps in the programme occur, it may be possible to bring forward an item or make a site visit; or the time may be required for reading proofs
- if possible, after 3 or 4 weeks a more substantial adjournment may be appropriate if the inquiry is programmed to last much longer than that. At this stage it can be helpful to have a break to read in more detail the proofs of the evidence yet to be heard. (It is sometimes appropriate to programme a complicated technical topic to follow a break). The adjournment should be incorporated into the programme and regarded as a firm commitment. Sometimes it is convenient to adjourn for a brief period that contains a public holiday or a PINS meeting.
- Inspector Managers/Group Ops Leads facing a long inquiry should consider asking a colleague to deal with day-to-day queries from members of their inspector groups.

Annex I - Assessors at inquiries

The status of an Assessor

1 An Assessor (as defined under Rule 2(1)) is a specialist adviser, usually scientific or technical, selected to assist you by hearing, testing and weighing evidence of a specialised nature that may be outside the normal experience of the Inspector but which may have an important bearing on the issues to be decided. Assessors are appointed by the Secretary of State or National Assembly for a particular inquiry and should hold a letter or minute to that effect in case their status is challenged. In planning cases the Assessor's name and qualifications will be notified to the parties together with the matters on which the Inspector is to be advised.

2 It is important that Assessors should not have had any previous connection with the proposal the subject of the inquiry or any professional association or connection with the parties. Where the number of experts in the relevant field is so small that this condition cannot be wholly met it will usually be desirable for some statement of the precise position to be made at the beginning of the inquiry. It is also important that the Assessor should not have taken a public stance on the policies at issue in the inquiry. If Assessors realise, after accepting the appointment, that they have had some previous connection with the case or the parties, or if any other situation arises in which they might find their position a source of embarrassment to themselves or to PINS, they should mention it immediately to you (if they are in touch by this time) or otherwise discuss it with PINS.

3 Once an appointment as an Assessor has been offered there should be no private communication by them with the parties or with any interested person before or during the inquiry. If the Assessor considers that further information should be obtained from any of the parties before the inquiry, they should, after discussion with you, ask the Case Officer to obtain it.

Function of an Assessor

4 The Assessor's task is to evaluate the specialist evidence within their field that is presented at the inquiry and so far as is possible indicate the weight which it should, in their opinion, be given in your conclusions.

5 It is the Assessor’s responsibility to ensure that, as far as possible, all relevant facts within their specialised field are obtained. It is your duty to see that the Assessor is afforded every opportunity to obtain those facts.

Before the inquiry

6 Assessors are sent copies of the inquiry papers as soon as possible after accepting the appointment. They are also notified of the name of the Inspector. It is important that you and the assessor should discuss the case at an early stage. For small inquiries, discussion on the telephone may be sufficient, but for more complex cases a meeting is usually necessary. Where a pre-inquiry meeting is held with the parties it is usually appropriate for the Assessor to attend, so there is the opportunity for you to meet immediately beforehand. It will also be necessary to meet immediately before the inquiry.

7 Matters which might be discussed at an appropriate stage before the PIM or the inquiry include:

a. the precise boundaries of the Assessor's specialist interest in relation to the subject matter of the inquiry - sometimes these are not obvious;

b. the definition of issues and topics on which evidence will be needed; the adequacy of the specialist evidence coming forward; whether further information should be obtained from the parties; whether it appears that a witness does not intend to take into account a key document (e.g. a published technical report) known to the Assessor; and whether there are any serious inconsistencies which the parties could be asked to clear up before the inquiry. Such matters may form the basis for advice to the parties at a pre-inquiry meeting;

c. the programming of the inquiry with particular reference to the specialist content and whether it is necessary for the Assessor to attend all sessions;

d. whether there will be an advantage in an accompanied site visit being conducted before or during the inquiry, so that features noted at the visit can be discussed in the inquiry;

e. points of procedure on which the Assessor requires clarification, including points arising from this advice;

f. you will also wish to know how the Assessor sees the specialist issues standing at the beginning of the inquiry and the particular aspects which need to be pursued.

8 The full statements of case, statement of common ground and witnesses' proofs of evidence should be available before the inquiry. Copies of those that are received in good time will be sent to the Assessor. The Assessor must arrange adequate preparation time before the inquiry so that the evidence can be closely studied and points of clarification and follow-up questioning identified. The evidence should be fresh in the mind when the witness is called, as it may well not be read out at the inquiry; frequently only a short summary is presented before cross-examination starts. If for any reason - such as late receipt of the proofs of evidence - the Assessor would prefer the evidence (or parts of it) to be presented more fully, this should be discussed with you beforehand.

The conduct of the inquiry

9 It should always be remembered that you are the person appointed to conduct the inquiry. Even when specialist issues are being argued it is you who is being addressed by parties and who has the right to put questions to witnesses and those appearing on behalf of the parties. When specialist issues arise, it may be enough for the Inspector to put questions suggested by the Assessor.

10 However, if the Assessor puts the questions, there should be no suggestion of partiality either in the manner in which they are put or in the phrasing. There must be no attempt to cross-examine, to lead, or to discredit a witness by embarking on a line of questioning more appropriate to an opposing advocate. Comments or expressions of opinions of any kind must be scrupulously avoided.

11 In the event of any dispute an Assessor should leave decisions on procedure to be handled by you. You are responsible for the conduct of the inquiry, even though the

dispute may concern evidence or matters which fall within the province of the Assessor's specialised field.

12 The Assessor should not interrupt the proceedings at any stage. If an important point arises which needs to be cleared up immediately, a note should be passed to you. Assessors should not attempt to hold whispered conversations with you when being addressed by others as you have to be seen at all times to pay undivided attention to the representations. If it is essential to speak to you, the proceedings would have to be halted momentarily, or formally adjourned.

13 Assessors must display a courteous, temperate judicial approach and they should support you by being soberly dressed and always punctual. When they have no direct involvement in the proceedings at a particular stage, even if they are sitting by your side, they should not show that they are obviously thinking of other things or otherwise distracted, such as by excessive shuffling of papers and hunting for documents.

The site visit.

14 Although there is no objection to the Assessor and you paying an unaccompanied visit to the site before the inquiry is held (provided that discretion is exercised and that entry to private property is not entailed), it is usual to make a formal site inspection during or after the inquiry in company with representatives of the main parties and of such other parties as have the right to accompany you or do so at the your discretion. However, it may occasionally be appropriate to arrange for an accompanied site visit to take place before the inquiry opens, but care should be taken to ensure that all parties are aware of this.

15 The Assessor, as well as you, must not be accompanied, at any stage of the visit, by the representative of one party without the presence of a representative of the other parties present. You should keep close to each other throughout the visit, because if something is pointed out to one, the other should also be aware of it. New evidence cannot be adduced during the visit, nor any comments made, but it is legitimate for the parties to direct your joint attention to physical features which they believe are important to the case(s).

16 If a site visit, taking place after the inquiry is closed, reveals to the Assessor that there are new aspects of the case that have not been raised at the inquiry and which are likely to influence the conclusions, then you should be consulted and steps taken in accordance with established procedures to refer such matters to the parties for comment before the report is completed. It is therefore of particular importance that Assessors should prepare carefully for the inquiry. They may need to make arrangements with you to look at the site in advance in order to foresee what information they will need to obtain on matters which may be important but which may not otherwise be raised during the inquiry.

The Inspector's report or decision

17 The Assessor will give such advice to you on the specialised issues arising at the inquiry as may seem to be necessary, and will collaborate in the production of the report or decision. It is for you to ascertain the facts, and to reach your own conclusions. Where the specialist issues are complicated or difficult, the Assessor may assist you by preparing draft findings on those issues and any conclusions to be drawn from them which you may adopt. It must be clearly understood, however, they become your findings and conclusions, and you must accept full responsibility for

them. Any draft conclusions of the Assessor's should, like yours, derive from what has been seen and heard at the inquiry.

18 Assessors' conclusions will be arrived at in the light of their specialist knowledge and experience and a background of generally accepted data on such matters can be assumed. The Assessor should not, however, take into account any new or controversial technical material which has not been canvassed at the inquiry.

19 In many cases, all that will be necessary is for you to state at the end of his/her conclusions, "The Assessor, [Mr/Ms] ..... agrees with my conclusions in paragraphs ....." provided, of course, that is so. Alternatively, if it is felt that the Assessor's contribution should be more clearly identified, it should be possible to frame the report in such a way that the specialist advice can be introduced in appropriate places by the phrase "I am advised by the Assessor that ....".

20 However, in cases where there has been a great deal of argument and where the decision turns on specialist issues, it may be appropriate for the Assessor to produce a written report to you. In a Secretary of State case, this is appended to your own report and you state how far it is accepted. In a transferred case, it is not normally appended to the decision, but a reference to its existence is made and it is made available for inspection.

21 An Assessor’s advice or conclusions should not go beyond what is necessary for the decision. Reports should only be necessary where the issues or detailed technical data and calculations are unusually intricate.

22 If a report is produced, it must bear the Assessor's signature. It should carry the appropriate file reference and be headed by the appropriate brief title, such as "Compulsory Purchase Order .....", and the suffix "Assessor's Report".

Annex J - Call-in applications

Background and policy

1 Under s77 of the Town and Country Planning Act 1990 the Secretary of State may call in planning applications to be referred to him for a decision instead of being dealt with by LPAs. Inquiries into these applications are held under section 77. The Town and Country Planning (Inquiries Procedure) (England) Rules 2000 9SI 2000/1624) apply.

2 The call-in is effected by a direction which requires the planning application to be referred to the Secretary of State. The direction can only be given before the application is decided by the LPA, that is, before the decision notice has been issued. The Secretary of State may sometimes issue a holding direction. This is often used following a public request for call-in procedures to be used and allows a `breathing space' while the National Planning Casework Unit considers the arguments for and against call-in. The Secretary of State's call-in letter identifies the reasons for the direction and the matters about which the Secretary of State particularly wishes to be informed for the purposes of considering the application (the Secretary of State's Rule 6 statement).

Pre-inquiry meetings (PIMs) and pre-inquiry preparation

General

3 Because of their scale, complexity and nature, call-in cases are particularly challenging for Inspectors. Careful and thorough preparation during the pre-inquiry stages will enable inquiries to be conducted effectively, avoid pitfalls, and assist Inspectors in preparing reports which comprehensively inform and advise decision-makers.

4 PIMs are especially useful in all call-in cases except the smallest and most straightforward ones. This is because of the differences between them and s78 inquiries, and because they are more likely to present you with the unexpected.

5 PIMs will be arranged for call-in cases expected to last 8 days or more. There may be good grounds for calling a PIM in shorter call-in cases. If you are allocated a call-in case expected to run for less than 8 days, you should give consideration to the desirability of calling a PIM under Rule 7(2). Among factors which might point to the desirability of calling a PIM in such cases are if the LPA or the applicant has suggested that a PIM would be desirable, or if the inquiry is likely to:

- involve three or more major parties,
- give rise to many issues,
- give rise to significant quantities of technical or statistical evidence e.g. retail impact analysis, highways evidence, nature conservation evidence.

6 You should call for the file well in advance of the date any PIM might need to be arranged. There may be more information on the file than when the case was allocated. For a shorter inquiry you will need to decide whether or not a PIM is needed. In the more complex cases it is useful anyway to have an early sight of the file since it gives you an advance view of what the case might involve.

Pre-inquiry administrative arrangements

7 It is important that you approach a called-in application with a fresh and unbiased mind. The National Planning Casework Unit have the task of culling letters from third parties from the file and replacing them with a schedule setting out the names and addresses of those other than the applicant and LPA who have made representations before the application was called-in. Where a PIM is to be held, PINS' Major Casework team invites those listed on this schedule to it. You should be aware that the schedule provided by the National Planning Casework Unit may be incomplete, and that you may therefore need to deal with complaints from third parties who were not invited or notified, both at the PIM and at the inquiry. Often it will be sufficient to explain that the PIM is not concerned with merits and to ensure the complainants are provided with copies of the PIM Notes.

At the PIM

8 The conduct of PIMs in call-in cases is not significantly different from those for other types of case, although on occasions large-scale attendance by the public occurs because of local controversy. Neither is the content likely to vary much from s78 cases, except that particular care and attention will need to be paid to the evidence the parties should produce and the procedure at the inquiry – especially as the only opposition to the proposal may be from third parties (including Rule 6 parties) whose advocate may not be legally qualified and the third parties may not be familiar with inquiry procedures and required documents. It may be helpful to refer them to the Planning Inspectorate's Guide to Rule 6 for interested parties involved in an inquiry – planning appeals and called-in applications (or Guide to Rule 6 for interested parties involved in an inquiry - enforcement appeals and certificate of lawful use or development appeals), if in England.

Calling for evidence at the PIM

9 A key source of evidence to be considered is the list of matters about which the Secretary of State particularly wishes to be informed. The list usually starts with a reference to whether or not the proposal conforms with the policies of the various parts of the development plan for the area, or of emerging plans. Relevant policies may be available on the file, although coverage at this stage is sometimes incomplete. The parties should be asked to comment on the factors which might affect the weight to be given to relevant policies of any emerging plan, or to any important supplementary planning guidance. They should be asked to provide evidence if necessary on whether or not parts of the existing development plan are up-to-date. Circumstances can change between the drafting of the Secretary of State's call-in letter and the start of the inquiry.

10 A number of specific matters are normally identified in the call-in letter, such as the effect of a proposal on the vitality and viability of a town centre, or on traffic conditions. It is useful to identify at the PIM the principal national policy tests which need to be applied in considering these specific matters.

11 You should bear in mind you are expected to probe those aspects of the parties' cases which stand a risk of not being properly tested if there is little or no opposition, for example, where the LPA are in favour of the proposal. Accordingly, the reasons for the call-in should be studied closely. These can indicate areas of concern to the Secretary of State, especially relating to national policy, which are not identified specifically in the list of matters about which the Secretary of State particularly wishes to be informed.

12 The list of matters will often end with a catch-all reference to any other matters which the Secretary of State finds relevant to his decision. The Secretary of State's list is effectively a preliminary list, prepared before the receipt of evidence. It is normal for other matters to emerge before the inquiry. It is prudent to try to identify these for reference at the PIM.

13 Papers on the file, such as committee reports and consultation responses from sources such as the County Archaeologist, should be checked for material points. The letters of third parties and interested persons can be useful in identifying significant information not possessed by the LPA or the applicants, for example the presence on the site of protected species. Maps on the file should also be checked. They can show features, including landfills, former industrial sites which could be contaminated, and archaeological find spots, which the principal parties might neglect to mention.

14 Before the inquiry, prepare lists of questions for individual witnesses. In cases where the evidence of one side, or part of it, is unlikely to be tested properly by the other side, your questions assume greater importance. In those circumstances you must draw up the lists of questions with particular care and thoroughness.

15 You may wish to explain that you intend to be more inquisitorial than normal – to test the evidence – and that that this does not indicate bias on your part. Inspector's reports that, for example, dismiss residents' concerns about traffic generation solely because "there was no expert evidence to demonstrate harm" are unlikely to reassure anyone that the issue has been properly assessed. You should establish the actual position, so far as practicable, and then express your own conclusion based on what is available. Be willing, if necessary, to ask the parties (ideally at a PIM) to provide additional information to assist you.

At the inquiry: procedure

16 Under the 2000 Rules the normal procedure at inquiries is for the LPA to present its case first. However this may not be the most suitable approach in some types of call-in case, such as those where the LPA are in favour of the development. In such cases the applicant will usually present the more substantial case with the LPA acting in a supporting role. Under Rule 15(4) you have discretion to vary the normal inquiry procedure and, in these circumstances, it is often sensible to hear the applicant's case first, others supporting the development being heard next, followed by those opposing it.

17 In cases where the LPA oppose the development and they are the only party entitled to appear who is in opposition then they should be asked to give their evidence first in line with the standard procedure set out in the 2000 Rules. However, if they are in support and it is another authority or party which provides the main opposition, for example the County Council, then it could present a more logical sequence to hear those in favour initially followed by those in opposition. In all cases where the Inspector considers it may be appropriate to exercise his or her discretion to vary the normal procedure this should be done within the principles of natural justice and after taking the views of the parties into account.

18 Closing submissions would be made in reverse order. Third parties and interested persons not making substantial cases could be heard on a date towards the end of the inquiry fixed by you after consultation with the parties.

19 If there has been no PIM and you have formed a preliminary view that a procedure different from the standard one might be more appropriate, you should raise this as part of the opening announcement and settle it after taking into account the views of the parties.

20 Where a residents' group or similar is the main opposing party, they may lack experience of planning inquiries. Time spent explaining the procedure and programme will not be wasted, as residents' ideas may have been formed from participating in public meetings. Common expectations are that the LPA will go first, and that the residents' group will act as a panel, answering each point from the other side as it is made. The group might indeed have prepared their participation on this basis and might be caught off-guard by the structured inquiry approach. You should offer impartial help.

21 In a call-in inquiry you might be more inclined than in other cases to make a point of asking interested persons whether they have any questions for each of the applicant's witnesses. This would be particularly so if the opposition to large parts of the applicant's case comes only from individuals who are not organised in a group.

22 In circumstances such as this it is possible the individuals concerned might apply for legal aid (public funding) on the basis of Article 6(1) of the European Convention on Human Rights. However, neither you nor the Secretary of State can entertain applications for public funding. If faced with such a request, you should explain this and suggest means of mitigating any disparity of resources. You should offer to assist those unfamiliar with inquiry procedure as far as possible consistent with your role. It could also be suggested that the individuals might be able to co-operate with another party sharing part or all of the same case; and that assistance may be available from Planning Aid (the address is in the *Guide to taking part in planning, listed building and conservation area consent appeals proceeding by an inquiry – England* and in the *Guide to Rule 6 for interested parties involved in an inquiry – planning appeals and called-in applications – England*), Citizens Advice Bureaux, or other organisation offering free assistance or funding. If a party decides nevertheless to apply for public funding, it may be necessary to adjourn the inquiry to give time for the application to be processed, although in a long inquiry it may be possible to rearrange the programme to avoid an adjournment. See the 'Human Rights and Equality' ITM Chapter for further advice.

23 Since, in call-in cases the decision is for the Secretary of State, you should be especially careful not to be too rigid in identifying the main issues as required by Rule 15(2). It may be appropriate to use a phrase like "main considerations upon which it seems likely at this stage that the Secretary of State will base the decision."

24 In a call-in case which has generated a lot of local opposition and media interest there can be special merit in asking the advocates for the main parties and any substantial third parties to give a short opening statement at the start of the inquiry. This will give those not closely involved in the proceedings a succinct overview of the main points of the cases for and against.

Reporting

25 In structuring your conclusions, you may find it is best to follow the order of the matters about which the Secretary of State particularly wishes to be informed, finishing with any other matters raised by the parties or by you. Where this order is not followed, you should ensure that you conclude upon every one of the matters identified by the Secretary of State.

Annex K - Managing Disruptive Parties

As a responsible employer PINs has a duty of care to its staff. Our Customer Charter states that we expect all staff to be treated with courtesy and respect and warns that we will not tolerate rude or abusive behaviour. All staff are entitled to carry out their duties without fear of abuse or harassment.

1. Our decisions impact on people, their homes and communities and passions can run high. Much of what is set out here can be found in the Inspector Training Manual (ITM). The advice in the ITM and the training you received in conducting Hearings and Inquiries will enable you to deal with most situations. The purpose of this note is to advise on the steps to follow when these strategies fail and more serious action is required.

Powers

2. Rule 15 (9) of the Town and Country Planning (Inquiries Procedure) (England) Rules 2000[29] and Rule 11 (8) of the Town and Country Planning (Hearings Procedure) (England) Rules 2000[30] empower Inspectors to require participants at Hearings and Inquiries to leave if they are being disruptive[31]. The Inspector may refuse to allow the person who has been asked to leave to return or permit a return only on such conditions that the Inspector may specify. Rule 15 (11)[32] and Rule 11 (10) allow the Inspector to proceed in the absence of any person entitled to appear at it.

3. Advice on what to do if a main party is absent can be found as stated previously in this chapter here.

What is unreasonable/unacceptable behaviour?

4. Anything which disrupts the smooth running of a Hearing or Inquiry and prevents you from focusing on the arguments or any other party from making their case. This could range from threats or shows of aggression to constant low-level interruptions, particularly if they are aimed at de-stabilising another party's attempt to make their case.

5. The ITM advises that the general principle is that filming and recording should be allowed. However, if you consider the way you or the event is being filmed or recorded to be intimidating you should ask that it stops. If the person recording refuses this constitutes unreasonable behaviour.

What to do about unreasonable/unacceptable behaviour?

---

[29] Rule 16 (9) of the Town and Country Planning Appeals (Determination by Inspectors) (Inquiries Procedure) (England) Rules 2000 No 1625, or Rule 18 (9) of the Town and Country Planning (Enforcement) (Inquiries Procedure) (England) Rules 2002 No 2686, or Rule 17 (9) of the Town and Country Planning (Enforcement) (Determination by Inspectors) (Inquiries Procedure) (England) Rules 2002 No 2685
Rights of Way: Rule 9(9) of the Rights of Way (Hearings and Inquiries Procedure) (England) Rules 2007
Also Rule 11 (8) of the Town and Country Planning (Enforcement) (Hearings Procedure) (England) Rules 2002 No 2684
NSIP: Section 95 of the Planning Act 2008

[31] Any person required to leave may submit any evidence or other matter in writing before the close of the Hearing or Inquiry

[32] As footnote 1, the number will change depending on the procedure

6. As stated above your training will have equipped you to deal with most situations without needing to revert to any of the measures set out above. All these avenues should be explored before proceeding to the following stages. If a party's behaviour becomes disruptive you should:

i. Explain why their behaviour is unreasonable and that if they continue you will adjourn to give them time to calm down/reflect. If necessary/appropriate you could set conditions for their return (see Rules 15 and 11 above). Explain that if you are forced to adjourn because of their unreasonable behaviour you have the power to instigate an award of costs against them.
ii. That if they continue to behave unreasonably you will invoke your powers under Rule 15 (11)[33] or Rule 11 (10) and have them removed.
iii. That if they are removed they may submit any evidence or other matter in writing before the close of the Hearing or Inquiry but if they are a main party,

7. All the above needs to be properly documented in order that any subsequent complaint or challenge may be defended.

8. If a party refuses to leave, adjourn and request the Council to use its security team to accompany the disruptive person from the premises. If that is not possible or in the event of serious disruptive behaviour or threat activate your lone worker protection alarm or call 999[34].

Suggested text for requiring an Appellant/Agent or Advocate to leave an event

Appellant/Agent:

Mr X, I have asked you on 3 occasions now not to interrupt me/AN Other. If you do so again I will exercise my powers under Rule 15(9)[35] of the Town and Country Planning (Inquiries Procedure) (England) Rules 2000/ Rule 11 (8) of the Town and Country Planning (Hearings Procedure) (England) Rules 2000 and require you to leave. I will consider whether to make an award of Costs against you/your client for unreasonable behaviour.

If relevant: [I will also take action to report your unreasonable behaviour to your Professional Institution.]

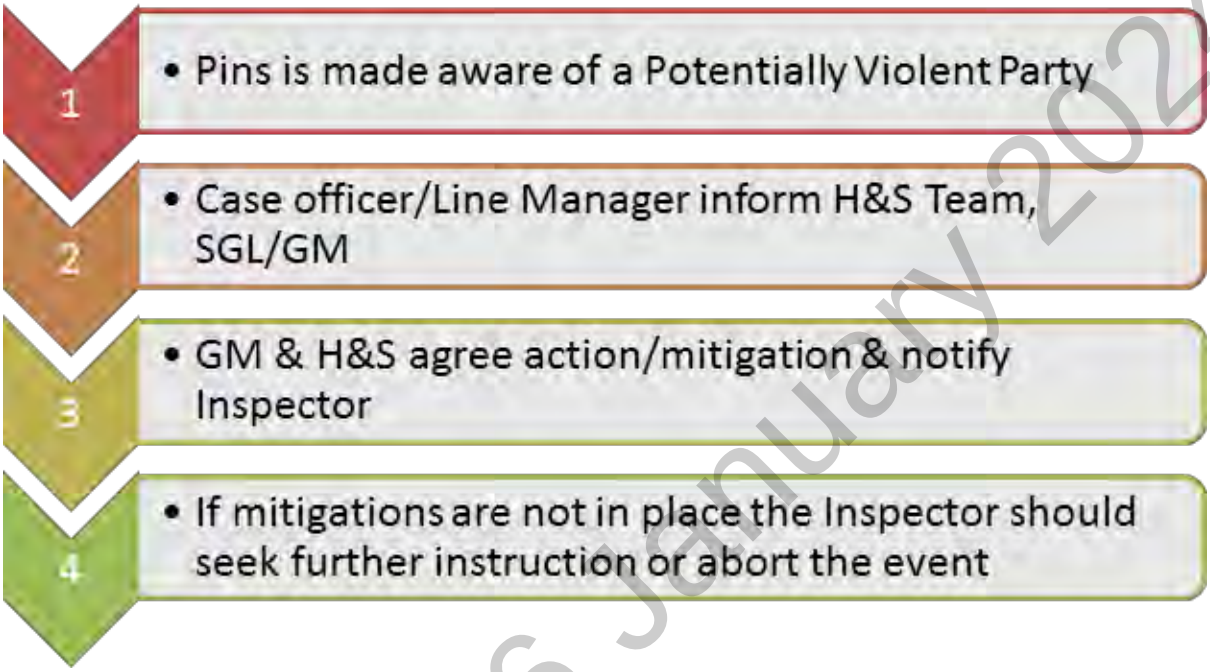
Barrister/Solicitor: Mr X, I have asked you on 3 occasions now not to interrupt me/AN Other. If you do so again I will exercise my powers under Rule 15(9)[36] of the Town and Country Planning (Inquiries Procedure) (England) Rules 2000/ Rule 11 (8) of the Town and Country Planning (Hearings Procedure) (England) Rules 2000 and require you to leave. I will consider whether to make an award of Costs against your client for

[33] Check that you are using the correct Rule
[34] Section 4(1)(a) of the Public Order Act 1986 states that a person is guilty of an offence if he uses towards another person threatening, abusive or insulting words or behaviour with intent to cause that person to believe that immediate unlawful violence will be used against him or another by any person, or to provoke the immediate use of unlawful violence by that person or another, or whereby that person is likely to believe that such violence will be used or it is likely that such violence will be provoked.
[35] Check that you are using the right Rule
[36] Check that you are using the right Rule

unreasonable behaviour. I will also take action to report your unreasonable behaviour to [The Bar Standards Board] [The Law Society].

Annex L - Potentially violent parties procedure

The Inspectorate's procedure on handling potentially violent parties is summarised in the diagram below:



The full procedure on handling potentially violent parties is provided in a flow chart, available via this hyperlink.

Annex M - Case management conference calls: example documents

M1 – Inspector's pre-conference call note

The Planning Inspectorate

APPEAL REF: APP/E5900/W/19/3236184
Former LEB Building, Former LEB Building, 255-279 Cambridge Heath Road, Bethnal Green, London

Demolition of existing buildings on site and redevelopment to provide 189 residential units and 1,676 sqm of flexible commercial floorspace (Use Classes A1, A2, A3, B1 and/or D1) in two buildings ranging from 5 to 15 storeys, along with disabled parking, servicing, cycle parking, public realm and amenity space.

CASE MANAGEMENT TELEPHONE CONFERENCE TO BE HELD AT 10.30 ON FRIDAY 1 NOVEMBER 2019

INSPECTOR'S PRE-CONFERENCE NOTE

1. The case management conference will be led by the Inquiry Inspector, Mrs Jennifer Vyse, a chartered town planner and Planning Inspector. Attached as separate documents are instructions for joining the conference, a conference etiquette which will be observed, and the conference agenda.

2. There will be no discussion as part of the conference as to the merits of your respective cases and Mrs Vyse will not hear any evidence. Rather the purpose is to set out a clear indication as to the ongoing management of this case and the presentation of evidence, so that the forthcoming Inquiry is conducted in an efficient and effective manner.

3. The Inquiry itself is scheduled to open at 10.00am on Tuesday 7 January 2020 at a venue to be confirmed. It is currently expected to sit for no more than five days, hopefully less through effective early engagement.

Main Issues

4. The last of the Council's reasons for refusal refers to the absence of a planning obligation to secure various provisions. It seems likely that an obligation is to be submitted to address the Council's concerns in this regard. On that understanding I consider, in the absence of an agreed main statement of common ground and based on the material currently before me, that the main issues in this case are likely to relate to:

- the effect of the development proposed on the significance of nearby heritage assets including the Bethnal Green Gardens Conservation Area, listed buildings and non-designated assets; RfR5

- effect on the character and appearance of the surrounding area, including the Bethnal Green Gardens Conservation Area; RfR5

- effect on the safety of vehicular and pedestrian users of Birkbeck Street;

- effect of the development proposed on local wind/microclimate conditions, having particular regard to use by pedestrians and cyclists of landscaped areas and thoroughfares;[37]

- whether sufficient affordable housing is secured and whether the proposed tenure mix is appropriate; and,

- whether the housing mix across the site generally is appropriate having regard to type/size.

5. The Inquiry will also look at any benefits to be weighed in the planning balance, including any implications of not proceeding with the scheme.

6. It is essential that all parties communicate effectively with one another to seek to narrow the issues for consideration at the Inquiry. This should be an on-going conversation. You are therefore requested to give consideration in advance of the case management conference as to whether the identified matters encapsulate those most pertinent to the outcome of the appeal.

Dealing with the Evidence

7. The Inquiry will focus on areas where there is disagreement. With that in mind, the conference will explore how best to hear the evidence in order to ensure that the Inquiry is conducted as efficiently as possible.

8. To avoid unnecessary repetition in the presentation of evidence, my initial thoughts are that, with the exception of the two housing issues, the other main issues set out above might most efficiently be dealt with as individual round table sessions (heritage matters; character and appearance; pedestrian/highway safety, and local wind/microclimate conditions if not resolved in the meantime). The Inspector would lead those sessions informed by your respective proofs and dedicated topic-specific statements of common ground/ disagreement.

9. On the basis that there is the potential for the two housing issues set out above to involve evidence on viability, it seems to me that they would comprise a topic best suited to the formal presentation of evidence and cross-examination.

10. Matters relating to planning policy and the overall planning balance, including any benefits of the proposal, would be dealt with through the formal presentation of evidence in chief by the planning witness for each of the main parties, which would

[37] There is a possibility that this issue may be resolved through the submission of additional evidence in due course.

be subject to cross-examination. The evidence of the appellant will also need to address any other matters raised by interested parties.

11. You are requested to give the above careful consideration in advance of the related discussion at the case management conference. Any request for evidence to be heard other than as currently envisaged will need to be fully justified.

12. All the above points are included on the case management conference agenda.

13. The attached Annex sets out the preferred format and content of proofs and other material, which should be observed.

Jennifer A Vyse

INSPECTOR

23 October 2019

M2 - Content and Format of Proofs and Appendices

Content

Proofs of evidence **should**:

- focus on the main issues identified, in particular on areas of disagreement;
- be proportionate to the number and complexity of issues and matters that the witness is addressing;
- be concise, precise, relevant and contain facts and expert opinion deriving from witnesses' own professional expertise and experience, and/or local knowledge;
- be prepared with a clear structure that identifies and addresses the main issues within the witness's field of knowledge and avoids repetition;
- focus on what is really necessary to make the case and avoid including unnecessary material, or duplicating material in other documents or another witness's evidence;
- where data is referred to, include that data, and outline any relevant assessment methodology and the assumptions used to support the arguments (unless this material has been previously agreed and is included as part of the statement of common ground).

Proofs **should not**:

- duplicate information already included in other Inquiry material, such as site description, planning history and the relevant planning policy;
- recite the text of policies referred to elsewhere: the proofs need only identify the relevant policy numbers, with extracts being provided as core documents. Only policies which are needed to understand the argument being put forward and are fundamental to an appraisal of the proposals' merits need be referred to.

Format of the proofs and appendices:

- Proofs to be no longer than 3000 words if possible. Where proofs are longer than 1500 words, summaries are to be submitted.
- Proofs are to be spiral bound or bound in such a way as to be easily opened and read.
- Front covers to proofs and appendices are to be clearly titled, with the name of the witness on the cover.
- Pages and paragraphs should be numbered.
- Appendices are to be bound separately.
- Appendices are to be indexed using **projecting tabs**, labelled and **paginated**.

M3 – Inspector's conference call agenda

The Planning Inspectorate

APPEAL REF: APP/E5900/W/19/3236184
Former LEB Building, Former LEB Building, 255-279 Cambridge Heath Road, Bethnal Green, London

Case Management Conference to be held at 10.30 on Friday 1 November 2019

(Details for logging in to the case conference are set out in a separate note)

AGENDA

1. Introduction by Inspector
2. Purpose of the conference
3. Confirmation of advocates
4. Likely main issues
5. How the main issues will be dealt with
6. Conditions
7. Planning Obligation
8. Core Documents
9. Inquiry venue
10. Inquiry running order/programme/evening session
11. Timetable for submission of documents
12. Costs
13. Any other procedural matters

M4 – Inspector's conference call speaking script

APPEAL REF: APP/E5900/W/19/3236184
Former LEB Building, Former LEB Building, 255-279 Cambridge Heath Road, Bethnal Green, London

Demolition of existing buildings on site and redevelopment to provide 189 residential units and 1,676 sqm of flexible commercial floorspace (Use Classes A1, A2, A3, B1 and/or D1) in two buildings ranging from 5 to 15 storeys, along with disabled parking, servicing, cycle parking, public realm and amenity space.

1. Welcome/Introduction

1. Morning all and welcome. Can everyone hear me? Council? Appellant?

2. Just to confirm, I am Jennifer Vyse. I am a planning Inspector and chartered town planner and, as you know, I have been appointed to conduct the related Inquiry opening on 7 January.

3. Have you all seen/got sight of the previously circulated agenda?

2. Purpose of the conference

4. The purpose of this conference is to provide an opportunity for me to give a clear indication as to the ongoing management of the case and the presentation of evidence so that the forthcoming Inquiry is conducted in an efficient and effective manner. Following the close of this conference, I will issue a summary of the outcome of this discussion, together with any necessary Directions.

1. Advocates

5. Confirm advocates for the main parties.

2. Main Issues

6. I set out my initial thoughts on potential main issues in the earlier note. I noted in there that in principle, it appeared that the proposed planning obligation may address the last of the Council's reasons for refusal. Is that the case?

7. What about the additional info re local wind/microclimate conditions? Does the Council know at this stage whether it is likely to pursue that reason for refusal? Can always leave it as a main issue for now and revisit when I get the agreed main statement of common ground.

8. On that basis, the main issues in this case are likely to relate to:

   - the effect of the development proposed on the significance of nearby heritage assets including the Bethnal Green Gardens Conservation Area, listed buildings and non-designated assets;
   - effect on the character and appearance of the surrounding area, including the Bethnal Green Gardens Conservation Area;
   - effect on the safety of vehicular and pedestrian users of Birkbeck Street;

- effect of the development proposed on local wind/microclimate conditions, having particular regard to use by pedestrians and cyclists of landscaped areas and thoroughfares;[38]
- whether sufficient affordable housing is secured and whether the proposed tenure mix is appropriate; and,
- whether the housing mix across the site generally is appropriate having regard to type/size.

9. The Inquiry will also look at any benefits to be weighed in the planning balance, including any implications of not proceeding with the scheme.

10. Are there any other main topic areas that need to be covered by the evidence?

5. How the main issues will be dealt with

11. As set out in the earlier note, it seems to me that most of those could most efficiently be dealt with through separate round table sessions.

12. Go through each issue – discuss RTS or XX
    - Heritage (Conservation Area, LBs and non-designated assets)
    - Character and Appearance including character and appearance of the CA
    - Pedestrian and highway safety
    - Wind/microclimate if still a live issue
    - AH – Nos and tenure split
    - Housing across the site – type/size

13. Each of those areas will require a separate topic specific statement of common ground, although it might be that heritage and character/appearance could be combined, as could the two housing issues. Heritage one is to identify the relevant assets, set out their special interest and/or heritage significance, assess what contribution their setting make to that interest/significance, identify whether the appeal site lies within any setting and if it does, what effect would the development proposed have on that heritage interest/significance.

14. Appellant to take the lead on preparing the topic specific statements, liaising with the Council. Whilst identifying areas of agreement, the statements will need to focus on the areas where there is no agreement. I will lead the RTSs but you should work with each other on a draft agenda for each session, which will need to be submitted a couple of weeks before the Inquiry. I will issue finalised agendas based on those shortly before the Inquiry opens. Those agendas will help keep the discussion focussed in the most relevant matters.

15. Matters relating to planning policy, and the overall planning balance, including any benefits of the proposal, would be dealt with through the formal presentation of evidence in chief by your respective planning witnesses, which would be subject to cross-examination. The evidence of the appellant will also

[38] There is a possibility that this issue may be resolved through the submission of additional evidence in due course.

need to address any additional matters raised by interested parties.

6. Conditions

16. An *agreed* schedule of suggested planning conditions and the reasons for them, including references to any policy support, is to be submitted at the same time as the proofs. The Council should take the lead on preparing the list, in discussion with the appellant. You will need to pay careful attention to the wording and the conditions will need to be properly justified having regard to the tests for conditions, in particular the test of necessity. You are reminded in this regard that as set out in the NPPF, planning conditions should be kept to a minimum and that conditions that are required to be discharged before development commences should be avoided unless there is a clear justification. The reasons for any pre-commencement conditions will need to include that justification. Any difference in view on any of the suggested conditions, including suggested wording, should be highlighted in the schedule with a brief explanation given.

7. Planning Obligation

17. I will need an early draft of the planning obligation, with a final draft to be submitted shortly before the Inquiry opens. The final draft must be accompanied by a CIL Compliance Statement prepared by the Council. The statement must contain a fully detailed justification for each obligation sought, setting out how it complies with the CIL Regulations, in particular the test of necessity in order to mitigate a harm arising out of the development proposed. It should include reference to any policy support and, in relation to any financial contribution, exactly how it has been calculated and on precisely what it would be spent. With regard to any financial contributions, whilst the pooling restriction has been rescinded, I will still need to know whether any relevant schemes are the subject of other financial contributions in order to be able to come to a view on whether any contribution sought in relation to this appeal is justified.

18. I note a reference in the Council's SoC to a contribution towards monitoring. As you know, *Regulation 122 of the CIL regulations has been amended to make provision for local planning authorities to charge monitoring fees in planning obligations. That said, the sum to be paid must fairly and reasonably relate to the scale and kind to the development and must not exceed the authority's estimate of the cost of monitoring the development over the lifetime of the planning obligations which relate to that development. The CIL compliance statement will need to include detailed information to fully justify the requested amount, explaining how the figure is derived.*

19. There is also reference to a car permit free agreement. I draw attention in this regard to related case law, including *Westminster City Council v SSCLG & Mrs Marilyn Acons [2013] EWHC 690 (Admin)* and the later *R (oao Khodari) v Royal Borough of Kensington and Chelsea & Cedarpark Holdings Inc [2017] EWCA Civ 333*. Is Tower Hamlets an authority where the provisions of s16 of the Greater London Council (General Powers) Act 1974 might be engaged? s16 is effective to secure car-free development because the wider wording of s16 does not require a restriction on land, but only that an undertaking or agreement has a 'connection' with the land/property. If a presented deed

includes s16 powers then it will be a secure way of achieving 'car-free' development in London.

20. A short time will be allowed after the Inquiry for submission of a signed version.

8. Core Documents

21. You will need to discuss and agree a list of core documents in advance of preparing your proofs so they can be properly referenced in the proofs. That list is to be co-ordinated by the appellant and must be submitted with the proofs, together with a hard copy set of the documents. I will send out a template for that list with the Summary Note following this conference. An important point to note is that the Core Documents should comprise **only** those documents to which you will be referring. A copy of the National Planning Policy Framework does not need to be included as a specific core document. Any Appeal Decisions and/or legal authorities on which any of you intend to rely will each need to be prefaced with a note explaining the relevance of the document to the issues arising in the Inquiry case, together with the propositions on which you are seeking to rely, with the relevant paragraphs flagged up.

9. Inquiry Venue

22. Got a venue yet? Capacity? Microphones, hearing loop, Wi-Fi, photocopying? Secure overnight/leave papers out? Retiring rooms? Parking? Food?

23. Layout for round table sessions.

24. Does the Council have someone who will be able to act as a point of contact for IPs during the event?

10. Inquiry Running Order/Programme/Evening Session

25. In general, I will aim to finish each day at around 17.00. With the exception of the first day, is there any objection to starting at 09.30 on subsequent days?

26. Any problems with availability of your respective witnesses during the week?

27. In terms of running order, following my opening comments on the first day of the Inquiry, I will invite opening statements from you, which should be no longer than 5-10 minutes: appellant first, followed by the Council.

28. I will then hear from any interested parties present who wish to speak, which often suits those who have taken time out from work, or who may have other commitments. While we are on the matter of interested parties, I have also seen a request from three local Councillors for an evening session, citing the level of public interest. I note in this regard that there were six responses from external consultees in relation to the planning application, with none received in response to the appeal. Views? I am not averse to holding an evening session in principle. In my experience, holding it on the evening of the first day of the Inquiry is usually most effective. On that basis, it might be useful to do the accompanied SV on the afternoon of the first day, after I have heard from any who wish to speak to the Inquiry then. Views? Arrangements? Location? Timing? I will include details in relation to the evening session as part of the

Note that I will issue following this conference. Deal also with arrangements for SV if doing on first day.

29. Given the parties' agreement on the presentation of evidence (hopefully), the running order is likely to be:

- heritage
- character and appearance
- pedestrian and highway safety
- wind/microclimate
- AH
- general housing

30. Lastly in terms of evidence will be the planning witness for each party, with the evidence to be cross-examined. Council first, then appellant. Appellant's evidence will also need to address any other matters raised by interested parties.

31. On conclusion of all that, I will lead the usual round table session on conditions and provisions of the planning obligation.

32. Closing submissions – Council, then appellant (copies in writing) No longer than 30 minutes preferably. They should simply set out your respective cases as they stand at the end of the Inquiry and should be fully cross-referenced.

33. If not already covered - An accompanied visit will be undertaken at some stage. Given the issues raised in relation to heritage assets, is there merit in doing that visit before hearing any evidence? Such as during Day 1?

34. Whenever it takes place, its purpose is simply for me to see the site and its surroundings. I cannot listen to any representations/ discussion/arguments during the visit, but parties can point out physical features.

35. The Inquiry is currently scheduled to sit for up to 5 days. On the basis of today's discussion and the agreed format for the presentation of evidence, it seems hopeful, even allowing for an evening session, that we will be able to get through everything in that time. Availability of witnesses? Can now sit Friday morning if that is helpful.

36. The advocates are to work collaboratively on their time estimates for each stage of their respective cases. A draft programme will be issued following receipt of your final timings in due course, when I will have a better feel for the overall duration. Other than in exceptional circumstances, you are expected to take no longer than the timings indicated, which will require the cooperation of both advocates and witnesses.

9. Timetable for submission of documents

37. No signed SoCG as yet – when can I expect that?

38. As set out in the start letter, all proofs are to be submitted no later than **10 Dec.** Details of the preferred format and content of proofs and other material were Annexd to the pre-conference note.

39. The other more detailed topic specific statements of common ground that we have discussed should inform your proofs and are to be submitted at the same time (**10 Dec)**.

40. The early draft of the proposed planning obligation is also to be submitted at the same time as the proofs (**10 Dec**) with a final draft no later than **20 Dec??** to be accompanied by the CIL Compliance Statement prepared by the Council and the relevant office copy entries.

41. The Council is to make sure a copy of the notification letter setting out details of the Inquiry, and a list of those notified is sent in to PINS no later than **17 Dec**.

42. There is no reference in the Rules or the Procedural Guide to supplementary or rebuttal proofs and PINS does not encourage the provision of such. However, where they are necessary to save Inquiry time, copies should be provided no later than **20 Dec**. It is important that any rebuttal proofs do not introduce new issues. As an alternative to a rebuttal, it may be that the matter could more succinctly be addressed through an addendum statement of Common Ground. Final timings for openings and closings, evidence in chief and XX also by **20 Dec**.

43. Do you need me to run through the timings again?

????	Signed Main SoCG
10 December Need to be earlier to allow for Christmas??	Deadline for submission of: • all proofs • suggested planning conditions • core documents list • topic specific statements of common ground • initial draft planning obligation
17 December	Deadline for the Council to submit a copy of the Inquiry notification letter and list of those notified
20 December (2 weeks before would be 24 Dec. Need time for parties to look at anything submitted)	Deadline for submission of: • final draft planning obligation and relevant office copy entries • CIL Compliance Statement (Council) • any necessary rebuttal proofs • final timings
31 December	Deadline for draft agendas for each of the round table sessions
7 January 2020	Inquiry opens 10.00 am

10. Costs

44. No application for costs has been foreshadowed as far as I am aware. If any application is to be made, the planning practice guidance makes it clear that, as a matter of good practice, they should be made in writing before the inquiry. Does either side anticipate making any application at this stage?

45. I also need to remind you that, in order to support an effective and timely planning system in which all parties are required to behave reasonably, that the I have the power to initiate an award of costs in line with the Planning Guidance. Unreasonable behaviour may include not complying with the agreed timetables.

11. Any other matters

46. Are there any other procedural matters that need to be dealt with?

47. All that remains is for me encourage your close and continuing collaboration in advance of the Inquiry, reflecting the tone and spirit of this case conference. I hope you found the process helpful. Just to confirm, I will issue a Note shortly summarising the matters agreed during our discussion today. This call is now closed. (Note time)

M5 – Inspector's post-conference call note

The Planning Inspectorate

APPEAL REF: APP/E5900/W/19/3236184
Former LEB Building, Former LEB Building, 255-279 Cambridge Heath Road, Bethnal Green, London

CASE MANAGEMENT CONFERENCE SUMMARY

1. The case management conference was led by the Inquiry Inspector, Jennifer Vyse. The Inquiry is to be held at the Town Hall, 5 Clove Crescent, Mulberry Close, Poplar, London E14 2BG, opening at 10.00am on Tuesday 7 January 2020.

2. Although currently scheduled to sit for up to five days, if all the matters referred to below are to be dealt with it may be that additional time will be required. Accordingly, in addition to the scheduled sitting days (7-9 and 14-15 January 2020) and with the agreement of the parties, the Inquiry may also to sit on Friday 10 January, with the parties to reserve 16 January as well, just in case, although it is to be hoped that sitting on the Friday will be sufficient. Once the parties' positions are finalised in relation to the main issues set out below, and with a better idea of timings for each element of the parties' cases following the submission of proofs of evidence, a more informed timetable can be discussed.

3. The advocates were confirmed as Russell Harris KC for the appellant, and James Burton, of Counsel, for the Local Authority.

4. The Council agreed to provide an officer during the Inquiry to assist with administration and to act as a point of contact at the event for interested parties.

5. The Council is encouraged to draw the attention of interested parties to this Note, including posting a copy on its web site.

Main Statement of Common Ground

6. No signed statement of common ground was submitted with the Council's statement of case as required by the Rules. It was agreed that this would be submitted by **8 November 2019**. It is noted in this regard that the Council's statement of case sets out a huge raft of policies and guidance, ranging significantly further than those referred to in the reasons for refusal. The Inquiry will focus on those policies that are most important and those that are relevant to the matters in dispute. These will need to be confirmed in the statement of common ground and should help avoid the inclusion of unnecessary/irrelevant material in the core documents.

Main Issues

7. It transpired that there was still some way to go in relation to issues relating to vehicular/pedestrian safety and wind/microclimate effects. On that basis, it was agreed that these matters would remain as potential main issues for the time being, albeit that they may be resolved prior to the Inquiry.

8. On that basis, it was agreed that the main issues in this case are likely to relate to:

- the effect of the development proposed on the significance of nearby heritage assets, including the Bethnal Green Gardens Conservation Area and Registered Park and Garden, listed buildings and non-designated assets;
- effect on the character and appearance of the surrounding area, including the Bethnal Green Gardens Conservation Area;
- effect on the safety of vehicular and pedestrian users of Birkbeck Street;
- effect on local wind/microclimate conditions, having particular regard to use by pedestrians and cyclists of landscaped areas and thoroughfares;
- whether sufficient affordable housing is secured and whether the proposed tenure mix is appropriate; and,
- whether the housing mix across the site generally is appropriate having regard to type/size.

9. The Inquiry will also look at any benefits to be weighed in the planning balance, including any implications of not proceeding with the scheme.

Dealing with the Evidence

10. With the agreement of the parties, the evidence relating to the first two of the identified main issues (heritage and character and appearance) will be tested in topic specific round table sessions. If the third main issue, relating to pedestrian/vehicular safety is still at issue between the parties by the time of the Inquiry, that will also be dealt with in the same manner. The Inspector will lead the related sessions, but the parties will need to work together in advance to prepare a draft agenda for each session, to ensure that all relevant matters are properly aired and interrogated.

11. If the issue of effect on wind/microclimate conditions is still at issue by the time of the Inquiry, the related evidence will be tested through formal presentation and cross-examination. Matters relating to affordable housing provision and tenure, and general housing mix across the site will be tested in the same way.

12. Separate topic specific statements of common, but more particularly uncommon ground are required in relation to each of the identified main issues, although it might be that heritage and character/appearance could be combined, as could the two housing issues. The appellant is to take the lead in the preparation of those statements, liaising with the Council.

13. Any outstanding matters, including matters raised by interested parties, planning policy, any benefits and the overall planning balance, will also be dealt with through the formal presentation of evidence in chief and cross-examination.

Conditions

14. An agreed schedule of suggested planning conditions and the reasons for them, including references to any policy support, is to be submitted at the same time as the proofs. The Council is to take the lead on preparing that list, in discussion with the appellant, using those suggested by the appellant as appended to its Statement of Case. Careful attention is to be paid to the wording and the conditions will need to be properly justified having regard to the relevant tests, in particular the test of necessity. You are reminded that as set out in the NPPF, planning conditions should be kept to a minimum and that conditions that are required to be discharged before development commences should be avoided unless there is a clear justification. The reasons for any pre-commencement conditions will need to include that justification. Any difference in view on any of the suggested conditions, including their wording, should be highlighted in the schedule with a brief explanation given.

Planning Obligation

15. An early draft of the planning obligation is to be provided, with a final agreed draft to be submitted shortly before the Inquiry opens. The final draft must be accompanied by a CIL Compliance Statement prepared by the Council. That statement is to set out a fully detailed justification for each obligation sought, detailing how it complies with the CIL Regulations, in particular the test of necessity in terms of how it would mitigate a particular harm arising out of the development proposed. It should include reference to any policy support and, in relation to any financial contribution, exactly how it has been calculated and on precisely what it would be spent. With regard to any financial contributions, whilst the pooling restriction has been rescinded, the Statement will still need to set out whether any relevant schemes are the subject of other financial contributions in order for the Inspector to be able to come to a view as to whether any contribution sought in relation to this appeal is properly justified.

16. As mentioned at the conference, the Council's statement of case and the initial draft version of the planning obligation refer to a contribution towards monitoring, which is now allowed for I the CIL Regulations. Any such sum must fairly and reasonably relate to the scale of development and must not exceed the authority's estimate of the cost of monitoring the development over the lifetime of the planning obligations which relate to that development. The CIL compliance statement will need to include detailed information to fully justify the requested amount, explaining how the figure is derived.

17. There is also reference to securing the development scheme as car free. That can present problems in terms of whether an 'obligation' presented amounts to a binding obligation rather than a personal undertaking, affecting enforceability. The attention of both parties was drawn to related case law in this regard, including *Westminster City Council v SSCLG & Mrs Marilyn Acons [2013] EWHC 690 (Admin)* and the later *R (oao Khodari) v Royal Borough of Kensington and Chelsea & Cedarpark Holdings Inc [2017] EWCA Civ 333*. It was confirmed for the Council that Tower Hamlets is an authority where the provisions of s16 of the Greater London Council (General Powers) Act 1974 are engaged. Pursuant to the *Khodari* case, S16 is effective in securing car-free development because its wider wording does not require a restriction on land, but only that an undertaking or agreement has a 'connection' with

the land/property. If a presented deed includes s16 powers then it is likely to be a secure way of achieving 'car-free' development here. That will need addressing.

18. It was also noted that whilst the scheme includes residential development, with a likely increase in demand for local school places, the early draft obligation makes no mention of the need for any education contribution. The appellant confirmed that they were aware of the non-statutory guidance issued in April by the Department of Education partly in response to the removal of the pooling restriction on Section 106 contributions, which is intended to help local authorities secure developer contributions for education. In order to pre-empt any late request from the education authority for associated funding, the appellant agreed to liaise with the relevant education authority as a matter of urgency.

19. A short time will be allowed after the Inquiry for submission of a signed version of the obligation.

Core Documents/Inquiry Documents

20. You will need to discuss and agree a list of core documents in advance of preparing your proofs so they can be properly referenced in the proofs. That list is to be co-ordinated by the appellant and must be submitted with the proofs, together with a hard copy set of the documents for the Inspector. A template for that list is attached.

21. The Core Documents should comprise **only** those documents to which you will be referring and do not need to include a copy of the National Planning Policy Framework or deal with areas where there is no dispute. Any Appeal Decisions and/or legal authorities on which any party intends to rely will need to be prefaced with a note explaining the relevance of the document to the issues arising in the Inquiry case, together with the propositions on which you are seeking to rely, with the relevant paragraphs flagged up.

22. Where any documents on which it is intended to rely are lengthy, only **relevant extracts** need to be supplied, as opposed to the whole document. Such extracts should, however, be prefaced with the front cover of the relevant document and include any accompanying relevant contextual text.

23. The appellant agreed to supply an extra hard copy set of the Core Documents on Inquiry opening to form an Inquiry library, which can be accessed by interested parties at the event. The Council will be provided with an electronic set of the documents and it will be for it to print out what elements it needs in hard copy.

24. Any documents submitted once the Inquiry has opened will be recorded as Inquiry Documents on a separate list, overseen by the Inspector.

25. A minimum of two copies of any new documents produced at the Inquiry will be required - one for the other main party and one for the Inspector. - with extra copies to be made available to assist interested parties if necessary.

Inquiry Running Order

26. In general, the Inquiry is expected to finish each day no later than around 17.00 hours and, with the exception of the first day, will resume on subsequent days at 09.30 hours.

27. In terms of running order, following the Inspector's opening comments on the first day of the Inquiry, she will invite opening statements from the main parties (appellant first, followed by the Council) which will set the scene. She will then hear from any interested parties who wish to speak, which often suits those who have taken time out from work, or who may have other commitments.

28. At the request of local Councillors, an evening session will be included as part of the Inquiry. That session will be held on 7 January, commencing at 18.30 hours. Details for taking part in that are attached hereto at Annex B. The Council is to ensure that those details are made known to interested parties.

29. The presentation of evidence during the daytime sitting sessions will commence with a short presentation by the appellant on the design of the appeal scheme, which will lead into the round table session on heritage matters, followed by the round table session on character and appearance. Next, if not resolved beforehand, will be the session on pedestrian and vehicular safety.

30. The presentation of evidence in chief and cross-examination, which will be dealt with on a topic by topic basis, will deal with effect on wind/ microclimate conditions if that is still a live issue, then affordable housing provision and tenure, followed by evidence on the general housing mix across the site. Last in terms of evidence, matters relating to planning policy, any benefits to be weighed in the planning balance, including any implications of not proceeding with the scheme, and the overall planning balance will also be dealt with through evidence in chief and cross examination. In each case, the Council will present its evidence first, which will be cross-examined and re-examined if necessary, followed by the corresponding evidence of the appellant on the same basis. The appellant's evidence should also address any other matters raised by interested parties at application and appeal stage.

31. On conclusion of that, the Inspector will lead the usual round table discussion on conditions and provisions of the planning obligation. That will be followed by closing submissions (Council, then appellant) which should set out your respective cases as they stand at the end of the Inquiry, with a written copy handed up at the time, appropriately cross-referenced where evidence is relied on, for the avoidance of doubt.

32. The Inspector will carry out an accompanied site visit either after the Inquiry has closed, or before if an appropriate opportunity presents itself in the programme. Whenever it takes place, its purpose is simply for her to see the site and its surroundings. She cannot listen to any representations/discussion/arguments during the visit, but parties can point out physical features, so it is important that you give some thought as to where you wish her to see the site from. It is likely that access will be required to at least some of the buildings on site, which will need to be facilitated.

Document Submission Dates

33. The main statement of common ground is due no later than **8 November** and should be used to inform your respective proofs.

34. As set out in the start letter, all proofs are to be submitted no later than **10 December.** Details of the preferred format and content of proofs and other material were Annexd to the pre-conference note. The topic specific statements of common ground, which should also inform your proofs, are to be submitted at the same time (**10 December)**.

35. The early draft of the proposed planning obligation is also to be submitted by **10 December,** with a final agreed draft no later than **20 December,** accompanied by the relevant office copy entries and a CIL Compliance Statement prepared by the Council.

36. The Council is to ensure that a copy of the Inquiry notification letter and a list of those notified is sent into the Planning Inspectorate no later than **17 December**.

37. There is no reference in the Rules or the Procedural Guide to supplementary or rebuttal proofs and the Inspectorate does not encourage the provision of such. However, where they are necessary to save Inquiry time, copies should be provided no later than **20 December**. It is important that any rebuttal proofs do not introduce new issues. As an alternative to a rebuttal, it may be that the matter could more succinctly be addressed through an addendum statement of common ground.

38. The advocates are to work collaboratively on the time estimates for each stage of their respective cases, with final timings for openings and closings, evidence in chief and cross-examination to be submitted no later than **20 December**. A draft programme will be issued following receipt of your final timings in due course, when the Inspector will have a better feel for the overall duration. Other than in exceptional circumstances, you are expected to take no longer than the timings indicated, which will require the cooperation of both advocates and witnesses.

8 November 2019	Deadline for main signed statement of common ground
10 December 2019	Deadline for submission of: • all proofs • suggested planning conditions (Council to lead) • core documents list (appellant to lead) • topic specific statements of common ground on heritage/character and appearance, pedestrian and highway safety, wind/microclimate conditions, affordable housing/housing (appellant to lead) • initial draft planning obligation
17 December 2019	Council to send in copy of Inquiry notification letter and list of those notified
20 December 2019	Deadline for submission of: • final draft planning obligation and relevant office copy entries • CIL Compliance Statement (Council to lead)

	• any necessary rebuttal proofs • final timings
31 December 2019	Deadline for submission of draft agendas – one for each of the round table sessions
7 January 2020	Inquiry opens 10.00 am

Costs

39. No application for costs is currently anticipated by any party at this stage, although positions were reserved. If any application is to be made, the Planning Practice Guidance makes it clear that it should be made in writing before the Inquiry. Costs can be awarded in relation to unreasonable behaviour which may include not complying with the prescribed timetables. You are also reminded in this regard, that in order to support an effective and timely planning system in which all parties are required to behave reasonably, the Inspector has the ability to initiate an award of costs, although hopefully she won't have to use it.

Jennifer A Vyse

1 November 2019

ANNEX A

TEMPLATE FOR CORE DOCUMENTS LIST

(Adapt headings to suit)

CD1	Application Documents and Plans
1.1	
1.2 etc	
CD2	Additional/Amended Reports and/or Plans submitted after validation
2.1	
2.2	
CD3	Committee Report and Decision Notice
3.1	Officer's Report and minute of committee meeting
3.2	Decision Notice
CD4	The Development Plan
4.1	
4.2	
CD5	Emerging Development Plan
5.1	
5.2	
CD6	Relevant Appeal Decisions*
6.1	
6.2	
CD7	Relevant Judgements*
7.1	
7.2	
CD8	Other
8.1	
8.2	

* Any Appeal Decisions on which a party intends to rely must each be prefaced with a note explaining the relevance of the Decision to the issues arising in the current Inquiry case, together with the propositions relied on, with the relevant paragraphs flagged up. A similar approach is to be taken in relation to any legal citations relied upon.

ANNEX B
EVENING INQUIRY SESSION

1. The evening session forms part of the public inquiry that will have opened earlier in the day. The session will commence at 18.30 hours at the Town Hall on 7 January 2020 and will sit no later than 21.00 hours.

2. The purpose of the evening session is to allow those unable to attend the daytime sitting sessions the opportunity to put their views to the Inspector. It is important to note that the evening session is a formal part of the Inquiry and is not a public meeting. As such, all speakers will need to observe the normal rules of Inquiries, addressing the Inspector rather than the public at large, putting their respective views to her. As is usual practice, the witnesses heard in the day sessions will not be available at the evening session for cross-examination, although representatives of both the main parties will be present to hear what is said.

3. Anyone wishing to speak at the evening session should arrive in advance and provide their name and details to the Council's officer who will be assisting with proceedings and who will collate a list of participants for the Inspector.

4. The advice accessed via the links below should be read by anyone wishing to take part either in the daytime or evening sessions. In particular, it is most helpful if you write down in advance what you want to say, even if it is a series of headings, which will not only help you not to forget anything, but will also help the Inspector record accurately what you are saying. To that end, you will need to provide three copies of any note (one for the Inspector and one each for the Council and the appellant) submitted in advance of the evening session if at all possible - Inquiries are not the place to spring surprises.

5. Furthermore detailed information for interested parties can be found on the Planning Portal, including:

   Procedural Guide: Planning appeals– England (August 2019)

   https://www.gov.uk/government/publications/planning-appeals-procedural-guide/procedural-guide-planning-appeals-england

   and

   Guide to taking part in planning, listed building and conservation area consent appeals proceeding by an Inquiry – England (September 2019)

   https://www.gov.uk/government/publications/planning-appeals-dealt-with-by-an-inquiry-taking-part

Annex N - Case management conference calls: documents issued by the case officer

N1 - Case management conference set-up instructions

Case Management Conference set-up

The Case officer will:

Identify date, time and Inspector and confirm in start letter.

Ask for details (phone/email) of participants and spokesperson in start letter.

Book the audio conference.

Send invites to the parties in advance, together with a phone number to dial and a joining code and Inspector's agenda, pre-conference notes and the etiquette guide.

Send phone number for the conference and joining code to Inspector and agree the best way to contact them on the day to notify him/her that the parties are present and ready to start (such as email/teams message).

To start the conference, the case officer will:

Dial in to start the conference call.

Take the names of the parties as they join the call and confirm who is the relevant spokesperson.

When all present, notify the Inspector via agreed method to tell him/her to dial in with the joining code.

The case officer will confirm to the parties that the Inspector has arrived, advise who the main spokesperson is for each party, and then will leave the conference, leaving the Inspector in control.

The Inspector will:

Have liaised early on with the case officer to agree a date and a time for the case management conference and advised how want to be notified that OK to join the conference call e.g. email/teams message.

Have prepared an agenda and a pre-conference note in advance, so that the parties understand the Inspector's thoughts in terms of likely main issues and preferred means of hearing the evidence. These will be sent out with the invites to the conference by the case officer.

Be ready a few moments before the conference call with the phone number to dial and the joining code to hand, together with a list of expected attendees, a copy of the agenda, and the 'speaking notes/script' it is intended to follow, adjusted to suit the matters at issue.

When notified by the case officer that those expected at the conference are 'present,' dial in to the conference call using the joining code when prompted. This can be done from any phone.

The case officer will advise the parties that the Inspector has joined the conference and will then hang up. The Inspector will then conduct the meeting.

On conclusion, the Inspector will advise the parties that the meeting is closed and promptly hang up. That will finish the conference call. The Inspector will issue a post-conference note as soon as possible after the conference, confirming the agreed arrangements and timetable for the submission of documents.

The Planning Inspectorate

Case Management Conference Call Etiquette

- Make sure all the necessary persons for your side are present in good time and that mobile phones and the like are turned off, or on silent mode during the conference.

- Make sure any electronic devices/phones you will be relying on during the conference all are fully charged.

- Make sure you know how the service works and how to dial in. This means keeping the dial-in number and any required PIN to hand. If you haven't dialled in before, it's best you try to dial in early so you give yourself enough time to troubleshoot in case you run into any complications.

- Have a copy of the agenda readily to hand.

- Each party should have a single spokesperson nominated to speak. A case officer will record the names of those present during the call for each party, before the Inspector leading the case conference 'arrives'. The Inspector will 'arrive' last and leave first.

- Background noise on a conference call can be an issue. You may want to consider putting yourself on mute and then un-muting yourself when you speak. Also make sure that personal phones are kept away from the main speaker phone in order to avoid potential issues with feedback.

- Know when, and when not to speak – talking over people is rude in any situation, and when you're on a conference call, you can't see the body language of someone who is about to speak. No one likes being spoken over, so make sure you take note of your cues to speak and don't speak over (or louder) than the other participants on the call. The Inspector will lead the conference and will invite specific contributors to speak at particular times.

- As a matter of courtesy, please make the case officer aware when joining if you intend to record the conference call.

N3 - Guidance note on round table sessions

The Planning Inspectorate

ROUND TABLE SESSION VS CROSS-EXAMINATION

The Rules set out that it is for the Inspector to determine the procedure at an Inquiry (except as expressly provided for by the Rules). It is essentially your decision therefore, informed by the views of the parties, as to whether a topic is better suited to formal presentation of evidence and cross-examination, or to round table sessions (RTS) which still allow for the robust testing and understanding of evidence. Bear in mind too, that for some topics there will be sufficient evidence in the written submissions such that there is no need to hear any oral evidence.

There can be no 'one size fits all' approach, so how do you decide? In ensuring that the evidence is tested to the extent that is needed in order to ensure justice, you will need to think about proportionality. Although you may have an initial view, it is important to keep an open mind and listen to what the parties have to say. The decision regarding the approach is not cast in stone – if it transpires at any point that the best interests of the Inquiry would be served by changing formats, then that is a matter for you, after considering the views of those involved.

It is in no-one's best interest to waste time in cross-examination when a RTS could get directly to the nub of the matter more quickly. A RTS can also be more efficient for some matters even where a topic based approach to hearing the evidence is not adopted, particularly where the issue relates to a 'list' (see point 9 below). Consider inviting reasoned views on the respective approaches of the parties in advance of the case management conference. It may also be helpful to clarify with the parties the role of advocates at the RTS, e.g. team leaders or just observers and occasional contributors, and who should you direct your questions to on each side.

To give the parties confidence that any RTS will cover the matters that they consider need testing and exploring at the Inquiry, get them to agree a draft agenda for each session for you. You would then issue a final version shortly before the event, adding further matters as necessary.

Considerations that might inform your approach:

1. Have the main parties expressed a reasoned preference for a particular approach? Are they agreed?

2. The nature of any interested party involvement. If lots, a RTS might be unmanageable. Are the matters raised by interested parties in dispute between the main parties? How would their interests be best served?

3. How far apart are the main parties on the issue? Is either party likely to change its position or concede anything in cross-examination, or would a RTS with directed questions better assist your understanding of the evidence?

4. With proportionality in mind, what would cross-examination really add to your understanding of an issue beyond the written evidence. How significant a factor is the issue likely to be in determining the outcome?

5. Is there a lot of data and/or is the issue a specialist or technical one where professional witnesses are needed to address an objection and where advocacy skills may be of less help? If so, a RTS between the professionals can sometimes be the best and shortest way to get the necessary information, directed by the Inspector assisted by the advocates in focussing the discussion and clarifying important points.

6. A RTS is likely to be more suited to matters that do not rely on policy understanding/weight to be applied, or that depend on the professional views of expert witnesses.

7. Does the topic relate to matters best understood/appreciated on site?

8. Would more focussed wording for the main issue assist the parties in narrowing the focus of their evidence, giving a better indication as to whether a RTS would be appropriate?

9. In order to avoid repetition, RTS are often well suited to cases where an issue relates, for instance, to multiple housing land supply sites, the effects on a number of views, impacts on a number of heritage assets, living conditions or sunlight/daylight etc. Asking for the evidence to be presented in summary table form can be really helpful in highlighting the differences between the parties and informing a RTS agenda.

10. Could some s106 matters (e.g. education or POS contributions) be better discussed between the relevant witnesses outside Inquiry time, with a subsequent report back to the Inquiry - maybe via an agreed Note?

11. Will the Inquiry venue lend itself readily to RTS (think about e.g. layout, microphones, audibility etc) so that all who want can readily take part? Consider a different/new seating arrangement for a RTS if that is possible, so that people are sitting loosely in table-style format so as to facilitate the discussion, but also to emphasise to everyone present that this is different from the formality and structure of the overriding Inquiry.

12. Where there is common ground between the main parties on an issue but significant objection from interested parties, this would be likely to lend itself to a RTS based on a brief proof produced by the appellant's witness who would then be called to field questions from any interested parties and the Inspector.

Specific considerations include:

Five Year Housing Land Supply: generally a good candidate for a RTS, especially where based on a statement of disagreement including a composite list of the main disputed sites with a short summary of each position on deliverability. This should include site specific evidence on whether sites with detailed pp may not be delivered, or

sites with outline pp or allocated in the DP will be delivered in five years, plus build out rates.

Design, Character and Appearance etc: where an issue requires judgement say, on effect on proportions, general aesthetics or 'quality', this would be a potential candidate for a RTS, especially as your decision will largely be informed by what you see on site. However, where the evidence is particularly complex, where there are methodological differences or, for instance, it is necessary to examine the understanding of relevant policy in other Inspectors' decisions, cross-examination might be necessary. This can also be helpful to interested parties in understanding their own case and can often shorten their objections.

Heritage: In cases where related planning merits are at issue (e.g. the significance of an asset) a RTS may be appropriate. However, cases where the effect on a number of heritage assets is at issue and/or the legal arguments are more involved, particularly in terms of the weight to be given to their conservation, are more likely to benefit from cross-examination, at least in part – you might, for instance deal with the heritage significance of each asset as RTS, or possibly even via an agreed statement.

Landscape Character: Does the main issue accurately reflect what is at issue? Give careful consideration as to whether the generic 'effect on character and appearance' wording really directs the parties to what you want to know. RTS lend themselves to discussion of the relative merits of LVIAs, particularly disagreement on the most relevant aspects to consider, the effects of any screening over time from photomontage evidence and the key viewpoints. You only need to go through photomontages/viewpoints once and they would inform the RTS agenda. Significant methodological differences though, may need cross-examination.

Living Conditions: generally unlikely that effects on privacy, outlook, daylight/sunlight, noise/disturbance, private amenity space and internal space standards require cross examination. It may be necessary though where, for example, noise or daylight/sunlight impacts involves significant disagreement on technical assessments. In such circumstances, it may still be helpful to get the parties to produce a composite table setting out the main differences and the reasons for them.

Modelling/technical evidence: may be more suited to a RTS, in particular traffic, noise, air quality, and possibly viability. The topics may also need to be addressed by cross examination, but a RTS can usefully establish the reasons for differences and include interested parties. Again, a composite table setting out the main differences of input elements can usefully inform both the discussion format and cross-examination.

Management of Interested Parties: In dealing with the evidence, you will need to consider how their interests might best be served at the Inquiry. A RTS may be less intimidating for them in terms of taking part, but large numbers can be more difficult to manage at a RTS. Remember too that you need to record the names of all those who speak for your Decision or Report.

Other Issues: provision of/loss of open space, housing mix and housing technical standards may also be suited to RTS where there is an alleged conflict with policy and the evidence/analysis is unclear.

The Planning Inspectorate

Complaints and how to avoid them

Updated to reflect December 2023 Framework (NPPF)
What's new since the last version Changes highlighted in yellow made in March 2017: • Annex A added regarding the 'slip rule' process Text
Other recent updates

Contents

Information Sources

High Court Judgments

Town and Country Planning Act 1990, S.288

Human Rights Act 1998 (s7(1)(a))

Introduction

1. PINS Customer Quality Team (CQ) uses a wide definition of the term 'complaint'. Any adverse comment about any aspect of an appeal decision is regarded as a complaint, regardless of whether the letter in general is couched in positive terms.

2. For example, a request for clarification, indicating that doubt exists over what is meant, is an implied complaint; and if it is found that the request has been necessitated by an error or wording that is genuinely capable of being misunderstood or confused, the complaint will be regarded as justified.

3. The greatest proportion (about 60%) of complaints comes from interested party objectors.

4. A complaint is an allegation that the Planning Inspectorate, in processing and deciding the casework for which it is responsible, did something material it shouldn't have done, or didn't do something material it should have done. In practice, this means that where there is still time to correct an error, and this is done, it will not be counted as a complaint, provided that it cannot have a material impact on the correct processing, or outcome, of the case. The definition of a Justified Complaint is therefore one where, following thorough and impartial investigation, the complaint is upheld.

5. JCs are categorised as either:

   - *Minor* - judged not to have affected the outcome of the case, usually of little consequence. For example, errors of a typographical or minor factual nature, misspelled names etc are not included in the definition of justified complaint, as such errors would potentially be correctable under the Slip Rule. These are still recorded as errors so that Seconded Inspector Trainers (SITs) or Inspector Managers (IMs) can be made aware of any issues requiring remedial coaching or training.

   - *Significant* – potentially affecting the outcome of the case or perceived by the public as prejudicial to a party's interests. For example, if an Inspector fails to notice a window on an elevation of a dwelling opposite a proposed neighbouring extension where the issue is one of overlooking, the error may well be significant. If the window is located on another elevation where overlooking would not result, the error is more likely to be minor.

Categories of justified complaints

- Improper conduct of site visit/hearing/inquiry.
- Taking into account an irrelevant factor / Failing to take into account/give appropriate weight to a relevant factor/ Misinterpreted a relevant factor or policy.
- Inadequate reasoning.
- Significant errors of judgement/perversity.
- Inclusion of unnecessary or inappropriate comments.
- Conditions errors/omissions/oversights.
- Failure to comply with rules of natural justice.
- In all instances where a clear error has occurred and this is agreed by the Inspector, CQ will reply without further input. Where there is any element of doubt or the issues are not clear-cut, CQ will seek not only the Inspector's comments but also those of the Professional Lead (PL) (also the SIT for those in training) before coming to an independent view. The complaint would only be confirmed as justified with the agreement of the PL, or the Head of Planning Inspector Profession, should a disagreement arise.
- Once investigations are complete, CQ will reply, copying to Inspector's IM and PL, with an appropriate explanation or apology, or both.
- The table below presents some tips for avoiding common causes of justified complaints.

Potential problems	**Check the following:**
Factual matters	Allowed/dismissed – are they the same in both decision and conclusion? Beware missing "not"s! References, names, addresses, dates LPA and parties' names Policy reference Page & paragraph numbering (check for missing text) Compass points Have plans have been amended? – if so, clarify which you are dealing with

Reasoning	Ensure you conclude on all main issues and development plan policies Ascribe weight to emerging plans as appropriate, if they change anything Show that you have had regard for any statutory requirements (but not necessary to state sections of Acts, etc) SPG/SPD –Address compliance with the Regulations if contested and clarify the weight afforded if it adds anything Write for the losing party Character & Appearance issue? Briefly establish existing C & A first before assessing proposal against it, particularly in Conservation Areas , where test is stronger (but avoid too much unnecessary description). It is not sufficient simply to reach a view on any matter – you must say why. Deal with any relevant previous appeal decisions: if reaching a contrary conclusion, say why. Where important, differentiate between matters of fact & those of personal judgement/opinion. Do not engage in theorising or making unsubstantiated assumptions. Don't neglect interested parties' views, particularly if relevant or well-researched: As mentioned above, about 60% of complaints are from them. Do not be afraid of making third party views a main issue (if appropriate) simply because LPA have not refused on those grounds. Dismissing a failure case? Don't forget to refuse planning permission too Outline development – clarify what matters are reserved. S.106 Undertakings – don't dismiss appeal simply through lack of one, consider whether necessary and if so, identify harm that would arise without one. Do not include matters likely to come as a surprise to parties

	without first canvassing their views.
On site	Avoid being with just one of the parties during an accompanied site visit. Be diplomatic. Conduct yourself in a professional manner. Don't discuss the merits of the case with the parties. Don't accept documents on site
Conditions	Check all conditions are NPPF and PPG compliant. Ensure all intended ones are included. Include reasons why/why not imposed. Do not add your own without canvassing the parties' views first. Check that opening/closing times make sense, use 24-hour clock. Avoid using terms like weekday/weekend – refer to precise days of the week. Don't forget implementation clauses.
Style & good practice	Establish a proof-reading regime that works for you and use it every time. Don't rely on the computer spell-checker. Avoid using double negatives – too easy to omit an important "not". Phrase main issues neutrally. Use plain English Write positively and concisely. Be diplomatic. Avoid making helpful comments

The Parliamentary and Health Service Ombudsman

6. The Ombudsman's function is to investigate complaints by those who claim to have sustained injustice as a consequence of maladministration arising from action taken by or on behalf of a government department. The term maladministration encompasses such things as bias, neglect, incompetence, discourtesy, a failure to follow proper procedures and serious delay.

7. The Ombudsman's powers are limited to the investigation of the administrative functions of government. S/he can therefore investigate to see whether there has been maladministration in the decision making process, but cannot change in any way an Inspector's decision.

8. The Ombudsman receives thousands of complaints a year, many of which are sifted out at an early stage. When the Ombudsman is satisfied that there is a case to answer, she writes to the Chief Executive of PINS, setting out the details of the complaint and asking for a report. Inspectors involved in a complaint will be advised by PINS on the necessary procedures.

Annex A – Correction of Errors in Decisions (Slip Rule)

Part 5 of the Planning and Compulsory Purchase Act 2004 (as amended) (the 2004 Act) allows the Inspectorate to issue a 'Correction Notice' to correct certain types of errors in decisions, provided that the error is contained in the decision document but does not form any part of the reasons given for the decision (see Section 59(5) of the 2004 Act). The provisions of the 2004 Act are only intended to correct obvious clerical mistakes, typographical errors, omissions or accidental slips, which are obvious to the parties concerned. By definition, correctable errors would not materially affect the reasoning in the decision if an amendment is made. The process for correcting such errors is often referred to as the "Slip Rule".

Once issued, a corrected decision has full legal status, carries a fresh date (except for wrongly dated decisions – see below) and will replace (and be subject to the same provisions as) the original in all respects. The fresh date has the effect of resetting any High Court challenge period.

What qualifies as a "Slip Rule" request?

The statutory requirements in Part 5 of the 2004 Act must be met before a correction notice is issued. A judgement has to be made as to whether the error in question is correctable under legislation and it is in the public interest to make the correction.

A "Slip Rule" request can be made by any person. In addition to the above criteria, for a request to be valid it must have been made in writing, relate to a decision type permitted to be corrected under legislation and submitted within the relevant High Court challenge period.

This criterion also applies to the Secretary of State or Inspectors who detect errors in their own decisions and wish to make a "Slip Rule" request.

Registering and answering requests

The Customer Quality Team is responsible for recording and processing "Slip Rule" requests and making decisions on whether corrections should be made, having assessed the context of the request and sought comments from the appointed Inspector. The Customer Quality Team is also responsible for notifying the relevant parties about any intended correction.

Corrected decisions are sent to all parties who received a copy of the original decision. A procedural paragraph explains that the original decision has been superseded, with the following standard wording inserted above the first paragraph in the new decision, which reads:

"This decision is issued in accordance with Section 56(2) of the Planning and Compulsory Purchase Act 2004 (as amended) and supersedes the decision issued on …"

This paragraph is purposefully numberless, in order not to cause an effect on the existing paragraph numbers within the decision.

The covering letter, referred to as the Correction Notice, specifies the correction of the error and accompanies the amended decision, which supersedes the original decision once issued.

In the circumstances where a correction is not made, the original decision continues to have full force and effect. That decision not to correct an error is communicated to the relevant parties by the Customer Quality Team, in accordance with Section 57(1) (b) of the 2004 Act.

Correcting Wrongly Dated Decisions

The "Slip Rule" should not be used where the error involves an incorrect date (or no date) on an issued decision. Such errors cannot be left uncorrected, however, as this could have major implications to the parties and the enforceability of a decision.

When such errors occur, the decision should be correctly dated and reissued by the relevant casework team to all parties who received the original decision, along with an apology and explanation for the mistake. It is legally necessary that the corrected decision date must be the date that the appeal decision was originally made – being the date that should have been correctly included in the decision in the first instance.

As it is not a "Slip Rule" change, responsibility for reissuing the appeal decision rests with the relevant casework team who issued the original decision. It is important for them to provide an explanation as to why the reissued decision is being sent. Any complaints arising from the reissuing of a decision will then be answered by the Customer Quality Team.

Further information

For further information and assistance about the "Slip Rule" process, please contact the Customer Quality Team. "Slip Rule" requests received in any business area are forwarded to the Customer Quality Team as a priority matter. Colleagues in all business areas are responsible for:

Being aware that any person can make a "Slip Rule" request;

Identifying where such requests are made within correspondence sent to PINS; and

Notifying the Customer Quality Team (✉ feedback@planninginspectorate.gov.uk) of requests that need to be considered in compliance with legislation.

The Customer Quality Team is responsible for handling all requests made, advising on the statutory requirements for "Slip Rule" and following the process for correcting decisions.

The Planning Inspectorate

High Court Challenges

Not yet updated to reflect December 2023 Framework (NPPF)
What's new since the last version • Last revised: 27 April 2018. Updates for clarification throughout the chapter including updated hyperlinks.
Other recent updates

Contents

Information Sources

Court Judgments

Knowledge Matters

The Inspector Training Manual, particularly the chapters on Role of the Inspector, The approach to decision-making, Human Rights and the Public Sector Equalities Duty.

Relevant Legislation

Criminal Justice and Courts Act 2015

Equality Act 2010

Human Rights Act 1998

Planning (Listed Buildings and Conservation Areas) Act 1990

Town and Country Planning Act 1990

Introduction

1. Almost inevitably one of the parties to an appeal will not welcome the Inspector's decision. Complaints about decisions are therefore not unusual and they are sometimes accompanied by a request that the decision be reversed or reconsidered.

2. An appeal decision can only be reconsidered following a successful challenge in the High Court, or where a decision is made to consent to judgment before it gets to court.

Who can challenge a decision?

3. Section 288(1) of the Town and Country Planning Act 1990 ('the Act') provides a right of challenge for any person aggrieved by a section 78 planning appeal decision to challenge the validity of that decision in the High Court. Over time, this has come to mean that anyone who has made representations during the course of an appeal is likely to be able to exercise the right to challenge under section 288 of the Act. The grounds are (a) that a decision is not within the powers of the Act or (b) that any of the relevant requirements have not been met (such as procedural requirements, regulations, rules) and as a result prejudice has occurred.

4. Section 289(1) of the Act provides a right of challenge to the Appellant, the Local Planning Authority or any other person having an interest in the land to which the notice relates. Challenges by any other party can only be made by Judicial Review. This relates to challenges to decisions on appeals against enforcement notices made under s174, and other notices under s207 and s215.

5. Decisions may also be challenged under s288 / s289 on the basis of Inspector's duties arising from the Human Rights Act 1998 and the Equality Act 2010 (see paragraph 13 below).

Time limits for making a challenge

6. High Court challenges proceed under different legislation depending on the type of appeal and the period allowed for making a challenge varies accordingly.

7. Any challenge made to **planning appeal decisions** must be made within six weeks (42 days) from the day after the date of the decision. This is a statutory time limit and cannot be extended. These are normally applications under Section 288 of the Town and Country Planning Act 1990 to quash Inspectors' decisions on appeals brought under section 78 against decisions by local planning authorities to refuse planning permission or to grant subject to conditions. Section 288 claims can also challenge enforcement appeals allowed under ground (a), deemed application decisions or Lawful Development Certificate appeal decisions. When an application is made under section 288, permission from the Court is required in order to bring the claim. Permission is decided by a judge on the papers initially. If permission is refused, the claimant can request that it is reconsidered at an oral hearing.

8. For **listed building consent** appeal decisions, challenges are made under Section 63 of the Planning (Listed Buildings and Conservation Areas) Act 1990 and must also be made within six weeks from the day after the date of the decision.

9. Any challenge made to **enforcement appeal decisions** must be made within 28 days of the date of decision, unless the Court extends this period. Enforcement appeal decisions can be challenged under Section 289 of the Town and Country Planning Act 1990. Listed building or conservation area enforcement appeal decisions can be challenged under Section 65 of the Planning (Listed Buildings and Conservation Areas) Act 1990. To challenge an enforcement decision under Section 289 or Section 65 permission of the Court must be obtained before a legal challenge can be made. Permission is dealt with at an oral hearing. If the Court does not consider that there is an arguable case, it can refuse permission.

10. Where a local authority grants planning permission, a party who was not the applicant for permission may not bring a section 78 appeal but may, if they can demonstrate a sufficient interest in the matter, challenge the local authority's decision by way of a judicial review application. Judicial review claims may also be brought in relation to planning decisions which are not caught by sections 288 or 289, including some procedural decisions. The time limit for making a claim for Judicial Review is 3 months from the date of a decision. However, where the application for judicial review relates to a decision made by the Secretary of State or local planning authority under the planning acts, the claim form must be filed not later than six weeks from the date of the decision.

11. Section 284 precludes any challenge to decisions on section78 appeals except by way of application to the High Court under section 288.

12. As part of reforms to reduce challenges of little merit to planning decisions, s91 and Schedule 16 of the Criminal Justice and Courts Act 2015 have introduced the requirement for leave of the court to be obtained before a legal challenge can be

made, including challenges made to decisions on planning appeals under s288 of the Act, as referred to in paragraph 7, above, and under s63 of the Planning (Listed Buildings and Conservation Areas) Act 1990, with effect from 26 October 2015. Applications for leave must be made within the six-week period following the decision or action being challenged.

Grounds of challenge

13. The Act defines the grounds on which a challenge may be made. For Inspector's decisions some broad categories of challenge have developed from case law including: (1) the decision is illogical / irrational (2) there was a failure to take account of a material consideration (3) inadequate reasons were provided for the decision (4) there was a failure to correctly interpret or apply local or national planning policy and (5) natural justice / procedural fairness requirements were not met. In addition, Human Rights Act and Equality Duty grounds might on occasion be incorporated into an s288 / s289 challenge on the basis that an Inspector failed to give proper consideration to these matters.

14. The Court is only interested in the legality or otherwise of the issued decision and decision-making process, and the courts have made clear on a number of occasions that an Inspector's conclusions on the planning merits of an appeal cannot be challenged directly through the courts.

15. Of the five broad categories in paragraph 13 above, the two most common grounds of challenge are that the reasoning in the decision letter is inadequate or that the decision is irrational (sometimes known as the *Wednesbury*[1] test). Occasionally the grounds will include a natural justice challenge i.e. an accusation that the Inspector has in some way failed to act fairly or that there has been a procedural error.

Powers of the Court

16. If the Court is satisfied that the decision contains an error in law, and as a result the interests of the claimant have been substantially prejudiced, the Court will usually quash the decision and return the appeal to the Secretary of State for reconsideration, although the Court may also exercise its discretion not to quash / remit the decision in some rare cases. It should be noted that when a section 288 claim succeeds, the Court will quash the decision and remit it for reconsideration, whereas in section 289 appeals the decision is not quashed, but is remitted for reconsideration with the opinion / direction of the Court. In either case, the Court has no power to substitute the Inspector's decision on the planning merits of the appeal with one of its own. The Court does however, have the discretion not to quash / remit a decision if it is satisfied

[1] From *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223. See paragraphs 12-14 of the Role of the Inspector chapter for further advice on this matter.

that, despite an error in law, the Inspector's decision would inevitably have been the same in any event. In practice though, this is relatively rare.

Role of the Government Legal Department

17. A claimant's grounds of challenge to a planning appeal decision will be set out in a claim form and should be lodged with the Administrative Court within the six week period. The claim form must then be served on the Government Legal Department (GLD), who acts for the Secretary of State in such cases. Even in transferred cases the challenge is always made against the Secretary of State rather than the Inspector. In addition to providing us with legal advice on the challenge, GLD will appoint and brief Counsel to represent the Secretary of State should the case eventually get to Court.

Handling challenges within PINS

18. GLD will send a copy of the claim form to PINS High Court section who will ask the Inspector, via email, for his or her initial comments on the grounds of challenge. Inspectors will normally be given 5 working days to respond, due to the tight timescales of the challenge process. These are passed to GLD who will then provide advice on the merits of the challenge and appoint Counsel to advise further if required. On the basis of the GLD advice, plus any advice from Counsel and any further comments from the Inspector and their GM, we will then decide whether the challenge can be successfully resisted. We will instruct GLD accordingly and they will brief Counsel either to prepare the Summary Grounds of Defence (to be filed within 21 days of service of s288 claims) or to attend the oral permission hearing (in enforcement appeals). We will always resist a challenge unless there has clearly been an error in law that has substantially prejudiced one of the parties to the appeal.

19. In providing initial comments, try to be as prompt as possible, as litigation is costly. Focus on the essence of the case that is being made by the party, however you must respond to all of the grounds unless they are matters beyond your remit e.g. admin matters. If that is the case, make clear in your comments the points to which you are responding.

20. If you have made a mistake e.g. used a wrong measurement or direction, or policy, put your hands up, acknowledge the mistake and move on. Learn from it and try to make sure that you do not make the same mistake again. Where it is plain that an Inspector has gone seriously wrong e.g. relied on an old policy, we will instruct GLD not to resist the challenge and submit to the judgment of the court, on the papers. This normally avoids the need for a formal court hearing and can save considerable costs. The decision will be quashed and the appeal returned to the Secretary of State for re-determination.

Evidence and Witness Statements

21. The majority of challenges are either successfully resisted or withdrawn by the Claimant before they get to court. In those cases that do reach court, typically about 6 to 9 months after the decision letter has been issued, it is not normally necessary for

an Inspector to provide a witness statement or otherwise attend court. Occasionally though, GLD will advise us that one is necessary. Witness statements cannot expand on reasons. They will be factual. An example would be where unfairness is alleged against the Inspector e.g. about behaviour at a site visit. Where GLD have clear instructions / comments from the Inspector on the relevant issues, they will normally produce a first draft, which will be forwarded to the Inspector for comment. In other cases, where further explanation is needed, GLD may ask the Inspector to prepare a first draft.

22. If you are asked to provide a witness statement, check the draft with great care. If there is anything in it that is not entirely accurate, or it omits something relevant, you should make any amendments and return the witness statement to the High Court team, who will then forward it on to GLD for consideration. Once you advise the High Court Team that you are content with the witness statement, you will be provided with a clean version to sign. The signature on the witness statement must be handwritten. Inspectors are ultimately responsible for the content of their statements. Although it is very rarely exercised, the courts do have the power to order an Inspector to attend the hearing for cross-examination. Inspectors should therefore only agree a statement if they would be willing to defend its contents under cross-examination. It is our policy not to allow Inspectors to be cross-examined unless there is a Court Order, or unless Counsel has clearly advised that it would be in our interests to provide oral evidence.

Costs and outcomes

23. If a challenge is successfully resisted in court that is normally the end of the matter, although unsuccessful claimants can seek permission to appeal to the Court of Appeal. Costs usually follow the event, i.e. if the case is won the claimant will be ordered to pay PINS legal costs, and if the case is lost, PINS will have to pay the claimant's costs. If a challenge succeeds, the planning appeal will be re-determined by PINS from the start, with a different Inspector who will consider the issues afresh.

Redetermination

24. Advice on redetermination can be found in 'The Approach to Decision Making – Part 1 Constructing the Decision'.

The Planning Inspectorate

Advertisement appeals

Updated to reflect December 2023 Framework (NPPF)

What's new since the last version

Changes highlighted in yellow made 23 February 2023:

- Updated at Paragraphs 73 + 74 to include the Hackney LBC v JCDecaux (UK) Ltd case and advice regarding 10 years continuous use.
- Removal of Annex 2 relating to pre-2015 appeals – renumbering of appendices/removal of footnotes to compensate

Other recent updates

- 29 March 2022 - Advice at paragraphs 28-34 concerning conservation areas and listed buildings, updated

Contents

Introduction

1. Inspectors make their decisions on the basis of the evidence before them. Consequently, they may, where justified by the evidence, depart from the advice given in this section.

2. Some of the good practice advice in 'The approach to decision-making', 'Conditions', 'Householder, Advertisement and Minor Commercial Appeals' and 'Site Visits' applies to advertisement appeal casework.

3. This advice applies to casework in England only.[1]

Legislation, policy and guidance

4. Section 220 of the Town and Country Planning Act 1990 sets out the legal basis for the restriction and regulation of the display of advertisements.

5. The display of advertisements is regulated by the 'The Town and Country Planning (Control of Advertisements) (England) Regulations 2007'. This was amended in 2007, 2011, 2012 and 2013. It is important to use an up-to-date consolidated version. You should note that Schedule 4 of the Regulations sets out modifications to the 1990 Act in relation to advertisements.

6. Under the Regulations there are 3 types of advertisements:

   Exempt from control (Regulation 4(2)) – these can be displayed without needing express or deemed consent and are set out in Schedule 1 (for example, advertisements on enclosed land and on moving vehicles[2]).

   Deemed consent (Regulation 6) – these are granted consent under the Regulations subject to standard conditions[3] and are set out in Schedule 3 (for example estate agents 'for sale' signs). Each of the classes of advertisements in Schedule 3 are subject to conditions and limitations (relating to such matters as size, height and illumination).

   Express consent (Regulation 9) – all other applications require express consent through an application to the LPA.

[1] PINS Wales produces separate material for Wales which summarises differences in policy.
[2] See Planning Practice Guidance ID 18b-066-20140306 'What action is possible against unauthorised advertisements alongside highways?' for guidance on when advertisements on vehicles require express consent.
[3] The only exception is Class F in Schedule 1 where condition 4 (maintaining structures or hoardings in a safe condition) does not apply - see Planning Practice Guidance ID 18b-003-20140306 – 'How is consent obtained to display advertisements?'

7. Regulation 17 confirms the right of appeal under Section 78 of the 1990 Act[4] where the LPA has refused express consent (or failed to determine the application) or against a condition imposed on a deemed consent.

8. National policy is set out in paragraph 136 of the National Planning Policy Framework (the NPPF).

9. Further guidance is provided in the government's Planning Practice Guidance. This deals with, amongst other things:

    - Definition of an advertisement (s336 of the 1990 Act)
    - Requirements for consent
    - Applications for express consent – procedure, and - determination, appeals, and revocation
    - Additional restrictions on the display of advertisements
    - Enforcement against specific unauthorised advertisements
    - Considerations affecting public safety
    - Considerations affecting amenity

10. The procedures for advertisement appeals are set out in the Procedural Guide - Planning Appeals – England[5] (The 'Procedural Guide').

11. You will need to be familiar with the content of these documents. Although they are referred to throughout this good practice advice they are not repeated in full.

Procedure

12. Appeals relating to express consent are dealt with by:

    Written representations – mostly under the 'Commercial Appeals Service' (CAS).[6] See 'Householder, advertisement and minor commercial appeals' for best practice advice. However, some appeals may not be suitable for this procedure (see the 'Procedural Guide' for information).

[4] As modified by Schedule 4 of the Regulations

[5] The Procedural Guide – Planning appeals – England applies to planning appeals, householder development appeals, minor commercial appeals, listed building appeals, advertisement appeals and discontinuance notice appeals. It also applies to appeals against non-determination. The Procedural Guide –Called-in planning applications – England applies to all applications which are 'called-in'.

[6] Under Part 1 of The Town and Country Planning (Appeals) (Written Representations Procedure) (England) Regulations 2009 (Statutory Instrument 2009/452) as amended by The Town and Country Planning (Appeals) (Written Representations Procedure and Advertisements) (England) (Amendment) Regulations 2013 - Statutory Instrument 2013/2114

Hearing/inquiry – see below for more information

13. The Secretary of State can determine the procedure used to decide advertisements appeals (see Criteria for determining the procedure for planning, enforcement, advertisement and discontinuance notice appeals). Most cases will be suitable for the written representations procedure and only a minority are dealt with by means of a hearing.

Appeals relating to express consent

What are the most common types of casework?

14. Casework most commonly involves fascia and projecting signs on shops and commercial premises, poster panels, free standing display units, totem signs and large PVC sheets wrapped around buildings. Some commonly used terms are set out in Annex 1 to this guide.

What should be the wording in the banner heading?

15. The regime for regulating advertisements is separate to that of planning. Consequently, the banner heading should read:

> The appeal is made under Regulation 17 of the Town and Country Planning (Control of Advertisements) (England) Regulations 2007 against a refusal to grant express consent[7].

What are the relevant considerations?

16. Your assessment is confined to the issues of **amenity** and **public safety**:

- Regulation 3(1) – "A local planning authority shall exercise its powers under these Regulations in the interests of amenity and public safety, taking into account - (a) the provisions of the development plan, so far as they are material; and (b) any other relevant factors."

- NPPF paragraph 141 – "Advertisements should be subject to control only in the interests of amenity and public safety, taking account of cumulative impacts."[8]

Where one of the issues is agreed between the parties, it should still be expressly mentioned and dealt with in your decision. In the judgment *BC of Calderdale v SoSHCLG & Clear Channel UK* [2021] EWHC 695 Admin, the judge observed that the Inspector did not mention whether or not public safety was an issue. While the decision did not fall on this point, it was a contributing factor.

[7] Appeals may also be made where the local planning authority granted express consent subject to conditions, and also where that authority neither gave notice of their decision nor gave a notice under s70A to decline to determine the application within 8 weeks from receipt of the application.
[8] See also Planning Practice Guidance ID 18b-026-20140306 *'What factors can a local planning authority take into consideration when determining an advertisement application?*'

How should the effect on amenity be assessed?

17. Regulation 2 states that 'amenity' includes aural and visual amenity. Further advice is in the Planning Practice Guidance which also points out that, where relevant, the noise generated by advertisements needs to be considered.[9]

    Regulation 3(2) states that factors relevant to amenity include:

18. the general characteristics of the locality, including the presence of any feature of historic, architectural, cultural or similar interest

19. When assessing the effect on visual amenity have regard to paragraph 141 of the NPPF and paragraph 079 in the section on Advertisements in the Planning Practice Guidance.

20. Concerns about aural amenity do not occur very often. However, there may occasionally be concerns about potential noise disturbance from advertisements with moving motorised parts or the flapping of a flag displayed close to residential windows.

How should the effect on public safety be assessed?

21. Regulation 3(2)(b) states that factors relevant to public safety include:

    (i) the safety of persons using any highway, railway, waterway, dock, harbour or aerodrome (civil or military)

    (ii) whether the display of the advertisement in question is likely to obscure, or hinder the ready interpretation of, any traffic sign, railway signal or aid to navigation by water or air

    (iii) whether the display of the advertisement in question is likely to hinder the operation of any device used for the purpose of security or surveillance or for measuring the speed of any vehicle.

22. The Planning Practice Guidance provides detailed guidance on the assessment of the possible effect on 'public safety'.[10] This covers the main types of advertisements which may cause danger to road users and the ways in which advertisements can affect the safety of railways, aircraft and aerodromes, waterways, docks and harbours and the prevention of crime. The Planning Practice Guidance emphasises that all advertisements are intended to attract attention but proposed advertisements at points where drivers need to take more care are more likely to affect public safety. Examples are given from paragraph 067 onwards as to what may constitute harm to public safety.

[9] See Planning Practice Guidance ID 18b-027-21040306 *'How can 'amenity' be defined when considering applications for express consent?*'

[10] See Planning Practice Guidance ID 18b-028-20140306 '*What considerations should local planning authorities take into account in assessing public safety in relation to advertisement applications?'* and further guidance on the consideration of, and consultation regarding, possible effect of advertisements on public safety.

Can other matters be taken into account?

23. Sometimes issues which are not related to amenity or public safety may be raised by the parties. For example, it may be argued that there is (or isn't) a need for the advertisement, or that it would have economic benefits and would represent sustainable development in line with the NPPF. Concerns might be expressed about the content of the specific advertisement.

24. However, advertisements should be subject to control only in the interests of amenity and public safety. There is no indication in the Regulations, NPPF or Planning Practice Guidance that any other factors can be taken into account either for, or against, a proposal – with the sole exception of sign posting in rural areas.[11] In relation to the content of the advertisements, the Planning Practice Guidance states:

> Unless the nature of the advertisement is, in itself, harmful to amenity or public safety, consent cannot be refused because the local planning authority considers the advertisement to be misleading (in so far as it makes misleading claims for products), unnecessary, or offensive to public morals. (ID 18b-026-20140306)

25. If necessary, you can explain this by reference to the NPPF, Regulation 3(1) and relevant extracts from the Planning Practice Guidance.

Should any existing advertisements in the area be taken into account?

26. Subject to the advice in the Planning Practice Guidance[12], existing advertisements may be taken into account where it is considered they form part of the character of the area against which the impact on amenity is being assessed.

27. Although the decision maker has the power to disregard any advertisement that is being displayed (Regulation 3(3)), this should be used with caution. It is important that clear reasons are given why it is considered appropriate to disregard any other signs. The judgment in *Retail Media Ltd v SSETR & Macclesfield BC* [2000] EWHC Admin 398 emphasised the need for adequate reasoning in decisions. The aim is to achieve a consistency of approach in reasoning, whilst recognising that the resulting conclusions and decisions must always turn on the merits of the particular case. Where existing advertisements in the same locality as the appeal site are referred to by one or more of the parties and consistency is a major plank of the appellant's case, those advertisements and the question of consistency must be referred to in the decision. Points to consider are:

    a) Are the Council aware of the legality of the other signs and are they taking steps to do anything about them?

    b) Is it clear what the similarities or differences between the appeal sign and those that are to be disregarded are?

[11] Planning Practice Guidance ID 18b-032-20140306 – '*What additional considerations may apply when considering applications for sign posting in rural areas?*'
[12] Planning Practice Guidance ID 18b-079-20140306 – '*What does "amenity" mean?*'

c) Can the necessity of formally disregarding any signs be avoided, by acknowledging the other signs but making it clear they do not set a precedent, then explaining that the appeal has been dealt with on its own merits and it has been found to be harmful or acceptable for its own specific reasons? Even if nearby signs are very similar in impact, the effect of cumulative harm or the overloading of an area can both be arguments used to avoid the need to disregard signs.

Conservation areas and listed buildings

28. When dealing with an appeal for an advertisement in a conservation area, the test from s72(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 is that "special attention shall be paid to the desirability of "preserving or enhancing the character or appearance" of a Conservation Area". This statutory duty applies in advertisement appeals in so far as it relates to the consideration of 'amenity'. However, when dealing with an appeal for an advertisement on a listed building or within its setting, the statutory duty from s66(1) of the Act requiring decision makers to "have special regard to preserving the [listed] building or its setting or any features of special architectural or historic interest does not apply".

29. This is because the courts have held that in conservation area cases s72 applies to the exercise of functions under the planning acts and in reaching a determination under the regulations you are exercising a function under the 1990 Planning Act.[13] But s66(1) only applies to a grant of planning permission.

30. However, the fact that a building is listed is likely to be a relevant material consideration when considering the effect on 'amenity' for example, in terms of its appearance. The advertisement regulations state that factors relevant to amenity include the general characteristics of the locality, including the presence of any feature of historic, architectural, cultural or similar interest.[14]

31. In the case of an ordinary advertisement consent appeal, if you found harm to a listed building it is unlikely you would grant consent, but if, for whatever reason you do, it would be worth pointing out that a separate listed building consent may well be required. Listed building consent appeals for advertisements should be allocated to a heritage specialist.

32. As far as the NPPF is concerned when determining advertisement consent appeals within a conservation area or in relation to a listed building the question of less than substantial or substantial harm in paragraphs 199-203 is not relevant, as the policy only applies to the heritage-related consent regimes under the Planning (Listed Buildings and Conservation Areas) Act 1990.

Listed building consent applications and advertisements

33. For a listed building it is an offence to execute any works for its alteration or extension in any manner which would affect its character as a building of special architectural or historic interest unless those works are authorised. This means in effect that listed

[13] *R. (on the application of Clear Channel UK Ltd) v First Secretary of State, R (on the application of Clear Channel UK Ltd) v Islington LDC* [2004] EWHC 2483
[14] See Regulation 3(2)(a).

building consent is required for an advertisement that might affect a listed building's character or historic interest.[15]

34. Although, as noted above, the statutory test from s66(1) is not engaged, s16(2) applies the same test to any decision whether to grant listed building consent for any works and so you should have "special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses".[16] Similarly the tests of less than substantial and substantial harm from paragraphs 199-202 of the NPPF should be applied.[17]

35. In your decision on whether to grant listed building consent you should apply the relevant policies in the NPPF and explain your assessment of any harm to the heritage asset and the weight attached to any public benefits. Then you need to reach a conclusion on whether those benefits are sufficient to outweigh the identified harm.

Can development plan policies be taken into account?

36. Section 38(6) of the Planning and Compulsory Purchase Act 2004 does not apply to advertisement appeals. Instead, your starting point is the effect on 'amenity' and/or 'public safety' (rather than whether the proposal accords with the development plan). However, under Regulation 3(1) in England, you should take the provisions of the development plan into account if they are material. Regulation 3 states:

> A local planning authority shall exercise its powers under these Regulations in the interests of amenity and public safety, taking into account - (a) **the provisions of the development plan, so far as they are material**; and (b) any other relevant factors.

37. To show that you have taken material provisions into account it is good practice to assess whether or not the proposal complies with the relevant policy. So, for example, in a straightforward case you might say:

> I have taken into account policy [] of the [Local Plan] which seeks to [protect amenity] and so is material in this case. Given I have concluded that the proposal would/would not harm amenity, the proposal conflicts/does not conflict with this policy.

What if the site is within an Area of Special Control?

38. LPAs have the power under Regulation 20 to designate Areas of Special Control for Advertisements (ASCA). These place additional restrictions on the display of advertisements. In an ASCA some advertisements that would otherwise benefit from

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[15] See footnote 71 of the NPPF, which clarifies that Chapter 16 of the NPPF applies to heritage-related consent regimes under the Planning (Listed Buildings and Conservation) Areas Act 1990. This does not extend directly to advertisement decisions but similar considerations will apply when, for example, determining an advertisement decision which is related to a listed buildings consent application.

[16] Section 16(2) of the Planning (Listed Buildings and Conservation areas Act) 1990.

17 see Historic Environment ITM chapter paragraphs 31 onwards for advice on these tests (for an advertisement appeal this should suffice but a much more detailed approach specific to listed buildings is explained in paragraphs 157 onwards)

deemed consent will require express consent (but see paragraph 37 below). The Planning Practice Guidance provides further information.[18]

39. In most cases the presence of the ASCA will have little bearing on your assessment of the proposal - which should be considered on its merits in respect of the effects on amenity and public safety. However, it is good practice to acknowledge that the site is within an ASCA.

40. Very occasionally, you might find that the appeal is for a type of sign for which there is no provision in the Regulations for express consent to be granted within an ASCA.[19] In such cases you must refer the file back to the Case Officer so that the parties can be informed and their comments sought. The appeal may need to be declined.

41. Regulation 21(2) (b) requires that in an ASCA a directional sign[20] must be "reasonably required". You should assess whether this is so, particularly if you consider that the proposal is acceptable in terms of its effects on amenity and public safety.

What are standard conditions?

42. Under Regulation 14(a) all advertisements which are granted express consent are subject to the five standard conditions set out in Schedule 2 of the Regulations. You do not need to set these out as separate conditions. However, in order to draw them to the attention of the appellant, your formal decision should state:

> The appeal is allowed and express consent is granted for the display of [insert description of advertisement] as applied for. The consent is for [five] years from the date of this decision and is **subject to the five standard conditions set out in the Regulations** (and the following additional condition(s): [insert any non-standard conditions]).

Can non-standard conditions be imposed?

43. Any additional non-standard conditions must be set out in full and should be supported by specific and relevant planning reasons.[21] Examples of non-standard conditions are set out in PINS suite of suggested planning conditions, which will be available in DRDS when the interim solution is launched (see 'Conditions'). Further information is also provided in the 'Procedural Guide'.

Illumination intensity restriction

44. Advice in 'Technical Report No 5: Brightness of Illuminated Advertisements (Third edition 2001)' by the Institution of Lighting Engineers (now known as the Institute of Lighting Professionals) has now been replaced by that in 'Professional Lighting Guide 05 (PLG 05) Brightness of Illuminated Advertisements' by the Institute of Lighting

[18] Planning Practice Guidance ID 18b-055-20140306 – *'What is an area of special control?'*
[19] For example, an advertisement falling within Classes, 7B, 15, 16 or 17 of Schedule 3 to the Regulations
[20] Regulation 21(2)(b) refers to an advertisements "for the purpose of announcement or direction in relation to buildings or other land in the locality"
[21] Planning Practice Guidance ID 18b-034-20140306 – '*What conditions can be imposed on an express consent?*'

Professionals. A hardcopy is available in the Library although electronic copies are not available.

45. Although Condition Number 45 in PINS suite of conditions now reflects this change, it is not possible to reflect this in DRDS. Therefore Inspectors will need to make manual changes as highlighted below in green:

> The intensity of the illumination of the [sign] permitted by this consent shall be no greater than [**] candela. [If a figure is not mentioned in representations then say "within that recommended by the Institute of Lighting Professionals (for a sign within Zone ....) in its Professional Lighting Guide 05 (PLG 05) Brightness of Illuminated Advertisements (or its equivalent in a replacement Guide)."]

Can conditions be imposed which limit consent to a specific period?

46. Advice is provided in the Planning Practice Guidance.[22]

47. All consents are automatically given for 5 years, unless specifically stated - Regulation 14(7)(b). If you are content that the consent should be for 5 years, you do not need to impose a specific condition. However, it is good practice to refer to this period in your formal decision:

> The appeal is allowed and express consent is granted for the display of [insert description of advertisement] as applied for. **The consent is for five years from the date of this decision** and is subject to the five standard conditions set out in the Regulations (and the following additional condition(s): [insert any non-standard conditions]).

48. If the appellant has applied for a period of consent which is less than 5 years then you should make it clear that the consent is only for the period sought (even if you have no evidence to indicate that a longer period would not be appropriate or that the shorter period sought is necessary).

Should conditions be imposed that require the advertisement be removed at the end of the relevant period of consent?

49. After 5 years (or whatever period you specify) the advertisement can continue to be lawfully displayed as it will have the benefit of deemed consent under Class 14 of Schedule 3 of the Regulations. An advertisement with deemed consent can only be removed if discontinuance action is taken by the local planning authority.

50. However, an advertisement will not benefit from deemed consent under Class 14 if it would contravene a condition which has been imposed on an express consent (Class 14(b)). Consequently, if you consider an advertisement would be likely to be unacceptable at the end of the 5-year period (or any other period you consider relevant) you would need to impose a non-standard condition requiring that it is removed from the site at the end of that period. However, you should only do this if you have firm

[22] See Planning Practice Guidance ID 18b-036-20140306– '*How long does an express consent last?*'

evidence to indicate that the advertisement would be likely to be unacceptable at the end of the specified period. Are there convincing reasons why might this be so?

51. A condition requiring the removal of an advertisement is more likely to be necessary in circumstances where you consider that a consent of less than 5 years is justified (because you will, presumably, have concluded that the advertisement is unlikely to be acceptable after the relevant time period you have imposed).

52. There is an example of a condition in PINS suite of suggested planning conditions.

Should a condition be imposed requiring development to be carried out in accordance with the approved plans?

53. This is not necessary as your decision grants *express consent,* not *planning permission*. The condition is meant to facilitate applications under s73 for minor material amendments to a planning permission and so is not relevant when granting express consent for the display of an advertisement.[23]

If the LPA has made a split decision, which advertisements are before me at appeal?

54. This depends on the approach taken by the LPA:

    1) If the LPA has refused consent for some signs and granted others - you only need to deal with the signs which have been refused.

    2) If the LPA has granted consent but attached a condition effectively refusing consent for some signs - you only need to deal with the signs which have been refused.

    3) If the LPA has refused some of the signs applied for but has not granted consent for the others, despite indicating that it has no objection to them, your decision should relate to all the signs contained within the original application.

55. If it is not clear which signs are before you in the appeal you will need to go back to the parties.

What if it is argued that express consent is not required?

56. If it is argued that express consent is not required, you can acknowledge this, but note that, as the appeal follows an application for express consent, you are determining it on that basis.

57. However, if an applicant for express consent specifically requests a determination, the Judge in *Thomas v NAW & Neath Port Talbot* [2009] EWHC 1734 (Admin) found that the Inspector has the jurisdiction to determine the issue. So, if a determination has been requested, you should make one. However, you would need to have been provided with sufficient evidence to allow you to reach a reasoned conclusion.

[23] See Planning Practice Guidance on 'Flexible options for planning permissions'

58. You should not deal with advertisements which:

    - have been withdrawn from the application because they do not need express consent
    - the appellant and LPA agree do not require express consent.

59. Advice regarding applications for a s191 or s192 certificate to determine whether an advertisement display is lawful or requires express consent can be found in 'Enforcement and lawful development certificates'.

Do advertisements require planning permission?

60. The display of advertisements is controlled through a specific approval process and separate planning permission is not required in addition to advertisement consent.[24]

61. Although advertisement consent grants permission for the structure, planning permission for a structure does not grant consent for any advertisement. When planning permission is sought for a structure the effect a likely advertisement would have on amenity may be considered as part of the balancing exercise.

How are site visits conducted in written representations cases?

62. Advertisement appeals are mainly carried out under the 'Commercial Appeals Service' (CAS) and the site visit procedures are set out in 'Householder, advertisement and minor commercial appeals.'[25] As most advertisements are intended to be visible from a public place, the site visits will usually be unaccompanied. 'Site visits' provides advice about site visits where the appeal is not dealt with under CAS.

What is the format of an advertisement decision?

63. The format of the decision and your approach to writing it should be generally the same as for other planning appeals, including, in terms of defining the main issues, reasoning, conditions and conclusions.[26] However, there are differences between advertisement appeals and planning appeals (for example see the sections above on the matters that can be taken into account). You may need to explain these differences and your approach should it be relevant.

Can there be an award of costs?

64. The parties can submit a claim for costs.[27] The procedure and approach is the same as for s78 appeals.

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[24] See Planning Practice Guidance ID: 18b-001-20140306 – '*Background*'

[25] Some appeals will fall outside the scope of CAS (for example, where the appeal is against non-determination). See the Procedural Guide - Planning Appeals – England for more information

[26] See 'The approach to decision-making' for further advice

[27] See Planning Practice Guidance chapter *Appeals* '*The award of costs - general*'.

Hearings

65. For advertisement appeals made before 6 April 2015 which have not been determined by that date the hearings are subject to the Town and Country Planning (Inquiries Procedure) Rules 1974.

66. For advertisement appeals made from 6 April 2015 the Town and Country Planning (Hearings and Inquiries Procedure) (England) (Amendment and Revocation) Rules 2015 amend the 2000 Rules so that they apply to advertisement appeals which are to be dealt with by a hearing or an inquiry in England. Further advice can be found in 'Hearings' and in 'Inquiries'.

Appeals against conditions

67. Regulation 17 states that sections 78 and 79 of the 1990 Act shall apply in relation to applications for express consent. Section 78 of the 1990 Act (as modified by Part 3 of Schedule 4 to the Regulations), provides a right of appeal against a grant of express consent subject to conditions. These are in effect Type 1 ('section 79' appeals), although the time period for an appeal is 8 weeks (not 6 months). After the initial period for making a Type 1 appeal has expired it is possible to make a fresh application for a new consent without the offending condition. More advice can be found in 'Appeals against conditions'.

68. The banner heading should state:

> The appeal is made under Regulation 17 of the Town and Country Planning (Control of Advertisements) (England) Regulations 2007 against conditions imposed when granting express consent.

69. Regulation 17 refers only to sections 78 and 79 and there is no mention of sections 73 or 73A. Consequently, a local planning authority has no power to accept an application made under either of these sections to grant advertisement consent for an advertisement without complying with a condition(s) imposed on a previous consent (Type 2 and Type 3 as described in the 'Appeals against Conditions' chapter). Such appeals should be turned away as invalid when they are received. If one makes it through the system to you the Inspector, you will need to ask your case officer to issue a letter explaining the situation and offering a chance for the appellant to withdraw or you will dismiss the appeal because of a lack of jurisdiction. A sample letter is at Annex 2.

Discontinuance Notices

70. Discontinuance action deals only with advertisements being displayed with deemed consent. Class 14 of Part 1 of Schedule 3 of the Regulations grants deemed consent to any advertisement that has been displayed with express consent once the express consent expires, and Class 13 grants deemed consent for an advertisement that has been displayed on a site continually for 10 years without any express consent. A notice may thus be served in respect of either a particular advertisement or a site used for the display of advertising.

71. Generally, a discontinuance notice will be used against a site benefitting from a Class 13 deemed consent displaying one or more hoardings or large poster panels which have been in place for 10 years or more.

72. The Courts in *Westminster City Council v Moran* [1998] EWHC Admin 637; held that "continually" does not mean "continuously". An interruption in the use of the site for display of advertisements since 1974 does not deny the user deemed consent. Hence the display of advertisements on a basis which is regularly occurring is sufficient to secure deemed consent rights. However, Class 13 does not apply if there has been a material increase in the extent to which the site has been used. In *R (oao) Clear Channel UK Ltd v Hammersmith & Fulham LBC* [2009] EWCA Civ 2142, the courts held that a larger structure with a different form of illumination was a material change which meant the deemed consent that had been built up over the previous 10 years had been lost and the display of the sign was unlawful.

73. How the statutory provisions for such time limits should be interpreted and applied has recently been considered again by the High Court in *London Borough of Hackney v JCDECAUX (UK) Ltd [2022] EWHC 2621 (Admin)*.Whilst it was accepted that the advertisement panel had existed for 10 years, the Council contended that there had been two periods of time during the preceding ten years when it was not in use for the display of adverts, and so the requirement of continual use was not met and the Magistrate's Court agreed. However, the High Court Judgment stated: that the key question when interpreting Class 13 is:

> "whether any break in the display of advertisements is sufficient to amount to a material interruption which brings one period of use to an end, in other words, a cessation of use. If so, a new period of use will commence if and when there is any resumption of display of advertisements thereafter".

74. Relevant factors are likely to include the length of the period of use, the length of the interruption, the reason for the interruption and the circumstances around it and, whether, during any break in display, the local planning authority would not have been able to take enforcement proceedings.

75. Express consent cannot be discontinued, and neither can an unlawful advertisement. The local planning authority has powers to deal with the latter category in the Magistrates Courts.[28]

76. A discontinuance notice is a formal document that, once it takes effect, can result in conviction for non-compliance. In this respect it is similar to an enforcement notice. However, an important distinction is that a discontinuance notice can only be served against a lawful display.

[28] See Planning Practice Guidance ID: 18b-061-20140306 – '*Can an appeal be made against a removal notice?*'

The stricter tests – substantial injury/danger to the public

77. A discontinuance notice may only be served where the planning authority is satisfied that the removal of the advertisement is necessary 'to remedy a substantial injury to the amenity of the locality or a danger to members of the public' (regulation 8 (1)).

78. The Courts have accepted that the test in regulation 8 is somewhat stricter than that applicable where an application for express consent is being considered, but it is suggested that in practice this is likely to be a distinction without a difference. [R (Clear Channel (UK) Ltd v S of S [2004] EWHC 2483 Admin]. Even so, there may be cases where harm is found but that this is judged not to amount to substantial injury.

79. In *Palisade* it was held that: "to spoil the character and appearance of an area conveys very well, in my view, the effect that is relevant for the purpose of these proceedings, that is to say, the effect of inflicting substantial injury to the amenities of an area."

80. As regards 'danger to the public', although there is no case law to establish this, it should be noted that this too appears to be a stricter test than applicable when considering an application for express consent, where powers are exercised 'the interests of public safety'.

81. Where an advertisement is being displayed following the expiry of a grant of express consent, the considerations that were taken into account in granting that express consent would clearly be relevant (although not the only factor) in considering whether to take discontinuance action. [*R (Clear Channel (UK) Ltd)*.] Regulation 8 (8) requires a LPA, in considering whether to serve a discontinuance notice, to have regard to any material change in circumstance that has occurred (that is, since the advert was first displayed – whether with deemed or express consent). However, the Courts have also accepted that there does not need to have been a material change in circumstances to justify the service of a notice, although there will be in some cases. *[O'Brien v S of S and Doncaster MBC* [2001]. Equally, it is not sympathetic to the argument that a particular advertisement has been in existence for many years. [*Chequepoint (UK) Ltd*].

Discontinuance action in a conservation area

82. Where a site of an advertisement is within a conservation area, it has been held that the exercise of the power to serve discontinuance notices under the Regulations is a function by virtue of the 1990 Act, and thus one to which applies the duty (under section 72 of the Planning (Listed Buildings and Conservation Areas) Act 1990) to pay special attention to the desirability of preserving or enhancing the character or appearance of the area. [*R (Clear Channel (UK) Ltd*, at paragraphs 29-42].

Contents of discontinuance notice

83. Advice on the contents of the discontinuance notice is given at Annex Q of the PPG. In particular the site or the advertisement to be discontinued should be clearly and precisely defined. If, for example, a poster panel at first floor level on the flank wall of a building is the target for removal and there are other advertisements at lower level on that wall which are not, the latter will be covered by the terms of the notice too if the site is merely specified as the flank wall.

84. The notice should also include the date on which it is served and must specify the period at the end of which it will take effect (regulation 8(4)). Any appeal to the Secretary of State against the notice must be made before it comes into effect and in the absence of any such appeal, the advertisement will be unauthorised and thus render those responsible liable to prosecution.

85. The effective date of the notice must be at least 8 weeks after the date on which it is served. This means 8 weeks after the date it is received by the person on whom it is served, not 8 weeks after the date it is posted. Although there may be various recipients, there is only one notice, so it is important that it is issued to all intended recipients at the same time.

86. The date by which the display or use of the site must be discontinued must be specified in the notice and must be a reasonable period of time depending on any works which will be needed for the display to cease. This period, often 4 weeks, is designed to give time to remove the display and any supporting structures. Requests are sometimes made at appeal to extend the period but a plea that the display should remain for a further period of a year to allow a poster company to honour a commercial contract is unlikely to be relevant to the purpose of the period.

Service of a notice on the advertiser

87. A discontinuance notice is to be served on 'the advertiser'. This is defined, in Regulation 2, as:

    (a) the owner of the site on which the advertisement is displayed;

    (b) the occupier of the site, if different; and

    (c) any other person who undertakes or maintains the display of the advertisement;

    and any reference in the Regulations to the person displaying an advertisement shall be construed as a reference to the advertiser.

When the notice comes into effect

88. Anyone served with a notice may appeal against it at any time before it is due to come into effect. As noted above, the effective date of the notice must be a date not less than 8 weeks after service. Where an appeal is made the notice has no effect until the appeal is determined or withdrawn (regulation 8(5)).

Withdrawal or variation of a notice by the LPA

89. A planning authority may withdraw a discontinuance notice or, if no appeal is pending, extend its compliance period. In either case, the authority is required to notify those served with the original notice (regulation 8(6)). If the time for compliance is extended, this is generally an act of grace without legal consequences [*Joyner v Guildford Corporation* (1954) 5 P&CR 30)].

Correction/variation of a notice at appeal

90. Section 79 of the 1990 Act, as modified by Schedule 4 Part 5 of the Regulations, enables the Secretary of State at appeal to allow or dismiss the appeal or to correct any defect, error or misdescription in a discontinuance notice. Any part of the notice may also be reversed or varied, whether or not the appeal relates to that part.

91. Many appeals contain a challenge to the validity of the notice, but the Courts, as in Enforcement cases, have supported the view that unless there is an identifiable injustice to one or more of the parties involved, the Secretary of State's powers of correction can be widely applied.

92. In a case where the date of service contained an error in the year (2006 rather than 2007) legal advice obtained was that the error in that particular case did not affect the validity of the notice.

93. If the local planning authority have failed to notify one or more of the advertisers, the fact they are aware of the appeal and have provided representations suggests their interests have not been prejudiced. Similarly mistakes in the identification of the site or the scope of the notice can be rectified, subject to the same test of injustice.

Delegated Authority

94. A challenge to a discontinuance notice is sometimes made on the grounds that the local authority does not have the proper authority to serve it. This challenge might be on the basis that the person signing the notice did not have delegated authority to do so; or more fundamentally that the Council's Constitution does not provide for notices to be issued other than by the Executive.

95. It may be necessary, depending on the nature of the challenge and information supplied in relation to it, to obtain a copy of the Council's Constitution. However, invariably, decisions relating to planning matters are delegated to committee or to delegated officers and the latter are entitled to arrange for the discharge of their functions by subordinate officers. Section 234 of the Local Government Act 1972 (as amended) provides for authentication of documents by the 'proper officer' of the authority.

96. On the matter of functions which are the responsibility of the executive, The Local Authorities (Functions and Responsibilities) (England) Regulations 2000 (as amended) make clear that planning matters are not those for an executive of the authority. The list of functions in Schedule 1 of those Regulations refers to advertisement consents and does not specifically mention discontinuance of advertisements. However, the related power, in section 220 of the 1990 Act, is a wider power to 'make provision for restricting or regulating the display of advertisements', under which the advertisement Regulations, which include the power for discontinuance, were made. Moreover, the list of functions is not exhaustive in listing every single function relating to development control.

97. The judgment in *Swishbrook Ltd v Secretary of State for the Environment and Islington BC* [1990 JPL 824] deals with other matters of challenge, including finding that the omission in a notice of the formal title of the officer who signed the notice (the 'proper officer') did not invalidate the notice.

Nullity

98. A discontinuance notice will be a nullity – and not merely invalid – where it is defective on its face. The correct test to apply is similar to that in the enforcement case *Coventry Scaffolding Co (London) Ltd v Parker* [1987] JPL 127, where it was held that, in considering whether an enforcement notice was a nullity, it was legitimate to look beyond the notice and to consider whether, in the light of surrounding circumstances, the recipient was sufficiently and clearly apprised of its effect, and what he had to do as a result of it. This echoes the earlier formation of the test in *Miller-Mead v Minister of Housing and Local Government* [1963] 2 QB 196: "does the notice tell [the person on whom it is served] fairly what he has done wrong, and what he must do to remedy it."

99. Where a notice is a nullity on its face (and not merely invalid), it has no legal effect. There is thus no right of appeal to the Secretary of state. Such notices should be spotted before an appeal is allocated to an Inspector for decision. However, if upon receipt of a file, an Inspector forms the view that a notice is a nullity, they should inform both parties of their intention to take no further action, subject in the interests of natural justice, to any comments from the parties (the appellant and the authority).

Quashing a notice/Express Consent

100. Where it is decided that there is no substantial injury to amenity or danger to the public (as the case may be) the notice should be quashed. It should also be quashed where it contains an error that is fundamental to its purpose and is incapable of correction without prejudice to the parties on whom it was served.

101. The Act, as modified by Schedule 4, enables the Secretary of State to deal with the matter as if an application for express consent had been made and refused for the reasons stated for the taking of discontinuance action. In quashing a notice regard can be had to this power. However, since the exercise of this power is discretionary, it is not necessary to formally consider the matter at appeal unless a request has been made for this to be done.

102. If such a request has been made, it does not follow that a decision to quash a notice should necessarily result in a grant of express consent. A display that has been found not to cause substantial injury might well nevertheless be detrimental to amenity and thus unsuitable for grant of express consent. In any event, with the quashing of the notice the advertisement will continue to benefit from deemed consent. If a period of express consent is granted it will prevent any further discontinuance action until after the expiry of the period of this consent.

103. A request is sometimes made at appeal for express consent for an alternatively sized advertisement in the event that the appeal display is considered to create substantial injury. However, the power in the Act, as modified, is limited to consideration of the proposal at appeal. A modified proposal invariably amounts to a new proposal, which should not be entertained. Upholding the notice does not prevent the appellant from seeking a separate express consent from the planning authority.

Discontinuance action and the Human Rights Act

104. It was held in the Courts in 2000 that the right to display (with deemed consent) an advertisement might constitute a 'possession' within the terms of article 1 to the First

Protocol to the European Convention on Human Rights; and that, if it did, the deprivation of that possession, in the absence of a general right to compensation, might constitute a breach of the Convention – although not where it could be established that such dispossession was in the public interest and subject to conditions provided by law [*O'Brien v Secretary of State and Doncaster MBC* [2001] JPL 375, at paragraph 20]. Subsequent case law has tended to support that view, but has indicated that the planning system generally does represent a proportional and fair balancing of competing interests. A challenge to discontinuance action based on an argument of breach of human rights would accordingly be doomed to failure.

Enforcement

105. It is an immediate offence, under s224 of the 1990 Act and Regulation 30, to display an advertisement that requires express consent without having obtained it. The Regulations also provide for the issue of discontinuance notices to remove lawful advertisements displayed with deemed consent (see above).

106. For further advice on enforcement see the section on advertisements in the 'Enforcement' chapter.

Regulation 7 Directions

107. Local planning authorities may propose that the Secretary of State should make a direction under Regulation 7 that removes deemed consent from certain types of advertisements in a specific area. The following points should be noted:

- a direction does not forbid display: it merely requires express consent to be obtained;
- a direction applies to a particular area or a particular case. Such cases are rare.
- a direction will relate to a particular class of advertisements within Schedule 3 of the Regulations (or a specific category of advertisements within a class)
- Class 12 (advertisements inside buildings) and Class 13 (sites used for the display of advertisements for the last 10 years) cannot be the subject of such directions;
- directions can be for a specific period of time or indefinite. Generally they have been for 5 years or a similar length of time.
- there is a statutory requirement for proposed and approved directions to be published in the press - see Regulations 7(2) and (7).

108. The Planning Practice Guidance provides guidance on when a Regulation 7 direction might be appropriate.[29]

109. All requests for Regulation 7 directions are determined by the Secretary of State, following the submission of a report by an Inspector.

110. The LPA will apply for the direction to DLUHC, providing maps of the area to be covered and evidence of harm caused and their efforts made so far to combat the harm. DLUHC pass the papers on to the Planning Inspectorate who appoint an Inspector.

111. If you are appointed you should carry out a detailed site visit of the area. Get a feel for its overall character and the prevalence or otherwise of relevant advertisements.

112. Your report should be sent to the Procedure Team who will forward it to DLUHC for a decision. It should contain a recommendation to confirm the direction or not. In the case of a Direction covering a number of areas or streets, the recommendation can exclude certain areas, but cannot include new ones.

113. It is important the LPA make it clear how long they wish the Direction to last. If they haven't the Procedure Team should obtain that information before the report is written. You can recommend a different time limit, or introduce a limit where an indefinite period is requested, but only with good reasons.

Area of Special Control of Advertisements (ASCA) Orders

114. Regulation 20 requires every local planning authority from time to time to consider whether any part or additional part of its area shall be designated as an ASCA. Such designations are approved by the Secretary of State.[30]

115. Stricter controls apply within an ASCA. The display of certain types of advertisement is prevented altogether, since there is no provision for express consent to be granted for them. These are: poster-panels and the like (other than those specified in regulation 21(2)(a) or falling within Class 8), balloon advertising (Class 15), advertisements on telephone kiosks (Class 16)[31], certain flag advertisements (those falling within Class 7B) and certain illuminated signs (those falling within regulation 21 (3)).

116. As regards restrictions on deemed consent, the effect of the designation places somewhat tighter limits on advertisements that may be displayed with deemed consent. The advertisements within Classes 4A, 4B and 8 in Schedule 3, which would normally benefit from deemed consent, lose their deemed consent status altogether in an area of special control. However, they can be displayed provided express consent is obtained.

117. New or modified areas of special control are designated by an order made by a local planning authority and approved by the Secretary of State in accordance with the

[29] See Planning Practice Guidance ID 18b-042-20140306 – '*How can a local planning authority restrict deemed consent?*'
[30] See Planning Practice Guidance ID: 18b-055-20140306 – '*What is an area of special control?*'
[31] NB: However see 'Advertisements on telephone kiosks' below, regarding removal of deemed consent for the display of non-illuminated advertisements on the glazed surface of a telephone kiosk.

provisions of Schedule 5 of the Regulations. The procedure is similar to that for a Regulation 7 Direction. It involves a two-stage publication, the first by the local authority when seeking approval for the order and the second after the order has been approved. However, unlike the regulation 7 procedure, the forms of notice to be used are specified in the Regulations and there is a requirement for publication for 2 successive weeks in at least one local newspaper.

118. Also unlike the regulation 7 procedure, there is a provision for the holding of an inquiry as an alternative to a hearing to consider representations of objection to a proposed order. In practice no such inquiries have been held, although there have been hearings.

119. Various orders are in force in many parts of the country. These are mostly rural areas although some parts of urban areas are also covered, including parts of Cheltenham and Durham.

120. Local planning authorities are charged with reviewing their areas of special control at least once every 5 years, although it is understood that few do so in practice. It is possible that the character of an area may have changed considerably since designation so that it is unlikely it would now be considered appropriate to be an ASCA. Nevertheless, unless specifically revoked it still prevents the relevant classes of adverts from being granted express consent and any appeal on the grounds the ASCA was no longer relevant would be bound to fail.

121. Where a review is undertaken and a local planning authority proposes to revoke an order, a similar procedure of formal publication and approval is necessary before this can be done.

122. Advertisements on telephone kiosks

123. Class 16 of the Regulations used to grant deemed consent for the display of non-illuminated advertisements on the glazed surface of a telephone kiosk, unless the kiosk was a K2 or K6 model designed by Giles Gilbert Scott, or was within an AONB, conservation area, National Park or an area of special control. This right was removed on 25 May 2019.[32] From that date the display of any advertisement on the external surface of a telephone kiosk requires consent. However, if the advertisement was in place on or before 24 May 2019 it will continue to benefit from deemed consent. [33]

124. Whilst s222 of the Town and Country Planning Act 1990 allows for minor development involved with fixing an advertisement to an existing kiosk, it does not grant permission for the kiosk itself. The display of the advertisement and the construction of the kiosk are two distinct and separate developments. To resolve this situation, there would have to be two applications/appeals – one for advertisement consent and one for planning permission or the required prior approval.

125. If an Inspector is presented with one appeal and not the other, the correct approach is to deal only with the matter at hand. It is advisable to state that the other consent is not being considered in the current appeal. For example:

126. When considering advertisement consent, state that planning permission/prior approval is not being considered and would require separate consideration; or

127. When considering planning permission/prior approval, to state that only the construction of the kiosk is being considered and not advertisement consent.

128. Where both appeals are present, but the kiosk proposal is to be dismissed as being outside the permitted development right, the associated advertisement appeal will still need to be dealt with. It will be necessary for the advertisement consent application to describe the structure upon which the advertisement will be displayed; however, that structure would require a separate planning permission, whether granted by the GPDO or by the Local Planning Authority, which could be obtained at a later date.

129. If an associated advertisement appeal does not describe the structure on which it will be displayed, then the advert appeal may need to be dismissed.

[32] See regulation 19(2) of the Town and Country Planning (Permitted Development, Advertisement and Compensation Amendments)(England) Regulations 2019
[33] See Planning Practice Guidance ID: 18b-009-20190722 – 'Do advertisements on telephone kiosks need express consent?'

130. Further advice in relation to phone kiosks can be found in the Mobile Telecommunication chapter and the General Permitted Development Order and Prior Approval Appeals chapter.

Annex 1

Commonly used terms

Historic limitations on the printing process tied the outdoor advertising industry to the use of a modular format based on the size of a standard printed poster sheet. Modern printing technology means that the industry is no longer confined to standard sizes. However, the terminology and size references still persist:

4 sheet (1.5 x 1m) and 6 sheet (1.9m x 1.3m) – a small format typically seen on the forecourt of shops and in shopping centres/parades – will be in the form of a freestanding display unit or attached to a building/structure

48 sheet (3 x 6m) – the standard size poster panel for the industry – often attached to buildings but also freestanding

96 sheets (3 x 12m) – twice the size of 48 sheets – usually free standing

Scrolling posters – usually 48 sheet in size – previously a mechanical rotation typically of 3 advertisements in sequence – but often now by means of a light emitting diode (LED) display

PVC sheets/shrouds/wraps – often wrapped around scaffolding to buildings or hung on the elevation of a building – can be very large (eg the same size as the building)

Annex 2

Sample Letter for consulting with the appeal parties

Having given this appeal further consideration, the Inspector is concerned that it is not procedurally possible to amend or delete a condition on advertisement consent in the manner requested by the Appellant. The reasons for this are set out in the paragraphs

below:

> The display of advertisements is subject to a separate consent process within the planning system, which is set out in the Town and Country Planning (Control of Advertisements) (England) Regulations 2007 (the Regulations). The decision notice for the application
>
> [the application number of your appeal scheme] (the approved scheme) indicates that it was determined under the Regulations. It is an advertisement consent rather than a planning permission.
>
> Following the granting of the approved scheme on [date of consent], the Appellant sought to vary condition(s) [XX] of the approved scheme by submitting an application [reference and date of the application purporting to be under appeal]. This application was refused by the Council on [date of refusal]. The application was expressed as an application to vary conditions of a [planning permission/advertisement consent – however it was worded by the Appellant], and was made to the Council under Section 73 of the Town and Country Planning Act 1990 (as amended) (the Act) and treated as such by the Council.
>
> Section 73 of the Act allows applications to be made for a new planning permission to develop land without complying with a condition(s) imposed on a previous planning permission. Although Section 220(3) of the Act enables the Regulations to apply a wide variety of provisions of the Act to advertisement consent applications, modified as may be specified in the Regulations, they do not apply Section 73. As a result, it is not possible to amend or delete the conditions of the approved scheme under Section 73 of the Act.

Accordingly, the Inspector would be minded to dismiss the appeal unless the appeal were to be withdrawn. Please could both the Appellant and the Council provide comments on this letter within 10 working days of the date of this letter.

[NB substitute 73A for 73 when appropriate]

The Planning Inspectorate

Air Quality

Updated to reflect December 2023 Framework (NPPF)
What's new since the last version Changes highlighted in yellow made on 2 March 2023 • Paragraph 34 Updated to provide link to EIP Air Quality targets
Other recent updates

Contents

Introduction

1. Inspectors make their decisions on the basis of the evidence before them. Consequently, they may, where justified by the evidence, depart from the advice given in this training material, although the relevant regulations and statutory guidance will still be relevant in all cases.

2. This chapter is concerned with air quality and air quality considerations in planning and related casework. Detailed guidance on environmental licensing and permitting casework is covered in the Environmental Permitting ITM Chapter. Guidance on Environmental Impact Assessment (EIA) can be found in the EIA ITM Chapter. Detailed guidance on Habitats Regulation Assessment (HRA) can be found in the Biodiversity ITM Chapter.

3. This training material applies to all Appeals, Infrastructure, Specialist and Local Plans casework in England[1] where air quality is an issue.

Brief history of air pollution

4. Air pollution can be defined as 'the presence or introduction to the air of a substance which has harmful or poisonous effects on the environment, human health and material property'. Air pollution remains a major environmental problem in modern society. In modern society the emphasis has shifted from pollution caused by the coal and industry to those associated with motor vehicle emissions.

5. Studies have suggested that bad smog events[2] caused the premature deaths of thousands of people. In the UK in the 1950s and 60s smog events led to public outcry and to Government action regarding air pollution. This resulted in the first Clean Air Act in 1956[3]. In 1961 the UK established the first co-ordinated national air pollution monitoring network, called the National Survey, which monitored black smoke and sulphur dioxide emissions at about 1200 sites. Several further pieces of legislation and additional monitoring networks were introduced in the UK to tackle and measure air quality in the UK.

Atmosphere and fundamentals of air pollution chemistry

6. Unpolluted air consists of a number of gases that have fairly constant proportions in the global atmosphere, these are listed below[4]:

[1] Welsh AQ information can be found on the Welsh Government Website.
[2] for example the London smog event of December 1952 – where coal pollution mixed with fog, causing major health impacts. It is estimated that 4,000 people had dies as a result of the smog and 100,000 more were made ill by the effect of the smog on the respiratory tract. A modern equivalent of this event was the Eastern China Smog event in December 2013, where $PM_{2.5}$ and SO_2 from coal burning and industrial sources combined with lack of air flow and allowed a thick smog layer to accumulate over a wide area.
[3] 1956 (c.52) – introduced smoke control areas in which only smokeless fuels could be used, resulting in a shift towards the use of cleaner coal, electricity and gas. The Act also introduced measures to relocate power stations away from cities and for the height of some chimney stacks to be increased. This Act was repealed by Schedule 6 of the Clean Air Act 1993.
[4] The proportions are for dry air – without water vapour molecules.

Chemical	Symbol	Proportion by volume
Nitrogen	N_2	78.1%
Oxygen	O_2	20.9%
Argon	Ar	0.93%
Carbon dioxide	CO_2	370ppm
Neon	Ne	18ppm
Helium	He	5ppm
Methane	CH_4	1.7ppm
Hydrogen	H_2	0.53ppm
Nitrous oxide	N_20	0.31ppm

It is important to recognise the distinction between natural and man-made (anthropogenic) constituents in the atmosphere, both of which can affect air quality. For example, sulphur dioxide (SO_2) is produced by the combustion of sulphur contained within coal and heavy fuel oils but is also a main constituent of emissions by volcanoes and via oxidation of dimethyl sulphide released by oceanic phytoplankton. Therefore, both natural and man-made emissions can contribute to global trends in atmospheric composition and local effects. Pollutants can be in the form of solid particles, liquid droplets or gases. Air Pollutants can be classified as either:

- **Primary pollutant** – emitted directly from a known source, for example Nitrogen dioxide (NO_2) or Particulate Matter (PM_{10}, $PM_{2.5}$) from vehicle exhausts.
- **Secondary pollutant** – formed when primary pollutants react in the atmosphere and form other pollutants, for example Nitrogen dioxide[5] (NO_2) reacts with water (H_2O) to form Nitric acid (HNO_3)[6].

7. Atmospheric chemistry is extremely complex and there are many factors that can influence distribution and concentrations of emissions and therefore air quality, these

[5] Maybe formed from Nitric oxide (NO), which is oxidised to form NO_2.
[6] $3NO_2 + H_20 \rightarrow 2HNO_3 + NO$.

include topography, weather and chemical reactions in the air. Inspectors will not be required to understand the complex detail of these factors.

Air Pollution – source types and effects:

8. **Point Source (stationary) and Area Sources -** A point source of air pollution refers to an emission source that does not move, also known as a stationary source. Point sources include factories, power plants, incinerators and other industrial processes. The term area source is used to describe many small sources of air pollution located together whose individual emissions may be below thresholds of concern, but whose collective emissions can be significant. Residential wood burners are a good example of a small source, but when combined with many other small sources, they can contribute to local and regional air pollution levels. Area sources can also be thought of as non-point sources, such as housing developments and landfill sites.

9. **Mobile Sources -** A mobile source of air pollution refers to a source that is capable of moving under its own power. In general, mobile sources imply "on-road" transportation (for example heavy goods vehicles [HGVs] and light goods vehicles [LGVs] but also everyday operational vehicles such as cars, sport utility vehicles, and buses. In addition, there is also a "non-road" or "off-road" category that includes gas-powered lawn tools and mowers, farm and construction equipment, recreational vehicles, boats, planes, and trains.

10. **Agricultural Sources -** Agricultural operations, those that raise animals and grow crops, can generate emissions of gases and particulate matter. For example, animals confined to a barn or restricted area (rather than field grazing), produce large amounts of manure. Manure emits various gases, particularly ammonia into the air. This ammonia can be emitted from the animal houses, manure storage areas, or from the land after the manure is applied. In crop production, the misapplication of fertilizers, herbicides, and pesticides can potentially result in aerial drift of these materials and harm may be caused. Other sources include land management techniques, mobile generators and other small plant for construction purposes.

11. **Natural Sources –** as mentioned above, it is important to note that emissions can come from both anthropogenic sources and natural sources, a further example would be Nitrogen Dioxide (NO_2), where the major sources are road transport (as a product of combustion) and also from energy generation using coal or oil, but can also be produced naturally by lightning, where the very high temperature in the vicinity of the lightning bolt causes atmospheric oxygen and nitrogen to react and form NO_2. High levels of NO_2 can cause respiratory problems (inflammation of airways and lung function), may also have adverse effect of vegetation (leaf, needle damage and reduced growth) and acidification and/or eutrophication (nutrient enrichment) of sensitive habitats (especially water bodies), which leads to excess growth of algae and plants, which may result in oxygen depletion. Wild fires, dust storms and volcanic activity also contribute gases and particulates to our atmosphere.

Major Air Pollutants in the UK - Sources

12. The sources of major air pollutants present in the UK and subject to compliance under international conventions and associated protocols as well as European Directives[7], transposed into UK law are detailed below.

[7] EU retained law

13. **Nitrogen Oxides (NOx)** - All combustion processes in air produce oxides of nitrogen (NO_X). Nitrogen dioxide (NO_2) and nitric oxide (NO) are both oxides of nitrogen and together are referred to as NO_X. Road transport is the main source, followed by the electricity supply industry and other industrial and commercial sectors.

14. **Sulphur Dioxide (SO_2)** - UK emissions are dominated by combustion of fuels containing sulphur, such as coal and heavy oils by power stations and refineries. In some parts of the UK, notably Northern Ireland, coal for domestic use is a significant source.

15. **Carbon Monoxide (CO)** - Formed from incomplete combustion of carbon containing fuels. The largest source is road transport, with residential and industrial combustion making significant contributions.

16. **Ozone (O_3) -** Ozone is not emitted directly from any human made source. It arises from chemical reactions between various air pollutants, primarily NO_X and Volatile Organic Compounds (VOCs), initiated by strong sunlight. Formation can take place over several hours or days and may have arisen from emissions many hundreds, or even thousands of kilometres away.

17. **Particulate Matter ($PM_{2.5}$/PM_{10})** – Particulate Matter is generally categorised on the basis of the size of the particles (for example $PM_{2.5}$ is particles with a diameter of less than 2.5µm). PM is made up of a wide range of materials and arise from a variety of sources. Concentrations of PM comprise primary particles emitted directly into the atmosphere from combustion sources and secondary particles formed by chemical reactions in the air. PM derives from both human-made and natural sources (such as sea spray and Saharan dust). In the UK the biggest human-made sources are stationary fuel combustion and transport. Road transport gives rise to primary particles from engine emissions, tyre and brake wear and other non-exhaust emissions. Other primary sources include quarrying, construction and non-road mobile sources. Secondary PM is formed from emissions of ammonia, sulphur dioxide and oxides of nitrogen as well as from emissions of organic compounds from both combustion sources and vegetation.

18. **Polycyclic Aromatic Hydrocarbons (PAHs)** -There are many different PAHs emanating from a variety of sources. A benzo[a]pyrene (B[a]P) marker (for instance an indicator compound for exposure) is used for the most hazardous PAHs. The main sources of B[a]P in the UK are domestic coal and wood burning, fires (for example accidental fires, bonfires, forest fires, etc.), and industrial processes such as coke production. Road transport is the largest source for total PAHs, but this source is dominated by chemicals thought to be less hazardous than B[a]P.

19. **Benzene (C_6H_6)** - Has a variety of sources, but primarily arises from domestic and industrial combustion and road transport.

20. **1, 3 Butadiene** - Mainly from combustion of petrol. Motor vehicles and other machinery are the dominant sources, but it is also emitted from some processes, such as production of synthetic rubber for tyres.

21. **Ammonia (NH_3)** - Mainly derived from agriculture, primarily livestock manure/slurry management and fertilisers. Small proportion derived from variety of sources including transport and waste disposal.

Principles of Air Quality Management

22. The UK Government's air quality management strategy, established through legislation, policy and guidance implement the following the key principles:

    - The setting of national standards and reduction targets for all main pollutants (derived from International/European obligations);
    - Supplementing national policies with new systems for local air quality management, focussed on designated areas of risk (see sections on Local Air Quality Management [LAQM] and Air Quality Management Areas [AQMAs]);
    - Integrating air quality considerations with planning, transport and other policies; and
    - Promoting a balanced approach to emission control designed to secure the most cost-effective improvement process; and including maintaining control of domestic emissions, whilst pressing for the continued improvement of industrial emissions based on Best Available Technique Not Entailing Excessive Cost (BATNEEC) and securing major improvements in vehicle emissions.

Policy, legislation and guidance

Hierarchy

23. In general terms, like other environmental objectives UK Air Quality legislation is driven by EU Retained law[8] and international obligations, which can be summarised in the following hierarchy:

International – Conventions, protocols

European – [EU Retained law] Directives, Daughter Directives, Regulations

National – Acts, Regulations, SoS Directions

Local – Council Order for example AQMA designation

International Legislation

24. **UNECE Convention on Long-Range Transboundary Air Pollution (CLRTAP)[9]** – Ratified in 1983, the aim of the Convention is that Parties shall endeavor to limit and, as far as possible, gradually reduce and prevent air pollution including long-range transboundary air pollution. Parties develop policies and strategies to combat the discharge of air pollutants through exchanges of information, consultation, research and monitoring.

[8] New category of UK law created under sections 2 to 4 of the EU (Withdrawal) Act 2018 at the end of the UK-EU transition period to retain EU-derived domestic legislation, directly applicable EU legislation and most of the EU rights (etc) as they had effect in UK law / EU law at the end of the transition period; also includes any post-transition additions/modifications and interpretations by the UK courts.
[9] CLRTAP [UNECE, 1979]

25. **UNECE Protocol to Abate Acidification, Eutrophication and Ground Level Ozone (the Gothenburg Protocol)**[10] – extension of the CLRTAP set national emissions ceilings for 2010 up to 2020, with amendments to cover the period up to 2030 for four pollutants: sulphur dioxide (SO_2), nitrogen oxides (NOx), volatile organic compounds (VOCs) and ammonia (NH_3). It builds on previous Protocols that addressed sulphur emissions.

26. **UNECE Protocol Concerning the Control of Emissions of Nitrogen Oxides (the Sofia Protocol)**[11] – extension of the CLRTAP, the Protocol requires Parties to control or reduce emissions of nitrogen oxides. Furthermore, Parties are requested to introduce pollution control measures for major existing stationary sources and to apply national emissions standards to major new stationary and mobile sources, based on best available technologies that are economically feasible.

EU Retained Legislation

27. **EC Ambient Air Quality and Cleaner Air for Europe Directive (the Ambient Air Quality Directive)**[12] – merges most of existing legislation into a single directive (except for the fourth daughter directive) with no change to existing air quality objectives. There are new air quality objectives for $PM_{2.5}$ including the limit value and exposure related objectives. Includes the possibility to discount natural sources of pollution when assessing compliance against limit values and the possibility for time extensions of three years (PM_{10}) or up to five years (NO_2, benzene) for complying with limit values, based on conditions and the assessment by the European Commission. Subsequently transposed into UK law under the Air Quality Standards Regulations 2010[13].

28. **EC Directive relating to Arsenic, Cadmium, Mercury, Nickel and Polycyclic Aromatic Hydrocarbons in Ambient Air (the Fourth Daughter Directive)**[14] - completes the list of pollutants initially described in the Framework Directive. Target values for all pollutants except mercury are defined for the listed substances, though for PAHs, the target is defined in terms of concentration of benzo(a)pyrene which is used as a marker substance for PAHs generally. Only monitoring requirements are specified for mercury.

29. **EC Directive on National Emissions Ceilings for Certain Atmospheric Pollutants (the National Emissions Ceiling Directive)**[15] – sets equivalent ceiling limits as the Gothenburg Protocol for SO_2, NO_X, NH_3 and volatile organic compounds for countries to meet from 2010 onward in European law. Subsequently transposed into UK law under the National Emission Ceilings Regulations 2018[16].

National Legislation

30. **Environmental Protection Act 1990** - imposes duties on local authorities to deal with 'statutory nuisances'[17]. These include smoke emitted from premises that is prejudicial to

[10] Gothenburg Protocol [UNECE, 1999]; Gothenburg Protocol (amended Annex II and III) [UNECE, 2017)
[11] Sofia Protocol [UNECE, 1988]
[12] EU retained law Directive 2008/50/EC – repeals the following EC Directives: Framework Directive 96/62/EC, 1-3 daughter Directives 1999/30/EC, 2000/69/EC, 2002/3/EC, and Decision on Exchange of Information 97/101/EC.
[13] SI 2010/1001
[14] EU retained law Directive 2004/107/EC
[15] EU retained law Directive 2016/2284/EU repeals and replaces 2001/81/EC from 30 June 2018 and ensures emission ceilings for 2010 shall apply until 2020 and sets more ambitious targets for 2030, based on the revised Gothenburg Protocol.
[16] SI 2018/129 applies from 1 July 2018, which transposes EU retained law Directive 2016/2284/EU.
[17] Sections 79-82 in Part III of 1990 (c.43)

health or a nuisance; fumes or gases emitted from premises that is prejudicial to health or a nuisance or any dust, steam, smell or other effluvia arising on industrial, trade or business premises that is prejudicial to health or a nuisance.

31. **Clean Air Act 1993**[18] - introduced to address air pollution from smog's caused by widespread burning of coal for residential heating and by industry. The legislation targets smoke emission from chimneys and premises and smoke emissions from residential and non-residential furnaces. Although some activities fall on Defra and the Devolved Administrations, the key CAA measures are applied and supervised by Local Authorities and include the:

    - Control of dark smoke;
    - Prohibition of cable burning except at authorised installations;
    - Designation and supervision of smoke control areas – control of smoke emission and constraints on the types of appliances and fuels which can be used in such areas;
    - Approval of chimney heights for non-residential furnaces;
    - Control of grit and dust emissions from non-residential furnaces (up to thresholds in EPR);
    - Approval of new non-residential furnaces;
    - Approval of abatement equipment for use on non-residential furnaces.

32. The CAA regulates combustion and other activities (including domestic combustion) which provide significant contribution to the UK total emission for many pollutants. Consequently, they are also important contributors to local air quality.

33. **Environment Act 1995**[19] – as mentioned above the Act requires UK to produce a national Air Quality Strategy. Part IV of the Act requires local authorities in the UK to review air quality in their area and designate air quality management areas (AQMAs) if improvements are necessary. Where an AQMA is designated, local authorities are also required to work towards the Strategy's objectives prescribed in regulations for that purpose. An air quality action plan describing the pollution reduction measures must then be put in place. These plans contribute to the achievement of air quality limit values at local level to contribute to the requirements of the Ambient Air Quality Directive.

34. **Environment Act 2021**[20] – this Act makes provision about plans and policies to improve the natural environment; establishes the Office for Environmental Protection (OEP), which takes on the former governance roles of the EC in holding the Government to account on environmental matters. With regard to Air Quality, the Act:

    - Required the SoS to set long-term, legally binding AQ targets of at least 15 years duration and duties to set targets for $PM_{2.5}$ in ambient air, which have now been set in statute as part of the Environmental Improvement Plan (EIP), published on 31 January 2023;
    - Amends the LAQM Framework provisions in the EA1995, to require that the SoS reviews the Air Quality Strategy at least every 5 years and publishes annual progress reports. It also requires the production of local authority action plans for AQMAs. All tiers of local government, and neighbouring local authorities where relevant, will be required to co-operate in the development of the plans;

[18] 1993 (c. 11)
[19] 1995 (c.25)
[20] 2021 (c.30)

- Amends the enforcement powers of the Clean Air Act 1993, giving local authorities the power to impose financial penalties for the emission of smoke from a chimney within a smoke control area (SCA);
- Removes the exemption in the EPA1990 so that smoke emitted from a private dwelling can be enforced by local authorities as a statutory nuisance;
- Enables local authorities to extend the scope of SCA to cover moored vessels, subject to local consultation;
- Removes the limit on the fine in relation to the selling of controlled solid fuels for delivery, and creates a new duty for retailers to notify customers of the law relating to the purchase of controlled solid fuels;
- Enables regulation for the recall of products, such as motor vehicles, that do not meet relevant environmental standards;
- Introduces powers for the SoS to issue compulsory recall notices

35. **Air Quality (England) Regulations 2000[21] –** These Regulations prescribe the relevant period and set out the air quality objectives to be achieved by the end of that period. The objectives are the same as those set out in the Air Quality Strategy. Where any of the prescribed objectives are not likely to be achieved within any part of a local authority's area within the relevant period, the authority concerned will have to designate that part of its area as an AQMA[22]. An action plan covering the designated area will then have to be prepared setting out how the authority intends to exercise its powers in relation to the designated area in pursuit of the achievement of the prescribed objectives[23].

36. **Air Quality Standards Regulations 2010[24] –** transposes the Ambient Air Quality Directive and the Fourth Air Quality Daughter Directive and therefore sets legally binding limits for concentrations in outdoor air of major air pollutants that impact public health such as particulate matter (PM_{10} and $PM_{2.5}$) and nitrogen dioxide (NO_2). Also sets targets for levels in outdoor air of certain toxic heavy metals and polycyclic aromatic hydrocarbons.

37. **National Emission Ceiling Regulations 2018[25] -** transposes the National Emissions Ceiling Directive and therefore sets emission limits for which sets national emission limits (ceilings) for SO_2, NO_x, NH_3 and volatile organic compounds for countries to meet until 2030, equivalent to those in the amended UNECE Gothenburg Protocol.

National Policy:

38. **Air Quality Strategy -** The Air Quality Strategy for England, Scotland, Wales and Northern Ireland[26] sets out the air quality objectives[27] and policy options to further improve air quality in the UK from the present and in the long term. As well as direct benefits to public health, these options are intended to provide important benefits to quality of life and help to protect our environment.

39. **Volume 1** of the strategy provides an overview and outline of the UK Government and devolved administrations' ambient (outdoor) air quality policy. It sets out a way forward for work and planning on air quality issues, details objectives to be achieved, and

[21] SI 2000/928
[22] Under s83(1) of the Environment Act 1995
[23] Under s84(2) of the Environment Act 1995
[24] SI 2010/1001
[25] SI 2018/129
[26] Air Quality Strategy Cm7169 – Vol 1; Vol 2 [Defra, July 2007]
[27] National Air Quality Objectives and European Directive limit and target values for the protection of human health [Defra].

proposes measures to be considered further to help reach them. The strategy is based on a thorough and detailed analysis of estimating reductions in emissions and concentrations from existing policies and proposed new policy measures, and quantification and valuation of benefits and estimated costs (the analysis is set out in more detail in **Volume 2** of the strategy and the updated Third Report by the Interdepartmental Group on Costs and Benefits (IGCB)).

40. The Environment Act 1995 requires the strategy to include statements on 'standards relating to the quality of air' and objectives for the restriction of levels at which substances are present in the air. Standards have been used as bench marks or reference points for the setting of objectives. For the purposes of the strategy:

- **standards** are the concentrations of pollutants in the atmosphere which can broadly be taken to achieve a certain level of environmental quality. The standards are based on assessment of the effects of each pollutant on human health including the effects on sensitive subgroups or on ecosystems
- **objectives** are policy targets often expressed as a maximum ambient concentration not to be exceeded, either without exception or with a permitted number of exceedances, within a specified timescale.

41. **Clean Air Strategy -** The Clean Air Strategy[28] details how the Government will tackle all sources of air pollution, making our air healthier to breathe, protecting nature and boosting the economy. It sets out a wide range of actions on which all parts of Government and society need to take in order to meet the various regulatory requirements and also shows how devolved administrations intend to make their share of emissions reductions. The associated detailed National Air Pollution Control Programme[29] was published on 1 April 2019, which assess the emission reduction potential of a range of measures scheduled to be deployed across the UK to achieve the statutory air quality objectives. The Clean Air Strategy complements three other UK government strategies: the Industrial Strategy[30], the Clean Growth Strategy[31] and the 25 Year Environment Plan[32]. In terms of planning, the strategy states that:

- in order to control ammonia emissions, the government intends to produce guidance for local authorities explaining how cumulative impacts of nitrogen deposition on natural habitats should be mitigated and assessed through the planning system;

- Defra will continue to work with DLUHC to strengthen the planning practice guidance on air quality to ensure planning decisions help to drive improvements in air quality.

National Planning Policy Framework (NPPF)[33]

42. **Paragraph 8:** Achieving sustainable development means that the planning system has three overarching objectives: economic, social and environmental, which are interdependent and need to be pursued in mutually supportive ways (so that opportunities can be taken to secure net gains across each of the different objectives):

[28] Clean Air Strategy [Defra, Jan 2019]
[29] National Air Pollution Control Programme [Defra, Mar 2019]
[30] Industrial Strategy: Building a Britain fit for the future [HM Government, November 2017]
[31] The Clean Growth Strategy: Leading the way to a low carbon future [HM Government, October 2017]
[32] A Green Future: Our 25 Year Plan to Improve the Environment [HM Government, January 2018]
[33] Revised NPPF [DLUHC, December 2023]

a) an economic objective – to help build a strong, responsive and competitive economy, by ensuring that sufficient land of the right types is available in the right places and at the right time to support growth, innovation and improved productivity; and by identifying and coordinating the provision of infrastructure;

b) a social objective – to support strong, vibrant and healthy communities, by ensuring that a sufficient number and range of homes can be provided to meet the needs of present and future generations; and by fostering well-designed, beautiful and safe places, with accessible services and open spaces that reflect current and future needs and support communities' health, social and cultural well-being; and

c) an environmental objective – protect and enhance our natural, built and historic environment; including making effective use of land, improving biodiversity, using natural resources prudently, minimising waste and pollution, and mitigating and adapting to climate change, including moving to a low carbon economy.

43. **Paragraph 9:** These objectives should be delivered through the preparation and implementation of plans and the application of the policies in this Framework; they are not criteria against which every decision can or should be judged. Planning policies and decisions should play an active role in guiding development towards sustainable solutions, but in doing so should take local circumstances into account, to reflect the character, needs and opportunities of each area.

44. **Paragraph 15:** The planning system should be genuinely plan-led. Succinct and up-to-date plans should provide a positive vision for the future of each area; a framework for addressing housing needs and other economic, social and environmental priorities; and a platform for local people to shape their surroundings.

45. **Paragraph 32:** Local plans and spatial development strategies should be informed throughout their preparation by a sustainability appraisal that meets the relevant legal requirements. This should demonstrate how the plan has addressed relevant economic, social and environmental objectives (including opportunities for net gains). Significant adverse impacts on these objectives should be avoided and, wherever possible, alternative options which reduce or eliminate such impacts should be pursued. Where significant adverse impacts are unavoidable, suitable mitigation measures should be proposed (or, where this is not possible, compensatory measures should be considered).

46. **Paragraph 38:** Local planning authorities should approach decisions on proposed development in a positive and creative way. They should use the full range of planning tools available, including brownfield registers and permission in principle, and work proactively with applicants to secure developments that will improve the economic, social and environmental conditions of the area. Decision-makers at every level should seek to approve applications for sustainable development where possible.

47. **Paragraph 51:** Local planning authorities are encouraged to use Local Development Orders to set the planning framework for particular areas or categories of development where the impacts would be acceptable, and in particular where this would promote economic, social or environmental gains for the area.

48. **Paragraph 86:** Planning policies should:

c) seek to address potential barriers to investment, such as inadequate infrastructure, services or housing, or a poor environment

49. **Paragraph 108:** Transport issues should be considered from the earliest stages of plan-making and development proposals, so that:

    d) the environmental impacts of traffic and transport infrastructure can be identified, assessed and taken into account – including appropriate opportunities for avoiding and mitigating any adverse effects, and for net environmental gains.

50. **Paragraph 109:** The planning system should actively manage patterns of growth to support sustainable transport. Significant development should be focused on locations which are or can be made sustainable, through limiting the need to travel and offering a genuine choice of transport modes. This can help to reduce congestion and emissions, and improve air quality and public health. However, opportunities to maximise sustainable transport solutions will vary between urban and rural areas, and this should be taken into account in both plan-making and decision-making.

51. **Paragraph 180:** Planning policies and decisions should contribute to and enhance the natural and local environment by:

    e) preventing new and existing development from contributing to, being put at unacceptable risk from, or being adversely affected by, unacceptable levels of soil, air, water or noise pollution or land instability. Development should, wherever possible, help to improve local environmental conditions such as air and water quality, taking into account relevant information such as river basin management plans.

52. **Paragraph 192:** Planning policies should sustain and contribute towards compliance with relevant limit values or national objectives for pollutants, taking into account the presence of Air Quality Management Areas (AQMAs) and Clean Air Zones (CAZs) the cumulative impacts on air quality from individual sites in local areas, and the cumulative impacts from individual sites in local areas. Opportunities to improve air quality or mitigate impacts should be identified, such as through traffic and travel management, and green infrastructure provision and enhancement. So far as possible these opportunities should be considered at the plan-making stage, to ensure a strategic approach and limit the need for issues to be reconsidered when determining individual applications. Planning decisions should ensure that any new development in AQMAs and CAZs is consistent with the local air quality action plan.

53. The Glossary at Annex 2: defines the following relevant term:

    - Air quality management areas: Areas designated by local authorities because they are not likely to achieve national air quality objectives by the relevant deadlines.

National Guidance:

54. **Local Air Quality Management: Policy Guidance (LAQM.PG16)**[34] – This guidance has been designed to maximise the public health benefits of local authority action, in particular on priority pollutants such as NO_2 and Particulate Matter (PM_{10}/$PM_{2.5}$). A key element in streamlining the LAQM process is that while the quality of information is

[34] LAQM.PG(16) [Defra, April 2016]

retained, the requirements are more consistent and less burdensome and enable local authorities to clearly point to the actions that are being or will be taken. The guidance is statutory[35] and applies to local authorities in England only (except for those in London) who should have regard to it on action in respect of responsibilities affecting local air quality, including planning and transport.

55. **Local Air Quality Management: Technical Guidance (LAQM.TG16)[36] -** This technical guidance is designed to support local authorities in England and the devolved administrations (excluding London) carrying out their duties under the Environment Act 1995, and subsequent regulations. LAQM is the statutory process by which local authorities monitor, assess and take action to improve local air quality. Where a local authority identifies areas of non-compliance with the air quality objectives set out in Table 1.1, and there is relevant public exposure, there remains a statutory need to declare the geographic extent of non-compliance as an Air Quality Management Area (AQMA) and to draw up an action plan detailing remedial measures to address the problem. A general introduction to the system is provided in the Policy Guidance documents

56. **Local Air Quality Management: Practice Guidance[37]** - Defra has also produced Practice Guidance on some of the more directly effective and ambitious measures that local authorities can take to improve air quality. Local authorities are not required to have regard to the Practice Guidance, but they will find it useful if they are considering establishing one of the schemes covered by the guidance. The guidance also refers to existing policy on economic appraisal.

57. **UK Plan for Tackling Roadside Nitrogen Dioxide Concentrations[38]** – originally drafted by Defra in order to comply with a Supreme Court judgment[39], which ordered revised Air Quality Plans (AQPs) by the end of 2015. The judgment explicitly stated that the UK breached the 2008 Ambient AQ Directive, which sets limits (in Annex XI[40]) for NO_2, not by failing to apply for a derogation but by failing to put in place sufficient plans to secure compliance. Parts of the UK would not be compliant until 2030 (the Directive requires compliance by June 2010, which can be extended by 5 years under Article 22). The UK is divided into 43 zones (for AQ monitoring and reporting purposes). In 2013, 38 of the 43 zones were assessed as exceeding the maximum annual limit of NO_2 emissions – see paragraph 3.25 for the latest emissions data.

58. After 3 rounds of Court cases[41], the 'final' plan was published on 26 July 2017, as required by the Court Order and a supplemental plan to address inadequacies as required by the 3rd judgment[42] was published on 5 October 2018[43]. The Welsh

[35] As required under Part IV of the Environment Act 1995
[36] LAQM.TG(16) [Defra, April 2016]
[37] LAQM Practice Guidance [Defra]
[38] NO_2 Plan – An Overview; NO_2 Plan – Detailed Plan; NO_2 Plan – Technical Report; Supporting Documents – AQ Plan for NO_2 in UK 2017 - AQ Directions [Defra/DfT, updated 21 Mar 2019]; example of an 'approved' AQAP can be found at footnote 79.
[39] *R (ClientEarth) v SoS EFRA*, [2015] UKSC 28, *(*on appeal from [2012] EWCA Civ 897).
[40] Limit values: for one hour period - 200µg/m^3 not to be exceeded by >18 times in a year; for calendar year – 40µg/m^3 by 1 January 2010.
[41] ClientEarth submitted a further HC challenge to the AQ Plan on 26 October 2017 on the grounds that i) The latest plan backtracks on previous commitments to order 5 cities to introduce clean air zones by 2020; ii) The plan does not require any action in 45 local authorities in England, despite them having illegal and levels of air pollution; iii) The plan does not require any action by Wales to bring down air pollution as quickly as possible.
[42] *ClientEarth v SoS EFRA (No3)*, [2018] EWHC 315 (Admin).
[43] Supplement to the UK plan for tackling roadside nitrogen dioxide concentrations; and Annex D – Updated maps for each local authority [Defra/DfT, October 2018].

Government were also required to produce their own supplemental AQP by 30 November 2018[44].

59. The UK AQP aims to focus on the most immediate air quality challenge, for instance to reduce NO_2 concentrations around roads where the current levels are above legal limits within the shortest possible timescale. The Government announced that the AQP is one part of the wider programme to deliver clean air.

60. Local areas where breaches of the legal limits are still occurring were required to produce their own action plans within eight months and final plans by the end of 2018, however these timescales have slipped and are now subject to the timescales set out in the various Air Quality Directions under the Environment Act. The devolved administrations in London are pressing ahead with their own implementation to achieve compliance. Non-London Local authorities affected will have access to a range of options to tackle poor air quality in their plans, for example changing road layouts to reduce congestion, encouraging uptake of ultra-low emissions vehicles and use of innovative retrofitting technologies and new fuels and encouraging use of public transport. If these measures are not enough, local authorities will have the option for restrictions on polluting vehicles through either restricting these vehicles to using affected roads only at certain times or the introduction of charging zones.

61. Actions which the Government is already taking are set out in Annexes A to H of the AQP; a summary of the additional actions are described in Table 2 on pages 19-22 of the detailed AQP. Table 3 on page 31 lists the local authorities with persistent exceedances required to undertake action to reduce NO_2 emissions to within statutory limits within the shortest possible time.

62. Paragraph 6 of the AQP refers to the ban on the sale of all new conventional petrol and diesel cars in the UK by 2040 and the ambition for the UK to be a world leader in electric vehicle technology. Volvo has already announced that all new models will be electric from 2019 and other manufacturers have also announced plans to move away from conventional fuels.

63. As stated above as this is the 'final' AQP, Inspectors will need to have regard to it and attach appropriate weight to the objectives and proposed actions where relevant air quality issues arise in casework, in particular to:

    - **development which may negatively impact on compliance** - such as new roads, new housing and industrial development; and

    - **development intended to contribute positively to compliance** - such as alteration of existing roads; new or upgraded infrastructure for cleaner, for example electric cars and any associated charging infrastructure, through to infrastructure to encourage walking and cycling. It should be noted that as the Court Order specifies that the current AQ plan remains in place. Inspectors should therefore attach appropriate weight to this current AQP.

64. Objections may be raised to proposals that would involve activities that could potentially negatively impact local air quality in towns and cities which are currently non-compliant, or at risk of planned compliance being delayed, or an existing compliance being subsequently exceeded. The decision maker should attach appropriate weight to issues raised that suggest NO_2 emissions will be altered by the proposal, or by revisions to

[44] Welsh Government Supplemental Plan to the UK Plan for Tackling Roadside Nitrogen Dioxide Concentrations 2017 [WG, November 2018]

local plans (including waste local plans), in non-compliant zones where draft air quality improvement plans are under consultation.

65. Inspectors should consider if the views of parties should be sought on any further evidence that should be requested on the basis of forecasting or measures intended to ensure local compliance or the potential introduction of further Clean Air Zones (CAZs).

66. Inspectors will wish to consider, in their examination of matters, the basis on which any forecasting has been made in areas which are not in compliance with the Directive limits or may be brought into non-compliance as a result of proposed developments or plans, and what level of margin may be required to avoid any potential new non-compliance or delay in achieving compliance.

67. A cautious approach will be needed, for instance not relying solely on the AQP and the Supplemental AQP to deliver the EU retained law Directive objectives in those areas where the plan was found to be inadequate (the 45 English local authority areas in Table 1 of the AQP who were originally 'not required to conduct a feasibility study'). For these 45 areas the latest judgment specifies that 33 of these are required to produce a feasibility study for implementation of measures to provide compliance, the other 12 are likely to come into compliance shortly, so are not required to provide additional measures. However, you will also need to be satisfied that the proposed development or plan does not delay or reduce the chances of the location coming into compliance.

68. **Air Quality Planning Practice Guidance (PPG)**[45] - paragraphs 001 - 004 sets out the circumstances where air quality is relevant to planning and emphasises the role of Air Quality Management Areas (AQMAs), cumulative impact from smaller sites and point source pollution. This will need consideration in local/neighbourhood plans in order to help meet air quality targets. Paragraph 005 sets out the circumstances when air quality could be relevant to planning decisions Paragraph 006-007 sets out the issues to be considered and the requirements for an air quality assessment and Paragraph 008 sets out how impact can be mitigated. For planning casework conditions and obligations may be used to secure mitigation (providing the relevant tests are met) as set out in paragraph 008 of the PPG. Note: this guidance has not been updated to reflect the revised NPPF and should be treated with caution.

69. **Minerals PPG**[46] – Paragraphs 013 sets out the principal issues that mineral planning authorities should address, one of which is air quality. Annex C sets out Model Planning Conditions for hydrocarbon extraction. Paragraph 142 sets out a condition for dust and air quality. Note: this guidance has not been updated to reflect the revised NPPF and should be treated with caution.

London Specific Guidance:

70. Air quality in London is devolved to the Mayor of London, who has a supervisory role, with powers to intervene and direct local authorities in Greater London under Part IV of the Environment Act 1995.

71. **Local Air Quality Management: Technical Guidance (LLAQM.TG16)**[47] **-** This technical guidance has been prepared by the Greater London Authority (GLA) to support London boroughs in carrying out their duties under the Environment Act 1995 and connected regulations. Although the LLAQM technical guidance is largely based on

[45] Air Quality PPG [MHCLG, November 2019]
[46] Minerals PPG [DCLG, October 2014]
[47] LLAQM.TG (16) [Mayor of London, 2016]

the updated national guidance LAQM.TG(16), it does incorporate London-specific elements of the LAQM system.

72. **Local Air Quality Management: Policy Guidance (LLAQM.PG16)[48] -** As part of the Mayor's commitment to improving air quality he has also introduced this Local Air Quality Management system for London ("LLAQM"), in order to reflect the unique challenges, opportunities, and policies within London, and to enable enhanced focus on and co-ordination of local authority air quality work. The basic statutory framework remains the same as for other areas in the UK. Air quality in the capital is devolved to the Mayor of London, who has a supervisory role, with powers to intervene and direct local authorities in Greater London under Part IV of the Environment Act 1995.

Transport Guidance:

73. **Design Manual for Roads and Bridges (DMRB)** – Document LA 105[49] of the DMRB provides a framework for assessment, mitigation and reporting of impacts that road projects may have on local and regional air quality. It includes calculation methods to estimate local pollutant concentrations and regional emissions for air. Where appropriate, this advice may be applied to existing roads.

74. **Transport Analysis Guidance (WebTAG)** – TAG Unit A3[50] sets out five-steps for environmental appraisal of transport projects with regard to air quality impacts as follows:

- Scoping;
- The quantification of air quality impacts;
- The assessment of air quality impacts (see section 3.3);
- Monetary valuation of air quality impacts (see section 3.4); and
- Consideration of the distributional impacts of changes in air quality (see TAG Unit A4.2[51]).

75. **Aviation Policy Framework** – Published in 2013 by DfT, sets out the Government's policy on aviation and sets out the parameters within which the Airports Commission would work. Section 3 deals with environmental impacts. Paragraphs 3.46-3.55 deals with air quality and other local environmental impacts. Section 9.5 of the Airports Commission Final Report[52] sets out the environmental impacts and assessment of the shortlisted schemes[53], which informed the commission's recommendations. Paragraphs 9.52-9.96 deals with impacts of air quality.

Environmental Permitting Guidance:

76. **Air Emissions Risk Assessment Guidance** - The IED[54] require that all industrial operations in sectors covered by this EU Directive carry out air quality assessments and make provisions to minimise emissions. The IED also requires that Best Available

[48] LLAQM.PG(16) [Mayor of London, 2016]
[49] LA 105 – Sustainability & Environment Appraisal - Air Quality [HE, Nov 2019]
[50] TAG Unit A3 – Environmental Impact Appraisal [DfT, July 2021]
[51] TAG Unit A4.2 – Distributional Impact Appraisal [DfT, May 2020]
[52] Airports Commission: Final Report, July 2015
[53] GAL – new second runway at Gatwick (south and parallel to existing runway); HAL – new third runway at Heathrow (NW of current northern runway); HHL – extension of the existing northern runway at Heathrow.
[54] EU retained law Directive 2010/75/EU.

Techniques (BAT)[55] is be used to control air emissions, taking into account the cost, which should be reasonable for the changes to be implemented. Guidance on Air Quality and IED is contained within the Environment Agency Air Emissions Risk Assessment Guidance[56].

77. **Odour Management Horizontal Guidance (H4)[57]** - This guidance covers the regulatory requirements with regard to odour, advice on the management of odour, odour conditions on permits and the aspects that should be dealt with in an odour management plan (OMP)[58]. This guidance does not apply to waste water treatment facilities (unless they are subject to the IED Directive), standalone water discharges, groundwater authorisations, radioactive substance activities or any other activity which is not subject to an odour condition in a permit.

Nationally Significant Infrastructure Projects (NSIPs) - National Policy Statements

78. The NPPF does not contain specific policies for nationally significant infrastructure projects for which particular considerations apply. These are determined in England (and Wales) in accordance with the decision-making framework set out in the Planning Act 2008 and relevant national policy statements for major infrastructure, as well as any other matters that are considered both important and relevant (which may include the National Planning Policy Framework). National policy statements form part of the overall framework of national planning policy, and are a material consideration in decisions on planning applications.

Energy[59]:

79. **Overarching Energy (EN-1)[60]** – Section 5.2 deals with air quality and emissions and sets out general considerations for air quality limits, requirements for the applicant's assessment of impacts of a proposal and mitigation measures as set out if the Air Quality Strategy and AQ Standards Regulations 2010 mentioned in 2.4.1 & 2.4.5 above.

80. **Fossil Fuel Electricity Generating Infrastructure (EN-2)[61]** – Section 2.5 sets out general considerations for air quality limits, requirements for the applicant's assessment of impacts of a proposal and mitigation measures as set out if the Air Quality Strategy and AQ Standards Regulations 2010 mentioned in 2.4.1 & 2.4.5 above

81. **Renewable Energy (EN-3)[62]** – Paragraphs 2.5.53 – 2.5.58 set out specific air quality considerations for Biomass and Waste Combustion Plants and refers to the generic information on air quality legislation and emission limit values in EN-1 mentioned above.

[55] BAT – the available techniques which are best for preventing or minimising emissions and impacts on the environment. This includes both the technology used and the way in which the installation is designed, built and operated. In deciding the level of control that constitutes BAT for an installation, a number of factors should be considered: i) costs and benefits, ii) the technical characteristics of the installation, iii) geographical location and iv) local environmental conditions. BAT for each sector is set out in process or sector-specific guidance, derived from the EC BAT Reference Documents (BREF).
[56] Air Emissions Risk Assessment for your Environmental Permit [EA, Sept 2021]
[57] Odour Management–H4 [EA, March 2011]
[58] Control and monitor emissions for your environmental permit [EA, May 2021]
[59] The Energy suite of NPSs is currently subject to consultation and review to align them with the policies set out in the Energy White Paper and that they provide a framework to support infrastructure required for transition to net zero.
[60] EN-1 [DECC, July 2011]
[61] EN-2 [DECC, July 2011]
[62] EN-3 [DECC, July 2011]

82. **Gas Supply Infrastructure and Gas and Oil Pipelines (EN-4)**[63] – Section 2.18 covers specific air quality considerations relating to gas emissions from gas reception facilities projects and refers to the potential effects of these facilities.

83. **Nuclear Power Generation (EN-6)** – Paragraph 3.12.3 of Volume I [64]points out that a new nuclear power station is unlikely to be associated with significant air quality impacts during operation, but the impact may be greater during the construction phase. Volume II[65] briefly mentions potential site-specific effects on air quality at the eight sites chosen for new nuclear generation throughout Annex C.

Transport:

84. **Ports**[66] – Section 5.7 covers air quality and emissions considerations and the requirements for assessment of air quality impacts and mitigation from ports infrastructure proposals. Section 5.8 covers dust, odour, smoke and steam emissions considerations and the requirements for assessment of air quality impacts and mitigation.

85. **National Networks**[67] – Paragraphs 5.3 – 5.15 covers air quality impacts arising from roads and rail infrastructure proposals and refers to the European legislative requirements set out above. It also covers the requirements for assessment of air quality impacts and mitigation for rail and road infrastructure proposals.

86. **Airports: new runway capacity and infrastructure in the South East of England**[68] – The Airports NPS provides the primary basis for decision making on development consent for a North-West runway at Heathrow Airport and is an important consideration with regard to other applications for runways and airport infrastructure in London and the South East.

87. Air quality impacts of airport expansion are assessed in general at paragraph 5.23 of the NPS. The requirements for air quality assessment are set out in paragraphs 5.32-5.34 and mitigation measures are detailed at paragraphs 5.35-5.41.

Waste:

88. **Hazardous Waste**[69] – Section 5.2 sets out air quality and emissions considerations in infrastructure projects concerning recovery and/or disposal of hazardous waste, particularly where proposals are within or adjacent to AQMAs or Natura 2000 sites. Section 5.2 also covers the requirements for assessment of air quality impacts and mitigation for hazardous waste proposals. Section 5.6 covers dust, odour, smoke and steam emissions considerations and the requirements for assessment of air quality impacts and mitigation.

89. **Geological Disposal Infrastructure**[70] **-** provides guidance in order to determine applications for permanent disposal facilities for higher level radioactive waste (from nuclear power plants, medical treatments, research and defence activities). Section 5.2 sets out air quality and emissions considerations, particularly where proposals are within or adjacent to AQMAs or Natura 2000 sites. Section 5.2 also covers the

[63] EN-4 [DECC, July 2011]
[64] EN-6 Vol I [DECC, July 2011]
[65] EN-6 Vol II [DECC, July 2011]
[66] Ports NPS [DfT, January 2012]
[67] National Networks NPS [DfT, December 2014]
[68] Airports NPS [DfT, June 2018]
[69] Hazardous Waste NPS [Defra, June 2013]
[70] NPS for Geological Disposal Infrastructure [BEIS, July 2019]

requirements for assessment of air quality impacts and mitigation measures for geological disposal proposals.

Water:

90. **Waste Water**[71] – Section 4.11 sets out air quality and emissions considerations in infrastructure projects concerning waste water treatment plants. Section 4.11 also covers the requirements for assessment of air quality impacts and mitigation for rail and road infrastructure proposals. Section 4.12 covers dust, odour, smoke and steam emissions considerations and the requirements for assessment of air quality impacts and mitigation.

Other Guidance:

91. **WHO Air Quality Guidelines**[72] – are designed to provide guidance in reducing the health impacts of air pollution. The guidance provides suggested limits for particulate matter, ozone, nitrogen dioxide and sulphur dioxide. The limits in the EU Ambient Air Quality Directive[73] are based on this guidance. An updated version[74] was published on 22 September 2021, which recommend tighter air quality guideline levels and interim targets for the major air pollutants, based on the latest research into adverse effect levels and health risks. It will be some time before these revised limits are considered and potentially form the basis of updated air quality standards legislation.

92. **IAQM Land-Use Planning & development Control: Planning for Air Quality**[75] - This document has been developed for professionals operating within the planning system. It provides them with a means of reaching sound decisions, having regard to the air quality implications of development proposals. It also is anticipated that developers will be better able to understand what will make a proposal more likely to succeed. This guidance, of itself, can have no formal or legal status and is not intended to replace other guidance that does have this status. For example, industrial development regulated by the Environment Agency, and requiring an Environmental Permit, is subject to the EA's risk assessment methodology, while for major new road schemes, Highways England has prepared a series of advice notes on assessing impacts and risk of non-compliance with limit values.

93. **IAQM Guidance on the Assessment of Odour for Planning**[76] - This guidance is for assessing odour impacts for planning purposes. This document is not intended to provide guidance on odour for environmental protection regulatory purposes (for example Environmental Permitting, statutory nuisance investigations, etc.) and specific odour guidance from the EA and Defra addresses that need. Odour can be an important issue for waste-management proposals developments, wastewater treatment works (WWTWs), some industrial processes, and rural activities (for example farming and biosolids application to fields). The relevant LPA must consider whether a proposed development (an odour source itself or nearby new receptors such as residential dwellings) will be a suitable use of the land. The planning system should guide development to the most appropriate locations: ideally, significant sources of odour should be separated from nearby odour-sensitive users (receptors) or failing this employ mitigation measures in order to make a proposal acceptable.

[71] Waste Water NPS [Defra, March 2012]
[72] WHO Air Quality – Global Update 2005 [WHO, 2006]
[73] EU retained law Directive 2008/50/EC
[74] WHO Global Air Quality Guidelines [WHO, 2021]
[75] IAQM Planning for Air Quality Guidance [IAQM, EPUK, Jan 2017]
[76] IAQM Guidance on the Assessment of Odour for Planning [IAQM, July 2018]

94. **Building Regulations (Approved Document F: – Means of ventilation[77]) –** deals with the requirements and provisions for adequate ventilation provided for buildings where people go, of which any fixed systems for mechanical ventilation should be tested and adjusted to achieve adequate ventilation as required by Schedule 1 and regulations 39, 42 and 44 (in so far as it relates to fixed systems for mechanical ventilation) of the Building Regulations, as amended. It also deals with regulations 20(1) and 20(6) (in so far as it relates to in so far as it relates to fixed systems for mechanical ventilation) of Approved Inspectors Regulations, as amended.

95. **Air Quality – Certification of automated measuring systems (BS EN 15267 Series)** – part 1 specifies the general principles, including common procedures and requirements, for the product certification of automated measuring systems (AMS) for monitoring ambient air quality and emissions from stationary sources. BS EN 15267-1 consists of the following sequential stages:

    a) Performance testing of an automated measuring system;
    b) Initial assessment of the AMS manufacturer's quality management system;
    c) Certification;
    d) Surveillance.

96. Parts 2-4 covers in more detail the performance criteria, initial assessment, post certification surveillance and design changes on the performance of measuring systems.

Emerging Policy/Guidance:

Draft National Policy Statement for Water Resources Infrastructure[78]

97. A draft NPS subject to consultation, which seeks to provide guidance in order to determine applications for water resources infrastructure. Section 4.2 sets out air quality and emissions considerations, particularly where proposals are within or adjacent to AQMAs or Natura 2000 sites. Section 4.2 also covers the requirements for assessment of air quality impacts and mitigation measures for water resources proposals for example reservoirs, pipelines (for water transfer) and desalination plants.

Interaction of Planning and Pollution Control Regimes

98. The Waste PPG advises that there are a number of issues (including air quality) which are covered by other regulatory regimes and planning authorities should assume that these regimes will operate effectively. The focus of the planning system should be on whether the development itself is an acceptable use of the land and the impacts of those uses, rather than any control processes, health and safety issues or emissions themselves where these are subject to approval under other regimes. However, before granting planning permission decision-makers they will need to be satisfied that these issues can or will be adequately addressed through the pollution control regimes.

99. On some matters, the dividing line between planning and pollution control may not be clear-cut. Noise, dust, odour and hours of operation are examples. In general, to be a material planning consideration, the pollution issue should relate to the use of land. It may be helpful to consider the degree to which the pollution control authority (usually the Environment Agency [EA]) is able to address the risk in carrying out its statutory

[77] Approved Document F: Means of Ventilation [HM Government, 2010]
[78] Draft NPS for Water Resources Infrastructure [Defra, November 2018].

responsibilities. The classic case on this is *Gateshead MBC v Secretary of State and Northumbrian Water Group Plc*, which has been supported in subsequent cases.

100. At the appeal stage, it may not be known what conditions the EA will impose or even whether they are likely to grant a permit. However, a fair idea should be able to be gained on these matters from consultation responses from the EA and from knowledge of the subject areas of the respective control regimes. Applicants are now encouraged to make concurrent applications for planning permission and a waste environmental permit. However, they are sometimes reluctant to do so before planning permission is granted, due to the considerable costs involved in the permitting process.

101. Where a permit has already been granted or is likely to be decided during the course of the appeal, it is necessary to find out from the main parties how the permit application is progressing. If the permit is granted then it will be very useful to obtain a copy of the permit and the EA's decision document, which is particularly useful as it describes how the permit application has been determined; a record of the decision-making process; shows how all the relevant environmental factors and key issues have been taken into account and justifies specific permit conditions and contains a brief history of the site (including planning history). This may be useful to frame how the environmental issues are dealt with and alleviate public fears on environmental effects of the proposal as the document should explain the adequacy of environmental management techniques for the operation.

Implications of Exiting the EU

102. The UK left the EU on 31 January 2020 and the transitional arrangements that were put in place ended on 31 December 2020. From 1 January 2021, Defra needs to ensure that the EU environmental law that applied at 31 December 2020[79] can continue to operate appropriately in UK law by ensuring domestic legislation implements retained EU law and any international obligations. The Environment Act 2021[80] enshrines environmental principles into UK law and makes provision for a framework of environmental governance. The following will continue from 1 Jan 2021:

- the UKs legal framework for enforcing domestic environmental legislation by UK regulatory bodies or court systems
- environmental targets currently covered by EU legislation - they are already covered in UK legislation
- permits and licences issued by UK regulatory bodies

Current legislation is changed from 1 Jan 2021 to:

- remove references to EU legislation (which should be referred to in decisions / reports as 'Retained EU Law Directive / Regulation xx/xxxx/xx')
- transfer powers from EU institutions to UK institutions
- make sure the UK meets international agreement obligations

[79] EU Exit Web Archive – The National Archives
[80] 2021(c.30)

Casework Considerations[81]

Introduction

103. Any air quality issue that relates to land use and its development is capable of being a material planning consideration. The weight, however, given to air quality in making a planning application decision, in addition to the policies in the local plan, will depend on such factors as:

- **the severity of the impacts on air quality** – the overall degradation or improvement in local air quality and its effect on the compliance with national air quality objectives and EU limit values;
- **the air quality in the area surrounding the proposed development** – whether the development will materially affect any air quality action plan or other strategy in the area;
- **the likely use of the development** - the length of time people are likely to be exposed at that location and whether the development would introduce new public exposure; and
- **the positive benefits provided through other material considerations.**

Detailed Effects of air pollution:

Health Effects

104. As stated in section 1 above, various air pollutants can have serious health impacts. Below are detailed description of the health effects of the main pollutants in the UK which are likely to referred to in evidence:

105. **Particulates (PM_{10}/$PM_{2.5}$) -** Some estimates suggest that particulates are responsible for up to 10,000 premature deaths in the UK each year. The extent to which particulates are considered harmful depends largely on their composition. The effects of particulate emissions are considered detrimental due to their composition, containing mainly unburned fuel oil and polycyclic aromatic hydrocarbons (PAHs) that are known to be carcinogenic among laboratory animals. Particulates may originate from many other sources including cement manufacturing processes, incineration and power generation, meaning localised instances of particulate pollution are common. The categorisation of particles through size has recently become important when assessing their effects on health. This is due to the fact that particles of less than 10 micrometres (μm) in diameter can penetrate deep into the lung and cause more damage, as opposed to larger particles that may be filtered out through the airways' natural mechanisms.

106. **Ozone** - Ozone differs from most pollutants in that it is created as a secondary pollutant by the action of sunlight on volatile organic compounds (VOCs) and oxides of nitrogen, often over several days. This results in ozone being widely dispersed as a pollutant, and can form in greater concentrations in rural areas. As ozone concentrations are particularly dependant on sunlight, episodes are always likely to develop following sustained periods of warmth and calm weather. Ozone is a toxic gas that can bring irreversible damage to the respiratory tract and lung tissue if delivered in high quantities. Levels during air pollution episodes have peaked at around 250 ppb. At

[81] Applies to appeals, Infrastructure, specialist and Local Plans casework.

these concentrations ozone is likely to impair lung function and cause irritation to the respiratory tract. Asthmatics are known to adopt these symptoms more easily.

107. **Oxides of Nitrogen** - The oxides of most concern are nitric oxide (NO) and nitrogen dioxide (NO_2). The latter is more damaging to health, due to the toxic nature of this gas. NO is more readily emitted to the atmosphere as a primary pollutant, from traffic and power stations, and is often oxidised to nitrogen dioxide following dispersal. Health effects of exposure to NO_2 include shortness of breath and chest pains. The effects of NO include changes to lung function at high concentrations.

108. **Carbon Monoxide** - Transport, tobacco smoke and gas appliances are the major sources of carbon monoxide. Its link with haemoglobin, the oxygen carrying component of the blood stream, forms carboxyhaemoglobin (COHb) which can be life-threatening in high doses. The effects of carbon monoxide pollution are more damaging to pregnant women and their foetus. Research into smoking and pregnancy shows that concentrations within the blood stream of unborn infants is as high as 12%, causing retardation of the unborn child's growth and mental development.

109. **Lead** - Lead emissions have significantly reduced in recent years but lead is still a serious air pollutant especially to those living near to areas of dense traffic in cities where leaded fuel may still be in use. Damage to the central nervous system, kidneys and brain can result when levels in the blood reach concentrations of 800 mg/litre. Much of the concern regarding pollution from lead centres around its effects on child health. Children exhibit vulnerability to the toxic effects of lead at much lower concentrations than for adults. It has been shown that there is a strong link between high lead exposures and impaired intelligence.

110. **Sulphur dioxide** - The health effects of sulphur dioxide pollution were exposed graphically during the "Great Smog" of London in 1952. This resulted in approximately 4000 premature deaths through heart disease and bronchitis. Since then, however, emissions have been significantly reduced through legislative measures. Research has shown that exposure for asthmatics is significantly more damaging than for normal subjects. Concentrations above 125 ppb may result in a fall in lung function in asthmatics. Tightness in the chest and coughing may also result at levels approaching 400 ppb. At levels above 400 ppb the lung function of asthmatics may be impaired to the extent that medical help is required. Sulphur dioxide pollution is considered more harmful when particulate and other pollution concentrations are high. This is known as the synergistic effect, or more commonly the "cocktail effect." Therefore, the monitoring networks in the UK incorporate both smoke and sulphur dioxide.

111. **Volatile Organic Compounds (VOCs) -** Some VOCs are quite harmful, including the following: Benzene - may increase susceptibility to leukaemia, if exposure is maintained over a period of time. Polycyclic Aromatic Hydrocarbons (PAH) - forms of this compound can cause cancer. There are several hundred different forms of PAH, and sources can be both natural and man-made. Dioxins - sources of dioxins vary, although the manufacturing of organic compounds as well as the incineration of wastes and various other combustion processes involving chlorinated compounds may also produce dioxins. Health effects are as much a problem due to ingestion, as inhalation, such is the problem of dioxins entering the food chain from soils. 1,3 Butadiene - there is an apparent correlation between butadiene exposure and a higher risk of cancer. Sources are manufacturing of synthetic rubbers, petrol driven vehicles and cigarette smoke.

Effects on Ecosystems and Wildlife

112. Atmospheric pollution can adversely affect the natural environment in a number of ways. Pollutants such as sulphur dioxide and nitrate cause acidification (via 'acid rain'), which can cause significant damage to both living and non-living components of ecosystems. Eutrophication occurs when pollution delivers an excess of nutrients to ecosystems resulting in decreased biodiversity, for example by causing algal blooms in rivers and lakes which can wipe out fish populations.

113. Pollutants such as ozone and nitrogen can directly cause toxic damage to all living ecosystem components, and particularly to plants. Deposited heavy metals are stable and persistent environmental pollutants which cannot be degraded or destroyed. As such they may accumulate in soil, water and sediments and cause damage to both the environment and human health.

114. All of these effects result in significant subsequent impacts on both biodiversity and ecosystems, with resulting impacts on agriculture/aquaculture and other activities in these areas.

115. The extent of these impacts are assessed using critical loads and levels, which are estimates of the concentration of one or more air pollutants above which there is risk of damage to the environment. The term **'Critical Load'** refers to the deposition of pollutants from the air to land and water and can be defined as the *"quantitative estimate of exposure to one or more pollutants below which significant harmful effects on specified sensitive elements of the environment do not occur according to present knowledge"*, while **'Critical Level'** refers to pollutant concentrations in the atmosphere and can be defined as "*concentrations of pollutants in the atmosphere above which direct adverse effects on receptors, such as human beings, plants, ecosystems or materials, may occur according to present knowledge*"[82]. These are important parameters and are often referred to in Environmental Statements and Habitat Risk Assessments where for example a new road project or proposed Poultry shed would result in the release of nitrogen oxides and ammonia (NH_3) respectively, resulting in nitrogen deposition (N-deposition) on nearby sensitive areas, for instance 'European Sites' - SPAs/SACs and/or areas where protected species exist[83].

Effects on Heritage assets

116. There are many materials affected by acidic deposition as most materials are liable to some degree of damage. Those most vulnerable are: limestone; marble; carbon-steel; zinc; nickel; paint and some plastics. Stone decay can take several forms, including the removal of detail from carved stone, and the build-up of black gypsum crusts in sheltered areas. Metal corrosion is caused primarily by oxygen and moisture, although SO_2 does accelerate the process. Most structures and buildings are affected by acid deposition to some degree because few materials are safe from these effects. In addition to atmospheric attack structures that are submerged in acidified waters such as foundations and pipes can also be corroded. The effects of acid deposition on modern buildings are considerably less damaging than the effects on ancient monuments. Limestone and calcareous stones which are used in most heritage buildings are the most vulnerable to corrosion and need continued renovation.

[82] Source: UNECE Working Group definitions
[83] See Biodiversity CL&PG for further information.

Weather and Air Quality

117. The weather has an important effect on air pollution levels. Generally, windy weather causes pollution to be dispersed whilst still weather allows pollution to build up. Coastal locations and open areas often experience more windy weather and are therefore likely to experience better air quality. The wind direction also affects air pollution. If the wind is blowing towards an urban area from an industrial area then pollution levels are likely to be higher in the town or city than if the air is blowing from another direction of for example, open farmland. Sunshine can also affect pollution levels. On hot, summer days, pollution from vehicles can react in the presence of sunlight to form ozone. The pollution that causes ozone to be formed is usually generated from vehicles in cities and towns but because this pollution can be transported by winds, high levels of ozone may be found in the rural countryside. The pressure of the air also affects whether pollution levels build up. During high pressure systems, the air is usually still which allows pollution levels to build up but during low pressure systems the weather is often wet and windy, causing pollutants to be dispersed or washed out of the atmosphere by rain.

Effects of Topography on Air Quality

118. Concentrations of pollutants can be greater in valleys than for areas of higher ground. This is because, under certain weather conditions, pollutants can become trapped in low lying areas such as valleys. This happens for example, on still sunny days when pollution levels can build up due to a lack of wind to disperse the pollution. This can also happen on cold calm and foggy days during winter. If towns and cities are surrounded by hills, wintertime smog's may also occur. Pollution from vehicles, homes and other sources may become trapped in the valley, often following a clear cloudless night. Cold air then becomes trapped by a layer of warmer air above the valley – this is a 'temperature inversion'. See Annex C for the relationship between influences on air quality.

Local Air Quality Management

119. Local authorities have a central role in achieving improvements in air quality. Their local knowledge and interaction with the communities that they serve mean that they are better able to know the issues on the ground in detail and the solutions that may be necessary or appropriate to the locality. Through the Local Air Quality Management (LAQM) system local authorities are required to assess air quality in their area and designate Air Quality Management Areas (AQMAs) if improvements are necessary. Where an AQMA is designated, local authorities are required to produce an Air Quality Action Plan (AQAP) describing the pollution reduction measures it will put in place.

120. **AQMAs** – Section 83(1) of Part IV, Environment Act 1995 requires local authorities to designate an AQMA where:

    i) any one or more AQ objectives are not being met; and
    ii) where people are likely to be regularly present and therefore exposed to the emissions

121. Schedules 2 & 3 of the Air Quality Standards Regulations 2010 or Table 2 of Part 1 of the UK Air Quality Strategy 2007 set out all the UK Air Quality Objectives. It is important to note that an AQMA can be one street or cover very large areas.

122. **AQAPs** – section 84 of the Environment Act 1995 requires local authorities to develop an Action Plan[84] to improve air quality in the AQMA, the plan should include:

- pollution sources;
- quantification of impacts of the proposed measures;
- present clear timescales;
- how accountability and ownership will be measured (in order to fulfil its goal - all partners for example Highways England or Environment Agency to take responsibility for actions and engage constructively in the process).

123. There are currently over 700 active AQMA's around the UK (600 in England)[85], mostly for Nitrogen Dioxide (NO_2). It is important to note that AQMAs remain in place in order comply with the AQ objectives unless it can be shown that the objectives are being met and can be sustained even if the AQMA is revoked or amended. If an AQMA is revoked - a local Air Quality Strategy (AQS) can be put in place to ensure AQ remains high profile and to ensure a quick response if AQ deteriorates in the area.

124. **Clean Air Zones (CAZs) -** Defra/DfT published the Clean Air Zone Framework document[86] on 5 May 2017, which sets out the principles for setting up CAZ's in England[87]. A CAZ defines an area where targeted action is taken to improve AQ and resources should be prioritised to shape the urban environment to deliver improved health benefits and support economic growth. CAZs aim to address all sources of pollution, (including NO_2 and PM) and reduce exposure by using a range of measures tailored to that particular location. Points to note in particular are:

- General approach – areas, hours of operation, vehicle types
- Charging options – non-charging/charging (what levels to charge), exemptions and discounts
- Expected to deliver – support for local growth and ambition; accelerate transmission to a low emission economy; and immediate action to improve AQ and health.

Air Quality Monitoring and Modelling Techniques

Introduction

125. As mentioned in paragraph 2.34 above the UK is divided into 43 zones, for the purposes of monitoring, reporting and compliance with European Directives, divided into:

- 28 agglomeration zones (large urban areas); and
- 15 non-agglomeration zones[88]

[84] Example of Defra/Dft approved AQAP – Nottingham City Council AQAP and Appendices, as required by the EA1995 (Nottingham City Council) Air Quality Direction 2017.
[85] List of Local Authorities with AQMAs; AQMA interactive map [Defra, 2017]
[86] CAZ Framework Document [Defra/DfT, May 2017]
[87] Current position on CAZs in England
[88] Equivalent to the former Government Regional Offices in England and the boundaries agreed by the Scottish Government, Welsh Government and Department of the Environment in Northern Ireland.

126. Each of these zones has its own identification code (UK0001 – UK0043)[89]. The air quality assessment for each pollutant is derived from a combination of measured and modelled concentrations.

Where are we now? – Current Air Pollution in the UK

127. According to the latest annual report on air quality in the UK for 2019[90], the UK is compliant for the majority of pollutants, but is still non-compliant with respect to the annual mean targets for NO_2 in the vast majority of the 43 air quality monitoring and assessment zones. A summary of the results are as follows:

- The UK met the limit value for hourly mean nitrogen dioxide (NO_2) in all but one zone.
- Ten zones were compliant with the limit value for annual mean NO_2. The remaining 33 exceeded this limit value.
- Three zones exceeded the PM value for benzo[a]pyrene.
- All zones met the target values for arsenic, cadmium
- Four zones exceeded the target value for nickel.
- All zones met both the target values for ozone.
- No zones were compliant with the long-term objective for ozone (for protection of human health).
- 37 zones met the long-term objective for ozone (for protection of vegetation).
- All zones met the limit value for daily mean and annual mean concentration of PM_{10}.
- All zones met the target value for annual mean concentration of $PM_{2.5}$.
- All zones met the limit values for sulphur dioxide (SO_2), carbon monoxide (CO), lead and benzene (C_6H_6).

128. **National Atmospheric Emissions Inventory (NAEI) -** The UK National Atmospheric Emissions Inventory (NAEI)[91] is developed and maintained by Ricardo Energy & Environment, in collaboration with Aether, Centre for Ecology & Hydrology, and Gluckman Consulting. The NAEI is funded by the BEIS, Defra, the Scottish Government, the Welsh Government and the Northern Ireland Department of Agriculture, Environment and Rural Affairs.

129. The NAEI estimates annual pollutant emissions from 1970 to the most current publication year for the majority of pollutants. A number of pollutants are estimated from 1990 or 2000 to the most current publication year due to the lack of adequate data prior to the later date and the specific reporting requirements for each pollutant. The NAEI is made up of the Greenhouse Gas Inventory (GHGI) and the Air Quality Pollutant Inventory (AQPI). To deliver these estimates, the NAEI team collect and analyze information from a wide range of sources – from national energy statistics through to data collected from individual industrial plants.

[89] See Table 2-1 and Figure 2-4 of Air Pollution in the UK 2019 [Defra, Sept 2020].
[90] Air Pollution in the UK 2019 – full report; Compliance assessment summary [Defra, September 2020] as required by EU retained law Directive 2008/50/EC on Ambient Air Quality and the Fourth Daughter Directive 2004/107/EC. Previous annual reports can be accessed on the uk-air.defra.gov.uk website. The European Environment Agency (EEA) have produced a report, the Air Quality in Europe – 2020 report [EEA, 2020], which provides Europe-wide emissions data for a range of pollutants up to and including 2018.
[91] NAEI Homepage

130. **Automatic Monitoring Networks –** Automatic Networks produce hourly pollutant concentrations, with data being collected from individual sites by modem. The data go back as far as 1972 at some sites. Examples include:

    i) **Automatic Urban and Rural Network (AURN)** – The AURN is the UK's largest automatic monitoring network and is the main network used for compliance reporting against the Ambient Air Quality Directives. It air quality monitoring stations measuring oxides of nitrogen (NO_x), sulphur dioxide (SO_2), ozone (O_3), carbon monoxide (CO) and particles (PM_{10}, $PM_{2.5}$). These sites provide high resolution hourly information which is communicated rapidly to the public, using a wide range of electronic, media and web platforms.

    ii) **Automatic Hydrocarbon Network** – Automatic hourly measurements of speciated hydrocarbons, made using an advanced automatic gas chromatograph (VOCAIR), started in the UK in 1992. By 1995, monitoring had expanded considerably with the formation of a 13-site dedicated network measuring 26 pollutants continuously at urban, industrial and rural locations. Currently there are 4 sites measuring 29 pollutants continuously at urban and rural locations using an advanced automatic Perkin Elmer gas chromatograph.

    iii) **Automatic London Network** - The Automatic London Network is a subset of 14 sites on the AURN which also form part of the wider London Air Quality Network (LAQN) run by King's College ERG.

131. **Non-Automatic Monitoring Networks -** Non-automatic Networks measure less frequently compared to automatic networks - either daily, weekly or monthly - and samples are collected by some physical means (such as diffusion tube or filter). These samples are then subjected to chemical analysis, and final pollutant concentrations calculated from these results.

132. **Design Manual for Roads and Bridges (DMRB) –** The DMRB Screening Model published by the Highways Agency (now National Highways) can be used for Review and Assessment purposes. The updated model is currently being evaluated the current guidance can be found in Document LA 105[92] The model can be run to predict pollutant concentrations at receptor locations near to roads. It can be used to predict annual mean concentrations of nitrogen dioxide (NO_2) and PM_{10}, as well as oxides of nitrogen (NO_x), carbon monoxide, benzene and 1,3-butadiene. It also predicts the number of exceedances of 50 g/m^3 as a 24-hour mean PM_{10} concentration.

133. **Stack height calculations –** using HMIP 1993 'Guidelines on Discharge Stack Heights for Polluting Emission. Technical Guidance Note D1 (Dispersion)' - this document is now out-of-print[93]. It provides a simple but versatile method for calculating the minimum permissible chimney height to safeguard against short-term air quality impacts, for any pollutant species. It allows for building downwash effects but not terrain effects.

134. Care should be taken in using the D1 method, in terms of defining the local background (Bc) and the current air quality guideline value (Gd). The default values set out in the HMIP document are out-of-date. For Gd, the current statutory short-term Air Quality Strategy objectives should be used instead of values provided in Table 1 of the D1 Guidance. For Bc, local measured or estimated relevant percentile of the short-term background concentrations should be used instead of values provided in Table 2 of the

[92] LA 105 – Air Quality [HE, Nov 2019]
[93] Defra LAQM FAQ 89 – HMIP D1 Stack Height Calculation

D1 Guidance. These can be calculated from hourly/daily monitoring data from AURN monitoring stations or other local monitoring station[94].

135. **Emissions Factors Toolkit (EFT) -** published by Defra and the Devolved Administrations to assist local authorities in carrying out Review and Assessment of local air quality as part of their duties under the Environment Act 1995. The EFT allows users to calculate road vehicle pollutant emission rates for NOx, PM_{10}, $PM_{2.5}$ and CO_2 for a specified year, road type, vehicle speed and vehicle fleet composition.

136. The EFT is updated periodically due to updates to underlying data including emissions factors. Users are therefore advised to check this page regularly to ensure they are using the most up to date version of the tool for their studies.

137. The current version of the EFT is version 10.1 The EFT User Guide[95] explains in detail the methodology, datasets and assumptions used in the development of the EFT. It consolidates previously available information and guidance on the use of the EFT, and provides information regarding previous versions.

138. **Pollution Climate Mapping (PCM) -** Background annual average $PM_{2.5}$ concentrations for the year of interest are modelled on a 1km x 1km grid using an air dispersion model (Pollution Climate Mapping), and calibrated using measured concentrations taken from background sites in Defra's Automatic Urban and Rural Network. Data on primary emissions from different sources from the National Atmospheric Emissions Inventory and a combination of measurement data for secondary inorganic aerosol and models for sources not included in the emission inventory (including re-suspension of dusts) are used to estimate the anthropogenic (human-made) component of these concentrations. By approximating LA boundaries to the 1km by 1km grid, and using census population data, population weighted background $PM_{2.5}$ concentrations for each lower tier LA are calculated. This work is completed under contract to Defra, as a small extension of its obligations under the EU retained law Ambient Air Quality Directive (2008/50/EC).

139. **Community Multiscale Air Quality (CMAQ) Modelling System -** a sophisticated atmospheric dispersion model developed by the United States Environmental Protection Agency (EPA) to address regional air pollution problems. An example of a regional air pollution problem is a multi-state area where ozone or fine particulate levels exceed the US health standards. In addition to simulating the emission, advection, diffusion, and deposition of air pollutants, CMAQ treats a wide array of chemical reactions that occur throughout the lower atmosphere. Evidence submitted in UK casework may cite comparisons to this methodology.

Air Quality Evidence:

Reports and submissions

140. AQ reports are required for developments likely to impact on air quality, particularly for proposed developments in or adjacent to agglomeration Zones affected by risk of non-compliance with AQ objectives and/or subject to AQMAs. Reports should in general focus on evidence of current and predicted emissions, but more specific reports may be needed for particular types of development site and may include the following:

[94] The EA use Dispersion factor calculations as part of their Air Emissions Risk Assessment tool for an Environmental Permit.
[95] Emissions Factors Toolkit v10.1 – User Guide [Defra, August 2020].

- **Local Air Quality Data** – obtained from established national network monitoring/NEAI and/or an independent local assessment.

- **Air Quality Assessment Report** – Should assess:

    I. the existing air quality (baseline);
    II. predict the future air quality without the proposal (future baseline);
    III. predict future air quality with proposal.
    IV. Possibility of cumulative impacts[96].

- **Traffic Assessment** – using Trip Rate Information Computer System (TRICS) for trip generation data from new developments; WebTAG and/or DMRB methodology for impact appraisal as part of the cost-benefit analysis.

141. Ideally, an air quality assessment report should contain the following:

a. Relevant details of the proposed development;
b. The policy context for the assessment;
c. Description of the relevant air quality standards;
d. The basis for determining significance of effects arising from the impacts;
e. Details of the assessment methods;
f. Model verification;
g. Identification of sensitive locations;
h. Description of baseline conditions;
i. Assessment of impacts;
j. Description of construction phase impacts;
k. Cumulative impacts and effects;
l. Mitigation measures;
m. Summary of assessment results - which should include:

- Impacts during the construction phase of the development (usually on dust soiling and PM_{10} concentrations);
- Impacts on existing receptors during operation (usually on concentrations of nitrogen dioxide, PM_{10} and $PM_{2.5}$);
- Impacts of existing sources on new receptors, particularly where new receptors are being introduced into an area of high pollution;
- Any exceedances of the air quality objectives arising as a result of the development, or any worsening of a current breach (including the geographical extent);
- Whether the development will compromise or render inoperative the measures within an AQAP, where the development affects an AQMA;
- The significance of the effect of any impacts identified; and
- Any apparent conflicts with planning policy.

142. It should be noted that Data is likely to contain 'bias adjustment factors' (for year, locality and interference) and/or figures derived from conversion calculations (for instance from NO_x to NO_2).

[96] For instance, modelling a future scenario - With 'committed' development excluded and then included to allow the cumulative impact of all such future developments with planning permission to be assessed as one combined impact at selected receptors.

143. You will need to be aware of types of emission level requirements (from the AQS Regulations 2010) – The National Air Quality Objectives:

- **Limit values** – legally binding which must not be exceed. They are set for individual pollutants and are made up of a concentration value, an averaging time over which it is to be measured, the number of exceedances allowed per year, if any, and a date by which it must be achieved. Some pollutants have more than one limit value covering different endpoints or averaging times.

- **Target values** – to be attained where possible, taking all necessary measures, but the costs should not be disproportionate to the benefits.

144. **Evidence base -** One question that needs to be considered when presented with AQ reports and data is How reliable is the evidence base? Reports suggest that there are data accuracy issues concerning AQ monitoring data from national networks for example Automatic Urban and Rural Network (AURN) real-time data (for example diffusion tubes for NO_2) or Non-Automatic Networks (for smoke, SO_2, PAH), which collect samples to analyze externally and the figures calculated. There is a risk of possible calculation errors through equipment errors. Sampling data must be obtained using accepted sampling techniques, locational criteria and methodology as specified in Directive 2008/50/EC and the Local Air Quality Management Technical Guidance (LAQM.TG16).

145. You should be aware that there have been recent issues raised on evidence reliability and deliberate manipulation of AQ data:

I. **Cheshire East Council** – have admitted deliberate manipulation of NO_2 AQ data to appear better than it actually is for the period 2012 -2014 (there are 2 current Court cases where the Local Plan issued in July 2017 is being challenged as inaccurate as the flawed data was not taken into account).

II. **Waverley Borough Council** – has admitted publishing incorrect NO_2 AQ data for Jan 2016 – Sept 2017, attributed to use of standard low accuracy 'cheap' diffusion tubes (rather than expensive MCERTS approved Chemiluminescence method) and use of incorrect bias factors.

III. **Wealden judgment** – found HRA advice from Natural England which formed the basis for Local Plan policies, to be flawed in its analysis and conclusions regarding the in-combination effect of Nitrogen deposition on a European protected site (Ashdown Forest SAC) – See PINS Note 02/2017r2.

146. **Identifying Erroneous Data -** Different instruments require data to be processed in different ways. In all cases, the local authority should identify and delete erroneous data. There are various common issues that may indicate erroneous data, irrespective of pollutant or instrument, such as:

- **Instrument history and characteristics:** Has the equipment malfunctioned in this way before?

- **Calibration factors and drift:** Rapid or excessive response drift can make data questionable.

- **Negative or out of-range data:** Are the data correctly scaled?

- **Rapid changes or "spikes":** Are such sudden changes in pollution concentrations likely?

- **Characteristics of the monitoring site:** Is the station near a local pollution sink or source which could give rise to these results?

- **Effects of meteorology:** Are such measurements likely under these weather conditions?

- **Time of day and year:** Are such readings likely at this time of day/week/year?

- **The relationship between different pollutants:** Some pollutant concentrations may rise and fall together (for example, from the same source). For example, CO, NOx and PM_{10} are all vehicle derived pollutants.

- **Results from other sites in the network:** These may indicate whether observations made at a particular site are exceptional or questionable. Data from a national network or other sites in the area can be compared for a given period to determine if measurements from a particular station are consistent with general pollution concentrations. If any high concentrations are identified (seen as spikes) at the local site, further examination is required.

- **Quality Assurance Audit and Service reports:** These will highlight any instrumental problems and determine if any correction of the data is necessary.

147. **Environmental Impact Assessments and Habitats Regulation Assessments -** Some air quality assessments will be undertaken for development that falls within the scope of the Environmental Impact Assessment (EIA) Directive[97]. Such assessments will need to recognise the requirements of the EIA Regulations[98], in respect of the need to define likely significant effects and identify mitigation, for example. Further information on the EIA process can be found in the EIA ITM Chapter.

148. A detailed Air Quality Assessment will need to be carried out as part of the Environment Statement. As part of the assessment consider:

- Would the proposed development (including mitigation) lead to an unacceptable risk from air pollution, prevent sustained compliance or fail to comply with Habitats Regulations;
- How could an amended proposal be made acceptable (where practicable); and
- Note that there is now an additional requirement under the 2017 EIA regulations (which came into effect in May 2017) - when considering granting permission, conditions on the permission should include measures to monitor any potential significant adverse effects on the environment.

149. The requirements of the Habitats Directive[99] and Birds Directive[100] relevant to impacts on air quality also need to be considered for certain developments. Where additional

[97] EU retained law Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment, as amended by Directive 2014/52/EU
[98] The Town and Country Planning (Environmental Impact Assessment) Regulations 2017, SI2017/571 implement the requirements of the EIA Directive.
[99] EU retained law Directive 92/43/EEC on the conservation of natural habitats and wild fauna and flora.
[100] EU retained law Directive 2009/147/EC on the conservation of wild birds.

emissions may result in likely significant effect on a European site[101], the Habitats Regulations[102] require that an assessment of the implications for the European site is undertaken before permission is granted. Where development is likely to generate increased transport movements along route corridors in proximity to European sites, Annex A of PINS Note 02/2017r2 identifies guide questions to assist Inspectors with consideration of Habitats Regulation Assessment (HRA).

150. Detailed advice for Inspectors undertaking HRA can be found in the Biodiversity ITM Chapter.

151. **Decay rates –** the rate at which the pollutant 'disappears' as a result of absorption, chemical reaction or removal by rain needs to be factored into any air quality modelling scenario and taken into account in air quality assessments.

152. **Meteorological data and the Daily Air Quality Index –** as noted in paragraph 3.15 above, the weather plays an important role in air quality, through dispersion of pollutants in the atmosphere affected by wind direction, wind speed and atmospheric turbulence (and stability). Defra's air quality forecasts are produced by the Met Office using the AQUM[103] forecast modelling system. The Met Office model uses UK and European maps of annual average pollutant emissions to simulate the release of these chemicals into the atmosphere. These are then allowed to react at rates dependant on factors such as pollutant concentration, temperature and amount of sunlight. The Pollutants are then transported and dispersed within the model according to the winds and the concentrations are re-evaluated. Using the concentrations calculated in this way throughout the forecast period, the Daily Air Quality Index (DAQI)[104] is calculated as an average over prescribed time periods. The forecast is improved by incorporating recent observations of air quality from across the UK from the Automatic Urban and Rural Network (AURN). Forecasts are produced on a UK Map and are also available for 5000 locations (searchable by location or postcode)[105]. Weather data and/or DAQI data will be used in air quality assessments, where deemed necessary, so it will be useful for Inspectors to know how and where this data has been obtained from.

153. **Public concerns / perceptions of Air Quality -** You will need to deal adequately with any concerns over public health to allay perceived 'fear' if an event is held and will need to make sure that any questions over the reliability of AQ data with regard to either stand-alone AQ Assessments, as Part of an Environmental Statement or Habitats Regulation Assessment or regarding the basis for Local Plan policies are dealt with appropriately. Obviously, you will need to make sure the issues and concerns over public health and reliability of data are dealt with sufficiently in the decision/report.

154. **Local Plan considerations[106] –** Local Plans can have an effect on air quality by setting out the parameters of what development is proposed and where, and any policies that encourage sustainable transport. Therefore, in plan making, it is important to take into account AQMAs, CAZs, LEZs or other areas where there could be specific requirements or limitations on new development because of air quality concerns and

[101] 'European sites' are: candidate Special Areas of Conservation (cSACs), Special Areas of Conservation (SACs) and Sites of Community Importance (SCIs) designated pursuant to the Habitats Directive; and Special Protection Areas (SPAs) designated pursuant to the Birds Directive.
[102] The requirements of the Habitats and Birds Directives have been transposed into domestic legislation by The Conservation of Habitats and Species Regulations 2017, SI2017/1012 ('the Habitats Regulations')
[103] Air Quality in the Unified Model.
[104] DAQI – levels of air pollution and recommended actions/health advice. The index is from 1-10 and divided into four bands from low (1) to very high (10).
[105] Daily Pollution forecasts from the Met Office.
[106] Local Plan Examinations ITM – Section 05: SA, HRA, Climate Change, Air Quality and Flood Risk

compliance with Directive requirements. Air quality is a consideration in Strategic Environmental Assessment and sustainability appraisal can be used to shape an appropriate strategy, including through establishing the 'baseline', appropriate objectives for the assessment of impact and proposed monitoring.

155. Paragraph 002 of the Air Quality PPG advises that – when carrying out a review of air quality as part of the local air quality management (LAQM) regime, a Local Plan may need to consider:

- the potential cumulative impact of a number of smaller developments on air quality as well as the effect of more substantial developments;
- the impact of point sources of air pollution (pollution that originates from one place); and,
- ways in which new development would be appropriate in locations where air quality is or likely to be a concern and not give rise to unacceptable risks from pollution. This could be through, for example, identifying measures for offsetting the impact on air quality arising from new development including supporting measures in an air quality action plan or low emissions strategy where applicable.

156. It should be noted that in light of the Whealdon judgment (see Case Law section below) and the reliability of evidence and data highlighted in the Cheshire East data scandal that Inspectors will need to be rigorous in their consideration of air quality assessment reports (in particular the methodology used and the data sets informing them) that may influence local plan policies. It is reasonable to expect that technical reports will have been prepared to a suitable professional standard. However, if there is any significant indication that there are concerns about the reliability of data or methodology, questions should be raised. PINS Note 02/2017r2 gives advice on the role of Inspectors in relation to local plan examinations and HRA.

Mitigation techniques

Introduction

157. Paragraph 008 of the Air Quality PPG states that mitigation options will be locationally specific, will depend on the proposed development and should be proportionate to the likely impact. The PPG also stresses the importance of the need for local planning authorities to work with applicants to consider appropriate mitigation so as to ensure the new development is appropriate for its location and unacceptable risks are prevented.

158. Mitigation can be secured using planning conditions, for example to require the installation of a suitable ventilation system and obligations, which could be used to secure financial contributions to require a 'car club' to be set up, where necessary, providing the relevant tests are met[107]. Combinations of conditions and obligations can be used to fund Low Emission Strategies and the Community Infrastructure Levy can also be a mechanism to require developers to contribute to new local infrastructure to improve air quality.

159. Examples of mitigation include:

- alteration of the design and layout of a development to increase separation distances from sources of air pollution;
- using green infrastructure, in particular trees, to absorb dust and other pollutants;

[107] See paragraph 003 of the Use of Planning Conditions PPG and the Planning Obligations PPG.

- improving the means of ventilation;
- promoting infrastructure to promote modes of transport with low impact on air quality;
- controlling dust and emissions from construction, operation and demolition; and
- contributing funding to measures, including those identified in air quality action plans and low emission strategies, designed to offset the impact on air quality arising from new development.

160. All these options will have features of the general approaches to mitigation, which can be applied to a range of casework. These are detailed below:

General Mitigation Options:

161. **Prevention –** Preference should be given to preventing or avoiding exposure and/or impacts to/of the pollutant in the first place by eliminating or isolating potential sources or by replacing sources or activities with alternatives. This is usually best achieved through taking air quality considerations into account at the development scheme design stage.

162. **Minimisation –** Reduction and minimisation of exposure/impacts should next be considered, once all options for prevention/avoidance have been implemented so far as is reasonably practicable (both technically and economically). To achieve this reduction/minimisation, preference should be given first to:

    i. mitigation measures that act on the source; before
    ii. mitigation measures that act on the pathway; which in turn should take preference over;
    iii. mitigation measures at or close to the point of receptor exposure.

163. These options should all be subject to their effectiveness, cost and practicality. In each case, measures that are designed or engineered to operate passively are preferred to active measures that require continual intervention, management or a change in people's behaviour.

164. **Enhancing Dispersion –** improving the dispersion of an emission has the effect of lowering the pollutant concentration to which receptors are exposed to within a more acceptable threshold. This can be achieved by increasing the stack height (see paragraphs 3.31-3.32 on stack height calculations above) or decreasing the process which causes the emission. However, this merely displaces the problem and does not provide a longer-term solution and therefore is not considered appropriate for most scenarios.

165. **Offsetting –** the impact of a new development's air quality impact may be offset by proportionately contributing to air quality improvements elsewhere (including those identified in air quality action plans and low emission strategies). This option should only be considered once all the above the options have been exhausted.

Air Pollution Control (APC) Techniques:

166. For industrial process regulated by the EA and Local Authorities under the Environmental Permitting regime (see EP ITM Chapter) that produce emissions there are various ways to minimise or prevent the pollution occurring by controlling the emissions at source:

i) modification of the process to minimise the production of wastes, or to avoid releasing the wastes to the atmosphere;
ii) collection of particulate materials;
iii) absorption of toxic gases

167. Some techniques can be used to control both the particulates and gases; others are applicable to only one. The following paragraphs briefly describe some of these APC techniques:

168. **Control of smoke –** can be achieved by use of more efficient combustion through design alterations to the combustion chamber and the control of the fuel & air supply.

169. **Control of grit, dust and fumes from industrial plant –** there are broadly five ways to in which the escape to the atmosphere of particulate matter can be controlled or prevented at source. The best solution for a particular process will depend on the size and shape of the particle(s) involved:

i) process modification to prevent particulates becoming airborne by use of protective enclosures.

170. If this method is not practically possible, airborne particulate matter can be separated out of a contaminated gas stream by the use of:

ii) gravity and inertial forces in a mechanical separator by for example a cyclone dust separator;
iii) a liquid (wet method) for 'washing' the particulates out of the atmosphere by using either scrubbers or wet arrestors for example simple demisters/dedusters or tower/spray scrubbers (for example venturi scrubber);
iv) a fabric filter by use of bag or cartridge filters; or
v) electrostatic forces in an electrostatic precipitator

171. **Control of gaseous pollutants** – it is necessary to use control systems to minimise gaseous emissions by either combustion or recovery. These are briefly detailed below:

i) **Combustion techniques** – the use of flares, conventional furnace systems or thermal/catalytic incinerators;
ii) **Recovery techniques** – the use of adsorption by activated charcoal or absorption by dissolution in, for example wet scrubbers or condensers or by simple chemical reaction for example flue gas desulphurisation (FGD).

172. **Odour Control -** There are several industrial, agricultural and domestic activities that can give rise to odours. Some offensive odours (for example hydrogen sulphide – 'rotten eggs' smell) are due to toxic gases, but others may be non-toxic at the concentrations emitted. Waste gases with offensive odours can originate from a variety of sources, such as:

- The production process;
- The storage area;
- Leakage from pumps and compressors;
- During transfer of material;
- Open wastewater treatment or waste composting plants;
- Spreading of sewage sludge and farm slurry on land

173. The options for controlling odours (at source) are largely similar to those controlling gaseous pollutants, including:

i) Chemical reaction by oxidation to neutralize the odour;
ii) Use of scrubbers;
iii) Incineration;
iv) Adsorption on activated charcoal;
v) Biotechnical methods, for example bioscrubbers/biofiltration
vi) Enhanced dispersion

174. **Air Pollution Control Regulation -** The Environment Agency (EA) has a remit to regulate the emission of gases, smoke or odours emitted from industrial and agricultural activities if they are subject to controls under the Environmental Permitting regime[108]. Local authorities rather than the EA regulate statutory nuisance under Part III of the Environmental Protection Act 1990[109]. The definition of statutory nuisance in this act includes emissions arising from industrial or commercial premises which is prejudicial to health or a nuisance. The provisions require a local authority to investigate any complaints of statutory nuisance and also to inspect their area from time to time to identify any potential statutory nuisances which ought to be dealt with. If the activity is regulated under the Environmental Permitting Regulations 2016[110], the EA may deal with nuisance issues arising if the nuisance relates to the regulated emissions.

175. **Planning and Air Pollution Control -** The planning system has an important role in preventing or minimising particulate, gaseous or odour impacts from new or changed developments by regulating the location and, to a certain extent, the specification of some design and control parameters of these activities. However, as noted above the processes are regulated by the EA or Local Authority and the advice on the interaction of the planning and pollution control regime at paragraph 2.76-2.79 above should be used. Paragraph 005 of the Air Quality PPG advises that where the proposal relates to large and/or complex industrial activities, the EA should be able inform the planning process by identifying:

- if an environmental permit is also required before the proposed development can start operating;
- if there are likely to be any significant air quality issues that may arise at the permitting stage (so there are 'no surprises'); and
- whether there are any special requirements that might affect the likelihood of getting planning permission (for example the height of chimneys).

176. **Smoke Control Areas –** Many parts of the UK are designated as smoke control areas where you cannot emit smoke from a chimney unless you're burning an authorised fuel or using 'exempt appliances' as specified under the Clean Air Act 1993[111]. Persons can be fined up to £1,000 in the event of an unauthorised emission. In a smoke control areas you can only burn an approved fuel[112] or a 'smokeless' fuel[113] or an unauthorised fuel in an exempt appliance[114].

[108] See EPR ITM Chapter for details of the EP regime
[109] 1990 C.43
[110] SI 2016/1154
[111] 1993 C.11
[112] List of authorised fuels designated under s20 of the Clean Air Act 1993.
[113] Anthracite, semi-anthracite, gas or low volatile steam coal.
[114] List of exempt appliances designated under s21 of the Clean Air Act 1993.

Emissions reduction from transport:

Introduction

177. As stated above nitrogen dioxide (and to a lesser extent other pollutants) emissions from transport sources[115] remain the most pressing of the air quality problems facing the UK, both from the effects on health/environment and compliance with the AQ objectives derived from the EU retained law Ambient AQ Directive. Hence the focus from government on reducing these emissions from transport and the various rounds of Court cases relating to the Air Quality Plan (see paragraph 2.36). There are various options to mitigate emissions from transport, some of these have already been covered earlier in this chapter, for example CAZs, Some outlined in the AQ Plan and London initiatives, others are detailed in Annex D and Annex K of the Air Quality Plan and other government documents[116] - some of these options are detailed below:

178. **Modal shift –** the most obvious mitigation would be to shift to more sustainable transport modes, for instance from private vehicles to public transport or better still cycling and walking. Other modal shifts should also be encouraged, for example for freight from road from rail and sea. In planning terms, siting of housing and other developments that generate traffic should aim to be placed within easy access of public transport hubs and/or where practical the creation of shared pedestrian/cycle ways.

179. **Traffic Speed and flow –** can impact on NOx emissions, which are typically higher when an engine is under higher loads (for example during acceleration). Schemes that tackle road congestion, which will reduce the 'stop-start' traffic and higher engine loads and consequently will reduce engine emissions.

180. **Low emission vehicles –** the UK Governments aim is for every car/van to be a zero-emission vehicle by 2050. Promoting uptake of ultra-low emission vehicles (ULEVs), for instance vehicles powered by electric batteries is the aim of the Office for Low Emission Vehicles (OLEV)[117]. The 2016 Autumn Statement included an additional £80 million for ULEV charging infrastructure, £50 million for ULEV taxis and funding for low emission buses. There is also ongoing research into electric vehicle batteries and a range of other ULEV technologies. The UK now has more than 11,500 public chargepoints for plug-in vehicles, including Europe's largest network of rapid chargepoints. The OLEV will continue to provide a range of support to grow the network further and to make it easy and convenient to own and use a plug-in vehicle. It is likely that more and more schemes will come forward which will allow for OLEV charging infrastructure in order to fulfil the Government's aims.

181. The Automated and Electric Vehicles Act[118] will increase the access and availability of chargepoints for electric cars, while also giving the government powers to make it compulsory for chargepoints to be installed across the country and enabling drivers of automated cars to be insured on UK roads. It should be noted that this will need the associated energy infrastructure to enable rapid growth in the use of OLEVs through installation of large battery storage facilities as part of the National Grid network[119].

[115] Up to 50% of NO_2 emissions in UK are from road vehicles and accounts for up to 80% of roadside NO_2 emissions.
[116] AQ Plan and Zone Plans [Defra, July 2017]; Strategy to improve Air Quality [Highways England, August 2017]; Rail Sustainable Development Principles [RSSB, May 2016]; Business Case and Sustainability Assessment – Heathrow Airport North West Runway [Airports Commission, July 2015]
[117] OLEV- Agency of DfT/BEIS
[118] 2018 (c. 18).
[119] See Electricity Supply Chapter of Future Energy Scenarios 2021 [National Grid ESO, July 2021]

182. **Alternative Fuels –** the development of vehicles using alternative (cleaner) fuels, for instance liquefied natural gas, hydrogen or liquefied petroleum gas or retrofitting existing vehicles could be an important element of reducing emissions of NOx and help in the goal towards zero emissions by 2050. The corresponding energy and fuel delivery infrastructure will also need to be developed to fuel the increase in demand.

183. **Other Measures** – there are a range of other measure that could form part of an AQAPs, including:

- commitment to working closely with relevant authorities responsible for highways and/or environmental regulation on possible emissions reduction measures where trunk roads and/or industrial sources are major local sources of pollutants;
- local traffic management measures to limit access to, or re-route traffic away from, problem areas. Low emission zones are a possible solution that some authorities have been looking at in this context;
- commitment to developing or promoting green travel plans and/or to using cleaner fuelled vehicles in the authority's own fleet;
- integrate the AQAP into the Local Transport Plan (LTP), where local road transport was a primary factor in the declaration of an AQMA, if not already completed;
- strategy for informing members of the public about air quality issues, perhaps via local newsletters or other media;
- quality partnerships with bus or fleet operators to deliver cleaner, quieter vehicles in return for the provision of better bus lanes or more flexible delivery arrangements;
- in the longer term, perhaps, congestion charging schemes and/or workplace parking levies.

184. **Rail electrification -** Electric trains typically provide faster and more reliable journeys than diesels. They are also better for the environment being zero emission at point of use as well as quieter and more carbon efficient. Around one third of rail lines are already electrified including most of the intercity routes and the commuting lines coming into London. As a result around 60% of passenger journeys are on electric trains. Further rail electrification is under way. Approximately 100 miles of the Great Western Main Line has been electrified over the last 8 years.

185. **Aviation –** current emissions at airports from aircraft are only 1% of UK NOx emissions. Road transport sources are the main contributor of emissions around airports so improvements in sustainability in access to and from airports are important in tackling air quality around airports. The UK government policy on aviation-related air quality is to seek improved international standards to reduce emissions from aircraft and to encourage the aviation industry to put in place measures to reduce emissions for which it is responsible. Industry is working together to reduce airport-related emissions through measures including operating aircraft more efficiently, introducing efficient new technology, using landing charges to incentivise cleaner aircraft, reducing vehicle emissions within the airport boundary and sustainable surface access.

186. **Ports and Shipping -** Connecting ships and other vessels to on shore electricity supply at ports and marinas can help reductions in pollutant emissions through alleviating the need for on board energy generation. The International Convention for the Prevention of Pollution from Ships (MARPOL)[120] regulates pollution from ships, and the overwhelming majority of states, including the UK, are parties to it. Annex VI sets out limits for sulphur

[120] MARPOL [IMO, 1983]

oxides and NOx emissions, both inside and outside waters designated by the International Maritime Organisation (IMO) as an emission control area (ECA), which will need to be complied with. The UK government is also looking to reduce ship emissions near densely populated conurbations.

Case law

Gladman Developments Ltd v SSCLG and Swale BC [2017] EWHC 2768 (Admin)

187. This was a s288 claim against an Inspector's decision on appeals against the refusal of planning permission for residential development and mixed residential and care home development in Newington, Kent.

188. The case was successfully defended in the High Court and it usefully confirmed the position regarding the application of *ClientEarth v SSEFRA* [2016] EWHC 2740 and the need for compliance with the Ambient Air Quality Directive (2008/50/EC) requirements 'in the shortest time possible', of which the Air Quality Plan is the UK government's response. Additionally, the case clarified the application of paragraph 122 of the then current NPPF, and considerations regarding the effectiveness of mitigation techniques, and where there are conflicts with the Air Quality Action Plan (for the Air Quality Management Areas).

189. On another important point, the Judge concluded that the Inspector was not required to assume that the local air quality would improve by any particular amount within any particular timeframe.

190. Inspectors should therefore note the correct approach to casework as outlined in the judgment with regards to the consideration of the air quality requirements of the Ambient Air Quality Directive and the NPPF, and the impacts that any proposal would have on both Air Quality generally and compliance with the Directive.

R. (on the application of Shirley) v SSCLG, Canterbury CC & Corinthian Mountfield Ltd [2017] EWHC 2306 (Admin)

191. This case involved a Judicial Review challenge to the SoS's refusal to call in a planning application for a major development in South Canterbury for 4,000 houses on agricultural land.

    The claimants argued that the SoS should have called in the application and refused planning permission because the proposed development would cause a further exceedance of limit values in breach of EU environmental law and it is the SoS's duty under the EU Directive 2008/50/EC to ensure that pollutant limit values are not exceeded. The claim was dismissed on all grounds.

    The Court found that the Directive does not require planning applications to be called in by the SoS to bring about compliance with air quality thresholds. Rather, the remedy provided for by the Directive in the event that limit values are exceeded is the production and implementation of an Air Quality Plan to cease exceedances and ensure that any exceedance period is kept as short as possible.

    The Court also found that it was not irrational for the SoS to point out that matters of substantive concern in relation to air quality could be addressed by the local planning authority or, alternatively, within a legal challenge to their decision. It was noted that the

powers of the local planning authority were identical to the powers of the SoS in terms of granting or refusing planning permission or imposing any conditions.

Wealden DC v SSCLG, Lewes DC, South Downs NPA and Natural England [2017] EWHC 351 (Admin)

192. The challenge was brought under s113 of the Planning and Compulsory Purchase Act 2004, and sought to quash part of the core strategy prepared and adopted jointly by Lewes DC and South Downs NPA ('the Joint Core Strategy' or JCS). The challenge related to the requirement of the Habitats Directive and Regulations to consider the likely significant effects of projects or plans on European protected sites, individually or in-combination, before deciding whether Appropriate Assessment (AA) was required. The relevant effect in this case was with regard to increased levels of deposition of nitrogen resulting from increased traffic movements on a road traversing the Ashdown Forest Special Area of Conservation (SAC). The Court considered two issues, whether:

    a. the JCS was in breach of the requirements of the Habitats Directive, in that they failed to take account of the Wealden Core Strategy (WCS) when assessing whether the JCS would have a likely significant effect upon the SAC; and

    b. the Inspector failed to have regard to representations made by the Wealden DC during the examination process that the WCS could have an in-combination likely significant effect on the SAC when considered with the JCS.

193. In respect of (a), the Judge found that the JCS HRA did take account of the in-combination effects at the scoping (likely significant effects) stage. However, the Judge found that NE's advice, that the JCS would not have a significant environmental effect on the SAC either alone or in-combination and so could be scoped out of the appropriate assessment stage, was erroneous.

194. The scoping mechanism/methodology used by NE derived from Highways England's Design Manual for Roads and Bridges (DMRB) and, in part, from an assessment approach used by the Air Quality Technical Advisory Group (AQTAG), who provide scientific advice to Defra. The Judge found that the methodology was not scientific, sensible or logical. He could not understand why NE was advising that a cumulative assessment did not require the aggregation of the known effect from the WCS and the JCS when considering in-combination effect.

195. In respect of (b), the judge found that the Inspector should have recognised that NE's advice was wrong and that he acted in a Wednesbury unreasonable manner in accepting that advice. PINS Note 02/2017 sets out the case and implications in more detail.

Example Decisions

Planning Appeals:

APP/E5330/W/15/3006475 – Manor Way, Blackheath, London

196. Failure to determine proposed 130 residential units, main issue related to:

- Requirement for proposal to implement LEZ on the site in the form of a Low Emission Transport Scheme;
- RB Greenwich is AQMA, para 124 of the then current NPPF requires decisions to ensure development consistent with local AQAP.

197. The Inspector concluded that requirement was not necessary as other measures were in place, but dismissed on grounds of lack of affordable housing provision.

APP/V2255/W/15/3067553 & 3148140 – London Road, Newington, Kent

198. Failure to determine proposed 330 dwellings (+ 60 extra care units) & alternative proposal of 140 dwellings (+60 extra care units), 1 of 11 main issues related to:

- The effect of the proposal (incl. mitigation measure) on AQ, particularly on Newington and Rainham AQMAs (the LPA raised no objection on AQ grounds);
- NPPF para 124 requires decisions to ensure development consistent with local AQAP.

199. Inspector concluded that the proposal will have an adverse effect on AQ, particularly the AQMAs, conflicting with the then current NPPF paras 120 & 124. Dismissed as the negative impacts on AQ and the effect on landscape character were not outweighed by the benefits.

APP/Q1445/W/15/3130514 – Ovingdean, Brighton

200. Refusal to grant proposal for 100 dwellings & associated infrastructure, 1 of 5 main issues related to:

- The effect of the proposal on AQ, particularly on Rottingdean AQMA;
- Para 124 of the then current NPPF, which requires decisions to ensure development consistent with local AQAP; issues raised by third parties on adequacy of AQ assessment methodology for traffic data

201. The Inspector concluded that the proposal would not have an adverse effect on AQ as suitable measures would be in place to mitigate impact (for example promote sustainable transport). Dismissed as the negative impacts on the landscape character were not outweighed by the benefits.

APP/T5150/W/16/3157330 – Craven Park, Harlesdon, London

202. Refusal to grant proposal for 6-storey building for 21 self-contained flats, 1 of 2 main issues related to:

- The effect of the proposal on local AQ for the living conditions of future occupants of the proposed development;
- Appeal site lies within an AQMA and the site experiences high levels of NO2, due to location in the middle of a busy traffic island. Mitigation measures included an ‘air handling’ system to provide satisfactory internal air AQ.

203. The Inspector concluded that the proposal would provide a appropriate balance between internal AQ and satisfactory living conditions. Dismissed as the benefits were not outweighed by the harm to the character and appearance of the surrounding area and also conflicts with objectives of the London Plan and the NPPF with regard to AQ.

APP/Z0116/W/17/3167991 – St Philip’s Marsh, Feeder Road, Bristol

204. Refusal to grant permission for proposed bio-diesel powered generators; 1 of 2 main issues related to:

- The effect of the proposal of the development on local AQ, with particular regard to human health;
- Appeal site is within the St Philip's Marsh AQMA; AQ assessment predicted that increase in NO_2 levels would result in breach of compliance for 1-hr mean at adjacent sites. Also concerns over calculations and methodology for predicted emissions for this type of generator.

205. Inspector concluded emission levels and mitigation measures have not been clarified and not been demonstrated that the impact would be acceptable. Appeal dismissed.

Enforcement Appeals:

APP/R5510/C/16/3163200 & 3163365 – Rainbow Industrial Estate, Trout Road, West Drayton, Middlesex

206. Enforcement Notice for use of land for car parking without planning permission; 1 of 4 main issues related to:

- The effect of the proposal of the development on local AQ;
- Appeal site is within the Hillingdon AQMA; AQ assessment confirmed the predicted increase in NO_2 levels would be 'imperceptible'. LPA argued that trip generation would produce emission levels higher than that at a public car park.

207. Inspector concluded that as emission levels are likely to be lower than those the LPA has permitted on the site and therefore the use would not be detrimental. Appeals were allowed and permission granted.

Transport Casework:

TWA/13/APP/06 – Midland Metro (Birmingham City Centre) Extension Land Acquisition and Variation Order and Request for Deemed Planning Permission

208. In July 2005 the SoS made The Midland Metro (Birmingham City Centre Extension, etc.) Order 2005, which authorised an extension to the Midland Metro Line 1 tramway in Edgbaston, Birmingham. The purpose of the Midland Metro (Birmingham City Centre Extension Land Acquisition and Variation) Order 201[X] is to confer further powers of compulsory acquisition on the West Midlands Passenger Transport Executive ("Centro") for the purpose of the works authorised by the 2005 Order (the compulsory acquisition powers of which expired in 2010), to authorise a variation in the alignment of the tramway authorised in Paradise Circus Queensway by the 2005 Order and to authorise the compulsory acquisition of land associated with that variation.

209. The effects of the development in relation to air quality and dust were seen to be negligible and the development was seen as having benefits by improving connectivity with the rail network and therefore would promote modal shift consistent with the aims of the Local Transport Plan and the AQAP. Mitigation measures included restricting HGV movements and following the Construction Code of Practice (CoCP).

210. The Inspector recommended that the Order and deemed planning permission should not be granted due to the harm to a listed building, the setting of listed buildings and character and appearance of the area. The SoS decided to make the Order and grant the planning direction, subject to modifications.

Environmental Casework:

APP/EPR/511 – Avonmouth Incinerator Bottom Ash (IBA) Recycling Facility, Royal Edward Dock, Avonmouth, Bristol

211. Refusal to grant an environmental permit for an installation to treat incinerator bottom ash (IBA). 2 of 3 main issues related to:

- The potential effect of the proposal on the environment (in particular nearby resident's) from dust and odour;
- Appellant provided extensive dust impact assessment (which also considered cumulative impact) and an odour management plan; activities would need to confirm to BAT Requirements and suitable monitoring and mitigation techniques would be required. Resident's concerns based on a previous occupier of the site, which had no implication for the proposed activity.

212. Inspector concluded that the installation would not result in an unacceptable level of dust and odour and was satisfied that suitable pollution management procedures would be in place to prevent adverse effects on the environment and human health. The appeal was allowed and the Environment Agency directed to grant the permit.

Annex A - Preparation and conduct at Inquiries, hearings and Site Visits

1. As stated previously air quality can be a main issue in many types of proposal and many involved proposals of a significant scale, which are likely to go to inquiry because of the degree of public interest, and to be of a sufficient complexity and duration as to require a PIM. Guidance on the conduct of these is in ITM Chapter on Inquiries. There may also be an EIA in such cases and this is likely to be complex, so you should be familiar with the ITM Chapter on EIA. Also adding to the bulk of the file there may be lots of plans (especially in transport and waste cases), and perhaps a copy of the Environmental Permit application, the Permit decision document and Permit/Varied Permit (if decision is known).

2. If the proposal concerns an existing industrial facility, consider arranging an unaccompanied pre-inquiry visit. Alternatively, a visit during the inquiry, perhaps if an adjournment is needed, can be very helpful in understanding the evidence. It should also shorten the visit at the end of the inquiry, although this will normally still have to be carried out. If there is a lot of public objection, you may have to consider holding an evening session, but take account of the burden upon yourself in undertaking this. These matters should be canvassed at the PIM, if appropriate.

3. A written reps case may require more site visit time than normal, especially, where the proposal involves an industrial facility. The site may cover a large area and you should ensure that there is no ambiguity about the meeting place, asking the office to liaise with the parties about this if necessary. Sometimes the parties will offer to convey you around the site by vehicle: it is for you to decide whether this is appropriate, balancing the savings in time against the better impression that might be gained on foot. You will usually need to use your PINS-provided hard hat, protective footwear and high viz clothing. Where additional protection is required (for example eyewear) this should be provided by the site operator. Be mindful that any open wounds/areas of broken skin should be covered when visiting a site where bio-aerosols are likely to be present.

4. Much of this advice also applies to site visits carried out in inquiry or hearing cases. With a large site, plan your itinerary carefully to ensure you see all that you need to see. The same applies where you need to see other locations in the vicinity. Where the parties request you to tour a lot of locations, get them to prepare an itinerary and perhaps provide transport. If everyone involved can fit into a minibus or similar, this can be more effective (and safer) than travelling in convoy.

Annex B - Glossary of Terms

Term	Abbreviation	Explanation
1,3 Butadiene		1,3-butadiene, like benzene, is an organic compound emitted into the atmosphere principally from fuel combustion for example petrol and diesel vehicles. Unlike benzene, however, it is not a constituent of the fuel but is produced by the combustion of olefins. 1,3-butadiene is also an important chemical in certain industrial processes, particularly the manufacture of synthetic rubber. It is handled in bulk at a small number of industrial locations. Other than in the vicinity of such locations, the dominant source of 1,3-butadiene in the atmosphere is the motor vehicle. 1,3-Butadiene is a known, potent, human carcinogen.
Acid Deposition		The total atmospheric deposition of acidity is determined using both wet and dry deposition measurements. Wet deposition is the portion dissolved in cloud droplets and is deposited during precipitation events. Dry deposition is the portion deposited on dry surfaces during periods of no precipitation as particles or in a gaseous form. Although the term acid rain is widely recognized, the dry deposition portion ranges from 20 to 60% of total deposition.
Acid Rain		When atmospheric pollutants such as sulphur dioxide and nitrogen oxides mix with water vapour in the air, they are converted to sulphuric and nitric acids respectively. These acids make the rain acidic, hence the term 'acid rain'. Acid rain is defined as any rainfall that has an acidity level beyond what is expected in non-polluted rainfall. Acidity is measured using a pH scale, with the number 7 being neutral. Consequently, a substance with a pH value of less than 7 is acidic, while one of a value greater than 7 is basic. Generally, the pH of 5.6 has been used as the baseline in identifying acid rain, with precipitation of pH less than 5.6 is considered to be acid precipitation.
Air Pollution Bandings		The Air Pollution Information Service uses four bands to describe levels of pollution. The bands are Low, Moderate, High and Very High. Healthy people do not normally notice any effects from air pollution, except occasionally when air pollution is "Very High".
Air Pollution Bulletins		Air Pollution Bulletins are issued daily for each zone of the UK. The bulletins show current and forecast air quality for the next 24 hours. The forecast air quality is categorised using four Air Pollution Bandings and also using a numerical Air Pollution Index.
Air Pollution Index		The Air Pollution Index is a numerical index for air pollution ranging from 1 to 10 related to the Low, Moderate, High and Very High Air Pollution Bandings.

Air Pollution Information Service		The Air Pollution Information Service provides free of charge, detailed, easy-to-understand information on air pollution. This information is particularly important to people with medical conditions which may be aggravated by poor air quality. The latest information is available by freephone, on Ceefax and Teletext, and via the Internet. The Service gives regionally based summaries and detailed information on current pollution levels, as well as forecasts for the next 24 hours.
Air Quality Management Area	AQMA	If a Local Authority identifies any locations within its boundaries where the Air Quality Objectives are not likely to be achieved, it must declare the area as an Air Quality Management Area (AQMA). The area may encompass just one or two streets, or it could be much bigger. The Local Authority is subsequently required to put together a plan to improve air quality in that area - a Local Air Quality Action Plan.
Air Quality Objectives	AQO	The Air Quality Objectives are policy targets generally expressed as a maximum ambient concentration to be achieved, either without exception or with a permitted number of exceedances, within a specified timescale. The Objectives are set out in the UK Government's Air Quality Strategy for the key air pollutants.
Air Quality Standards	AQS	Air Quality Standards are the concentrations of pollutants in the atmosphere which can broadly be taken to achieve a certain level of environmental quality. The Standards are based on assessment of the effects of each pollutant on human health, including the effects on sensitive sub-groups.
Air Quality Strategy		The Air Quality Strategy for England, Scotland, Wales and Northern Ireland describes the plans drawn up by the Government and the Devolved Administrations to improve and protect ambient air quality in the UK in the medium-term. The Strategy sets Objectives for the main air pollutants to protect health. Performance against these Objectives is monitored where people regularly spend time and might be exposed to air pollution.
Ambient Air		The air (or concentration of a pollutant) that occurs at a particular time and place outside of built structures. Often used interchangeably with "outdoor air".
Annual Mean		The annual mean is the average concentration of a pollutant measured over one year. This is normally for a calendar year, but some emissions are reported for the period April to March, which is known as a pollution year. This period avoids splitting a winter season between two years, which is useful for pollutants that have higher concentrations during the winter months.
Automatic Monitoring		AQ Monitoring is usually termed "automatic" or "continuous" if it produces real-time measurements of pollutant

		concentrations. Automatic fixed point monitoring methods exist for a number of pollutants, providing high resolution data averaged over very short time periods. BAM, TEOM and FDMS instruments are all automatic monitors.
Beta Attenuation Mass Monitor	BAM	The BAM (Beta Attenuation Mass Monitor) measures particulate concentrations automatically. The mass density is measured using the technique of Beta attenuation. A small Beta source is coupled to a sensitive detector which counts the Beta particles. As the mass of particles increases the Beta count is reduced. The relationship between the decrease in count and the particulate mass is computed according to a known equation (the Beer-Lambert law).
Benzene	C_6H_6	Benzene is an aromatic organic compound which is a minor constituent of petrol (about 2% by volume). The main sources of benzene in the atmosphere in Europe are the distribution and combustion of petrol. Combustion by petrol vehicles is the largest component (70% of total emissions) whilst the refining, distribution and evaporation of petrol from vehicles accounts for approximately a further 10% of total emissions. Benzene is emitted in vehicle exhaust as unburnt fuel and also as a product of the decomposition of other aromatic compounds. Benzene is a known human carcinogen.
Black Smoke		Black Smoke consists of fine particulate matter. These particles can be hazardous to health especially in combination with other pollutants which can adhere to the particulate surfaces. Black Smoke is emitted mainly from fuel combustion. Following the large reductions in domestic coal use, the main source is diesel-engined vehicles. Black smoke is measured by its blackening effect on filters. It has been measured for many years in the UK. Now interest is moving to the mass of small particles regardless of this blackening effect.
Carbon Monoxide	CO	Carbon monoxide is a colourless, odourless gas resulting from the incomplete combustion of hydrocarbon fuels. CO interferes with the blood's ability to carry oxygen to the body's tissues and results in adverse health effects.
Chemiluminescence		The reference method for NO_2 monitoring. Which requires analyses of the samples in a laboratory and is therefore considerably more expensive than diffusion tubes. This technique alternates between two modes: • Measuring NO by reacting NO with ozone which forms a photon of light, which is measured; and • Catalysing the NO_2 in the air over a molybdenum convertor which converts the NO_2 to NO. The air is then reacted with ozone. This gives the mixing ratios of both NO and NO_2 together, which is known as oxides of nitrogen (NOx).

		NO_2 is then calculated as NOx minus NO. These results are then converted to concentrations in µg/m^3
Co-operative Programme for Monitoring and Evaluation of the Long Range Transmission of Air Pollutants in Europe	EMEP	The EMEP programme consists of three main elements: 1. Collection of emissions data; 2. Measurements of air and precipitation quality; 3. Modelling of atmospheric transport and deposition of air pollution. EMEP regularly reports on emissions, concentrations and/or deposition of air pollutants, the quantity and significance of transboundary fluxes and related exceedances to critical loads and threshold levels. The EMEP programme is carried out in collaboration with a broad network of scientists and national experts that contribute to the systematic collection, analysis and reporting of emissions data, measurement data and integrated assessment results.
Committee on the Medical Effects of Air Pollutants	COMEAP	Committee on the Medical Effects of Air Pollutants, COMEAP is an Advisory Committee of independent experts that provides advice to Government Departments and Agencies on all matters concerning the potential toxicity and effects upon health of air pollutants.
Computer Programme to calculate Emissions from Road Transport	COPERT	is an software program for the calculation of air pollutant emissions from road transport. The technical development of COPERT is financed by the European Environment Agency (EEA), in the framework of the activities of the European Topic Centre on Air and Climate Change. In principle, COPERT has been developed for use to estimate emissions from road transport to be included in official annual national inventories. The COPERT methodology is also part of the EMEP/CORINAIR Emission Inventory Guidebook. The Guidebook, developed by the UNECE Task Force on Emissions Inventories and Projections, is intended to support reporting under the UNECE Convention on Long-Range Transboundary Air Pollution and the EU directive on national emission limits. The use of a software tool to calculate road transport emissions allows for a transparent and standardized, hence consistent and comparable data collecting and emissions reporting procedure, in accordance with the requirements of international conventions and protocols and EU legislation.
Data Capture		"Data capture" is the term given to the percentage of measurements for a given period that were validly measured.
Days with Exceedances		The number of days with exceedances is the number of days on which at least one period has a concentration greater than, or equal to, the relevant air quality standard (the averaging period will be that defined by that Standard). Since the National Air Quality Standards cover different time

		periods (15 min average, 24 hour running mean etc.), this gives a useful way of comparing data for different pollutants.
Deposition		See Acid Deposition
Diffusion Tube		inexpensive and many can be installed over a geographical area. The low cost per tube permits sampling at a number of points in the area of interest; which is useful in highlighting "hotspots" of high concentrations, such as alongside major roads. They are less useful for monitoring around point sources or near to industrial locations. It should be noted that diffusion tubes are not the reference method and the results are of low accuracy, which require bias adjustment factors to be used to 'correct' the results.
Dispersion Model		A dispersion model is a means of calculating air pollution concentrations using information about the pollutant emissions and the nature of the atmosphere. In the action of operating a factory, driving a car, or heating a house, a number of pollutants are released into the atmosphere. The amount of pollutant emitted can be determined from a knowledge of the process or actual measurements. Air Quality Objectives are set in terms of concentration values, not emission rates. In order to assess whether an emission is likely to result in an exceedance of a prescribed objective it is necessary to know the ground level concentrations which may arise at distances from the source. This is the purpose of a dispersion model.
Environmental Improvement Plan	EIP	The Environmental Improvement Plan (EIP) 2023 for England is Governments first revision of the 25YEP. It builds on the 25YEP vision with a new plan setting out how they will work with landowners, communities and businesses to deliver each of the goals for improving the environment, matched with interim targets to measure progress.
Emission Factor		An emission factor gives the relationship between the amount of a pollutant produced and the amount of raw material processed or burnt. For example, for mobile sources, the emission factor is given in terms of the relationship between the amount of a pollutant that is produced and the number of vehicle miles travelled. By using the emission factor of a pollutant and specific data regarding quantities of materials used by a given source, it is possible to compute emissions for the source. This approach is used in preparing an emissions inventory.
Emission Inventories		Emissions inventories estimate the amount and the pollutants that are emitted to the air each year from all sources. There are many sources of air pollution, including traffic, household heating, agriculture and industrial processes. The UK National Atmospheric Emissions Inventory (NAEI) can be accessed: http://www.naei.org.uk/

Environmental Quality Standards	EQS	Values, defined by regulation that specifies the maximum permissible concentration of a potentially hazardous chemical, generally in air or water. For Air these are defined in the EU Retained law Ambient Air Quality Directive (2008/50/EC).
Expert Panel on Air Quality Standards	EPAQS	The Expert Panel on Air Quality Standards (EPAQS) was set up in 1991 to provide independent advice to the UK Government on air quality issues, in particular regarding the levels of pollution at which no or minimal health effects are likely to occur. The Panel's recommendations were adopted as the benchmark standards in the National Air Quality Strategy. EPAQS has now been merged into the Department of Health's Committee on the Medical Effects of Air Pollutants (COMEAP).
European Union Air Quality Directives – EU retained law		The European Union has been legislating to control emissions of air pollutants and to establish air quality objectives since the early 1970s. European Directives on ambient air quality require the UK to undertake air quality assessment, and to report the findings to the European Commission on an annual basis. Historically this has been under the Air Quality Framework Directive (1996/62/EC) and the Daughter Directives (DD) (1st DD -1999/30/EC, 2nd DD - 2000/69/EC, 3rd DD 2002/3/EC and 4th DD- 2004/107/EC). In June 2008, a new Directive came into force: the Council Directive on ambient air quality and cleaner air for Europe (2008/50/EC), known as the "Air Quality Directive". This Directive consolidates the first three Daughter Directives, and was transposed into the Regulations in England, Scotland, Wales and Northern Ireland in June 2010. The 4th Daughter Directive remains in force.
Exceedance		An exceedance defines a period of time during which the concentration of a pollutant is greater than, or equal to, the appropriate air quality criteria. For Air Quality Standards, an exceedance is a concentration greater than the Standard value. For Air Pollution Bandings, an exceedance is a concentration greater than, or equal to, the upper band threshold.
Filter Dynamics Measurement System	FDMS	The FDMS monitors the core and volatile fractions of airborne particulate matter. The instrument is based on TEOM technology, measuring the mass of particles collected on a filter, whilst also accounting for loss of semi volatile material. The FDMS records gravimetric equivalent particulate data. Measurements recorded in the UK by the instruments are now used in the Volatile Correction Model (VCM) to correct TEOM measurements for the loss of volatile components of particulate matter that occur due to the high sampling temperatures employed by the instrument.
Gravimetric Measurements of		Instruments are available which pass air through a filter which is weighed before and after sampling. The concentration of

Particulate Matter		PM_{10} or $PM_{2.5}$ can then be calculated as the increase in mass of the filter divided by the volume of the sample expressed to ambient conditions. Due to the very tight controls that should be applied to the filter weighing and conditioning procedures, local authorities are advised to use an independent filter weighing service. The service should be UKAS.
Greenhouse Gases	GHG	Greenhouse gases are atmospheric gases such as carbon dioxide, methane, chlorofluorocarbons, nitrous oxide, ozone, and water vapour that slow the passage of re-radiated heat through the Earth's atmosphere.
Hydrocarbons		Hydrocarbons are compounds containing various combinations of hydrogen and carbon atoms. They are emitted into the air by natural sources (for example trees) and as a result of fossil and vegetative fuel combustion, fuel volatilization, and solvent use. Hydrocarbons are a major contributor to smog.
Local Air Quality Action Plan	LAQAP	When a Local Authority has set up an Air Quality Management Area, AQMA, it must produce an action plan setting out the measures it intends to take in pursuit of the Air Quality Objectives in the designated area. The plan should be in place, wherever possible, within 12-18 months of designation and should include a timetable for implementation. http://laqm.defra.gov.uk/action-planning/action-planning.html
Local Air Quality Management	LAQM	The Local Air Quality Management (LAQM) process requires Local Authorities to periodically review and assess the current and future quality of air in their areas. A Local Authority must designate an Air Quality Management Area (AQMA) if any of the Air Quality Objectives set out in the regulations are not likely to be met over a relevant time period. http://www.defra.gov.uk/environment/quality/air/airquality/local/
Maximum Hourly Average		The maximum hourly average is the highest hourly reading of air pollution obtained during the time period under study.
Micrograms per cubic metre	$\mu g/m^3$	A measure of concentration in terms of mass per unit volume. A concentration of 1 $\mu g/m^3$ means that one cubic metre of air contains one microgram (10-6 grams) of pollutant.
National Atmospheric Emissions Inventory	NAEI	The NAEI compiles annual estimates of UK emissions to the atmosphere from sources such as road transport, power stations and industrial plants. These emissions are estimated to inform policy, and to help to identify ways of reducing the impact of human activities on the environment and our health. The NAEI is funded by Defra, the Scottish Executive, the Welsh Assembly Government and the Department for the Environment in Northern Ireland.

National Air Quality Statistics		The emissions and concentration statistics shown in the air quality database are National Statistics. National Statistics are produced to high professional standards set out in the National Statistics Code of Practice. They undergo regular quality assurance reviews to ensure that they meet customer needs. They are produced free from any political interference.
Oxides of Nitrogen	NO_x	Combustion processes emit a mixture of nitrogen oxides (NO_X), primarily nitric oxide (NO) which is quickly oxidised in the atmosphere to nitrogen dioxide (NO_2). Nitrogen dioxide has a variety of environmental and health impacts. It is a respiratory irritant which may exacerbate asthma and possibly increase susceptibility to infections. In the presence of sunlight, it reacts with hydrocarbons to produce photochemical pollutants such as ozone. NO2 can be further oxidised in air to acidic gases, which contribute towards the generation of acid rain.
Ozone	O_3	Ozone (O_3) is not emitted directly into the atmosphere, but is a secondary pollutant generated following the reaction between nitrogen dioxide (NO_2), hydrocarbons and sunlight. Whereas nitrogen dioxide acts as a source of ozone, nitric oxide (NO) destroys ozone and acts as a local sink (NO_X-titration). For this reason, O_3 concentrations are not as high in urban areas (where high levels of NO are emitted from vehicles) as in rural areas. Ambient concentrations are usually highest in rural areas, particularly in hot, still and sunny weather conditions which give rise to summer "smog's".
Polycyclic Aromatic Hydrocarbons	PAHs	Polycyclic Aromatic Hydrocarbons (PAHs) belong to a large group of organic compounds, several of which have been shown to be carcinogenic. The Expert Panel on Air Quality Standards (EPAQS) (now merged into the Department of Health's Committee on the Medical Effects of Air Pollutants (COMEAP)) recommended a standard for PAHs of 0.25 ng/m^3 using benzo[a]pyrene (B(a)P) as a marker compound.
Particulate Matter	PM	Airborne PM includes a wide range of particle sizes and different chemical constituents. It consists of both primary components, which are emitted directly into the atmosphere, and secondary components, which are formed within the atmosphere as a result of chemical reactions. Of greatest concern to public health are the particles small enough to be inhaled into the deepest parts of the lung. Air Quality Objectives are in place for the protection of human health for PM_{10} and $PM_{2.5}$ – particles of less than 10 and 2.5 micrometres in diameter, respectively.
Parts per billion	ppb	Parts per billion, ppb, describes the concentration of a pollutant in air in terms of volume ratio. A concentration of 1 ppb means that for every billion (10^9) units of air, there is one unit of pollutant present.

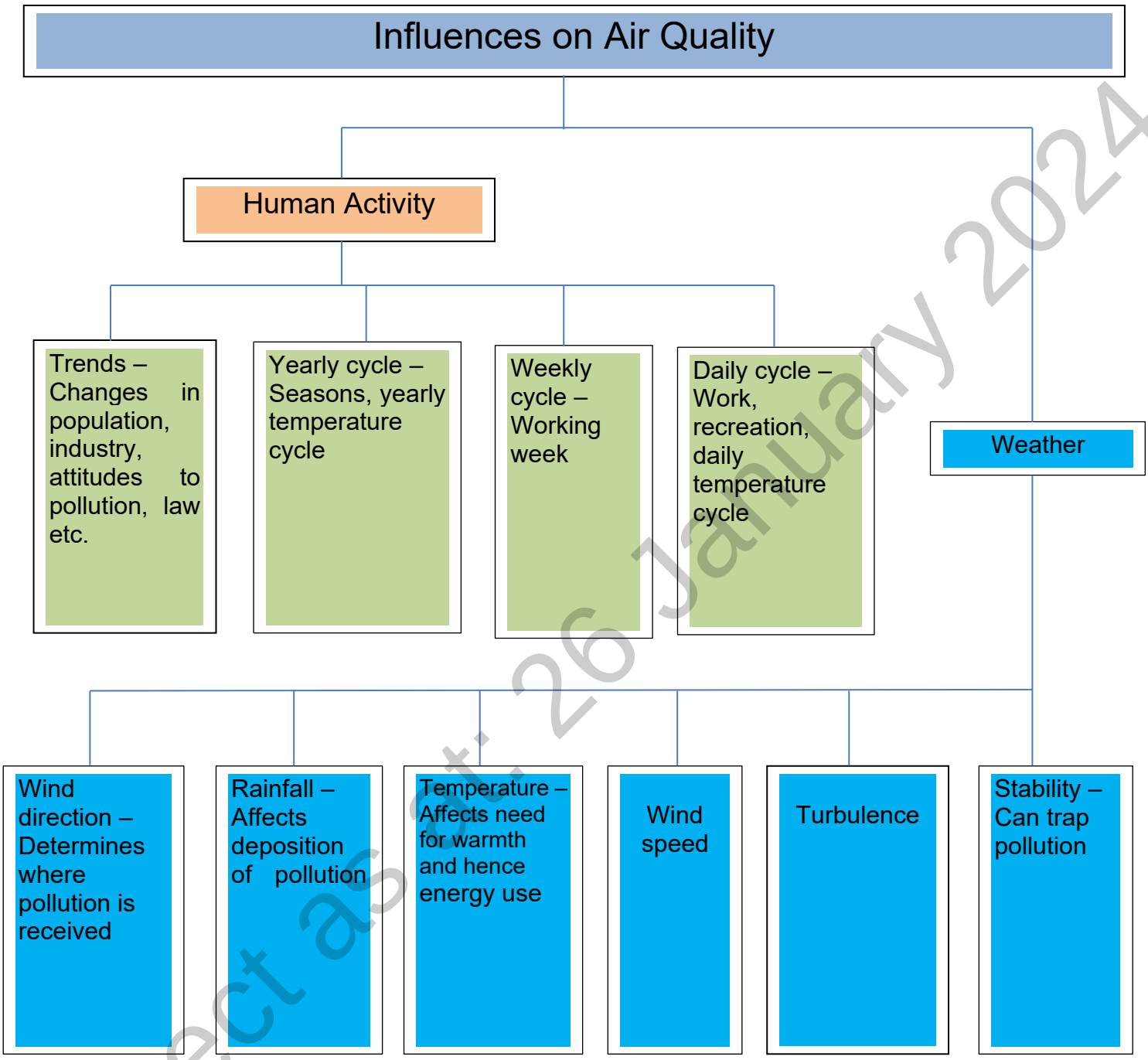
Parts per million	ppm	Parts per million, ppm, describes the concentration of a pollutant in air in terms of volume ratio. A concentration of 1 ppm means that for every million (10^6) units of air, there is one unit of pollutant present.
Percentile		A percentile is a value below which that percentage of data will either fall or equal. For instance, the 98th percentile of values for a year is the value below which 98% of all of the data in the year will fall, or equal.
Persistent Organic Pollutants	POPs	Persistent Organic Pollutants (POPs) are chemical substances that persist in the environment as they are resistant to environmental degradation via chemical, biological or photolytic processes. The compounds are known to bioaccumulate through the food web and pose a risk of causing adverse effects to human health and the environment. These include dioxins and furans (see TOMPS).
Plume		Steam of gas issuing from a stack which retains its identity and is not completely dispersed in the surrounding air. Near the stack the plume is often visible due to water droplets, smoke or dust that it contains, but often persists downwind after it has become invisible to the naked eye (albeit in much less concentrations).
Running mean		This is a mean - or series of means - calculated for overlapping time periods, and is used in the calculation of several of the National Air Quality Standards. For example, an 8-hour running mean is calculated every hour, and averages the values for eight hours. The period of averaging is stepped forward by one hour for each value, so running mean values are given for the periods 00:00 - 07:59, 01:00 - 08:59 etc. This can also be considered as a "moving average". By contrast, a non-overlapping mean is calculated for consecutive time periods. Using the same 8-hour mean example, this would give values for the periods 00:00 - 07:59, 08:00 - 15:59 and so on. There are, therefore, 24 possible 8-hour running means in a day (calculated from hourly data) and 3 non-overlapping means.
Scrubber		Device for flue gas cleaning for example spray towers, packed scrubbers and jet scrubbers – removes particles down to 1 micrometre in diameter when used with water. Can also control gaseous pollutants (used with alkaline solution). Scrubbers produce sludge, that requires dewatering and disposal.
Smog		Fog or haze intensified by smoke (for instance smoky fog) or other atmospheric pollutants - mainly vehicle exhaust emissions.
Stack gases		The gases discharged up a chimney stack for dispersion into the atmosphere. May also be termed ‘Flue gases’ or ‘Exhaust gases’.

Sulphur Dioxide	SO_2	Sulphur dioxide is a corrosive, acidic gas which combines with water vapour in the atmosphere to produce acid rain. Both wet and dry deposition have been implicated in the damage and destruction of vegetation and in the degradation of soils, building materials and watercourses. SO_2 in ambient air is also associated with asthma and chronic bronchitis.
Tapered Element Oscillating Microbalance	TEOM	TEOMs collect particles on a small oscillating filter. The change in oscillation frequency of the filter is proportional to the change in PM_{10} and $PM_{2.5}$ concentrations. TEOMs are operated at 50°C and as such lose volatile components of the PM_{10} and $PM_{2.5}$. Therefore, correction factors need to be taken into account.
Toxic Organic Micropollutants	TOMPs	Toxic organic micropollutants (TOMPs) are produced by the incomplete combustion of fuels. They comprise a complex range of chemicals some of which, although they are emitted in very small quantities, are highly toxic or carcinogenic. Compounds in this category include PAHs (Polycyclic Aromatic Hydrocarbons), PCBs (PolyChlorinated Biphenyls), Dioxins and Furans.
Trajectory Model		The trajectory model is used to predict episodes of photochemically generated pollutants in the summer, where long-range transport is an important factor in producing high UK concentrations. It uses the output of numerical weather prediction models as its input, and predicts how air masses have been transported for the preceding 96 hours. These pathways are known as "back trajectories". The model uses a simplified chemical scheme to predict the formation of ozone as the air travels to the UK. Concentrations of the secondary particle contribution to PM_{10} are also predicted by this model.
Volatile Organic Compounds	VOCs	VOCs are organic chemicals that have a high vapour pressure at ordinary room temperature. The EU defines VOCs as having a boiling point less than or equal to 250^0C (482^0F). Their high vapour pressure results from a low boiling point, which causes large numbers of molecules to evaporate or sublimate from the liquid or solid form of the compound and enter the surrounding air, a trait known as volatility. For example, formaldehyde, which evaporates from paint, has a boiling point of only –19°C (–2°F). VOCs are numerous, varied, and ubiquitous. They include both human-made and naturally occurring chemical compounds. Most scents or odours are of VOCs. Some VOCs are dangerous to human health or cause harm to the environment. Anthropogenic VOCs are regulated by law, especially indoors, where concentrations are the highest. Harmful VOCs typically are not acutely toxic, but have compounding long-term health effects. Because the concentrations are usually low and the symptoms slow to develop, research into VOCs and their effects is difficult.

Zones and Agglomerations		The UK has been divided into zones and agglomerations for the purposes of air pollution monitoring, in accordance with EU retained law EC Directive 96/62/EC. There are 16 zones. They Match: 1. The boundaries of England's Government Offices for the Regions; and 2. The boundaries agreed by the Scottish Executive, National Assembly for Wales, and Department of the Environment in Northern Ireland There are 28 agglomerations in the UK. An agglomeration is defined as any urban area with a population greater than 250,000.

Selected definitions adapted from:
Dictionary of Environmental Science and Technology (Fourth Edition), Porteous, Andrew, Wiley 2008; and
Defra Air Quality Glossary at - https://uk-air.defra.gov.uk/air-pollution/glossary

Annex C - Relationship between influences on air quality



The Planning Inspectorate

Appeals against Conditions

Updated to reflect December 2023 Framework (NPPF)

What's new since the last version

Changes highlighted in yellow made 2 January 2024:

- Further detail added to the section on 'S73 and conditions imposed on an approval of reserved matters (paragraphs 49 & 50)

Other recent updates

- New paragraph 12 referencing the Hillside Supreme Court Case
- Update to the section on prior approvals with regards to imposing conditions when an appeal is allowed and new planning permission granted under s73
- New sentence in Annex B2 advising that in s73 cases, the decision maker will need to address whether or not the planning permission remains extant
- New Paragraph 18 (need to update paragraph number once approved) citing a recent challenge that reinforces of the principles established in the Finney Judgment

Contents

Introduction

1. Inspectors make their decisions based on the evidence before them. Consequently, they may, where justified by the evidence, depart from the advice given in this guide.

2. References are to the Town and Country Planning Act 1990 (the Act) unless otherwise stated.

3. General practice advice about the use of conditions can be found in the Conditions chapter.

The different types of cases

4. There are several different types of conditions appeals. It is important that you establish which type is before you, that you are clear about the powers you have and that you select the correct template. You should clarify your approach in a preliminary paragraph if there is any doubt or confusion about the type of case or if you consider the main parties may have followed an incorrect approach. However, the guiding principle is to deal with the case as a conditions appeal on the basis of the type submitted.

5. Appeals will have been submitted to either 'remove' or 'modify' a condition which it is argued is not necessary. For example, the appeal may seek to remove a restriction on opening hours or it may seek longer opening hours.

6. The five main types of conditions appeals are set out below. The first three are the most common:

   A. Type 1 (s79) – appeals directly following a conditional **grant** of planning permission (see Annex A)

   B. Type 2 (s73) – appeals following a **refusal** of an application to carry out development without complying with a condition imposed on a permission (see Annex B)

   C. Type 3 (s73A) - 'Condition breached' – appeals following a **refusal of an application to 'retain' development** without complying with a condition imposed on the permission (see Annex C)

   D. Type 4 – appeals seeking to extend **'temporary permissions'** (see Annex D)

   E. Type 5 – appeals seeking to **extend standard time limits** for starting development (see Annex E)

   The flow chart in Annex F should help you decide which type of appeal you are dealing with. A summary checklist is at Annex G.

7. Examples of the standard templates for each type of appeal are set out in Annex H.

Legislation, caselaw, national planning policy and guidance

8. The power to impose conditions is drawn widely in legislation (s70(1) and s72). However, the courts have limited a decision-maker's discretion to impose conditions in three ways; firstly, a condition must fulfil some planning purpose; secondly it should fairly and reasonably relate to the development being allowed, and thirdly it

should not be Wednesbury unreasonable (see House of Lords case – *Newbury DC v SSE* [1981] AC 578). A condition which fails to comply with the Newbury principles will be invalid. *Seymour Holdings Pension Fund v SSCLG* [2013] EWHC 3555 (Admin) also provides a good summary of what to have in mind when dealing with appeals against conditions.

9. National policy on the use of conditions, including the 'six tests' is found in the revised NPPF at paragraphs 55 - 56. Three of these overlap with the Newbury principles. It advises that the number of planning conditions should be kept to a minimum and only imposed where they meet the 'six tests'. Suggested national model conditions can be found in the retained Appendix A of cancelled Circular 11/95: Use of Planning Conditions. PINS also has available for Inspectors a suite of suggested planning conditions; the list is not exhaustive, these are a starting point for consideration and the conditions given may need to be amended if appropriate to the case. More detailed guidance can be found in the government's Planning Practice Guidance; 'Use of Planning Conditions' - in particular see the following:

   What options are available to an applicant who does not wish to comply with a condition?

   Flexible options for planning permissions (which covers 'non-material amendments', 'minor material amendments' and amending conditions under section 73).

Scope of S73 and S73A applications

10. S73 allows for a grant of permission for the development of land without compliance with conditions subject to which a previous permission was granted (same development only subject to different conditions). S73(2) requires **only** consideration of the question of what conditions a grant of planning permission should be subject to. It should be noted that if the appeal is allowed a new permission is created and the original permission remains extant and unaltered (along with the conditions attached to it). If it is considered that the disputed conditions are reasonable and necessary and that, in effect, planning permission should only be given subject to those conditions, then the appeal should be dismissed.

11. If an application has been made retrospectively to amend approved plans, you can proceed to determine the appeal in accordance with s73A and grant retrospective permission for the development already carried out. (see section on Appeals against conditions where development has already been carried out and Annex C).

12. The Supreme Court case of *Hillside Parks Ltd v Snowdonia National Park Authority* has implications on the way proposals that have planning permission can be amended. It was noted in the Judgment that "there are limited ways in which a planning permission can be amended, but there is no reason why an approved development scheme cannot be modified by an appropriately framed additional planning permission which covers the whole site and including the necessary modifications". Further information relating to *Hillside* can be found in the section on Overlapping Permissions in the Approach to decision making chapter.

13. *Armstrong v SSLUHC* considered whether a fundamental variation could be permitted by s73 as well as the reliance on the PPG: Flexible options for planning permissions. The Judge held that the scope of s73 is not limited to minor material amendments and commented that some of the terminology within the PPG "puts an impermissible gloss" on its scope. In light of this, Inspectors should consider how much reliance can be placed on this section of the PPG on a case by case basis.

14. It should be noted that there are no powers to grant a new approval of reserved matters or a new prior approval under s73 as the provisions only permit a grant of planning permission. See sections "S73 and conditions imposed on an approval of reserved matters" and "Prior Approvals" for further details.

The Finney Judgment

15. In the case of *John Leslie Finney v Welsh Ministers & Carmarthenshire County Council, Energiekontor (Uk) Limited* (otherwise known as 'Finney') the Courts established that an application under s73 may **not** be used to obtain a permission that would require a variation to the terms of the 'operative' part of the planning permission, that is, the description of the development for which the original permission was granted. This also applies to s73 appeals involving retrospective development, but it does not apply to appeals made against conditions immediately following the grant of planning permission (Type 1 s79 appeals).

16. In 'Finney', planning permission had been granted for "the installation of 2 wind turbines with a tip **height of 100m**". The applicant submitted a s73 application to vary the plans condition which would allow for the tip height to be **increased to 125m**. The application was refused by the LPA, but an Inspector allowed it on appeal, amending the condition to refer to the new height and removing the wording in the operative part concerning the turbine height. This resulted in the grant of a new permission which did not accord with the original description of the development.

17. The appeal decision was subsequently quashed as there are no powers under s73 to grant a new planning permission with a different operative part to that contained in the original permission.

18. The same principle was reinforced by the Courts in the case of *Fiske v Test Valley BC & Woodington Solar Limited.* The original description of development for installation of a solar park included amongst other matters, a substation. Under the subsequent s73 application, the amended plans omitted the substation and the Judge concluded that in granting planning permission, it had created a conflict with the operative part of the permission which rendered the s73 permission unlawful.

19. In terms of decision making, this means that:

    The description of development in an existing planning permission cannot be amended at all. Only the conditions can be varied;

    - The description of development specified in the decision is that taken from the original planning permission and not from the subsequent application to vary any of the conditions;
    - If amending a condition would result in a conflict between it and the description of development (there is no distinction between use and built development), then that particular amendment is beyond the powers under s73 and cannot be made (a fresh planning application would be required).

20. If it is considered that the variation of a condition could cause conflict with the original description of the development and it hasn't previously been raised by the parties, it is advisable to seek their views before coming to a decision. If it is concluded that a conflict has arisen, the appeal cannot be dealt with under s73 or s73A and the appeal will be invalid. If you are dismissing the appeal on this ground, there is no need to consider any of the wider issues.

21. One commonly occurring scenario that could create a conflict with the description of the development is variation of the plans condition. Examples could include, but are not limited to;

    - Permission granted for: **single storey rear** extension

    Does the amended plan indicate that it is still a single storey rear extension? There would be conflict if the amended plan included an additional storey, or the extension covered another elevation other than the rear of the property;

    - Permission granted for: conversion of existing building into **5no self-contained flats**

    Are there still 5 flats within the amended plan? A change in the layout of the flats would not conflict with the original description of the development but there would be conflict if the number of units had changed.

22. In 2017, York City Council granted planning permission for "The demolition of existing structures and the erection of an **8,000-seat community stadium**, leisure centre, **multi-screen cinema**, retail units, outdoor football pitches, community facilities and other ancillary uses, together with associated vehicular access, car parking, public realm, and hard and soft landscaping."

23. The applicant submitted a s73 application to amend a plan to allow 13 screens with a capacity of 2,400 for the multiscreen cinema, an increase from 12 screens and a capacity of 2,000 as granted in the original permission. The council allowed the application and granted a new permission which was subsequently Judicially Reviewed as a result of a challenge submitted by a third party *(R (Vue Entertainment Limited) v City of York Council*).

24. The Judge held that the change to the condition did not fundamentally alter the permission itself, which did not mention or define the size of the multiscreen cinema.

25. However, had the applicant sought to change the capacity of the community stadium, there would have been conflict with the description of the original development which specified 8,000 seats, meaning it would go beyond the scope of s73.

26. 'Finney' may also be applicable in cases where the original description of the development specifies the use of land and where that use of land is also secured by conditions. For example:

    Original description of development: "The use of the land for the stationing of **two caravans** for **residential** purposes".

    Condition: "No more than two caravans, as defined in the Caravan Sites and Control of Development Act 1960 and the Caravans Act 1968 as amended shall be stationed on the site at any time".

    If this condition was varied (to increase / decrease the number of caravans allowed on the land), it would create conflict with the original description of the development which specifically stated that only two caravans could be stationed on the land.

Removal of conditions

27. While 'Finney' (and '*Arrowcroft*') concerned the adding of conditions, the case of *Freddie Reid v SSLUHC* related to the removal of conditions, in particular a condition that had restricted the permitted use of the land to holiday accommodation and no other use within Class C3. The Judge held that "when a condition is removed, the operative part of the permission remains intact, albeit in an unconditioned way. In the present case, the removal of the relevant conditions would and have had no effect of the description". This is because there is no condition remaining to conflict with the description of the development.

28. Under such circumstances, Inspectors should exercise their planning judgement to determine whether permission can be granted for the development as set out in the description without the condition attached.

29. Inspectors should be mindful that "what can be done with the land may not be exhaustively written into the description of the development but may arise by the operation of law". For example the removal of a condition that restricts the permitted use to office use only, would allow the land to be used under any other use falling within Class E of the Use Classes Order (UCO). It may subsequently follow that the land could benefit from permitted development rights for a change of use, as permitted under the GPDO.

Prior approvals

30. The GPDO imposes conditions on planning permissions granted under certain parts and classes. These conditions are not listed in the formal grant of prior approval but are imposed through the provisions of Article 3(1) and schedule 2 of the GPDO.

31. Decision-makers may also impose conditions on prior approval cases that are not deemed conditions as set out in the GPDO. Although the legality of doing so has not been tested by the Courts, the GPDO does not provide any general authority for imposing additional conditions beyond the deemed conditions. There are however specific powers in some circumstances as set out in the GPDO itself, for example:

    - under paragraph A.4(12), Schedule 2, Part 1 of the GPDO "The local planning authority may grant prior approval unconditionally or subject to conditions reasonably related to the impact of the proposed development on the amenity of any adjoining premises."; and,

    - under paragraph W(13) of Schedule 2, Part 3 of the GPDO "The local planning authority may grant prior approval unconditionally or subject to conditions reasonably related to the subject matter of the prior approval.".

32. Such examples may include the imposition of a condition restricting opening hours, or a condition preventing the occupier from applying for a parking permit.

33. An applicant may appeal directly against a grant of prior approval subject to conditions. If the appeal was allowed, there would be a new grant of prior approval.

34. It is also possible for an application or appeal to be made under s73 or s73A against a condition imposed on a prior approval. It should be noted that any application made under s73 is an application for planning permission and therefore if the appeal is

allowed, it would result in the grant of a new planning permission subject to the conditions imposed. There is no power under s73 to grant a new prior approval.

35. In such circumstances, the appeal should be considered in the same way as any type 2 or 3 (s73 or s73A) appeal in that the decision maker can only deal with the question of conditions and cannot vary the operative part of the permission or seek to impose new conditions which would conflict with the operative part of the permission.

36. In *Pressland v Hammersmith and Fulham LBC [2016] EWHC 1763 (Admin)* the Judge noted that "the fact that any conditions in a development order itself were specified by the Secretary of State is not necessarily of itself a reason for refusal any more than it would be if the previous conditional planning permission had been granted on appeal by the Secretary of State". This means that the decision-maker on an appeal under s73 is not bound by the conditions imposed by the GPDO or attached to any prior approval, although the reasons for the imposition of those conditions may be a material consideration.

37. If allowing an appeal made under s73 or s73A against a condition imposed on a prior approval, the conditions imposed either by the GPDO or otherwise, will not automatically carry forward. Therefore, consideration will need to be given as to which conditions are necessary and should be reimposed.

38. Furthermore, the GPDO contains restrictions which prevent future permitted development rights. For example, permitted development rights granted under Part 1 'Development within the curtilage of a dwelling house' do not apply if the permission to use the dwellinghouse as such was granted by virtue of Part 3, classes G, M, MA, N, P, PA or Q. In order to carry forward such restrictions, it may be necessary to impose a condition.

39. A general condition referring to restrictions in the GPDO is unlikely to meet the tests. However, if it is considered reasonable and necessary to impose a condition, it may be possible to utilise similar wording to other model conditions that restrict permitted development rights. Please see the suite of model conditions for examples.

40. In such circumstances, it will be necessary to write to the parties to explain the position and to seek their views on the imposition of conditions that would withdraw permitted development rights in line with the GPDO.

Refusal to approve details required by a condition (including reserved matters)

41. These are appeals against the refusal by the LPA to approve details required by a condition. The most common are reserved matters appeals following the grant of outline permission. However, appeals can be made in respect of any condition which requires the submission and approval of details. In effect, the appeal is seeking approval for the submitted details which you will either approve (if the details submitted address the requirements of the condition) or dismiss – it is not for you to reconsider the planning permission or discuss whether the condition is necessary (the appeal before you is not one against the condition).

42. The appeal is made under s78(1)(b) – "the Right to appeal against planning decisions and failure to take such decisions. (1) Where a local planning authority - (b) refuse an application for any consent, agreement or approval of that authority

required by a condition imposed on a grant of planning permission or grant it subject to conditions …"

43. Examples of the templates to use are provided in Annex H.

S73 and conditions imposed on an approval of reserved matters

44. Applications under s73 are usually made following the grant of full or outline planning permission. There will be times when an application is made under s73 to vary or remove a condition that has been imposed on an approval of reserved matters.

45. A s73 application is an application for development to be carried out without complying with a condition imposed on a planning permission. The result is the grant of a new planning permission therefore it is not possible to grant a new approval of reserved matters on a s73 application.

46. In the case of *R. (on the application of Fulford Parish Council) v York City Council [2019] EWCA Civ 1359*, the Court of Appeal concluded that a condition of a reserved matter approval is a condition of planning permission.

47. It is important though to note that the *Fulford Parish Council* case related to an application made under s96A of the TCPA 1990. S73 and s96A are different in that when a successful application is made under s73, it results in a grant of planning permission that didn't exist before. The powers under s96A only allow for a non-material amendment to be made to an existing planning permission which if allowed, is simply varied, and continues in its altered form. There is no right of appeal for applications made under s96A.

48. Although the Court of Appeal did not consider whether a condition on a grant of reserved matters was a condition of planning permission for the purpose of s73, it is possible that the court would apply similar reasoning.

49. In any event, on an application under s73 you are considering whether planning permission should be granted subject to the same conditions or different conditions. In doing so, if you are allowing the appeal, you have the option to either grant a full permission or a further outline permission. The option you take will depend on the facts and circumstances of the case and should seek to resolve the issues raised in connection with the disputed condition on the reserved matters approval. Either way it is likely that you will need to revert to the parties to set out the possible courses of action in the event that the appeal is allowed.

50. If all other reserved matters have been approved granting a full permission for the development is likely to be the most straightforward option but you would need to confirm any approved details and to include any conditions relating to their implementation and any necessary conditions relating to on-going requirements. However, this may not be possible where, for example, other reserved matters have not yet been approved and you do not have the evidence before you to consider them. Alternatively, you could grant a further outline permission which requires a new reserved matters approval from the LPA, provided the conditions you impose are in some way different from the original permission. Ideally this should also confirm by condition how the disputed matter should be dealt with in order that the appellant's position is advanced.

Deemed Discharge of Conditions (England s74A (2) (a))

51. To ensure that planning conditions are cleared on time, so that development granted planning permission can start on site without delay, planning provisions within the Infrastructure Act 2015 made amendments to the TCPA 1990. This allows the Secretary of State to provide by development order (DMPO 2015) for the deemed discharge of certain conditions[1] attached to planning permissions which require the consent, agreement or approval of the LPA.

    See Annex J for details of the s74A provisions including how to deal with any related appeals.

Writing the decision

Main Issues and introductory paragraphs

52. You need to make sure that the phrasing of your main issue is wide enough to cover all the matters you need to address. Examples include:

    - Whether the condition is necessary [and reasonable] having regard to [the safety of pedestrians, cyclists and drivers using ….]
    - The main issue is the effect that removing [varying] the condition would have on [the safety of pedestrians, cyclists and drivers using ….]
    - The main issue is the effect that varying the opening hours would have on [the living conditions of neighbouring residents on …]
    - The main issues are the effect that removing condition # would have on the living conditions of neighbours and the effect that removing condition # would have on the character and appearance of the area.

53. It can be helpful to briefly explain which conditions are in dispute and what the appellant is seeking. Sometimes your explanation of the relevant circumstances can lead into your main issue (under a heading that might be entitled '*Background and main issue*'). For example:

    A hot food takeaway is now trading at the appeal site. The appellant wishes to extend the opening hours from those originally imposed to between 0600 and 2300 hours every day of the week. The main issue is the effect that these proposed opening times would have on the living conditions of neighbouring residents in [….].

    Planning permission has been granted for 4 dwellings. The appeal seeks permission to carry out the development without complying with condition 12. This requires the provision of a footway along []. The main issue is whether the footway is necessary to ensure the safety of pedestrians, cyclists and drivers.

[1] S74A (6) exempt conditions ie ones that should only be discharged where a formal decision has been made. Schedule 6 of 2015 DMPO lists exemptions.

54. The issue, that is, the alleged harm if the condition were varied or removed, should be clear from the LPA's appeal statement (and the reason for refusal in s73/s73A cases). Usually, the LPA's concern will stem from the reason given for the condition when permission was granted. However, the LPA may now argue that the condition is necessary for different or additional reasons. Your consideration of the appeal must be based on present circumstances and so is not confined to the original reasons given for imposing the condition. If the LPA has argued that there are additional/different reasons, it can be helpful to explain this in a background paragraph.

Reasoning

55. In appeals against conditions cases have you considered the following:

- Having regard to the Newbury principles is the condition valid?

- In s73 or s73A appeals would the proposed amendment result in any conflict between the conditions and the description of the development? Subject to the views of the parties, it may be that what is sought is beyond the powers available in those types of appeal, given that the description of development cannot be altered and that the conditions should be consistent with it. If that is the case, then the appeal would have to be dismissed.

- Is the condition necessary? What would be the effect of removing or varying the condition? Would the consequences of removing or altering the condition have any effect on the acceptability of the original development? Would it lead to any significant harm? Does it still serve a useful purpose having regard to the current development plan and material considerations?

- If the condition is necessary, is it enforceable, relevant to planning, relevant to the development to be permitted, precise and reasonable in all other respects? If not, could it be amended or re-drafted so that it would comply with these tests (subject, where necessary, to the views of the parties)? This might, for example, involve omitting unnecessary elements of a condition but retaining those that are necessary to make the development acceptable. If a condition cannot be made enforceable then it would serve no planning purpose.

- If the condition is necessary but cannot be re-drafted to meet the tests, then non-planning powers or a planning obligation may provide alternative means of control. In a s79 appeal this may lead to a conclusion that the proposed development is not acceptable. In that event, the views of the parties should be sought as the appellant may wish to withdraw the appeal (see A10 for further advice). In a s73 or s73A appeal a balance may have to be struck between the provisions of national policy regarding the use of conditions and those of the development plan, bearing in mind that the original permission will remain.

- Is your conclusion clear? Will the parties understand the outcome? The term 'allow' can be misleading. This is because it is used where a disputed condition is retained but in a modified (and sometimes more onerous) form. Consequently, in some cases, although you may be allowing the appeal, the appellant will not achieve what they sought. Do you need to explain clearly what the effect of your decision is?

- Have you referred to and, as necessary, concluded against relevant development plan policies and SPD, relevant parts of the revised NPPF (including the 6 tests) and the Planning Practice Guidance (if relevant)?

- You do not generally need to refer to non-disputed conditions, unless you have significant concerns about them. If allowing the appeal under s73 or s73A the PPG indicates that all of the conditions that continue to have effect should be re-stated in the interests of clarity.

Other casework issues

Multiple permissions, applications and appeals

56. Sometimes you will find that there has been a long history of planning permissions, s73 applications and appeals against conditions on the site. You will need to be sure about which condition, from which planning permission is in front of you. If it is unclear, seek clarification from the parties. It is usually best to explain your approach in a procedural paragraph or at the start of your reasoning.

Previous permissions allowed by an LPA under s73

57. There is no power under s73 to vary or remove a condition on an existing permission.[2] The only power to do this is at appeal under s79. However, you will sometimes find that, where an LPA has previously allowed a s73 application to remove or vary a condition, the decision notice will purport to amend the original decision by deleting or varying the condition (rather than by granting a new permission). However, the effect of the decision will have been to create a second permission. You will need to be clear which decision your appeal relates to. In such cases, it can be helpful to set out the basis of your approach in a procedural paragraph.

58. In the circumstances described above, the question of whether or not any conditions imposed upon the original permission have been transferred over to the second permission will be arguable and is likely to depend on an interpretation of the precise wording used on the decision notice[3].

59. In the recent *Lambeth*[4] case, although the judgment did not turn on it, the Supreme Court indicated that, in their provisional view, original conditions could remain valid

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[2] See Planning Practice Guidance ID 21a-031-20180615, ID 17a-015-20140306 and advice in this guide on Type 2 appeals – i.e. whatever the outcome of a s73 application or appeal, the original permission will remain unaltered with all its original conditions intact. If a s73 application or appeal is allowed, a second separate planning permission is created.

[3] See discussion in *R (oao) Reid & Reid Motors v SSTLR & Mid-Bedfordshire DC* [2002] EWHC 2174 (Admin)

[4] *Lambeth LBC V SSCLG & Aberdeen Asset Management, Nottinghamshire CC & HHGL Ltd* [2019] UKSC 33 - which concerned the permitted uses of a retail store. Planning permission was originally granted in 1985, but the use was limited by condition to sale of DIY goods and other specified categories, not including food sales. The permitted categories were extended by later consents (under section 73 of TCPA 1990), the most recent being in 2014. The owner sought a certificate from the Council determining that the lawful use of the store extended to sales of unlimited categories of goods including food. A certificate was refused by the Council but

and binding (even though not expressly repeated in a subsequent s73 permission) if there was nothing inconsistent to their continued operation. Paragraph 38 of the judgment says it is a matter of construction as to whether a later permission on the same piece of land is compatible with the continued effect of earlier permissions and, following their implementation, conditions would in principle remain binding unless and until discharged by performance or further grant.

60. If you are allowing the appeal you should use the description of development given on the original planning permission. However, if the LPA's s73 approval purports to vary the original permission, there may be no description of development (for example, it may just refer to amending the original permission by deleting/varying a condition). In most such cases you will usually be able to use the description of development from the original approval, but if in doubt seek clarification from the parties.

Creation of a new planning permission and effect on planning obligations

61. As above, although commonly referred to as a variation, the effect of a successful s73 application will actually be to create a new planning permission. The applicant will then have the choice of which of the planning permissions to implement.

62. This is particularly important if the original permission was subject to a planning obligation. In that case, a new planning obligation must be submitted to cover the new permission, or the original planning obligation must be varied to make it also apply to the new planning permission. If this is not done, the applicant would be able to choose to implement the new planning permission free from any planning obligations which were attached to the original planning permission.

63. As an example of this, see *Norfolk Homes Limited v North Norfolk District Council & another* [2020] EWHC 2265 (QB), where a failure to ensure the planning obligation applied to a permission created by a successful s73 application meant that the developer was not obliged to provide affordable housing or other financial contributions.

64. See also the 'Variation of planning obligations' section of the Planning Obligations chapter of the ITM for more details as to how planning obligations can be varied to refer to the planning permission created by a successful s73 application.

Imposing additional conditions

65. Planning Practice Guidance states that in granting permission under s73, new conditions may be imposed provided that they do not materially alter the development that was subject to the original permission and are conditions that could have been imposed on that original permission. This advice is consistent with 'Finney'. Additional conditions should not be imposed though without first seeking the

granted on appeal as "No condition was imposed on [the 2014 permission] to restrict the nature of the retail use to specific uses falling within Use Class A1 …" and was upheld by the lower courts. However, the Supreme Court found that the obvious and only natural interpretation was that the Council was approving, when granting approval in 2014, what was applied for - the variation of one condition from the original wording to the proposed wording, in effect substituting one for the other. The 2014 permission was clear on its face (taken together with its planning permission history) that a reasonable reader would know that from the way it was worded, that the restriction (to non-food) wasn't being removed.

views of the parties. Also, because the original permission ensues, it is likely to be unreasonable to impose more onerous conditions on the new permission.

Appeals against conditions where development has already been carried out

66. In the case of *Lawson Builders Ltd v SSCLG* [2015] EWCA Civ122 the Court of Appeal confirmed that there is a fluidity between sections 73 and 73A and that in an appropriate case (depending upon the nature and stage of the development – see Annex D2 regarding temporary permissions), a decision maker considering an application made under s73 to proceed with a development without complying with conditions attached to an existing permission might grant, under s73A, retrospective permission for development already carried out and in addition impose conditions under s70.

67. In the *Lawson* case, the circumstances were that the development had been carried out in accordance with the existing permission, albeit in breach of a condition precedent (strictly irremediable) and therefore the court said it was implicit that the Inspector had been using the power given by s73A to grant permission retrospectively which caused no prejudice. Although the court did not indicate in what instances use of the power might not be appropriate, an example might be where the development that has been carried out is quite different from that previously granted, such as a material change of use or a change between use/operations, in which event prejudice might be caused by use of the s73A power.

Cases involving wider permissions

68. Some appeals may relate to only a part of a site that was subject to a wider planning permission; for example, this could arise on 'open plan' estates where the original permission was conditioned to prevent walls and fences being erected to the front of houses (often by removing permitted development rights). If a householder now wants to carry out development which is precluded by condition, they may seek to achieve this by applying for planning permission to erect the fence or wall, in which case it can be dealt with as a conventional S78 appeal.

69. Alternatively, they may apply to remove the condition. If so, the appeal should be dealt with on that basis. Assuming that the proposal is acceptable and that the condition is not necessary, Inspectors should be careful not to inadvertently remove that condition for the entire estate, given that the permission granted as part of the conditions appeal would relate to it. This can be accomplished by imposing a new condition that maintains the general restriction except for the property the subject of the appeal. If that option has not been canvassed, then it may be necessary to go back to the parties for their views. The appellant's proposal might include works that would require planning permission in their own right and would not be covered by the new permission. In that event, it is advisable to draw it to the appellant's attention.

Annex A. Type 1 (s79) appeals

A1. What is the appeal?

The appeal is made directly against a condition imposed on a planning permission. The appellant will have a concern about one or more conditions and will be seeking to have that condition removed or modified.

It should be noted that the 'Finney' principles are not applicable with S79 appeals because this type of appeal includes the powers for the Inspector to consider the matter afresh and 'deal with the application as if it has been made to them in the first instance'. In light of the above, in such cases the Inspector also has the powers to amend the description of the development should they consider it necessary.

A2. Who makes the appeal and when?

The appeal must be made by the original applicant, and most planning appeals must be received within 6 months of the grant of permission.[5]

A3. Is there a decision notice?

There will be only one decision notice – that granting planning permission for the development subject to conditions. This is because the appeal is made directly against a condition which has been imposed on that planning permission. Consequently, the LPA has not refused permission for anything.

A4. What is the relevant legislation?

The right of appeal is provided in s78(1)(a) of the Act. This provides the applicant with the *right to appeal:*

"where an LPA refuse an application for planning permission or grant it subject to conditions."

A5. What powers do I have?

In determining the appeal, s79(1) allows the Inspector to:

"(a) allow or dismiss the appeal, or

(b) reverse or vary any part of the decision of the LPA (whether the appeal relates to that part or not) and may deal with the application as if it had been made to him in the first instance."

Consequently, the original planning permission is at risk and you have the authority to reverse the original decision (ie to refuse planning permission), or to amend or delete existing conditions and/or to impose new ones.

[5] Appeals made under the 'Householder Appeals Service' (HAS) and 'Commercial Appeals Service' (CAS) must be made within 12 weeks from the date of the local planning authority's decision. **NOTE – Advertisement consent appeals must be submitted within 8 weeks** (for further information see ITM: Advertisement appeals, Appeals against conditions).

A6. Why does PINS call this type a S79 appeal?

Although the right of appeal is under s78, PINS refers to these appeals as 's79' to distinguish them from appeals which follow a refusal of permission by an LPA (ie Types 2 and 3). The term s79 is not used in the decision template.

A7. What happens if I decide the disputed condition is necessary?

You would dismiss the appeal. The permission would remain unaltered.

A8. What happens if I decide the disputed condition is necessary but should be modified?

This might occur where you agree with an appellant's argument that the condition should be modified (for example, to extend opening hours) or where you consider modification is necessary to meet the 6 tests (for example, to make the condition enforceable).

In these circumstances, you would allow the appeal and alter the permission by removing the condition and replacing it with a modified version. You should not vary the permission so that part of a condition remains in force, but the remainder is superseded by a new condition. Instead, in order to ensure clarity, you should delete the original condition in its entirety and replace it with a new one.

So for example, if a condition restricted opening to 1100 to 1300 and 1700 to 2200, and you intend to extend evening opening until 2300 but leave lunchtimes unaltered – you should delete the original condition and replace it with one specifying all the new hours (ie 1100-1300 and 1700-2300).

A9. What happens if I decide the disputed condition is unnecessary?

You would allow the appeal and vary the original permission by removing the condition. The original planning permission and your decision would be read together. You would not be creating a new separate planning permission for the development.

A10. What happens if I consider that the original planning permission was fundamentally flawed?

You would dismiss the appeal and refuse planning permission – so reversing the original decision. However, this would be an unusual occurrence. You should ask yourself - is the original decision so fundamentally flawed that it would result in unacceptable harm?

A decision to refuse permission would clearly put the appellant in a worse position than they were in before they made the appeal and is also very likely to come as a surprise. If you are convinced that planning permission should not have been granted in the first place, to ensure natural justice you should ask the case officer to send a letter to the appellant briefly explaining your concerns and giving them the opportunity to comment and withdraw the appeal. The case officer will have a standard letter that can be adapted. If the appeal is not then withdrawn you can proceed to make your decision.

A11. What happens if I decide that there is a problem with a condition that has not been disputed by the appellant or that an additional condition is necessary?

You have the power under s79 to vary or add a condition. However, would significant harm result if an existing condition is not amended or if a new condition is not imposed? In most cases you will not need to look beyond the disputed conditions.

If you do intend to modify or delete a non-disputed condition, has it been discussed in the written representations or at the hearing or inquiry? If it would be a surprise, you would need to go back to the parties to give them an opportunity to comment. You will need to set out your concerns, together with the possible wording of any revised or additional condition you consider to be necessary.

A12. What is the 'decision' if I decide that an original condition should be replaced with a more onerous one or that an additional condition should be imposed?

If you make *any* change to the original permission, you will be 'allowing' the appeal, even though this may not give the appellant what they have sought. Consequently, it is important to make sure that the effect of your decision is clear in your reasoning and conclusions. The resulting 'permission' will be the original decision as modified by your more onerous or additional condition(s).

A13. Does it matter if the planning permission has been begun or if the condition is not being complied with?

In most cases it would make no difference to your consideration of this type of appeal. For example, a condition might require that a window in a new house is obscure glazed. It does not matter whether the house has been built or partially built (with or without obscure glazing to the window), or that it has not been built. However, pre-commencement conditions and conditions requiring works or actions within a specific time- period of start or completion are an exception because it is not possible to have a condition requiring something before commencement or completion if the development has been carried out.

A14. What if the condition being added or modified is a pre-commencement condition?

As per s100ZA(5) and (6) of the TCPA90, written agreement will need to be sought from the appellant. Further details can be found in the section on pre-commencement conditions within the Conditions chapter.

If the appellant does not agree to the condition, you will need to consider whether to reverse the original decision, in which case the appellant should be given the opportunity to withdraw the appeal as advised in Appendix A10.

A15. What happens if the planning permission has already expired?

As long as the appeal is made within the statutory period following the decision date, it does not matter that the permission which is granted by the LPA has expired. Effectively, what is being challenged by the appeal is the decision, rather than the resulting permission.

You will be considering the matter afresh (s79(1)) and have the power to come to a different decision to that of the LPA - this may include varying the condition for the commencement of the planning permission.

As an extreme example, imagine that the LPA grants planning permission subject to a condition that the development must be commenced within 12 hours of the decision – this would probably mean that the permission would expire even before the applicant had received notice of the decision. If it mattered that the permission had already expired, the applicant would not have any right of appeal against the LPA's decision.

A16. How should the standard condition regarding the time limit for the

commencement of the development be dealt with?

You would usually leave it unaltered.

A17. Which decision template should I use?

The correct template is:

PLG conds (1) variation of existing (s79(1))

Annex B. Type 2 (s73) appeals

B1. What is the appeal for?

The appeal will follow, and will be against, the refusal by an LPA of an application for planning permission[6] to carry out development without complying with a condition which has been imposed on a planning permission. Alternatively, it could follow the LPA's failure to determine such an application.

Section 73 appeals are often described as being to 'vary', 'modify' or 'remove' conditions. However, this is not strictly the case. If the appeal is allowed a new permission is created and the original permission remains extant and unaltered (along with the conditions attached to it).[7]

B2. Who makes the appeal and when? (and what happens if the original permission has lapsed without the development having begun?)

The appeal does not have to be made by the original applicant. However, most planning appeals must be received within 6 months of the date of the LPA's refusal to 'remove' or 'vary' the condition[8] (or within 6 months of the expiry of the period for determination – if the LPA did not make a decision).

Section 73 does not apply if the planning permission was granted subject to a time limited commencement condition and that time period has expired without the development having begun S73(4).

Therefore, it does not matter whether the development the subject of the planning permission has begun provided it is still within the time limit for commencement. However, if the permission has been implemented and the disputed condition has been breached it may be necessary to deal with the appeal as a Type 3 (s73A) case (see Annex C).

If the original permission has begun, there is no time limit on when the application can be made to the LPA to 'vary' or 'remove' the condition.

If the original permission has not begun, the appeal must be made and the appeal determined **before** the standard time limit has elapsed – in most cases this will be 3 years from the date of a full permission. See Annex D for advice about extending temporary permissions.

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[6] The appeal must therefore be publicised as an application for planning permission. If the correct notification procedures have not taken place, in the interests of natural justice, you may need to ask the LPA to give interested parties notification of the appeal.

[7] As confirmed in Planning Practice Guidance ID 21a-040-20190723 – "The original planning permission will continue to exist whatever the outcome of the application under section 73…"

[8] Appeals made under the 'Householder Appeals Service' (HAS) and 'Commercial Appeals Service' (CAS) must be made within 12 weeks from the date on the notice of the local planning authority's decision. **NOTE: Advertisement consent appeals – it is not procedurally possible to amend or delete a condition on an advertisement consent under section 73 -** for further information see ITM: Advertisement appeals, Appeals against conditions.

Once the standard time limit has passed without the permission being begun **there will be no extant permission and so s73 does not apply**[9].

Consequently, it is not possible to 'remove' or 'vary' a condition attached to a lapsed permission. This scenario might arise because the LPA accepted an application in relation to a lapsed permission **or because the permission has lapsed at some point during the appeal process.** In such circumstances, you should write to the main parties explaining why you consider that there is no extant permission to 'vary'. It is likely that the appeal should be dismissed on those grounds. If necessary, seek advice (see the section on *seeking advice* in The approach to decision-making chapter). The appellant would have the option of making a new planning application to the LPA.

As an expired planning permission ceases to exist other than as a point of reference in the planning history, where the relevant permission has lapsed it will be necessary to set out in the decision letter that there can be no s73 appeal and that no further action will be taken on the appeal.

The decision maker will need to address and give reasons if the planning permission remains extant or not and proceed accordingly.

B3. Is there a decision notice?

There will usually be two decision notices. The first being the original grant of planning permission subject to conditions, the second being the LPA's decision to refuse permission to remove or modify the disputed condition. However, if the appeal is against non-determination there will only be the original grant of planning permission.

In some cases you may be presented with more than two decision notices. See the advice in 'other casework issues' (paragraphs 31- 35).

B4. What is the relevant legislation?

Section 73 allows for an application to be made to an LPA: "to develop land without compliance with conditions previously attached."

Section 73(2) requires that the LPA "shall consider only the question of the conditions subject to which planning permission should be granted".

Section 73(2)(a) allows LPAs to grant planning permission "subject to conditions differing from those, subject to which the previous planning permission was granted, or that it should be granted unconditionally…"

Section 73(2)(b) states that "if they decide that permission should be granted subject to the same conditions as those subject to which the previous permission was granted, they shall refuse the application."

The right of appeal is provided in s78(1)(a). This is the right to appeal where an LPA "refuse an application for planning permission or grant it subject to conditions."

[9] s73(4) of the 1990 Act – *"This section does not apply if the previous planning permission was granted subject to a condition as to the time within which the development to which it related was to be begun and that time has expired without the development having been begun."*

B5. What powers do I have?

Whatever decision you make, the original permission is not at risk and it remains intact and unamended.[10] Section 73(2) makes it clear that the LPA (and, therefore, by extension the Inspector) "shall consider only the question of the conditions subject to which planning permission should be granted."

The Planning Practice Guidance[11] states that:

"…. under s73 the LPA must only consider the disputed condition/s that are the subject of the application – it is not a complete re-consideration of the application."

"A local planning authority decision to refuse an application under section 73 can be appealed to the Secretary of State who will also only consider the condition/s in question"

and[12]

"… In granting permission under section 73 the local planning authority may also impose new conditions – provided the conditions do not materially alter the development that was subject to the original permission and are conditions which could have been imposed on the earlier permission."

Section 73 is drafted widely and so, in addition to considering the disputed condition(s), it does provide the power to attach new conditions, to not attach conditions which were previously imposed or to attach modified versions of them. However, in most cases you will not need to look beyond the disputed condition. Nevertheless, if after having regard to the advice in the Planning Practice Guidance, you consider it essential to look beyond the disputed condition, perhaps because a consequential change would be logical following your conclusions on the disputed condition, consider:

- Would attaching a new condition or deleting or modifying an existing condition materially alter the development?
- Would amending a condition result in a conflict between the condition as amended and the description of development, if so, that particular amendment cannot be made[13].
- Would your approach come as a surprise to the parties and, if so, whether they should be given the opportunity to comment.

[10] Planning Practice Guidance ID 21a-040-20190723 and ID 17a-015-20140306

[11] Planning Practice Guidance ID 21a-031-20180615

[12] Planning Practice Guidance ID 21a-040-20190723

[13] 'Finney' has clarified that the description of development in an existing planning permission (the 'operative' part of the permission) cannot be amended at all. Only conditions can be amended – see earlier paragraph 11.

However, you cannot extend the time limit within which a development must be started or an application made for the approval of reserved matters.[14]

B6. Why do PINS call this type a s73 appeal?

This is because an application seeking permission to carry out a development without the condition (or with a different one) is initially made to the LPA under s73.

B7. What happens if I decide the disputed condition is necessary?

You would dismiss the appeal. The original permission would remain extant and unaltered.

B8. What happens if I decide that the disputed condition is necessary but should be modified (for example, to ensure that it is enforceable)?

This might be because you agree with the appellant that a less restrictive condition is appropriate (for example, allowing longer opening hours) or because a condition which is necessary needs to be modified to comply with the 6 tests (for example, to ensure it is enforceable).

In both cases you would allow the appeal and grant a new planning permission for the development subject to the modified condition. However, the original permission would remain intact and unamended and so the appellant could choose to implement either permission.

B9. What happens if I decide the disputed condition is unnecessary?

You would allow the appeal and grant a new planning permission for the development without the disputed condition. The original permission would remain intact and unamended. However, the appellant would be able to choose which permission, if any, to implement (and would presumably choose to implement the one without the disputed condition).

B10. If I allow the appeal, how should I deal with any other conditions imposed on the original permission?

If you allow the appeal, you will be granting a new planning permission which is separate from the original permission. Any conditions which were attached to the original permission may not automatically be carried over to the permission you have granted.

The second permission will be subject to the conditions which you specifically impose.[15] If you impose no conditions the second permission may, arguably, be unfettered - this is

[14] Planning Practice Guidance ID 17a-014-20140306 and s73(5) of the 1990 Act

[15] See Planning Practice Guidance ID 21a-040-20190723 – "… For the purpose of *clarity, decision notices for the grant of permission under section 73 should set out all of the conditions imposed on the new permission, and restate the conditions imposed on earlier permissions that continue to have effect."* The same guidance is repeated in ID 17a-015-20140306

likely to depend on an interpretation of the precise wording used on the decision notice.[16] *Lambeth* CoA judgment (paragraph 42) reinforces the wisdom of Sullivan J's comments that it is good practice and highly desirable to restate **all** the conditions to which the new permission will be subject and not left to a process of cross-referencing. Therefore, you need to consider whether any previous conditions should be imposed on the permission you grant. In doing so, you have two main options:

a) Review all the conditions previously imposed and decide whether or not each one should be imposed on the permission you are granting – applying the 6 tests in paragraph 56 of the revised NPPF. However, do you have sufficient evidence to make a reasoned decision on each condition[17]? For example, do you know which conditions have been discharged? Could the outcome of this exercise come as a surprise to the parties? – or:

b) If you have insufficient information about whether or not the other, uncontested, conditions imposed on the original permission have been discharged or remain relevant you should re-impose all of them. Issues relating to whether any of the conditions have been discharged would be for the appellant and LPA to deal with. However, it would have to be made clear in the decision why you have taken this course of action, for example along the lines of:

"The guidance in the Planning Practice Guidance makes clear that decision notices for the grant of planning permission under section 73 should also restate the conditions imposed on earlier permissions that continue to have effect. As I have no information before me about the status of the other condition(s) imposed on the original planning permission, I shall impose all those that I consider remain relevant. In the event that some have in fact been discharged, that is a matter which can be addressed by the parties."

Some conditions require matters to be approved by the Council and then retained. In that case, even if you are presented with evidence that the details have been approved, you will need to consider whether to reimpose the retention element to avoid the possibility that the details could subsequently change.

In retrospective cases, you may need to impose 'sanction' conditions. More detail on the imposition of this type of condition can be found under the 'Retrospective permission' section of the conditions chapter.

B11. What happens if I decide that there is a problem with a condition that has not been disputed by the appellant, or that an additional condition is necessary?

If you are allowing the appeal you have the power to impose any conditions you consider necessary, not to impose a previous condition you consider unnecessary or to impose a different version of a previous condition. However, you will need to consider if your action would come as a surprise to the main parties. See B5 above.

B12. How should the standard condition regarding the time limit for the

[16] This issue of whether conditions from the original permission applied to the 2nd permission was considered in *Queen oao Reid v SSTLGR and Mid Beds DC* [2002] EWHC 2174 (Admin) and more recently in *Lambeth* – see earlier paragraphs–31 - 33.

[17] The appeal questionnaire will be updated to include a requirement for this information to be provided.

commencement of the development be dealt with?

Section 73(5) states that:

"Planning permission must not be granted under this section to the extent that it has effect to change a condition subject to which a previous planning permission was granted by extending the time within which - (a) a development must be started; (b) an application for approval of reserved matters (within the meaning of section 92) must be made."

This is confirmed in the Planning Practice Guidance.[18]

Consequently, if you allow the appeal and grant planning permission, you should not extend the time period within which the development must start from that set out on the original permission. Instead, the time limit should run from the date of the original permission (usually 3 years from the date of a full permission). You will therefore need to adjust the standard time limit condition (and any conditions relating to the submission of reserved matters), so that the permission you grant runs from the date of the original permission.

The case of *R (on the application of Hill) v First Secretary of State* [2005] EWHC 1128 illustrates the type of issues that can arise if the time limit conditions are not carefully considered.[19]

If the original development has been started, you will not need to impose a time limit condition. This will only apply if the development that has been started is the same as that for which you are granting permission. You will therefore need to check whether the details are the same.

If the appeal application *only* seeks to extend the time limit for starting the development – see the advice in Annex E relating to Type 5 appeals.

B13. Do the Environmental Impact Assessment Regulations apply?

This is answered in Planning Practice Guidance ID 17a-016-20140306.

B14. Which decision template should I use?

The correct template is:

PLG conds (2) variation (s73) – refusal or
PLG conds (2) variation (s73) – failure

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[18] Planning Practice Guidance ID 17a-014-20140306

[19] The Inspector allowed a s73 appeal and granted a new outline permission. In doing so he re-imposed the original condition requiring that the application for the approval of reserved matters be made within 3 years of the original approval. However, this date had already passed and so the permission could not be begun. Accordingly, the consideration of the disputed conditions was academic. However, the Inspector had not been asked to remove the time limit condition and so could not be criticised for not doing so. Nevertheless, the Judge noted that local planning authorities and Inspectors should be on their guard when dealing with s73 applications and be astute to consider any issues arising in respect of time limits imposed on the original permission.

Annex C. Type 3 (s73A) - 'Condition breached' appeals

C1. What is the appeal for?

These are appeals where development authorised by a planning permission has been carried out without compliance with one or more conditions. They will follow the refusal of an application to the LPA to 'retain' the development without complying with the disputed condition. They can be seen as a retrospective application for development. In some cases the appellant may suggest an alternative version of the disputed condition (for example, with different opening hours).

If the condition was breached before the planning application was made – the appeal should be dealt with under s73A.

If the breach occurred after the planning application was made – the appeal should be dealt with under s73. If the appeal relates to ground (a) of an enforcement appeal, please refer to the enforcement chapter.

C2. Are there any differences between s73 and s73A appeals?

The practical differences are limited and the advice given above for s73 Type 2 appeals generally applies. However, be careful with the tense you use (because the development has already been carried out and the condition breached).

You will need to consider the planning merits of allowing the development to continue without compliance with the disputed condition. Has the failure to comply with the condition resulted in material harm (or would it be likely to cause harm over time)?

If the condition is unnecessary – you would allow the appeal and grant a new (retrospective) permission without the disputed condition.

If the condition is necessary (and does not require any modification), you would dismiss the appeal even if the breach could not be remedied. The original permission would remain unaltered.

If the original condition is necessary but needs to be modified – you would allow the appeal and impose a revised condition on a new planning permission (and the original permission would remain intact).

If you are allowing, you will need to decide how to deal with any other conditions which were originally imposed. You can choose to impose previous conditions, to vary them, to omit them or to add new ones. If so, do you need to give the parties a chance to comment? See the advice in B5 above regarding Type 2 s73 appeals before doing so.

You should not impose a condition limiting the time for commencement, because the development has already begun.

C3. What is the relevant legislation?

Section 73A(1) & s73A(2)(c) provide that "On an application made to a local planning authority, the planning permission which may be granted includes planning permission for development carried out before the date of the application […] without complying with some condition subject to which planning permission was granted."

The right of appeal is provided in s78(1)(a) where an LPA “refuse an application for planning permission, or grant it subject to conditions.”

C4. Which decision template should I use?

The correct template is:

PLG conds (3) breach (s73A(2)(c) – refusal or

PLG conds (3) breach (s73A(2)(c) – failure

Annex D. Type 4 – appeals seeking to extend 'temporary permissions'

D1. What is the appeal for?

Where a planning permission has been granted subject to a condition that the use shall cease (or buildings/works are removed) within a given period of time, the appellant can seek to extend the permission, or to make it permanent.[20]

D2. How might the appellant seek to make the permission permanent?

There are 3 ways in which an appellant might seek to achieve this. You should always make it clear how you have dealt with the appeal:

Type 1 (s79)

The appeal would seek to directly remove or vary the relevant condition. See the advice in Annex A on Type 1 appeals.

Type 2 (s73)

The appellant would have applied to the LPA to have the condition 'removed' or 'varied'. This application would need to be made **before** the time limit given in the condition expired. If the application is refused, or not determined, an appeal can be made. See the advice in Annex B on Type 2 appeals.

Type 4 (s73A)

Where a use continues or buildings remain, after the temporary period specified in the condition has expired, s73A(2)(b) may be used to grant planning permission having retrospective effect.

In these specific circumstances, unlike with other types of conditions where retrospective consent is sought for a change to them (as set out above in Annex C Type 3 appeals, which relate to s.73A(2)(c)) the appropriate application is likely to be a "full" application made under s.62 TCPA for development of the site. This is because the development (buildings / use of site) is no longer authorised following the expiry of the time limit condition and it is likely that full consideration of the planning merits is required to determine whether the development (retention of buildings / continuation of use) should be permitted.[21]

s73A(3)(b) permits the application to be 'back dated' "so as to have effect from – (b) if it was carried out in accordance with planning permission granted for a limited period, the end of that period." It can be good practice to backdate permissions where there is evidence that a failure to do so could cause problems, perhaps by invalidating a waste

[20] The power to grant a 'temporary' permission is provided under s72(1)(b)

[21] Although this matter has not been specifically considered by the Court, support for this position is derived from the commentary of the Court in the case of *Wilkinson v Rossendale BC [2002] EWHC 1204 (Admin)* where the Court considered that the grant of permission without compliance with a personal occupancy condition required full consideration of the planning merits.

management or caravan site licence. You can use a modified version of the standard decision wording:

I allow this appeal and grant planning permission for the [description of original act of development] at [address] **effective from** [insert date the time-limit expired] in accordance with application Ref [] dated [] etc.

If you allow the appeal, you will be granting a new planning permission. The development granted in the original permission is no longer authorised because the time limit has expired. Conditions attached to the original permission will no longer apply, save for the time limit and restoration condition(s) which will continue to exist until the time limit for enforcement has expired.[22]. Consequently, any necessary conditions must be imposed on the permission you grant.

D3. Which decision template should I use?

The templates to use are:

PLG conds (4) ex temp pp (s73A(2)(b) – refusal or

D4. Is there any national guidance on 'temporary' planning permissions?

The Planning Practice Guidance provides guidance on the use of conditions to grant planning permission for a temporary period only (ID 21a-014-20140306).

[22] *Avon Estates Ltd v Welsh Ministers* [2011] EWCA Civ 553 – this case discussed the status of a temporary permission following the expiry of the time limited condition. . The Court decided that at the end of the period specified within the time limited condition, the permission no longer authorised the development and the conditions attached to it could no longer bind the land or be enforced, **except for the time limit and restoration condition(s)** which survive until the time for enforcement action has passed.

Annex E. Type 5 – appeals seeking to extend standard time limits for starting development

E1. What is the legal basis for these appeals?

Permission cannot be granted under s73 to extend time limits for commencement (normally 3 years on a full permission and 3 and 2 years on outline permission). Section 73(5) states:

"Planning permission must not be granted under this section to the extent that it has effect to change a condition subject to which a previous planning permission was granted by extending the time within which –

(a) a development must be started;

(b) an application for approval of reserved matters (within the meaning of section 92) must be made."

The Planning Practice Guidance also confirms that a s73 application cannot be used to vary the time limit for commencement.[23]

However, s93(3) of the 1990 Act provides for the right of appeal against conditions relating to the commencement of development.[24] Such appeals will be s79 (Type 1) cases.

E2. Which decision template should I use?

The correct template is:

PLG conds (1) variation of existing (s79(1))

E3. Is there any discretion to impose time limits for commencement which are longer or shorter than the standard periods?

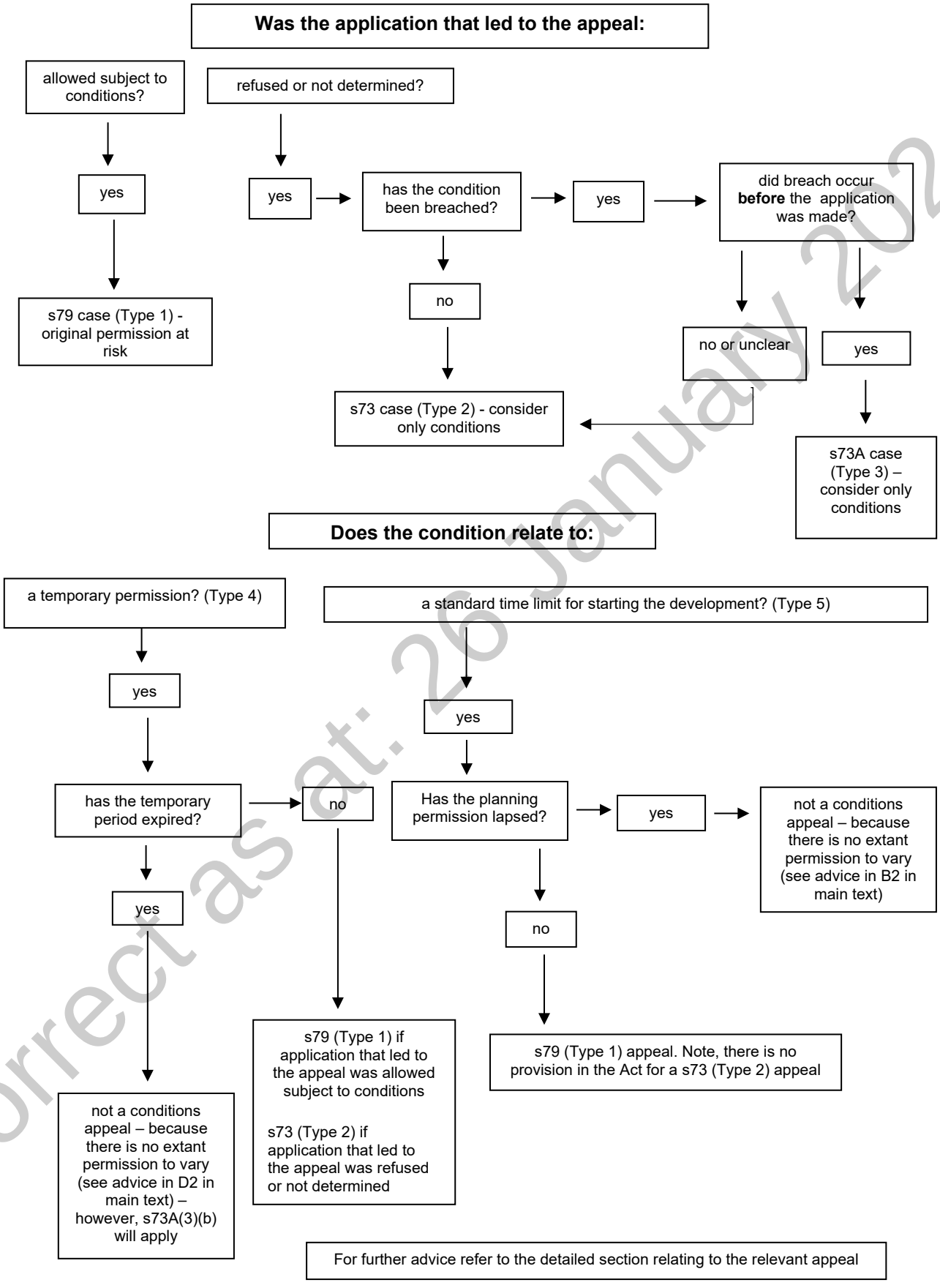
LPAs have the discretion under s91(1)(b) and s92(4) to impose time limits for commencement which are longer or shorter than the standard periods. The Planning Practice Guidance provides guidance.[25]

[23] Planning Practice Guidance ID 17a-014-20140306

[24] Section 93(3) states: "… the fact that any of the conditions of the permission are required by the provisions of section 91 or 92 [time limits for commencement] to be imposed, or are deemed by those provisions to be imposed, shall not prevent the conditions being the subject of an appeal under section 78 against the decision of the authority"

[25] See Planning Practice Guidance ID 21a-027-20140306

Annex F. Flow chart



Annex G. Summary checklist

1. Are you clear which type of appeal it is and what your powers are?

2. Have you selected the correct template? See the flow diagram in Annex F.

3. Have you checked that what you have written in the banner heading and in the formal decision (if allowing) is correct? Look at the example templates in Annex H.

4. In s79 appeals the whole permission is before you (and so is at risk).

5. In s73 appeals, the original permission is not at risk. You can only consider "the question of the conditions subject to which planning permission should be granted."

6. If you allow a s73 appeal, you will be creating a new standalone permission. If so, have you imposed all necessary conditions?

7. Section 73A appeals are very similar to s73 appeals – the main difference is that, in s73A appeals, the appealed condition will have been breached.

8. Does your main issue accurately reflect the matter that is in dispute?

9. Will it be clear from your decision what the appellant is seeking and is this reflected in your main issue?

10. If you are removing, altering or replacing a condition or adding a new one, you will be 'allowing' the appeal (even if this would not give the appellant what they have sought)? Will the outcome of your decision be clear to the parties? Does it give the appellant what they want, or not?

11. In s79 appeals, do not partially remove a condition. Instead delete it in its entirety and replace it with a new one.

12. If you are minded to amend or delete existing conditions or to add new ones, would this come as a surprise to the parties? If so, should you give them the chance to comment?

13. In s79 appeals, would the appellant be left in a worse position (for example, because you might reverse the decision or impose a more onerous condition)? If so, give the appellant the opportunity to withdraw the appeal.

14. Be careful how you deal with conditions limiting the period for commencement.

Annex H. Examples of standard wording

A. Type 1 (s79) appeal

Template: PLG conds (1) variation of existing (s79(1))

The Planning Inspectorate

Appeal Decision

Site visit made on []

by []

an Inspector appointed by the Secretary of State

Decision date:

Appeal Ref: []

[address]

The appeal is made under section 78 of the Town and Country Planning Act 1990 against a grant of planning permission subject to conditions.

The appeal is made by [*appellant's name*] against the decision of [*LPA's name*].

The application Ref [ ], dated [ ], was approved on [ ] and planning permission was granted subject to condition[s].

The development permitted is [*insert description of development given on planning permission*].

The condition[s] in dispute [is] [are] No[s] [ ] which state[s] that: [*quote condition/s in full]*.

The reason[s] given for the condition[s] [is] [are]: [*quote reason/s in full*].

Decision

The appeal is allowed and the planning permission Ref [insert p app ref] for [insert description of development given on planning permission] at [insert address] granted on [insert date of planning permission] by [insert name of LPA] Council, is varied by deleting condition(s) [insert nos of any conditions to be deleted] [and substituting for them the following conditions: [set out any varied or additional conditions]].

OR

The appeal is dismissed.

B. Type 2 (s73) appeal – refused

Template: PLG conds (2) variation (s73) - refusal

The Planning Inspectorate

Appeal Decision

Site visit made on

by []

an Inspector appointed by the Secretary of State

Decision date:

Appeal Ref: []

[*address*]

The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission under section 73 of the Town and Country Planning Act 1990 for the development of land without complying with conditions subject to which a previous planning permission was granted.

The appeal is made by [*appellant's name*] against the decision of [*LPA's name*].

The application Ref [ ], dated [ ], was refused by notice dated [ ].

The application sought planning permission for [*description of original act of development*] without complying with [a] condition[s] attached to planning permission Ref [ ], dated [ ].

The condition[s] in dispute [is] [are] No[s] [ ] which state[s] that: [*quote condition/s in full*].

The reason[s] given for the condition[s] [is] [are]: [*quote reason/s in full*].

Decision

The appeal is allowed and planning permission is granted for [*description of original act of development– usually from the planning permission*] at [*address*] in accordance with the application Ref [*insert ref for application subject of the appeal not the original permission*] dated [*insert date for application subject of the appeal not the original permission*], without compliance with condition number[s] [*list all conditions which have been successfully appealed against or have been discharged or are no longer relevant*] previously imposed on planning permission Ref [*insert ref no from original planning permission*] dated [*insert date from original planning permission*] and [subject to the following conditions: [*set out in full all conditions which you intend to impose on the permission you are granting*].

Note 1 – this is template decision option: PLG s73 conds – allow (no ref to old).

Note 2 - this would be the option to use where you intend to grant permission subject to conditions. You need to set out **all** the remaining relevant conditions from the original permission together with any new ones – **ensure you delete the superfluous DRDS end option**: [without compliance with the conditions previously imposed on the planning permission Ref ** dated **].

OR

The appeal is allowed and planning permission is granted for [description of original act of development] at [ ] in accordance with the application Ref [ ] dated [ ] without compliance with the conditions previously imposed on the planning permission Ref [ ] dated [ ].

Note 1 – this is template decision option: PLG s73 conds – allow (no ref to old).

Note 2 - you should **only** use this option where you intend to grant permission **without any conditions** – **ensure you delete the superfluous DRDS option**:[without compliance with condition number(s) ** previously imposed on planning permission Ref ** dated ** and subject to the following conditions: **].

OR

The appeal is dismissed.

Note: - You would be 'allowing' the appeal if you decide that the disputed condition is unnecessary, the disputed condition is necessary but needs modification or if you vary or delete any other condition or add a new condition. Consequently, there may be circumstances where you are allowing the appeal even though the outcome will not have been that sought by the appellant.

B. Type 2 (s73) appeal – failure to determine

Template: PLG conds (2) variation (S73) - failure

The Planning Inspectorate

Appeal Decision

Site visit made on []

by []

an Inspector appointed by the Secretary of State

Decision date:

Appeal Ref: []

[address]

The appeal is made under section 78 of the Town and Country Planning Act 1990 against a failure to give notice within the prescribed period of a decision on an application for planning permission under section 73 of the Town and Country Planning Act 1990 for the development of land without complying with conditions subject to which a previous planning permission was granted.

The appeal is made by [*appellant's name*] against [*LPA's name*].

The application Ref [ ] is dated [ ].

The application sought planning permission for [*description of original act of development*] without complying with [a] condition[s] attached to planning permission Ref [ ], dated [ ].

The condition[s] in dispute [is] [are] No[s] [ ] which state[s] that: [ ].

The reason[s] given for the condition[s] [is] [are]: [ ]

Decision

The decision options when allowing are the same as for Type 2 (s73) appeal – refusal.

When dismissing the option is:

The appeal is dismissed and planning permission is refused for [].

C. Type 3 (s73A) 'Condition breached' appeal – refused

Template: PLG conds (3) breach (s73A(2)(c) - refusal

The Planning Inspectorate

Appeal Decision

Site visit made on []

by []

an Inspector appointed by the Secretary of State

Decision date:

Appeal Ref: []

[address]

The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission under section 73A of the Town and Country Planning Act 1990 for the development of land carried out without complying with conditions subject to which a previous planning permission was granted.

The appeal is made by [*appellant's name*] against the decision of [*LPA's name*].

The application Ref [ ], dated [ ], was refused by notice dated [ ].

The application sought planning permission for [*description of original act of development – usually from planning permission*] without complying with [a] condition[s] attached to planning permission Ref [ ], dated [ ].

The condition[s] in dispute [is] [are] No[s] [ ] which state[s] that: [ ].

The reason[s] given for the condition[s] [is] [are]: [ ].

Decision

The decision options when allowing are similar to Type 2 (s73) appeal – refusal

The appeal is allowed and planning permission is granted for [description of original act of development] at [] in accordance with the application Ref [] made on the [] [without complying with condition(s) No(s) [list all conditions which have been successfully appealed against or have been discharged or are no longer relevant] set out in planning permission Ref ** granted on ** by the ** Council, but otherwise subject to the following conditions: **] [without compliance with the conditions previously imposed on the planning permission Ref ** granted on ** by the ** Council]

Note 1 - template decision option: PLG s73A conds retro – allow (no ref to old)

Note 2 - this would be the option to use where you intend to grant permission subject to conditions and need to set out **all** the remaining relevant conditions in full from the original permission together with any new ones **or** where you intend to grant permission without any conditions (**ensure the correct ending is used by deleting the superfluous DRDS option**).

OR:

The appeal is dismissed.

C. Type 3 (s73A) 'Condition breached' appeal – failure

Template: PLG conds (3) breach (s73A(2)(c) - failure

The Planning Inspectorate

Appeal Decision

Site visit made on

by []

an Inspector appointed by the Secretary of State

Decision date:

Appeal Ref: []

[address]

The appeal is made under section 78 of the Town and Country Planning Act 1990 against a failure to give notice within the prescribed period of a decision on an application for planning permission under section 73A of the Town and Country Planning Act 1990 for the development of land carried out without complying with conditions subject to which a previous planning permission was granted.

The appeal is made by [*appellant's name*] against [*LPA's name*].

The application Ref [ ] is dated [ ].

The application sought planning permission for [*description of original act of development*] without complying with [a] condition[s] attached to planning permission Ref [ ], dated [ ].

The condition[s] in dispute [is] [are] No[s] [ ] which state[s] that: [ ].

The reason[s] given for the condition[s] [is] [are]: [ ].

Decision

The decision options when allowing are the same as for Type 3 (s73A) appeal – refusal.

When dismissing the option is:

The appeal is dismissed and planning permission is refused for [].

D. Type 4 temporary permission appeal – refusal

Template: PLG conds (4) ex temp pp (s73A(2)(b)) – refusal (note: only use this template if the appeal is being considered under s73A)

The Planning Inspectorate

Appeal Decision

Site visit made on []

by []

an Inspector appointed by the Secretary of State

Decision date:

Appeal Ref: []

[address]

The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission under section 73A of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 for [*description of original act of development*] for which a previous planning permission was granted for a limited period.

The appeal is made by [*appellant's name*] against the decision of [*LPA's name*].

The application Ref [ ] is dated [ ].

The application sought planning permission for [description of original act of development] granted planning permission for a limited period Ref [ ], dated [ ].

The permission is subject to a condition requiring the [cessation of the use] [removal of the buildings or works] on or before [ ].

The reason given for the condition is: [ ].

Decision

The appeal is allowed and planning permission is granted for [description of original act of development] at [address] **effective from [insert date the time limit expired]** in accordance with application Ref [] dated [] subject to the following conditions: [].

Note 1 – this is template decision option – PLG expired temporary permission - allow

Note 2 – use the wording in **bold** if you intend to back date the permission (it can be good practice to backdate permissions where there is evidence that a failure to do so could cause problems).

Note 3 – Conditions attached to the expired original permission cease to exist (see Annex D, Footnote 34), so any conditions necessary must be imposed on the permission granted.

OR

The appeal is dismissed.

D. Type 4 temporary permission appeal – failure

Template: PLG conds (4) ex temp pp (s73A(2)(b)) – failure (note: only use this template if the appeal is being considered under s73A)

Appeal Decision

Site visit made on []

by []

an Inspector appointed by the Secretary of State

Decision date:

Appeal Ref: []

[address]

The appeal is made under section 78 of the Town and Country Planning Act 1990 against a failure to give notice within the prescribed period of a decision on an application for planning permission under section 73A of the Town and Country Planning Act 1990 for [description of original act of development] for which a previous planning permission was granted for a limited period.

The appeal is made by [*name of appellant*] against [*name of LPA*].

The application Ref [ ] is dated [ ].

The application sought planning permission for [description of original act of development] granted planning permission for a limited period Ref [ ], dated [ ].

The permission is subject to a condition requiring the [removal of the buildings or works] [cessation of the use] on or before [ ].

The reason given for the condition is: [ ].

Decision

The decision option for allowing is the same as for Type 4 temporary permission appeal – refusal.

When dismissing the option is:

The appeal is dismissed and planning permission is refused for [].

Refusal to approve details required by a condition (including reserved matters)

This is the template to use where the LPA has refused to approve details which have been submitted pursuant to a condition. It is most commonly used where the LPA has refused a reserved matters application. In effect, the appeal is seeking approval for the submitted details.

The appeal is made under S78(1)(b) – "*the Right to appeal against planning decisions and failure to take such decisions. (1) Where a local planning authority - (b) refuse an application for any consent, agreement or approval of that authority required by a condition imposed on a grant of planning permission or grant it subject to conditions …*"

Current DRDS options

Note that the options listed below do not cover all the different scenarios and that subject to the scope of the DRDS review they may be addressed then.

PLG details pursuant (eg reserved matters) – conditional
Appeal Ref: APP/00000/
address]

The appeal is made under section 78 of the Town and Country Planning Act 1990 against a grant subject to conditions of consent, agreement or approval to details required by a condition of [a planning permission]/[a consent]/[an agreement]/[an approval].
The appeal is made by [name1] against the decision of [name2].
The application Ref [ ], dated [ ], sought approval of details pursuant to condition[s] No[s] [ ] of [a planning permission]/[a consent]/[an agreement]/[an approval] Ref [ ] granted on [ ].
The development proposed is [ ].
The condition[s] in dispute [is] [are] No[s] [ ] which state[s] that: [ ].
The reason[s] given for the condition[s] [is] [are]: [ ]

PLG details pursuant (eg reserved matters) – failure
Appeal Ref: APP/00000/
[address]

The appeal is made under section 78 of the Town and Country Planning Act 1990 against a failure to give notice within the prescribed period of a decision on an application for consent, agreement or approval to details required by a condition of [a planning permission]/[a consent]/[an agreement]/[an approval].
The appeal is made by [name1] against [name2].
The application Ref [ ], dated [ ], sought approval of details pursuant to condition[s] No[s] [ ] of [a planning permission]/[a consent]/[an agreement]/[an approval] Ref [ ] granted on [ ].
The development proposed is [ ].
The details for which approval is sought are: [ ].

PLG details pursuant (eg reserved matters) – refusal
Appeal Ref: APP/00000/
[address]

The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant consent, agreement or approval to details required by a condition of [a planning permission]/[a consent]/[an agreement]/[an approval].
The appeal is made by [name1] against the decision of [name2].
The application Ref [ ], dated [ ], sought approval of details pursuant to condition[s] No[s] [ ] of [a planning permission]/[a consent]/[an agreement]/[an approval] Ref [ ], granted on [ ].

The application was refused by notice dated [ ].
The development proposed is [ ].
The details for which approval is sought are: [ ].

Decisions

PLG details pursuant cond grant - allow

The appeal is allowed and the approval Ref [ ] given to the details pursuant to conditions Nos [ ] of a planning permission Ref [ ]) given on [ ] is varied by deleting conditions [ ] [and substituting for them the following conditions: [ ]].

PLG details pursuant cond grant – allow (failure cases)

The appeal is allowed and the [ ] details submitted pursuant to conditions Nos [ ] attached to planning permission Ref [ ] granted on [ ] in accordance with the application dated [ ] and the [plans] submitted with it are approved.

PLG res matters allow

The appeal is allowed and the reserved matters are approved, namely [list the reserved matters concerned] details submitted in pursuance of condition No [ ] attached to planning permission Ref [ ] dated [ ].

PLG res matters dismiss

The appeal is dismissed and approval of the reserved matters is refused, namely: [specify the reserved matters covered] details submitted in pursuance of condition [ ] attached to planning permission Ref [ ] dated [ ].

Annex I. Conditions attached to Listed Building Consents

1. The provisions are simpler than those for planning applications. S20 of the Planning (Listed Building and Conservation Areas) Act 1990 allows 3 types of appeals to be made:

Type 1 - appeals within 6 months of the original grant of consent

2. These are analogous to S79 planning appeals. S22 gives an inspector the right to deal with the application as if it had been made to him or her in the first place. So you can dismiss the appeal and refuse to grant listed building consent, or can attach whatever new conditions you think fit. However, as in planning appeals, care should be taken when exercising these powers that the principles of natural justice are not offended.

Type 2 -appeals following refusal of an application to vary/discharge a

Condition

3. If the application is refused or allowed subject to further conditions, an appeal can be made. Such an appeal should be made within six months of the date of the notice of decision by the LPA or of the expiry of the period of determination. In these cases you can, by virtue of S22, deal with the appeal as if it has been made to you in the first instance. In this case, however, the application was only to vary or discharge the condition(s). The original consent is not at risk but you can remove any or all of the conditions on the consent (regardless of whether they were the subject of the appeal or not) and attach new ones. Again, if these powers are to be exercised, and any conditions other than those subject to the appeal are to be removed, varied or added to, then the parties must be given a chance to comment.

Breach of conditions cases

4. There are no separate provisions for dealing with breach of conditions cases. Thus they should be dealt with as in the paragraph above.

Type 3 - appeals against the refusal of a scheme required by a condition

5. The third type of appeal allowed by S20 is where a scheme is required, by condition, to be agreed with the LPA and the submitted scheme is refused, or allowed subject to further conditions. Again, the whole application is before the Inspector. So even if the appellant only wished one of the conditions that have been attached to be removed, the original consent is at risk. However, be aware of the requirements of natural justice and follow the same principles as for planning appeals.

Granting consent

6. If an appeal is allowed, a new consent is **not** granted. Instead the original consent is altered by deleting, varying or adding any relevant conditions to it.

Relationship to S78 Conditions Appeals

7. Often a condition on a planning permission will duplicate that on a Listed Building Consent. In such cases the appeals will usually travel together. Separate decisions will have to be reached on each appeal, as not only are the issues likely to be different, but the powers available to you, and the way any permission might be worded, will also be different.

Annex J. Deemed Discharge Of Conditions (England s74A (2) (a))

J1. What is a deemed discharge of conditions[26]

Planning provisions within the Infrastructure Act 2015[27] inserted a new section 74A into the Town and Country Planning Act 1990. This allows the Secretary of State to provide by development order (2015 DMPO)[28] for the deemed discharge of certain conditions[29] attached to planning permissions which require the consent, agreement or approval of the LPA. Once a deemed discharge notice has taken effect the LPA are not able to take enforcement action or stop development on site on the basis that the condition had not been complied with.

J2. Definition s74A (3)

"Deemed discharge of a condition means that the local planning authority's consent, agreement or approval to any matter as required by the condition is deemed to have been given."

J3. Timing of the deemed discharge provisions

The deemed discharge provisions apply only to conditions attached to planning permissions where the planning application for planning permission was made on or after **15 April 2015**[30]. The SoS has the general power to do this under s74A(9) TCPA, and has done so in the 2015 DMPO, article 47(5)).

J4. What is the relevant legislation?

Infrastructure Act 2015, Chapter 7
Town and Country Planning Act 1990

The Town and Country Planning (Development Management Procedure) (England) Order 2015

Article 28 - Deemed discharge

Article 29 - Deemed discharge notice

Article 30 – Exemptions

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[26] PPG: Use of Planning Conditions now includes a section on Deemed Discharge – ID 21a-041-20190723 to 21a-045-20190723.

[27] Infrastructure Act 2015, Chapter 7, Part 5, section 29 - Infrastructure Act 2015, Chapter 7 - Explanatory notes paragraphs 142- 153

[28] The Town and Country Planning (Development Management Procedure) (England) Order 2015

[29] S74A (6) exempt conditions are ones that should only be discharged where a formal decision has been made. Schedule 6 of 2015 DMPO lists the types of exempt conditions where this process is not appropriate, for example ones where there are potential risks to human or environmental wellbeing.

[30] PPG ID 21a-042-20190723

Article 47(5) – Transitional provisions

SCHEDULE 6 — Deemed discharge: 12 exemptions (included are those relating to **reserved matters**; the investigation and remediation of contaminated land; highway safety; sites of special scientific interest and investigation of archaeological potential)

J5. Who makes the deemed discharge notice[31]

The deemed discharge process is **activated** by the developer giving "the deemed discharge notice" (requirements set out article 29) **after 6 weeks have elapsed** from the day after the written application for approval of the details required by the condition in question was received by the LPA. The developer confirms in the notice that no appeal has been made under s78, and the date after **expiry of a further 2 weeks** or such period as may be specified (as there is flexibility for applicants and the LPA to agree a different time period) on which the deemed discharge is to take effect.

J6. Deemed discharge notice[32]

The notice states that the consent, agreement or approval required by the condition will be deemed to have been given if the LPA have not responded within the timeframe of the notice.

The developer will not be deemed to have complied with the condition until the later of the end of the 8-week determination period or the date specified in the deemed discharge notice.

If the LPA refuses the application within the 8-week period or before the date in the deemed discharge notice the appellant has the usual right of appeal.

If the LPA issues a decision after the specified date, **it will have no effect** and they are not able to take enforcement action or stop development on site on the basis that the condition had not been complied with.

Paragraph 2(6) of The Town and Country Planning (Development Management Procedure (England) Order 2015, is clear that emails received outside of business hours shall be taken as received the next working day. If the LPA e-mails the notice outside of the recipient's business hours, it may be deemed to have arrived late.

J7. Appeals after deemed discharge notice given

Although s74A(8) gives the power for an order to modify the appeal provisions where the steps taken to bring about deemed discharge have been taken, this power has **not** been exercised in the new DMPO.

This means that although the applicant cannot appeal and then serve a deemed discharge notice (the deemed discharge notice must include a statement confirming that no appeal has been made (article 29(3)(b)), they can serve a deemed discharge notice and then appeal (whether before or after the deemed discharge notice has actually taken

[31] PPG ID 21a-043-20190723

[32] PPG ID 21a-045-20190723 – what information needs to be included is set out in Article 29 of the Town and Country Planning (Development Management Procedure) (England) Order 2015.

effect). However, by the time the appeal is looked at, the date in the deemed discharge notice is likely to have passed, so the appeal will almost certainly be dealt with as below.

J8. What is the effect on appeals?

Section 73 applications/appeals, to vary or remove a condition, would **not** be covered by the deemed discharge process as the provisions only apply to applications "for any consent, agreement or approval required by a condition or limitation attached to a grant of planning permission" (DMPO, article 27(1)).

An example is where a condition requires the approval of the LPA for a landscaping scheme before commencement of development. A s73 application would seek to vary/remove that condition whereas a s74A application would seek to establish that the developer is deemed to have complied with the condition.

There is potential for PINS to receive appeals where there are "deemed discharge" disagreements between the applicant and LPA, although it is expected that this would mainly arise in enforcement or LDC appeals. Some examples of issues that might arise are given below:

- disputes over whether the condition(s) is one to which s74A applies or comes within the exemption list of Schedule 6
- whether a deemed discharge notice was correct and validly made to the LPA
- whether the LPA gave notice[33] of their decision before the specified date
- in enforcement/LDC appeals there could be potential arguments that the development did not benefit from deemed discharge (same sort of disputes as above).

In such cases the Inspector would have to establish the situation in planning law terms and determine these issues on the basis of the evidence presented before deciding the appeal accordingly (in a similar way to prior approval cases).

J9. What powers do I have?

If the Inspector considers the condition in question **has deemed consent** (ie the deemed discharge notice has taken effect), he should make this clear in the decision:

- in planning cases the appeal should be dismissed with no further consideration of the merits of the details submitted as they already have the LPA's deemed consent.
- in enforcement/LDC cases the appeal will be determined on the basis that any development/details subject to the effective s74A application complies with the condition.

[33] Like prior approval applications there can be arguments about whether the notice has been given. There is statute in place with the effect that notices can be deemed to have been received in the normal course of post, even if they arrive late or never actually arrive, as long as the person giving notice can prove postage.

If it is considered on the evidence that there is **no deemed consent** the Inspector would go on to determine the appeal whether for planning/enforcement/LDC in the usual way.

J10. What decision template should I use?

There are no specific templates for appeals involving deemed discharge issues. The appeal will either be allowed or dismissed using the current relevant DRDS template for the case work type before you ie:

- PLG details pursuant (see annex H)
- PLG enf
- LDC appln

The Planning Inspectorate

Character and Appearance

Not yet updated to reflect December 2023 Framework (NPPF)
What's new since the last version Changes highlighted in yellow made 4 August 2015 (First edition)
Other recent updates

Contents

Information Sources

- National Planning Policy Framework – Chapter 12 Achieving well-designed places
- Planning Policy Guidance: Design
- Building for Life 12 – January 2015 update

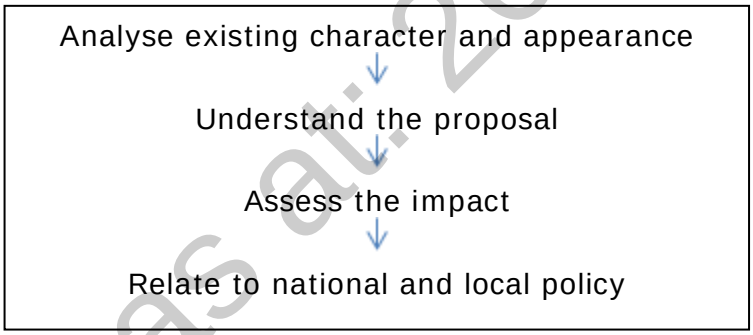
Broad Approach

1. Appearance can be described as the outward visible qualities, whereas character is the sum of all the qualities which distinguish an area.

2. Design should establish a strong sense of place, using streetscapes and buildings to create attractive and comfortable places to live, work and visit. It should respond to local character and history, and reflect the identity of local surroundings and materials, while not preventing or discouraging appropriate innovation.

3. Permission should be refused for development of poor design that fails to take the opportunities available for improving the character and quality of an area and the way it functions.

4. Summary approach: weave the reasoning on the proposal in with a description of how you assess the character and appearance, rather than setting out that assessment as a freestanding statement.



5. Establish the facts. Identify:

   - The site and its locality.
   - The proposed development type and form.
   - The relevant policies, designations and statutory constraints.

6. Assess the existing character and appearance of the surrounding area. The questions below provide a structured approach to assessing the design context for the proposal.

   - What makes the locality distinctive?
   - What gives it a sense of place?
   - What is the quality of the area?
   - Is it urban, suburban, rural?

7. Focus on those features relevant to the proposal under consideration.

    - Understand the design of the proposal.
    - What is its form and function?
    - Its physical and human relationship with the site?
    - Have the design values on which it is based been articulated, for example in a design and access statement? (refer to checklist below)
    - Is there adequate information (particularly for outline applications)?

    - Assess the effect of the proposal on its surroundings. Consider how the character or appearance of the place might be changed, were the proposal to go ahead.
    - Would this change be material?
    - Would it be harmful to the character or appearance?
    - Would it improve the quality of the area?

8. Assess the proposal against relevant design policies and designations

Analysis of Context

9. Aspects to consider:

    - Characteristics of area – topography/aspect/features, urban/rural, function/activity.
    - Quality of environment – good/indifferent/poor.
    - Strong sense of place/on the cusp of different areas.
    - Building line, skyline, set back, window lines.
    - Type of existing buildings – varied or uniform, density.
    - Patterns of buildings.
    - Space around/between buildings - continuity/gaps. 'Outdoor rooms'.
    - Scale: human, monumental, child-sized, engineering.
    - Proportions.
    - Sculptural quality/elegance.
    - Appearance – form, materials, height, massing.
    - Boundary treatments – heights and patterns of walls, hedges, fences, shrubs.
    - Landscaping – open spaces, verges, trees.

10. Try to identify local distinctiveness. Pick out what is relevant to the proposal.

11. Understand the character and appearance in relation to development plan policies, Supplementary Planning Guidance and conservation area assessments or village plan documents.

12. Also consider any form of Landscape Visual Impact Assessment, most commonly based on the third edition Guidelines for Landscape and Visual Impact Assessment (GLVIA) produced by the Landscape Institute, presented in support of the proposals by the appellant, or opposing them by the Council.

13. Take time to compare the methodologies applied and the scope of their assessments, including the identified viewpoints. Also consider the magnitudes of effect identified and the number and type of 'receptors' in such reports and then calibrate these against your own assessment based on what you saw on site.

Analysis of Proposal

14. Matters to consider:

    - How would it relate to its context?
    - Would it promote or reinforce local distinctiveness?
    - Does it include/omit factors of good design?
    - How would it relate to patterns of buildings or gaps?
    - Is it legible? (Where is the front door?)
    - Is it well articulated?
    - Would it sit comfortably/ be inclusive towards the public realm/ create a pleasant place?
    - Would it be elegant?
    - How would views be affected?
    - Would materials blend/contrast pleasantly?

Practical Points

15. Be sure you really understand the drawings. If not, take time to work out, or have pointed out at the visit, the position, height etc. of the proposal.

16. Remember the differing statutory duties regarding conservation areas, the setting of listed buildings, National Parks and AONBs, covered in other Chapters.

17. Take a robust approach to poor designs. Even inoffensive buildings may not be adequate if they fail to take the opportunities available for improving the character and quality of an area and the way it functions.

18. Do not attempt to impose architectural styles or particular tastes and do not stifle innovation, originality or initiative through unsubstantiated requirements to conform to certain development forms or styles. It is however proper to seek to promote or reinforce local distinctiveness.

19. Ensure that land is used efficiently without compromising the quality of the environment.

20. Consider cumulative effects; to date or in the future.

21. Think about whether conditions are needed to secure key aspects of the design: building materials, window details, external colour scheme. If it is a key matter in the design of the building, a feature or material may need to be the subject of a specific condition.

Common Land and Town and Village Greens

Updated to reflect December 2023 Framework (NPPF)

What's new since the last version

Changes highlighted in yellow were made 25 October 2023:

- Various amendments throughout the chapter
- New Annex A to set out relevant judgments.
- New Annex B to set out decision templates

Legislation, Guidance, Advice and Judgments

Legislation

- Law of Property Act 1925
- Commons Registration Act 1965
- Wildlife and Countryside Act 1981
- Countryside and Rights of Way Act 2000
- Commons Act 2006
- Equality Act 2010
- Human Rights Act 1998

Secondary Legislation

- The Works on Common Land, etc. (Procedure)(England) Regulations 2007
- The Deregistration and Exchange of Common Land and Greens (Procedure)(England) Regulations 2007
- The Commons Registration (England) Regulations 2014

Guidance

- Commons Act 2006 Explanatory Notes
- Part 1 of the Commons Act 2006: Guidance to commons registration authorities and the Planning Inspectorate, Defra, December 2014

Guidance on carrying out work on common land

- Common Land Consents Policy Defra Nov 2015
- Common Land Guidance Sheets 1 to 13

Guidance on Exchange of Common Land

- Common Land Consents Policy Defra Nov 2015

Advice

- Library
- Common Land Notes

Other Sources of Information

- Gadsden on Commons and Greens, Sweet and Maxwell (3rd edition published in 2020) - Hard copy available via in the Library
- A Common Purpose - A guide to Community Engagement for those contemplating management on Common Land

Judgments

- Knowledge Library
- Bailii

Abbreviations

Common Land Works Regulations	The Works on Common Land, etc. (Procedure) (England) Regulations 2007
December 2014 Guidance	Part 1 of the Commons Act 2006: Guidance to commons registration authorities and the Planning Inspectorate, Defra, December 2014
Defra	Department for Environment, Food and Rural Affairs
Deregistration and Exchange Regulations	The Deregistration and Exchange of Common Land and Greens (Procedure) (England) Regulations 2007
ITM	Inspector Training Manual
SoS	Secretary of State for Environment Food and Rural Affairs
The Regulations	The Commons Registration (England) Regulations 2014

Introduction

1. This part of the ITM relates only to common land and town and village greens casework in England. Wales will be producing their own version in due course to take into account differing guidance and Regulations. This chapter provides an insight into common land and town and village greens casework and provides pointers to other existing guidance. This document does not attempt to replicate/duplicate other guidance which is comprehensive and should be turned to for more detailed advice and information.

A background to Common Land and the establishment of registers of Common Land and Town and Village Greens

2. There are around 572,000 hectares of common land in England and Wales. Commons range from the large hill commons of Wales and the north and south of England to the smaller lowland heaths of the south east. Commons are of value to agriculture, for the landscape, wildlife, archaeological interest, and recreation. Access on foot to common land is available under the Countryside and Rights of Way Act 2000. Access on foot and horseback is also available on some common land under other legislation such as the Law of Property Act 1925. Figures from the Open Spaces Society suggest that there are around 3650 registered greens in England covering about 3300 hectares with some 220 greens in Wales covering 250 hectares.

3. The origins of common land probably date from the manorial system following the Norman conquest in 1066. Poorer quality land of the manor (waste land of the manor) which was not cultivated by the lord, or his tenants might have been made available to all of those who worked on the manor for pasturage (grazing), pannage (turning out of pigs to eat acorns), estover (taking timber, bracken, and heather), turbary (turf and peat), common in the soil (right to take minerals) or piscary (taking fish). Other common fields (open field strips) would be available for grazing once the harvest had been gathered.

4. Where there was recognised long standing use of land by local communities for recreation, sports and fairs the courts began to regard the use as customary and the land was recognised in law as a town or village green, protected from interference.

5. Interest in more profitable agricultural production encouraged landowners to improve the productivity of common land by inclosing it. This was achieved by agreement but mainly by private or public Inclosure Acts. This resulted in the landscape that we currently know. Contrary to popular belief these were times of conflict and civil unrest. The village of Laxton in north Nottinghamshire is the only village in England which still operates the pre-inclosure medieval 'open field' farming system with strips of land worked by the farmers of the village under the jurisdiction of a Court Leet (a manorial court which dealt with administrative matters of the manor and also certain minor offences) and jury.

6. Towards the latter half of the nineteenth century commons were recognised for their importance as open space with the introduction of legislation to protect common land rather than to inclose it. The 1922 Law of Property Act and subsequently the Law of Property Act 1925 introduced a right of access to certain commons, in particular commons in urban areas. However, with continuing concerns over the loss of common land and town and village greens a Royal Commission was established to consider the needs of owners of common land, commoners, and the public. In 1958 the Royal Commission recommended legislation to promote the registration of common land and town and village greens, public access, and improved management.

7. Arising from the Royal Commission the Commons Registration Act 1965 was intended to establish registers of common land, town and village greens and rights of common. The second recommendation of the Royal Commission, the provision of public access, was not given effect until the Countryside and Rights of Way Act 2000.

8. Under the Commons Registration Act 1965 Commons Registration Authorities were established (generally County Councils) to draw up registers of common land and town and village greens. Applications were invited for the provisional registration of common land, greens, and rights of common. Disputed provisional registrations were referred to a Commons Commissioner for their consideration and determination; the last hearing was held in 2010. Unopposed provisional registrations automatically became final without further consideration.

9. In practice the establishing of registers was complex and there were a number of inadequacies. Amongst other things land was wrongly registered or left unregistered and grazing rights were not correctly recorded. The provisions for correcting errors were limited and even where common land had clearly been wrongly registered it was held by the Court of Appeal in *Corpus Christi College (Oxford) v Gloucestershire County Council* [1983] QB 360, that there was no mechanism to remove wrongly registered land from the register. The Commons Registration Act 1965 provided that land eligible for registration but which was not registered was deemed no longer to be common land or a green and unregistered rights of common ceased to be exercisable.

10. Following a number of initiatives and Government consultation the Commons Act 2006 was established. Part 1 provides, amongst other provisions, for amendments to be made to the commons register to correct errors, for the recording of new town and village greens, and the exchange of common land. Part 2 enables commons councils to be established with management functions of agricultural activities, vegetation, and the exercise of common rights. Part 3 contains provisions to prohibit the carrying

out of certain works and allowing for consent to be given for any works. Part 4 provides miscellaneous provisions for the appropriate national authority to take action against activities, such as overgrazing, and for Local Authorities to take action to protect unclaimed common land and town and village greens and to make schemes for regulation of commons. Part 5 is supplementary and general in relation to the operation of the Act and consequential amendments.

11. The Part 1 provisions relating to sections 16 and 17 (deregistration and exchange) came into force across the whole of England on 1 October 2007 as did sections 38 and 39 for Part 2.

12. In October 2008 Part 1 was fully implemented in seven pioneer registration authority areas (Blackburn and Darwen, Cornwall, Devon, Herefordshire, Hertfordshire, Kent, and Lancashire). Since December 2014 all of Part 1 was rolled out to two other registration authority areas, known as the 2014 authorities, (Cumbria and North Yorkshire) Common Land Note 01/2014. Only in these nine registration authority areas is it possible to add common land and town and village greens to the registers.

13. Thus, in principle Part I of Schedule 6 to the Commons Act 2006 wholly repeals the Commons Registration Act 1965 and paves the way for the provisions of Part I for the maintenance and updating of the respective registers of common land and town and village greens. However, for the time being Part I has only been fully brought into force in the nine pioneer registration authority areas of England. In essence, therefore, the current position is that the Commons Registration Act 1965 has been repealed in its entirely only in the nine pioneer areas. In so far as the remainder of the registration authority areas in England (and the whole of Wales) is concerned (often referred to as the 1965 Authorities) the Commons Registration Act 1965 remains on the statute book.

14. The result of this is that for the foreseeable future two different regimes relating to common land and town and village greens will operate side by side in England. It cannot be said with any certainty that the full provisions of the Commons Act 2006 will apply to other local authority areas in the near future.

15. This means that in the non-pioneer areas registration authorities must continue to operate a curious and unsatisfactory combination of certain provisions of each of the Commons Registration Act 1965 and the Commons Act 2006.

16. However, since December 2014, under transitional provisions, applications to the 1965 Authorities have been possible, under section 19, or any of paragraphs 6 to 9 of Schedule 2, to the Commons Act 2006 for the deregistration of certain wrongly registered common land or town or village green. The 1965 Authorities will continue to deal with applications and maintain their registers in accordance with the Commons Registration Act 1965.

A background to Town and Village Greens

17. As noted above, land used by local communities for recreation, sports and fairs began to be recognised in law by the courts as town or village greens. There is no distinction between a ‘town’ or ‘village’ green.

18. Under section 22 of the Commons Registration Act 1965, as originally enacted, a town or village green means land which has been allotted by or under any Act for the exercise or recreation of the inhabitants of any locality or on which the inhabitants of any locality have a customary right to indulge in lawful sports and pastimes. An

insertion by the Countryside and Rights of Way Act 2000 provided that land which had been used for not less than twenty years by a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, for lawful sports and pastimes as of right, and either continues to be so used also falls within the definition of town or village green.

19. Section 15 of the Commons Act 2006 sets out how land may be newly registered as a town or village green. A mistake in the wording of Regulation 26(3) of the 2014 Regulations means that it is no longer possible for commons registration authorities to refer town and village green registration applications to the Planning Inspectorate (this mistake occurred as a result of the introduction of a rogue comma in the second clause of subsection (3) when new wording was inserted. This produced an ambiguity thereby distorting the meaning of the sentence. It has not subsequently been corrected). Planning Inspectors do not therefore determine applications for the registration of town and village greens. Commons registration authorities appoint independent Inspectors, usually barristers, to hold an inquiry (referred to a "non-statutory public inquiry"). and to make a recommendation to the commons registration authority as to whether or not the land subject to the application should be registered.

20. In considering some applications under Schedule 2 of the Commons Act 2006 (paragraphs 51 to 59, below) it may be necessary to consider whether the land was, or was not, a town or village green. Regard must be given to the definition set out in the Commons Registration Act 1965. Paragraphs 6.10.23 and 6.10.24 of the December 2014 Guidance provides some information on the interpretation of the term "locality" which for the 1965 Act is generally considered to be a parish, electoral ward or other local administrative area with which it is coextensive.

Commons Registers

21. Registration Authorities must hold separate registers of common land and town and village greens. A Register must have a general part which must include any arrangements which apply to the whole register such as agency agreements, straddling agreements and exempted land. For each register unit there must be a land section which records the land that the right can be used on and a rights section which records the details of the right of common. The register also includes a land section which records the ownership of the land at the time of its registration although this may not be accurate.

22. The register must have a register map showing the common land parcels and supplemental maps which show the land to which the rights are attached.

23. Case files will contain copies of the register and map although supplemental maps are not generally made available by the applicant or Commons Registration Authority.

Scope of Common Land casework and decision making

24. Applications considered by the Planning Inspectorate in accordance with the Commons Act 2006 include those under section 16 (deregistration and exchange of common land) and section 38 (applications for restricted works); these applications are made directly to the Planning Inspectorate. Applications under section 19 and Schedule 2 (correcting mistakes and omissions) are made to the Commons

Registration Authority. However, the following types of application/proposal (a proposal is an application the Commons Registration Authority makes to itself under section 19, paragraphs 2 to 9 of Schedule 2 and paragraph 2 of Schedule 3. The 1965 Authorities cannot make proposals) must be referred to the Planning Inspectorate if the Authority believes that there would be a conflict of interest if it were to decide the application/proposal and/or a person having a legal interest in the land objects to the application/proposal: -

- one made under S19(2)(a) of the 2006 Act seeking to correct a mistake made by the CRA (all authorities); or
- one made under S19(2)(b)-(e) of the 2006 Act seeking to correct any other mistake or to update the register (only the seven "pioneer" and the two "2014" authorities - Devon, Kent, Cornwall, Hertfordshire, Herefordshire, Lancashire, Blackburn with Darwen, Cumbria and North Yorkshire); or
- one made under Sch2 para 4 or 5 of the 2006 Act seeking to add land to, or alter from "common" to "green" in, the register (only the seven "pioneer" and the two "2014" authorities); or
- one made under Sch2 para 6-9 of the 2006 Act seeking to remove land from the register (all authorities).

25. The majority of applications are determined by way of written representations although hearings and inquiries are not uncommon. Most applications under section 38 are determined in-house in the office unless it is considered that a site visit is needed.

26. Notice of the application will have been served in accordance with the Common Land Works Regulations, the Deregistration and Exchange Regulations or The Regulations depending on the type of application. Notices will have also been posted on the land and in a local newspaper. The consultation exercise may result in representations from statutory bodies such as Natural England, national bodies like the Open Spaces Society and common rights holders and members of the public.

27. The Inspector will normally receive the case documentation around three weeks before the event. However, the Inspector may already have had some involvement with the case, for example providing times for any site visit or preparing directions or requirements (see paragraphs 63 and 65 below). The case will include a copy of the application and relevant maps, copies of any objections or representations and subsequent responses, a site visit health and safety questionnaire and copies of the commons register and any other relevant information.

28. Representations received after the set deadlines would not normally be acceptable given the position as set out in the procedure regulations. The regulations imply that the date specified for persons to make representations is not extendable. If you are in doubt discuss the individual circumstances of the case with your Inspector Manager.

29. Applications should always be determined in accordance with the relevant criteria set out in the respective part of the Commons Act 2006 and any other relevant legislation. Regard should also be given to any case law. However, whilst there is an increasing number of cases relating to the registration of town and village greens there is little relating specifically to Sections 16, 38, 19 and Schedule 2 of the Commons Act 2006. The majority of all applications determined by the Planning Inspectorate fall under Sections 16 and 38 with a smaller number under Schedule 2. There are very few applications made under section 19. There are also a limited number of applications made under other provisions such as Article 12 of the Ministry

of Housing and Local Government Provisional Order Confirmation (Greater London Parks and Open Spaces) Act 1967 and Section 23 of the National Trust Act 1971. Regard will need to be given to the relevant provisions in each case.

30. The test to be applied to the evidence is the civil test of the balance of probabilities. However, Inspectors are reminded of the need to be as consistent as possible in their interpretation of the statutory tests, case law, policies, and legal advice. The onus of proving the case in support of the correction of the register rests with the person making the application and it is for the applicant to adduce sufficient evidence to merit granting the application.

Consent for Exchange of Common Land and works on Common Land (Sections 16 and 38 of the Commons Act 2006)

31. The Commons Act 2006, along with earlier legislation on common land, enables government to safeguard commons for current and future generations to use and enjoy, ensure that the special qualities of common land, including its open and unenclosed nature, are properly protected and improve the contribution of common land to enhancing biodiversity and conserving wildlife.

32. The consent process seeks to ensure that that the stock of common land and greens is not diminished, and any use of common land or green is consistent with its status. Works on common land should only take place where they maintain or improve the condition of the common or where they confer some wider public benefit and are either temporary in duration or have no significant or lasting impact.

33. The Common Land Consents Policy Defra Nov 2015 sets out Defra's policy and provides guidance for applicants and the Planning Inspectorate. This is the key document for considering applications under sections 16 and 38 and provides information on the issues that need to be taken into account. However, every decision must be considered on its merits and may depart from the guidance where considered appropriate. The reasons for departing from the guidance must be made clear in any decision.

34. In determining applications for exchanges and works the following matters need to be considered (Sections 16(6) and 39(1) of the Commons Act 2006).

    a) the interests of persons having rights in relation to, or occupying, the land (and in particular persons exercising rights of common over it);

    b) the interests of the neighbourhood;

    c) the public interest;

    d) any other matter considered to be relevant.

    An application should not generally have a negative impact on the interests of rights holders, have a positive impact on the neighbourhood and no negative impacts on the interests of the public. If the tests are not met, then the application would normally be refused. Conflicting factors may need to be balanced against other factors.

35. The term "neighbourhood" is not defined by the Commons Act 2006. Paragraphs 6.10.28 and 6.10.29 of the December 2014 Guidance offer some pointers. However, this advice is more closely related to the creation of town and village greens. For the

purposes of section 38 the neighbourhood and its extent are not generally an issue of dispute, or a matter even raised in the application or objections. The decision maker will nevertheless need to put some thought into what constitutes the neighbourhood. The neighbourhood should be considered in its normal 'English' meaning. The case of *R (oao Cheltenham Builders Ltd) v South Gloucestershire District Council* EWHC Admin [2003] 2803. Offers some guidance on the definition.

36. The public interest is broken down into four components, nature conservation, the conservation of the landscape, the protection of public rights of access and the protection of archaeological remains and features of historic interest. If the application land falls within a National Nature Reserve or Site of Special Scientific Interest, section 28(G) of the Wildlife and Countryside Act 1981 applies. This imposes a duty on s28(G) authorities, which includes inspectors carrying out their duties: "*to take reasonable steps, consistent with the proper exercise of the authority's functions, to further the conservation and enhancement of the flora, fauna or geological or physiographical features by reason of which the site is of Special Scientific Interest*". In reaching a decision, Inspectors must balance this with our duties under sections 16 and 39 of the Commons Act 2006.

37. In making any application the applicant is required to send a copy of the notice of the application to, among other organisations, Natural England, Historic England, and the local authority archaeological service. The case file will usually include responses from these bodies where there are relevant issues particularly in respect of nature conservation, archaeological remains and features of historic interest.

38. Other matters considered relevant may be taken into account such as an application for works which are of public benefit, either nationally or more locally, but where the application does not serve to improve the common (5.14 and 5.16 of Common Land Consents Policy Defra Nov 2015). The decision maker will not necessarily rely on the applicant, supporters, and objectors to bring all such matters to their attention but will also rely on experience and insight to draw appropriate conclusions. However, in considering issues not raised by the parties the decision maker must consider issues of whether to do so accords with the Franks' Principles.

Issues relating specifically to section 16 applications

39. The primary objective in determining applications under section 16 is to ensure the adequacy of the exchange land in respect of the statutory criteria. Applicants must propose the provision of replacement land if the area of the release land is more than 200m². Even if the land to be deregistered is not more than 200m² the Secretary of State will usually expect land to be offered in exchange for the land being deregistered as his policy is not to allow the stock of common land and greens to diminish. Consent would not normally be granted where the replacement land is already subject to some form of public access, whether that access was available by right or informally, as this would diminish the total stock of access land available to the public. The Defra guidance note De facto and de jure access to the countryside provides some information on informal access.

40. The Countryside and Rights of Way Act 2000 provides for open access on registered common land but this right of access only applies to land shown on a map in its conclusive form. If land is exchanged then rights of access under the Countryside and Rights of Way Act 2000 will not apply to the replacement land as the land will not be shown on the conclusive map showing access land. The land will not be so shown until the maps are reviewed. Although a review of access maps took place in Wales in 2012, whereby replacement land subject to exchange before that date will be

shown on the access maps, no such review has been carried out in England. No indications have been given as to when such a review will take place. The fact that there will be no formal access to replacement land may have some bearing on the decision (see also Common Land Note 05/2014). Access could be provided under section 193 of Law of Property Act 1925 (see paragraphs 38 and 39 below)

41. If an application under section 16 is approved, then the decision maker will need to attach an Order of Exchange which identifies the land to be released and the replacement land (where replacement land is being offered, the Secretary of State has no power to attach conditions to a decision made under Section 16 of the Commons Act 2006, nor to an order to be made under Section 17.). The Commons Registration Authority will use this to amend their Commons Register.

42. Section 17(6) provides that where an Order of Exchange is made in respect of common land any relevant provision applying to the release land will cease to apply to the release land but instead will apply to the replacement land (Section 17(6) does not apply to town and village greens. So, if an Order is made any "relevant provisions" will cease to apply to the release land and therefore will not automatically transfer to the replacement land). There may be instances, where Section 193 of the Law of Property Act 1925 does not apply to the release land but it is considered appropriate that such rights should apply to the replacement land. That Section 193 rights apply to the replacement land is a request sometimes made by interested parties, particularly where there is concern that there will be no access rights under the Countryside and Rights of Way Act 2000 until the review of the access maps. If the decision maker considers that rights should apply to the replacement land, then they should seek the views of the parties. Common Land Note 01/2019 provides further information. It should be noted that access under Section 193 includes equestrian access.

43. In the event that Section 193 rights are to apply to the replacement land the Order of Exchange should include the following wording:

Section 193 of the Law of Property Act 1925 (public right of access for air and exercise) shall apply to the replacement land, and the commons registration authority shall enter a note of the application of the right to the replacement land in the land section of the register.

44. Two decisions under section 16 are worthy of note. The first Decision is Application Ref: COM 492 re Walton Heath Common, Surrey. The decision was upheld by Holgate J on a judicial review application. The second decision is Land at The Sands, Durham Application Ref: COM/3236108.

Issues relating specifically to section 38 applications

45. **S38 application Vs Section 16**: Arguments are often advanced that applications made under S38, particularly when they amount to 'exclusion' of land from a common, should be made under S16. Nevertheless, when an application is made under either regime it has to be considered on its merits in accordance with the relevant criteria as set out in the legislation and DEFRA's Common Land Consents Policy. Your decision must clearly set out sufficient reasoning if you depart from these policies.

46. In particular, it should be noted that an application for consent under section 38, irrespective of whether the applicant intended to make an application under section 16, must explore alternatives which may include replacement land. Further

information can be found in the judgement **Open Spaces Society** v Secretary of State for Environment, Food and Rural Affairs [2022] EWHC 3044 (Admin)

47. On 24 April 2017 the **Environmental Impact Assessment** (Agriculture) (England) (No. 2) Regulations 2006 (as amended by the Environmental Impact Assessment (Agriculture) (England) (No. 2) (Amendment) Regulations 2017) applied environmental impact assessments (EIA) to common land. From 16 May 2017 section 38 applications need to be assessed against the thresholds set out in Regulation 5 and Schedule 1. However, EIA and section 38 applications are separate controls and section 38 applications should be decided on their merits regardless of whether EIA screening and consent is required (Common Land Note 02/2017).

48. Consent under section 38 is equivalent to a planning consent and is subject to the assessment of plans and projects under Regulation 63(1) of the **Habitats and Species Regulations 2017** (the Habitats Regulations). The Habitat Regulations require competent authorities (usually the body which is responsible for granting consent) before granting consent for a plan or project, to carry out an appropriate assessment (AA) in circumstances where the plan or project is likely to have a significant effect on a European site, alone or in-combination with other plans or projects. The process of considering the effects from a plan or project on European sites is usually referred to as Habitats Regulations Assessment (HRA) although it should be noted that this term does not actually appear in the Habitats Regulations.

49. The AA must consider the implications of the plan or project for the European site's conservation objectives and the appropriate nature conservation body must be consulted. If the AA demonstrates that the integrity of a European site would be affected then consent for the plan or project can only be granted if there are no alternative solutions, the plan or project must be carried out for imperative reasons of overriding public interest (IROPI) and compensatory measures will be provided which maintain the ecological coherence of the Natura 2000 network.

50. Further information relating to HRA can be found in the Biodiversity Chapter of the ITM

51. Common land may be regulated by a local Act or subject to a scheme of management made under the Commons Act 1876, the Metropolitan Commons Act 1866 or the Commons Act 1899 (see Common Land Note 01/2017). Such schemes of management or local Act may allow restricted works to be carried out with or without consent from the SoS or even prohibit restricted works. In Defra's view there is nothing in the section 38 process which dispenses with the need to comply with other schemes. Neither does section 38 consent convey any permission to carry out works that may need consent under other legislation. It is for the applicant to resolve any conflict with other schemes of management and access under section 193 of the Law of Property Act 1925.

52. Section 39(3)(b) of the Commons Act 2006 provides that consent under section 38 may be granted subject to conditions. Common Land Note 2/19 provides advice on the use of conditions where temporary consent is to be granted. It should be noted that in respect of other conditions, such as requiring further actions by the applicant, neither the Commons Registration Authority nor the SoS are able to discharge the conditions. Consequently, no conditions should be imposed requiring the applicant to carry out actions which require the consent of another party. Whilst enforcement powers are available to the public under section 41 of the Commons Act 2006 this is done through application to the County Court and is potentially a difficult and

expensive course of action. It may therefore be unlikely that any contravention of a condition will be pursued.

53. An applicant may seek to vary or revoke a modification or condition attached to a section 38 consent under section 39(5) of the Commons Act 2006 (Common Land Guidance Sheet 7). Any application must be made within 3 months of the decision. If no such application is made and the applicant wishes to vary a modification, then a fresh section 38 application should be made.

54. Section 39 (7) confirms that "Consent may be given under section 38 (1) in relation to works which have been commenced or completed; and any consent so given has effect from the time of commencement of the works. Therefore, it is entirely possible that consent can be granted retrospectively.

55. Inspectors will be aware that they, and the Planning Inspectorate, are subject to the Public Sector Equality Duty under Section 149 of the Equality Act 2010 (See the Human Rights and Public Sector Equality Duty Chapter of the ITM). Where there is potential for any decision to affect a person with a protected characteristic then due regard must be given under the Public Sector Equality Duty. Such issues may be relevant in respect of applications under Sections 16 and 38 although it is unlikely to be an issue with applications under section 19 or Schedule 2. However, other than the issue addressed below (paragraph 46), Public Sector Equality Duty issues are not generally raised or at issue. However, where the decision maker is aware that such issues could be material the Inspector's decision should address the substance of the 'due regard' duty under Section 149 of the Equality Act 2010.

56. Many applications under section 38 involve the fencing of common land. Such fencing will have implications in respect of restricting public access in accordance with the status of the common (pedestrian and equestrian) or in respect of the obstruction of public rights of way. Access may be provided through the provision of structures such as gates and stiles. Where structures are erected across any public right of way then, whilst consent may be given under the section 38 regime, the applicant will also need to obtain consent from the relevant competent authority, usually the Highway Authority, under Section 147 of the Highways Act 1980 .

57. In determining any application, the decision maker should have regard to the effect of any structures on public access. Advice can be found in the Defra publication Authorising structures (gaps, gates & stiles) on public rights of way . It should be noted that this advice is now archived but still provides useful information on the issue. The document provides guidance for local authorities on compliance with the Equality Act 2010 in respect of the erection of structures on public rights of way. In essence the decision maker will need to be satisfied that any structure complies with the Equality Act 2010. Any structures should be specified to an appropriate standard such as the current British Standard BS5709 to show compliance with the Equality Act 2010. The Open Spaces Society and other such organisations often make representations that any structures should comply with the current version of BS5709. If no information is provided in respect of structures, then the decision maker may wish to contact the applicant, through the office, seeking further information.

Rectification (Applications under Section 19 and Schedule 2 to the Commons Act 2006)

58. Paragraphs 2 to 5 of Schedule 2 enable land to be added to the registers, or for land to be moved from the register of common land to the register of town or village greens, in recognition of past mistakes or omissions. Applications may be made to add common land or greens to the registers recognised under statute, to reinstate waste land of the manor and to transfer common land to the register of town or village greens where it can be shown it was incorrectly recorded in the register of common land.

59. Paragraphs 6 to 9 of Schedule 2 enable land to be deregistered where certain criteria are met where the land was built upon and has remained as such or where land which was not considered by a Commons Commissioner, and which can be shown not to have been common land nor green at the time of registration.

60. The Commons Act 2006 sets out the relevant provisions and the 2014 Guidance provides specific advice in respect of each relevant section. It is not intended to set out the relevant tests here in any detail as the 2014 guidance is the key document and provides comprehensive advice and information.

Additions to the Register

Paragraphs 2 and 3 of Schedule 2: registration of statutory common land or greens

61. Paragraphs 2 and 3 of Schedule 2 enable the registration of land which was specifically recognised by, or under, an earlier statute as being common land or a town or village green, but which was not registered under the Commons Registration Act 1965. There is no provision which allows these types of applications or proposals to be referred to the Planning Inspectorate.

Paragraph 4 of Schedule 2: re-registration of waste land of the manor

62. Paragraph 4 of Schedule 2 enables certain land to be registered as common land. An application may be made only in respect of land which is not registered as common land or a green, which is waste land of the manor (see paragraphs 7.3.12 to 7.3.16 of the 2014 guidance for advice on the definition of waste land of the manor) at the date of the application, and was provisionally registered as common land under the Commons Registration Act 1965, but was subsequently cancelled.

Paragraph 5 of Schedule 2: town or village green wrongly registered as common land

63. Paragraph 5 of Schedule 2 enables certain land registered as common land to be transferred to the register of town or village greens. Some greens were mistakenly registered under Section 4 of the 1965 Act as common land, typically because the land was subject to rights of common, and the applicants believed that such land was required to be, or wished to have it, registered as common land.

Deletions from the Register

Paragraphs 6 and 8 of Schedule 2: deregistration of buildings

64. Paragraphs 6 and 8 of Schedule 2 enable the deregistration of land which is covered by a building or the curtilage of a building. Typically, such land may have been

registered so as mistakenly to include cottages or gardens on or abutting the common or green. Qualifying land, now recorded on the register, would have been provisionally registered and would have been, and continues to be covered by a building or within its curtilage. The issue is restricted to whether land was included in error and the issue of the loss of common land is not at issue.

Paragraph 7 of Schedule 2: deregistration of land wrongly registered as common land

65. Paragraph 7 of Schedule 2 enables the deregistration of land which was wrongly registered as common land under the Commons Registration Act 1965. Land covered by a building or within the curtilage of a building is dealt with under paragraphs 6 and 8 of Schedule 2 (paragraph 53 above). Land is eligible for deregistration under this paragraph if it was provisionally registered as common land and its provisional registration was not referred to a Commons Commissioner. Land which was not common land or a town or village green, waste land of the manor or not inclosed under Section 11 of the Inclosure Act 1845 may be deregistered.

Paragraph 9 of Schedule 2: deregistration of land wrongly registered as town or village green

66. This provision is similar to paragraph 7 of Schedule 2 but applies to the deregistration of certain registered town or village greens. However, the criteria for deregistration of greens are slightly different. Land is eligible for deregistration under this paragraph if it was provisionally registered as town or village green under the Commons Registration Act 1965 and its provisional registration was not referred to a Commons Commissioner. It also must be shown that the land could not be used as a town or village green in the 20 years prior to its provisional registration and was not allotted for recreation and exercise.

Section 19 of the Acquisition of Land Act 1981

67. Where Local Authorities intend to appropriate land which is also common land a certificate under section 19 of the Acquisition of Land Act 1981 (the 1981 Act) is required. An application for a certificate is made to the Common Land Casework Team.

68. In most cases, an Inspector will inspect the site unaccompanied and make a preliminary appraisal of the merits of the proposal.

Curtilage

69. Curtilage is not defined in the 2006 Act but has been considered by the courts in various contexts, in particular that of planning and development legislation. From such cases, it appears that the question of whether land is considered to be within the curtilage of a building is a question of fact and degree. More information on the definition of curtilage can be found at paragraphs 508 to 530 of the Enforcement section of the ITM.

70. The word curtilage was considered in detail in respect of an application to deregister land at Blackbushe Airport and subsequently by the High Court. The Court held that the curtilage of a building as found in the legislation requires the land in question to form part and parcel of the building to which it is related. The correct question is whether the land falls within the curtilage of the building and not whether the land together with the building fall within, or comprise, a unit devoted to the same or equivalent function or purpose. The correct principle was that for property to qualify

as falling within the curtilage of a building, it must form part and parcel of that building (not whether the building forms part and parcel of some unit which includes that land, or whether those two items taken together form part and parcel of an entity or an integral unit). The question posed by the statute is whether land forms part of the relevant building, and thus falls within its curtilage. The 'curtilage' question is not correctly addressed by asking what is the curtilage of an institution or use which occupies some larger area than the building itself. See also Common Land Note 1/2020.

Section 19: correction of the register

71. Section 19 allows applications to correct certain errors in the registers. It does not confer a power to correct all errors in the registers. For example, there is no power to correct an error in the quantification of rights shown in the register, unless the error is attributable to a mistake by the registration authority.

72. Applications can be made under Section 19(2)(a) to correct a mistake made by the commons registration authority in making or amending an entry in the register. This, for example, might arise where an error was made by the registration authority in transposing onto the register map a plan supplied by an applicant. Applications under Section 19(2)(b) can address any other mistake, whether made by the registration authority or another person, provided that the amendment would not affect the extent of land registered as common land or as a town or village green, nor the quantification of any right of common. An example may be where a mistake may have been made in identifying the land over which a right was exercisable. Section 19(2)(c) can be used to delete duplicate entries. Section 19(2)(d) may be used to update any name or address, principally those which relate to the registered owner of a right held in gross (A right which is not attached to any land). It should not be used to update the details of any name or address entered in column 3 of the rights section of the register. Those details relate to the person who applied for the registration of the right, and not to any successor in title. Section 19(2)(e) deals with situations where the area of common land has been affected by accretion or diluvion (accumulation of deposits along a watercourse (accretion) the erosion of land (diluvion)).

Commons Inquiries and Hearings

73. The Planning Inspectorate has been appointed by the SoS to inquire into and determine applications and proposals referred to it by a Registration Authority. The Planning Inspectorate may arrange an inquiry, hearing, or site visit in order to do so. The procedure used will depend on the complexity of the application, the number of objections and representations and whether there is a need for the evidence to be tested by cross examination. The holding of inquiries, hearings and site visits is subject to the Common Land Works Regulations, the Deregistration and Exchange Regulations and The Regulations. These Regulations do not set out detailed procedures and inquiries and hearings are normally conducted in the spirit of the Town and Country Planning (Inquiries Procedure) (England) Rules 2000 (SI No 1624) and The Town and Country Planning (Hearings Procedure) (England) Rules 2000 (SI No 1626).

74. In general the procedures relating to inquiries, hearings and site visits for Common Land casework are operated in a similar manner to other events and you should be familiar with the ITM chapters on Inquiries, Hearings and Site Visits. You should be aware that the ITM chapters for inquiries and hearings relate to planning,

advertisement and listed building consent appeals, although the principles set out may have wider relevance to Common Land Casework. Inspectors should be aware of the sections of The Regulations relating to inquiries and hearings held in respect of the Commons Act 2006. It is also to be noted that the Inspector has the power to make an order that evidence should be taken on oath.

75. Inspectors should remember that the 'Franks' Principles, natural justice, human rights and the Code of Conduct also apply to Common Land casework.

76. If a large number of people want to attend an inquiry or the case is particularly complicated a pre-inquiry meeting may be held. The meeting will be held by the appointed Inspector to deal only with matters such as the order in which evidence is presented. The meeting will not deal with the merits of the application. Only where a pre-inquiry meeting is held can an Inspector issue directions. Such directions will include matters which might have been dealt with at any pre-inquiry meeting and will normally identify the parties wishing to speak at an inquiry, forms of evidence and deadlines for the submission of documents and the procedure at any inquiry.

77. Historical documents may be put before you and it is helpful (if applicable) that the relevant local acts with their actual provisions are before you. However, even without these supporting a conclusion can be drawn that, on the balance of probabilities, the Commissioner(s) concerned will have been granted by the local Act the powers that they purported to exercise.

78. Please note that the guidance set out in paragraph 11 of Rights of Way Advice Note No.3, with regards to legal submission and cross- examination, applies equally to those Inspectors who undertake Commons casework: *"Inspectors do not allow cross-questioning on legal submissions. Where there is disagreement on points of law, parties should make the relevant points in their own submission. In the event that an Inspector wishes to seek clarification of a legal point this will be done by engaging advocates from the parties equally in discussion. Persons representing themselves will have the same opportunity to make out their case as those who are professionally represented. Should a party include points of law in an evidential statement; the Inspector will draw all the parties' attention to this and remind them that cross-questioning on legal submissions is not allowed*."

79. Hearings may be held where the issues are less complex, and the evidence does not require testing by cross-examination. A hearing may also be held where any party wishes to make oral representations (under section 27(7) of the Regulations). It is considered the fairest option, rather than hear those representations on any accompanied site visit, is for those oral representations to be made in more formal surroundings.

80. There are no specific powers to issue directions in respect of hearings, or inquiries where a pre-inquiry meeting is not held, but it is normal to issue 'Requirements' which serve the same purpose as directions. Although Requirements have no statutory backing, they do assist in the efficient running of a hearing, or inquiry, and are generally complied with by the parties. Requirements will address such matters as the exchange of documents, identifying the main issues and the running of the event but other matters could be included if considered appropriate. Draft requirements are prepared in the office in liaison with the Inspector.

81. Inspectors should be aware that the party making the application will make the case for the approval of the application. Commons Registration Authorities will generally adopt a neutral stance at any inquiry or hearing and, if so, they will offer assistance at

the event, for example by producing records, they will take no part in the proceedings and not make a case for or against the application. Nevertheless, a Commons Registration Authority may support, or object to, an application and in these circumstances is likely to take an active part in the proceedings.

Costs (Schedule 2 Applications)

82. Regulation 37 of The Regulations provides for the award of costs in the determination of any application (but not a proposal), referred to the Planning Inspectorate under Schedule 2 and where a public inquiry (but not a hearing) is held. The potential award of costs should discourage unreasonable behaviour by any party to a determination, such as where an application proves to be unfounded, but objectors are put to the expense of attending an unnecessary inquiry. Nevertheless, it should seldom be appropriate to award costs in relation to an application. An award can only be made in respect of costs incurred by the applicant, or by an objector who took part in the public inquiry. An award can only be made against the applicant, an objector who took part in the public inquiry or any registration authority taking part in the public inquiry.

83. Inspectors should be familiar with the ITM chapter on Costs, although not all of the content will be relevant to Common Land casework.

Human Rights Act

84. Inspectors should be aware of the Human Rights and Public Sector Equality Duty chapter of the ITM. Further information may be found in Rights of Way Advice Note 19. It is possible that Human Rights issues may be engaged in respect of applications under sections 16 and 38. However, in respect of other applications the criterion for determination is limited to matters of fact and it is unlikely that Human Rights issues will be engaged.

ANNEX A - Common Land

Case Law Summaries (April 2023) in Alphabetical Order

The provision of case summaries below does **not** mean that there is no need to read the judgment in full where a case is relevant to a Decision!

A

B

Barkas *v North Yorkshire CC*
[2012] EWCA Civ 1373
Towns and Village Greens
Summary: Where members of the public use land for recreation 'of right' or 'by right' then that land cannot be registered as a town or village green in the basis of use by the inhabitants of a locality or neighbourhood within a locality as such use is not 'as of right'.
R (on the application of ***Barkas****) v North Yorkshire County Council & another*
[2014] UKSC 31 Supreme Court

Key Words: Registration of a town or village green; "as of right", Beresford judgment

Summary: In this case the land claimed as a town or village green was held and maintained by the Council for public recreation pursuant to s12(1) of the Housing Act 1985. Lord Neuberger found that "so long as land is held under a provision such as S12(1) of the 1985 Act, it appears to me that members of the public have a statutory right to use the land for recreational purposes, and therefore they use the land "by right" and not as trespassers, so that no question of user "as of right" can arise."

> ***Beresford*** was found to be wrongly decided by the House of Lords. In that case the city council and its predecessors had lawfully allocated the land for the purpose of public recreation for an indefinite period and therefore there was no basis upon which it could be said that the public use of the land was "as of right"; it was "by right". It was made clear by Lord Carnwath that this does not mean that land in public ownership can never be subject to the acquisition of village green rights. It depends on the facts and whether the land is held or laid out for public recreational use.

Bakewell *Management Ltd v Brandwood & others*
[2003] EWCA Civ 23, [2003] 1 WLR 1429, (HL)[2004] UKHL 14, [2004] 2 AC 519, [2004] All ER 305, [2004] 2 WLR 955,[2005] 1 P & CR 1

Summary: (see ROW Advice Note 12) illegal user cannot be user as of right. Concerned a challenge to the charging of exorbitant sums by owners of common land for vehicular access over that land to private houses. It is an offence to drive without lawful authority on common land (see particularly s34(1) RTA 1988). Judgment: this offence was not a bar to the acquisition of a vehicular right of way by long use. If it was open to a landowner to dedicate a highway to the public, then that dedication could constitute 'lawful authority' for the purposes of s34(1). *Robinson v Adair* (1995) overruled and *Hanning v Top Deck Travel Group Limited* (1993) 68 P & CR 14 overturned. May not be lawful authority if it leads to a public nuisance.

Note: s66 of the NERCA 2006 reverses the effect of the *Bakewell* decision: After the commencement date, no public right of way for mechanically propelled vehicles is created unless by an enactment or instrument or otherwise on terms that expressly provide for it to be a way for such vehicles; or by construction in exercise of powers conferred by any enactment, of a road intended to be used by such vehicles.

Betterment *Properties (Weymouth) Ltd v Dorset County Council*
[2012]EWCA Civ 250 Court of Appeal

Key Words: Registration of a town or village green; as of right; effect of signs and vandalism of signs; interruption of 20 year period by third party works; rectification of the register; delay.

Summary: Was user "as of right" when the reason witnesses had failed to see signs appeared to be because they were vandalised and removed on a regular basis shortly after they were erected. The Court of Appeal referred to the judge's finding at first instance that if left in place, the signs were sufficient in number and location and were clearly enough worded so as to bring to the actual knowledge of any reasonable user of the land that their use of it was contentious. The appeal judges concluded that there was a "world of difference" between the case where the landowner simply fails to put up enough signs or puts them in the wrong place and a case where perfectly reasonable attempts to advertise his opposition to the use of his land is met with acts of criminal damage and theft. It was not necessary to take legal action, put notices in local papers or distribute leaflets.

Where part of a site is fenced off by a third party (in this case to carry out drainage works) it is sufficient to disrupt the 20 years user of land where the fencing results in a physical ouster of local inhabitants from the land. However, the disruption must be inconsistent with the continued use of the land as a village green. If the 2 competing uses can accommodate each other, then time does not cease to run.

Delay is not a barrier to rectification of the register under s14 unless it is shown that other public and private decisions have been taken on the basis of the existing register which has operated to the significant prejudice of the respondents or other relevant interests. Sullivan LJ added that a delay of a decade would be capable of being a delay that was so long that prejudice could be inferred. See ***Paddico*** for further discussion of delay.

R v SSE ex parte ***Billson***
(QBD)[1998] 2 All ER 587, [1998] EWHC 189 (Admin), [1998] 3 WLR 1240, [1999] QB 374

Summary: concerns duration of no intention to dedicate; a revocable deed; rights over common land and the effect of s193 of the Law of Property Act 1925 which created public rights of air and exercise. In this case, users of the tracks in question were permitted to use them by way of a revocable deed, conferring rights of access, executed by the landowner but which had not been publicised. Use by the public was held to be by licence not as of right, even though they believed it was as of right. A lack of intention to dedicate need not be shown for the whole 20 year period

under s31 HA 1980 – the words 'during that period' do not mean throughout that period.

***Blackbushe Airport** Limited v Hampshire County Council and Secretary of State for Environment, Food and Rural Affairs*
[2021] EWCA Civ 398

Background

Yateley Common was registered as common land under the Commons Registration Act 1965. Blackbushe Airport is a general civil airport operated by Blackbushe Airport Ltd ("BAL"). Almost all of the operational area of the airport lies within the area of the common. BAL applied to the Council under paragraph 6 of schedule 2 to the Commons Act 2006 to de-register part of the airport as common land. The application land comprised approximately 115 acres of operational land, including the runway, taxiways, fuel storage depot, car parking, the terminal building (including control tower) and a café. The two-storey terminal building has a footprint of about 360m2 in one corner of the site.

Despite already being in operational use as part of an airport, the application land was provisionally registered as common land in 1965. The registration became final in 1975. In order for the application land to be deregistered depended upon whether it was "within the curtilage of a building" to fulfil paragraph 6(2).

BAL contended that the entire operational area of the airport formed part of the curtilage of the terminal building. The Inspector allowed the application. That decision was quashed by the High Court upon challenge by the Council. BAL appealed to the Court of Appeal.

Ground of Challenge
The issue turned on what is meant by the phrase "within the curtilage of a building."

Judgment
The High Court was right to hold that for the airport's operational land to fall within the "curtilage of a building", for the purposes of the Commons Act 2006, the land must form part and parcel of the building to which it is related.
The focus of the language of the statute is on the building which is deemed to have been wrongly registered as common land, and not the land.

The test is not whether the land and building together formed part of the same unit. The correct test is whether the land should be treated as if it were "part and parcel of the building". The difference is critical. It led to the Inspector addressing the wrong question, namely, whether the land and building together fell within the curtilage of the airport rather than whether the land fell within the curtilage of the building.

Although land does not have to be ancillary to the building in order to fall within its curtilage, the answer to the question whether it is ancillary to the building was highly relevant. The correct question was whether the application land is ancillary to the terminal building, which it is not. It is ancillary to the functioning of the airport.

The ambit (or physical extent) of the curtilage of a building in any given case will be a question of fact and degree. In this instance, the extensive area of operational airfield could not properly be described as falling within the curtilage of the relatively small terminal building.

Implications
The judgment provides clarification of the meaning of the phrase "*the curtilage of a building*" in the Commons Act 2006.

Whether the test is satisfied in any given case will depend on the facts and circumstances of that case.

***Box** Parish Council v Lacey*
[1979] 1 All ER 113

Box Hill Common was formerly land of the manor of Box. A local authority provisionally registered the land under the Commons Registration Act 1965, to which the owner objected. The Commons Commissioner found that the land was severed in 1878, was "open, uncultivated and unoccupied" and refused to confirm the registration.
On the owner's appeal it was held allowing the appeal, that on a true construction of ss.1(1)(a) and 22(1) "waste land of a manor" could not be include land which had ceased to be connected with the manor before the date of registration.

NB This case has received mixed judicial comment and was not followed in *Hants CC v Milburn*, below.

*R(oao) **Cheltenham** Builders Ltd v South Gloucestershire District Council*
(QBD) [2003] EWHC 2803 (Admin)

Summary: concerns the registering of land as a village green, as of right. Held, having regard to *Sunningwell*, the question must be not whether those using the land knew that their use was being objected to or had become contentious, but how the matter would have appeared to the landowner, since in cases of prescription the presumption arises from the latter's acquiescence.

Church Commissioners for England v Hampshire County Council *[2014] 1 WLR 4555 (CA)*
C erected a fence on land in July 2003 and G applied in June 2008 to register the land as a village green under CA2006 but failed to comply with the regulations. C objected that the corrected version was filed out of time, but the High Court held that an application for a village green could, as a matter of law, be corrected, and if done within a reasonable period the corrected application would take effect from the filing date. Since C knew of the application and had assisted G by providing the map, C could not complain that the long period before the application was corrected was unreasonable.

C appealed to the Court of Appeal, that any corrected application should take effect from its filing date; and the judge had been wrong to find G had complied with all the requirements for applications within a reasonable opportunity. His appeal was dismissed, it being:

Held: (1) Regulation 5(4) suspended a registration authority's right to reject a non-compliant application until a reasonable opportunity had been given to put an application in order. If, within that reasonable opportunity, the errors were corrected, the original application had full force and effect; the Regulation had, therefore, to be retrospective.

(2) (by a majority) The question whether an applicant had had a reasonable opportunity to correct errors was a question of law for the court to be conducted on the concrete facts of the case. The vital point was that C was not aware that G had been given adequate extensions which had not been complied with for no good reason so a reasonable opportunity had been exceeded in the instant case.

C

D

E

Edwards v Jenkins
[1896] 1 Ch 308

Summary: Application was made to register a customary right over land by the inhabitants of several adjoining or contiguous parishes, to exercise the right of recreation over land situate in one of the parishes.

Held: The 'locality rule' applied. The inhabitants of the contiguous Surrey parishes of Beddington, Carshalton and Mitcham could not have a customary right of recreation over land in Beddington: the rule is 'One parish, one custom.'
This case was mentioned in the House of Lords decision of Oxfordshire CC v Oxford City Council as the "strictest application of the locality rule".

In para 11 of *Oxfordshire* the court noted that "In *New Windsor Corpn v Mellor [1975] Ch 380, 387* Lord Denning MR thought that Kekewich J had gone too far. "So long as the locality is certain, that is enough". But there is no doubt that the locality rule was the pinch-point through which many claims to customary rights of recreation failed to pass."

R on the application of ***Goodman*** *v Secretary of State for Environment Food and Rural Affairs (Eastern Fields)*[2015] EWHC 2576 (Admin)

Key Words: Registration of a town or village green; "as of right" and "by right"; implied appropriation; implied permission.

Summary: The court held that, for there to have been an implied appropriation, there must be evidence that the local authority met the statutory test for appropriation set out in s122 of the Local Government Act 1972. ***Barkas*** is not authority for the proposition that land can be appropriated without any evidence of the council having considered whether the land was no longer required for the use for which it was held and that appropriation can be deduced from the management of the land.

The inspector found that visits of a circus and funfair would have alerted a reasonable person to the fact that they were using the land by permission and therefore by virtue of an implied licence. However, the judge found that the situation was different to that in ***Mann*** by reason of the land being in public rather than private ownership. Also the nature and character of the events, although charged for, were at least arguably not inconsistent with a public entitlement to use the land.

For there to be an implied permission there must be evidence that the landowner intended to grant permission. In the case of land owned by a local authority the

fact that the intervening acts of the landowner were of themselves for the purposes of public recreation is also relevant. Eastern Fields was publicly owned and the types of events that the public were charged for were not inconsistent with a public entitlement to use the land.

F

G

H

Hampshire County Council *v Secretary of State for Environment, Food and Rural Affairs & Ors*

[2020] EWHC 959 (Admin)

Yateley Common was registered as common land under the Commons Registration Act 1965. It was requisitioned in WWII and derequisitioned in 1960. Blackbushe Airport is mostly in the area of the common. Its owner (BAL) applied to remove part of the airport as common land from the register.

The application land was c46.5 ha of operational land including runway, taxiways, fuel storage depot and terminal building (including control tower), the Bushe Café and car parking.

On appeal against the Inspector's decision to allow its de-registration, the issue was whether the whole of the airport's operational land (which included the application land) fell within "the curtilage of a building". The Secretary of State and BAL's case that under the 2006 Act the test was: is the land and building associated in such a way that *they* comprise part and parcel of the same entity, a single unit, or an integral whole, was rejected.

Held: "The curtilage of a building" as found in this legislation requires the land in question to form part and parcel of the building to which it is related. The correct question is whether the land falls within the curtilage of the building and not whether the land together with the building fall within, or comprise, a unit devoted to the same or equivalent function or purpose."

Analysing the case law on curtilage, the correct principle was that for property to qualify as falling within the curtilage of a building, it must form part and parcel *of that building* (not whether the building forms part and parcel of some unit which includes that land, or whether those two items taken together form part and parcel of an entity or an integral unit (which would be akin to the approach used to identify a different concept, the 'planning unit').

The question posed by the statute is whether land forms part of the relevant building, and thus falls within its curtilage. The 'curtilage' question is not correctly addressed by asking what is the curtilage of an institution or use which occupies some larger area than the building itself (*Dyer* and *Barwick*).

On the material available to the court, it was likely that the application to de-register anything other than the terminal building and the Bushe Café would have been rejected.

Attorney General v ***Hanmer***
(1858) 2 LJ Ch 837
Summary: Waste land of the manor was defined as "the open, uncultivated and unoccupied lands parcel of the manor…other than the demesne lands of the manor".

('Of the manor' was held by the court in the *Hazeley Heath* case to mean land which is or was formerly connected to the manor). Demesne land is that owned and occupied by the lord of the manor for his own purposes.

I

J

K

L

R (oao) ***Laing Homes*** *Ltd v SSEFRA ex parte Buckinghamshire CC*
[2003] EWHC 1578 (Admin), [2003] 3 PLR 6

Summary: concerns registering land as village green and whether s13(3) and s22 of the Commons Registration Act 1965 are compatible with Article 1 of Protocol 1 to the European Convention on Human Rights (see also *Oxfordshire*, RWLR s.15.3 pg135).

Lancashire County Council *v Secretary of State for the Environment, Food and Rural Affairs and Janine Bebbington*

2016 EWHC 1238 (Admin)

Summary: An application to register five areas of land adjacent to Moorside Primary School in Lancaster as a TVG, was granted for four of the areas. The local education authority applied for judicial review of a decision by a planning inspector that the majority of the site near a school should be registered as a TVG.

Held: Application refused. When considering an application to register land as a town or village green pursuant to the Commons Act 2006, there was no requirement for the "locality" to have existed in the same form for the required period of 20 years' user. It was sufficient to define the area in relation to which a "significant number of the inhabitants" of the locality or neighbourhood could be judged. There was no express or implied requirement for a geographical spread of users from throughout the locality.

This decision was appealed to the Court of Appeal and allowed, but on appeal to the Supreme Court was confirmed as correct (see below)

*R (on the application of **Lancashire County Council**) (Appellant) v Secretary of State for the Environment, Food and Rural Affairs and another (Respondents) R (on the application of NHS Property Services Ltd) (Appellant) v Surrey County Council and another (Respondents)*
[2019] UKSC 58

Summary: The Supreme Court confirmed the High Court decision (above) and dealt with another appeal concerning Leach Grove Wood in Leatherhead, sought to be registered as a green, relying on 20+ years use. The inspector recommended refusal but Surrey County Council registered the land. The owners sought JR and the registration was quashed on the basis that SCC failed to consider statutory incompatibility.

The central issue in both cases was the interpretation and application of the statutory incompatibility ground of decision identified in the majority judgment in the Supreme Court in *R (Newhaven Port & Properties Ltd) v East Sussex County Council [2015] UKSC 7.*

Held (by majority): *Newhaven* authoritatively interpreted the Act to mean that where land is acquired and held for defined statutory purposes by a public authority, the Act does not enable the public to acquire rights over that land by registering it as a green, where such registration would be incompatible with those statutory purposes. Here there is an incompatibility between the statutory purposes for which the land is held and use of that land as a green and therefore the Act is not applicable.

So, in the Lancaster case, the rights claimed pursuant to the registration of the land as a green are incompatible with their use for education purposes, including as playing fields or for constructing new school buildings. LCC did not need to show they are currently being used for such purposes, only that they are held for such statutory purposes.

> Similarly, in the Surrey case the issue of incompatibility has to be decided by reference to the statutory purposes for which the land is held, not by reference to how the land happens to be used at a particular point in time.

Leeds Group plc v Leeds City Council
[2010] EWHC 810 (Ch) [2011] EWCA Civ 1447

Summary: In the High Court, the case concerned an application to register land as a town or village green (TVG). After an inquiry conducted by a barrister (the Inspector) it was recommended that the land should be registered as a TVG and this was done. The Inspector had concluded that the land had been used in accordance with section 22(1A) of the 1965 Commons Act (the Act), as amended by the 2000 CROW Act by inhabitants of a 'neighbourhood' within a 'locality'. The use was not contested but the definitions of 'locality' and 'neighbourhood' were.

The 'locality' accepted by the Inspector in this case had ceased to be a recognised administrative unit in 1937. Nevertheless, it was found that it was still reasonable to regard Yeadon as a 'locality' when considering the definition of a 'neighbourhood within a locality', particularly as the intention of parliament in adding this limb to the legislation in 2000 was to make it easier to register TVGs. It was also found in this case that, even if Yeadon was not the appropriate 'locality', the parish of the local church could be considered as the relevant 'locality'.

With regard to use by the inhabitants of a 'neighbourhood', it was contended that this should be a single 'neighbourhood' whereas in this case inhabitants of two 'neighbourhoods' had used the area. However, it was held that the Act now only requires a significant number of the inhabitants of any neighbourhood within a locality to have used the area and there is no reason why the existence of two or more qualifying 'neighbourhoods' is fatal to an application to register a TVG. It was further argued that the 'neighbourhoods' referred to in this case could not reasonably be so regarded as they lacked cohesiveness as they contain a mixture of properties and lack community facilities. However, it was held that the use of the term 'neighbourhood' in the legislation was deliberately imprecise and the 'neighbourhoods' identified had linking streets with similar names and a preponderance of post-war semi-detached housing and could be regarded as relevant 'neighbourhoods'.

It was also contended that, as the criteria accepted in this case relied on use of the land by the inhabitants of a 'neighbourhood' within a 'locality' which was only added to the Act in 2000 and came into operation in 2001, use before this date should not count as being 'as of right'. Prior to this a landowner would have had no reason to resist recreational use of the land as he would have known it could not lead to a successful claim for it to be registered as a TVG. This was dealt with quite briefly and held with reference to the case of *Oxfordshire v Oxford City Council [2006]* that there was no indication in the legislation that parliament intended the operation of the amendment to be postponed.
The application for judicial review was dismissed.

In the Court of Appeal the question of retrospectivity regarding whether the amendment to the definition of TVG introduced by the Countryside and Rights of Way Act 2000 (the 2000 Act) should be construed so as to postpone its operation until 2020 was pursued further. The wording of the 2000 Act states that the relevant section (98) should come into operation two months after the passage of the 2000 Act, that is on 30 January 2001. As the amendment also required use of land to have continued up to the date of an application it was not entirely retrospective – a landowner had a minimum period of 2 months in which to prevent public use continuing.

It was again held that there is nothing in the legislation to suggest that parliament intended operation of the new provision to be postponed as was being claimed. Consideration was also given to whether the relatively short 2 month period between passage of the 2000 Act and it coming into operation in this respect was enough to be fair to landowners. It was decided that on balance it was, particularly as recreational use would have had to have taken place for nearly 20 years at least previously and a landowner would have had little realistic means of knowing whether users were inhabitants of a 'locality' or a 'neighbourhood within a locality' during this period and therefore might have been expected to be aware that there was a possibility that an application for his land to be registered as a TVG might be made.

The appeal was dismissed.

(see also R (Oxfordshire and Buckinghamshire Mental Health NHS Foundation Trust v Oxfordshire County Council)

Littlejohns and another v Devon County Council and another [2016] EWCA Civ 446

Summary: the Littlejohn family had grazed sheep and cattle on common land adjacent to their farms in Devon for decades. The common land was registered under the scheme introduced by the Commons Registration Act 1965 (CRA1965).
The family failed to register their rights of common by the July 1970 deadline under CRA1965 but continued to use the land and in 2010 applied to register rights of common by prescription based on usage since 1970.

Held: It is not possible to register new rights of common over land already registered as common land. The CA confirmed Devon CC's refusal of the application on the basis that a right of common could not be created by prescription over land that had been registered as common land under the CRA 1965. By sections 6(1) and (2) of Commons Act 2006, a right of common can no longer be created by prescription (save in the three areas of land excluded from the operation of Part I of the Act by section 5, namely the New Forest, Epping Forest and the Forest of Dean); only by express grant or enactment.

M

***Massey** & Drew v Boulden & Boulden*
[2002] EWCA Civ 1634, [2003] 1 WLR 1792, [2003] 1 P & CR 22, [2003] 2 All ER 87

Summary: concerns vehicular access to a property over a track across a village green. Held: on the true construction of s34(1) of the RTA 1988, the phrase 'land of any other description' meant what it said and was not to be construed *ejusdem generis* with the words 'common land' and 'moorland'. The wording of s34(1)(a) was unambiguous. Prescriptive rights for vehicular access can only be acquired over 'land forming part of a road' ie a highway or a road over which the public already has access in accordance with the definition in s192 – that is access to a track in the sense of using it as a road.

Seemingly vehicular rights can be acquired through post-1930 long user, provided that certain conditions are met.

Hampshire County Council and others v Milburn
[1990] 2 All ER 257

Summary: Land is 'of the manor' if it can be shown to be land which is, or was, formerly connected to a manor.

Mattingley Green and Hazeley Heath in Hampshire had been registered as common land not subject to rights of common. Both parcels formed part of the waste land of their respective manors. In 1981 the defendant, lord of both manors, conveyed the two manors and all manorial rights, reserving to himself the ownership of the two parcels. He then applied for deregistration of both parcels as common land since they were no longer waste land of the manor. The judge ordered the council to accede to the application.

Held, allowing the appeal, that "waste land of a manor" meant "land now or formerly waste land of a manor" or "waste land of manorial origin." The Royal Commission on Common Land (1958 Cmnd.462) had recommended that land which was common land at the date of the passing of the Commons Registration Act should remain so. Parliament could not have intended that "waste land" should cease to be affected by the 1965 Act by reason of a voluntary act of the owner for the time being.

Box Parish Council v Lacey [1980] Ch. 109, [1978] 5 WLUK 170 disapproved).

N

Newhaven *Port and Properties v East Sussex CC*
[2012] EWHC 647 [2013] EWCA Civ 276
Town and Village Greens

> **Summary**: Land which is a tidal beach and inundated by water for periods of the day can still be registrable as a town or village green if use by the inhabitants of a locality or neighbourhood within a locality satisfies the remaining tests under s15 of the 2006 Act or its predecessors. Use of the land may be regulated by byelaws, but for those byelaws to render use precarious, the landowner has to take some overt action to communicate the existence of those byelaws to the public – in the same way that *Godmanchester* requires overt acts on the part of the landowner to communicate a lack of intention to dedicate.

R (on the application of ***Newhaven*** *Port and Properties Limited) v East Sussex County Council and another*

[2015] UKSC 7 Supreme Court

Key Words: registration of a beach as a town or village green; rights over the foreshore; byelaws; implied licence; statutory incompatibility.

Summary: The case concerned the decision of East Sussex County Council to register an area of beach at Newhaven as a village green. The Supreme Court judgment covers 3 issues.

1. Whether the public have an implied licence to use the foreshore for sports and pastimes and therefore user could not have been “as of right”. The Court concluded that the issue was of wide-ranging importance but declined to determine it as it was not necessary to do so for the purpose of determining the appeal. The lower courts had found that members of the public used the beach for bathing “as of right” and not “by right” and the Supreme Court proceeded on the assumption that that was correct.

2. Whether byelaws gave the public am implied licence to use the beach. The relevant byelaws were not displayed and the majority of the Court of Appeal considered that it was essential that any licence be communicated to the inhabitants before it could be said that their usage of the land was “by right”. However, the Supreme Court referred to the judgment in ***Barkas*** and found that it is not always necessary for a landowner to draw attention to the fact that use of the land is permitted for use to be treated as “by right”. They concluded in this case that there was a public law right, derived from statute, for the public to go on the land and use it for recreational purposes and that this amounted to an implied licence. Accordingly, use was “by right” rather than “as of right”.
3. Statutory incompatibility. The Supreme Court held that where Parliament has conferred on a statutory undertaker (in this case the harbour authority) powers to acquire land compulsorily and to hold and use that land for defined statutory purposes (in this case a working harbour), the 2006 Act does not enable the public to acquire by user rights which

are incompatible with the continuing use of the land for those statutory purposes. However, the ownership of land by a public body, such as a local authority, which has statutory powers that it can apply in future to develop land, is not of itself sufficient to create a statutory incompatibility.

O

The **Open Spaces Society** v Secretary of State for Environment, Food and Rural Affairs

[2022] EWHC 3044 (Admin)

Key words: consideration of alternatives; interpretation of the policy wording.

Summary
This was an application by the Open Space Society ("OSS") for judicial review of a planning inspector's decision (on behalf of the Secretary of State) to allow the construction of a road over common land at Barking Tye, Suffolk pursuant to s.38 of the Commons Act 2006 (the "Commons Act"). The proposed road was to provide access to a development which had been granted planning permission by the LPA. The access road covered 70 m2 of common land, less than the threshold in s.16 Commons Act: this section provides for commons land to be de-registered and requires replacement land to be allocated where the de-registered land exceeds 200 m2.

The Claimant argued that the Inspector had misdirected himself in his interpretation of Defra's Common Lands Consents Policy (2015) ("CLCP") and in relation to consideration of alternatives under s.16 notwithstanding that the application was made solely under s.38 Commons Act. The principles in *Trustees of the Barker Mill Estates v Test Valley Borough Council* [2016] were applied by the Judge: to raise a genuine case of misinterpretation of policy a party must identify (1) the policy wording said to have been misinterpreted, (2) the interpretation of that language adopted by the decision maker; and (3) how that interpretation departs from the correct interpretation of the policy wording. The Judge found that the proper interpretation of the CLCP in respect of alternatives was that an application for consent under s 38 Commons Act, irrespective of whether the applicant intended to make an application under s.16, must explore alternatives which may include replacement land.

The applicant had submitted to the Inspector that it was not realistic to ask for alternatives to be considered as planning consent for the development including access had already been granted. However, the Court held that this does not exempt an applicant from the need to obtain other consents such as consents under the Commons Act.
Two alternatives to the proposed access had been advanced by OSS (and Natural England). The Court held that these were so obviously material as to require that they be taken into account by the Inspector. Since the Inspector did not require the applicant to address the alternatives and explain how they were not available or appropriate, his consideration of the two alternatives proposed by OSS and NE was found to be inadequate.

Despite this, the Judge found that there was no public law error made by the Inspector since his decision contained sufficient reasons to explain why he had departed from the CLCP - in the special circumstances of the case the applicant did not need to explore the alternatives as would otherwise be required.

***Oxfordshire** County Council v Oxford City Council & Robinson*

[2004] EWHC 12 (Ch), [2004] Ch 253, [2005] EWCA Civ 175

(HL)[2006] UKHL 25, [2006] 2 AC 674, [2006] 4 All ER 817

Summary: (Trap Grounds) the HL held that in the case of an application to have land registered as a village green under the Commons Registration Act 1965, the 20 year period of user required must precede the date of application, not (as held in the CA) the date of registration (see also *Laing Homes* and *Redcar*, RWLR s15.3 pg 135).

*R (**Oxfordshire and Buckinghamshire Mental Health NHS Foundation Trust** v Oxfordshire County Council*
[2010] EWHC 530 (Admin)

Summary: (RWLR 15.3 p167-174) concerns town and village greens and the erection of prohibitory notices and meaning of neighbourhood and locality.

On notices, the fundamental question is what the notice conveyed to the user; evidence of actual response to the notice by actual users is relevant; the nature, context and effect of the notice must be examined; it should be read in a common sense not legalistic way; would more actions/notices by the landowner have been proportionate to the user; subjective intent of what a notice is to achieve is irrelevant unless communicated to the users or a representative of them. (see also *Leeds Group plc v Leeds City Council*)

P

***Paddico** (267) Limited v Kirklees Metropolitan Council & others*

[2011] EWHC 1606 Ch [2012] EWCA Civ 262

Town and Village Greens – on the meaning of locality

*Jonathan Adamson v **Paddico** (267) Limited (1), Kirklees Metropolitan Borough Council (2), William John Magee (3), Thomas Michael Courtney Hardy (4)*

[2012] EWCA Civ 262 (Court of Appeal)

Key Words: Registration of a town or village green; rectification of the register; effect of delay; meaning of “locality”.

Summary: The appeal related to an Order that the register of town and village greens be amended by the deletion of the entry relating to Clayton Fields. The case confirmed Lord Hoffman’s observations in the *Oxfordshire* case and Vos J at first instance that a “locality” within s22 (1) of The Commons Registration Act 1965 and s98 of the Countryside and Rights of Way Act 2000 is singular and must have legally significant boundaries.

The Edgerton Conservation Area although having legally significant boundaries, could not be a “locality” as the boundaries were legally significant for a particular statutory purpose and defined by characteristics relating to special architectural or historic interest rather than by reference to any community of interest on the part of its inhabitants. Furthermore, the Conservation Area was not in existence for the full 20 year period.

The CoA also found the Vos J conclusion relating to the “predominance” test to be correct and confirmed that it is necessary to show that the land is used predominantly by the inhabitants of a defined locality.

The longer the delay in seeking rectification the less likely it is that it will be just to order rectification of the register. In this case the delay of over 12 years was "by the standards of any reasonable legal process, so excessive as to make it not just to rectify the register". Carnwath LJ would regard "a delay beyond the normal limitation period of 6 years as requiring very clear justification".

However, the CoA was not unanimous on the issue with Patten LJ dissenting on the basis that the registration had been found to be unlawful and there was no injustice in the Appellant being deprived of rights to which he was never entitled. See ***Betterment*** for further discussion of delay.

R v Oxfordshire County Council & others ex parte ***Sunningwell*** *Parish Council*

(HL)[1999] UKHL 28, [2000] 1 AC 335,[1999] 3 WLR 160, [1999] 3 All ER 385

Summary: (see ROW Advice Note No.6) concerns town or village greens, customary right, land used predominantly by villagers for informal recreation, whether belief in existence of right exclusive to villagers necessary, use for sport and pastimes, whether landowner's toleration prevents the claim. Held: "as of right" that is without force, secrecy or licence, did not require a subjective belief in the existence of that right; and toleration by the landowner was not fatal to a finding that user had been as of right.

Hoffman LJ said: To require an enquiry into the subjective state of mind of the users would be contrary to the whole English theory of prescription, which depends upon acquiescence by the landowner giving rise to an inference or presumption of a prior grant or dedication. For this purpose the actual state of mind of the road user is plainly irrelevant ... in my opinion the casual and, in its context, perfectly understandable aside of Tomlin J in *Hue and Whiteley* (1929) has led the courts into imposing upon the time-honored expression 'as of right' a new and additional requirement of subjective belief for which there is no previous authority and which I consider to be contrary to the principles of English prescription ... user which is apparently as of right cannot be discounted merely because, as will often be the case, many of the users over a long period were subjectively indifferent as to whether a right existed, or even had private knowledge that it did not.

Q

R

S

T

Taylor *v Betterment Properties (Weymouth) Ltd*

[2012] EWCA Civ 250

Towns and Village Greens

TW Logistics Ltd v Essex County Council and another

[2021] UKSC 4

This case concerns land registered as a Town or Village Green (TVG). The land in question is a 200m2 area of concrete close to the water's edge in a working port. It was

registered on the grounds that it had been used by local inhabitants for lawful pastimes for at least 20 years. The landowners, TW Logistics Ltd (TWL) challenged the registration in the High Court and the Court of Appeal and lost, having failed to establish, among other things that use had not been 'as of right' or did not constitute lawful pastimes.

The main issues before the Supreme Court were the contention by TWL that registration would criminalise the continued use of the land for commercial purposes and that the quality of use by local inhabitants was not such as to justify registration. It was accepted as a matter of fact that the land had been used during the relevant 20 year period for the passage of commercial vehicles, their loading and unloading and the occasional storage of materials as well as for walking and informal recreation by local inhabitants. However, commercial activity was not intense and did not discourage people from using the land for recreation nor did their activity adversely affect commercial use.

The issue of criminalisation was said to arise as a result of Victorian statutes which restricted various activities on TVGs and/or more recent legislation such as the Road Traffic Act (RTA) and Health and Safety legislation. These matters were dealt with at some length but, very briefly, it was found that it would not be unlawful for TWL to continue to use the land in the same manner as they had during the relevant 20 year period as the Victorian statutes and the RTA referred to activities carried out without lawful authority and would not apply. Health and Safety legislation was said to apply irrespective of the registration of the land as TVG and was unaffected by it.

With regard to the quality of use, it was claimed that TWL could not be regarded as having accepting that the public were asserting a right to use the land for recreation because they continued to use the land for commercial purposes inconsistent with such a right nor could they be thought to acquiesce to public use if it was likely to render their own use unlawful. It was held that in fact public use had taken place 'as of right' that is without force, secrecy or permission and had been perfectly obvious to the landowner. The fact that members of the public were said to have moved out of the way of commercial activities on occasion did not change this.

The appeal was dismissed.
(NB: The situation in this case differs from that in *R(Newhaven Port and Properties Ltd) v East Sussex County Council and another [2015] UKSC 7* in that TWL was not subject to any statutory obligations to operate as a port which were inconsistent with registration as a TVG).

U

V

W

R (oao) **Whitmey** v The Commons Commissioners
[2004] 3 WLR; [2004] EWCA Civ 951

Held: The Commons Commissioners had no jurisdiction to hear disputed applications for the registration of land as a town or village green under the Commons Registration Act 1965 s.13. The resolution of such disputes by registration authorities did not infringe the Human Rights Act 1998, as the courts had a wide power to review registration decisions under s.14(b) of the Act.

Disputes as to whether land should be registered as a green under s.13 could be determined: (1) by an application to court at any time for a declaration that a property was

or was not a village green for the purposes of the Act; (2) the registration authority could itself determine the matter, and (3) following registration, a dissatisfied party could apply to court for rectification of the register under s.14(b). If a dispute was serious and the registration authority had itself to make a decision on the application, it should firstly receive the report of an independent legal expert who had at their request held a non-statutory public inquiry. The registration authority had power to amend a register under s.13 even if there was a dispute as to the factual basis for an application.
X
Y
Z

ANNEX B - Decision Templates

Example of decisions can be found at Common land notices and decisions - GOV.UK (www.gov.uk)

1. **To register waste land of a manor as common land in the register of common land**

The Planning Inspectorate

Application Decision

Hearing held on 29 March 2023

By xx
An Inspector appointed by the Secretary of State for Environment Food and Rural Affairs pursuant to Regulation 4 of The Commons Registration (England) Regulations 2008 to determine the application.

Decision date:

Application Ref: xx
Register Unit: CL xx
Registration Authority: xx

- The application, dated xx, is made under Schedule 2 paragraph 4 of the Commons Act 2006 ('the 2006 Act').
- The application is made by xx.
- The application is to register waste land of a manor as common land in the register of common land.

Decision

1. The application is approved / refused and the land shown on the plan attached to this decision shall / shall not be added to the commons register.

Preliminary matters

2.

The Application Land

3.

Main Issues

4. The main issue is whether the land is waste land of a manor and whether before 1 October 2008:

(a) the land was provisionally registered as common land under section 4 of the Commons Act 1965 ("the 1965 Act");
(b) an objection was made in relation to the provisional registration; and
(c) the provisional registration was cancelled in the circumstances specified in sub-paragraphs (3), (4) or (5) of the Commons Act 2006. Sub-paragraph (5), on which the applicant relies, requires that the person on whose application the provisional registration was made requested or agreed to its cancellation (whether before or after its referral to a Commons Commissioner).

5. It is seldom possible to prove definitively that a particular parcel of land is of a manor. But it should be sufficient to show that, on the balance of probabilities, the land lies in an area which is recognised to have been, or still be, manorial, and that there is no convincing evidence to the contrary.

Reasons

(adapt to the circumstances of your case)

Whether the land had been provisionally registered as common land under section 4 of the Commons Registration Act 1965

6. .

Whether an objection was made to the provisional registration

7. .

Whether the provisional registration was cancelled as set out in sub-paragraph (5)

8. .

Whether the land is waste land of a manor

9. .

Whether the land fulfils the character of waste land of a manor

10. .

Other Matters

11. .

Conclusion

12. .

Inspector

INSPECTOR

The Planning Inspectorate

Application Decision

by xx

an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs

Decision date:

Application Ref: xx
xx Common
Register Unit No: CLxx

Commons Registration Authority (CRA): xx County Council

- The application, dated xx, is made under Section 38 of the Commons Act 2006 (the 2006 Act) for consent to carry out restricted works on common land.
- The application is made by xx.
- The works comprise xx.

Decision

1. Consent is granted* / refused for the proposed works *(in accordance with the application dated xx, subject to the following conditions (for example):

   1) The works shall begin no later than 3 years from the date of this decision.

   REASON: To provide certainty to users of xx Common.

   2) Any temporary fencing shall be removed within one month of completion of the works.

   REASON: To retain access for Commoners, public and livestock across Brockeridge Common.

Preliminary Matters

1. .

Main Issues

2. I am required by section 39 of the 2006 Act to have regard to the following in determining this application:

   I. the interests of persons having rights in relation to, or occupying, the land (and in particular persons exercising rights of common over it);

   II. the interests of the neighbourhood;

III. the public interest. (Section 39(2) of the 2006 Act provides that the public interest includes the public interest in; nature conservation; the conservation of the landscape; the protection of public rights of access to any area of land; and the protection of archaeological remains and features of historic interest); and

IV. any other matter considered to be relevant.

Reasons

The interests of those occupying or having rights over the land

3. .

The interests of the neighbourhood and the protection of public rights of access

4. .

Nature Conservation

5. .

Landscape

6. .

Archaeological Remains and Features of Historic Interest

7. .

Other matters

8. .

Conclusion

9. .

Inspector

INSPECTOR

2. Application to De-register and exchange common land or village green land

The Planning Inspectorate

Application Decision

Site visit made on xx
by xx
appointed by the Secretary of State for Environment, Food and Rural Affairs

Decision date:

Application Ref: xx
Register Unit No. CL xx / VG xx
Registration Authority: xx

- The application, dated xx, is made under Section 16 of the Commons Act 2006 to deregister and exchange part of the xx common / xx Village Green.
- The application is made by xx.
- **The release land** comprises xx.
- **The replacement land** comprises xx.

Summary of Decision: The application is granted / refused.

Preliminary matters

1. Section 16(1) of the Commons Act 2006 ('the 2006 Act') provides, amongst other things, that the owner of any land registered as Common Land / a town or village green may apply for the land ('the release land') to cease to be so registered. If the area of the release land is greater than 200m^2 a proposal must be made to replace it with other land to be registered as Common Land / a town or village green ('the replacement land'). However, even if the land to be deregistered is not more than 200m² the Secretary of State will usually expect land to be offered in exchange for the land being deregistered so that stock of Common Land / village greens will not diminish.

Main Issues

3. I am required by Section 16(6) of the 2006 Act to have regard to the following in determining this application:

(1) The interests of persons having rights in relation to, or occupying, the release land;

(2) The interests of the neighbourhood;

(3) The interests of the public (Section 16(8) of the 2006 Act provides that the public interest includes the public interest in nature conservation, the

conservation of the landscape, the protection of public rights of access to any area of land, and the protection of archaeological remains and features of historic interest); and

(4) Any other matter considered to be relevant.

4. I will also have regard to published guidance (Common Land Consents Policy Guidance, November 2015, Defra) in relation to the determination of applications under Section 16.

The application

.

The release land

.

The replacement land

5. .

Representations

6. .

Reasons

Interests of persons having rights in relation to, or occupying, the release land

7. .

Interests of the neighbourhood

8. .

Public interest

Nature conservation

9. .

Conservation of the landscape

10. .

Recreation and access

11. .

Archaeological remains and features of historic interest

12. .

13. *Other relevant matters*

14. .

Conclusions on the public interest

15. .

Conclusions

16. *The overriding factor is to protect and maintain commons and village greens and to ensure the overall stock of such land is not diminished. The main objective in reaching my conclusions is to ensure the adequacy of the proposed exchange in terms of the statutory criteria. Having regard to my findings, the guidance referred to above, written representations received and the merits of the proposed deregistration, I conclude that the application should / should not be granted, and an Order of Exchange should be / should not be made.*

Inspector

Inspector

Order

On behalf of the Secretary of State for Environment, Food and Rural Affairs and pursuant to section 17(1) and (2) of the Commons Act 2006, **I HEREBY ORDER** xx Council, as commons registration authority for the area in which the release land is situated:

- to remove the release land from its register of town and village greens, by amending register unit VG xx to exclude the release land;

Schedule – the release land

Colour on plan	Description	Extent
Outlined in Red	xx	xxm^2

- to add the exchange land to its register of town and village greens, by amending register unit VG 14 to include the exchange land;

Schedule – the exchange land

Colour on plan	Description	Extent
Outlined in Green	xx.	xxm^2

Inspector
Inspector

3. Application to correct a mistake made by the registration authority in making or amending an entry in the register of common land

Application Decision

By xx

An Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs

Site Visit / Hearing / Inquiry held: xx
Decision date:

Application Ref: xx address
Register Unit: CLxx
Registration Authority: xx

- The application, dated xx, is made under Section 19(2)(a) of the Commons Act 2006 ("the 2006 Act") to correct a mistake made by the registration authority in making or amending an entry in the register of common land.
- The application is made by xx.

Decision: The application is Granted / Refused.

Preliminary Matters

1. .

The Application Land

2. The application land comprises xx.

Main Issue

3. The application has been made in accordance with the provisions of section 19(2)(a) of the 2006 Act. This section provides that a CRA may amend its register of common land to correct a mistake made by the CRA in making or amending an entry in the register.

4. The main issue is whether the entry made by the CRA in the land register for CL147 was mistaken and requires correction.

5. The onus of proving the case in support of the correction of the register rests with the person making the application and it is for the applicant to adduce sufficient evidence to merit granting the application. The burden of proof is the normal civil standard, namely, the balance of probabilities.

Reasons

Background to application

6. .

Whether a mistake has been made by the Commons Registration Authority in making an entry in the register

7. .
8. .

Other matters

9. ..

Conclusions

10.. Having regard to these and all other matters raised, I conclude that the application should be granted / refused.

Inspector

INSPECTOR

The Planning Inspectorate

Community Infrastructure Levy (CIL): Examination of a Charging Schedule

Not yet updated to reflect December 2023 Framework (NPPF)

What's new since the last version

Changes made 3 October 2019:

- Amendments to the CIL Regulations which came into force on 1 September 2019 and the accompanying updates to the PPG.
- Changes to the Viability chapter of the PPG published on 9 May 2019.

Contents

Introduction

1. This guide provides an overview for use by Inspectors in order to assist them in carrying out their role consistently and effectively when undertaking examination of a charging schedule in England.

2. This guide does not provide policy advice, nor does it seek to interpret Government legislation or guidance. In addressing policy issues Inspectors must have regard to the statutory guidance produced by MHCLG. In the event that there appears to be a discrepancy between the advice in this guide and the statutory guidance, the latter will be conclusive as the original policy source.

Reform of developer contributions

3. Following the Government's review of developer contributions carried out in 2017-18, amendments to the CIL Regulations came into force on 1 September 2019. The changes are intended to make developer contributions simpler, more flexible and transparent. An explanation of all of the changes is given in PINS Note 12/2019. The main changes as they affect CIL examinations are:

    a. the statutory requirement for consultation on the preliminary draft schedule, the 4-week minimum time period for consultation on the draft charging schedule, and the requirement to advertise consultations and the CIL examination in a local newspaper have all been removed to make it faster and simpler to introduce or amend a CIL (Regulation 3);
    b. to make developer contributions more flexible, the restriction on the pooling of funds for a single infrastructure project from no more than five S106 planning obligations has been removed, and both CIL and S106 obligations can now be used to fund the same item of infrastructure (Regulation 11);
    c. to introduce greater transparency, the Regulation 123 list has been replaced with an annual infrastructure funding statement, to be produced by charging authorities, setting out the infrastructure list and how charging authorities have used both S106 and CIL developer contributions to fund infrastructure (Regulation 9)

4. The PPG chapter on CIL was also updated on 1 September to incorporate the amended Regulations and provide advice on their application. The implications of these changes for CIL examinations are considered below in paragraphs 64-68 and 72-74.

Relevant policy and guidance

5. The Community Infrastructure Levy is no longer specifically referenced in the versions of the National Planning Policy Framework from February 2019 onwards (NPPF). However, the Planning Practice Guidance (PPG) on the Community Infrastructure Levy (chapter 25) and Viability (chapter 10) provide

detailed guidance on the purpose of CIL, its relationship to the development plan, how rates should be set, the evidence required to support them and the basis for the examination of CIL charging schedules.

6. The Viability chapter was comprehensively revised in July 2018 to reflect changes to the assessment of viability in the NPPF and further updated in May 2019. The CIL chapter was updated in March 2019 to reflect changes arising from the NPPF and updated again in September 2019 to address the changes introduced by the CIL Amendment Regulations.

5. The following is a summary of the key points of national policy and guidance which set the context for CIL examinations:

   a. Plans should set out the contributions expected from development and such policies *(i.e. defining the contributions)* should not undermine the deliverability of the plan (NPPF, paragraph 34);

   b. CIL is a tool for local authorities to help deliver infrastructure to support the development of the area [1], which can include pooling a proportion of CIL receipts to fund cross-boundary strategic infrastructure[2];

   c. CIL charging schedules should be consistent with and support the implementation of up-to-date Plans[3];

   d. The policy requirements for development contributions in Plans should be informed by an assessment of viability that takes into account all relevant policies, including the cost implications of the CIL[4];

   e. The total cumulative cost of all relevant policies and developer contributions *(including CIL)* should not undermine the deliverability of the plan[5];

   f. The CIL is expected to have a positive effect on development across the local plan area *(i.e. by helping to fund new infrastructure)* and CIL rates should strike an appropriate balance between securing the additional investment for infrastructure needed to support development and its potential effect on the viability of developments[6]

Relevant legislation

6. The following are the key statutory instruments for CIL:

Planning Act 2008: sections 205 -225

[1] *PPG Paragraph: 001 Ref ID: 25-001-20190901 – What is the Community Infrastructure Levy?*
[2] Paragraph: 159 Ref ID: 25-159-20190901 – *Can groups of charging authorities pool a proportion of their Community Infrastructure Levies?*
[3] *PPG Paragraph: 011 Ref ID: 25-011-20190901 – What is a charging schedule?*
[4] PPG Paragraph: 001 Ref ID 10-001-20190509 – *How should plan makers set policy requirements for contributions from development?*
[5] *PPG Paragraph: 002 Ref ID 10-002-20190509 – How should plan makers and site promoters ensure that policy requirements for contributions from developers are deliverable?* and Paragraph 166 Ref ID: 25-166-20190901 – *How does the Community Infrastructure Levy relate to other developer contributions?*
[6] *PPG Paragraph: 010 Ref ID: 25-010-20190901 – How are Community Infrastructure Levy rates set?*

Planning Act 2008: Explanatory Notes

Localism Act 2011: Section 114-115

Localism Act 2011: Explanatory Notes

The Community Infrastructure Levy Regulations 2010 No. 948

Explanatory Memorandum to the Community Infrastructure Levy Regulations 2010 SI 2010 948

Explanatory Memorandum to the Community Infrastructure Levy (Amendment)(England) (No2) Regulations 2019 SI 2019 1103

Starting point: essential and other reading

7. The starting point for any Inspector undertaking CIL examination work must be to consider fully:

   a. Part 11 of the Planning Act 2008 (as amended by paragraphs 114 and 115 of the Localism Act 2011);

   b. the 2010 CIL Regulations (as amended) and the 2011, 2012, 2013, 2014, 2015 and 2019 CIL Amendment Regulations (the consolidated version of the 2010 Regulations above incorporates the amendments arising from these instruments);

   c. The Planning Practice Guidance (PPG) on CIL and Viability;

   d. The CIL Reports – Key themes briefing at Annex 2.

The examiner (Section 212)

8. The charging authority [not the Secretary of State] appoints the examiner, who is 'independent' and 'suitably qualified and experienced'

9. With the examiner's agreement, the charging authority can appoint an assistant e.g. development economics advisor, although in practice such appointments are unusual.

10. PINS will recover the examiner's costs plus expenses from the charging authority.

Content of a charging schedule (Regulation 12)

11. The charging schedule must name the charging authority and contain the rates (set at pounds per square metre) at which CIL is to be chargeable in the authority's area.

12. It must provide an explanation of how the chargeable amount will be calculated.

Differential rates (Regulation 13)

13. A charging authority may set differential rates:

    - For different zones in which development would be situated;
    - By reference to different intended uses of development;
    - By reference to the intended gross internal area of development;
    - By reference to the intended number of dwellings or units to be constructed or provided under a planning permission.

14. A charging authority may set supplementary charges, nil rates, increased rates or reductions.

15. Where differential rates are set by zone, the charging schedule must identify the location and boundaries of zones (Regulation 12(2)(c) requires this to be on an Ordnance Survey map which shows National Grid lines and reference numbers).

'An appropriate balance' (Regulation 14)

16. In setting rates (including differential rates) in a charging schedule, a charging authority must strike an appropriate balance between the desirability of funding from CIL (in whole or in part) the actual and expected estimated total cost of infrastructure required to support the development of its area, taking into account other actual and expected sources of funding; and the potential effects (taken as a whole) of the imposition of CIL on the economic viability of development across its area. Further guidance is given in the PPG[7].

Submission of the charging schedule

17. Regulation 19 outlines the documentation that the charging authority must submit to the examiner:

    a. the draft charging schedule,
    b. a statement setting out the number of representations made in relation to the draft charging schedule and a summary of the main issues raised, or a statement that no representations were made,
    c. copies of any representations made in relation to the draft charging schedule
    d. where the draft charging schedule was modified following publication, a statement of modifications and
    e. copies of the relevant evidence

18. Hard copies of all the above must be provided. Those documents specified under a, b and d above must also be sent electronically as should those specified under c and e if practicable to do so.

[7] PPG Paragraph: 009 Reference ID: 25-009-20190315 – *How does a section 73 application which amends a planning condition affect the levy liability?*

19. Preferably at the same time, but as soon as possible after submission, the charging authority must:

    - place a copy of the Regulation 19 documents at its principal office and other places it considers appropriate
    - It must publish the draft charging schedule (a), the representations statement (b) and any statement of modifications (d) on its website.
    - As far as it is practicable to do so, the other documents (c) and (e) specified in Regulation 19 should also be placed on the website.
    - A statement that the Regulation 19 documents are available for inspection and where they can be seen must also be published on the website.

20. At the same time the charging authority must notify those persons who requested to be informed that the draft charging schedule has been submitted to the examiner.

21. Charging authorities must notify all persons who have made a representation on the draft charging schedule of the place, date and time of an examination session at least 4 weeks before it takes place and must publish those details on its website (Regulation 21(8) as amended by the 2019 Amendment Regulations). In addition:

    - Anyone who wishes to be heard in relation to any modifications made after the draft charging schedule was first published (under Regulation 16) must inform the charging authority in writing within 4 weeks of the draft charging schedule being submitted to the examiner (Regulation 21(5)).
    - Charging authorities must notify those persons of the place, date and time of an examination session at least two weeks before it takes place (Regulation 21(11)).

Statement of modifications

22. The charging authority can modify a draft charging schedule after publication by means of a statement of modifications, under Regulation 16. Regulation 19(4) requires that, where a draft charging schedule has been so modified, the charging authority must do the following before submitting the draft charging schedule for examination:

    - send a copy of the statement of modifications to each of the consultation bodies invited to make representations at the preliminary draft stage (those consultation bodies specified under Reg 16 as amended by the 2019 Amendment Regulations);
    - publish the statement of modification on its website.

23. Regulation 21(3) requires that where a charging authority modifies a draft charging schedule after it is published in accordance with Regulation 16, any person may request to be heard by the examiner in relation to those modifications. This right to be heard applies only in relation to the modifications made to the draft charging schedule as set out in the statement of modifications (Regulation 21(4).

24. The examiner will need to examine the charging schedule as amended by the statement of modifications, regardless as to whether or not the hearings have taken place. Therefore, the examiner will not need to recommend what was in the statement of modifications as a change in their report.

The Purpose: examiner checklist

25. Has the charging authority complied with the procedural requirements in the 2008 Act and the 2010 Regulations (as amended)? The 2010 Regulations have been amended on several occasions subsequently (see paragraphs 6 and 7 above), and examiners should ensure that they use an up to date consolidated version of the Regulations.

26. Has the draft charging schedule been supported by appropriate available evidence - economic viability and infrastructure planning?

27. Has the draft charging schedule been informed by the charging authority's draft list of the infrastructure it intends will be, or may be, wholly or partly funded by CIL (Reg 14(5))?[8]

28. Are the proposed rate(s) informed by and consistent with the evidence?

29. Does the evidence show that the proposed rate(s) would be consistent with the relevant plan and that the combined effect of the CIL and other developer contributions would not undermine the deliverability of the plan?[9]. Note that the 'relevant plan' includes any strategic policy including those set out in any Spatial Development Strategy[10].

30. Does the draft charging schedule comply with Regulation 12(2) as to how Charging Zone Maps are presented? It is important that the exact extent of the boundaries of the zones must be clear so that an owner or developer can see into which zone any particular property falls.

Examination procedure

31. The Inspectorate will normally apply principles and practices of local plan examinations in all appropriate respects.

[8] NB. The 2019 CIL Amendment Regulations state that from 31 December 2020 the 'infrastructure list' will be a charging authority's Infrastructure Funding Statement.

[9] Paragraph 011 Reference ID: 25-011-20190901– *What is a charging schedule?*; *Paragraph: 040 Reference ID: 25-040-20190901 – What is in the examiner's report?*; and Paragraph: 166 Reference ID: 25-166-20190901 – *How does the Community Infrastructure Levy relate to other developer contributions?*
[10] PPG Paragraph: 012 Reference ID: 25-012-20190901 – *What is a 'relevant plan'?*

32. The charging authority will need to appoint a Programme Officer.

33. The examiner will do an initial paper based examination, to include identifying main issues and questions.

34. A pre hearing meeting (PHM) will not be necessary (in most cases).

35. Hearing sessions will be conducted as a roundtable discussion, similar to a Local Plan examination hearing.

36. Anyone who has made a representation has a right to be heard (section 212(9)). However, this right is qualified by Regulation 21(12). At the discretion of the examiner other parties may be heard.

The report

37. The examiner should prepare a clear and concise report which will be subject to our quality assurance process before being sent to the charging authority for 'fact check'.

38. The report may recommend that draft Charging Schedule be approved, rejected or approved with specified modifications[11].

39. The examiner must give reasons for the recommendations.

40. The charging authority must publish the recommendations and reasons.

Examiner's recommended modifications

41. Where necessary to ensure that the schedule is consistent with the evidence an examiner can recommend a modification to lower a CIL rate, without the need for consultation, so long as this would not come as a surprise to the charging authority nor result in selective assistance (under European Commission regulations, which includes conferring of a selective advantage to any undertaking.[12] However, there may be occasions where even a lower rate should be subject to consultation through a statement of modifications. This might be the case, for example if it is based on new evidence and there might be persons who could reasonably argue that their interests would be prejudiced if they were denied an opportunity to comment.

42. Where there are representations arguing that the rates proposed by the charging authority are too low to strike the appropriate balance between funding infrastructure and ensuring the viability of development (which is sometimes argued by Parish Councils), it might also be inappropriate to reduce rates without consultation.

43. A modification to increase a CIL rate should only ever be recommended following public consultation. Such modifications should generally be avoided but may be appropriate when necessary to ensure consistency with the

[11] PPG Paragraph: 040 Reference ID: 25-040-20190901 *What is in the examiner's report?*
[12] – PPG Paragraph 022 Ref ID: 25-022-20190901 – *Can differential rates be set?*

evidence, where the charging authority supports the modification and where the alternative would be to not approve the schedule.

44. If the charging authority has prepared a statement of modifications in accordance with the Regulations, the schedule being examined is the one which was submitted for examination as modified by the statement. Consequently, it is not necessary to recommend modifications made through a statement of modifications in the examiner's report.

Localism Act: Sections 114-115

45. Section 114 directly relates to the examination, the recommendations of the examiner and adoption of the charging schedule and came into force on 16 November 2011. It amends sections 211 – 213 of the Planning Act 2008 and also inserts a new section 212A.

46. It makes clear that "appropriate available evidence" must inform a charging schedule and provides regulation making powers to further define that term if necessary.

47. It removes the requirement on the charging authority to specifically make a declaration of compliance with the charging schedule drafting requirements on submission to the examiner. However the examiner must check for such compliance.

48. It limits the binding nature of examiner's detailed recommendations, giving the authority scope to decide exactly how to correct non-compliance with statutory drafting requirements. In order to adopt, the authority is required to correct any failure to comply specified by the examiner but has more discretion about how to do this e.g. it may depart from the detail of recommendations on mix of charges for different classes of development.

49. Section 115 concerns wider CIL regime changes and has been commenced (on 15th January 2012) by separate order.

50. It clarifies that CIL may be spent on the ongoing costs of providing infrastructure (e.g. improvement, replacement, operation, maintenance) as well as its initial provision.

51. It provides regulation making powers to require authorities to pass a specified proportion of CIL receipts to another party, such as a parish council where new development takes place. It provides that such a proportion may be spent on infrastructure or other matters addressing demands that development places on the area. It further provides that regulations may allow a specified proportion of CIL spent by an authority in an un-parished area to be spent on infrastructure or other matters to address those demands.

Practical handling of the examination

52. Examinations are normally conducted in essentially the same way as for local plans, although not all need hearing sessions. For those that do, normal duration is one or two days.

53. The PPG advises that the charging authority should sample an appropriate range of types of sites across its area reflecting the nature of sites and type of development proposed for allocation in the plan (see paragraphs 019 of the CIL chapter of the PPG and 003 and 004 of the Viability chapter).

54. The PPG also emphasises the importance of considering strategic sites and suggests site specific viability assessments be undertaken for those that are critical to delivering the priorities of the Plan.[13] So, the issue for the examiner is whether the sampling and the sites tested in the viability assessments reasonably reflects the planned development that is likely to come forward.

Viability Assessment

55. To date the methodologies and terminologies used in economic viability assessments have varied considerably. However, paragraph 58 of the NPPF now states that all viability assessments, including any undertaken at the plan making stage *(usually CIL and Local Plan Viability Assessments are undertaken together)*, should reflect the recommended approach in national planning guidance, including a series of standardised inputs. Paragraph 020 of the CIL chapter of the PPG also states that charging authorities should use evidence in accordance with the PPG on viability.
56. The relevant guidance on viability assessments is contained in the updated version of the Viability chapter of the PPG, published in July 2018 alongside the revised NPPF and updated in May 2019. Unlike local plan examinations there were no transitional arrangements in the NPPF for CIL examinations.
57. Where a submitted CIL charging schedule has been prepared under the original NPPF, the examiner may consider (if necessary having sought the views of the charging authority) whether any viability assessment prepared prior to publication of the 2019 NPPF and PPG viability guidance generally accords with that policy/guidance, applying reasonable judgement so as to not unnecessarily delay examinations.

58. The government's recommended approach to viability assessments for planning (including CIL) is set out in paragraphs 010 to 019 of the Viability chapter 10 of the PPG and, specifically for CIL charging schedules, in paragraphs 019 to 021 of the CIL chapter of the PPG.

59. CIL Examiners should familiarise themselves with this guidance prior to undertaking the examination. In summary it explains that viability assessment is a process of assessing whether a site is financially viable, by looking at whether the value generated by a development (known as the gross development value or GDV) is more than the cost of developing it. This includes looking at the key elements of gross development value, costs, land value, landowner premium and developer return.[14]

[13] Paragraph: 005 Reference ID: 10-005-20180724 – *Why should strategic sites be assessed for viability in plan making?*
[14] Paragraph: 010 Ref ID: 10-010-20180724

60. The PPG contains detailed guidance on the standardised inputs for these elements of the assessment. Of particular note is the recommended approach to defining benchmark land values as an input to the assessment of development costs, which to this point have been the subject of much debate at CIL examinations. The updated PPG establishes that benchmark land values should be based on existing use value plus a premium for the landowner (called EUV+).[15]

61. Alternative use value (AUV) can be used to inform the benchmark land value of a site, but paragraph 017 of the Viability chapter of the PPG is clear that this should be limited to those alternative uses which would fully comply with up to date development plan policies, and where the use can be implemented on the site, there is evidence of market demand for the use and it can be explained why the alternative use has not been pursued.

62. For CIL purposes, the overall approach taken towards assessing viability for a particular use generally involves assessing all the development costs (including the cost of land, build costs, finance, professional fees and developer profit). This is then taken away from the value (GDV) of the completed development. If there is a surplus the development would be viable and the surplus could in theory be used to pay a CIL charge (the surplus is sometimes referred to as the maximum possible theoretical CIL charge).

63. However, the PPG advises that it would be appropriate to ensure that a 'buffer' or margin is included, so that the levy rate is able to support development when economic circumstances change[16]. This should always leave a reasonable viability "margin" or "cushion" for all types of scheme to which a CIL charging rate applies.

64. There are other published sources of advice on viability assessment to which reference may be made in CIL examinations. These include the Harman Report on "Viability Testing Local Plans" (June 2012) and the RICS Assessing viability in planning under the National Planning Policy Framework 2019 for England The Harman report, in particular, remains a useful resource as background advice, but does not have any formal or legal status in the planning system. The NPPF and the associated planning practice guidance comprise the Government's recommended approach to viability in planning. For this reason, where reference to published guidance on viability assessment is necessary, examiners reports should rely on the NPPF and PPG rather than the Harman or RICS reports.

65. The national guidance is clear that the assessment of development costs must include the total cost of all relevant policy requirements, including contributions towards affordable housing set out in the adopted local plan.[17] For this reason, it is not acceptable or appropriate to use a lower target or percentage as an input

[15] Paragraphs 013 to 016 of the Viability chapter of the PPG
[16] PPG Paragraph: 020 Ref ID: 25-020-20190901 – *How should development be valued for the purposes of the levy?*
[17] PPG Paragraph: 012 Ref ID: 10-012-20180724 – *How should costs be defined for the purpose of viability assessment?*

for the cost of affordable housing on the basis that this is all that is being achieved at present.

Differential Rates

66. As referenced above, the Regulations allow charging authorities to set differential rates for different geographical zones, types or uses of development and scales of development. However, differential rates must be supported by viability evidence alone and should not be used as a means to deliver policy objectives, for example to support retail in one area rather than another or to support development in a regeneration area. It will also be important to ensure that setting differential rates does not have a disproportionate effect on particular sectors or specialist forms of development e.g. housing needed for different groups in the community such as accessible and adaptable housing.[18]

67. This includes in respect of the thresholds within the same use class and any boundaries between charging zones, such as town centre and out-of-centre. The guidance and regulations allow for charging differential rates for distinct types of development within the same Use Class (Regulation 13(1)(b) and PPG Paragraph: 023 Reference ID: 25-023-20190901[19]). But any such distinction in a charging schedule can only be based on viability evidence. So, for example, it is important that charging higher CIL rates for larger format or out of centre A1 retail development is not used as a means of restricting this form of development in favour of town centre A1 retail development by placing it at an economic disadvantage. Viability evidence must demonstrate the ability of larger format or out of centre retailing to viably support a higher CIL rate.

Seeking further viability evidence and 'sensitivity testing'

68. If the examiner is likely to conclude that a specific rate is set too high after considering the viability evidence, it can be helpful to ask the charging authority to set out its view on what the rate should be set at on a '*if I were to conclude*' basis, before, during or after the hearings. In addition, it is quite common for examiners to request additional viability assessments based on different specified assumptions about certain costs and/or values before or after hearing sessions. This is often known as 'sensitivity testing'. Similarly it is common for examiners to request site-specific viability assessments on strategic development sites which are critical to the delivery of the development plan, where these have not been provided as part of the evidence and there is dispute or uncertainty about the development costs.

Infrastructure Planning Evidence

69. In setting rates charging authorities are to have regard to the actual and expected costs of infrastructure required to support the development of its area and, as part of the appropriate balance, the extent to which it is desirable to fund this from CIL taking account of other sources of funding. In assessing whether the appropriate balance has been struck, examiners will need to test that the infrastructure planning evidence is sufficient to confirm the aggregate

[18] PPG Paragraph: 022 Ref ID: 25-022-20190901 – *Can differential rates be set?*
[19] *PPG Paragraph: 023 Reference ID: 25-023-20190901 – How can rates be set by type of use?*

infrastructure funding gap, and the target amount of funding the charging authority proposes to raise through CIL.[20] This is usually set out in an Infrastructure Delivery Plan (IDP) and/or in the draft charging schedule (DCS) and submitted as evidence for the examination.

70. Previously charging authorities were also required to set out in a 'Regulation 123 list' the infrastructure projects or types which they intended to fund through the CIL and were not allowed to seek S106 planning obligations for infrastructure on the Regulation 123 list. However, under the 2019 CIL Amendment Regulations, from 1 September 2019 onwards, the requirement for a Regulation 123 list has been removed and charging authorities can use both CIL and S106 obligations to fund the same piece of infrastructure.

71. Regulation 123 lists will be replaced by annual infrastructure funding statements (IFS), which amongst other things, should set out the infrastructure projects or types to be funded wholly or partly by CIL.[21] The first IFSs must be published by 31 December 2020. Until then existing 'Regulation 123 lists' are likely to remain useful to inform infrastructure planning evidence in the preparation and examination of charging schedules.

72. As with the Regulation 123 list, the IFS or any interim infrastructure list is not before you for examination. Whilst it may be part of the evidence base submitted with the Charging Schedule, its purpose is to identify the infrastructure for which there is a funding gap justifying the charging of a levy[22]. It is important that you do not get drawn into considering, discussing or reporting on the content of the IFS/infrastructure list other than as necessary to assess the infrastructure planning evidence and the infrastructure funding gap.

73. However, given that both CIL and S106 obligations can now be used to fund the same infrastructure projects, in order to confirm the extent of the funding gap that demonstrates the need for a CIL, it may be necessary to clarify as part of the examination what proportions of the cost of each infrastructure project identified in the infrastructure list or IFS it is anticipated the charging authority will fund through the levy and through S106 obligations.

74. The IFS or infrastructure list may include infrastructure outside of the authority's area, such as strategic cross-boundary infrastructure, for which charging authorities can pool a proportion of CIL receipts. Any such proposal should be supported by a Memorandum of Understanding explaining the proportion of CIL from the charging authority area to be pooled for this purpose.[23] This will be relevant in identifying the infrastructure funding gap.

Residual S106 Costs

[20] PPG Reference ID: 25-018-20190901 – *What infrastructure planning evidence is required at examination?*
[21] PPG Paragraph: 018 Reference ID: 25-018-20190901 – *What infrastructure planning evidence is required at examination?*
[22] PPG Paragraph: 018 Ref ID: 25-018-20190901 – *What infrastructure planning evidence is required at examination?*
[23] PPG Paragraph: 159 Ref ID: 25-159-20190901 – *Can groups of charging authorities pool a proportion of their Community Infrastructure Levies?*

75. Examiners will also need to be clear that the allowances for S106 costs in the development appraisals in the submitted economic viability evidence are consistent with anticipated future use of S106 obligations to fund infrastructure identified in the IFSs or infrastructure lists. Given that both CIL and S106 obligations can now be used to fund the same item of infrastructure, examiners should ensure that any allowance for such 'residual' S106 costs in appraisals is consistent with this. Further advice on this is given in paragraph A2.30 of Annex 2 below.

Payment by instalments policies

76. Policies enabling the payment of CIL by instalments may accompany or form part of CIL Charging Schedules submitted for examination. They can assist the viability of development by phasing CIL payments over the lifetime of the construction thereby assisting cash flow. You are likely to encounter representations which seek changes to the instalments policy to increase the length of time over which charges may be paid, or, if no instalments policy is proposed, request that one be introduced.

77. Whilst the instalments policy itself is not before you for examination, the existence of one or the willingness of the charging authority to introduce one can be a material consideration in assessing the viability of proposed rates. It may be necessary to establish whether the financial appraisals used to test the viability of CIL have assumed payment of the CIL charge up front or by instalments and if the latter whether an instalments policy is or would be in place to support this. If the appraisals have assumed the former, then the intention to introduce an instalments policy would allow a greater margin for viability.

Relationship between the CIL Charging Schedule and Local Plan

78. Where a CIL and Plan are submitted together it has been common practice in recent years to only start the CIL examination when the plan examination is well-advanced (so the plan basis for the CIL is reasonably stable). If this is the case, you should explore the timing with the LPA before concluding on programming.

Consultation on Draft Charging Schedules

79. Following the 2019 CIL Amendment Regulations it is for charging authorities to decide how they wish to consult. There is no requirement to consult on a preliminary draft charging schedule nor a statutory minimum consultation period on the draft charging schedule (DCS). However, the PPG states that where a CIL is being introduced for the first time or significant changes are being proposed to an existing CIL, charging authorities will be expected to consult for a minimum of 4 weeks on the DCS.[24]

80. Examiners must therefore consider whether the charging authority has given adequate time for consultation on the DCS, particularly for consultations of less than 4 weeks, taking account of the scale and complexity of the CIL proposals.

[24] PPG Reference ID: 25-032-20190901 – *What consultation is required in the draft charging schedule?*

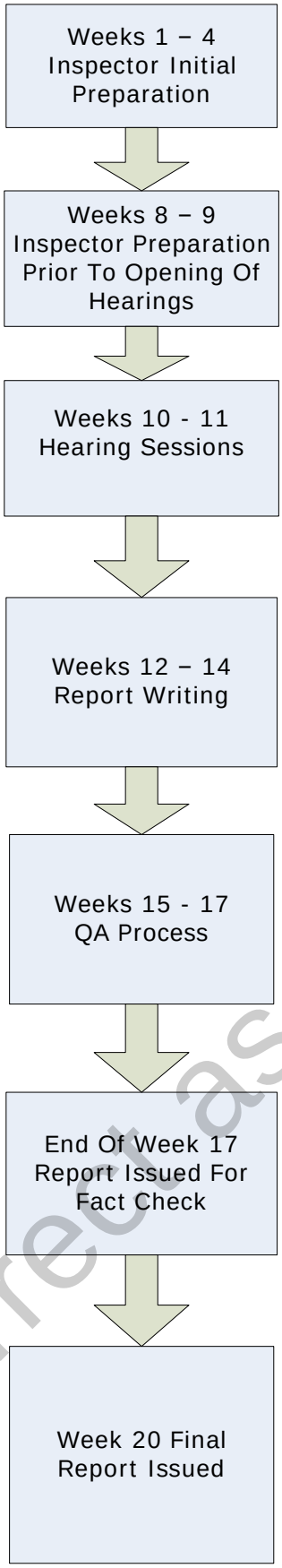
This should be done as part of the assessment of legal and procedural compliance.

81. The 2019 CIL Amendment Regulations also make it a requirement that charging authorities must 'take into account' any representations made on the DCS before submitting it for examination. This should be set out in the statement of representations required to be submitted under Regulation 19(1)(b).

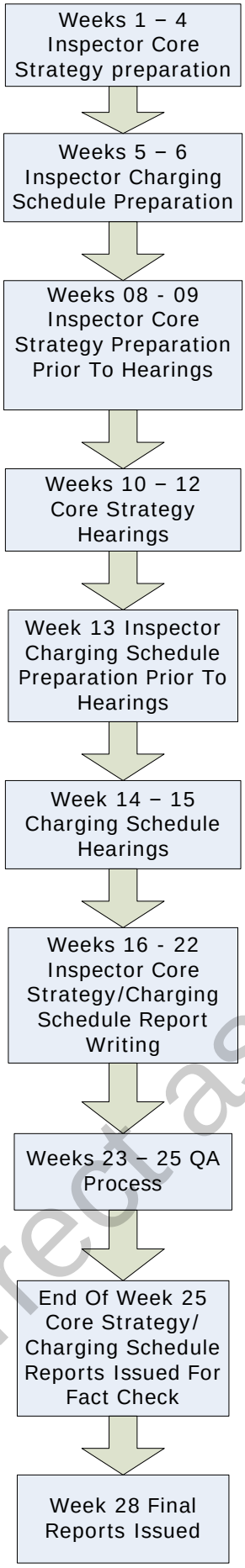
82. There are transitional provisions for charging schedules on which consultation had commenced before 1 September 2019:

    a. Where a DCS had already been published, the former Regulations on consultation apply;
    b. Where a preliminary DCS had already been consulted on any representations on it should be taken into account before the DCS is published.

Annex 1: Indicative timelines for examinations



A. Charging Schedule Examination (up to 5 hearing days, no PHM)



B. Local Plan /Charging Schedule Joint Examination (NO PHM)

Annex 2

Community Infrastructure Levy

Key Themes from Reports

2013-2016

March 2016

Contents

Introduction

A2.1 This is a reference guide to some of the key themes which have emerged in reports on examinations of Community Infrastructure Levy (CIL) charging schedules from 2013-2016. This report sets out extracts from the relevant reports and provides a brief commentary. Most of these reports can be found on the Local Plans/CIL Guide on PINS intranet or alternatively on the relevant examination websites. MHCLG has indicated that an update of the CIL chapter of the PPG will be published later in the autumn 2018, to address any further consequential changes arising from the new NPPF. This report will be reviewed in full again at that point.

A2.2 Please let the Plans Team (copying in the Knowledge Centre) know if there are particular issues you would like covered or that you think are of relevance.

Report structure and style

A2.3 The structure and style of individual reports will vary depending on the particular examination. The CIL report template should be used to ensure consistency. However, the report to Crawley Borough Council is a good example of a clear, concise and well-written report. It firstly sets out the position on the local plan and the infrastructure planning evidence, including the funding gap and the contribution CIL may make. It then moves on to assess the economic viability evidence and the modelling assumptions before concluding on the proposed residential and commercial rates.

Statement of Modifications – changes do not need to be recommended as modifications

A2.4 The Regulations allow the charging authority to modify the draft charging schedule after it has been published through a Statement of Modifications – as defined in Regulation 11(1).[25]

A2.5 If the Council has carried out consultation on a Statement of Modifications, the proposed revised rates will then form the basis for the examination. This applies even if the consultation is carried out during the course of the examination, including after the hearing sessions. Consequently, the changes advanced in a Statement of Modifications do not need to be set out as recommendations in the report. The approach taken should be explained in the report.

Dudley – paras 4 & 5

"The Council carried out further consultation in January and February 2015 on a 'Statement of Modifications'. This advanced changes to clarify the approach to retail charging at Merry Hill & Waterfront and to increase the charge for 'Retirement Housing with le ss than 25% affordable housing' in one postcode area.

Consequently, the basis for the examination is now the submitted draft charging schedule of July 2014 as amended through the Statement of Modifications.

[25] PPG Paragraph: 019 Reference ID: 25-019-20190901 – *How could local authorities prepare their evidence to support a levy charge?*

Accordingly, I do not need to recommend any of the changes set out in the Statement of Modifications in my report. In reaching my conclusions, I have taken into account the representations made in response to the March and July versions of the charging schedule and to the Statement of Modifications."

Infrastructure planning evidence and justification for CIL

A2.6 It is necessary for Examiners' reports to explain that the Council has assessed what infrastructure will be necessary to deliver the development set out in the Local Plan and broadly how it will be funded. The report should then outline the extent that CIL will contribute to any shortfall in funding. This should be covered as briefly as possible. Infrastructure funding statements will replace the Regulation 123 list as part of the infrastructure planning evidence as from 31 December 2020.

Hambleton – paras 7 and 8 (infrastructure evidence)

"The Core Strategy (L/219) was adopted in 2007 with Development Policies (L/220) and Allocations (L/221) following in 2008 and 2010 respectively. Annex 4 of the Allocations document includes a *Strategic Infrastructure Plan*. Following liaison with partner organisations the Council prepared a *Draft Infrastructure Development Plan Update* in January 2014 (L/211). This sets out the key infrastructure schemes required to support the main elements of growth in the development plan.

The costs of the key infrastructure schemes, along with confirmed sources of funding, are set out in the *Infrastructure Funding Gap* document (Ref L/212). This was updated in July 2014 to take into account the latest position on developer contributions and the availability of Local Enterprise Partnership (LEP) funding (P/608 & S/304)."

Hambleton – paras 10-12 (infrastructure cost and funding)

"The total cost of the required infrastructure is around £33.7 million. Confirmed funding sources add up to about £8.9 million leaving a significant funding gap of around £24.9 million (S/304).

The revenue from CIL over the development plan period is projected to be about £13.4 million, based on the reduced charge of £55 for private market housing (P/617). This does not take into account the proposed reduction of the rate for supermarkets to £90. However, the vast majority of the projected revenue (around £13 million) is forecast to come from housing development. After taking into account administration fees (at 5%) and the 'meaningful proportion' passed on to parish councils (15-25%), CIL revenue is likely to be about £10.6 million (P/617).

It is apparent that the proposed charges would not make anything like a full contribution to the funding gap. Nevertheless, the figures clearly demonstrate the need to introduce a CIL to help deliver the infrastructure which is necessary to support planned growth."

Infrastructure Funding Statement (formerly the Regulation 123 List) – scope and coverage

A2.7 The IFS should set out the infrastructure projects and types which the Council intends will be funded wholly or partly from CIL income. It is not formally examined as part of the CIL Examination because, under S212 of the 2008 Planning Act, the examination is only of the *charging schedule*.

A2.8 Some representors may argue that changes should be made to the list, usually to include additional projects.

Dudley – para 13 (scope of list and effect on funding gap)

"Some representors have argued that the draft Regulation 123 list should include additional or different infrastructure projects. For example, the Highways Agency has suggested that it should refer to the enhancement of the four Black Country motorway junctions. However, adding further infrastructure requirements would simply increase the already significant funding gap (see below). Consequently, it would not lessen the justification for introducing a CIL. Furthermore, the Council has confirmed that it will review the Regulation 123 list from time to time."

Hambleton – para 9 (scope of list)

"The infrastructure to benefit from CIL funding is set out in the Draft Regulation 123 List (L/214). Representors have questioned the need for some infrastructure projects and whether some of these should be funded by CIL payments made in other parts of the district. Others have suggested additional infrastructure that might be funded. However, the Council considers that the list includes those schemes which are essential to the delivery of the planned growth and I have no substantial evidence to indicate otherwise. Furthermore, it is not the role of this examination to re-open infrastructure planning issues that have already been considered when the development plan was put in place. However, the Council advised at the hearing that it would periodically review the list."

Is there a relevant plan?

A2.9 The *Planning Practice Guidance* (PPG) states that charging authorities should ensure that the combined total impact of CIL and other developer contributions does not in the deliverability of the Plan. The March 2019 update to the PPG now defines the *relevant Plan* as any strategic policy, including those set out in any Spatial Development Strategy.[26]

A2.10 Many CIL schedules have been submitted in the context of an up-to-date and recently adopted Local Plan. However, some have been submitted concurrently with a Local Plan or in advance of the submission of a Local Plan for examination. The Act and Regulations do not prevent this. It is common practice to only start the CIL examination when the plan examination is well-advanced so the plan basis for the CIL is reasonably stable. However, whatever stage it has reached the Examiner is likely to need to consider whether the emerging Plan provides an appropriate basis for setting CIL. For example, does the emerging Plan provide a sufficiently stable basis for assessing the scale, distribution and type of development likely to come forward?

Birmingham - para 24 (local plan being examined separately)

[26] PPG Paragraph: 012 Reference ID: 25-012-20190901 - *What is a 'relevant Plan'?*

"The 'development' of the city, in the terms envisaged in S.205 of the Planning Act 2008, is clear, and the strategy of concentrating most growth on largely brownfield sites within the urban area, supported by strategic Green Belt releases, is very unlikely to change. There is a sufficiently stable development plan backcloth to enable high level CIL viability assessments to be made. However, my comments should not be treated as any predetermination of the Plan's outcome and, at the examination Hearings, the Council did concede that there could be circumstances that would require the CIL proposals to be revisited e.g. any changes to the Green Belt housing release (which has its own tightly drawn CIL zone). However, those are matters to be addressed if and when they arise."

Lewes - para 31 (local plan and CIL being examined at the same time)

"The Lewes Local Plan Part 1 – Joint Core Strategy is being examined and is presently subject to proposed main modifications. Provided that the LP is adopted in the modified form proposed it will provide an appropriate basis for the concurrent adoption of the CIL charging schedule."

Rother – paras 30 and 31 (Core Strategy adopted but no site allocation plan)

"It is represented that until such time as there is an allocations plan in force, it is not possible to have a clear understanding of the infrastructure requirements for the district, and thus there is not a firm foundation to assess the economic effect on development arising from different levels of CIL charging. The situation in Rother District is that the adopted CS will be followed by a Development and Site Allocations Plan (DaSA). The Council is currently working to produce initial proposals for consultation. The period for initial public consultation is not yet fixed, but it is anticipated to commence in Autumn 2015. Therefore the DaSA has not yet begun to emerge in public.

Nevertheless, in my view the CS, adopted a bare twelve months ago, provides a framework of sufficient clarity, identifying the main types of development and their locations over the period to 2028. The only references in the regulations and guidance are to the "relevant plan" and "the local plan in England"; there is also reference elsewhere to an up-to-date plan. The emphasis in the regulations and guidance is on providing evidence of an aggregate funding gap that demonstrates the need to put in place the levy. Quite clearly the DaSA will fill in considerably more detail than the CS, but the policies of the CS have been sufficiently detailed to enable differentiation of charge by geographical area to be undertaken, reflecting the nature of development anticipated across the district. Many CIL examinations have led to the approval of CIL Charging Schedules on such a development plan basis, and indeed in some cases, on plans which are far less up-to-date. I see no reason to fault the Rother DCS on this basis."

Do proposed differential rates comply with the Regulations?

A2.11 The Regulations only allow for differential CIL rates to be set in relation to:

- different zones
- different intended uses
- intended gross internal area of development
- intended number of dwellings or units

A2.12 An early task for the Examiner will be to ensure that the schedule's rates clearly fall within one or more of these categories. If there is doubt on the matter, ask the Council to clarify its approach.

A2.13 The Guidance makes it clear that different intended uses are not limited to TCPA Use Classes. However, the Examiner will need to be assured that the proposed differentiation reflects what can reasonably be considered to be a different intended use.

A2.14 It is also important to be alert to circumstances where differential rates are being proposed but which do not stand out from the schedule – for example, a rate of £x for convenience retail, no specific reference to any other retail and a £0 rate for all other uses. This would be proposing a differential rate by use.

A2.15 The Regulations require that Zones (including those relating to individual sites) must be identified on an Ordnance Survey based map which shows National Grid lines and reference numbers. Consequently, it is not possible to differentiate according to the existing greenfield/brownfield status of land, unless the land in question is shown on a map base.

Eastbourne – para 45 (apartments as a different use)

"The legislation allows for differential rates by reference to intended uses of development. The PPG makes it clear that the definition of "use" for this purpose is not tied to the Town and Country Planning (Use Classes) Order 1987, and gives the example of applying differential rates to social housing if that is justified by viability evidence. In this case, the evidence indicates that the viability of apartments is quite different to other forms of housing development in Eastbourne. Part of the reason for this is the additional development costs associated with creating shared access, circulation and outside amenity areas. Furthermore, these features of apartment blocks mean that such buildings are used in a materially different manner to individual dwellings with private gardens. I am, therefore, satisfied that the application of a differential rate to apartment developments would be in accordance with the relevant legislation and national guidance."

Hambleton – para 20 (apartments as a different use)

"Apartments fall within the same use class as houses. However, the Planning Practice Guidance states that the definition of 'use' is not tied to the classes of development in the *Town and Country Planning Act (Use Classes Order) 1987*.[27] Apartments generally have a shared access from the street and from internal communal areas. In this sense they are not used in the same way as houses. Furthermore, other charging schedules, which have been found sound, have accepted apartments as a different use. [footnote ref to specific examples]"

London Borough of Tower Hamlets – para 46 (different retail uses)

"…. shopping destinations which are designed to enable many or most customers to arrive, and take home their purchases, by car can readily be distinguished at the planning application stage, and are a different use in CIL terms, from retail development which is not so designed. However, to provide clarity and to ensure effective and fair implementation of CIL in Tower Hamlets, and it is necessary to include the Council's more detailed definition in the schedule itself."

[27] Paragraph: 023 Reference ID: 25-023-20190901 - *How can rates be set by types of use?*

Hambleton – paras 21-22 (different retail uses)

Some representors have expressed concern that supermarkets and retail warehouses are not different uses. However, a supermarket has different characteristics to a neighbourhood convenience store and tends to be used in a different way. The same applies when comparing a retail warehouse to a high street comparison store. Furthermore, as noted above, the PPG advises that such differentiation need not be tied to the Use Classes Order. The Council's definitions set out criteria which will allow a clear differentiation to be made between these uses.

Rother – paras 4-11 (differentiation by brownfield/greenfield status - not compliant with the Regulations)

In this case, the Council had sought to advance differential rates depending on whether the development would be on greenfield or brownfield sites. However, these sites were not shown on a map base.

"It can be seen that differentiation by brownfield and greenfield does not fall within regulation 13(1)(b), (c), or (d). The only basis on which the distinction could be made would be if brownfield and greenfield areas were able to be defined by zones. The Council has confirmed that it would be impractical to identify all the sites within the two descriptions by zonal mapping: it had been the Council's intention that individual sites would be identified by assessing which category the site fitted, at the time of imposing the Levy. Counsel's Opinion noted that the word "must" in regulation 12(2) indicated that the requirement to identify zones on a map by which charges would be differentiated was mandatory, and confirmed that the Council's approach does not fall within the scope of the regulations and therefore cannot be adopted. As a result, the Council has reconsidered the intended differentiation of charge between brownfield and greenfield."

Wigan CIL – para 74 (need to show zones on an OS map)

The Regulations require that differential rates set by zone must be shown on an Ordnance Survey map which shows National Grid lines and reference numbers and an explanation of any symbols or nations. However, there have been cases where the maps were not on an OS base or failed to fully comply with the Regulations. Any such shortcomings can usually be overcome by means of a recommendation. In the first example below, the Council provided revised maps, but that may not always be necessary.

"Following submission of the DCS, the Council amended the residential changing zone maps to add grid reference numbers to the Ordnance Survey bases in accordance with Regulation 12(2)(c) of the CIL Regulations 2010. Although mainly presentational changes, as they have been made post submission and to comply with the Regulations, the Council has asked me to include them in my recommended modifications (**EM6**)."

Rother CIL – paras 19 & 20 (need for zone boundaries to be clear and on a map showing grid lines)

Finally, two points with regard to the compliance of the Zones Map with the regulations:

i. It is important that the boundaries of zones are clear, so that landowners/developers can see clearly which zone a site is within. This cannot be said of Zone 3 in the submitted DCS. The Council has

produced an inset map to clarify the boundaries of the sub-zones of Zone 3.

ii. Regulation 12(2)(iii) requires the map to show national grid lines and reference numbers. This point is easily answered by the addition of grid lines and numbers on the map.

The Council has asked me to deal with all these issues by stipulating modifications in my recommendations. I have done so, as can be seen in the Appendices to this report.

Dudley CIL – paras 56 and 57 (can development in a particular area be excluded from the CIL system?)

In this case the Council had proposed that retail development in a town centre should be excluded from the CIL system altogether. The examiner did not accept this approach and concluded that the Council was, in effect, proposing a nil rate (which the examiner subsequently concluded was justified on the basis of viability evidence). Paras 52-64 of the report set out the reasoning in full.

"The Council is seeking to achieve this aim by excluding comparison retail at Merry Hill from the CIL system altogether. This is the reason for the Statement of Modifications proposing that the 'rate' should be changed from £0 to 'N/A'. However, regardless of how the schedule is phrased, I find it difficult to accept that what is being proposed does not amount to a differential rate of £0 as provided for in Regulation 13. In particular, it relates to a *different zone* (Merry Hill & Waterfront) and to a *different intended use of development* (comparison retail).

Following from this, the key question is whether a nil rate is justified by viability evidence. The Planning Practice Guidance advises that *differences in rates need to be justified by reference to the economic viability of development* and that differentiation should only be applied *where there is consistent economic viability evidence to justify this approach*. However, *differential rates cannot be used as a means to deliver policy objectives*. The PPG also advises that developers may be asked to contribute to infrastructure in several ways and that, where justified, some site-specific mitigation can be required by means of a planning obligation."

Setting out the overall approach to viability assessment and rate setting

A2.16 The terminology used in viability assessments and rate setting will often vary from one charging authority to another. Consequently, it can be helpful to set out briefly the approach taken early on in report. The same terminology should then be used through-out the report. Paragraph 57 of the new Framework now states that all viability assessments should reflect the recommended approach in national planning guidance, including a series of standardised inputs. Accordingly, terminology should as far as possible be consistent with the Viability chapter of the PPG. The following report extract pre-dates the new Framework and PPG, but remains a useful example.

Hambleton – para 16

"The viability assessments are based on a residual valuation approach, using standard assumptions for a range of inputs such as building costs and profit levels. In summary, they seek to establish a *residual value* by subtracting all costs (except for land purchase) from the value of the completed development (the *Gross*

Development Value). The price at which a typical willing landowner would be prepared to sell the land (the *Benchmark Land Value*) is then subtracted from the *residual value* to arrive at the *overage* or '*theoretical maximum charge'*. This is the sum from which the CIL charge can be taken provided that there is a sufficient *viability buffer* or *margin*."

Is the approach to site sampling justified?

A2.17 The PPG advises that the charging authority should sample an appropriate range of types of sites across its area reflecting the nature of sites and type of development proposed for allocation in the plan. (see paragraphs 019 of the CIL chapter of the PPG and 003 and 004 of the Viability chapter). The issue for the examiner is whether the sampling in the viability assessments reasonably reflects the planned development that is likely to come forward?

A2.18 Viability assessments rarely assess every possible development type or use. Instead the issue can be whether a specific development type that has not been assessed is significant for the delivery of the development plan; for example a strategic site or brownfield sites if the plan relies on this.[28]

Hambleton – paras 27 & 28 (residential sampling)

"The residential viability assessments have looked at scenarios for low, moderate and high value sites, in each case assuming a standard 1 ha (gross) site area of which 0.9 ha will be developable. In addition, an assessment has been carried out for the strategic North Northallerton site.

Hambleton is a rural district and the largest settlements are the market towns of Northallerton and Thirsk. With the exception of the strategic North Northallerton site, most of the allocated sites in the development plan are less than 2.5-3 ha in size. While developers may currently be proposing development on larger unallocated sites, CIL is premised on providing infrastructure to support planned growth. In this context, the sampling covers a reasonably representative selection of the types and sizes of planned residential development."

Lewisham – para 22 (no assessment of commercial leisure)

"The VA did not assess other types of development such as commercial leisure (within the D2 uses class). I consider this issue later in the report. However, I accept that the VA has sought to assess the types of development of greatest significance for the Borough over the plan period. The evidence used by the Council to inform its charging schedule cannot test every type of development. Some of the untested types of development may not be viable with the CIL rate proposed, but provided that they are not significant for the delivery of the plan as a whole, then the approach is reasonable. I note that of the 5 strategic allocations only one – Lewisham Gateway - has a specific quantum of leisure space identified in the policy (SSA6) and that outline planning permission for this scheme has already been granted. I do not regard the delivery of further commercial leisure schemes as critical to the delivery of development in the Borough taken as a whole."

Has an appropriate buffer or margin been applied?

[28] Paragraph: 005 Reference ID: 10-005-20180724 – *What are the principles for carrying out a viability assessment?*

A2.19 The Guidance advises that CIL charges should not be set right at the margins of viability and indicates it would be appropriate to include a buffer or margin (ID 25-019-20190315). Many viability assessments/studies determine the maximum amount of CIL a development can viably pay and then, applying a "buffer", set an actual CIL rate someway below the maximum. Typically "buffers" vary between 10% and 50%.

A2.20 In general terms the larger the "buffer" the less impact CIL is likely to have on the viability of development.

London Borough of Bexley – para 22 (25% buffer)

"Moreover, the reasonable buffer or margin (of at least 25%) applied to the possible maximum CIL rates that could viably be charged according to the VS is able to mitigate the potential impacts of such site specific factors on overall viability."

Hambleton – paras 16 & 74 (25-50% buffer)

"The Planning Practice Guidance states that it would be appropriate to include a buffer or margin so that the levy rate is not set at the margins of viability and is able to support development when economic circumstances adjust. This can also provide some degree of safeguard in the event that gross development values have been over-estimated or costs under-estimated and to allow for variations in costs and values between sites. The Council has therefore assumed that the charges should be no more than 50-75% of the overage.

As noted above the Council considers that the rate should not exceed 75% of the maximum theoretical charge. On this basis the maximum theoretical CIL charge for a retail warehouse would be £61 sqm and for a supermarket £126 sqm. A charge of £40 sqm for a retail warehouse would represent around 66% of this theoretical maximum, leaving a margin of £21 sqm. The charge of £90 for supermarkets would represent about 71% of the theoretical maximum, leaving a margin of £36 sqm. This is a reasonable viability cushion and provides sufficient flexibility to allow for some variations in costs and values without adversely affecting viability."

London Borough of Tower Hamlets – para 52 (25% buffer)

"Bearing in mind that the proposed rate is reduced by 25% from the maximum level of CIL demonstrated to be viable, I am not persuaded that any of the other detailed criticisms of the assumptions used in the hotel appraisals would be likely to significantly undermine the viability of this CIL rate for most hotel development across the borough."

The use of historic planning obligation (s106) evidence to help justify CIL rates

A2.21 Comparisons may be made between historic planning obligation (s106) receipts and forecast CIL income. In some cases this can provide a 'sense check' on the likely viability of the proposed CIL rates. However, it is unlikely to be determinative. This is because historic planning obligation requirements may have been higher or lower than many developments could viably support, contributions may not have been secured on a comparable basis and there is no requirement in the legislation, regulations or guidance that CIL income should not exceed that historically secured through planning obligations.

Hambleton – para 61

"Furthermore, in 3 out of 8 recent housing developments, the CIL revenue (plus residual S106 costs) would be lower than the S106 contributions which were secured. This analysis is based on the levels of affordable housing that were actually achieved which ranged from 8 to 50%. However, if affordable housing had been provided at full policy levels the overall CIL payments would have been reduced because affordable housing is exempt from paying CIL. This would have resulted in the CIL revenue being lower than the S106 costs in 6 out of the 8 cases. Furthermore, this analysis is based on the earlier higher proposed rate of £65 rather than the current reduced rate of £55. Overall, therefore, the evidence indicates that CIL would not be significantly more expensive to housing developers than the current S106 regime. This helps demonstrate that a residential charge of £55 is reasonable."

Are rates for strategic sites and other significant areas of growth justified?

A2.22 Authorities may decide that the essential infrastructure for a strategic site should be funded by s106 obligations rather than by CIL income and that a nil rate should therefore be set. Sometimes this is seen by the charging authority as a pragmatic solution, given that the infrastructure will be specifically intended to serve just one strategic site/development (and so should be funded by it rather than by pooling contributions via CIL).

A2.23 However, this in itself, would not justify a nil CIL rate for a strategic site. This is because CIL must be justified by viability evidence. So the issue will be whether the viability assessments show that the particular infrastructure costs of strategic site development (eg roads, schools etc) are such that a contribution towards CIL would not be viable. In these circumstances, a zero CIL rate for specific development on the site would be justified. In other circumstances, the evidence may justify a lower CIL rate than in other zones.

A2.24 It is also important to be clear about whether a proposed differential rate for a strategic site refers to all, or just specific, uses.

London Borough of Bexley – paras 19-22 (a lower rate is justified, but the nil rate suggested by representors would not be)

"The Council's evidence, supported by almost all representors in principle, is clear that the northernmost part of the borough has a lower level of viability for new development, in comparison with the proposed southern charging zone. It is also the area, not least at Thamesmead and Abbey Wood, most in need of new investment in regeneration projects and where the majority of new housing is expected to come forward over the CS period.

Accordingly, it is critical to the delivery of the plan, notably its social and economic objectives, that any CIL rate imposed should not give rise to a serious risk to delivery in viability terms in this locality, bearing in mind issues relating to ground conditions, including the need for piled foundations. However, these constraints are well known and should already be reflected in local land values and do not give rise to any additional requirements in regard to flood defences."

The evidence is clear that the lower CIL rate across the northern zone would be economically viable. So, the suggestion that all or some parts of that zone, notably those where regeneration projects are most needed at present or just alongside the river, should be nil rated for the CIL would introduce an unjustified inconsistency and unnecessary complexity to the prospective charging regime. It would also

potentially risk conferring direct financial advantage on a few particular schemes and/or developers, as well as perhaps setting a form of precedent for the expected treatment of future regeneration projects in the area. Moreover, the reasonable buffer or margin (of at least 25%) applied to the possible maximum CIL rates that could viably be charged according to the VS is able to mitigate the potential impacts of such site specific factors on overall viability."

Dudley - paras 52-60 (a nil rate for comparison retail in the town centre was justified by viability evidence)

"It is clear that the extent and cost of these infrastructure works would be very significant. Indeed, the Infrastructure Delivery Plan refers to costs of £25 million for a 'pre-rapid transit busway' and £12.75 million for improvements to the quality bus network. In this context, the Viability Assessment concludes that the cost of the infrastructure works are likely to be in excess of any calculated CIL charge. The earlier Viability Assessment (December 2012 version) also concluded that if these infrastructure costs were funded through a S106 agreement "there would quite probably be no additional surplus remaining to contribute towards CIL." Given the extent and cost of the works, these are reasonable conclusions. Consequently, a nil rate for comparison retail is justified by reference to appropriate available evidence relating to economic viability."

Kensington & Chelsea – paras 71-72 (a strategic site should be modified to set a nil rate)

"Overall, I am not convinced that the Council's evidence base supports its CIL approach for the Kensal site. The development economics of this large and complex site are clearly very different to those of other tested sites, yet the site is treated the same for CIL purposes in terms of setting the proposed rates (within Zone F). Whilst I accept that CIL will always be a relatively small proportion of development costs, the Council's evidence does not convince me, particularly given the substantial number of unknowns, that viability will not be compromised. That compromise may not be the difference between 'viable' and 'not viable', but it could result in reductions in affordable housing requirements, or strategic infrastructure requirements, all of which are important elements of the 'relevant plan's' objectives.

Whilst I have taken a pragmatic view on the CIL / Affordable Housing relationship on other sites, I do not feel that this can be the case on the strategic Kensal site, given its scale and importance in delivering the substantial proportion of the planned new market and affordable homes in line with the relevant plan. It would not serve a positive purpose to impose the Council's proposed CIL charge in these circumstances as the potential effects could be significant. Accordingly, I conclude that an additional zone should be defined around the Kensal site and a £0 psm CIL rate applied (EM2/EM3). My conclusion should not be interpreted as a finding that the Kensal site cannot ever support a CIL charge but, rather, that there is currently insufficient evidence to support the treatment of the site in the same way as other sites in Zone F. Given that the site will not come forward before 2018, the Council has a good opportunity to develop a much more detailed evidence base and revisit the issue of CIL for the Kensal strategic site."

Wiltshire – para 67 (lower rates on strategic sites were justified)

"The key issue here is whether the Council's proposed CIL rates would actually threaten viability and prevent important strategic schemes happening. The proposed CIL charges are effectively discounted 'normal' rates and would be £40 psm for the strategic sites falling in Charging Zone 1 (five of the tested sites) and

£30 psm for those falling in Charging Zone 2 (two of the tested sites). Although views were expressed that such sites should not receive discounted rates, I do not agree, as the evidence demonstrates the substantial additional site specific infrastructure costs that would fall on these sites."

Are the geographical charging zone boundaries justified?

A2.25 Examiners will often be faced with arguments that the boundaries between zones are incorrectly drawn and that a particular area or site should be moved into a different (typically lower) charging zone.

Worthing – para 27

"I accept that defining boundaries between zones is not easy and that almost inevitably zones will include some development out of kilter with that which predominates in the area. Indeed, it is possible that the Cissbury Chase and Yeoman Chase evidence referred to above reflects this. It is thus likely that with a nil rate for the low value areas some residential development which would be viable with the £100 CIL charge will take place and that a small amount of CIL income will be foregone. However, this in an almost inevitable feature of CIL: there will always be development which, in reality, could viably pay a higher level of CIL than the rate proposed."

London Borough of Bexley – para 26

"As proposed, the boundary between the northern and southern charging zones is clearly delineated by a main railway line, running almost east to west through the borough. Although there is some information indicating differing land values within the identified zones, including for specific small localities, these are not so marked as to justify introducing any further complexity to the schedule through additional zones. In contrast, the railway marks a transition in character and viability between parts of the borough, with firm evidence of an overall material difference in valuation terms either side, which reinforces it as the logical choice to provide a boundary between charging zones in this area of the borough at present."

London Borough of Tower Hamlets - paras 26 and 27

"There is evidence that some residential properties in the part of Cubitt Town proposed to be located in Zone 1 have values much closer to those typical of the, lower value, Zone 3. However, these are existing properties (which as they stand would not be subject to CIL). The Council's contention that any new residential development in this area would be highly likely to be smaller but of a higher quality is a persuasive one. Consequently, the assumption that the value (per sq m) of new residential development in Cubitt Town would be higher than that of some existing property in this area is sound.

It is also argued that the Lanark Square area, proposed to be located in Zone 1, has more in common with the southern area of the Isle of Dogs which is located in Zone 2. However, the evidence submitted by the representor does not support this: whilst the quoted £625 per sq ft value is below the average assumed value for Zone 1, it is well in excess of the minimum £575 sq ft value. The 25% buffer by which the maximum viable CIL rates have been reduced to the actual proposed CIL rates should ensure that development of below-average value in a particular zone remains viable with CIL in place. Moreover, given that property values can vary markedly over a short distance, there is no inherent flaw in the schedule proposing

that, in places, Zones 1 and 3 will abut each other, without the "buffer" of an intermediate Zone 2."

Are 'nominal charges' justified?

A2.26 Some authorities have proposed low or nominal rates for specific zones on the basis that these rates will have a negligible effect on the viability of development and/or on the amount of development that will come forward.

Dudley – paras 26, 28, 29 & 31 (nominal charges were not justified)

"Table 6.2 of the Viability Assessment sets out the proposed CIL rates for open market housing. The 2nd and 3rd columns list the surplus or deficit per m^2 for each of the postcode areas. This shows that, in many areas, residential development is not viable (with or without affordable housing). Nevertheless, in a significant number of these areas, a charge of £20 psm is proposed.

However, while development in some parts of these postcodes might be viable, this does not justify setting a charge of £20 psm where the appraisals show that most residential development would not be viable. Furthermore, the postcode areas affected by this approach cover a significant area of the borough.

I accept that a charge of £20 psm would only represent a small percentage of development costs. Nevertheless, the charging schedule indicates that this would result in an average charge of £1,760 per dwelling. It has been suggested that this cost might be reflected in a Lower Threshold Land Value. However, there is no firm evidence that this would be the case. Consequently, in these postcodes, there is a significant risk that imposing this charge would make marginal developments unviable and unviable developments even more unviable. This would be likely to threaten the delivery of housing across a significant part of the local authority area, both as things stand now and if economic circumstances were to improve.

The Planning Practice Guidance states that there is no requirement for a proposed rate to exactly mirror the evidence. However, it also advises that the proposed rates should be informed by and consistent with the evidence on economic viability across the charging area, that it may not be appropriate to set a charge right at the margins of viability and that, where viability is low, very low or zero, the charging authority should consider setting a low or zero rate in that area. The proposed CIL charges in these postcode areas are not consistent with this guidance."

Affordable housing – has this been correctly taken into account in the viability assessments?

A2.27 The PPG chapter on CIL states that an authority "should take development costs into account when setting its levy rate or rates" and that "development costs include costs arising from existing regulatory requirements, and any policies on planning obligations in the relevant plan, such as policies on affordable housing".[29] Affordable housing is often a significant cost and sensitivity analyses in Viability Appraisals can demonstrate that the viable level of CIL for residential development increases significantly if affordable housing requirements are reduced or waived.

A2.28 "Taking account" of policies on affordable housing in setting CIL rates has been interpreted by some examiners as meaning that the CIL rate should be based on the assumption that the relevant plan's policy on affordable housing will be met in

[29] Paragraph: 021 Ref ID: 25-021-20190315 – *How should development costs be treated?*

full. The new PPG chapter of Viability emphasises that when setting policy requirements, particularly for affordable housing, these should be set at a level which takes account of housing and infrastructure needs and allows for development to be deliverable.[30] Therefore, the assumption should be that the policy compliant requirement for affordable housing has already been tested and found to be viable at the plan making stage and should be applied in full when testing CIL rates.

A2.29 However, plan policies on affordable housing often allow some flexibility in relation to viability. Therefore, examiners may have to consider opposing arguments as to whether this flexibility should, or should not, be taken into account in setting CIL rates. The two examples below illustrate how these arguments have been dealt with in previous CIL examiners' reports. The second example below relates to a London borough, where the examiner concluded that a % affordable housing assumption in a viability appraisal could reasonably be lower than the borough-wide target.

Mid-Devon - paras 10-17 (CIL should be assessed on full affordable housing requirements)

"The CS sets an overall target for affordable housing provision of 30% and it confirms that the delivery of affordable homes is a key issue for the District. For what are described as urban sites, however, the target in the AIDPD is 35% (Bampton, Crediton, Cullompton and Tiverton). The Council has not used the 35% figure but has utilised a figure of 22.5% in its calculations (a 36% reduction on its target) because it states that this represents the average percentage of affordable housing currently being achieved. However, reference is made to a current planning application at Farleigh Meadows in Tiverton, where the full 35% provision has been offered by the developers, although I acknowledge that sites in other locations have achieved much lower provision.

The policies in the Development Plan (DP) reflect the Council's objective which is to achieve at least 35% affordable housing on 'urban sites'. This approach accords with the advice in the National Planning Policy Framework (NPPF) which advises that requirements for affordable housing should be set out. The NPPF also advises that CIL charges should be worked up and tested alongside the local plan.

There was discussion regarding the terminology used and it is correct that policy AL/DE/3 refers to a *target* of 35% affordable housing provision. However, it is clear that there is a very significant need for affordable housing in the District and policy AL/DE/2 states that 2,000 or more affordable dwellings should be *provided* between 2006 and 2026.

The DP policies – including where appropriate the affordable housing targets - will remain the starting point in the consideration of any planning application. The key test is therefore whether or not the assumptions upon which the proposed level of CIL are based would undermine the delivery of the DP targets, particularly with regard to affordable housing provision. The CSCSP advises that consideration should be given to the implications of the charge for the priorities that the Council has identified in its DP7 and the specific example of affordable housing targets is given.

I consider that it is reasonable to conclude that the use of the 22.5% figure by the Council will be seen as a reason not to seek the achievement of the full target and

[30] Paragraph: 002 Ref ID: 10-002-20180724 – *How should plan makers and site promoters ensure that policy requirements for contributions from development are deliverable?*

consequently it will put the provision of affordable housing at serious risk. If the Council wishes to reduce the percentage of affordable housing to be provided (assuming such an approach could be justified, bearing in mind the advice in the NPPF that in principle the full objectively assessed needs for market and affordable housing should be met) then this should be achieved through a review of the adopted policies. The Council should have taken all its policy requirements, including affordable housing, into account when setting the CIL rate and on this basis it can be concluded that the viability evidence, on which the proposed charge of £90 per sqm is based, is not robust.

Following the identification of affordable housing provision as an issue of significant concern, the Council did submit evidence to show that if the calculations were based on 35% affordable housing provision, then a lower CIL charge of £40 per sqm would be viable. The five viability appraisals were re-assessed. The urban extension models at Cullompton and Tiverton and the urban infill model at Bampton were found to be viable with the lower charge. The situation with regard to the urban infill site models at Crediton and in a village location are described as marginal but bearing in mind there are likely to be considerable variables between such sites, there is no reason to conclude that the lower charge would put at serious risk overall development in the area.

Reference was made by the Council to the Redbridge CIL charge which is based on a 30% affordable housing provision, rather than on 50% which is the requirement in the Redbridge Core Strategy. I have not seen the evidence from which the Examiner drew his conclusions and can therefore only give little weight to this matter.

On the issue of affordable housing I conclude that the Council should have based its analysis on the foundation provided by the adopted DP and that the calculations should have reflected the 35% affordable housing target. I therefore recommend that the Charging Schedule is modified accordingly by reducing the charge from £90 per sqm to £40 per sqm, as set out in **EM1** in Appendix A."

Lewisham – paras 16-17 (reasonable to assess CIL on basis of 35% affordable housing rather than borough-wide policy target of 50%)

"Core Strategy policy CSP1 sets a Borough-wide target of 50% affordable housing provision. It specifically allows for viability to be taken into account in considering the appropriate provision in any particular development. The Council may seek less affordable housing where there is already a high level of affordable housing, such as in the Deptford area where 4 of the 5 strategic allocations are based. In practice, the delivery of affordable housing has not achieved the 50% target in recent years, although 2010/2011 and 2011/12 came close with 49 % and 47% provision respectively. The 50% target takes into account that some development will be 100% affordable housing.

The baseline assumption used in the VA for the provision of affordable housing in the residential scheme examples is 35%, with a 70%/30% split between social rented and intermediate housing (VA, 4.17). The Council estimate that CIL liable developments will need to deliver only 35% affordable housing (in combination with other 100% affordable housing projects) to meet the Core Strategy's 50% overall target (VA, 4.16). There is no evidence to the contrary. Policy CSP1 is also clearly intended to be applied flexibly to reflect local housing circumstances and site characteristics. It would be inappropriate therefore to use the overall 50% Borough-wide strategic target for the assessment of individual development schemes. Nevertheless, some postcodes in the Borough are able to deliver 50% affordable housing with the proposed CIL rates (VA, paragraph 7.26). I therefore

consider that the VA assumption of 35% is reasonable and that the introduction of the CIL as proposed would not undermine achieving the aim of policy CSP1 across the Borough over the plan's lifetime."

Residual S106 costs – have these costs been correctly taken into account in the viability assessments?

A2.30 The contents of the infrastructure funding statement or infrastructure list can have an effect on development costs and therefore on viability. Under the 2019 CIL Amendment Regulations infrastructure can now be funded by both CIL and S106 obligations. If the Council intends to seek such S106 contributions, these costs should be included in the viability appraisals. The combination of paragraphs 012 Ref ID: 10-012-20180724 of the Viability chapter and 020 Ref ID: 25-020-20140612 of the CIL chapter of the PPG makes this clear. And the Framework and PPG are clear that local authorities should ensure that the combined total impact of CIL and other developer contributions does not undermine the deliverability of the plan (Paragraph 34 of the Framework and PPG Ref ID: 25-093-20190315).

Dudley – para 24

"Residual costs from S106 contributions are assumed at 0.5% of construction costs. The Viability Assessment explains that the only frequent post-CIL S106 contributions are likely to be in relation to air quality and public art. The Council has subsequently clarified that, although some air quality and public art projects would be funded by CIL (as specified in the Regulation 123 list), there may also be a need for some on-site mitigation or provision. The Council has also confirmed that, if there is any justification to secure contributions towards education infrastructure, this would be covered by the CIL charge and so would not be subject to any contributions through planning obligations."

Hambleton – para 71

"The Council has assumed that, after CIL has been introduced, residual S106 costs would be limited in amount. A representor has suggested that much higher figures should be applied citing examples of developments in other parts of the country where a wide range of contributions have been sought. However, the Regulation 123 list includes strategic road network and transport infrastructure and under the Regulations any post-CIL contributions made by means of S106 would be very tightly controlled. In this context, the residual costs assumption of £50 sqm for retail warehouses and £100 sqm for supermarkets seems reasonable and I can see no reason why the imposition of CIL would lead to any double charging for infrastructure."

Enfield – para 17 (Reg 123 list applies CIL funding to just one strategic site)

In this case the Reg 123 list only sought to use CIL to pay for two items of infrastructure in relation to one strategic site (delivering a minimum of 5,000 homes). The examiner concluded that the main issue for him was whether the S106 costs for developments which would not receive any funding from the Reg 123 list had been adequately taken into account in the viability assessments. The overall conclusion is set out below. Paras 10-17 of the report set out the reasoning in full.

"In the light of the above I am satisfied that, although the R123list is very unusual, and it is necessary to guard against unfair charges for developments which do not

come within the scope of that list, the Viability Assessment which is submitted to justify the proposed CIL charge levels has made adequate provision in the individual scenario assessments for the S106 obligations which are likely to arise from both the extant S106 SPD and from the successor document which is currently emerging."

Reaching conclusions on viability assessments

A2.31 The Examiner's Report will need to consider whether or not the viability evidence supporting the CIL schedule is appropriate and robust. The level of detail in the report may depend on the extent to which the evidence is challenged.

A2.32 In many cases the assumptions about the costs and value of development will be subject to detailed criticism. The new Viability chapter of the PPG now provides detailed guidance on the standardised inputs for viability assessments, which viability evidence submitted in support of a CIL Charging Schedule should be consistent with (as expected by paragraph 57 of the new NPPF). However, other than for developers return, the PPG does not define what a particular cost or value should be. Whilst the Harman Report contains guidance on the value of certain cost inputs, such as strategic infrastructure and utility costs and fees, there is often no clear right or wrong answer about what a particular cost or value should be.

A2.33 It is worth noting that the Planning Act 2008 requires the use of 'appropriate available evidence' (S211(7A)) and the PPG chapter on CIL states that the Government recognises that the available data is unlikely to be comprehensive[31] (Ref ID: 25-019-20190315).

A2.34 If you are persuaded that cost assumptions are too low and/or development value assumptions are too high, you will need to consider the likely effect on the ability of development to viably pay CIL, having regard to the size of any buffer/margin (see section above on *'Has an appropriate buffer or margin been applied?'*). Clearly, the smaller the buffer, the less the scope there will be for development costs to be higher than assumed (or values lower) without the proposed CIL rate rendering development unviable.

A2.35 Many examiners have asked Council's to re-run appraisals for certain development types or zones (sometimes known as 'sensitivity testing') and this can lead to different (lower) rates being justified. Indeed, if the Examiner concludes that rates are set too high, it is helpful to have clear evidence to justify the setting of a lower rate.

A2.36 The following extracts set out the approaches taken by examiners.

Hambleton – paras 46 & 47 (example of detailed consideration of specific costs)

"The cost of building the houses is based on BCIS mean values for general estate housing. This is a realistic assumption for the 1 ha sample sites. Higher costs have been factored in for the moderate and higher value sites to reflect better specifications. The BCIS database is constantly and retrospectively updated as information about new developments is received. Consequently, the reported build costs for a specific period may vary over time. However, it is not unreasonable to base the assessments on the BCIS data available at the time the viability study was

[31] Paragraph: 020 Reference ID: 25-020-20190901 – *How should development be valued for the purpose of the levy?*

being prepared.

An allowance of 10% of build costs has been made for other *construction costs*, including gardens, estate roads & footpaths/pavements, utility connections and landscaping. This is a reasonable assumption for the 1 ha sample sites, given that the Benchmark Land Value relates to readily developable sites and that much of the land supply is comprised of smaller sites where there will be less, if any, need for *secondary infrastructure* such as extensive spine roads, major utilities extensions or strategic landscaping. While there may be some sites where there are significant abnormal construction costs, these are unlikely to be typical and this would, in any case, be reflected in a lower land value. In addition, such costs could, at least to some degree, be covered by the sum allowed for contingencies."

Dudley – para 68 (Council provides evidence to justify a revised rate)

"The proposed rate of £95 would take most of the surplus of £101 for public houses and restaurants and would exceed the surplus of £93 for hot food takeaways. A charge of this size would, therefore, result in most such development being at best only marginally viable. The Council has confirmed that applying a buffer of 25% would allow the rate to be set at £67.50 across the borough and that it would accept a change along these lines. This would represent around 67% of the maximum potential charge for public houses and restaurants and around 73% for hot food takeaways. This would leave a satisfactory margin so helping to ensure viability. The rate for A3-A5 uses at Merry Hill & Waterfront and the Remaining Areas should be amended accordingly. **(EM10)"**

Hambleton – para 57 (overall conclusions)

"There is considerable scope for disagreement about the values and costs of individual inputs to the model and seemingly small changes can have a significant effect on viability. However, there are often no absolute right or wrong answers. Instead, assumptions have to be based on judgement informed by appropriate and available evidence. This is particularly so in relation to land values, given that the Benchmark Land Value is the price a typical willing landowner would be prepared to sell the land for once CIL is introduced and given the relatively limited information available on actual transactions. Indeed, to some degree, I agree with the DVS report which states that establishing the level at which a landowner would release development land is subjective (albeit based on appropriate and available evidence). For the reasons outlined above, I consider that, in broad terms, the assumptions are reasonable."

Gedling – para 36 (overall conclusions)

"I recognise that there are different opinions on individual cost elements and that small variations in some could cumulatively have an impact on viability. However there are no definitive right or wrong figures to be applied and the assumptions made by the Council in their VA, in the main reflect appropriate industry costs and are not set significantly low. The existence of contingency costs and significant viability buffers reinforces the Council's approach and provides reasonable margins for any additional costs."

CIL Rates for Retail Development

A2.36 Where a single rate for all retail development is proposed the Examiner will need to be assured that it would not have a significant effect on all planned retail development likely to come forward. However, authorities will often propose more

than one retail rate differentiating them by zone, type of development or scale (or a combination of these).

A2.37 It is common for authorities to propose differential rates for supermarkets/superstores/retail warehouses and then for all other retail development. Examiners will need to be satisfied that such differentiation is made on the basis of different uses (the precise wording of the relevant definitions can be important here – see section above on 'Do the proposed differential rates comply with the Regulations?') and that the viability evidence justifies the differential rates.

A2.38 In some cases differential retail rates may be set on the basis of scale – eg different rates for retail development of less than and more than 280 sq m. Again Examiners are likely to need to be assured the viability evidence supports these differential rates. For example, if the evidence only relates to sample retail developments of 100 sqm and 3,000 sqm, would this provide a sufficient justification for using 280 sqm as the 'threshold' between different rates? Finer grained sampling might be necessary to justify this.

A2.39 In some cases it may not be clear whether differential retail rates are being proposed on the basis of type of use or scale and authorities may need to be asked to clarify their position.

A2.40 A multi-storey/undercroft car parking would be liable to pay CIL because it is a building, whereas open car parking would not. CIL costs for a retail scheme including a multi-storey/undercroft car park would consequently be significantly higher than for a similar scheme including open car parking. Examiners may face arguments that CIL would therefore render unviable retail schemes with "in-building" car parking and that, as a result, ancillary parking should be excluded from the CIL charge.

LB Tower Hamlets- para 46 (need to clarify definitions of uses)

"…. shopping destinations which are designed to enable many or most customers to arrive, and take home their purchases, by car can readily be distinguished at the planning application stage, and are a different use in CIL terms, from retail development which is not so designed. However, to provide clarity and to ensure effective and fair implementation of CIL in Tower Hamlets, and it is necessary to include the Council's more detailed definition in the schedule itself."

Southwark – para 72 (distinction between different retail uses)

"Concern regarding the Revised Draft retail rates tested in the VS mainly concerned the higher rate of £250 psm for 'destination' retail developments. These were defined as comprising large shopping centres, malls and supermarkets, invariably providing car parking, high volume sales and high unit rents and values but often occupying brownfield sites, such as former industrial areas, with lower initial costs. Following my Interim Finding that the distinction between destination and other retail uses was not made out, the 'destination retail' category and the related CIL rate of £250 is deleted in the SoM and this modification is also endorsed."

Southwark – Para 74 (no justification for a nil rate below 280 sqm)

"However, there is a proposition that retail development below 280 sqm should be nil-rated, citing other London CIL Schedules, in the interest of promoting local shopping provision. Treating the Southwark RDCS on merit however, the VS assesses a wide range of retail operations including some well below that size threshold. Any development below 100 sqm is not liable for CIL in any event, whilst

there is potential that many developments would reuse existing floorspace, also not subject to CIL. On the available evidence, the case for a differential zero rate for retail development below 280 sqm is not made out."

Rother – para 49 (sampling justified)

"It is represented that the retail CIL rates generally, and for out-of-centre retail floorspace in particular, are unrealistic. It is suggested that a large convenience retail store of circa 5,000 sq.m should be tested. In response the Council points out that it is the planned floorspace of the CS which should be used to determine the appropriate typologies. The CS sets out the following targets for convenience floorspace in the main towns: Bexhill – 2,000 sq.m; Rye – 1,650 sq.m; Battle – 1,000 sq.m. Thus, if a single operator took all the floorspace in any of these locations, to meet policy objectives it would not exceed the typology tested of 2,500 sq.m. There appears to be no evidence of a larger store being promoted in Rother District, but in any event it would not put the delivery of the plan at risk if its viability proved to be problematical."

Worthing – para 36 (multi-storey and undercroft car parking)

"Although it is not a factor specifically tested in the appraisals, the Council does not contradict the contention that the proposed retail CIL charge could threaten the viability of retail development which incorporates car parking in a building (eg a multi-storey or undercroft car park). I concur with this point and it is common sense evidence that such car parking provision, on which CIL would be levied, would be unlikely to add any more value to a development than would an open car park on which CIL would not be levied. The Council envisages that there will not be many such developments during the plan period, although that does not address the potential viability problems for the schemes which do come forward, even if there are only a small number of them. Moreover, the CS identifies retail development in Worthing town centre as an important element of the Borough's regeneration. The Council also suggests that a developer could apply for planning permission for the car park separately from the retail unit to avoid having to pay CIL on the car park. However, even if feasible, this would be unnecessarily complicated. Consequently, given the potential for CIL to undermine the viability of retail development incorporating ancillary car parking in buildings, it is appropriate to specifically exclude ancillary car parking from the CIL charge. Modification **EM2** is therefore necessary. [EM2 was as follows: 'Retail (A1-A5), *excluding ancillary car parking*']"

CIL Rates for Community Facilities

A2.41 Community Facilities are often zero rated in CIL schedules, either specifically or within an "all other development" zero rate. However, some schedules do propose a charge for such facilities, although this will usually be small. Having regard to the representations made on the matter an Examiner will need to be assured that there is evidence to support whatever rate is proposed.

Barking & Dagenham

"The police and the London Fire and Emergency Planning Authority (LFEPA) argued that their vital community safety should be excluded from the payment of the levy…However, police and fire station developments are liable for more substantial Mayoral CIL charges of £20 psm and, in spite of the representation from LFEPA…I have seen no substantive evidence such as an economic appraisal to

demonstrate that Barking and Dagenham's proposed charge would make the provision of new fire station facilities unaffordable."

Bexley - para 34

"In contrast, the Council's decision to apply nil rates to new buildings for education, medical/health and emergency services uses strikes an appropriate balance and is valid in viability terms in that such schemes usually involve an element at least of public funding to proceed economically. Some may also receive CIL income and their inclusion in the schedule would add a layer of unnecessary complexity to the overall charging regime in the borough without raising any material level of additional CIL income over the plan period."

Southwark – para 75

"There were objections from statutory infrastructure providers, specifically of sewage and water facilities and fire stations, that it is illogical and inappropriate for the 'All Other Uses' rate to be charged against such publicly funded development. There was also local objection in principle to the 'All Other Uses' rate being charged for community facilities such as public halls, youth clubs or child care facilities, especially given that the Mayoral CIL is already charged on all development. It was my Interim Finding that, despite exemptions applying to certain charitable organisations, the 'All Other Uses' rate was not substantiated. In the SoM it is reduced to nil and this modification, too, is endorsed."

CIL Rates for Elderly Persons Dwellings /Residential institutions and Extra Care housing/ Sheltered housing

A2.42 It is sometimes argued that sheltered/elderly persons accommodation etc has significantly higher costs than mainstream housing and that proposed CIL charges would render such development unviable. Where this is argued an Examiner may consider it appropriate to request the Council to undertake specific viability appraisals of such development if they have not already done so. Again, the examiner needs to be sure this represents a different use. Paragraph 021 of the CIL chapter of the PPG provides further specific guidance on this.

Watford - para 40

"….. there is no evidence before me to suggest that such schemes would be rendered unviable with a modest CIL charge in place. Based on the evidence I consider the £120 psm charge to be reasonable and comfortably below the modelled maximum."

Worthing – paras 30 & 31

"The majority of points addressed above apply equally to sheltered housing as to general purpose residential development, and based on the specific updated appraisal undertaken (CD06/12), maximum viable CIL levels for sheltered housing generally lie in the middle of the range of levels for the other appraised types of residential development as set out in paragraphs 15 and 16 above……. Consequently, even accounting for slower sales rates than assumed by the

Council, it is unlikely that CIL would threaten the viability of most sheltered housing development in the Borough."

Rother – para 48

"It was argued in representations that the rates set for sheltered/retirement homes had not been tested appropriately in the EVA due to a lack of allowance for the extent of communal floorspace provision that is provided in this type of accommodation. I invited the Representor and the Council to meet in order to assess the matter technically whereby typical floor plans could be examined and measured: a more suitable method of dealing with the matter in contention than at a hearing. The result was a Statement of Common Ground in which it was agreed an acceptable 'buffer' for retirement development would be around 30%. Greenfield sites should be ignored because these are rarely suitable for specialist forms of older person accommodation. It was further agreed that the proposed CIL rates were acceptable within the zones apart from Battle, Rural North & West where there would be a negative buffer. It was mutually agreed that a modification would be put forward that the CIL rate within Zone 1 – Battle, Rural North & West should be reduced from £200 to £140 for Sheltered /Retirement Homes. Since this reduction is clearly supported by the additional viability testing, I will recommend the modification."

CIL Rates for Student Housing

A2.43 Student housing often differs in viability terms from mainstream housing and frequently will be the subject of a specific viability appraisal and potentially a differential rate. If not already produced an examiner might consider it appropriate to request the preparation of such appraisals where student housing development is likely to take place and it is argued that its viability differs from mainstream housing. The evidence may also point to differential rates for student accommodation which is provided for a profit and that which is operated at below-market rents levels.

London Borough of Tower Hamlets - para 61

"Given that the evidence clearly identifies that any CIL charge would be highly likely to render unviable below-market rent student housing and that it is not guaranteed that Charitable or Exceptional Circumstances Relief would apply to such development … it is necessary to modify the schedule to set a nil rate for this use…"

London Borough of Lambeth – para 17

"I conclude that the Council's CIL rate is higher than is justified on the basis of viability…I will recommend the figure of £215 as the revised CIL rate for student accommodation; a rate which should be applied to 'nominated' and 'direct let' student accommodation at market rents."

CIL Rates for Hotels

A2.44 Where a CIL charge is proposed it is a common argument that the viability of budget hotels is very different from other types of hotel. Consequently the examiner may need to be assured that an appropriate range of types of hotel have been appraised.

East Hampshire – para 53 (issues about hotel typology sampling)

The appropriate hotel CIL rate was a significant issue in this examination which is covered in detail in paras 40-53 of the report. The overall conclusion is as follows:

"I appreciate that the assumptions used have been challenged by a representor with local experience. However, overall, I consider that the budget hotel typology is reasonably representative of what is likely to come forward and that the values and costs have been reasonably established."

Tower Hamlets – para 52 (additional typology sampling required)

"In response to criticism that budget hotels were not adequately appraised, the Council submitted, as part of its Supplementary Evidence, an appraisal of the Bethnal Green Travelodge using information provided by Travelodge."

Lambeth – para 36 (lower rate justified by evidence)

The examiner concluded that the proposed rates should be lowered based on an assessment of the evidence relating to build costs and yields. This is set out in paras 25-36 of the examiner's report. Only the conclusion is presented below.

"I will therefore recommend that the Rate for hotel development in Zone A should be modified to £100 and the Zones B and C should have a Nil rate. On the basis of the available evidence, such modifications meet the need, as a matter of judgement, to come to an appropriate balance between the need for CIL funds and the delivery of development."

Southwark – paras 67-70 (rate proposed appropriate)

"The main objection, from budget hotel operators, is that the rate of £125 for all except Zone 1 fails to recognise the further variation in values across Zones 2 and 3, with only sites relatively close to the boundary of Zone 1 having been assessed and none toward the southern edge of the Borough.

It is further claimed that the examples taken fail to reflect the room size standards set by various budget hotel companies of up to 24 sqm net or 34 sqm gross. However, the Council bases its assessments on actual planning permissions granted. It is not practical to differentiate between types of budget or luxury hotel operation which can change within a permitted use. Moreover, in those examples assessed within Zones 2 and 3, the lower rate is well below the maximum CIL capacity of any type of hotel. Furthermore, there is further evidence of budget hotel promoters achieving lower building costs per room than those input to the VS appraisals.

The hotel rates appear overall to be sufficiently conservative to be justified on the evidence."

CIL rates for gypsy & Traveller development

A2.45 Separate rates for G&T sites are unusual for the reasons set out below.

London Legacy Development Corporation – para 22

"The Charging Schedule does not distinguish between different types of residential development. However, there is no evidence that would indicate that a differential approach to rates would be justified. In the case of gypsy and traveller sites these are normally regarded as a sui generis use for which a nil rate is proposed. In any

event, the stationing of caravans is a use of land and CIL only applies to buildings, with various exemptions including minor developments of less than 100 sqm."

Other matters – exceptional relief, instalments policy etc

A2.46 Charging authorities may grant discretionary relief if there are exceptional circumstances to justify doing so, if they consider it expedient and if they consider a CIL payment would have an unacceptable impact on the economic viability of the proposed chargeable development (Regulation 55). The PPG states that an authority wishing to offer such relief must first publish a notice of their intention to do so. It is sometimes argued that a Council's intention to provide relief, (where the criteria in Regulation 55 apply), could help justify setting a rate for developments that would not generally be able to sustain a CIL charge. Examiners should consider very carefully the weight to be given to any such arguments, taking into account that such relief can only be applied where there are 'exceptional circumstances'. The examiner in the first case below concluded that the possibility of relief in exceptional circumstances did not justify a charge in an area where the evidence indicated that most residential development would not be viable.

A2.47 Representations may focus on a range of matters which lie outside the scope of the examination, because they do not relate to the schedule. These can generally be dealt with quite briefly, as in the second example below.

Worthing – para 28 (exceptional circumstances relief did not help justify a rate where most development would not be viable)

"At the hearing the Council referred to the possibility of Exceptional Circumstances Relief being applied in respect of residential development in low value areas made unviable by CIL. However, its name implies that this relief should be applied to development which is exceptionally not viable because of CIL. In this case the evidence clearly identifies that most residential development in low value areas would not be viable and thus a finding that, in reality, a specific such scheme could not viably pay the proposed CIL charge would not be an exceptional circumstance. Notwithstanding this, whether or not the Council decides to introduce an Exceptional Circumstances Relief policy is primarily not a matter for consideration in the Examination."

Hambleton - para 79 (covering various 'other matters')

"Representors have raised concerns about the instalments policy, relief in exceptional circumstances, the amount of CIL receipts which will be passed to Parish Councils and the mechanisms for doing so. However, the instalments policy is a matter for the Council, the other issues are controlled by the relevant regulations and the percentage of funds passed to Parish Councils is decided at a national level. That said, I note that, under Regulation 55, the Council intends to make provision for relief in exceptional circumstances. While the number and timing of instalments is arguable, the existence of an instalments policy of any sort can only assist viability by allowing payments to be staggered."

Reaching a final conclusion and the need for a review

A2.48 Reports need to reach an overall conclusion. In some cases examiners have specifically suggested that a review should be carried out, although this has not been expressed as a modification. The 2 year period suggested in the first

example was based on the specific circumstances of this CIL. Other periods (or none) may also be appropriate.

Hambleton - para 80

"In overall terms, the Council has used appropriate and available evidence to inform the assumptions about land and development values and likely costs. This evidence indicates that the overall development of the area, as set out in the development plan, will not be put at risk if the proposed charging rates are applied. I can, therefore, see no reason why the proposed rates might discourage development or have any significantly adverse effects on the local economy, employment rates or the achievement of the development plan's vision and objectives. However, it would be prudent for the Council to review the CIL charges within 2 years of adoption to ensure that development remains viable, particularly given that some of the evidence dates back to reports published in 2009 and 2010."

Royal Borough of Kensington and Chelsea - paras 81 and 82

In addition to these modifications, I consider it appropriate to make a recommendation that, given the particular circumstances that have been highlighted through this examination, the Council should undertake an early review of its CIL regime.

There are three principal reasons for this recommendation. First, it will allow for the local effects of the CIL charges in practice to be carefully monitored. Second, it will also allow for any revisions to affordable housing policies to be devised, adopted and reflected in the CIL regime. Third, it will provide an opportunity to revisit the CIL approach to the strategic site at Kensal. It is clearly a matter for the Council to consider the timing of such a review, although it would seem sensible to undertake it before the anticipated commencement of the strategic development at Kensal. Such a review, which the Council has indicated that it is likely to undertake in any event, will provide the opportunity to evolve and refine the CIL regime in a positive manner and should ensure that it is aligned with any key changes in policy requirements and with the progress on the borough's most significant strategic development site.

Crawley – paras 38-40

The CBLP [Local Plan] and the IDS [Infrastructure Delivery Schedule] provide a clear framework for planned growth and necessary infrastructure in Crawley borough. There is a substantial infrastructure funding gap that justifies the imposition of a CIL.

The Council's flat rate residential development CIL charge of £100 psm will not threaten the viability of planned residential development. Indeed, the evidence indicates that the CIL would be set at a level where there will be a comfortable viability buffer across all tested development scenarios. The Council's evidence also supports its differentiation and the CIL charges for various types of retail development, which are set with substantial headroom to avoid any risk to scheme viability.

Overall, I conclude that the Crawley Borough Council Draft Community Infrastructure Levy Charging Schedule satisfies the requirements of Section 212 of the 2008 Act and meets the criteria for viability in the 2010 Regulations (as amended). I therefore recommend that the Charging Schedule be approved.

CIL reports assessed

This document is based on the assessment of a large number of reports which were finalised between 2013 and 2015. Those included in this report are listed below.

CIL	Report date
London Boroughs	
Barking and Dagenham	28/05/2014
Bexley	30/12/2014
Enfield	18/12/2015
Lambeth	19/05/2014
Lewisham	23/01/2014
Southwark	27/02/2015
Tower Hamlets	14/11/2014
Kensington and Chelsea	22/12/2014
Outside London	
Birmingham	04/06/2015
Crawley	25/02/2016
Dudley	16/03/2015
Eastbourne	13/01/2015
East Hampshire	19/10/2015
Hambleton	23/12/2014
Gedling	14/05/2015
Lewes	17/07/2015
London Legacy Development Corporation	27/11/2014
Rother	01/09/2015
Watford	18/08/2014
Wigan	28/12/2015
Wiltshire	16/03/2015
Worthing	19/11/2014
Woking	09/07/2014
Mid-Devon	20/02/2013

The Planning Inspectorate

Compulsory Purchase and other Orders

Not yet updated to reflect December 2023 Framework (NPPF)
What's new since the last version Changes highlighted in yellow made 22 April 2021: • Major additions and updates for paragraphs 19.3-19.27 relating to Revocation, Modification and Discontinuance Orders
Other recent updates

Contents

Introduction

1. This chapter of the Inspector Training Manual is a guide to the work of PINS in handling work on compulsory purchase and other Orders apart from those under the Housing Acts, public rights of way, tree preservation, Listed Buildings and those relating to water and sewerage. It complements the general advice in the Inspector Training Manual about the conduct of Inquiries and the reporting of such cases, and provides information on various types of Order.

2. An Inspector may, within the normal confines of the legislation and case-law, vary any arrangements described by this guidance.

3. This chapter advises on:

    - general CPO policy;
    - pre-Inquiry action;
    - conduct of CPO inquiries;
    - CPOs dealt with by written representations;
    - delegated decision making
    - reporting to the Secretary of State;
    - costs and charges;
    - types of CPO;
    - grounds of objection to CPOs;
    - compulsory purchase and special kinds of land; and
    - other Orders.

Relevant Statutory Sources and Guidance

England

Acquisition of Land Act 1981 (as amended)
Town and Country Planning Act 1990 (as amended)
Planning and Compulsory Purchase Act 2004

The Housing and Planning Act 2016 (see also the Housing and Planning Act 2016 (Commencement No.2, Transitional Provisions and Savings) Regulations 2016 (SI 2016 No. 733)
SI 2004 No. 2595 Compulsory Purchase of Land (Prescribed Forms) (Ministers) Regulations 2004
SI 2004 No. 2594 Compulsory Purchase of Land (Written Representation Procedure) (Ministers) Regulations 2004
SI 2007 No. 3617 The Compulsory Purchase (Inquiries Procedure) Rules 2007
SI 2018 No. 253 The Compulsory Purchase of Land (Written Representations Procedure) (Ministers) (Miscellaneous Amendments and Electronic Communications) Regulations 2018
SI 2018 No. 248 The Compulsory Purchase (Inquiries Procedure) (Miscellaneous Amendments and Electronic Communications) Rules 2018
Guidance on compulsory purchase process, and the Crichel Down Rules (MHCLG, 2019)
Appeals Planning Practice Guidance – the award of costs and compulsory purchase and analogous orders

Wales

Acquisition of Land Act 1981 (as amended)
Planning and Compulsory Purchase Act 2004

The Housing and Planning Act 2016 (see also the Housing and Planning Act 2016 (Commencement No.2, Transitional Provisions and Savings) Regulations 2016 (SI 2016 No. 733)
NAFWC 14/2004 Revised Circular on Compulsory Purchase Orders (Part 1) (Part 2) Please contact PINS Wales for Emerging Guidance
SI 1994 No. 512 Compulsory Purchase by Non-Ministerial Acquiring Authorities (Inquiries Procedure) Rules 1990[1]
MHCLG Guidance on Compulsory Purchase Process and the Crichel Downs Rules (MHCLG, October 2015)[2]
Compulsory Purchase (Inquiries Procedure) (Wales) Rules 2010 (SI 2010 No 3015) Compulsory Purchase of Land (Written Representations Procedure) (National Assembly for Wales) Regulations 2004 (SI 2004 No 2730 (W237)

Glossary of Abbreviations

4. The following standard abbreviations are used:

ALA	Acquisition of Land Act 1981 (as amended)
CPO	Compulsory Purchase Order
PCU	Planning Casework Unit
HCA	Homes and Communities Agency
IP Rules	The Compulsory Purchase (Inquiries Procedure) Rules 2007
LPA	Local Planning Authority
PCPA	Planning and Compulsory Purchase Act 2004
PIM	Pre-Inquiry Meeting
SPP	Special Parliamentary Procedure
SSHCLG	Secretary of State for Housing, Communities and Local Government
TCPA	Town and Country Planning Act 1990 (as amended)
The Guidance	Guidance on compulsory purchase and the Crichel Down Rules

[1] These Rules apply in Wales until such time as they are revoked by Welsh Ministers.

[2] The publication of the first version of the MHCLG Guidance in October 2015, which cancelled ODPM Circular 06/2004 in England only. There may therefore be some residual categories of CPOs in Wales where ODPM Circular 06/2004 still applies.

List of Definitions

5. **Acquiring Authority** means the Minister, local authority, Homes and Communities Agency or other person who may be authorised to purchase land compulsorily (Section 7 of the ALA).

6. **Confirming Authority** means when the acquiring authority is not a Minister, the Minister having power to authorise the acquiring authority to purchase the land compulsorily (Section 7 of the ALA). Note that from 6 April 2018, most decisions have been delegated to Inspectors (under Section 14D of the ALA), who now act as the Confirming Authority in most CPO cases, rather than the SoS. This only applies to MHCLG cases and not casework for DfT, Defra, BEIS etc.

7. **Authorising Authority** is the confirming authority in the case of a non-Ministerial Order, or the 'appropriate authority' in the case of a Ministerial Order. For an order proposed to be made in the exercise of highway land acquisition powers, the Secretary of State for Transport and the Planning Minster will act jointly as the appropriate authority. In any other case, it means the Minister (see paragraph 4(8) of Schedule 1 to the ALA 1981

8. **Remaining Objector** means a person who has made a remaining objection within the meaning of Section 13A of, or paragraph 4A(1) of Schedule 1 to, the Acquisition of Land Act 1981 – that is, a 'qualifying person' (generally an owner, lessee, tenant or occupier of land) who has made a 'relevant objection' which has been neither disregarded (for example because it relates solely to matters of compensation) nor withdrawn.

Background

9. CPOs are made by an acquiring authority under specific legislation ('the enabling Act'), and some require confirmation by the Secretary of State for Housing, Communities and Local Government (SSHCLG) or other appropriate Government Minister or, in Wales, the Welsh Ministers ('the confirming authority') (see definitions section 1.5 above). If there are valid remaining objections to a CPO then the confirming authority must hold an Inquiry under s13A(3)(a) or hearing under section s13A(3)(b) of the Acquisition of Land Act 1981 ('ALA') (unless there is agreement to proceeding by way of written representations (see section 7 below)). In practice, inquiries are the norm, although it remains at the Inspector's discretion to hold a hearing, the absence of procedural rules relating to hearings render this procedure inadvisable. The confirming authority has the authority under sub-section 13(4) of the ALA to disregard any objection which relates exclusively to matters which can be dealt with by the tribunal by whom compensation is to be assessed (the Upper Tribunal (Lands Chamber). The confirming authority also has the discretion under Section 5(1) of ALA to cause an Inquiry (but not a hearing) to be held for the purpose of executing any of his powers and duties under that Act. The confirming authority may, therefore, decide to hold an Inquiry even if there are no remaining objections to a CPO.

10. Inspectors may be appointed to hold inquiries where the confirming authority is, or is additionally, a Minister other than the SSHCLG. In these cases the Inspector must have received proper authority to hold the Inquiry and should ensure that the correct pre-Inquiry procedures have been observed. This may include cases where the initial scrutiny of the submitted Order has been carried out by a Government department other than PCU. The name and title of the Minister concerned must be known for reference at the Inquiry and for addressing in the Inspector's report/decision.

11. Although inquiries are held and written representations site visits carried out because objections have been made, the Inquiry and the report/decision is into the CPO itself. Following the Inquiry or written representations site visit, the Inspector must decide/recommend whether the CPO should be confirmed with or without modifications or not confirmed, or explain in rare cases why no recommendation is made. The report/decision must therefore deal with the whole of the CPO, and not just those parts to which objection(s) have been made. In Inquiry cases, it should also address the case for objections where no Inquiry appearance is made.

12. Inspectors should be aware that the Planning Casework Unit (PCU) is part of MHCLG and as such share the same email and telephone system as PINS. Inspectors must not contact PCU directly, all communication should be via the Environment and Transport Team. If an Inspector is contacted directly by PCU by email, s/he must not respond, but should forward the email to the Environment & Transport Team. If contacted by telephone, the Inspector should explain briefly that s/he cannot talk to them and should ask them to contact the Environment and Transport Team.

General Policy

13. The Guidance confirms the value the Government places on the appropriate use of compulsory purchase powers as a means of assembling the land needed to help deliver social and economic change. In all cases, CPOs need to be fully justified, their use being restricted to cases where there is a compelling case in the public interest sufficiently justifying interfering with the human rights of those with an interest in the land affected (see Tier 1 Para 12 of the Guidance). In this respect, regard must be had to the provisions of Article 1 to the First Protocol to the European Convention on Human Rights (protection of property) and, in the case of the compulsory purchase of a dwelling where an objector has an interest, to Article 8 of the Convention (right to respect for private and family life).

14. In addition Article 6 of the ECHR may be raised. This provides that everyone is entitled to a fair and public hearing. This should be met by the procedures for objection and confirmation of the CPO.

15. All public sector bodies are bound by the Public Sector Equality Duty (PSED) set out in s149 of the Equality Act 2010. As a public authority every Inspector must comply with the PSED in the exercise of their functions. It is a duty on the Inspector personally regardless of equality issues being raised by any party. The duty is to have due regard to the need to:

    - eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Act;
    - advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
    - foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

16. If any person or persons with protected characteristics are likely to be affected by the decision then the Inspector must have due regard to the equality aims set out above. Having due regard requires gathering relevant information from the parties to ensure that the impact of any decision on a person / persons who share a relevant protected

characteristic is clearly understood. Where a decision is likely to have an impact on a person / persons who share a relevant protected characteristic the Inspector must address this specifically in their report/decision and the report/decision should reflect the fact that the Inspector has complied with the PSED. It is essential that Inspectors are familiar with the training material in the Human Rights and the Public Sector Equality Duty chapter.

17. In doing so, Inspectors should be mindful that if information submitted comprises sensitive personal data or is otherwise sensitive in nature, for example children's names, ages and educational needs, notwithstanding that it may be or address a crucial or determining consideration, you **must not refer in detail** to this information in your report/decision (please see *Sensitive Information* in Annexe 1 of The approach to decision-making chapter, for more information).

18. The acquiring authority will need to demonstrate that it has taken reasonable steps to acquire all of the land and rights in the Order by agreement. Compulsory purchase is intended as a last resort.

19. It is in the interests of acquiring authorities to provide a comprehensive justification for a CPO including a clear explanation of the purposes to which the land would be put if compulsorily acquired, and whether the scheme of implementation has firm prospects of success. Each case will be considered on its merits.

Targets

20. The Housing and Planning Act 2016 introduced a new Section 14D to the Acquisition of Land Act 1981, which provides powers for CPO casework to be decided by Inspectors, rather than the SoS[3] and also inserted a new subsection 3 into section 24 of the 1981 Act, to introduce statutory reporting targets for planning CPO casework. Resulting from these, the Compulsory Purchase of Land (Written Representations Procedure) (Ministers) Regulations 2004 (SI 2004 No 2594) and the Compulsory Purchase (Inquiries Procedure) Rules 2007 (SI 2007 No 3617) have been amended by further Statutory Instruments[4] to introduce the following statutory targets:

21. For **written representations** casework there is:

SoS Casework:

- A statutory requirement for a site visit to be undertaken within 15 weeks of the date of the start letter;

[3] It appears that 80-90% of CPO casework is delegated to Inspectors.

[4] The Compulsory Purchase of Land (Written Representations Procedure) (Ministers) (Miscellaneous Amendments and Electronic Communications) Regulations 2018 (SI 2018 No 253) and the Compulsory Purchase (Inquiries Procedure) (Miscellaneous Amendments and Electronic Communications) Rules 2018 (SI 2018 No 248) - applying to casework after 6 April 2018. Target timescales set out in MHCLGs *Guidance on Compulsory purchase process and The Crichel Down Rules* (paragraphs 50-55).

- A target for 80% of cases to be dealt within a total of 8 weeks (i.e. 4 weeks for the preparation and quality control of the Inspector's report and 4 weeks for the decision letter stage. There is also a 'back stop' of the remaining 20% of cases being dealt within 12 weeks;

- Where there has not been a site inspection, the timescales for decision will be taken from the final exchange of representations under Regulation 5 of the Compulsory Purchase of Land (Written Representations Procedure) (Ministers) Regulations 2004;

- Inspectors' reports will need to be submitted to the office within 3 weeks of the site visit date, which will allow a 1 week Q&A process. If, whilst writing their reports, Inspectors think they will not be able to comply with this, the Environment and Transport casework team should be informed immediately.

Delegated cases:

- Statutory requirement for a site inspection to be undertaken within 15 weeks of the date of the starting date letter;

- Target for a decision to be issued within 4 weeks of the site inspection date in 80% of cases; with 100% of cases being decided within 8 weeks of the site inspection date;

- Where there has not been a site inspection, the timescales for decision will be taken from the final exchange of representations under Regulation 5 of the Compulsory Purchase of Land (Written Representations Procedure) (Ministers) Regulations 2004.

22. For **Inquiry** casework there is:

SoS Casework:

- A statutory requirement that within 10 working days of the close of the Inquiry, Inspectors, in consultation with the authorising authority, should inform the acquiring authority and the other parties to the Inquiry, the timescale for when a decision will be issued;

- 'Back stop' targets, of a maximum of 8 weeks for Inspectors to write up the report and the Environment and Transport casework team to carry out the Q&A checks, 12 weeks for the National Planning Casework Unit to review the report and issue a final decision letter in 80% of cases, and a further 4 weeks allowed for the remaining 20% of cases.

- Target for a decision to be issued within 20 weeks of the close of the Inquiry to in 80% of cases; with 100% of cases being decided within 24 weeks.

Delegated Casework:

- Statutory requirement that within 10 business days beginning on the day after the day the Inquiry closes, the acquiring authority and the other parties to the Inquiry should be notified of the expected date on which a decision will be issued;

- Target for a decision to be issued within 8 weeks of the close of the Inquiry in 80% of cases; with 100% of cases being decided within 12 weeks.

- There is also a range of information required from PCU/PINS. This includes the reporting period, the enabling power under which the CPO was made, whether it is a Secretary of State case or delegated (currently only MHCLG cases).

The scope of delegation to Inspectors

23. The Housing and Planning Act 2016 added s14D to the Acquisition of Land Act 1981. This provides that a confirming authority may appoint a person ("an Inspector") to act instead of it in relation to the confirmation of a compulsory purchase order to which section 13A applies. An Inspector may be appointed to act in relation to a specific compulsory purchase order or a description of compulsory purchase orders. An Inspector has the same functions as a confirming authority and retains those functions even if all remaining objections are withdrawn after the Inspector has begun to act in relation to the CPO.

24. Where an Inspector is appointed the confirming authority must inform every person who has made a remaining objection and the acquiring authority. When an Inspector decides whether or not to confirm the whole or part of a CPO, the Inspector's decision is to be treated as that of the confirming authority. (The appointment may be revoked of varied.)

25. The Guidance sets out the criteria which will be considered by the Secretary of state when deciding whether to delegate a decision on a CPO? Delegation will be considered on individual merits but will generally take place when the case appears unlikely to conflict with national policies on important matters; raise novel issues; give rise to significant controversy or have impacts which extend beyond the local area.

Pre-Inquiry action

26. The advice in the Inspector Training Manual chapter on Inquiries regarding preparation before the Inquiry also applies to inquiries into CPOs. The Guidance provides acquiring authorities with comprehensive guidance on the preparation, promotion, confirmation and implementation of CPOs to which the ALA applies. For most CPOs the relevant Inquiries Procedure Rules are the Compulsory Purchase (Inquiry Procedure) Rules 2007 (the IP Rules) which bring CPO inquiries generally into line with planning Inquiry procedures. Joint CPO and planning or highway inquiries may be held when special or hybrid procedures are necessary.

27. When an Order is made it will be submitted by the acquiring authority to PCU (in MHCLG) (or in Wales, PINS Wales) who will carry out the initial administration of the process and undertake procedural checks. Inspectors should understand the grounds on which CPOs can be made and confirmed. They need to be familiar with the relevant parts of the enabling Act (which can sometimes be of some age and specialist nature) and have these with them at the Inquiry. The IP Rules should also be studied and taken to the Inquiry for reference. It should not be assumed that every acquiring authority has extensive experience of the process of making and seeking the confirmation of CPOs, although it is expected that the initial screening of draft Orders by PCU/PINS Wales will usually have identified any obvious errors of procedure or content.

28. The IP Rules (Rule 4) enable an authorising authority to hold a pre-Inquiry meeting (PIM). This must be held not later than 16 weeks after the 'relevant date' (the date of the written

notice of intention to cause an Inquiry to be held). Normally Ministers will call a PIM only in exceptional circumstances (for example as a result of public interest because of regional/national implications, or complexity and where there is much third party interest). Rule 5 requires the acquiring authority to serve an outline statement on each remaining Objector, and in the case of a non-Ministerial Order, to the authorising authority, not later than 8 weeks after the relevant date. There is also a discretionary power available to the authorising authority to require any remaining Objector and others wishing to appear at the Inquiry, to serve within eight weeks of the notice an outline statement on him/her. Outline statements are intended to assist the Inspector and other parties in preparing for the Inquiry. They should contain the principal submissions and identify key issues.

29. Rule 6 enables the Inspector to hold a PIM in cases where it is considered desirable and the authorising authority has not required one. Not less than three weeks' written notice of the PIM is required to be given to the authorising authority, the acquiring authority (in the case of a non-Ministerial Order), each remaining Objector, others entitled to appear and those whose presence at the meeting appears to the Inspector to be desirable. It is for the Inspector to determine the matters to be discussed and procedures to be followed. Where a PIM is not arranged, and there is a significant number of objectors requiring a multi-day Inquiry, there is likely to be merit in an Inspector arranging for a procedural Pre-Inquiry Note (PIN) to be issued by the PINS Environment and Transport team and setting out procedural matters and a draft Inquiry programme. The Inspector should draft the note for the case officer (or Programme Officer where one has been appointed) to issue. PINs do not feature in any Regulations, but PINS' role is widely accepted by parties.

30. A CPO Inquiry may be the first time an Inspector has worked with a Programme Officer. They are neutral officers of the Inquiry working to yourself. Along with programming appearances and ensuring the timely submission of documents, they can be invaluable in a range of administrative functions. They may be private individuals working as programme officer, an employee of one of the companies who specialise in this field, or a local authority employee seconded to the Inquiry for the duration. They can be especially useful in setting up an Inquiry website, on which all key documents can be downloaded.

31. An acquiring authority is required to send a Statement of Case to each remaining Objector and, in the case of a non-Ministerial Order, to the authorising authority, within 4 weeks of the conclusion of any PIM, or 6 weeks after the relevant date in any other case (Rule 7). The authorising authority may also require by notice in writing any remaining Objector, or anyone who has notified it of an intention to appear at the Inquiry, to send a statement of case to it and anyone specified in the notice. This should be done within 6 weeks of the notice.

32. Paragraph 33 of Tier 1 of the Guidance states that requiring objectors' statements of cases is a useful device for minimising the need to adjourn inquiries as a result of the introduction of new information. The intention is to enable the parties to know as much as possible about each other's case at an early stage to enable a focus on matters in dispute and to see whether there is scope for negotiation. In addition, Rule 7(5) provides the opportunity for the authorising authority or Inspector to require such further information as they may specify about the matters contained in the statement of case. The Environment and Transport Team will be able to facilitate any such requests.

33. The Prescribed Forms Regulations 2004[5] set out the prescribed forms of notice and other procedural matters to which the ALA applies. Although the CPO will have been examined20014 by the procedure staff at PCU (or in Wales, PINS Wales) to ensure conformity with the relevant regulations, Inspectors should satisfy themselves that the Order and Order Map are in the prescribed form.

34. Any modifications to the Order, Order Map and Order Schedule will be carried out by the Environment and Transport Team. They will copy directions from the Inspector who should supply a "mock copy" of the modifications. Any modifications (no matter how small) will need to be flagged clearly. In view of the recent delegation of most CPO's to Inspectors, who can act as a confirming authority, the advice in paragraph 44 of The Guidance applies to Inspectors. Significant substantive modifications should, however, be raised at the Inquiry, so that the agreement of the acquiring authority can be sought or its views obtained and reported. All parties should be made aware at the Inquiry of the nature and extent of any proposed modification. Paragraph 44 of Tier 1 of the MHCLG Guidance states that, where potential modifications have been identified before the Inquiry, the Inspector will normally wish to provide an opportunity for them to be debated. Such cases might, for example, include where PCU (PINS Wales) has suggested a more appropriate wording for the Order which the confirming authority would wish to use if the Order was confirmed or, more frequently, where there are apparent discrepancies between the Order Schedule and the Order Map. It must be borne in mind that modifications cannot be made which have the effect of adding to the land included within the Order as shown on the Order Map without the consent of all persons with an interest in the land (section 14 ALA). Nor can a CPO be considered or confirmed for a different purpose from that for which it was made.

35. Discrepancies sometimes occur between the Order Map and the Order Schedule. If possible, such matters, if they require amendments being made to the Order Map, should be clarified by the production of a corrected map before the end of the Inquiry; changes to the Order Schedule may be more appropriately dealt with in the Inspector's recommendation if it is one of confirmation of the CPO. The Secretary of State should be left in no doubt from the Inspector's report/decision as to the specific details of any recommended modification. In view of the delegation of most CPO's to Inspectors, who can act as a confirming authority, the advice in paragraph 44 of The Guidance.

36. Inspectors should be particularly vigilant in identifying whether any land within the CPO amounts to 'special kinds of land' as defined in sections 16-19 of the ALA. The categories of land include: land of statutory undertakers, land owned by a local authority, land owned by the National Trust and held by them inalienably, and land forming part of a common, open space, fuel or field garden allotment. Particular protection is given to such land against compulsory purchase. These circumstances are likely to occur most frequently in cases where electricity or gas substations or other statutory undertakers' installations are included within the Order area and where the statutory undertaker has objected to the Order. The Inspector should identify what action, if any, the acquiring authority is taking to satisfy the requirements of sections 16-19. The Inspector may need to reach a

[5] In Wales, the SI 2004 No 2732 Compulsory Purchase of Land (Prescribed Forms)(National Assembly for Wales)

Regulations 2004 apply.

view as to whether such action, or any perceived lack of action, is likely to affect the Inquiry proceedings, such as by a request or the need for adjournment of the Inquiry. This and related issues are dealt with further in section 13 below.

Conduct of a CPO Inquiry

37. The advice in the Inspector Training Manual Chapter 'Inquiries' applies generally. The Inspector Training Manual Chapter on Housing CPOs gives guidance on the conduct of Housing Act CPO inquiries. An alternative ('Method B') order of proceedings is suitable for inquiries where many Objectors are appearing and has proved to be effective, particularly where Objectors are concerned primarily about the effect on their property rather than the principle of the Order. However the parties sometimes have views about the procedure, and it would be advisable to discuss it with them before finally deciding on which procedure to use – this can be raised at a PIM or canvassed in a PIN (or earlier). The 'Method B' procedure is set out in Annex 1.

38. It used to be general practice after opening the Inquiry for the Inspector to ask a representative of the acquiring authority (usually its advocate) to read out the notice published in a newspaper and displayed on or near the land informing the public about the Inquiry (traditionally known as the Convening Notice). If the Order Schedule is a long one it is customary to take that as read. However, an 'announced' opening more akin to the opening of a s78 planning Inquiry may be appropriate. This may be so particularly where a CPO Inquiry is held jointly with an Inquiry into a related matter such as a section 78 appeal or called-in application, in which circumstances it may be simpler for the Inspector to make a composite opening announcement, identifying all the matters with which the inquiries are concerned and seeking the parties' agreement.

39. The ALA, the IP rules and The Prescribed Forms Regulations 2004 contain requirements as to the form, content, placing and display of notices. The enabling Acts concerned may contain similar requirements. Failure to comply with statutory requirements may result in a challenge to the validity of the CPO, or a request for an adjournment. The acquiring authority must be asked to confirm that it has complied with all the statutory formalities and provide material to substantiate this point. Any submissions about the formalities, on legal or procedural grounds, may then be heard together with the response from the authority and any reply from the Objector(s). It is often useful to ask the Objector(s) if their interests have been prejudiced by the alleged failure to comply with the statutory formalities and, if so, in what manner. This information can then be included in the Inspector's report/decision.

40. In the case of delegated decisions the Inspector will need to make the decision about whether or not there has been compliance and whether or not the Inquiry will need to be adjourned or cancelled. Even if lack of compliance with the formalities has been alleged or conceded it is generally desirable to allow the Inquiry to proceed, without prejudice to any decision that might subsequently be made on such matters by the confirming authority. However, where there is a real possibility that an interested party may have been substantially prejudiced (see section 24(2) of the ALA), an adjournment of the Inquiry, or at least the hearing of that objection, for a specified but limited period may be advisable (see *Davies v SSW* [1997] JPL 102 and *Performance Cars Ltd v SSE* [1997] P&CR 92 CA). Requests for adjournments require careful consideration, to avoid the possibility of unfairness to objectors (see *Webb v SSE* [1990] 22 HLR 274).

41. In line with planning inquiries the IP Rules require the advance submission of written evidence that anyone wishes to rely upon at an Inquiry. Anyone intending to give evidence by reading a 'statement of evidence' (neither the Rules nor the Guidance refer to 'proofs of evidence') must submit this statement, and any summary, to the Inspector not later than 3 weeks before the start of the Inquiry (or as specified in a timetable if a PIM has been held or PIN issued). Summaries should be provided when a statement exceeds 1,500 words and generally only these should be read at the Inquiry (Rule 15).

42. Rule 16 of the IP Rules provides that, except as otherwise provided, the Inspector shall determine the procedure at the Inquiry. However, unless the Inspector so determines with the consent of the acquiring authority, the Rules provide that the authority shall begin and have the final right of reply, both in its general case and that in relation to individual objections. Other persons entitled or permitted to appear may appear in whatever order the Inspector may determine. The sequence of other events described in the Inspector Training Manual chapter on Inquiries may often be appropriate, with suitable variations where the occasion demands.

43. It is usually more sensible for any supporters of the acquiring authority to be heard immediately after the authority itself, especially where they have a direct interest in the Order. Remaining Objectors have, under Rule 16(3) of the IP Rules, the right to cross-examine the acquiring authority's witnesses.

44. Whilst not common, it is possible that a joint Inquiry CPO/appeal/call-in Inquiry may be held where the sole Objector is also the appellant or applicant it may be convenient to proceed as for a s78 appeal, but with the authority having the right of final reply in respect of the Order only. The "authority" will have two different capacities if it is the same Council in both, one as LPA and the other as acquiring authority. The evidence in the Inquiry must be led making such distinctions clear and the report(s)/decision(s) written likewise.

45. The acquiring authority must always be invited to comment, in writing, on objections where no appearance is made and its response must be summarised in the Inspector's report/decision.

46. Within 10 working days of the Inquiry closing PINS will write to the parties giving them the date by which the decision will be issued. If an Inspector is asked at an Inquiry when this is likely to be they should inform the parties that the decision will be issued within 8-12 weeks of the Inquiry closing. No further details should be given. Within 3 days of the Inquiry closing, the Inspector should make contact with the office giving them an eta for their decision/report. The office will write out to the parties with a generic 8 weeks from the close of the Inquiry. Only in very exceptional circumstances will we invoke the backstop 12 weeks. It is very important that the Inspector flag up with the office and their line manager any potential issues/problems that may impact the 8 week target.

47. If asked about the likely submission date of a report/decision to the Confirming Authority, Inspectors should state that PINS will send the report/decision to the SoS as soon as they can. For a clearer idea of likely submission to the SoS, parties should seek advice of the Environment and Transport Team, but they should wait until a week after the Inquiry has closed.

48. A CPO made by the SSHCLG, other authorised Minister or in Wales the Welsh Ministers is prepared in draft, and the purpose of the Inquiry is to determine whether it should be made, not confirmed. In such an Inquiry, the case for the SSHCLG, Minister or National Assembly should be heard first. It may be presented orally by a representative from the

Department concerned, or may be in writing. Such a procedure would also apply where the SSHCLG/National Assembly proposes to confirm a Revocation Order made under section 97 of the TCPA 1990. A Departmental representative will normally attend any Inquiry and state the case for the Order.

CPOs dealt with by Written Representations

49. There is provision in the PCPA (Part 8) for CPOs in respect of which objections have been received to be confirmed without the need to hold a public Inquiry, but only in certain circumstances. Section 13A has been inserted into the ALA, which, supported by the provisions of The Written Representations Regulations 2004[6], details these circumstances. The Order should not be subject to the Special Parliamentary Procedure (SPP) under section 17 of the ALA; it should, in the case of an Order to which Section 16 of the ALA applies, benefit from a certificate given under subsection (2) of that Section; and importantly that every person who has made a remaining objection must have consented in the prescribed manner to the written representations procedure. Even if all these conditions are met, the confirming authority has the *discretion* not to apply the procedure and to opt for a public Inquiry instead.

50. The written representations procedure requires a site inspection to be carried out by the Inspector, which all the remaining Objectors have a right to attend. The normal rules of protocol apply as to site visits for s78 planning appeals though where an unaccompanied visit is not possible, an accompanied visit, rather than an ARSV, should be undertaken. The Inspector then composes a report/decision to the SSHCLG, other Minister or, in Wales, the Welsh Ministers.

Reporting to the Secretary of State

51. The general principles of reporting to the Secretary of State (see the Inspector Training Manual chapter on Secretary of State Casework) apply with equal force. The aim must be to give concisely to the Confirming Authority all the information necessary for it to understand all the issues, and to advise it on any technical implications of the case.

52. The Inspector must take account of objections to a proposal, report on those objections, reach clear conclusions based on carefully explained reasoning and, unless there are exceptional reasons for not doing so, make a recommendation on the proposal. There is no obligation to list the facts on which conclusions are based, but it must be clear on which evidence the relevant reasoning is based. See the Inspector Training Manual chapter on the approach to decision making. The SSHCLG or other Minister who makes a decision on the Order relies heavily on the Inspector's reasoning in the report and very few Inspectors' recommendations on CPOs are not agreed to. It is worth noting the *Horada v SSCLG* judgment which provides a useful synthesis on the duty to give reasons, where it was found that the SoS had failed to give intelligible and adequate reasons for disagreeing with an Inspector's recommendation to not confirm a CPO. Reasons must be sufficiently detailed to enable the reader to understand why the matter was decided as it

[6] In Wales, the Compulsory Purchase of Land (Written Representations Procedure)(National Assembly for Wales)

Regulations 2004 (SI 2004 No 2730 (W237)) apply.

was, and what conclusions were reached on the principle matters. The degree of particularity required will depend on the nature of the issues. The duty to give reasons does not however mean that every detail of the proposed scheme should be explored or mean that there is a duty to show that protection for those affected is absolute. If detailed legal points are raised these should be recorded. PCU have advised that, in CPO casework, it is not generally necessary for an Inspector to comment on legal matters. However, if the Inspector considers that there are important reasons for doing so, s/he should seek legal advice and indicate in the report that these are detailed matters of law and that it is for the Secretary of State to reach his/her conclusions in this regard.

53. The form of report may vary according to the case, but a general guide to the kind of format that will assist the Secretary of State is set out in Annex 2. Reports should be as succinct as possible, readable, fairly reflect the parties' cases and follow a sequence which allows ready appreciation of the objections and responses without any unreasonable or excessive need for the reader to cross refer to different parts of the report/decision. However, that is not to suggest that it is inappropriate in the Inspector's conclusions to provide and rely upon references to earlier parts of the report. Indeed, such references are crucial to demonstrate that the reasons and conclusions are supported by evidence and argument.

54. When an Inquiry is held jointly with a related appeal or call-in, the issues are often so interlinked that a single report will be possible even when more than one Secretary of State is concerned. Separate reports (with cross-references) may be necessary where there are distinct regimes with different legal tests. This matter should be discussed with the relevant GM before the Inquiry is opened or site visit carried out. If there are differences, they should be distinguished in the description. Irrespective of the way the report(s) and the Inspector's conclusions are handled in respect of the different matters, separate recommendations will always be necessary in relation to the separate tasks the Inspector has been appointed to carry out. A joint list of appearances can be appended, but separate lists of documents, plans and photographs may sometimes be necessary.

55. In simpler cases a joint report, separated into clearly definable sections, may be prepared, where two government departments are involved.

Modification of an Order

56. Inspectors will need to be aware of the importance of accuracy, when required to occasionally modify an Order. When modifications are required, you will need to ensure any modifications, however minor, are 100% accurate (in particular when Order maps require changes to the applicable Order boundary). This is necessary as the Order is a 'Sealed Order' (i.e. a legal document) with only one master copy. Any modifications to the Order, Order Map and Order Schedule will be carried out by the Environment and Transport Team. They will copy directions from the Inspector who should supply a "mock copy" of the modifications. Any modifications (no matter how small) will need to be flagged clearly.

General Data Protection Regulations

57. Due to the type of issues that may occur in housing CPO cases e.g. health, criminal records, it will often be required to draft a decision according to the requirements of the UK GDPR.

Writing delegated decisions

58. In the case of decisions delegated to Inspectors, there is no need to rehearse all the background material which might be included in a report to the Secretary of State, or at least not in so much detail. There does need to be confirmation of some of the basic facts of the case, especially the name of the CPO and the fact that the legal requirements have been complied with.

59. Decisions should be as succinct as possible, readable, fairly reflect the parties' cases and address the objections and responses. The exact form of decision may vary according to the case, but a general guide to the suggested format is set out in Annex 3 and Annex 4.

60. Don't forget that the parties should know the site and its history, so a relatively short description will often suffice – but in some cases the condition of the site/area will be important in relation to the justification of the CPO. The planning position as it affects the site will need to be spelt out, but this doesn't necessarily demand a separate section.

61. The decision will need to cover all the relevant points in the Guidance:

    - Is it clear how the land would be used if the CPO was confirmed?
    - Are the necessary resources likely to be available? (A general indication may suffice.)
    - Are there any planning or other impediments? (Bear in mind that planning permission is not necessarily a prerequisite.)
    - How does the scheme underpinning the CPO fit in with the development plan/emerging policy/local guidance and national policy?
    - Does the scheme contribute to the achievement of the promotion or improvement of the economic, social or environmental wellbeing of the area?
    - Could the objectives of the scheme be achieved by any other means, including alternative proposals?

62. Each objector needs to be able to locate the Inspector's consideration of their objection. This can be done in many ways, but perhaps the easiest is to include a short, sub-headed, section on each objection. It is perfectly acceptable to refer back in these sections to previous more general considerations of the merits of the CPO, but be careful to include all the main points raised by the objector.

63. Finally, do not forget that the decision is into the CPO as a whole, not simply a consideration of objections. In some cases consideration of the objections may encompass many of the merits, or otherwise, of the scheme – but this is not the whole story.

Costs and Departmental Charges

64. Detailed advice is set out in the Government's Planning Practice Guidance (PPG)[7]. Successful Objectors to CPOs and analogous Orders are normally awarded their costs. No application need be made at the Inquiry or during the written representation procedure by an Objector since the decision whether or not to confirm the Order will not have been issued. This matter need not be addressed in the report/decision.

65. Awards of costs may be made on the grounds of unreasonable conduct by an Objector or the acquiring authority. Where remaining objectors are successful then an award will be made in their favour (unless there are exceptional reasons for not doing so). There is no need for an application for costs to me be made by the objector for an award to be made. However, if the case goes to an Inquiry and there are applications for costs for unreasonable behaviour then the Inspector will need to hear those applications. If the Inspector decides not to confirm the CPO then the Inspector will not be able to award the Inspector costs on the grounds of unreasonable behaviour (because this would mean the objector would be paid twice). In those circumstances perhaps a preliminary paragraph in the CPO decision could explain.

66. Costs are not awarded on both the grounds of success and unreasonable behaviour. The advice on costs in the Government's Planning Practice Guidance applies generally. An application for costs made at a joint Inquiry into an Order and appeal or call-in or delegated case must be heard at the Inquiry, and a separate report/decision submitted. The costs attributable to the different matters (i.e. appeal or CPO) must obviously be distinguishable. Where a late Objector (such as a person claiming title to all or part of the land who had not previously been identified in the Order Schedule) is heard at the Inquiry the circumstances must be reported as part of the case for that Objector, to enable eligibility for costs to be properly assessed.

67. There may also be a scenario whereby a CPO is confirmed with modifications. If those modifications have taken out a plot of land which would mean an entire objection would fall away, an Inspector would need to seek advice, if there was a claim for costs on the grounds of unreasonable behaviour.

68. PINS expenses are recoverable in all delegated and SoS Order cases and Inspectors must attach a completed copy of a CIR1 form (available via the Environment and Transport team) when the report/decision is submitted. Inspectors should ensure that detailed records are kept of activities and expenses in case of queries from acquiring authorities. **These must correspond with time recorded on the Inspector's weekly MWR.** In joint Inquiry cases the CIR1 form should be placed on the file containing the report/decision; it should show the times both for the whole Inquiry and the part for which expenses are recoverable.

Sealed Orders and Maps

69. Sealed copies of the Order and Order Map will be located in a folder attached to the file. These are legal documents and must not be marked or harmed in any way, and should

[7] In Wales, see the NAFWC 14/2004 Revised Circular on Compulsory Purchase Orders

never be used as Inquiry documents. However, often the sealed copy is retained by the PCU (PINS Wales).

Types of Compulsory Purchase Order

70. Most CPOs involve acquisitions by local authorities for urban regeneration, town centre land assembly and other planning purposes under Section 226 of the TCPA 1990 as amended by Section 99 of the PCPA. Land can be acquired compulsorily if an acquiring authority thinks that this will facilitate the carrying out of development, redevelopment or improvement on or in relation to land under Section 226(1)(a).

71. The intention behind the amendment was to encourage local authorities to make greater use of paragraph (a) in subsection 226(1), including as part of regeneration initiatives. Paragraph (b) in subsection 226(1), which refers to land being acquired because it is 'required for a purpose which it is necessary to achieve in the interests of the proper planning of an area', remains substantively unchanged.

72. Subsection 226(1A) requires the power under paragraph (a) in subsection 226(1) to be exercised only if the local planning authority thinks that the development, redevelopment or improvement is likely to contribute to the economic, social or environmental well-being of its area. This provision is linked to the duty that many acquiring authorities have under section 2 of the Local Government Act 2000 to promote those objectives.

73. The MHCLG Guidance on Orders under Section 226 of the TCPA is set out in Tier 2 Section 1. Paragraph 106 sets out a non-exhaustive list of the matters that are to be considered on confirmation which are: whether the purpose for which the land is being acquired fits in with the adopted Local Plan or where no up to date Local Plan exists, the National Planning Policy Framework; the extent to which the proposed purchase will contribute to the achievement of the promotion or improvement of the economic, social or environmental wellbeing of the area; the potential and deliverability of the scheme for which the land is being acquired (which necessarily entails a consideration as to whether the proposed scheme is likely to be viable); and whether the purpose for which the acquiring authority is proposing to acquire the land could be achieved by any other means including considering the appropriateness of any alternative proposals put forward.

74. 'Tier 2: Enabling Powers' of the MHCLG Guidance sets out advice on a range of Enabling Acts. This includes guidance on Orders made by local authorities and urban development corporations under the Local Government Act 1972; by the HCA under s9 of the Housing and Regeneration Act 2008; by local housing authorities under s17 of the Housing Act 1985 (dealt with in the Inspector Training Manual chapter on Housing CPOs); by authorities under s93(2) of the Local Government and Housing Act 1989; under the Education Act 1996; under s47 of the Planning (Listed Buildings and Conservation Areas) Act 1990; and under the National Parks and Access to the Countryside Act 1949.

75. In all types of Order it is essential for the Inspector to understand the powers which exist under the enabling Act and be aware of the criteria for compulsory purchase which must be taken into account in the making and confirmation or non-confirmation of the Order concerned. The ALA lays down the procedure to be followed in the case of the compulsory purchase of land by a local authority or Minister, by virtue of any other enactment. The procedure in the ALA has been adopted in many Acts containing powers of land acquisition.

Grounds of objection to CPOs

76. There is wide scope for objections to CPOs. Some common grounds are that:

- The Order is invalid. This is a legal submission on which the Inspector would be expected to reach conclusions in delegated cases, but not in SoS cases. The submissions of each side should be noted and reported (if they are lengthy and / or complex, it is good practice to seek them in writing and to append them as a document to the Inspector's report/decision), and legal advice should be sought via the relevant Professional Lead at the earliest possible opportunity.

- The land is not needed for the purposes proposed. Inspectors have to exercise judgement in deciding whether the land is so required and/or whether it is necessary to achieve such a purpose. CPOs should only be made, and can only be confirmed, where there is a compelling case in the public interest.

- The site is unsuitable for the purposes proposed. Authorities are expected to establish before making CPOs that schemes can proceed without planning difficulties. Paragraphs 105 and 106 of the MHCLG Guidance (or in Wales Circular 14/2004) give guidance about planning requirements in connection with CPOs. Amongst other things, paragraph 100 should be noted, which refers to the right contained in section 245(1) of the TCPA to disregard objections which, in the Secretary of State's opinion, amount to an objection to the development plan. This power is unique to CPOs made under section 226 of the TCPA.

- Equally suitable or better sites are available. It is for the Inspector to decide whether evidence should be heard about alternative sites. However, in relation to Planning CPOs it is necessary to investigate alternative sites in a meaningful way (see *GLC v SSE & London Dockland Development Corporation* [1986] JPL 193). If an Inspector concludes that a more suitable site exists, it is sufficient to say that on the evidence available the Order land is not considered to be the most suitable for the purposes proposed. Inspectors should, however, be cautious about expressing definite opinions on the relative merits of alternative sites and must do so only with the benefit of credible and appropriately tested tested evidence concerning such sites.

- The costs arising from confirmation of the Order would be excessive. Submissions that other agencies could acquire and/or develop the Order land at less cost to the public purse should be carefully reported. In SoS cases the Inspector should be able to reach a conclusion in the light of the facts and relevant Government policy. In delegated cases, the Inspector would have to reach a conclusion. If not, the report/decision should explain why.

- The Order has been made for an improper or ulterior motive. Historically Inspectors have tended to accept assurances given by Councils as elected public bodies regarding the propriety of their actions. However, occasionally an Objector alleges that an Order has been made for a covert or inappropriate purpose different to the purpose stated on the Order. A defining case in this respect was *Don & Don (trading as Northern Markets) v SSE & Manchester City Council* [1994] JPL B85, arising from an Order made under subsection 226(1)(b) of the TCPA 1990. The Court, as one of the reasons for quashing the Order, held that the Inspector had failed to make a finding on whether the acquiring

authority had acted with proper motives. Inspectors must therefore, on being presented with allegations of an improper or ulterior motive in the making of a CPO, obtain information at the Inquiry and endeavour to reach a conclusion on the allegation in their report/decision. In general terms, it follows that an Inspector must deal with all matters of substance raised at the Inquiry, irrespective of whether or not they relate to planning or other principal matters connected with the Order.

- The Order represents a form of state aid, public procurement, or subsidy. Objectors may make this argument in regard to Land Transfer Agreements, and this argument may be potentially valid, however it is inappropriate to reach a conclusion on this with regards to the CPO itself. The making of a CPO cannot in itself be a state aid or public procurement exercise as it merely empowers the local authority to acquire land. (See NPCU/CPO/L5240/73807)

- That s233 of the TCPA 1990 has not been complied with. This section requires that, in respect of the giving of consent to disposals, relevant occupiers are offered a suitable opportunity for accommodation so far as is practicable. It was made clear in *Crabtree (A) Ltd v Minister of Housing* (1996) 17 P&CR 232 that the issue of compliance with s233 was a matter that could and should be raised by objection to the CPO. If allegations of non-compliance are made Inspectors should hear the merits of all objections and make a recommendation; however, non-compliance with this section may then go to the legality of the CPO and the decision whether to confirm it.

- Section 14 of the ALA 1981 stipulates that CPOs on confirmation shall not, unless all interested persons' consent, take in land not included in the original Order. An Inspector who contemplates recommending adding land to a CPO must therefore do so with the greatest caution, only with the relevant landowner's consent in writing, and only after consulting his/her Professional Leads.

Compulsory purchase and special kinds of land

Appropriation Orders

77. Where a CPO includes a statutory undertaker's land acquired for the purposes of the undertaking and the undertaker submits duly-made representations under Section 16 of the ALA 1981, the CPO cannot be confirmed unless the Minister connected with the service which the undertaking represents ('the appropriate Minister') certifies that the land can be taken and not replaced (by other land owned or available for acquisition by the undertaker where necessary) without serious detriment to the undertaking. The certification (or evidence of it) should be made available by the acquiring authority at the CPO Inquiry.

78. Similar provision exists in Schedule 3 to the ALA in the case of the acquisition of 'new rights' over land where full ownership is not required (e.g. the compulsory creation of a right of access). 'Right' is defined in Section 28 of the ALA and 'new right' is explained in paragraph (2) and in Part II of Schedule 3, parts of which relating to commons, open spaces etc were amended by Schedule 15 to the Planning and Compensation Act 1991.

79. Section 16 of the ALA does not apply to CPOs made under powers in Section 31 of the Act if the Order is confirmed jointly by 'the appropriate Minister' and the SSHCLG or other

making or confirming Minister or authority. Similarly, the provision of a certificate under Schedule 3 in the cases of new rights does not apply in these circumstances. Thus, such Orders may be jointly made or confirmed notwithstanding a Section 16 representation. The joint basis for the Inquiry, report and final decision should be reflected in the Inspector's appointment to the case.

80. In all cases where land owned by a statutory undertaker is included in an Order, the acquiring authority should be asked to confirm at the Inquiry that it has received copies of any Section 16 representations made to the appropriate Minister, and to supply any representations received direct. Inspectors should check Section 16 representations beforehand. If a PIM is to be held or a PIN issued, Inspectors should clarify such matters at that stage. Although it rarely happens, Inspectors should be aware that there is a provision for the confirming SoS to appoint a separate (non-PINS) Inspector/appointee to deal with s16 matters to a different timetable. Where this is apparent Inspectors should contact the Environment and Transport Team as soon as possible so that they can establish that the scope of your brief for the PINS case is clear.

81. Special provisions apply to National Trust land and land owned by local authorities and statutory undertakers.

82. Where an authority holds land for a particular purpose it may, by Order made under Section 229 of the TCPA and confirmed by the SSHCLG, appropriate land to any other purpose for which it may be authorised to hold land. In the case of land forming part of a common or open space, Section 19 of the ALA 1981 will apply. This provides for SPP unless the Minister certifies that equally sizeable and advantageous land is being given in exchange, or that the land does not exceed 209 square metres (250 square yards), or that the land is required for highway widening and the giving of exchange land is unnecessary.

83. Under Section 232 of the TCPA, land held for planning purposes may be appropriated to another purpose, but if it forms part of a common or is held or managed by the authority in accordance with a local Act, then the consent of the SSHCLG is required.

Crown Land

84. Paragraphs 101, 194 and paragraphs 249-253 (section 19) of the MHCLG Guidance deal with Crown Land. As a general rule Crown Land cannot be compulsorily acquired as legislation does not bind the Crown unless it states to the contrary. There are some limited exceptions to the general rule that compulsory purchase powers do not apply to Crown Land. A Crown interest in land should generally not be included in an Order unless there is: a) agreement under Section 327 of the Highways Act 1980 which provides for the use of compulsory purchase powers; or b) the Order is made under an enactment listed in the Appendix or in any other enactment which provides for compulsory acquisition of interests in Crown Land. Where b) applies Crown Land should only be included where the acquiring authority has obtained (or is, at least, seeking) agreement from the appropriate authority. The confirming authority will have no power to authorise compulsory acquisition of the relevant interest or interests without such agreement.

Other Orders

Highway Stopping-up or Diversion Orders under the TCPA

85. Sometimes the implementation of development for which planning permission has been granted involves the making of an Order by the Secretary of State for Transport under Section 247 of the TCPA to secure the stopping-up or diversion of any highway (including footways) necessary to enable the development to be carried out. If the development also requires land to be acquired and as part of the land assembly process a CPO is made to which there are objections, any objections to the draft Section 247 Order can be heard and the draft Order considered at the same Inquiry as that relating to the CPO (though care should be taken to ensure that the proceedings are clearly distinguished to avoid confusion.) Where reference is made in a CPO Statement of Reasons to the need for a SUO, the casework team will seek advice as to the progress of the draft SUO and aim to combine it with the consideration of the CPO. Where it appears to an Inspector that that has not taken place, s/he should contact the PINS case officer at the earliest possible opportunity because considering both Orders at once provides for greater efficiency, including in the use of PINS resources, and greater certainty for all parties concerned.

86. In these circumstances the Inspector's report will in England be a joint one, to the SSHCLG and the Secretary of State for Transport. The Inspector's appointment to hold what are in effect concurrent inquiries and submit the report should reflect the dual nature of the task and should bear the authorisation of both Secretaries of State. As in the case of Ministerial CPOs, the Inspector's recommendation to the Secretary of State for Transport is whether or not the section 247 Order should be made, not confirmed. Note that from 6 April 2018, decisions have been delegated to PINS Inspectors, who now act as the Confirming Authority in most MHCLG CPO cases, rather than the SoS. The SUO report will not be subject to the same targets as the CPO and will be a report to either a London Borough[8] or DfT SoS

Revocation, Modification and Discontinuance Orders

87. The power for the local planning authority to revoke or modify a planning permission to such extent as it considers expedient is in s97 of the TCPA. The power for the local planning authority to require the discontinuance of use or alteration or removal of buildings or works, if it is expedient in the interests of the proper planning of the area, is in s102. In deciding whether action under these powers is expedient, the local planning authority must have regard to the development plan and any other material considerations. Accordingly, s38(6) of the Planning and Compulsory Purchase Act 2004 (PCPA) applies, so that the Council must make its determination in accordance with the development plan unless material considerations indicate otherwise.

88. Following the Supreme Court judgement in *R (Health and Safety Executive) v Wolverhampton City Council* [2012] 1 WLR 2264 (the HSE case), the word expedient "implies no more than that the action should be appropriate in all the circumstances" and "material" is "the same as relevant."

89. Under s100, the SSHCLG also has the power to revoke or modify a planning permission. However, in APP/NPCU/MOD/N2739/71898 the NPCU advised the objector that the

[8] As LBs make their own SUOs and the Inspector reports directly to them.

SSHCLG's power to revoke or modify would only be exercised "where the original decision appeared so grossly wrong as to damage the wider public interest in a matter of national concern." This mirrors a statement made by the then Planning Minister, Yvette Cooper in March 2006.

90. Under s97(3) the powers to revoke or modify may be exercised (a) where the permission relates to the carrying out of building or other operations, at any time before those operations have been completed; and (b) where the permission relates to a change of use of land, at any time before the change has taken place; providing (s94(4)) that the revocation or modification of permission for operational development shall not affect operations previously carried out. Any opposed revocation/modification order under s97 of the Act must be confirmed by the Secretary of State under s98(1) 1990 Act.

91. A revocation or modification order might be considered expedient for example because of a material change in circumstances since the original permission was granted. A planning authority might also seek to revoke or modify a planning permission because the decision notice was issued in error. Having regard to Sullivan LJ's comments in *R (Gleeson Developments Limited) v Secretary of State for Communities and Local Government* [2014] EWCA Civ 1118 and also *Archid v Dundee City Council* [2013] CSOH 137 [2014] JPL 336 (a Scotish case, but nevertheless persuasive), a decision notice is to be treated as valid until and unless it is declared invalid by order of the court or it is revoked through the statutory procedure. In this regard, a planning permission is not like an enforcement notice, which an Inspector can declare a nullity, without recourse to the courts.

92. Where there is doubt about whether the decision notice granted or refused permission, the test is what a reasonable person reading it would conclude (see *Newark & Sherwood District Council v Secretary of State for Communities and Local Government* [2013] EWHC 2162 (Admin), confirmed also in *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] 1 EGLR 57). This means that there is an element of judgment to be applied. An example of this might be when the decision states that "Planning permission has been granted" but also attaches a reason for refusal and no conditions. However, if the planning authority has made a revocation or modification they must have accepted that the decision notice granted planning permission.

93. However, in any event a revocation or modification order leaves the local planning authority liable to pay compensation under s107 of the TCPA, including compensation for abortive work and for any other loss or damage directly attributable to the revocation or modification, such as depreciation of the value of the land (s107(3) and (4)). (Compensation under s107 is payable by the local planning authority, irrespective of whether the order was made by the local authority or exceptionally by the SSHCLG under the provisions of s100. However, Schedule 1, paras. 16 to the TCPA provides that the SSHCLG may, after consultation with the local planning authority, direct that the authority shall be entitled to reimbursement of some or all of the compensation payable in certain circumstances.

94. The implications of the cost of compensation is a material consideration in determining whether to revoke or modify a planning permission *(the HSE judgment)*.

95. The Encyclopedia of Planning Law and Practice (at P97.03) suggests that the statutory route may not be the most appropriate way to deal with a permission that was granted in error. It may not be expedient for the local planning authority to revoke permission and pay compensation. Instead an application for judicial review may be made by a person

supported by the council, such as an elected member, and the court could be asked to quash the permission. (See *R v Bassetlaw District Council Ex p. Oxby* [1998] PLCR 283, where Mr Oxby, as leader of the council, was held to have sufficient standing to bring the application). In that event, no liability for compensation would arise under the Act. However, applications for judicial review are subject to time limits and revocation or modification may be the only option left to the local planning authority.

96. Except where a revocation or modification order can be confirmed as an unopposed order under s99, the local planning authority must give notice to the owner or occupier of the land and any other person who in their opinion will be affected by the order, giving them an opportunity of appearing before and being heard by a person appointed by the Secretary of State (s98). That does not expressly allow for the matter to be determined through written representations, but that procedure has been followed where all parties were content with it. (See APP/NPCU/MOD/N2739/71898).

97. In any event, jurisdiction in these cases is not "transferred" and the appointed Inspector will report to the Secretary of State with recommendations.

98. The Secretary of State may confirm a revocation or modification order submitted to him "either without modification or subject to such modifications as he considers expedient." (s98(6)). The Secretary of State's power to modify an order when confirming it would not however enable him to convert a modification order into a revocation order or vice versa. Given the terms of s97(1) however, the Secretary of State could modify a revocation order, so that it only revokes permission for part of the development described in the decision notice.

99. Where a planning permission has been granted in error it will probably be unconditional and one of the local planning authority's concerns may be that this does not give them sufficient control. As part of that argument, it might suggest that, in the absence of a condition requiring the development to be carried out in accordance with the approved plans, the permission authorises any development falling within the description in the decision notice. On this point, regard should be had to *Barnett v Secretary of State for Communities and Local Government* [2009] EWCA Civ 476, [2010] 1 PACR 8, which indicates that a full planning permission for operational development must be read with regard to the approved plans and, in the absence of an indication to the contrary, these will be the plans listed in the application.

100. In response to the local planning authority's concerns about the absence of conditions on a permission granted in error, the owner objecting to a revocation order might suggest that conditions could be attached to the permission. This would convert the revocation order into a modification and would be beyond the Secretary of State's powers. However, the objector might offer a s106 planning obligation to put relevant controls in place and there is no reason why this should not be effective.

101. Section 98(6) simply says the Secretary of State "may confirm an order", perhaps with expedient modifications. This is a wide discretion and, given that there is no express requirement for the Secretary of State to have regard to the development plan, s38(6) of the PCPA does not apply to his determination of the matter. Nevertheless, the development plan is bound to be a relevant and important consideration. Indeed, deciding whether or not to revoke or modify a planning permission will involve all the usual considerations that bear on a planning appeal decision, but other matters are likely to be relevant. For example, the case for revoking a planning permission issued through a clerical error, following an officer report recommending refusal and where the applicant

had been expecting a refusal, is likely to be stronger than the case for revoking a permission issued following a resolution of a planning committee, based on an officer's recommendation to grant it.

102. However, even in the case of a permission granted through an obvious clerical error, revocation or modification of that permission will leave the Council liable to pay compensation under s107 of the TCPA. It is no part of the Inspector's role to recommend whether or how much compensation should be paid and it is not for the Secretary of State to determine that question. That is an entirely separate process whereby, if the revocation or modification order is confirmed, a claim can be made to the council by a person interested in the land. If they are unable to reach agreement then, under s118, that dispute will be referred to the Upper Tribunal (formerly the Lands Tribunal) for determination.

103. The compensation regime presents a difficulty for an Inspector when dealing with a revocation or modification order case. It is not for the Inspector to determine the amount of compensation but, following *the HSE judgement*, the implications of the cost of compensation is a material consideration in determining whether the order should be confirmed. It is difficult to know how much weight to attach to this consideration without knowing how much the compensation is likely to be. Without ruling on the question of compensation, the Inspector will probably need to consider evidence of the likely level of compensation, in broad terms. (In 2 cases heard in 2016 (APP/NPCU/REV/N4720/76703 and 76785), the Council decided not to proceed with revocation orders when presented at the hearings with evidence concerning the likely level of compensation).

104. The objection to a revocation or modification order will be made to the Secretary of State (NCPU), who will ask PINS to provide an Inspector and arrange the appropriate event. No procedural rules govern these cases but, conducting a hearing or inquiry in the spirit of the rules relating to s78 cases will ensure that the procedure is fair. As the local planning authority is asking for its order to be confirmed, it would make sense to hear its evidence first at an inquiry. As the objector will be someone affected by the order, they should have the final word.

105. At paragraph ID 16-057 – 16-064, the Appeals section of the PPG deals with the award of costs in relation to compulsory purchase and analogous orders and revocation and modification orders are among the list of analogous orders. The key point is that costs will be awarded in favour of a successful remaining objector, unless there are exceptional circumstances. So, if the Secretary of State decides not to confirm the order, the objector will then be invited to submit an application for costs and this will be dealt with in writing by the PCU.

106. If either party wishes to claim costs in any event, on the basis that the other party has behaved unreasonably, then an application will have to be made to the Inspector, who will make a recommendation to the Secretary of State. If the local planning authority decides not to proceed with the order, the objector may also have costs awarded. Although the PPG does not specifically deal with this point, the Inspector's jurisdiction will end if the order is not proceeded with. By analogy with paragraph ID 16-039 of the PPG, the costs application will be dealt with in writing, but by the PCU, rather than the PINS Costs and Decisions Team.

107. Service of a Discontinuance Order under s102 of the TCPA does not imply that the use or operations are unlawful or illegal, in fact, the opposite. Breaches of planning control (unlawful uses, activities and operations) may be remedied without compensation by

taking planning enforcement action. Unlawful uses which already constitute a planning offence can be remedied by prosecution or, failing that, default action by the local planning authority. It is only uses and operations which are, or would be, lawful for planning purposes which may need to be discontinued (or their permissions revoked or modified as the case may be).

108. Lawful uses can grow or be intensified without necessarily involving a material change of use, but to such an extent that serious detriment is caused. Uses or operations which once were, or would have been, acceptable on the land may no longer be so as a result of subsequent changes in the local planning circumstances, including changes in planning policy. Whilst the issues for discontinuance will often be the same as for revocation or modification, the issues must include, in addition, consideration of the present impact of the use etc. on the surroundings.

109. The Order may provide for the discontinuance of uses and the removal or alteration of buildings, or may impose conditions on the continuance of the use. It may at the same time grant permission for an alternative use of the Order land. Section 102(6) deals with the acquiring authority's duty to make alternative accommodation available where the Order involves displacement of persons residing on the Order land

110. The SSHCLG when confirming discontinuance Orders may modify them and grant permission for alternative development, and Inspectors should be prepared at inquiries to hear arguments for such modifications.

111. Inspectors in any doubt on the foregoing matters should consult the relevant Professional Lead before holding the Inquiry or preparing the report/decision.

Check List

112. Inspectors are asked to check (see also the checklist in the Inspector Training Manual chapter on Secretary of State Casework):

Pre-event

- The allocation of the case and that it is an appropriate specialism (most Planning CPOs and SUOs can be conducted under the "Gen" specialism;
- Understand the nature of the Order and the relevant enabling Act and Part of the Act under which it is made and whether the Order and Order Map appear to be in the correct prescribed form;
- Has the correct authority been given to hold an Inquiry/written representation site visit by the appropriate Minister?
- Does the case fall within the scope of recovery by the SoS instead of being delegated to Inspectors?
- Is there a need for a PIM or, if not, a PIN?
- The date and time arranged for the Inquiry or visit;

- Venue for the Inquiry; are there likely to be access issues, particularly for any known disabled or impaired participants/attendees?

- From what can be seen on the file, the nature and extent of the cases and numbers of witnesses likely to be called or others wishing to speak, does the time allowed for the Inquiry appear adequate? If not, flag up with case officer to alert the parties and ascertain their views;

- Agree which method of proceeding is appropriate i.e. if there are many appearing Objectors is 'Method B' the better option?

- Note any correspondence on the file between PCU and the acquiring authority about the making of the Order(s) which may require modifications to be specified and recommended if the Order(s) was (were) to be confirmed (e.g. names, addresses, interests, correct colouring of the Order Map(s).

At the Inquiry

- Check whether the Statutory Formalities have been complied with and whether there are any questions arising;

- If not done pre-Inquiry, decide which method of proceeding is appropriate i.e. if there are many appearing Objectors is 'Method B' the better option?

- If an Order Map requires amendment has an amended Map been produced before the close of the Inquiry?

The report/decision

- Is the name of the Order correctly and precisely recorded?

- Have the Statutory Formalities been recorded as being complied with together with any comments on non-compliance?

- The sequence of objections and responses should be simple and logical thus minimising the need to cross refer to other parts of the report/decision;

- SoS casework. Does the conclusions of the report flow logically from the assessment of the cases summarised and address the whole of the Order, not simply those parts to which objection has been made?

- Delegated decisions. Does the decision address the whole of the Order, not simply those parts to which objection has been made? Is it clear what the Inspector's view is of each individual objection?

- SoS casework. Are there appropriate cross-references in the conclusions to source paragraphs in the earlier part of the report where the evidence relied upon for those conclusions is to be found? The conclusions should contain no new facts or introduce evidence not summarised in the earlier part of the report/decision;

- Has a conclusion been reached that there is or is not a compelling case in the public interest for confirmation/authorisation of the Order(s)?

- Has a conclusion been reached regarding impact on Human Rights with reference to the specific rights in the European Convention on Human Rights which might be affected?

- In the name of the Order in the decision/recommendation exactly as written on the Order?

- If confirmation/authorisation with modifications is decided/recommended is it clear within the decision/recommendation what those modifications are?

- When submitting the report/decision has the CIR1 form been completed? (This deals with the recovery of costs.)

Annex 1: Method B order of proceeding at an Inquiry

ACQUIRING AUTHORITY'S CASE:

(1) opening statement by advocate

(2) all witnesses in turn:

(a) evidence-in-chief on common or general matters.

(b) questions by Inspector on matters of fact or common interest only.

NB cross-examination by objectors is generally deferred.

FIRST OBJECTION:

(1) Acquiring authority's case on that objection:

(a) evidence-in-chief by authority's witness(es) specific to the objection.

(b) cross-examination of all or any of acquiring authority's witnesses by Objector

(c) re-examination

(d) Inspector's questions (if not dealt with during evidence).

[repeated for each subsequent witness]

(2) Objector's case:

(a) evidence-in-chief by Objector's first witness.

(b) cross-examination by acquiring authority.

(c) re-examination

(d) Inspector's questions (if not dealt with during evidence/xx).

(e) procedure repeated for objector's second and subsequent witnesses (if appropriate).

(f) Objector's submissions (if appropriate)

(g) Acquiring authority's specific reply to objection (unless deferred to final submissions – if so, ensure objector will be present).

SECOND AND SUBSEQUENT OBJECTIONS

Same procedure as for first objection.

OBJECTIONS WHERE NO APPEARANCES MADE

[The acquiring authority should respond to these, if this has not been included in its general evidence. If it has, this must be made clear.].

INTERESTED PERSONS

ACQUIRING AUTHORITY'S FINAL SUBMISSIONS

CLOSE OF INQUIRY

Annex 2: CPO Template

The Planning Inspectorate

CPO Report to the Secretary of State

by A N Other DipTP MRTPI

an Inspector appointed by the Secretary of State

Date

[NAME OF ENABLING ACT][9]

ACQUISITION OF LAND ACT 1981

NAME OF COUNCIL IN WHOSE AREA THE ORDER LIES

APPLICATION [BY THE[10]]

[NAME OF ORDER-MAKING AUTHORITY][11]

FOR CONFIRMATION OF [THE[12]]

[NAME OF ORDER][13]

Inquiry held on

Inspections were carried out on [ ].

File Ref(s): /00000/

[9] As in heading to the sealed Order, including use of capitals.

[10] These two words used only if the acquiring authority is not the Council.

[11] If not the Council.

[12] Omit this word if the word 'The' is included in the title of the Order.

[13] Name the Order exactly as cited in the sealed Order, including punctuation. In the case of SSHCLG and other Ministerial Orders the references throughout should be to authorization and not confirmation.

File Ref: /00000/
[address]

The Compulsory Purchase Order was made under section 226(1)(a) of the Town and Country Planning Act 1990 and the Acquisition of Land Act 1981 by [*name of Council*] on [*date*].

The purposes of the Order are [state the purpose as stated in the enabling Act or in the Order, as amplified in the Statement of Reasons].

The main grounds of objection are [*briefly summarise*].
When the Inquiry opened there were [*number*] remaining objections and [*number*] non-qualifying additional objections. [*number*] objections were withdrawn and [*number*] late objections were lodged.

Summary of Recommendation: that the Order be [confirmed with/without modification/not confirmed]

Procedural Matters and Statutory Formalities

[if you announced that you had replaced another Inspector, say so here, giving the name and initials of the Inspector concerned, but not their qualifications]
[The Convening Notice was read]. The Acquiring Authority (AA)/Council confirmed its compliance with the Statutory Formalities. There were no submissions on legal or procedural matters. [I*f there were submissions concerning the validity of the Order they should be reported here, irrespective of what stage they were made during the Inquiry. If necessary there should be sub-headings relating to those who made the submissions. The AA's reply and any comments or rulings by the Inspector should be included.*]
[If the Inquiry was adjourned the reason should be given, if necessary under headings of those requesting, consenting or objecting to the adjournment, and including the Inspector's decision.]
[Any rulings by the Inspector should be dealt with here. Any written ruling or ruling read out from a script should be included as an Inquiry document]

The Order Lands and Surroundings

[The extent of the description is a matter for discretion, depending upon the case. The aim should be to help the Secretary of State to understand those physical features of the land(s) and buildings that may have a bearing on the case. [See also the Inspector Training Manual chapter on Secretary of State Casework]. Personal opinions should be avoided. Factual information about issues raised at the Inquiry should also be recorded.]
[State the location of the Order land(s) in relation to the town centre or other landmark, and the situation of the land in relation to adjoining roads or land. Mention any conspicuous features, e.g. steep slope.]
[Describe the Order land(s) and any buildings thereon in general terms]
[If a listed building is involved describe its general condition and state of repair, with particular attention to any features of special architectural or historic interest. The statutory list description may be set out here if not included in the case for one of the parties, or as a document. You should state whether the building seen agrees with the listing description. If not, the differences should be noted. Similarly other Designated/Non-Designated features should be described.]
[Describe the immediate surroundings by main use and character, mentioning any special features e.g. canals, railway embankments, conservation areas.]

[Describe any alternative sites or other properties mentioned during the Inquiry and visited during the course of the site inspection.]
[Indicate whether there are any other Protected Assets affected; details should be on the protected Assets Certificate submitted by the acquiring authority]

The Case for the Council [Acquiring Authority]

[Generally the case for the acquiring authority should be reported first and should record the whole of its general case, although in as concise a form as is practicable. Sub-headings may be used where appropriate. Any modifications to the Order suggested by the authority should be recorded.]
Submissions Supporting the Council

[How these are reported is a matter for discretion having regard to their substance and how they were made. Some may require headings in the same manner as the principal parties (e.g. parish/town councils, national amenity bodies, established local societies].

The Objections

[It is usually appropriate for ease of identification to report objections in ascending order of reference numbers as given in the Schedule to the Order, taking the lowest number in a group as the key number. This applies whether or not objections are remaining, or late. However, it will often be beneficial to report firstly the objections in respect of which there was an Inquiry appearance, and then the objections reliant upon written representations and any withdrawn objections, in separate sections of the report/decision. In any event, it should be made clear if the objection was not the subject of an Inquiry appearance.]

Reference No

Address

Name of Objector – Legal Interest

[Reference number and street address as given in the Order Schedule. Omit if only one property is included in the Order. List all the references, addresses and names of the Objectors where there are appearances by the same advocate. If there was no appearance the summary of the principal grounds of objection should include, if appropriate, any amplification in subsequent correspondence.]

[If the objection has been withdrawn, say so, giving the grounds for withdrawal or partial withdrawal (if known). This may be important in an assessment of costs, e.g. if a building is to be excluded but land is still to be acquired. It may, however, be sufficient to state simply that the objection was withdrawn by letter dated …]

[If the withdrawal is made subject to conditions it should be dealt with as remaining, although sometimes the matter can be resolved, for example by an undertaking by the acquiring authority to preserve a right of way or not to implement a confirmed Order if certain specified works are carried out within a defined period]

[It may be convenient to deal with a number of withdrawn objections together]

Case for the Objector

[Record the Objector's case in logical order, including the Objector's reply to the acquiring authority's case.]

Response by the Council

[Do not repeat anything already in the authority's general case, or introduce any fresh matter. This section is unlikely to be necessary in cases where there is only a single objection. If the section is included, a useful first sentence is sometimes 'The general case applies', and then the specific response related to the objection.]

Description

[Sufficient description should normally have been included under the general description of the Order lands and surroundings. However it may sometimes be necessary to clarify some points arising from the Objectors' cases in more detail if the Order covers a large number of properties of different kinds, several of which are the subject of objection. If a description is given, expressions of opinion should be avoided.]

Other Submissions opposing the Council

[See comment on Submissions supporting the Council above.]

Response by the Council

[See comment on response by the (Council) AA above]

Unopposed Lands

[This section is only required where there are some parts of the Order that are not subject to objection, and then not in every instance. If the description of the unopposed lands is adequately covered by the general description of the Order lands, then the section will not be necessary. Otherwise only a brief description will usually be necessary, but sufficient to support any conclusions the Inspector may reach in regard to that part of the Order area.]
Conclusions
[As in any report/decision to the SSHCLG, the facts on which the Inspector's conclusions are based must be clear. The general guidance in the Inspector Training Manual chapter on Secretary of State Casework applies. The origin of every factual statement should be identifiable from the text, generally by indicating the source paragraph in parentheses.]

It is advisable to begin the report as follows (tailored to circumstances):
The CPO seeks to acquire rights and ownership of land shown on the Order Map for the purpose of securing development of [xxxxx]. It is made under Section 226 (1)(a) of the Town and Country Planning Act 1990 (as amended by the Planning and Compulsory Purchase Act 2004). The power granted is intended to assist a local authority to fulfil its duties of promoting the economic, social and environmental well-being of its area.
Paragraph 106 of the Guidance lists the factors to be considered for the purposes of an Order made under the well-being power. The conclusions are framed around these considerations as follows:

[Facts should cover the whole of the Order and not be confined to those parts to which objections have been made. They should normally be verifiable and not open to dispute. However, conflicting estimates of e.g. the costs of repair may be attributed to the parties making them. Any relevant undertakings by the AA should be included.]
[Conclusions, like facts, must relate to the Order as a whole as well as to objections. They often conveniently fall into two categories. First express a reasoned view on the merits of the Order itself, having regard to the section of the enabling Act under which it was made, and to conclude that it meets the requirements of the Act, or that the Order should be modified, or that the Order should not be confirmed. Secondly, decide whether all or any of the objections are decisive, whether any modifications should be made, or whether the Order should not be confirmed. The outcome of these considerations should be summed up clearly and explicitly, giving reasons for any modifications or reasons why the Order should not be confirmed.]

Recommendation

I recommend that the [*insert full title of Order*] [be not confirmed] [be confirmed] [be confirmed with the following modifications]:
[example] the exclusion/deletion of Reference(s) ……..
[In the case of SSHCLG or other Ministerial Orders, the reference should be to authorisation, not confirmation.]
[Reference numbers and street addresses of the properties to be excluded must be given in the recommendation, generally as in the Order Schedule. Properties to be excluded should be hatched green (by the Inspector) on a copy of the Order Map (not the sealed copy). The hatched copy should be included as Plan A in the Plans List.]

Annex 3: CPO Decision Template - W/Reps

The Planning Inspectorate

Compulsory Purchase Order Decision

Site visit made on <<date >>

by

Inspector appointed by the Secretary of State for Housing, Communities and Local Government

Decision date:

File Ref: /00000/
[address]

- The Compulsory Purchase Order was made under section 226(1)(a) of the Town Country Planning Act 1990 and the Acquisition of Land Act 1981 by [name of Council [date].
- The purposes of the Order are [state the purpose as stated in the enabling Act or in Order, as amplified in the Statement of Reasons].
- The main grounds of objection were [briefly summarise].
- There are [number] remaining objections and [number] non-qualifying additional objecti

Procedural Matters and Statutory Formalities

Decision

That the Order be [confirmed with/without modification/not confirmed]

The Order Lands and Surroundings

In only as much detail as necessary

Considerations

Based on the Guidance

Include clear identification and consideration of the Objections

Human Rights issues

Recommendation

Any need for Modification?

For the reasons given above and having to all matters raised I therefore [confirm/do not confirm] the [*insert full title of Order*] Compulsory Purchase Order.

Inspector

INSPECTOR

Annex 4: CPO Decision Template - Inquiry

The Planning Inspectorate

Compulsory Purchase Order Decision

Inquiry held on <<date>>
Site visit made on <<date >>

By

Inspector appointed by the Secretary of State for Housing, Communities and Local Government

Decision date:

Case Ref: PCU/CPOP/<<LPA Ref>>/<<xxxxxxx>>

- The Order <title of order> was made under section 226(1)(a) of the Town and Country Planning Act 1990, <<*if relevant* The Local Government (Miscellaneous Provisions) Act 1976>> and the Acquisition of Land Act 1981 by <<the Acquiring Authority>>.
- The purposes of the Order are for the purpose of facilitating the carrying out of development, redevelopment or improvement on or in relation to the land comprising …….. ……..
- There is x objection(s) from x & y
- The main grounds of objection were <<……>>
- At the close of the Inquiry there were <<…insert number….>> remaining objectors.

Procedural Matters and Statutory Formalities

Decision

That the Order be [confirmed with/without modification/not confirmed]

The Order Lands and Surroundings

In only as much detail as necessary

Considerations

Based on the Guidance

Include clear identification and consideration of the Objections

Human Rights issues

Recommendation

Any need for Modification?

For the reasons given above and having to all matters raised I therefore [confirm/do not confirm] the [*insert full title of Order*] Compulsory Purchase Order.

Inspector

INSPECTOR

LISTS OF APPEARANCES AND DOCUMENTS

The Planning Inspectorate

Conditions

Updated to reflect December 2023 Framework (NPPF)

What's new since the last version

Changes highlighted in yellow made 21 December 2022:

- New paragraph 51 confirming that conditions requiring new access roads to be dedicated to public highway are not lawful
- New paragraph 215 confirming enforceability of retrospective conditions in the event of deemed discharge of conditions

Other recent updates

- New section on 'Litter associated with hot food takeaways' following update to the PPG on 'Healthy and safe communities'
- Update to the conditions checklist
- Updated section about imposing conditions in planning appeals and natural justice

Contents

Conditions Checklist

Do the conditions meet the three legal tests? • Imposed for a planning and no other purpose, however desirable. • Fairly and reasonably related to the development permitted. • Not so unreasonable that no reasonable planning authority could have imposed them.	
Do the conditions meet the six policy tests? • Necessary. • Relevant to planning. • Relevant to the development to be permitted. • Enforceable. • Precise. • Reasonable in all other respects.	
Have you checked the advice in the PPG?	
Have you given reasons for imposing **and** not imposing conditions?	
Have you imposed **all** the conditions you have said you will**?** • **Tip**: Write a list of conditions and then tick them off. • The plans condition should normally be imposed to create certainty for all parties and to allow for applications for minor material amendments.	
Have you checked the wording of the PINS model conditions? • via 'PINS Help' in DRDS • via the PINS model conditions within the Library	
Are the conditions accurate and complete? • Are **details** to be submitted for approval? • Is an **implementation** clause necessary?	

• …**timing** clause? • …**retention** clause? • …**maintenance** clause? • Have you deleted **'**tailpiece**'** **phrases** which could allow significant changes to the development? • **Tip:** Ensure that the wording of any model conditions is adjusted to suit the circumstances of the case and do not rely on or accept uncritically the proposed wording put forward by LPAs.	
Is the permission retrospective? • Do **not** include a 'standard' commencement condition. • **Do** consider whether a 'plans' condition is necessary. • Do **not** impose pre-commencement conditions. • **Do** use a 'retrospective' condition to ensure the submission of details.	
Have you addressed all of the conditions suggested by **all** of the parties? • Have you considered whether any conditions **not suggested** by the parties should be imposed? • Would imposing any conditions not suggested by the parties result in injustice or prejudice if the parties were not given the opportunity to comment?	

Introduction

1. This chapter sets out legal, policy and practical considerations regarding the imposition of conditions on planning permissions in England.

2. This chapter is written with planning appeals in mind but contains advice that is relevant to **all** casework where existing or proposed conditions are before the decision-maker.

3. Inspectors make their decisions on the evidence before them, which may sometimes justify departure from the advice given in this chapter.

The Legal Framework

The 'Compulsory Standard Conditions'

4. Section 91(1) of the Town and Country Planning Act 1990 (TCPA90) provides that every planning permission shall be granted or deemed to be granted subject to the condition that the development to which it relates must be begun not later than the expiration of specified periods.

5. S92(2) provides that outline planning permission for development consisting in or including the carrying out of building or other operations, shall be granted subject to specified conditions.

6. The 'compulsory statutory conditions' apply to permissions granted by planning authorities, Inspectors or the Secretary of State.

Powers to Impose other Conditions

7. S70(1)(a) empowers a planning authority, subject to s62D(5), s91 and s92, to grant planning permission on application unconditionally or '**subject to such conditions as they think fit**'.

8. The s70(1)(a) power must be interpreted with regard to the legal tests and policy tests described below, the development plan, other material considerations including the National Planning Policy Framework (the NPPF) and the Planning Practice Guidance (PPG), plus any case law which may be relevant to legal and/or policy matters.

9. S72(1) describes particular types of conditions which may be imposed under s70(1) 'without prejudice to the generality of' that section:

   (a) for regulating the development or use of any land under the control of the applicant…or requiring the carrying out of works on any such land, so far as appears…to be expedient for the purposes of or in connection with the development authorised by the permission;

   (b) for requiring the removal of any buildings or works authorised by the permission, or the discontinuance of any use of land so authorised, at the end of a specified period, and the carrying out of any works required for the reinstatement of land at the end of that period.

10. Planning permission granted subject to a s72(1)(b) condition shall be referred to as 'planning permission granted for a limited period'; s72(2).

11. S77(4)(a) provides that the powers set out under s70 and 72(1) apply to applications referred to the Secretary of State.

12. S100ZA(1), added by the Neighbourhood Planning Act 2017, sets out restrictions on powers to impose conditions. It states that the Secretary of State may by regulations provide that:

    (a) conditions of a prescribed description may not be imposed in any circumstances on a relevant grant of planning permission for the development of land in England

    (b) conditions of a prescribed description may be imposed on any such grant only in circumstances of a prescribed description, or

    (c) no conditions may be imposed on any such grant in circumstances of a prescribed description.

13. S100ZA(5) and (6) provide that permission may not be granted subject to a pre-commencement condition without the applicant's written agreement to the terms, except

in such circumstances as may be prescribed; see advice below on the Town and Country Planning (Pre-Commencement Conditions) Regulations 2018.

14. S58A(1) and s59A of the TCPA90 make provision for the grant of 'permission in principle' for housing-led development of land in England. Under s58(3) and s70(2ZZA), a grant of permission in principle consent must be followed by an application for technical details consent (TDC), which must be determined in accordance with the permission in principle. The PPG confirms that there are two stages to this consent route[1].

15. S70(2ZZB) states that an application for TDC is an application for planning permission. It follows that conditions cannot be imposed on a grant of 'permission in principle'[2], that is, at the first stage, because that is **not** a grant of planning permission. A permission in principle consent remains in force for a prescribed period during which time the application for TDC must be made[3].

16. S70(2ZZB) provides that a TDC application must particularise '*all matters necessary to enable planning permission to be granted without any reservations of the kind referred to in section 92*' – meaning that this is not an outline permission where matters can be reserved for future consideration. Conditions may be imposed in the usual way on a grant of permission made at TDC stage[4].

17. Schedule 5 of the TCPA90 deals with Mineral Working conditions.

Development Orders

18. Planning permission granted by any development order may be subject to conditions or limitations as specified. Conditions on classes of permitted development (PD) are conditions on a grant of planning permission, but s70(1), s72(1), s79(1) and s100ZA of the TCPA90 do not apply.

19. Advice on the grant of an *express* permission subject to conditions which withdraw PD rights is given below. The General Permitted Development Order and Prior Approvals Appeals chapter covers other matters relating to conditions, including imposing conditions in prior approval appeals.

[1] PPG paragraph 58-001-20180615

[2] PPG paragraph 58-020-20180615

[3] Under s58A(3) and s70(2ZZC) of the TCPA and the Town and Country Planning (Permission in Principle) Order 2017 (as amended) a permission in principle remains in force for three years where granted upon application to a local authority, or five years where granted through a brownfield register.

[4] PPG paragraph 58-021-20170728

Appeals against Conditions and Retrospective Permission

20. The Appeals against Conditions chapter gives full advice on such appeals; information given here is to assist with comprehension of this chapter.

21. There is a right of appeal under s78(1)(a) to an authority's decision to grant planning permission subject to conditions. S79(1)(b) enables the Secretary of State, and by extension an Inspector dealing with such appeal, to 'reverse or vary any part of the decision…and…deal with the application as if it had been made to [them] in the first instance'.

22. S73 allows for a grant of permission for the development of land without compliance with conditions subject to which a previous permission was granted. On such an application, the decision-maker shall only consider the question of the conditions that should be imposed on the permission.

23. Where an application is made under s73A, permission is sought for development which has already been carried out – whether it was carried out in breach of a disputed condition or without prior grant of permission. An application under s73A is 'in all respects a conventional planning application, save that development will have been commenced'[5].

24. If a s73 appeal is made in relation to development that has been carried out in breach of a condition, it may be necessary to determine the appeal as though it were made under s73A, because the power to grant permission will derive from s73A and s70[6].

25. For advice on the imposition or discharge of conditions under s174(2)(a) and s177 in Enforcement casework, see the Enforcement chapter.

Deemed Discharge of Conditions

26. S74A(1) of the TCPA90, added by the Infrastructure Act 2015, empowers the Secretary of State to provide by development order for the deemed discharge of a condition that requires any consent, agreement or approval of a planning authority; see advice on deemed discharge below.

The Legal Tests

27. While planning authorities, the Secretary of State and Inspectors may impose 'such conditions as they think fit', the House of Lords held in *Newbury DC v SSE & Others* [1980] 2 WLR 379, [1981] AC 578 that conditions must be:

- Imposed for a planning purpose and no other purpose, however desirable

[5] *Wilkinson v Rossendale BC* [2002] EWHC 1204 (Admin), cited in *R (oao Thomas) v Merthyr Tydfil CBC & Merthyr Motor Auctions* [2016] EWHC 972 (Admin)

[6] *Lawson Builders Ltd & Lawson & Lawson v SSCLG & Wakefield MDC* [2015] EWCA Civ 122

- Fairly and reasonably related to the development permitted
- Not so unreasonable that no reasonable planning authority could have imposed them – that is, 'Wednesbury' unreasonable[7].

28. These are the '*Newbury'* or legal tests. While there is some overlap, they should not be confused with the policy tests described below. The legal tests will rarely be addressed in planning appeal casework. Questions relating to the validity of conditions normally arise only in Enforcement appeals proceeding on legal grounds.

29. In s73 or s73A appeals against conditions, you may decide to remove or 'vary' a condition in accordance with the policy tests, but do **not** have the power to decide whether the condition is or is not lawful.

Overview of Planning Policy

The Policy Tests

30. The NPPF states in paragraph 55 that planning authorities should consider whether otherwise unacceptable development could be made acceptable through the use of conditions.

31. However, paragraphs 56 of the NPPF and 21a-003-20190723 of the PPG state that conditions should only be imposed where they are:

- Necessary
- Relevant to planning
- Relevant to the development to be permitted
- Enforceable
- Precise, and
- Reasonable in all other respects.

32. The PPG refers to these as the 'six tests' and states that each of them needs to be satisfied for each condition that a planning authority (or, by extension, an Inspector) intends to apply[8].

33. The PPG also advises that any proposed condition which fails to meet one of six tests should not be used, even if it is suggested by an applicant, members of a planning

[7] *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] (Court of Appeal)

[8] PPG paragraph 21a-003-20190723

committee or third party[9]. Even if all parties to an appeal agree to a condition being imposed, the Inspector as the decision-maker will need to establish whether the condition would be necessary and meet other tests.

34. Paragraph 56 of the NPPF is emphatic that 'conditions should be kept to a minimum'. Paragraph 21a-018-20190723 of the PPG repeats this aim and encourages pre-application discussions as well as 'rigorous application of the six tests' to reduce the need for conditions.

Necessary

35. The PPG states[10]:

> "…used properly, conditions can enhance the quality of development and enable development to proceed where it would otherwise have been necessary to refuse planning permission, by mitigating the adverse effects. The objectives of planning are best served when the power to attach conditions to a planning permission is exercised in a way that is clearly seen to be fair, reasonable and practicable. It is important to ensure that conditions are tailored to tackle specific problems, rather than standardised or used to impose broad unnecessary controls".

36. Since conditions may only be imposed where doing so is necessary to avoid a refusal of planning permission, it follows that you should be able to show why permission would be refused if the condition could not be imposed. The condition should be needed to make the development acceptable in planning terms, and not be wider in scope than is necessary to achieve the desired objective.

37. In considering whether a condition is necessary, bear in mind that it is usually not possible to rely on the description of development to control, restrict or limit a development. It was held in *I'm Your Man Ltd v SSE & North Somerset DC* [1999] 4 PLR 107 that there is no direct or implied legal power to impose a time limitation on a planning permission except by means of 'temporary' condition[11].

38. When granting permission, any restriction to the development should be secured by condition, whether that be a limitation to opening or operating hours, the occupation of the site or the duration of the permission. Even if the description of development purports to contain a restriction, such as a proposal for 'a dwelling for occupation by a farm worker', a restriction to that end will only be enforceable if secured by condition; see advice on temporary, personal and occupancy conditions and withdrawing PD and change of use rights by condition below.

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[9] PPG paragraph 21a-005-20190723

[10] PPG paragraph 21a-001-20140306

[11] In *I'm Your Man*, permission had been granted for '*sales, exhibitions, and leisure activities for a temporary period of seven years'*. Held that the permission for the use was a permanent one because no condition had been imposed to require that the use must cease at the end of the seven years. Where use continues after a temporary permission has expired, enforcement action should be taken against a breach of the condition.

39. It is not necessary to impose a condition to define what is permitted if the permission itself does so properly. It was held in *Winchester CC v SSCLG & Others* [2013] EWHC 101 (Admin) upheld in [2015] EWCA Civ 563 that a permission granted for a 'travelling show peoples site' could not be interpreted as a general permission for a residential caravan site, although no occupancy condition had been imposed, because a 'travelling show people's site' is a sui generis use, and other conditions imposed were commensurate with the permission being for that use.

Relevant to planning

40. Planning conditions must relate to planning objectives **and** be within the scope of the permission. Conditions must not be used to control matters that are subject to other primary legislation, such as the environmental protection, building control or highways acts. Conditions must neither be used to control matters that are subject to separate planning regulations, such as advertisement control or tree preservation.

Relevant to the development being permitted

41. Conditions must be 'fairly and reasonably' relevant to the development being permitted. It is not sufficient for a condition to relate to planning objectives it must also be justified by the nature or impact of the development. And a condition cannot be imposed to remedy a pre-existing problem which was not created and would not be exacerbated by the development before you.

Enforceable

42. An unenforceable condition for the purposes of the six tests would be one where it is impossible for the planning authority to detect a breach of the condition. This is a practical question, and it should not be merely difficult for the authority to monitor compliance. A judgment should be made as to whether monitoring in the circumstances would be unreasonably onerous or practicably impossible.

43. Whether a condition is enforceable is relevant to the legal tests. A condition which is merely difficult to enforce would not necessarily be invalid[12] – but one that is impossible to enforce or incomplete might be regarded as absurd and so invalid for that reason[13]. A condition that is not reasonably enforceable is not reasonable for *Newbury* purposes[14].

Precision

44. While 'Newbury' requires Inspectors to interpret conditions previously imposed to so as to 'give it a sensible meaning', it does not follow that the test of precision can be taken lightly when drafting any new conditions.

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[12] *Bizony v SSE* [1976] JPL 306

[13] *Penwith DC v SSE* [1986] JPL 432; *Bromsgrove DC v SSE* [1988] JPL 257

[14] *R v Rochdale MBC, ex parte Tew* [1999] 3 PLR 74

45. Conditions must be worded so that they can be understood by the appellant and/or their successor(s) in title, the authority and interested parties. The condition must be clear as to what is required and, where relevant, by when. Any rights being removed by condition should be precisely explained by reference to the relevant legislation.

46. The Courts will interpret conditions based on the natural and ordinary meaning of the words – including the meaning conferred by grammar. It was held in *Telford and Wrekin Council v SSCLG & Growing Enterprises Ltd* [2013] JPL 865 that a condition requiring that details of products to be sold '*should be submitted to and agreed in writing by the local planning authority*' did not prohibit the sale of goods **not** on the list because of the difference in meaning between 'shall' and 'should'.

Reasonable

47. Any condition which places an unjustified and disproportionate burden on the appellant will be unreasonable. The question of what is proportionate may depend on the circumstances of the case; for example, a condition that requires the maintenance of a landscape scheme for five years may be reasonable where permission is granted for a major housing estate but not where permission is granted only for a single house on a small plot.

48. It is always unreasonable to impose a condition which would nullify the benefit of the permission, for example, if it is suggested that the use of a building as a hot food take-away is permitted subject to a condition which limits opening hours to the extent that it would be impossible to run a viable take-away business. If the use would only be acceptable with such restricted opening hours, it may be necessary to refuse permission.

49. Conditions should not contradict the permission. If you permit a 'house and garage', it would be unreasonable to impose a condition which stops the garage from being built – subject to advice below on split decisions.

Conditions to Avoid

50. Paragraph 21a-005-20190723 of the PPG sets out specific circumstances where conditions should **not** be used:

- Conditions which unreasonably impact on the deliverability of development.
- If details are submitted with an outline application for approval, conditions cannot be imposed to reserve these matters for future consideration.
- Conditions requiring development to be carried out in its entirety.
- Conditions requiring compliance with other regulatory requirements.
- Conditions requiring that land is given up or ceded to other parties.
- Positively-worded conditions requiring the payment of money or other consideration.

51. Furthermore, in the case of *DB Symmetry Ltd v Swindon BC,* the Supreme Court established that it is not lawful to impose planning conditions that require the dedication of any new access roads as public highway. The power to impose conditions should not be interpreted, in the absence of clear words, as derogating from the owner's property rights. A condition that requires a developer to dedicate land as a public highway without compensation is an unlawful condition; *Hall & Co Ltd v Shoreham by Sea UDC [1964] 1 WLR 20* applied. Such matters should be dealt with through a s106 planning obligation because the applicant could be subjected to an obligation only by its voluntary act, rather than a unilaterally imposed condition.

Model Conditions

52. On publication of the PPG, pre-existing Government guidance in Circular 11/95: Use of Planning Conditions was cancelled – except that Appendix A to the Circular was retained. It sets out various national model conditions.

53. Planning authorities may use their own lists of model conditions, although PPG paragraph 21b-021-20190723 encourages them to consider national model conditions where appropriate in the interests of consistency.

54. PINS provides its own suite of planning conditions. This can be accessed via 'PINS Help' in DRDS or this **link**. The list is not exhaustive, and the conditions given may need to be amended if appropriate to the case.

55. PPG paragraph 21b-021-20190723 states that model conditions can improve the efficiency of the planning process, but it is important not to apply them in a rigid way or without regard to whether the six tests will be met. **This advice applies to national, local and PINS model conditions**. Treat the wording of any suggested condition with caution and do not rely on it meeting the tests especially if further details are sought; see advice on the Anatomy of Conditions below.

Imposing Conditions in Planning Appeals

The Parties and Conditions

56. The planning authority will be asked to provide a list of suggested conditions with the questionnaire. They may provide the list with their statement or via other documentation such as their committee report.

57. If the authority does not provide a list, consider whether they ought to be asked to provide one but there is no imperative to allow them that opportunity. You may wish to ask for suggested wording if the authority has only provided a brief outline of conditions to be imposed.

58. Always check whether the appellant, statutory consultees and/or other parties have suggested conditions; it is not unusual for the Highways Authority or Environment Agency to do so[15]. The need to impose these must be considered against the relevant

[15] PPG paragraph 21a-016-20140306

tests. Sometimes parties will indicate that certain measures might be necessary, such as landscaping – even if they have not discussed conditions in terms. You should consider whether such proposals could and should be secured by condition.

59. As part of their reasoning, Inspectors may need to address whether a condition suggested by an appellant would overcome the harm identified.

60. 'Informative' notes set out on planning permissions do not carry any legal weight and cannot be used in place of a condition[16].

Natural Justice

61. An Inspector may take the view that a condition which has **not** been suggested would be necessary to make a development acceptable. It will not be necessary to seek comments in every case, but you should not impose conditions where the parties, including third parties, would reasonably expect, but did not have any opportunity to comment.

62. Consideration should be given to whether it would result in injustice or prejudice by not giving the relevant parties an opportunity to comment, for example if the condition would introduce restrictions or limitations.

63. In the case of *Jory v SSTLGR [2002] EWHC 2724*, the Inspector had sought comments on a draft condition from the main parties, but failed to seek comments from an interested party who lived in the neighbouring property and had made representations at the hearing. The Judge held that the Inspector had erred by sending the draft condition to the main parties only, and that the rules of natural justice required that all parties whose interests would have been affected by the proposed development should have been given an opportunity to comment on the condition.

64. If a condition is standard, clearly uncontentious or the parties have previously had an opportunity to comment upon it, it will not be necessary to seek their views. For example, it is unlikely to be necessary to go back to the parties when:

- The appellant has commented on the mitigation that the condition would achieve, for example, obscure glazing.
- Other parties have proposed some mitigation and the appellant has had an opportunity to comment.
- The condition is 'standard' and obviously uncontentious for the case, such as use of matching materials as indicated on the plans or application form.
- The condition is required to secure the provision and/or retention of part of the proposal shown on the plans such as the layout of parking spaces.

[16] PPG paragraph 21a-026-20140306

65. Inspectors may need to re-draft conditions that have been suggested by the parties so that they comply with the six tests or simply for precision or clarity. It is normally possible to do this without referring back to the parties if the essence of the condition is unchanged.

66. If you re-draft a condition, consider whether doing so will make it more onerous or otherwise change its meaning or effect, such that the parties would expect to have an opportunity to comment.

67. Inspectors will need to robustly set out their approach to the imposition of conditions within their reasoning and identifying why revisions have been made to conditions suggested by the parties.

Drafting Conditions

68. Conditions imposed on a permission are likely to be scrutinised by the parties. Small drafting errors or omissions can alter the intended meaning of a condition or prevent it from being enforced, such that a high court challenge or further application or appeal may follow. Conditions must therefore be carefully written and checked.

69. Where several conditions are imposed, it improves the look and flow of a decision if they are set out in a schedule at the end. You would need to word the 'decision' so that planning permission is granted '*subject to the conditions set out in Schedule 1*' or similar and the schedule is so headed.

70. Where possible, use the PINS suite of planning conditions to ensure consistency and best practice. However, you should always consider whether a relevant standard condition would need to be modified, or a non-standard condition should be used to reflect the circumstances of the case, and perhaps deal with specific requirements of the parties.

71. It is always necessary to check whether every suggested condition:

- Contains any unnecessary requirements or overly detailed specifications of particular requirements. This sort of assessment should be undertaken, for example, with 'landscaping' conditions. It may be reasonable to leave the planning authority to decide, for example, the extent and species of planting.

- Refers to any statutory instrument, policy or guidance document which may be subject to future updates or withdrawal such as the GPDO, Planning Policy for Traveller Sites or British Standards. Consider whether it is necessary to refer to the document at all and, if so, whether the condition can be worded to remain enforceable and otherwise stand the test of time.

- Purports to delegate approval of a scheme to another party, such as the Environment Agency. Approval is the responsibility of the planning authority and it

will be for them to decide whether or not to consult with any other parties when considering if a submitted scheme is acceptable[17].

'Anatomy' of a Condition

72. Many planning conditions have different component parts, such as a requirement to submit details for approval, and implementation (and retention) in accordance with the approval.

73. When considering suggested conditions, you must consider whether each suggested component is necessary – and if any necessary components are missing, for the condition to fulfil the reason for its imposition:

- If **further details** are required, they should be submitted to and approved by the local planning authority in writing.
- An **implementation clause** should be included where it is necessary to control how the development is carried out: 'Development shall be carried out in accordance with the approved details'.
- A **timing clause** should be included where it is necessary to control when something is done: 'The dwellinghouse hereby approved shall not be occupied until a parking space has been laid out in accordance with the approved plan'.
- A **retention clause** should be included where it is necessary that something is retained in posterity: 'The parking space shall thereafter be retained for use for parking by the occupiers of the approved dwellinghouse at all times'.
- **Maintenance clauses** are occasionally necessary to ensure that the works or installation being required will remain effective. Maintenance should be in accordance with the approved details or with the scheme to be approved by the planning authority[18].

74. If an essential component part is missing, the condition as a whole may be sufficiently flawed that the entire decision is at risk of challenge or the condition may be unenforceable.

The Order of Conditions

75. PPG paragraph 21a-024-20140306 advises that, in addition to precise drafting, clear ordering of conditions on a decision notice will help them to be understood – and it is good practice to list the conditions in the order that they will need to be satisfied.

[17] PPG paragraph 21a-016-20140306

[18] See model conditions 83 (contaminated land), 107, 108 and 109 (landscape), 145 (trees) and 151, 152 and 153 (sustainable drainage) in the PINS suite of planning conditions and DRDS.

76. The PPG states that a good structure is:

- Standard time limit;
- Details and drawings subject to the permission;
- Any pre-commencement conditions;
- Any pre-occupancy or other early stage conditions;
- Conditions relating to post-occupancy monitoring and management.

Reasons for Imposing (or not Imposing) Conditions

77. Planning authorities must determine planning applications in accordance with the Town and Country Planning (Development Management Procedure) (England) Order 2015 (DMPO). Article 35(1) states:

"When the local planning authority give notice of a decision or determination on an application for planning permission or for approval of reserved matters— (a) where planning permission is granted subject to conditions, the notice must state clearly and precisely their full reasons—(i) for each condition imposed; and (ii) in the case of each pre-commencement condition, for the condition being a pre-commencement condition".

78. The PPG also states that clear and precise reasons must be given by the local planning authority for the imposition of every condition[19].

79. The DMPO 2015 and PPG do not place the same onus on Inspectors to give reasons for imposing conditions, but it is still necessary to do so. As described in the Procedural Guide to Planning Appeals, an Inspector's duty is to give reasons for their decision – as a whole, and thus including the decision to impose conditions – in writing. The Courts interpret the duty as meaning that the reasons must be adequate and intelligible[20].

80. You must look at the evidence to support each condition proposed by the planning authority, appellant, statutory consultees and/or other parties. You must be satisfied and must explain why each condition is necessary or not as a matter of planning judgment. Reasons such as 'in the interests of proper planning' or 'for the avoidance of doubt' are not adequate.

81. It is essential that the parties can understand the reasons for a decision. If you are dismissing the appeal you must expressly deal with any conditions put forward by the appellant to overcome the alleged harm and:

[19] PPG paragraph 21a-023-20140306

[20] *Verdin v SSCLG & Cheshire West and Chester BC & Winsford Town Council* [2017] EWHC 2079

- Explain why any condition(s) would not remedy the harm so that permission can be granted.

- Consider whether other suggested conditions are relevant to your reasoning, or central to the case of the losing party and would need to be addressed.

82. When rejecting conditions put forward by the appellant or other parties the 'Verdin' judgment underlines the need to give specific and rational reasons for any finding that those conditions would either be unenforceable, imprecise or unreasonable.

83. If the appeal is being allowed, you must clearly explain your reasons:

- For imposing any conditions other than the standard time limits – making it clear why each condition is necessary to avoid refusal of permission;

- For **not** imposing conditions suggested by the parties, including statutory and other third parties; and

- For any timing requirements, particularly in relation to retrospective permissions and pre-commencement or pre-occupation conditions.

84. The reasons for imposing an uncontested condition should be brief. Even in other cases, the reasons for imposing or not imposing conditions should proportionate in length and detail to the relevant matter. Note that:

- The test of necessity is often the most critical; refer to other tests only where they are decisive in some respect, for example, lack of enforceability is the reason for not imposing a condition;

- Minor changes to suggested conditions should be explained briefly; it may suffice for example to state at the outset that you have amended the wording of the condition(s) for clarity or to meet the six tests.

- More reasoning may be required if you intend to make any substantial changes to a suggested condition.

- More reasoning may be needed when imposing or not imposing conditions that are contentious and/or unusual;

85. It is essential that you **double check** your decision to be sure that there is consistency between your reasoning on the main issue(s), reasoning in the Conditions section, overall conclusion and actual decision. If you indicate that a condition would be necessary, it must actually be imposed.

86. In *Lambeth LBC v SSCLG & Aberdeen Asset Management* [2019] UKSC 33, the Supreme Court addressed whether a s73 permission should be interpreted as containing a condition imposed on previous permission(s) to restrict the use of the premises. Finding the answer to be yes, it was held that 'the absence of a reason would not affect the validity of the condition (see Brayhead (Ascot) Ltd v Berkshire CC [1964] 2 QB 303)'.

87. However, validity goes only to the legal or *Newbury* tests, and *Lambeth* does not alter any of the advice about the importance of giving reasons for imposing or not imposing conditions in appeal decisions.

Casework Issues

Interpreting Conditions

88. Full advice on the interpretation of planning permissions as well as conditions is given in the Enforcement chapter. Key principles are summarised here, however, since it may be necessary to interpret a condition in s79, s73 or s73A appeals, or indeed *any* PINS casework where the planning history is relevant.

89. It was held in *Newbury* that an Inspector has a duty to interpret a condition to give it a sensible meaning if they can[21]. The Courts have subsequently developed a pragmatic and purposive approach to the interpretation of conditions in law[22].

90. Paragraph 37 of the high court judgment in *Dunnett Investments Ltd v SSCLG & East Dorset DC* [2016] EWHC 534 (Admin) (upheld in [2017] EWCA Civ 192) summarises the key principles:

- Conditions must be construed in the context of the permission as a whole[23];
- Conditions should be construed in a common sense way, so that the Court should give the condition a sensible meaning if possible;
- Consistent with that, a condition should not be construed narrowly or strictly;
- There is no reason to exclude an implied condition, but a planning permission is a public document which may be relied upon by parties unrelated to those originally involved[24];
- The fact that breach of a condition may be used to support criminal trials means that a 'relatively cautious approach' should be taken;

[21] Citing Lord Denning in *Fawcett Properties Ltd v Buckinghamshire CC* [1961] AC 636: it is 'the daily task of the courts to resolve ambiguities of language…and to construe words so as to avoid absurdities or to put up with them…this applies to conditions in planning permissions as well as to other documents'.

[22] Examples of the Courts taking a purposive approach to interpreting conditions include *FSS v Arun DC & Brown* [2006] EWCA Civ 1172, where it was held that two conditions could be read together to gain a sensible meaning; or *Barlow v SSTLR & Uttlesford DC* (QBD 14.11.02 Sullivan J) where the term "rating" could be interpreted to refer to Council Tax.

[23] See also *Carter Commercial Developments Ltd v SSE* [2002] EWHC 1200 (Admin); a condition should be interpreted in a 'benevolent manner within its context, which includes the permission it limits'.

[24] *Trump International Golf Club Scotland Ltd & Another v the Scottish Ministers* [2015] UKSC 74

- A condition must be construed objectively; not by what the parties may or may not have intended at the time but what a reasonable reader construing the condition in the context of the permission as a whole would understand;

- A condition should be clearly and expressly imposed;

- A condition is to be construed in conjunction with the reason for its imposition so that its purpose and meaning can be properly understood;

- The process of interpreting a condition as for a planning permission, does not differ materially from that appropriate to other legal documents.

91. *Lambeth LBC v SSCLG & Aberdeen Asset Management* [2019] UKSC 33 concerned a retail unit where a planning authority had granted permission under s73 without restating conditions imposed on previous permissions to limit the range of goods sold.

92. From the wording of the proposal and the operative part of the s73 permission, the Supreme Court held that the 'obvious and only natural interpretation' was the Council had approved what was applied for, namely the variation of one condition. There is nothing to indicate an intention to remove the restriction on the sale of food goods.

93. The s73 permission was thus read to the effect that it carried forward a previous condition, although that had not in fact been imposed. *Lambeth* underscores the extent to which conditions should be given a 'sensible meaning' – and this principle must be followed in all casework[25].

94. This benevolent approach to the interpretation of previous conditions should not be taken as lessening the Inspector's duty to impose new conditions properly. Any permission granted at appeal will be at risk of challenge if conditions do not meet the six tests including precision, or are incomplete, or are not imposed at all when they should be[26].

Conditions and Planning Obligations

95. In some cases a particular requirement or restriction could reasonably be achieved by imposing a planning condition or by the appellant entering into a planning obligation under s106 of the TCPA90.

96. Paragraph 55 of the NPPF states that 'Planning obligations should only be used where it is not possible to address unacceptable impacts through a planning condition.' Even if

[25] See, for example, *R (oao Network Rail Infrastructure Ltd) v SSEFRA* [2018] EWCA Civ 2069

[26] In *Lambeth*, the Supreme Court endorsed *R (oao Reid) v SST* [2002] EWHC 2174 (Admin) that 'it is highly desirable that all the conditions to which the new [s73] planning permission will be subject should be restated…and not left to a process of cross-referencing'.

it would be equally possible to overcome an objection via condition or obligation, the PPG states that a condition should be used[27]. Conditions are preferable because they:

- represent the most straightforward approach for all parties.
- can be re-drafted by the Inspector.
- are imposed upon and thus form part of the planning permission.
- are easier to enforce and can be enforced in perpetuity.
- are easier to vary or remove.

97. However, a condition cannot override, supersede or revoke a completed planning obligation. If a completed obligation has been provided, it will be essential to consider whether a duplicating condition would be necessary.

98. There may be a small number of occasions when a condition could sit alongside a completed planning obligation, for example when a clause within an obligation is broad and a condition requesting further details could complement and add precision to the obligation. Such an approach should be taken with caution and will depend on the specific circumstances of the case. It is imperative that the details to be submitted satisfy the condition but do not in any way conflict with, or contradict, the planning obligation.

99. As noted above, the PPG is clear that positively worded conditions cannot be imposed which require the payment of money[28]. The PPG also advises that a positively worded condition which requires an applicant to enter into a planning obligation is unlikely to be enforceable.

100. The PPG continues that a negatively worded condition which requires an applicant to enter into a planning obligation is unlikely to be appropriate in the majority of cases; entering into an obligation prior to a grant of permission is the best way to ensure certainty and transparency.

101. However, the PPG continues that:

'In exceptional circumstances a negatively worded condition requiring a planning obligation or other agreement to be entered into before certain development can commence may be appropriate, where there is clear evidence that the delivery of the development would otherwise be at serious risk (this may apply in the case of particularly complex development schemes).'

102. If a planning authority wishes to use such a negatively worded condition, they should discuss it and agree the heads of terms with the applicant before permission is granted[29].

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[27] PPG paragraph 21a-011-20140306

[28] PPG paragraph 21a-005-20190723

[29] PPG paragraph 21a-010-20190723

An Inspector should have regard to and, where appropriate, test any evidence of such discussions.

103. See the Planning Obligations chapter for further advice.

When and How Conditions Come into Effect

104. When and how conditions come into effect depends on the stage of the permission or development that they relate to.

105. If works are carried out in breach of a condition precedent, the permission would not have been lawfully commenced. The development will be without planning permission unless particular circumstances apply as described in the Enforcement chapter. The meaning of 'condition precedent' is given in advice below on pre-commencement conditions.

106. Where a condition is imposed requiring that the development is not carried out except in complete accord with the approved plans, but the development does not in fact conform to the plans:

- If the deviation from the plans is relatively minor, the Council can enforce against a breach of the condition but not the development as a whole.

- If the deviation from the plans is substantial, perhaps because the building is sited in a significantly different position from that approved, the development as a whole is without planning permission.

107. Thus, the plans condition comes into effect when the development is commenced and remains effective for the lifetime of the permission.

108. Where it is necessary to secure the approval of further details of the development, but these are not of such significance to justify delaying works on site, it may be appropriate to word the condition so as to require the submission of the details before occupation of the development.

109. Pre-occupation conditions, and conditions which relate to the lifetime of the development do not come into effect until the permission has been commenced or implemented. For example:

- A condition requiring that trees on the site are protected during construction would not prevent damage to them before the permitted works are begun;

- A condition removing PD rights for extensions to an existing house would not prevent PD extensions being added before the permission is commenced.

- A condition specifying the opening hours of a hot food take-away would not come into effect until the permission has been implemented.

110. If pre-occupation or other conditions are not complied with, the authority would need to enforce against a breach of condition, not development without planning permission. This is the case even where there has been a breach of a temporary or personal permission.

Split Decisions

111. When deciding a planning application or appeal, the planning authority or Inspector may make a 'split decision' whereby permission for part of the development is allowed and part is refused. Full advice on split decisions is set out in 'the Approach to Decision-making' chapter.

112. Inspectors deciding appeals made under s79 of TPCA90 may also make a split decision, since they may 'reverse or vary any part of the decision of the local planning authority…'; see Appeals against Conditions.

113. The PPG advises that where a planning authority considers part of the development unacceptable, it is normally best to seek amended details[30]. If those are provided, permission can then be granted subject to a 'plans' condition which clearly refers to the amended drawings[31].

114. Where a split decision is made, take care to ensure that any conditions imposed relate only to the part of the development being allowed.

Revoking Permissions and Replacement Buildings

115. A planning permission can only be revoked by the planning authority or the Secretary of State following the process (with provisions for compensation) set out under s97 and s100 of the TCPA90.

116. A planning application may be determined with regard to a planning obligation whereby the appellant agrees to not implement a previously granted but unimplemented permission. A planning condition cannot be imposed to achieve the same end.

117. Where permission is sought for an **alternative to a previously approved development that is not yet built**:

- Consider whether the previous permission remains extant[32] and, if so, whether it would be physically possible to carry out both developments.
- If so, consider whether that would be acceptable or if there are compelling planning objections to both developments going ahead.

[30] PPG paragraph 21a-013-20140306

[31] PPG paragraph 21a-013-20140306 suggests that, in exceptional circumstances, and where the acceptable and unacceptable parts of the development are clearly distinguishable, it may be appropriate make a split decision by using a condition to grant permission for only part of the development. But this can be difficult to achieve in practice when it is simpler and safer to permit part and refuse part of the development as above.

[32] Do not determine whether a previous permission has been lawfully commenced / implemented. You can however record if the parties have agreed it has, and / or if the time limit for commencement has not lapsed.

- If so, a completed planning obligation would be required to prevent both permissions being implemented. If there is no obligation, the appeal should be dismissed on the basis of the harm that would result from there being no means of preventing both developments from going ahead.

118. However, conditions can assist where permission is sought for a **new building to replace one that is existing and lawful**. If it is proposed to construct a replacement building, and that could be done without the existing being demolished, and there are sound planning objections to both structures being in place, a condition may require that the existing is demolished before the appeal development is commenced.

Conflicting Conditions

119. It is crucial that conditions are not imposed which would conflict with others on the same permission – or conflict with conditions imposed on an existing permission that is still extant and relevant to the site.

120. For example, if you need to impose a condition requiring the provision and retention of a visibility splay with no obstructions over 0.6m – or there is a pre-existing condition to that effect – it would be unreasonable to impose another condition requiring that the development is landscaped in accordance with a plan that shows trees within the splay. The appellant would be put at risk of enforcement action if they plant the trees and thereby breach the visibility splay condition.

Discretionary or 'Tailpiece' Conditions

121. Conditions are sometimes worded to suggest that the requirements may be changed, usually by including a phrase such as 'unless otherwise agreed by the local planning authority in writing'. These are sometimes referred to as a 'tailpiece' phrases or conditions.

122. Such wording should be considered with care and avoided where possible, because it can create a risk that developers will seek to make significant changes to the development and/or to circumvent the statutory routes to vary conditions, depriving third parties of the opportunity to comment.

123. It was held in *Midcounties Co-operative Ltd v Wyre Forest DC* [2009] EWHC 964 that a tailpiece added to a condition to limit floor space allocations *'makes it hopelessly uncertain what is permitted. It enables development not applied for, assessed or permitted to occur. It side steps the whole of the statutory process for the grant of permission and the variation of conditions…'*

124. In *Hubert v Carmarthenshire CC* [2015] EWHC 2327 (Admin), permission had been granted for the construction of a wind turbine and it was held that a condition stating that the turbine should be of certain dimensions '*unless given the written approval of the local planning authority*' could lead to the approval of a turbine of a greater scale and environmental impact than had been permitted; the clause had to be removed.

125. Tailpiece conditions may be used where the potential for change would be minor, perhaps where a condition requires the implementation of a planting scheme submitted with the application, to give the authority scope to agree changes to the timing or species planted.

Discharge of Conditions

126. Details required by condition must be submitted to the planning authority in writing in accordance with Article 27(1) of the DMPO[33]. Fees are payable on an application for written confirmation of the discharge of condition(s) and/or that condition(s) have been satisfied[34].

127. Planning authorities are subject to the usual 8-week target to give notice of their decision on a request to discharge a condition; the clock starts on the day following receipt of the application; Article 27(2). A longer period can be agreed in writing with the applicant but, if no decision is made within 12 weeks, the authority must return the fee[35].

128. The provisions do not apply to prior approval applications, although those are in effect applications made in accordance with pre-commencement conditions imposed on permitted development. The provisions also do not apply to applications for the approval of reserved matters pursuant to a grant of outline permission; Article 27(3).

129. An application as required by a condition imposed on permission for EIA development is subject to the DMPO except that the planning authority has 16 weeks to make its decision; Article 68(2) of the Town and Country Planning (Environmental Impact Assessment) Regulations 2017[36].

130. There is a right of appeal under s78 of the TCPA90 where an application to discharge a condition is refused or not determined within the statutory period[37]. Such appeals are determined essentially like any other made under s78, that is, on the basis of the main planning issues.

131. The overriding question for the Inspector in these cases is whether the details submitted are sufficient and acceptable for the condition to be discharged, with regard to the condition itself, the reason for imposing the condition, the nature of the development permitted, the objections raised by the authority (if any) and submissions by the appellant.

132. For example, in an appeal against a refusal to approve 'landscaping' details required by condition, the main issue might be: 'the effect of the proposed landscaping scheme on the character and appearance of the approved development'.

[33] An application to discharge a condition is not the same as an application for non-material changes to a planning application, the procedure for which is set out in Article 10 of the DMPO.

[34] PPG paragraph 21a-033-20140306

[35] PPG paragraph 21a-033-20140306

[36] PPG paragraph 21a-034-20190723

[37] In DRDS, the appeal type is 'PLG details pursuant (eg res matters) – conditional grant/failure/refusal'

Deemed Discharge

133. Where an applicant has concerns about the timeliness of a planning authority in giving notice of a decision to discharge a condition imposed on a permission granted for the development of land in England after 15 April 2015[38], they may secure the 'deemed discharge' of the condition[39].

134. This provision exists to 'avoid unacceptable delays and costs at a stage in the development process where applicants are close to starting on site or where development is underway'[40].

135. The applicant must follow the proscribed procedure, or their only recourse against an authority's failure to determine an application to discharge a condition will be by making an appeal as above.

136. Under s74A(1) of the TCPA90 and Article 28(1) of the DMPO, a condition is deemed to be discharged where:

- the applicant has submitted details required by the condition in accordance with Article 27;
- the applicant has given notice in accordance with Article 29[41]; and
- the period for the authority to give notice to of their decision on the application has elapsed without such notice being given to the applicant.

137. Under Article 28(2), deemed discharge takes effect on the date specified in the 'Article 29 notice'[42] **or** 14 days after the day immediately following that on which the notice is received by the authority (whichever of those is later)[43] **or** on such later date as may be agreed by the applicant and the authority in writing[44].

138. Article 30 of the DMPO states that the deemed discharge provisions under Article 28 do not apply where (a) the condition falls within the exemptions listed in Schedule 6; or (b) the applicant and the planning authority have agreed in writing that the provisions of s74A of the TPCA90 do not apply.

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[38] PPG paragraph 21a-042-20190723

[39] PPG paragraph 21a-034-20190723

[40] PPG paragraph 21a-041-20190723

[41] PPG paragraph 21a-045-20190723

[42] No earlier than the 8 week date by when the authority should give notice of their decision.

[43] PPG paragraph 21a-044-20190723

[44] See also PPG paragraph 21a-043-20190723

139. The exemptions set out in Schedule 6 of the DMPO relate to:

- EIA development – in specified circumstances.
- Conditions intended to manage the risk of flood.
- Sites of Special Scientific Interest – in specified circumstances.
- Conditions relating to the assessment or remediation of contaminated land.
- Conditions relating to the investigation of archaeological potential.
- Conditions relating to highway access or an agreement to be entered into pursuant to s278 of the Highways Act 1980 as to execution of works.
- Conditions requiring the approval of Reserved Matters.
- Conditions requiring [actions pursuant to] a planning obligation
- Conditions imposed on a permission granted by development order.

140. See also the Appeals against Conditions ITM.

Viability

141. References to viability in the 'Use of Conditions' chapter of the PPG are:

- Conditions should not be imposed if they would unreasonably impact on the deliverability of development with regard to the NPPF and supporting guidance on viability[45].
- Conditions can be used to stipulate the sequence or phasing of development or ensure that a particular element in a scheme is provided by a particular stage, so long as the authority discusses and agrees the condition with the applicant before permission is granted, to understand how the requirements would fit into the planned sequence for developing the site, impacts on viability, and whether the tests of reasonableness and necessity will be met[46].

142. As noted above, any condition placing 'unjustifiable and disproportionate financial burdens on an applicant' would be unreasonable, whether or not viability is raised as a material consideration.

[45] PPG paragraph 21a-005-20190723

[46] PPG paragraph 21a-008-20140306

Types of Conditions

The Standard Commencement Condition

143. The standard 'three year' condition for the commencement of development is deemed to be imposed on every planning permission. It is good practice to expressly impose the condition on every grant of permission for completeness. That advice does not apply, however:

- Where the appeal does not concern an application for full permission[47],
- Where the development has already begun and so planning permission would be granted on a retrospective basis.

144. S91(1)(b) of the TCPA90 allows planning authorities to modify the standard condition and impose a longer or shorter time limit for the start of the development. The NPPF and PPG advise that[48]:

- A shorter period may be appropriate to encourage the commencement of development, where non-commencement has previously had negative impacts and/or to ensure that proposed housing is implemented in a timely manner, where this would expedite the development without threatening its deliverability or viability.
- A longer period may be justified for very complex projects where there is evidence that three years is not long enough for completion of the preparations necessary before development can start.

Outline and Reserved Matters

145. The Approach to Decision making chapter provides full information on outline and reserved matters appeals.

146. When considering the imposition of conditions, it is crucial to bear in mind that planning permission for the development is granted at outline stage. An application for the approval of reserved matters is, by definition, an application for the approval of details pursuant to the permission.

147. Article 2 of the DMPO defines the matters that may be 'reserved for future consideration' as:

[47] Such as appeals concerning applications for outline permission or prior approval.

[48] Paragraph 81 of the NPPF and PPG paragraph 21a-027-20140306

- access[49];
- appearance;
- landscaping;
- layout; and
- scale[50].

148. When dealing with an appeal for outline planning permission, you must clarify at the start which matters are for approval at this stage, if any; which matters are reserved for future consideration; and which plan(s) in front of you are for approval or simply indicative or illustrative.

149. As set out in the PPG[51], unless it is clear that details have been submitted for illustrative purposes only, conditions cannot be used to reserve details for subsequent approvals.

150. The key conditions to impose on any grant of **outline permission** will be:

- The standard condition requiring that details of the reserved matters are submitted for approval[52].
- The standard condition specifying when the reserved matters application must be submitted by'[53].
- The standard condition specifying when the development permitted must be commenced by'[54].
- The 'plans' condition – which should only list the plans submitted for approval, not any indicative or illustrative plans[55].
- Any conditions that are necessary in respect of the principle of development, for example, a restriction to the number of houses or height of buildings.

[49] Under Article 5(3), where access is a reserved matter, the outline application must state the area or areas where access points to the development proposed will be situated.

[50] Scale, except in the term 'identified scale', means the height, width and length of each building proposed within the development in relation to its surroundings.

[51] 005 Reference ID: 21a-005-20190723

[52] S92(2)(a) of the TCPA90; model condition (2) in the PINS suite of planning conditions and DRDS

[53] S92(2)(b) of the TCPA90; model condition (3) in the PINS suite of planning conditions and DRDS

[54] S92(2)(c) of the TCPA90; model condition (4) in the PINS suite of planning conditions and DRDS

[55] PPG paragraph 21a-005-20190723

- Any conditions which are necessary with regard to matters for approval at outline stage; for example, if the application includes details of the site access for approval, any condition pertaining to access and highway safety must be imposed on the outline permission[56].

- Any conditions which are necessary to control matters that fall outside of the scope of the reserved matters, such as drainage or contamination.

- Any conditions which are necessary to clarify what should be submitted at reserved matters stage, for example, if the landscaping scheme should include tree planting, or the layout should include car parking spaces.

151. If you are dealing with an appeal for the approval of some or all of the **reserved matters**, you can only impose conditions which directly relate to the matters you are approving[57].

152. For example, if you approve the details of 'appearance' as a reserved matter, you may impose a condition requiring that particular windows are obscure-glazed, since that condition could not have been reasonably imposed before the plans were submitted.

Temporary, Personal and Occupancy Conditions

153. Where permission is granted under s72(1)(b) for a limited period, it is essential not only that the duration of the permission is specified in a condition[58], but also that the condition requires the removal of the permitted structures and/or the discontinuance of the permitted use at the end of the period, plus the carrying out of any works required to reinstate the land to its previous condition.

154. Those stipulations apply whether you are imposing a 'temporary' condition to limit the duration of the permission to a specific period of time or a 'personal' condition which would limit the duration of the permission to the period that it is required by the appellant or occupier.

155. However, the PPG is clear that it would rarely be reasonable to impose a condition which requires the demolition of a building that is intended to be permanent. Moreover, a condition that requires the demolition of a building would be unlikely to relate fairly and reasonably to the development when the permission being granted is for a change of use[59].

156. The PPG advises on the circumstances where it may be appropriate to impose a temporary condition:

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[56] PPG paragraph 21a-025-20140306

[57] *R v Newbury DC ex parte Stevens & Partridge* [1992] JPL 1057; PPG paragraph 21a-025-20140306

[58] See the advice on the 'Necessary' test above

[59] PPG paragraph 21a-014-20140306

- A trial run is needed to assess the effect of the development on an area;
- It is expected that the planning circumstances will have changed in a particular way by the end of the temporary period;
- To enable the temporary use of vacant land or buildings prior to longer-term proposals coming forward.

157. Unless the circumstances provide a clear rationale, it will rarely be justifiable to grant a second temporary permission, and there is no presumption that permanent permission should be granted once the temporary period has expired.

158. The PPG advises that, since planning permission runs with the land, it is rarely appropriate to provide otherwise, but sometimes development that would not normally be permitted may be justified because of who would benefit from the permission[60].

159. It is important to bear in mind that planning permission is required for a material change of use of land, but not for any change of who occupies the site. If it is necessary to restrict the enjoyment of a use to a person or group of persons, the restriction must be achieved by way of condition.

160. Such conditions typically need to be considered where there is some policy objection to permitting the proposed use on an unconstrained basis, for example, residential use of land or a building in the countryside.

161. Personal and occupancy conditions differ in that:

- A personal condition will be imposed where the justification for granting permission rests on the personal circumstances of the appellant or occupier, while an occupancy condition will be imposed where the type of occupier will make the use acceptable in planning terms.
- A personal condition would set out the name(s) of the individuals who would benefit from the permission; an occupancy condition would not.
- A personal condition would endure for such time as proscribed, but an occupancy condition would normally apply in perpetuity.

162. A condition limiting the benefit of a permission to a company is inappropriate because its shares could be transferred to other persons without affecting the legal personality of the company.

163. Types of occupancy conditions include[61]:

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[60] PPG paragraph 21a-015-20140306

[61] See model conditions 21, 22, 23, 36 and 38 in the PINS suite of planning conditions and DRDS. Gypsy and traveller sites are also subject to occupancy conditions; see the Gypsy and Traveller Casework chapter. Affordable housing conditions may include occupancy clauses; see the Housing chapter.

- ‘Agricultural’ occupancy conditions, which restrict occupation of a dwellinghouse to those involved in local agriculture. This type of condition may be adapted for those taking majority control of a farm business, or forestry or other essential rural workers, in accordance with the circumstances of the case and paragraph 88 of the NPPF.

- ‘Seasonal’ or ‘holiday’ occupancy conditions, which restrict occupation of a caravan site or dwellinghouse in order to support the tourism industry and/or prevent occupation as a permanent home.

- Occupation by persons of a certain age.

- Staff occupancy conditions.

- ‘Live/work’ occupancy conditions.

164. The PPG does not recommend the use of conditions to restrict a use to holiday lets, but an appeal decision was recently quashed by the high court in part because the Inspector failed to consider the imposition of such a condition[62].

165. It is unlikely that an occupancy condition which requires the keeping of a register of occupiers would be considered unworkable or unlawful under data processing regulations, because the condition itself would provide a lawful basis for the processing of relevant personal data.

166. However, if you find that it would be unreasonable for the condition to require the keeping of a register, alternative ways to ensure that the premises is only occupied as stipulated would be:

- Leave it to the planning authority to enforce the occupancy condition in the usual way, bearing in mind their powers of investigation and particularly to issue a Planning Contravention Notice under s171C of the TCPA90, or

- Include a requirement in the condition that the appellant must submit a statutory declaration under the Statutory Declaration Act 1835 to the authority at regular intervals to confirm the use and occupation of the site.

167. Personal and ‘agricultural’, staff or live/work occupancy conditions should be worded to extend the benefit of the permission to ‘resident dependants’. It was held in *Shortt & Shortt v SSCLG & Tewksbury BC* [2015] EWCA Civ 1192 that, as a matter of ordinary language, ‘dependants’ can include persons in relationships which involve non-financial dependency, such as emotional support and care.

168. It is possible to impose a condition which limits the number of people occupying a development, for example, a house in multiple occupation, so long as this is reasonable

[62] *Great Hadham Country Club Ltd & Morgan v SSCLG & East Hertfordshire DC* [2019] EWHC 1203 (Admin)

and necessary. The condition should be enforceable, since a breach would be difficult but not impossible to detect.

169. Any breach of a temporary, personal or occupancy condition would not become immune from enforcement action for a period of ten years under s171B(3) of the TCPA90 – although use of a building as a dwellinghouse (or the breach of a condition which prevents such use) becomes immune after four years under s171B(2); see the Enforcement chapter.

The 'Plans' Condition

170. While advice to this effect in the 'use of conditions' section of the PPG has been deleted, it remains good practice to grant permission subject to a condition which specifies the approved plans. Your reason for imposing the condition would be that it creates certainty for all parties; that applies particularly but not only where revised plans have been submitted.

171. Imposing a plans condition allows the appellant to make a s73 application for 'minor material amendments' to the permission. Indeed, s96A of the TCPA90 allows an applicant to seek the *addition* of a 'plans' condition for this very reason. If a new permission is granted under s73, it should be subject to a new plans condition which lists the plans that show the development subject to minor material amendments[63].

172. If none of the parties suggests imposing a plans condition, you should still do so, and do not need to confer with the parties first. It should not come as a surprise to any party that the development permitted should be carried out as shown on the approved plans.

173. However, it is not appropriate to impose a plans condition:

- On a grant of permission for development involving a change of use only.
- On a grant of outline permission where all submitted plans are indicative or illustrative – unless there is a Masterplan or other drawing showing an outline scheme that is agreed to necessarily fix the parameters of the development.

174. If the development has already been carried out, it may be unnecessary to impose a plans condition. If that is the case, it is still good practice to refer to the plans in the effective part of the decision:

"The appeal is allowed, and planning permission is granted for [ ] at [ ] in accordance with the terms of the application, Ref [ ], dated [ ], [**and the plans numbered x, y and z**], subject to the following condition[s]: [ ]"[64].

175. However, you should always be mindful that permission is granted for the development applied for, which may not be the same as the development on the ground. If there are

[63] PPG paragraph 17a-018-20140306

[64] This wording should not be used if a plans condition is imposed

differences between what is proposed and what was actually built, impose a plans condition to require that the development is completed in accordance with the plans.

176. Ideally the condition will list the plans by number or title. If the plans are not numbered or named, the condition should refer to those 'submitted' and perhaps the date of the plans or date of receipt by the authority. If there are many plans, they should be listed in a schedule that is referenced in the condition and appended to the decision[65].

177. If it is necessary to require the submission and approval of further details, you should impose the standard plans condition and word the 'details' condition along the following lines:

Notwithstanding condition # [the plans condition], the development hereby permitted shall not be occupied until details of # have been submitted to and approved in writing by the local planning authority. Development shall be carried out in accordance with the approved details.

178. If the plans show some unacceptable detail which can simply be omitted from the development, and is therefore not fatal to a grant of permission, you should adapt the standard plans condition along the following lines:

The development hereby permitted shall be carried out in accordance with the following approved plans: [insert plan numbers] except in respect of the [specify the detail] shown on plan [insert plan number].

179. The standard plans condition cannot require that all features shown on the plans are provided or retained, or that the development and all of its component parts must be completed. The condition can only ensure that the development accords with the plans if and insofar as it is carried out.

180. If it is essential – assuming the permission is implemented – that some specific feature shown on the plans is provided, such as proposed parking spaces or landscaping, you must impose an additional condition to ensure that the feature is delivered and, if necessary, retained.

Outstanding Details and Pre-Commencement Conditions

181. Even when full, as opposed to outline permission is granted, it may be necessary to impose conditions requiring the submission and approval of details which were not provided as part of the planning application.

182. The PPG states that is '*important that the local authority limits the use*' of such conditions '*other than where it will clearly assist with the efficient and effective delivery of development*'. Planning authorities are expected to discuss such conditions with the applicant to ensure that unreasonable burdens would not be imposed.

[65] See model conditions 5, 6, 7 and 8 in the PINS suite of planning conditions and DRDS.

183. The PPG also emphasises that the timing for the submission of details should meet with the planned sequence for developing the site. Conditions that unnecessarily affect an appellant's ability to bring a development into use or occupation, or otherwise impact on the proper implementation of the permission should not be used[66].

184. Conditions that require the approval of details must specify when the information should be submitted to the planning authority, otherwise, the condition will be unenforceable. The timescale is normally:

- **Before the development is commenced** (for example, 'No development shall take place until…'); or
- **Before the development is occupied or used** (for example, 'No dwelling hereby permitted shall be occupied until…'); or
- **By a specified time** (for example, 'Within x months of the date of this decision…'); this wording is required where the development has been begun and planning permission is sought retrospectively.

Pre-commencement Conditions

185. The term 'pre-commencement condition' is defined in s100ZA(8) of the TCPA90 as meaning:

'a condition imposed on a grant of planning permission (other than a grant of outline planning permission within the meaning of section 92) which must be complied with—

(a) before any building or other operation comprised in the development is begun, or

(b) where the development consists of a material change in the use of any buildings or other land, before the change of use is begun'.

186. Development is taken to be **begun** when 'material operations' or 'material development' as described by s56 of the TCPA90 have taken place in accordance with the development permitted[67].

187. As noted above, s100ZA(5) and (6) of the TCPA90 provide that planning permission for the development of the land may not be granted subject to a pre-commencement condition without the written agreement of the applicant to the terms of the condition. An Inspector should have regard to any agreement already gained and seek agreement to the imposition of any different (or differently worded) pre-commencement conditions.

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[66] PPG paragraph 21a-006-2014030

[67] The term 'implementation' is not defined in statute and '*can be used to refer to the beginning of the development authorised by a planning permission…[or] more generally to the carrying out or completion of the development authorised by a planning permission*'; *R (oao) Robert Hitchens Ltd v Worcestershire CC* [2015] EWCA Civ 1060 and see also the Enforcement chapter.

188. Written agreement is only required before granting planning permission (except outline permission). Pre-commencement conditions may also be attached to other types of consent including listed building and prior approval if justified, however written agreement is not required from the appellant.

189. The PPG describes that a planning authority may serve notice on an applicant to seek the written agreement to a pre-commencement condition[68]. The Town and Country Planning (Pre-Commencement Conditions) Regulations 2018 provide that the Secretary of State may also serve such notice, and the 'Regulation 2(4) Notice' must include:

- the text of the proposed pre-commencement condition,
- the full reasons for the proposed condition, set out clearly and precisely,
- the full reasons for the proposed condition being a pre-commencement condition, set out clearly and precisely, and
- notice that any substantive response must be received…no later than the last day of the period of 10 working days beginning with the day after the date on which the notice is given.

190. The Regulations provide that the applicant or appellant may give written agreement to the terms of the proposed pre-commencement condition, or a 'substantive response' whereby they do not agree to the imposition of the proposed condition or provide comments on the proposed condition.

191. The PPG gives more information on these options available to the applicant or appellant[69]. If they provide a 'substantive response', the pre-commencement condition cannot be imposed.

192. Paragraph 56 of the NPPF advises that conditions which are required to be discharged before development commences should be avoided, unless there is a clear justification. The PPG also explains that:

'pre-commencement conditions should only be used where there is a clear justification, which is likely to be mean that the requirements of the condition (including the timing of compliance) are so fundamental to the development permitted that it would otherwise be necessary to refuse the whole permission'[70].

193. Where the requirements are 'fundamental', a pre-commencement condition will amount to a 'condition precedent' for enforcement or other purposes. A condition precedent is essentially characterised by:

[68] PPG paragraph 21a-037-20180615. This refers to paragraph 019 but that has now been deleted.

[69] PPG paragraph 21a-038-20180615

[70] PPG paragraph 21a-007-20180615

- Prohibiting any development authorised by the permission from taking place until the condition is complied with; and

- Going to the heart of the permission[71]

194. *Greenwood v SSHCLG , Wokingham Borough Council and Sheldon Seal* confirms the approach taken in *Whitley and Sons v Secretary of State for Wales and Clwyd CC (1992)*, namely that works which contravene a conditions precedent cannot be taken as lawfully commencing development. However, the Decision maker should keep in mind that, where appropriate, enforcement is solely a matter for the Council, thus observations about whether development is unlawful and thus susceptible to enforcement should be avoided unless it is expressly required within the remit of the appeal.

'Grampian' Conditions

195. The key features of a Grampian condition are:

- It is negatively-worded, to prohibit the commencement or occupation of (part of) the development until some specified action takes place; and

- The required action must be on land that is not controlled by the applicant and/or must be authorised by another person or body.

196. Conditions which [positively] require works on land that is not controlled by the applicant and/or works to be authorised by another person or body are often unreasonable and unenforceable. However, it may be possible to achieve the same result by imposing a Grampian condition[72].

197. Grampian conditions derive from *Grampian Regional Council v Aberdeen CC* [1983] P&CR 633, which concerned whether permission should be refused on highway safety grounds or granted subject to a negatively-worded condition that would prohibit development from taking place until a road had been closed. The land lay outside of the applicant's control and consent for the works would be required from the highways' authority.

198. It was held in the House of Lords that the works would be necessary for the development to proceed – and whether any condition is reasonable depends on the circumstances. In this case, the Reporter had found the development to be in the public interest, so it was appropriate to grant permission subject to the condition.

199. It was also held that negatively-worded conditions are enforceable – and imposing such a condition with respect to land outside of the applicant's control would not create

[71] Further advice on conditions precedent is contained in the Enforcement chapter

[72] PPG paragraph 21a-009-20140306

unacceptable uncertainty, since there is nothing to compel any applicant to implement a permission in any event.

200. However, the PPG advises that Grampian conditions should not be used where there are 'no prospects at all' of the action being performed within the time-limit imposed by the condition[73].

201. If it is unclear as to whether there are any such prospects, you may exercise discretion and not impose a suggested Grampian condition but must give a sound planning reason. It must be more than unlikely or uncertain that the action would be achieved to justify refusing permission for development which would be acceptable with the condition in place[74].

202. Failure to consider imposing a suggested Grampian condition, or indeed any other suggested condition, would be considered procedurally unfair[75].

'Phasing' Conditions

203. The PPG advises that, where necessity and the other policy tests are met, conditions may be imposed to ensure that the development is carried out in a certain sequence – and/or that some specified element(s) of the scheme are provided by a particular time or at a particular stage[76]. For example, conditions may require that:

- The site access is completed before the approved buildings are begun;
- The approved parking spaces are laid out before the development is brought into use.

204. The PPG advises that planning authorities and applicants should discuss and agree such conditions before permission is granted, to understand how the requirements would fit with the developer's planned sequence of development, the impacts of the requirements on viability, and whether the requirements would be necessary and reasonable. Inspectors should consider – and test at hearing or inquiry – evidence on those matters.

Retrospective Permission

205. Conditions may be imposed on any planning permission being granted retrospectively, whether the application was made under s78, s73A or, in an enforcement appeal, s174 and s177 of the TCPA90. However:

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[73] PPG paragraph 21a-009-20140306

[74] *Bellway Homes Ltd v SSCLG & Cheshire East Council* CO/302/2015

[75] *Engbers v SSCLG* [2016] EWCA Civ 118

[76] PPG paragraph 21a-008-20140306

- The standard commencement condition should not be imposed.

- Other standard conditions may be unnecessary, for example, requiring the use of matching materials.

206. Some standard conditions require action, such as the submission and approval of a landscaping scheme, before the development is begun or occupied. In retrospective cases, such conditions must be adapted to set a timetable for action, and a 'sanction' for non-compliance in order to be enforceable. The PINS suite of planning conditions and DRDS include conditions that require action in simple and complex retrospective cases[77]; both must be drafted with particular care.

207. The standard 'sanction', in both the simple and complex conditions, is that the use being granted permission must cease or the building being granted permission must be demolished in the event of failure to take the required action by the specified time. If the condition is not complied with, the Council would only be able to enforce against the breach of condition; they could not enforce against development without permission at all. However, the consequences would still be serious because:

    - Where permission is granted for a use of land, enforcing against a breach of the condition would mean that the use must cease and so it would be impossible to exercise the benefit of the permission;

    - Where permission is granted for a building or other operational development, enforcing against a breach of condition would mean that the works must be removed, and the permission would be 'spent'.

208. In some cases, you may be able to draft the condition so that there is a lesser sanction. You should consider what is proportionate in the case and whether the action required would go to the heart of the permission. You may even be able to draft the condition so that it simply requires that the action is undertaken by a specified date, and then the Council could use their powers under s172 or s187A of the TCPA90 to enforce against the action rather than development as a whole.

209. If you are imposing one of the standard retrospective conditions, you should therefore explain not only the reason for requiring the action, but also how the condition would operate and what its effects would be. You should give the following reason for imposing the standard condition which requires the carrying out of action in a **simple** retrospective case:

    "Condition XX is imposed to ensure that [the required details] are submitted, approved and implemented so as to make the development acceptable in planning terms. There is a strict timetable for compliance because permission is being granted retrospectively, and it is not possible to use a negatively worded condition to secure the approval and implementation of the [outstanding matter] before the development takes place. The

[77] Details – retrospectively where PP is granted for development already carried out (long form)(34) and 'Details – retrospectively where PP is granted for development already carried out (short form) (35)'

condition will ensure that the development can be enforced against if the requirements are not met".

210. You should give the following reason for imposing the standard condition which requires action in a **complex** retrospective case:

"Condition XX is imposed is to ensure that [the required details] are submitted, approved and implemented so as to make the development acceptable in planning terms. There is a strict timetable for compliance because permission is being granted retrospectively, and so it is not possible to use a negatively worded condition to secure the approval and implementation of the [outstanding matter] before the development takes place".

"The condition will ensure that the development can be enforced against if the [required details] are not submitted for approval within the period given by the condition, or if the details are not approved by the local planning authority or the Secretary of State on appeal, or if the details are approved but not implemented in accordance with an approved timetable".

211. Whether imposing the long or short-form retrospective condition, it is essential to consider not only whether it is necessary and reasonable to require the further details, but also whether the timeframe being given for the submission of those details is reasonable in the circumstances.

212. There have been some concerns that the PINS model retrospective conditions may not meet the test of enforceability as there is the possibility that deemed discharge could occur before the relevant timescales set out within the model condition have expired. However, in such situations, the relevant condition will cease to have effect because it will have been legally discharged as a result of the deemed discharge.

Changes of Use and PD Rights

213. Paragraph 54 of the NPPF states that planning conditions should not be used to restrict national PD rights unless there is clear justification to do so. The PPG also advises that conditions restricting the future exercise of PD rights **and** conditions restricting future changes of use may not pass the test of reasonableness or necessity[78].

214. However, if a proposed development would only be acceptable if certain PD rights are not exercised in the future, it may be necessary and reasonable to impose a condition to withdraw those rights[79].

215. Similarly, if permission is granted for a use which falls within a use class set out in the Schedule to the Town and Country Planning (Use Classes) Order 1987 (UCO) such as a funeral director's (class A1) or crèche (class D1), a condition would have to be imposed

[78] PPG paragraph 21a-017-20190723

[79] See, for example, model conditions 31, 32 and 33.

if it is necessary to prevent a change of use to another use within the same class taking place without permission, given the provisions of s55(2)(f) of the TCPA90[80].

216. The PPG advises that the scope of conditions which restrict PD or change of use rights must be precisely defined by reference to the relevant provisions in the GPDO. Again, this applies to s55(2)(f) and the UCO.

217. PD and change of use rights cannot be removed by implication; a condition stating '*no further extensions shall be made*' or '*the use is limited to…'* would not prevent the operation of the GPDO or s55(2)(f). The condition must contain some explicit restriction. The Courts have held that conditions requiring that land is 'only' used for a particular use; or is used for a particular use and 'no other'; or is used for a specific use and 'for no other purpose' do restrict change of use rights[81].

218. However, it is helpful to refer in the condition to the relevant legislative provisions so as to meet the tests of necessity and reasonableness as well as precision. This will help you to be clear as to what rights are being withdrawn, and help you ensure the appellant loses no rights beyond what is needed to make the development acceptable.

219. For example, if it is necessary to remove PD rights set out under Article 3, Schedule 2 and Part 1 of the GPDO so as to prevent the construction of further extensions to a dwellinghouse, consider whether this applies to extensions to the house permitted under Class A, extensions to roof permitted under Class B, a porch permitted under Class D and/or separate curtilage buildings permitted under Class E.

220. The PINS suite of planning conditions and DRDS include model conditions to withdraw PD and change of use rights[82]. Crucially, these conditions are carefully worded to survive any future replacement of the GPDO or UCO. They can be tailored in other respects in response to the case.

221. Any PD rights that are withdrawn by condition may be exercised before the permission is commenced – unless there is a completed planning obligation to the effect that the appellant would forego their PD rights upon the grant of the permission. If there is no such obligation but, for example, the proposed house extension subject to the appeal would only be acceptable provided that other extensions are not constructed first, the only way to prevent that would be to dismiss the appeal.

[80] S55(2)(f) provides that 'in the case of buildings or other land which are used for a purpose of any class specified in an order…the use of the buildings or other land…for any other purpose of the same class shall not be taken to involve the development of land'; see model condition 9.

[81] *Dunoon Developments v Poole BC* [1992] JPL 936, *Royal London Mutual Insurance Society Ltd v SSCLG* [2013] EWHC 3597, *Dunnett Investments Ltd v SSCLG* [2017] EWCA Civ 192.

[82] For example, model conditions 9, 31, 32, 33, 37 and 97.

Housing Cases

Extensions and Annexes

222. See above for advice on withdrawing PD rights for extensions and alterations to dwellinghouses.

223. PD rights set out under Article 3 and Schedule 2, Part 1 of the GPDO may apply to Houses in Multiple Occupation (HMOs) with up to six (C4 use) or more than six (sui generis use) occupiers. The question is whether the HMO is a 'dwellinghouse' as a matter of fact and degree.

224. The owners of neighbouring properties will occasionally extend their houses such that each extension would be, more or less, a mirror image of the other. If it is necessary that the two houses continue to have a symmetrical or cohesive appearance, each extension may only be acceptable if the other would be carried out.

225. However, if neither of the appellants has control over the other's land, it would be unreasonable to impose conditions which require the completion of both extensions or would prevent the occupation of one until both are completed. If it is essential that both extensions are completed, probably on visual grounds, then such appeals are likely to fail unless there is a completed planning obligation signed by the appellants in which both undertake to carry out the development as a single scheme.

226. Where it is proposed to construct an extension to or a separate building in the curtilage of a dwellinghouse, the use of the structure will normally be:

- To provide additional living space, which would be part and parcel of the primary dwellinghouse use; or

- For purposes incidental to the use of the dwelling – meaning a use that is not 'part and parcel' of but has a normal functional relationship with the primary dwellinghouse use. Examples of incidental uses are parking/garaging, garden buildings, home gyms etc.

227. As described further in the Housing chapter, where it is proposed to construct an extension or outbuilding to provide living space for a relative or other person, the use will normally be:

- Still part and parcel of the primary dwellinghouse use because the use of the extension or annexe would be physically and/or functionally connected to the use of the main house and a new planning unit would not be created[83].

- Use as a separate dwellinghouse in a separate planning unit.

[83] It was held in *Uttlesford DC v SSE & White* [1992] JPL 171 that self-contained accommodation with facilities for independent living was not a separate planning unit as a matter of fact and degree because it functioned as an annex with the occupant sharing living activity with her family in the main dwelling.

228. If an extension or outbuilding is proposed for incidental use, or for use as part of the dwelling, a condition to restrict the use will rarely be needed. Even if the development could be used as a separate dwelling and a party has raised sound planning objections to such a use, it should suffice to point out that there is no separate dwelling before you.

229. Furthermore, if following a grant of permission, the structure is not built or used as proposed, or if there is a future material change of use to create a separate dwelling, then another grant of permission would be required, and the building or use would be at risk of enforcement action if such permission is not granted.

230. There can be cases where it is proposed to construct an extension or annexe that is capable of being used a separate dwelling but would in fact remain part of the main dwellinghouse because the space is required for occupation by a particular individual who is connected with (usually a relative of) the occupiers of the main house. The development will remain in place long after the need which gave rise to the application has gone. Imposing a condition to restrict the use may make the development acceptable in planning terms and thus ensure that your decision is proportionate. An appropriate condition might be:

    The [extension/building] hereby permitted shall not be used other than as [part of] [and/or] [for purposes ancillary to the use of] the dwelling known as [**][84].

231. Further advice is given in the Housing and Enforcement chapters.

Affordable Housing

232. Advice on the use of conditions and planning obligations to secure affordable housing is set out in the Housing chapter.

Housing Standards

233. National planning policy is set out in:

- Paragraph 135 and footnote 52 of the NPPF;
- The Written Ministerial Statement of 25 March 2015 – see paragraphs on zero carbon homes, housing standards and plan-making;
- The PPG chapter on Housing: optional technical standards – covering accessible and adaptable homes, water efficiency and space standards
- Technical Housing Standards – Nationally Described Space Standard.

234. The Housing chapter advises on the application of the above and development plan policies on housing standards in appeals casework.

[84] This is a modified version of model condition 24 in the PINS suite of planning conditions and DRDS.

235. Conditions requiring compliance with housing standards should only be imposed so far as is necessary to make the development acceptable in planning terms. For example, if the requirement is to remedy harm relating to space standards, it would be unreasonable to impose conditions relating to energy efficiency.

236. It is also important to bear in mind that conditions would be unreasonable if they would negate the benefit of the permission or could not achieved without significantly amending the scheme. If compliance with space standards is necessary but cannot be physically achieved, you may need to refuse permission.

237. PINS does not have model conditions relating to housing standards, but conditions should be drafted along the following lines bearing in mind that implementation is secured through the Building Regulations:

- **Accessibility and adaptability:** The dwelling(s) shall not be occupied until the Building Regulations Optional requirement [x] has been complied with.

- **Water efficiency:** The dwelling(s) shall not be occupied until the Building Regulations Optional requirement [x] has been complied with.

- **Space standards:** The dwelling(s) shall not be occupied until the nationally described space standard [ref] has been complied with and the details of compliance provided to the local planning authority.

- **Energy performance**[85]: The dwelling(s) shall not be occupied until the relevant requirements of level of energy performance equivalent to ENE1 level 4 of the Code for Sustainable Homes have been met and the details of compliance provided to the local planning authority[86].

Car-free Housing

238. Car free development can only be implemented effectively within a Controlled Parking Zone (CPZ). Development is permitted on the basis that it will not increase demand for on-street parking because the occupants of the development will not be eligible for a resident's parking permit. The issuing of permits is the responsibility of the highway authority and enforced through the Traffic Regulation Orders (TROs). As part of its TROs, the Council may operate an up-to-date list of properties within the TRO area whose occupants cannot be issued with a resident's parking permit. Details of how the TROs are prepared and how the list of properties are updated may differ between authorities.

239. If it is contended that a development should be car-free and the TRO requires amendment to remove eligibility to a parking permit you will need to consider:

[85] The WMS allows planning authorities to apply existing (as of March 2015) development plan policies which require compliance with (the equivalent of) Level 4 in the Code for Sustainable Homes until s43 of the Deregulation Act 2015 comes into force, serving to amend the Planning and Energy Act 2008.

[86] Building Regulations Part L 2013 is equivalent to the former Code level 3 on energy performance.

a) the extent to which the proposal would be contrary to the development plan's requirements if it was not car-free, having regard to adopted parking standards and any other relevant development plan policies which seek to promote this type of development and/or the use of modes other than the car;

b) what harm would be caused in terms of highway safety (e.g. causing obstructions, illegal or footway parking), increased parking stress or inconvenience to the wider neighbourhood from additional demand for parking in the locality if that were to occur;

c) if, to be acceptable in planning terms, the development must be car-free, whether there is a suitable mechanism for achieving this through either a planning condition or a planning obligation.

240. It may be proposed that the development could be secured as car-free by means of a planning condition. The PINS suite of planning conditions suggests the following condition for car-free housing:

"No development shall take place until arrangements shall have been made to secure the development as a car-free development in accordance with a detailed scheme or agreement which shall have been approved in writing by the local planning authority. The approved scheme or agreement shall ensure that:

(i) no occupiers of the approved development shall apply for, obtain or hold an on-street parking permit to park a vehicle on the public highway within the administrative district of the local planning authority (other than a disabled person's badge issued pursuant to section 21 of the Chronically Sick and Disabled Persons Act 1970 or similar legislation); and

(ii) any occupiers of the approved development shall surrender any such permit wrongly issued or held.

Such scheme or agreement shall be implemented prior to the occupation of the development hereby permitted and shall be retained and operated for so long as the use hereby permitted continues."

241. That condition contemplates the execution of a planning obligation, the relevant advice in the PPG[87] being:

"…in exceptional circumstances a negatively worded condition requiring a planning obligation or other agreement to be entered into before certain development can commence may be appropriate, where there is clear evidence that the delivery of the development would otherwise be at serious risk (this may apply in the case of particularly complex development schemes). In such cases the 6 tests should also be met."

242. It will be a matter of judgement whether there are exceptional circumstances and whether the delivery of the development would be at serious risk. The Planning Obligations Chapter of the ITM includes advice on car-free housing obligations.

[87] Paragraph: 010 Reference ID: 21a-010-20190723

However, paragraph 55 of the NPPF says planning obligations should only be used where it is not possible to address unacceptable impacts through a planning condition. As an alternative to that set out in the PINS Suite of Suggested Conditions, a suitable condition could be:

"[Within X weeks from the commencement of][Prior to works above slab level in] the development hereby permitted the local planning authority shall be informed in writing of the [property's][properties'] full postal address(es) and the dwelling(s) hereby permitted shall not be occupied until the Traffic Regulation Order has been amended by removing the dwelling(s) from the list of dwellings for which Residents Parking Permits can be issued."

243. The reasonableness of the prohibition on occupation might be questioned as the TRO amendment process is outside the appellant's control. However, without it, the condition could not be enforced effectively; the owner/person in control could only be compelled to provide the property address, even if the dwelling were already occupied and a permit had been issued. In theory, the Council could render the dwelling useless by choosing not to amend the TRO. However, the position could be analogous to that where permission is granted for development which necessitates alterations to the highway, requiring an agreement under s278 of the Highways Act 1980. In *R. v Warwickshire County Council Ex p. Powergen plc* ([1997] 3 P.L.R. 62; [1998] J.P.L. 131 it was held that the apparently wide discretion enjoyed by a local highway authority to enter into a s278 agreement only where satisfied that it would be in the public interest, is strictly limited in a planning context where the public interest has been tested elsewhere. (See Encyclopaedia of Planning Law P106.23)

244. If the address is likely to be known at the outset, you could consider a pre-commencement condition, bearing in mind the PPG advises such a condition should only be used where it would clearly assist with the efficient and effective delivery of development and the applicant's agreement has been obtained, or notice has been served seeking agreement[88]. In any event, an amendment to the TRO cannot happen immediately on the grant of any individual planning permission. The Council will require time to publicise the list as part of implementing the amendment. This may be undertaken on a regular basis – e.g. quarterly, six monthly or annually. To assess the overall reasonableness of the above condition, you may need to ask the parties for relevant information, such as:

- when will it be reasonable for the appellant to provide information about the address;
- what is the likely timescale for amendment of the TRO thereafter; and
- is that likely to unreasonably delay occupation of the property.

[88] See PPG Use of Conditions Paragraph 007 Reference ID: 21a-007-20180615

245. It may be that the Council will take no action without the appellant contributing towards the cost of amending the TRO, but the PPG says a condition should not be used to require the payment of money. This could only be secured through a planning obligation.

246. There are appeals which seek to remove condition(s) restricting eligibility for parking permits. In such cases your reasoning should firstly address whether the development should be car-free to be acceptable in planning terms. If there is insufficient justification for the restriction, you can allow the appeal and delete the condition(s) as it/they would not be necessary.

247. If you conclude the development should be car-free but the existing condition(s) does/do not meet all 6 tests, you will need to consider whether to alter or replace the condition(s) or add a new one. Furthermore, in a s79 type appeal (directly following a conditional grant of planning permission), you would have the power to reverse the original decision to grant planning permission, albeit that you should give the appellant an opportunity to comment or withdraw the appeal. (See the Appeal against Conditions Chapter of the ITM for a full discussion of the powers available).

248. Alternatively, car-free housing may be secured through a planning obligation. The judgements in *Westminster CC v SSCL & Acons* [2013] EWHC 690 (Admin) and *R (oao Khodari) v Kensington and Chelsea & Cedarpark Holdings Inc* [2017] EWCA Civ 333 highlight the difficulties in wording obligations to directly restrict use of 'the land' to this end, but it is not impossible to draft an obligation to restrict the holding of permits by occupants; see Planning Obligations chapter.

Other Conditions

Construction Management

249. It is common for planning authorities to request the imposition of a condition that requires the submission and approval of details regarding activities on the site during the construction phase.

250. There is a model condition which sets out the typical requirements for a construction management plan[89]. However, as with all conditions, the Inspector should always consider the necessity not only of the condition itself, but also of the specific requirements:

- The requirements must be relevant to planning, so you may need to consider whether appropriate control would be provided under other legislation.
- Consider whether requirements to provide, for example, wheel-washing or operatives' parking facilities would be reasonable given the size of the site and/or scale of development.

[89] Condition 29 in the PINS suite of planning conditions and DRDS

- The operatives may be able to control the use of their own vehicles on the public highway, but not how deliveries from other companies should be routed or the times such deliveries would arrive.

Opening Hours

251. It is not unusual to impose opening hours conditions, particularly on food and drink uses, but care should still be taken when drafting such conditions. Inspectors must:

    - Address whether it is necessary to restrict opening hours at all and, if so, whether to restrict the hours to those suggested by the authority;

    - Address whether the restriction should apply to the use or just to specific aspects of it – for example, the hours that customers are on the premises;

    - Address whether the condition would be reasonable, and ensure it would not negate the benefit of the permission;

    - Word the condition to be clear as to exactly what opening hours are allowed on what days – using the 24 hour clock, noting where the hours on one day would spread across to the following day, and specifying the hours where necessary for Sundays and/or public holidays.

252. There are three PINS model conditions for food and drink uses:

    - Model condition 17 restricts the hours that the use would be open to customers; 'reasonable time' should be allowed for people on the premises to finish their meals and leave; *Miah v SSE & Hillingdon LBC* [1986] JPL 756.

    - Model condition 18 limits the hours that customers may be on the premises, but allows for staff to remain in the building, for example, to prepare for the use or wash and clear up.

    - Model condition 19 simply restricts the hours of the use. It was held in *Rees v SSE & Chiltern DC* [October 11 1994] (CO/2719/93) that this condition relates to the 'total use', meaning that no activities connected with the use can take place outside of the specified hours, including cleaning and tidying.

253. PINS has other model conditions designed where hours restrictions are required for: construction and/or demolition activities (14), industrial uses (15), deliveries (16), the playing of music (20), the illumination of adverts (42), the use of noisy machinery or equipment (92 and 95), aircraft movements (99), petrol filling station uses (132) and commercial activities on traveller sites (171).

Litter associated with hot food takeaways

254. The PPG on Healthy and safe communities has introduced guidance on proposals for change of use to hot food takeaways[90] which should include measures to reduce litter associated with the proposed development.

255. Such measures may include installation of litter bins, commitments to undertake litter picking and advisory signage. Litter generated from such premises may be deposited away from the immediate vicinity of the premises and therefore consideration may be given to the wider effect this has on local amenity.

256. Conditions may be appropriate to require ongoing compliance with these measures. However they should only be imposed if suggested by the parties, **and** care has been taken to ensure that they meet the policy tests. If you do impose such a condition, an explanation should be given as to how it would meet the tests.

Caravan Sites

257. The stationing of a caravan on land is normally a material change of use of the land – as opposed to a building operation – and it is therefore crucial to define the user. Caravans may be used for residential purposes, with or without occupancy restrictions, or they may be used for storage or for purposes incidental to another use such as farming; it is also possible to use land for the storage of caravans.

258. Since the use of land will be the same regardless of the number of caravans, it may be necessary to impose a condition which restricts the number of caravans on the land; see PINS model condition 155[91].

259. Conditions may be imposed to control the occupation of caravans in residential use cases, where or how caravans are stationed on the site, and the type of caravans; see PINS model conditions 154, 156, 157, 163, 164, 165, 166, 167, 179 and 180. Some of those conditions are drafted with reference to traveller sites but could be adapted to other casework.

Ground or Finished Floor Levels

260. Where there is uncertainty about existing ground levels and/or finished floor or slab levels, particularly where the site slopes and/or in relation to adjoining buildings, this may give rise to concern about the impacts of the development – for example, on living conditions or the character and appearance of the area. In such cases, a condition may be imposed which requires the submission and approval of details of the finished levels, or even a full site survey[92].

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[90] See PPG Healthy and safe Communities Paragraph: 013 Reference ID:53-013-20220807

[91] If you wish to permit any use of land where the terms of the permission would otherwise allow the scale of the use to fluctuate, any limitation to numbers should be contained in a condition.

[92] Model conditions 11, 12 in the PINS suite of planning conditions and DRDS

Public Rights of Way

261. If the proposed development in a planning appeal would conflict with a public right of way (PROW), you may be asked to impose a condition which would prevent the development from taking place or being occupied until the PROW has been stopped up or diverted.

262. Such a condition would fail the test of relevance to planning and be unnecessary because any grant of planning permission does not authorise any obstruction to or interference with any PROW – whether the PROW is or is not recorded on the Definitive Map and Statement.

263. S257(1) of the TCPA90 provides for the stopping up or diversion of any footpath, bridleway or restricted byway, if necessary, to enable the carrying out of development in accordance with a planning permission by way of a Public Path Order (PPO).

264. PPOs are subject to separate regulations. Even if a PPO has been 'made' by the time of an appeal, Inspectors should not speculate as to whether the order would be 'confirmed' so as to remedy any obstruction caused by the development in the event that permission is granted; see the Public Rights of Way chapter.

265. However, paragraph 104 of the NPPF requires that planning decisions should protect and enhance PROW. Subject to the usual assessments of what is necessary and reasonable in the circumstances of the case, and with regard to the restrictions to use of pre-commencement conditions, you may be able to impose a condition requiring the submission and approval of details of a PROW management scheme.

The Planning Inspectorate

Costs Awards

Updated to reflect December 2023 Framework (NPPF)

What's new since the last version

Changes highlighted in yellow made 5 April 2023:

- Correction of paragraph 33 to confirm that re-determination of costs applications should be made by Inspectors

Other recent updates

- Following a recent submission to judgement, para 7 has been amended to clarify that the potential availability of other avenues of dispute resolution are immaterial to the consideration of an application for costs

Contents

Information Sources

Planning Practice Guidance: Appeals – The award of costs - general

Gov.uk – Claiming Planning Appeal Costs

Legislation and guidance

1. The legislation underpinning costs awards in planning-related proceedings under the Town and Country Planning Act 1990 is:

   Section 320 – This section incorporates s250(5) of the Local Government Act 1972 into the 1990 Act[1] and by doing so allows orders as to costs to be made by Inspectors in circumstances where a **local inquiry** has been held.

   Section 322 – this section applies the costs regime (as set out in s320 above) for orders as to costs to be made by Inspectors in **hearings and written representations** appeals in the same way as it applies to local inquiries.

   Section 322A – this section allows orders as to costs to be made where a local inquiry or a hearing has been scheduled but the inquiry or hearing does not take place.

   Section 322B – this section applies the costs regime (as set out in s320 above) for orders as to costs to be made by Inspectors in circumstances where a local inquiry is held as a result of the London Mayor directing refusal of a planning application.

2. Guidance can be found in the Planning Practice Guidance (PPG) Section 16: Appeals, The award of Costs – general[2].

Introduction

3. This chapter deals with costs applications and costs decisions in relation to planning appeals by written representations, hearings and inquiries cases. The principles governing applications for an award of costs and the basis of such an award are the same irrespective of how the appeal is processed. Please note that costs applications for other casework types dealt with by PINS may proceed under different legislation/guidance.

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[1] For the Planning (Listed Buildings and Conservation Areas) Act 1990, section 89 incorporates s250(5) of the Local Government Act 1972.

[2] Which replaced DCLG Circular 03/2009: Costs Awards in Appeals and Other Planning Procedures

4. This training material applies to English casework only[3].

What is an award of costs?

5. An award of costs is an order which states that one party shall pay to another party the costs, which may be in full or in part, which have been incurred by the receiving party during the process by which the Secretary of State's or Inspector's decision is reached. The costs order states the broad extent of the expense the party can recover from the party against whom the award is made. It does not determine the actual amount[4].

General Principles

6. Parties in planning appeals and other planning proceedings normally meet their own expenses.

7. The costs regime is intended to support a well-functioning appeal system and encourage proper use of the right of appeal. It is aimed at ensuring that all those involved in the appeal process behave in an acceptable way and are encouraged to follow good practice, whether in terms of timeliness or in quality of case. That other avenues may be available to resolve a dispute (for example a fresh planning application or seeking a certificate of lawful use or development) is immaterial. Once an appeal is made the parties are within the scope of the costs regime and their behaviour should be judged against the advice in this chapter and the Planning Practice Guidance.

8. The appeal decision will not be affected in any way by the fact that an application for costs has been made; the two matters are entirely separate. Accordingly, it is possible for costs to be awarded against the 'winning' party to an appeal.

When can costs be awarded?

9. Costs will normally be awarded where the following conditions have been met:

   - a party has made a timely application for an award of costs;
   - the party against whom the award is sought has behaved unreasonably; and

[3] In Wales WO Circular 23/93 applies and PINS Wales have produced separate material on the policy differences. Any guidance required in addition to WO Circular 23/93 should be raised direct with PINS Wales.

[4] Planning Practice Guidance ID: 16-027-20140306.

- the unreasonable behaviour has caused the party applying for costs to incur unnecessary or wasted expense in the appeal process.

What are the deadlines for making an application?

10. The procedures for costs applications are not statutory, so while there are strict deadlines[5] for making an application for costs there is discretion to accept applications outside the time limits set. However, anyone making a late application for an award of costs will need to show good reason for having made the application late, if it is to be accepted for consideration. For a costs application to be timely it should be made:

    - orally at a hearing or inquiry – before it closes;
    - in writing[6] – at the same time as a householder, commercial or tree preservation order appeal is made by the appellant (14 days from the 'start date' letter for the LPA) – or no later than the final comments stage for all other appeals determined via written representations;
    - In relation to conduct at a site visit – no later than 7 days from the date of the site visit; and
    - In relation to a withdrawn appeal or enforcement notice – no later than 4 weeks from the Inspectorate's notification of the withdrawal.

Who can apply for an award of costs and who can have costs awarded against them?

11. Local planning authorities, appellants and interested parties who have taken part in the process, and exceptionally the Mayor of London. Also statutory consultees where the power to direct a planning authority to refuse permission has been exercised or where they are party to an appeal. A party applying for costs may have costs awarded against them, if they themselves have behaved unreasonably.

12. An application for an award of costs may be for a full award of costs, or a partial award of costs.

[5] PPG ID: 16-035-20140306

[6] While a form for use in applying for costs in writing is available on .GOV.UK, this is not a requirement and pplications can be made by letter.

What is unreasonable behaviour?

13. "Unreasonable" is used in its ordinary meaning as established by the Courts in *Manchester City Council v SSE & Mercury Communications Limited* [1988] JPL 774, and not in the stricter public law definition of "Wednesbury" unreasonable.[7]

14. Unreasonable behaviour can be either substantive (relating to the merits of the appeal) or procedural (relating to the process) in nature. The Inspector has discretion when deciding an award to take into account extenuating circumstances.

15. Examples of unreasonable behaviour that may lead to an award of costs against appeal parties (LPA, appellant, Statutory consultees and interested parties) are given in the PPG[8] and may concern (this list is not exhaustive):

    - non-compliance with procedural requirements;
    - failure by the planning authority to substantiate a stated reason for refusal of planning permission (the planning authority must be able to show that it had a reasonable basis for its stance, even though it may have lost the appeal or failed to win on that particular ground). When an LPA refuses a planning application because it is contrary to the provisions of the development plan (for example, retail to restaurant in a prime shopping frontage) the LPA is exercising its Planning and Compulsory Purchase Act 2004 section 38(6) duty, giving reasons which are entitled to some weight and such a decision is therefore unlikely to meet the test of being 'unreasonable'[9];
    - planning authority clearly failing to have regard to government policy or its own adopted policies;
    - appellant pursuing a clear "no hope" case, for instance inappropriate development within the Green Belt without very special circumstances advanced, or development plainly in conflict with the development plan without material considerations to the contrary; and

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[7] TM: "The role of the Inspector", paragraph 13 sets out what Wednesbury unreasonableness is ie a decision that is so unreasonable that no reasonable authority would ever consider taking it.

[8] PPG ID: 16-046-20140306 to 16-056-20140306

[9] A recent Court case, where the Secretary of State submitted to judgment, illustrates that an Inspector exercising planning judgement and weighing all matters in the balance can take a different view from the LPA on the same planning decision and (in this respect) the main appeal decision was not challenged. However, in determining a linked costs application it was incumbent on an Inspector to remember that the starting point of decision-making is plan led, and where that was shown to be the case, a Court challenge to an Inspector's award of costs against the Council on grounds of unreasonable behaviour was considered likely to succeed.

- the withdrawal of an appeal, late cancellation of an event or withdrawal of an enforcement notice.

What is unnecessary or wasted expense?

16. The PPG indicates that an application for costs will need to clearly demonstrate how any alleged unreasonable behaviour has resulted in unnecessary or wasted expense. Such costs may include, for example, the time spent by appellants and their representatives, or by local authority staff, in preparing for an appeal and attending the appeal event, including the use of consultants to provide detailed technical advice, and expert and other witnesses. If necessary and at events it may be possible to clarify the unnecessary or wasted expense that is alleged to have occurred. However, if it is obvious from the application and evidence provided that there will have been a direct consequence in terms of expense arising from the unreasonable behaviour then it is not essential for this to be specified in the application itself. For example, when considering a partial award, if the imposition of one of the reasons for refusal was unreasonable then the expense incurred in contesting it is likely to be readily apparent given what is referred to in the PPG and does not need to be spelt out by the applicant. No details of actual expenditure are required but the kind of expense or time should be identified in broad terms to assist the parties in settling the amount. In addition, you should bear in mind the following:

    - expense should be identifiable or capable of being quantified;
    - expense may be wasted because the entire appeal could have been avoided;
    - expense may be unnecessary because time and effort was expended on a part of the case that should not have had to be pursued;
    - the power to award costs relates to costs necessarily and reasonably incurred in the appeal process[10]. For an appellant, typically the costs of employing an agent to submit the appeal and represent them throughout the process. For a planning authority, costs will be typically incurred in resisting the appeal and defending its decision (or stance, in “failure to determine” cases);
    - awards cannot extend to compensation for indirect losses (eg delay in obtaining planning permission); and
    - any unnecessary costs should relate to the appeal process.

[10] Costs of the planning application are ineligible, but the LPA behaviour in dealing with the application may have a bearing on the award of costs. Advice about the role of the Local Government Ombudsman in relation to allegations against LPAs is in Annex B.

17. The important principle to be aware of is that the unnecessary expense should follow directly from the unreasonable behaviour and that there should be both 'cause and effect'

18. Annex A provides some key judgments concerning the general principles outlined above.

When may Inspectors initiate[11] an award of costs?

19. In order to support an effective and timely planning system in which all parties are required to behave reasonably, you may on your own initiative[12] make an award of costs, in full or in part, if you consider a party has behaved unreasonably resulting in unnecessary expense and another party has not made an application for costs against that party.

20. You must not announce at the hearing or inquiry that you are considering making an award of costs as this may be perceived as pre-determination of the appeal.

21. After the event, if you are considering an award of costs, you should contact the Costs and Decisions Team (CDT) at the same time as sending the appeal decision in for issuing. CDT should be provided with a draft letter stating that you are considering whether to make an award of costs against a party and setting out the reasons for considering that there may have been unreasonable behaviour leading to unnecessary or wasted costs and inviting comments by a deadline to be set by CDT. CDT will issue letters to the parties and monitor the timetables. This letter should be sent for comment to the relevant party only, within one week of the issue of the appeal decision, at the latest.

22. If you are a Salaried Inspector you must inform your case officer so that you can be allocated the appropriate reporting time. Any Non-Salaried Inspectors will need to ask NSI CMU to authorise allocation of the appropriate reporting time.

23. Any costs award should be drafted in the usual way using the most up-to-date guidance. A dummy Inspector initiated cost award is at Annex C1.

24. CDT will write to the relevant party to confirm the decision to award costs and copy any party who has the benefit of the award. It is important that if, having initiated the costs award process, you decide not to make an award, you should ask CDT to write

[11] Note - Costs may be awarded at the initiative of the Inspector in relation to planning appeals received on or after 1 October 2013 (including appeals relating to lawful development certificates, listed buildings, enforcement and planning obligations) and called-in planning applications where the date of the call-in letter is 1 October 2013 or later.

[12] PPG ID: 16-036-20140306

to the party to confirm that, having considered all of the evidence, no award is being made.

25. To date this power has been rarely used and it is advisable to discuss with your SGL first.

An application for a full award of costs

26. An application for a full award of costs:

- relates to the applicant's whole costs of the statutory process, including submission of the appeal statement and supporting documentation (including the expense of making the costs application); and
- could be granted in full, refused or allowed in part *(*even if the applicant has applied for a full award and has made no specific reference to a partial award).

An application for a partial award of costs

27. An application for a partial award of costs:

- may be made in appropriate circumstances, for instance where the application relates only to one ground of refusal, or to a particular aspect or part of the appeal process up to (or after) a specified date;
- in such cases, an award of costs would be limited to the expense caused by the unreasonable behaviour identified, e.g. the time and effort expended on pursuing that particular part of the case (you do not have to define the specific amount of any award); and
- may be allowed in the terms of the application; refused; or allowed in part (that is, a smaller partial award than that sought may be made).

Costs Order

28. A costs award, where justified, is an order which can be enforced in the Courts:

- it states that one party shall pay to another party the costs, in full or in part, which have been incurred during the appeal process;
- the costs order states the broad extent of the expense the party can recover from the party against whom the award is made;
- it does not determine the actual amount (however, where a full award has been sought but partial costs awarded, you must be specific as to what failing is being awarded against); and

- settling the amount is for subsequent agreement between the parties. In the event of failure to agree a sum, the successful party can apply to the Senior Courts Costs Office for independent assessment[13].

Inspector's Task

29. Assuming that an application has been made in a timely fashion the task before you is to judge whether there has been unreasonable behaviour on the grounds claimed, resulting in unnecessary or wasted expense with reference to the guidance in the PPG. Costs decisions are taken on the balance of probability. This is an entirely separate matter to the appeal decision, although a costs decision should be logically consistent with the appeal decision. You may therefore need to explain in your decision how the unreasonable behaviour has directly led to the unnecessary expense having regard to the facts and circumstances of the case. Where some elements of behaviour have been unreasonable you will need to be particularly careful in deciding the extent of any unnecessary expense. To assist with this, it might be worth considering what would have occurred if there had been no unreasonable behaviour.

30. You are only concerned with the principle of whether costs should be awarded and not the amount. Should one party deny that the other has incurred unnecessary expense, you need to be satisfied that it has occurred because even if unreasonable behaviour is evident, both tests need to be met.

Costs and Decisions Team

31. Most costs applications are determined by Inspectors in conjunction with transferred appeals. However, the Costs and Decisions Team (CDT) also deal with a range of costs casework in England on behalf of the Secretary of State under delegation arrangements[14] following an exchange of written comments from the parties. CDT make decisions on costs applications in a variety of circumstances including:

    - the admissibility of "late" applications for costs[15];

[13] PPG ID: 16-044-20140306

[14] In Wales these duties are carried out by the Wales Assembly Government.

[15] PPG ref ID: 16-035-20140306– applications made after the stated time limits, summarised in "What are the deadlines for making an application" within this TM.

- where an appeal or enforcement notice has been withdrawn and the appeal is not decided[16] or circumstances leading to no further action being taken on an appeal;
- where the appellant (or LPA) fails to attend the hearing/inquiry/site visit;
- where there are unusual or novel issues indicating that the costs decision is more appropriately taken by the Secretary of State on the basis of an Inspector's costs report;
- when the party against whom the application is made is not present[17];
- re-determination of a freestanding costs application resulting from a successful High Court challenge[18].

High Court Re-determinations

32. Appeal and costs decisions are two separate decisions for which (usually) separate challenges must be made if both the decisions are to be quashed and re-determined. If only the appeal decision is successfully challenged, and unless the Court judgment clearly states that the Inspector's costs decision is also being quashed and remitted to the SoS for re-determination, **the original costs decision remains extant and cannot be revisited** even if, in the context of re-determining the appeal, it seems odd.

33. However, you can entertain a fresh costs application made solely in connection with the re-determination of the appeal decision (as opposed to the need for the original costs decision to be re-determined following a successful challenge to that costs decision). It is important that any such costs determination does not stray into matters previously addressed in the earlier, and still extant, costs decision. In practice this is likely to relate only to procedural misconduct for the period post the High Court in the re-determination proceedings.

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[16] PPG ref ID: 16-042-20140306 – If the appeal or enforcement notice is withdrawn without sound reason (ie a material change in circumstances relevant to the planning issues) or with avoidable delay, giving rise to unnecessary or wasted expense for another party, an application for costs can be made. Such applications should be made in writing to CDT no later than 4 weeks after receiving confirmation from PINS or the local planning authority that no further action is being taken.

[17] PPG ref ID: 16-047-20140306 and 16-052-20140306

[18] Please note that where successful High Court challenges have been made to **both** an appeal decision and a related costs decision C&DT do not need to get involved in the re-determination of a costs application – the relevant Inspector can deal with it with a view to issuing the re-determined costs decision at the same time as the decision on the re-determination of the appeal. But please bear in mind that Inspectors are also responsible, via a separate decision letter, for deciding any fresh application for costs made solely in connection with appeal re-determination proceedings e.g. procedural misconduct at an inquiry (see section below on High Court Re-determinations).

34. Re-determination of costs applications, whether or not there is a related redetermination of an appeal, are dealt with by Inspectors.

Can a claim for an award of costs be withdrawn?

35. Yes, if the party who applied for an award of costs formally notifies the Planning Inspectorate of the withdrawal. However, this does not prevent another party from seeking costs, nor the potential for an Inspector to initiate an award against either party.

Procedural matters (written representations: PCO)

36. The costs application will be made by written submissions and all the costs correspondence will be found in the 06 Costs Folder of the Inspector E File. For hearing appeals the costs correspondence may also be placed in a yellow folder on the right-hand side of the paper file.

37. When a timely costs application is made, the Case Officer will invite the other party to respond within 7 days, giving the applicant a further 7 days for final comment on the response, before the decision can be issued (the applicant always has the opportunity to make a final reply in writing).

38. The Case Officer will check correspondence received to identify either an application for costs or any costs response and, where possible, this will be added separately to the 06 Costs Folder (yellow folder within paper file for hearing/inquiry cases). If the costs application or response is contained within another document such as the full statement of case then the case officer will rename the document to include COSTS as a suffix, that is: 02 STATEMENT AND APPENDICES AND COSTS (or attach a costs flag to the hard copy document on the paper file for hearing/inquiry cases).

39. Whilst the Case Officer will aim to identify and put all of the costs application material in the 06 Costs Folder/yellow folder, you will need to satisfy yourself that you have had regard to all the relevant costs material when writing the decision.

40. Costs applications in relation to appeals following the expedited written representations “householder appeal” procedures (HAS) and the “minor commercial appeal” procedures - including advertisement appeals (CAS) are dealt with by Inspectors within the time allocated for the HAS/CAS appeal. However, if dealing with a costs application takes a substantial amount of time – then additional time can be charted (discuss you’re your SGL/SIT).

41. You should decide all costs applications in non-HAS/CAS cases where the application has been received by the deadline for final comments. Applications received after this deadline will be dealt with by CDT. CDT will also deal with any applications which concern conduct at the site visit whether or not received within 7 days of the event. To assist CDT you should record in a file note what happened at the event.

42. It is usual practice, where possible, to issue the appeal and costs decisions at the same time. However, given the tight targets for HAS/CAS appeals, it can be acceptable although not advisable (because of the associated risk of prompting further costs submissions) to issue the appeal decision first, so that the target is met.

Procedural matters (inquiries and hearings)

43. The PPG[19] states that all costs applications must be formally made and heard before the inquiry or hearing is closed. You should therefore indicate in opening the event that any such application should be made before closure of the inquiry/hearing or before departure to a site visit. Before closing the inquiry/hearing ask if there are any applications for costs (unless advanced written warning of a costs application has already been made – see paragraphs 43 to 45 below). Check that the parties have nothing further to add and that there are no other matters they wish to raise. It is not advisable to try and hear a costs application on site and it is best to avoid the inconvenience of having to return to the venue.

44. **Oral applications** – ideally, as a matter of best practice, the grounds for seeking an award of costs should be made in writing (see paragraph 43 below). However, if an application is made orally without prior written warning it must still be raised and dealt with at the inquiry/hearing, and it may be necessary to allow the parties a short period of thinking time (for example 10/15 minutes) to prepare their oral response. If both parties make applications these should be heard or taken one after the other.

45. When a costs application is made, or an advance application supplemented in the light of events 'on the day', the other side should always be given the chance to respond - ensuring that the party against whom the costs application is being made is able/capable of responding (that is where a junior officer is present and is not able/authorised to respond). The costs applicant should be given the chance to make any final comments on any new points raised. You will need to take full notes. In most cases this process need not lead to an adjournment for a response to be prepared, but it may be necessary, in certain instances, in the interests of fairness.

46. Only in **very exceptional** circumstances where a different approach is required (ie where it is not practical to hear an application and/or response at the event) you may use your discretion (sparingly) to allow written costs submissions - the PPG being guidance not statute. In such exceptional cases you should give very clear guidance as to what is required, what will be accepted and by when. This avoids a paper chase and or revisiting any of the appeal evidence. **You will also need to ensure that the**

[19] PPG ref ID: 16-035-20140306, 3rd bullet

appeal decision is not issued before the costs submissions process is complete.

47. **Advance written submissions on costs received from both sides** – Where a party has indicated their intention to make a costs application during the processing of the appeal the case officer will invite written submissions before the event. If it is not possible to complete the process of receiving a response/final response the case officer will inform the parties that responses can be provided at the oral event. You should review the relevant costs correspondence in the 06 Costs Folder/yellow folder

48. Check if the submissions have been fully exchanged and that there is nothing to add. If you and both sides have had adequate opportunity to read and understand the written submissions there is no need for these to be read out as a matter of course. The making of a costs application should not take up hearing or inquiry time because the written submissions can simply be taken as read and appended to the file.

49. **If only the applicant has produced something in writing in advance** (see paragraph 43 above) - if given to the other party beforehand you should check that there is nothing to add before inviting the respondent to reply orally and then allowing the applicant to have the 'final say' on any new point raised. Should the respondent not have received the written submission in advance you should ensure that sufficient time is allowed for this to be absorbed and a response prepared. Time may also be needed for you to read it and, in these circumstances, an adjournment may be required.

50. **Application at site visit** – where an inquiry or hearing is kept open for a site inspection and a party then makes an application, in the interests of fairness you would have to determine if the relevant party could reasonably hear and respond to the application on site. If not, and they require time to consider the application, it may be that an adjournment is required before meeting back at the original venue or somewhere else suitable to properly hear the application and response.

51. **Hearing or inquiry resumed on another day** - any costs applications should be heard at the end of the resumed event. It should also be briefly recorded in the Preliminary Matters section (this is to assist CDT if any costs application is made after the close of the hearing). If the appeal is withdrawn before it resumes then a note should be placed on the file to also cover this eventuality.

52. **Costs application made against a party who fails to attend the inquiry/hearing** – you should hear the costs application but it would be unfair to proceed, in the absence of hearing a response to the costs application, to decide the costs application yourself. In such cases you should submit a costs report (to the Secretary of State) for the attention of the CDT (for more information see paragraph 31). The report should summarise the costs application and record (if appropriate) your tentative conclusions, however, you should **not** make any recommendation on costs – no firm conclusions can be drawn in the absence of considering any response to the costs application.

Charting arrangements

53. You will normally be charted half a day per costs application (except for HAS/CAS appeals).

54. For inquiry and hearings cases where applications are not known about in advance of the event, you should 'claim' reporting time by e-mailing the Case Officer and by adding an entry to your Movement and Work Record (MWR). This will be added to your work programme at the earliest available opportunity.

55. For inquiry and hearings cases where costs applications are made in advance, time will be allocated as part of the reporting on the case.

56. In written representations cases, costs reporting time will be added as soon as the Case Officer is made aware of the costs application. The reporting will be charted as close to the site visit as possible taking into account the latest deadline for comments on the costs application.

Writing the Decision

57. The appeal decision should include a reference to the costs decision at the outset. This is to indicate that an application for costs has been made and is (or will be) the subject of a separate decision.

58. The relevant costs decision template can be selected from DRDS (see "Which decision template should I use?"), and a costs decision template is shown at Annex C.

59. If a late application has been accepted the decision should say why.

60. Costs do not follow the appeal outcome. However, costs decisions should be consistent with the appeal decision. Address the points made by the applicant one by one and reach a view on them, referring to, where necessary, relevant sections of the PPG.

61. For an award to be made the two parts of the test have to be met – unreasonable behaviour that also results in unnecessary or wasted expense. It therefore follows that the costs decision must specifically address, and clearly conclude on, these two questions.

62. In written representations cases the application and response[20] will have been submitted in writing and will already be a matter of record. There is therefore no need to rehearse the cases of the parties before setting out the reasoning.

63. Your reasoning should address the applicant's arguments as to why costs should be awarded, taking into account the counter arguments made in response by the other party. This reasoning should lead logically to your conclusion

64. The same principle applies in hearing and inquiry cases. However, the gist of any additional oral submissions should be noted. It may also help the sense of the decision if a very brief indication is given of the matters raised but this is not essential.

65. If both submissions were made verbally then these should be summarised as part of the decision to ensure that there is a record of them.

66. In Secretary of State casework, as well as following the above advice, the costs report should also record any written submissions in the list of inquiry documents appended to the main report. These should be cross-referenced at the start of the costs report and placed on the file.

67. If an application is made for a full award but does not succeed, then consideration should also be given in the same decision as to whether only a partial award is justified. As a general rule guard against making a full award of costs (as opposed to a partial award) against a successful appeal party[21].

68. If full and partial awards are sought as alternatives, deal with these in one decision but distinguish clearly between them.

69. You may have to disentangle the moment at which unreasonable actions 'kicked in' as opposed to the normal costs of undertaking an appeal. Specify in your decision in broad terms, what were the matters on which costs were expended unnecessarily or were wasted. If a partial award is made then the extent of that award should be clearly specified - this may require explanation about the time in the appeal process when the unreasonable behaviour led directly to unnecessary expense.

70. If both main parties apply for an award against each other you can deal with these in one decision letter (but remember to conclude separately in relation to each

[20] Where a party has given advance written warning of an intention to apply for costs and has clearly set out the basis for the claim, their case will be strengthened if the opposing party is unable to, or does not offer evidence to counter the case (PPG ID: 16-038-20140306).

[21] For example it would seem illogical to make a full award of costs against an appellant, on grounds of an unreasonable appeal, in circumstances where the appeal is allowed. But a partial award could be made for an element of unreasonable behaviour e.g. causing an adjournment of a hearing/inquiry.

application and to give a separate decision on each application). Alternatively, it might be more straightforward to deal with them as separate decisions.

71. Give clear reasons for your findings and be sensitive to the losing party (if they have lost the planning appeal this will be an added blow). Bring in the evidence given to you to back up what you say and ensure that your costs decision is 'on all fours' with the appeal decision.

Statutory consultees

72. Statutory consultees[22] play an important role in the planning system: local authorities often give significant weight to the technical advice of the key statutory consultees. Where a local planning authority has relied on the advice of the statutory consultee in refusing an application, they may wish to request that the consultee in question attends the event or makes written representations to substantiate its advice as an interested party. In doing so this would make the statutory consultee a party to the appeal.

73. When the statutory consultee is a party[23] to the appeal, they may be liable to an award of costs to or against them. However, if they have not been party to the appeal then usually the LPA are the only party against whom an award can be made. You may wish to discuss the matter with the CDT before proceeding to a decision on the costs application.

Mayor of London Direction

74. Where the Mayor of London[24] (or any other statutory consultee) exercises a power to direct a planning authority to refuse planning permission, this party will be treated as a principal party at the appeal and may be liable for an award of costs if they behave unreasonably or have an award of costs made to them.

[22] PPG ID: 16-055-20140306

[23] s322(2) of the 1990 Act now states "The Secretary of State has the same power to make orders under section 250(5) of the Local Government Act 1972 (orders with respect to the costs of the parties) in relation to proceedings in England to which this section applies which do not give rise to a local inquiry as he has in relation to a local inquiry"

[24] S322B of the 1990 Act makes special provision for a award in the circumstances of a direction to refuse planning permission by the Mayor of London.

Third parties

75. The definition of a third party[25] includes a participating Government Department[26].

76. Interested parties who choose to be recognised as Rule 6 parties under the inquiry procedure rules may be liable to an award of costs if they behave unreasonably. They may also have an award of costs made to them. See the Planning Inspectorate guide on Rule 6 for more detail.

77. It is not anticipated that awards of costs will be made in favour of, or against, other interested parties, **other than in exceptional circumstances**[27]. An award will not be made in favour of, or against interested parties, where a finding of unreasonable behaviour by one of the principal parties relates to the merits of the appeal. However an award may be made in favour of, or against, an interested party on procedural grounds, for example where an unnecessary adjournment of a hearing or inquiry is caused by unreasonable conduct. In cases dealt with by written representations, it is not envisaged that awards of costs involving interested parties will arise.

Called-in planning applications

78. A "called-in" planning application places the parties in a different position from that in a planning appeal. The local planning authority is not defending a decision to refuse planning permission, or a failure to determine the application within the prescribed period.

79. In these circumstances, it is not envisaged that a party would be at risk of an award of costs for unreasonable behaviour relating to the substance of the case or action taken prior to the call-in decision. However, a party's failure to comply with the normal procedural requirements of inquiries, including aborting the process by withdrawing the application without good reason, risks an award of costs for unreasonable behaviour[28].

[25] PPG ID: 16-056-20140306

[26] Following commencement of Part 7, Chapter 1 of the Planning and Compulsory Purchase Act 2004, which ended the Crown's immunity from the planning system, Crown bodies are no longer immune in principle to an award of costs.

[27] PPG ID: 16-056-20140306

[28] PPG: Reference ID: 16-034-20140306

Non-planning casework

80. It may be possible to apply for an award of costs in regard to appeals under legislation made by other Government departments. An illustrative list of case types (covering most planning and examples of other case types) where costs may be sought is available on the GOV.Uk site (here) and is reproduced at Annex D.

Which decision template should I use?

81. The appeal decision should refer to the costs application (using the standard paragraph) making clear costs is the subject of a separate decision.

82. The relevant costs decision template should be selected from DRDS options:

- Costs Decision – w rep
- Costs Decision – I/H
- Costs report

83. An example decision template is shown at Annex C.

Annex A: Relevant Court decisions

Meaning of 'unreasonable' in the costs context

***Manchester CC v SSE and Mercury Communications*, 1988 JPEL 774**. This case established that the word "unreasonable" has its ordinary meaning for the purposes of a costs award. It can be distinguished from the higher public law test for the courts namely unreasonable in the Wednesbury sense taken from the case of **Associated Provincial Picture Houses v Wednesbury Corporation (1948 1 QB 223).**

***Ealing R v Secretary of State for the Environment ex parte London Borough of Ealing* [1999] EWHC Admin 345**, in which the Judge stated that because of the discretionary nature of the award of costs by an Inspector, and the fact that the Inspector would be in the best position to judge whether a party had acted unreasonably, it would only very rarely be proper for this court to intervene and strike down a decision.

The Ealing case was followed by a number of cases including;

***R (Mole Valley DC) v SSETR [2000] WL and R v SSCLG ex parte Stratford upon Avon DC* [2014] unreported** – The court approved the Ealing case stating the Inspector is best placed to advise whether a party has acted unreasonably

Partial awards and reasons

***R v SSE, ex Parte North Norfolk DC* (12 July 1994)** - In dismissing the appeal on one main ground the Inspector had nevertheless awarded (partial) costs in relation to the Council's refusal of the other two main grounds (density and amenity). But there were no clear and intelligible reasons for the award. The question for the Inspector should have been not just that there was insufficient evidence to substantiate those two grounds but also how it was that the Council had acted unreasonably.

Scrivens v SSCLG [2013] unreported - In making a partial award of costs to the Council on the basis of (an unreasonably large) quantity of evidence produced by the Appellant, the Inspector should have indicated the proportion of evidence upon which that award was based. In the absence of such an indication the decision had to be quashed.

Annex B: The Local Ombudsman

Role of the Local Ombudsman

There may be allegations which suggest the basis of a complaint to the Local Ombudsman - on grounds of alleged maladministration by the LPA at the planning application stage or in handling a previous application; or perhaps the appellant says they have already made a formal complaint.

The Local Ombudsman regards the costs regime as a way of enabling complaints against an LPA's handling of a planning application to be resolved satisfactorily. This is because at that stage the applicant still has the remedy of exercising their statutory right of appeal against a refusal or failure to determine and can apply for an award of costs as part of that statutory process.

For this reason, if allegations are included in a costs application suggesting maladministration by the LPA, they should not simply be "ruled out" on the ground that they are a matter for the Local Ombudsman. However, if an applicant for costs does not mention the Local Ombudsman, neither should the Inspector. If the Local Ombudsman is referred to then this should be recorded (unless the application is made in writing) but need not be specifically referred to in the Inspector's conclusions. However, any allegations should be considered against the advice in the PPG[29].

The power to award costs is limited to those necessarily and reasonably incurred in the appeal process (see PPG[30]). So expense incurred at application stage, or any indirect expenses, cannot be recovered by an award of costs in any event.

[29] Planning Practice Guidance ID 16-046-20140306 to 16-050-20140306

[30] Planning Practice Guidance ID 16-032-20140306

Annex C: Costs Decision Template

The Planning Inspectorate

Costs Decision

Site visit made on [insert date]

by [insert Inspector's name and qualifications]

an Inspector appointed by the Secretary of State

Decision date:

Costs application in relation to Appeal Ref: [insert ref]

[insert address]

The application is made under the Town and Country Planning Act 1990, sections 78, 322 and Schedule 6, and the Local Government Act 1972, section 250(5).

The application is made by Name 1 for a [partial] [full] award of costs against Name 2.

The hearing was in connection with an appeal against the [refusal of] [failure of the Council to issue a notice of their decision within the prescribed period on an application for] [grant subject to conditions of] planning permission for [ ].

Decision

The application for an award of costs is allowed in the terms set out below. – **Or**:

The application for an award of costs is refused.

Reasons

The Planning Practice Guidance advises that costs may be awarded against a party who has behaved unreasonably and thereby caused the party applying for costs to incur unnecessary or wasted expense in the appeal process. (DRDS, *PINS Help menu - Costs Circulars – England)*

[insert reasoning]

I therefore find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the Planning Practice Guidance, has been demonstrated and that a [full][partial] award of costs is justified. – **Or**:

I therefore find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the Planning Practice Guidance, has not been demonstrated.

Costs Order [where awarding costs]

In exercise of the powers under section 250(5) of the Local Government Act 1972 and Schedule 6 of the Town and Country Planning Act 1990 as amended, and all other enabling powers in that behalf, IT IS HEREBY ORDERED that [full name or respondent] shall pay to [full name of applicant], the costs of the appeal proceedings described in the heading of this decision [limited to those costs incurred in]; such costs to be assessed in the Senior Courts Costs Office if not agreed.

The applicant is now invited to submit to [person/body awarded against], to [whom] [whose agents] a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount.

[insert name] INSPECTOR

Annex C1: Inspector initiated Costs Award template

The Planning Inspectorate

Costs Award

Inquiry opened on [insert date]
Site visit made on [insert date]

by [insert Inspector name and qualifications]

an Inspector appointed by the Secretary of State

Award date:

Costs award in relation to Appeal Ref: [insert ref]

[insert address]

The award is made under the Town and Country Planning Act 1990, sections 174, 320 and Schedule 6, and the Local Government Act 1972, section 250(5).
The appeal was made by YYYY against an enforcement notice issued by ZZZZ District Council.
The inquiry was in connection with an appeal against an enforcement notice alleging the erection of rear roof extensions to the main roof of the dwelling house and to the roof of the two storey rear wing, including raising the ridge of the main roof of the property, and the erection of a roof extension on the rear wing.
The inquiry sat for[x] days from [x] to [x] 20xx.

99. **Summary of award: A partial award is made against the appellant.**

Procedural matters

Following the issue of my decision on [x] the Planning Inspectorate's Costs and Decision Team (CDT) wrote to the appellant to say that I was considering whether to make an award of costs against the appellant, because the appellant had pursued an appeal on ground (c) where there was no evidence to support the appellant's case, and in consequence there was no need for a Public Inquiry. Ground (c) is concerned with whether the matters alleged in the enforcement notice (if they occurred) do not constitute a breach of planning control.

The appellant responded in accordance with the timetable CDT set out.

The response by the appellant

The appellant had raised all along the fact that the Council had never responded to any correspondence, and for that reason an Inquiry was necessary, to find out what the evidence really was.

The appellant agreed that ground (c) should not have been pursued if there was compelling evidence that it was not permitted development. It was for the Council to have supplied this

evidence in advance so that a sensible appellant would have said they would not continue. The Council did not do so and the appellant had no choice but to continue with the Inquiry.

Reasons

The Planning Practice Guidance advises that costs may be awarded against a party who has behaved unreasonably and thereby caused another party to incur unnecessary or wasted expense in the appeal process.

It is clear from the evidence that …

For all of these reasons the development cannot be considered to be permitted development under The Town and Country Planning (General Permitted Development) (England) Order 2015.

I therefore conclude that the appellant had no reasonable prospect of success on the ground (c) appeal, and I therefore find that unreasonable behaviour resulting in unnecessary or wasted expense has been demonstrated, and that a partial award of costs is justified. As the consequence of pursuing the ground (c) appeals an Inquiry was held; it was the sole reason for holding an Inquiry, a request which was made by the appellant and for the reasons given accepted by The Planning Inspectorate. In the event, based on the Criteria set out in Annexe K of Planning Appeals – England dated 23 March 2016, the appeal on the planning merits would normally have been dealt with by Written Representations, and I therefore consider that the unnecessary and wasted expense for the Council in preparing for and attending a Public Inquiry is also to be part of the award of costs.

Costs Order

In exercise of the powers under section 250(5) of the Local Government Act 1972 and Schedule 6 of the Town and Country Planning Act 1990 as amended, and all other enabling powers in that behalf, IT IS HEREBY ORDERED that [the appellant] shall pay to [the Council] the costs of the appeal proceedings described in the heading of this award limited to those costs incurred in dealing with the appeal on ground (c), and the costs of preparing for and attending a Public Inquiry over and above preparing for and attending a Written Representations appeal; such costs to be assessed in the Senior Courts Costs Office if not agreed.

[The Council] is now invited to submit to [the appellant], to whose agent a copy of this award has been sent, details of those costs with a view to reaching agreement as to the amount.

[insert name] INSPECTOR

Annex D: Illustrative list of case types for which costs awards are available

It may be possible to apply for an award of costs in regard to appeals under legislation made by other Government Departments. An illustrative list of case types (covering most planning and examples of other case types) where costs may be sought is available on the GOV.Uk site (here) and is reproduced below:

Case types under the Planning Acts

Unless otherwise stated, costs applications can be made irrespective of procedure

Planning appeals under section 78 Town and Country Planning Act 1990 [TCPA]

Planning applications referred to the Secretary of State under section 77 TCPA

Enforcement appeals under section 174 TCPA

Listed building enforcement appeals under section 39 Planning (Listed Buildings and Conservation Areas Act 1990 [P(LB&CA)A]

Lawful development certificate appeals under section 195 TCPA

Advertisement appeals under 78 TCPA and the Town and Country Planning (Control of Advertisements) (England) Regulations 2007

Tree preservation order appeals under section 78 TCPA and Regulations

Tree replacement enforcement notice appeals under section 208 TCPA and Regulations

Listed building consent appeals under section 20 P(LB&CA)A

Listed building enforcement notice appeals under section 39 P(LB&CA)A

Listed building consent applications referred to the Secretary of State under section P(LB&CA)A

Conservation area consent applications referred to the Secretary of State under section 74 (2)(a) P(LB&CA)A

Conservation area consent appeals under section 74 (3) P(LB&CA)A

Conservation area enforcement appeals under section 74 (3) P(LB&CA)A

Purchase notices referred to the Secretary of State under sections 139 and 140 TCPA

Listed building purchase notices referred to the Secretary of State under sections 33 and 34 P(LB&CA)A

Orders under section 257 or 258 TCPA relating to public rights of ways affected by development (Note: exceptionally, awards are available in these cases only if inquiry or hearing is held)

Appeals under section 22 of, and Schedule 2 to, the Planning and Compensation Act 1991 against determination of conditions to be attached to a registered old mining permission

Prohibition orders and orders (after suspension of winning and working of minerals or the depositing of mineral waste) for the protection of the environment, under Schedule 9 to the Town and Country Planning Act 1990, as amended by Town and Country Planning (Environmental Impact Assessment) (Amendment) (England) Regulations 2008

Appeals under Section 96 of, and Schedules 13 and 14 to, the Environment Act 1995 against, respectively, an initial determination of conditions to be attached to a mineral site or the terms of a working rights notice accompanying an initial determination, and a periodic determination of conditions to be attached to a mining site

Appeals under section 106B TCPA in respect of planning obligations

*Orders under sections 97 and 98 of, and Schedule 5 to, TCPA, revoking or modifying a planning permission

*Orders under sections 23 and 24 P(LB&CA)A, revoking or modifying listed building consent

*Orders under sections 220 TCPA and Regulations revoking or modifying a grant of advertisement consent

*Discontinuance orders under sections 102 and 103 of, and Schedule 9 to, TCPA

Completion notices requiring confirmation by the Secretary of State under section 95 TCPA

Hazardous substances applications referred to the Secretary of State under section 20 Planning (Hazardous Substances) Act 1990 [PHSA] and Regulations;

Hazardous substances consent appeals under section 21 PHSA and Regulations

Appeals under section 25 PHSA and Regulations against hazardous substances contravention notices

*Orders under section 14 and 15 PHSA and Regulations, revoking or modifying hazardous substances consent *These cases are regarded as analogous to compulsory purchase orders.

Examples of case types under non-planning legislation

Awards are available only if inquiry or hearing held, except where stated Otherwise

Appeals under section 18 Land Compensation Act 1961 (Note: awards available only if inquiry held)

Opposed definitive map orders under sections 53 and 54 Wildlife and Countryside Act 1981 relating to public rights of way

Opposed public path and rail crossing orders under sections 26, 118 to 119A Highways Act 1980 (as amended)

Applications referred under section 36 of the Electricity Act 1989 (Note: awards available only if inquiry held)

Appeals concerning integrated pollution control authorisations and waste management licenses under the Environmental Protection Act 1990, waste carrier licenses under the Control of Pollution (Amendment) Act 1989, and abstraction licenses and discharge consents under the Water Resources Act 1991;

Opposed compulsory purchase orders [Note: awards may also be made if the written representations procedure is followed

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Design

Updated to reflect December 2023 Framework (NPPF)

What's new since the last version

Changes highlighted in yellow made 27 October 2021:

- Updated to reflect revised National Planning Policy Framework published July 2021
- Reference to the Building Better Building Beautiful Commission Report published January 2020 and the government response.
- Reference to the Design Principles for National Infrastructure
- Reference to the 'Building for a Healthy Life' publication, which replaces 'Building for Life 12'.
- Refers to the National Model Design Code published in July 2021.

Other recent updates

Contents

Introduction

1. Inspectors make their decisions on the basis of the evidence before them. Consequently, they may, where justified by the evidence, depart from the advice given in this training material, although the National Planning Policy Framework (NPPF), the Government's Planning Practice Guidance (PPG) and National Policy Statements (NPS) will still be relevant in all cases.

2. This training material applies to casework in England only.[1]

What is design?

3. PPG1, although now superseded, gave a useful definition of urban design:

   "the relationship between different buildings; the relationship between buildings and the streets, squares, parks, waterways and other spaces which make up the public domain; the nature and quality of the public domain itself; the relationship of one part of a village, town or city with other parts".

4. CABE[2] defines design as being about *how places work*.

National Policy on Design

National Planning Policy Framework

5. The NPPF[3] places a greater emphasis on the importance of high-quality design. NPPF 8 sets out the three overarching objectives of the planning system in achieving sustainable development. As part of the "social objective" at NPPF 8 b), it sets out that a sufficient number and range of homes should be provided to meet the needs of present and future generations and should also foster well-designed, "beautiful" and safe "places". Detailed guidance is provided at Chapter 12 of the NPPF as to how this can be achieved.

6. Alongside the NPPF, the Government has published a National Model Design Code (NMDC), which forms part of the suite of PPG, and the National Design Guide (NDG). Both are referred to throughout the NPPF. Inspectors should familiarise themselves with the contents of the NPPF, NDMC and NDG.

7. NPPF 132 states that plans should set a clear design vision and expectations. All Local Planning Authorities should prepare local design guides or codes which are consistent with the principles set out in the NMDC and NDG (NPPF 133). These locally produced guides and codes should be prepared at a variety of scales (such as area

[1] In Wales, policy and guidance on design can be found in Planning Policy Wales: Edition 11 (WG, Feb 2021) and TAN 12: Design (WG, March 2016).

[2] The Commission for Architecture and the Built Environment; merged into the Design Council in 2011.

[3] Revised NPPF [DLUHC December 2023]

wide, neighbourhood or site specific) but must be based on effective community engagement and reflect local aspirations (NPPF 134). The NPPF also makes clear that, in the absence of any locally produced design guides or codes, national documents (the NMDC and NDG) should be used to guide decisions on applications (NPPF 134).

8. In determining planning appeals, NPPF 135 sets out in detail a number of factors which should be taken into account in decision-making, which will provide a useful starting point for assessing the acceptability of the design before you.

9. NPPF 136 states that planning policies and decisions "should ensure that new streets are tree lined[4], that opportunities are taken to incorporate trees elsewhere in developments (such as parks and community orchards), that appropriate measures are in place to secure the long-term maintenance of newly-planted trees, and that existing trees are retained wherever possible". Locations of trees should be agreed with highways officers and tree officers and should be compatible with highways standards and the needs of different users.

10. The NPPF also confirms that design should be considered throughout the evolution of proposals, with appropriate tools and processes being used. The importance of effective community engagement throughout the design process is also emphasised (see NPPF 137-138), with NPPF 137 stating, applications "that can demonstrate early, proactive and effective engagement with the community should be looked on more favourably than those that cannot".

11. NPPF 139 states that development that is not well designed should be refused, "especially where it fails to reflect local design policies and government guidance on design, taking into account any local design guidance and supplementary planning documents such as design guides and codes". Conversely, significant weight should be given to: "a) development which reflects local design policies and government guidance on design, taking into account any local design guidance and supplementary planning documents such as design guides and codes; and/or b) outstanding or innovative designs which promote high levels of sustainability, or help raise the standard of design more generally in an area, so long as they fit in with the overall form and layout of their surroundings".

12. A section has also been added to the Housing ITM for specific guidance on national design policy in relation to housing developments.

Design in the wider context

How are well-designed places achieved through the planning system?

The *Design: Process and Tools* Planning Practice Guidance (PPG) chapter provides advice on the key points to take into account on design, which supports the NPPF.

[4] Footnote 53 states: Unless, in specific cases, there are clear, justifiable and compelling reasons why this would be inappropriate.

[Note that the PPG has not yet been updated to take account of the revised NPPF, so should be treated with caution.]

13. The PPG chapter sets out that well-designed places can be achieved by taking a proactive and collaborative approach at all stages of the planning process, from policy and plan formulation through to the determination of planning applications and the post-approval stage. As set out in NPPF 139, permission should be refused for development that is not well designed.

National Design Guide

14. The NDG, published in October 2019, which should be read alongside the PPG sets out the ten characteristics of good design, each of which is expanded upon within the NDG:

Context: is the location of the development and the attributes of its immediate, local and regional surroundings.

Identity: The identity or character of a place comes from the way that buildings, streets and spaces, landscape and infrastructure combine together and how people experience them. Local identity is made up of typical characteristics such as the pattern of housing, and special features that are distinct from their surroundings.

Built form: is the three-dimensional pattern or arrangement of development blocks, streets, buildings and open spaces. It is the interrelationship between all these elements that creates an attractive place to live, work and visit, rather than their individual characteristics. Together they create the built environment and contribute to its character and sense of place.

Movement: Patterns of movement for people are integral to well designed places. They include walking and cycling, access to facilities, employment and servicing, parking and the convenience of public transport. They contribute to making high quality places for people to enjoy. They also form a crucial component of urban character. Their success is measured by how they contribute to the quality and character of the place, not only how well they function. Successful development depends upon a movement network that makes connections to destinations, places and communities, both within the site and beyond its boundaries.

Nature: contributes to the quality of a place, and to people's quality of life, and it is a critical component of well designed places. Natural features are integrated into well designed development. They include natural and designed landscapes, high quality public open spaces, street trees, and other trees, grass, planting and water.

Public spaces: are streets, squares, and other spaces that are open to all. They are the setting for most movement. The quality of the spaces between buildings is as important as the buildings themselves.

Uses: Sustainable places include a mix of uses that support everyday activities, including to live, work and play. Well-designed neighbourhoods need to include an integrated mix of tenures and housing types that reflect local housing need and market demand. They are designed to be inclusive and to meet the changing needs of people of different ages and abilities. New development reinforces existing places by

enhancing local transport, facilities and community services, and maximising their potential use.

Homes and buildings: Well-designed homes and buildings are functional, accessible and sustainable. They provide internal environments and associated external spaces that support the health and wellbeing of their users and all who experience them. They meet the needs of a diverse range of users, taking into account factors such as the ageing population and cultural differences. They are adequate in size, fit for purpose and are adaptable to the changing needs of their occupants over time. Successful buildings also provide attractive, stimulating and positive places for all, whether for activity, interaction, retreat, or simply passing by.

Resources: Well-designed places and buildings conserve natural resources including land, water, energy and materials. Their design responds to the impacts of climate change. It identifies measures to achieve mitigation, primarily by reducing greenhouse gas emissions and minimising embodied energy; and adaptation to anticipated events, such as rising temperatures and the increasing risk of flooding.

Lifespan: Well-designed places sustain their beauty over the long term. They add to the quality of life of their users and as a result, people are more likely to care for them over their lifespan. They have an emphasis on quality and simplicity.

The issues covered include:

- **Context**: the existing character, movement patterns, appearance and other attributes of the area, while not preventing appropriate innovation.
- **Sustainability**: structure, layout and design of buildings and places that help reduce energy demand and support ecosystems.
- **Environmental considerations**: landscape, nature conservation, future occupiers and neighbours living conditions: daylight, sunlight/shadowing, aspect, privacy, overlooking, noise, smells, outlook.
- Creating successful places that contribute to local identity and are attractive spaces for formal and/or informal social interaction.
- Safety/crime reduction through connectivity and usability of public space.
- Road safety for traffic and pedestrians.
- Public realm – the space between buildings. Public spaces should be designed to deliver a range of social and environmental goals.
- Inclusivity-creating buildings and places that are for everyone.

National Model Design Code

15. The NMDC provides detailed guidance on the production of design codes, guides, and policies to promote successful design. It expands on the ten characteristics of good design set out in the NDG, which provides an overarching framework and principles for design. The NMDC forms part of the Government's PPG. It is not a statement of national policy but is referred to throughout the NPPF.

16. A 'design code' is a set of illustrated design requirements that provide specific, detailed parameters for the physical development of a site or area. The NMDC: Part 1 – The coding process is intended to be used as a toolkit to guide local planning authorities on the design considerations that need to be taken into account when producing design codes and guides, as well as methods to capture and reflect the views of the local community from the outset, and at each stage in the process. The accompanying NMDC: Part 2 - Guidance Notes set out possible contents for a design code, using the ten characteristics of well-designed places detailed in the NDG, which has been amended to align with the Design Code and Guidance Notes.

Building Better Building Beautiful Commission Report

17. Building Better, Building Beautiful Commission report, launched on 30 January 2020, 'Living with beauty – promoting heath, well-being and sustainable growth', sets out the Commission's recommendations to government and focuses on three main aims for the planning system – **Ask for Beauty; Refuse Ugliness;** and **Promote Stewardship**.

The report made 44 policy proposals in the following areas:

- Planning: create a predictable level playing field
- Communities: bring the democracy forward
- Stewardship: incentivise responsibility to the future
- Regeneration: end the scandal of left behind place
- Neighbourhoods: create places not just houses
- Nature: re-green our towns and cities
- Education: promote a wider understanding of placemaking
- Management: value planning, count happiness, procure properly

Amongst the 130 detailed recommendations, were the following:

- Planting millions of trees over the next 5 years, as well as opening old canals and supporting every home to have its own or access to a fruit tree;
- Speeding up the planning process for beautiful buildings through a new 'Fast Track for Beauty' rule for councils;
- Increasing democracy and involving communities in local plans and planning applications, including using digital technology like virtual reality and 3D modelling to help locals shape their own areas.

18. The recommendations were designed to support the creation of more beautiful communities. The Governments' response to the report published on 30 January 2021 proposed changes to the NPPF, a draft National Model Design Code and the creation of an 'Office for Place'. These measures seek to implement the policy changes in response to the BBBB report and place greater importance on quality, design, and the

environment. The revised NPPF and final NMDC were published on 20 July 2021 and are detailed above and below.

Design Principles for National Infrastructure

19. The Design Principles for National Infrastructure, developed by the National Infrastructure Design Group in consultation with all infrastructure sectors, sets out four design principles to guide the planning and delivery of major infrastructure projects:

- Climate;
- People;
- Places; and
- Value

These principles are designed to guide projects which will upgrade and renew the UK's infrastructure system. They should be applied to all economic infrastructure: digital communications, energy, transport, flood management, water and waste.

Achieving "beautiful" places

20. The NPPF includes the Government's commitment to making beauty and place making a strategic theme in national planning policy. Amongst other things, it makes clear that development that is not well designed should be refused and that good design and beautiful places should be at the centre of plan making and decision making. The July 2021 NPPF thus introduces the concept of "beautiful" homes, buildings and places.

21. NPPF 8 b) and 126 set out that the creation of high quality, "beautiful" and sustainable buildings and places is fundamental to what the planning system should achieve. However, the NPPF does not provide a definition for the term "beautiful", which in relation to design features within NPPF 8 b), 73 c), 125, 126 and 128. The Government response to the National Planning Policy Framework and National Model Design Code: consultation proposals (updated 20 July 2021) provides useful background to the inclusion of "beautiful" in the revised NPPF. It indicates that the term "beautiful" should be read "as a high-level statement of ambition rather than a policy test"[5].

Design and Access Statements

22. In recent years the importance of design in planning has come to the forefront of government policy. The importance of seeking to ensure good design is now a statutory requirement, set out in section 42(1) of the Planning and Compulsory

[5] The Government's response to Q1 (Do you agree with the changes proposed in Chapter 2 "Achieving Sustainable Development"?), Q4 (Do you agree with the changes proposed in Chapter 5 "Delivering a sufficient supply of homes"?), Q7 (Do you agree with the changes proposed in Chapter 11 "Making effective use of land"?), Q8 (Do you agree with the changes proposed in Chapter 12 "Achieving well designed places"?) and Q14 (Do you have any comments on the changes proposed in Annex 2 "Glossary"?).

Purchase Act 2004.[6] This section amends section 62 of the principal Act[7] such that a planning application must now be accompanied by *'a statement about the design principles and concepts that have been applied to the development'* and *'a statement about how issues relating to access to the development have been dealt with'*. However, the standard of Design and Access Statements varies. Some provide a useful starting point; many merely set the site context and provide little analysis as to how this site context has informed the design.

- Beware post-rationalisation (making up the process after the event).
- Statement should *explain* why design is good (or bad).
- A good DAS provides a starting point for your consideration of the proposal. Are the design objectives valid/relevant to the development proposed and its context? Does the proposal achieve the stated objectives?

23. Design and Access Statements are normally fairly uninformative as to why a development has been designed the way it has been. They do not generally look at the design process itself and what principles were adopted, but rather just describe the proposal. If it is being argued that the proposal is appropriate to its context and there is no information in the Design and Access statement that analyses the context and explains how that has led to the design of the proposal, it is quite legitimate for the decision-maker to say that.

Local Policy

24. To carry weight in decision-making, NPPF 129 states that design guides and codes should be *"…produced either as part of a plan or as Supplementary Planning Documents (SPDs)…"*. The NPPF also requires that they should reflect the local character and the design preferences of local areas and development aspirations, be based on effective community engagement and be consistent with the principles in the NDG and the NMDC – see paragraphs 6 & 7 above. These guides and codes are often aimed at householder applications and other residential developments.

25. The current PPG Design: process and tools, explains that LPAs should set out their vision and objectives for the types of place(s) which the local plan aims to realise, the expectations for development and investment including design as well as how sustainable development will be achieved. It goes on to state:

"Where a plan contains strategic policies, they can be used to set out these design expectations at a broad level - for example in relation to the future character and role of town centres, areas requiring regeneration or suburban areas facing more incremental change. Strategic policies can also be used to set key design

[6] The Planning and Compulsory Purchase Act 2004

[7] The Town and Country Planning Act 1990

requirements for strategic site allocations and explain how future masterplanning and design work is expected to be taken forward for these sites"[8].

26. More local and/or detailed design principles for an area, including design requirements for site specific allocations, can be set out in non-strategic policies in local or neighbourhood plans. These should be based on appropriate evidence of the defining characteristic of the area, such as its historic, landscape and townscape character. They can provide a clear indication of the types of development that will be allowed in an area, especially where they link to detailed local design guides, masterplans or codes[9].

Factors to consider

27. The NDG indicates that "A well-designed place is unlikely to be achieved by focusing only on the appearance, materials and detailing of buildings. It comes about through making the right choices at all levels…" The Guide indicates that factors to consider include:

- **Layout (or Masterplan)** is the framework of routes and blocks of development that connect locally/more widely, and the way development is arranged to create streets, open spaces and buildings and how these relate to one other.
- **Landscape** is the character and appearance of land, including its shape, form, ecology, natural features, hard and soft landscape, and the way these components combine.
- **Form** is the three-dimensional shape and modelling of buildings and the spaces they define and can take many forms. The form of a building or a space has a relationship with the uses and activities it accommodates, and also with the form of the wider place where it is sited.
- **Scale** is the height, width and length of each building proposed within a development in relation to its surroundings. This relates both to the overall size and massing of individual buildings and spaces in relation to their surroundings, and to the scale of their parts
- **Appearance** is the aspects of a building or space which determine the visual impression the building or space makes, such as its architecture, building techniques, decoration, colour, texture, and lighting.
- **Materials** used for a building or landscape affect how well it functions and lasts over time. They also influence how it relates to what is around it and how it is experienced.

[8] PPG Reference ID: 26-003-20191001

[9] PPG Reference ID: 26-004-20191001

- **Detailing** affects the appearance of a building or space and how it is experienced. It also affects how well it weathers and lasts over time.

For a more detailed explanation of 'factors to consider' in design, see paragraph 23 – 31 on pages 6-7 of the NDG.

Requirement for Good Design

28. Section 183 of the Planning Act 2008 amended section 39 of the Planning and Compulsory Purchase Act 2004, supplementing the original objective of planning decisions to contribute to the achievement of sustainable development, with *the duty to have regard to the desirability of achieving good design*.

How to identify it

29. Good design will usually:

- Demonstrate an understanding of its context and shows how it has learnt from it (the design is rooted in place).
- Respond favourably to a good environment.
- Aim to lift a poor environment.
- Promote or reinforce local distinctiveness

30. The approach adopted may:

- Be subservient to adjoining/adjacent buildings; aim to echo or blend harmoniously and unobtrusively - a side extension might be set back and down, be narrower and have smaller windows.
- Create a fresh confident entity which contrasts appropriately with its neighbours.[10]
- Be well articulated in relation to existing built forms.
- Be well proportioned in itself and in the spaces it creates.
- Distinguish public and private spaces.
- Have a clear imagery and be easy to understand. Typically, its purpose and function will be self-evident – a house looks like a house, an office like an office etc. (exceptions would include conversions which try to keep the original character or deliberately light-hearted designs).

[10] But be wary of proposals which fall between two stools, and are neither subservient nor self-confident.

- Be legible – e.g. the entrance is clearly identified by the architecture.

31. A scheme which is reliant on conditions to make it acceptable should be examined very carefully. Would it meet the fundamental objectives of good design which go beyond style or ornament?

Writing about design in decisions

32. This section deals with how to write about design in appeal decisions. Addressing design matters as part of the decision-writing process can be challenging. However, as with most areas of casework, articulating the arguments in a comprehensive and well-reasoned manner will assist the decision-writing process. Understanding and utilising design terminology and applying it correctly can often assist this process and a number of key terms are set out as an annex to this chapter.

33. Publications like the Urban Design Compendium and Manual for Streets are useful. The Manual for Streets can be used in connection with highways issues and visibility splays but it also covers street design and the elements that make up residential streets. An architectural dictionary can also be very helpful. There's no one way to objectively assess design quality. There will necessarily always be a degree of subjective judgement.

34. Everyone's perception is slightly different. All development will alter the appearance and/or the character of an area in some way. Whether that's positive, negative or neutral is nearly always subjective. This does not matter, as long as you are able to clearly justify your assessment

35. It is clear from the updated revised NPPF, that 'design' should go beyond aesthetic considerations. It should take into account the way that an area functions and how the proposal would relate to those functions, as well as what a scheme may look like.

36. Therefore, planning policies and decisions should address the connections between people and places and the integration of new development into the natural, built and historic environment.

37. The effect of a scheme upon the character and appearance of an area comes down to context and how a proposal relates to what is around it. It's equally valid to have a contrasting architectural style as one which reflects the surrounding architecture. A useful assessment method is to consider the design cues of the surrounding area.

For example:

- roof forms;
- horizontal or a vertical emphasis of the buildings;
- window shapes and forms;
- solid to void ratios;
- height and width of the buildings around the site;

- any distinctive design rhythms (e.g. uniformly designed terraces; consistent spaces between buildings; dominant materials).

and even small details such as brick bond patterns. It is also worth considering whether a building will look like what it is meant to be. Does a house look like a house, rather than an office block, for example.

38. When considered in isolation, the design of a building may not be fundamentally bad, but the design may not have taken cues from the surroundings and, as a result, won't integrate well. If a contemporary design incorporates similar design elements as the existing buildings around it then it is more likely to successfully integrate into the surrounding area.

Useful recent publications:

Building for a Healthy Life – A design toolkit for neighbourhoods, streets, homes and public spaces – July 2020

39. Published by Design for Homes / Urban Design Doctor and endorsed by Homes for England, the House Builders Federation, Design Network and the Urban Design Group, the Building for a Healthy Live (BHL) provides a framework and traffic light scoring system to assist in design assessment of housing schemes. A completed assessment may be submitted, which can be carried out by anyone, normally the applicant/appellant. Conclusions should be supported by evidence. It does not provide a definitive judgment on the scheme but enables discussion about design and may provide a useful tool for exploring the design merits of the proposal. The BHL updates the Building for Life 12 (Cabe, 2015) which set out a 12 point structure and underlying principles, which are still at the heart of the BHL. The new name reflects changes in legislation as well as refinements which have been made to the 12 considerations in response to good practice and user feedback.

Historic England Advice Note 4: Tall Buildings

40. Historic England published its Tall Buildings - Historic England Advice Note 4 in December 2015. This Advice Note supersedes 'Guidance on Tall Buildings' which was produced by English Heritage and CABE in 2007. The advice is intended for developers, designers, local authorities and other interested parties. It seeks to guide people involved in planning for and designing tall buildings so that they may be delivered in a sustainable and successful way through the development plan and development management process.

Annex 1 - Glossary of urban design terms

Authenticity - The quality of a place where things are what they seem: where buildings that look old are old, and where the social and cultural values that the place seems to reflect did actually shape it.

Background building - A building that is not a distinctive landmark.

Bay – vertical subdivision of a building elevation.

Block - The area bounded by a set of streets and undivided by any other significant streets.

Bonding pattern – the way in which bricks or blocks are laid i.e. Flemish, English, English Garden Wall, Stretcher bond, stack bonding etc.

Building element - A feature (such as a door, window or cornice) that contributes to the overall design of a building.

Building line - The line formed by the frontages of buildings along a street.

Building shoulder height - The top of a building's main facade.

Bulk - The combined effect of the arrangement, volume and shape of a building or group of buildings. Also called massing.

Context - The setting of a site or area and the features of a site or area (including land uses, built and natural environment, and social and physical characteristics).

Desire line - An imaginary line linking facilities or places which people would find it convenient to travel between easily.

Enclosure - The use of buildings to create a sense of defined space.

Facade - The principal face of a building.

Fenestration - The arrangement of windows on a facade.

Figure/ground diagram - A plan showing the relationship between built form and publicly accessible space (including streets and the interiors of public buildings such as churches) by presenting the former in black and the latter as a white background, or the other way round.

Fine grain - The quality of an area's layout of building blocks and plots having small and frequent subdivisions.

Height to width ratio – determines the degree of enclosure of a street or space, the height of the buildings compared to the distance between buildings facing each other.

Landmark - A building or structure that stands out from the background buildings.

Legibility - The degree to which a place or building can be easily understood by its users and the clarity of the image it presents to the wider world.

Live edge - Provided by a building or other feature whose use is directly accessible from the street or space which it faces; the opposite effect to a blank wall.

Local distinctiveness - The positive features of a place and its communities which contribute to its special character and sense of place.

Massing - The combined effect of the arrangement, volume and shape of a building or group of buildings.

Node - A place where activity and routes are concentrated.

Perimeter block – a block with the buildings situated around the edges which may or may not be continuous.

Permeability - The degree to which a place has a variety of pleasant, convenient and safe routes through it.

Plot ratio - A measurement of density expressed as gross floor area divided by the net site area.

Proportion – the relationship of two or more elements in a design and how they compare with one another. Good proportion adds harmony, symmetry, or balance among the parts of a design.

Rhythm – in design, rhythm is the regular, harmonious recurrence of a specific element, often a single specific entity coming from the categories of line, shape, form, colour, light, shadow, and sound.

Solid to void ratio – the proportion of a building elevation that is wall compared to the proportion that is windows or other openings.

Uniformity - defined as the state or characteristic of being even, normal, equal or similar. Uniformity and consistency help users extract meaning from the design of an application, keeping them focused on the tasks and not distracted by design ambiguities. Elements such as visual hierarchy, proportion, alignment, and typography play major parts in the uniformity of a design.

Urban grain - The pattern of the arrangement and size of buildings and their plots in a settlement; and the degree to which an area's pattern of street-blocks and street junctions is respectively small and frequent, or large and infrequent.

Urban structure - The framework of routes and spaces that connect locally and more widely, and the way developments, routes and open spaces relate to one another.

Vernacular - The way in which ordinary buildings were built in a particular place before local styles, techniques and materials were superseded by imports.

Annex 2 - Suggested reading List

Online publications:

Active by design – Designing places for healthier lives [Design Council, 2014]

Building for a Healthy Life: A Design Toolkit for neighbourhoods, streets, homes and public spaces, [Design for homes / Urban Design Doctor, July 2020][11]

Creating successful masterplans - a guide for clients [Cabe, 2008]

Design and access statements: How to write, read and use them [Cabe, 2007]

Design in and around heritage assets by D McCallum, M Harlow [PINS Training 18th March 2013]

Design Review Principles and Practice [Design Council, 2013]

Design Reviewed Masterplans: Lessons learnt from projects reviewed by CABE's expert design panel [Cabe, 2004]

Good design: the fundamentals [Cabe, 2008]

Green space strategies a good practice guide" [Cabe, 2008]

Manual for Streets 2 [CIHT, 2010]

Manual for Streets [DfT/DCLG, 2007]

Planning for places - delivering good Design through core strategies [Cabe, 2009]

Tall Buildings - Historic England Advice Note 4 [HE, December 2015]

Urban Design Compendium, (Second Edition) [EP, 2007]

The Essex Design Guide (Online Edition) [EPOA, 2018]

Hard Copy publications:

Architecture and the urban environment - a vision for the new age by D Thomas [Jan 2002]

The Penguin Dictionary of Architecture by J Fleming, H Honour & N Pevsner (Fourth Edition) [Jan 1991]

Oxford Dictionary of Architecture (Third Edition) by J Stevens Curl & S Wilson [2016]

The Concise Townscape by G Cullen [1961]

[11] Replaces Building for Life 12 [Cabe, 2015]

The Image of the City by K Lynch [1960]

Guidelines for landscape and visual impact assessment (Third edition) [Landscape Institute, Jan 2013]

The Essex design guide [Essex CC / Planning Officers Association, 2005]

Visual dictionary of Architecture by F Ching [Jan 1995]

Design - the key to a better place by J Smit [Jan 2009]

Designing community - charrettes, masterplans and form-based codes by D Walters [Jan 2007]

Vernacular Architecture – an illustrated handbook by R W Brunskill (Fourth Edition) [2000]

Design Champions:

PINS Intranet Design Champions page [*PINS intranet > People > Design Champions*]

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Environmental Impact Assessment

Updated to reflect December 2023 Framework (NPPF)
New in this version • Comprehensively updated on 05 August 2022
Other recent updates

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Information Sources

EIA Directive (85/337/EEC) (as amended)

Directive 2011/92/EU

Directive 2014/52/EU

Town and Country Planning Act 1990 (as amended)

National Planning Policy Framework

The Town and Country Planning (Environmental Impact Assessment) Regulations 2017[1]

The Marine Works (Environmental Impact Assessment) Regulations 2007

Planning Practice Guidance – Environmental Impact Assessment (Updated May 2020)

The Town and Country Planning (Environmental Impact Assessment) Regulations 2011

Introduction

1. Environmental Impact Assessment (EIA) is an iterative assessment process required for projects that are likely to have significant effects (positive or negative) upon the receiving environment (EIA development). The EIA process serves a number of purposes important to the design and promotion of certain projects. A main purpose of EIA is to provide the decision maker and members of the public with a clear description of what the likely significant environmental effects of a project would be and how they have been assessed; this is provided within an Environmental Statement (ES). Another main purpose is public participation, and it is a requirement for the ES to be published to afford the consultation bodies, as defined by the 2017 EIA Regulations[2], the opportunity to comment on the anticipated likely significant effects of the development. Best practice dictates that public participation/consultation is undertaken at an early stage and that regard is had by applicants to comments received, adapting the design of the development as appropriate, but it is not a statutory requirement to do so.

2. Inspectors must be familiar with the relevant regulations and advice for two reasons. First, the need for EIA may be raised during the course of an appeal. Second, Inspectors are under a duty to consider the need for EIA and/or the EIA requirements in every case to which the regulations apply, regardless of whether it should have been considered at an earlier stage.

[1] Consolidated version of the EIA regulations, which includes the Town and Country Planning (Development Management Procedure, Listed Buildings and Environmental Impact Assessment) (England) (Coronavirus) (Amendment) Regulations 2020

[2] Regulation 2, The Town and Country Planning (Environmental Impact Assessment) Regulations 2017

Legislative Context

3. The European Union (EU) EIA Directive (85/337/EEC) (as amended) applies to a wide range of defined public and private projects. The initial EIA Directive of 1985 has been amended three times. The amendments have been codified by Directive 2011/92/EU of 13 December 2011. Directive 2011/92/EU was amended in 2014 by Directive 2014/52/EU. The most recent amendments to the Directive were transposed into UK law in 2017.

4. The EIA Regulations implement the requirements of the EIA Directive for projects for which an application is made under the Town and Country Planning Act 1990 (as amended). In England, the current EIA Regulations came into force on 16 May 2017; Wales[3], Scotland and Northern Ireland are subject to separate Regulations.

5. The UK left the EU on 31 January 2020 and the transitional arrangements that were put in place ended on 31 December 2020. From 1 January 2021, domestic EIA legislation has been amended[4] to ensure that retained EU law and any international obligations that applied on 31 December 2020 can continue to operate appropriately. References in this chapter to specific Regulations are to the 2017 EIA Regulations only. These Regulations provide the legislative basis for EIA in England; legislative references in Inspectors' reports and other documents should refer to these Regulations, rather than the EIA Directive. Judgments of the European Court given prior to 31 December 2020 must still be complied with in the UK[5], and EU guidance on EIA will continue to be relevant for as long as domestic legislation mirrors the requirements of the EU EIA Directive.

6. Separate EIA Regulations apply to Planning Act projects, Transport and Works Act projects, projects in the marine realm and projects relating to certain types of infrastructure (e.g. some pipelines) or activities (such as forestry and agriculture).

Transitional Provisions

7. The 2017 EIA Regulations revoke the 2011 EIA Regulations but also include transitional provisions, which continue to apply the 2011 EIA Regulations (in full or in part) in certain circumstances. These are set out in Regulations 76(2) and 76(3) and apply when the following has occurred before the commencement of the 2017 Regulations:

   - the Local Planning Authority (LPA) has initiated the adoption of a screening opinion;
   - the Secretary of State (SoS) has initiated the making of a screening direction;

[4] EU Exit Regulations
[5] The UK Supreme Court is excepted from this and is at liberty to depart from CJEU judgments after Brexit if it is considered appropriate to do so.

- an appellant/applicant has requested a screening opinion or a screening direction;
- the LPA has adopted a screening opinion;
- the SoS has made a screening direction;
- an appellant/applicant has requested a Scoping Opinion; or
- an appellant/applicant has submitted an ES.

8. Since the transitional provisions apply to 'an appellant/applicant', it is possible that the transitional provisions may not apply in the situation where an appellant/applicant has changed its name subsequent to one of the occurrences listed. If you think this may be the case, please contact the Environmental Services Team (EST) for further advice.

The 2017 EIA Regulations

9. The 2017 EIA Regulations introduced a definition of the EIA process (Regulation 4) and the content of an ES (Regulation 18) for the first time.

10. Regulation 4 explains that the process of EIA is more than just the preparation of an ES, it also includes consultation, publication and notifications as well as the responsibilities for the decision maker. It explains the types of effects and the environmental aspects that need to be considered (including factors such as population and human health; biodiversity; land; soil; water; air; climate; material assets; cultural heritage; landscape, the interaction between these factors and any other information in Schedule 4 of the Regulations).

11. Regulation 4 also requires that assessments consider operational effects and new aspects such as major accidents and disasters and the requirement for the relevant planning authority or the SoS have access to 'sufficient expertise'.

12. The Inspectorate considers that a range of factors including your EIA knowledge, training and support from EST ensure that you have access to sufficient expertise.

The EIA process

13. The EIA stages that make up the EIA process can be broadly described as follows:

14. **Screening** – this is the consideration of whether a project is EIA development and subject to the Regulations. This is a duty for the LPA, the Inspectorate for s62a casework, or where there is disagreement, or the LPA fails to produce a Screening Opinion within the statutory timescales – a direction can be sought by the applicant from the SoS. If the case is not at appeal or is not already being dealt with by the Inspectorate (e.g. as s62a applications), directions are dealt with by the Planning Casework Unit (PCU) at the Department for Levelling Up Housing and Communities (DLUHC), who deal with all direct requests to the SoS.

15. Schedule 1 of the 2017 EIA Regulations sets out the type of development for which EIA is mandatory – e.g. nuclear powers stations and developments over a certain size threshold such as airports with a runway length >2,100m and wastewater treatment plants exceeding 150,000 population equivalent.

16. Where a project is of a type not described in Schedule 1, it is screened against Schedule 2. Schedule 2 includes descriptions of relevant development and thresholds that should be applied. If a project is of a type listed and exceeds those thresholds then it should be screened as to whether it is EIA development. Where a development does not exceed the thresholds, it may be deemed EIA development by virtue of the factors set out in Schedule 3 of the regulations.

17. Voluntary submission of an ES also makes a project EIA development.

18. **Scoping** – Before preparing an ES and submitting an application, the 2017 EIA Regulations allow for an applicant to request a 'Scoping Opinion' of the LPA. Scoping is a voluntary stage to establish the scope, and level of detail, of the information to be provided in the ES. The LPA in consultation with consultation bodies adopts a Scoping Opinion. Where an LPA has failed to adopt a Scoping Opinion, an applicant may request a Scoping Direction from the SoS via PCU.

19. **Preparation of the ES** - Following scoping, the applicant is responsible for the preparation of an ES and a public facing non-technical summary (NTS), which are the written record of the EIA process. These must be consulted on in public.

20. **Decision making** – When determining an application for EIA development, the LPA, SoS or Inspector must:

    (a) Demonstrate that the environmental information has been examined;

    (b) reach a reasoned conclusion on the significant effects of the proposed development on the environment, taking into account the examination and, where appropriate, any supplementary examination considered necessary;

    (c) integrate that conclusion into the decision; and

    (d) if planning permission is to be granted, set out any conditions required to address likely significant environmental effects and consider whether it is appropriate to impose monitoring measures.

21. The determination period for a Town and Country Planning Act application for EIA development is 16 weeks.

22. **Post consent** – Where it is determined to be required, monitoring should be carried out and remedial action implemented where effects are identified as being worse than predicted. Monitoring should be proportionate to the effect and not duplicate existing monitoring activity (e.g. by the local council).

The content of an ES

23. Regulation 18 establishes the minimum information that is necessary for inclusion within the ES, the main application document, in order for it to be considered as such. It explains that the content of the ES should include a description of:

    (a) the proposed development (site, design, size and other relevant features);

    (b) the likely significant effects;

    (c) any features or measures envisaged in order to avoid, prevent or reduce and, if possible, offset likely significant adverse effects;

    (d) the reasonable alternatives studied by the appellant/applicant, which are relevant to the proposed development and its specific characteristics, and an indication of the main reasons for the option chosen, taking into account the effects of the development on the environment;

    (e) a non-technical summary of this information; and

    (f) any additional relevant information specified in Schedule 4 (Information for inclusion in environmental statements) which is relevant to the characteristics of the development and the environmental features that are likely to be significantly affected.

24. The ES must also include a reference list and be prepared by 'competent experts'. A statement to demonstrate the competence of the experts that prepared the EIA must be submitted as part of the ES.

25. The features or measures necessary to avoid, prevent, reduce and, if possible, offset significant adverse effects of a development are commonly referred to as 'mitigation' and can be delivered in a number of ways including through specific input to design, e.g. siting and arrangement. Such measures are normally referred to as 'inbuilt', 'inherent', 'embedded' or primary mitigation and are very typical in EIA. It is rare for this type of mitigation to require any specific condition to secure it.

26. Mitigation which is not inherent, embedded or inbuilt, but necessary and relied upon to mitigate significant adverse effects, will need to be adequately secured; otherwise it must not be relied upon for the purposes of screening or in the ES. It is typical for such measures to be secured by suitable conditions, e.g. timing/characteristics of specific works or preparation of specific post-consent plans (see Conditions chapter). This is also referred to as secondary mitigation.

27. You may also see reference to tertiary mitigation, this is defined by the Institute for Environmental Management and Assessment (IEMA) as "*Actions that would occur with or without input from the EIA feeding into the design process. These include actions that will be undertaken to meet other existing legislative requirements, or actions that are considered to be standard practices used to manage commonly occurring*

environmental effects." An example of tertiary mitigation is the emission control for an industrial stack to meet the requirements of the Industrial Emissions Directive (Directive 2010/75/EU).

Rochdale Envelope

28. Where a consent procedure involves more than one stage (ie a 'multi-stage consent'), it is typical for outline planning consents to be restricted by reference to parameters plans. This approach has been derived in case law (*R (oao Tew, Milne (No 1) & Garner) v Rochdale Metropolitan BC* [1999] QBD [6] and *R (oao Milne (No.2)) v Rochdale Metropolitan BC* [2000] EWHC 650 (Admin)) and is used to establish an envelope in which the detailed design and discharge of reserved matters can be agreed (sometimes known as 'the Rochdale Envelope'). These court judgments have been used to establish an assessment approach, based on defined parameters, for ESs prepared in support of outline planning applications. The key points to note are that:

    - the permission (whether in the nature of the application or achieved through 'masterplan' conditions) must create 'clearly defined parameters' within which the framework of development must take place; and
    - the accompanying ES must take account of the need for such evolution, within those parameters, and present the likely significant effects of such a flexible project, adopting a worst case approach assuming use of the maximum parameters/resulting in the worst case effect.

29. There can be substantial debate over the scope of a worst case assessment. Some assessments are based on a 'reasonable worst case' approach. This approach acknowledges that whilst a worst case approach may be hypothetically possible, it is not likely and therefore it may be appropriate to assess a more realistic or reasonable worst case scenario. Whichever approach has been adopted the Inspector should consider whether it is likely to be representative of the scope and magnitude of effects that could arise from the development authorised by the consent.

Relationship between EIA and Habitats Regulations Assessment

30. Unlike Habitats Regulations Assessment (HRA), EIA is a tool to aid decision-making, but is not a process designed to introduce an environmental "veto" power into the planning process. On that basis the 2017 EIA Regulations do not preclude a decision-maker from permitting development with significant environmental effects. However, they do require that such decisions are taken with full knowledge of the environmental consequences[7].

[6] The *Tew* judgment established that outline applications involving EIA development should acknowledge clearly defined parameters and ES should take account of these parameters. Parameters could be defined by the nature of the application (and the use of parameters plans), planning obligations and/or planning conditions.
[7] Regulation 3, The Town and Country Planning (Environmental Impact Assessment) Regulations 2017

31. Regulation 27 of the 2017 Regulations introduced the concept of a 'co-ordinated approach' between EIA and HRA processes. In practice this means that some information may be shared between both assessments and the Inspector should be aware of any conclusions drawn in the HRA when determining an application for EIA development. It may be possible for slightly different conclusions to be drawn about the impacts on certain features of designated sites owing to the different requirements of the different regulations, e.g. it might be possible to conclude a likely significant effect in EIA terms but no adverse effect on integrity in HRA terms.

Guidance

32. More information on EIA, including the approach typically adopted in response to the Rochdale cases discussed above, is available in the Environmental Impact Assessment section of the Planning Practice Guidance. For cases subject to transitional provisions, the guidance relevant to the 2011 Regulations can be accessed via the National Archives.

Procedures

EIA Screening

33. As highlighted above 'screening' is typically undertaken by the LPA or PCU before an application is made, however relevant appeals and applications, including those with EIA screening opinions adopted by local authorities, are routinely screened by PINS' Environmental Services Team (EST).

34. If at any time during the progress of an appeal/application the Inspector is concerned that the proposed development may be EIA development, then the Inspector may request that a screening direction is provided by the SoS (see Regulation 14). Before making this request, Inspectors should contact EST to discuss the relevant issues. Any screening direction required would be issued by EST on behalf of the SoS, not the Inspector.

35. It is not mandatory for an appellant/applicant to seek a screening opinion from the LPA and an appellant/applicant may instead elect that the proposal is 'EIA development' through the unilateral submission of an ES[8].

EIA Scoping

36. As highlighted above 'scoping' is typically undertaken by the LPA. In situations where a LPA doesn't adopt a Scoping Opinion within the required timeframe, an applicant may choose to request a scoping direction from the SoS (prepared by PCU). In rare cases, a scoping direction may be requested during an appeal. In this situation EST may provide a scoping direction on behalf of the SoS, following agreement with PCU

[8] Regulation 5(2)(a), The Town and Country Planning (Environmental Impact Assessment) Regulations 2017

and subject to the appellant having previously sought to obtain a Scoping Opinion from the local authority.

37. Like screening, scoping isn't mandatory. However, where an appellant/ applicant has received a Scoping Opinion, Regulation 14(3)(a) of the 2017 EIA Regulations requires the ES to be based on the most recent Scoping Opinion it receives. Recent case law on scoping (*R (oao Finch) v Surrey CC & others* [2020] EWHC 3566 (Admin)) suggests that where an appellant/applicant produces an ES that does not comply with a Scoping Opinion, this does not constitute a breach of the 2017 Regulations so long as the required environmental information is included in the ES and can be taken into account when the application is determined.

38. Occasionally, an applicant will request a joint EIA screening and Scoping Opinion, thereby using the EIA screening stage to also identify the scope of the assessment if an EIA is determined to be required. In these cases, if the decision-maker considers that the development is EIA development, it is required to provide a Scoping Opinion within a defined timeframe following the screening opinion decision.

Environmental Statements

39. Where it has been determined that the appeal/application is EIA development (see 'EIA Screening' above) either by a LPA or the SoS, or in the event that an appellant/applicant has chosen to elect that their development is EIA development, an ES summarising the findings of the EIA process must be produced and submitted to accompany the appeal or application.

40. If during the course of an appeal/application that is EIA development it becomes apparent or there is concern that the ES does not meet the requirements of Regulation 18 of the 2017 EIA Regulations, the Inspector has powers to request 'further information' through Regulation 25 of the EIA Regulations. However, before doing so, the Inspector should consult with the EST to ensure that the request is consistent with the requirements of the EIA Regulations and recent applicable case law. Where appropriate EST, acting as an officer of the SoS, will prepare and issue the formal request on behalf of the Inspector.

Dealing with matters that may arise at an inquiry

41. **Avoiding the appearance of prejudice** - If the SoS or the Inspectorate have pronounced on the need for (or adequacy of) an ES, it may be necessary to explain that this does not prejudice the Inspector's position or function. Without such an explanation, there can be an appearance of prejudice, which can work in opposite ways. First, the decision that EIA is needed may appear to pre-judge the issue of whether the development will harm the environment whereas it simply determines that the project is likely to have significant effects on the environment. Second, the decision that an ES is adequate might appear to endorse an ES in its entirety, even including any conclusion that the development should be given planning permission but all that is determined is the adequacy of the information provided against the requirements of

Regulation 18. It is for the inquiry and decision making process to determine whether the environmental information provided is “adequate” as a basis for granting or recommending the grant of planning permission or other forms of project consent. Explanation of this point may be necessary at the inquiry, but also desirable at the case management conference/pre-inquiry meeting. This point should also be considered when requesting further information to supplement the ES. An Inspector should avoid the appearance of having pre-judged adequacy as a basis for the decision or recommendation.

42. **Validity** - It may be alleged that the ES is inadequate and that the application and/or appeal is therefore invalid. If the Inspector is persuaded that further information is necessary, it should be requested in the normal way. The concern of the inquiry is with the adequacy of the EIA process as a whole, not just the ES in isolation and that encompasses the information collected at the inquiry itself.

43. **Provision of information -** A party to the inquiry or interested person may allege that another party or consultee has failed to provide information considered crucial to the preparation or content of the ES. The 2017 EIA Regulations only require public bodies to disclose (with exemptions for confidential information) information already in their possession. The preparation of an ES does not require such bodies to undertake research to meet requests for information made by the prospective appellant/applicant or third party seeking to challenge the content of an ES.

Reporting

44. When drafting reports or decisions, Inspectors must make it clear that they have taken into account the ES and any other environmental information produced in cases where EIA is undertaken, as part of a ‘reasoned conclusion’. A paragraph should record that:

    a) an ES was produced in accordance with the 2017 EIA Regulations, if applicable

    b) comments from statutory consultation bodies (that is, those required to be consulted by the terms of the Regulations) and any representations duly made by any particular person or organisation about the ES and the likely environmental effects of the proposed development; and

    c) further information under Regulation 25 and any other information.

45. These items constitute the environmental information which must be taken into account. The report or decision should state, explicitly, that this has been done in arriving at the recommendation or decision. This is a requirement if planning permission is to be granted. The decision or report should also state that all other environmental information submitted in connection with the appeal including that arising from questioning at a hearing or inquiry has also been taken into account as such material contributes to the totality of the environmental information before the decision maker.

46. The appellant/applicant, relevant planning authority and the public must not only be notified of the decision, but also provided with the following information:

a) information regarding the right to challenge the validity of the decision and the procedures for doing so; and

b) if the decision is to grant planning permission or subsequent consent –

i. the reasoned conclusion of the relevant planning authority, Inspector or the SoS, as the case may be, on the significant effects of the development on the environment, taking into account the results of the examination referred to in regulation 26(1)(a) and (b);

ii. any conditions to which the decision is subject which relate to the likely significant environmental effects of the development on the environment;

iii. a description of any features of the development and any measures envisaged in order to avoid, prevent, reduce and, if possible, offset, likely significant adverse effects on the environment; and

iv. any monitoring measures considered appropriate by the relevant planning authority, Inspector or the SoS, as the case may be; or

c) If the decision is to refuse planning permission or subsequent consent, the main reasons for the refusal.

47. The measures envisaged to avoid, prevent or reduce and, if possible, offset likely significant adverse effects form an essential part of the decision. The ES itself may not clearly highlight all measures as it may not incorporate the outcome of consultations undertaken by the LPA on the planning application post submission. Proposed mitigation measures may be in:-

- the project itself, as part of the application (embedded mitigation achieved through careful siting or design of buildings; layout of the site; choice of process; pollution control measures; or landscaping proposals);
- the [recommended] conditions or management measures (for example proposed landscaping, noise levels, restricted hours of working, opportunity for archaeological investigation, animal underpasses, balancing ponds to regulate run-off, direction of working and progressive restoration of minerals and waste sites);
- a planning obligation to incorporate mitigation measures (to deal with traffic during the construction phase of a project or provide a replacement habitat by way of compensation) which may be incorporated into the construction phase or deferred to the operational/ decommissioning phase. These could include provisions for monitoring of emissions and corrective action where necessary. Such deferred

mitigation may be attained through the operation of other statutory control regimes (see below); and

- the requirement that a particular aspect be covered by another control regime, such as the Environmental Permitting regime. The Inspector may rely on the permitting regime to control effects however, this does not preclude the need to examine whether the development is an acceptable use of the land.

48. Inspectors should be aware of the mitigation hierarchy. Design of a project should avoid or prevent an impact or, if it cannot be avoided, minimise it. Once the source of an impact has been minimised the next step is to reduce the impact on the environment by abatement on-site, or where this is not possible, by abatement at the receptor.

49. If an unwanted effect remains and cannot be avoided the next option will be to consider if there are ways of repairing the damage after it has occurred or, if this is not possible, compensating for it by replacing what is lost. Inspectors should be aware of the need to consider policy advice on whether such forms of compensation are either related or unrelated to the project in question.

50. Inspectors are advised to encourage the main parties to take a comprehensive view of mitigation in the presentation of their cases; for instance at the case management conference, they may ask that planning witnesses ensure that they include a section in their evidence summarising their view on mitigation measures. Inspectors may also wish to check the list of mitigation measures with the parties (perhaps in association with a session discussing possible conditions and obligations) and/or asking the advocates for the main parties to address the matter in their closing submissions.

51. It should be borne in mind that there are limitations to the efficacy of mitigating conditions in remedying deficiencies in the EIA process. If an Inspector finds that the parties suggest a number of conditions requiring submission of schemes or surveys for later approval this may be an indication that the EIA process has not been sufficiently rigorous. This may arise particularly in the case of a project involving only an outline planning application. In (*R (oao Hardy) v- Cornwall CC* [2000] QBD) an ES was submitted without survey data for bats although the site was known to favour them and the planning authority conditioned surveys to be carried out prior to construction. The judge ruled that field data was required to ensure that relevant information relating to a potentially significant effect had been taken into account prior to granting permission.

52. A clear distinction has to be drawn, for the purpose of granting or recommending the grant of permission, between mitigation measures capable of implementation by the appellant/applicant, usually by way of planning conditions or obligations and those requiring implementation by others. The latter may include off-site measures such as traffic management measures or the provision of new infrastructure.

53. A paragraph or section on mitigation measures should therefore be included towards the end of every decision or report on a case in which EIA has been carried out - with the exception of decisions in which the appeal is dismissed.

54. Conditions requiring implementation of measures specified in the ES should not be employed even if agreed between the appellant/applicant and the LPA. Not only are they unlikely to meet the tests of precision or enforceability but also the project consent must be capable of being read as a free-standing and complete document by those who may subsequently rely upon it.

55. Monitoring requirements identified in the ES may provide for adjustments or corrective actions to be taken during the construction or operational phases of the project. These may have to be secured in the decision by way of planning conditions or obligations. The Inspector should seek the views of the parties on such mechanisms.

56. If representations are made at an inquiry or hearing that EIA should be carried out, and they are not accepted by the Inspector, it is important to address them in the report or decision. This is necessary to guard against a High Court challenge to the effect that the Inspector or SoS failed to consider the matter.

EIA and Permitted Development

57. Where development is determined to be EIA development, permitted development rights do not apply, with the effect that Schedule 1 developments always require the submission of a planning application, accompanied by an ES. Schedule 2 developments do not constitute permitted development unless a screening opinion/direction has been given to the effect that EIA is not required. Where a positive screening opinion or direction has been issued a planning application, accompanied by an ES, must be submitted.

Special Cases

58. Certain projects are excluded from these provisions including projects for the purposes of civil emergencies, national defence, or subject to other EIA Regulations.

Enforcement Appeals and Review of Minerals Permissions (ROMP)

59. Please note that there are separate provisions within the 2017 regulations relating to enforcement and minerals casework.

60. The need for EIA may arise in enforcement cases which come before the SoS. In the case of appeals involving unauthorised EIA development the SoS cannot grant permission unless the environmental information has been taken into account. If the LPA decides to take enforcement action in relation to a Schedule 1 or 2 project, they should adopt a screening opinion. A Regulation 37 Notice must be served on the developer or land owner/occupier, including a copy of the screening opinion and statement of reasons, requiring an appellant to submit (if ground (a) is to be pleaded) two copies of an ES to the SoS. Copies of the Regulation 37 notice must be sent to the SoS, the consultation bodies and any other parties likely to be affected by the notice.

61. The SoS (in effect the Inspectorate) may also consider whether an enforcement notice appeal relates to EIA development and issue a screening direction requiring the

submission of an ES to accompany a ground (a) appeal or deemed application for planning permission. Failure to provide an ES means that the ground (a) appeal or deemed application will lapse at the end of any period specified in a screening direction. If the enforcement notice appeal is linked with a Section 78 appeal and an ES accompanies the latter then this will be regarded as supporting both appeals and a separate ES is not required. The same publicity requirements extend to enforcement appeals in respect of EIA development as for planning applications/ appeals.

62. An appellant may challenge the description of development alleged in an enforcement notice and whether it constitutes EIA development. In these circumstances it may be helpful for the Inspector to begin consideration of an appeal, in order to avoid a situation where an appellant maintains that it is unable to provide an ES on the basis that the EIA development is not occurring and is therefore unable to be assessed. In this situation if the Inspector is minded to allow the appeal, the appeal should be suspended until the ES has been provided. Where the Inspector elects to dismiss the appeal on other grounds, they are able to conclude that had they been minded to allow the appeal, they would have required an ES. It may also be possible for the Inspector to amend a notice such that the permitted development is non-EIA development.

63. The need or otherwise for EIA may arise in Lawful Development Certificate cases, for example in relation to development by statutory undertakers. If planning permission is not required because it is a form of development to be considered by a body other than the LPA or SoS exercising planning functions it may nevertheless require EIA. The project may not normally require planning permission because of a GPDO permission. However, if EIA is required for such a project then it loses its “permitted development” status and requires planning permission in the normal way.

The role of the Environmental Services Team (EST)

EIA screening

Appeals screening is undertaken by EST with delegated authority from the SoS. Where there is a screening opinion issued by the LPA, EST revisit the determination. Where there is no screening opinion at all EST conduct a separate screening review. This review is carried out for a number of reasons, eg the baseline conditions may have changed; and as there may be potential for new cumulative effects with other development that was not previously within the planning system and therefore not considered in the assessment of cumulative effects.

If EST is content that the LPA's screening opinion is robust, EST will not issue a formal screening direction but will place the completed screening matrix on the Horizon file for the Inspector's consideration. If, as is often the case, there is no screening opinion from the LPA or EST, as a result of the review, disagrees with the planning authority's screening opinion, then EST will issue a formal letter to the appellant and the relevant LPA. The letter will include the SoS's reasons and constitutes the formal screening direction on behalf of the SoS. The screening matrix is not routinely provided to appellants but can be (and is) made available on request and on occasion has been submitted as evidence to the Courts in s288 challenges.

In the event that the screening direction is positive then the appellant/applicant will be asked to undertake EIA and provide an ES, before the appeal/ application can proceed to an event. Where an appellant/applicant has been notified of the need to undertake EIA and provide an ES but does not submit one the Inspector can only determine the appeal / application by refusing permission. An ES can take a period of months to over a year to produce dependent on the scale and nature of the development and any seasonally constrained survey requirements.

Environmental Statement Reviews

In order to support Inspectors, EST will routinely review an ES accompanying an appeal/application to ensure it is adequate and in accordance with Regulation 18 of the 2017 EIA Regulations. In the event that an ES is found to be deficient, a request for 'further information' will be made by EST in accordance with Regulation 25. In carrying out the ES review, EST will complete a standard ES review matrix and will bring to the Inspector's attention pertinent issues, including the need to request further information, where relevant.

Where an appellant is required to provide further information, the Inspector may not allow an appeal until the further information has been provided and examined. Where information is submitted for cases determined by hearing or inquiry, this information may be submitted direct to the inquiry, although the Inspectorate advocates publicising this material as a matter of good practice.

Where information is provided in respect of an appeal determined by written representations, the further information must be advertised in public for a minimum period of 30 days before an appeal may be allowed.

In certain circumstances, it may be clear to an Inspector that an appeal may be dismissed on grounds unrelated to the EIA. In this case, an Inspector may elect to dismiss an appeal, stating in their decision that had they been minded to allow the appeal, the further information would have been required. This prevents delay to the appeal process and also reduces unnecessary expense for appellants.

Annex B

Relevant Case Law

Note on Court Cases

This section contains a selection of key judgements relevant to EIA both in the European Court of Justice (ECJ) and in the UK courts and is not exhaustive. EIA case law is constantly evolving. The full references of the cases mentioned under the headings below are listed at the end of this Annex.

The Need for EIA

In Berkeley, the House of Lords issued a landmark ruling to the effect that disregard for the EIA Regulations and the Directive will be fatal to a permission granted on a project requiring EIA. Although the earlier decision of the ECJ in the Dortmund Power Station case had established that EIA by any other name would suffice it was still necessary for there to be an identifiable process akin to EIA itself. The argument in this case that the developer's ES could be found by a trawl through the evidence presented to the inquiry; statements of evidence by other parties and background documents, a process described as a "paper chase", was rejected. The ES contemplated by the directive was a single and accessible compilation (including a non-technical summary) produced at the start of the application process. Reliance on the concept of "substantial compliance", by virtue of the process of scrutiny provided by a public inquiry, was not sufficient to give effect to the requirements of the Directive for full, open and rational consideration of the environmental effects of a project before consent is given by a competent authority. The Courts are, accordingly, obliged to quash planning permissions for EIA development granted without EIA. The exercise of the Court's discretion not to quash would only appear to apply in situations amounting to only a trivial breach of the regulations. The implication for the Inspectorate is that a strict approach must be taken to the requirements of the regulations and the Directive.

In the Crystal Palace Ruling (*R (oao Barker) v Bromley LBC* [2006] UKHL 52) outline planning permission was granted without an EIA and a reserved matters application was approved the following year. A challenge that EIA should be done at reserved matters stage was dismissed. However, the ECJ ruled that the UK Government had failed to implement the Directive in "multi-stage" development consents. The outcome is that screening is required at the reserved matters stage if significant effects are only identifiable at this stage or if there are changes in the environment or scheme proposals.

In ADT Auctions it was held that the then Secretary of State for the Environment Transport and the Regions (SSETR) could call for an EIA at any stage in the determination process in order to give effect to the requirements of the directive. This case involved a re-opened inquiry into a case where, initially, it was not regarded as requiring the submission of an ES. This view was changed after an inquiry. An ES was presented to the re-opened inquiry. After considering the Inspector's report the SSETR dismissed the appeal and the appellant's subsequent legal challenge failed. In another case involving Lady Berkeley it was held that an Inspector was not obliged to refer a case to the SoS for him to decide whether, exceptionally, he would wish to exercise his discretion under Regulation 4(8) and require the submission of an ES in relation to development below the thresholds or outside the criteria in the EIA Regulations for Schedule 2 projects.

In Kathro and others the court held that challenges to the issue of a screening opinion by a LPA should not normally be addressed to the Courts in the first instance as the regulations allowed for requests to be made to the SoS or Welsh Assembly for issue of a screening direction which could override any screening opinion. It was also a requirement that any challenge should be made promptly as confirmed in the Catt case. The Lebus and Younger Homes cases established that there should be a documentary record of a screening opinion so as to avoid the necessity for a "paper chase" to establish whether the requirements of the Regulations relating to screening had been complied with. The Anderson case reaffirmed that the screening opinion could be briefly expressed and was not required to be exhaustive. However, the Hereford Waste Watchers Ltd case confirmed that where it was not clear to the courts that a reasoned process of consideration had been undertaken then the Courts would be prepared to quash decisions and require proper consideration of the requirements of the Regulations.

In the Westminster, Preece and Adamson case it was held that a decision by the London Mayor not to undertake EIA in respect of the introduction of the Congestion Charge did not represent a breach of the EIA Regulations or a failure to comply with the Directive. The scheme for a Congestion Charge did not represent a "project" for the purposes of both the Directive and the Regulations. Schemes of this nature would now be considered in the light of the SEA Directive and domestic legislation relating thereto.

In Baker v Bath and North East Somerset Council, the question of changes and extensions was considered. It was determined that when screening changes and extensions the screening decision should consider the development as modified as a whole and that courts should 'take all the general or particular measures necessary' to ensure that the fundamental objectives of the EIA directive are not undermined in practice. Screening should consider the original project and the extension when considering whether EIA is required.

Adequacy of EIA

In Tew and Milne (or Rochdale 1 and 2) and Hardy (the Cornwall Case), the Courts considered the relationship of EIA procedures to outline planning applications for large scale projects. An application for planning permission (in these cases a Business Park) must adequately describe the development proposed. It was not necessary to be overly precise and the competent authority had discretion to decide whether an outline application was sufficient. The decision to grant permission had to be taken in "full knowledge" of the likely significant effects on the environment. It was not sufficient that information could be submitted at a later stage as by then it would be too late to go back on the principle of development granted by the outline permission. Nor, at a later stage, would the public have the same opportunities to be consulted and so contribute to the provision of environmental information necessary before full planning permission could be given. In the second case, after a revised application and new environmental information had been submitted it was held that there was "sufficient" information available to reach a reasoned judgement as to significant environmental effects.

In Hardy the LPA had reached a conclusion that no significant impact upon certain nature conservation interests (bats) would occur if permission were to be granted for the project. In so doing, however, they had imposed conditions requiring further survey work to be undertaken and reported by the developer. As a result the decision was quashed as being irrational because the relevant information about likely significant effects had not been taken into account. The decision of the LPA was further criticised as not having included an attempt to inform the public as to the main reasons and considerations on

which the decision was based. These decisions are useful in that they lay down some markers for the decision maker in assessing the adequacy of the project description, the content of an ES and the process of decision making.

In Portland the UK Courts considered that the requirement was for EIA to be carried out only in respect of a current project and not future aspirations or ambitions. This raises the point as to whether future extensions to a project or the likelihood of consequential projects should form part of the initial EIA. To this extent there appears to be a slight divergence between the views of the ECJ and domestic courts. The point was considered again in Candlish where it was held that where there was evidence of the possibility of a wider project or cumulative impacts of several small projects then this had to be looked at in a practical way and as a matter of real risk not a matter of theory. The High Court ruling for Save Britain's Heritage (July 2013) concluded that "If it can be seen that the smaller project under consideration, although harmless in itself, will lead to a larger development which may have significant effects on the environment it is necessary to take the effects of the larger development into account so as to avoid a situation in which by a series of small developments which fall under the radar the larger development comes about without an opportunity to subject it to EIA".

The case of Maureen Smith held that information presented to an inquiry could supplement the material in the project ES and an Inspector was entitled to take it into account as relevant “environmental information”. This point was considered again in (1) Blewett and (2) Atkinson where it was held that it was an unrealistic counsel of perfection to expect that an ES should always contain “full information” about the environmental impact of a project. Through consultation and the inquiry process there are opportunities for deficiencies in information to be addressed before a decision is taken on the project. In the Belize case the Privy Council held that the fact that the EIA process had not covered every topic did not necessarily invalidate it or require a finding that it did not substantially comply with the statute and regulations (adopted in Belize) to the extent that it was inadequate.

In Humber Sea Terminal Ltd it was held that the absence of any proposed compensatory measures in an ES did not render it invalid. On the particular facts the mitigation measures proposed were extensive and addressed the significant impacts of the project.

In Finch, a dispute arose regarding the scope of the direct and indirect Greenhouse Gas emissions assessment in an ES for an oil well in Surrey and whether it should consider emissions from the use of end products. The judge concluded that the EIA was required to assess the effects of the ‘EIA development’ only i.e. the extraction of oil and not the downstream effects. However, a subsequent Court of Appeal ruling determined that downstream effects could be considered as indirect effects of the project, although it was for the decision maker to determine the information to be taken into account when making a decision.

Meaning of "Development Consent"

Art 1(2) of the Directive defines "development consent" as "…the decision of the competent authority or authorities which entitles the developer to proceed with the project….". In the Wensley Quarries case, the House of Lords held that this included the determination of conditions imposed by the LPA following the review of an old mining permission [ROMP cases] under the Planning and Compensation Act 1991. The determination of conditions was quashed; they could not be determined without an EIA. The Court of Appeal in the Sherburn Quarry case held that an individual could (under the

doctrine of “direct effect”) require the courts to hold invalid a deemed grant of permission in ROMP cases because of failure to consider whether there was a need for EIA. The 2017 EIA Regulations incorporate the process of EIA into the consideration of old mining permission cases where a determination is sought as to what conditions should apply. The deemed consent provisions will not apply unless either the minerals planning authority or SoS has issued a screening opinion that EIA is not required.

In the case of Prokopp the courts were asked to determine that a decision not to take enforcement action constituted a “development consent”. The Courts rejected this argument on the basis that EIA was required in the case of applications for development consent which resulted in assessment prior to approval. On the particular facts it had not been suggested that breach of project consent conditions had produced significant environmental effects. Had this been the case enforcement action could have been taken and the Regulations could have been engaged.

In Edwards and Horner it was held that changes to a fuel source at a cement kiln did not amount to a “project” for the purposes of engaging the requirements of the Directive or Regulations. The concerns with regard to environmental effects were, on the particular facts, a matter for the permitting regime.

Interpretation of Annex 2/Schedule 2 projects

In Kraaijeveld (the Dutch Dykes case), a developer argued that the project was of a type not listed in Annex I or II of the EIA Directive and therefore an EIA was not required. First, although point 10(e) of the Annex refers to "canalization and flood-relief works", it should be interpreted as encompassing all works for retaining water and preventing floods; it thus included works on a dyke running alongside a waterway. The underlying principle is that any provision is to be interpreted by reference to the purpose and general scheme of the Directive. "The wording of the Directive indicates that it has a wide scope and a broad purpose. That observation alone should suffice to interpret point 10(e) of Annex II to the directive as encompassing all works for retaining water and preventing floods.".

On the interpretation of modifications to Annex I projects, Dortmund Power Station established that the construction of a new block with a heat output of over 300 megawatts at a thermal power station was NOT a modification to an Annex I project under para 12 of Annex II of the 1985 Directive. This was because the project itself constituted an Annex I project, so EIA was mandatory.

A number of cases considered the issue of whether multiple small applications could, when considered cumulatively, exceed the thresholds in Annex II and require EIA. This is known as project splitting (or “salami slicing”), in deciding whether development was likely to have significant effects on the environment, a particular planning application should not be considered in isolation if, in reality, it is properly to be regarded as an integral part of an inevitably more substantial development (Swale; Commission v. Ireland [1999], paragraphs, 76, 82; Ecologistas en Accion-CODA [2008](and others))

The case of Goodman considered the interpretation of the term “urban development projects” in Schedule 2. A warehouse or depot could be regarded as an “infrastructure” development falling within Schedule 2, paragraph 10.

The standing of objectors

In Moses, the Courts had to consider a number of issues relating to cumulative impact, the standing of an objector and the interests of good administration. Permission had been granted for an extension to the runway at East Midlands by 610m in 1993. An EIA was not requested under the 1988 Regulations. In 1997 a further proposal for a 130m extension was submitted. An EIA was requested and this was submitted covering not only the current project but also the cumulative impact of both projects. Permission was granted. This decision was challenged by a local resident on the grounds that the earlier project should have been the subject of EIA and the later ES covering cumulative impact was insufficient. The Court held that because of delay (almost 5 years) it was too late to re-open consideration of the 1993 permission and it would not be in the interests of good administration to allow the later project to be the vehicle for such challenge particularly as it had itself been subject to EIA (including issues of cumulative impact). In the intervening period since lodging the action the objector had moved out of the district. The Court concluded in such circumstances that sufficient standing had not been retained.

Case references: European Court of Justice

1. *Case C-392/96 Commission of the European Communities v Ireland* [1999] (**Project thresholds criteria**)
2. *Case C-431/92 Commission of the European Communities v Federal Republic of Germany* [1995] (**Dortmund Power Station**)
3. *Case C-72/95 Aanermersbedrijf P K, Kraaijeveld B V and others v Gedeputeerde Staten van Zuid-Holland* [1996] (**Dutch Dykes**)
4. *Case C-142/07 Ecologistas en Accion-CODA v Ayuntamiento de Madrid* [2008]

Case References: UK Courts

5. *ADT Auctions Ltd v SSETR and Hart DC* [2000] QBD.
6. *Atkinson v SoS for Transport* [2006] EWHC 995 (Admin)
7. *Belize Alliance of Conservation Non-Governmental Organisations v Department of the Environment* [2004] UKPC 6
8. *Berkeley v SSETR & others* [2000] HoL
9. *BT PLC & Bloomsbury Land Investments v Gloucester CC* [2001] EWHC Admin 1001
10. *Edwards v Environment Agency & others* [2006] EWCA civ 877
11. *Hereford Waste Watchers Ltd v Hereford DC* [2005] EWHC 191 (Admin)
12. *Humber Sea Terminal Ltd v SoS for Transport & Associated British Ports Ltd* [2005] EWHC 1289 (Admin)

13. *Lady Berkeley v SSETR, Berkeley Homes Ltd & Richmond upon Thames BC* [2001] EWCA civ 1012
14. *Smith v SSETR & others* [2003] EWCA civ 262
15. *R (oao Anderson & others) v York CC* [2005] EWHC 1531 (Admin)
16. *R (oao Baker) v Bath and North East Somerset Council & Hinton Organics (Wessex) Ltd & SoS CLG* [2009] EWHC 595 (Admin)
17. *R (oao Barker) v Bromley LBC* [2000] QBD
18. *R (oao Barker) v Bromley LBC* [2006] UKHL 52. (**the Crystal Palace ruling**)
19. *R (oao Blewett) v Derbyshire CC* [2003] EWHC 2775 (Admin)
20. *R (oao Brown) v North Yorkshire CC* [1999] HoL (**Wensley Quarries**).
21. *R (oao Candlish) v Hastings BC and Hastings & Bexhill Renaissance Ltd* [2005] EWHC 1539 (Admin)
22. *R (oao Finch) v Surrey CC & others* [2020] EWHC 3566 (Admin)
23. *R (oao Finch) v Surrey CC* [2022] EWCA civ 187
24. *R (oao Goodman & Hedges) v Lewisham LBC & The Big Yellow Property Company Ltd* [2003] EWCA civ 140
25. *R (oao Hardy) v Cornwall CC* [2000] QBD (**the Cornwall case**)
26. R (oao Horner) v Lancashire CC & Castle Cement Ltd [2005] EWHC 2273 (Admin)
27. *R (oao Huddleston) v Durham CC* [2000] CoA (**Sherburn Quarry**).
28. *R (oao John Catt) v Brighton and Hove CC & Brighton and Hove Albion Football Club* [2006] EWHC 1337 (Admin)
29. *R (oao Kathro, Evans, Evans, Grant and Llantwit Fardre Community Council) v Rhondda Cynon Taff CBC* [2001] EWHC Admin 527
30. *R (oao Lebus & others) v South Cambridgeshire DC [*2002] EWHC 2009 (Admin)
31. *R (oao Milne (No.2)) v Rochdale Metropolitan BC* [2000] EWHC 650 (Admin) (**Milne/Rochdale 2**)
32. *R (oao Moses (No 2)) v North West Leicestershire DC & East Midlands International Airport Ltd* [2000] CoA
33. *R (oao Portland Port Ltd & Portland Harbour Ltd) v Weymouth and Portland BC* [2001] EWHC Admin 1171
34. *R (oao Prokopp) v London Underground Ltd & Strategic Rail Authority* [2003] EWCA civ 961
35. *R (oao RSPB) v Swale Borough Council* [1990] QBD

36. *R (oao Save Britain's Heritage) v SoS CLG & Sefton Metropolitan BC* [2013] EWHC 2268 (Admin)

37. *R (oao Tew, Milne (No 1) & Garner) v Rochdale Metropolitan BC* [1999] QBD (**Tew/Rochdale 1**)
38. *R (oao the Mayor and Citizens of the City of Westminster, Cathy Preece & Gareth Anderson) v The Mayor of London* [2002] EWHC 2440 (Admin)
39. *Younger Homes (Northern) Ltd v FSS & Calderdale MBC* [2003] EWHC 3058 (Admin)
40. *Younger Homes (Northern) Ltd v FSS & Calderdale MBC* [2004] EWCA civ 1060

The Planning Inspectorate

Environmental Permitting

Not yet updated to reflect December 2023 Framework (NPPF)

What's new since the last version

Changes highlighted in yellow made 2 March 2023:

- EA Replacement of most of OPRA for EP charging from 1 August 2018; introduction of EP supplementary charges
- EA introduction of Performance Based Regulation (PBR) from 14 January 2019
- Publication of the Clean Air Strategy and 'Brexit' implications for BAT
- Paragraph 2.34 - Updated to reflect the end of the Brexit transition period from 1 Jan 2021
- Reference to updated Defra/WG Core Guidance – March 2020
- Updated guidance on EPR Permit conditions at paragraph 6.24
- Updates to the 'future of Environmental Permitting at paragraphs 2.8-2.10

Contents

Introduction

1. Inspectors make their decisions on the basis of the evidence before them. Consequently, they may, where justified by the evidence, depart from the advice given in this training material. The applicable legislation and statutory guidance will still be relevant in all cases.

2. This chapter is concerned with Environmental Permitting casework only. Related environmental licensing specialist casework under environmental legislation is currently not covered in this Chapter,but is likely to be included in future editions. Appeals under the planning regime and applications under the national infrastructure regime are addressed in the Waste Planning ITM and Water Related Casework CL&PG. In simple terms planning is concerned with the suitability of use of the land for a particular development proposal, whereas permitting/licensing is concerned with the operation of the facility and its potential effect on the environment and human health.

3. This training material applies to casework in England and Wales.

What is Environmental Permitting?

4. Certain types of facility have the potential to harm the environment or human health unless they are controlled. The Environmental Permitting Regime (EPR) requires operators of these facilities to obtain permits and to register others as exempt in order to provide for monitoring and supervision by the appropriate regulator. The aim of the EPR regime is to:

    - Protect the environment in order to achieve statutory and Government policy targets to be met;
    - Deliver permitting and compliance with permits and environmental targets effectively and efficiently to provide maximum clarity and minimise the administrative burden on both the operators and regulators;
    - Encourage regulators to promote best practice in the operation of permitted facilities; and
    - Continue to fully implement relevant European Legislation (Directives, Regulations)

Scope of the regime

5. The EP regime covers those facilities previously regulated under the Pollution Prevention and Control Regulations 2000[1]; the Waste Management Licensing and exemption schemes[2]; some parts of the Water Resources Act 1991[3]; the Radioactive Substances Act 1993; the Groundwater Regulations 2009[4]. The EP regime covers England and Wales. It also applies to the adjacent sea as far as the seaward boundary of the territorial sea[5].

[1] SI 2000/1973
[2] Part 2 of the Environmental Protection Act 1990 and the Waste Management Licensing Regulations 1994, SI 1994/1056.
[3] In relation to discharge consenting and flood defence consents.
[4] SI 2009/2982.
[5] 12 nautical miles (13.8 miles) from the baseline (usually the mean low water mark).

Activities covered under the regime

6. The EP regulations specify the facilities that require an environmental permit and those that are exempt from requiring a permit (see section 2.21). The facilities that require a permit are known as 'regulated facilities'. The ten classes of regulated facility are:

    - **an installation** (regulation 8 (1)(a)) – consists of any 'stationary technical unit' where activities listed in Schedule 1 to the Regulations, and any directly associated activities are carried on;
    - **mobile plant** (regulation 8(1)(b)) – plant designed to move or be moved and used to carry on either one of the Schedule 1 activities or a waste operation;
    - **a waste operation** (regulation 8(1)(c)) – defined as a waste recovery or disposal operation;
    - **a mining waste operation** (regulation 8(1)(d)) – the management of extractive waste, whether or not involving a mining waste facility[6];
    - **a radioactive substances activity** (regulation 8(1)(e)) – involving the keeping and use of radioactive material (including mobile radioactive apparatus) or the accumulation and disposal of radioactive waste;
    - **a water discharge activity** (regulation 8(1)(f)) – includes the discharge of any poisonous, noxious or polluting substances, waste, trade effluent or sewage effluent to controlled waters; the discharge from land through a pipe into the sea of trade effluent or sewage effluent; the cutting or uprooting of large amounts of vegetation in inland freshwaters and failure to take reasonable steps to remove the vegetation from the waters; or the operation of a highway drain or discharge of trade or sewage effluent into lakes or ponds which are not inland freshwaters, where a notice has taken effect;
    - **a groundwater activity** (regulation 8(1)(g)) – includes the discharge of a pollutant that will or may lead to a direct or indirect input to groundwater; any other discharge that may lead to direct or indirect input of a pollutant to groundwater; an activity subject to a notice under schedule 22 has taken effect; or an activity, as a part of the operation of a 'regulated facility' that may lead to any discharge mentioned above;
    - **a small waste incineration plant** (regulation 8(1)(h)) – all waste incineration plants or co-incineration plants with a capacity less than thresholds listed in Chapter III of the Industrial Emissions Directive (IED) and subject to Schedule 13 of EPR2016;
    - **a solvent emission activity** (regulation 8(1)(i)) – an activity listed in Annex VII of the IED[7] and subject to Schedule 8 of EPR 2016;
    - **a flood risk activity** (regulation 8(1)(j)) – an activity listed in Schedule 25 of EPR 2016[8].

[6] Does not include activities in Article 2(2)(c) of the Mining Waste Directive 2004/21/EC.
[7] Directive 2010/75/EU
[8] Previously regulated as Flood Defence Consents, existing consents automatically transferred to Environmental Permits on 6 April 2016.

Policy, Legislation and Guidance

Integrated Pollution Control Regime: Brief history of the EPR

7. First introduced by the UK Environmental Protection Act 1990, the concept of Integrated Pollution Control (IPC) ensures that all emissions to media (i.e. water, air, land) are considered simultaneously and not in isolation as, for example, the reduction of pollution in one environmental medium can have an effect on another.

8. Under IPC, Best Available Techniques Not Entailing Excessive Cost (BATNEEC) is required to minimise pollution of the environment as a whole, using the most effective techniques for an operation at the appropriate scale and commercial availability, where the benefits gained by using the technique should bear a justifiable relationship to the cost (unless emissions are very toxic).

9. The IPC concept was enshrined in the Integrated Pollution Prevention and Control (IPPC) Directive[9] which came into force in 1996. Integrated permits are required for certain listed activities such as the energy and chemical industries, waste management, animal rendering, various food processes and intensive poultry and pig-rearing. This required that installations be regulated in an integrated way, controlling emissions to air and water and the management of waste. IPPC also requires that other environmental issues are taken into account, such as energy efficiency, consumption of raw materials, prevention of accidents and restoration of the site. This process encourages industry and regulators to consider the whole process and adopt 'cleaner technology' rather than just adding 'end-of-pipe' controls.

10. The IPPC Directive was transposed into UK Law mainly by the Pollution Prevention and Control Act 1999 and the Pollution Prevention and Control (England and Wales) Regulations 2000 (PPCR)[10]. The concept of Best Available Techniques (BAT) was applied to the operation of installations covered by IPPC, a similar requirement to BATNEEC.

11. In 2007 the PPCR was expanded and replaced by the Environmental Permitting (England and Wales) Regulations 2007 (EPR2007)[11]. The EPR2007 introduced a streamlined permitting and compliance regime covering waste management licensing (WML) and PPCR.

12. The PPC regime was further expanded in 2010, through the Environmental Permitting (England and Wales) Regulations 2010 (EPR2010)[12], which largely replaced the EPR2007. Since 2010 the EPR regime has expanded further to include the classes of regulated facility described in paragraph 1.6 above, whilst incorporating further environmental Directive provisions[13].

13. On 1 January 2017 a consolidated and updated version of the EPR came into force[14], which revoked (almost all of) the 2007, 2010 and 15 amendment regulations and made some minor amendments. These are the current EP regulations (EPR2016).

[9] Directive 96/61/EC
[10] SI 2000/1973.
[11] SI 2007/3538.
[12] SI 2010/676.
[13] Primarily including the Industrial Emissions Directive 2010/75/EU (IED), which recasts the IPPC and 6 other environmental directives, following extensive review of the existing policy.
[14] SI 2016/1174.

Future of the EPR

14. Abstraction / Impoundment regime - Under the provisions of the Water Act 2014, there are plans to expand the EPR regime in the future by the inclusion of the water abstraction and impoundment regime, currently regulated under the Water Resources Act 1991. The Water Abstraction Plan provides a timeline of implementation. It is expected that the abstraction and impoundment licensing will be brought within the EPR regime in 2023 – a consultation on changes to the EPR regime to enable the transfer of abstraction and impoundment licensing ended on 22 December 2021. A government response is awaited.

15. Waste Carriers, Brokers and Dealers regime – Currently regulated under the Control of Pollution (Amendment) Act 1989 and the Waste (England and Wales) Regulations 2011, the Review into Serious and Organised Crime in the Waste Sector in 2018 recommended that registration and duty of care requirements for carriers, brokers and dealers should be reformed to ensure controlled waste is moved or traded by authorised persons in a safe manner. To further the commitment to reform the waste sector from the Resources and Waste Strategy, a consultation which ended on 15 April 2022 sought view on a move from registration into the EPR permit-based regime; what activities should be covered by permits and what should be exemptions or not included; and the level of technical competence required and how it can be demonstrated.

16. Circular Economy[15] - In December 2015 the European Commission (EC) adopted a Circular Economy package[16], emphasising the use of waste as a resource, which means a greatly increased attention to economic benefits of waste management, rather than relying solely on original principles of environmental protection and human health.

17. As well as creating new opportunities for growth, a more circular economy will:

    - reduce waste
    - drive greater resource productivity
    - deliver a more competitive UK economy.
    - position the UK to better address emerging resource security/scarcity issues in the future.
    - help reduce the environmental impacts of our production and consumption in both the UK and abroad

[15] Closing the loop – An EU action plan for the Circular Economy [EC, December 2015]
[16] Includes revised legislative proposals on waste detailed in the factsheet 'Clear Targets and Tools for Better Waste Management' [EC, December 2015]

Schedule 1 activities, Installations and Mobile Plant

18. The regulator for these classes of facility are defined in regulation 32 of EPR2016. For the industrial and waste management processes the activities are described in schedule 1, based on risk and are as follows:

- **Part A(1)** – high risk activities, regulated by the Environment Agency (EA)/Natural Resources Wales (NRW) (sometimes known as IPPC activities);
- **Part A(2)** – medium risk activities, regulated by the Local Authority (sometimes known as LA-IPPC activities).
- **Part B** - low risk activities, regulated by the Local Authority (sometimes known as LA-PC activities, concerned with air emissions only)[17].

19. The full list of the types of activities regulated by the EA/NRW and the Local Authority is below:

i) The Environment Agency/Natural Resources Wales regulates:

- Part A(1) installations
- waste mobile plant
- waste operations, including those carried on at a Part B installation or by Part B mobile plant (unless the waste operation is a Part B activity)
- mining waste operations, including any carried on at a Part B installation
- radioactive substances activities
- water discharge activities, including those carried on at a Part B installation
- groundwater activities, including those carried on at a Part B installation.
- flood risk activities described under schedule 25 of EPR2016.

ii) The relevant Local Authority regulates:

- Part A(2) installations including any waste operations, water discharge activities or groundwater activities carried on as part of the installation or mobile plant

[17] Previously regulated under Part 1 of the EPA1990 Air Pollution Control Regime.

- Part B installations and Part B mobile plant (except as set out above)
- Small waste incineration plants
- Solvent emission activities.

Best Available Technology (BAT)

20. An overarching principal in EPR is that all activities must use BAT principles to prevent or minimise emissions. BAT is defined in Article 3 of the IED and in basic terms is "use of the available techniques which are the best for preventing or minimising emissions and impacts on the environment". 'Techniques' include both the technology used and the way an installation is designed, built, maintained, operated and decommissioned. The permit conditions will tell the operator what BAT they must use or they may set emission limit values (ELV) or other environmental outcomes, based on BAT. If the permit says the operator must follow BAT or 'appropriate measures' to achieve an outcome or ELV, they will need to check the BAT guidance for that activity. The operator may have to decide which BAT to use if the permit doesn't tell them. They may also need to take additional measures to meet the conditions in the permit.

21. The European Commission (EC) produces best available technique reference documents or BREF notes. They contain BAT for installations. For example, there is a BREF for intensive agriculture which contains BAT for housing for pig rearing units and a BREF for the textiles industry which contains BAT for selecting materials for textile manufacture.

22. The EC is updating BREF notes and the updated versions also include 'BAT conclusion documents'[18]. These contain emission limits associated with BAT (BAT AELs) which must be complied with unless the EA/NRW agrees certain criteria have been met. The guide for a particular activity will include a link to the BREF note or BAT conclusion document for each activity (if there is one available).

Permit types – Standard/Bespoke; Permit Exemptions/Exceptions

23. Depending on the proposed activity, one of the following must be obtained:

    - a **regulatory position statement** – would state that the EA/NRW does not currently require a permit for that activity (usually because it has been assessed as unlikely to cause environmental pollution or harm to human health)
    - an **exemption** – a permit is not required for the activity, but the operator must still register with the EA/NRW. The exemption has specific limits and conditions but is a 'light touch' form of regulation as the activity is classed as low risk
    - an **exclusion** – applies to certain flood risk activities, where the flood defence consent has lapsed and there is no longer a need for consent and other listed activities. The activity will still need to be operated within the description and conditions of the exclusion
    - a **standard rules permit** – a set of fixed rules for common activities
    - a **bespoke permit** – tailored to the operators business activities.

[18] Article 14(3) of IED – BAT conclusions shall be the reference for setting the permit conditions to installations covered by the Directive.

24. The two forms of environmental permit (standard/bespoke) are based on the risk to the environment and human health from the particular activity. A standard rules or bespoke permit will be required for all those activities listed in paragraph 2.9 above.

Standard Rules Permit

25. The Secretary of State, the Welsh Ministers and the EA/NRW can make standard rules for certain activities[19] under regulation 26 of EPR2016. These rules consist of requirements common to the type of facilities subject to them and can be used instead of site-specific permit conditions. Standard rules are suitable for sectors where a number of regulated facilities share similar characteristics in relation to environmental hazards.

26. The standard rules must achieve the same high level of environmental protection as site-specific conditions. There is no right of appeal under regulation 31(2)(b) or (c) against the imposition of standard rules as permit conditions (regulation 27(3)) since applying for a permit subject to the rules is voluntary and the conditions have been under consultation and agreed with the relevant industries. All other rights of appeal are unaffected.

27. It is the operator's decision as to whether they wish to operate under standard rules. The generic risk assessments for standard facilities should be made available to applicants to assist them in determining whether their activity is within the scope of the standard rules and, if they apply for a standard permit, in the adoption of suitable control measures to meet those rules. Regulated facilities that require a location specific assessment of impact and risk are not suitable for standard rules.

28. Standard rules can be revised and there is a duty imposed by the Regulations to keep the rules under review under regulation 26(3) of EPR2016. Standard rules can also be revoked under regulation 29. For cost reasons, standard permits tend to be more attractive to operators of smaller, non-specialist facilities such as waste transfer stations.

Bespoke Permit

29. A bespoke permit is required if the activity does not fit the conditions of a standard rules permit (i.e. unusually complex or novel, higher risk activities and multi-functional installations). The following must be completed by the applicant before an application is made:

    - check if a conservation risk assessment is needed (heritage and nature conservation screening)
    - check that the legal operator and competency requirements (including technical competency) are met
    - develop a management system (a written set of procedures that identifies and minimises the risks of pollution)
    - complete a risk assessment
    - design the facility to avoid and control emissions
    - check the relevant technical guidance

30. The conditions and requirements on the operator for a bespoke permit are tailored to suit that particular activity.

[19] EA Standard rules permits

Permit Exemptions and Exceptions

31. Certain low risk activities can be classed as exempt from the need to hold a permit, but only where the relevant EU Directive allows this. A waste operation, water discharge, flood risk or groundwater activity must fulfil certain criteria to qualify as exempt, these activities are listed in Schedule 2 of EPR2016. The activity must be registered with the EA and are still subject to certain conditions, limits, other requirements and subject to periodic inspection and the same compliance principles as permitted activities.

32. Specific flood risk activities, e.g. emergency work, minor works or temporary works and where the flood defence consent has lapsed and there is longer a need for a consent are not required to have a permit and are excluded from the regulations, but must be operated within the description and conditions of the exclusion. These activities are listed under Part 2 of Schedule 25.

EPR Legislation

EU Directives:

EU Industrial Emissions Directive 2010/75/EU[20](IED) (recast IPPC Directive)

33. Implemented through amendments to the Environmental Permitting Regulations 2010, incorporates the Waste Incineration / Large combustion Plant Directives & 5 others related Directives - requiring strict emission limits for e.g. Incinerators.

Other relevant EU Directives[21]:

EU Directive 2008/98/EC on Waste (the Waste Framework Directive) (WFD)

34. Member states must ensure that waste is recovered or disposed of without endangering human health and by using processes/methods which do not harm the environment. Obligations are imposed on those dealing with waste, including holders, collectors and transporters of waste.

EU Directive 99/31/EC on Landfill of Waste (the Landfill Directive)

35. This Directive complements the WFD and seeks to prevent/reduce the harmful effects of the disposal of waste by landfilling. It sets uniform technical standards and requirements for landfill sites and requires the progressive diversion of biodegradable municipal waste from landfill.

EU Directive 2000/53/EC on End of Life Vehicles (the ELV Directive)

36. This also supplements the WFD. It prevents waste from vehicles through the re-use, recycling/recovery of end-of life vehicles and their components, at all stages of a vehicle's life.

EU Directive 2012/27/EU on Energy Efficiency

37. This establishes binding measures to help the EU reach its 20% energy efficiency target by 2020 by requiring all EU countries to use energy more efficiently. On 30 November 2016 the Commission proposed an update including a new 30% energy efficiency target for 2030.

EU Directive 2012/19/EU on Waste Electrical and Electronic Equipment (the WEEE Directive)

38. The WEEE Directive also supplements the WFD and makes provisions for the waste prevention, reuse, recycling/recovery of WEEE, reducing the disposal of this waste stream. It also specifies treatment requirements.

[20] The following Directives were repealed and encompassed within the IED – 2008/1/EC, 99/13/EC, 2000/76/EC, 2001/80/EC and 3 other environmental directives concerning Titanium Dioxide production.
[21] All these Directives make provisions in relation to pollution of the environment. The EPR2016 re-transposes those parts of the Directives which must be transposed through permits and those provisions capable of being transposed through permits.

EU Directive 2006/66/EC on Batteries and Accumulators and Waste Batteries and Accumulators (the Batteries Directive)

39. The Batteries Directive seeks to minimise the negative impact of batteries and accumulators. It makes producers responsible for the waste management of batteries and accumulators that they place on the market.

EU Directive 2000/60/EC on Water (the Water Framework Directive)[22]

40. This Directive integrates requirements of a number of existing Directives and introduces new ecological objectives to prevent further deterioration of aquatic ecosystems; to protect and enhance their status; to promote sustainable water use and mitigate the effects of floods and droughts.

EU Directive 2006/118/EC on the protection of groundwater against pollution and deterioration (the Groundwater Daughter Directive)

41. Establishes a regime which sets out groundwater quality standards and introduces measures to prevent or limit pollution into groundwater. The directive sets out quality criteria taking account of local characteristics and allows for further improvements based on monitoring data and new scientific knowledge.

EU Directive 2006/21/EC on management of waste from the extractive industries (the Mining Waste Directive)

42. As its name suggests, this Directive provides for measures to prevent or reduce any adverse effects from the management of waste from mining and other extractive industries.

EU Directive (EU)2015/2193 on limitation of certain air pollutants from medium combustion plants (the Medium Combustion Plant Directive)

43. This regulates emissions of SO_2, NO_X and dust from the combustion of fuels in plants with a rated thermal input greater than 1 MWth and less than 50MWth. All plant must be registered and permitted. The permitting provisions have been transposed into the EPR through amendment regulations[23] and will apply to new plants from December 2018 and existing plants in stages up until 1 January 2029.

Primary UK Legislation

Pollution Prevention and Control Act 1999[24]

44. This Act contains enabling provisions for making regulations to cover a wide range of waste management purposes. The Act transposed the Integrated Pollution Prevention and Control Directive 96/61EC, which required certain industrial processes to be licensed in an integrated manner, therefore controlling emissions to air, water and the management of waste to protect the environment as a whole.

[22] The following Directives were repealed and encompassed within the WFD – 75/440/EEC, 77/795/EEC, 79/869/EEC, 78/659/EEC, 79/923/EEC, 80/68/EEC and 76/464/EEC.
[23] SI 2018/110
[24] 1999 (c.24)

Environmental Permitting (England and Wales) Regulations 2016[25]

45. Supersedes the provisions of the Environmental Protection Act 1990 and implements the permitting requirements under the Industrial Emissions Directive (and other relevant Directives) for certain categories of waste management sites and many other types of industrial installation with potentially harmful consequences for human health and/or the environment. A permit must be obtained from the Environment Agency for all such development as defined in the Regulations. There are powers of enforcement by the Agency, and rights of appeal to the Secretary of State, against refusal or revocation of a permit or the grant of a permit subject to conditions. A permit cannot be granted unless the regulator is satisfied that the applicant is a fit and proper person to carry out the activity. An important concept is that Best Available Techniques (BAT), defined in the Industrial Emissions Directive (IED)[26] shall be used to prevent pollution. Schedules to the regulations identify precise requirements, article by article for each Directive, which must be delivered through the permitting regime. Each Directive has a specific schedule.

Other relevant UK Legislation

Environmental Protection Act 1990[27]

46. Part I sets out provisions for the Air Pollution Control (APC) regime Part 2 sets out the provisions for waste management licensing (WML). This has been extensively amended and largely replaced by the Environmental Permitting Regulations 2016.

Environment Act 1995[28]

47. Part I established the Environment Agency as the responsible body for waste and water regulation in England and Wales, in particular with respect to pollution control. The Agency administers the environmental permitting system and other regulatory functions. Part IV, section 80 introduces the requirement for a national air quality strategy and Part V, Section 92 introduces the requirement for a national waste strategy.

Water Resources Act 1991[29]

48. This Act is the key piece of legislation governing discharges to surface waters from non-prescribed processes under Integrated Pollution Control (IPC) in England and Wales. The Act consolidated much of the legislation governing water pollution which was previously contained in, for example, the Water Act 1989 and the Control of Pollution Act 1974. Some of the main provisions relevant to water quality in estuaries and coastal waters are: Definition of controlled waters, Water Protection Zones and Nitrate Sensitive Areas, Offences of Polluting Controlled Waters, Discharge Consents[30], Abstraction licences.

Waste (England and Wales) Regulations 2011[31]

49. Transposes the WFD into UK law to apply the revised ‘waste hierarchy’ (Article 4); to impose duties to improve the use of waste as a resource; requires waste management

[25] SI 2016/1154
[26] Article 1(10) of Directive 2010/75/EU
[27] 1990 (c.43)
[28] 1995 (c.25)
[29] 1991 (c.57)
[30] Now encompassed within the EPR regime under Schedule 21.
[31] SI 2011/988

plans (Article 28); imposes duties on planning authorities when exercising planning functions in relation to waste management – Article 13 (protection of human health and the environment), Article 16(1) (in part) and Article 16(2) and (3) (household waste collection methods to enable appropriate quality of material for recycling).

The Control of Pollution (Amendment) Act 1989[32]

50. This Act contains provisions for the registration of waste carriers and further provision with respect to powers in relation to vehicles shown to have been used for illegal waste disposal.

Scrap Metal Dealers Act 2013[33]

51. This Act repeals the Scrap Metal Dealers Act 1964 and Part 1 of the Vehicles (Crime) Act 2001, creating a revised regulatory regime for the scrap metal recycling and vehicle dismantling industries. The Act maintains local authorities as the principal regulator but gives them the power to better regulate these industries by allowing them to refuse to grant a licence to unsuitable applicants and a power to revoke licences if the dealer becomes unsuitable. The Act aims to raise trading standards across the scrap metal industry by requiring more detailed and accurate records of transactions to be kept. Scrap metal dealers will also be required to verify the identity of those selling metal to them.

End of Life Vehicles Regulations 2003[34]

52. These Regulations partially implement the ELV Directive. End-of-life vehicles are defined in regulation 2. Part III covers the design requirements for materials and components of vehicles. Part V introduces the Certificate of Destruction (CoD). Regulation 27 provides that when an end-of-life vehicle is transferred to it for treatment, an authorised treatment facility (defined in regulation 2) may issue a CoD to the last holder/owner of the end-of-life vehicle. All site licences (being a type of waste management licence) are issued and monitored under the EPR regime[35].

Hazardous Waste Regulations 2005[36]

53. These set out the regime for the control and tracking of the movement of hazardous waste. Part 4 bans the mixing of hazardous waste unless permitted as part of a disposal or recovery operation in accordance with the WFD. Parts 5 & 6 relate to the movement of hazardous waste.

Animal By-Products (Enforcement) (England) Regulations 2013[37]

52. These regulations are intended to prevent ABPs (which are not intended for human consumption) ending up in the human food chain and strengthen the previous regulations. They lay down health rules associated with ABPs and their use/disposal following BSE and foot & mouth outbreaks.

[32] 1989 (c.4)
[33] 2013 (c.10)
[34] SI 2003/2635
[35] Schedule 11 of EPR2016.
[36] SI 2005/894
[37] SI 2013/2952

The Conservation of Habitats and Species Regulations 2017[38]

53. Transposes EU Directive 92/43/EEC 'the Habitats Directive' requiring public bodies to exercise nature conservation functions in order to comply with the Habitats Directive and Wild Birds Directive. Regulation 63 requires that the effect on a European site is considered before granting consents or authorisations, including environmental permits.

EPR Policy & Guidance; EA/Natural Resources Wales – Policy & Guidance

Core Environmental Permitting Guidance, Defra/WG, March 2020

54. The scope of this guidance is to provide comprehensive advice to those operating regulated facilities covered by the EP Regulations 2016 and regulated by the Environment Agency and Natural Resources Wales. It sets out the provisions of the regulations and the views of the SoS for Defra and the Welsh Assembly Government on how it should be applied and interpreted. The relevant guidance for appeals is at Chapter 13.

Secretary of State's Guidance: General Guidance Manual on Environmental Permitting Policy and Procedures for A2 and B Installations, Defra, April 2012

55. This manual is the principal guidance issued by the SoS and Welsh Government on activities regulated by Local Authorities and gives practical advice on the operation of the LA regulated pollution control regime and how it should be applied and interpreted. The guidance for appeals can be found at Chapter 30

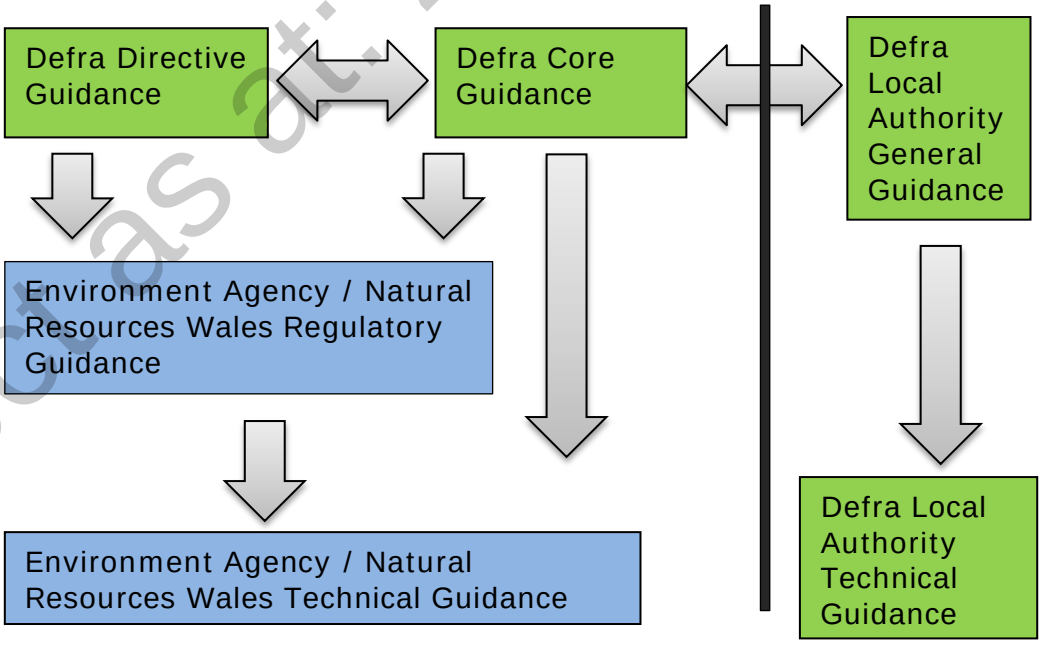

Fig. 1 – Illustration of EP guidance relationships

[38] SI 2017/1012

Specific Guidance

Part A1: (These should be read in conjunction with the EP Core Guidance)

Regime Specific Guidance (RSG), Defra

56. These describe the general permitting, compliance requirements and guidance for specific regimes. They include exempt waste operations, Radioactive Substances Regulation (RSR)[39], Water Discharge Activities[40] and flood risk activities.

Directive Specific Guidance Notes (DGN), Defra

57. These describe the general permitting, compliance requirements and guidance on each of the EU Directives implemented through the EP regime. Examples include IED EPR Guidance on Part A Installations; LFD EPR Guidance; Mining Waste Directive EPR Guidance.

Sector/Issue Specific Guidance:

Part A1: Horizontal Guidance Notes (HGN), Environment Agency/Natural Resources Wales

58. A series of guidance notes applying to all sectors and relating to specific issues such as odour emissions, Environmental Risk Assessment, noise and site conditions reports. In England only H3 (Part 2) Noise Assessment and Control, H4 Odour Management and H5 Site Condition Report are extant as H1 and H2 have been replaced by 'risk assessments for specific activities: environmental permits' and 'Energy efficiency standards for industrial plants to get environmental permits'. In Wales all horizontal guidance is still extant.

Regulatory Guidance Notes (RGN), Environment Agency/Natural Resources Wales[41]

59. This is a series of guidance notes on interpretation of the regulations and regulatory issues produced for Agency staff to assist them in determining EP applications. Most of the RGNs were withdrawn in England in February 2016 and reclassified as internal guidance following a 'Smarter guidance' review. Those that remain extant in England are:

    i) RGN 2 – Understanding the meaning of regulated facility, Appendices 1-4 cover Interpretation of Schedule 1 EPR;– Defining the scope of the Installation; Interpretation of Intensive Farming Installations; and – The scope of Mobile Plant.

    ii) RGN 9 – Surrender guidance on how land and groundwater should be protected at permitted facilities before surrender of a permit is considered.

    iii) RGN 13 – Waste recovery plans and permits (permanent deposit of waste on land).

[39] RSR for non-nuclear sites; RSR for nuclear sites.
[40] To surface water and groundwater.
[41] In Wales, RGNs remain largely extant.

Technical Guidance Notes (TGN) and Sector Guidance Notes (SGN), Environment Agency/Natural Resources Wales

60. These guidance notes provide advice on indicative standards of operation and environmental performance relevant to specific sectors, allowing assessment of compliance with regulations and setting out BAT for that sector to be taken into account when deciding applications and are gradually being updated; e.g. EA Guidance on Discharges to surface Water & Groundwater replaces the withdrawn water technical guidance, and is now located in the associated EPR guidance. These need to be read alongside the generic guidance[42], which has been updated. There is also a series if guidance specifically for landfill operators on the technical standards required to meet Directive requirements and permit conditions. In Wales TGNs/SGNs also remain extant.

Part A2: Local Authority Sector Guidance Notes (SG Notes), Defra

61. Statutory guidance issued by SoS for specific LA-IPPC Part A2 industrial activities, giving details of mandatory requirements affecting emissions and impacts from installations and general BAT assessments. These are currently being updated but the SGNs remain extant as at March 2017. If in doubt, you should check with the Knowledge Centre on the current status of these documents.

Part B: Local Authority Process Guidance Notes (PG Notes), Defra

62. Statutory guidance issued by SoS for specific industrial activities giving details of mandatory requirements affecting emissions to air from LAPPC Part B installations and guidance on BAT/BATNEEC assessment. These are currently being updated but the PGNs remain extant as at March 2017. If in doubt, you should check with the Knowledge Centre on the current status of these documents.

Monitoring Guidance (MCERTS), Environment Agency/Natural Resources Wales

63. Businesses either monitor their emissions all the time, known as continuous monitoring, or at times defined in their permit, known as spot tests or periodic monitoring. In both cases they must meet the EA's quality requirements. MCERTS is the Environment Agency's Monitoring Certification Scheme. It provides the framework for businesses to meet their quality requirements. The guidance covers emissions to air, land and water.

[42] The 'How to comply with your environmental permit' has been withdrawn and replaced with new guides – 'system' and 'Controlling and monitoring emissions'. The H1 risk assessment overview guidance has been withdrawn and replaced with 'Risk assessments for your environmental permit'.

Interaction of Planning and Pollution Control Regimes

64. The Core EP Guidance advises that if a regulated facility also needs planning permission, it is recommended that the operator should make both applications in parallel whenever possible. This will allow the environmental regulator to start its formal consideration early on, thus allowing it to have a more informed input to the planning process.

65. The Environment Agency have produced guidance for developments requiring planning permission and environmental permits[43], which covers how the EA will advise on permitting issues as part of a planning application.

66. Advice on the role of the EA and NRW with regard to the Nationally Significant Infrastructure Project (NSIP) regime[44], the requirement for an Environmental Permit for certain projects covered under the regime and interface with Development Consent Orders (DCO) and Environmental Permitting can be found in Annexes A & D to Advice Note 11[45].

67. The Planning Practice Guidance (PPG) on waste[46] also advises on the relationship between planning and other regulatory regimes and re-iterates that it is important that the EA are involved in the pre-application stage of proposals for waste management facilities and how they can advise on key environmental issues affecting both planning and/or permitting decisions.

Implications of Brexit

68. The UK left the EU on 31 January 2020 and the transitional arrangements that were put in place ended on 31 December 2020. From 1 January 2021, Defra needs to ensure that the EU environmental law that applied at 31 December 2020[47] can continue to operate appropriately in UK law by ensuring domestic legislation implements retained EU law and any international obligations. The Environment Bill[48] will enshrine environmental principles into UK law and makes provision for a framework of environmental governance. The following will continue from 1 Jan 2021:

- the UKs legal framework for enforcing domestic environmental legislation by UK regulatory bodies or court systems
- environmental targets currently covered by EU legislation - they are already covered in UK legislation
- permits and licences issued by UK regulatory bodies

69. Current legislation is changed from 1 Jan 2021 to:

- remove references to EU legislation (which should be referred to in decisions / reports as 'Retained EU Law Directive / Regulation xx/xxxx/xx')
- transfer powers from EU institutions to UK institutions
- make sure the UK meets international agreement obligations

[43] Guidance for developments requiring planning permission and environmental permits [EA, October 2012]
[44] Under the Planning Act 2008 (c.29)
[45] Advice Note 11: Working with Public Bodies v4 [PINS, Nov 2017], Annex A – Natural Resources Wales v2 & Annex D – Environment Agency v2 [PINS, Nov 2015].
[46] Waste PPG, Paragraph 052 [DCLG, October 2015].
[47] EU Exit Web Archive – The National Archives
[48] Environment Bill 2019-2021.

Regulation of permitted activities

Application process

70. An operator needs to obtain a permit for each regulated facility that it operates[49]. One of the classes of regulated facility under regulation 8 is an 'installation'. An installation may include one or more regulated facilities, e.g. a waste operation and/or water discharge activity, but will only require one permit unless different parts of the installation are operated by different operators, in which case each part with a separate operator will require its own permit. There should be no ambiguity over which operator has responsibility for which part of the installation.

71. Pre-application discussions between operators and regulators are encouraged.

72. The requirements for applications are set out in Schedule 5 of EPR2016. Amongst other things, an application must:

    - include the information required by the application form (and any other requirements) to be 'duly made' and determined. The regulator can issue a notice requiring further information[50]
    - regulators must carry out consultation as required under Schedule 5(6). The scope of the required consultation is determined by the type of application and activity applied for.

73. Determination periods for permit applications are set out in Schedule 5(15) and vary depending on the type of application and type of activity. The operator and regulator can agree extensions to the determination period. The operator may appeal against non-determination (deemed refusal) or deemed withdrawal under regulation 31 – see paragraph 6.2 below.

Types of application

74. The following types of application apply to all classes of activity (unless stated otherwise):

    i) an application for a **grant of an environmental permit** under regulation 13(1) – authorising the operation of a regulated facility and the named operator as the person authorised to operate the facility

    ii) an application for **variation of an environmental permit** under regulation 20(1) – does not apply where the variation would reduce the extent of the site of regulated facility unless it applies to a Part B installation (except waste operations) or a stand-alone water discharge or groundwater activity. It should be noted that the regulator can vary an environmental permit as it sees fit, regardless of any application for variation[51]

    iii) an application for the **transfer (full or in part) of an environmental permit** under regulation 21(1) – except where the permit relates to a stand-alone water discharge, groundwater or flood risk activity. Where the facility is subject to any

[49] Regulation 12(1) of EPR2016.
[50] Schedule 5(4) EPR2016.
[51] Except where this relates to a stand-alone water discharge facility, without prior agreement with the operator if within 4 years of the grant of the permit (the so-called 4-year 'hands off' rule – see regulation 20(4) and exceptions at 20(5)).

enforcement or suspension notice the duty to comply also transfers to the new operator[52]

iv) an application for the **surrender (full or in part) of an environmental permit** under regulation 25(2) – does not apply to Part B installations (except waste operations), mobile plant, solvent emission activity or stand-alone water discharge, groundwater or flood risk activity[53].

Commercial confidentiality and the public register

75. The EA publishes a range of information under the duty to maintain a public register[54]. The applicant can ask the EA not to make public any information that is commercially sensitive.

76. There is a right of appeal if the request is denied – see paragraph 6.20-21 below

Decision-making process

77. The regulator must decide whether to grant or refuse the proposal in an application (or decides to make a regulator-initiated variation)[55] and, where applicable, what permit conditions to impose. For all applications made under the Regulations, the regulator must ensure that its decision delivers the necessary directive and other requirements and provides the required level of protection to the environment. This will include assessment of the following:

i) **Environmental risk** - in particular the adequacy of the impact assessment including whether the control measures proposed by the operator are appropriate for mitigating the risks and their potential impact[56].

ii) **EU Directive requirements** - EU Directives set out most of the requirements to be met through environmental permitting. Schedules 7 to 24 set out those parts of the Directives that the regulator must take into account.

iii) **Operator competence** - whether the operator[57] cannot or is unlikely to operate the facility in accordance with the permit – see paragraph 3.14. The regulator might doubt whether the operator could or is likely to comply with the permit conditions, taking into account the following:

- the adequacy of the operator's management system[58]
- the adequacy of the operator's technical competence[59]
- the operators record of compliance with previous regulatory requirements (which includes previous relevant convictions) and
- the adequacy of the operator's financial competence

[52] Regulation 21(7).
[53] These activities must notify the regulator of their intention to surrender under regulation 24.
[54] Regulation 46 of EPR2016
[55] Schedule 5(17) of EPR2016
[56] EA risk assessment guidance.
[57] Regulation 7 of EPR2016
[58] Prepared to recognised standards e.g. ISO 14001, EMAS – linked to OPRA scores.
[59] CoTC, WAMITAB, 'Qualified expert' provisions of Euratom Basic Safety Standards Directive.

78. The regulator may take into account various factors[60] when considering an application or revocation[61] of a permit, particularly:

- the adequacy of the management system
- the technical or financial competence of the operator
- the record of compliance, including repeated failures of procedures or other management controls, permit breaches, failure to comply with advice, warning(s) and notice(s)
- criminal convictions for relevant offences
- whether the applicant or holder has been uncooperative or abusive/hostile
- whether there is a repeat pattern of offending
- impact on local amenities, local residents or legitimate businesses
- likelihood of re-offending
- the applicant will not operate the facility in accordance with the permit

79. The regulator may refuse or revoke on the basis of a single offence, depending on severity.

Structure of a permit and decision document

80. A permit usually contains information such as[62]:

- details of the regulated facility which has been authorised and the operator
- a description of the main features of the permit and status log of the permit (permitting history)

81. Conditions (general requirements) dealing with:

- Management
- Operations
- Emissions and Monitoring
- Information

82. Schedules (site-specific descriptions, limits and requirements):

- permitted activities (description and limits, improvement programme)
- permitted waste types[63], raw materials and fuels
- emissions and monitoring (emission source(s), limits and monitoring requirements)
- reporting requirements
- notification requirements
- interpretation (definitions)
- site plan

83. Accompanying the permit will usually be a decision document[64], which sets out in detail the EA's process for determining the application, how all the relevant factors were taken

[60] EA Internal Instruction Document No 194_03 – Refusing and revoking environmental permits (V10).
[61] Regulation 22 of EPR2016.
[62] Regulation 13 of EPR2016.
[63] Under List of Waste Regulations 2005, SI 2005/895, which implement the European Waste List (European Waste Codes) set out in Decision 2000/532/EC.
[64] Do not normally apply to local authority regulated activities or standard rules permits.

into account in reaching the decision and why specific conditions have been included in the permit

Duty of Care

84. The duty of care provisions[65] make provision for the safe management of waste to protect human health and the environment and applies to operators involved in the following:

    - Importation;
    - Production;
    - Carriage;
    - Keeping;
    - Treating;
    - Disposal of waste.

85. Or as a dealer or broker of certain waste in England and Wales. Failure to comply with the duty of care is an offence[66]. The EA produce a code of practice[67], which sets out practical guidance on how to meet the duty of care requirements.

Operator competence

86. One of the main requirements of the EPR is to examine and maintain an operator's ability to operate a regulated facility to fulfil the requirements of the permit. The legal operator, i.e. having sufficient control over the facility is also considered to be the competent operator. Operator competence is frequently identified as a reason to refuse or revoke a permit. When assessing operator competence, the following considerations may be relevant:

    - **Technical Competence**[68] – has the operator demonstrated the technical competence to carry out the permitted activity for example in relation to the operation of equipment; fulfilling their statutory obligations; minimising the risk to human health and the environment; has the operator recognised or acknowledged any past failings in the management of the site? How does the operator propose to address them?
    - **Environmental Record** – how responses to any accidents at sites in the past have been dealt with; are there any previous convictions for environmental offences; record of compliance with the permit or other permits (e.g. if the operator has received warnings or enforcement notices and how they have responded to them); whether the operator acknowledges any environmental harm which may have resulted from previous breaches (actual or risk of harm).
    - **Financial Competence** – the operator should be able to demonstrate that there are adequate finances to carry out the operations and meet the permit conditions.

87. Financial Provision – the operator will need to make a 'financial provision' (a guarantee) for certain activities, i.e. a landfill site and a Category A or hazardous waste mining facility. If the business ceases operating there needs to be enough money to carry out the actions needed before a permit can be surrendered or a closure notice issued.

[65] Under s34 of the EPA1990.
[66] S34(6) EPA 1990.
[67] Waste Duty of Care Code of Practice [EA, March 2016], Issued under s34(9) EPA1990.
[68] Includes necessary qualifications, e.g. WAMITAB or EU Skills required for permitted waste activities.

Monitoring

88. The level of monitoring is usually based on an assessment of the level of risk (the Opra score) based on:

    - an assessment - a desk-based check of compliance, e.g. checking that required information has been provided;
    - an inspection[69] - where an officer visits a site – this is normally recorded on a Compliance Assessment Report (CAR) form;
    - sampling of the permitted water discharge

89. Waste operations, installations, complex flood risk activities and complex water discharges activities, e.g. large sewage treatment plants, will definitely be assessed or inspected. Other sites may be assessed or inspected if there is:

    - a pollution incident at the site, or in the area;
    - a flood incident at the site (for flood risk activities);
    - a complaint about the activity

90. If Environment Agency staff carry out an assessment, inspection or attend an incident, they will complete a CAR form. The CAR will record activities on site, any breaches of the permit and actions required. It will contain a score[70] for any permit conditions breached. This score feeds into the overall compliance score (Opra)[71] which, in turn, influences the annual permit fee (subsistence fee).

91. Permits are reviewed to check that they reflect the latest regulations and environmental standards. Individual permits will also be reviewed if they are not being complied with. The operator may have to apply for a change to the permit, or new conditions may be applied by the regulator (a regulator-initiated variation). For standard rules permits, the EA can change the conditions of its rule set, following consultation.

Enforcement

92. The regulator may take action if it is suspected that the operator has committed an offence, or it is thought the operator is about to. This might include:

    - giving advice
    - changing the permit conditions
    - serving an enforcement notice[72], and for flood risk activities a remediation notice[73], which will state what actions are required and by when
    - serving a suspension notice[74] if there's a risk that pollution might occur

[69] Regulation 34(2) EPR2016.
[70] Compliance Classification Scheme (CCS) – to record non-compliance with permit conditions, 1-4 points system, where 1 – non-compliance that could result in major pollution incident (category 1 incident under the Common Incident Classification Scheme [CICS]) to 4 – non-compliance that could not have any impact on the environment.
[71] Operational Risk Appraisal (Opra) score, which combines five 'attributes' i) Complexity – type of activities covered by the permit; ii) Emissions and inputs – the amounts allowed to be put into and released from an activity; iii) Location – the state of the environment around the permitted site; iv) Operator performance – the management systems and enforcement history; and v) Compliance rating – how well the conditions on the permit are complied with, using the CCS scores. The scores total over a year to provide an Opra Banding system – scores falling within Band A being fully compliant to Band F being extremely non-compliant.
[72] Regulation 36 EPR2016
[73] Schedule 25, Part 1(8) EPR2016
[74] Regulation 37(2) EPR2016

- serving a revocation notice[75] revoking the permit, in whole or in part where appropriate. This should only occur if all other enforcement tools have failed
- Serving a prohibition notice[76] to stop offending from a specific groundwater activity
- Serving a notice requiring a permit[77] to either stop offending for a specific groundwater activity or to prevent discharge of trade or sewage effluent by requiring the person(s) to hold a permit.
- prosecuting the operator[78] if the EA think it is in the public interest.

Casework Considerations

Operator competence/non-compliance history

93. This often arises in waste EPR casework in relation to appeals against revocation or enforcement notices or decisions to refuse. The inspector will need to review CAR forms which record past non-compliance. There may also be a high Opra score. It may also be argued that the operator would be unlikely to operate the facility in accordance with the permit, based on e.g. lack of evidence of likely compliance in the permit application or past history at the application site or another related site. Decisions are issued for the reasons as outlined in paragraphs 3.8-9 & 3.14 above. The CAR form may identify problems with the condition of the building(s) or other aspects of site maintenance.

Air emissions/odour/dust

94. Considerations may include the proximity of sensitive receptors, including ecological as well as human receptors, (e.g. deposition of nitrogen on special protection areas [SPA] from ammonia emissions from intensive poultry facilities), and the extent to which adverse emissions can be controlled through the use of appropriate and well-maintained and managed equipment, which must conform to BAT requirements. This will be considered as part of the permit risk assessment process. EPR guidance is contained within the Defra/EA Guidance notes or the EA risk assessment guidance and EA Horizontal Guidance on Odour Management (H4). Odour Management Plans[79] may be necessary for some facilities handling waste likely to emit noxious odours, e.g. wastewater treatment or waste facilities handling biodegradable waste.

Noise/vibration

95. From tipping of waste, lorry movements and general industrial machinery noise from both inside and outside of buildings. Considerations will include the proximity of sensitive receptors. Intermittent and sustained operating noise may be a problem if not properly managed particularly if night-time working is involved; hours of operation can arise as an issue, with consideration of suitable conditions. Noise assessment usually carried out using the BS4142 methodology – see Noise ITM Chapter. EPR guidance is contained within the Defra/EA Guidance notes or the EA Horizontal Guidance on Noise (H3 Part 2).

[75] Regulation 22 EPR2016
[76] Schedule 22(9) EPR2016
[77] Schedule 22(10) or Schedule 21(5) EPR2016
[78] Regulation 38 EPR2016, s33 EPA1990 or other offence.
[79] See Appendix 4 of H4 Odour Management guidance

Litter/vermin/birds

96. Some waste management facilities, especially landfills which accept putrescible waste, can attract vermin and birds. The numbers, and movements of some species of birds, may be influenced by the distribution of landfill sites. Where birds congregate in large numbers, they may be a major nuisance to people living nearby. They can also provide a hazard to aircraft at locations close to aerodromes or low flying areas. EPR guidance is contained within the Defra/EA Guidance notes or the EA risk assessment guidance.

Pollution of controlled waters

97. Most industrial facilities, waste facilities, water/wastewater treatment facilities and private 'package' treatment systems will need to discharge to 'controlled waters'[80] with the risk of pollution of freshwater and marine habitats (particularly bathing waters), SACs and SPAs. The operator needs to limit the potential for pollution in the receiving waters and ensure the waters achieve the objectives set by the legislation to ensure protection of the environment and human health. Guidance can be found in the relevant Defra/EA sector guidance, the Defra Water Discharge Activities Guidance[81] and the EA Discharge to surface water and groundwater guidance and Additional (point source) Guidance[82].

Water

Water Framework Directive issues[83]

98. Permitting requirements (including the Environmental Quality Standards [EQS]) are derived from the relevant Directives and implemented (in part) through permit conditions. The aims of the Directive are:

    - prevent further deterioration of aquatic ecosystems;
    - to protect and enhance their status;
    - to promote sustainable water use;
    - to provide further protection to the aquatic environment; and
    - for groundwater, to ensure the progressive reduction of the present level of pollution and prevent its further pollution;
    - to contribute to mitigating the effects of floods and droughts.

99. The Water Framework Directive has further aims relating specifically to surface water. These include:

    - implementing necessary measures to prevent deterioration of the status of all bodies of surface water;
    - protecting, enhancing and restoring all surface water bodies (other than heavily modified or artificial) with the aim of achieving good status by 2015 at the latest;
    - in relation to artificial or heavily modified water bodies, protecting and enhancing them with a view to achieving good ecological potential and good surface water chemical status by 2015 at the latest; and

[80] Defined in s104 of the Water Resources Act 1991 as relevant territorial water and coastal waters within 3 miles from the baselines; inland freshwaters (includes lakes, ponds, reservoirs, rivers and other watercourses) and groundwaters.
[81] Environmental Permitting Guidance: Water Discharge Activities [Defra, v2 Dec 2010]
[82] How to comply with your environmental permit. Additional guidance for water discharge and groundwater (from point source) activity permits (7.01) [EA, 2012]
[83] Schedules 21-22 EPR2016

- phasing out discharges of priority hazardous substances and progressively reducing the pollution from priority substances.

100. In order to achieve the first of these, the Directive establishes a demanding water classification system to identify pressures that may lead to a deterioration in ecological status of water bodies.

101. River Basin Management Plans (RBMPs) detail the measures that must be taken to improve or maintain the ecological status of water bodies. Some of these measures can be achieved by controlling environmental emissions. It is these measures that are delivered through the Environmental Permitting Regulations, by means of environmental permits for water discharge activities. RBMP were originally published in 2009 and have been reviewed in 2015. There are 11 river basin districts (RBDs) in England and Wales. The Environment Agency manage the 7 RBDs in England. Natural Resources Wales (NRW) manage the Western Wales RBD. NRW and the Environment Agency jointly manage the Dee and Severn RBDs[84]

Water Quality issues: dangerous substances

102. The Water Framework Directive aims to eliminate very toxic substances and to reduce pollution from other less severely toxic substances. For any discharges to inland, coastal and territorial surface waters, it is necessary to obtain prior authorisation if the discharge is likely to contain dangerous substances. The directives set emission limit values and environmental quality objectives. It also establishes EQSs for a list of 33 prioritised substances, and includes the required standards for those substances.

Urban Waste Water treatment Directive[85]

103. The UWWTD aims to protect the environment from the adverse effects of the discharge of waste water. The Directive includes requirements for the collection and treatment of urban waste water and so mainly affects the statutory water and sewerage companies, since they own and operate the public sewerage system and the urban waste water treatment works. Discharges from certain industrial sectors such as food and drink processing plants can have a similar polluting effect to untreated sewage, so some of these are also covered by the Directive.

104. The Directive broadly sets treatment levels for discharges on the basis of the size of the discharge and the sensitivity of the waters receiving the discharge. Most discharges will require secondary treatment, which is usually a biological process. Discharges into 'Sensitive Areas'[86] will require more stringent treatment than this ordinary secondary treatment. All sewerage systems that also collect rainwater (combined sewers) need overflow outlets (combined sewer overflows (CSO[87])) to deal with the extra water collected during some rainstorms. Without these safety valves both domestic, other properties, and sewage treatment works would be at risk of flooding. The Directive recognises that although sewage in these overflow discharges is diluted with significant amounts of rainwater, it can affect the environment. The legislation therefore requires that pollution from these overflows is limited. There are up to 30,000 CSOs in the UK and they are gradually being phased out or, where practical, alternative storage

[84] River Basin Management Plans [Defra/EA, 2015]
[85] Directive 91/271/EEC
[86] waters that are eutrophic or may become eutrophic if protective action is not taken; waters that exceed or could exceed a specified concentration of nitrate; and waters receiving discharges that are subject to more than secondary treatment under the requirements of other EU Directives.
[87] Prevents overflows of the sewerage network in storm events by diverting excess rainwater mixed with untreated sewage into a separate pipe which runs off the main sewer and directly to a river or the sea

methods are being constructed to limit their spill frequency. Water company appeals may relate to permit revocations or variations relating to CSOs and technical, practical and economic arguments for and against their retention.

Economic: Asset Management Plans & periodic review

105. Water companies operating the public water networks hold appointments as water undertakers and those operating the public wastewater networks hold appointments as sewerage undertakers. There are currently 10 regional companies that provide water and sewerage services and 9 water only companies. Price limits for water and sewerage company services are set by the Water Services Regulation Authority (Ofwat) on a 5 yearly basis. The next price review (periodic review 18) is in 2019 for the period 2020-25 (AMP 7 period). As part of the price review each company is required to submit its Asset Management Plan (AMP), which details:

- the company's overall strategy and the implications for price limits and average bills;
- its strategic objectives in terms of service performance, quality, environmental and other outputs
- the activities necessary in the period to meet these objectives
- the scope for improvements in efficiency
- Water company performance is monitored against the AMP output objectives

106. In terms of environmental permits, water companies may cite the AMP and price review in terms of the amount they can spend on infrastructure improvements that may be necessary following variations in permit conditions (e.g. to enable tighter water quality limits to be met).

Waste:

107. **Waste Framework Directive requirements**[88] – The *Waste Hierarchy* (Article 4) – the hierarchy gives top priority to waste prevention, followed by preparing for re-use, then recycling, other types of recovery (incl. energy recovery), and the least desirable being disposal (e.g. via landfill). The 2011 Regulations[89] require those involved in waste management (and waste producers) to take all 'reasonable' measures to apply the hierarchy (except where justified). Regulators under the Environmental Permitting regime must ensure the hierarchy is applied when exercising their functions. Defra have published guidance on the application of the waste hierarchy[90].

[88] Schedule 9 EPR2016
[89] SI 2011 No. 988
[90] Guidance on applying the waste hierarchy [Defra, June 2011].

Principles of Proximity and Self-sufficiency (Article 16) – The proximity principle highlights a need to treat and/or dispose of wastes in reasonable proximity to their point of generation. The self-sufficiency principle works to establish an adequate 'local' network of waste facilities for recovery of mixed municipal waste collected from private households using the most appropriate methods and technologies, taking into account best available techniques (BAT).

108. **Landfill Directive requirements**[91] - under the Landfill Directive there are targets that member states should meet in order to reduce the amount of biodegradable municipal waste (BMW) sent to landfill – landfill diversion. In England these targets, together with the UK Landfill Tax and the now cancelled Landfill Allowance Trading Scheme (LATS), has (in part) led to a substantial growth in waste management technologies that can now process waste, rather than being sent to landfill (e.g. Anaerobic digestion, incineration, mechanical biological treatment (MBT) plants etc. It should be noted that as there are currently no new landfill sites being applied for and the landfill diversion targets are being met there are likely to be very few cases where this issue arises, only perhaps extension of existing sites.

109. **Definition of terms** - issues have arisen in EP appeals relating to the legal interpretation of standard terms used in activities covered under EPR, e.g. 'waste'[92]; waste types[93], activities[94], recovery/disposal[95], which require careful scrutinising and legal advice as a decision may need to be recovered due to potential national impact on the industry concerned and European Directive legal implications.

110. Measures to raise standards - periodically, there will be pressure to address particular aspects of waste management activities. For example, in recent years the EA has taken action to improve the storage arrangements on sites in order to reduce the risk of fire. This has been implemented through a requirement for *Fire prevention plans (FPP)*[96]. This has resulted in many enforcement notices being issued by the EA. Operators need to ensure they have adequate measures in place to prevent fires and to contain fires and firewaters in the event of a fire happening. These measures are often quite specific such as specifying maximum stack sizes of waste; minimum separation distances; quarantine area; monitoring and suppression systems. They also address

[91] Schedule 10 EPR2016
[92] Article 3(1) of Directive 2008/98/EC
[93] European Waste Codes, transposed by the List of Wastes (England) Regulations 2005, SI 2005/895
[94] Under Schedule 1 EPR2016
[95] Article 3(15) & (19) of Directive 2008/98/EC.
[96] Required where storage of combustible materials occurs at permitted waste sites. There have been many high profile fires occurring at waste sites in the UK recently e.g. Averies recycling, Swindon, where 3,000 tonnes of waste caught fire in July 2014 and was burning for 2 months. These fires can cause significant damage not just to the site, but environmental damage to the surrounding areas from e.g. firewater run-off.

the business model, so that the operator must be able to demonstrate that the business is capable of maintaining a rapid throughput of wastes. At appeal the likely issues are: operator competence (technical or financial) and record of compliance; that the requirements are new or have changed recently[97]; that it is not the EA's role to regulate fire prevention; EA Staff are not qualified or competent; there is no data to show potential impact; or that the EA also has a duty to promote economic growth.

Caselaw

111. *R.(on the application of Tarmac Aggregates Ltd [formerly Lafarge Aggregates Ltd]) v SoS for EFRA and The Environment Agency*

Date: 17 November 2015; Ref: [2015] EWCA Civ 1149

112. The Court of Appeal considered an appeal from a decision in the High court in which the Judge dismissed an application by the Appellant for judicial review of a decision dated 29 January 2015 by the Inspector, who dismissed an appeal[98] by Tarmac against a refusal by the EA to grant a standard rules environmental permit for 'recovery' of waste (in this case spoil from quarrying operations). Tarmac intended to use the waste to remodel the landscape at the quarry to comply with a condition imposed on a planning permission. Both the EA and the Inspector concluded that the proposed operations did not constitute 'recovery operations' under Directive 2008/98/EC. The central issue in this case was the interpretation of the terms 'recovery' (as opposed to disposal) and 'recovery operations' under Article 3(15) and Annex II of Directive 2008/98/EC. 'Recovery' means any operation the principle result of which is waste serving a useful purpose by replacing other materials which would otherwise have been used to fulfil a particular function. It was argued that the operations could fall to be defined either as a disposal or a recovery operation, as listed in Annexes I and II of the Directive.

113. The Inspector concluded that the case turned on *'… whether the reinstatement of an excavated section of a footpath would be likely to occur if waste were not to be used…. …Both the scale of the landform, and the resulting cost of using non-waste materials, would make it likely that alternative approaches would be considered for the reinstatement of the footpath. These approaches would reasonably be expected to include the redesign of the proposed landform and its construction, which could include the use of a footbridge or permanent diversion of the footpath…'* This would not be replacing other materials so would not be an act of recovery.

114. The Court of Appeal disagreed with Inspector's assessment on the facts of the case. The Council had confirmed it would still require the Appellant to complete the approved restoration scheme, which was covered by a Planning Obligation. As the scheme would proceed anyway, the waste would replace primary materials. Therefore, it was a recovery rather than a disposal operation.

115. *R.(on the application of Rockware Glass Ltd) v Chester City Council & Quinn Glass Ltd*

Date: 15 June 2006; Ref: [2006] EWCA Civ 992

116. This case concerned the emission limits for NOx and the approach taken with regards to consideration of BAT for glass manufacture. Quinn Glass Limited built the largest

[97] Fire Prevention plans: environmental permits [EA, November 2016]
[98] APP/EPR/13/118 – Appeal against refusal of a standard rules permit (SR2010 No8_100Kte) at Methley Quarry, Green lane, Methley, Leeds LS26 9AH.

glass container work factory in Europe. Chester City Council issued an IPPC permit[99] which imposed requirements in relation to the emissions from the plant of NOx. Rockware Ltd, a competitor challenged the legality of the permit in relation to air emissions and the permit was quashed in the High Court.

117. Quinn Glass appealed to the Court of Appeal, which upheld the Judge's reasoning. The Court of Appeal considered one of the issues raised by Quinn Glass fundamental to the case was the implications for decisions under the IPPC Directive of the requirements of Environmental Quality Standards (EQS) laid down under other parts of the EC law (in this case Directive 96/62/EC on ambient air quality. Quinn Glass argued that it was not the objective of the IPPC Directive to reduce emissions as far as possible, but to reduce emissions to a level where a high level of protection of the environment as a whole is reduced. One this point is reached there is no requirement to go further even if this was technically possible.

118. The Court of Appeal rejected this argument and took the view that those who introduced a potentially polluting situation had to be controlled and not escape control by stating that the EQS had been achieved. The legislation set up stringent limits on pollution on a plant-by-plant basis and Quinn had been wrong to contend that it should not be required to do anything if the limits from plants, as a whole, stayed below the EQS values.

Environmental Permitting Appeals

119. The rights of appeal and appeal procedures to be followed are set out in EPR2016 at regulation 31 and Schedule 6. You should familiarise yourself with these regulations before dealing with an appeal.

Appeal Types

120. Regulation 31 gives the following persons the right of appeal against the decision made by the regulator:

R31(1)

a) a person whose application is refused;

b) a person who is aggrieved by a decision to impose an environmental permit condition following that person's application;

c) a person who is aggrieved by a decision to impose a condition on an environmental permit held by that person -

(i) as a result of a regulator-initiated variation, or

(ii) to take account of the partial transfer, partial revocation or partial surrender of that environmental permit;

d) a person who is aggrieved by the deemed withdrawal under paragraph 4(2) of Part 1 of Schedule 5 of that person's duly-made application;

[99] Appeals by Rockware Glass against Doncaster MBC issuing an Enforcement Notice (APP/PPCL/06/160) and their refusal of permit variation (APP/PPCL/07/192) under PPCR2000 were received after the Judgment and decided on 27 November 2007.

e) a person who is aggrieved by a decision relating to an environmental permit held by that person not to authorise the closure procedure mentioned in -

(i) Article 13 of the Landfill Directive after a request referred to in Article 13(a)(ii) of that Directive, or

(ii) Article 12 of the Mining Waste Directive after a request referred to in Article 12(2)(b) of that Directive;

f) a person on whom an enforcement notice, a revocation notice, suspension notice, prohibition notice, landfill closure notice, mining waste facility closure notice, flood risk emergency works notice, flood risk activity notice of intent or flood risk activity remediation notice is served.

121. Appeals cannot be made under the following circumstances:

i) where a decision or notice that implements a direction of the SoS given under EPR2016 r62(1), r63(1) or (6), or r31(6);

ii) where an application for the grant or variation of a permit for Category A mining waste facility that is an existing facility is refused under paragraph 14(2) of schedule 20;

iii) where a revocation or suspension notice is served in relation to non-payment of subsistence fees under r66(1);

iv) where it relates to conditions on a 'standard permit'[100]

Appeals Process

122. Appeals are submitted on an appeal form (akin to the planning appeal form, adapted for EPR appeals), although this is not a legal requirement. For an appeal to be valid[101] the following should be provided by the appellant:

a) written notice of appeal/appeal form;
b) statement of the grounds of appeal;
c) statement indicating whether you wish the appeal to be dealt with by the written representations procedure or otherwise to be heard by an Inspector at a hearing or inquiry;
d) copy of the relevant application (if any);
e) copy of the relevant environmental permit (if any);
f) copy of any relevant correspondence, plans etc. that you exchanged with the regulator; and
g) copy of the decision or notice which is the subject of the appeal.

123. The grounds of appeal should explain, in full, why the appellant is aggrieved by the regulator's decision. It should describe those aspects of the decision which the appellant would wish to change and how the change should be effected. It should also state whether any of the information enclosed with the appeal has been the subject of a successful application for commercial confidentiality[102], and provide relevant details.

[100] R27(3) of EPR2016
[101] Schedule 6(2) of EPR2016
[102] R48 of EPR2016

Unless such information is provided, all documents submitted will be in the public domain and open to inspection

Time Limits

124. Notice of appeal must be given, i.e. received by both the Inspectorate and the regulator, within the following time-scales[103]:

- in relation to an appeal against a **revocation notice**, before the revocation notice takes effect;
- in relation to the **withdrawal of a duly-made application** under paragraph 4(2) of Part 1 of Schedule 5, not later than 15 working days after the date of the further notice served by the authority stating that the application is deemed to be withdrawn;
- in relation to an **enforcement notice, a regulator-initiated variation, suspension notice, mining waste facility closure notice or landfill closure notice**, not later than 2 months after the date of the variation or notice;
- in relation to a **prohibition notice**, not later than 21 days after the date of the notice; or
- in **any other case**, not later than 6 months after the date of the decision or deemed decision.

125. Appeals made outside the time limits are only accepted in very exceptional circumstances, for appeals outlined in b) to e) above. Appeals in relation to revocation notices cannot be accepted if they are submitted outside the time limit.

Effects of appeal

126. The acceptance of a valid appeal has the following effects[104]:

- Where an appeal is lodged against a **revocation notice**, the revocation will not take effect until the decision is issued or the appeal is withdrawn (unless the regulator deems it necessary to prevent or minimise pollution).
- If an appeal is made in relation to **refusal of a permit, transfer, surrender, variation or conditions**, the lodging of an appeal will not suspend the decision or the operation of the conditions.
- Where an appeal has been made against a **variation notice, enforcement notice, suspension notice or deemed withdrawal of an application**, the appeal will not suspend the notice.
- Where an appeal is brought against a **closure notice or to initiate a closure procedure**, the appeal will not suspend the notice.
- Where an appeal is brought **against a condition on a permit for a water discharge activity**, the condition will not take effect until the determination or

[103] Schedule 6(3) of EPR2016
[104] R31(7)-(10) of EPR2016

withdrawal of the appeal (unless the condition is deemed necessary by the regulator to prevent or minimise pollution).

Notification requirements[105]

127. Within 10 days of receipt of the notice of appeal the regulator must inform:

a) any person who made representations to the regulator about the subject matter of the appeal; and

b) any person who appears to the authority to have a particular interest in the appeal; and

c) relevant national consultees (generally those consulted at the application stage).

128. The regulator must notify the above parties that an appeal has been made and by whom, describe the application or permit to which the appeal relates, and state that representations must be made in writing to the Planning Inspectorate within 15 working days of the date of the notification. The notification should also explain that any representations made to the Inspectorate will be copied to the appellant and the regulator and will be entered on the public register. The regulator will confirm to the Inspectorate that this has been done.

Appeal Procedures

129. The procedure timetable for appeals under R31 broadly follow 'in the spirit of' the 2000 Planning appeals regulations and rules. These are detailed in the Appeals Procedure Guide[106]. Normally, a hearing is held in public. There is however provision for the Inspector to decide that the hearing, whole or in part, may be held in private. This applies in cases where commercial confidentiality is raised in appeals under R53.

Costs

130. The award of costs applies to hearings and inquiries in appeals under EPR, by virtue of Schedule 6(6), which applies s250(2)–(5) of the Local Government Act 1972. Schedule 20 of the Environment Act 1995, which has effect by virtue of S114(2)(viii) in relation to 'appointed persons' also applies costs provisions to hearings and inquiries. Following an application for costs the Inspector can act 'in the spirit of' and apply the general principles of the Award of Costs section of the Planning Practice Guidance on Appeals'[107]. An application for costs can only be considered where an 'event' (i.e. a hearing or inquiry) has been held.

Powers of the Inspector

131. The Inspector is appointed under R31 (and Schedule 6) on behalf of the Secretary of State for Environment, Food and Rural Affairs (Defra) and has wide powers under R31(5) and has in effect the same powers as the regulator had when making the decision. This means that the powers in Schedule 5 also can also be used by an Inspector in relation to an appeal. For example Schedule 5 Para 12(2) states that "the regulator may grant an application subject to such conditions as it sees fit" and

[105] Schedule 6(4) of EPR2016
[106] Environmental Permits: The Appeal Procedure Guide [PINS, Feb 2017].
[107] Planning Appeals PPG – Award of Costs

Schedule 5 Para 12(3)(a) states that “variations of an environmental permit in relation to the grant of an application for variation… must be in consequence of the variation”.

Appeals – points to note

132. Waste management proposals and some proposals dealing with water quality on any significant scale are likely to go to inquiry because of the degree of public interest, and to be of a sufficient complexity and duration as to require a PIM. Guidance on the conduct of these is in ITM Chapter on Inquiries. There may also be an accompanied planning application/appeal proceeding at the same time, possibly with an EIA, which in such cases is likely to be complex, so you should be familiar with the ITM Chapter on EIA. Also adding to the bulk of the file there may be lots of plans (especially in landfill cases, although these will be unlikely), and perhaps a copy of the planning application, draft working plan, previous permit decision documents and, for landfill cases, a hydrogeological risk assessment.

133. As with all casework, the simplest cases tend to be dealt with by the written representations (WR) procedure. However, these used to be rare, but are now increasing. For the more complex cases, involving multiple issues, local/national interest and/or legal issues a hearing or inquiry is the norm. Defra will on rare occasions ‘recover’ cases where there is a national or novel technical and/or legal issue(s) involved.

134. In the past, it has sometimes been necessary to go back to the parties for more information on WR cases, because the parties have assumed that Inspectors have access to a wealth of relevant documentation. Now, the parties are increasingly realising that they must provide PINS with the relevant parts of any documents that they wish to rely on - Inspector’s decisions will be based on what is before them.

135. For appeals involving water companies, negotiations between the appellant and the Environment Agency are often at a critical stage when a hearing or inquiry opens. There is a real risk that the proceedings will be adjourned for long periods to allow those negotiations to be completed. A complicating factor is that regional Agency staff may need to discuss the position with national staff; this can cause delays.

136. For these reasons:

- If there is a PIM, it may be helpful to encourage the parties to consider whether a suitable compromise can be reached and to identify the areas of disagreement (as well as agreement) in the statement of common ground. Make it clear that you intend running the proceedings as efficiently as possible and that you expect any negotiations to be completed before the inquiry opens.
- If there is no PIM, but there is a request for an adjournment during the proceedings, point out that you do not intend adjourning more than once and that the parties should therefore use the break to complete all outstanding discussions.

137. A written reps case may require more site visit time than normal, especially in a landfill case. The site may cover a large area and you should ensure that there is no ambiguity about the meeting place, asking the office to liaise with the parties about this if necessary. Sometimes the parties will offer to convey you around the site by vehicle, it is for you to decide whether this is appropriate, balancing the savings in time against the better impression that might be gained on foot.

Commercial Confidentiality

138. If the regulator has decided that information should be placed on the Public Register, any objector who has a commercial interest that may be affected by the inclusion of certain information may appeal to the SoS under regulation 53, on the grounds that it should be considered commercially confidential. Appeals should be submitted within 15 working days from the date the notice of determination was given. The regulator must not include the information that is the subject of the appeal on the public register until the appeal is decided.

139. The procedures for this type of appeal will follow the same procedure as appeals under R31, except that hearings will be conducted wholly or partly in private[108] The Inspector will determine whether:

    a) the relevant information is to be classified as commercially confidential and therefore should not be published on the regulator's Public Register (status reviewed after 4 years in certain cases); or

    b) the relevant information is not commercially confidential, in which case the regulator should place it on the Public Register.

Test Cases

140. In general waste cases**,** and those involving 'private' or commercial discharge consents**,** involve a single site and relates to a single **permit but** may involve both a permit application/variation and or revocation/enforcement notice. In contrast discharge consents from water/sewerage undertakers may involve multiple sites (sometimes involving hundreds of sites spread over a wide area and may involve multiple companies as it relates to a nationally imposed condition). In these cases they are usually placed in abeyance until either the companies come to an agreement with the EA and Defra and withdraw the appeals or if there is no agreement it may be necessary to consider using 'test cases' to cover issues that occur at multiple similar sites or sites within the same catchment area at a single event, which can then be applied to other similar sites. This approach has been used successfully on a few occasions[109]. Some waste cases have had issues which also relate to national discussions on a particular permitting issue in the waste industry and 'test cases' have been used to resolve these cases.

Health & Safety

141. Site visits will normally be to waste facilities, water treatment works, riverbanks, discharge pipes etc., but occasionally Inspectors have to visit something that cannot be seen, such as a leaky pipe. You will usually need to use your PINS-provided hard hat, protective footwear and high-viz clothing. Before visiting, make sure you are fully aware of the protective clothing requirements – in some cases this may extend to face masks,

[108] Paragraph 4(3)(d) of Schedule 20 of the Environment Act 1995.

[109] APP/WQ/10/2770-71 and 30 others – r31(2)(b) appeals by Anglian Water, South-West Water and Yorkshire Water against EA imposed conditions on permits for stand-alone discharges associated with water/wastewater treatment works and CSOs at sewage pumping stations to controlled waters; various conditions in dispute including those relating to general management, operating techniques and emissions. The 32 appeals raised matters of law, risk and environmental impact. Six 'test cases' were chosen which represented common issues, but all the sites also had site specific considerations. The EA were directed to vary conditions of each permit. The appellants applied for costs against the EA, which were allowed.

safety boots etc. and where additional protection is required (e.g. eyewear) this should be provided by the site operator or the regulator. Be mindful that any open wounds/areas of broken skin should be covered when visiting a site where bio-aerosols are likely to be present.

Decisions & Conditions

142. As mentioned in paragraph 6.13 above the powers of the Inspector are wide-ranging, but should be used with caution as any change to conditions needs to conform to the necessary Directive provisions and Defra and EA guidance, in particular any BAT Reference/BAT conclusions documents enshrined within the EA Sector Guidance. You are likely to be presented with a set of suggested conditions by the parties (normally the regulator) which may need to be scrutinised, Paragraphs 7.10-7.12 of the *Defra/WG Core Guidance*[110], states that all permit conditions should be both necessary and enforceable. "Necessary" means that the regulator should be able to justify the permit conditions. To be enforceable, conditions should clearly state the objective, standard or desired outcome of the condition so that the operator can understand what is required. Subject to legal requirements, duplication with the requirements of other legislation should be avoided. The *Core Guidance* adds that permit conditions may comprise some or all of the following: conditions stipulating objectives or outcomes, standards to mitigate a particular hazard/risk, and conditions addressing particular legislative requirements. The regulator can include conditions in the permit setting out steps to be taken during, prior to and after the operation of the regulated facility.

143. Particular care needs to be exercised when deciding on enforcement or revocation notices as these may be linked to pollution events and risk of pollution which should not be prolonged by 'generous' timescales for completion. The same applies to water company 'test cases' and occasionally waste industry cases as any decision may affect many hundreds of sites nationally.

144. It should be noted that the EA have been asked by Defra to target waste sites that are in continued non-compliance (Opra Bands E & F in particular) and decisions on appeals at these sites need to be consistent with this approach to enforcement. Inspectors decisions that are not consistent with this approach could be perceived as sending out the wrong message to the waste management industry and may result in challenges where it could be argued the decision may hinder the EA's approach to enforcement and prolong risk to the environment and human health. In these cases the progress towards compliance that the operator has made/appears to have made and the relative risk to the environment of continued non-compliance needs to be taken into account as part of the decision-making process.

145. In order to assist Inspectors in the decision-making process a 'checklist' which covers points that may need to be addressed in the decision:

a) Does the decision adhere to the principles of the EP regime, particularly as regards giving primacy to the protection of the environment?

b) Is the decision internally consistent as regards any finding of operator competency?

c) Where a decision addresses a novel issue, or takes a novel approach, has specialist advice been sought?

[110] Environmental permitting: Core Guidance, Defra/WG, March 2020.

d) Does the decision header refer to the correct department, legislation and regulations?

e) With enforcement and revocation notices, have the 'steps to be taken' been reviewed and updated?

146. It should be noted that with regard to training in EPR the level of training inspectors receive is sufficient to equip them to review the merits of the EA's actions but not to become directly involved in detailed matters of site management. As a result, the standard approach is to review whether the EA's actions are reasonable and proportionate, so that it is rare to exercise the Inspector's powers under Reg 31(5). If a situation arises where an Inspector is considering such action, this should be aired at the event. Also, the Inspector should be confident that s/he has sufficient information as to the detailed situation and should demonstrate that particular consideration has been given to the implications in respect of the principles of the EP regime – i.e. protection of the environment and prevention of harm to human health by use of use of BAT, where necessary, and in compliance with the relevant EU Directives.

Annex A - Example Decisions

Example Environmental Permitting Decisions

1. **Permit refusal: APP/EPR/12/81 – S31(2)(a) appeal by Mr N Stoker, Unit 1, Farrar Mills, Farrar Mills Lane, Siddal, Halifax HX3 0PY** – Site Visit 20 June 2013, decision dated 2 August 2013. Refusal of 'Standard rules' [SR2008No3 75kte] permit application for the operation of installation for a household, commercial and industrial waste transfer station with treatment (<75,000tpa throughput).

    - **Reasons for refusal**: EA concluded that the appellant would not be the operator; the appellant would not be able to comply with certain permit conditions as borne out by a long history of non-compliance.

    - **Grounds of appeal**: appellant would be in control of operations on the site as he currently lives at the site; granting of an operators licence to the appellants at another site.

    - **Inspector's decision**: not convinced that the appellant would be likely to have the authority to control the site activities or to make financial decisions and therefore could not be the operator; current state of site and history of non-compliance that would breach the permit upon issue and concluded that the appellant would not operate the facility in accordance with the permit. Appeal dismissed: permit application refused.

2. **Conditions: APP/EPR/13/87 – S31(2)(c)(i) appeal by Omega Proteins Ltd, Wildriggs, Greystoke Road, Penrith, Cumbria, CA11 0BX** – Hearing 15 October 2013, decision dated 5 December 2013. Regulator-initiated variation by Eden DC to impose conditions in relation to effluent discharge to a sewer (other conditions appealed were agreed and appeal withdrawn with regard to those aspects) to a permit for an A2 (s6.8, Schedule 1) animal by-product rendering process to turn category 3 material into meat and bone meal (MBM) and tallow.

    - **Reasons for variation:** following review of the permit, conditions varied to incorporate all variation applications made, advances in BAT, reviewed sector guidance and general guidance.

    - **Grounds of appeal:** Examples of dual regulation, which we do not believe are in alignment with the Government's stance and current policy on 'deregulation and better regulation' and also result in dual enforcement at an additional cost to Local Government. Additional controls being imposed over and above what is required in current guidance (specifically Sector Guidance Note IPPCSG8 Integrated Pollution Prevention and Control (IPPC) - Secretary of State's Guidance for the A2 Rendering Sector). The cost/benefit of imposing the additional controls. Insufficient scientific explanation of the reasons for the additional controls on the odour abatement equipment.

    - **Inspector's decision:** concluded that many of the monitoring requirements in the disputed conditions are already included in other EP conditions. Other conditions appealed changed and agreed between the parties. Inspector allowed the appeal (as reduced in scope) and modified the consolidated permit by deleting 3 conditions and modifying the thermal oxidiser monitoring condition.

3. **Permit transfer, surrender: APP/EPR/12/42 – S31(2)(a) appeal by Clive Hurt (Plant Hire) Ltd, Great Knowley and Gorse Hall Landfill Site, Blackburn Road, Chorley, Lancashire PR6 8TH** – Site Visit 24 July 2012, decision 17 August 2012. Application for surrender of a permit for a non-hazardous landfill site

    - **Reasons for refusal:** following review of the permit, conditions varied to incorporate all variation applications made, advances in BAT, reviewed sector guidance and general guidance. The EA considered that the appellant had failed to adequately demonstrate that the deposits of waste within the site are no longer resulting in generation of excess landfill gas and not giving rise to groundwater pollution.

    - **Grounds of appeal:** the appellant maintained that the landfill gas monitoring results show that there is no gas flow at the site boundary and no gas migration off-site; the results of groundwater monitoring meet the completion criteria in the EA Guidance; and there is sufficient landfill monitoring infrastructure to enable closure of the site.

    - **Inspector's decision:** concluded that although the information submitted as part of the application with regard to monitoring has been taken from several points around the site (predominantly the Southern part), given the time period of operation and the waste characteristics, the information is insufficient to show that the waste mass is sufficiently stable and does not present an undue risk to the surrounding area. The appeal was therefore dismissed.

4. **Revocation of permit 1: APP/EPR/15/401 – S31(2)(f) appeal by Metropolitan Waste Management Ltd, 185 Manor Road, Erith, Kent DA8 2AD** – Hearing held 23 September 2015, decision 19 November 2015. Permit revoked in its entirety and steps required for a waste transfer station and soil screening facility.

    - **Reason for revocation:** EA considered the operator is not competent and will not operate the facility in accordance with the permit. In particular persistent failure to comply with the permit conditions; non-compliance with previous enforcement notice; inadequate technical competence; historical prosecution demonstrating non—competence. The Notice required various steps to be taken to bring the facility back into compliance including prevention of emissions & monitoring; removal of all waste from site and empty/clean all drainage systems.

    - **Grounds of appeal:** revocation was unreasonable and disproportionate and the EA is wrong to consider the appellant is not a competent operator. The appellant has endeavoured to comply with all CAR's and enforcement notices (although not always within the timescales due to mitigating circumstances); the company does have a person who has a Certificate of Technical Competence (CoTC) who has increased his level of attendance and the current site manager is in the process if gaining CoTC. Historical prosecution does not have any bearing on the current situation.

    - **Inspector's decision:** concluded that continued poor performance of the operator indicates that he is not competent and was not convinced that the appellant could comply in the future and the was satisfied that the revocation of the permit was proportionate in this case. The Notice was affirmed with modifications.

5. **Revocation of permit 2: APP/EPR/15/443 – S31(2)(f) appeal by Wasteology Ltd, Greenham Quarry, Wellington, Somerset TA21 0JU** – Hearing held 19 April 2016, decision 1 July 2016. Permit revoked in its entirety and steps required for a waste transfer station facility.

    - **Reason for revocation:** EA considered the operator is not competent and will not operate the facility in accordance with the permit. In particular the company has a poor record of compliance; the banding for Opra compliance was the lowest rating (Band F) for 2011-2015; the company received advice and guidance on compliance as well as warning letters, 19 Enforcement Notices and 2 formal cautions which have failed to secure compliance; inadequate working plan; inadequate infrastructure and drainage at the site; site has impacted on the local amenity with regard to noise; occasions where the technically competent management cover has been inadequate. The Notice required various steps to be taken to bring the facility back into compliance including prevention of emissions & monitoring; removal of all waste from site and empty/clean all drainage systems.

    - **Grounds of appeal:** the notice of revocation was unreasonable and disproportionate, and the EA has not acted consistently or transparently and has failed to take all of the relevant considerations into account. On 27 November 2014 the EA advised the company that it had 18 months to achieve compliance or the permit would be revoked (until 27 May 2016); the company relied upon that assurance and invested significant money in the redevelopment of the site to ensure its future compliance within the timeframe; however, in serving the Notice on 20 August 2015, the EA has unfairly reneged upon its previous position to the serious detriment of the company.

    - **Inspector's decision:** concluded that there does not remain a significant risk of pollution from the appeal site and the revocation is not justified in the interests of the protection of the environment; Inspector was not convinced that there was such a change in circumstances or any other trigger to issues a revocation Notice prior to the end of the 18 month period. Although there is continued poor performance there have been recent improvements which indicate that the operator is capable of operating the site in compliance with the permit. The appeal was allowed and the Revocation Notice was quashed.

6. **Enforcement Notice: APP/EPR/15/462 – S31(2)(f) appeal by T K Lynskey (Excavations) Ltd, Clifton Works, Neepsend Lane, Sheffield, South Yorkshire S3 8AW** – Site visit 14 April 2016, decision 13 May 2016. Notice and steps required related to permit for waste transfer station for non-hazardous waste.

    - **Reason for Enforcement Notice:** breach of permit conditions – activities not managed in accordance with the management system as there is no written management system which identifies and minimises the risks of pollution; waste is not being kept in a building/secure container and on impermeable surface with sealed drainage; acceptance of waste not authorised by the permit (waste from mechanical treatment of waste). The notice required submission of a written management system; movement of all waste to secure containment with suitable surface and drainage; removal of all non-authorised waste from the site.

    - **Grounds of appeal:** appellant disputes alleged breaches of permit; Notice not justified – based on flawed reasoning with no supporting evidence; EA acted unreasonably and prematurely in issuing the Notice; the conditions are unreasonable and unnecessary; timescale for compliance insufficient.

- **Inspector's decision:** concluded that absence of written management system breaches permit condition; evidence of contraventions of waste storage conditions; CARs and on-site evidence proves contravention of permit conditions on waste acceptance and unacceptable risk of pollution and nearby river; EA enforcement action was reasonable and justified; steps and timescale for compliance necessary and reasonable. Appeal was dismissed and Notice upheld.

7. **Commercial Confidentiality: APP/EPR/12/52, S53(1) appeal by JBMI Group Ltd, Kingsilver Refinery, Hixon, Staffordshire ST18 0PY** – site visit deemed not necessary, decision 12 March 2013. Rejection of request to grant commercial confidentiality for reporting of performance indicators relating to waste removed from site and Pollution Inventory return relating to off-site waste transfers in respect of varied permit for recovery of contaminated aluminium and production and processing of secondary aluminium.

    - **Reasons for refusal:** request not granted as the information has appeared in the public domain in previous years without a confidentiality request.

    - **Grounds of appeal:** the EA are required to exclude information that is commercial and industrial as it relates to commercial activities and processes of the company; the information is already subject of legal confidentiality in order to protect legitimate economic interests, via contractual confidentiality which applies non-disclosure agreements to all aspects of the company's processes; there is no significant public interest in having this information disclosed, but there is public interest in maintaining commercial confidences.

    - **Inspector's decision:** no evidence that the appellants marketplace is any more competitive than others or requires any greater level of sensitivity; the existence of the non-disclosure agreements are a matter between those parties involved and is not an overriding indication of necessity of commercial confidentiality. The appeal site lies close to housing and a school and the appeal information give an indication of the activity level of the site, which is in the public interest. The EPR carries a presumption in favour of disclosure and this together with the other points does not provide a convincing argument for excluding the information from the public register. The appeal was rejected.

Annex B – EPR Glossary of Terms

Term	Abbreviation	Explanation
Activated Carbon	AC	Very porous carbon, acts as adsorbent for aromatic organic pollutants – can adsorb large quantities of gases, extensively used for odour control.
Activated sludge		Sludge removed from the activated sludge sewage treatment process. Consists of bacteria and protozoa which can live on the sewage and requires continuous removal. Part of the still active sludge is returned to the raw sewage (hence 'activated sludge') and the majority (about 90%) is sent for disposal to land, sea or incineration.
Activity		In schedule 1 of EPR2016. Activity as listed in Part 2 of the Schedule. An activity is carried on at an installation or mobile plant. For an activity carried on at an 'installation', the place where the activity is carried on forms part of the installation.
Advanced Thermal Treatment	ATT	A generic term to describe energy from waste technologies (primarily those that use Gasification or Pyrolysis) which are more efficient at recovering energy than conventional methods. See separate definitions of Gasification, Pyrolysis and Thermal Treatment for further details.
Anaerobic Digestion	AD	Biological treatment for organic wastes such as food and green garden/ horticultural waste, where plant and animal materials (biomass) are broken down by micro-organisms in the absence of oxygen, using an enclosed system, under controlled conditions. The main end products are "biogas" which can be used to generate heat or power, and "digestate" (a compost-like material that can be used as a fertiliser). As the process is enclosed in a building, AD does not require a large site, but must be an appropriate distance away from "sensitive receptors" such as housing and community facilities, because of potential health risks.
Asset Management Plan	AMP	Tactical plan for managing the water industry infrastructure to a methodology that drives continuous improvement on a 5-year cycle (currently AMP6 covering 2015-2020, i.e. the 6th AMP period since privatisation in 1989). The expenditure is linked to the OFWat periodic price review (currently PR18)
Best Available Techniques	BAT	Means the most effective and advanced stage in the development of activities and their methods of operation which indicates the practical suitability of particular techniques for providing the basis for emission limit values and other permit conditions designed to prevent and, where

		that is not practicable, to reduce emissions and the impact on the environment as a whole: (a) 'techniques' includes both the technology used and the way in which the installation is designed, built, maintained, operated and decommissioned; (b) 'available techniques' means those developed on a scale which allows implementation in the relevant industrial sector, under economically and technically viable conditions, taking into consideration the costs and advantages, whether or not the techniques are used or produced inside the Member State in question, as long as they are reasonably accessible to the operator; (c) 'best' means most effective in achieving a high general level of protection of the environment as a whole - from Article 3 of the Industrial Emissions Directive 2010/75/EU (formally the IPPC Directive), BAT reference documents for the basis for setting of permits/licence conditions under the Environmental Permitting Regime and EPR 2016.
Best Available Techniques Not Entailing Excessive Costs	BATNEEC	The most effective techniques for an operation at the appropriate scale and commercial availability, where the benefits gained by using the technique should bear a justifiable relationship to the cost (unless emissions are very toxic) – an updated version of Best Practicable Means (BPM).
BAT Reference Notes	BREF Notes	Documents published by the C, which follow from an exchange of information on BAT between the member states. These form the basis for the BAT Conclusion documents, which in turn feed into permit conditions.
Best Practicable Environmental Option	BPEO	Establishes the option which provides the least damage to the environment as a whole at an acceptable cost. BPEO was included in Pt I of the Environmental Protection Act 1990 as basis for the IPC authorisation process.
Biodegradable Waste		Waste that is subject to being broken down by microbial action.
Biological Treatment		A method of treating waste that uses biological processes, involving micro-organisms, to break down the waste. Examples of this form of treatment include Anaerobic Digestion and Composting. Treatment of waste water and sewage, and some specialised methods of contaminated soil treatment, also involve biological treatments.
Biomass		Biological materials (i.e. derived from plants or animal sources) which are used as a source of fuel to generate energy. Biomass energy generating plants do not all use waste as feedstock: some generate energy from energy crops grown specifically for the purpose, whereas others may use a combination of biomass crops and pre-treated waste wood

		and/ or Refuse Derived Fuel (RDF). See separate definition of Refuse Derived Fuel.
By-Product		The term “by-product” is defined in Article 5 of the Waste Framework Directive (2008/98/EC) as a “substance or object, resulting from a production process, the primary aim of which is not the production of that item,” where the following conditions are met: (a) Further use of the substance or object is certain; (b) The substance or object can be used directly without any further processing other than normal industrial practice; (c) The substance or object is produced as an integral part of a production process; and (d) Further use is lawful, i.e. the substance or object fulfils all relevant product, environmental and health protection requirements for the specific use and will not lead to overall adverse environmental or human health impacts. Such a product is not regarded as “waste” if these conditions are met. It is implicit that if these conditions are not met, the product is likely to be a “waste.” Quality Protocols have been developed by the Environment Agency in association with the Waste and Resources Action Programme (WRAP) for various products, to establish the conditions that must be met for them to qualify as a product rather than as a “waste”.
Ceramic filter		Method of ‘cleaning’ waste gases from treatment processes, where particles are collected on the surface of the element, as filtration continues the layer of particle deposits becomes thicker, forming a ‘cake’. The cake is removed for disposal.
Chemical Treatment		A method of treating waste that uses chemicals to treat waste to neutralise or reduce its harmfulness, prior to further treatment, recovery or disposal. These methods are often used to treat Hazardous Wastes (see separate definition) but chemical treatments are also applied in waste water treatment.
Circular Economy		An alternative to a traditional linear economy (make, use, dispose) in which we keep resources in use for as long as possible, extract the maximum value from them whilst in use, then recover and regenerate products and materials at the end of each service life.
Civic Amenity Site	CA	See Household Waste Recycling Centre.

Clinical Waste		Waste generated by healthcare activities (hospitals, GPs surgeries, vets, laboratories, may range from plasters, used needles to drugs and body parts).
Coastal Waters		Waters within the area extending landward from those baselines as far as the high tide limit, or in the case of freshwater, the freshwater limit of the river or watercourse and any waters within an enclosed dock adjoining waters within that area.
Co-mingled Waste		Mixed Waste stream, where waste has not been segregated at source (kerbside collection). Is easier for households and has been shown to boot overall recycling rates, but increases cost and increases contamination risk.
Commercial and Industrial Waste	C&I	Waste generated by industry and by businesses. The fraction of C&IW that is similar in nature to household waste (for example, food, green waste, paper, card, cans, glass and plastics) is “municipal” waste according to the definition in Article 2 (b) of the Landfill Directive – see definition of Municipal Waste below for details.
Composting		A method of biological treatment that involves breaking down organic waste into a soil-like substance, using various micro-organisms in the presence of oxygen. Can be done in “open windrows” or “in-vessel” (see separate definitions). The end-product is compost which has various horticultural and agricultural uses. As there are potential risks to health from “bio-aerosols” and in some cases, animal by-products, composting is normally only allowed on sites that are an appropriate distance away from away from “sensitive receptors” such as housing and community facilities. The Environment Agency has issued guidance on developments that require both planning permission and environmental permits, which explains the risks.
Construction and Demolition Waste	C&D	Waste generated by the construction and demolition process. This waste stream therefore includes various building materials, including concrete, bricks, gypsum, wood, glass, metals, plastic, solvents, asbestos and excavated soil, many of which can be recycled.
Controlled Waste		aste from agricultural, mining and quarrying, sewage sludge d dredging spoils, accounting for 60% of the total are regarding having relatively low potential for causing harm to human alth of the environment.
Controlled Waters		levant territorial waters, coastal waters, inland freshwaters, nds, lakes and groundwaters as defined in s104 WRA 1991.

Combined Heat and Power	CHP	A term used to describe the process of capturing and using heat that is a by-product of the electricity generation process (for example, heat generated by energy from waste facilities). It involves putting into place infrastructure (e.g. pipework) to supply the surplus heat to developments nearby (such as an industrial estate or housing estate), that have a demand for it, which otherwise have to be met by a conventional boiler or energy generating system.
Combined sewer overflow	CSO	An overflow pipe, legally allowed to operate during storm events, directly connected to sewers and/or sewage pumping stations, they are designed to operate at times of heavy rainfall to release pressure in the network and reduce the risk of flooding. However as this is effectively untreated sewage mixed with storm waters there is a risk of pollution (with concerns in particular around bathing waters).
Directly associated activity		An activity that could have an effect on pollution that is carried on the same site as an installation and is technically connected with an activity carried on at the same installation.
Disposal		Defined in Article 3 (19) of the Waste Framework Directive (2008/98/EC) as "...any operation which is not recovery even where the operation has as a secondary consequence the reclamation of substances or energy." A detailed (but non-exhaustive) list of the operations that fall under the definition of "recovery" is set out in Annex I of the Directive. In other words, it means any waste management operation whose main purpose is to get rid of the waste, even if some value is recovered in the process. Therefore, incineration may be disposal if the main purpose is not energy recovery. The deposit of excavation waste onto or into land (landfill or land-raising) is also usually regarded as waste disposal although there are "grey areas" where material is being used for land remediation or landscaping purposes.
Duty of Care		Applicable to those who import, produce, carry, keep, treat or dispose of controlled waste or as brokers have control of such waste must take all reasonable measures to achieve protection of the environment and prevention of harm to human health by measures outlined in s34 of the Environmental Protection Act 1990.
Energy from Waste / Energy recovery	EfW	Use of residual waste as a fuel to generate energy (see below for definition of Residual Waste). There are various types of facility for generating energy from waste or from "refuse derived fuel" (see below for definition). These include municipal energy from waste facilities for incineration of waste with energy recovery, and more advanced technologies which are more efficient at recovering energy, for example, by generating energy from gas produced by other waste treatment processes such as pyrolysis, gasification and anaerobic digestion (AD). Defra has produced guidance

		(2014) on the issues around energy from waste and the options available.
Emission Limit Value	ELV	The mass concentration or level of an emission which may not be exceeded over a given period.
Environment Act 1995		Act which established the Environment Agency (EA) and SEPA and set out their functions, rights and liabilities and made provisions on contaminated land, control of pollution, conservation, fisheries and National Parks.
Environmental Permitting Regulations 2016 [SI2016/1744]	EPR2016	Regulations made under powers in the Pollution Prevention and Control Act 1999, transpose various EU Directives – IPPC, Waste. Landfill, Incineration, End of Life Vehicles, Large Combustion Plants & others, which extended the EP regime under the previous 2007 regulations, which streamlined the Waste Management Licensing and Pollution Prevention and Control regimes into one permitting and compliance system. The 2010 regulations added water discharge consenting, groundwater authorisations, radioactive substances regulations to the regime and transposed the permitting parts of the Mining Waste and Batteries Directives. The 2016 regulations consolidated and updated the EPR2010, with amendments and came into effect from 1 Jan 2017.
Environmental Protection Act 1990		Act which made provision for improved pollution control, re-enact provisions of the Control of Pollution Act 1974 with respect to waste, modifications to functions of the regulatory bodies. Introduced Integrated Pollution Control regime – all major emissions are considered simultaneously and not in isolation – see IPPC.
Environmental Quality Standards	EQS	Values, defined by regulation that specifies the maximum permissible concentration of a potentially hazardous chemical, generally in air or water. For water these are defined in the Water Framework Directive (2000/60/EC) and for Air in the Ambient Air Quality Directive (2008/50/EC).
European Waste Catalogue	EWC	Established by Commission Decision 2000/532/EC a harmonized, non-exhaustive list of waste types. Each waste type is given a 'six digit' code, made up of 'two digit' sub-codes. In general the catalogue describes the type of process and the industry/sector from which the waste type arises. Hazardous wastes are assigned an asterisk '*' after the code. These codes are used in permits to set out the permitted waste types for relevant waste installations. The list was transposed under the List of Waste Regulations 2005.
Gasification		A type of Advanced Thermal Treatment/ Energy Recovery technology, which under strictly controlled temperature conditions, converts biomass and/ or pre-treated wastes into gas (syngas), which can then be either used as a source of

		energy or converted into electricity. The other main product is a solid ash residue. This method of treatment is only suitable for pre-treated wastes, such as Refuse Derived Fuel (RDF), which may be generated on-site from residual waste, or be imported from another facility which processes residual waste into RDF. See also separate definitions of Advanced Thermal Treatment, Biomass, Energy Recovery, Refuse Derived Fuel, Residual Waste and Thermal Treatment.
Groundwater		All water below the surface of the ground in the saturation zone and in direct contact with the ground or subsoil.
Hazardous Waste		Defined in Article 2 (2) of the Waste Framework Directive (2008/98/EC) as "...waste which displays one or more of the hazardous properties listed in Annex III." In other words, waste whose properties are likely to cause risks to health, the environment or water quality. Annex III of the Directive provides a (non-definitive) list of properties that render waste "hazardous," and the Environment Agency has produced guidance on the types of waste that are likely to be hazardous.
Household Waste		There is no standard definition of household waste but in general it means waste generated by households. Most of this waste is collected from local councils from households through kerbside collections or household waste recycling centres (HWRCs), although some household waste is also dealt with by the commercial waste sector (e.g. skip hire).
Household Waste Recycling Centre	HWRC	Facility operated by or on behalf of a local council, where local residents can bring waste (also referred to as a Civic Amenity Site or a "tip").
Incineration		The combustion of waste, either with or without energy recovery. Municipal energy from waste plants tend to be referred to as "incinerators" although they normally recover some energy, and the most recently developed plants are efficient enough to qualify as a waste "recovery" operation (see separate definition of Recovery).
Industrial Emissions Directive	IED	EU Directive which recasts the IPPC and 6 other existing directives, following extensive review of the existing policy. Aims to achieve high level of protection of the environment and human health taken as a whole by reducing emissions across the EU, in particular better application of BAT. Environmental permits should set conditions in accordance with the principles and provisions of the IED. Transposed through amendments to the EPR2010.
Inert Waste		Waste that does not undergo any significant physical, biological or chemical changes likely to cause risks to health or to the environment or to affect water quality – the legal

		definition of “inert waste” can be found in Article 2 of the Landfill Directive (1991/31/EC). This type of waste can be disposed of at any permitted Landfill site. Certain types of inert waste such as clean waste soils may also be disposed of onto land for the legitimate purpose of restoration, land remediation or landscaping.
Inland freshwaters		Rivers, streams, watercourses and lakes or ponds that are above the freshwater limit, i.e. not tidal – see s104 WRA 1991.
Integrated Pollution Prevention and Control	IPPC	The IPPC Directive 96/31/EC sets out an integrated environmental approach to the regulation of certain industrial activities. This means that emissions to air, water (including discharges to sewer) and land, plus a range of other environmental effects, must be considered together. It also means that regulators must set permit conditions so as to achieve a high level of protection for the environment as a whole. These conditions are based on the use of the Best Available Techniques (BAT), which balances the costs to the operator against the benefits to the environment. IPPC aims to prevent emissions and waste production and where that is not practicable, reduce them to acceptable levels. IPPC also takes the integrated approach beyond the initial task of permitting through to the restoration of sites when industrial activities cease. Covers Part A(1) – EA Regulated (IPPC) and Part A(2) – LA Regulated (LA-IPPC) installations, but not Part B – LA Regulated (LA-PPC) installations (which concerns lower risk installations that concern emissions to air only). Note that all regulated under the EPR2010.
Installation		A ‘stationary technical unit’ where one or more activities listed in Schedule 1, Part 2 of EPR2016 are carried on and any other location on the same site where any directly associated activities are carried on.
In-Vessel Composting	IVC	See separate definition of Composting. This method involves composting in an enclosed environment, allowing greater control over the process than “open windrow” composting. The waste is usually shredded before processing. There are various systems available using containers, silos, bays or tunnels, rotating drums, or an enclosed hall. The end-product is compost which has various horticultural and agricultural uses. This method can be used to compost food and green garden/ horticultural waste mixtures, because composting takes place in an enclosed environment, with accurate temperature control and monitoring. The end-product is compost which can be used by farmers and gardeners to improve soil. There are various systems depending on the type of container or building used. It does not require such a large site as Open Windrow Composting but must still be an appropriate distance away from “sensitive receptors” such as

		housing and community facilities, because of potential health risks from “bio-aerosols” and animal by-products.
Landfill		Defined in Article 2 (g) of the Landfill Directive (1991/31/EC) as: “A waste disposal site for the deposit of the waste onto or into land (i.e. underground), including: Internal waste disposal sites (i.e. landfill where a producer of waste is carrying out its own waste disposal at the place of production), and A permanent site (i.e. more than one year) which is used for temporary storage of waste but excluding: Facilities where waste is unloaded in order to permit its preparation for further transport for recovery, treatment or disposal elsewhere; Storage of waste prior to recovery or treatment for a period less than three years as a general rule, or storage of waste prior to disposal for a period less than one year.
Landfill Diversion		Ways of recovering value from waste instead of disposing of it to landfill – see separate definition of Landfill.
Landfill Gas	LFG	Generated in Landfill sites by anaerobic decomposition of municipal waste – consists of predominantly Methane (CH_4) and Carbon dioxide (CO_2). Directed through system of pipes to vents and maybe used as fuel for onsite boilers for site energy needs. Needs to be monitored for many years after site is closed and capped.
Leachate		Seepage of liquid through a waste disposal site or spoil heap (mainly from municipal waste landfill sites). Leachate characterized by high Biological Oxygen demand (BOD), high ammonia, organic nitrogen, volatile fatty acids, has high pH – requires collection (from sumps) and treatment before being discharged to controlled waters. May need to be monitored for many years after landfill site is closed and capped. Should be prevented from entering controlled waters by use of low permeable barrier i.e. geological and synthetic liner.
Material Recycling Facility / Materials Recovery Facility.		Facility that uses mechanical techniques to sort, separate and recover raw materials from mixed household wastes, such as paper, card, cans, glass and plastics, which can then be re-used by industry, or recycled into new products. It therefore fits into either the “Preparing for Re-use” or “Recycling” steps of the “waste hierarchy.” Other more specialised materials recovery techniques can also be used to recover value from other types of waste generated by households and

		businesses, such as waste electrical and electronic equipment (WEEE).
Mechanical and Biological Treatment	MBT	Use of a combination of techniques to extract as much value as possible from mixed wastes. This involves two or three stages of treatment on the same site. There is often an initial mechanical sorting and separation stage to recover materials suitable for recycling, followed by processing and/ or treatment of the residue, to prepare it for a final treatment stage, when any remaining residual waste is used to recover energy and/ or prepared for disposal. In this combination the final stage involves some form of biological treatment.
Mechanical Heat Treatment	MHT	Use of a combination of techniques to extract as much value as possible from mixed wastes. This involves two or three stages of treatment on the same site. There is often an initial mechanical sorting and separation stage to recover materials suitable for recycling, followed by processing and/ or treatment of the residue, to prepare it for a final treatment stage, when any remaining residual waste is used to recover energy and/ or prepared for disposal. In this combination the final stage involves some form of thermal or heat treatment.
Mobile Plant		Plant which is designed to be moved and used to carry on an activity or waste operation.
Municipal Waste		Defined in Article 2 (b) of the Landfill Directive 1991/31/EC as "…waste from households, as well as other waste which, because of its nature or composition, is similar to waste from household."
Non-Hazardous Waste		Waste that is neither inert nor hazardous (see separate definitions), which can include pre-treated organic wastes and stabilised residues from waste treatment. This type of waste can only be disposed of at a permitted Non-Hazardous Landfill site or another facility permitted to accept it.
Non-Controlled Waste		Waste arising from municipal (waste from household and small businesses), commercial and industrial, construction and demolition activities. These wastes account for 40% of the total and contain environmentally damaging by-products when they degrade. Other substances may be toxic or hazardous to health in other ways.
Operator		The person who has control over the operation of the regulated facility.
Operational Risk Appraisal	Opra	Methodology for formal risk assessment for processes subject to EPR2016. Environment Agency assess the risk to the environment of the running of the process and to target resources and charges as appropriate, dependent on the risk – consists of three 'Tiers' Tier 1 being the simplest processes

		with the lowest risk, Tier 3 being the most complex with high risk activities. A permit can cover more than one activity and in more than one tier.
Plume		Steam of gas issuing from a stack which retains its identity and is not completely dispersed in the surrounding air. Near the stack the plume Is often visible due to water droplets, smoke or dust that it contains, but often persists downwind after it has become invisible to the naked eye (albeit in much less concentrations).
Preparing for Re-Use		Defined in Article 3 (16) of the Waste Framework Directive (2008/98/EC) as "...checking, cleaning or repairing recovery operations, by which products or components of products that have become waste are prepared so that they can be re-used without any other pre-processing."
Proximity Principle		One of the principles to be applied to the disposal of residual waste and recovery of mixed municipal waste from households and other sources where collected as part of the same collection arrangements, under Article 16 of the Waste Framework Directive (2008/98/EC) – the other principle to be applied in parallel is "self-sufficiency" (see separate definition). The objective is to enable these wastes to be managed at "one of the nearest appropriate installations, by means of the most appropriate methods and technologies, in order to ensure a high level of protection for the environment and public health" – in other words, that waste facilities should be appropriately located in relation to the sources of waste, so that the impacts on the environment and health are minimised.
Pyrolysis		A type of Advanced Thermal Treatment/ Energy Recovery technology, which under strictly controlled temperature conditions, converts biomass and/ or pre-treated wastes into gas, which can then be either used as a source of energy or converted into electricity. Other by-products include liquid and solid residue ("char") which can be used as fertiliser. This method of treatment is only suitable for pre-treated wastes, such as Refuse Derived Fuel (RDF), which may be generated on-site from residual waste, or be imported from another facility which processes residual waste into RDF. See also separate definitions of Advanced Thermal Treatment, Biomass, Energy Recovery, Refuse Derived Fuel, Residual Waste and Thermal Treatment.
Radioactive Waste		Waste that undergoes radioactive decay (may be from laboratories, health facilities or the nuclear energy industry).
Recovery		Defined in Article 3 (15) of the Waste Framework Directive (2008/98/EC) as "...any operation the principal result of which is waste serving a useful purpose by replacing other materials which would otherwise have been used to fulfil a particular function, or waste being prepared to fulfil that function, in the

		plant or in the wider economy." A detailed (but non-exhaustive) list of the operations that fall under the definition of "recovery" is set out in Annex II of the Directive. Essentially, "recovery" of waste is the same as "Landfill Diversion" (see separate definition). The generation of energy from waste may qualify as "recovery," but only where the technology achieves the levels of efficiency required by the Directive (see Annex II, R1).
Refuse Derived Fuel	RDF	Residual waste which has been pre-treated (for example by being screened and shredded) to produce a fuel which can then be used to generate energy at a Biomass, Energy from Waste or Advanced Thermal Treatment facility. Refuse Derived Fuel is still technically a "waste" and not a product. Operations that involve the processing of residual waste into RDF may qualify as "recovery" but do not fall within the definition of "recycling" (as is sometimes claimed). See separate definitions of Advanced Thermal Treatment, Biomass, Energy from Waste, Recycling, Recovery and Residual Waste.
Residual Waste		Waste left over from treatment or recovery processes, once the re-useable and recyclable waste has been removed.
Recycling		Defined in Article 3 (17) of the Waste Framework Directive (2008/98/EC) as "...any recovery operation by which waste materials are reprocessed into products, materials or substances whether for the original or other purposes. It includes the reprocessing of organic material but does not include energy recovery and the reprocessing into materials that are to be used as fuels or for backfilling operations."
Re-Use		Re-use is defined in Article 3 (13) of the Waste Framework Directive (2008/98/EC) as "...any operation by which products or components that are not waste are used again for the same purpose for which they were conceived."
Scrubber		Device for flue gas cleaning e.g. spray towers, packed scrubbers and jet scrubbers – removes particles down to 1 micrometre in diameter when used with water. Can also control gaseous pollutants (used with alkaline solution). Scrubbers produce sludge, that requires dewatering and disposal.
Self-Sufficiency Principle		One of the principles to be applied to the disposal of residual waste and recovery of mixed municipal waste from households and other sources where collected as part of the same collection arrangements, under Article 16 of the Waste Framework Directive (2008/98/EC) – the other principle to be applied in parallel is "proximity" (see separate definition). The objective is for Member States to "to establish an integrated and adequate network of waste disposal installations and of installations for the recovery of mixed municipal waste" taking into account "best available techniques" – in other words that

		within the UK an adequate network of facilities should be developed so that each area should have enough capacity to meet its requirements.
Stack gases		The gases discharged up a chimney stack for dispersion into the atmosphere. May also be termed ‘Flue gases’ or ‘Exhaust gases’.
Tallow		Animal fat obtained from animal rendering processes, which can be used as fuel in boilers – will need to conform to Waste Incineration Directive emission limits, now applied through the Industrial Emissions Directive.
Thermal Treatment		A method of treating waste that involves heating it. Examples of thermal treatment are Anaerobic Digestion, Energy Recovery and Incineration – see separate definitions of these technologies.
Treatment		Defined in Article 3 (14) of the Waste Framework Directive (2008/98/EC) as “...recovery or disposal operations, including preparation prior to recovery or disposal.” See separate definitions for the meaning of “recovery” and “disposal.”
Waste		Defined in Article 3 (1) of the Waste Framework Directive (2008/98/EC) as “any substance or object which the holder discards or intends or is required to discard.” As it is not always easy to determine whether material is a “waste” or a “by-product,” Defra has issued guidance (2012) on the legal definition of waste.
Waste Hierarchy		The waste hierarchy is a system for ranking methods of managing waste by preference, according to how efficiently they make use of resources - see Figure 1 for details. The legal definition of the waste hierarchy can be found in Article 4 of the Waste Framework Directive (2008/98/EC), which states that it is to be applied as a priority order in waste prevention and management legislation and policy. Defra has issued guidance (2012) on applying the “waste hierarchy” when considering waste management options. There is separate guidance (2011) on applying the “waste hierarchy” when considering options for hazardous waste.
Waste Management Industry Training and Advisory Board	WAMITAB	Awarding organisation that develops qualifications for those working in the ‘Waste’ industry for operatives through to management. Specific Waste Management qualifications under the WAMITAB (Certificate of Technical Competence - CoTC) are required in order to be classed as ‘competent operator’ for regulated facilities under the Environmental Permitting Regime and EPR2016.
Waste Operation		Any recovery or disposal of waste.

Waste Projections		Forecasts or predictions of the amounts of waste likely to arise over a given period. The estimates are usually calculated by "projecting" from estimated current arisings (the "baseline"), and applying assumptions about how waste is likely to grow or fall over time, which may relate to the amount of new development expected to take place and other factors such as economic trends.
Windrow Composting		See separate definition of Composting. This method of composting is carried out in the open air or in a large covered area, and is only suitable for green garden or horticultural waste, such as grass cuttings, tree and shrub pruning's and leaves. The waste is shredded and laid out in long piles called "windrows," which are mechanically turned from time to time to aid the process of breakdown of material. The end-product is compost, which has various horticultural and agricultural uses. This type of operation requires a large site that is an appropriate distance away from "sensitive receptors" such as housing and community facilities, because of potential health risks from "bio-aerosols."

Selected definitions adapted from:

Dictionary of Environmental Science and Technology (Fourth Edition), Porteous, Andrew, Wiley 2008

The Planning Inspectorate

ENFORCEMENT

Not yet updated to reflect December 2023 Framework (NPPF)

What's new since the last version

Changes highlighted in yellow made 14 November 2023:

- Paragraph 412 added following *LB of Brent V SSLUHC & Yehuda Rothchild*
- Paragraph 417 added following the judgment in Brent LBC v SSHCLG & Chaim Reiner [2020] EWHC 3620 (Admin)
- Paragraph 677 advice on "Fallback" has been updated
- Other minor amendments

Contents

Sources & Glossary of Abbreviations

Note: where applicable from 1 January 2021, current legislation will be changed to remove references to EU legislation, transfer powers from EU to UK institutions and ensure the UK meets international agreement obligations.

BCN	Breach of Condition Notice (issued under s187A)
BPA20	Business and Planning Act 2020
BPC	Breach of planning control
CoA	Court of Appeal
CSA68	Caravan Sites Act 1968
CSCDA60	Caravan Sites and Control of Development Act 1960
DA15	Deregulation Act 2015
DMPO	Town and Country Planning (Development Management Procedure) (England) Order 2015
DPA	Deemed planning application [arising under s177(5)]
EIA	Environmental Impact Assessment
EIAR	Town and Country Planning (Environmental Impact Assessment) Regulations 2017
EN	Enforcement Notice
ENAR	Town and Country Planning (Enforcement Notices and Appeals) (England) Regulations 2002
ECL	The Enforcement Case Law ITM chapter
EPA90	Environmental Protection Act 1990
EPLP	Encyclopedia of Planning Law and Practice (Westlaw Books)
ES	Environmental Statement
Fee Regulations	Town and Country Planning (Fees for Applications, Deemed Applications, Requests & Site Visits) (England) Regulations 2012
GPDO	The Town and Country Planning (General Permitted Development) (England) Order 2015
HA04	Housing Act 2004
Hearing Rules & Guide	Town and Country Planning (Enforcement) (Hearings Procedure) (England) Rules 2002 Guide to Taking Part in Enforcement Appeals and LDC Appeals Proceeding by a Hearing – England

HoL	House of Lords
Inquiry Rules & Guide	Town and Country Planning (Enforcement) (Determination by Inspectors) (Inquires Procedure) (England) Rules 2002 Town and Country Planning (Enforcement) (Inquires Procedure) (England) Rules 2002 Guide to Taking Part in Enforcement Appeals and LDC Appeals Proceeding by an Inquiry – England
IM	Inspector Manager
LDC	Lawful Development Certificate
LGA72	Local Government Act 1972
LPA	Local Planning Authority
LA11	Localism Act 2011
MCU	Material Change of Use
NAPE	National Association of Planning Enforcement (network under the Royal Town Planning Institute)
NPPF	The National Planning Policy Framework
PA08	Planning Act 2008
PCA91	Planning and Compensation Act 1991
PCN	Planning Contravention Notice
PD	Permitted development (under the GPDO)
PEBA	Planning and Environment Bar Association
PFL	Professional Lead
PP	Planning Permission
PPG	Planning Practice Guidance 16: Appeals (for costs applications) 17b: Enforcement and Post-Permission Matters 17c: Lawful Development Certificates 21a: Use of Planning Conditions
POCA	Proceeds of Crime Act 2002
Procedural Guide	Procedural Guide: Enforcement Appeals – England
SoS	Secretary of State
TCPA90	Town and Country Planning Act 1990

UCO	Town and Country Planning (Use Classes) Order 1987
Written Representations Rules & Guide	Town and Country Planning (Enforcement) (Written Representations Procedure) (England) Regulations 2002 Guide to Taking Part in Enforcement Appeals and LDC Appeals Proceeding by Written Representations – England

The Enforcement Notice – Checklist for Decisions

Part of the EN (PPG model)	**Source**	**To Check**
Header		If the EN includes a header specifying the type of EN i.e., operational development or a material change of use, is it correct?
Paragraph 1	S173(1)(b) of the TCPA90	Is the reference to s171A(1)(a) or (b) right?
Paragraph 2 (and plan)	S173(10) & ENAR4(c)	Does the EN properly identify the boundaries of the land? Is the address consistent with the plan?
Paragraph 3	S173(1)(a)	Does the EN properly set out the matters said to constitute the alleged breach? Is it clear whether the breach relates to ops, an MCU or breach of condition? Does the allegation satisfy s173(1)(a) & (2)? Is the EN specific about what has taken place and where? Does the allegation tally with the address and/or plan? Is the allegation correct? Has there been a breach? Is the allegation confused with the RFEN? Can any errors in the allegation be corrected without causing injustice?
Paragraph 3/4		Does the EN set out the s171B immunity period? Does the explanatory note? If not, is there a (hidden) ground (d) appeal?
Paragraph 4	s173(10) & ENAR4(a)	Does the EN include reasons for issue?

	s173(10) & ENAR4(b)	Do the reasons refer to policies and proposals in the development plan?
Paragraph 5	S173(3) & (4)	Does the EN set out the steps to be taken/activities to cease? Are the steps sufficiently precise to comply with s173(3)? Is the purpose of the EN to remedy the breach and/or injury? Are the steps clear and reasonable? Do they accord with s174(4)-(7)? Is any part of the allegation not subject to the requirements, or described differently in the requirements, creating a risk of planning permission being granted under s173(11)? If the allegation is a breach of condition, would the steps lead to compliance? If the allegation is development which does not accord with a PP, would the steps ensure compliance with the PP and its terms and conditions? Is any such PP extant and capable of implementation in accordance with its terms and conditions? Can any errors in the requirements be corrected without causing injustice?
Paragraph 6	S173(9)	Does the EN specify a period for compliance with the requirements?
Paragraph 7	S173(8)	Does the EN specify when it takes effect? Is this at least 28 days after the date of issue?
		Does the EN specify the date of issue?
		Is the EN signed?
Annex	S173(10)	Is an explanatory note attached?
	PPG: 17b-019-20180222	Is a PINS' information sheet attached
		Is a plan/photo/drawing/ informative attached as said in the EN?

The Grounds of Appeal – Checklist for Decisions

Ground	Type	Provision of s174(2) of the TCPA90
(e)	Legal	that copies of the EN were not served as required by s172
(b)	Legal	that those matters [*stated in the EN*] have not occurred
(c)	Legal	that those matters (if they occurred) do not constitute a breach of planning control
(d)	Legal	that, at the date when the EN was issued, no enforcement action could be taken in respect of any breach of planning control which may be constituted by those matters
(a)	Planning merits	that, in respect of any breach of planning control which may be constituted by the matters stated in the notice, planning permission ought to be granted or, as the case maybe, the condition or limitation concerned ought to be discharged
(f)	Mitigation	that the steps required by the notice to be taken, or the activities required by the notice to cease, exceed what is necessary to remedy any breach of planning control which may be constituted by those matters or, as the case may be, to remedy any injury to amenity which has been caused by any such breach
(g)	Mitigation	that any period specified in the notice in accordance with section 173(9) falls short of what should reasonably be allowed

Banner heading in Enforcement Appeals

The name of the appellant and the grounds of appeal are taken from the appeal form. The site address and all other details are taken from the enforcement notice. See Annex 4 for advice on situations where more than one person appeals the same EN.

Banner heading in LDC Appeals

As in s78 appeals, details are taken from the application form and any LPA decision notice; one appeal may have more than one appellant.

Introduction

1. This chapter of the Inspector training manual (ITM) provides legal, policy and practical training for Enforcement appeal casework, including Lawful Development Certificate (LDC) appeals.

2. Advice contained in this ITM chapter may also assist Inspectors dealing with other casework in understanding aspects of the statutory planning system and planning law.

3. Many Enforcement judgements are summarised in the Enforcement Case Law ITM chapter. However, it is always good practice when considering legislation, case law and planning policy or guidance to refer to the source text.

4. This ITM chapter is written with England in mind; some advice applies to Wales, but Inspectors should be alive to differences in:

    - Primary and secondary legislation;
    - Commencement orders for common provisions in various Acts;
    - Planning policy regimes; and
    - The procedure rules.

The Legal Framework

The Town and Country Planning Act 1990 (TCPA90)

5. The current legal framework for planning enforcement is based on the report 'Enforcing Planning Control' (HMSO 1989), better known as the Carnwath Report, which led to Part VII of the Town and Country Planning Act 1990 (TCPA90) being amended via the Planning (Consequential Provisions) Act 1990 and Planning and Compensation Act 1991 (PCA91).

6. Part VII concerns 'Enforcement' and, as amended, comprises s171A-s196D inclusive. As described in the Encyclopaedia of Planning Law and Practice (EPLP), Part VII confers discretionary powers on local planning authorities (LPAs)[1] to take enforcement action as defined in s171A(2) in respect of a breach of planning control (BPC) as defined in s171A(1).

7. Part VII is a self-contained code. Powers to enforce, for example, planning obligations or against works to trees or listed buildings, are set out in other Parts of the TCPA90 or other enactments. Part VII therefore underpins enforcement casework, but some forms of enforcement action that are provided for under Part VII cannot be appealed to the

[1] The TCPA90 refers in the main to 'local planning authorities' and so that term is used in this chapter but it should be taken as including county, national park and mineral planning authorities plus, where relevant, development or other corporations with enforcement powers.

Secretary of State (SoS)[2] – while Inspectors need to be familiar with other Parts of the Act, particularly:

- Part III – Control of Development;
- s285 – Validity of enforcement notices…;
- s288 – Proceedings for questioning the validity of other orders, decisions and directions (judicial review of s78 and s195 decisions)[3];
- s289 – Appeals to High Court relating to enforcement notices[4];
- s296A – Enforcement in relation to the Crown;
- s303 – Fees for Planning Applications etc
- s324 – Rights of entry;
- s329 – Service of notices;
- s336 – Interpretation; and
- Sch 6 – Determination of certain appeals by persons appointed by the SoS.

8. Under s188(1), every district planning authority and the council of every metropolitan district or London borough shall keep a register containing such information as may be prescribed with respect to the enforcement notices (EN), planning enforcement orders, stop notices and breach of condition notices which relate to land in their area. An EN should be disclosed on any local land charges search.

Expressions Used in Connection with Enforcement – s171A[5]

9. S171A(1) provides for the purposes of the TCPA90 that (a) carrying out development

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[2] Provisions relating to Planning Enforcement Orders, Planning Contravention Notices, Tree Replacement Notices, Breach of Condition Notices, Stop Notices, Temporary Stop Notices and Injunctions are described in Annex 1.

[3] Where an LPA seeks to challenge a grant of PP made by an Inspector on the DPA in an enforcement appeal, they must apply under s288 to quash the PP and make an appeal under s289 against the quashing of the EN; *Oxford CC v SSCLG & One Folly Bridge Ltd* [2007] EWHC 769 (Admin). The time limits are different for s288 and s289 challenges.

[4] Where an enforcement appeal is remitted for redetermination following a successful s289 challenge, the appeal is to be determined de novo albeit that the SoS has discretion to determine the extent of the evidence to be re-heard. Redetermination may be limited to the ground on which the challenge succeeded (and ensuing grounds) or other matters, particularly where there has been a change in circumstances; *R (oao Perrett) v SSCLG & West Dorset DC* [2009] EWCA Civ 1365. More advice on redetermination can be found in the approach to decision making part 1 - constructing the decision

[5] EPLP P171A.01

without the required planning permission; or (b) failing to comply with any condition or limitation subject to which PP has been granted, constitutes a breach of planning control.

10. For s171A(1)(a) and the whole Act, the meaning of 'development' is as set out in s55. S57(1) provides that planning permission (PP) is required for the carrying out of any development of land.

11. S171A(1)(b) applies to a failure to comply with any condition imposed on any grant of express PP under Part III of the TCPA90 or the Town and Country Planning Acts of 1947, 1962 or 1971; s171B(3). S171A(1)(b) also applies to conditions or limitations on any PP deemed to have been granted under the Town and Country Planning (General Permitted Development) (England) Order 2015 (GPDO) or other development order.

12. S171A(2) provides that (a) the issue of an EN as defined in s172 or (b) the service of a breach of condition notice (BCN) defined in s187A constitutes taking enforcement action.

13. Any BPC as defined under s171A(1) is unlawful unless and until it becomes lawful in accordance with s191(2)-(3) of the TCPA90. Though unlawful, in the absence of a Stop Notice, the BCP is not *illegal* in terms of criminal law, even if an EN has been upheld at appeal. an EN has been upheld at appeal. Under s179(1) and (2), a landowner has committed an offence only if and when they are in breach of an EN – where they have not complied with the requirements after the end of the period for compliance as specified by the EN[6].

14. S171A(3) provides that in Part VII, 'planning permission' includes PP granted under Part III of the TCPA47, TCPA62 or TCPA71.

Time Limits for Enforcement Action – s171B[7]

15. The time limits for taking enforcement action are set out in s171B.

    (1) where there has been a breach of planning control consisting in the carrying out without planning permission of building, engineering, mining or other operations in, on, over or under land, no enforcement action may be taken after the end of the period of four years beginning with the date on which operations are substantially completed.

    (2) in respect of the change of use of any building to use as a single dwellinghouse, no enforcement action may be taka en after the end of the period of four years beginning with the date of the breach.

[6] Whereas criminal liability arises directly from any unauthorised action constituting works to a listed building or the felling of protected trees. It is a criminal offence to fail to comply with a Stop Notice or Injunction, and it is a criminal response to not respond or give false information in response to a Planning Contravention Notice – see Annex 1.

[7] EPLP P171B.01 to P171B.12; see also advice below on ground (d) and LDCs.

(2A) there is no restriction on when enforcement action may be taken in relation to a breach of planning control in respect of relevant demolition [within the meaning of s196D – the demolition of unlisted buildings in conservation areas].

(3) in respect of any other breach of planning control no enforcement action may be taken after the end of the period of ten years beginning with the date of the breach.

16. It was held in *R (oao Evans) v Basingstoke and Deane BC* [2013] EWCA Civ 1635 that the time limits on taking enforcement action in s171B are not, in principle, incompatible with the need to comply with Environmental Impact Assessment (EIA) regulations.

17. Section 171B(2) applies to the change of use of a building – which may include 'part of a building – to a single dwelling and to breach of a condition which prevents a change of use of a building to a single dwelling. . However, if a building is erected unlawfully and used as a dwelling-house from the outset, meaning that no change of use occurs as such, the time limit for enforcement action against the use is then ten years. The building itself may still become immune after four years.

18. S171B(4)(b) allows for 'taking further enforcement action in respect of any breach of planning control if, during the period of four years ending with that action being taken, the local planning authority have taken or purported to take enforcement action in respect of that breach'.

19. So long as the LPA issued an EN in respect of a BPC within the appropriate four or ten year period, they have a further four years to issue another EN in respect of (what in essence must be) the same breach and site. The LPA may have 'purported' to act, for example, where they issued a defective EN which was withdrawn or found null or invalid, or where the EN was quashed on ground (e).

20. Where an EN is issued under s171B(4), Inspectors must consider any ground (d) appeal on the basis of whether the development was lawful **on the date of the first notice**, or when the LPA first purported to take action. That is how the 'second bite' provisions operate to stop the clock in proceedings. It may therefore be necessary to ascertain the date of the first EN and whether it did in fact concern essentially the same breach and site.

21. Be alert to the 'second bite' powers available to LPAs under s171B(4)(b) when considering whether to grant an LDC for an existing use on the basis that no enforcement action may be taken because, as at the date of the LDC application 'the time for taking enforcement action has expired' under s191(2)(a). Even though the time specified in s171B(1) to (3) had expired by the application date, the LPA may nevertheless have been able to take enforcement action at that date because of the second bite provisions (*LB Brent v SSHCLG, Ebele Muorah* [2022] EWHC 1875 (Admin), at paragraphs 48, 52 and 54). This will prevent the grant of an LDC, unless there are other reasons why, assessed at the time of the LDC application, no enforcement action may be taken against the use or operations, for example because they were PD. It should also be born in mind that, following William Boyer (Transport) Ltd v SSE [1996] 2 WLUK 85, the second bite provisions will only enable the service of a second enforcement notice if the first was issued in time. If in doubt, you may seek advice from your manager or Professional Lead.

22. An LPA cannot take enforcement action under s171B(4)(b) if a previous EN which related to the same matter was quashed as a result of success at appeal on grounds (c)

or (d), or if PP was granted for the development after the first EN was withdrawn.

23. It has been argued that the second bite provisions do not apply when the first EN is a nullity, on the basis that a null EN is not of legal effect and does not amount to enforcement action. That approach would unnecessarily restrict the purpose of s171B(4),which is to stop the clock where an LPA issued a faulty EN or needs to issue another in order to protect their position. The Courts have thus taken a liberal view of 'purported':

    - In *Jarmain v SSETR* [2002] PLR 126, a pragmatic approach was adopted in preference to the 'arid technicalities' that the 1991 amendments had sought to remove from the TCPA90. It was held that the breach referred to in s171B(4)(b) was the physical reality of the breach. A second bite could be taken where the first EN had alleged a breach of condition but the BPC was in reality unauthorised development, as the facts were the same.

    - In *R (oao Romer) v FSS* [2006] EWHC 3480 Admin, the second EN was within s171B(4)(b) because it dealt with the same development, albeit described differently, and was served on the same owner; it did not matter that the first EN had incorrectly referred to adjacent land.

    - It was held in *R (oao Lambrou) v SSCLG* [2013] EWHC 325 (Admin), [2014] JPL 538 that an EN could be issued under s171B(4) where the first had not been properly authorised.

24. If there is a risk that the development will gain immunity, because the first EN was issued close to the end of the relevant period and/or appeal proceedings on the first EN will not be concluded within the period, a second bite EN may be issued within four years of the date of the first EN to protect the position of the LPA.

25. However, the second bite provisions do not apply where there are differences in the allegations, and this is not because of a misdescription in the first EN but rather due to factual differences in the range or nature of uses or operations on the site when the ENs were issued[8].

26. S171B(4)(b) does not apply where the second EN encompasses a wider range of components than the aggregate of the components covered by the earlier EN(s). It was held in *Fidler v FSS & Reigate and Banstead BC* [2004] EWCA Civ 1295 that even if the LPA had intended to direct the first EN at the whole mixed use, it fell materially short of doing so and the later was not a second bite EN.

Investigating the Breach – s171C[9]

27. S171C(1) and (2) give discretionary powers to LPAs that, where it appears to them that there may have been a BPC, they may serve a Planning Contravention Notice (PCN)

[8] *Saunders & Saunders v FSS & Epping Forest DC* [2004] EWHC 1194 (Admin)

[9] EPLP P171C.01 to P171C.12

on the owner, occupier or person carrying out activities on the land to give information on the operations, use and other activities being carried out, and on any matter relating to the conditions or limitations subject to which any PP in respect of the land has been granted; see Annex 1.

28. S330 of the TCPA90 empowers LPAs to make an order or issue or serve a notice requiring specified details of the interests in and use of the land. A limited power of investigation is provided under s16 of the Local Government (Miscellaneous Provisions) Act 1976.

Crown land – s296A and s296B

29. By repealing s296 and adding ss296A and 296B to the TCPA90, s84(2) of the Planning and Compulsory Purchase Act 2004 (PCPA04) brought about major changes in enforcement in respect of Crown land. As explained in the PPG[10], there are restrictions on what enforcement action an LPA may take on Crown land.

- S296A(5) and (6): a step taken for the purpose of enforcement includes entering land, bringing proceedings or making an application but not the service of a notice or the making of an order, other than a court order. The LPA cannot issue or serve an EN or stop notice, or a revocation or discontinuance order.

- S296A(2) and (3): An LPA must not take any step for the purpose of enforcement action in relation to Crown land unless it has the consent of the appropriate authority, and that may be given subject to conditions. An LPA would need consent in order to enter land or bring proceedings, even if such action was against a non-Crown interest, such as a private leaseholder.

Issue and Service of an Enforcement Notice[11]

Issuing the Notice – s172(1)

30. S172(1) provides that an LPA may issue an EN where 'it appears to them (a) that there has been a breach of planning control; and (b) that it is expedient' to issue the EN, having regard to the provisions of the development plan and any other material considerations.

31. The LPA does not have to be certain that a BPC has occurred or there are no grounds of appeal; it is for an appellant to establish such grounds[12]. But it must 'appear' to the LPA that the alleged matters have taken place. An EN may not be issued to prevent an anticipated BPC[13]. A landowner may seek judicial review to prohibit an LPA from issuing

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[10] PPG on Enforcement and Post-Permission Matters, paragraph 17b-056-20140306

[11] EPLP P172.01 to P172.10

[12] *Ferris v SSE* [1988] JPL 777

[13] *R v Rochester-upon-Medway CC ex parte Hobday* [1990] JPL 17

an EN at any time before it is actually issued[14].

32. Since enforcement action is discretionary, paragraph 59 of the National Planning Policy Framework (the NPPF) requires LPAs to act proportionately in responding to suspected breaches of planning control. The Planning Practice Guidance (PPG) draws attention to and elaborates on para 59 of the NPPF[15].

33. The PPG advises that the provisions of the European Convention on Human Rights (ECHR), as incorporated into the Human Rights Act 1998 (HRA98), are relevant when deciding whether to take enforcement action. LPAs should, where relevant, have regard to the potential impact on the health, housing needs and welfare of those affected by the proposed action, and of those who are affected by the BPC.

34. There is no requirement that breaches must be enforced against consistently. As Otton J held in *Donovan v SSE* [1987] JPL 118: '…that others got away with an unauthorised use cannot put Mr Donovan in the right or make his uses lawful'. An LPA may issue a second EN even if the first is in force and in similar terms[16]; s172 does not prevent an LPA from issuing further ENs in respect of the same breach or to cover a wider area[17].

35. There is no reason why an EN should not be issued while a planning or LDC application or appeal remains undetermined[18], but the courts tend to deprecate prosecutions for non-compliance with an EN whilst there is a pending planning appeal[19]. An LPA may also encounter difficulties in prosecuting for non-compliance with an EN where it became effective some time ago but there was no further action in the intervening period.

36. It was held in *Britannia Assets v SSCLG & Medway Council* [2011] EWHC 1908(Admin) that any challenge as to whether it was 'expedient' for the LPA to issue the EN must be pursued by way of judicial review; Inspectors have no jurisdiction to determine whether the LPA complied with s172.

37. The issue of an EN may be challenged in the courts on the basis of improper motive, but a developer seeking judicial review of the issue of the EN should still make an appeal under s174 (and s289) to prevent it from taking effect. Once the EN is issued, s285 precludes any challenge other than by way of s174 appeal, even where proceedings for

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[14] *R v Basildon DC ex parte Martin Grant Homes* [1987] JPL 863

[15] PPG on Enforcement and Post-Permission Matters, paragraph 17b-003-20140306

[16] *Edwick v Sunbury on Thames UDC* [1964] 63 LGR 204

[17] *Biddle v SSE & Wychavon DC* [1999] 4 PLR 31. In *Koumis v SSCLG* [2013] JPL 215 it was said that an LPA which erroneously issues a badly drafted notice can withdraw the defective notice and replace it with a valid one - it doesn't have to wait for any legal action to be resolved first.

[18] *Davis v Miller* [1956] 6 P&CR 410

[19] *R v Newland* [1987] JPL 851

a declaration have begun[20]. Any claim of unfair or unlawful discrimination may be a material consideration on appeal[21] but Inspectors should seek advice from their Inspector Manager and Professional Lead (PFL) if such issues are raised.

38. S101(1)(a) of the Local Government Act 1972 (LGA72) provides that a local authority may arrange for the discharge of any of their functions by a committee, sub-committee or officer of the authority. LPAs have no power to delegate the issuing of ENs to one member, but officers are often given delegated powers, perhaps exercisable on condition on approval by a committee chairperson[22]. Advice is given below in relation to claims that the EN is a nullity because the LPA did not follow proper procedures.

Service of the Notice – s172(2) and (3)

39. S172(2) provides that a copy of the EN shall be served on the owner and occupier of the land to which it relates, and any other person having an interest in the land, including mortgagees, tenants and sub-tenants, being an interest which, in the opinion of the LPA, is materially affected. It is for the LPA to decide who is materially affected, but they risk an appeal on ground (e) if they exercise their discretion wrongly.

40. The term 'owner' is defined in s336 but 'occupier' is not. Occupiers may be lessees, licensees by virtue of an oral or written licence, or trespassers who are settled enough to have a degree of control, even if they lack the right or capacity (standing or locus standi) to make an appeal. Relevant factors will include degree of control, duration of occupation and the nature of the occupancy.

41. Caravan dwellers are occupiers where they have been on a site for some time[23]. The same is true of occupiers of bed sits[24]. In [1976] JPL 113, market stall holders were not regarded as occupiers – but the s329 procedures for service should be followed in such cases if possible, usually by affixing a copy to some object on the land.

42. It is not necessary for 'the land' to be the planning unit. In *Rawlins v SSE* [1989] JPL 439, several families were using a single area as a travelling showpeople's site. The land was in multiple ownership but appeared to be one unit. The CoA endorsed the Inspector's decision to uphold separate ENs served on each occupier, although the whole site was subject to each EN. The owner or occupier of one plot could not be prosecuted for what occurred on another, but the Inspector could consider any case made that was specific to a particular owner or occupier. No unfairness was involved.

43. S179(4) limits criminal liability for carrying on or causing or permitting the continuance of an activity which the notice requires to cease to those who have control of or an interest

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[20] *Square Meals Frozen Foods v Dunstable Corporation* [1973] JPL 709

[21] *Davy v Spelthorne BC* [1983] UKHL 3, [1984] AC 262

[22] *Fraser v SSE* [1988] JPL 344

[23] *Stevens v Bromley LBC* [1972] 23 P&CR 142

[24] Decisions reported at [1976] JPL 116 and [1990] JPL 861

in the land. S179(7) also provides a defence against prosecution for anyone who can claim to not be aware of the notice because they were not served and the particulars of the EN were not entered in the LPA's enforcement register kept under s188.

44. The EN is a single entity. The LPA retains the original, and any number of copies may be served; indeed, ENs should be served in duplicate on each person so they can submit a copy to the SoS with any appeal. S172(3)(a) provides that the EN must be served not more than 28 days after the date of issue, but not necessarily contemporaneously on every person affected.

45. S172(3)(b) requires that the EN is served not less than 28 days before the date specified as that when the EN is to take effect; this is in order to give the recipient(s) time to make an appeal under s174 or make an application for judicial review.

46. In *Porritt & Williams v SSE & Bromley LBC* [1988] JPL 414, the EN gave 27 days but the Inspector had discretion to disregard the defect because a valid appeal had been received in time and no recipient had been substantially prejudiced. Each copy of the EN must show the same date of issue and same date of effect.

Contents and Effect of an Enforcement Notice

Contents of the Notice

47. Every EN shall specify[25]:

- S173(1)(a): The matters which appear to the LPA to constitute the breach of planning control.
- S173(1)(b): The paragraph of s171A(1) within which, in the opinion of the LPA, the breach falls: 'development' without planning permission under s171A(1)(a) or a breach of condition or limitation under s171A(1)(b).
- S173(3): The steps which the authority require to be taken or the activities which the authority require to cease.
- S173(8): The date on which the EN is to take effect…subject to s175(4) and s289(4A).
- S173(9): The period(s) at the end of which any steps are required to be taken or activities are required to have ceased.
- S173(10): Such additional matters as may be prescribed.

48. The PPG includes an example EN for operational development[26]. It is likely that most

[25] EPLP P173.01 to P173.10

LPAs will use this model notice, but it has no statutory force and other forms may be used. An EN does not have to be sealed and a facsimile signature will suffice.

The Alleged Breach of Planning Control – s173(1)-(2)

49. S173(2) says that an EN complies with s173(1)(a) if it '*enables any person on whom a copy of it is served to know what those matters are'*, being the matters alleged to constitute the breach. The test is as described in *Miller Mead v MHLG* [1963] 1 A11 ER 459, namely whether the EN tells the recipient fairly what they have done wrong and must do to remedy it as explained in the section on 'Nullity and Invalidity'.

50. Where the allegation is of unauthorised development, the EN should distinguish between operations and a material change of use (MCU) – although there is no reason why one EN should not combine allegations of both, provided they relate to connected matters[27]. The heading of the notice must be correct and the allegation and requirements clearly structured to reflect the different types of development being alleged.

51. That said, the PPG advises that ENs 'are not improved by over- elaborate wording or legalistic terms: plain English is always preferable'. Over-particularisation can defeat the purpose of the EN and prosecution may fail if the Court finds the EN incomprehensible to the lay person. The EN may cite generic descriptions of the use (eg 'shop' or 'office') or operations ('fence' or 'extension') alleged[28].

52. An EN alleging an MCU need not recite the previous use but it is better if it does so in order to make it clearer why the LPA considers there has been a material change[29]. In mixed use cases, the allegation should refer to all the components of the mixed use, even if only one is required to cease. It was held in *R (oao) East Sussex CC v SSCLG* [2009] EWHC 3841 (Admin) that, where there is a mixed use, it is not open to the LPA to decouple elements of it; the use is a **single mixed use** with all its component activities. Inspectors should be alive to scenarios where an EN alleges a breach comprising a single mixed use, but the requirements are drafted to require each separate component of the mixed use to cease. The alleged single mixed use may be unlawful, but a component use of it may have been lawful. For example, premises may have a lawful restaurant use. The addition of a nightclub so as to create a single mixed restaurant and nightclub use might result in a MCU. If an EN attacks the single mixed use, the owner would be entitled to return to the last lawful (restaurant) use by reason of section 57(4). If the requirements of the EN were drafted to 'de-couple' the mixed use for example, by requiring as step one to cease the restaurant use and (2) cease the nightclub use, then the appellant

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[26] PPG on Enforcement and Post-Permission Matters, paragraph 17b-019-20180222

[27] *Valentina of London v SSE & Islington LBC* [1992] JPL 1151

[28] *Bristol Stadium v Brown* [1980] JPL 107

[29] *Westminster CC v SSE & Aboro* [1983] JPL 602, *Ferris v SSE* [1998] JPL 777

or owner could be prevented from reverting to the last lawful restaurant use. The owner could also lose the ability to obtain an LDC for the restaurant use, on the basis that the use would be in contravention of a requirement of an EN in force (section 191(2)(b)).

53. An EN that alleges a breach of condition should recite details of the relevant PP and condition. Only an express condition can be enforced; the description of development might limit the scope of the PP but does not have the same effect as imposing a condition[30] – but see discussion of conditions and particularly *Lambeth LBC v SSCLG & Aberdeen Asset Management* [2019] UKSC 33 below.

54. LPAs sometimes serve alternative notices, one alleging a breach of condition, the other an MCU. There is no objection to this, providing it is made clear in a covering letter that this is the intention[31]. Generally, the Inspector will be able to decide which EN is correct and quash the other, since there is a risk of uncertainty and injustice if two ENs subsist in respect of essentially the same BPC.

55. It may be that both ENs are correct because there has been a breach of condition and MCU. And there may be cases where it is right to uphold both ENs, for example, where they relate to overlapping planning units. But if the ENs relate the same site and activity, it is usually preferable to pursue MCU notice and quash the other for the purposes of the deemed planning application (DPA).

56. Where there are duplicate ENs, the Inspector should quash the duplicate as such; the criminal defence of 'double jeopardy' would arise if and when an LPA prosecuted for contravention of both[32]. An EN should not be corrected so as to create duplicating notices.

The Requirements or Steps – s173(3)-(7)

57. S173(3) makes it clear that the EN shall specify the steps required to be taken or activities required to cease in order to achieve, wholly or partly, any of the purposes set out in s173(4) – to remedy the BPC or remedy any injury to amenity.

58. The purposes of the EN should not be confused with the reasons for the EN, since the reasons can only specify (under ENAR4) why the LPA consider it expedient to issue the notice. The wording of the requirements should show whether LPA seeks to remedy the breach or injury to amenity.

59. The power of LPAs to 'under-enforce' follows from the phrase 'wholly or partly' in s173(3); the availability of two purposes in s173(4); and from the provisions of s173(5)(c), which states that an EN may require 'any activity on the land not to be carried on except to the extent specified' in the EN. An EN cannot under- enforce to the

[30] *Wilson v West Sussex CC* [1963] 2QB 764

[31] *Britt v Buckinghamshire CC* [1964] 14 P&CR 318

[32] *Ramsey v SSE (No 1)* [1991] JPL 1148

extent of requiring no action at all. An EN that fails to specify the steps is not a notice for the purposes of s173[33].

60. The 'or' which separates s173(4)(a) from (4)(b) is not entirely disjunctive. LPAs are not required to formulate the steps so that they correspond solely with either one purpose or the other[34]. An EN may require, for example, that part of the site is restored to its previous condition, but lesser works on a different part of the site designed to remedy the injury to amenity. In most cases, however, the purpose will fall wholly within s173(4)(a) or (b).

61. Under s173(4)(a), the purpose of remedying the breach may be achieved by 'making any development comply with the terms (including conditions and limitations) of any [PP] which has been granted in respect of the land, discontinuing any use of the land, or restoring the land to its condition before the breach took place'.

62. Where an EN alleges that a building was erected not in accordance with the approved plans and requires that the building is removed or modified to accord with the PP, the purpose of the EN will be to remedy the breach. The same applies where the EN alleges that there has been an MCU and requires the use to cease.

63. S173(5) gives examples of works which an EN may require, and these include (a) the alteration or removal of any buildings or works or (b) the carrying out of any building or other operations. An EN may include such requirements whether it relates to operations, an MCU or a breach of condition, and whether the purpose of the steps is to remedy the BPC or injury to amenity.

64. Thus, an EN that is directed at an MCU may require the removal of works integral to and solely for the purpose of facilitating the unauthorised use, even if such works on their own might not constitute development, or they would be PD or immune from enforcement, so that the land is restored to its condition before the change of use took place[35].

65. In such cases, it is not necessary for the allegation to refer to such works – but it may assist the appellant for it to do so in order that the DPA will cover the MCU and associated works. The EN in such cases may allege something like 'the making of a material change of use to use X and the construction of Y to facilitate that change of use' – so that the 'construction of Y' is not alleged in its own right or thereby subject to the four year rule.

66. Where an EN is issued in respect of the demolition of a building, s173(6) and (7) provide that it may require the construction a replacement building. Advice on particular types of requirement is given in relation to ground (f) below.

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[33] *Tandridge DC v Verrechia* [2000] QB 318

[34] *Wyatt Brothers (Oxford) Ltd v SSETR* [2001] PLCR 161

[35] *Murfitt v SSE* [1980] JPL 598, *Somak Travel v SSE* [1987] JPL 630, *Kestrel Hydro v SSCLG & Spelthorne BC* [2016] EWCA Civ 784

67. As with the allegation, the requirements should be considered in the light of *Miller Mead*, where Upjohn LJ ruled that the recipient of the EN 'is entitled to…find out from within the four corners of the document what one is required to do or abstain from doing'.

68. Thus, the requirements cannot be so fundamentally vague or uncertain that the recipient does not know how to comply – or the EN is likely to be a nullity. An EN cannot require the recipient to 'comply or seek compliance', since that would introduce uncertainty. A requirement to 'cease or cause the cessation of' is also potentially bad for uncertainty and in conflict with s179(4)[36].

69. The oft-used standard wording 'to restore the land to its condition before the development took place' is sufficient for validity purposes[37]. In many cases the landowner will be the person with the best knowledge of what that previous condition was[38].

70. Where evidence is available a notice should be corrected to refer to specific steps, so long as they are not more onerous than the original. Requirements should not be based on potentially subjective judgements, such as to leave the land in a clean and tidy condition, or include open-ended works to be carried out, such as 'to the satisfaction of the LPA'.

71. There is a risk that requirements in the alternative will be found uncertain – but it is appropriate in some cases to give the appellant a choice of steps so long as the options do not conflict. For example, an EN may require that a building is demolished **or** modified in accordance with an extant PP. Following *Oates v SSCLG* [2018] EWCA Civ 2229, it is a legitimate exercise of s176(1) corrective powers for an Inspector to remove a requirement found to be unnecessary.

Time for Taking Effect and Period for Compliance – s173(8)-(9)

72. Under s173(8), the EN shall specify the date on which it is to 'take effect' and it shall take effect on that date, unless the EN is appealed under s174. Thus, s171B(4) refers to an EN 'in effect' – but lawfulness under s191(2)(b) and 3(b) involves not contravening any of the requirements of any EN then 'in force'.

73. As a general rule, it is good practice for Inspectors to use the words given in whatever section or subsection of the legislation that is pertinent to the case in hand. As a matter of simple language, however, there is no distinction to be made between 'in effect' or 'in force' – because neither term is defined within the TCPA90 and so both should be given their ordinary meaning. If and when an EN 'takes effect', it shall be 'in effect' or 'in force'.

74. S175(4) provides that where an appeal is brought under s174, the EN shall, subject to

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[36] *Hounslow LBC v SSE & Indian Gymkhana Club* [1981] JPL 510

[37] *Lipson v SSE* [1976] 33 P&CR 95

[38] *Ormston v Horsham RDC* [1965] 17 P&CR 105, *Al-Najafi v SSCLG & Ealing LBC* [2015] (CO/4899/2014)

any order under s289(4)(a), be of no effect pending the final determination or withdrawal of the appeal. The PPG thus states that an EN is not in force when an enforcement appeal is outstanding, or an appeal has been upheld and the decision has been remitted to the SoS for re-determination and that is still outstanding[39]. For clarity, the final determination of the appeal should be taken as being when the appeal process is exhausted, including rights of appeal to the courts.

75. Under s289(4A), the High Court or CoA may order that the EN shall have interim effect to some specified extent pending the conclusion of the court proceedings and any re-determination by the SoS.

76. S173(9) provides that an EN 'shall specify the period at the end of which any steps are required to have been taken or any activities are required to have ceased and may specify different periods for different steps or activities…' Thus, it is not necessary for an EN to specify different periods no matter the number of requirements.

77. If an EN does specify different periods for different steps or activities, however, then 'any reference in [Part VII of the TCPA90] to the period for compliance with' an EN, in relation to any step or activity, 'are to the period at the end of which the step is required to have been taken or the activity is required to have ceased'.

78. The period[s] for compliance with the EN start[s] to run from the date when the EN comes into effect. Since a compliance 'period' must be specified under s173(9), an EN which does not contain any period, or does not set out a time which could amount to a period, is likely to be a nullity. It has been held that 'the word "period" implies a start point and an end point with a period of time in between'. An EN which required compliance 'immediately this notice takes effect' did not specify a period as required by s173(9) and was a nullity[40].

79. During the period for compliance, including any extended period following success on ground (g), the use remains unlawful but not *illegal* unless there is also a Stop Notice.

Additional Matters – s173(10)

80. An EN must specify such as additional matters as prescribed, and these are set out under ENAR4 as: (a) the reasons why the LPA consider it expedient to issue the EN; (b) all policies and proposals in the development plan which are relevant to the decision to issue an EN; and (c) the precise boundaries of the land to which the EN relates, whether by reference to a plan or otherwise.

81. S173(10) further provides, with ENAR5, that every copy of an EN shall be accompanied by an explanatory note which includes a copy or summary of ss171A, 171B and 172 to 177; information that there is a right to appeal to the SoS; the means and grounds of appeal; the fee payable for the DPA; the need to provide a statement stating the facts

[39] PPG on Lawful Development Certificates, paragraph 17c-003-20140306

[40] *R (oao Lynes & Lynes) v West Berkshire DC* [2003] JPL 1137; *Koumis v SSCLG*[2014] EWCA Civ 1723 – but see also *Oates v SSCLG* [2108] EWCA Civ 2229.

relied upon in support of each appeal ground; and a list of the names and addresses of the persons on whom a copy of the EN has been served.

82. The PPG advises that the LPA must enclose with the EN an information sheet provided by PINS about how to make an appeal. As the PPG makes clear, this information sheet is **not** the same thing as the explanatory note required by s173(10) and ENAR5.

Planning Permission Treated as Granted – s173(11)-(12)

83. S173(11) provides that (a) where an EN in respect of any BPC 'could have required buildings or works to be removed or any activity to cease, but does not do so; and (b) all the requirements of the notice have been complied with, then, so far as the notice did not so require, planning permission shall be treated as having been granted by virtue of s73A in respect of development consisting of the construction of the buildings or works or, as the case may be, the carrying out of the activities'.

84. The CoA held in *Fidler v FSS & Reigate and Banstead BC* [2004] EWCA Civ 1295 that s173(11) had effect only in relation to works that are alleged by the EN to constitute a BPC; whether the EN 'could have' required removal of works or activities to cease is contingent upon the terms of the allegation. S173(11) does not operate to grant PP for other possible breaches or anything unmentioned by the EN which is left on site once the EN has been complied with[41]. Where unlawful activities or works are not alleged, the EN cannot require them to cease or be removed[42].

85. S173(11) continues to cause difficulties for LPAs. It is not unusual for ENs to omit a requirement relating to some aspect of the allegation, especially where the breach includes multiple components. In MCU cases, s173(11) may have effect where the allegation does not state the use properly; for example, the EN may allege the stationing of residential caravans and omit to require the cessation of residential use.

86. S173(11) may also apply where the use is described differently in the allegation and requirements, for example, the EN may allege the use of land for the storage of vehicles and then require the cessation of parking. S173(11) can apply in a breach of condition case, meaning that – once the EN is complied with – deemed PP is granted for the development originally permitted without complying with the relevant condition.

87. S173(11) can cause problems where there is more than one EN. In *Millen v SSE & Maidstone BC* [1996] JPL 735, two ENs alleged the same mixed use, but each required that only one element should cease, and both ENs were upheld on appeal. This resulted in a situation where each element could gain a deemed PP once the EN

[41] In *Maldon DC v Hammond* [2004] EWCA Civ 1073, the EN alleged the construction of a building and required that the building was demolished. The EN could not have required use for the repair of cars to cease because that did not constitute the BPC. The LPA was not required to scour the planning unit for any potential BPC for fear that PP for such might be deemed to be granted. A stay against an injunction to remove vehicles from the land was lifted.

[42] The exception is where works have facilitated and been part and parcel of an MCU. As noted above, the EN may in such cases require the removal of such works even if the alleged BPC is simply the MCU.

requiring the other element to cease had been complied with, and this resulted in uncertainty.

88. The Court held that, in the circumstances of *Millen*, one EN could have been corrected to include both requirements and the other EN could have been quashed. Any such corrections should normally only be made after the matter has been canvassed with the parties but would be unlikely to cause injustice since the totality of the allegations and requirements would stay the same.

89. The grant of deemed PP is dependent on compliance with the steps set out in the EN. If there are intermittent further breaches before the EN is fully complied with, the deemed PP may be negated; see SoS decision at [1996] JPL 873. That s173(11) is not satisfied until all of the requirements have been complied with is one reason why it is essential for the EN to include appropriate compliance periods.

90. Requirements may be akin to continuing conditions; for example, an EN may require that planting is carried out in the next planting season or maintained for a period of years. Even then, the period for compliance should never be open-ended, and neither the LPA nor recipient should be placed in a position of uncertainty in the future as to whether any requirement was in fact complied with on time. Where longer-term steps must be taken, it may therefore be appropriate for the EN to set out staged compliance periods.

91. Where some lawful activity is referred to in the allegation – say as part of a mixed use – the EN cannot require it to cease and thus s173(11) has no bearing upon it. If the use is lawful by virtue of an implemented PP which was granted subject to conditions, s173(11) does not obviate the need for compliance with the conditions.

92. S173(12) grants a deemed planning permission for a replacement building that is required in accordance with s173(6) and (7) once the notice has been complied with in full.

Power to Withdraw, Waive or Relax – s173A

93. S173A(1) empowers LPAs to (a) withdraw an EN or (b) waive or relax any requirement of an EN and, in particular, to extend the period for compliance. The powers do not allow for change to the effective date or anything that is not a 'requirement' of the EN.

94. These powers may be exercised whether or not the EN has come into effect, and they are not suspended once an appeal is made, meaning that they can be exercised after an appeal is decided. If the LPA exercises the powers, they must notify immediately everyone who was served with a copy of the EN or who would be served with a re-issued EN. S173A(4) provides that the withdrawal of an EN does not fetter the LPA's power to issue a further EN.

95. The withdrawal of an EN cannot give rise to any claim for estoppel or compensation but could be regarded as 'unreasonable behaviour' for the purposes of an application for costs. Withdrawing an EN without good reason is cited in the PPG as an example of behaviour that might lead to a procedural award of costs against an LPA.

96. In O*'Connor v SSCLG* [2014] EWHC 3821 (Admin), Mr Justice Wyn Williams commented that it was not strictly part of the Inspector's remit to draw attention to the LPA's powers under s173A(1)(b) to extend the period for compliance with the EN – and it was not for the SoS to offer an opinion, since that was all it could be, upon the

desirability of the LPA invoking that section. Whether or not to invoke was entirely a matter for the LPA.

97. In the light of this judgment, it is best in appeal decisions to avoid referring to s173A where possible. If such a reference is necessary or would be helpful, you should describe in a neutral fashion what powers are available to the LPA and be explicit that the exercise of the powers is at the discretion of the LPA.

Effect of the Notice

98. Where an EN is not complied with in the specified period, s178(1) gives LPAs the power to enter land, take the required steps and recover any expenses reasonably incurred from the owner of the land (as defined in s336). It is an offence under s178(6) to obstruct a person acting for the LPA in the exercise of those powers.

99. The PPG advises that the 'default powers' of the LPA under s178(1) should be used when other methods have failed to persuade the owner or occupier to carry out the steps required by the EN[43]. Under s178(2), the landowner is entitled to recover from the person who committed the BPC the expense of complying with the EN or the sums paid to the LPA if they took the required steps.

100. S179(1) provides that where the EN has not been complied with by the end of the period, the person who is the owner of the land is in breach of the EN. Under s179(2), the owner then 'shall be guilty of an offence'. It is a defence under s179(3) that the owner did everything possible which could be expected of them to secure compliance, or that they were not served, and the notice was not entered on the statutory register.

101. In *Camden LBC v Galway-Cooper* (CO/5519/2017 22 May 2018), the LPA's attempt to prosecute for non-compliance with EN failed on the s179(3) ground that the owners had taken all reasonable steps to comply; it was structurally infeasible to reinstate the wall. This was not a breach of s285 or putative ground (f) appeal since the requirements did not exceed what was necessary to remedy the BPC; the question was whether the BPC could be remedied.

102. Under s179(4), a person who is not the owner of but has a control of or interest in the land to which an EN relates must not carry on, or cause or permit to be carried on any activity that is required by the EN to cease. Any contravention is an offence under s179(5).

103. All offences prosecuted under s179 are heard initially (and usually only) in the Magistrates' Court, where fines may be imposed of up to £20,000[44]. If the case progresses to the Crown Court, the fine may be unlimited. Account may be taken of any 'financial benefit' from the unauthorised development in fixing the amount. Upon

[43] PPG on Enforcement and Post-Permission Matters, paragraph 17b-023-20140306

[44] S66 and s67(9) of the Police and Criminal Evidence Act 1984 require that potential offenders should be cautioned. The absence of a caution could result in a prosecution eventually failing but does not affect the validity of the EN or the appeal process.

successful conviction, the LPA can apply for a Confiscation Order under the Proceeds of Crime Act 2002 (POCA) recover the financial benefit obtained through unauthorised development[45].

104. S180(1) of the TCPA90 provides that where PP is granted after the service on a copy of the EN for any development already carried out, the EN shall cease to have effect insofar as it is inconsistent with the PP. This means that the PP overrides the EN to the extent that the PP authorises what is being enforced against. However, the EN is not quashed and does not cease to have effect altogether.

105. It was held in *Rapose v Wandsworth LBC* [2010] EWHC 3126 (Admin) that the protection afforded by s180 is activated upon the grant, not implementation of PP. S180 does not stipulate that the site in respect of which PP is granted must be the same as the site that is subject to the EN. The provision is not directed simply and solely at the situation in which PP is later granted for precisely the same development the subject of an EN, nor does it make a difference to the overriding effect that conditions restricting or regulating the development are imposed on that PP.

106. The critical words in s180 are '*so far as*'. The question is whether there are elements of development common to both the PP and EN. In *Rapose*, parts of the development alleged were physically subsumed in that which was permitted by the LPA. To the extent that the structure was common to the PP and the EN, s180 operated to prevent the EN from continuing to bite upon it.

107. S180(1) applies where PP is granted subsequent to the issue of the EN[46] - and then the EN 'ceases to have effect' even if the PP is temporary. The prohibition contained in the EN does not revive upon the expiry of the temporary PP[47] but the LPA may issue a fresh EN once the temporary PP has expired.

108. S181(1) provides that compliance with any of the requirements contained in an EN 'shall not discharge the notice'. Under s181(2), any requirement of an EN that a use is discontinued shall operate as a requirement that it be discontinued permanently, and so the resumption of the use at any time after discontinuance shall be in contravention of the EN[48].

109. The requirements of an EN thus have an enduring effect. If the EN is complied with but there is a later breach of the requirements, or the use is resumed not in accordance with the requirements, s181(1) and (2) mean that this remains enforceable under s179.

110. Under s181(3) and (5), if buildings or works are altered or removed in compliance with

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[45] PPG on Enforcement and Post-Permission Matters, paragraph 17b-022-20140306; see also Section 7 of the NAPE Handbook.

[46] *Goremsandu v SSCLG & Harrow LBC* [2015] EWHC 2194 (Admin)

[47] *Cresswell v Pearson* [1997] JPL 860

[48] *Klein v Whitstable UDC* [1958] 10 P&CR 60; an EN does not need to require that a use is 'permanently' ceased but need not be corrected just to delete that word.

an EN, and development is then carried out to reinstate or restore the buildings, the EN is deemed to apply to the buildings or works as it applied before they were reinstated or restored – and the person who carried out the development (without PP) is guilty of an offence.

Power to Decline to Determine Retrospective Applications – s70C

111. S70C(1) of the TCPA90, added by s123(2) of Localism Act 2011, gives LPAs in England the power to decline to determine application for PP or permission in principle for the development of any land if granting PP for the development would involve granting, whether in relation to the whole or part of the land to which a pre-existing EN relates, PP in respect of the whole or any part of the matters specified in the EN as constituting a BPC.

112. A 'pre-existing' EN is defined in s70C(2) as an EN that was issued before the application for PP or permission in principle was received by the LPA. It is implicit that the EN cannot have been withdrawn or quashed, while 'received' suggests that the EN could be issued before the application was validated. The application does not need to describe the development in identical terms to the EN but 'the most convenient starting point' in deciding whether s70C applies 'is the relevant part of the' EN[49].

113. The Localism Act 2011 also introduced to the TCPA90:

- S78(2)(aa) to preclude any right of appeal where the LPA declines to determine a retrospective planning application.

  Case officers are instructed to turn away any such appeals and Inspectors should be vigilant as to any that slip through.

- S174(2A) to preclude ground (a) appeals where the EN was issued after the making of a related application for PP but before the end of the period applicable under s78(2) for the application to be determined – that is, where the EN was issued during the eight or 13 week period. Under s174(2B), an application is 'related' to an EN if granting PP for what is proposed would involve granting PP in respect of the matters specified in the EN as constituting a BPC.

114. It was held in *Wingrove v Stratford on Avon DC* [2015] EWHC 287 (Admin) that the introduction of s70C and amendments to s174(2) mean that the 'applicant cannot have "multiple bites at the cherry"'. The power afforded to LPAs under s70C to decline to determine an application is discretionary but it was not exercised in a manner challengeable on public law grounds in this instance.

115. In *R (oao Banghard) v Bedford BC* [2017] EWHC 2391 (Admin), an EN had been upheld against the erection of a dwellinghouse, with the Inspector finding that an alternative scheme for a storage building with a different design did not form 'part of the alleged

[49] *Chesterton Commercial (Bucks) Ltd v Wokingham DC* [2018] EWHC 1795 (Admin)

breach'. The LPA then declined to determine an application for the storage building. The High Court held that the LPA had interpreted s70C so that 'rather than the Claimant having multiple bites of the cherry, they have none'.

116. The Court also held that 'there is necessarily an element of planning judgment in whether the development for which permission is being sought involves "any part of the matters specified" in the EN…'

117. This point was endorsed in *Chesterton Commercial (Bucks) Ltd v Wokingham DC* [2018] EWHC 1795 (Admin) but with a qualification that the matters to be considered are objective and require a comparison between two documents, being the application and EN. It is necessary to consider whether the circumstances described in s70C exist, such that the discretion to decline to determine the application is available to the LPA, before considering the manner in which that discretion is exercised. It was held that s70C is concerned not with the existence of differences but of similarities between two developments: the statutory language required an assessment of whether granting the planning permission sought would involve granting permission for any part of the matters previously specified in the EN.

118. In *R (oao Finnegan) v Southampton CC* [2020] EWHC 286 (Admin), the EN concerned an MCU to a mixed use for storage, display and sale of motor vehicles and residential use. The LPA then declined to determine an application for PP for the sale of motor vehicles on part of the site and subject to conditions. The claimant argued that the merits of that use had not been considered.

119. However, the Court upheld the LPA's decision holding – as in *Banghard* – that s70C confers a broad discretionary power. The LPA had not erred in the exercise of its power. The question was whether the claimant had had an opportunity to canvas the merits of the alternative scheme, not whether the opportunity had been taken. .

Appeals against Enforcement Notices

Who may Appeal – s174(1)

120. S174(1) provides that 'a person having an interest in the land' to which an EN relates or a 'relevant occupier' may appeal to the SoS, whether or not a copy of the EN has been served on them.

- A 'person' may be a limited company or unincorporated body.
- An 'interest in the land' means a legal or equitable interest. It may be freehold or leasehold, or that held by a person with a mortgage, a periodic tenancy or legal easement or right of way. It does not include a person with no such interest but some other link with the land such as a mere contractual right.

121. The wording of s174(1) requires the interest in the land to exist at the time the appeal is made; a lease which expires between the service of the notice and the date of the appeal does not provide the basis for an appeal.

122. 'Relevant occupier' is defined in s174(6) as 'a person who (a) on the date on which the enforcement notice is issued occupies the land to which the notice relates by virtue of a licence; and (b) continues so to occupy the land when the appeal is brought'.

123. Such a licence may be an express written or oral licence, or an implied contractual or

bare licence. In other words, a licence within the meaning of s174(6) means a permission to enter and occupy the land in question[50].

124. Whether there is an implied licence will depend on matters such as the relationships between the parties involved and circumstances in which the premises were occupied. The relevant occupier or person with the interest in the land must appeal, a director of a company has no right of appeal on the Company's behalf[51].

125. Any disputes on whether a person can make an appeal should be resolved at procedure stage. An occupier who had been settled on land for 12 years and could claim title by adverse possession was granted a right of appeal[52]; in similar cases today, the period would be 10 years for registered land. In general, only trespassers have no right of appeal and they may still contest the validity of an EN in the courts[53] granted a right of appeal[52]; in similar cases today, the period would be 10 years for registered land. In general, only trespassers have no right of appeal and they may still contest the validity of an EN in the courts[53].

126. Persons who were living on boats but unable to demonstrate a legal interest in the land to which the boats were moored, did not succeed in their challenge to a decision by the SoS to not accept their appeals against ENs on the basis that they lacked standing[54].

127. Their grounds included that, since s285 precludes any challenge to the content of the EN other than by way of s174 appeal, their rights under Articles 6 and 8 were not adequately protected by the separate provisions for them to apply for PP and/or seek judicial review of the LPA's decision to issue the ENs. These arguments were rejected on the basis that the assumption that PP would be refused, and the fact that any judicial review application would now be out of time, do not address whether the system itself affords appropriate protection.

128. It is not for the Inspector to challenge an appellant's standing or the validity of an appeal, and they should not raise these points at an inquiry unless the parties do so. Where parties raise them, they must be treated in the same way as any other legal issues. At the inquiry, the Inspector should hear any submissions made and the remainder of the cases, unless all parties request an adjournment to consider their positions, in which case it may be appropriate to grant one.

129. If it is found that the appellant had no right of appeal, or the appeal was invalid, the Inspector will conclude accordingly in the decision letter, and explain that there is no appeal to be determined, and they will take no further action. Such a decision could be the subject of an application for judicial review. Inspectors should take advice from their

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[50] *Flynn & Sheridan v SSCLG & Basildon BC* [2014] EWHC 390 (Admin)

[51] *Buckinghamshire CC v SSE & Brown* [1997] QBD 19.12.97

[52] R v SSE & South Shropshire DC (ex parte Davies) [1991] JPL 540

[53] Scarborough BC v Adams [1983] JPL 673, see also [1991] JPL 190

[54] CO/2356/2020, CO/2366/2020 and CO/2367/2020

IM and Professional Lead in such cases.

130. In *R (oao McKay) v FSS* [2005] EWCA Civ 774, which concerned an appeal made in error against a withdrawn EN, the CoA held that the approach to procedural irregularities is to decide what the legislator intended to be the consequence of non-compliance, given the facts of the case. It was important not to attach too much significance to procedural requirements if that would lead to injustice.

131. Once an appeal has been validly made and accepted, there can be a change of appellant.

- The appeal can be continued by a subsequent owner provided they have a letter of consent from the original appellant. The Inspector should request such a letter if it is not on the file. Without express consent, the appeal must be determined in the name of the original appellant, and any subsequent owner treated as a third party.

- Where the appellant dies or is made bankrupt during proceedings, the appeal may be continued by an executor, mortgagee, receiver, liquidator or administrator, subject to proof of their relevant interest.

132. It is only necessary for one person served with the EN to make an appeal in order to delay the EN coming into effect. It is not uncommon, however, to have multiple appellants, such as spouses or a landlord and tenants. Different appellants may appeal on different grounds against the same notice – but each ground can only be determined in the same way, so individual appeals on the same ground can never be treated differently.

Grounds of Appeal – s174(2)

133. An appeal may be brought on any or all of the seven grounds of appeal contained in s174(2):

a) That, in respect of any breach of planning control which may be constituted by the matters stated in the notice [*the 'matters' being the allegation*], PP ought to be granted or, as the case may be, the condition or limitation concerned ought to be discharged;

b) That those matters have not occurred;

c) That those matters (if they occurred) do not constitute a breach of planning control;

d) That, at the date when the EN was issued, no enforcement action could be taken in respect of any breach of planning control which may be constituted by those matters;

e) That copies of the EN were not served as required by s172;

f) That the steps required by the EN to be taken, or the activities required by the EN to cease, exceed what is necessary to remedy any breach of planning control which may be constituted by those matters or, as the case may be, to remedy any injury to amenity which has been caused by any such breach;

g) That any period specified in the EN in accordance with s173(9) falls short of

what should reasonably be allowed;

134. The grounds are taken in the sequence (e), (b), (c), (d), (a), (f) and (g). If the EN was not properly served, it would be contrary to natural justice to adjudicate on the contents of the EN. If the matters have not occurred, there is no possibility of or point in considering whether there was a BPC or immunity has accrued. If the development is lawful, there is no possibility of or point in addressing the planning merits.

135. If there is full success on grounds (e), (b), (c), (d) or (a), the EN will be quashed and any following grounds do not fall to be considered. However, ground (g) will need to be considered even if there is success on (f), and the EN appeal should also be dealt with in full if there is a linked s78 appeal instead of a ground (a). This is so that the appellant's case against the EN remains properly considered and determined in the event that a successful challenge is made only under s288 to the decision on the s78 appeal[55].

136. Grounds (e), (b), (c) and (d) are known as the legal grounds of appeal. The onus is on the appellant to make out their case to the standard of the balance of probabilities[56] and their evidence should not be rejected simply because it is not corroborated[57]. If there is no evidence to contradict their version of events, or make it less than probable, and their evidence is sufficiently precise and unambiguous, it should be accepted. This approach was endorsed in *Ravensdale Limited v SSCLG* [2016] EWHC 2374 (Admin) in the context of an appeal on ground (d).

137. Inspectors should always be mindful of the rights of the appellant and other parties to a 'fair trial' under Article 6 of the ECHR, incorporated into UK law in the HRA98. These rights are engaged in enforcement as in other appeal proceedings. Other human rights, particularly property rights under Article 1 of the First Protocol and rights to a private and family life, home and correspondence under Article 8 may be engaged in grounds (a) and (g) where the decision-maker has some discretion. Article 8 rights should be taken as including the 'best interests of the children.

138. The public sector equality duty (PSED) set out under s149 of the Equality Act 2010 (EA10) may also be engaged in grounds (a) and (g),. as discussed in the Human Rights and PSED ITM chapter. However, human rights and the PSED do not come into play in the legal grounds[58] where the questions are whether or not, as a matter of fact and law, the EN was properly served, the matters occurred, or the matters are in BPC or immune. The legal grounds do not allow for consideration of the effect of the decision on individuals and their rights – and nor does ground (f).

139. S174(2A) and (2B) of the TCPA90, introduced by s123(4) of the LA11, provide that an

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[55] *South Buckinghamshire DC v SSETR & Gregory* [1999] JPL 545

[56] See 'The burden of proof and approach to evidence'.

[57] *Gabbitas v SSE & Newham LBC* [1985] JPL 630

[58] *Massingham v SSTLR & Havant BC* [2002] QBD, *Blackburn v FSS & South Holland DC* [2003] QBD

appeal may not be brought on ground (a) if the EN relates to land in England and was issued after the making of a related application for PP but before the end of the period applicable under 78(2) – being the 8 or 13 week period for the LPA to determine the application.

140. Ss123(5) and (6) of the LA11 amended s177(5) such that the appellant is only deemed to have made an application for PP if they brought an appeal on ground (a). If the fee payable for the DPA is not paid by the date specified, ground (a) will lapse.

141. While ground (a) cannot be introduced after the DPA has lapsed, other grounds may be added or withdrawn at any time up to or during an inquiry or hearing. Depending on the circumstances, this may amount to unreasonable conduct causing wasted expense, justifying a costs award. Upon complete withdrawal of an appeal, the EN comes into effect. An appeal cannot be re-instated[59].

142. For the banner heading in enforcement appeals, the name of the appellant and the grounds of appeal are taken from the appeal form. The site address and all other details are taken from the EN.

Hidden Grounds and Grounds not Pleaded

143. It is the Inspector's duty to be up to date as to the law and to ensure that it is applied correctly to the facts as found[60]. Accordingly, an Inspector must:

- Be alert to and deal with any 'hidden' grounds of appeal – unless there is a hidden ground (a) and the ground was not pleaded and fee was not paid.
- Be alert to and deal with potential validity or other legal issues, such as human rights or equality, not appreciated by the parties.
- Be mindful of their powers under s176(1)(b) to vary the terms of the EN.
- Not make decisions on a basis that may come as a surprise to the parties.

144. There may be hidden grounds of appeal where an argument relating to one ground is raised in connection with another. For example, if the appellant pleads ground (a) on the basis that the alleged development is PD, then there may be a hidden ground (c). Inspectors should read the file benevolently.

145. In *Ahmed v SSCLG & Hackney LBC* [2014] EWCA Civ 566, the appellant made a case under ground (f) that the alleged building should have been modified. There was a ground (a) in this case and so the Inspector should have considered whether PP ought to be granted for the modification as 'part of the matters'.

146. If the appellant has not pleaded grounds (f) and (g) or made any arguments relevant to

[59] *R v SSE ex parte Crossley* [1985] JPL 632

[60] *John Pearcy Transport v SSE* [1986] JPL 680

those grounds, the Inspector is under no obligation to – and indeed should not often consider whether the requirements of the EN are excessive or the period for compliance is reasonable. However, it is always open to the Inspector to exercise their powers under s176(1)(b) and vary the terms of the EN if they consider it appropriate[61].

147. For example, the period of compliance may be extended where, given the time involved in the appeal process, the EN as it stands would oblige a family to move out of their caravan home in mid- winter. Periods were extended in some cases during the Covid-19 pandemic where it would have been unreasonable to require that occupiers move and/or difficult for the LPA to enforce compliance.

148. However, Inspectors should avoid introducing the question of varying the terms of the EN for the first time in their decision, only to decide against doing so. It is also the case that Inspectors should never reach conclusions without inviting full argument from the parties either at the hearing/inquiry or via written representations.

149. The case officer may well identify any hidden grounds or validity issues and write to the appellant to clarify the matter in the early stages of the appeal. Occasionally, case officers will seek advice from Inspectors on validity issues. But if they do not do so, or if the Inspector becomes aware of some other issue later that the parties have not addressed, the Inspector must give the parties an opportunity to make comments before the appeal is determined.

Form of the Appeal – s174(3)-(4)

150. S174(3) provides that an appeal must be made by giving written notice to the SoS before the date when the EN is to take effect[62]. The SoS has no power to extend the period for making an appeal, as with s78, because this would alter the effective date of the EN[63].

151. S174(4) and ENAR6 require the appellant to submit to the SoS, when giving notice of the appeal or within 14 days of notification, a written statement which specifies the grounds and the facts on which they propose to rely. If the appellant fails to comply, the SoS may determine the appeal under s174(5) without considering grounds for which no facts have been given or dismiss the appeal under s176(3)(a). Those powers are **not** transferred to Inspectors under Schedule 6 and are in practice little used.

Appeals: Supplementary Provisions – s175

152. S175(1) enables the SoS to prescribe the procedure to be followed on appeals made under s174 and, in particular:

- S175(1)(a) and (b) and ENAR9 – require the LPA to submit a statement within

[61] Likewise if the appeal is recovered, the Inspector may recommend that the power is exercised by the SoS.

[62] Procedural Guide: Enforcement Appeals – England

[63] *R v SSE ex parte JBI Financial Consultants* [1989] JPL 365

six weeks of the start date indicating the submissions they propose to put forward on the appeal, which should include a summary of their response to each ground of appeal, a statement as to whether PP ought to be granted and, if so, subject to what conditions.

- S175(1)(c) and s175(2) – require the LPA or appellant to give notice that is likely to bring the appeal to the attention of persons in the locality of the land to which the EN relates.

- S175(1)(d) and ENAR8 – require the LPA to send to the SoS within 14 days of the notification a certified copy of the EN and a list of the names and addresses of the persons served.

153. S175(3) provides that the SoS shall give the appellant or the LPA, if they so desire, an opportunity to appear before and be heard by an appointed person. This is subject to s176(4), which allows the SoS to not comply with s175(3) if the SoS proposes:

    - To dismiss an appeal under s176(3)(a) – where the appellant failed to provide the required 'facts and grounds' information;

    - To allow an appeal and quash the EN under s176(3)(b) – where the LPA fail to comply with s175(1) and ENAR.

154. The power of the SoS to allow an appeal under s176(3)(b) is not transferred to Inspectors under Schedule 6[64]. If a ruling is sought at an inquiry or hearing to the effect that the power should be exercised, the Inspector should adjourn to enable the matter to be dealt with by the SoS. If EN is so quashed, the LPA may still issue another EN under s171B(4).

155. The right to appear before and be heard by an appointed person as set out under s175(3) is also subject, in effect, to s319A of the TCPA90, which was inserted by s196 of the Planning Act 2008 and has been amended by the Business and Planning Act 2020 (BPA20). S319A gives the SoS the power to determine the procedure for dealing with enforcement appeals.

Fee for the DPA

156. The appellant is liable to pay a fee to the LPA where ground (a) is pleaded and a DPA arises under s177(5). The reason for requiring payment of a fee is to prevent anyone carrying out unauthorised development and then obtaining PP retrospectively for free.

157. The fee is to be calculated in accordance with s303 of the TCPA90 and the Town and Country Planning (Fees for Applications, Deemed Applications, Requests and Site Visits) (England) Regulations 2012 as amended (the Fee Regulations); see also the PPG on Fees for Planning Applications.

158. In some cases, the DPA is fee exempt. More detail is available in the desk instructions

[64] Despite a suggestion to the contrary in *Barraclough v SSE & Leeds CC* [1990] JPL 911

but, in summary, no fee is payable if:

- The appellant made a valid planning application for the alleged development before the EN was issued or a s78 appeal against the refusal of that application before the EN would take effect, and the application or appeal has not been determined – Regulation 10(7). The effect of s174(2A) is that an appeal may not be brought on ground (a) in such circumstances, and the appellant will need to rely on their s78 appeal for a grant of PP.

- The development is required solely for the provision of facilities for the health, safety, comfort or access of a disabled person or persons.

- The development would normally be permitted by the GPDO but is not by reason of an Article 4 Direction made by the LPA.

159. A grant of PP will run with the land and so does not need to be sought by more than one appellant. Where more than one appeal is made against an EN, the fee request letter will explain that only one appellant needs to pay the fee for ground (a) and the DPA to be considered. Ground (a) would then lapse on the other appeals. However, if only one appellant pays the fee and they withdraw their appeal later, the other appellants would be left unable to reinstate ground (a) after the deadline for payment has passed.

160. PINS is responsible for setting the payment period if the fee has not been received with the appeal forms. Fees are refundable in respect of appeals withdrawn 21 days or more prior to the inquiry, hearing or site visit date, but the whole appeal must be withdrawn, not just ground (a). Fees are also refundable if the appeal succeeds and the EN is quashed on any of the legal grounds, except in cases involving caravan sites or where an LDC is issued by the Inspector exercising discretionary power under s177(1)(c).

161. S177(5A) provides that if the requisite fees are not paid within the stipulated period, the ground (a) appeal and DPA will lapse. Ground

(a) cannot then be reinstated unless there has been a procedural error. The case officer should make the fee situation clear on the file, but it is the Inspector's responsibility to verify whether the fee has been paid and, if ground (a) has been pleaded, whether the DPA is to be considered before the inquiry, hearing or visit.

162. If it is argued, or the Inspector considers that the DPA has been lapsed in error, or there is some other misunderstanding regarding the fee, the Inspector should alert the case officer and, if necessary, initiate correspondence which will allow the Procedure Team to resolve the point.

163. If the matter is raised at a site visit, say that any points about fees must be put in writing to PINS. If the fee remains in dispute by the time of a hearing or inquiry, hear evidence:

- On the matter but make no ruling as to whether or not ground (a) has lapsed,

- On the planning merits, to avoid the possibility of the event having to be re-

opened later, but also on the express basis that this is without prejudice to the eventual decision by the SoS on the fees issue.

164. The Inspector should always be clear that the fee is a procedural matter, over which they have no jurisdiction. In no circumstances should the Inspector say anything at an event which might commit PINS or the SoS to any particular course of action[65]. Nor should an Inspector ever accept late fees offered at the inquiry or hearing.

165. Where an EN is corrected, the area covered by the DPA may be reduced and/or the category of development may be changed, and this may have implications for fees. In the case of development falling within Part 2 of Schedule 1 to the Regulations, Inspectors should ascertain any reduced area to the nearest 0.1ha and set out that information in their decision so the right refund can be made.

Powers of the Secretary of State and Inspectors

Powers Transferred to Inspectors

166. Schedule 6 to the TCPA90 and the Town and Country Planning (Determination of Appeals by Appointed Persons) (Prescribed Classes) Regulations 1997 as amended transfer all appeals under s174 and s195 to Inspectors, except cases linked with other nontransferable appeals, and cases which raise complex or highly sensitive issues where the SoS recovers jurisdiction.

167. Jurisdiction in respect of claims for costs is transferred by Schedule 6, paragraphs 6.4-6.5. For administrative reasons, all claims arising in whole or part from the late withdrawal of a whole appeal or appeals under s322A are determined in PINS Costs Branch.

168. The power for the SoS to recover jurisdiction is contained in paragraph 3(1) of Schedule 6. Paragraph 4(1) of Schedule 6 gives a further power to 'de recover' an appeal if, for example, an associated non-transferable appeal is withdrawn. Guidelines for recovery are revised from time to time to accommodate sensitive issues, but as a general rule Inspectors should only consider recommending recovery if there are intransigent or novel legal problems or issues of development control, or they propose to go against firmly held views of another Government Department.

169. Paragraph 2(8) of Schedule 6 provides that any challenge to the effect that a decision should be made by the SoS, rather than by an appointed person, must be made before the appeal decision is given. It is not open to the parties to demand as of right that a particular case within the transferred classes be recovered.

170. The powers transferred to Inspectors in Enforcement appeals are:

- To correct any defect, error or misdescription in the EN under s176(1)(a) **and/or** vary the terms of the EN under s176(1)(b), where the Inspector is satisfied that

[65] Although a contrary comment was made by in *Dyer v Purbeck DC* [1996] JPL 740.

doing so will cause no injustice to the appellant or the LPA.

- To quash the EN under s176(2).
- To give any directions necessary to give effect to the determination on the appeal – s176(2A).
- To disregard the failure to serve a person required to be served with the EN under s172(2), if neither the appellant nor that person has been substantially prejudiced – s176(5).
- To grant PP in respect of the matters stated in the EN as constituting the breach of planning control, whether in relation to the whole or any part of those matters, or the whole or any part of the land to which the notice relates – s177(1)(a). The PP may be any that might be granted on an application under Part III – s177(3). This imports s70 and 72, s73 and s73A.
- To discharge any condition or limitation subject to which PP was granted under s177(1)(b) and substitute another condition or limitation for it, whether more or less onerous under s177(4).
- To determine whether, on the date the appeal was made, any existing use or operations carried out or matters resulting from the failure to comply with a condition or limitation were lawful and, if so, issue an LDC under s191 – s177(1)(c).

An LDC which is issued under this power should include the date of the determination of lawfulness, being in these cases the date of the s174 appeal decision.

Quashing the Notice and Split Decisions

171. An EN may only be quashed in its entirety.

172. Where an appeal is **wholly** allowed on any legal ground or ground (a), the EN is quashed. In respect of ground (a), PP is granted under s177(1) on the application deemed to have been made by the appellant under s177(5) provided that application did not lapse.

173. The EN is upheld in the following circumstances:

- Any legal grounds of appeal are dismissed
- There is partial success on a legal ground so that the EN is corrected but not quashed
- Any appeal on ground (a) is dismissed
- There is a split decision on ground (a) so that PP is refused in respect of 'part of the site' or 'part of the matters'
- There is a split decision on legal grounds or ground (a) in a breach of condition case, whereby the appeal succeeds in respect of one condition but fails in respect of another

- Appeals on grounds (f) or (g) succeed in whole or part – or fail.

174. If and when an Inspector makes a split decision and grants PP subject to conditions for part of the site or matters, the EN should not be varied through the deletion of those requirements that apply to the permission. Doing so could give rise to two inconsistent PPs, the conditional one granted and an unconditional one deemed to have been granted under s173(11)[66].

175. In such cases, explain in your conclusions on ground (a) that the requirements of the EN will not change but the appellant can rely on s180, which provides that the EN will cease to have effect so far as inconsistent with the permission.

Correcting and/or Varying the Notice – General

176. Although the Courts are unlikely to place much weight on whether an Inspector describes a 'correction' or 'variation' properly as such, the following distinction should be applied for consistency.

177. Under s176(1)(a), powers of correction apply to '**any** defect, error or misdescription in the enforcement notice' – and thus **not** just to any such problem in the recital of the breach. Powers of correction may be exercised, where appropriate, in respect of any errors in the EN, including the header or requirements, and including typos.

178. The EN may also be corrected, as noted above, to exclude from the allegation any part of the development found to be lawful following partial success on grounds (b), (c) or (d). Where the allegation is corrected for whatever reason, consequential corrections may be required to the requirements and/or other parts of the EN.

179. The provisions under s176(1)(b) are to 'vary the terms' of the EN. Accordingly, an Inspector may exercise powers of variation only to modify the requirements of or period for compliance with the EN – if and when they allow an appeal on grounds (f) and/or (g) or find, of their own volition, a requirement excessive or period for compliance unreasonable.

180. The Courts interpret the power to correct notices very widely. In *Simms v SSE & Broxtowe BC* [1998] JPL B98, it was held that the words of s176 propound only one test, namely whether the change would cause injustice. There is no test that the correction should not go to the substance of the matter or be material as implied in cases on the previous TCPA[67].

181. So long as the EN is not a nullity by reason of hopeless ambiguity and uncertainty, Inspectors can make any correction which will put the EN on a proper footing, including

[66] R v Chichester Justices Ex Parte Chichester DC [1990] 60 P&CR 342

[67] The powers under s176(1) go further than the equivalents under earlier legislation which only allowed the SoS or Inspector to 'change the label' and 'get the notice in order if they can'; *Hammersmith LBC v SSE & Sandral* [1975] 30 P&CR 19.

broadening the scope of the EN, or removing vague requirements[68].

182. An obvious error on the face of the EN can be corrected so that the EN is wholly consistent[69]. For example, the recitals can and should be corrected if they refer to an MCU, but the allegation is that there has been a breach of condition. Typos should be corrected where necessary to clarify the meaning or ensure the credibility of the EN.

183. Whether by writing to the parties or canvassing the matter at inquiry or hearing, the Inspector should give the parties an opportunity to comment on any proposed corrections and variations to the EN, unless they would be entirely minor in nature or not come as a surprise[70]. Indeed, where an oral event is being held, you should mention even minor corrections and variations for completeness; it would be strange not to.

184. S176(1) says the EN **"may"** be corrected if there is no injustice to the appellant or LPA. It makes no reference to interested parties, but, notwithstanding the Inspector's duty to "try get the notice in order" if they can, the power to correct or vary is nevertheless discretionary. Inspectors should consider whether correcting or varying the allegation and/or requirements of an EN would cause any loss of natural justice, perhaps in respect of another occupier using the planning unit, who had deliberately not appealed against the EN because their activities were not affected by it as originally drafted. Given the discretion inherent in the word "may", injustice to interested parties could justify a decision not to correct or vary.

Correcting the Allegation

185. Grounds (b), (c), (d), (f) and (a) are assessed against, and the terms of the DPA are derived from the allegation, whether or not that is corrected. The allegation is also relevant to the question of whether the steps are excessive for ground (f). The Inspector should correct any error in the allegation unless there would be injustice to the appellant or LPA in terms of s176(1) or there would be such prejudice in respect of an interested party as to cause a loss of natural justice. Where the allegation is plain wrong, but correction would cause injustice, the EN must be quashed as invalid.

186. An allegation of an MCU can be corrected to refer to a breach of condition, including where there has been a breach of a 'temporary' condition as in *Ahern*. An EN alleging a breach of condition may also be corrected to allege an MCU and should be if there is a new use that ought to be permitted through an appeal on ground (a). Whichever way the allegation is changed, the relevant paragraph in s171A(1) cited in the EN should also be corrected.

187. An allegation of operational development (within the four year period) can be corrected to refer to an MCU (within the ten year period) and vice versa, so long as doing so

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[68] *Lynch v SSE* [1999] JPL 354; *Oates v SSCLG* [2108] EWCA Civ 2229

[69] *Epping Forest DC v Matthews* [1986] JPL 132

[70] In *Burgoyne v SSCLG* and *Malvern Hills DC v SSCLG* (Consent Order 3/1/17), the SoS conceded that Inspectors had caused injustice to the Claimants in breach of s176 by correcting ENs and widening allegations without first giving opportunity to comment.

would cause no injustice to the appellant in respect of ground (d)[71].

188. If it is apparent in an MCU case that the EN does not describe all of the components of a mixed-use taking place on the site, and the additional components are lawful, the EN should be corrected if possible, to describe the mixed use properly. If the additional components are lawful, the requirements would not be varied, and the prospect of PP being granted by virtue of s173(11) would be of no concern. However, correcting the allegation in such a case could have implications for the parties' cases on ground (a) and the legal grounds. On ground (a), the merits of use for a residential caravan site and keeping horses may differ from the merits of residential use alone. For an appellant to demonstrate that a mixed use is immune from enforcement action on the balance of probabilities under ground (d), they will need to show that the whole mixed use has taken place for ten years.

189. So even where additional components of a mixed use are lawful, you should consider whether correcting the EN to name them in the allegation would cause injustice in the circumstances. Similarly, the allegation cannot be corrected in such a way as to change the planning unit, if doing so would prejudice the parties' cases as to the materiality or merits of the change of use[72].

190. The allegation should never be corrected so that PP may be granted for some development which does not reflect the factual position, no matter what the parties may agree to. However, the powers in s176(1) do extend to correcting the allegation in order that the alleged breach is properly described for the purposes of the DPA where there is an appeal on ground (a) – and/or for the purpose of correcting or varying the requirements of the EN.

191. For example, if an EN alleges that there has been an MCU and requires that the use is ceased and facilitating works are removed, the Inspector may correct the EN so that the facilitating works are described as such in the allegation and brought within ground (a).

Correcting or Varying the Requirements

192. The requirements should square up with and follow logically from the allegation, with regard to what an EN may require under s173(3)-(7). It is within an Inspector's power to bring the steps into line with the allegation or make consequential changes to the requirements pursuant to the allegation being corrected.

193. It is not necessary for the appellant to plead ground (f) in order for the Inspector to find that the requirements are unclear, excessive or even incomplete. As discussed below, any corrections or variations to the requirements may be made, even if they would make the EN *prima facie* more onerous, so long as there would be no injustice to either the Appellant or LPA[73]. It should **not** be assumed that adding to the requirements would

[71] *Hughes v SSE & Fareham BC* [1985] JPL 486

[72] *T L G Building Materials v SSE* [1981] JPL 513

[73] *Lynch v SSE & Basildon* [1999] JPL 354

automatically cause injustice.

194. In *Dacorum BC v SSETR & Walsh* [2000] QBD, the EN alleged a MCU of land to residential [garden] use and the construction of structures including a fence. It was held that removal of the fence could not be implied into or inferred from the actual requirement to 'restore the land to open pasture' – but the Inspector erred in failing to address the inconsistencies in the EN, especially after finding the fence harmful in planning terms. The Inspector ought to have considered whether the EN could be varied to provide for the removal of the most intrusive element of the alleged development.

195. *Bennett v SSE* [1993] JPL 184 concerned the use of an annexe as a dwelling. The EN related to the whole property, alleged that there had been an MCU to use as two dwellinghouses, and required the appellant to (i) cease using the premises as two dwellinghouses and (ii) restore the use as a single dwellinghouse. The Inspector deleted the second step and upheld the EN, but cessation of the use of the main house would not achieve what was intended. It was not clear from the EN which unit had to be vacated. The Inspector should have considered whether the EN could have been corrected to require only the cessation of the use of the annexe.

196. There is little point in spending time in getting the requirements right if your decision will be to quash the EN, but they should be corrected or varied as required if the EN is upheld while PP is granted separately on a s78 appeal.

Correcting the Allegation and Requirements

197. Difficulties are likely to arise when the Inspector discovers that the allegation is incorrect such that the requirements may be incomplete. The usual example of this scenario is where the EN alleges that there has been an MCU but does not refer to one or more unlawful components of a mixed use that was being carried out on the site at the time the EN was issued – and all of the activities are properly a matter for the LPA[74].

198. Where there are additional unlawful activities on the site:

- Widening the scope of the allegation and requirements could cause injustice to the appellant by making the EN more onerous to comply with. This is likely to be the case if, as a result, the appellant ends up worse off than if there had been no appeal.

- Widening the scope of the allegation but not requirements could cause injustice to the LPA by giving rise to the prospect of PP being granted via s173(11) for a use including or comprising the additional activity or activities alleged.

[74] *Tandridge DC v Verrechia* [2000] QB 318 concerned a site where Tandridge DC enforced against use for car parking and Surrey CC against use for the dumping of waste. On the 'waste' appeal, the Inspector corrected the EN to incorporate the parking use but added no requirements to remedy that breach. In injunction proceedings, the HC rejected the appellant's argument that deemed PP had been granted by the operation of s173(11). Surrey CC had no power to enforce against the parking use and was not granted such jurisdiction by s176(1). Moreover, s173(11) only applies if the EN could have specified remedial steps and since Surrey CC could not have required that the cessation of parking, s173(11) did not come into play in respect of that use.

- Either approach could cause injustice to either party by changing their case on the legal grounds or planning merits.

199. Accordingly, where the EN does not encompass all the activities taking place on the site, it will be necessary to decide the right course of action in the circumstances. It will normally be appropriate to choose one or more of these options:

    - To invite the LPA to withdraw the EN, noting that they may be able to issue a new EN in exercise of their 'second bite' powers under s171B(4). **This option should be pursued if it seems unlikely that there could ever be any outcome other than the EN being withdrawn or quashed.**

    - To canvas the views of the parties as to whether injustice would be caused in the circumstances. For example, while it will often cause injustice to an appellant to expand the allegation and requirements of the EN, this might not be the case if the Council intended to cover all elements of the actual mixed use and the appellant read the EN that way in the first place.

    - To quash the EN as inaccurate and incapable of correction without injustice to the appellant or other relevant occupiers as defined in s174(6) – noting again that the LPA may be able to issue another EN. This option should be followed if it is clear that the LPA did not intend to omit the component of the mixed use and would want the activity to cease.

    - To correct the allegation **and** requirements to refer to all elements of the mixed use. It is essential in such cases that the parties are given a full opportunity to make representations on the ramifications of the scope of the EN (and DPA) being widened. The Inspector will need to be convinced that in the particular circumstances no injustice will be caused.

200. Other courses of action should be considered with **caution**:

    - To leave the EN unaltered, perhaps because the activity began after the EN was issued or is completely unrelated to the development that is subject the EN, and so it is not the case that the EN 'could have' required the activity to cease for the purposes of s173(11).

    This option is normally best avoided, because the appeal decision could be liable to challenge on the basis that the Inspector failed to correct an inaccurate allegation[75]. Moreover, the actual mixed use would remain unauthorised if PP is granted for what is alleged, and further problems

[75] An Inspector's decision to quash an EN on the basis that it did not accurately describe the breach was upheld in *R (oao East Sussex CC) v SSCLG & Robins* [2009] EWHC 3841, although that was a permission hearing and does not form a binding precedent. The EN did not specify clearly what was alleged or what action was required. It is not open to the LPA to specify part of a breach, particularly where that comprises a single MCU – *Fidler v FSS* [2004] EWCA Civ 1295 distinguished. Where an EN is concerned with a single mixed use, LPA cannot decouple elements of the use considered to fall within the jurisdiction of another authority.

would arise in respect of the implementation and enforceability of conditions.

- To correct the allegation but not the requirements, reflecting the option to 'under-enforce'. **This option should rarely be used** because it will result in deemed PP being granted under s173(11) if the EN is upheld and the requirements relating to the use as originally alleged are complied with. There can also be complications if there are two ENs.

- To cut down the ambit of the EN so that it must exclude the activity, perhaps by amending the plan to exclude the part of the site where the activity takes place. **This option should only be adopted if it is reasonably clear** that the activity does not form a component of a mixed use with the alleged use but is a separate use taking place in a separate planning unit without, for example, shared accesses or communal areas.

Correcting the Plan

201. The Inspector's power to correct the EN extends to the substitution of the plan, whereby any errors in respect of what area is identified as the site and/or in respect of any hatching or colouring of the area may be remedied so long the matter is canvassed with the parties and the amendments would cause no injustice[76].

202. It was held in *Howells v SSCLG* [2009] EWHC 2757 (Admin) that the power to correct the plan is not constrained to reducing the area to which the plan relates. There was no objection in that case to the Inspector extending the area in two directions; the only test was one of injustice.

203. If the site area is to be enlarged, however, care should be taken to ensure that no injustice is caused to the appellant simply by reason of the EN becoming more onerous to comply with. It is also necessary to ensure that enlarging the site area does not result in the introduction of new issues and/or interests in land.

204. An inaccurate plan can be deleted without offending ENAR 4(c) so long as the site is or can be precisely be described in words alone[77]. However, where no part of the development alleged falls within the plan area, it may be better to quash the EN as invalid so that the LPA can start again. This will be the appropriate course where the errors in the plan had consequences in terms of who was served, who appealed or what the grounds of appeal were.

Power to Issue an LDC under s177(1)(c)

205. Where an enforcement appeal succeeds on ground (c) or (d), Inspectors are empowered by s177(1)(c) to determine whether, on the date of which the appeal was

[76] It may be necessary for you to ask the parties to agree a revised plan and/or to request a blank plan from the LPA which you modify yourself.

[77] *Wiesenfeld v SSE* [1992] JPL 556

made, any existing use, operations or failure to comply with any condition or limitation was lawful – and if so issue an LDC under s191. The power is discretionary and only intended to be exercised in exceptional circumstances[78]. It should be used with caution because:

- The relevant date is that of the appeal, not that of the EN;
- There may be some points of distinction between the existing (say) use found to be lawful and what is alleged by the EN; The power under s177(1)(c) is not limited to the development referred to in the allegation, even as corrected and varied – even if it is difficult to envisage circumstances in which an Inspector was asked to issue an LDC for activities which were not closely related to the subject matter of the EN[79].
- S177(1)(c) does not allow an inspector to issue an LDC setting out a non-existing use which would be lawful.
- If an appeal succeeds on ground (c) or (d) and the EN is quashed, any fee paid for the DPA would be refunded. If an LDC is issued in exercise of the powers under s177(1)(c), however, the fee is appropriated for the LDC[80]. Since the fee for the DPA is a double fee, exercising the power to issue an LDC will disadvantage the appellant. They might prefer a refund and to make a separate later application to the LPA for an LDC, paying one fee only.

206. The power should not therefore be exercised unless the appellant has specifically asked that it is before the appeal is determined. It is open to the Inspector even then to decline to exercise the power, particularly if insufficient plans and details are available. In a mixed use case it would be unreasonable to grant an LDC only for elements which would be of no benefit to the appellant, whilst allowing the SoS and LPA to retain the fees.

207. However, the 'exceptional circumstances' approach does not apply to cases relating to caravan sites, because success on ground (c) or (d) alone is not equivalent to a grant of PP or LDC for the purposes of a site licence under the CSCDA60. Accordingly, in all such cases where ground (c) or (d) succeeds, even if a fee has been paid, an LDC should be granted under s177(1)(c) for the existing use so that the appellant can get a site licence[81].

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[78] See *Turner v SSCLG & South Buckinghamshire DC* [2015] EWHC 1895 (Admin)

[79] Any appellant who makes such a request should be advised to apply to the LPA for an LDC, as described in How to complete your enforcement appeal form and the fee letter.

[80] Regulation 10(13) of the Fees Regulations

[81] An LDC is not the equivalent of a PP except, under s191(7), for the purposes of s3(3) of the CSCDA68, s5(2) of the Control of Pollution Act 1974 and s36(2)(a) of the Environmental Protection Act 1990. Where an LDC is granted under s177(1)(c), the appellant would, as in other cases, be deprived of a refund on the double fee for the DPA. The Fee Regulations 2012 (as amended) reversed the provisions of the Fee Regulations 1989, such that fees paid in respect of a DPA in relation to the use of land as a caravan site are now to be treated the

208. Likewise, in waste disposal and other cases where a licensing regime operates in parallel with planning control, Inspectors should exercise their s177(1)(c) power to issue an LDC upon success on ground (c) or (d) so that the appellant can obtain a waste management licence under the Environmental Protection Act 1990. Any LDC should be issued under s191 and in the appropriate form.

Nullity and Invalidity

The Difference between Nullity and Invalidity[82]

209. Defects that are fatal to an EN fall into two main categories: those that make it a nullity and those that make it invalid. In short:

- **An EN is null if it is 'defective on its face'[83]**, normally by missing some vital element that an EN 'shall' include under s173. A fundamental error in the EN renders it a nullity. There is, in effect, no 'enforcement notice' as such; it is 'so much waste paper [sic]'[84]. There is nothing to be corrected or subject to any ground of appeal set out under s174(2)[85].

- **An EN is invalid if it is flawed in some way, but not so defective as to be a nullity.** An invalid EN can be corrected/varied by an Inspector under s176 provided the correction or variation will not cause injustice to the Appellant or LPA.

Nullity and the Allegation

210. Accordingly, an EN will be null if it omits to clearly state the matters constituting the breach of planning control as required by s173(1). An EN must enable the recipient to 'know what those matters are' under s173(2) and thus an EN may be null because the allegation is too unclear. The appropriate test is whether the notice is hopelessly ambiguous and uncertain, either as regards the description of the PB, or the breach of conditions alleged, or the necessary remedial steps, as set out by Upjohn LJ in *Miller-Mead v MHLG* [1963] 2 WLR 225:

> Supposing then upon its true construction the notice was **hopelessly ambiguous and uncertain** so that the owner or occupier could not tell in what respect it was alleged that they had developed the land without permission or in what respect it was alleged

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same as other applications for the purposes of refunds; Reg 10(13).

[82] EPLP P173.06

[83] *R v Wicks* [1996] JPL 743; [1997] JPL 1049 (HoL)

[84] Upjohn LJ in *Miller-Mead v MHLG* [1963] 2 WLR 225

[85] In *Sarodia v Redbridge LBC* [2017] EWHC 2347 (Admin), the recipient did not make an enforcement appeal but the EN was found to be a nullity in the courts and the Council's attempt to prosecute the recipient for non-compliance failed.

they had failed to comply with a breach of condition or, again, that they could not tell with reasonable certainty what steps they had to take to remedy the alleged breach. The notice would be bad on its face and a nullity

211. An EN must be drafted so as to tell the recipient fairly what they have done wrong and must do to remedy it. An EN must be fundamentally defective in order to be found a nullity. Minor invalidities in the EN should be corrected via the application of s 176 where possible. It is in the public interest to not set the nullity test too low, since the result is normally the issue of another EN under s171B(4) and further appeal[86].

212. In *Davenport v The Mayor and Citizens of the City of Westminster* [2011] EWCA Civ 458, the question was whether an EN was null because it cited and purported to rely on a condition that was no longer operative. It was held on the facts that the EN complied with s173; the recipient would know the matters said to constitute the breach, while the requirements and other elements of the EN were also plainly stated. The EN should have referred to s57(2), not the condition, but it was accurate with regard to the relevant PP and extent of the use that the property could be put to[87].

Nullity and the Requirements

213. The requirements of the EN should be approached in a similar way; if an EN omits to include any steps, it will fail to comply with s173(3) and be null. If the requirements are there but ambiguous, the test is as *Miller-Mead*; the EN will be a nullity if the recipient '*could not tell with reasonable certainty what steps they had to take'*. The bar should not be set too low.

214. In *Payne v NAW and Caerphilly CBC* [2007] JPL 117, the EN required the submission of a scheme of levelling and planting to be submitted to the LPA for approval. The Inspector found the requirement insufficiently specific to comply with s173(3) and described the EN as 'unacceptable because of the uncertainty it introduces.' Even so, he substituted precise requirements. It was held that the Inspector erred because, since they had made an express finding that the EN did not comply with s173(3), they ought to have found the EN null and incapable of variation.

215. In ¶31 of his judgment, Wyn Williams QC rejected an argument that the offending requirement could have been deleted, since he knew 'of no case where the fact that only part of the notice was uncertain has allowed the court to conclude that the notice as a whole complies with [s173]'.

216. Since *Payne*, where an EN concerned with an MCU or operations includes a requirement that a scheme be submitted, the approach has been to find the EN null[88].

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[86] In *R v SSE & Tower Hamlets LBC ex parte Ahern (London) Ltd* [1989] JPL 757, the Inspector was found to have erred in quashed an EN because the allegation was wrongly described as MCU instead of breach of condition. The SoS may correct any defect or error if satisfied that there would be no injustice; 'the pettifogging has to stop'; see also *Simms v SSE & Broxtowe BC* [1998] JPL B98.

[87] Applied in the injunction case of *Wokingham BC v Scott* [2017] EWHC 294.

[88] Where an EN alleges that there has been a breach of a condition which required the submission of a scheme for approval, the EN should require compliance with the condition and submission of the scheme.

However, Wyn Williams QC stated in ¶33 that he 'was quite unable to say that the Inspector erred' in finding that the EN did not comply with s173, because no argument was put in court that the requirement was not uncertain.

217. In *Oates v SSCLG v Canterbury CC* [2018] EWCA Civ 2229, the third requirement of the EN was to 'make good the land…' The Inspector found the step 'vague and subjective' but that it could be deleted without causing injustice. The grounds of challenge included that the EN ought to have been found null, but HHJ Waksman QC in the HC endorsed the Inspector's approach, and the ground was not pursued in the CoA. Compliance with steps (1) and (2) would suffice to remedy the breach; the Inspector was entitled to use their powers to remove what they found unnecessary.

218. In ¶60 of *Oates*, HHJ Waksman considered ¶31 of *Payne* and gave the following reasons for disagreeing with Wyn Williams QC that one 'offending requirement' would make the EN null:

- There was a reported case where the Inspector deleted such a requirement and otherwise upheld the EN as compliant[89];
- It is not right that most of the EN complies with s173 in all nullity cases. In other cases reported, the whole of the requirements section was too uncertain[90];
- In *Payne*, the offending section could not have simply been excised. Something had to be put in its place and the Inspector could not have formed a judgment that the EN was compliant in its attenuated form.
- The logic of proceeding on the basis that an EN must be null even if a small part falls foul of the statue could lead to absurd results because it takes no account of the relative importance or materiality of what is removed compared to what is left.

219. Referring to various authorities in ¶62[91], HHJ Waksman QC distilled relevant principles in ¶63:

1) If an EN does not comply with s173(1) or (3) and (4), it is null and cannot be saved by s176(1).
2) The EN must inform the recipient with reasonable certainty what the BPC is and what must be done to remedy it.
3) Some degree of uncertainty or other defect in the relevant section of the EN

[89] *Hattingh v SSE* [2002] PLCR 10

[90] *Hounslow LBC v SSE* [1981] JPL 510

[91] *Trott v Broadland DC* [2011] EWCA Civ 301; *Davenport v the Mayor and Citizens of the City of Westminster* [2011] EWCA Civ 458; *Koumis v SSCLG* [2014] EWCA 1723.

does not mean that there is non-compliance with the statutory requirements.

4) A decision by the Inspector as to whether a defect in the EN renders it null is a matter of judgment and should be accorded very considerable weight.

5) Whether a defect renders the EN null must be viewed in context: the importance or otherwise of that part of the EN; whether the defect is bound up with the remainder of that section; whether the EN would be valid in the absence of the defect. It is open to an Inspector to conclude that, while part of the relevant section of the EN was uncertain and could not stand, the EN as a whole complied with the statutory requirements. The Inspector could delete the offending part.

6) The Inspector and Courts should approach the exercise in a way which is not unduly technical or formalistic.

220. *Oates* is consistent with *Ahern*, when the same is difficult to say about *Payne*. The approach set out in *Oates* may also apply in situations where a requirement may need to be amended rather than deleted. A correction is a correction. If an EN is null, nothing can be deleted or amended. If an EN is not null, it does not matter what the correction is, the only question is injustice.

221. However, *Oates* cannot be read as authority for the proposition that an Inspector could delete a 'scheme' requirement so long as other steps are not vague and compliance with them would suffice to remedy the breach. *Payne* still applies where an EN requires the submission of a scheme so as to cause unacceptable uncertainty. *Payne* also stands insofar as, if an Inspector finds that an EN does not comply with s173, they must conclude that the EN is null.

222. It may be argued that the EN is a nullity because the requirements are impossible to comply with – but any such problem is likely to be rooted in the facts as identified, and is not necessarily a fundamental defect on the face of the EN:

- It was held in *McKay v SSE* [1994] JPL 806 that an EN was null because it included requirements that could only have been complied with by the commission of a criminal offence, in breach of s2 of the Ancient Monuments and Archaeological Areas Act 1979. The EN, however, was not defective on its face and so the CoA in *South Hams DC v Halsey* [1996] JPL 761 disagreed with the decision in *McKay* – holding that, if compliance with the EN would amount to a criminal offence, the recipient would have a defence to the EN if prosecuted. The EN itself was not null and corrections under s176(1) could have been considered.

- That it was not structurally feasible to reinstate a wall was successfully pleaded as a reasonable defence under s179(3) in *Camden LBC v Galway-Cooper* (CO/5519/2017 22 May 2018).

Nullity and Other Defects in the Notice

223. While S173(1)(b) provides that the EN 'shall state…**the paragraph of s171A(1)** which applies', the EN is unlikely to be null if the paragraph is omitted or wrong. The defect can and should be corrected, provided it is clear whether the EN alleges development without planning permission or a breach of condition, and no injustice would be caused.

224. Failure to state **the date on which the EN takes effect**, in accordance with s173(8), will render the EN a nullity. The same applies if the EN fails to specify a **period for compliance** – whether by complete omission or by failing to specify a period as such, perhaps by requiring compliance 'immediately' or 'forthwith'[92]. The period for compliance must be separate from that for taking effect.

225. If it is possible to deduce the period within the four corners of the EN, perhaps because it sets out two dates, or phased compliance with some dates inadvertently missed out, it may be possible to correct the EN and provide for a revised timetable subject to there being no injustice[93]. The same may be true if the EN provides for phased compliance and specifies a period for some steps but not others; the courts have not addressed whether such an EN should be found null or not, but *Oates* could be read as lending support to the proposition that such an EN may be correctable. The defect must be considered in context and with regard to the importance or otherwise of that part of the EN.

226. It was held in *Koumis v SSCLG* [2014] EWCA Civ 1723 that although a variation notice issued under s173A was a nullity – because it purported to vary the compliance period of an EN but did not specify the period – this did not make the EN itself null. The flaw was not on the face of the EN. An LPA ought to be able to withdraw and replace an erroneous variation notice without having the original EN quashed by a court.

227. If an EN sets out no **reasons** why the LPA consider it expedient to issue the EN, it is likely to be null – because there will be a failure to comply with s173(10) and ENAR4(a), and s172(1)(b) provides that an EN can only be issued where it appears to the LPA that it is expedient to do so. It is not enough to say that there has been a breach of planning control. However, if the RFEN are incomplete or incorrect, that would not justify a finding that the EN is null.

228. In *Silver v SSCLG & Camden LBC & Tankel* [2014] EWHC 2729 (Admin), it was claimed that the EN was null because the RFEN stated why the Council had refused PP, not why they considered it expedient to take enforcement action. The High Court held, upholding the EN, that it was not permissible to look beyond the scope of an EN to determine the reasons for the issue of the EN; *Miller-Mead v MHLG* [1963] 2 QB 196, [1962] 12 WLUK 50 applied. However, each relevant paragraph of the EN had articulated a reason for issue, and given a reference to each part of the development plan as required by s172(1)(b).

229. An EN is also unlikely to be null simply because it fails to specify the **relevant development plan policies** as required by ENAR4(b)[94]. There may be no relevant policies – but even if there are, and they were missed off or incorrectly cited in the EN, the recipient should have sufficient information to appeal provided there were some RFEN. The policies can be requested in the appeal process and the costs regime gives

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[92] *R (oao Lynes & Lynes) v West Berkshire DC* [2003] JPL 1137

[93] *King & King v SSE* [1981] JPL 813

[94] Consistent with s172(1)(b)

the appellant some recourse against the introduction of such evidence late.

230. Even if this is possible, it is rarely appropriate to correct the RFEN or any errors pertaining to the relevant policies, since they are matters for the Council and their purpose – to inform the appellant of the objection to what has been done – has passed by the time of the appeal decision.

231. An EN would probably be null if it gives no sensible indication of the **precise boundaries of the land to which the notice relates** as required by ENAR4(c). However, the absence of a plan or error on the plan should not be enough on its own to support a finding of nullity or even invalidity. A failure to state the street number of the premises enforced against, or an incorrect address does not render the EN a nullity or invalid so long as the recipient is not misled[95].

232. An EN is not null if it lacks a signature or contains some other clerical error. If it lacks a date of issue but that can be gleaned from other evidence, the appeal can be progressed. However, an EN which purports to take effect before its date of issue will be null.

233. The EN is unlikely to be null if the explanatory note is incomplete or even missing entirely – particularly if the appellant has been able to make a valid appeal and thereby suffered no injustice or prejudice.

Nullity and LPA Procedures

234. It has been argued in appeals that the EN is null because the LPA did not follow proper procedures when issuing the EN. However, the House of Lords (HoL) held in *R v Wicks* [1997] JPL 1049 that, because an EN is only a nullity if the defect is evident on the face of the document, it is not open to the defence in a criminal prosecution to go behind the EN and challenge the *vires* of the LPA's decision to issue the EN. Consideration of the 'residual group of invalidity grounds' – bad faith, bias, procedural impropriety or expediency – would involve complex assessment and investigation of the background to the issue of the EN, and so should be the subject of an application for judicial review.

235. It was also held that the proper course in such cases is to challenge the issue of the EN by way of judicial review in *Britannia Assets (UK) Ltd v SSCLG* [2011] EWHC 1980 (Admin)[96]. In *Beg & Others v Luton BC* [2017] EWHC 3435 (Admin), it was held that whether LPA had the required delegations in place when the EN was issued does not fall within the scope of what can amount to a nullity argument.

236. The Courts have not specifically addressed whether procedural errors made by an LPA could render an EN invalid and so it may be necessary to seek legal advice if such points are raised by the parties[97]. However, since the Inspector does not have

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[95] *Coventry Scaffolding Co (London) Ltd v Parker* [1987] JPL 127

[96] Wyn Williams J at paras [24]-[26] and [33]-[34]

[97] Historically, costs have been awarded against an LPA where an EN is quashed because it was found not to have been properly authorised; [1997] JPL 1081.

jurisdiction to deal with submissions as to whether the LPA acted outside their powers in issuing the EN, it is likely that the proper course for the appellant would be to challenge the EN by way of judicial review.

Nullity and Invalidity Arguments at Appeal

237. Nullity and validity arguments are often advanced under grounds (b) or (c) because of the effect of s285 and the fact that there no ground under s174 that expressly relates to validity. No matter how the appellant raises the issue, any submissions that the EN is null or invalid must be aired at any oral event and addressed in the decision. The same applies if you as the Inspector have reasons to consider that the EN is null or invalid.

238. If any nullity or invalidity question does not flow logically from an appeal on ground (b) or (c), you should deal with it separately in the decision letter. Any finding that the EN is not null or invalid may be set out as a 'Preliminary Matter'. Otherwise the issue may be addressed under 'Reasons for the Decision'.

239. A decision that an EN is null means that it does not exist in law and there is nothing to quash. The formal decision must be that there is no jurisdiction and therefore no further action to be taken on the appeal, and, in the interests of clarity, the LPA should be asked to remove the EN from the register; see Annex 6. Any decision that the EN is null is open to challenge in the High Court by way of application for judicial review[98].

240. If an EN is not a nullity but is invalid because it contains some defect that cannot be corrected without causing injustice, applying s176, the formal decision will also be that the EN is quashed; see Annex 6. If the EN is null or invalid, the grounds of appeal are not considered, and any fee paid for consideration of the DPA will be refunded.

241. If it is apparent that there is a serious defect in the EN at an early stage of the appeal, the case officer, perhaps after discussion with the Inspector, will point this out to the LPA, and they may then withdraw and reissue the EN. If the LPA dispute the matter, the appeal will proceed for the Inspector to determine in the usual way.

242. The Inspector may be asked to make a ruling at the outset of an inquiry on whether the EN is null, so the parties do not waste time presenting their case on the grounds of appeal. The Inspector should make such a ruling where possible, having heard or considered any arguments relevant to the issue, and then close or continue with the inquiry as the case may be and set out details of the ruling in their decision. Circulation of a pre-inquiry note may obviate the need for the inquiry at all.

Estoppel and Legitimate Expectation[99]

The Principle

243. The term 'estoppel' is derived from a Norman French word meaning to stop, bar or

[98] *Rhymney Valley DC v SSW* [1985] JPL 27

[99] EPLP P172.08

preclude, and it is a long-established concept of English private law. It is defined in the Oxford Dictionary of Law as:

'A rule of evidence or a rule of law that stops a person from denying the truth of a statement one has made or from denying the existence of facts that one has alleged to exist. The denial must have been acted upon (probably to his disadvantage) by the person who wishes to take advantage of the estoppel or his position must have been altered as a result'

244. Generally, then, estoppel may arise where Person B relies upon the acts or words of Person A, and Person A then seeks to deny or go back on those acts or words, and Person B seeks to prevent or 'estop' Person A from doing so. There are different varieties of estoppel, as described below, which may be claimed in enforcement and LDC appeals.

245. Estoppel has arisen less frequently since the enactment of the TCPA90 and the HoL made their judgment in *Reprotech* described below. However, submissions on estoppel are still sometimes made and should be dealt with as a preliminary matter, or under the heading of ground (c) or (d) in an Enforcement decision, or as a main issue in an LDC case.

Estoppel by Representation

246. Estoppel by representation may be claimed where the LPA made representations that led the appellant to believe the development is lawful or not to be subject to enforcement action. It is a fundamental principle, however, that an LPA may not fetter its discretion to issue an EN by any form of agreement; *Southend-on- Sea Corporation v Hodgson (Wickford)* [1961] 12 P&CR 165.

247. It was held in *Saxby v SSE & Westminster CC* [1998] JPL 1132 that, given the amendments to the TCPA90 in 1991 to introduce ss191-196, it was no longer possible for an appellant to seek some informal determination of whether PP is required. The new provisions are 'an entirely new and fully comprehensive code'[100].

248. In *R v E Sussex CC ex parte Reprotech (Pebsham) Ltd* [2002] UKHL 8, the HoL held that concepts of private law should not be introduced into the public law of planning control which binds everyone. The general principle is that public authorities cannot be estopped from performing their statutory duties. Any representation by an LPA as to how it will or will not exercise its powers under s172 will not give rise to a binding estoppel.

Estoppel by Conduct

249. Estoppel by conduct (or estoppel *en päis*) may be claimed in an LDC or ground (d) enforcement case where the LPA claims that the appellant is estopped from denying the truth of false statements that they made to the LPA before the development became immune from enforcement action.

[100] See also *Flattery & Japanese Parts Centre Ltd v SSCLG* [2010] EWHC 2868 (Admin).

250. The onus is on the LPA to detect unauthorised development within the four or ten-year period, and it should be borne in mind that the statutory immunity periods were conceived, in part, as normally sufficient for an LPA to discover, investigate and act against an unlawful operation or use.

251. However, difficulties may arise if the LPA *does* investigate the development during the four or ten year period and is persuaded to not issue an EN because the appellant gives them information which turns out to be false. For example, the appellant may take steps to assure the LPA that a building is being used lawfully and not for the suspected (and actual) unauthorised use.

252. In cases such as this, it is more likely now that an LPA will seek to rely on 'deliberate concealment' in the *Welwyn Hatfield* sense than estoppel by conduct. And it would be prudent for an Inspector to justify any finding that an appellant is not entitled by reason of their conduct to rely on the immunity periods set out in the TCPA90 on the basis of the *Welwyn* principles.

253. However, it is still possible for LPA to refer to false statements made by the appellant even if they do not also argue (successfully) that the conduct amounted to positive deception. The Inspector can consider the extent to which a witness is credible now, if it is shown that they lied in the past to their advantage.

Issue Estoppel

254. Issue estoppel (or estoppel by record or estoppel *per rem judicatam*) prevents a person from re-opening questions that have been adjudicated upon by a 'court of competent jurisdiction'. There must have been a previous **legal** determination – perhaps by an Inspector in an appeal decision – of the same or a relevant issue between the same parties or their predecessors in title, and no material change in circumstances[101].

255. It was held in *Watts v SSE & South Oxfordshire DC* [1991] 1 PLR 61 that, for an earlier appeal decision to act as an issue estoppel, and where the relevant issue was determined on the basis of both fact and law, the whole matter must have been fairly and squarely before the previous Inspector, who must have fully addressed the matter and made an unequivocal decision on it. That these three conditions were fulfilled should be clear on the face of the decision.

256. In *A & T Investments v SSE* [1996] JPL B94, it was said that where issue estoppel arising from a previous decision was relied upon, it was necessary to identify the question determined by the previous Inspector and the findings of fact (or fact and law) which were the basis of that determination – and then consider whether those findings would be expressly contradicted by what is contended in the current proceedings.

257. Other criteria were laid down in *Porter v SSETR* [1996] 3 All ER 693 and followed in *Forrester v SSE & South Bucks DC* [1997] JPL B154. The issue in respect of which issue estoppel is claimed must:

[101] *Thrasyvoulou v SSE (No. 2)* [1990] 2 WLR 1

- have been decided by a Court or Tribunal of Competent Jurisdiction (a previous Inspector);
- have been decided finally and be of a type to which issue estoppel can apply;
- be the same issue as that previously decided; and
- be an issue between those who are parties to the decision.

258. On that basis, issue estoppel is still applicable to decisions by Inspectors determining appeals against enforcement notices on grounds (b) to (d)[102]. Inspectors should therefore **avoid making any determinations on issues of legal right which are not crucial or necessary** to the decision in hand. If, in order to support your reasoning on the main issue, you would find it helpful to express a view on another issue, include a disclaimer that you have not made a formal finding on the point so as to reduce the risk of your decision giving rise to a later claim of issue estoppel.

259. Issue estoppel does not apply to findings on planning merits, where an Inspector is free to disagree with a previous decision so long as they make the reasons for their disagreement clear and do not offend general principles of consistency in decision making[103]. Issue estoppel is irrelevant where an EN is quashed on procedural grounds under s176(3)(b) and another EN can be issued[104].

Estoppel by Convention

260. Estoppel by convention applies where one party seeks to alter a previously agreed assumption. This form of estoppel can occur in situations where the parties conducted their dealings on the basis of an agreed set of facts or suppositions and one of the parties subsequently seeks to change its position.

261. On the facts in *R v Basildon DC ex parte Martin Grant Homes* [1987] JPL 863, a PP was held to include amendments to the plans that had been required in accordance with building regulations consent, so that no EN could be issued. However, this does not mean that building regulation consent estops an LPA from taking enforcement action, particularly when such consents carry express disclaimers that they do not apply to planning legislation.

262. In *Hillingdon LBC v SSE* [1999] EWHC 772 (Admin), the LPA had approved details of an incinerator on the basis of an assumption by both parties that non-statutory arrangements for Crown development applied; it later transpired that they did not. The Court found that the LPA could not resile from views previously expressed and were thus estopped from issuing an EN. They had been in possession of all the facts and the procedures had been followed, which also gave similar protection to third parties

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[102] *R (oao East Hertfordshire DC) v FSS* [2007] EWHC 834 (Admin)

[103] *Rockhold v SSE* [1986] JPL 130; *North Wiltshire DC v Clover* [1992] JPL 955

[104] *R v Wychavon DC & SSE ex parte Saunders* [1991] EGCS 122

whether the non-statutory or statutory process was followed.

263. In *R v Caradon DC ex parte Knott* [2000] 3 PLR 1, the LPA had made a revocation order and a discontinuance order. Both were confirmed and discussions on compensation were proceeding. The LPA found that the dwelling was erected outside of the PP site and issued an EN alleging its construction. The Court held that avoiding compensation was not a lawful basis on which to issue the EN. Estoppel was found on three grounds:

- Estoppel by representation – the appellants withdrew a s73 application and objection to a revocation order on the basis of the formal representations of the LPA. The LPA could have argued earlier that the PP was not implemented.

- Issue estoppel – in earlier HC proceedings, to which the LPA were a party, the judge had reached a clear conclusion that the PP was alive and capable of implementation.

- Estoppel by convention – since the parties had conducted their dealings on the basis that the PP had been implemented, it would be unjust for the LPA to proceed otherwise.

Legitimate Expectation

264. Legitimate expectation arises where a public authority has induced in someone a reasonable expectation that some procedure will be followed before a decision is taken, or that they will be granted or retain some substantive benefit. It has been argued by appellants that the issue of an EN constituted an abuse of power given their legitimate expectation that such action would not be taken – but few such cases have succeeded.

265. In *Henry Boot Homes Ltd v Bassetlaw DC* [2002] EWCA Civ 983, the developer began work pursuant to a PP without complying with conditions precedent. The CoA held that the appellant had no legitimate expectation that the LPA would treat the PP as having been implemented, despite the LPA having indicated to that effect. Legitimate expectation would rarely operate in such circumstances, given the public interest in compliance with conditions only being 'waived' through the statutory process (ie, s73 or s73A).

266. It was held in *Flattery & Japanese Parts Centre Ltd v SSCLG & Nottinghamshire CC* [2010] EWHC 2868 (Admin) that legitimate expectation was irrelevant to lawfulness. Only a formal decision made by an LPA in the proper exercise of its statutory powers would represent a conclusive assessment of the status of a use[105].

Development

[105] See also *Coghurst Wood Leisure Park Ltd v SSETR* [2002] EWHC 1091 (Admin)

The Meaning of 'Development' – s55[106]

267. S55 provides a broad definition in subsection (1) of 'development' for the purposes of the TCPA90 and related legislation[107]. This is the starting point for Enforcement casework because 'development' requires PP under s57(1), and the carrying out of development without the required PP constitutes a BPC under s171A(1).

268. S55(2) makes exemptions to the definition, providing that particular operations or uses shall not be taken for the purposes of the Act as involving development [and therefore do not require any grant of PP]. S55(3) and (4) provide for particular inclusions.

269. 'Development' comprises 'two limbs:

- The carrying out of building, engineering, mining or other operations in, on, over or under land.
- The making of any material change in the use of any buildings or other land.

270. As the EPLP states at P55.10, the distinction between the two limbs runs through the TCPA90 and is confirmed by the definition of 'use' in s336(1) as not including use for the carrying out of any building or other operations on land.

271. Thus, it was held by Lord Denning in *Parkes v SSE* [1979] 1 All ER 21172 that operational development 'comprises activities which result in some physical alteration to the land, which has some activities which are done in, alongside or on the land but degree of permanence to the land itself, whereas…'use' comprises do not interfere with the actual physical characteristics of the land'.

272. It is important to distinguish between the two limbs, and in some cases the Inspector may need to decide where whether what is alleged should be regarded as primarily operational development, primarily an MCU or as involving both.

273. The CoA held in *West Bowers Farm Products Ltd v Essex CC* [1985] JPL 857 that a distinction should be drawn between composite activities where one constituent part was ancillary to the other, and where two or more activities were substantial and separate as a matter of fact and degree. The construction of a reservoir involved the extraction of gravel, and so planning permission was required for both engineering and mining operations[108].

274. The EPLP advises at P55.12 that 'in some cases, the question of whether an activity is in one category or the other may be answered only by looking at the developer's

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[106] EPLP P55.10-13

[107] The definition can and should be interpreted broadly, at least pre-Brexit, so as to include whenever possible projects which require an EIA, so that the EIA Directive is effectively transposed into UK law; *R (oao Save Woolley Action Group Ltd) v Bath and North East Somerset Council* [2013] EWHC 2161 (Admin)

[108] In *R v Durham CC ex parte Lowther* [2002] P&CR 22, however, the CoA held that different aspects of a process do not always fall to be categorised as different operations or uses for planning purposes.

intention'. An example is given that the tipping of waste materials may be undertaken for the purpose of waste disposal (a use of land) or as part of an engineering or building operation. In an instance such as this, however, Inspectors should look at 'intentions' on an objective basis and in the light of all of the facts of the case.

275. 'Land' is defined in s336(1) as 'any corporeal hereditament, including a building…' The bed and banks of a river constitute a corporeal hereditament, but the flow of water does not. Despite defects in the Inspector's reasoning, the CoA upheld a decision that a two storey prefabricated building which was erected on a floating platform and attached to the bank by metal mooring rods could be classified as a residential houseboat[109].

276. In *Thames Heliport Ltd v Tower Hamlets LBC* [1997] JPL 448, the CoA considered whether PP was required, given that no operational development would be involved, to establish a heliport facility on a vessel held on the River Thames. It was held that the activity was capable of amounting to an MCU of the riverbed.

277. The lawful use of the land was to provide a channel that constitutes a tidal river – and while the exercise of rights of passage or navigation was ordinarily incidental to the lawful use, the same could not be said for holding a vessel stationery during the landing and taking off of helicopters. At such times, the vessel would not be navigating but an obstruction to navigation. Activities taking place on the water could amount to an MCU of the land.

Buildings and Building Operations[110]

278. The term 'building operations' is defined for the purposes of the TCPA90 in s55(1A) as including (a) demolition, (b) rebuilding, (c) structural alterations of or additions to buildings, and (d) other operations normally carried on by a person in business as a builder. The list is not exhaustive.

279. S55(1) and (1A) should be read with regard to s336(1) which defines a 'building' as including any structure or erection and any part of a building, but not plant or machinery comprised within a building. If you need to ascertain whether 'building operations' took place, the EPLP explains at P55.14 that 'the approach of the courts in construing the definitions has been to ask first whether what has been done has resulted in the erection of a 'building': if so, the court should want a great deal of persuading that the erection of it had not amounted to a building or other operation'[111].

280. In *Oates v SSCLG & Canterbury CC* [2018] EWCA Civ 2229, the Inspector was entitled to uphold an EN alleging the construction of 'new buildings' although the structures included parts of existing buildings. Such operational development was undertaken that, as a matter of fact and degree, new buildings had been constructed.

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[109] *Sussex Investments Ltd v SSETR & Spelthorne BC* [1998] PLCR 172; EPL P55.13

[110] EPLP P55.14

[111] *Barvis v SSE* (1971) 22 P&CR 710. In *R (oao Westminster CC) v SSETR* [2001] EWHC Admin 270, the SoS erred in focussing on whether the placing of the kiosk was a building operation and not whether the kiosk in its final form was a building.

281. Where building or indeed other operations have been carried out in accordance with a grant of PP but have been left uncompleted an in an unsightly condition, the works would not be in BPC[112]. The LPA would need to consider issuing a completion notice under s94(2) and a discontinuance notice under s102. However, an LPA may issue an EN in respect of an unauthorised building that is not finished; see below for dealing with ground (a) in such cases.

282. There are often disputes in enforcement appeals as to whether a 'temporary' or moveable structure is a building. In *Cardiff Rating Authority v Guest Keen Baldwin's Iron and Steel Co Ltd* [1949] 1QB 385, endorsed by CoA in *Skerritts of Nottingham Ltd v SSETR (No.2)* [2000] 2 PLR 102, three primary factors were identified as decisive of what was a building:

    (a) **size** – could the structure have been brought to site [partially] completed, or did it have to be constructed on site?

    (b) **permanence** – has the structure been moved? Is it capable of being moved and, if so, how? Is it intended to be moved in practice? How long has it been or will it be in one position? NB: 'permanence' does not necessarily connote that the state of affairs is to continue forever or indefinitely[113].

    (c) **physical attachment** – how it is it fixed to the ground? Does it need to be fixed, or will it rest by its own weight? Is it mounted on a permanent base? Is it attached to services? Has the placing of the portable building resulted in any physical change in the characteristics of the land? The EPLP advises at P55.14 that this factor in itself may be inconclusive but tilt the balance when weighed with other factors.

283. The placing of a portable building on land may in some cases be part and parcel of a use of land[114] or indicative of an MCU; for example, there may be instances where land is being used for the storage of portable buildings. However, the setting up of such structures is generally regarded as a building operation, except in respect of caravans as described below.

284. Where there is a dispute as to whether a moveable structure is a building, it will be necessary to apply the *Skerritts* three tests and make a fact and degree assessment. None of the factors are necessarily decisive[115] and you may give greater weight to one over others in reaching a conclusion.

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[112] *Cardiff CC v NAW & Malik* [2006] EWHC 1412 (Admin)

[113] *Skerritts of Nottingham Ltd v SSETR (No. 2)* [2002] EWCA Civ 5569

[114] As with a freestanding lorry body in [1982] JPL 202 and container in [1983] JPL 134.

[115] See also *James v Brecon CC* [1963] 15 P&CR 20, *Chester CC v Woodward* [1962] 2 QB 126, *Barvis v SSE* [1971] 22 P&CR 710, *R (oao Hall Hunter Partnership) v FSS* [2006] EWHC 3482 (Admin), *R (Save Woolley Valley Action Group Ltd) v Bath and North East Somerset Council* [2012] EWHC 2161 (Admin) and the EPL at P55.14.

285. It could be found, for example, that the erection of a stable amounted to a building operation because, although the structure is not of a size that it had to be constructed on site, it is intended to be permanently in one place, it is attached to services and it has resulted in a physical change to the characteristics of the land.

286. It has been found that operational development took place in the siting of an ex-railway box van[116], a radio aerial[117] and children's play equipment[118]. In *Scott v SSE & Bracknell DC* [1983] JPL 108, the Court upheld the finding of the SoS that, on the facts, operations took place in the erection of a portacabin.

287. Wooden chalets that had been in position as permanent holiday homes for more than 40 years were held to be buildings in *R v Swansea CC ex parte Elitestone* [1993] JPL 1019. It was also held in *Skerritts of Nottingham Ltd v SSETR & Harrow LBC (No. 2)* [2000] EWCA Civ 5569 that the erection of a marquee on site for eight months of every year amounted to operational development because of its ample dimensions, permanent rather than fleeting character and secure anchorage.

288. Where a portable structure has or may have been sited to facilitate an MCU, see advice on material change of use and caravans below.

Demolition[119]

289. The demolition of buildings is brought within the s55(1A) definition of building operations – but s55(2)(g) excludes from the definition the demolition of any description of building specified in a direction given by the SoS. The Town and Country Planning (Demolition – Description of Buildings) Direction 2014 (the 2014 Direction) provides that the demolition of the following shall **not** be taken to involve development for the purposes of the TCPA90[120] [121]:

- Any building the cubic content of which, measured externally, does not exceed 50 cubic metres. The term 'building' in this context does not include part of a building.
- The whole or any part of any gate, fence, wall or means of enclosure – except in a conservation area.

290. In *Cambridge CC v SSE & Milton Park Investment Ltd* [1991] 1 PLR 109, JPL 428, the

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[116] [1986] JPL 462

[117] [1990] JPL 604

[118] [1986] JPL 637, [1996] JPL 1162

[119] EPLP P55.27-P55.32

[120] The 2014 Direction did not alter but clarified the law after the CoA in *SAVE Britain's Heritage v SSCLG* [2011] EWCA Civ 334 quashed paragraphs 2(1)(a) to (d) in the Town and Country Planning (Demolition – Description of Buildings) Direction 1995. It was also held that where demolition works are likely to have significant effects on the environment, the LPA must issue a screening opinion as to whether EIA is required.

[121] Some acts of demolition that are not exempted from 'development' under s55(2)(g) and the 2014 Direction are permitted under Part 11, Classes B and C of the GPDO; see the General Permitted Development Order & Prior Approval Appeals chapter.

CoA held that demolition would constitute 'development' only if the works were to be properly to be regarded as a building (or other) operation in their own right, rather than as part of a larger proposal for the development of the site. It follows that the nature and consequences of the works have to be assessed in terms of s55(1) and (1A) – and, particularly in cases of partial demolition, with regard to the exemption in s55(2)(a)(ii).

291. S196D(1) of the TCPA90 makes it an offence to fail to obtain PP for the demolition of unlisted buildings in conservation areas in England. In *Barton v SSCLG & Bath and North East Somerset Council* [2017] EWHC 573 it was held that the s336(1) definition of 'building' applies to s196D, meaning that the demolition of part of a gate or wall in a conservation area was relevant demolition within the meaning of s196D (and was not PD)[122].

Exceptions – s55(2)(a)[123]

292. S55(2)(a) excludes from the definition of development works for the maintenance, improvement, or other alteration of any building which (i) affect only the interior or (ii) do not materially affect the external appearance of the building.

293. When considering whether works are exempted from development under **s55(2)(a)(i)**, it may be necessary to start by identifying the 'building' itself, with regard to the definition set out in s336(1) and the *Haringey* case described below. In [1995] JPL 643, the SoS decided that alterations to the dividing walls between two individual shop units represented works affecting only the interior of the building because the building was the whole shopping centre.

294. The carrying out of operations to change the internal appearance or layout of a building does not constitute development, whether the purpose of the works is to meet the needs of the present user or facilitate a change of use of the building. If the change is material, however, the MCU would constitute development and an EN concerned with the MCU could require the removal of the internal works which facilitated the change of use.

295. Turning to **s55(2)(a)(ii)**, it was held in *Burroughs Day v Bristol* CC [1996] EGCS 126 that, for works to 'materially affect' external appearance, the changes must be visible from a number of vantage points and material to the appearance of the building as a whole. Materially affecting the external appearance means an impact capable of having some effect in planning terms.

296. In that case, however, there was no dispute as to what the relevant 'building' was. Since s336 defines 'building' as including 'part of a building', it may be necessary in some cases to decide what the relevant building or part of a building is on a fact and degree basis. In *Haringey LBC v SSCLG & Muir* [2019] EWHC 3000 (Admin), it was held that

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[122] A different approach was taken in *Shimizu (UK) Ltd v Westminster CC* [1997] 1 WLR 168, JPL 523 – but that was a listed building case. Information on controls relating to the demolition of listed buildings is set out in the Listed Building Enforcement chapter.

[123] EPLP P55.15-P55.18

the Inspector gave inadequate reasons for finding that the relevant building was the whole terrace 'when in common parlance each house in a terrace would be considered a building'[124].

297. Making the 'material affecting' assessment may involve some subjective and/or aesthetic judgment, but you should avoid making any suggestion as to whether the works improve or harm external appearance, at least to the extent of appearing to decide on the merits of the works. The decision on a ground (c) or LDC appeal will be one of 'materiality' as a matter of fact and degree.

298. It was held in *Windsor and Maidenhead RBC v SSE* [1988] JPL 410 that painting the exterior of a building materially affected the character of a listed building. In *R (oao Lisle-Mainwaring) v Isleworth Crown Court & Kensington and Chelsea RBC* [2017] EWHC 904 (Admin), the court struck down a s215 notice against the painting of a unlisted house in a Conservation Area in red and white stripes, observing that the works were permitted under Part 2, Class C of Schedule 2 to the GDPO. That there is a PD right for 'the painting of the exterior of any building or work' indicates that the work is likely to amount to development[125].

299. The replacement of original wooden or metal windows with uPVC windows has normally been found to have a material effect, as a result of differences in the appearance (including colour, texture and thickness) of the materials, arrangement of glazing bars and meeting rails and possibly opening method. However, the carrying out of such works may again be PD[126]. Changing the size of openings may also be material, but the insertion of a stable door carefully designed to match the existing brickwork was found not to do so, despite the difference in appearance when the door opened.

300. The Courts have endorsed an Inspector's decision that the erection of railings and a trellis to the perimeter of a flat roof, and of an external staircase to the roof was PD – and thus development[127]. The installation of floodlights on the façade of a hotel has been found not to materially affect the external appearance of a building although the lights had such an effect when switched on[128].

301. There will come a point with replacement structures where works do not amount to maintenance, improvement or alteration but rebuilding, which is development and not

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[124] *Haringey* and the decision reported at [1995] JPL 643 show the importance of distinguishing 'building' from 'planning unit'.

[125] It was held that the stone cladding of a house was PD under the equivalent of Part 1, Class A in *City of Bradford MBC v SSE* [1977] 35 P&CR 387, indicating that the work is 'development'. PD rights under Part 1, Class A are now subject to condition A.3(a) that exterior materials are of a similar appearance to those used in the construction of the exterior of the existing dwellinghouse.

[126] For example, under Part 1, Class A in respect of dwellinghouses and Part 7, Class A for shops, or financial or professional services establishments

[127] *Hammersmith LBC v SSE & Davison* [1994] JPL 957

[128] *Kensington and Chelsea RBC v SSE & CG Hotels* [1981] 41 P&CR 40

PD under, for example, Part 1[129]. That it is possible to conclude that there is a 'new building' even where parts of the 'old' building remain was affirmed by the High Court in the case of *Oates* as discussed above, following *Hibbitt v SSCLG* [2016] EWHC 2853.

Engineering, Mining and 'Other' Operations[130]

302. **Engineering operations** involve works with some element of pre- planning, which would generally be supervised by a person with engineering knowledge – including traffic as well as civil engineers. It is not necessary for the operations to actually be so supervised in the particular case, meaning that the appellant or person who carried out the work does not have to be an engineer[131].

303. The effect of s55(4A) is that the placing or assembly of any tank in any part of inland waters for the purposes of fish farming shall be treated as resulting from the carrying out of engineering operations over that land. Part 6 of Schedule 2 to the GPDO sets out limited PD rights for fish farming.

304. S336(1) includes the formation and laying out of means of access to highways within the definition of engineering works. The works need not be substantial, but more must be done than merely driving onto land; something that amounts to the 'formation' or 'laying out' must take place as a matter of fact and degree.

305. If the formation of an access involves alterations to a wall or fence, the scheme as a whole is likely to involve building as well as engineering operations[132]. Thus, works to alter an existing access, such as by widening a gateway, will be development if something is done which amounts as a matter of fact and degree to a building and/or engineering operation.

306. Where an access is formed through a means of enclosure, it may be argued that the works were demolition and did not amount to development. The correct approach is to look at the works as a whole, and where what took place would be properly characterised as the formation of a means of access to a highway, there will have been operational development. The CoA held that the breaking and digging up of tennis courts to clear a site for redevelopment was an 'engineering or other operation' and not act of demolition[133].

307. S55(2)(b) and (c) exempt some highway and service works from development. Other access works are permitted under Schedule 2, Part 2, Class B of the GPDO, subject to the provisos in Article 3(6) which excludes PP, other than under certain classes of Parts

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[129] *Sainty v MHLG* [1963] 15 P&CR 432; *Larkin v SSE & Basildon DC* [1980] JPL 407; and *Hewlett v SSE* [1983] JPL 155

[130] EPLP P55.19-P55.32

[131] *Ewen Developments v SSE* [1980] JPL 404 and *Fayrewood Fish Farms v SSE* [1984] JPL 587.

[132] [1985] JPL 658

[133] *Coppen v Bruce-Smith* [1998] JPL 107

9 and 18, for development that requires or involves the formation, laying out or material widening of an access to a trunk or classified road, or creates any obstruction to the view of persons using any highway used by vehicular traffic, so as to cause danger to them.

308. **Mining operations** involve the winning and working of 'minerals' as defined in s336. S55(4) includes the removal of material of any description from a 'mineral working deposit' – also defined in s336(1) – or slag heap, and the extraction of minerals from a disused railway embankment.

309. Mining operations are treated as continuous, with each successive shovelful constituting a further act of development[134] – that is destructive not constructive by nature. As a continuing activity, mining is treated as a use of land strictly for the purposes of discontinuance action[135] and certain minerals regulations. The definition of mining operations in Article 1(2) of the GPDO is again for the purposes of the Order only.

310. **'Other' operations** may include such works as the formation of earth banks, where this was undertaken without the degree of pre- planning and skill constituting engineering operations. It was held in *R (oao Beronstone Ltd) v FSS* [2006] EWHC 2391 & [2007] JPL 471 that hammering 554 marker stakes into a field so as to define the boundaries of 40 plots of land and a network of access ways was capable as a matter of fact and degree of being an 'other' operations. There was an obvious degree of permanence and it took two men two days to carry out the work.

311. 'Other' operations can also include tipping that has some purpose other than waste disposal, perhaps to raise land levels. There are limited Part 6 PD rights for 'other' operations in respect of forestry.

Material Change of Use[136]

312. While the meaning of 'use' is provided in s336(1), the concept of an MCU is not defined in statute or statutory instrument. The basic approach is that, for an MCU to have occurred, there must be some significant difference in the character of the activities from what has gone on previously as a matter of fact and degree.

313. Be aware that LPAs sometimes use the word 'conversion' as a synonym for an MCU. However, 'conversion' is also sometimes used to describe works which facilitate an MCU, or both the MCU and works. Inspectors should correct any allegation that there has been a conversion – so long as there would be no injustice – and where the word is used in evidence, Inspectors should analyse what the party meant to say[137].

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[134] *Thomas David (Porthcawl) Ltd v Penybont RDC* [1972] 3 All ER 1092

[135] Schedule 9 of the TCPA90

[136] EPLP P55.33-34

[137] In reasoning, Inspectors may wish to avoid using the word 'conversion' or use it only and expressly to mean facilitating works, with dictionary definition being 'the adaption of a building or part of a building for a new use'.

314. S55(3)(a) and (b) provide that particular activities 'for the avoidance of doubt' involve an MCU. For other cases, the EPLP sets out at P55.34 that the principal questions to be considered are:

- What is the primary use of the land?
- What is the scope of that use?
- What is the extent of any lawful ancillary [or incidental] use?
- What [planning] unit is the primary use attached to?
- Is the primary use lawful?
- Does the change to a new use represent a material change to the use of the planning unit?

315. **As the EPLP also warns, the categories are not rigid and the questions may overlap**. There will be times when it will be hard to describe, for example, whether a use is primary or incidental. However, the basic concepts should be applied in a straightforward way according to the facts of each case, and the conclusion fully reasoned, bearing in mind that whether an MCU has occurred is an objective question, unaffected by the circumstances of the user[138].

316. Not every change of use is material. There are exemptions under s55(2)(d), (e) and (f) as described below. In other cases, the change may be *de minimis,* meaning that it is on too small a scale for the law to take account of it. A change in the identity of the person carrying out the use, or the source or the destination of vehicles coming to and from a site will not be material[139].

317. A change in the nature of goods stored will not be material if the overall character of the activity and general implications for the area remain the same[140]. Off-site effects may be highly relevant to whether there has been an MCU or not. In *Westminster CC v SSCLG & Oriol Badia and Property Investment (Development) Ltd* [2015] EWCA Civ 482, the Inspector should have given consideration to complaints about noise and disturbance when considering whether a change from a hotel to a mixed hotel and hostel use amounted to a material change to the character of the use.

318. The planning consequences of the change may be relevant, but a change of use which leads to an 'improvement' in respect of planning merits can amount to an MCU just as much as one that causes harm. Where such a change is correctly assessed as being 'material', the benefits of the new over the existing (and fallback) use would be a consideration in favour of an appeal on ground (a).

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[138] *Stewart v FSS & Cotswold DC* [2004] EWHC 2262 (Admin)

[139] *Lewis v SSE* [1971] 23 P&CR 125

[140] *Snook v SSE* [1976] JPL 303

319. It was held in *Richmond upon Thames LBC v SSETR* [2001] JPL 84 that the extent to which a particular use fulfils a legitimate or recognised planning purpose is relevant in deciding whether there has been an MCU. The legal principles relevant to such a determination were laid down in *R (oao) Kensington and Chelsea RBC v SSCLG & Reis & Tong* [2016] EWHC 1785 (Admin):

a) A planning purpose is one which relates to the character of the use of land;

b) Whether there would be an MCU or development in terms of s55(1) depends upon whether there would be a change in the character of the use of land;

c) The extent to which an existing use fulfils a proper planning purpose is relevant in deciding whether a change from that use would amount to an MCU. The need for a land use such as housing or a type of housing in a particular area is a planning purpose which relates to the character of the use of land;

d) Whether the loss of an existing use would have a significant planning consequence, even where there would be no amenity or environmental impact, is relevant to an assessment of whether a change from that use would represent an MCU;

e) The questions are ones of fact and degree for the decision- maker and only subject to challenge on public law grounds;

f) Whether or not a planning policy addresses a planning consequence of the loss of the use is relevant but not determinative of whether the loss would have a significant planning consequence or consequences.

Intensification[141]

320. The intensification of a use may amount to an MCU if and where that causes the character of the use to change in a fundamental way. It applies when the former and present uses can only be distinguished in terms of scale and effects related to scale.

321. In *Hertfordshire CC v SSCLG & Metal and Waste Recycling Ltd* [2012] EWCA Civ 1473, the CoA held that the Inspector applied the right test: 'What must be determined is whether the increase in the scale of the use has reached the point where it gives rise to such materially different planning circumstances that, as a matter of fact and degree, it has resulted in a such a change in the definable character of the use that it amounts to a material change of use'[142].

322. If the use changes in some respect but remains within the same use class set out in the Town and Country Planning (Use Classes) Order 1987 (UCO) as amended, by virtue of

[141] See EPLP P55.53

[142] The case of *Brent LBC v SSCLG [2019] EWHC 1399 (Admin)* confirmed that, in considering a s174 appeal, the Inspector should have considered whether the intensification of use during a period of 10 years constituted a MCU, thus undermining the s174(2)(d) appeal. The Inspector's failure to address the issue of whether the unlawful activity continued throughout the relevant period was an error of law.

s55(2)(f), no MCU or development is involved[143] unless there a property in C3 use is subdivided and s55(3)(a) applies. Previous and present uses should be distinguished with a different 'label' where applicable.

323. When considering whether alleged intensification has resulted in a material change, it is necessary to examine what is happening on the land **and** as suggested above, any off-site impacts. The LPA should be clear from the outset as to what external effects it relies upon as factors material to the intensification.

324. An increase in the number of caravans on a caravan site may or may not be material. Lord Denning doubted in *Esdell Caravan Parks v Hemel Hempstead RDC* [1965] 3 All ER 737 that an increase from 24 to 78 caravans would not require PP[144]. It was held in *R (oao Childs) v FSS & Test Valley BC* [2005] EWHC 2368 Admin that a change from four to eight caravans would be material based on the character of the use and impacts on the surroundings[145].

325. In *Reed v SSCLG* [2014] JPL 725, the Inspector found that the alleged MCU had taken place through a change from one static and one touring caravan to two static mobile homes, touring caravans and a storage container. The CoA held that the Inspector had erred by failing to address the appellant's point that adding an additional caravan did not amount to an MCU. The Inspector did not refer to intensification or expressly conclude that there had been a change in the character of the use.

326. The intensification of one element of a dual or mixed use to the exclusion of the other may amount to an MCU of the unit as a whole. The HC held in *Beach v SSETR & Runnymede BC* [2001] EWHC 381 (Admin) that the correct approach when new primary uses are added to a mix, so that A+B becomes A+B+C, is to ask whether that has amounts to an MCU. The same approach should be followed where one element of a mixed use is ceased[146].

327. An EN should allege an MCU by intensification if that is the LPA's concern. It has been held that the Inspector's power to correct an EN cannot be used to change an allegation from 'MCU by the introduction of a new use' to 'MCU by intensification'[147]. However, those cases predate the TCPA90 and such a correction was made in the case reported at [1997] JPL 492.

328. In *Hertfordshire*, it was held that additional factors actually raised by the LPA in the court ought to have been identified in the EN as contributing to the MCU. Still, where the

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[143] *Brooks and Burton v SSE* [1977] JPL 720, confirmed in *Eastleigh BC v FSS & Asda Stores* [2004] EWHC 1408 (Admin).

[144] See also [1997] JPL 492

[145] It may be necessary in caravan cases to have regard to the effect of not only the increase in numbers but also any change in the type of caravan (touring or static).

[146] An earlier judgment in *Wipperman v Barking LBC* [1965] 17 P&CR 755 that the mere cessation of one activity within a unit is unlikely, on its own, to be material should be applied with caution.

[147] *Kensington and Chelsea RBC v SSE & Mia Carla* [1981] JPL 50; see also *Lilo Blum v SSE* [1987] JPL 27.

EN does not but ought to allege intensification, the question is as always whether correcting the EN would cause injustice in the circumstances of the case.

Primary, Mixed and Incidental (or Ancillary) Uses[148]

329. The primary use of land or a building will be, as the term implies, the main use or activity that is carried out by the occupier.

330. The EPLP advises at P55.35 that, to ascertain the primary use of a site, 'in many cases it is unnecessary to look beyond the general category in which the use falls, again because of the effect of s55(2)(f) and the UCO. If the existing use can be, for example, simply described as retail or shop, or office or dwellinghouse, then that term can and should be used.

331. However, there may be cases where the use needs to be defined more precisely. In *London Residuary Body v SSE* [1988] JPL 637, the courts upheld a decision by the SoS that the future use of Council Hall for office purposes would constitute an MCU because the pre-existing "London governmental use" was distinguishable from ordinary office use. The SoS and Inspector in their report had considered the character of the use and physical characteristics of the complex in order to make an objective planning judgment and not apply any subjective 'purpose' test.

332. The concept of a mixed use is one of two or more primary (or main) uses existing within the same planning unit. One is not incidental to the other, although there may be incidental uses associated with each primary use. In a complicated mixed use site, the Inspector should check, and if necessary correct the allegation for clarity as to which uses are primary and which are incidental.

[148] EPLP P55.35-43

333. An incidental use is one which is functionally related to the primary use. By definition, then, an incidental use cannot be one that is integral to or part and parcel of the primary use[149].The functional relationship should be one that is normally found and not based on the personal choice of the user[150]

334. For example, where the sole primary use of a planning unit is use as a dwellinghouse, the use of land within the planning unit for parking cars or storing garden tools will normally be incidental to the primary residential use. This is because parking and storage are uses which differ in character to residential use but are being carried out as a function of the enjoyment of the dwellinghouse, and the functional relationship is one commonly found.

335. However, where an outbuilding within the same planning unit as the dwellinghouse is used for the provision of additional living space, it will not be in incidental use. It will be in the same use as the house. It will be in residential use and not a use that is incidental to residential use. Even if the outbuilding itself is described as 'ancillary' to the house, its **use** will not be. The outbuilding will either be used for residential purposes that are integral to the residential use of the house, or there will have been an MCU through subdivision of the planning unit and the creation of a separate dwelling.

336. The doctrine of primary and incidental use has been developed by the courts as a response to the practical realities of planning control on the ground: so long as the primary use does not change, the user(s) may vary the level and type of incidental use(s) over time and according to their needs without causing any material change in the overall character of the use of the land. A resident may change the incidental use of their shed from storage to a gym without there necessarily being any MCU of the land.

337. Uses such as parking, storage or leisure may be incidental in some cases and the primary use in others. Whether a use should be regarded as incidental will be a matter of fact and degree, but the 'incidental' link or relationship must be maintained. The scale of the use may be relevant but is not determinative. If a site is in a mixed use, for example as a scrapyard, haulage and skip hire, one or more of those activities should not be regarded as incidental simply because they are small in relation to the others[151].

338. Incidental uses may be changed, expanded or decreased without giving rise to an

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[149] In *Sage v SSHCLG & Bromley LBC [2021] EWHC 2885* (Admin), Sir Duncan Ouseley, sitting as a High Court Judge, held that 'incidental or ancillary [uses]…are in law part of the single main use, and for these purposes are not a separate use at all: the "singlemain use" is in reality the single use of which the incidental and ancillary uses are part'. It should be noted that the 'purposes' of that judgment were to decide 'the materiality of environmental and amenity considerations to the question as to whether the use of a building within the curtilage of a dwellinghouse is for a purpose incidental…' The judgment should not be interpreted as meaning there is no difference between an incidental/ancillary and a primary use; it rather upholds the established principle that a. planning unit may have a single primary use, and not be in mixed use, even if uses incidental to the primary use are carried out.

[150] In *Harrods v SSETR* [2002] JPL 1258, it was held that landing a helicopter on the roof was not ordinarily incidental to the use as a retail department store. One had to look at what shops in general had as reasonably ancillary activities; even if subordinate to the primary use, extraordinary activities are excluded if their introduction amounts to an MCU of the planning unit; see also Schieman LJ in *Millington v SSE* [2000] JPL 297.

[151] *Main v SSETR & South Oxfordshire DC* [1999] JPL 195

MCU, so long as they remain subsidiary to the primary use(s) of the planning unit as a whole[152]. A non-residents bar can be incidental to a hotel use, so long as the character of the use of the planning unit overall remains that of the hotel[153].

339. If an incidental use alters or expands to a point where it has ceased to be functionally related to the extant primary use, and become a primary use on its own, either within a new planning unit or so as to put the original planning unit into a new mixed use, then it is likely that there will have been an MCU[154].

340. Incidental use rights do not continue after the cessation of the primary use[155]. Activities carried on within a single planning unit cannot be incidental to activities carried on outside that unit[156].

341. Inspectors should normally describe a use that is functionally related to the primary use as 'incidental'. This is because s55(2)(d) refers to expressly to the word 'incidental', as do Articles 2 and 3(3) of the UCO and Article 2(1) plus Classes E and F to Part 1, Classes A, L and M to Part 7, and Classes A and B to Part 9 of Schedule 2 to the GPDO[157]. However, the UCO and GPDO also refer in places to 'ancillary' uses and that wording should be followed where relevant.

342. The words 'incidental' and 'ancillary' do not strictly mean the same thing, but they are often used interchangeably. It is not wrong for a party to use the word 'ancillary' even when the question is (for example) whether a use is 'incidental' for the purposes of GPDO Part 1, Class E.

343. A more difficult problem is that the parties do not always properly identify uses as primary or incidental/ancillary. It is important to analyse what the parties actually mean, and whether they are correct in their use of terminology. In practice, something described as an 'ancillary' use is likely to be either part of the primary use or an incidental use[158].

The Planning Unit[159]

344. In cases where there is a dispute as to whether an MCU has occurred, it is first necessary to ascertain the correct planning unit, and the present and previous primary

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[152] *Brazil (Concrete) Ltd v MHLG & Amersham RDC* [1967] 18 P&CR 396

[153] *Emma Hotels v SSE* [1981] JPL 283

[154] *Wood v SSE* [1975] 25 P&CR 303 and *Trio Thames Ltd v SSE* [1984] JPL 183

[155] *Barling v SSE* [1980] JPL 594

[156] *Essex Water Co v SSE* [1989] JPL 914

[157] The word ancillary is used in other Parts and Classes of the GPDO, plus the explanatory memorandum to the UCO.

[158] The OED defines 'ancillary' as 'providing necessary support to the primary activities or operation…' or 'in addition to something else but not as important'.

[159] EPLP P55.44-50

(as opposed to incidental) uses of that unit. As the EPLP states in P55.44:

> 'The planning unit is a concept which has evolved as a means of determining the most appropriate physical area against which to assess the materiality of change, to ensure consistency in applying the formula of material change of use. The general rule has always been that the materiality of change should be assessed in terms of the whole site concerned…'

345. The leading case for determination of the planning unit is *Burdle & Williams v SSE & New Forest DC* [1972] 1 WLR 1207, which confirmed that an Inspector may correct or vary an EN under s176 to ensure it was directed to the correct planning unit. In *Burdle*, it was held that the planning unit is usually the **unit of occupation**, unless a smaller area can be identified which, as a matter of fact and degree, is physically separate and distinct, and occupied for different and unrelated purposes; **the concept of physical and functional separation is key**[160]. Bridge J suggested three broad categories of distinction:

    a) A single planning unit where the unit of occupation has one primary use and any other activities are incidental or ancillary;

    b) A single planning unit that is in a mixed use because the land is put to two or more activities and it is not possible to say that one is incidental to another; and

    c) The unit of occupation comprises two or more physically separate areas which are occupied for different and unrelated purposes. Each area that has a different primary use ought to be considered as a separate planning unit.

346. The area to be looked at is the whole of that used for a particular purpose, including any part of that area which is put to incidental use[161]. The area covered by a PP is not necessarily determinative of the planning unit, although that is likely to be relevant and may be a good starting point[162].

347. A simple example would be where the planning unit – that is, the unit of occupation – comprises a dwellinghouse with a garden and garage. If the householder starts carrying out car repairs on a significant scale in the garage, the planning unit will be in a mixed use for residential purposes (or use as a dwellinghouse) and car repairs because the functional relationship remains although there might be a degree of physical separation between the uses.

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[160] The EPL P55.46 states: "Both functional and physical separation are required before a smaller unit can be identified, since without functional separation the ancillary link remains; and without physical separation there is no smaller physical area which can be identified as a separate unit." This properly reflects the *Burdle* judgment, which says, at p.8G, "… it may frequently occur that within a single unit of occupation two or more physically separate and distinct areas are occupied for substantially different and unrelated purposes."

[161] *G Percy Trentham Ltd v MHLG and Gloucestershire CC* [1966] 1 ALL ER 701

[162] *Hertsmere BC v SSE & Percy* [1991] JPL 552

348. If the householder has let the garage to a different operator for car repairs, however, the dwellinghouse and garage will be different planning units. The garage is a separate unit of occupation and its use is physically and functionally separated from that of the house.

349. In some cases, uses may be physically separated but functionally connected – or vice versa. Neither factor is necessarily decisive. Where there are a number of activities on a site, analysis of the physical and functional relationships could lead to different conclusions on a fact and degree basis: that there is more than one planning unit each with primary and incidental uses; or the whole area is in a single mixed use with primary and incidental uses; or a there is single primary *sui generis* use comprised of a number of disparate but related activities. Whatever the finding is will be the basis for the determination of whether there has been an MCU.

350. In *Stone & Stone v SSCLG & Cornwall Council* [2014] EWHC 1456 (Admin), the Court held that whether or not an occupier of land has created a new planning unit is a question of fact and degree for the decision-maker. The Inspector was entitled to conclude that there were two planning units within the site and they were 'new units' compared to what had existed previously. A use which is authorised by PP is capable of being extinguished by the creation of a new planning unit in respect of the land in question.

351. It is not open to an LPA to divide up a planning unit artificially so as to achieve a more restrictive effect than would result from an EN directed at the unit as a whole[163]. However, an EN does not have to be directed at the whole unit or indeed to identify it[164]. In many cases the activity complained of only takes place on a small area, but the LPA is entitled to anticipate changes to defeat the operation of the notice by enforcing against the planning unit as a whole.

352. Thus, where markets or other leisure uses take place on farmland, the planning unit will normally be the farm rather than individual fields. Where boot fairs were held on adjacent parcels of land in different ownerships, the CoA upheld the Inspector's finding that the planning unit was the area put to the co-ordinated use[165].

353. It is not necessary for each component of a mixed use to be carried out in strictly separate areas of the planning unit. In *Westminster CC v SSCLG & Oriol Badia and Property Investment (Development) Ltd [2015] EWCA Civ 482*, the EN alleged '…the material change of use of the Property from a hotel (Class C1) to a mixed use hotel and hostel (sui generis)'. The CoA held that the Inspector erred, when considering whether the change of use was material, by focussing whether part of the premises was in exclusive use as a hostel and part was in exclusive use as a hotel.

354. The larger the unit of occupation, the less likely it is that a change of use of the part will be an MCU of the whole. In the case of a large factory complex, the planning unit will

[163] *De Mulder v SSE* [1973] 27 P&CR 369

[164] *Hawkey v SSE* [1971] 22 P&CR 610; Richmond on Thames LBC v SSE [1988] JPL 396

[165] *Ralls v SSE* [1998] JPL 444

likely be the whole premises. The various subsidiary activities, such as canteens, offices and car parks will be incidental uses, which may fluctuate without there necessarily being an MCU of the planning unit[166].

355. In other cases, however, where several activities are carried on within one unit of occupation, it may be found as a matter of fact and degree that there is one planning unit in a mixed use or there are separate planning units, each with an individual primary use. In *Johnston & Johnston v SSE* [1974] 28 P&CR 424, individual garages or blocks of garages within an overall complex of 44 units were treated as separate planning units on the basis of the occupancies. Individual flats within a block will normally be separate planning units.

356. In *Church Commissioners v SSE* [1996] JPL 669, a single shop that was occupied by an individual trader was held to be a separate planning unit with its own primary use – although it was located within a shopping mall and it could be said that the whole centre was occupied for retail purposes by the landowners. A change of use of one shop might not be sufficient to materially change the character of the use of the centre as a whole, but it was much more likely to be material in relation to the individual shop.

357. Where there are multiple BPCs, involving several buildings within a single complex having a common access and circulation areas, it can be difficult to decide whether there is one planning unit in mixed use or several planning units. Relevant factors may include:

- The form of tenancy and the legal relationship between the landlord and tenants, including the degree of control exercised by the site owner;
- The ease with which tenants may switch sites or expand or contract their areas of occupation;
- The extent to which individual sites are physically defined or have changing boundaries;
- The proportion of the site given to communal uses such as access, parking, landscaping etc, and the rights of use by the occupiers over them.

358. It is not necessarily incorrect for an LPA to serve ENs in relation to individual units, which may be vulnerable to subsequent changes between units, or to serve a composite EN which relates to the site as a whole but may not identify the individual activities[167]. ENs in such cases should only be quashed on the ground that the planning unit is incorrect if the case for doing so is clear cut and strong.

359. The LPA may serve individual **and** composite ENs in the alternative, leaving the Inspector to determine the correct planning unit or units. In such cases, the Inspector may accede to that request and quash the incorrect EN prior to considering the grounds

[166] *Vickers-Armstrong Ltd v CLB* [1957] 9 P&CR 33

[167] *Simms v SSE & Broxtowe BC* [1998] JPL B98

of appeal:

- So long as doing so would cause no injustice.
- Stating that the decision is specific to the facts of the case.
- Giving the reasons for taking the decision.
- So long as there is a sound reason for doing so – perhaps because PP is to be granted, and so as to avoid the granting of two or more PPs relating to the same site, possibly with different provisions and conditions.

Another reason might be that the ENs have inconsistent steps. It would be unacceptable for an appellant to comply with the requirements of one EN but face prosecution for failing to comply with another that deals with essentially the same matters in respect of a wider or smaller part of the same land.

360. However, there is nothing to prevent the Inspector from upholding both individual and composite ENs[168], and that may be the correct approach where there is no obvious reason why one EN is flawed, or quashing one would cause injustice, or different ENs are subject to different legal grounds of appeal – the outcome of which may radically alter the approach to the remainder of the decision. See below for dealing with ground (a) where there are multiple ENs.

Curtilage[169]

361. The concept of curtilage is relevant to Enforcement because the use of land within the curtilage of a dwellinghouse for any purpose incidental to the enjoyment of the dwellinghouse as such is exempted from development under s55(2)(d).

362. Curtilage is also relevant to listed building control – see the Listed Building Enforcement chapter and EPLP 1.004.2. There are PD rights for development in the curtilage of a dwellinghouse and other buildings under various Parts of Schedule 2 to the GPDO.

363. The term 'curtilage' must not be confused with the planning unit. The two will sometimes cover the same area on the ground, but that will not always be the case and does not in any event mean that they are the same thing[170]. Curtilage should also never be confused with a use of land. It will not be correct, for example, for an EN to allege a 'change of use to domestic curtilage'. Such allegations should be corrected to 'use of land for residential purposes' or '…for purposes incidental to use as a dwelling'.

364. There is no all-encompassing, authoritative definition of the term 'curtilage'. It derives

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[168] See *Rawlins* and *Church Commissioners* above and *Ramsey v SSE* [1991] JPL 1148

[169] EPLP P55.54 – regarding the curtilage of a dwellinghouse

[170] In *James v SSE and Chichester DC* [1991] JPL 550, a tennis court was separated from a dwelling by an area of rough grass and found not to be within the curtilage.

from conveyancing law where it was and remains a term of art. The key authorities for planning purposes include listed building, and landlord and tenant cases. It was established in *Sinclair-Lockhart's Trustees v Central Land Board* [1950] 1 P&CR 195 that:

> 'The ground used for the comfortable enjoyment of a house or other building may be regarded as being within the curtilage of the house or building and…an integral part of the same even though it has not been marked off in any way…**It is enough that it serves the purpose of the house or building in some necessary or reasonably useful way**.'

365. In *Methuen-Campbell v Walters* [1979] 1 QB 525, the COA agreed that, for land to fall within the curtilage of a building, it must be intimately associated with the building to support the conclusion that it forms part and parcel of the building. Further considerations arising from case law are:

- Interpretation of the word curtilage is not a matter of law and but a judgment for the decision-maker given the ordinary meaning of words[171]. It is a matter of fact and degree[172].

- Regard should be had to three tests of (i) physical layout of the [listed] building and the land or building said to be in the curtilage, (ii) ownership (past and present) and (iii) use or function (past and present) applied[173].

- Curtilage does not need to be confined to a small area, as indicated in *Dyer*. In *Skerritts of Nottingham Ltd v SSETR (No. 1)* [2000] EWCA Civ 60, [2001] JPL 1025, the CoA found the concept of smallness so relative, in the context of the curtilage of a substantial listed building, as to be almost meaningless and unhelpful as a criterion[174]. The size of the curtilage relative to the building may, however, be relevant[175].

- Whether the land or building said to be within the curtilage are 'ancillary' to the main building will be relevant but there is no legal requirement that the curtilage should be ancillary[176].

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[171] *Brutus and Cozens* [1973] AC854; *Dyer v Dorset CC* [1988] 3 WLR 213.

[172] It was held in *Burford v SSCLG & Test Valley BC* [2017] EWHC 1493 (Admin) that "*whether something falls within a curtilage is a question of fact and degree and thus primarily a matter for the decision-maker"* and "*It was for the Inspector to decide what weight should be given to each of the relevant factors*."

[173] *HM Attorney-General ex rel Sutcliffe & Rouse & Hughes v Calderdale BC* [1983] JPL 310; this was a listed building case and Stephenson LJ held that 'where they are in common ownership and one is used in connection with the other, there is little difficulty in putting a structure near a building or even some distance from it into its curtilage'.

[174] See also *Lowe v FSS & Tendring DC* [2003] EWHC 537 (Admin)

[175] *Challenge Fencing Ltd v SSCLG & Elmbridge BC* [2019] EWHC 553

[176] *Skerritts of Nottingham Ltd v SSETR (No. 1)* [2000] EWCA Civ 60, [2001] JPL 1025; *Challenge Fencing Ltd v*

- Physical enclosure is not necessary[177] but the degree to which the building and claimed curtilage fall within one enclosure is relevant as an aspect of the test of physical layout[178].

- Land said to be in the curtilage must have an intimate association with that undoubtedly within the curtilage[179].

366. It was held in *Hampshire CC & the Open Spaces Society v SSEFRA & Blackbushe Airport* [2020] EWHC 959 (Admin) that for land to be 'within the curtilage of a building' for the purposes of an application made under the Commons Act 2006, the land must form part and parcel of the building. The question is not whether the building forms part and parcel of some unit which includes the land, or whether the two items taken together form part and parcel of an entity or an integral unit.

367. The CoA[180] agreed that it had been wrong for the Inspector to ask whether the land and building together comprised a unit. The correct test was that set out in *Methuen-Campbell*, namely whether the land was so intimately associated with a building that the land formed part and parcel of the building. The case is being appealed to the Supreme Court.

368. Since curtilage is not a use, the **starting point** when considering whether any use is lawful should be identification of the planning unit and its primary use(s) as outlined above. For example, if the case is concerned with the use of land as a residential garden, and the site is outside of the residential curtilage but nonetheless within the same planning unit as the dwellinghouse, then it will be unlikely that there has been any MCU as defined by s55(1).

369. If it is found in such a case that the site is or was outside of the residential planning unit, it follows from *O'Flynn v SSCLG & Warwick DC* [2016] EWHC 2984 (Admin) that Inspectors must address **another two questions** when considering any dispute as to whether the use of land as a residential garden is lawful:

    - Whether the evidence shows that, on the relevant date, the land was within the curtilage of the dwellinghouse and being used for a purpose incidental to the use of dwellinghouse as such. S55(2)(d) provides that 'the use of any buildings or other land within the curtilage of a dwellinghouse for any purpose incidental to the enjoyment of the dwellinghouse as such' is not 'development'[181].

SSCLG & Elmbridge BC [2019] EWHC 553

[177] *Sinclair-Lockhart's Trustees*, endorsed in *McAlpine v SSE* [1995] JPL B43

[178] *R (oao Sumption) v Greenwich LBC* [2007] EWHC 2276 (Admin); *Challenge Fencing Ltd v SSCLG & Elmbridge BC* [2019] EWHC 553.

[179] *McAlpine v SSE* [1995] JPL B43

[180] Blackbushe Airport Ltd v Hampshire CC & SSEFRA

[181] See also *R (oao Sumption) v Greenwich LBC* [2007] EWHC 2276 (Admin) where an LPA's decision to grant

- If it is found that the land was not within the residential planning unit or curtilage, and there has been an MCU to use of the land as a residential garden, the question is whether the use is immune from enforcement action under s171B(3)[182].

370. *O'Flynn* is a controversial judgment but it is unlikely that an Inspector could find, for example, that the change of use of land from use as a public park or farm field to use as a domestic garden to be lawful simply on the basis that the appellant moved a fence.

371. In such a case, the appellant would need to demonstrate on the balance of probabilities that the land 1) is in the curtilage of the dwellinghouse, given the tests set out above **and** 2) is used for purposes incidental to the enjoyment of the dwellinghouse as such. Incidental use is not determinative on its own of curtilage because it is only one test and 'it does not assist, in particular, to resolve the question of whether the land is attached with the dwelling house forming one enclosure with it'[183].

372. It is also necessary to consider in some PD cases whether land is within the curtilage of a building. The GPDO includes definitions of the word 'curtilage' for the purposes of some, but not all of the relevant Parts. Inspectors should refer carefully to the wording of Order and the General Permitted Development Order & Prior Approval Appeals chapter when dealing with relevant casework[184].

373. It should be borne in mind that PD rights under Part 1 only apply to the curtilage of a dwellinghouse and not the whole residential planning unit, if that is larger. Again, however, there are implications for GPDO cases from the findings in *Sumption* and *O'Flynn* that curtilage can potentially be extended.

374. By virtue of Article 3(5)(b) of the GPDO, PD rights do not apply if, in the case of permission granted in connection with an existing use, that use is unlawful. But 'curtilage' is not a 'use', and whether land falls within the curtilage of a dwelling must be decided on the factual evidence and tests outlined above. If it is found that land is within the curtilage of a dwelling, and used for purposes incidental to the use of the dwelling, so that s55(2)(d) applies and the use is not unlawful, then it would appear that Part 1 PD rights, such as the erection of garden buildings under Class E, may be exercised.

375. **However, it should be noted that there is no definitive court judgment to provide authority for the above proposition.** In practice, moreover, each assessment of the

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an LDC was quashed. The land had been acquired and brought into the curtilage of a listed building and so the proposed works were not PD. It was not relevant that the garden use had not been approved; what mattered was the status of the land from the factual situation existing at the date of the application.

[182] See [1998] JPL 1189-92.

[183] *Burford v SSCLG & Test Valley BC* [2017] EWHC 1493 (Admin)

[184] Permitted Development for Householders: Technical Guidance has also been revised to include a definition of curtilage for Part 1 purposes: 'land which forms part and parcel with the house. Usually it is the area of land within which the house sits, or to which it is attached, such as the garden, but for some houses, especially in the case of properties with large grounds, it may be a smaller area'.

extent of the curtilage will depend upon the facts of the case applied to the relevant tests.

376. NB: *Collins v SSE* [1989] EGCS 15 is sometimes cited on the subject of curtilage, but the case was misreported in the EGCS and is not a valid authority on the matter. The Judge observed that the debate as to whether or not a building was within the curtilage of the dwelling was a debate into which they need not venture.

S55(2)(f) and the UCO[185]

377. S55(2)(f) of the TCPA90 provides that, in the case of buildings or other land which are used for a purpose of any class specified in an order made by the SoS under this section, the use of the buildings or other land or, subject to the provisions of the order, of any part of the buildings or the other land, for any other purpose of the same class shall not be taken to involve development of land.

378. Article 3(1A) and – from 1 September 2020, subject to transitional arrangements[186] – Schedules 1 and 2 to the UCO thereby provide that where a building or other land is used for a purpose of any class specified in (a) Part B or C of Schedule 1, or (b) Schedule 2, the use of that building or other land for any other purpose of the same class is not to be taken to involve development of the land. These changes are bilateral.

379. Accordingly, no development is involved with a change within the same use class even if the character is substantially different, and the change would otherwise be material[187] [188]. This remains the case following the 2020 amendments to the UCO which provide, for example, that uses for the provision of financial series principally to visiting members of the public, and for an office to carry out any operational or administrative function – which previously fell under classes A2 and B1(a) respectively – now both fall under class E.

380. Article 3(2) of the UCO provides that references in Article 3(1A) to a building include references to land occupied with the building and used for the same purposes. In *Cawley v SSE* [1990] JPL 742, the Court held that a Class A1 shop use cannot subsist on an entirely open site, but that does not accord with the explanatory note to the UCO as published in 1987, which refers to the uses specified in 'Parts A and B of the Schedule' as 'uses of buildings or land'[189]. Paragraph 7.9 of the Explanatory Memorandum to the 2020 Amendment Regulations states that 'these reforms [to the UCO]…apply to all uses of land and buildings…'

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[185] EPLP P55.58 to P55.59 and 3B-950.1 to 3B-963.1

[186] As set out in the Town and Country Planning (Use Classes) (Amendment) (England) Regulations 2020 amending the UCO 1987

[187] *Carpet Decor (Guildford) Ltd v SSE & Guildford DC* [1981] JPL 806

[188] As noted above, there is no development is a use is intensified but still within the same use class – unless there is subdivision of a property in C3 use and s55(3) applies.

[189] *Cawley* and the wording of the UCO is discussed at [1996] JPL 725.

381. S55(2)(f) and the UCO provide that a change within a use class is exempted from development. The UCO should not be interpreted as meaning that some change between use classes is necessarily development. The key issue is whether the change is **material**. As indicated above, it will be a question of fact and degree in each case as to whether a change from a use falling within one class to a use falling within a different class amounts to an MCU.

382. Thus, Inspectors should never assume or give the impression that they have assumed that there must have been an MCU simply because the two uses are in different use classes or one use is in a use class and the other is sui generis. The analysis requires two steps:

383. a) are the before and after uses in the same use class? and

b) if not is the change between the uses or use classes material?

This advice holds regardless of the use classes in question but may prove particularly applicable if considering a change of use to a shop falling within class E(a) from a shop falling within class F.2(a) of the UCO (or vice versa) as amended.

384. If an unauthorised MCU takes place, and there is a change from the unlawful use to another within the same use class within the relevant immunity period set out under s171B, the clock continues to run from the date of the original BPC. It was held in *R (oao Harbige) v SSCLG* [2012] EWHC 1128 (Admin) that s55(2)(f) should not be read as if the word 'lawfully' is inserted. The Inspector was correct that, after ten years, no enforcement action could be taken against a use that fell within the then class D1. A change of use that did not constitute development did not restart the clock. Inspectors should, in this context, be alert to arguments about intensification of use (see above and *Brent LBC v SSCLG* [2019] EWHC 1399).

385. Article 3(1A) also provides that, if specified, the use of part of that building or other land ('part use') for any other purpose in the same use class is not development. In other words, s55(2)(f) and the UCO operate where there is a sub-division of the planning unit – but this does not apply to a change of use of part of a building used as a C3 dwellinghouse to use as a separate dwellinghouse by virtue of Article 4, which thus mirrors s55(3)(a) of the TCPA90.

386. Article 3(3) protects uses that are 'included in and ordinarily incidental', providing that they are not excluded from the use to which they are incidental merely because they are specified in Schedule 1 or 2 as a separate use. So, for example, there is no MCU if part of a nursing home (use class C2) is used as an office so long as the office use is ordinarily incidental to the nursing home.

387. Prior to 1 September 2020, all mixed uses were outside of any use class, with a single qualified exception being specified in Article 3(4): where land on a single site or adjacent sites used as parts of a single undertaking is used for purposes consisting of or including purposes falling within classes B1 [now E(g)] and B2, those classes may be treated as a single class so long as the area falling within class B2 is not substantially increased as a result.

388. In the UCO as amended in 2020, Class E encompasses 'use, or part use, for all or any of the following purposes' which include those or some of those that previously fell within classes A1, A2, A3, B1, D1 and D2. Thus, the UCO exempts from development any change of use from a single to a mixed use, or from one mixed use to another within

class E, as well as a mix of E(g) and B2 uses in the circumstances described in Article 3(4).

389. Otherwise, it remains the case that sites in mixed use do not benefit from the provisions of s55(2)(f)[190]. A mixed use is a single mixed use and thus 'sui generis' and outside of any use class. An EN that alleges an MCU to a mixed use should not refer to use classes but describe the mixed use that was taking place, with its component uses, when the EN was issued.

390. Many uses are 'sui generis'. Some, including car sales premises, scrapyards, launderettes and hostels are specifically referred to in Article 3(6) of the UCO. The list was extended by the 2020 amendment to the UCO, and it now includes uses such as (p) a public house, wine bar or drinking establishment or (t) a cinema which previously fell within use classes. However, there are still many sui generis uses such as builders' yards, riding stables and vehicle hire depots which are not named in Article 3(6).

391. The fact that some element of an overall use may be within a use class does not bring the whole use within that class[191]. Another factor that may have a bearing on the lawfulness of a use is that the UCO was amended prior to 2020; for example, hostels were once in the same class as hotels and guest houses.

392. Some changes of use between different use classes are PD as set out in Part 3 of Schedule 2 to the GPDO, but the 'ratchet' effect operates so that most permitted changes are one way only, and the initial grant of express PP must have been implemented[192].

393. Conditions may be imposed, subject to the usual tests, to prohibit a future change of use within a use class and/or to withdraw PD rights; see the PPG on Conditions and the General Permitted Development Order & Prior Approval Appeals chapter.

394. Where PP is granted subject to a condition restricting use to a class (or classes) within the UCO that was in place at the time, it will be necessary to consider what the condition was designed to control. This was the subject of *Lazari v SSLUHC & LB of Camden* [2023] EWHC 2026 (Admin).

Development – Particular Types and Issues

Residential Uses

Dwellinghouses and Class C3

395. There is no definition of the term 'dwellinghouse' in the TCPA90 but it was accepted in

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[190] *Belmont Riding Centre v FSS & Barnet LBC* [2003] EWHC 1895

[191] In *Brazil (Concrete) v MHLG & Amersham RDC* [1967] 18 P&CR 396, a shed used for industrial processes within a builders' yard was not in B2 use.

[192] *Kwik Save Discount Group Ltd v SSW & Others* [1981] JPL 198 (CoA)

Gravesham BC v SSE & O'Brien [1983] JPL 306 that the distinctive characteristic of a dwellinghouse was its ability to afford to those who used it the facilities required for day-to-day private domestic existence. A self-contained flat is normally a dwellinghouse for the purposes of the TPCA90 but not for some Parts of the GPDO, including Part 1.

396. In *Wealden DC v Mitchell* [2017] EWHC 2328 (QB), Mr Justice Holroyde granted an injunction requiring the demolition of a 'hobbit house' on the basis that 'there is no merit in the argument…that the structure is not a house. It clearly lacks certain amenities generally found in most houses…It is however plainly capable of being used as a dwelling and Mr Mitchell's own case…was that he was, at the time, so using it.'

397. It is important to distinguish between 'use' and 'occupation'. The occupation of land is not development under s55. In *Gravesham*, a 'weekend and holiday chalet' was subject to a condition restricting occupation to four months of the year but it did not lose the characteristics of a dwellinghouse.

398. The limited use of a family home for holiday lettings would not necessarily be an MCU[193]. The CoA held in *Moore v SSCLG* [2012] EWCA Civ 1202 that materiality in such cases will be a matter of fact and degree, with the answer depending on the characteristics of the use as holiday accommodation[194]. The same approach should apply to short-term lets and be taken where holiday caravans are used for permanent residences[195].

399. A dwellinghouse for the purposes of use class C3[196] need not be used as 'the sole or main residence' and so may include second or holiday homes. There are three types of C3 dwellinghouses:

    (a) a single person or by people to be regarded as forming a single household. The term 'single household' is to be construed in accordance with s258 of Housing Act 2004 (HA04) – defined in subsection (2) as including persons who are all members of the same family (as defined in subsection (3) or persons whose circumstances are described in regulations. There is no limit to the number of people who may live together as a single household in a C3(a) dwellinghouse.

    (b) not more than six residents living together as a single household where care is provided for residents; or

    (c) not more than six residents living together as a single household where no care is provided to residents (other than a use within class C4). This would

[193] *Blackpool BC v SSE* [1980] JPL 527

[194] In this case – not to be confused with *Moore* [1998] – the groups who occupied property were not single households. Given the characteristics of the lettings, and as a matter of fact and degree, there was an MCU from use as a dwellinghouse.

[195] *Forest of Dean DC v Howells* [1995] JPL 937

[196] EPLP 3B-978.1 to 3B-979

cover a situation where the household is comprised of a group of unrelated people[197].

400. It is worth reiterating that, for PD rights under Part 1 of the GPDO to apply, a building cannot be a flat, but must be a 'dwellinghouse' in Gravesham terms, used as a dwellinghouse as a matter of fact and degree, have a curtilage[198] and be substantially completed[199].

Subdivision and Amalgamation

401. S55(3)(a) provides that the use as two or more separate dwellinghouses of any building previously used as a single dwellinghouse involves an MCU of the building as a whole and each part of it which is so used. In other words, the provision of self- contained flats within what was a single dwellinghouse represents an MCU of the whole building and each individual flat within.

402. As noted above, s55(3) has the effect of disapplying s55(2)(f) to the change of use of a dwellinghouse to flats, even though the 'before' and 'after' uses both fall within use class C3. However, where a single dwellinghouse remains as such but is occupied differently, so that the building would fall within (for example) class C3(b) rather than C3(a), there will not normally be an MCU.

403. An MCU can arise when a residential planning unit, perhaps including a dwelling and detached garage, is sub-divided to form separate planning units[200]. However, it will be necessary in such cases to establish whether there are indeed two separate dwellings as a matter of fact and degree. In *Moore v SSE* [1998] JPL 877, the CoA held that each holiday cottage in a complex was a separate dwelling and benefitted from the four year rule. Each unit satisfied the *Gravesham* test. An argument that there was one planning unit in use for the provision of holiday accommodation, to which the 10- year immunity period would apply, was rejected.

404. The TCPA90 is silent as to whether the change of use of a building from flats to a dwellinghouse is or is not an MCU. In such cases, however, the 'before' and 'after' uses should not both be treated as C3, because a building used as flats plural would not have been used as a single dwellinghouse[201].

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[197] The CoA held in *R (oao Hossack) v Kettering BC & English Churches Housing Group* [2002] EWCA Civ 886 that it was too prescriptive to say that people who come to a house neither as a preformed group nor for a predetermined period, and with merely "a common need for accommodation, support and resettlement" will necessarily fail to enjoy a relationship which enables them to be regarded as living in a single household. The precise nature of the relationship between the residents will be a material consideration, but it is not necessarily determinative.

[198] *Gore v SSCLG & Dartmoor NP* [2008] EWHC 3278 (Admin)

[199] *R (oao Townsley) v SSCLG* [2009] EWHC 3522 (Admin)

[200] *Wakelin v SSE & St Albans DC* [1978] JPL 769

[201] *Richmond upon Thames LBC v SSETR* [2001] JPL 84

405. Accordingly, the usual approach must be taken in such cases of considering the materiality of the change as a matter of fact and degree. In areas where there are housing shortages, LPAs may argue that the negative effect of amalgamations on housing supply is a factor supporting the view that there has been an MCU which is subject to planning control. The Inspector must consider the significance of this factor[202].

C1, C2 and C4, HMOs and Temporary Sleeping Accommodation

406. Use class C1 set out in Schedule 1 of the UCO includes use as a hotel or boarding or guest house where no significant element of care is provided. It does not include use as a hostel, since that is excluded from any use class under Article 3(6)(i)[203]. Whether a change of use between a hotel and hostel is material is for the judgment of the decision-maker[204].

407. Class C2 encompasses residential accommodation and care to people in need of care, hospitals, nursing homes and residential schools, colleges and training centres. Class C2A covers secure residential institutions such as prisons and secure hospitals.

408. It was held in *North Devon DC v FSS & Southern Childcare Ltd* [2003] JPL 1191 that the definition of 'care' in Article 2 of the UCO restricts the personal care of children to class C2 only. Children cannot form a household without the presence of a care-giver and so a children's care home cannot fall within class C3 unless a care- giver is resident. The same would apply to those who suffer from a disability and need care – but it does not follow that a C2 use would necessarily be materially different to a C3 use.

409. In *R (oao Crawley BC) v FSS & the Evesleigh Group* [2004] EWHC 160 (Admin), it was held that *Southern Childcare* is not to be read as laying down the principle that those who suffer from disability and need care in the community can never constitute a household for the purposes of class C3. It is necessary to focus on those in occupation and ask whether they form a single household as a matter of fact and degree.

410. A change of use from a dwellinghouse to a house in multiple occupation (HMO)[205] is normally material, even though the use can be described broadly as 'residential'. The same may be true of a change between a guest house and HMO use (and vice versa) depending on such factors as services and length of stay[206].

411. Use class C4 is the use of a dwellinghouse by not more than six residents as an

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[202] *Richmond upon Thames LBC v SSETR* [2001] JPL 84; *R (oao) Kensington and Chelsea RBC v SSCLG & Reis & Tong* [2016] EWHC 1785 (Admin)

[203] *Panayi v SSE* [1985] JPL 783 considers case law on the meaning of the term 'hostel'.

[204] *Westminster CC v SSCLG & Oriol Badia and Property Investment (Development) Ltd* [2015] EWCA Civ 482

[205] *Birmingham Corporation v MHLG & Habib Ullah* [1964] 1 QB 178

[206] *Winmill v SSE* [1982] JPL 445

HMO[207]. The change of use from C3 to C4 and vice versa is permitted by Part 3, Class L of the GPDO, but some LPAs have introduced Article 4 Directions to remove such PD rights, in order that they can control the numbers of HMOs in certain areas through decisions on express planning applications.

412. In *LB of Brent V SSLUHC & Yehuda Rothchild* [2022] EWHC 2051 (Admin) the Court held that the Inspector made no error in concluding that regardless of whether the property fell within Use Class C3 or C4 at the time of construction of the extension, the HMO would still benefit from permitted development rights. Therefore no error was made in concluding that it was academic whether the property was extended whilst it was still occupied as a single-family dwelling or when already an HMO, following its permitted change of use under Class L of the GPDO.

413. For the purposes of class C4, an HMO has the same meaning as in s254 of the HA04, except that it does not include a 'converted block of flats' to which s257. The definition of an HMO set out in s254(1) relates to 'a building or part of a building', meaning that a building can be in a mixed use as a small HMO and something else.

414. A building or part of a building is used as an HMO under s254(1) – and for the purposes of use class C4 – if there is an 'HMO declaration' in force as described under s255, or if it meets the 'standard test' under s254(2), the 'self-contained flat' test in s254(3) or the 'converted building test' in s254(4). It is a requirement of all of the tests that the living accommodation is occupied by persons who do not form a single household. However, only the standard and self-contained flat tests also require that two or more of the households share one or more basic amenities, or that the living accommodation lacks one or more basic amenities.

415. HMOs with more than six occupiers fall outside of any use class. If each bedroom is occupied separately and subject to an individual tenancy agreement with (or license from) a non-resident landlord, the use of the property is likely to be multiple occupation and not use as a dwellinghouse[208]. Whether a change from C3 or C4 to use as a large HMO is material would, as always, need to be considered as a matter of fact and degree, with regard to[209]:

- Whether the new or proposed use comes within the terms of class C3, such there has been no development or MCU.
- If the new or proposed use does not come within the terms of class C3, is it or would it be materially different to the actual existing C3 use. The comparison must be between the new use and the old use as it took place, rather than a

[207] It was held in *Paramaguru v Ealing LBC* [2018] EWHC 373 (Admin) that children are included in the meaning of the term 'residents' in the case of a property in C4 use.

[208] [1993] JPL 501 and [1996] JPL 883

[209] *R (oao Hossack) v Kettering BC* [2002] EWCA Civ 886, *Barnes v Sheffield CC* [1995] 27 HLR 719, see also EPL 3B-979.

notional use or level of occupation that might be within the use class[210].

416. If there is a change of use from an HMO to flats, it will be necessary to consider whether the change is material with regard to differences in the character of the use and factors such as what works have taken place and any change to the number of units. The sub-division of one planning unit into two or more is not automatically an MCU unless the original planning unit is a single dwellinghouse[211]. The question will be whether the change to flats has 'planning consequences' as a matter of fact and degree[212].

417. An Inspector's findings that the provision of units with bathrooms did not change the planning unit or the character of the house as an HMO, and thus there was no MCU was upheld in *R v SSE & Gojkovic ex parte Kensington and Chelsea RBC* [1993] JPL 139. However, that case is only authority for the correct approach; it does not mean that a change of use from an HMO to use as self- contained flats would never be material. An MCU did occur where 20 bed-sitting rooms were changed to seven self-contained flats[213].

418. When considering whether a building is in use as an HMO, or is comprised of self-contained flats, all evidence relating to actual use should be considered; this was held by the Court in *Brent LBC v SSHCLG & Chaim Reiner* [2020] EWHC 3620 (Admin)[214].

419. S25(1) of the Greater London (General Powers) Acts 1973 (GLGPA73) provides that the use as temporary sleeping accommodation of any residential premises in Greater London involves an MCU of the premises and each part of the premises so used.[215] 'Temporary sleeping accommodation' means use as sleeping accommodation that is occupied by the same person for less than 90 consecutive nights, and which is provided with or without other services for a consideration arising by way of trade for money or money's worth, or by reason of the employment of the occupier, whether or not there is a landlord/tenant relationship.

420. The GLGPA73 was amended by the Deregulation Act 2015 (DA15) so as to introduce s25A and s25B. S25A provides that use as temporary sleeping accommodation of any residential premises in Greater London does **not** involve an MCU if conditions are met[216]:

- The sum of (a) the number of nights as use as temporary sleeping accommodation and (b) the number of nights (if any) of each previous use as temporary sleeping accommodation in the same calendar year does not exceed ninety;
- The person or at least one of the persons who provided the sleeping

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[210] *SSETR v Waltham Forest LBC* [2002] EWCA Civ 330; also *Southern Childcare* above.
[211] *Welwyn Hatfield BC v SSHCLG & Ismail Kabala (IP) [2022] EWHC 3175 (Admin)*
[212] See [1991] JPL 172 and *Winton v SSE* [1984] JPL 188
[213] *Mitchell v SSE* [1994] JPL 916
[214] Permission hearing only – full transcript not available
[215] S25 was considered in *Fairstate Ltd v FSS & Westminster CC* [2005] EWCA Civ 283; see EPLP P55.02-P55.03.
[216] Temporary sleeping accommodation' means use as sleeping accommodation which is occupied by the same person for less than 90 consecutive nights.

accommodation was liable to pay Council Tax in respect of the premises.

421. S25B of the GLGPA73 then empowers LPAs or the SoS to make directions as to where s25A does not apply. S45 of the DA15 empowers the SoS to make such regulations.

422. The rise of Airbnb has led LPAs outside London to enforce against the use of residential properties for temporary sleeping or short- term letting. Where the GLGPA73 does not apply, the question is likely to be whether there has been a material change in the character of the use as a matter of fact and degree with regard to any continued occupation by the householder, whether the guests typically form a single household (if the change was from C3 use), the frequency and turnover of guests, whether there is a settled or transient pattern of occupation, and the materiality of off-site effects such as noise and comings and goings.

Residential and Incidental Uses

423. S55(2)(d) provides that the **use** of land or buildings within the curtilage of the dwellinghouse for any purpose incidental to the enjoyment of the dwellinghouse as such is not development. Such use should not be conflated with the construction of buildings for incidental use, which is development but permitted under Part 1, Class E of Schedule 2 to the GPDO[217].

424. Whether or not a use is incidental for the purposes of s55(2)(d) must be considered with regard to the primary residential use and the type and size of the dwellinghouse and its curtilage, as well as the scale and nature of the claimed incidental activity.

425. The carrying out of some hobby and/or working from home – as in the case of planning inspectors – may be incidental, but it is always vital that there is a normal functional relationship between the incidental and the residential use. The keynote is reasonableness. The CoA held that using a front garden for parking a Spitfire did not fall within the s55(2)(d) exception 'no matter how exquisite the pleasure' for the householder[218].

426. Even if a use may be incidental to the enjoyment of a dwelling, it might not be so if it is carried out on such a scale or in such a way as to cause some material change to the character of the overall use of the planning unit. That may be the case if, for example, a business run from home generates significant comings and goings by customers. Parking on the drive is often an incidental use but may not be if it is a commercial vehicle associated with an off-site business that is being parked[219].

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[217] The PD rights granted under Class E only relate to buildings required for a purpose incidental to the enjoyment of the dwellinghouse as such, not to use for a purpose integral to the use as a dwellinghouse. Whether that is the case will depend on a fact and degree assessment; see *Pêche d'Or Investments v SSE* [1996] JPL 311 and the General Permitted Development Order & Prior Approval Appeals chapter.

[218] *Croydon LBC v Gladden* [1994] 1 PLR 30; see EPL P55.55

[219] [1994] JPL 974

427. Even a hobby can be carried out so as to materially change the character of the use of a planning unit, and indeed the materiality may be evident from effects of the hobby activity on the living conditions of neighbours[220]. Activities such as the keeping of dogs in large numbers will amount to an MCU if the scale of the use falls outside what could normally be expected to occur within a dwellinghouse and its curtilage[221].

428. In the case of *O'Flynn v SSCLG & Warwick DC* [2016] EWHC 2984 (Admin) – which is also discussed above in relation to curtilage – it was held that the Inspector erred in discounting the appellant's use of the land for strolling around, sitting out and gardening. Whether such activities amount to incidental use will depend on the facts.

429. However, the CoA held in *Suburban Property Investment Limited v SSCLG & Another* [2011] EWCA Civ 112 that the use of underground garaging associated with an apartment block by non- residents was not for a purpose incidental to the enjoyment of their dwellings. There was no connection between the parking of their vehicles and drivers' enjoyment of their own dwellings.

430. It is implicit in the requirement for there to be some functional relationship that an incidental use will not be the same as the primary use. Where an extension or outbuilding or caravan within the curtilage of a dwellinghouse provides all the facilities necessary for independent day-to-day living, it will be in residential use and not use for a purpose incidental to the use of the dwellinghouse.

431. In such cases, the residential use of an extension or outbuilding may be regarded as part and parcel of (rather than incidental to) the use of the dwellinghouse, even if the outbuilding contains the facilities required for use as a self-contained dwellinghouse, as was the case in *Uttlesford DC v SSE & White* [1992] JPL 171.

432. It is necessary to assess the physical and functional links between the use of the outbuilding and main dwelling and consider whether a separate planning unit has been created as a matter of fact and degree. If the outbuilding is let to tenants, that may be conclusive of an MCU having taken place[222]. But if the dwellinghouse and outbuilding remain part of the same planning unit, and that is still occupied by a functionally single household, no MCU is involved[223].

433. Where residential use needs to be carried out in connection with other uses, such as where there is a functional requirement for someone to live on or close to a farm, the **occupation** of the dwelling or caravan might be regarded as functionally related to the agricultural use of the land but the residential use will normally a separate main use. This is why a condition must be imposed to control who occupies the residential development.

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[220] See [1992] JPL 888 and [1994] JPL 75, 77

[221] *Wallington v SSW* [1991] JPL 942

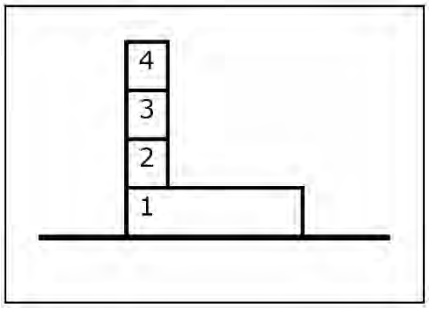
[222] *Pope v SSE* [1991] EGCS 112

[223] This will be the case if a building was constructed as PD under Class E and the use of the building was subsequently changed to a use integral to that of the dwellinghouse.

434. It is rare for residential use to ever be regarded as incidental to some other use. If the primary use is itself a form of residential use, perhaps a hotel, and some space is provided in the building or grounds for staff to live in, that use is likely to be considered part and parcel of the main hotel use rather than incidental to it.

435. The use of a flat roof of a single family dwelling for sitting out may be considered as part and parcel of the residential use, or as a use incidental to the enjoyment of the dwellinghouse as such which is exempted from development under s55(2)(d). PP would only be required for the use if it is precluded by condition.

436. The same principles apply to the use of a roof on a building that is divided into flats, since a flat is regarded as a dwellinghouse for the purposes of s55(2)(d). Thus, the occupier of Flat 1 could use, or allow the occupier of Flat 2 to use their roof as a balcony or terrace, or for any other residential purpose, without an MCU taking place, so long as the use remained residential or incidental to residential use as such. Any of the flat occupiers could use the roof over the entire block likewise – provided that residential use remains the primary use of the block as a whole.



437. The situation is different where the building contains different planning units and each has a different primary use. For example, if the unit denoted as 1 above is used as a shop, and its roof is used for sitting out by the occupiers of flats above, there would be an MCU of the retail unit to residential use.

438. Where works are carried out to facilitate the use of a flat roof, and there is a dispute over whether the works amount to operational development that requires PP, the first question will be whether the works materially affect the external appearance of the building or are excluded from development by virtue of s55(2)(a).

439. If PP is required, the next question will be whether that is granted by the GPDO[224]. There may be the case in respect of works to single dwellinghouses but not buildings used for flats under Part 1 of Schedule 2. There are PD rights to extend or alter prescribed commercial premises under Part 7.

Agriculture and Forestry

440. The use of land and buildings occupied with the land for agriculture and forestry, including afforestation, is excluded from the definition of development under s55(2)(e).

441. 'Agriculture' is defined in s336 as including but not necessarily being limited to a list of activities. The definition is relevant when considering whether there has been an MCU, for example, the siting of a caravan for agricultural use[225]. It is necessary to look at the

[224] See the General Permitted Development Order & Prior Approval Appeals chapter.

[225] *Wealden DC v SSE & Day* [1988] JPL 268

nature of what is being done on the land and whether it can properly be said to be included in any of the things set out in s336(1). The conduct of a trade or business is not required.

442. The activities listed in s336(1) include the breeding and keeping of livestock and the use of land for grazing land, but those terms do not encompass – and agriculture does not include – the breeding and keeping of horses, which involves activities other than just putting the horses out to graze[226].A 'leisure plot' is not an agricultural use[227] and nor are commercial lairage or storage of grain reserves[228]. The term 'for the purposes of agriculture' means the productive processes of agriculture, not the buying and selling of agricultural products[229] or food processing.

443. However, if there is a question over the lawfulness, for example, of an MCU of a farm building to use for the sale or processing of food, it will be necessary to consider whether the activities could be regarded as ordinarily incidental to agriculture or consequential on the agricultural operations of producing the crop[230]. The use of a building as a farm shop can be incidental to an agricultural use, but once a significant proportion of produce is imported, it is likely to be a separate retail use[231]. Significance is not about arbitrary percentages but should be considered on a fact and degree basis.

444. The GPDO grants PD rights for agricultural and forestry buildings and works, subject to the limitations and conditions set out in Schedule 2, Part 6. It also permits changes of use of agricultural buildings under Part 3.

445. The GPDO does not define 'agriculture' and so the meaning set out in s336(1) applies. However, the GPDO does define terms such as 'agricultural building' (in Part 3, paragraph X) and 'agricultural land' (in Part 6, paragraph D.1). Those definitions are only relevant to casework relating to Part 3 and/or Part 6. PD rights apply only to agricultural uses operating as a trade or business, whether profitable or not, whereas the s336(1) definition is much wider.

446. The PD rights set out under Part 6 of the GPDO are subject to limitations including, for example, that the development is 'reasonably necessary for the purposes of agriculture'. It is important to apply such tests only when considering whether development is in fact PD, and not in relation to planning merits. A building that is not 'reasonably necessary' such that it is PD may still be related to the agricultural use as

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[226] *Belmont Farm v MHLG* [1962] 13 P&CR 417; see also EPL P55.56 & 3B-2100

[227] *Pitman v SSE* [1989] JPL 831

[228] *Warnock v SSE* [1980] JPL 590 and case report at [1989] JPL 290

[229] *Hidderley v Warwickshire CC* [1963] 14 P&CR 134

[230] The 'instinctive view' of the CoA in *Millington v SSETR* [1998] EGCS 154 was that the making of wine, cider or apple juice on this scale was a normal activity for a farmer engaged in growing wine grapes or apples.

[231] *Bromley LBC v Hoeltschi & SSE* [1978] JPL 45

defined under s336(1) and acceptable in planning terms[232].

447. Further advice on agriculture is set out in the General Permitted Development Order & Prior Approval Appeals chapter.

Caravans[233]

448. The term 'caravan is defined in s29(1) in the Caravan Sites and Control of Development Act 1960 (CSCDA60) as meaning 'any structure **designed or adapted for human habitation** which is **capable of being moved from one place to another** (whether by being towed, or by being transported on a motor vehicle or trailer) and any motor vehicle so designed or adapted, but does not include—(a) any railway rolling stock which is for the time being on rails forming part of a railway system, or (b) any tent'.

449. Where a PP or LDC relates to a caravan, the word should be construed in accordance with the statutory definition[234] – and it means that a caravan is mobile by definition. The stationing of caravans and other makeshift structures on encampments is normally taken as constituting a use of land just as tents are, although caravans may be stationed for permanent use[235].

450. In law, a caravan is only a caravan if it meets the description laid down in s29 CSCDA 1960 and Caravan Sites Act 1968 (CSA68) as amended[236]. By contrast, s 13 CSA 68 does set out size limitations for a *twin-unit* caravan: even an object which is, say, 10mm larger than the dimensions given cannot be classed as a twin-unit 'caravan' for the purpose of this section; there is no de minimis allowance, the requirements are absolute.[237]

451. The term 'caravan site' is defined in s1(4) of the CSCDA60 as meaning 'land on which a caravan is stationed for the purposes of human habitation and land which is used in conjunction with land on which a caravan is so stationed'. Where PP or an LDC is granted for the siting of caravans for residential use, the site is a 'caravan site' for the

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[232] *Hill v SSE and Bromley* [1993] JPL 158; avoid phrases such as 'trade or business' and 'reasonably necessary' in ground (a) reasoning to avoid confusion and challenge.

[233] See also training on caravans in the Gypsy and Traveller Casework ITM chapter.

[234] *Wyre Forest BC v Allen's Caravans* [1990] 2 WLR 517; *Breckland DC v SSHLG & Plum Tree Country Park* [2020] EWHC 292 (Admin)

[235] See [1996] JPL 435 and 618

[236] The CoA held in *Windsor and Maidenhead RBC v Smith* [2012] EWCA Civ 997 that what comprised a caravan was always a matter of fact and degree according to the legal and non-legal context. The words in this instance did not bear the extended meaning of something designed or adapted for domestic living space of any kind. However, that case turned on the meaning of the word 'caravan' in the context of an injunction rather than the statutory definition in s29 of the CSCDA60.

[237] s 29 CSCDA definition this is as follows: *"caravan"* means any structure designed or adapted for human habitation which is capable of being moved from one place to another (whether by being towed, or by being transported on a motor vehicle or trailer) and any motor vehicle so designed or adapted, but does not include - (a) any railway rolling stock which is for the time being on rails forming part of a railway system, or (b) any tent.

purposes of the CSCDA60 and a site licence is both required and obtainable[238].

452. However, caravans are not necessarily or always stationed for the purposes of human habitation or residential use. It is **essential** that an EN does not simply allege the 'stationing' of caravans but specifies what use of land the caravans are sited for[239]:

- Residential use, which may be temporary or permanent, all year round or seasonal, and/or for specified occupiers such as Gypsies or holiday-makers.
- Storage use, whether the caravans accommodate the stored goods or are being stored (and repaired) themselves[240].
- A purpose incidental to some other lawful use.

453. It was held in *Deakin v FSS* [2006] EWHC 3402 (Admin) that the correct approach is to establish the lawful use of the planning unit, the effect of the caravan and its use on the character of the lawful use, and whether there was a MCU. It is not enough to examine the physical characteristics of the caravan and its use.

454. It is frequently argued that the siting of a caravan constitutes operational development rather than an MCU, not least because the change of use of a building to a dwelling is subject to a four year time limit for enforcement action under s171B(2), but the ten year rule under s171B(3) applies to an MCU of land.

455. If a caravan remains mobile, then the likelihood is that a use of land is involved. In this context, a caravan 'does not need to be mobile in the sense of being moved on its own wheels and axles. It will be sufficient that the unit can be picked up intact, including its floor and roof, and put on a lorry by crane or hoist. However, given the tests for buildings, the following matters should be addressed:

- **Attachment** – how is the structure attached to the ground and how may it be detached? It is invariably simple to detach a caravan from connections to service such as water, drains and electricity.
- **Permanence** – where a caravan is placed on some purpose- built plinth or hardstanding or is extended through the addition or a porch or conservatory, this may indicate a degree of permanence but is unlikely to affect the mobility of the unit.

456. Twin-unit 'mobile homes' are composed of not more than two sections separately

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[238] An LDC is not the equivalent of a PP except, under s191(7), for the purposes of s3(3) of the CSCDA68, s5(2) of the Control of Pollution Act 1974 and s36(2)(a) of the Environmental Protection Act 1990.

[239] If the EN does not state the use for which a caravan is stationed, it should be corrected provided there would be no injustice; *Woodspring DC v SSE & Goodall* [1982] JPL 784 and *Hammond v SSE & Maldon DC* [1997] (CO 4190/98).

[240] An EN which alleged the stationing and storage of a caravan could be corrected to refer to a residential use, provided that the appellant had appealed on the basis of that use or was given an opportunity to do so.

constructed and designed to be assembled on a site but then, when assembled, physically capable of being moved by road[241]. The whole unit must be transportable – but the illegality of such transportation on the public highway is irrelevant, as is the fact that such a caravan cannot be physically transported along the road leading to the site. The fact that wheels, axles or tow bars have been removed will generally be of no great significance in deciding whether a use or operational development is involved. It will be for the appellant to prove that there were two separate sections designed to be assembled on a site to create the final structure (assembled on a site by means of bolts, clamps etc) and to satisfy the Inspector that the caravan fell within the CSA68 s13 definition (see *Byrne* below for further details). Such cases will turn on their specific facts.

457. However, where a caravan has permanent appendages, the Inspector will need to make a fact and degree finding as to whether what is on the site has become a building or structure[242].

- A caravan body with wheels removed was held to be a building in *Wealden DC v SSE & Innocent* [1983] JPL 234. However, in *Carter v SSE* [1991] JPL 131, it was accepted that the stationing of a mobile home without wheels, which satisfied the definition of a caravan in s29 of the CSCDA60, would not amount to a building operation.

- It was held in *Byrne v SSE & Arun DC* [1998] JPL 122 that a structure did not meet the CSA68 definition as the construction of the caravan did not take place using two separately constructed sections as required, and because the s13(1)(b) requirement to be 'physically capable of being moved by road' would be failed if lifting the caravan onto a trailer by crane would 'carry a very real risk of structural damage'. However, this case concerned a cabin at risk of structural damage from its size and intrinsic design. This case can be distinguished where there would be risk in moving a caravan that meets the CSA68 definition but is derelict.

- The Deputy Judge said in *Measor v SSETR* [1999] JPL 182 that he would be wary of holding, as a matter of law, that a structure which satisfies the definition of, for example, a mobile home under s13(1) of the CSA68 could never be a building for the purpose of the TCPA90 – but it would not generally satisfy the well-established definition of a building, having regard to factors of permanence and attachment. It would be contrary to the purposes of the TCPA90 to hold that, because caravans are defined as 'structures' in the CSA68, they fall within the definition of 'building' in the TCPA90.

- *R (oao Green o/b the Friends of Fordwich and District) v FSS* [2005] EWCA Civ 1727 that permission could not be granted for 'units of mobile living

[241] S13 of the CSA68, which states that the overall constructure must have been constructed in such a way that there were two sections constructed separately which were designed to be, and were in fact, assembled on a site by means of bolts, clamps or other devices.

[242] *Pugsley v SSE & North Devon DC* [1996] JPL B124

accommodation' subject to acondition limiting the number of caravans, when the Inspector had not decided whether the units were 'caravans' as a matter of law. It was for the Inspector to determine whether each unit taken as a whole, with its timber extensions, amounted to a single fixture and the effect on its mobility.

458. An increase in the number of the caravans on a site will not necessarily amount to an MCU by intensification. Where PP is granted for the use and it is necessary to limit the number of caravans, a condition should be imposed to proscribe the number. A condition would also be required to restrict the use on a seasonal basis; no such stipulation could be imposed on a site licence[243].

459. In *St Anne's Court Dorset Ltd v SSHCLG & Dorset Council* [2021] EWHC 2954 (QB) the Court hel that whether the use of the site for the stationing of static caravans for human habitation, as compared with use of the site for touring caravans, was a material change of use was a matter of fact and degree for the Inspector

Refuse Tips – s55(3)(b)

460. S55(3)(b) limits lawful use rights where land is used for waste disposal, by providing in effect that there will be MCU if the deposit of materials serves to extend the existing superficial area of the deposit or extend its height above the level of the adjoining land. The planning unit is the whole site except that, if one hole in a quarry is filled, tipping in a second hole constitutes development[244].

461. The definition of 'waste' for planning purposes includes any material that is discarded by the producer or person in possession. Where the primary purpose of the deposit is for its reuse, then that is the use, not the discarding of it. But if the primary intention is to discard and **later** reuse the material, it may be waste in the interim. In *Wyatt Bros (Oxford) Ltd v SSETR* [2001] PLCR 161, waste was deposited to be used later for creation of a golf course.

462. The tipping of controlled waste – that is, household, industrial or commercial waste – requires an Environmental Permit under the Environmental Permitting (England and Wales) Regulations 2016, which cannot be granted unless a PP or an LDC is granted[245].

Advertisements – s55(5)[246]

463. S55(5) of the TCPA provides that the use for the display of advertisements of any external part of a building which is not normally used for that purpose shall be treated as

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[243] *Babbage v North Norfolk DC* [1990] JPL 411

[244] *Duckworth v Haslingden UDC* [1973] JPL 196

[245] See the Environmental Permitting and Waste Planning chapters, plus the National Planning Policy for Waste and the PPG on Waste.

[246] See the Advertisement Appeals chapter, plus the NPPF and PPG on Advertisements

involving an MCU of that part of the building.

464. The use of land or a building for the display of advertisements is controlled under the Town and Country Planning (Control of Advertisements) (England) Regulations 2007 (as amended). Where such a display is exempted from control, or granted deemed or express consent under the Regulation, deemed PP for any structures and supports required for the display of the advertisement is granted deemed PP under s222 of the TCPA90.

465. The definition of 'advertisement' in s336(1) of the TCPA90 includes sign-written fixed blinds, awnings and canopies and those with logos on them. Schedule 3 to the 2007 Regulations provides that deemed consent is granted for classes of advertisement which include advertisements on 'business premises'.

466. The PPG recommends that LPAs use their powers under s224 and 225 of the TCPA90 to control unauthorised advertisements[247]. ENs issued under s172 cannot achieve any greater control. It is an offence under s224 and Regulation 30 of the 2007 Regulations to display any advertisement that requires express consent. The 2007 Regulations also provide for the issue of Discontinuance Notices to remove lawful advertisements displayed with deemed consent.

467. However, the links between the planning and advertisement regimes through s55(5) and s222 suggest that there is nothing in law to prevent an LPA from issuing an EN against an unlawful advertisement display, or a developer from applying for an LDC under s191 or s192 to ascertain whether a display is lawful.

Planning Permissions and Conditions

Planning Permission Required – s57

468. S57(1) provides that PP is required for development, subject to exclusions in s57(1A)-(7) and Schedule 4, which sets out special provisions as to land use on 1 July 1948.

469. S58(1)(a) provides that PP may be granted by a development order, including a local, Mayoral or neighbourhood development order[248]. PP is granted under Article 3(1) of the GPDO for the classes of development set out in Schedule 2[249], but the PP does not apply if the building or use that PP is granted in connection with is unlawful[250]. A PP granted by the GPDO is 'crystallised' when the development begins or, in the case of prior approval development, when the LPA has stated that prior approval is not required

[247] PPG paragraph 18b-058-20140306

[248] See also EPLP P58.03 - P61D.02

[249] *Keenan v SSCLG & Woking BC* [2017] EWCA Civ 438

[250] *RSBS Developments Ltd v SSHCLG & Brent LBC* [2020] EWHC 3077 (Admin)

– or failed to make a determination within the specified period[251].

470. S58(1)(b) provides that PP may be granted by the LPA or SoS on application. S58(1)(c) and (d) make provisions for PP to be granted on the adoption, approval or alteration of a Simplified Planning Zone scheme or designation or modification of an Enterprise Zone.

471. A grant of PP for operational development is spent when what is permitted has been completed; the operations may only be carried out once[252]. The CoA held in *Cynon Valley BC v SSW* [1986] JPL 760 that a grant of PP for an MCU authorises that change only and not further changes. Once the MCU has been made the PP is spent.

472. A grant of PP for an MCU also does not permit the carrying out of operational development that may be incidental to the permitted use[253]. However, s75(2) and (3) of the TCPA90 provide that where PP is granted for the erection of a building, the PP may specify the purposes for which the building may be used – and if no purposes is specified, the PP shall be construed as including permission to use the building for the purpose for which it is so designed[254].

473. It was held in *Mid Suffolk DC v FSS & Lebbon* [2005] EWHC 2634 (Admin) [2006] JPL 859 that s75 applied only to buildings built with PP and not those which had become lawful through the passage of time. Moreover, in *University of Leicester v SSCLG & Wigston BC* [2016] EWHC 476 (Admin), it was held that s75(3) does not apply if PP is granted for the erection of a building with the use specified.

474. S57(2) allows reversion to the **'normal'** use after the expiry of a PP granted for a limited period. This will or should include any express PP granted subject to 'temporary' and/or 'personal' conditions. S57(3) allows for reversion to the 'normal use' where PP has been granted by development order subject to time limitations – which will include but not be restricted to the temporary PD rights set out in Part 4 of Schedule 2 of the GPDO.

475. S57(5) provides that, in determining what is or was the normal use for the purposes of subsections (2) and (3), no account shall be taken of any use begun in contravention of Part III or previous planning control. The term 'normal use', therefore, does not encompass uses which become lawful through immunity from enforcement due to the passage of time under s171B. **This is the only difference between lawfulness under s191(2) and that arising from an express or deemed PP or a pre-1948 use**.

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[251] *R (oao Orange Personal Communication Services Ltd & Others) v Islington LBC* [2006] EWCA Civ 157; the General Permitted Development Order & Prior Approval Appeals chapter gives further information on the provisions in the TCPA90 that are relevant to GPDO as well as the construction and operation of the Order itself.

[252] Unless the PP expressly authorises the repeated taking down and re-erection of what would normally be a temporary structure like a marquee that facilitates a seasonal use.

[253] *Wivenhoe Port v Colchester BC* [1985] JPL 396, affirmed in *Kane Construction v SSCLG & Nottinghamshire CC* [2010] EWHC 2227 (Admin) – see EPL P55.12

[254] "Designed" in this context means "intended", rather than "architecturally designed" (*Wilson v West Sussex County Council* [1963] 2 Q.B. [1963] 14 P&CR 301.

476. The right is not limited to immediate reversion upon expiry of the temporary PP. It may be exercised when the temporary use is actually ended, be that before or after the expiry of the permitted period; *Smith v SSE* (1984) 47 P&CR. However, in *Bramall v SSCLG* [2011] JPL 1372, it has held that in order for s57(2) to be engaged, there must be a fairly close link in time between the former use and the planning application. The right to resume a previous use following a grant of a temporary PP could be abandoned:

> '..there must necessarily come a point in time when, as a matter of interpretation, it simply cannot be said that the resumed use occurred at the end of the period during which an alternative use was authorised.'

477. S57(4) provides that where an EN has been issued in respect of any development of land, PP is not required for its use for the purpose for which (in accordance with the provisions of this Part of this Act) it could **lawfully** have been used if that development had not been carried out. The meaning of lawful use is discussed below.

478. It has been suggested that, since the words '(in accordance with the provisions of this Part of this Act)' must refer to Part III, that must mean that s57(4) does not allow reversion to a use that is lawful in accordance with the provisions of Part VII – by having gained immunity from enforcement action through the passage of time. This argument should not be accepted because s191(2) and (3) define lawfulness 'for the purposes of this Act'[255].

479. However, s57(4) does not provide for resumption of a past lawful use when there has been one or more intervening unlawful uses between that and the current unlawful use. The land may then have a nil use[256]. Where there is a right to revert to a particular use, it is essential to ensure the requirements of an EN do not purport to restrict that right; see advice on ground (f) and *Mansi*.

480. In *Stone & Stone v SSCLG & Cornwall Council* [2014] EWHC 1456 (Admin), it was found that an existing lawful use of an area of land which was authorised by PP was capable of being extinguished by the creation of a new planning unit in respect of the land in question. The EN related to land that was delineated into four areas. PP had been granted for the use of one area for residential and storage purposes; the EN alleged that the whole of the land was in such mixed use. The Inspector found that there were two planning units and these were 'new units' compared with what had existed previously. One unit was in storage use, and the other – being part of the site subject to the PP – was in residential use. The Inspector excluded that area and otherwise upheld the EN.

481. The decision was challenged on the basis that the Inspector gave inadequate reasons for finding that the PP had been extinguished. The court endorsed the Inspector's decision and held that s57(4) did not assist the appellant because it relates to whatever 'land' is the subject of the EN. Since the 'land' in this case included areas which were

[255] *Hillingdon LBC v SSCLG & Autodex Ltd* [2008] EWHC 198 (Admin)

[256] *LTSS Print and Supply Services v Hackney LBC* [1976] 1 QB 663 and *Young v SSE* [1983] JPL 677 (HoL)

not the subject of the PP, the use authorised by the PP was not a use referable to the land that was the subject of the EN. There had been an MCU of the site subject to the PP and s57(4) did not permit the use of part that site for the originally permitted use.

Interpretation of Planning Permissions

482. In ground (c) cases and LDC appeals, it may be necessary to interpret a PP, in order to decide whether it permits what is alleged or said to be lawful.

483. In *Trump International Golf Club Scotland Ltd v the Scottish Ministers* [2015] UKSC 74, Lord Carnwath held that the process of interpreting a PP should not be regarded as differing materially from that appropriate to other legal documents which must be interpreted in a particular legal and factual context. A PP is a public document which may be relied on by parties unrelated to those originally involved. The approach is to consider what the reasonable reader would understand the words to mean in the context of the overall purpose of the PP and with common sense.

484. The basic rule is that a PP should stand by itself and the meaning should be clear within the four corners of the document. The advice that follows should thus be read together with that on conditions below. Where it is necessary to interpret what is permitted, questions to ask are set out in §27 of the High Court judgment in *Winchester CC v SSCLG* [2013] EWHC 101 (Admin): what is the use permitted by the PP? Does s75(3) apply? Does the use fall within a use class? If the use is sui generis, how is it described and what is the functional significance of the words?

485. If something is not clear but the PP clearly incorporates the application and plans, they may be used as aids to interpretation or to understanding the scope of what is permitted[257]. It is usually the case that such documents are incorporated but, in *R v SSE ex parte Slough BC* [1995] JPL 1128, the CoA held that mere reference to a plan or other document was not enough to incorporate it into the PP without further clear words to that effect.

486. It was also held in *R v Ashford BC ex parte Shepway BC* [1998] EWHC 488 (Admin) that documents including an Environmental Statement that were listed in an 'Informative/Amendment' on the PP could not be incorporated so as to restrict the ambit of the operative sections of the PP.

487. However, it was noted by the CoA in *Barnett v SSCLG & East Hampshire DC* [2009] 1 P&CR 24 that *Ashford* related to an outline PP where the public could not know from the PP what was incorporated into the PP unless clearly stated on its face[258]. Every planning application must include a site plan which can necessarily be presumed to form part of the PP in accordance with statutory provision. Other plans and drawings may or may not accompany an application for outline PP (or PP for an MCU) but must

[257] *Slough Estates v Slough BC (No 2)* [1970] 2WLR 1187

[258] In *Polhill Garden Centre v SSE & Sevenoaks DC* [1998] JPL 1070, it was held that an unambiguous outline permission which included a store, where no plans or elevations had been submitted in respect of that building, allowed the developer to complete a store in any design or dimension, since these were not reserved matters.

accompany an application for full PP for building operations so far as is necessary to describe the development subject to the application.

488. On its face, therefore, a full PP for building operations does not purport to be a complete and self-contained description of the development that had been permitted. The public, reading the decision notice, would realise that it was incomplete, indeed useless, without the approved plans and drawings.

489. The interpretation of PPs was further considered in *Wood v SSCLG & the Broads Authority* [2015] EWHC 2369 (Admin). Mr Justice Lindblom held that the Inspector, in seeking to identify the lawful use of the relevant planning unit, was entitled to consider all of the public documents and drawings comprised in the relevant planning applications, as well as the decision notices. The Inspector was also entitled to have regard to the development which had in fact been carried out. The approach was not inconsistent with relevant case law.

490. The 'pragmatic' approach described in *Wood* was endorsed in *Kemball v SSCLG* [2015] EWHC 3338 (Admin) and *University of Leicester v SSCLG & Oadby & Wigston BC* [2016] EWHC 476 (Admin). The High Court held in the latter case that, in order to resolve ambiguity on the face of the PP, it is permissible to look at extrinsic evidence including but not limited to the application form and other documents, depending on the circumstances of the individual case.

Conditions[259]

Interpretation of Conditions

491. Powers to impose conditions are set out in ss91-92 and ss70, 72 and 77 of the TCPA90. S70(1)(a) provides that LPAs may grant PP 'subject to such conditions as they think fit'. Without prejudice to that 'generality', s72(1) describes that conditions may be imposed:

    (a) for regulating the development or use of any land under the control of the applicant…or requiring the carrying out of works on any such land, so far as appears…to be expedient for the purposes of or in connection with the development authorised by the permission;

    (b) for requiring the removal of any buildings or works authorised by the permission, or the discontinuance of any use of land so authorised, at the end of a specified period, and the carrying out of any works required for the reinstatement of land at the end of that period.

492. Conditions may thus restrict lawful uses[260] and GPDO and UCO rights[261]. Indeed,

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[259] See also the Conditions and Appeals against Conditions chapters plus EPL P72.06.

[260] *Kingston-on-Thames LBC v SSE* [1973] 26 P&CR 480

[261] Subject to advice in the PPG; see also the General Permitted Development Order & Prior Approval Appeals chapter.

conditions **must** be imposed on a grant of PP if the decision-maker considers it necessary to restrict or constrain the type of development or the way in which the development takes place. Absent such a condition, the PP must be carried out in accordance with the description but that may not encompass all relevant details and would not prevent subsequent change.

493. For example, where PP is granted for an MCU, a further grant of PP would be required for any subsequent MCU but that would not include, by virtue of s55(2)(f) and the UCO, a change to another use within the same use class. If an LPA wishes to control any change that is not material, it is open to them to restrict the use within the prescribed development but only by way of condition.

494. In *I'm Your Man Ltd v SSE & North Somerset DC* [1999] 4 PLR 107, PP was granted for a particular use of a building with the words 'a period of seven years' in the description. However, no condition was imposed to require the cessation of the use after that period. It was held that, in the absence of a specific condition, the PP was a permanent PP and not restricted to a temporary period.

495. Similarly, it was held in *Cotswold Grange Country Park LLP v SSCLG & Tewkesbury BC* [2014] JPL 981 that only a condition was capable of imposing a limitation on a use in law, here where PP had been granted for a holiday caravan park and the number of caravans was specified in the description but not any condition.

496. In *Winchester CC v SSCLG* [2013] EWHC 101 (Admin) and [2015] EWCA Civ 563, the LPA had granted PP for a change of use to a 'travelling showpeople's' site'. There was no condition limiting the occupation of the site to such persons but the High Court and CoA held that a travelling showpeople's site may be a separate use in planning terms. In this case, everything including the conditions pointed to the PP being for use as a travelling showpeople's site. In *I'm Your Man*, the restriction related to the manner in which the use could be exercised, not the extent of the use itself.

497. It was also held in *Wood v SSCLG & the Broads Authority* [2015] EWHC 2368 (Admin) that the principle that a limitation must be imposed on a PP by condition applies to 'substantive' as well as 'temporal' limitations. However, the *I'm Your Man* principle does not displace the effect of s75(3). If a condition is not imposed on a grant of PP for a building, it cannot be construed that PP is granted for the building to be used for a purpose that is materially different to that for which is it designed.

498. In *Lambeth LBC v SSCLG & Aberdeen Asset Management, Nottinghamshire CC & HHGL Ltd* [2019] UKSC 33, the Supreme Court considered whether a condition restricting the use of the premises should be implied into a PP granted under s73 by the LPA or, alternatively, whether the PP should be interpreted as containing such a condition. Lord Carnwath summarised existing case law on interpretation and held that:

> 'Whatever the legal character of the document in question, the starting-point – and usually the end-point – is to find "the natural and ordinary meaning" of the words there used, viewed in their particular context (statutory or otherwise) and in the light of common sense.
>
> 'The obvious, and…only natural, interpretation…is that the Council was approving what was applied for: that is, the variation of one condition from the original wording to the proposed wording, in effect substituting one for the other. There is…nothing to indicate an intention to discharge the condition altogether, or in particular to remove the restriction on sale of other than non-

food goods…'

499. The courts take a **purposive** as well as pragmatic approach to the interpretation of conditions.

- In *FSS v Arun DC & Brown* [2006] EWCA Civ 1172, for example, the CoA held that two conditions could be read together to provide a sensible meaning.
- In *Royal Mutual Insurance Society v SSCLG* [2013] EWHC 3597 (Admin), the use of a retail park was restricted to '…non- food sales only in bulky trades normally found on retail parks.' The Court held that the condition did exclude the operation of the UCO and restrict the range of goods that could be sold.
- In *Dunnett Investments Limited v SSCLG & East Dorset DC* [2016] EWHC 534 (Admin), [2017] EWCA Civ 192, it was held that a condition that 'This use of this building shall be for purposes falling within Class B1(Business)…and for no other purpose whatsoever, without express planning consent from the Local Planning Authority first being obtained' excludes any use for which deemed PP may be granted by the GPDO. An 'express planning consent from the LPA' means a grant of PP on application.

500. Taking a pragmatic approach to interpretation does not always assist LPAs. In *Telford and Wrekin Council v SSCLG & Growing Enterprises Ltd* [2013] EWHC 79 (Admin), PP had been granted for use as a garden centre subject to the condition that 'prior to the garden centre hereby approved opening, details of the proposed types of products to be sold should be submitted to and agreed in writing by the LPA.' The court held that the condition was not ambiguous and did not prohibit the sale of goods not on the list; there was a difference in meaning between 'shall' and 'should'.

501. In Swindon BC v DB Symmetry Ltd & SSHCLG [2022] UKSC 33, it was held that a condition concerning the construction of 'access roads…that serve a necessary highway purpose' could not be construed as requiring the developer to dedicate the roads as public highways. It had to be interpreted on the basis of the natural and ordinary meaning of the words, *Trump* and *Lambeth* applied. There were no words to evince an intention by the LPA to exclude rights of the landowner as in *Dunnett Investment*.[262] A condition requiring a developer to dedicate as a public highway land that they own without compensation would be unlawful.

Validity of and Tests for Conditions

502. In ground (c) or LDC cases where the LPA is concerned that there has been a breach of condition, the appellant may argue that the condition was not legally imposed and/or that it fails one the policy tests described in the NPPF and PPG. The legal and policy tests are not the same, and failure to meet all or some of latter does not necessarily

[262] The Court also held in *DB Symmetry* that 'the courts should give some weight to the expertise of an experienced and specialist planning Inspector…in the…interpretation of a planning permission'.

make a condition invalid[263].

503. The legal or *Newbury* tests were laid down by the House of Lords in *Newbury DC v SSE & Others* [1980] 2 WLR 379, [1981] AC 578 – and affirmed by the Supreme Court in *R (oao Wright) v Resilient Energy Severndale Ltd & Forest of Dean DC* [2019] UKSC 53. Conditions must be:

- Imposed for a planning purpose and no other purpose, however desirable;
- Fairly and reasonably related to the development permitted;
- Not so unreasonable that no reasonable planning authority
- could have imposed them or 'Wednesbury' unreasonable[264].

504. If a condition fails the test of 'Wednesbury' unreasonableness, on the basis that no reasonable planning authority properly directing itself could have imposed it, or is otherwise invalid, then no EN can be founded on the condition, ground (c) should succeed, and the EN should be quashed.

505. It was also established in *Newbury* that a condition cannot be enforced if the PP was not in fact required and the grant of PP does not therefore preclude the landowner from relying on pre-existing use rights and ignoring conditions imposed on the PP[265].

506. The policy tests also include that conditions must be relevant to planning and to the development to be permitted and reasonable in all other respects. It has been held that a condition which did not fairly and reasonably relate to the development permitted was invalid[266]. However, the legal and policy tests are phrased slightly differently and, in any event, a condition which is unreasonable in policy terms may not be 'Wednesbury' unreasonable.

507. A condition which is difficult to enforce would not necessarily be invalid[267]. In *Sevenoaks DC v FSS & Pedham Place Golf Centre* [2005] 1 P&CR 13, for example, a condition that did not expressly require works to be carried out in accordance with approved details was found unambiguous and valid. No extraneous words were to be implied. The LPA had simply failed to heed the policy advice about implementation clauses. However, a condition that is impossible to enforce or otherwise incomplete might be regarded as invalid on the basis of absurdity or unreasonableness in *Newbury* terms[268].

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[263] *Ashford BC v SSE* [1991] JPL 362

[264] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223

[265] Applied in *Peak Park JPB v SSE & ICI* [1980] JPL 114; see also EPL P57.08

[266] *Elmbridge BC v SSE* [1989] JPL 277

[267] *Bizony v SSE* [1976] JPL 306

[268] *Penwith DC v SSE* [1986] JPL 432, *Bromsgrove DC v SSE* [1988] JPL 257, *R v Rochdale MBC ex parte Tew*

508. A condition is only void for uncertainty if it can be given no sensible meaning[269], bearing in mind that the courts will take a purposive approach to interpretation. In *Delta Design and Engineering Ltd v SSE [2000] 4 P.L.R 1* the Court of Appeal quashed an Inspector's decision to uphold a condition requiring the removal of part of an unsightly barn in the grounds of a listed country house on a PP for its MCU. The approach that the condition would improve the appearance and setting of the listed building was contrary to the *Newbury* approach. There was no obvious connection between the change of use of the listed building and the demolition of the barn.

Particular Types of Condition

509. Where a condition is imposed on a grant of PP providing that the development should not be carried out except in complete accord with the approved **plans**, and the development is not built in accordance with those plans, there will be a BPC consisting of:

- A breach of the condition, if there are comparatively minor deviations between what was permitted and what is built – for example, if the windows are in the wrong position[270].

- Development without PP, where there is a substantial deviation from the approved plans or the building is sited in a significantly different position from that approved. None of the conditions imposed on the PP will thus have effect[271].

510. However, a 'plans' condition will not prevent – once the building is completed and occupied – the carrying out of works which are exempted from development under s55(2)(a) or which are permitted by the GPDO. Another condition would need to be imposed to prohibit such works or remove the relevant rights..

511. Where PP is granted for a use of land subject to a **time-limited** (temporary or personal) condition, the continuation of the use after the period is not development. Sir David Keene noted in *Avon Estates Ltd v the Welsh Ministers & Ceredigion CC* [2011] EWCA Civ 553 that the TCPA90 is silent as to what happens at the expiry of a temporary PP – but since s72(1)(b) provides for the imposition of a time limit and restoration condition, and a PP granted subject to such a condition is 'a planning permission for a limited period', it is implicit that the condition 'circumscribes the entire authorisation of the use' and so survives for the purposes of enforcement action.

[1999] 3 PLR 74

[269] *Fawcett Properties v Buckinghamshire CC* [1961] AC 636

[270] There is no such breach where differences between the approved and 'as built' development fell within the normal tolerances and minor variations inherent in their layout and construction; *Wycombe DC v Williams* [1995] 3 PLR 19. Plans conditions also have value in facilitating applications for non-material and minor material amendments.

[271] *Handoll & Suddick v Warner & Goodman & Street & East Lindsay DC* [1995] JPL 930

512. Where a use of land is continued after the expiry of a temporary PP, an EN should be directed against a breach of the condition that required the use to cease at a specified time. It would only be right to allege that there has been an MCU where it is clear on the facts that the use was ceased after the expiry of the temporary period, or there was an intervening MCU, meaning that the condition was complied with and the PP expired before the use was resumed.

513. There is no provision in s72 for other 'enduring' conditions to be imposed on a temporary PP. Sir David Keene's *obiter* view in *Avon Estates* was that it is 'very unlikely that the statutory scheme allows for what can be described as a permanent condition on a temporary permission, other than the time limit condition itself'.

514. In *Avon Estates*, a seasonal occupancy condition applied for the duration of the temporary PP but not beyond. The PP could not be construed such that the seasonal occupancy condition had any effect once the development had ceased to be authorised by the PP. It follows that, if any breach of the time-limiting condition becomes immune from enforcement action, other conditions on the PP cannot bite. The development is not subject to the PP but lawful.

515. PP may be sought for development of **land outside the control of the applicant**, subject to the requirements of s65 as to notifying owners. Conditions may be imposed under s70(1)(a) in respect of land within the application site at the date of the decision, or under s72(1)(a) to regulate the use or development of land under the control of the applicant, whether within the site or not[272]. Control is not limited to ownership; it may extend to some form of agreement or licence sufficient to allow the condition to be implemented[273].

516. Conditions requiring action on land outside the PP site will be valid if it can be shown that the applicant had control at the date of the decision[274]. However, a condition which affects land that is outside of the site and the control of the applicant is usually invalid[275] unless the applicant controls the activity being prohibited[276]. See advice below for dealing with a breach of a condition relating to land outside of the PP site in ground (c) and ground (a) appeals.

517. The key features of a '**Grampian'** type condition[277] are that it is negatively worded, to prohibit the commencement or occupation of the development until some specified action takes place and the required action must be land not controlled by the appellant.

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[272] *Penwith DC v SSE* [1977] 34 P&CR 269

[273] *Wimpey v SSE & New Forest DC* [1979] JPL 314

[274] *Atkinson v SSE* [1983] JPL 599

[275] *Peak Park JPB v SSE and ICI* [1980] JPL 114

[276] In *Davenport v Hammersmith and Fulham LBC* [1996] The Times 26 April 1996, the applicant was able to comply with a condition which simply required that cars are not parked on an adjacent road.

[277] *Grampian Regional Council v City of Aberdeen DC* [1984] 47 P&CR 633

Where development is commenced in breach of a Grampian condition, it will be necessary to consider whether it was a condition precedent.

518. Conditions which restrict who or how a site is **occupied** may require careful analysis, particularly in cases of historic PPs. In cases relating to agricultural occupancy conditions, the phrase 'mainly working (or employed) in agriculture' has been taken as applying to a person who spent 52% of a normal working week as a farm worker and earned less than their non-farm working spouse. Indeed, it is not necessary for the farm to make a profit.

519. The word 'dependents' should not be interpreted to only mean people who are financially dependent. As a matter of ordinary language, 'dependants' is capable of referring to relationships involving emotional support without financial dependency[278].

Commencement and Implementation

520. The words 'commencement' and 'implementation' are sometimes but ought not to be conflated. Indeed, it is important to distinguish between the beginning of development, the completion of development, and the implementation of a PP.

521. It is not enough for development to be lawfully begun in order for a PP to be considered implemented in accordance with its terms and conditions. It is possible for a developer to begin development on time but then face enforcement action in respect of some later deviation from the PP.

When Development is Begun – s56[279]

522. Where reliance is placed on an existing PP, it may be necessary to address whether the PP is extant; this may include any PP granted on the DPA under s177(5)[280]. In most cases, however, the question will be whether the development was begun within the statutory period – which will be as prescribed in ss91 for any full PP and s92 for any outline PP granted on application.

523. The starting point in such cases will be **s56(2) and (3)**, which provide that development shall be taken to be begun for the purposes of ss91 and 92 on the earliest date on which any material operation comprised in the development begins to be carried out[281]. In practice, little is needed for development to be begun under s56(2). 'Material operations'

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[278] On the facts in *Shortt v SSCLG & Tewkesbury BC* [2014] EWHC 2480 (Admin), where the agricultural enterprise was loss-making, the appellant's dependents included their spouse and children. There was no requirement of financial dependency on the face of the condition, and the inclusion of the reference to 'widows/widowers' shows that the condition was intended to include spouses without financial dependency.

[279] EPL P56.01-P56.19 contains detailed discussion on s56 considerations and case law.

[280] *Butcher v SSE & Maidstone BC* [1996] JPL 636

[281] S56(1) describes when development shall be taken to be 'initiated' for the purposes of the TCPA90 but it does not assist any determination as to when development is begun for the purposes of an enforcement or LDC appeal because the Act only uses the word 'initiated' in relation to compensation under Part V; see discussion at EPLP P56.04.

are defined in s56(4) as including the digging of a trench[282]. Works undertaken solely to keep a PP alive, when the developer has no intention of proceeding further at that time, can suffice to initiate development[283].

524. Indeed, it is only necessary for the 'material operation' to be begun to be carried out for the whole development to be taken to be begun under s56(2). A material operation does not have to be completed. Moreover, it was held in *Field v FSS & Crawley BC* [2004] EWHC 147 (Admin) that s56(2) does not, as a matter of ordinary language, exclude the possibility that the development might in fact be begun in other circumstances. For example, if PP is granted for the construction of an embankment, any work involved in executing that PP would not fall within s56(4) but would still begin the development.

525. However, it is necessary for the works carried out to be comprised in the PP and more than de minimis[284]. Where there is a dispute, the question will be whether the works were done in accordance with the relevant PP and were material as a matter of fact and degree. S56 sets an objective test and the intention of the person carrying out the development is not relevant.

526. Where the prior demolition of buildings was part of the total works necessary to undertake the development, and this was carried out by a builder and was the type of operation normally carried out by a builder, and the PP specifically authorised the demolition, those works of demolition should be taken as the start of the point at which development had begun in accordance with the PP[285].

527. In considering whether works amount to a material operation under s56(2), it not enough to list or measure any differences between what is on the ground and on the plans. It is also necessary to consider the significance of the differences – and the similarities between what has been done and what was approved. The degree of compliance with the plans is relevant, as is the degree to which the works are substantially usable in the permitted building[286].

528. In *Hussain v SSCLG* [2017] EWHC 687 (Admin), it was found that it was possible to commence a development for the purpose of s56 and thereby meet a deadline forming a condition of the planning **permission**, and then later to deviate from the permitted works in a manner that later became an enforcement issue without retrospectively altering the fact that the **commencement** of the development had occurred for s56

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[282] See *Malvern Hills DC v SSE* [1982] JPL 439 and EPL P56.09

[283] *East Dunbartonshire Council v SSS & Mactaggart Mickel Ltd* [1999] 1 PLR 53 followed in *Riordan Communications Ltd v South Bucks DC* [2000] JPL 594.

[284] *Connaught Quarries Ltd v SSETR & East Hants DC* [2001] JPL 1210

[285] *Field v FSS and Crawley BC* [2004] QBD

[286] *Commercial Land Ltd v SSTLR & Kensington & Chelsea RBC* [2002] EWHC 1264 Admin, [2003] JPL 358, also *R (oao Brent LBC) v SSCLG & Ashia Centur Ltd* [2008] EWHC 1991 (Admin), *R v (oao Imperial Resource SA) v FSS* [2003] EWHC 658 (Admin).

purposes. Although the Inspector had not expressly stated that there was no **commencement** under s56, what the Inspector had decided in substance was that works had been commenced in 2003 that s*ubsequently did not match the plans or the* ***permissions*** (see paras 45-47 of judgment).

529. For MCU cases, s56(4)(e) provides that a 'material operation' means 'any change in the use of any land which constitutes material development' – which is defined in s56(5) including as any development other than (a) that for which PP is granted by a development order for the time being in force, and which is carried out so as to comply with any condition or limitation subject to which PP is so granted. This means that development involving an MCU will be begun when the change of use begins to be made, unless the PP was granted by Order such as the GPDO.

Implementation

530. In *R (oao) Robert Hitchens Ltd v Worcestershire CC* [2015] EWCA Civ 1060, Richards LJ observed that the term 'implementation' in relation to a PP is not the subject of statutory definition. It can be used to refer to the beginning, carrying out or completion of development. In this case, the Judge rejected submissions that the word 'implementation' was used in a s106 obligation to denote 'begin'.

531. Whether a PP has been implemented is a matter of fact and degree. In *Butcher v SSE* [1996] JPL 636, it was held that a conditional permission granted previously for an MCU on a DPA under s177(5) was not implemented at once or automatically, and there had to be some conscious step towards implementation before the conditions imposed took effect.

532. Questions can arise as to whether a PP has been or can be lawfully implemented where there are or may be inconsistent PPs. It was held in *Pilkington v SSE* [1973] 26 P&CR 508 that there may be any number of PPs covering the same area but if the implementation of PP/1 in accordance with its terms and conditions would make it physically impossible to implement PP/2 in accordance with its terms and conditions, then PP/2 cannot be lawfully implemented[287].

533. In such cases, it is not enough for the two PPs to be 'incompatible'; the PPs must be so inconsistent that implementation of the first would make it physically impossible to implement the second[288]. On that basis, *Pilkington* holds and was endorsed in *Hillside Parks Ltd v* Snowdonia NPA [2022] UKSC 30.

534. The Court in *Hillside* also held that:

- express words in the master permission can make individual components of the development severable
- in a multi-unit development, part completion is not unlawful and not subject to

[287] See also *Pioneer Aggregates (UK) Ltd v SSE* [1984] 2 All ER 358, JPL 651

[288] *Prestige Homes v SSE* [1992] JPL 842

enforcement

- where implementing a later permission renders any of the earlier permission is physically impossible, the earlier permission would then become unlawful for further development (unless the incompatibility is not material in the context of the scheme as a whole)

- permission which departed in a material way from that scheme would make it physically impossible and unlawful to carry out any further development

- the later permission can be seen as authorising a variation of an earlier permission if it covers the whole site

535. It was held in *Singh v SSCLG & Sandwell BC* [2010] EWHC 1621 (Admin) that where some parts of the development are incapable of being completed and the PP cannot be implemented in its entirety, the whole development becomes unlawful.

Conditions Precedent[289]

536. In *F G Whitley & Sons v SSW & Clwyd CC* [1992] JPL 856, the CoA held that the only question, when deciding whether development was begun in accordance with a PP, is whether the development was permitted by the PP with its conditions. If the development was in contravention of a 'condition precedent', it cannot properly be described as commencing in accordance with the PP. This is the **'Whitley principle'**.

537. Cases sometimes arise – particularly where the PP is in danger of lapsing – where there is a dispute over whether the PP was begun in breach of a condition precedent. The first matter to consider will be whether the condition should be so described.

- It must **prohibit the commencement** of development until a requirement has been met – as opposed, for example, to requiring that something is done before occupation.

- It must have such significance to the PP that it **goes to the heart** of the PP as a matter of judgment.

538. If the tests are met and the condition is a condition precedent, the next question will be whether the works were carried out in breach of that condition. If the answer is yes, it is then necessary to consider whether any **exceptions** to the Whitley principle apply so that it can be found that the PP was lawfully commenced.

The Tests for Conditions Precedent

539. Woolf LJ held in *Whitley* that it is not necessary to try to determine whether the relevant condition is properly capable of being classified as a condition precedent – on the basis that what had taken place was development without PP and a breach of condition, and so enforcement action of some kind could be taken.

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[289] EPLP P56.13

540. However, in *R (oao Hart Aggregates Ltd) v Hartlepool BC* [2005] EWHC 840 (Admin), Sullivan J held that a distinction had to be drawn between a condition which required some action to be undertaken and one that expressly prohibits any development taking place before a particular requirement has been met.

541. He found that a condition will only be a condition precedent where it expressly prohibits the commencement of development and goes to the heart of the PP. If both tests are satisfied, the *Whitley* principle applies and there would be development without PP. Otherwise, there would merely be a breach of the condition.

542. The CoA endorsed and applied the tests in *Greyfort Properties Ltd v SSCLG* [2011] EWCA Civ 908. This judgment makes it clear it is not necessary for the wording of the condition to be expressly prohibitive; it is enough for the condition to be prohibitive in substance or effect. A condition that requires something to be done prior to the commencement of development' is capable of being a true condition precedent[290].

543. The CoA also found in *Greyfort* that the Inspector was in the best position to assess the importance of the condition to the PP[291]. In *Silver v SSCLG* [2014] EWHC 2929, an Inspector's conclusion that a condition went to the heart of the PP was upheld; the decision could only be challenged on grounds of irrationality. The Inspector had applied relevant principles and was best placed to judge.

544. Whether a condition should be found prohibitive may depend on the precise language used. It is also a matter of judgment whether a condition goes to the heart of the PP, but where it concerns some minor detail such as boundary treatment, it is unlikely that a breach would render the whole development unlawful.

Exceptions to *Whitley*

545. In *Whitley*, the principle that the development was undertaken without PP was disapplied on the basis that there was an exception to be made. The condition required that a scheme be submitted for approval. The appellant submitted the requisite details in time – but the scheme was not approved until the date for implementation of the PP had passed. The EN was issued later. The CoA held that, once the scheme was approved, the works were not enforceable against and the development had been validly commenced.

546. Thus, *Whitley* established the principle that development begun in contravention of a condition is development without PP, and it established an exception: if the condition requires that something is approved before a given date, and the developer applies for that approval before that date, and the approval is subsequently given so that no

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[290] In *Greyfort*, the appellant challenged an appeal decision that a PP had not been lawfully implemented and had lapsed. The PP was subject to a condition that: '*before any work is commenced on the site the ground floor levels of the building hereby permitted shall be agreed with the LPA in writing'*. The CoA held that the prohibition applied to the access works carried out and the Inspector was entitled to find the requirements of the condition fundamental to the development permitted.

[291] Earlier in *Leisure GB Plc v Isle of Wight* [1999] 80 P&CR 80, Keene J held that it was not for the court to assess the importance of the conditions to the works undertaken.

enforcement action could be taken, work that is carried out before the deadline and in accordance with the ultimately approved scheme can amount to a lawful start to development.

547. The courts have in subsequent cases applied the *Whitley* principle flexibly, recognising the need for some latitude in the timing of major developments provided there is no prejudice to the purpose of the conditions. While there were some differences on the facts, *Agecrest v Gwynedd CC* [1998] JPL 325 and *R v Flintshire ex parte Somerfield Stores* [1998] PLCR 336 established exceptions where the LPA agreed the development could start without full compliance and the condition had been met in substance but not in form.

548. However, it should be noted that, in *Agecrest*, PP had been granted in 1967 when the statute contained no equivalent of s73. In *Henry Boot Homes Ltd v Bassetlaw DC* [2002] EWCA Civ 983, the CoA rejected the developer's attempt to rely on the fact that the Council had previously 'waived' breaches of conditions. There is no general power for an LPA to 'waive' such breaches, and s73 and s73A now provide the means to deal with any need for flexibility in conditions.

549. As noted above, the CoA also upheld the Inspector's finding that development was begun unlawfully in breach of a condition precedent in *Greyfort*. In *Hart Aggregates*, however, it was found that it would be an abuse of power to seek to deny that a PP had been lawfully implemented some 30 years.

550. It was also held in *Ellaway v Cardiff CC* [2014] EWHC 836 that it would be legitimate to rely on the *Whitley* exception to validate works undertaken prior to lawful discharge in an EIA case. *Whitley* is consistent with the Directive, the terms of the exception are clear and self-contained, and it is obvious when the exception will apply. The exceptions to the *Whitley* principle are not closed, but it does not follow that these will be unpredictable or uncertain.

Lawful Uses and Loss of Lawful Use Rights

Lawful Uses

551. S191(2) provides that, for the purposes of the TCPA90 – and not simply Part VII – uses and operations are lawful at any time if:

(a) no enforcement action may then be taken in respect of them (whether because they did not involve development or require PP or because the time for enforcement action has expired or for any other reason); and

(b) they do not constitute a contravention of any of the requirements of any EN or BCN then in force[292].

[292] Under s191(3), a failure to comply with a condition is lawful at any time if (a) the time for enforcement action has expired and (b) it does not constitute a contravention of any of the requirements of any EN or BCN then in force.

552. With regard to 'any other reason', EPLP P57.04 indicates that a use is lawful for the purposes of s57(4) in these circumstances:

- The change to that use was made with the benefit of express or deemed PP and continuance of the use is in accordance with the terms of the PP. Failure to comply with a condition does not render a use unlawful except with conditions precedent.
- The use was commenced before 1 July 1948 and has continued without abandonment or extinguishment.
- The use was the 'normal use' on 1 July 1948, but the land was then being used temporarily for another purpose, and it was resumed before 6 December 1968. This provision only applies where there was a normal use and temporary use on the appointed day and that arrangement still prevails when the normal use was resumed.
- It was the last use or an 'occasional use' of the land on 1 July 1948, but the land was then unoccupied, and it was resumed before 6 December 1968.
- It was the 'normal use' resumed in accordance with s57(2) or s57(3) and s57(5).
- If no enforcement action may be taken in respect of it and its continuance is not in breach of an EN in force; s191(2).
- If an LDC is in force, in which case lawfulness is to be conclusively presumed; s191(6)[293].

553. A use that commenced before 1 July 1948 (the appointed day) is lawful under the TCPA90. Its use rights could only be lost through abandonment, a subsequent MCU, implementation of a PP that required the lawful use to cease, or by condition. However, the former distinction between lawful and 'established' uses will still be relevant in some cases with long histories.

554. It was held in *Panton & Farmer v SSETR & Vale Horse DC* [1999] JPL 461 that a use may be regarded as 'existing' and lawful even if it is dormant or inactive, for example, following the death of the landowner. However, the use must have become lawful before it fell dormant, and lawful use rights must not have been lost.

Established Uses

555. The amendments to the TCPA90 made by the PCA91 included the addition of s171B and substitution of ss191-194. The amendments came into force on 27 July 1992 and are not retrospective in effect, meaning that previous immunity periods can still be relevant.

[293] An LDC is not the equivalent of a PP except, under s191(7), for the purposes of s3(3) of the CSCDA68, s5(2) of the Control of Pollution Act 1974 and s36(2)(a) of the Environmental Protection Act 1990.

556. Prior to 27 July 1992, the limitation period was four years for operations; breaches of conditions relating to operations, including conditions requiring demolition; and for the making of an MCU to use as a single dwellinghouse and breaches of conditions precluding such a change; s172(4) of the TCPA90 as originally enacted.

557. All other changes of use could only be found to be immune if it was shown that the BPC had taken place prior to 1 January 1964 and continued from then; s174(2)(e) as originally enacted. Even then, the use would remain unlawful – but it could be subject to an Established Use Certificate (EUC); s191 as originally enacted.

558. If a use began **before** the end of 1963 and gained immunity as an 'established use', it would have remained immune unless it was abandoned, superseded by an MCU, or extinguished by a requirement of a subsequent PP that had been implemented. This would be the case even if the use had become dormant by 27 July 1992 and whether or not an EUC had been granted[294].

559. However, the ten year rule set out under s171B(3) does not apply to periods of active use that commenced **after** the end of 1963 and ceased before 27 July 1992[295]. Accordingly, because no lawful use rights would have accrued and such a use could not have continued as a 'dormant' use, the cessation of the use would simply have meant that the particular BPC had come to an end.

560. Existing EUCs continue to have effect and the immunity they grant was carried forward via SI 92/1630. It follows that no enforcement action may be taken against any use subject to an EUC and so the use would now be considered lawful under s191(2)(a) – unless there is an EN in force, invoking s191(2)(b).

Loss of Lawful Use Rights

561. Lawful use rights may be lost:

a) By Discontinuance Order made under s102 or in accordance with a planning obligation made under s106.

b) By express condition on a subsequent PP[296] unless the *Newbury* principle applies. The condition must be valid and will not bite in any event if the PP itself is not required.

c) By an MCU to some other use. It was held in *Stone & Stone v SSCLG & Cornwall Council* [2014] EWHC 1456 (Admin) that an existing lawful use of land which is authorised by PP is capable of being extinguished by the creation of a new PU in respect of the land in question. The service of an EN, however, may allow a landowner to revert to the previous lawful use through

[294] *Panton & Farmer v SSETR & Vale Horse DC* [1999] JPL 461

[295] *R (oao Colver) v SSCLG & Rochford DC* [2008] EWHC 2500 (Admin)

[296] *Peak Park JPB v SSE* [1980] JPL 114

the provisions of s57(4)[297].

d) By the implementation of an inconsistent PP or the carrying out of acts inconsistent with the continuation of a lawful use.

e) By abandonment.

f) Following the issue of an EN which is not appealed on grounds (c) or (d), given the effect of s285(1)[298]

562. A use cannot survive the destruction of buildings and installations necessary for it to be carried on[299]. If a PP is implemented for a new building to be put to a new use, the previous use rights on the site will be expunged[300]. However, a replacement building can be put to the existing lawful use of the planning unit[301].

563. Where a building is demolished and replacement buildings are erected without the benefit of PP, the only lawful use is that of the land. There are no existing rights to have buildings on the site[302].

Abandonment[303]

564. The mere cessation of a use is not development, but the concept of abandonment applies if a building or land 'remains unused for a considerable time, in such circumstances that a reasonable man might conclude that the previous use had been abandoned'[304].

565. It is not enough, certainly where PP was granted, for a use simply to have been allowed to dwindle away without being extinguished by another use[305]. Abandonment involves a cessation of use in such a way and for such a time as to give the impression to a reasonable onlooker, applying an objective rather than a subjective test, that it was not

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[297] *Fairstate Ltd v FSS & Westminster CC* [2005] EWCA Civ 238

[298] *Staffordshire CC v Challinor* [2007] EWCA Civ 864, [2008] JPL 392 and *Wokingham BC v Scott* [2017] EWHC 294

[299] *Iddenden v Secretary of State for the Environment*. [1972] 1 WLR 1433.

[300] *Petticoat Lane Rentals v SSE* [1971] All ER 310

[301] *Jennings Motors v SSE* [1982] JPL 181

[302] *Hancock v SSCLG & Windsor and Maidenhead RBC* [2012] EWHC 3704

[303] EPLP P57.08

[304] Lord Denning in *Hartley v MHLG* [1970] 1QB 413

[305] *Stockton-on-Tees BC v SSCLG & Ward* [2010] EWHC 1766 (Admin)

to be resumed[306]. The land may be left with a nil use[307].

566. In *Trustees of Castell-y-Mynach Estate v Taff-Ely BC* [1985] JPL 40, the Court suggested four criteria for abandonment:

- The period of non-use
- The physical condition of the land or building
- Whether there had been any other use, and
- The owner's intentions as to whether to suspend the use or to cease it permanently.

567. The CoA held in *Hughes v SSETR* [2000] 80 P&CR 397 that the test of the owner's intentions should be objective and not subjective. The intentions of Mr Hughes and the previous owner, although relevant, could not be decisive, because the test was the view to be taken by a reasonable man with knowledge of all the relevant circumstances. Evaluating all four factors, the Inspector was entitled to conclude that the residential use had been abandoned.

568. In *Bramall v SSCLG* [2011] JPL 1373, Wyn Williams J affirmed the four criteria of abandonment, and that the weight attached to each of the pillars is a matter of judgment for the decision-maker. The task on the issue of the owner's intentions is to discern whether or not they intend to resume the active use of the land in question.

569. The concept of abandonment does not apply to uses that have not acquired lawfulness. In essence, the concept is that the lawful use of land is capable of being abandoned and those rights lost[308]. A use certified as lawful through an LDC can be abandoned later since all that the LDC does is certify lawfulness at the date of application.

570. Abandonment does not apply where PP is granted and capable of implementation for operational development[309]. But rights acquired through a grant of PP can be lost by means a) to d) set out above.

Illegality

571. Where an EN relates to development which is unlawful, such as the stationing of a caravan for human habitation without a site licence, or operating a waste management or disposal site without a licence, the LPA may cite *Glamorgan CC v Carter* [1962] 14 P&CR 88 as authority for the proposition that it is not possible to acquire a legal right by

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[306] *Nicholls v SSE & Bristol CC* [1981] JPL 890

[307] see also [1990] JPL 526 and [1993] JPL 964

[308] *M & M (Land) Ltd v SSCLG* [2007] All ER(D) 55

[309] *Pioneer Aggregates (UK) Ltd v SSE* [1984] JPL 651

reason of an unlawful act.

572. However, *Glamorgan* applies only to unlawfulness under the planning legislation, that is, the TCPA90 and subsidiary legislation. Unlawfulness under other legislation does not prevent success on ground (d) or any other ground of appeal and does not prevent the grant of an LDC. Thus, a caravan or waste disposal site, though unlawful under other legislation, can become immune from planning enforcement action through the passage of time.

573. Where unlawful conduct arises under the TCPA90, however, normally where the development is in breach of the requirements of an effective EN, it cannot become lawful given the provisions of s191(2)(b).

Ground (e)

574. Ground (e) is that copies of an EN were not served as required by s172. For any appeal proceeding on ground (e), see advice above on the service of an EN and who may appeal.

575. Ground (e) may be pleaded where the appellant considers that:

- A copy of the EN was not served on every owner and/or occupier of and/or person having an interest in the land;
- The EN was served more than 28 days after its date of issue or less than 28 days before the date specified as the date for taking effect;
- The appellant was not served with a correct copy of the EN;
- The LPA did not follow the mechanics of service proscribed in s329 of the TCPA90.

576. In many cases, ground (e) appeals cannot succeed because of the provisions in s176(5)[310]. If an appellant claims they were not served as required by s172 but they received a correct copy of the EN and made a valid appeal, it will make little difference as to whether they were properly served. The Inspector is normally bound to conclude that they were not substantially prejudiced.

- In *Skinner & King v SSE* [1978] JPL 842, one EN alleging an MCU of a complex of buildings was served on the owner, while other ENs referring to specific activities were served on each of the tenants. It was held that no party was substantially prejudiced by the failure to serve identical ENs on each.
- In *Mayes v SSW* [1989] JPL 848, an Inspector reported that individual 'teepee wigwam' occupiers had been substantially prejudiced by failure to serve them

[310] Where it would otherwise be a ground for determining an appeal under s174 in favour of the appellant that a person required to be served with a copy of the EN was not served, the SoS may disregard that fact if neither the appellant nor that person has been substantially prejudiced by the failure to serve them.

with copies of the EN. The SSW agreed but gave them opportunities to make written representations before dismissing the appeal, and the Court upheld that decision.

- An Inspector's decision that ground (e) should fail was also upheld in *Dyer v SSE and Purbeck DC* [1996] JPL 740, where the EN was allegedly served only three working days before it came into effect. In this case, however, there was evidence that the EN had previously been served by recorded delivery and the appellant had failed to collect the letter.

577. Moreover, there are limits to how far the LPA need go in identifying the owners, occupiers and persons having an interest in the land[311]. It was held in *Newham LBC v Miah* [2016] EWHC 1043 (Admin) that a land registry address is proper service if an LPA has not been given another. The LPA does not need to check the records of other Council departments; the statutory framework points to the knowledge of the LPA as relevant for the service of the EN[312].

578. However, (e) is the first ground considered in an appeal decision because it would be unjust to proceed further, and the EN must be quashed, if it is found that the EN was not properly served and an owner, occupier or person having an interest in the land was substantially prejudiced. This may be the case, for example:

- If it becomes apparent that persons who should have been served were not and have not appealed, or

- An incorrect copy of the EN was served, leading some recipients to make no appeal at all, or not plead grounds that they would have wished to argue had they received the right EN – bearing in mind that ground (a) cannot be added or reinstated if the deadline for payment of the fee has lapsed.

579. While the powers are discretionary, LPAs are advised to issue a PCN under s171C or a Requisition for Information under s330 of the TCPA90 prior to the service of an EN, in order to discover who the relevant owners, occupiers and persons with an interest (and entitlement to appeal) are. Where ground (e) is pleaded – except where it is obvious that any failure to serve can be disregarded by virtue of s176(5) – the Inspector should generally ask for a copy of any PCN and reply received to it, plus evidence of personal or postal service including where necessary the affixation of the notice to some object on the premises, as required by s329.

580. It may sometimes be appropriate to afford someone who would otherwise be substantially prejudiced the opportunity to prepare a case against the EN. This may be achieved by giving them (and perhaps other parties) time to make late representations or by adjourning the hearing or inquiry. However, this course of action will not always be appropriate, particularly if the person might have reasonably pleaded ground (a) and

[311] Notwithstanding that LPAs 'must carry out adequate prior investigation' before taking enforcement action – paragraph 16-048-20140306 in the PPG on Appeals.

[312] See also *Oldham MBC v Tanna* [2017] 1 WLR 1970

that cannot now be introduced. The Inspector should then quash the EN, noting the provisions under s171B(4) for the LPA to issue another EN.

Ground (b)

581. Ground (b) is that those matters [stated in the EN] have not occurred. This ground applies where the appellant considers that

- What is alleged by the EN has not in fact happened.
- The EN recites the wrong breach, such as an MCU instead of a breach of condition[313] or a breach of condition but no condition imposed actually prohibits what has occurred.
- Misstatements of fact in the allegation can be the subject of an appeal on ground (b), but do not necessarily defeat the EN, given the power to correct any "misdescription" in s176(1)(a).

582. The EN may not be issued until sometime after the breach was detected. In the meantime, the appellant may make changes on site, curtail their activity and claim – rightly or not – that the breach has ceased. It makes no difference whether the breach has been genuinely stopped or not. S174(2)(b) is worded in the past tense, and the question is whether the breach **had** occurred by the **date of issue** of the EN. If the alleged activities or structures had been on the site, an appeal on ground (b) cannot succeed simply on the basis that the activities or structures were removed. The last use of the site will have been the unauthorised use that is subject to the EN, and breach will have occurred as a matter of fact (on which, if necessary, reasonable inferences may be drawn on the balance of probability from the available evidence).

583. Even where the dispute is whether the matters 'had' occurred, in line with wording of the Act, ground (b) can be straightforward – and any finding in favour of the appellant may result in the EN being corrected rather than quashed. The appeal on ground (b) may 'succeed in part' or 'succeed to this extent', for example, where the appellant claims that an EN concerned with an MCU describes the wrong existing use.

584. However, determining a ground (b) appeal can sometimes involve consideration of complex and/or competing factual evidence. If you find that the allegation is wholly wrong, the appeal should succeed on ground (b) and the EN should be quashed, unless it can be corrected without causing injustice.

585. It is not unusual for appellants to raise nullity or invalidity issues under ground (b). It is also common for appellants to confuse grounds (b) and (c) and indeed it can be sometimes simpler to deal with these two grounds together, rather than trying to disentangle them. The wording of ground (c) allows for this pragmatic approach: 'that those matters (if they occurred)…'.

[313] *Young v SSE & N Warwickshire DC* [1990] JPL 673

586. However, if it is argued for ground (b) that an alleged change of use was not 'material', the correct approach is normally to treat this as pertaining to [a hidden] ground (c). This is because the question of materiality goes to whether PP is required and there has been a breach of planning control. If the appellant refutes that there has been an MCU but not that the alleged use is taking place, they are unlikely to have shown that the matters did not occur.

Ground (c)

587. Ground (c) is that those matters (if they occurred) do not constitute a BPC. This is the most frequently advanced legal ground of appeal. The matters alleged will not constitute a BPC if PP is not required or is already granted, perhaps because:

- What is alleged is not 'development' as defined by s55(1) – for example, the change of use was not material.
- What is alleged is exempted from development under s55(2) – for example, the works did not materially affect the external appearance of the building or is a change within a use class.
- What is alleged has been found to be lawful – perhaps because an LDC which relates to the same development (as a matter of fact and degree) was correctly issued and remains in force.
- What is alleged was resumption of the normal use or the last lawful use as defined by s57(2) or (4) respectively.
- What is alleged is permitted by the GPDO or other Order and the PD right was not removed by, for example, a planning condition or an Article 4 Direction.
- What is alleged complies with the terms and conditions of a PP

and…

- …The PP is extant, with the development having been instigated or begun under s56 during the relevant period and…
- …The development was not commenced in breach of a 'condition precedent'.
- In a breach of condition case, the condition was complied with or not valid, or the PP was not implemented.

588. S174(2)(c) is worded in the present tense: '…do not constitute a breach…' An appellant may rely upon matters occurring since the date of issue of the EN to show that, at the time of the decision, what was alleged does not amount to a BPC[314]. It is crucial in such cases that the development is that which was alleged when the EN was issued and not

[314] *Bury MBC v SSCLG & Entwistle* [2011] EWHC 2192

some subsequent altered development.

589. The wording of ground (c) does not help the appellant, however, where it is claimed that what is alleged is PD. Since the GPDO does not grant retrospective PP, the development undertaken would need to have been permitted by the GPDO in force when the development was begun or the PP was 'crystallised' – and you may need evidence as to when that was. The development must not have been precluded by Article 3(5) and it must have complied with the conditions and limitations to PD, particularly any requirement to seek prior approval before beginning the development.

590. In breach of condition cases, it is necessary to find that a condition was invalid in law for the EN to be quashed. If a condition was valid on its face but in some respect 'inappropriately imposed', there is more likely to be success on ground (a) rather than (c)[315].

591. That will be the case where the breached condition requires the carrying out of works or activity on land outside of the PP site and the appellant is unable to comply with the condition or, therefore, the requirements of the EN. If the condition was not reasonable or necessary for PP to be granted, the simplest solution will be to grant PP without the condition. However, if the condition falls to be considered on ground (c), the appeal will succeed and the EN will be quashed if the condition was invalid in *Newbury* terms.

592. The outcome will be the same if the condition was a condition precedent or had some fundamental link to the development permitted. In such a case, the EN should have alleged the carrying out of development without PP rather a breach of condition – and the EN should require the removal of the development or cessation of the use permitted, rather than the carrying out of works or activity as required by the condition. The appeal should succeed on ground (c) on the basis that the EN cannot be corrected without causing injustice to the appellant, and so the EN is invalid[316].

593. S177(1)(b) empowers the SoS to discharge a condition on the determination of an appeal under s174; the power is not limited to ground (a) or discharge on the merits. So there may be a question as to whether a condition could be discharged on grounds of invalidity – but if a condition is invalid, it is not a condition at all. Inspectors should decline to discharge any condition found to be invalid via ground (c), on the basis that there is nothing capable of being discharged under s177(1)(b) and no other condition may be substituted for it under s177(4).

594. Any finding that a condition is invalid in law may raise questions as to validity of the PP, and whether the development was constructed unlawfully but is now immune from enforcement. Where an EN which alleges a breach of condition is quashed through success on ground (c), the decision may serve as an issue estoppel should a party seek to re-open such legal issues in the future[317].

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[315] See, for example, *Banister v SSE & Fordham* [1995] JPL 1011.

[316] Even though such a decision may lead to the LPA issuing another EN that requires the use to cease.

[317] The same does not apply if an EN alleging a breach of condition is quashed pursuant to success on ground

Ground (d)

595. Ground (d) is that, at the date the EN was issued, no enforcement action could be taken in respect of any BPC which may be constituted by the matters. In other words, it is claimed that what is alleged is immune from enforcement action, having subsisted for the four or ten year time limit periods laid down by s171B.

Operational Development – s171B(1)[318]

596. S171B(1) provides that no enforcement action may be taken in respect any unauthorised operational development after the end of the period of four years beginning with the date on which the operations were 'substantially completed'.

597. The phrase 'substantially completed' must be taken as having the meaning established by Lord Hobhouse in *Sage v SSETR & Maidstone BC* [2003] UKHL 22: in the case of building operations, what is required is 'a fully detailed building of a certain character'. PP is not granted for structures which are incomplete. If a building operation is not carried out, internally and externally, fully in accordance with the PP, the whole operation is unlawful.

598. In *Sage*, the alleged building had no glazing, guttering, ground floor, access to the first floor, service fittings or internal finishes. The appellant argued that such works would be exempted from development under s55(2)(a)[319]. The HoL held that s55(2)(a) applied only in cases where the building is completed and then altered or improved. A building could not be regarded as substantially completed for the purposes of s171B(1) even if outstanding works affected only the interior.

599. For an appeal to succeed on ground (d), the whole of the alleged development must be substantially completed and the EN may require the removal of all works[320]. It was held in *Singh v SSCLG & Sandwell BC* [2010] EWHC 1621 (Admin) that a development must be regarded holistically. Where some parts are incapable of being completed then the whole development becomes unlawful.

600. However, where it is alleged that there has been more than one operation, the first may be outside and the second inside the four year period[321] and there may be partial success on ground (d), so the EN is corrected rather than quashed.

601. A building must be substantially completed in order for PD rights to become available.

(a).

[318] EPLP P171B.06

[319] The CoA held in *Sage* that 'substantially completed' would mean the development 'has reached the stage at which no further planning permission would be required for any of the works being done to it'. That judgment was applied in *R (oao Watts) v SSETR* [2002] JPL 1473 but overturned by the HoL in *Sage* in April 2003.

[320] *Ewen Developments v SSE* [1984] JPL 439

[321] *Worthy Fuel Injection v SSE* [1983] JPL 173

For example, works that ordinarily permitted under Part 1 of the GPDO to a dwellinghouse will not apply unless the dwelling has been substantially completed in *Sage* terms[322]. It should also be noted that PD rights do not apply to unlawful buildings under Article 3(5)(a) of the GPDO.

Change of Use to a Dwellinghouse – s171B(2)[323]

The Application of s171B(2)

602. Under s171B(2), no enforcement action may be taken after the end of the period of four years beginning with the date of the breach consisting in the change of use of any building to use as a single dwellinghouse. The phrase 'beginning with the date of the breach' is not the same as 'ending with the date of the EN' and so it may be necessary in some cases to go back more than four years to determine when the BPC took place.

603. S171B(2) applies where a building is being used as a dwellinghouse in breach of a condition which serves to prevent that use[324]. The condition need not expressly 'prevent use as a dwellinghouse'; it may require, for example, that the building is only used for purposes incidental to an existing dwellinghouse in what is or was the same planning unit. For the four year rule to apply, the condition being breached must have the effect of preventing the change of use described in s171(2).

604. The four year rule in s171B(2) applies to ENs concerned with an MCU of a single dwellinghouse to flats or some other subdivision of a residential building. The word 'building' in s171B(2) must be read as defined in s336(1) as including any part of a building, and flats are dwellinghouses for the purposes of the TCPA90. In such cases, each alleged flat has the protection of the four year rule[325]. In *Moore v SoS [1998]JPL 877 it was said that the distinctive* characteristics of a dwellinghouse were its ability to afford the facilities required for day-to-day private domestic existence.

605. However, s171B(2) does not apply in cases where there has been a change of use to an HMO or some other residential use where units are not self-contained[326]. Even if there been an MCU to a use within class C4, that is, 'use **of** a dwellinghouse…as a' HMO, there will not have been a change of use **to** a single dwellinghouse. The ten year rule set out under s171B(3) will apply in such cases.

606. S171B(2) is also disapplied in cases where the building was constructed unlawfully and

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[322] *R (oao Townsley) v SSCLG* [2009] EWHC 3522 (Admin); see also *Arnold & Arnold v SSCLG* [2015] EWHC 1197 (Admin), [2017] EWCA Civ 231; [2017] JPL 923 and the General Permitted Development Order & Prior Approval Appeals chapter.

[323] EPLP P171B.07

[324] *FSS v Arun DC & Brown* [2006] EWCA Civ 1172

[325] *Van Dyck v SSE, Doncaster MBC v SSE* [1993] JPL 565

[326] See [1997] JPL 371, where a bed-sitting room which did not have exclusive use of a WC was held not to be a flat and therefore not used as a dwellinghouse.

used as a single dwellinghouse from the outset, meaning that there was no change of use. That was the case in *Welwyn Hatfield BC v SSCLG & Beesley* [2011] UKSC 15, where PP had been granted for the construction of a barn and the building was constructed to look like a barn, but it was built for use, and so used as a dwelling.

607. Lord Mance held in *Welwyn Hatfield* that s171B(2) was not apt to encompass the use of a newly built house as a dwellinghouse. A change of use for the purposes of s171B(2) could not consist of a simple departure from permitted use. The word 'use' in the section is directed to real or material use, not permitted use[327].

608. The implication of *Welwyn Hatfield* is that the ten year rule under s171B(3) applies in cases where a building is unlawfully used as a dwellinghouse from the outset. Indeed, it had previously been held in *Mid Suffolk DC v FSS & Lebbon* [2006] JPL 859 that a building may become immune from enforcement action within four years under s171B(1) although its use remains liable to enforcement action.

609. However, LPAs can face difficulty in drafting the allegation for an EN in such cases. The EN must allege a BPC, meaning development without PP. Whereas an MCU is development, 'use' is not. If a building has been used as a dwellinghouse from the outset, and there has been no change of use, an EN which alleges that there is 'use as a dwellinghouse' will not describe development. It may not be possible to enforce against the building if four years have gone.

610. In cases where the land was formerly in a non-residential use, there may have been an MCU of the land on which the building was constructed and then ground (d) may be properly considered on the basis of s171B(3) and the ten year rule. The position may be less clear where the planning unit was already in residential use and the use of the new building is not in breach of any condition imposed upon the grant of PP for the erection of that structure.

611. Lord Mance suggested at para 17 in *Welwyn Hatfield* that once an LPA 'has allowed the four year period for enforcement against the building to pass, principles of fairness and good governance could, in appropriate circumstances, preclude it from subsequently taking enforcement steps to render the building useless'. However, that is a matter for LPAs and questions of fairness do not come into ground (d). Ultimately, the approach to be taken where a building was used as a dwellinghouse from the outset, and more than four years but fewer than ten have elapsed since the BPC, is only likely to be resolved by a further court decision on the topic.

The Approach in s171B(2) Cases

612. Where ground (d) is pleaded for any change of use of a building to a dwelling, as with any MCU falling to be considered under s171B(3), there will be two questions to address:

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[327] Lord Mance's position in Welwyn was supported in an obiter dictum remark by Supperstone J in *Lawson Builders Ltd & Lawson & Lawson v SSCLG & Wakefield MDC* [2013] EWHC 3368 (Admin). That point was not taken further in the CoA judgment on Lawson [2015] EWCA Civ 122.

- The date of the breach, or when the change of use took place

and

- Whether the use continued throughout the requisite period.

613. To determine the date of a change of use of a building to a dwellinghouse, regard should be had to two factors, neither of which is decisive[328]:

- When the building provided viable facilities for living, with regard to the *Gravesham* characteristics of a dwellinghouse.

- When the use actually commenced.

614. A building may provide viable facilities for habitation before all physical works are completed. The question is whether the building was capable of being used as a dwellinghouse as a matter of fact and degree, bearing in mind that it is possible to find that a change of use took place before the building was actually occupied.

615. Lord Mance held in *Welwyn Hatfield BC v SSCLG & Beesley* [2011]UKSC 15 that 'too much stress… [has] been placed on the need for "actual use"…it is more appropriate to look at the matter in the round and to ask what use the building has or of what use it is.' Thus, it is incorrect to regard the commencement of residential use as automatically giving rise to the change of use – or, conversely, to conclude that there had not been a change of use because the building was not actively occupied as a dwellinghouse.

616. However, it may be difficult for an appellant to show that a change of use occurred only through physical works. 'Actual use' remains a factor and must be more than squatting or camping out[329]. It is necessary to look at the evidence in the round with regard to the former use of the building, the physical state of the building at the relevant date, the actual use of the building at that date[330], the intended use and the whole chronology. Intended use should be considered objectively and with regard to evidence of, for example, any active marketing of the dwelling for sale or let.

617. Turning to **continuity**, it was held in *Thurrock BC v SSETR & Holding* [2002] EWCA Civ 226 that a use can only become lawful if it continues throughout the relevant immunity period, such that the LPA could have taken enforcement action at any time. A use may only be dormant in *Panton & Farmer* terms if it has acquired lawfulness. If a use that is taking place in breach of planning control is ceased, the immunity 'clock' would need to start again.

618. *Thurrock* was applied in *Swale BC v FSS & Lee* [2005] EWCA Civ 1568, where it was held that there is a difference between an established dwellinghouse, when an occupier

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[328] *Impey v SSE & Lake District SPB* [1981] JPL 363, [1984] 47 P&CR 157 and *Backer v SSE* [1983] JPL 167

[329] *Backer v SSE* [1983] JPL 167

[330] Not likely to be a nil use.

does not have to be continuously or even regularly present in order for the building to remain in use as a dwellinghouse, and where there is no established use. To be immune from enforcement action under s171B(2), the use of a building as a dwellinghouse must be 'affirmatively established' over the four year period.

619. Accordingly, the correct approach in such ground (d) cases is to ask is whether there was any time during the relevant four year period when the LPA could not have taken enforcement action against the use of the building as a dwellinghouse, even if it was available for use, because it was not actually occupied or used as a dwelling.

620. It must be adjudged whether any period of non-occupation was *de minimis*. It may not be fatal if a few days elapse between one tenant moving out and another moving in, particularly works to further the breach, such as redecoration, took place during that time[331]. However, a break that is significant as a matter of fact and degree will result in the four year clock starting again.

621. The critical question is whether the use was continuous, not whether the building was continuously fitted out or intended for residential use. In *Islington LBC v SSHCLG & Maxwell Estates* [2019] EWHC 2691 (Admin), the Inspector erred by considering whether the building remained a dwelling in *Gravesham*, *Impey* and *Welwyn Hatfield* terms, and not applying the principles established in *Thurrock* and *Swale* to the question as to whether there was an interruption in continuous use.

Any Other MCU – s171B(3)[332]

622. S171B(3) applies to any BPC consisting of an MCU of land and/or buildings, except for a change of use of a building to use as a single dwelling, and it provides that S171B(3) provides that no enforcement action may be taken after the end of the period of ten years beginning with the date of the breach.

623. A comparison must be made between the use as it existed on the date that the EN was issued, and as it existed ten years before. Consideration must be given to the relevant planning unit and its primary use over the relevant period. As with s171B(2), it may be necessary to go back more than ten years to establish when the BPC began – and to consider not only when the MCU took place, but whether the use continued for a ten year period.

624. Regard should be had to advice above as to what is meant by a material change of use, because it may be necessary to decide whether what occurred at a particular point in time was material. For example, the question may be when a change in the scale of a use amounted to an MCU, whether there was a change of use within the same use class, or whether an incidental use became a primary use, either in a separate planning unit or as a new element in a mixed, dual or composite use within the ten year period.

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[331] See *Basingstoke and Deane BC v SSCLG & Stockdale* [2009] EWHC 1012 (Admin) – although this case concerned a breach of condition, and the question was whether there had been a continuous breach of the condition, rather than continuous occupation.

[332] EPLP P171B.08

625. Where an additional primary use (C) is added to an existing mixed use (A+B), the comparison is to be made between mixed use A+B and mixed use A+B+C. If they are materially different, there would be an MCU of the whole planning unit to a different mixed use[333]. The appellant will need to show that the MCU to the new mixed use occurred more than ten years before the date of the EN, and that A+B+C then continued for a ten year period. It does not matter how long the original uses continued for unchanged.

626. It is open to an Inspector to find that no BPC occurred when a new use was only of a 'casual intermittent and insignificant' nature[334]. But once there has been an unauthorised MCU, the question arises as to whether it took place substantially uninterrupted for ten years, with the test being whether the LPA could have taken enforcement action against the use at any time in the period[335].

627. An interruption in the ten year period can take the form of some cessation in activity or change to the character of the use or size of the planning unit. The break must be minor if it is not to be fatal to a ground (d) appeal. A short suspension in activity during a change of ownership or period of illness, or non-material fluctuations in the scale of a use will not usually stop the clock. Where a change of use during the period did not comprise development or require PP, immunity can be claimed for the use subsisting at the date of issue of the EN on the basis that the original BPC took place more than ten years ago and there has been no MCU since.

628. However, there can be no significant cessation in the use or intervening MCU of the planning unit, including in the composition of any mixed use during the ten year period. It will be a matter of fact and degree in each case as to whether enforcement action could have been taken against what is alleged during the interruption in activity on the ground. If so, the resumption of the alleged use will constitute a fresh BPC and the clock will restart.

629. The clock will also restart if temporary PP is granted for the use during the ten year period, because there will be a new BPC when the use continues after the expiry of the temporary PP. It was held in *Bailey v SSE* [1993] JPL 774 that the Inspector did not err when upholding an EN against a use which had continued after the expiry of a temporary PP, even though it was undisputed that the appellant would have been entitled to an EUC before making 'the fateful planning application'. The same principle applies to the regime for lawful uses and LDCs.

Breach of Condition

630. From 27 July 1992, every breach of condition is subject to a ten year immunity period under s171B(3), unless the condition prevents use as a single dwellinghouse and the

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[333] *Beach v SSETR & Runnymede BC* [2002] JPL 185

[334] *Davies v SSE & South Herefordshire DC* [1989] JPL 601

[335] *Thurrock BC v SSE & Holding* [2002] EWCA Civ 226; The principle established in *Panton & Farmer v SSETR & Vale Horse DC* [1999] JPL 461 that a use can be regarded as having dormant for planning purposes only applies to uses which have already accrued lawfulness through the passage of time or are otherwise lawful.

breach falls to be considered under s171B(2).

631. It is crucial in breach of condition cases proceeding on ground (d) to distinguish between conditions that can be breached once and for all – such as one which specifies the materials of a building – and conditions which impose a continuing requirement. Examples of continuing requirement conditions include those which stipulate who may occupy a dwelling or what the opening hours of a commercial premises may be.

632. If a continuing requirement condition is breached, and then the offending activity is ceased and the condition is complied with once more, the BPC is deemed to have ended and the ten year clock will restart if and when the condition is breached again. However, this only applies if the interrupting compliance is significant and not *de minimis* as a matter of fact and degree[336]. The question to be asked is whether enforcement action could have been taken against a breach of the condition during the period of compliant activity. The wording of the condition may be determinative.

633. On the facts, a substantial period of non-occupation for refurbishment did not bring the breach of condition to an end in *Basingstoke and Deane BC v SSCLG & Stockdale* [2009] EWHC 1012 (Admin). In *North Devon DC v SSE & Rottenbury* [1998] EGCS 72, a dwellinghouse subject to an agricultural occupancy condition was used for holiday accommodation only in the summer. It was held that there would not normally have been a breach of condition when the property was vacant in the winter.

634. A different North Devon case, *North Devon DC v FSS & Stokes* [2004] JPL 1396 concerned a breach of a seasonal occupancy condition. It was held that the breach of such a condition could become lawful through the passage of time, although there would be periods when the property was occupied in accordance with the condition. The breach could become immune after ten years of occupation outside of the permitted season.

635. The case of *R (oao St Anselm Development Co Ltd) v FSS & Westminster CC* [2003] EWHC 1592 (Admin) concerned a condition which required that the whole of a car park was retained for use by certain occupiers. Most but not all of the spaces had been used by others for more than ten years – and only those spaces were immune from enforcement action. The condition remained effective in respect of the spaces for which lawfulness had not been shown.

636. If it is found in a ground (d) appeal that a continuing requirement condition has been breached for any ten-year period, without significant interruption, it will follow that the particular breach is immune from enforcement action and lawful. This is so, even if the breach is not actually occurring when the enforcement notice is issued, unless the lawful right has been lost through some event sufficient to terminate it. If the appellant or some future landowner were to comply with the condition again, the clock would start again on any new and different breach of the condition.[337] If discharge of the entire condition is justified on the merits, it may be appropriate in such cases to not quash the

[336] *Nicholson v SSE & Maldon DC* [1998] JPL 553 applied in *Ellis v SSCLG* [2009] EWHC 634 (Admin)

[337] See *R (Ocado) v Islington LBC [2021] EWHC 1509 (Admin) and advice on LDC's and breach of condition*

EN pursuant to success on ground (d), but to go on to deal with any ground (a) appeal that has been made and then discharge the condition.

637. However, any such step should be taken with extreme caution – and after canvassing the views of the parties – because there may be good reasons for not allowing such an appeal on ground (a). It may be better for the condition to 'lie fallow' until the existing breach has ceased, and then become effective again. The appellant may also prefer that ground (a) is not considered so that the fee is refunded. It would, after all, still be open to them to make a s73A application to the LPA in the future.

Deliberate Concealment[338]

638. In *Welwyn Hatfield BC v SSCLG & Beesley* [2011] UKSC 15, the developer sought a grant of PP for a barn while having no intention of implementing the PP. The developerbuilt what looked like the barn, so that no enforcement action would be taken, but used the building as a dwellinghouse. After four years, the developer applied for an LDC to state that the use as a dwellinghouse was lawful under s171B(2)[339].

639. The Supreme Court held that, while the TCPA90 contains a complete statutory code, the public policy principle[340] that no one should benefit from their own wrong may nonetheless apply. The actions of the developer amounted to 'positive deception in matters integral to the planning process…[which] was directly intended to and did undermine the regular operation of that process'. He was not therefore entitled to rely on the provisions of s171B(2)[341].

640. It was emphasised in *Welwyn Hatfield* and later cases that this principle should only be applied in extreme cases. The statutory immunity periods must have been conceived, in part, as sufficient for an LPA to normally discover an unlawful operation or use. Thus, there must be some connection between what is done to evade discovery and the statutory provision. LPAs and Inspectors ought not to cast around for marginal aspects of cases to rely on the principle; the appellant must do more than 'keep a low profile'[342].

641. Nonetheless, *Welwyn Hatfield* has been applied in subsequent cases, and the CoA has indeed held that LPAs may continue to rely on the *Welwyn* principle despite the powers now available to them to make a Planning Enforcement Order in such cases[343]. In

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[338] EPLP P171B.12

[339] In *R (oao Fidler) v SSCLG & Reigate and Banstead BC* [2011] EWCA Civ 1159 the developer famously built a dwellinghouse purported to look like a castle behind straw bales. The case ended in the CoA upon the decision of the Supreme Court in *Welwyn*.

[340] Or *Connor* principle – that one cannot rely on a fraud which creates a state of affairs leading to the application of a statutory rule that would not otherwise have applied.

[341] *Welwyn* resulted in the insertion of ss171BA-171BC into the TCPA90, see Annex 1.

[342] *Jackson v SSCLG & Westminster CC; Bonsall v SSCLG & Rotherham MBC* [2015] EWCA Civ 1246

[343] *Jackson v SSCLG & Westminster CC; Bonsall v SSCLG & Rotherham MBC* [2015] EWCA Civ 1246

Matilda Holdings Ltd) v SSCLG [2016] EWHC 2725 (Admin), it was held that there could be deliberate concealment even where the use could be seen – and it is not necessary for the four matters identified by Lord Mance in ¶56 of *Welwyn Hatfield* to be made out. There is no 'exceptionality' or 'egregious' test to be applied when determining whether there has been deliberate concealment.

642. Whether there has been positive deception in the circumstances of any case will always be a highly fact-sensitive question. Where the conduct of the appellant is disreputable but not at the *Welwyn Hatfield* standard of deception, it may still diminish the veracity of and weight to be given to the appellant's evidence.

Ground (a)

'Planning Merits'

643. Ground (a) is 'that, in respect of any breach of planning control which may be constituted by the matters stated in the notice, planning permission ought to be granted or, as the case may be, the condition or limitation concerned ought to be discharged'.

644. The shorthand for ground (a) is 'planning merits'. When an EN is appealed on this ground and the fee is paid on time, the appellant is deemed under s177(5) to have made an application for PP in respect of the matters stated in the EN as constituting the BPC. S177(1) provides for the grant of PP and s177(3) provides that the PP which may be granted is any which might be granted under Part III, and so the PP is similar to one granted under s73A.

645. S177(2) states that the Inspector or SoS 'shall have regard to the provisions of the development plan, so far as material to the subject matter of the enforcement notice, and to any other material considerations' – which will include the NPPF and PPG.

646. Regard may also need to be had to the Planning Policy Statement (PPS) on Green Belt protection and intentional unauthorised development issued by the SoS on 31 August 2015. It makes 'intentional unauthorised development' a material consideration to be weighed in the determination of planning applications and appeals, including enforcement appeals. The PPS remains extant although it is not incorporated into the NPPF or PPG.

647. However, PP should not be refused simply on the basis that the development was carried out without PP or is unlawful. Those bare facts should not be held against an appellant at all, and the point may need explaining to interested parties. A finding of 'intentional unauthorised development' must be supported by evidence of something more – that the appellant intended the development to be unauthorised or actively sought to harmfully flout the rules.

648. The statue provides through s174(2) and s177 for PP to be granted for development that is being enforced against. S73A also allows for a grant of PP on application for development that has been carried out. The CoA held in *Tapecrown Ltd v FSS & the Vale of White Horse DC* [2006] EWCA Civ 1744 that 'the Inspector should bear in mind that the enforcement procedure is intended to be remedial rather than punitive'. In *Ardagh Glass v Chester CC & Quinn Glass* [2009] EWHC 745 (Admin), it was held that a grant of retrospective PP is not inherently unlawful, although this should not afford any advantage.

649. It may be necessary to address in some MCU or breach of condition cases whether to

grant temporary PP through ground (a) or extend the period for compliance with the EN pursuant to a ground (g) appeal. Another temporary PP would be appropriate if circumstances justify the permission being extended for more than one year and/or other conditions would need to be placed on the use for the duration, for example, to restrict the numbers of caravans on a residential caravan site.

650. If an Inspector decides to grant temporary PP, the EN will be quashed and the LPA will have to enforce separately against a breach of the temporary condition if the use is continued after the period specified. Any risks arising should be considered in the planning rather than ground (g) balance.

651. Personal circumstances are frequently pleaded in favour of a grant of PP in enforcement appeals, and it is well-established that the 'human factor' may be material to planning decisions[344]. Failure to take such considerations into account can be the subject of an application for judicial review, as can failure to meet duties pertaining to human rights, including the best interests of the children, and equality (see above). Where ground (a) succeeds in an MCU case because of personal circumstances [and related human rights], the use should be permitted subject to a 'personal' condition.

652. In an enforcement appeal, the appellant – or indeed occupiers who are not party to the appeal – may lose their existing home or business, or an element of it. This could include an extension housing a child's bedroom or office, a room already crucial to their family life or livelihood.

653. Such matters are material and must be properly considered and given due weight in the planning balance – with sensitivity in language and care over the use of sensitive personal information. Inspectors should be mindful that the consequences of dismissing an appeal on ground (a) are likely to be much more severe for the appellant than failure in a s78 appeal, and not just because non- compliance with the EN may lead to a criminal record.

654. An appeal may succeed on ground (a) if the development is EIA development. However, Regulation 36 of the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 (EIAR) prohibits the grant of PP under s177 for unauthorised EIA development unless an EIA has been carried out[345]. In relevant cases the LPA must serve with the EN a statement that the development is likely to have a significant effect on the environment, such that any s174 appeal must be accompanied by an environmental statement (ES).

655. If an appeal is submitted without an ES then the SoS will determine whether one is required. If it is required but not provided, ground (a) and the DPA will lapse. The categories of development requiring an ES are set out in Schedules 1 and 2 of the

[344] As stated by Lord Scarman in *Westminster CC v Great Portland Estates PLC* [1955] 1 AC 661 and re-emphasised in *R v Kerrier DC ex parte Uzell & Others* [1996] JPL 837.

[345] It was held in *Ardagh Glass v Chester CC & Quinn Glass* [2009] EWHC 745 (Admin) that PP could be granted retrospectively for development undertaken unlawfully, and for which an EIA would be required, so long as the competent authorities paid careful regard to the need to protect the objectives of the Directive.

Regulations; see also the PPG and Environmental Impact Assessment chapter.

The DPA and 'the Whole or any Part of those Matters'

656. The DPA is for the operations or MCU carried out or, in breach of condition cases, the development permitted without compliance with the condition being enforced against. Where the allegation refers to an MCU to a mixed use, PP should be granted for the mixed use and not just the new elements even if the others were already lawful. If and when the Inspector corrects the allegation, the DPA is changed accordingly.

657. The allegation cannot be corrected in order to grant PP for more extensive development than is subject to the EN[346]. However, if the EN alleges that there has been an MCU and requires cessation of the use plus removal of associated works, it may assist the appellant for the allegation to be corrected so that the DPA will cover the MCU and associated works. The EN in such cases may allege something like 'the making of a material change of use to use X and the construction of Y to facilitate that change of use' – so that the 'construction of Y' is not alleged in its own right or thereby subject to the four year rule.

658. S177(1) provides that PP may be granted 'in relation to the whole or any part of those matters or in relation to the whole or any part of the land to which the notice relates' – and so an Inspector or the SoS may make a split decision on ground (a). It is not unusual for the Inspector to exercise the power. LPAs sometimes serve composite ENs, referring to more than one development. In breach of condition cases, an appeal may be allowed in part and PP granted so as to delete or 'vary' one condition but not others. Many s174 appeals thus result in split or multiple decisions on the merits.

659. It is not for the Inspector to make an appellant's case or search around for an acceptable modification to the alleged development where none is proposed. In *Tapecrown*, however, Carnwath LJ expressed the view that if, on an Inspector's consideration of the submissions and in the light of the site visit, it appeared that there is an obvious alternative which would overcome the planning difficulties at less cost and disruption than total removal, they should feel free to consider it. In such circumstances, fairness may require that notice is given to the parties for comment.

660. The CoA confirmed in *Ahmed v SSCLG & Hackney LBC* [2014] EWCA Civ 566 that an Inspector must address whether or not a proposed alternative scheme amounts to part of the matters and may be permitted. In that case, and this is not unusual, the appellant raised the prospect of the development being retained with some modification through ground (f) rather than (a). In any such situation, so long as there is an appeal on ground (a), the Inspector must consider whether the modified development would be 'part of the matters' and should be permitted.

661. In *Arnold v SSCLG and Guildford BC* [2017] EWCA Civ 231, the CoA held that the Inspector properly considered alternative schemes in the context of the breach constituted by the matters stated in the EN, as required by s174(2)(a). The Inspector addressed whether the alternative schemes were within the scope of the matters,

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[346] *Richmond BC v SSE* [1972] 234 EG 1555

whether part or parts of the building were severable and, if so, whether any parts could be identified as acceptable. His conclusion that the development was integrated and there were no severable, acceptable parts was unassailable.

662. Likewise, in *Ioannou v SSCLG & Enfield LBC* [2013] EWHC 3945 (Admin), [2014] EWCA Civ 1432, the High Court held that the Inspector was entitled to find that an alternative scheme did not form 'part of those matters', and had directed himself correctly in holding that it was to the matters stated in the EN as the BPC that his attention was directed to under s177(1)(a). That section cannot be read as empowering the grant of PP for a development which is not the whole or part of the alleged breach[347].

663. However, it was held in *R (oao Banghard) v Bedford BC* [2017] EWHC 2391 (Admin) that 'there is necessarily an element of planning judgment in whether the development for which permission is being sought involves "any part of the matters specified" in the EN…' That case concerned s70C of the TCPA90, but it was cited in *Bhandal v SSHCLG & Bromsgrove DC* [2020] EWHC 2724 (Admin), where it was held that the Inspector took too narrow a view of s177(1)(a) when the Inspector did not grant PP for the alternative schemes because they would involve new works.

664. Mr Justice Pepperall found in *Bhandal* that 'virtually any alternative scheme is likely to involve at least some element of new work…the Inspector would be entitled to take the view that the extent of new work required by either of the new developments would be such that they do not properly fall within the statutory power to grant planning permission. What an Inspector is not, however, entitled to say is that the mere fact of any new work would be required is a complete answer to an appeal upon ground (a)'.

665. Thus, existing case-law demonstrates that whether an alternative scheme forms part of the matters is a matter of planning judgement. Whether new works would be involved, differences in the design or even footprint of the proposed and alleged buildings, plus any differences in the use of the land or building are relevant but not necessarily determinative factors.

666. What may be granted PP is ultimately governed by the wording of s177(1)(a). The *Wheatcroft* principle (which has now been advanced by *Holborn Studios Ltd*[348]) has no application to ground (a) or the DPA[349]. However, it is necessary to ensure that the alternative would amount to 'part of the matters' and not be, for example, a replacement smaller building. It is vital that the PP is drafted with the necessary precision to ensure the right outcome.

667. Where an Inspector wishes to make a split decision on ground (a) and grant PP in

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[347] The appellant did not pursue this point in the CoA, and Sullivan LJ held that 'he was right not to do so'.

[348] It was held in *Holborn Studios Ltd v The London Borough of Hackney [2017] EWHC 2823 (admin)* that amended plans can be accepted on s78 appeal and approved through a grant of conditional PP subject to 'substantive' and 'procedural' tests – see the approach to decision making chapter.

[349] *Ioannou v SSCLG & Enfield LBC* [2013] EWHC 3945 (Admin), [2014] EWCA Civ 1432

respect of part of the matters and/or land, the **decision** should be as follows:

CORRECT any defect(s) in the EN and substitute any amended plan required to identify which areas are and are not subject to the PP. **Do not delete either the acceptable or unacceptable part of the development from the allegation**.

ALLOW the appeal 'insofar as it relates to…' and **GRANT** PP under s177(5) **for** the development or specified part of the development **at** the land or specified part of the land, subject to any conditions.

VARY any requirements of the EN or the period for compliance which relate to any part of the development that is being refused, pursuant to success on grounds (f) or (g). **Do not delete requirements relating to the part you are allowing**.

DISMISS the appeal and **UPHOLD** the EN as corrected and/or varied and **REFUSE** PP under s177(5) 'insofar as it relates to…' the development or specified part of the development **at** the land or specified part of the land.

668. The **conclusion** on the decision should explain the above approach and precisely which parts of the development will be and will not be permitted. You should also explain that the requirements of the EN relating to the acceptable part of the development will not be deleted, so as to avoid any grant of unconditional PP being made through s173(11). The appellant can rely on the EN ceasing to have effect insofar as it is inconsistent with the PP under s180(1).

669. Alternative approaches to making a split decision should **not** be taken. If PP is granted for the whole development and conditions are imposed to require that the unacceptable part is removed, the EN would be quashed. It would be difficult for the Inspector to draft enforceable conditions and for the LPA to secure compliance[350].

670. Where there is a linked s78 appeal, it is sometimes appropriate to only make a split decision and allow the acceptable part of the development (subject to conditions) on the s78 appeal. The enforcement appeal may be dismissed on ground (a), so that the EN is upheld and it is easier for the LPA to enforce against any deviation from the conditional PP granted.

671. Again, s180 will come into play in such cases to override the EN so far as that is inconsistent with the PP, because the PP will be taken to have been granted subsequently[351]. It will be necessary in such cases to consider the remaining grounds in the s174 appeal, including (f) and/or (g), in case the decision to grant PP under s78 is successfully challenged under s288 and the EN is not overridden.

Partially Completed or Unfinished Development

[350] *Newbury BC v SSE & Gore* [1991] JPL 555

[351] *R v Chichester Justices & Knight ex parte Chichester DC* [1990] JPL 820

672. Difficulties may also arise in ground (a) appeals where the EN alleges something like the 'commencement of…' or 'partial erection of…' and indeed the development has not been completed. In this situation, noting s177(1) only allows for a grant of PP for the whole or part of the matters, one infers that PP cannot be granted for more than the partially constructed structure. Another grant of PP would be required to complete the building and so it may be inappropriate to allow the appeal on ground (a).

673. However, the ground (a) appeal must still be determined on its merits. Consideration should be given to whether the unfinished building is so objectionable that it must be removed[352]. If the allegation is concerned with, say, an MCU as well as the unfinished building, the existence of the structure and any risk of it becoming immune from enforcement action – while still being unusable – may weigh in favour of a grant of PP for the alleged use.

Multiple Notices

674. Where an LPA issues multiple ENs, for example, in relation to each individual unit on an industrial estate, each ground (a) appeal and DPA must be considered on its individual merits. PP cannot be refused for a use on one site simply because of the effect of the same use on another site or the impact of the uses together.

675. It was held in *Collis Radio Ltd v SSE* [1975] 29 P&CR 390, JPL 221 that precedent does not arise if there are legitimate reasons for permitting one development but not another – but the Inspector may address the consequences of granting PP in one case for similar development in the area.

676. In *Reed v SSE* [1993] JPL 329, however, one EN was directed at the whole site and nine others were issued in relation to individual buildings. The Court criticised the Inspector's findings that all of the uses contributed to the overall traffic problem and it would therefore be unjust to only permit some of the uses. It was held that each EN gave rise to an entirely separate DPA which had to be considered discretely.

677. *Collis Radio* and *Reed* were somewhat reconciled in *Bruschweiller v SSE* [1996] JPL 292, where the Court found it possible for an Inspector to conclude that the cumulative effect of approving all of the DPAs would justify a refusal of each one. The Inspector must consider the DPAs in respect of the individual ENs first, but they could go on to look at overall impact in recognition that granting PP in any one case would make it difficult to refuse the others. Thus, the effect of precedent need not be ignored, but the starting point required each DPA to be considered on its merits.

Fallback Position

678. The 'fallback position' or what is likely to happen if the EN is upheld is an important material consideration on the merits of any DPA. In *Schneck v SSHCLG & West Berkshire DC* [2022] EWHC 3335 (Admin) the Court held that "the prospect of the fallback position does not have to be probable or even have a high chance of occurring; it has to be only more than a merely theoretical prospect. Although the possibility of the

[352] *R v Leominster DC ex parte Pothecary* [1998] JPL 335

fallback position happening may be very slight, this is sufficient to make the position a material consideration.

679. The fallback position must also be identified in sufficient detail that it may be compared to what is alleged[353]. The question is whether, if PP were to be refused, the 'fallback' would take place and be less desirable than that for which PP is sought. Clear reasons should be given for rejecting a fallback argument[354].

680. Where there is a realistic fallback position, the Inspector should properly compare the impact of the development subject to the EN against the effect of what other development could lawfully take place. In *Short v SSE & North Dorset DC* [1991] JPL 731, the Inspector erred in failing to compare the appearance of the chalets or 'permahomes' subject to the EN with that of the static caravans which could be stationed in accordance with the lawful use.

681. The fallback position should be considered with regard to the right, when an EN has been issued, of reversion to the lawful use under s57(4)[355], unless the right has been lost, perhaps because there has been one or more intervening unlawful uses between the lawful use and the one alleged, and there is now a nil use[356]. Normally, however, the lawful use will be clear on the evidence, or it may be established for the purpose of deciding the fallback position by applying common sense to the situation[357].

682. PD rights under the GPDO are material to planning merits[358] but, under Article 3(5), the PP granted by Schedule 2 does not apply if (a) in the case of permission granted in connection with an existing building, the building operations involved in the construction of that building are unlawful; (b) in the case of permission granted in connection with an existing use, that use is unlawful.

683. It was held that the two sub-paragraphs of Article 3(5) are not mutually exclusive in *RSBS Developments Ltd v SSHCLG & Brent LBC* [2020] EWHC 3077 (Admin). Prior approval had been granted for an MCU but it took place after the building of an unauthorised extension. The Inspector was entitled to find that the PP granted by the GPDO for the MCU did not apply because of the effect of Article 3(5)(a) and unlawful operations involved in the construction of the building that the PP was granted in

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[353] *Simpson v SSCLG & Medway Council* [2011] EWHC 283 (Admin)

[354] *Coln Park LLP v SSCLG & Cotswold DC* [2011] EWHC 2282 (Admin)

[355] *Day & Mid-Warwickshire Motors v SSE* [1979] JPL 538

[356] *Young v SSE* [1983] JPL 677

[357] *Sefton MBC v SSTLR & Morris* [2003] JPL 632 concerned a s73A appeal and it was also held in this case that s57(4) should not be ignored even if no enforcement action has been taken. The Inspector was entitled to find on the evidence that the use subject to the appeal would continue unless and until an EN was issued, and if that occurred the appellant would be entitled to revert to the former use. It would be a matter for the Inspector's judgment as to how much weight to give to the argument.

[358] *Burge v SSE* [1988] JPL 487

connection with[359].

684. Where PD rights would allow partial re-instatement of works prohibited by the EN, the Inspector must assess the likelihood of this happening[360]. It was held in *Nolan v SSE* [1998] JPL B72 that before upholding a EN directed at walls 4m high, the Inspector should consider the effect of the 2m walls which the developer said they would put up in replacement.

Breach of Condition

685. When the EN is issued under s171A(1)(b) to allege that there has been a breach of one or more conditions imposed on a PP, the DPA is to carry out the development subject to the PP – whether that was for operations and/or an MCU – without complying with the condition(s) being enforced against.

686. The DPA is therefore similar to a retrospective application made under s73A(2)(c)[361], including in the sense that it is not open to the Inspector to review any of the other conditions imposed on the original PP; doing so would widen the scope of the EN.

687. Where an appeal on ground (a) is allowed in respect of a breach of condition, such that the condition(s) being enforced against will be removed **and no** new condition(s) are to be imposed, PP should be granted on the DPA under s177(5) for the development originally permitted, subject to all of the other conditions previously imposed. S177(5) refers back to s177(1)(a) and s177(3), and so to s70(1)(a), which provides for a grant of PP subject to conditions.

688. However, where the appeal succeeds on the basis that one or more new conditions should be imposed, it is necessary not only to grant PP on the DPA under s177(5) and s177(1)(a) as above, but also to discharge the condition that is subject to the EN under s177(1)(b) and impose the new conditions on the original PP under s177(4). The Inspector should explain in the decision letter that they are exercising the parallel sets of powers.

689. It is necessary to impose new conditions on both the old and new PPs to ensure consistency and that the appellant does not continue implement the old PP and sidestep the new conditions. It cannot be assumed a new PP will lawfully be implemented even when it is granted retrospectively[362]. The formal decision should provide in the same terms for the discharge and imposition of conditions on the old PP and the grant of the new PP.

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[359] The Inspector's decision to uphold the EN did not rest entirely on the application of Article 3(5)(a); the operations carried out were such that the MCU was not carried out in accordance with the plans approved through the prior approval procedure.

[360] *Brentwood DC v SSE and Gray* [1996] JPL 939

[361] See the Appeals against Conditions ITM

[362] *Butcher v SSE & Maidstone BC* [1996] JPL 636

690. S177(4) expressly allows for the substitution of more onerous conditions. In the interests of natural justice, the Inspector should not make a decision that would put the appellant in a worse position than if there had been no appeal. Subject to the usual tests for conditions, however, the Inspector may vary the scope of the condition. For example, an Inspector could discharge an opening hours condition being enforced against and substitute another condition which allows for later opening but also prohibits the playing of amplified music after an earlier time.

Conditions Relating to a Wider Area

691. An LPA may issue a breach of a condition EN in relation to a smaller area than that which was subject to the original PP. For example, an EN may be issued against a fence that was erected in front of a house in breach of a condition that restricts the erection of fences on the whole estate. In such cases, where the appeal succeeds on ground (a), the condition should be re-imposed except insofar as it relates to the appeal site, so that the estate as a whole does not lose the protection of the condition.

692. A similar approach should be taken if the case concerns part of a large planning unit. For example, if the condition restricts open storage within a factory yard, and the use would be acceptable on its merits on just part of the yard, the condition should be re-imposed on the remainder of the site. It may be necessary to clarify which areas are and are not subject to the condition through corrections to the plan attached to the EN, and to refer to the powers under s177(1)(a) to grant PP in relation to part of the land.

693. Care should be taken in cases where the condition that has been breached relates to land outside of the PP site or outside of the appellant's control, and the appellant would be unable to comply with the requirements of the EN to carry out works or activity on that land. Depending on the terms of the condition, the appeal may succeed on ground (c) but the simplest approach may be to grant PP for the development without complying with the condition.

Temporary Conditions

694. As discussed above, where PP is granted for an MCU subject to a 'temporary' condition, and the use is continued after the expiry of the period, enforcement action should be taken against a breach of the condition[363]. It cannot be said that the continuation of the use amounts to the carrying out of an MCU without PP because the MCU was in fact authorised by the original PP.

695. When an appeal on ground (a) succeeds in respect of a breach of a temporary condition, the temporary condition on the original PP should **not** be discharged, because this might raise arguments as to whether the old permission still subsisted without the condition.

696. In such cases, the Inspector should simply grant a new PP under s177(5) and s177(1)(a), analogous with powers under s73A(2)(b). The Inspector is not bound by any conditions imposed on the time- expired PP and they may impose any new conditions

[363] The same applies to a 'personal' condition which has the effect of limiting the duration of the PP.

which are necessary and reasonable in relation to the continuation of the use.

Breach of Condition and MCU

697. Where the alleged development is both in breach of a condition and an MCU, but the EN only alleges that there has been a breach of condition, then PP can only be granted on the DPA to carry out the original development without complying with the condition enforced against – and that will not make the MCU lawful.

698. For example, if PP is granted for the construction of a domestic outbuilding subject to a condition which ties the use and occupation of the building to that of the main house, and there is an MCU of the outbuilding to use as a separate dwelling, if the EN only alleges that there has been a breach of condition, any decision to discharge the condition would not make the new dwellinghouse use lawful.

699. In such cases, if it is clear that the LPA's concern was the MCU, and the appellant also seeks PP for the MCU, it would be appropriate to raise the matter with the parties and propose that you correct the allegation to an MCU. It is unlikely that doing so would cause any injustice. However, such a correction would be unnecessary if the appeal is to be dismissed and the EN upheld since the allegation is not wrong either way.

Imposing Conditions on the Deemed Planning Permission

700. Inspectors should deal with any conditions suggested by the parties and consider whether others would make the development being enforced against acceptable. It is necessary to give clear reasons for rejecting any compromise solution which could be secured by condition[364], and to give the parties an opportunity to comment if any condition would come as a surprise.

701. The policy tests set out in the NPPF and discussed in the PPG on Use of Planning Conditions apply to conditions imposed on a deemed PP granted under s177(1). Inspectors should also have regard to the Conditions ITM Chapter which includes advice on imposing conditions where the development has taken place.

702. Inspectors should take account of any planning obligation proffered under s106 in support of an appeal on ground (a). Again, the policy tests set out in the NPPF apply – but they do not have statutory force because the Community Infrastructure Levy Regulations 2010 do not apply to the DPA. With that caveat, Inspectors should follow advice in the Planning Obligations ITM chapter.

Revised Plans or Alternative Schemes

703. The appellant may propose that PP is granted for the development alleged subject to some modifications. If plans are submitted which show that works could be undertaken to overcome the planning objections – and the end development could still be considered as the whole or part of the matters – the appeal may succeed on ground (a) on that basis.

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[364] *Tierney v SSE* [1983] JPL 799

704. However, because the DPA is made in respect of the development as alleged and built, there is no mechanism for incorporating any revised plans into any deemed PP granted. It is not possible to impose a 'plans' condition on the PP, or to impose a condition which purports to modify the detail of the development. Grampian-type conditions are also not appropriate in enforcement cases[365].

705. The correct approach is to grant PP for the development alleged subject to condition which requires that a scheme of works is submitted to the LPA for their approval and implemented. The construction and operation of such a condition is described below. The condition should give brief details of what the scheme should comprise or include – whether that be, for example, building works, landscaping or access or drainage improvements.

706. The Inspector should describe clearly in the decision why the scheme is necessary to overcome the objection, and that the LPA would be able to enforce against a breach of the condition either through a further EN or the issue of a BCN under s187A, against which there is no right of appeal.

Submission and Approval of a Scheme

707. Where development has taken place, it is not possible to impose a condition precedent or require that outstanding details are agreed before the development is commenced or occupied, no matter how important the details are. Thus, where a condition is imposed to require the submission and approval of a scheme in respect of development that already exists, it must include some sanction or mechanism for enforcement in the event of non-compliance.

708. The Conditions chapter, PINS' suite of suggested planning conditions and DRDS/DART give the wording of 'long form' and 'short form' conditions which require 'Details – retrospectively where planning permission is granted for development already carried out'. Both 'retrospective conditions' are similar in effect and whether the short or long form is used will depend on the complexity of the matters to be submitted and approved.

709. The key feature of both the short and long form retrospective conditions is that the operational development permitted must be removed, or the use permitted must be ceased if:

- The required scheme is not submitted within the prescribed timescale, or
- It is submitted on time but not approved and an appeal against the Council's refusal to approve the details submitted pursuant to the condition is not made on time, or
- An appeal against the Council's refusal to approve the details submitted pursuant to the condition is dismissed, or

[365] *De Souza v SSCLG & Test Valley BC* [2015] EWHC 2245 (Admin)

- The scheme is submitted and approved but not implemented within the prescribed timescale.

710. Each step is a necessary part of the condition. Details of the required scheme, the timescales for each step and the time by which the operations should be removed or the use ceased in the event of non-compliance will normally need to be canvassed with the parties. All requirements of the condition and the time periods set out must be reasonable. Any breach of any step would amount to a breach of condition which may be enforced against.

711. The manner in which the condition is intended to work should be thus explained in the decision as well as any correspondence or discussion about the condition at the hearing or inquiry. It must be made clear that the submission, approval and implementation of the scheme is necessary to render the development acceptable in planning terms – and that the sanction for non-compliance is very serious. The grant of PP would not be lost but the appellant would in effect lose the benefit of the PP because any EN issued in respect of the breach of condition could require that the operations permitted are removed or the use permitted is ceased.

712. For that reason, there may be situations where the short or long form retrospective condition should not be used, because doing so would create a risk of 'over-enforcement'. It is essential to consider what is reasonable in each case. It may be disproportionate, for example, to impose a condition that could require the cessation of the use of land for a residential caravan site in the event that a fence is not replaced on time.

713. An alternative to the 'retrospective condition' would be to impose one which stipulates that the required action is done 'within x months of this decision'. It may be difficult for the LPA to enforce such a condition in practice because, if the action is not done on time, another EN could only require that the action is done, and that may again not happen. However, the LPA could issue a BCN under s187A and, in any event, it may be more complicated for them to enforce against the entire development subject to the PP just for a minor breach of a 'retrospective condition'. One that requires action 'within x months of this decision' may suffice where the required details or action do not 'go to the heart of the' PP.

714. In any case where a scheme must be approved, a separate condition will be required if it is necessary that the scheme or elements of the scheme such as new planting, visibility splays or parking spaces must be retained and/or maintained thereafter.

Ground (f)

The Approach to Ground (f)

715. Ground (f) is that that the steps required by the notice to be taken, or the activities required by the notice to cease, exceed what is necessary to remedy any breach of planning control which may be constituted by those matters or, as the case may be, to remedy any injury to amenity which has been caused by any such breach.

716. It should be noted that the appeal form summarises ground (f) as 'the steps…are excessive and lesser steps would overcome the objections'. There is no reference to overcoming objections in the TCPA90 and Inspectors must determine ground (f) appeals clearly and strictly on the basis of the wording of the statute. Any variation to the requirements of EN will constitute success on ground (f).

717. As noted above, the requirements of an EN may be corrected as well as varied. It is the Inspector's duty to be alert to any hidden ground (f)[366] and to check anyway whether any steps are excessive for the purposes of the EN. For example, if an EN requires use as flats to cease and that use as a single dwelling is resumed, the latter step should be deleted whether or not the point is raised in a ground (f) appeal, because an EN cannot require that a lawful use is actively carried out.

718. While the connection is not explicit, the wording of s174(2)(f) links back to s173 which provides that (3) an EN shall specify the steps…to be taken, or activities…to cease, in order to achieve, wholly or partly…(4) those purposes [of] (a) remedying the breach…or (b) remedying any injury to amenity.

719. The words 'as the case may be' in s174(2)(f) serve to distinguish between s173(4)(a) and (b). It was held in *Elmbridge BC v SSCLG & Giggs Hill Green Homes Ltd* [2015] EWHC 1367 (Admin) that s173 draws a clear distinction between an EN which sets out to remedy a BPC and one designed to remedy any injury to amenity caused by the breach.

720. The **starting point** in a ground (f) appeal, therefore, should be to identify the purposes of the EN[367]. The purposes should not be confused with the reasons for taking enforcement action, since they do no more than set out why it was expedient for the LPA to issue the EN. Even if the reasons expressly refer to the 'injury to amenity', the purpose of the EN may be to remedy the breach[368].

721. If it is unclear, the purpose of the EN should be clarified by writing to the parties or at the hearing or inquiry but it can usually be gleaned from what compliance with the requirements would in fact achieve, given the confines of s173(3)-(7). In a simple case of a building put up without PP, if the requirement is to demolish the building and remove the materials, the purpose of the EN is to remedy the breach. The same applies if an EN alleges that there has been an unauthorised MCU and the steps are to cease the use and restore the site to its previous condition.

722. The **next task** is to consider whether there is any 'obvious alternative' or 'lesser step' which would achieve the purposes of the EN with less cost and disruption[369]. The requirements of the EN should be 'proportionate' in that sense[370]. The alternative should be put to the Inspector by the appellant or other party, or it may be inferred from the appellant's evidence[371]. It may also be raised by the Inspector but there is no obligation

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[366] It was affirmed that a potential or hidden appeal on ground (f) may succeed in *Moore v SSCLG & Suffolk Coastal* [2012] EWCA Civ 2010.

[367] See also *Keenan v Woking BC & SSCLG* [2016] EWHC 427 (Admin)

[368] *Mata v SSCLG* [2012] EWHC 3473 (Admin)

[369] *Tapecrown Ltd v FSS & Vale of White Horse DC* [2006] EWCA Civ 1744

[370] *Lough & Others v FSS* [2004] 1WLR 2557; *Makanjuola v SSCLG & Waltham Forest LBC* [2013] EWHC 3528 (Admin)

[371] *Humphreys v SSCLG & Essex CC* [2016] EWCA Civ 1432

on them to scout around for or raise any possible alternative that is not put in evidence[372].

723. A typical complication in ground (f) appeals is overlap with ground (a). For example, an appellant may argue that an EN does not require that the alleged extension is removed, but rather that a fence is constructed, on the basis that a boundary treatment would overcome the visual harm caused by the extension. It was held in *Tapecrown Ltd v FSS & Vale of White Horse DC* [2006] EWCA Civ 1744 that an Inspector has wide powers to decide whether there is any solution short of a complete remedy of the breach which is acceptable in planning and amenity terms – and so there may be cases where grounds (a) and (f) can be used together to achieve more than could be gained under (f) alone.

724. While that point stands, Inspectors must be clear that planning merits may only be considered pursuant to ground (a), where that is pleaded and the fee is paid for the DPA. If an appeal is not brought on ground (a), it is not appropriate for appellants to introduce arguments on the merits in the context of an appeal on ground (f). The power to vary the terms of the EN under s176(1) cannot be used to attack the substance of the EN[373].

725. It was held by the CoA in *Ioannou v SSCLG & Enfield LBC* [2014] EWCA Civ 1432 that the requirements of the EN cannot be varied so as to result in a grant of deemed PP under s173(11) for operations or activities that were not in existence when the EN was issued. The Inspector's powers under ground (f) mirror that conferred on the LPA by s173(4)(b) to under-enforce, but PP may only be granted in an enforcement appeal under s177(1). The limitation to what may be permitted under s177(1) cannot be sidestepped by adopting an interpretation of s173(11) which would, in conjunction with ground (f), enable a grant of PP for matters other than those specified as constituting the BPC.

726. The following approach should be taken if it is proposed on ground (f) that the EN is varied to allow some alternative scheme:

- If the appellant has pleaded ground (a), consider whether PP could be granted for the development as alleged and, if not, for the alternative. To be permitted, the alternative must be 'part of the matters' or achievable through the imposition of a condition on the PP. This approach should be taken even if the alternative was only raised by way of ground (f) and in relation to the requirements of the EN rather than allegation[374].

- If there is no ground (a) or ground (a) does not succeed, and the purpose of the EN is to remedy the BPC, any lesser step that would not remedy the breach cannot be accepted through ground (f). The TCPA90 cannot be interpreted as

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[372] *Williams v SSCLG & Chiltern DC* [2013] EWCA Civ 958; *Al-Najafi v SSCLG & Ealing LBC* [2015] (CO/4899/2014)

[373] *Wyatt Brothers (Oxford) Ltd v SSETR & Oxfordshire CC* [2001] PLCR 161

[374] *Ahmed v SSCLG & Hackney LBC* [2014] EWCA Civ 566

allowing a submission that the requirements exceed what is necessary to remedy any injury to amenity where the purpose of the requirements is to be found wholly within s173(4)(a).

The power afforded to an Inspector to vary the terms of an EN under s176(1)(b) cannot be used to attack the substance of the EN[375]. Thus, if an EN alleges the construction of an extension and requires that the extension is removed, the purpose of the EN is to remedy the breach. Retaining the extension with a new fence on the site would not achieve that.

- A case where the purpose of the EN is to remedy the injury to amenity and there is no ground (a) was considered in *Miaris v SSCLG & Bath and North East Somerset Council* [2016] EWCA 1564 (Admin). The CoA held that *Wyatt* remains authority for the proposition that the SoS 'may have no power to consider an appeal made under ground (f) on the basis that the requirements of the notice exceed what is necessary to remedy the injury to amenity…when there is no appeal seeking planning permission on ground (a)'. The Inspector cannot deal with general planning considerations through ground (f)[376].

  Similarly, Sullivan LJ emphasized in *Ioannou* that an Inspector's power to allow an appeal on the second limb of ground (f) is relatively narrow when there is no ground (a) appeal. There is a substantial difference in scope between appeals proceeding on ground (a) and on the second limb of ground (f). Thus, if there is no ground (a) and the purpose of the EN is to remedy the injury to amenity, the Inspector will have little scope to significantly vary the requirements.

727. Indeed, another constraint to varying an EN where the purpose is to remedy the injury to amenity is that it may be difficult to word the proposed requirements with the necessary precision[377], bearing in mind the *Miller Mead* test and particularly if the suggested lesser steps would be akin to planning conditions. It may also be difficult to draft 'condition' type requirements so that whatever needs to be done can be achieved within a period for compliance.

728. It should further be noted that human rights considerations do not arise in ground (f). The issue is strictly whether the requirements are excessive to remedy the breach or harm as the case may be. For the steps to be 'proportionate' in *Lough* terms, they should be the minimum necessary to remedy the breach or harm. There is no scope to consider whether the requirements are excessive in terms of their impacts on the individual.

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[375] *Wyatt Brothers (Oxford) Ltd v SSETR & Oxfordshire CC* [2001] PLCR 161

[376] *Miaris* concerned an alleged MCU from a restaurant to use as a restaurant, drinking establishment and nightclub. The EN required the drinking establishment and nightclub uses to cease and that DJs be no longer allowed to perform. The Inspector was entitled 'in the absence of an appeal under ground (a), to decline…to consider any contention on its merits that additional patrons attracted to the premises would not be harmful and that a limit on the numbers who drink but not eat there would be acceptable' – and would have been at fault if one had not done so.

[377] *Williams v SSCLG & Chiltern DC* [2013] EWCA Civ 958

729. However, it was also held in *Ioannou* that 'it does not follow that ground (f) is otiose merely because there is now some overlap between [grounds (a) and (f)], in that injury to amenity is relevant under both grounds; nor does it follow that ground (f) is otiose because it cannot be used in conjunction with subsection 173(11) to secure for an alternative scheme a planning permission which is unobtainable under section 177(1)'. That there is a second limb in ground (f), meaning that less onerous steps may suffice if they remedy any injury to amenity, means that deciding an appeal on this ground may involve an element of planning judgment which is bound to overlap to an extent with that as to the wider planning merits in ground (a).

730. It is always necessary to approach ground (f) being mindful of the risks and implications of s173(11) coming into play if there is any under-enforcement, and of other unintended consequences that may arise from variation, such as the EN becoming uncertain[378] or one requirement being in conflict with another. It would not be possible for an appellant to 'restore land to its previous condition' if a different requirement of the EN is varied so as to allow the development to remain in modified form.

731. Where the requirements cannot be varied pursuant to ground (f), but the alternative may be acceptable in planning terms or there are some compelling personal circumstances, it may be reasonable to extend the period for compliance with the EN – even if there is no appeal on ground (g) – so that the appellant has time to make a planning application for the alternative scheme[379].

Deviation from Approved Plans

732. As defined in s173(4)(a), the purpose of the EN may be to remedy the BPC by making any development comply with the terms (including conditions and limitations) of any PP granted in respect of the land. S336(1) defines 'planning permission' as meaning PP granted under Part III, which includes PP granted by Order as well as on application, but not a 'permission in principle'.

733. Given the word 'any' in s173(4), therefore, you may be asked to vary the EN – where its purpose is to remedy the BPC – so that it allows for what is alleged to be modified in accordance with a PP where the alleged development was constructed following a grant of express PP but not in accordance with the approved plans[380].

734. In such cases, for the PP to be relevant it must be extant and not have lapsed[381]. It may be necessary to address where the PP is capable of implementation in accordance with its conditions with regard to advice on 'when development is begun – s56'.

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[378] *Bennett v SSE* [1993] JPL 134

[379] *Arnold & Arnold v SSCLG* [2015] EWHC 1197 (Admin), [2017] EWCA Civ 231

[380] S177(3) provides that a grant of deemed PP under ground (a) and s177(1) is any PP that might be granted on application under Part III. However, PP granted on the DPA in an enforcement appeal cannot be tied to plans. If there is a breach of a condition on a PP granted on appeal on ground (a), enforcement would likely be taken against a breach of the condition and not development without PP.

[381] *Elmbridge BC v SSCLG & Giggs Hill Green Homes Ltd* [2015] EWHC 1367 (Admin)

735. Where an EN is directed at a building which differs materially from approved plans and the allegation is the construction of a building without PP[382], the EN should require that the building is **either** demolished **or** '…altered to comply with the terms of the planning permission [ref] dated [] including the conditions subject to which that permission was granted'. The developer should be given this choice because either step would remedy the breach in accordance with s173(4)(a)[383].

736. While it is not unusual for LPAs to draft EN with an intention of securing compliance with a PP, such requirements in practice are often imprecise. For example, the EN may specify that whatever part of the building does not accord with the plans is put right. The problem with such requirements is that, once they are complied with, the whole building will have a deemed PP under s173(11) and the conditions imposed on the original PP will cease to have effect. However, the EN can usually be corrected without causing injustice to require that the development is modified in accordance with the terms and conditions of the PP, where that is clearly what the LPA intended to seek.

737. It is particularly important to require compliance with the terms of the PP where a condition was imposed to withdraw PD rights. If the EN is drafted so that, upon compliance, the building is permitted through s173(11), the condition will not bite. The reinstatement works will be carried out on a building that is lawful for Article 3(5) purposes and so the GPDO will grant PP for the works. S181(5) will not assist the LPA since that provides only that the reinstatement or restoration of the works removed or altered in compliance with an EN is an offence if the works are carried out without PP.

738. If the original PP was not subject to a condition withdrawing PD rights, the EN should still require that the development is made to comply with the PP, but it will not be possible to vary the EN to prevent the exercise of PD rights[384]. In such cases, the only way to prevent that from happening – if necessary – is to allow the appeal on ground (a) with regard to the fallback position, and grant PP for what is alleged subject to a condition which withdraws PD rights.

Mansi and Protection of Lawful Rights[385]

739. The requirements of the EN must not purport to stop a developer from doing something they are entitled to do without PP by relying on existing lawful use rights, including right of reversion under s57(4), rights under the GPDO, and right to carry out anything

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[382] If a condition was imposed on a grant of PP requiring that the development is carried out in accordance with the approved plans, the EN may allege a breach of condition or development without PP, depending on the significance of the departure from the plans. It was held in *Copeland BC v SSE* [1976] JPL 304 that, where no plans condition was imposed, the EN must allege that there has been development without PP. Whether or not any differences from the approved plans are material is a question for ground (c).

[383] Although whether an EN that requires the modification of a building so as to accord with the terms of a PP does in fact have the effect of 're-imposing' conditions that contain continuing requirements has never been considered by the courts.

[384] Whether there has been any material change in the planning circumstances in relation to any conditions imposed on a previous PP is a matter for ground (a).

[385] EPLP P176.05

exempted from the definition of development under s55(2). This is the *Mansi* principle or doctrine, so-called from the HC decision in *Mansi v Elstree RDC* [1964] 16 P&CR 153[386].

740. The *Mansi* principle extends to the carrying out of uses that are ordinarily incidental to the primary use of the planning unit. For example, an EN which alleges the MCU of a farm building to use as a shop should not seek to prevent the appellant from selling site-grown produce at the farm gate[387]. A requirement to 'discontinue the sale of fruit and vegetables' on the land should be varied to incorporate the saving – say 'discontinue the sale of fruit and vegetables other than those grown on the land'.

741. Similarly, if the EN relates to use of land as a residential caravan site, and there is evidence that a caravan was on the land before and used for purposes incidental to the lawful use before the MCU took place, it would suffice for the EN to require that the residential use is ceased. No purpose may be served by requiring that the caravan is removed from the site when it would likely be immediately returned.

742. The *Mansi* principle extends to uses that are lawful because they were subsisting at the Appointed Day (1 July 1948) or have become immune from enforcement whether under s171B(3) or the former established use provisions[388]. A requirement prohibiting a use 'except to the extent to which such use was carried on prior to the relevant date' has been held to be valid[389]. However, savings for such lawful uses should generally be limited to a particular area or numbers, particularly in view of the emphasis on specifics in the advice relating to LDCs[390].

743. Where is it necessary to vary the EN via ground (f) to make a saving for a lawful use with some prescription on the level of the use, it should not be suggested that the limit somehow represents the point above which there would be an MCU. In *Wallington v SSW* [1991] JPL 542, the Inspector found that keeping 44 dogs as a hobby was not incidental to the use of a dwellinghouse. The Inspector varied the EN to allow the keeping of no more than six dogs, with this number being arbitrary but reasonable in the circumstances.

744. Where the EN specifies a maximum level of use, this may provide the parties with valuable certainty. However, it is essential to have regard to the specific terms of the EN, the cases of the parties and long-term enforceability. It is not appropriate to make a numeric saving in mixed use cases if doing so would lead to the EN under- enforcing against the unlawful component of the mixed use – so that, once the EN is complied with, s173(11) would grant an unconditional PP for that mixed use. If the allegation is correctly formulated, the EN must be amended to be clear that only the mixed use

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386 See also *South Ribble BC v SSE* [1990] JPL 808 & *Kennelly v SSE* [1994] JPL B83

387 *Allen v Reigate and Banstead BC* [1990] JPL 340

388 *Denham Developments v SSE* [1984] JPL 347

389 *Trevors Warehouses v SSE* [1972] 23 P&CR 215, *Lee v Bromley LBC* [1982] JPL 778

390 *Choudhry v SSE* [1983] JPL 231

which comprised the breach was required to cease, allowing reversion to the previous lawful use.[391].

745. In *Lynch v SSE & Basildon BC* [1999] JPL 354, there was an MCU from a low-key, limited use to the use alleged which had more components, was more intensive and covered a wider area. The limited use had not subsisted for ten years before being superseded by a mixed use of which it was but one component. Thus, neither the first mixed use nor the latter one was lawful and the first did not have to be protected.

746. Another limit to the *Mansi* principle was described in *Mohamed v SSCLG* [2014] EWHC 4045 (Admin), where it was held that the EN did not need to allow for retention of buildings erected or altered in BPC. Likewise, it was held by the CoA in *Oates v SSCLG & Canterbury City Council* [2018] EWCA Civ 2229 that the Inspector was entitled to find that the EN could require the removal of buildings which were 'new buildings' as a matter of fact and degree, and thus had 'no pre-existing lawful use rights'.

747. It is unnecessary to vary an EN to state what 'must be obvious to everybody' or allow a householder to repair their car or boat at home[392]. Hancock v SSCLG & Windsor and Maidenhead RBC [2012] EWHC 3704 EWHC 3704 concerned a case where PP had been granted for the use of land and not operational development. Buildings were later constructed and an EN was issued to require their demolition. The Court held that the PP was for the use of the land not operational development. There were no existing use rights to have buildings on the site which the EN had to protect – and the EN did nothing to prevent continuation of the lawful use.

Fallback PD Rights

748. It is frequently argued in ground (f) appeals that the requirements of the EN should be varied to allow for implementation of PD rights, it is important to bear in mind that the GPDO does not grant retrospective PP. For example, if a fence is erected adjacent to a highway used by vehicular traffic, it would only be permitted by the GPDO if it met the height limitations under Paragraph A.1 of Part 2 of Schedule 2 when it was erected or constructed. If the fence exceeded those limits, it will not be permitted under the GPDO if and when it is altered later.

749. It follows – using the same example – that varying an EN so that a fence adjacent to a highway used by vehicular traffic must be reduced in height from 2m to 1m would not serve to remedy the BPC. The fence was unlawful as a whole, not just the part of the fence that exceeded the PD limits[393]. It was constructed without PP and would only have PP after the EN is complied with by virtue of s173(11) – not as PD.

750. Nonetheless, in straightforward cases, such as where a fence beside the road could be reduced to 1m in height, it may be appropriate to vary the EN to require that the

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[391] *Duguid v SSETR & W Lindsay DC* [2001] 82 P&CR

[392] *Cord v SSE* [1981] JPL 40; see also *North Sea Land Equipment v SSE & Thurrock* [1982] JPL 384

[393] *Garland v MHLG* [1968] 20 P&CR 93

development is modified to have whatever dimensions or measurements are specified in the relevant Part and Class of the GPDO (**or** is removed). It should be recognised in the reasoning on ground (f) that requiring complete removal would be unlikely to achieve anything and therefore excessive, because the grant of PP under the GPDO represents a realistic fallback position and is an 'obvious alternative' that could be achieved with less cost and disruption[394].

751. However, it is unlikely to be possible to vary an EN to require that development is modified in accordance with PD limits in many cases because of the difficulties in framing the requirements with sufficient precision that the appellant knows that they have to do. Caution should be exercised where PD rights are granted subject to conditions, given that compliance with the EN would lead to the modified development being permitted by way of s173(11). In such cases, it may not be possible to vary the requirement so as to reflect any fallback PD rights.

752. In the permission hearing for *Singhal UK Ltd v SSCLG & Hounslow LBC* [2017] EWHC 946 (Admin), the HC held that there was an arguable case that the Inspector erred in consideration of ground (f) by failing to properly understand the extent of the appellant's PD rights, and to take their full potential effect into consideration in determining what steps were excessive. The purposes of the EN were in that case to remedy the injury to amenity.

Removal of Works in an MCU Notice

753. S173(4)(a) provides that an EN may require that the breach is remedied by discontinuing any use of land or by restoring the land to its condition before the breach took place – while s173(5) gives power to require the alteration or removal of buildings or works, or the carrying out of any building or other operations.

754. Accordingly, it was held in *Murfitt v SSE & East Cambridgeshire DC* [1980] JPL 598 that where an EN is issued in respect of an MCU, and works were carried out to facilitate the MCU, the EN may require that the 'ancillary' works are removed in order that the site is restored to its previous condition and the breach is remedied.

755. In *Murfitt*, the EN alleged that there had been an MCU to use for the parking of HGVs; it required discontinuance of the use and restoration of the site and that would involve removal of hardcore laid for the vehicles to be parked upon. The hardcore had been in place for more than four years but the appellant agreed that the only purpose of the hardcore was to enable the unauthorised use. It followed that the placing of the hardcore was part and parcel of that use and could be required to be removed.

756. It follows from *Murfitt* that an EN concerned with an MCU may not only require the removal of works which would otherwise be immune, but also the removal of those which might have been PD if they had not been constructed to facilitate the alleged use. It was further held in *Somak Travel v SSE & Brent LBC* [1987] JPL 630 that an EN could require the removal of works – in this case, the construction of an internal staircase – which did not amount to 'development' at all, but had facilitated an

[394] *Tapecrown Ltd v FSS & Vale of White Horse DC* [2006] EWCA Civ 1744

unauthorised MCU of the first floor of the building.

757. However, the CoA in *Murfitt* did not consider the approach to be taken if there is some question as to whether the works were carried out for some other lawful use. It was held in *Bowring v SSCLG & Waltham Forest LBC* [2013] EWHC 1115 (Admin) that, where an EN alleges an MCU and requires that certain works are removed, those works must have been integral to or part and parcel of the making of the MCU. The EN cannot require the removal of works that were undertaken for a different and lawful use and which could be utilised in that other lawful use if the unauthorised use ceased[395].

758. However, it was held in *Kestrel Hydro v SSCLG & Spelthorne BC* [2016] EWCA Civ 784 that *Bowring* does not warrant an approach whereby works carried out after the breach and integral to the unauthorised use must be considered potentially available for resumption of previous lawful use. In other words, it is not enough in ground (f) cases for the appellant to show that the works could serve the lawful use. The EN may still require the removal of such works if they were in fact installed to enable the unauthorised MCU.

759. Inspectors should also be aware that Waller LJ distinguished in *Murfitt* between cases where the works represent something which 'would have been obvious…[and] permanent…[and] should have been dealt with in a period of four years' – and where the works have an 'ancillary purpose' and, if not required to be removed, would 'leave land…in a useless condition for any purpose'.

760. In *Kestrel Hydro*, Lindblom LJ also held that 'the principle acknowledged and applied in Murfitt does not embrace operational development of a nature and scale exceeding that which is truly integral to a material change of use…this is what Waller LJ had in mind when the word "ancillary"…' was used.

761. Thus, where an EN is concerned with an MCU and requires the removal of works, the first question to be asked is whether the *Murfitt* principle applies, with regard to whether the works were installed for the unauthorised or previous lawful use and – if the former – they were of a nature and scale exceeding that which is truly integral to the MCU. The answers will be fact-sensitive.

762. Even if the *Murfitt* principle is capable of being applied, it may also necessary in such ground (f) cases to address whether any removal of works or resultant restriction on the use of the building is proportionate in the sense of being the minimum necessary to remedy the breach[396]. It is open to the Inspector to form the view as to what steps would be the least onerous to prevent the resumption of the unauthorised use, bearing in mind s173(5) as well as the authorities above.

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[395] The works in question had been installed for a change of use prior to that subject to the EN. The Inspector who redetermined the appeal found that the prior change of use had also been unlawful and so it was not excessive for the EN to require the removal of the works. That decision was upheld in *Bowring v SSCLG* [2015] EWHC 1027 (Admin).

[396] *Lough & Others v FSS* [2004] 1WLR 2557; *Makanjuola v SSCLG & Waltham Forest LBC* [2013] EWHC 3528 (Admin)

763. Care is particularly needed in cases where the works are of 'a nature and scale' [Kestrel Hydro] that they would have been obvious…[and] permanent…[and] should have been dealt with in a period of four years' [Murfitt]. That may be the case, for example, where a dwellinghouse was constructed unlawfully and put to residential use from the outset, such that there was no change of use. In such cases, some LPAs have issued an EN which alleges that there has been an MCU of the land, and which requires that the use is ceased and the building is removed even if it has been in place for more than four years.

764. While that approach may seem consistent with *Murfitt*, such an EN may cause problems, particularly if the building is within the planning unit of an existing dwellinghouse and it may have been erected under or consistent with PD rights, or be usable for incidental purposes by the occupier of the main dwelling, and its demolition would in any event exceed what is necessary to remedy the breach consisting of an unauthorised MCU.

765. It may be the case with any EN that a requirement to restore the land to its previous condition would be excessive or too wide in the circumstances, and the EN should be corrected or varied to require something less onerous.

Particular Types of Requirement

766. Since the scope of the EN is limited by s173(4)(a) and (b). The recipient cannot be required to undertake works that would go beyond remedying the breach. No matter how the works are specified, the most that they can achieve is compliance with a PP or restoration of the land to its previous condition – bearing in mind that the landowner should have the best knowledge of what that previous condition was[397].

767. Thus, there is no scope for an EN to require some **improvements** to the land, even if the result is that compliance with the EN would mean the building is left insecure or open to the elements. Indeed, it may be excessive in some circumstances to require that the land is restored to its previous condition. It would be for the appellant to carry out any improvements needed, seeking PP if necessary.

768. Where a new **access** was formed, it may suffice to require that the opening is closed off, leaving the appellant to choose the method of doing so. Given s173(5)(b), however, an EN may require that works take place to remedy the breach including that any fence or wall which was breached to form the access is repaired or replaced.

769. An EN can include **steps akin to conditions with a continuing effect**, for example, to maintain planting for a time. Such a requirement must be formulated precisely and subject to an appropriate compliance period, in order to provide clarity regarding compliance for the purposes of s173(11), as well as future enforcement and any prosecution.

770. It is sufficient in an **MCU** case, if the purpose of the EN is to remedy the BPC, for the EN to require the unauthorised use to cease. In cases where there has been

[397] *Ormston v Horsham RDC* [1965] 17 P&CR 105, *Al-Najafi v SSCLG & Ealing LBC* [2015] (CO/4899/2014)

intensification of use, a requirement to reduce the level of activity to that pertaining on a certain date may be appropriate. There is no scope to require reversion to the lawful use or that another activity takes place. The EN cannot prohibit other lawful uses or possible future breaches.

771. Where an EN seeks to remedy the injury to amenity from an MCU, the requirements may be worded as 'negative conditions' so as to define the extent of use that is allowable. For example, the steps might be 'cease the stockpiling of materials above a height of 5m above ground level' or 'cease to permit more than one crusher and one screener to be on the site' followed by 'cease the use of the land for [] save in accordance with the requirements listed above'.

772. Care should be taken with **numbers**. If an EN alleges an MCU of a single dwellinghouse to use as five flats, for example, it should just require the use as flats to cease. The risk of requiring 'use as five flats' to cease is that the building will be used for four or six flats.

773. Where there has been a MCU from use as a dwellinghouse to use as an HMO or flats, the EN may require the **removal of fixtures and fittings** such as kitchens, bathrooms, locks and/or meters, but regard must be had to whether they were installed for the lawful or unauthorised use, and what fixtures would be reasonably required to sustain the lawful use[398] as a matter of judgment[399].

774. Where an EN requires that the alleged use does not take place for more than **28 days in any calendar year**, in accordance with PP granted by Article 3 and Part 4 of Schedule 2 to the GPDO, the use can take place up to the expiry of the period for compliance with the EN and thereafter on however many number of days are left of the 28 in this particular calendar year[400].

775. In general, **requirements should not conflict with or be dependent on consents under other legislation**, although these will not necessarily be fatal to the EN. In *McKay v SSE & Cornwall CC & Penwith DC* [1994] JPL 806, it was held that an EN that required works for which scheduled ancient monument consent was needed but not obtained was a nullity, since the recipient would have to carry out a criminal offence. However, the CoA took a different approach in *South Hams DC v Halsey* [1996] JPL 761 holding that an EN that required works for which listed building consent would be needed was **not** null, since such findings should be confined to where there is a patent defect on the face of the EN.

776. Where there is a deviation from approved plans in **minerals and waste disposal** cases, the requirements of the EN may be limited to cessation of the activity or modifying the contour of the deposit of materials on land by altering the gradient or gradients of its sides as per s173(5)(d). The removal of large quantities of material may

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[398] *Bowring v SSCLG & Waltham Forest BC* [2013] EWHC 1115 (Admin)

[399] *Hereford CC v SSE & Davies* [1994] JPL 448

[400] *Attorney General's Reference No. 1 of 1996 under s36 of the Criminal Justice Act 1972* [1997] JPL 749

be both undesirable and impractical.

777. In breach of condition cases where the condition in question relates to **land outside of the PP site or appellant's ownership**, and the appellant could not comply with the condition or requirements of the EN, the appeal may succeed because the EN is invalid or otherwise on ground (c), or on ground (a). It may occasionally be possible to vary the requirements so as to enable compliance but only where this would not result in the EN becoming more onerous or uncertain. Compliance should not be dependent on the appellant reaching a possible agreement with the adjacent owner.

Ground (g)

778. Ground (g) is that 'any period specified in the notice in accordance with s173(9) falls short of what should reasonably be allowed'. Thus, an appeal on ground (g) may be made in relation to a period specified in relation to just one, some or all of the requirements – although it should be noted that if a period for compliance with one step is varied on the basis of unreasonableness, consequential variation may be required in respect of the period(s) for compliance with subsequent steps.

779. Where a stop notice has been issued and complied with, there will be no reason to extend the period for compliance. If a stop notice has not been complied with, the appellant will be committing a criminal offence while continuing with the development. In the absence of a stop notice, however, the development will remain unlawful but not illegal during the period for compliance.

780. The key question for ground (g) is what is 'reasonable'; this is a matter of judgment in which the Inspector has discretion. The task is essentially to balance the public interest in the EN being complied with expeditiously against the private interests bound up in the development subject to the EN (as corrected).

781. It must be assumed that the development causes whatever harm was identified in your conclusions on ground (a) or, if ground (a) was not pleaded, whatever harm is described in the reasons for the EN. Where the development poses a threat to life and limb, perhaps from loss of highway safety, that may be a compelling reason to not allow an appeal on ground (g). But the harm is not always decisive, because whether development ought to be granted PP is a different question to how long is reasonable to comply with the EN. The overall period for compliance should never be reduced.

782. In terms of the private interests, the Inspector must be mindful of the rights of the parties under the Human Rights Act 1998 and have 'due regard' to the PSED[401]. Where the appellant or others stand to lose their home or even part of their home – perhaps an extension which forms a child's bedroom – it is essential to consider whether the period for compliance is proportionate in human rights or equality terms. The same may apply where the appellant stands to lose their business or part of their premises or an element of the commercial mixed use being carried out.

783. Much the same approach to human rights and equality should be taken in ground (g) as in ground (a) and s78 appeals described in the Human Rights and PSED chapter. In most ground (g) cases, there is no need to rehearse the rights or duties in any great detail, but you must clearly balance the harm caused by the development against the needs of the appellant or others, being mindful of the best interests of the children, so as to reach a conclusion as to what period is 'proportionate' and reasonable in the circumstances.

784. Although the EN may have been issued some time before the appeal is decided, the appellant is entitled to assume success on any ground. If they pleaded any legal ground or (a) as well as (g), they may anticipate the EN being quashed. If the only other ground was (f), the appellant will not know before the appeal is decided what the requirements of the EN will ultimately be. Any suggestions by the LPA or interested parties to the effect that the period for compliance should not be extended because the appellant had time during the appeal proceedings should be rejected.

785. A different approach may be taken where (g) is the only ground. The appellant will have appealed for the sole reason of securing more time and in the expectation that the EN will be upheld as it was issued. In such cases, the Inspector may take account of the time that has lapsed since the issue of the EN in deciding what period for compliance is reasonable. But it is possible even then for ground (g) to succeed, perhaps if the Inspector exercises their powers under s176 to remedy defects in the EN that the appellant was not alert to or there are exceptional personal circumstances.

786. It would be exceptional for the compliance period to be extended beyond one year[402]. Allowing it to remain for longer could call into question whether it was expedient for the LPA to issue the EN in the first place. If there is a ground (a) appeal and a clear case for an alleged use to continue beyond one year, consideration should be given to a grant of temporary PP.

787. Where the requirements of an EN could or will have to be undertaken sequentially, it may be appropriate to give staged periods for compliance, so that the appellant may wind down their activity or is not given too little time to carry out the initial steps. For

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[401] Since the Inspector is expected to know and apply the law and given the powers of variation under s176(1)(b), Inspectors should be alert to any Human rights or equality implications of a short period for compliance with the EN even if there is no ground (g) appeal. The usual caveat applies that variations to the EN should not cause injustice or come as a surprise, and thus be canvassed in advance with the parties.

[402] In *Hounslow LBC v SSE & Lawson* [1997] JPL 141, the Court upheld an extension of the period to eight years, even though the appellant had only asked for 18 months, but the case involved the provision of a lift for a disabled person in a listed building.

example, if it is reasonable for an appellant to be given six months to cease the use, with that time being required to look for alternative accommodation, the EN ought to prescribe six months to cease the use and subsequent periods of time to carry out works required to restore the site to its pervious condition.

788. Where an EN requires compliance by a calendar date, this is likely to have been overtaken by the appeal process. The EN should be varied to give a period that is expressed in weeks or months but is no shorter than the original period. An Inspector should not use the confusing term of 'calendar months' but it is not essential to correct an EN simply to modify that phrase if the parties do not query it.

789. Inspectors should be mindful of the powers afforded to the LPA under s173A(1)(b) to extend any period for compliance – but only refer to this provision neutrally and with care. The exercise of the powers is entirely for the LPA's discretion – and if an appellant has pleaded ground (g), it is the Inspector's duty to reach a view on the evidence as to what period for compliance is reasonable.

Lawful Development Certificates[403]

LDC Applications and Appeals – ss191-196

790. S191(1) provides that if any person wishes to ascertain whether (a) any existing use of buildings or other land is lawful; (b) any operations which have been carried out in, on, over or under land are lawful; or (c) any other matter constituting a failure to comply with any condition or limitation subject to which PP has been granted is lawful – they may make an application for the purpose to the LPA, specifying the land and describing the use, operations or other matter[404].

791. S192(1) provides for the making of an application to ascertain whether (a) any proposed use of buildings or other land; or (b) any operations proposed to be carried out in, on, over or under land would be lawful. S192 does not provide for an LDC to be sought or granted in respect of a proposed breach of condition. However, s193(4) provides that an LDC may be issued under s191 or s192 for the whole or part of the land specified in the application; and, where the application specifies two or more uses, operations or other matters, for all of them or some one or more of them.

792. In an LDC appeal, as with enforcement legal grounds, the onus is on the appellant in an LDC case to make out their case to the standard of the balance of probabilities. The Inspector should apply the *Gabbitas* principle. Issues of planning merit are not relevant and there is no deemed planning application[405], even if the case relates to a caravan or waste disposal site.

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[403] See also PPG on Lawful Development Certificates and EPLP P191.01 to P196.03. Should you be handling an LDC appeal affecting a heritage asset, the Historic Environment and Listed Building Enforcement Notice chapters may also be relevant.

[404] Instead of LDC, the parties may refer to CLEUD or CLOPUD – Certificate of Lawful Existing/Proposed Use or Development.

[405] Though will be raised where an LDC and s78 appeal are linked; *Kensington and Chelsea RBC v SSCLG & Reis & Tong* [2016] EWHC 1785 (Admin).

793. Rights under the HRA98 are not engaged in the context of an LDC appeal, except in relation to the fairness of the proceedings, for the same reason that they are not engaged in the legal grounds in a s174 appeal. The PSED is not engaged. The grant of an LDC is declaratory of lawful use or development rights and a refusal to grant one is simply a refusal to grant the declaration sought[406].

794. Under s191(4) and s192(2), the relevant date for ascertaining whether the existing development is lawful, or the proposed development would be lawful, is the date of the LDC application. This remains the case even if the parties agree some modification to the description of the development and/or the plans.

795. S191(5) and s192(3) provide that an LDC shall:

(a) Specify the land to which it relates;

(b) Describe the use, operations [or other matters in s191 cases, meaning a breach of condition].

(c) Give the reasons for determining the use [or] operations [or other matters] to be lawful.

(d) Specify the date of the application for the certificate.

796. Article 39(1) of the Town and Country Planning (Development Management Procedure) (England) Order 2015 (DMPO) sets out requirements for LDC applications, while Article 39(14) provides that any certificate [issued] under s191 or s912 must be substantially in the form prescribed in Schedule 8 of the DMPO. If an LDC is not in such form, it will be invalid[407]. In an LDC appeal, details for the banner heading should be taken from the application form and any LPA decision notice as in s78 appeals.

797. Any person may apply for an LDC, regardless of whether they have an interest in the land – and there is no requirement for them to notify the or any other owners or occupiers. However, Article 39(2)(c) of the DMPO provides that an LDC application must be accompanied by a statement setting out the applicant's interest in the land, the name and address of any other person known to the applicant to have an interest in the land and whether any such person has been notified of the application[408].

798. It was held in *R (oao North Wiltshire) v Cotswold DC* [2009] EWHC 3702 (Admin) that an LDC was not invalid or unlawful on its face where it gave a date that was patently not the date of the application. This was an administrative error and not incapable of rectification by an administrative act on the part of the LPA. It was within the power of the LPA to re-issue the LDC with the date of the application properly given as the

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[406] *Massingham v SSTLR & Havant BC* [2002] EWHC 1578 (Admin)

[407] *James Hay Pension Trustees Ltd v FSS & South Gloucestershire Council* [2006] EWCA Civ 1387

[408] Article 39 deals with the validation of LDC applications generally. Provisions for validation disputes in planning applications under Article 12 do not seem to apply.

certified date of lawfulness[409].

799. S195(1) provides that an appeal may be made to the SoS where an application under s191 or s192 is refused or refused in part – where the LPA makes a split decision under s193(4) – or the LPA do not give notice of their decision within the prescribed period. S195(2) and (3) provide that, on appeal, the SoS shall grant an LDC if the LPA's [deemed] refusal is not or would not have been 'well-founded' and the SoS shall dismiss the appeal if the [deemed] refusal is or would have been well-founded.

800. The EPLP comments at P195.03 that 'the wording of subs.(2)-(3) rather suggests that s195 appeals are strictly limited to a review of the authority's decision. However, they are invariably treated as de novo appeals…the parties and interested persons may submit additional evidence to the [SoS] which was not before the authority at the time of its decision'.

801. Inspectors should indeed take this approach because s195 refers to the 'refusal' being well-founded – meaning the LPA's decision, not the reasons for the decision. Moreover, the application being appealed is made to ascertain what is or would be lawful. If the evidence taken as a whole suggests that the matter in question is not lawful, it would be wrong to grant an LDC, even if the LPA had different (and misplaced) reasons for reaching the same conclusion.

802. Thus, it was held in *Cottrell v SSE & Tonbridge and Malling BC* [1982] JPL 443 that the SoS cannot be compelled to issue a certificate when they are of the opinion that one should not be granted; this was an EUC case but applies to LDCs. An Inspector should consider any relevant fresh evidence advanced at the appeal, including where this evidence was not advanced at application stage. The purpose of the LDC provisions are to enable the making of an objective decision based on the best facts and evidence available when the decision is taken.

803. In any event, it would serve no public purpose for an Inspector to refuse an LDC strictly on the basis of the evidence submitted with the application, because it would always be open to the applicant to make a further LDC application on the basis of evidence that came to light after the LPA's refusal.

804. An Inspector may determine an appeal under s191 even if the application was made under s192, if the appellant is in reality seeking to ascertain that an existing use or development is lawful. However, it is necessary to secure the agreement of the parties to any such fundamental change to the basis of the appeal and the evidence would need to be sufficient for the lawfulness of the use or development as existing to be properly considered.

805. The links between the planning and advertisement regimes suggest that there is no restriction to applying for an LDC to determine whether an advertisement display is lawful. It is possible to issue an LDC for a specific advert if benefits from deemed consent under the advert regulations and therefore has PP under s222.

[409] See also *R v Arun DC ex parte Fowler* [1998] JPL 674

Lawfulness and the Time for Taking Enforcement Action

806. S191(2) sets out the circumstances in which 'uses and operations are lawful' for the purposes of the TCPA90, meaning that s191(2) applies to s192 as well as s191 appeals[410], and indeed to any consideration of lawfulness in an appeal made under s174(2).

807. Under s191(2), uses and operations are lawful at any time if:

(a) no enforcement action may then be taken in respect of them (whether because they did not involve development or require planning permission or because the time for enforcement action has expired or for any other reason); **and**

(b) they do not constitute a contravention of any of the requirements of an EN then in force.

808. The phrase 'any other reason' should be considered with regard to advice above on lawful uses and loss of lawful use rights. All lawful development attracts PD rights under the GPDO, and regard may need to be had to the right to reversion under s57(4) to the lawful use following the issue of an EN. However, because s57(5) excludes uses begun in contravention of planning control, an LDC does not confer rights to resume the 'normal use' under s57(2) and (3) after the expiry of a temporary PP.

809. The 'and' between s191(2)(a) and (b) is crucial. If it is found, for example, that an EN was issued but not in force on the relevant date and so s191(2)(b) is met, that is not enough for an LDC to be granted[411]. The appellant will still need to show that no enforcement action may be taken in order to satisfy s191(2)(a).

810. Similarly, s191(3) provides that a failure to comply with any condition or limitation is lawful at any time if (a) the time for taking enforcement action has expired **and** (b) it does not constitute a contravention of the requirements of any EN or BCN then in force.

811. It has been argued that an LDC can be granted before a s174 appeal has been determined, because the EN has not taken effect due to the provisions of s175(4) and so is not in force. It could be that an EN is issued before the relevant 4 or 10 year immunity period under s171B(1), (2) or (3) has expired, and then an LDC application is made after the expiry of that relevant immunity period, but before determination of an appeal against the EN. Similarly, an LDC application may be made after an EN is withdrawn but before the expiry of the four year period in which the LPA, under s171B(4), are not prevented from issuing a 'second bite' EN.

812. In the situation given in paragraph 805, the LDC Inspector should have regard to s171B(4) when deciding whether no enforcement action may be taken because the time

[410] Hence references to s191(2) on any lawful development certificate issued.

[411] Even if an EN (or BCN) is obviously or indisputably in force, an LDC appeal should not be turned away on that basis. The appellant has a statutory right to have their appeal determined, and so it is for the Inspector to reject the appeal having heard it, not to deny the right of appeal in the first place.

for taking enforcement action has expired, as at the date of the LDC application. Even though the time specified in s171B(1) to (3) had expired, the LPA may nevertheless have been able to take enforcement action at that date, because of the second bite provisions (*London Borough of Brent v Secretary of State for Housing Communities and Local Government, Ebele Muorah* [2022] EWHC 1875 (Admin), at paragraphs 48, 52 and 54). This will prevent the grant of an LDC, unless there are other reasons why, assessed at the time of the LDC application, no enforcement action may be taken against the use or operations, for example because they were PD. It should also be born in mind that, following *William Boyer (Transport) Ltd v SSE* [1996] 2 WLUK 85, the second bite provisions will only enable the service of a second enforcement notice if the first was issued in time. If in doubt, you may seek advice from your manager or Professional Lead.

813. However, it is important to recognise that something may be lawful on the date of an LDC application but not the date of issue of an EN, or vice versa. S171B(4) protects the position of LPAs by stopping the clock at the earliest stage. If a 'second bite' EN is appealed on ground (d), the Inspector must decide if the development was immune on the date that the first EN was issued, not the date of the second EN.

814. The time for taking enforcement action will expire as and when the LPA fails to issue an EN within the relevant period under s171B(1),(2) or (3) and the LPA will not be able to take further enforcement action if an EN is withdrawn or quashed and it does not issue a second EN within four years under s174B(4). A use or operation may become lawful under s191(2)(a) if an EN is issued and appealed, and proceedings are protracted and yet the LPA fails to exercise its powers under s171B(4). In the latter scenario, a s191 appeal could succeed before an appeal against an EN is finally determined, unless the LPA applies to the courts under s289(4A) for the EN to take effect in full or to such extent as may be specified.

815. Nevertheless, in that latter scenario, when the Inspector comes to determine the appeal against the EN on ground (d) they must consider whether the development was immune when the EN was issued. The question is not whether it was immune as at the date of a later LDC application. In these circumstances, the EN appeal on ground (d) might be dismissed, notwithstanding the earlier success of an LDC appeal. The appellant would then have an LDC certifying lawfulness as at the date of the application, but this would be academic, as they would still have to comply with the EN, having regard to s285(1) (*Staffordshire CC v Challinor* [2007] EWCA Civ 864).

816. S191(3A) provides that the time for taking enforcement action 'in respect of a matter' is to be taken not to have expired if specified circumstances apply in relation to the applying for or making of planning enforcement order under s171BA.

Existing Uses, Operations and Breach of Conditions – s191

817. S191(6) provides that the lawfulness of any use, operation or failure to comply with condition for which an LDC is in force under s191 'shall be conclusively presumed'. Thus, the use, operation or breach of condition described in an LDC issued under s191 is shown to have been protected from enforcement action on the date of the application, and it will remain so unless and until there is a material change in circumstances.

818. Accordingly, and since an LDC cannot be subject to conditions, an application must relate to a specific use, operation or breach of condition. It is not open to an applicant to pose a general enquiry as to what is or might be lawful. S191(5)(b) provides that where

the existing use is within a class specified in an order under s55(2)(f) – meaning the UCO – the LDC should describe the use by reference to that class. However, Inspectors should not describe the use solely or entirely on that basis.

819. The PPG advises that 'precision in the terms of any certificate is vital, so there is no room for doubt about what was lawful at a particular date, as any subsequent change may be assessed against it…a certificate for existing use must include a description of the use, operations or other matter for which it is granted regardless of whether the matters fall within a use class… the description needs to be more than simply a title or label, if future problems interpreting it are to be avoided. The certificate needs to spell out the characteristics of the matter so as to define it with precision. This is particularly important for uses which do not fall within any "use class"…[412]'

820. The terms of the LDC, meaning the description of the development found to be lawful and the specification of the land to which the LDC relates, will be the benchmark against which the materiality of any subsequent change in the character or intensity of the certified use – or the lawfulness of further works to the certified building will need to be assessed. There may be a question as to whether what takes place later on the site would amount to development under s55(2) or be permitted under the GPDO. The terms of an LDC may also indicate what the lawful use is for the purposes of s57(4)[413] or what the 'fallback position' is in terms of planning merits[414].

821. In an existing use case, therefore, the LDC should describe the activity that was, on the evidence, actually carried out during the ten year period – as well as, where applicable, the use class. For example, an LDC could be issued for 'the stationing of [x] caravans for residential use on [x] pitches' or 'use for the storage of building materials and equipment, being a use falling within class B8 of Schedule 1 to the [UCO]…'[415].

822. It must be clear if the LDC is issued in respect of some but not all components of a mixed use or part of a planning unit, so that any later change may be subject to planning control if and when it is material as a matter of fact and degree[416]. The PPG states that where an LDC 'is granted for one use on a 'planning unit' which is in mixed or composite use, that situation may need to be carefully reflected in the certificate. Failure to do so may result in a loss of control over subsequent intensification of the certified use'[417].

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[412] PPG on Lawful Development Certificates: paragraph 17c-010-20140306

[413] *Hillingdon LBC v SSCLG & Autodex Ltd* [2008] EWHC 198 (Admin)

[414] See, for example, *Simpson v SSCLG & Medway Council* [2011] EWHC 283 (Admin), *Kensington and Chelsea RBC v SSCLG & 38 Cathcart Ltd* (CO/4492/2016), *Parvez v SSCLG & Bolton MBC* [2017] EWHC 3188 (Admin) and *Sharma v SSCLG & Spelthorne BC* [2018] EWHC 2355 (Admin).

[415] If an LDC does not refer to any use class, but nonetheless the lawful use would fall within one, s55(2) and the provisions of the UCO will still have effect. The lawfulness of any new use will only be constrained by the need to demonstrate that it remains within the parameters of that class; see the PPG on Lawful development Certificates.

[416] *Wipperman v Barking LBC* [1965] 17 P&CR 225

[417] PPG on Lawful Development Certificates: paragraph 17c-010-20140306

823. There is no requirement for an LDC to specify the quantity of item(s) that are lawful[418]; doing so may be helpful or unnecessary depending on the circumstances. It was held in *R (oao North Wiltshire DC) v Cotswold DC* [2009] EWHC 3702 (Admin) that the LDC issued under s191 for the use of Kemble Airfield for 'general aviational purposes' could not be impugned. An LDC should not be issued in terms wider than the use which the evidence shows to be lawful, but there was nothing in case law or Government policy (then) to establish any obligation to include the fine details.

824. In *Westminster CC v SSCLG* [2013] EWHC 23 (Admin), an LDC was sought for the use of a defined area of pavement in front of a restaurant for the placing tables and chairs in connection with the restaurant. The use only occurred when the restaurant was open, and even then the amount of furniture fluctuated. The Court held that the LDC clearly and correctly defined the use. It defined the location precisely and the nature of the use, being the placing of tables and chairs while the restaurant was open. It would be unduly restrictive to define the use further.

825. However, an LDC should refer to the level of use where there has been an intensification in activity which is not yet sufficient to amount to an MCU. How the level is particularised is for the decision-maker and will depend on the evidence; it may be, for example, the levels at the start of the ten year period, or the average or lowest level in that time.

826. S191(4) allows the LPA to modify the description of the existing use, operation or other matter. The SoS or Inspector may exercise this power on appeal and is indeed obliged to issue an LDC for any use or development that is shown to be lawful on the facts and evidence, rather than refuse a certificate on the basis of some error or misunderstanding in the application form. The power should seemingly be exercised even if the use and/or whole planning unit were not included in the application, and thus reinforces the need to properly identify the planning unit[419].

827. However, the description should be modified with care because the power given under s191(4) is discretionary. It should not be read as empowering the grant of an LDC for something totally different to what is applied for or as justifying the certification of something obvious. The Inspector should canvas with the parties any substantive modification to the description considered necessary.

828. Most s191 appeals relate to whether the existing use, operation or breach of condition is immune from enforcement action due to the passage of time – and fall to be considered on a similar basis to ground (d) appeals. But there may alternatively or additionally be ground (c) type issues, such as whether the existing use or operation amounts to development or the condition being breached was valid or a condition precedent.

829. The same considerations also apply as in ground (d) cases where it is claimed that a breach of a continuing requirement condition is immune from enforcement action. The

[418] *Hillingdon LBC v SSCLG & Autodex Ltd* [2008] EWHC 198 (Admin)

[419] *Panton & Farmer v SSETR & Vale of White Horse DC* [1999] JPL 461

failure to comply must continue for ten years; if the breach ceases within the period and the condition is complied with, the clock will start again.

830. The judgments of the High Court in *Nicholson v SSE & Maldon DC* [1998] JPL 553 and *Ellis v SSCLG* [2009] EWHC 634 (Admin) indicate that the failure to comply with the condition must be in existence at the date the LDC application is made. However, in *R (Ocado) v Islington LBC* [2021] EWHC 1509 (Admin), Holgate J carried out a thorough review of the law and respectfully concluded that the judgments in *Nicholson* and *Ellis* on this point should not be followed. Given that these are all High Court decision, *Ocado* does not strictly overrule the earlier judgments. Nevertheless, Holgate J's reasoning may be preferred. It was held:

- If a condition has been breached continuously for any ten-year period, without significant interruption, the breach will be lawful thereafter, unless that lawful right has been lost through some event sufficient to terminate it. (The question of the nature of the events which might terminate that right was left open).

- The breach does not have to be continuing at the date of an LDC application to become lawful.

- However, the condition is not expunged. It was cited that the example of PP granted for a caravan site subject to a condition restricting the number of pitches to 50. If the landowner can show that there has continued to be 55 pitches on the site for a 10-year period, they are entitled to an LDC legitimising the breach of that condition to the extent of allowing up to 55 pitches. In effect, the condition restricting the number of pitches continues in force, but with a revised ceiling on the total number of pitches allowed.[420]

831. This point should be spelt out in the reasoning and the certificate itself for the avoidance of doubt[421]. Where there has been a breach of an agricultural occupancy condition, for example, the LDC may provide that 'PP [ref] was granted on [date] for… Condition [x] requires that [agricultural occupancy]. The condition has not been complied since [approximate date], being an uninterrupted period of [10+] years prior to the date of the application, because [the dwelling was occupied by persons not working in agriculture]. The occupation of the dwelling by any person continuing the same breach of condition [x] is thereby immune from enforcement action under s171(3) of the TCPA90.'

832. Under s191(1)(c), an LDC may be sought in respect of a 'matter constituting a failure to comply with any condition or limitation subject to which PP has been granted'. S193(5) provides that any LDC granted under s191 or s192 shall not affect any matter constituting a failure to comply with any condition or limitation subject to which PP has been granted, unless it is described in the certificate. It follows that an LDC granted under s191(1)(c) need not relate to the condition as a whole.

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[420] By way of comment, to use the language of s191(1)(c) it is merely the "matter constituting a failure to comply with any condition" which becomes lawful. It follows that a different matter failing to comply with the condition, which has not been expunged, will not be lawful."

[421] Even though any LDC will only certify that a particular matter was lawful on a particular date.

833. There may be a breach of just one component of the condition and/or in relation to part of the land that the condition relates to – such as where PP was granted for an estate subject to a condition controlling the erection of fences. If the occupier of one house puts up a fence that becomes immune from enforcement after four years, the LDC should relate only to that fence and not prevent the LPA from upholding the condition across the wider estate.

Proposed Uses or Operations – s192

834. In s192 cases, the question is whether the proposed use or operation would be lawful if 'instituted or begun' on that date. So, for example, if an LDC is sought for an extension to a house on the basis that the development would be PD, regard should be had to the provisions of the GPDO on the date of the application. The word 'begun' should be interpreted in s56(2) terms.

835. S192(4) provides that the lawfulness of any use or operation for which an LDC is in force under s192 'shall be conclusively presumed unless there is a material change, before the use is instituted or the operations are begun, in any of the matters relevant to determining such lawfulness'. A material change may include a change in the law or other circumstances affecting the status of the land. For example, if an LDC is granted for a proposed house extension on the basis that it is PD, the extension still may not be lawfully begun if an Article 4 Direction comes into force first.

836. It was held in *Saxby v SSE* [1998] JPL 1132 that making an application under s192 is the only procedure available to obtain a determination as to whether PP is or is not required[422]. In *Pitt v SSCLG* [2015] EWHC 1931 (Admin), it was affirmed that an LDC for issued under s192 does not only certify lawfulness on the date of the application; it also remains conclusive under s192(4) unless there is a material change before the development is begun.

837. An LDC issued under s192 should be worded with the same precision on any issued under s191. There is no equivalent power to that set out under s191(4) for the LPA, SoS or Inspector to modify the terms of an LDC application. It is for the appellant to propose the use or operation that they wish to ascertain the lawfulness of. However, the terms may in practice be modified by the appellant or where they agree[423].

838. In some cases, the LPA and appellant may have agreed a modified description or plans and the appeal has gone forward on that basis. The Inspector must ensure that any modifications would not prejudice any party to the proceedings or have implications for those who have not been a party to the agreed modification.

839. S192 cases will often involve only legal submissions as to the interpretation of the statutory provisions. It is often possible for the appeal to be dealt with by written representations and, potentially, without a site visit. The Inspector should carefully

[422] And the old law whereby every planning application was also said to include an implied application for a determination no longer applies.

[423] *R v Thanet DC ex parte Tapp & Another* [2001] EWCA Civ 559

consider if a site visit is not required at all having regard to the circumstances and facts. It may be best to inform the appeal parties where no site visit is conducted. If a party asks for a site visit, advice should be sought from the manager. In some cases, however, it will be necessary to investigate the lawfulness of the existing use or operations before deciding whether what is proposed is lawful.

840. S192 cases may also be complicated where multiple applications are made, perhaps for the use of the land as a residential caravan site with eight, ten or 15 caravans, where lawfulness was established at a lower base level. The objective of the applicant is to ratchet up the numbers on the back of the next lowest number that can be shown to be lawful.

841. The correct approach to be taken in such cases is as laid down by the CoA in *Waltham Forest LBC v SSETR & Tully* [2002] EWCA Civ 330. It is necessary to compare the proposed use with the actual existing use, and not with some notional use that might be lawful. In other words, it is necessary to look at each LDC application in turn and decide whether eight caravans would represent an MCU as a matter of fact and degree before looking at whether ten would and so on. An LDC will not normally be granted under s192 without evidence about the character of an existing use.

842. Where there is success in such a case for a marginal increase on a lawful base level, the LDC must be worded to avoid creating a new point of reference and facilitating 'creeping lawfulness'. For example, if the existing caravan site has seven caravans, the LDC might state that the increase to eight is lawful for the reason that '…the use is not materially different from the use for the stationing of seven caravans for residential use as described in LDC [ref] [date]'.The use certified might be 'use as a caravan site for [an absolute maximum of] eight caravans'.

The Value of an LDC

843. It was held in *Broxbourne BC v SSE* [1979] JPL 308 that an EUC shall be conclusive for the purposes of an enforcement appeal. The SoS was entitled to find that there had not been an MCU because the use being enforced against was not so different to that described in an EUC. It did not matter that the EUC was 'silent as to the scope and intensity of the use'. There was no limit to where the use could take place within the site or the intensity of the use.

844. Broxbourne was applied in *Breckland DC v SSHCLG & Plum Tree Country Park* [2020] EWHC 292 (Admin), where it was held that the interpretive principles applicable to PPs apply to LDCs. The Inspector was entitled to find the scope of a 2006 LDC clear and unambiguous on its face, meaning that extrinsic evidence was irrelevant. The lawfulness of the use was 'conclusively presumed' as certified and the LPA could not import limitations into the LDC[424].

845. However, in *Staffordshire CC v Challinor* [2007] EWCA Civ 864, the grant of an LDC did not give the claimant relief from an injunction. The LDC had been granted in relation to part of the site, whereas the EN subsequently issued related to the whole site – and had

[424] See also *Adams v SSHCLG & Huntingdonshire DC* [2020] EWHC 3076 (Admin)

not been appealed on ground (c) or (d).

846. Under s285(1), an EN is not to be questioned in any proceedings on any grounds on which an appeal may be brought, other than by way of an appeal under Part VII. It was held in *Staffordshire* that the LDC could not be relied upon. What was lawful before the EN took effect was no longer lawful. The effect of s285(1) was that lawful rights could be taken away by an EN in these circumstances[425].

847. Where an LPA claims that an LDC may not be granted because of an EN in force, it is important to bear in mind that the EN cannot be interpreted so as to deprive the recipient of lawful use rights – such as to carry out development permitted by the GPDO or use land for a purpose that is ordinarily incidental to a primary use that has not been enforced against.

848. The grant of an LDC is not a pre-requisite to lawfulness, and the provisions of ss191-2 do not negate any EUC or s53/64 determination made under earlier legislation. However, it is open to any landowner to apply to convert an EUC to an LDC. The lawful rights certified by an EUC or LDC may be lost as outlined above, including by abandonment or implementation of a PP in a way that is wholly incompatible with the continuation of the certificated use.

849. S193(5) provides that an LDC does not affect any non-compliance with a condition on a PP unless that matter is mentioned in the certificate. This means the LDC procedure cannot be used to circumvent conditions imposed on an existing valid PP[426].

850. S193(7) provides that an LPA may revoke an LDC issued under s191 or s192 in the event that, on the application, a statement was made or document used which was false in a material particular, or any material information was withheld. The SoS has no equivalent power, but an LPA could revoke an LDC granted by the SoS.

Evidence and Events

The Burden of Proof and Approach to Evidence

851. As noted above, the burden of proof is on the appellant in LDC appeals and enforcement appeals, to make their case in respect of the legal ground[427]. The standard of proof is the civil standard, which is the 'balance of probabilities' or whether something is more likely than not[428]. Given this standard, it is best to avoid discussing whether or not the evidence 'proves' or 'is proof' of any claim.

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[425] *Wokingham BC v Scott* [2017] EWHC 294

[426] *Adams v SSHCLG & Huntingdonshire DC* [2020] EWHC 3076 (Admin)

[427] *Nelsovil v SSE* [1962] 13 P&CR 151

[428] *Thrasyvoulou v SSE* [1984] JPL 732; in no circumstances should reference be made to the criminal standard, which is 'beyond reasonable doubt'.

852. The above points apply whether the appeal is decided by written representations (WR), hearing or inquiry, and regardless of the form of the evidence. Evidence should not be rejected simply because it is uncorroborated. If there is no evidence to contradict the appellant's version of events or make it less than probable, and their evidence is sufficiently precise and unambiguous, it should be accepted[429]. Often the question is simply whether the appellant's evidence is precise and unambiguous enough to show that (for example) it is more likely than not that the alleged building was substantially completed four years before the EN was issued.

853. Enforcement appeals are often made by householders or small business proprietors who have a great deal at stake on the outcome of the appeal and cannot afford professional or legal representation. Likewise, agents and, to an even greater extent interested parties, may not know what evidence or case-law to submit. The Inspector should take the evidence for what it is and not reject it simply because it is poorly put together.

854. However, there may be good reasons to why an appellant's sworn evidence does need corroborating in a particular case, perhaps because it is contradicted, thin or weak or even because the appellant is in some respect unconvincing at the Hearing or Inquiry. Where the Inspector concludes that corroboration is required, however, the reasons why should be clearly explained in the decision. The courts tend to criticise/reject generalised evidence or generalised reasoning as to why evidence has been rejected.

855. It was held in *Ravensdale Ltd v SSCLG* [2016] EWHC 2374 (Admin) that an appellant seeking to make out a lawful use pursuant to ground (d) must provide sufficient evidence which shows on the balance of probabilities that there had been a continuous use for the relevant immunity period. The court endorsed the Inspector's conclusion that the sparse nature of the declarations and 'patchy' evidence of lettings was insufficient to satisfy the onus of proof. It is for the decision-maker to rule on the evidence provided; there is no duty to explain what evidence might have been satisfactory.

856. Certain websites may offer appellants forged utility bills or bank statements. Unless the LPA can demonstrate that a bill is forged, or there is an obvious error with a document, any issue of forgery that is raised should be dealt with on the balance of probabilities. Where there is a dispute as to fact on the legal grounds, an inquiry may be the most appropriate procedure because contested evidence is best tested under oath, and there is no power for an Inspector to administer the oath at a hearing.

857. Accordingly, there is a hierarchy in terms of the weight afforded to different forms of evidence which is, in descending order:

- Evidence that is given orally under oath by an independent witness and tested by cross-examination.
- Evidence that is given orally under oath by a witness for one of the parties and tested by cross-examination.

[429] *Gabbitas v SSE & Newham BC* [1985] JPL 630 but also see *Ravensdale Ltd v SSCLG [2016] EWHC 2374 (Admin)* at paragraph 837

- Verifiable and ideally dated photographs.
- Contemporaneous documents, such as dated letters and invoices.
- Statutory declarations which are not tested by questioning
- Unsworn written statements and letters which are not tested by questioning.

858. The Perjury Act 1911, which imposes penalties in respect of false sworn statements made in writing as well as under oath, underlies the above hierarchy.

859. However, the hierarchy should only be seen as the starting point. Much depends on the evidence and the circumstances of the case; weight may be affected by other factors such as precision and corroboration. Even sworn documents may only contain hearsay but tribunals are entitled to act on any material which is logically probative; *T A Miller Ltd v MHLG* [1968] 1 WLR 992. In some cases, evidence may be undermined by inconsistency – or there may be too much consistency whether one would normally expect varying gaps in the memories of witnesses. Where evidence was tested at hearing or inquiry, regard should be had to how the witnesses and their evidence withstand questioning.

860. In *R v SSE & Leeds CC ex parte Ramzan* (QBD 18.12.97 CO/2202/97), the Inspector was entitled to give little weight to inconsistent and unreliable evidence submitted in support of ground (d) without making any further offer of an inquiry or seeking more information; the appellant had requested WRs. However, evidence should not be rejected simply because it has not been 'tested' where the WR procedure was followed. Any evidence must be properly analysed on the balance of probabilities test with regard to its source, content, consistency and probable reliability[430].

861. Evidence on ground (a) and the DPA should be considered in the same way as a s78 appeal. References to the burden of proof or balance of probabilities are inappropriate in the context of the planning merits.

Statutory Declarations, Affidavits and Other Documents

862. A Statutory Declaration is a formal statement made under the provisions of the Statutory Declarations Act 1835 to affirm that something this true to best knowledge of the person making the declaration. A statutory declaration submitted pursuant to an enforcement or LDC appeal should be treated as sworn first-hand evidence.

863. All documents which purport to be Statutory Declarations can be so classed. A Statutory Declaration must be witnessed by and signed in the presence of a solicitor, commissioner for oaths or notary public, who should add their signature and details. A Statutory Declaration should also include the form of words set out in the Schedule to the 1835 Act:

'I A.B. do solemnly and sincerely declare, that and I make this solemn declaration

[430] *Mahajan v SSTLR & Hounslow LBC* [2002] JPL 928

conscientiously believing the same to be true, and by virtue of the provisions of an Act made and passed in the year of the reign of his present Majesty, intituled [the 1835 Act].'

864. An affidavit is also a sworn written statement of fact which complies with certain formal requirements and is used in certain court proceedings where required by law. The main difference between affidavits and statutory declarations is in the way they are made, with the former accompanied by an oath sworn by the person making it.

865. A signed statement to which no sanctions apply will carry less weight, even if signed in the presence of a solicitor. If a document is purported to be sworn but does not appear on its face to be a statutory declaration, and the case turns on this evidence, it may be necessary to clarify its status with the parties.

Recordings and Electronic Evidence

866. Inspectors may be asked to view and accept video recordings or other electronically created material as evidence, for example, to demonstrate lorry movements or noise associated with the use in question. It is generally reasonable to do so at an Inquiry or Hearing, so long as all others appearing at the event have the opportunity to view and hear the recording.

867. Such evidence should not be accepted in WR cases because there is no practical way to ascertain that the same video or audio recordings have been received by the other parties. If the evidence was accepted because the procedure was originally going to be a hearing or inquiry, it should be returned to the party that submitted it and discounted by the Inspector.

868. Such evidence may be accepted at a hearing or inquiry, on the basis that it is watched or listened to by the parties at the event[431]. The Inspector should be satisfied that the recording is authentic and reflects as far as possible typical conditions on the site. It can be helpful for the witness presenting the recording to be asked to identify the main points arising for the purposes of subsequent discussion or cross-examination.

869. Where objections are raised to the admission of such evidence, Inspectors should hear the arguments and say that they will be considered when judging what weight, if any, should be attached to the recordings. Whether there are objections or not, the Inspector should make it clear that the material is viewed without prejudice to consideration of its relevance, on which others will be allowed to comment. It is likely that oral evidence and the Inspector's own observations of the site will carry more weight.

Translators and Interpreters

870. An appellant, their witnesses and/or interested parties attending an inquiry or hearing may require the services of an interpreter. There is no obligation upon the LPA to provide an interpreter for other parties. It is for the appellant to provide their own

[431] See also the Guide to Taking Part in Enforcement Appeals and LDC Appeals Proceeding by an Inquiry – England

interpreter[432], although, given the public sector equality duty, the Inspector must ensure that the appellant is able to do this and participate properly in the inquiry.

871. If it appears from the case file that there might be the need for an interpreter(s) at the event, you are advised to inform the appellant, their agent and/or other parties in advance that they should make the necessary arrangements. You should do this either by raising the matter in a timely pre-inquiry note or by asking the case officer to write to the parties specifically on this matter.

872. The National Register of Public Service Interpreters (NRPSI) is an independent voluntary public interest body. Registered Interpreters are those who have met standards for education, training and practice in public service, and are subject to the NRPSI Code of Professional Conduct. Courts in the UK will only use Registered Interpreters who understand that their duty is to be impartial and assist the Court.

873. In planning and enforcement proceedings, however, parties are not obliged to employ a Registered Interpreter or indeed pay for any professional service. It is open to an appellant to make use of a family member or friend as an interpreter. The Inspector should clarify the relationship between the party and their interpreter at the start of the hearing or inquiry and, if necessary, check that they understand each other.

874. It may be difficult for a friend or relative acting as an interpreter to remain impartial, but the Inspector should not assume from the outset that they are compromised, and should not reduce the weight ascribed to the party's evidence on that theoretical basis. The interpreter should be reminded that they must simply translate the party's oral evidence to the best of their ability. They should not alter or elaborate on that evidence and should not discuss it with the party before translating it. If the interpreter seeks to assist the party in some way beyond their role, the way in and degree to which they do so and the implications for the proceedings should be assessed on a case by case basis.

875. It may be necessary on occasion for you to enable an appellant or other party to find an interpreter on the day of the event. This may involve allowing an adjournment and/or asking the party if they have a friend or relative who can assist them at short notice, perhaps by writing notes of submissions.

876. If any party objects to any matter arising from the securing and/or use of another party's interpreter, invite them to address this in their closing submissions.

877. Where evidence is being taken under oath, it is **essential** to put the interpreter on oath and use the prescribed oath or affirmation for Interpreters set out in Annex 3.

Written Representations Appeals and Site Visits

878. The procedures rules for both enforcement and LDC appeals proceeding by WR are set out in the Town and Country Planning (Enforcement) (Written Representations Procedure) Regulations 2002 – SI 2002/2683

[432] See permission hearing *Salem Mussa Patel v SSCLG* (CO/2301/2015).

879. The key provisions of these Rules are:

- 4 – the SoS shall, as soon as practicable after receipt of the written notice of the appeal, advise the appellant and the LPA in writing of the 'starting date' – or start date as it is known – and the grounds on which an appeal may be brought.

- 5(1) and 6(1) – within two weeks of the starting date, the LPA shall give written notice of the appeal to any person served with a copy of the EN, any 'occupier of property in the locality [of the land subject to the EN]' and any other person who in the opinion of the LPA is affected by the BPC alleged – and the LPA shall submit to the SoS a completed questionnaire and copy of each document referred to in it.

- 7(1) – the notice of appeal, the documents accompanying it and any statement provided under ENAR6 shall comprise the appellant's representations in relation to the appeal.

- 7(2) – the LPA may elect to treat the questionnaire, copy of each document referred to in it and statement submitted under ENAR9 as their representations.

- 7(3) and 7(4) – if the appellant wishes to make any further representations, or the LPA do not elect to proceed as described in 7(2), the further representations shall be submitted within six weeks of the starting date.

- 7(7) and 7(8) – the appellant and LPA shall submit any comments on each other's representations within nine weeks of the starting date. The SoS may disregard further information from the appellant and LPA which was not submitted within nine weeks unless it was requested.

- 8(1) – an interested person notified under 5(1) may submit representations within six weeks of the starting date.

- 10(1) – the SoS may proceed to a decision on the appeal taking into account only such written representations as have been submitted within the relevant time limits.

- 10(2) – the SoS may, after giving the appellant and LPA notice, proceed to a decision on an appeal notwithstanding that no written representations have been made within the relevant time limits if it appears that there is sufficient material to reach a decision.

880. It is not always necessary to carry out a site visit in Enforcement or LDC cases – perhaps if the only question is, for example, whether a building has existed for four years, or a particular activity is excluded by a condition imposed on a PP, or an extension would be PD in a s192 appeal. Even in such cases, however, seeing the land and development may help you contextualise or understand the evidence better. It is usually essential to see the site where ground(a) is pleaded, with the advantage in an enforcement or s191 case being that the development is already there.

881. An Inspector is entitled to base their conclusions on what they see on the site[433]. However, evidence regarding, for example, highway conditions, which was obtained at an unaccompanied site visit should not be relied upon without the parties having an opportunity to comment on any circumstances which they consider may have pertained at the particular time of the visit[434].

882. At the start of an Enforcement accompanied site visit (ASV), the Inspector should confirm with the parties that they have the correct EN – since there are no plans as in s78 appeals. Otherwise, the advice set out in the Site Visits ITM chapter applies, including that the Inspector should not accept new evidence. If it transpires that you or one of the parties has the wrong EN, or that further or missing evidence needs to be received, mention the matter but insist that the documents are sent in writing to the case officer.

883. Similarly, the Inspector should not discuss the case at the site visit where the appeal is proceeding by WR. There should be no conversation which is or could be construed as relevant to any ground of appeal or validity point. Planning merits should not be discussed whether they are at play in the appeal or not. Inspectors should also be extremely careful to avoid being seen in the company of or talking to one party without the others. A tactful but firm reminder to the parties is usually sufficient to prevent a potentially embarrassing situation from developing.

884. Enforcement cases are often sensitive and it may be that the appellant refuses to allow the LPA officer on the site or to view from the site from an adjoining property; likewise a neighbour may refuse to allow the appellant onto their land. If one or other party is unwilling to accompany the Inspector where this would normally be required, ask for the agreement of all parties before entering the land with just one. The Inspector should **never** enter land with only one party if this has not been agreed, you feel this could lead to some concern about impropriety or bias and/or you feel unsafe.

885. If an Inspector is denied entry to the site by an uncooperative appellant, and unable to see everything necessary from vantage points on the public highway, the visit should be aborted. The Inspector should consult with their IM and PFL as to whether it may be possible for the LPA to authorise a return inspection.

886. Rights of entry for enforcement purposes are governed by s196A-C and s324 of the TCPA90. Any person authorised in writing by an LPA (s196A-C) or the SoS (s324) may enter land and premises to ascertain whether a breach of planning control has taken place, whether and how enforcement powers should be exercised, and whether requirements have been complied with.

887. These powers do not appear to extend to the situation experienced by an Inspector when dealing with an appeal. However, experience has shown that rights of entry can usually be arranged to enable a site visit to take place in difficult circumstances.

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[433] *Winchester CC v SSE* [1979] 39 P&CR 1

[434] *Southwark LBC v SSE* [1987] JPL 36

888. Where information is provided during the course of the appeal that there may be some risk to the Inspector and/or other parties at the site visit, the case officer should seek advice from the PFL. If such information comes to light at a later stage, the Inspector should contact the PFL and their Inspector Manager immediately and discuss the matter.

889. The PFL will consult the LPA and, if required, the local police force for a determination on whether it would be appropriate for police to be present at the visit. If so, the visit would automatically become an ASV and the PFL would co-ordinate it with the police and LPA. The police presence could be:

- Low profile: non-uniformed officers in a vehicle near the site. Medium profile: uniformed officers in a vehicle near the site.
- High profile: uniformed officers present at the ASV, with all of the main parties notified in advance.

Hearings[435]

890. The Town and Country Planning (Enforcement) (Hearings Procedure) Regulations 2002 (SI 2002/2684) contain similar provisions to those for WR appeals, with 'documents' and the 'hearing statement' to be submitted at the six week stage, and comments on the opposing party's statement by nine weeks.

891. Rule 1(1) provides that a document includes a photograph, map or plan – while a 'hearing statement' means a written statement which contains full particulars of the case which a person proposes to put forward at a hearing and copies of any documents which that person intends to refer to or put in evidence'.

892. Inspectors are encouraged to prepare early and send out a pre- hearing note in most cases. The note should set out any 'virtual' joining instructions and other arrangements for the event as necessary, including arrangements for any site visit where that would need to be on a different day to the virtual hearing.

893. The note should also set out the agenda and main issues for the hearing, and it will ideally address any defects in the EN, list any missing plans or documents and set out any other matters that the parties should be aware of before the hearing. The note may save considerable hearing time and even obviate a need for the event.

894. As in WR cases, Rule 4(2) requires the LPA to give written notice of an enforcement appeal to any person served with a copy of the EN, any 'occupier of property in the locality [of the land subject to the EN] and any other person who in the opinion of the LPA is affected by the BPC alleged. The SoS may under Rule 6(5) require the LPA to, not less than two weeks before the date of the hearing, publish notice of the hearing in a local newspaper or send notice of the hearing to persons as specified.

895. Where interested parties were notified of the appeal and/or have made representations,

[435] See also the Hearings ITM chapter

they must in practice be notified of the hearing arrangements. If the Inspector realises that people who would have wished to attend were not properly notified about the hearing, it is likely that the event will need to be adjourned. The public are entitled to attend the hearing and so any decision to proceed where the rules on notification were not complied with should be taken with caution. It may be possible on occasion to continue with the excluded parties given an opportunity to make written representations, but then there will be a risk that any submissions made would necessitate the hearing being re-opened.

896. A hearing may also need to be adjourned to another date if the appellant seeks to introduce a new ground of appeal or any party seeks to introduce significant new evidence. However, a lengthy adjournment is unlikely to be necessary if the appellant merely seeks to substitute one ground for another – say, ground (c) for ground (b) – where the evidence remains the same. It is also usually possible for any new ground (f) and/or (g) appeal to be accommodated without a lengthy adjournment.

897. An enforcement or LDC hearing will take place along much the same lines as a s78 hearing. The agenda and Inspector's opening announcements should address any validity issues and all grounds of appeal, as advised in relation to inquiries below. The Inspector must be mindful at all times of the responsibility on them to test the evidence[436].

898. If it becomes clear during the hearing that evidence should be taken on oath to resolve disputed facts pertaining to a legal ground or s191 appeal, the Inspector should abort the hearing and arrange for an inquiry to be held. There is no statutory power for an Inspector to administer the oath at hearings and doing so would be inappropriate, because hearings are more informal than inquiries and do not normally involve cross-examination (although the Rules enable this to take place when appropriate).

899. Rule 12(1) of the Hearing Rules allows the Inspector to adjourn the hearing to and conclude the hearing at the appeal site, where it appears to the Inspector that one or more matters should be more satisfactorily resolved by doing so, and the hearing would proceed satisfactorily, no party would be placed at a disadvantage, all parties present at the hearing would have to opportunity to attend it as so adjourned and the LPA and appellant have not raised reasonable objections to the hearing being continued at the site.

900. Accordingly, the Inspector should normally close the hearing at or after the site visit – but it may be best to close the event before then if any third parties who have taken part in the discussion at the hearing would be unable to attend the site visit and thus would be disadvantaged should further discussion take place there.

Inquiries[437]

[436] *Dyason v SSE & Another* [1998] 2 PLR 54 (CoA)

[437] The advice in Inquiries (England & Wales) applies in general to enforcement and LDC inquiries. Further advice is also given in Human Rights and Equality

901. There are two sets of rules for Enforcement and LDC inquiries: the Town and Country Planning (Enforcement) (Determination by Inspectors) (Inquiries Procedure) Regulations 2002 (SI 2002/2685) which apply to transferred appeals, and the Town and Country Planning (Enforcement) (Inquiries Procedure) Regulations 2002 (SI 2002/2686) which apply where the appeal is recovered by the SoS for their own determination. These are referred to as the 'Inspector [Inquiry] Rules' or 'SoS [Inquiry] Rules' and there are some differences between them.

902. Again, those to be notified of the appeal and entitled to appear at any inquiry are any persons on whom a copy of the EN has been served, occupiers of property in the locality of the land to which the EN relates and any other person who, in the opinion of the LPA, is affected by the BPC. In LDC cases, any person who has an interest in the land affected is entitled to appear. Where the LPA fails to notify such persons as required, the same approach should be taken as in hearings.

903. Interested parties may be granted 'Rule 6' status, but there is no concept, as there is in s78 appeals, of any 'statutory party'. There is no provision for a Parish, Town or Community Council to appear as of right, unless they have been required to serve a statement of case. However, their representatives may appear at the Inspector's discretion and, in practice, permission should always be granted.

904. Both sets of inquiry rules require the submission of the 'statement of case' and this must contain 'full particulars of the case which a person proposes to put forward at an inquiry' – although only 'a list' (rather than copies, as with a hearing statement) of any documents to be referred to or put in evidence[438]. Annex D to the Procedural Guide: Enforcement Appeals – England indicates that statements of case should set out the planning and legal arguments that a party intends to put forward at the inquiry, and the statutory provisions and case law they intend to use in support.

905. The Rules – 6(5) and 6(8) in relation to transferred appeals – provide for the parties to request copies of documents referred to in the statement of case, and for SoS to require further information about the matters contained in the statement of case. The aim of the Rules is to ensure full disclosure of the evidence to be relied on in advance of the inquiry, in order to reduce the areas of dispute and time taken at the inquiry. The sanction against the production of new evidence at a late stage prior to or during the inquiry lies in an award of costs on the grounds of unreasonable behaviour, where unnecessary expense has been incurred as a result of last minute preparation, wasted time at the inquiry, or an adjournment.

906. Proofs of evidence are required four weeks before the date of the inquiry where a person proposes to give, or to call another person to give evidence at the inquiry by reading a proof of evidence. There is no obligation to provide evidence in the form of a proof, and it is not unusual for witnesses of fact to rely upon oral evidence. However, also four weeks before the inquiry, the appellant shall send a copy of the statement of common ground to the SoS. Anyone who is entitled or permitted to appear and

[438] The statement of case must be submitted at the six week stage by the appellant and LPA. Any person who notifies the SoS of an intention or wish to appear at the inquiry must submit a statement of case within four weeks of being so required.

proposes to give or call another person to give evidence shall provide a written estimate of the time required to present their evidence and the number of witnesses they intend to call.

907. The Rules allow an Inspector to hold a pre-inquiry meeting and allow the SoS, where the appeal is recovered, to serve a statement of matters on which they particularly wish to be informed in connection with the appeal on the appellant, the LPA, any other party required to serve a statement and any other person on whom a copy of the EN has been served. There are no similar provisions for transferred cases but the Inspector may request further information in the statement of case or at the PIM.

908. As with hearings – but more so – Inspectors should prepare early. Sending out a pre-inquiry note is advised in all cases. It may be that the note is only required to address procedural or technological issues – but alerting the parties early to, for example, any defects in the EN, case law that they need to be aware of or any questions relating to the main issues may save considerable inquiry time.

909. There is no provision in the Inspector or SoS Inquiry Rules for the Inspector to make an accompanied site visit before the inquiry has opened. If the Inspector would find it beneficial to make an ASV before hearing all or some of the evidence, they should adjourn the inquiry after opening submissions or another convenient time during the course of the inquiry for the ASV to take place. Where the inquiry is to take place virtually, it may be necessary to arrange the date and time of the ASV through pre-inquiry correspondence, taking care not to disadvantage interested parties.

910. It is usually helpful to carry out the ASV before the inquiry ends in case it emerges at the site that there are errors or discrepancies in the plan(s) or other documents. It may even be that there is some use taking place on the site that was not mentioned in the written evidence. However, the Rules do not permit, as with hearings, for an inquiry to be adjourned to the site. Any ASV should take place as if the procedure was WR, with no discussion of the case taking place until the inquiry has been resumed online or in the venue.

Opening the Inquiry

911. Both sets of Rules state that the Inspector shall identify the main issues and any matters on which they require further explanation from the persons entitled or permitted to appear – but this shall not preclude any person entitled or permitted to appear from referring to other issues that they consider relevant to the determination of the appeal.

912. In opening an enforcement or LDC inquiry:

- As in any inquiry, the Inspector should describe the procedures and programme for the inquiry.
- The Inspector should, in a s174 case, verify the contents of the EN – what is alleged and required, what the period for compliance is, the date of issue and details of the address and the plan. The Inspector should also explain any corrections that are required or proposed and note if there are any questions as to whether the EN is null or invalid. If the EN is obviously flawed, explain how. Invite suggestions and seek agreement to any corrections that would be necessary if the EN is to be upheld, making it clear that this is without prejudice to the other arguments

- Also in s174 cases, the Inspector should confirm the grounds of appeal and seek to resolve any misunderstandings. It is important to clarify, particularly if members of the public are present, where planning merits do and do not come into play.

- In s195 appeals, the Inspector should clarify the terms of the application and the plan as well as any reasons for refusal.

- Any discrepancy between the description of what is sought and what was refused should be resolved[439].

- As in s78 inquiries, the Inspector should confirm what documents have been submitted and read.

- Where there is disputed evidence of fact for an enforcement legal ground or LDC appeal, the Inspector should say that evidence will be taken on oath and describe the sanctions for giving false evidence that is material to the case.

- The Inspector should outline the main arguments raised in the case in respect of any legal grounds or LDC application as they appear from the papers; describe what legal matters they wish to hear addressed; and give citations for any important judgments that the parties have overlooked. These points will ideally have been raised in the pre-inquiry note, but they should be recapped in opening. The Inspector should be clear about what they wish the parties to address without appearing to lay down the law or having pre-judged the case.

- For example, where the inquiry is concerned with immunity, the Inspector should identify the relevant time period and, in MCU cases, the need for the use to have been continuous. The relevance of the planning unit may also need to be explained where the case concerns an MCU.

- Where there is a ground (a) and/or linked s78 appeal, the Inspector should define what they see, without prejudice, as the main planning issues at this stage.

913. It is good practice in any inquiry for the Inspector to minimize 'jargon' and ensure that their opening announcements are as clear and concise as possible. It is particularly important to take this approach where the appellant is not represented or any participant may be reasonably expected to find the inquiry procedures and/or matters for discussion complex and difficult.

Procedure at the Inquiry

914. The normal procedure in inquiries is for:

- The appellant or their advocate make their opening submissions first;

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[439] *R v Thanet DC ex parte Tapp* [2001] JPL 1436

- Opening submissions are then given on behalf of the Council, and then on behalf of any Rule 6 party;
- Witnesses for the appellant to give their evidence, followed by any interested parties who support the appellant
- Witnesses for the Council to give their evidence, followed by any interested parties who object to the appeal.
- Discussion of conditions and/or any s106 obligation where there is a ground (a) or s78 appeal.
- Closing submissions are given on behalf of any Rule 6 party, and then the Council.
- The appellant or their advocate makes the final closing submissions.

915. The parties' opening submissions should be brief and essentially set the scene – outlining the principal legal submissions to be made, without prejudice to later changes based on the evidence adduced.

916. It is important that the appellant gives their evidence first important where legal grounds are involved because the burden of proof is on them. However, if the appellant is unrepresented and shows no grasp of what the issues are, it may be appropriate for you to hear the LPA first. It may also be possible with the LPA going first, as in s78 appeals, in enforcement cases proceeding only on grounds (a), (f) and (g), provided all parties are content.

917. The Rules provide that any person entitled to appear shall be entitled to call evidence, and the appellant, LPA and any person served with a copy of the EN shall be entitled to cross-examine persons giving evidence. However the calling of evidence and cross-examination shall otherwise be at the discretion of the Inspector – who may also refuse to permit the giving or production of evidence, cross-examination of persons giving evidence or presentation of any matter which is considered irrelevant or repetitious. In such instances, the person wishing to given evidence may submit it in writing before the close of the inquiry.

918. It is common practice for witnesses to read from a proof and for the Inspector to retain a copy of the proof. However, an unrepresented appellant, witness of fact or interested party may be allowed to read from a prepared statement. If a witness has difficulty in reading, the advocate should be allowed to read the statement and the witness should verify the truth of it under oath.

919. The Inspector will normally ask any questions that they have of the witnesses after cross-examination and before re-examination. However, the Inspector should also be prepared to intervene at any time that they or others would benefit from a point being clarified, or if there seems to be a misunderstanding, or if it would assist the parties for the Inspector to outline their thoughts at that time. It is crucial to be alert to any implications of the emerging evidence for the parties' cases and inquiry itself.

920. It may be that defects in the EN only emerge during the inquiry when, for example, evidence about the actual use has been clarified. The Inspector should be alert to any implications of the evidence for the EN and highlight such issues at the earliest opportunity. Corrections and variations should be made ideally with the agreement of

the parties, or at least with them having such opportunity to comment that there is no injustice.

921. As with s78 appeals, the Inspector may be asked to give a ruling at the inquiry – and should only do so after careful consideration. All important matters arising at the inquiry should be recorded in the decision letter or report.

922. The Inspector should be as helpful as possible to unrepresented appellants; this may mean, for example, explaining the procedures more fully and frequently than otherwise. It may be that the inquiry needs to be run more like a hearing, where the Inspector takes the appellant through their questions to the LPA. Interested parties should likewise be assisted to participate. They should not be prevented from speaking if, for example, they were not present when the inquiry opened, or did not then say that they wished to give evidence or ask questions. However, helpfulness should not extend to a point where it might be seen as partiality.

923. It is sometimes suggested by appellants that evidence should only be heard and the appeal decision should only be based on the LPA's stated reasons for issuing the EN or for refusing to grant the LDC. Any such argument should be rejected because the decision is taken in the public interest and the Inspector needs to be acquainted with all relevant facts.

924. Similarly, LPAs may claim that evidence which was not before them when the EN was issued or LDC application was made should not be considered. Again, Inspectors should not accept that argument. It is always essential, however, for evidence to be submitted in accordance with the appeal timetable where possible and for parties to have an opportunity to consider any late evidence.

925. Members of the Bar should follow the Bar Council Code of Conduct throughout an inquiry, recognising in particular their duty to assist the inquiry. Members of the Bar should inform the Inspector of all relevant legislative provisions and case law of which they are aware, whether they are favourable or unfavourable to their case.

926. Once the cross-examination of a witness has commenced, they should not communicate with their advocate outside the inquiry room, unless they need to clarify some technical issue and the Inspector consents. When an inquiry is adjourned before a witness has finished being cross-examined and re-examined, the Inspector should warn that witness not to discuss their evidence with anyone else during the adjournment. The Inspector should remind the parties of these points regularly, particularly in virtual inquiries – where appellants may be communicating ordinarily with their advocate by text or email – and where evidence is given on oath.

927. In general, matters relating to the conduct of the parties, such as allegations of bad faith, ulterior motives or impropriety, are not planning matters, although they may be relevant to claims for costs. Annexes K and L of the Inquiries ITM chapter set out the approach to be taken if any party is disruptive or potentially violent. Inspectors should ensure that they have always have access to this advice at an inquiry. The key message is that the safety of the Inspector and parties is paramount.

Evidence on Oath

928. Where there is a dispute of fact, as in many s174 appeals on legal grounds and almost all s191 cases, evidence should be taken on oath (or affirmation). Indeed, that evidence should be given on oath may be the primary reason for the appeal being determined by

the inquiry procedure. Witnesses may not need to be sworn where legal issues are to be dealt with entirely by submissions, but if in doubt then the oath should be administered. The Inspector should agree if either party asks that evidence is taken on oath, unless it is patently unnecessary.

929. The sanction behind the administration of an oath or affirmation is provided by the Perjury Act 1911. This states that where a person lawfully sworn as a witness in a judicial proceeding wilfully makes a statement material in that proceeding, which he knows to be false or does not believe to be true, he shall be guilty of perjury. The maximum penalty for perjury in a 'judicial proceeding' – which includes a proceeding before any court, tribunal or person having, by law, power to hear, receive, and examine evidence on oath – is seven years imprisonment or a fine.

930. The other potential sanction for perjury in an enforcement or LDC case is that the decision may be overturned in the courts if it is subsequently found to have been based upon false or misleading evidence given at the inquiry.

931. The statutory authority of an inspector to take evidence on oath applies only to statutory inquiries – held under a duty imposed or a power given by a statute. Most planning inquiries are included but not hearings because the power to administer the oath derives from the statutory nature of the inquiry rather than the office of Inspector. The source of the power is s250 of the LGA72 which is applied by s319A and Schedule 6 of the TCPA90 to local inquiries in the planning sphere.

932. Where an appellant is unrepresented or their (or a Rule 6 party's) agent is appearing as both advocate and witness, the appellant/agent should take the oath before making their opening submissions. In every other respect, it is crucial that the parties are treated and seen to be treated equally. For example, if the appellant calls several lay witnesses of fact but the LPA only calls a planning officer who has no personal knowledge of the site beyond what they have read on the file, the appellant's and LPA's witnesses should be sworn alike.

933. Any interested parties who give factual evidence should be sworn. The Inspector should seek to ascertain the nature of their evidence at an early stage of the inquiry with this point in mind. However, any professional witnesses called to deal solely with matters of policy and opinion on the planning merits do not need to be sworn.

934. When taking the oath, witnesses should be asked to come up to a convenient point close to the Inspector's table, leaving their papers at the witness table. At a face-to-face inquiry, the Inspector and witness should stand and face each other. The Inspector should ask which oath or affirmation the witness wishes to take, with the different forms being set out in Annex 3. The general affirmation will normally be used at virtual inquiries; otherwise, it is normally enough to enquire whether the witness wishes to swear on a Holy Book or Text, or make an affirmation, but it may be necessary to explore with the witness how they wish to take any other oath.

935. The Inspector should read out the form of oath or affirmation in clear and audible tones for the witness to repeat, phrase by phrase, including their full name. Where a holy book is held it should be in accordance with the rites of the relevant Religion. Others in the room should be asked to be silent while the oath is administered. It is critical that the person taking an oath appreciates the seriousness of giving evidence on oath, and the similarity in this respect of an inquiry and a court, and that they therefore take the oath in a manner which they regard as binding on their conscience.

936. If any party objects to a witness having their proof before them while giving evidence on oath, the Inspector should ask the advocate to take the witness through the evidence by question and answer. If there are any discrepancies between the sworn evidence given in writing (in a statutory declaration) and orally at the inquiry, the witness should be asked to clarify the situation. They should be warned that they appear to have breached their oath and that their evidence may be considered unreliable at least in respect of the discrepancy.

Witness Exclusion and Witness Summonses

937. Where there are several witnesses as to fact, the Inspector may be requested to exclude them until they give their evidence, so they are not tempted to repeat what previous witnesses have said. Taking this course of action may be difficult for practical reasons, perhaps because there are no convenient waiting rooms outside of the venue, or some witnesses are hostile to others, or there is no way of preventing witnesses from discussing their evidence with others – whether in person or by text.

938. It is also essential to ensure that one side is not disadvantaged; it would very rarely be right to exclude an appellant from any part of the inquiry, except for extremely disruptive behaviour; likewise interested persons, even if they are prospective witnesses, unless there are special circumstances. Nevertheless, it remains open to Inspectors to exercise their discretion in the matter, if it can be done fairly and without undue difficulty.

939. While full advice is given in the Inquiries ITM chapter, it is more likely that a party will ask an Inspector to exercise their power to summon a witness to give evidence at an enforcement than s78 inquiry. Sometimes a past landowner or ex-LPA employee is the only person who can provide information about the site history.

940. The form of summons is set out at Annex 2, and Inspectors should always have a copy to hand at an inquiry. However, this course of action should only be taken if Inspector is reasonably satisfied that the evidence is likely to be material to the case; the witness is the appropriate person to give the evidence; they will not come unless a summons is served and the production of a statutory declaration would not obviate the need for personal attendance.

ANNEX 1: Other LPA Powers under Part VII

Planning Enforcement Orders (PEO) – ss171BA, 171BB & 171BC[440]

1. The 'planning enforcement order' (PEO) code in ss171BA, 171BB and 171BC is a supplementary procedure enabling LPAs to enforce against breaches of planning control that are thought to have been deliberately concealed. The availability of the power to seek a PEO does not preclude an LPA from issuing an EN or refusing an LDC on the basis of the *Welwyn Hatfield* principle[441].

2. The key provisions of s171BA, in summary, are that the LPA must apply to the magistrates' court for a PEO and, if the order is made, the LPA may take enforcement action in respect of the apparent breach or any of the matters constituting the apparent breach at any time in the 'enforcement year', being the year that begins 22 days after the date of the court's decision or on the day that subsequent proceedings are finally determined or withdrawn. In the enforcement year, the LPA will be able to act against a developer who seeks immunity from prosecution notwithstanding that the time limits for enforcement set out in s171B(1) to (3) have expired, but where deliberate concealment took place during that period.

3. S171BB and BC set out further procedural matters, including that an application for a PEO must be made within 6 months of the date on which evidence of the apparent breach came to the LPA's knowledge. The court will not issue a PEO unless it is satisfied on the balance of probabilities that the apparent breach or any matters constituting it has been 'deliberately concealed' by any person or persons, to any extent, and that it is just to make the PEO having regard to all the circumstances. What constitutes 'deliberately concealed' is not defined in the Act, although it is likely that over time this will be proven via case law, to relate only to the most flagrant cases of abuse.

4. For the purposes of LDC appeals, s191(3A) states that the time for taking enforcement action will not have expired if (a) the time for applying for a PEO has not expired; (b) an application for a PEO in relation to the matter has been made but not decided or withdrawn; and (c) a PEO in relation to the matter has been made and not rescinded, and the enforcement year has not expired.

Planning Contravention Notice (PCN) – ss171C-D

5. A PCN may be served by an LPA in order to formally investigate a suspected BPC; it may be preliminary to and effectively warn of the issue of an EN. The PPG contains a model PCN and describes that such a notice may be used to do the following:

   - Allow the LPA to require any information they want for enforcement purposes

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[440] The NAPE Planning Enforcement Handbook for England is a useful source of information regarding the variety of enforcement powers available to LPAs but the usual health warning applies to the content of this external document.

[441] *Jackson v SSCLG & Westminster CC; Bonsall v SSCLG & Rotherham MBC* [2015] EWCA Civ 1246

about any operations being carried out or any use of or activities being carried out on the land; and

- Invite the recipient to respond constructively to the LPA about how the suspected BPC may be remedied.

6. 'Any information' can and should include information about the ownership of and interests in the land. There is no right of appeal against the service of a PCN, and there are penalties for recipients who fail to respond or provide false information. It must appear, however, to the LPA that a BPC may have taken place before they may issue a PCN[442] It is prudent for LPAs to keep full records relating to service, including when and how the PCN was posted or delivered, and full records of their entire investigation into the breach.

7. It was held in *Meecham v SSCLG & Uttlesford DC* [2013] (HC) that an Inspector was entitled to take account of responses made by the appellant to PCNs, which gave incorrect information and thus supported a finding that the development had been deliberately concealed and was not immune from enforcement action. The claim that the PCNs related to different breaches was rejected; the PCNs and answers given to them needed to be read as a whole.

8. A PCN is just one investigative power for planning enforcement purposes, and whether to serve a PCN is at the LPA's discretion. While effective enforcement action relies on accurate information about an alleged breach, comprehensive information about the planning history of the site and the alleged breach of planning control may be readily available from the LPA's own records, site visits and other publicly available information[443].

9. Thus, the PPG also advises that an LPA is at risk of an award of costs in enforcement appeals if more diligent investigation could have avoided a need to serve the EN or ensured that the EN was accurate. However, it does not suggest that such investigation ought to necessarily include the service of a PCN[444].

Tree Replacement Notice (TRN): ss206-214A

10. S206 of the TCPA90 provides that where a treat in respect of which a Tree Preservation Order (TP)) is in force, and the tree is removed, uprooted or destroyed in contravention of the TPO or TP regulations, it shall be the duty of the owner of the land to plant another tree of an appropriate size and species in the same place as soon as they reasonably can, unless certain circumstances apply. S207 empowers LPAs to enforce against non-compliance with s206 or any failure to comply with the

[442] *R v Teignbridge DC ex parte Teignbridge Quay Co Ltd* [1996] JPL 828

[443] PPG on Enforcement and Post-Permission Matters – paragraph 17b-014-20140306

[444] PPG on Appeals – paragraph 16-048-20140306; the Local Government Ombudsman found in a report dated 15 July 1992 that there was maladministration when no liaison took place; Manchester CC Ref GO/C/2240, 91/C/2240, 91/C/1726

conditions of any consent given under a TPO or TP regulations which require the replacement of trees.

11. The provisions for enforcement under s207 are modelled on those set out under Part VII for planning enforcement. Under s207(2), a Tree Replacement Notice (TRN) may only be served within four years of the alleged failure to comply. It must specify a date for taking effect, which shall be not less than 28 days after the date of service. The TRN may be appealed under s208 with the grounds being prescribed under s208(1) – and an appeal to the courts against the Inspector's decision may be made, as with enforcement appeals, under s289.

12. S209 gives LPAs the power to enter land, carry out works required by the TRN and recover 'expenses reasonably incurred' from the landowner. S210 provides that if any person carries out prescribed activities in respect of trees in contravention of a TPO or the TP regulations, they shall be guilty of an offence. SS211-214 similarly protect trees in conservation areas. S214A provides that an LPA may apply for an injunction to restrain an actual or apprehended offence under s210 or s211, while s214B-214D provide or rights of entry in respect of trees.

13. *Distinctive Properties (Ascot) Ltd v SSCLG* [2015] EWCA Civ 1250 concerned a TRN which alleged that an area of woodland covering about 0.8ha had been 'removed, uprooted or destroyed' in contravention of a TPO – which had covered 'all trees of whatever species'. The TRN specified the species to be planted and the planting density, amounting to 1280 trees in total. It allowed for a mortality rate of up to 15%.

14. The CoA held that ss206 and 207 confirm that a TRN cannot require more trees to be replaced than have been removed, but it may be necessary to estimate the figure if and where there are problems in arriving at a figure for the number of trees lost. A TRN may be appealed under s208(1) on the grounds that (aa) the s206 duty should be dispensed with in respect of any tree or (b) the requirements of the notice are unreasonable. However, the onus of proof is on the appellant to show that the number of trees lost or destroyed was less than the number estimated to be required to be planted. The landowner is also in the best position to assist in making such an estimate. If the burden is not discharged, a challenge to the requirements of a TRN might be rejected – and in this case the 'rough estimate' was 'the best that could be done'.

15. The appellant also argued in *Distinctive Properties* that 'tree' includes saplings but not shrubs, bushes, scrub or seedlings. Since there is no definition in statute, the CoA accepted the finding in *Palm Developments Ltd v SSCLG* [2009] EWHC 220 (Admin) that a tree should be regarded as a tree at all stages of its life, subject to the exclusion of a mere seed. A seedling would be a tree for the purpose of the TCPA90 once it was capable of being identified as of a species which normally takes the form of a tree. This accords with the purpose of a TPO to protect woodland over a period of time as trees come and go, die and are regenerated.

Breach of Condition Notice (BCN) – s187A

16. A BCN may be served on any person who is carrying or has carried out development and has control of the land in order to secure compliance with PP granted for the carrying out of development subject to conditions. The PP may be granted on application or by development order. Under s187A(4), the condition may be any that regulates the use of the land. The BCN shall, under s187(5), specify the steps that

ought to be taken or activities which ought to cease to secure compliance with the conditions.

17. There is no right of appeal to the SoS, but a BCN is susceptible to an application for judicial review or defence in the Magistrates or Crown Court. A prosecution is defensible if the person charged can prove that they took all reasonable measures to secure compliance with the conditions specified in the BCN or was not in control of the land when the notice was served.

18. Non-compliance with a BCN (as with an EN) is a criminal offence under s187A and punishable by fine, but there are no default powers for the LPA to take physical steps to enforce compliance. Given the risks of a BCN being subject to costly judicial review and the uncertainties over the outcome, LPAs may prefer to enforce against a breach of condition by serving an EN that can be appealed to the SoS and corrected by the Inspector.

Stop Notice – s183-4

19. A Stop Notice may be served with or following the issue of an EN, but not beforehand and not once the EN has taken effect. A Stop Notice may prohibit a 'relevant activity' – that is, some or all of the activities which comprise the BPC alleged in the EN – before the expiry of the period for compliance with an EN. Thus, it is a means for the LPA to secure urgent cessation of the use or activity being enforced against.

20. A Stop Notice may not prohibit the use of any building as a dwellinghouse or activity that has been carried out, whether continuously or not, for a period of more than four years ending with the service of the notice.

21. There is no right of appeal against a Stop Notice and failure to comply with it is a separate criminal offence under s187. A Stop Notice can however be challenged by way of application for judicial review – and it will be discharged if and when an EN is quashed, or the period for compliance expires. If the EN is quashed on legal grounds, compensation may be payable under s186.

Temporary Stop Notice – ss171E-H

22. A Temporary Stop Notice (TSN) may be served independently of an EN, meaning that they can be utilised by LPAs to secure the immediate cessation of activity thought to be in BPC. Serving a TSN provides the LPA with a breathing space to consider what enforcement procedure would be appropriate, and it is an alternative to an injunction. However, a TSN may only have effect for a maximum of 28 days and again it cannot be used in relation to use as a dwellinghouse. Compensation may be payable if it is withdrawn or the use or operations found to be lawful.

Injunction – s187B

23. An LPA may apply to the High Court for an injunction to restrain an actual or apprehended BPC without prejudice to the use of their other powers. Failure to comply places the injunctee in contempt of court. S214A extends the powers to protected trees.

ANNEX 2: Witness Summons

A blank witness summons form is attached on the next page.

The Planning Inspectorate

WITNESS SUMMONS

issued under Section 250 of the Local Government Act 1972 and Section 320(2) of the Town and Country Planning Act 1990

To: []

In exercise of the powers conferred upon me by Section 250 of the Local Government Act 1972, I hereby require you to attend at:

at 10 am on: []

to give evidence in the Inquiry then and here proceeding by direction of the Secretary of State in the matter of: []

You are also required to produce at the said Inquiry the following documents: []

Given under my hand, this day of Two thousand and

Signed:

The person appointed by the Secretary of State to hold the Inquiry.

Section 250(2) and (3) of the Local Government Act 1972, which apply for the purpose of the Inquiry, enact as follows:-

(2) For the purpose of any such local inquiry, the person appointed to hold the inquiry may by summons require any person to attend, at a time and place stated in the summons, to give evidence or to produce any documents in his custody or under his control which relate to any matter in question at the inquiry, and may take evidence on oath, and for that purpose administer oaths, or may, instead of administering an oath, require the person examined to make a solemn affirmation:

Provided that-

a. no person shall be required, in obedience to such summons to attend to give evidence or to produce any such documents, unless the necessary expenses of his attendance are paid or tendered to them; and

b. nothing in this section shall empower the person holding the inquiry to require the production of the title, or any instrument relating to the title, of any land not being the property of a local authority.

(3) Every person who refuses or deliberately fails to attend in obedience to a summons issued under this section, or to give evidence, or who deliberately alters, suppresses, conceals, destroys or refuses to produce any book or other document which is required or is liable to be required to produce for the purposes of this section, shall be liable on summary conviction to a fine not exceeding £100 or to imprisonment for a term not exceeding six months, or to both.

ANNEX 3: Forms of Oath and Affirmation

Affirmation

I do solemnly, sincerely and truly declare and affirm that the evidence I shall give shall be the truth, the whole truth and nothing but the truth.

Buddhist

A Buddhist should be invited to make the general form of solemn affirmation or to state the form of oath they regard as binding on the conscience.

Christian (Taken on both Testaments or the New Testament alone)

I swear by almighty God that the evidence I shall give will be the truth the whole truth and nothing but the truth.

Hindu (Taken on the Gita)

I swear by the Gita that the evidence I give shall be the truth the whole truth and nothing but the truth.

Jew (Taken on the Old Testament or Torah)

I swear by almighty God that the evidence I shall give will be the truth the whole truth and nothing but the truth.

Muslim/follower of Islam (Taken on the Qur'an/Koran)

I swear by Allah that the evidence I shall give will be the truth, the whole truth and nothing but the truth.

Scottish Form

I swear by Almighty God as I shall answer to God at the Great Day of Judgement, that I will speak the truth, the whole truth and nothing but the truth.

Sikh (Taken on the Sunder Gutka)

I swear by Waheguru that the evidence I shall give shall be the truth, the whole truth and nothing but the truth.

(An alternative form of Sikh oath may be used - swear by the Guru Nanak that the evidence I shall give shall be the truth the whole truth and nothing but the truth.)

Oath for an Interpreter

I swear by Almighty God that I will well and faithfully interpret, and true explanation make, of all such matters and things as shall be required of me to the best of my skill and understanding.

Affirmation for an Interpreter

I do solemnly, sincerely and truly declare, and affirm, that I will well and faithfully interpret, and true explanation make, of all such matters and things as shall be required of me to the best of my skill and understanding.

NOTES

- Christian men take the oath with their heads uncovered.
- Jews cover their heads to take the oath.
- "Kissing the Book" is unnecessary.

- It is usual for the person administering the oath to stand whilst doing so.

The appointed Inspector should make sure any request for translators and/or holy books has been shared with the LPA and provision made by the LPA.

ANNEX 4: 'Mr & Mrs' Enforcement Appeals

Given the provisions of s172(2) and s174(1), two or more appeals are often made against the EN, and these will often be on the same grounds. Where ground (a) is pleaded, it is only necessary to pay one fee in order for the DPA and ground (a) to be considered – but it is still sensible and necessary to link such appeals.

Where separate appeals are made on ground (a) against an EN and a linked s78 appeal is proceeding in the names of both appellants, such that the development is fee-exempt, there will be two DPAs but PP will be granted once as set out below.

However, where there are 'Mr & Mrs' appeals and one (at least) seems to be fee-exempt, care should be taken to ensure not only that the planning application was for the development being enforced against but also that the appellant(s) benefitting from the exemption is/are the applicant(s) who made the application.

Header

The grounds of appeal would be recorded in the header as:

- Appeal A is proceeding on the grounds set out in section 174(2)(a),

  (c) and (g) of the Town and Country Planning Act 1990 as amended. Since an appeal has been brought on ground (a), an application for planning permission is deemed to have been made under section 177(5) of the Act.

- Appeal B is proceeding on the grounds set out in s174(2)(c) and (g) of the 1990 Act.

  Where both appeals are fee exempt:

- Appeals A and B are proceeding on the grounds set out in section 174(2)(a) and (f) of the Town and Country Planning Act 1990 as amended. Since an appeal has been brought on ground (a), an application for planning permission is deemed to have been made under section 177(5) of the Act.

Conclusion

Where the grounds of appeal are identical with the exception of (a), and there is success on (a), it would follow that Appeal A alone will succeed – but the EN subject to both appeals will be quashed.

After considering Appeal A on ground (a), the following conclusion would therefore be made: Appeal A succeeds on ground (a) and the deemed planning application is approved. The EN will be quashed, and it follows that Appeals A and B on grounds (f) and (g) do not fall to be considered.

If legal grounds fail but Appeal A alone succeeds on ground (a), the decision in respect of Appeal B will be to dismiss the appeal but not uphold the EN. This gives the second appellant a determination on legal grounds that they can challenge by way of s289.

Where there are no legal grounds, Appeal A succeeds on ground (a), and Appeal B was only pleaded on grounds (f) and/or (g), the decision on Appeal B would be: I take no further action in respect of Appeal B. This ensures that, in the event of a successful challenge to Appeal A, Appeal B may also be re-determined.

Where the appeals are fee-exempt and there is success on ground (a), the decisions for both appeals will be: the appeals are allowed, the enforcement notice is quashed and planning permission is granted on the applications deemed to have been made under s177(5) of the 1990 Act as amended for the development already carried out, namely…

ANNEX 5: Enforcement Appeals – Beginnings

Appeal type	Authority	Appellant	Detail
PLG enf – MCU/ops **single appeal*	The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended.	The appeal is made by [*name 1*] against an enforcement notice issued by [*authority*]	The notice was issued on [] The breach of planning control as alleged in the notice is: [] The requirements of the notice are [to]: [] The period[s] for compliance with the requirement[s] is [are]: ***AND – there is no ground (a)*** The appeal is proceeding on the ground[s] set out in section 174(2)[] of the Town and Country Planning Act 1990 as amended. ***OR – ground (a) is brought and the fees is paid or the development is fee-exempt*** The appeal is proceeding on the ground[s] set out in section 174(2)[] of the Town and Country Planning Act 1990 as amended. Since an appeal has been brought on ground (a), an application for planning permission is deemed to have been made under section 177(5) of the Act.

Appeal type	Authority	Appellant	Detail
			OR – ground (a) is brought but no fee is paid The appeal is proceeding on the ground[s] set out in section 174(2)[] of the Town and Country Planning Act 1990 as amended. Since the prescribed fees have not been paid within the specified period, the appeal on ground (a) and the application for planning permission deemed to have been made under section 177(5) of the Act have lapsed.
PLG enf – MCU/ops **two+ appeals*	The appeals are made under section 174 of Town and Country Planning Act as amended	The appeals are made by [*name 1*] (Appeal A) and [name 2] (Appeal B) against an enforcement notice issued by [*authority*]	**As above except:** ***No ground (a)*** Appeals A and B are proceeding on the ground[s] set out in section 174(2)[] of the Town and Country Planning Act 1990 as amended. ***OR – 'Mr & Mrs' appeals, with Appeal A only on*** ***ground (a)*** Appeal A is proceeding on the ground[s] set out in section 174(2)[] of the Town and Country Planning Act 1990 as amended. Since… Appeal B is proceeding on the ground[s] set out in section 174(2)[] of the Act.

			OR – 'Mr & Mrs' appeals, with both proceeding on ***ground (a) since both are fee-exempt*** Appeals A and B are proceeding on the ground[s] set out in section 174(2)[] of the Town and Country Planning Act 1990 as amended. Since…

Appeal type	**Authority**	**Appellant**	**Detail**
PLG enf – breach of condition	The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended.	The appeal is made by [name 1] against an enforcement notice issued by [authority]	The notice was issued on [] The breach of planning control as alleged in the notice is failure to comply with condition[s] imposed on a planning permission ref [] granted on [] The development to which the permission relates is: [] The condition[s] in question [is/are] no[s] which state[s] that: The notice alleges that the condition[s] [has/have] not been complied with in that: [] The requirements of the notice are [to]: [] The period[s] for compliance with the requirement[s] is [are]: AND As above for grounds of appeal

ANNEX 6: Enforcement Appeals – Endings

Appeal type	Conclusion	Decision	Summary Decision
PLG enf – notice a nullity	I conclude that the notice is a nullity. In these circumstances, the appeal[s] on the ground[s] set out in section 174(2)[] of the 1990 Act as amended [and the application for planning permission deemed to have been made under section 177(5) of the 1990 Act as amended [does] [do] not fall to be considered.	Since the notice is found to be a nullity, no further action will be taken in connection with the appeal[s]. In the light of this finding the Local Planning Authority should consider reviewing the register kept under section 188 of the 1990 Act as amended.	No further action is taken.
PLG enf – notice not correctable	For the reasons given above, I conclude that the enforcement notice does not specify with sufficient clarity [the alleged breach of planning control] [the steps required for compliance] [the period for compliance] [the land where the breach of planning control is alleged to have taken place]. It is not open to me to correct the error in accordance with my powers under section 176(1)(a) of the 1990 Act as amended, since injustice would be caused were I to do so. The enforcement notice is invalid and will be quashed. In these circumstances, the appeal[s] on the ground[s] set out in section 174(2)[] of the 1990 Act as amended [and the application for planning permission deemed to have been made under section 177(5) of the 1990 Act as amended [does] [do] not fall to be considered.	The enforcement notice is quashed.	The enforcement notice is quashed.

Appeal type	Conclusion	Decision	Summary Decision
PLG enf – discharge invalid condition	For the reasons given above, I conclude that the condition the subject of the notice is invalid. It follows that no breach of planning control can arise from any failure to comply with it. The matters alleged in the enforcement notice do not constitute a breach of planning control [and the [hidden] appeal made on ground (c) succeeds]. Since a condition which is invalid is not a condition, I cannot exercise the powers contained in section 177(1)(b) of the 1990 Act as amended to discharge the condition. In these circumstances, the appeal[s] on the ground[s] set out in section 174(2)[] of the 1990 Act as amended [and the application for planning permission deemed to have been made under section 177(5) of the 1990 Act as amended [does] [do] not fall to be considered.	The appeal[s] [is] [are] allowed and the enforcement notice is quashed.	The appeal[s] [is] [are] allowed and the enforcement notice is quashed.

Appeal type	Conclusion	Decision	Summary Decision
PLG enf – defective service	I conclude that [appellant[s]] [and] [*other*][s] [has] [have] been substantially prejudiced by the non- service of the enforcement notice and this is not a case when I can exercise the power to disregard that non-service in accordance with section 176(5) of the 1990 Act as amended. The appeal on ground (e) succeeds and the enforcement notice will be quashed. In these circumstances, the appeal[s] on the ground[s] set out in section 174(2)[] to the 1990 Act as amended [and the application for planning permission deemed to have been made under section 177(5) of the 1990 Act as amended [does] [do] not fall to be considered.	The appeal[s] [is] [are] allowed and the enforcement notice is quashed	The appeal[s] [is] [are] allowed and the enforcement notice is quashed.
PLG enf – Dismiss **no ground (a)* **no corrections or variations*	For the reasons given above, I conclude that the appeal[s] should not succeed. I shall uphold the enforcement notice.	The appeal[s] [is] [are] dismissed and the enforcement notice is upheld.	The appeal[s] [is] [are] dismissed and the enforcement notice is upheld.
PLG enf – dismiss **no ground (a)* **corrections &/or variations*	For the reasons given above, I conclude that the appeal[s] should not succeed. I shall uphold the enforcement notice [with [a] [correction][s] [and] [variation][s]].	It is directed that the enforcement notice is [corrected] [and] [varied] by:	The appeal[s] [is] [are] dismissed and the enforcement notice is upheld with [a] [correction][s] [and] [variation][s] in the terms set out below in the Formal Decision.

Appeal type	Conclusion	Decision	Summary Decision
		the deletion of the words "edged red" and the substitution of the words "edged [and hatched] black" in [] *the deletion of the words "[]" [and the substitution of the words "[]"] in []* *the deletion of [] and the substitution of [] as the time for compliance* *the substitution of the plan annexed to this decision for the plan attached to the enforcement notice* Subject to the [correction][s] [and] [variation][s], the appeal[s] [is] [are] dismissed and the enforcement notice is upheld.	
PLG enf – dismiss & PP refused	For the reasons given above, I conclude that the appeal[s] should not succeed. I shall uphold the enforcement notice [with [a] [correction][s] [and] [variation][s]] and refuse to grant planning permission on the application deemed to have been made under section 177(5) of the 1990 Act as amended	[It is directed that the enforcement notice is [corrected] [and] [varied] by []] [Subject to the [correction][s] [and] [variation][s],] the appeal[s] [is] [are] dismissed, the enforcement notice is upheld and planning permission is refused on the application deemed to have been made under section 177(5) of the 1990 Act as amended.	The appeal[s] [is] [are] dismissed and the enforcement notice is upheld [with [a] [correction][s] [and] [variation][s]] in the terms set out below in the Formal Decision.

Appeal type	Conclusion	Decision	Summary Decision
PLG enf – dismiss: (f) and/or (g) only	For the reasons given above, I conclude that [the requirements of the notice are excessive to remedy [the breach of planning control] [the injury to amenity]] [and] [the period for compliance with the notice falls short of what is reasonable]. I shall vary the enforcement notice prior to upholding it. The appeal[s] on ground[s] [(f)] [and] [(g)] succeed[s] to that extent.	It is directed that the enforcement notice is varied by: *by the deletion of [] and the substitution of [] in []* *by the deletion of [] and the substitution of [] as the period for compliance*. Subject to the variations, the enforcement notice is upheld.	The appeal[s] succeed[s] in part and the enforcement notice is upheld with [a] variation[s] in the terms set out below in the Formal Decision.
PLG enf – allow on legal grounds **no corrections*	For the reasons given above, I conclude that the appeal[s] should succeed on ground [(b)] [(c)] [(d)]. The enforcement notice will be quashed. In these circumstances, the appeal[s] on ground[s] [] [and the application for planning permission deemed to have been made under section 177(5) of the 1990 Act] [does] [do] not fall to be considered.	The appeal[s] [is] [are] allowed and the enforcement notice is quashed.	The appeal[s] [is] [are] allowed and the enforcement notice is quashed.
PLG enf – allow on legal grounds	From the evidence before me, I conclude that the [alleged breach of planning control set out in the	[It is directed that the enforcement notice is corrected by: []]	The appeal[s] [is] [are] allowed following correction of the

Appeal type	Conclusion	Decision	Summary Decision
**with corrections*	enforcement notice] [and] [the plan attached to the notice] [is] [are] incorrect. [The appeal[s] succeed[s] on ground (b) [to that extent].] [On the balance of probabilities, the appeal[s] on ground [(c)] [(d)] should succeed in respect of those matters which, following the correction of the notice, are stated as constituting the breach of planning control.] The enforcement notice will be corrected and quashed. In these circumstances, the appeal[s] on grounds [] [and the application for planning permission deemed to have been made under section 177(5) of the 1990 Act as amended] [does] [do] not need to be considered.	Subject to the correction[s], the appeal[s] [is] [are] allowed and the enforcement notice is quashed.	enforcement notice in the terms set out below in the Formal Decision.
PLG enf – allow on legal grounds and find lawful use or development	I conclude on the balance of probabilities that the [alleged] [operation][s]] [material change of use] [failure to comply with [a] condition[s] or limitation[s]] [does] [do] not represent a breach of planning control [by reason of a grant of planning permission]. **OR**	The appeal[s] [is] [are] allowed and the enforcement notice is quashed. Attached to this decision is a certificate of lawful use or development, issued in accordance with the powers under section 177(1)(c) of the 1990 Act as amended, in respect of the [operation][s]] [use] [failure to	The appeal[s] [is] [are] allowed, the enforcement notice is quashed, and a certificate of lawful use or development is issued in the terms set out below in the Formal Decision.

Appeal type	Conclusion	Decision	Summary Decision
	I conclude on the balance of probabilities that the [alleged] [operations] [material change of use] [failure to comply with [a] condition[s] or limitation[s]] took place more than [4] [10] years prior to the issue of the enforcement notice and so, at the date that the enforcement notice was issued, the time for taking enforcement action as set out in section [171B(1)] [171B(2)] [171B(3)] of the 1990 Act as amended had expired. The appeal[s] succeed[s] on ground [(c)] [(d)]. I further conclude that in the exceptional circumstances of this case, it is appropriate to exercise the power available to me under section 177(1)(c) of the 1990 Act as amended to issue a certificate of lawful use or development under section 191 of the 1990 Act as substituted by section 10 and paragraph 24(1)(b) of Schedule 7 of the Planning and Compensation Act 1991 in relation to the existing [use] [operation] [failure to comply with condition or limitation] which is found to be lawful].	comply with [a] condition[s] or limitation[s]] which [is] [are] [subject to a grant of planning permission] [immune from enforcement action] at [land] together with a plan and a note as to the effect and extent of the certificate.	
PLG enf – grant pp for ops	For the reasons given above, I conclude that [the appeal] [the appeals] [Appeal A] succeed[s] on	[It is directed that the enforcement notice is [corrected] by []]	[The appeal] [the appeals] [Appeal A] [is] [are] allowed, the enforcement notice is quashed, and

Appeal type	Conclusion	Decision	Summary Decision
	ground (a). I shall grant planning permission for [the development] as described in the notice [as corrected]. [The appeal[s] on ground[s] (f) [and/or] (g) [do] [does] not therefore fall to be considered.]	[Subject to the [correction][s],] [the appeal] [the appeals] [Appeal A] [is] [are] allowed, the enforcement notice is quashed and planning permission is granted on the application[s] deemed to have been made under section 177(5) of the 1990 Act as amended for the development already carried out, namely the [alleged operational development] at [land] as shown on the plan attached to the notice [and subject to the following condition[s]: []].	planning permission is granted in the terms set out below in the Formal Decision.
PLG enf – grant PP for MCU	For the reasons given above, I conclude that the appeal] [the appeals] [Appeal A] succeed[s] on ground (a). I shall grant planning permission for [the use] as described in the notice [as corrected]. [The appeal[s] on ground[s] (f) [and] (g) [do] [does] not fall to be considered.]	[It is directed that the enforcement notice is [corrected] by: []] [Subject to the [correction][s],] [the appeal] [the appeals] [Appeal A] [is] [are] allowed, the enforcement notice is quashed and planning permission is granted on the application[s] deemed to have been made under section 177(5) of the 1990 Act as amended for the development already carried out, namely [the alleged use] at [land] as shown on the plan attached to the notice [and subject to the following condition[s]:	[The appeal] [the appeals] [Appeal A] [is] [are] allowed, the enforcement notice is quashed, and planning permission is granted in the terms set out below in the Formal Decision.

Appeal type	Conclusion	Decision	Summary Decision
PLG enf – grant pp for breach of condition	For the reasons given above, I conclude that [the appeal] [the appeals] [Appeal A] should succeed on ground (a) and the enforcement notice should be quashed. I shall discharge the condition[s] which are subject to the notice, and grant planning permission on the application[s] deemed to have been made for the [operations] [change of use] previously permitted without complying with the condition[s] enforced against [but subject to [a] new condition[s] as described above]. [The appeal[s] on ground[s] (f) [and] (g) [do] [does] not fall to be considered.]	[The appeal] [the appeals] [Appeal A] [is] [are] allowed and the enforcement notice is quashed. In accordance with section 177(1)(b) and section 177(4) of the 1990 Act as amended, the condition[s] no[s] [] attached to the planning permission dated [], ref [] are discharged and the following new condition[s] [] are substituted. Planning permission is granted on the application[s] deemed to have been made under section 177(5) of the 1990 Act as amended for [describe the operations or use set out in the original permission or, in the case of a permission involving multiple development, the particular part of the development the subject of the notice] without complying with the said condition[s] [but subject to the other conditions attached to that permission] [and the following new condition[s]: **identical conditions*	[The appeal] [the appeals] [Appeal A] [is] [are] quashed, and planning permission is granted in the terms set out below in the Formal Decision.
PLG enf – split decision on ground (a)	For the reasons given above I conclude that [the appeal] [the appeals] [Appeal A] should succeed in part only, and I will grant planning permission for [specified part of the matters] [and] [specified part of the land], but otherwise I will uphold the notice [with] [a] correction][s] [and] [variation][s] and refuse to grant planning permission in respect of the other [part of the matters] [and] [part of the land]. The requirements of the notice will cease to have effect so far as inconsistent with the planning permission which I will grant by virtue of s180 of	[It is directed that the enforcement notice is [corrected] [and] [varied] by: section 177(5) of the 1990 Act as amended. **do not delete any requirements relating to the development to be granted permission* [Subject to the [correction][s] [and]	The appeal] [the appeals] [Appeal A] succeed[s] in part and permission for that part is granted, but otherwise the appeal[s] fail[s], and the enforcement notice is upheld as [corrected] [and] [varied] in the terms set out below in the Formal Decision.

	the Act.	[variation][s], [the appeal] [the appeals] [Appeal A] [is] [are] allowed insofar as [it] [they] relate[s] to [land hatched or edged black on the plan where permission is granted] [and] [the specified part of the development being permitted] and planning permission is granted on the application[s] deemed to have been made under section 177(5) of the 1990 Act as amended, for [specify the [part of] the alleged development to be granted permission] at [specify the [part of] the land subject to the permission] [and subject to the following conditions:[]. [The appeal] [the appeals] [Appeal A] [is] [are] dismissed and the enforcement notice is upheld as [corrected] [and] [varied] insofar as it relates to [land hatched or edged black on the plan where permission is refused] [and] [the specified part of the development being refused] and planning permission is refused in respect of [specify the [part of] the alleged development to be refused] at [specify [the part] of the land subject to the refusal] on the application[s] deemed to have been made under section 177(5) of the 1990 Act as amended.	

ANNEX 7: LDC Appeals – Beginnings

Appeal	Authority	Appellant(s)	Detail
LDC appln - refusal	The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended against a refusal to grant a certificate of lawful use or development (LDC).	The appeal is made by [*name 1*] against the decision of [*authority*] OR The appeal is made by [*names 1 and 2*] against the decision of [*authority*]	The application ref [], dated [], was refused by notice dated []. The application was made under section [191(1)(a)] [191(1)(b)] [191(1)(c)] [192(1)(a)] [192(1)(b)] of the Town and Country Planning Act as amended. The [use] [development] [failure to comply with any condition or limitation] for which a certificate of lawful use or development is sought is: []

LDC appln – refusal in part	The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended against a refusal in part to grant a certificate of lawful use or development (LDC).	As above	The application ref [], dated [], was refused in part by notice dated []. The application was made under section [191(1)(a)] [191(1)(b)] [191(1)(c)] [192(1)(a)] [192(1)(b)] of the Town and Country Planning Act as amended. The [use] [development] [failure to comply with any condition or limitation] for which a certificate of lawful use or development is sought is: []
LDC appln – failure	The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended against a failure to give notice within the prescribed period of a	The appeal is made by [*name 1*] against [*authority*] OR	The application ref [] is dated []. The application was made under section [191(1)(a)] [191(1)(b)] [191(1)(c)] [192(1)(a)] [192(1)(b)] of the Town and Country Planning Act as amended.
	decision on an application for a certificate of lawful use or development (LDC).	The appeal is made by [*names 1 and 2*] against [*authority*]	The [use] [development] [failure to comply with any condition or limitation] for which a certificate of lawful use or development is sought is: []

ANNEX 8: LDC Appeals – Endings

Appeal type	Conclusion	Decision	Summary Decision
LDC - dismiss	For the reasons given above I conclude that the Council's [refusal] [refusal in part] [deemed refusal] to grant a certificate of lawful use or development in respect of [ ] was well-founded and that the appeal should fail. I will exercise accordingly the powers transferred to me in section 195(3) of the 1990 Act as amended.	The appeal is dismissed.	The appeal is dismissed.
LDC – allow	For the reasons given above I conclude, on the evidence now available, that the Council's [refusal] [refusal in part] [deemed refusal] to grant a certificate of lawful use or development in respect of [ ] was not well-founded and that the appeal should succeed. I will exercise the powers transferred to me under section 195(2) of the 1990 Act as amended.	The appeal is allowed and attached to this decision is a certificate of lawful use or development describing the [extent of the] [existing use] [existing operation] [matter constituting a failure to comply with a condition or limitation] [proposed use] [proposed operation] which is found to be lawful.	The appeal is allowed and a certificate of lawful use or development is issued, in the terms set out below in the Formal Decision.

Enforcement Case Law

What's new since the last version

Changes highlighted in yellow were made on 15 December 2023 with the following judgment summary:

- *Welwyn Hatfield BC v SSHCLG & Ismail Kabala (IP)*

These summaries of important judgments should be used with caution. They do not purport to provide more than a brief outline of the key points as a quick reference. Moreover, this ITM chapter does not provide a conclusive or exhaustive list of all cases. The facts of individual cases vary and if reliance is to be placed on a judgment in a decision it would be wise to obtain the judgment transcript or at least read a more complete summary first. Advice can be sought from your IM or mentor, a specialist adviser or Professional Lead.

Care should be exercised in relying on older judgments since there may be more recent case law and/or the legislation may have changed subsequently.

The list of contents and alphabetical index refer to the judgments summarised in this chapter. Be aware that other cases are mentioned in bullet points. If a judgment is not in the index but mentioned by parties, it may be worth carrying out a 'word search' of this chapter. Please inform Knowledge Centre and the Professional Leads if you are or become aware of a judgment that is missing from but should be included in this chapter.

It is important to remember that a court is bound by the decisions of a court above it and therefore a Supreme Court (previously House of Lords) decision on a given issue has more status than a High Court or Court of Appeal decision on the same point.

If judgments are to be cited in decisions it is important that they do not come as a surprise to the parties.

Contents

ADVICE ON CITATIONS

Use the neutral or court citation where available. This can be found on the Westlaw case transcript and it will have the following convention:

- *Party v Party* [Year of judgment] Court abbreviation Judgment no. for that year

If the case has received a judgment from the Court of Appeal, add the CoA neutral citation after the HC neutral citation, separating the two references with a comma. Similarly, if the case has received a judgment from the Supreme Court, add the UKSC neutral citation after the CoA neutral citation. Older UKSC cases will have the citation UKHL when the Supreme Court was titled 'House of Lords' eg *Sage*.

- *Miaris v SSCLG & Bath and NE Somerset Council* [2015] EWHC 1564 (Admin), [2016] EWCA Civ 75

Publication citations would follow the neutral citation (if given) and be separated by semi-colons. More than one citation may be given:

- *Henry Boot Homes Ltd v Bassetlaw DC* [2002] EWCA Civ 983; [2003] JPL 1030
- *Burdle & Williams v SSE & New Forest RDC* [1972] 1 WLR 1207; 116 SJ 507; 3 All ER 240; 24 P&CR 174; 70 LGR 511; JPL 759

The year should always be cited first, in square brackets. In the JPL, the cited year will be that of the report. In publications like P&CR, the year cited will be that of the Court judgment, but the citation will include a Volume number. A case decided in 1991 but not reported in JPL or P&CR until 1992 would be cited as:

- [1992] JPL page…
- [1991] 70 P&CR page…where 70 is one of the volumes produced in 1992.

- Refer to the Secretary of State for Housing, Communities and Local Government as 'SSHCLG' (and other/previous Secretaries of State or Ministers accordingly). If there is more than one party on one side of a case, use '&' to separate their names. Another convention in this chapter is to refer to local authorities as 'place' followed by Council or abbreviation, so that the alphabetical index can be easily searched. For example:
  - *Bath and North East Somerset Council…*
  - *Camden LBC…*
  - *Elmbridge BC v SSCLG & Giggs Hill Green Homes* [2015] EWHC 1367 (Admin)
  - *Hampshire CC v SSEFRA & Blackbushe Airport Ltd* [2021] EWCA 398
-
- If authorities are cited to you, relevant extracts should be supplied, but you may also try to get copies. The main sources are:
  - Horizon: Court Judgments
  - Knowledge Centre/High Court team
  - Encyclopaedia of Planning Law & Practice – Westlaw
  - Journal of Planning & Environment Law – Horizon: Knowledge Library for access to the online JPL from 2003; Jean Russell has hard copies of JPL from 1973-2015 – collection kindly donated by Andy Kirkby and Bridget Campbell.

Key findings from judgments are also set out in:

- The Enforcement and other Training Manual chapters
- Case Law Updates from July 2007
- Enforcement Briefings June 2010-December 2015
- Knowledge Matters from October 2014
- Enforcement Bulletins from March 2021

Abbreviations

WLR	Weekly Law Reports	P&CR	Planning and Compensation Reports
SJ	Solicitors Journal	LGR	Local Government Reports
ALL ER	All England Law Reports	JPL	Journal of Planning & Environment Law

ABANDONMENT AND EXTINGUISHMENT

Hartley v MHLG [1970] 2 WLR 1

Where the site remains unused for a time and in such circumstances that a reasonable man might conclude that the previous use had been abandoned, it may be found to be abandoned. Where a use ceases with no view to resumption, it is abandoned.

Petticoat Lane Rentals v SSE [1971] All ER 310

If PP is granted and implemented for a new building to be put to a new use, the previous use rights on the open site will be expunged.

Iddenden v SSE [1972] 1 WLR 1433; [1973] JPL 38

CoA: A use cannot survive if everything necessary to sustain it – buildings and installations – are removed or destroyed by accident.

Nicholls & Nicholls v SSE & Bristol CC [1981] JPL 890

The subjective test for abandonment was rejected. Evidence that the appellant had no intention to abandon the use did not displace that of the appearance of the site to the outside observer.

- *See also Hughes v SSETR & South Holland DC [2000] JPL 826*

Young v SSE & Bexley LBC [1983] JPL 465; [1983] JPL 677

HoL: Implementation of a new unlawful use extinguishes previous established and lawful use rights. Lawful use rights are preserved under s57(4) if an EN is served.

- *The library record (linked) includes the HC summary and CoA transcript only. The HoL upheld the judgments of the HC and CoA, as described at [1983] JPL 677.*
- *See also Balco Transport Services Ltd v SSE [1986] JPL 123 (CoA)*

Pioneer Aggregates (UK) Ltd v SSE [1984] 2 All ER 358; [1984] JPL 651

HoL: A PP which is capable of being implemented cannot be abandoned. Where there are two mutually inconsistent permissions, implementation of one prevents that of the other.

- *See also Pilkington v SSE & Lancashire CC [1973] 1 WLR 1527; Newbury DC v SSE [1980] 2 WLR 379, [1981] AC 578; Hillside Parks Ltd v Snowdonia NPA [2020] EWCA Civ 1440*

Trustees of Castell-y-Mynach Estate v SSW [1985] JPL 40

Four factors for abandonment to be considered: the physical condition of the land; the period of non-use; any other use; and the owner's intentions.

- *See also Hughes v SSETR & South Holland DC [2000] JPL 826*

White v SSE & Congleton BC [1989] JPL 692

CoA: A pre-1948 use can be abandoned.

Nicholson v SSE & Maldon DC [1998] JPL 553

A lawful use right acquired through a breach of a continuing requirement condition, can be lost by subsequent compliance with the condition even if a LDC has been granted.

Panton & Farmer v SSETR & Vale of White Horse DC [1999] JPL 461

Lawful use rights could only be lost by evidence of abandonment; by the formation of a new planning unit; or by being superseded by a further change of use. A use which was merely dormant or inactive could still be considered as 'existing', so long as it had already become lawful and not been extinguished in one of those three ways.

Hughes v SSETR & South Holland DC [2000] JPL 826

CoA: The test was the view to be taken by a reasonable man with knowledge of all the relevant circumstances. The owner's intentions were not more significant than other factors and should be objectively assessed.

Fairstate Ltd v FSS & Westminster CC [2005] EWCA Civ 283; [2005] JPL 1333

CoA: while a PP capable of being implemented cannot be abandoned, a use that is lawful through the passage of time could be under s25 of the Greater London (General Powers) Act 1973. S25 provides that use as temporary sleeping accommodation [less than 90 consecutive nights] of any residential premises in Greater London involves an MCU of the premises and each part thereof which is so used. Such a use could become lawful through immunity from enforcement action, but the use would be abandoned if the property was again used for lets in excess of 90 nights. Even if no MCU is involved in the change back, it would require PP by virtue of s25. The s57(4) reversion right did not apply in absence of enforcement against previous change.

- *S44 and s45 of the Deregulation Act 2015 served to amend s25 of the 1973 Act so that it is subject to s25A, which provides that, notwithstanding s25(1), use as temporary sleeping accommodation does not involve an MCU if two conditions are met. S44 and s45 came into force on 26 May 2015.*

M & M (Land) Ltd v SSCLG [2007] All ER(D) 55

A use certified as lawful through an LDC can be abandoned subsequently. An LDC does no more than certify conclusively that the use is lawful at a point in time. Whether it is later abandoned is to be assessed according to the objective test of abandonment.

- *Case Law Update 1*
- *Confirmation and clarification that lawfulness through an LDC is not in the same species of the 'hardy beast' of lawfulness in Pioneer Aggregates.*

Stockton on Tees BC v SSCLG & Ward [2010] EWHC 1766 (Admin); [2011] JPL 183

1961 PP had been implemented. The site was no longer in active use, but there had been no lawful COU. The permitted use had not been abandoned simply because the activity had been allowed to dwindle away, and when it had not been extinguished by another use.

- *Case Law Update 12*

Bramall v SSCLG & Rother DC [2011] EWHC 1531 (Admin)

Affirms the four criteria for abandonment set out in *Hughes*, and that the weight to attach to each criterion is a matter of judgment for the decision-maker.

- *Case Law Update 16*

AGRICULTURAL OCCUPANCY CONDITIONS

Fawcett Properties Ltd v Buckinghamshire CC [1960] All ER 503; [1961] AC 636

'Dependants' are persons living in a family with the person defined and dependent on him or her in whole or in part for their subsistence and support.

- *See also Shortt & Shortt v SSCLG & Tewkesbury DC [2015] EWCA Civ 1192*

Kember v SSE & Tunbridge Wells DC [1982] JPL 383

The Inspector granted PP for an agricultural worker's cottage but imposed an AOC on the existing cottage occupied by the appellant on his adjacent holding, as well as the new dwelling. Decision quashed on the basis that the condition was not imposed for the needs of the farm where the cottage was to be built, but of agricultural generally.

***Alderson v SSE & Another* [1984] JPL 429**

CoA: condition limiting occupation to persons employed "locally" in agriculture was not void for uncertainty; *Fawcett Properties* applied.

Newbury DC v SSE & Marsh [1994] JPL 137

CoA: The four year rule [s171B(2)] cannot apply to a breach of an occupancy condition.

- *See also FSS v Arun DC & Brown [2006] EWCA Civ 1172*

Sevenoaks DC v SSE & Geer [1995] JPL 126

PP for residential use subject to an AOC. There was no holding and the appellant did not work in farming, but the Inspector was wrong to find the AOC 'inappropriately' imposed and grant PP for the building without compliance with the condition. The circumstances, including the need for agricultural workers' dwellings in the area must be considered.

- *An enforcement appeal might have succeeded on ground (c) – EN founded on an invalid condition.*

Banister v SSE & Fordham [1995] JPL 1011

The EN concerned non-compliance with an AOC. The Inspector granted PP on the DPA on the basis that the condition had been inappropriately imposed on the original PP. This challenge by a third party succeeded because the Inspector had not considered whether retention of the AOC was appropriate, and the circumstances indicated a need for agricultural workers' dwellings. In accordance with *Sevenoaks*, the Inspector was required to look at the planning considerations existing at the time of his decision.

North Devon DC v SSE & Rottenbury [1998] EGCS 72

A dwelling that was subject to an AOC had been used for more than ten years as holiday accommodation, but only in the summer months. The Inspector granted a LDC in respect of a ten year breach but failed to distinguish between the seasonal use and lack of occupation during the winter periods. A distinction must be drawn between a use which is continuous but seasonal, and activities amounting to a breach of the condition. There would not normally have been a BoC when the property was vacant.

Shortt & Shortt v SSCLG & Tewkesbury BC [2015] EWCA Civ 1192; [2016] JPL 349

A person can meet the requirement to be employed in agriculture without making money from the business. *Fawcett* does not support the contention that 'dependents' referenced in

an AOC may be restricted to persons who are financially dependent on the agricultural worker. As a matter of ordinary language, ‘dependents’ is capable of referring to persons in relationships involving non-financial dependency, such as emotional support and care.

- *Case Law Updates 26 & 28*

BUILDINGS AND OPERATIONAL DEVELOPMENT

Cardiff Rating Authority v Guest Keens [1949] 1 KB 385

Rating case: it is not possible to construct an exhaustive test of what 'is or is in the nature of a building or structure' – but the main characteristics of a building are: (1) that it is of a size that it would normally be constructed, as opposed to being brought ready-made onto the site; (2) it would cause a physical change of some permanence; and (3) there would be physical attachment to the ground.

Re St Peter the Great, Chichester [1961] 2 All ER 513

(Transformer on Consecrated Ground)

1. Would the ordinary man think this was a building?
2. Does the structure have walls and a roof?
3. Can one say the structure is built?

Chester CC v Woodward [1962] 2 WLR 636, 2 QB 126

A coal hopper on wheels was not a building; 'moveability' is only one of the tests as to whether operational development has taken place. It is necessary to consider whether the physical character of the land has been changed by the operations.

James v MHLG & Brecon CC [1963] 15 P&CR 20

There must be some idea of permanency. Swing boats that were capable of being removed by six men and dismantled in an hour did not amount to development.

Street v MHLG & Essex CC [1965] 193 EG 537

Whether construction works amount to 'maintenance' or 'rebuilding' is a matter of fact and degree. Works intended to repair the property involved substantial demolition. The re-building amounted to development and was not PD by Class I(I) of the GDO.

Barvis v SSE [1971] 22 P&CR 710

An 'enormous' crane on steel was a building despite being in situ temporarily. Bridge J cautioned against reliance on the application of tests from real property law as to what is a "fixture". He asked whether the crane when erected was a "building" as defined in statute, with regard to the three-fold test laid down in *Cardiff Rating Authority*.

Thomas David (Porthcawl) Ltd & the Trustees of Merthyr Mawr Estates v SSW & Others [1971] 3 All ER 1092; [1973] JPL 39

CoA: Mining operations are continuous, with each successive shovelful constituting a further act of development.

Ewen Developments Ltd v SSE & North Norfolk DC [1980] JPL 404

Engineering operations involve works with some element of pre-planning, which would normally but not necessarily be supervised by a person with engineering knowledge. Earth embankments were not a means of enclosure or PD under the GDO, Schedule 2 Part 2. If the development as a whole can be enforced against there is no saving for part of it which may have been carried out more than four years before the EN.

- *See also Fayrewood Fish Farms v SSE & Hampshire CC [1984] JPL 267*

Scott v SSE & Bracknell DC [1983] JPL 108

On the facts, the erection of a portacabin involved operational development.

Howes v SSE & Devon CC [1984] JPL 439

Mining operations are different to building or engineering operations in that the former can be seen as activity of destruction with no discernible end, whereas the latter are operations of construction which will have a definable end.

A single building or engineering operation is immune from enforcement under the four year rule when it is substantially completed. The removal of part of a hedge and fence, and the tipping of hardcore comprised a 'single operation of construction' to form an access. The Inspector had to make a finding of fact as to when the operation was substantially completed by the laying of the hardcore. If that was after the 'four year date', the whole operation including the opening of the fence could be enforced against.

Cambridge CC v SSE & Milton Park Investment Ltd [1991] 1 PLR 109; [1992] JPL 644

CoA: Works for demolition will constitute development if properly regarded as building, engineering or other operations. This is a question of fact for the decision maker.

R v Swansea CC ex parte Elitestone [1993] JPL 1019

CoA: Wooden chalets supported by pillars, in position as permanent holiday homes for more than 40 years, were held to be buildings.

Shimizu (UK) Ltd v Westminster CC [1997] 1 WLR 168; [1997] JPL 523

HoL: LB case on the distinction between alterations and demolition; held that s336(1) had no relevance to the Planning (Listed Buildings and Conservation Areas) Act 1990.

- *See Barton v SSCLG & Bath and NE Somerset Council [2017] EWHC 573 (Admin)*

Burroughs Day v Bristol CC [1996] 1 PLR 78; 1 EGLR 167

Alterations to the exterior of a building will fall within development if they *materially* affect the external appearance of the building. Such judgment will involve consideration of the change to the external appearance of the building as a whole and not a part in isolation; the degree of visibility by an observer outside the building; the nature of the building; and the nature of the alterations/works.

Sussex Investments Ltd v SSE & Spelthorne BC [1997] EWCA Civ 3049

EN appeal concerning the mooring of three pontoons, on one of which was affixed a prefabricated wooden house. The challenge was that the SSE had misdirected himself in the way in which he approached the question of whether the 'craft' differed so far from what could be called a typical houseboat as to no longer merit the description 'houseboat' as that expression would normally be used. The CoA upheld the SSE's "fact and degree" approach; he had considered all of the evidence and determined the meaning of the words 'residential houseboat' in a reasonable way.

Skerritts of Nottingham Ltd v SSETR & Harrow LBC (No. 2) [2000] EWCA Civ 5569; [2000] JPL 1025

This listed building case was the first where the CoA considered the issue of 'what is a building'. The CoA held that the three-fold test for a building derived from *Cardiff Rating Authority* was of general application in the planning context.

A steel-framed marquee was sited in the grounds of a hotel for eight months each year. 'Permanent' in the context of planning control did not necessarily mean everlasting. The

character of the marquee indicated that it remained in place for sufficient time to be significant; annual removal did not deprive it of the quality of permanence.

Sage v SSETR & Maidstone BC [2003] UKHL 22; [2003] JPL 1299

The exception to 'development' in s55(2)(a) applies only to a completed building on which work was carried out for its maintenance, improvement or other alteration. It does not apply to the work involved in completing a structure still subject to planning control. Even if the work remaining on an uncompleted dwellinghouse affected only the interior, that work did not come within the exception and the building could not be regarded as substantially completed for the purposes of s171B(1).

When an application was made for PP for a single operation, it was made in respect of the whole of the operation. If a building operation is not carried out, both internally and externally, fully in accordance with the PP, the whole operation is unlawful. The EN had not been served out of time because the building had not been substantially completed.

R (oao Beronstone Ltd) v FSS [2006] EWHC 2391; [2007] JPL 471

The hammering of 554 marker stakes to define the boundaries of 40 plots and a network of access ways was capable, as a matter of fact and degree, of being 'other operations in s55(1). The Inspector was not under any obligation to define a threshold at which a conglomeration of stakes became a development. He took account of the extent, visibility, patterns and degree of permanence of the posts when finding that they were of sufficient substance, scale and type to amount to development.

- *Case Law Update 1*

R (oao Hall Hunter Partnership) v FSS & Waverley BC [2006] EWHC 3482 (Admin); [2007] JPL 1023

The erection of polytunnels in linked networks over 28ha on a 45ha farm amounted to a building operation, not a use of land, given size, permanence and degree of attachment.

- *Case Law Update 1*

R (oao Save Woolley Valley Action Group Ltd) v Bath and North East Somerset Council [2012] EWHC 2161 (Admin)

The Council erred in finding that, despite their 'size, weight and bulk', poultry units would be chattels rather than buildings because of their lack of attachment to the ground and mobility. Their approach to "development" and "building" as defined in s55 and s336(1) was too narrow. The Council misdirected itself on the question of permanence.

- *Case Law Update 19*

Hancock v SSCLG & Windsor and Maidenhead RBC [2012] EWHC 3704 (Admin)

Where a building is demolished and a replacement is constructed without PP, the only lawful use is the lawful land use. There are no use rights for a building on the site.

- *Case Law Update 21*

Barton v SSCLG & Bath and North East Somerset Council [2017] EWHC 573 (Admin)

Demolition of a section of wall and a gate in a Conservation Area amounts to relevant demolition under s196D of the TCPA90. The s336(1) definition of a 'building' as including 'any structure or erection' applies to s196D; *Shimizu* distinguished. Demolition of part of a wall or gate within a CA is not PD. The Inspector made no error in focussing on the part of the wall to be removed, rather than the part untouched.

- *Case Law Update 31*
- *Knowledge Matters 30*

Oates v SSCLG & Canterbury CC [2017] EWHC 2716 (Admin), [2018] EWCA Civ 2229; [2019] JPL 251

The Inspector was entitled to uphold an EN alleging the construction of 'new buildings' although the structures incorporated parts of existing buildings. Substantial operational development had been undertaken and, as a matter of fact and degree, new buildings constructed. The Inspector did not err in failing to consider s336(1); for a structure to be 'part of a building', there must be a building of which it can be part. There was no error in concluding that complete demolition was required to remedy the breach.

- *Case Law Update 34*
- *Knowledge Matters 37*

Hargrave House Ltd & Reiner v Highbury Corner Magistrates Court & Islington LBC [2018] EWHC 279 (Admin)

On prosecution for failing to comply with a LBEN, the owners argued that removal of render as required would damage the bricks and make it necessary to rebuild the entire wall – which would go beyond the requirement to 'repair any damage to the facing fabric…' Held that the meaning of a word like 'repair' is context dependant and capable of encompassing a requirement to demolish and rebuild a wall.

Haringey LBC v SSHLG & Muir [2019] EWHC 3000 (Admin)

Successful s289 challenge to an Inspectors decision concerning an EN which alleged '*…the installation of UPVC windows on the ground floor front elevation'*. The Inspector allowed the appeal on ground (c), on the basis that the operations were not to be taken as development under s55(2)(a)(ii), which required consideration as to "what is the building" and "what is the effect of the works on external appearance".

Mrs Justice Lieven ruled that the inspector gave inadequate reasons for concluding that the relevant "building" was the whole terrace when 'in common parlance each house in a terrace would be considered a building'. The Inspector erred by applying *Church Commissioners* to resolving "what is the building", since that judgment is rather concerned with "what is the planning unit for the purposes of a material change of use".

The Inspector also erred by conflating the questions before him and applying *Burroughs Day* to "what is the building", when that case was of relevance only to the effect of the works on the external appearance of the building. Further, the Inspector wrongly took account of the appearance of the wider area in considering the effect of the works of the appearance of the building for s55(2)(a). He was obliged to focus on the visual impact that the window had on the building – and nothing else. The prevalence of uPVC windows elsewhere in the conservation area was 'plainly legally irrelevant.'

- *Knowledge Matters 62*

Dill v SSCLG & Stratford-on-Avon DC [2017] EWHC 2378 (Admin), [2018] EWCA Civ 2619, [2020] UKSC 20; [2020] JPL 1421

It was held in this unanimous SC judgment that an appellant is entitled to appeal against an LBEN on the ground that a "listed building" is not in fact a "building".

Lord Carnwath endorsed the principle laid down in *Boddington v British Transport Police* [1999] 2 AC 143 (and reflected in Article 6 of the HRA98) that '*the issue of statutory construction is subject to the rule of law that the individuals affected by legal measures should have a fair opportunity to challenge these measures.'* That principle must be read in the context of the statutory scheme in question but, in listed building as in planning enforcement, the statutory grounds of appeal are wide enough to extend to 'every aspect of the merits' of the decision to serve the notice; *Wicks* applied.

Moreover, a “listed building” means “a building which is…included in [the] list…”; s1(5) of the Planning (LBCA) Act 1990. There are two elements, it must be a “building” and it must be included in the list. If it is not in truth a building at all, there is nothing to say that mere inclusion in the list will make it so. There is no reason why an appellant cannot make that point in an appeal made under s39(1)(c), enabling an Inspector to determine the issue on a case-by-case basis using ‘workable criteria’ developed with ‘appropriate legal advice’.

Lord Carnwarth noted a ‘disturbing lack of clarity’ and ‘reliable guidance’ adopted by the relevant authorities regarding the criteria for determining whether an item which appears on the statutory list is in fact a building. He held that the *Skerritts* test, which involves consideration of size, permanence and attachment, is relevant to the listed building context, and remitted the appeal to the SoS.

- *Case Law Update 34*
- *Knowledge Matters 36, 50 and 68*

Barry Devine v SSLUHC & Anor [2022] EWHC 2031 (Admin)

The new building could not have been “substantially completed” before the Relevant Date as the roof works had not yet taken place. The Inspector rejected the appellant's submission that the roof replacement was an act of “repair” and the court held that there was nothing unreasonable or legally inadequate in the Inspector’s decision in this regard. Appellant seeking PTA in CoA

BURDEN OF PROOF AND EVIDENCE

Nelsovil v MHLG [1962] 1 WLR 404

The onus is on the appellant in an enforcement appeal to show that there has been no breach of planning control. This case is good law for legal grounds.

R v Deputy Industrial Injuries Commissioner ex parte Moore [1965] 1 QB 456

It is necessary to differentiate between natural justice in terms of appeal proceedings and technical rules of evidence applicable to criminal trials.

'The requirement that a person exercising quasi-judicial functions must base his decision on evidence means no more than it must be based on material which tends logically to show the existence or non-existence of facts relevant to the issue to be determined, or to show the likelihood or unlikelihood of some future event, the occurrence of which would be relevant…he may take into account any matter which, as a matter of reason, has some probative value in the sense mentioned above. If it is capable of having any probative value, the weight to be attached to it is a matter for the person to whom Parliament has attached the responsibility of deciding the issue. The supervisory jurisdiction of the High Court does not entitle it to usurp this responsibility and to substitute its own view for his.'

T A Miller Ltd v MHLG [1968] 1 WLR 992

The contents of a declaration or oral statement may be hearsay, but tribunals are entitled to act on any material which is logically probative.

Knights Motors v SSE [1984] JPL 584

Hearsay evidence is admissible at inquiry; an inquiry is not a criminal trial.

- *See also Doncaster MBC v SSCLG & AB [2016] EWHC 2876 (Admin)*

Thrasyvoulou v SSE & Hackney LBC (No 1) [1984] JPL 732

The standard is the 'balance of probability', not 'beyond reasonable doubt'.

Gabbitas v SSE & Newham LBC [1985] JPL 630

The appellant's evidence should not be rejected simply because it is not corroborated. If there is no evidence to contradict their version of events, or make it less than probable, and their evidence is sufficiently precise and unambiguous, it should be accepted.

K G Diecasting (Weston) Ltd v SSE & Woodspring DC [1993] JPL 925

If a submission is to be dealt with as a serious possibility, it should be led in evidence-in-chief and cannot be left to be drawn out only in XX and re-examination.

- *See also White & Cooper & Phillips v SSE [1996] JPL B108*

Mahajan v SSTLR & Hounslow LBC [2002] JPL 928

If the written procedure is followed, written evidence on legal grounds cannot be dismissed as untested, and thus of little weight, without regard to its source, content, consistency with other evidence or reliability. If written evidence is given little weight regardless, it is difficult to see how an appellant in a WR case could discharge the onus of proof. Such evidence must be properly analysed on the balance of probability test.

Ravensdale Ltd v SSCLG & Waltham Forest LBC [2016] EWHC 2374 (Admin)

It is for the appellant to make out a lawful use pursuant to ground (d); they must take care to provide sufficient evidence which meets the balance of probabilities test. It is not for the Inspector to seek out evidence or draw an inference from gaps in evidence.

- *Case Law Update 30*
- *Knowledge Matters 22*

Doncaster MBC v SSCLG & AB [2016] EWHC 2876 (Admin)

PP granted under s177(5) was challenged on grounds including that the Inspector had relied on hearsay evidence to which no weight should be attached, given *Knights Motors*. Gilbart J rejected the claim: the passages relied on in *Knights Motors* were 'entirely obiter dicta' and did not amount to a 'generally applicable statement of principle'.

Inspectors dealing with the merits of development hear 'evidence which ranges from the thoroughly researched set of data, through generalised opinion to the anecdotal, some of it persuasive and some not. Hearsay evidence is often adduced'. The rules can be tougher if there has been a breach of planning control, but strict admissibility tests would have the effect of excluding large swathes of perfectly acceptable evidence. The correct approach is to determine what weight should attach to a piece of evidence.

- *Case Law Update 30*
- *Knowledge Matters 26*

Barnsley MBC v SSHCLG & Others (permission hearing – no transcript)

The Inspector found that there had been a lack of due diligence by the interested parties but that is not the same as a finding of intentional unauthorised development. The point was not squarely before the Inspector and he cannot be criticised for failing to consider it. Further he would have been required to make findings of fact on the issue if it had been properly raised in the substantive appeals, and this is a further reason for not granting permission in this case. Even if there had there been a clear basis for the application of national policy on intentional unauthorised development, the Claimant would have to demonstrate that it was so *"obviously material"* that the Inspector was irrational not to refer expressly to it in the DL.

CARAVANS

CSCDA60 = Caravan Sites and Control of Development Act 1968
CSA68 = Caravan Sites Act 1960

Woodspring DC v SSE & Goodall [1982] JPL 784

Where an EN alleges the stationing of a caravan, it should be corrected to specify the purpose for which the caravan is used.

- *See also Hammond v SSETR & Maldon DC [1997] 74 PCR 134*

Restormel BC v SSE & Rabey [1982] JPL 785

It is not possible to know whether the stationing of a caravan amounts to an MCU without knowing the purpose for which the caravan was used, and whether that purpose fitted in with the existing use of the land.

Wealden DC v SSE & Day [1988] JPL 268

CoA: The stationing of a caravan is not an MCU, it is necessary to identify the purpose for which the caravan is sited. No development is involved if the use is incidental.

Wyre Forest BC v SSE & Allen's Caravans [1990] 2 WLR 517; [1990] JPL 724

HoL: The statutory definition of "caravan" in the CSCDA60 and CSA68 applies in construing all permissions relating to caravans.

'*If Parliament in a statutory enactment defines its terms (whether by enlarging or by restricting the ordinary meaning of a word or expression), it must intend that, in the absence of a clear indication to the contrary, those terms as defined shall govern what is proposed, authorised or done under or by reference to that enactment.'*

Short & Short v SSE & North Dorset DC (QBD CO/227/90)

'Permahomes' fall outside the definition of a caravan but should be compared with the caravans that could lawfully be stationed on the land, in deciding whether the 'extra' involved demonstrable harm.

Carter v SSE & Carrick DC [1991] JPL 131; [1995] JPL 311

Held in the HC that a structure which was originally in prefabricated sections did not fall within s13(1) of the CSA68 because it could not lawfully be moved on the road. The CoA clarified that, to be a caravan for purpose of s29(1) of the CSCDA60, the assembled unit must be *capable* of being towed or transported as a whole by a vehicle – even if the caravan could not be so transported lawfully or accommodated on the roads by the site.

Forest of Dean DC v SSE & Howells [1995] JPL 937

PP granted for 'holiday' caravans with no condition to restrict the use. There may be no material difference between caravans occupied as holiday or permanent residences, but it is a matter of fact and degree, and off-site effects should not be disregarded.

- *See also Devon CC v Allen's Caravans* [1962] 14 P&CR 440 and *Barton Park Estates Ltd v SSHCLG & Dartmoor NPA [2021] EWHC 1200 (Admin)*

Pugsley v SSE & North Devon DC [1996] JPL 124

Where a caravan has permanent appendages, eg, blockwork surround or extension, it is necessary to assess whether what is on the site as a whole has become a building as a matter of fact and degree.

Byrne v SSE & Arun DC [1998] JPL 122

A structure did not meet the CSA68 definition in part because the s13(1)(b) requirement to be 'physically capable of being moved by road' would be failed if lifting the caravan onto a trailer by crane would 'carry a very real risk of structural damage'.

- *Byrne concerned a cabin at risk of structural damage from its size and intrinsic design. This case can be distinguished where such a risk would arise from moving a caravan that meets the CSA68 definition but has been allowed to fall derelict.*

Measor v SSETR & Tunbridge Wells DC [1999] JPL 182

The issue was the definition of 'development' and whether the siting of a caravan was a building operation or use of land. The Deputy Judge stated that he would be wary of holding, as a matter of law, that a structure which satisfied the s13(1) definition could *never* be deemed a building for the purposes of the TCPA90. However, a mobile home would not generally satisfy the well-established definition of a building, with regard to permanence and attachment. It would be contrary to the purposes of the TCPA90 to hold that because caravans are 'structures' for the CSA68, they must fall within the s336(1) definition of 'building'.

R (oao Green o/b of the Friends of Fordwich and District] v FSS & Canterbury CC & Jones [2005] EWHC 691, [2005] EWCA Civ 1727; [2006] JPL 1185

Permission could not be granted for 'units of mobile living accommodation' subject to a condition limiting the number of caravans, when the Inspector had not decided whether the units were 'caravans' as a matter of law. It was for the Inspector to determine whether each unit taken as a whole, with its timber extensions, amounted to a single fixture and the effect on its mobility

Deakin v FSS [2006] EWHC 3402 (Admin); [2007] JPL 1073

The EN alleged the siting of caravan for a use unconnected with agriculture and of a mobile home for residential purposes. The correct approach would be to determine the lawful use of the planning unit; establish the effect of the introduction of the caravans and their use on the use of the PU; and assess whether that effect amounted to an MCU.

- *Case Law Update 1*

Bury MBC v SSCLG & Entwistle [2011] EWHC 2191 (Admin); [2012] JPL 51

There was no evidential basis to support the Inspector's finding that the structure was a caravan, and there was no rational way in which that conclusion could have been reached. The appellant had suggested that the appropriate way to move the structure was to dismantle it; that could not be treated as a formal admission that the structure could not be moved in one piece, but it was clearly relevant.

- *Case Law Update 17*

Breckland DC v SSHLG & Plum Tree Country Park [2020] EWHC 292 (Admin)

The Inspector was entitled to find an LDC for the 'use of land as a camping and caravan site…' unambiguous. A caravan falling within the CSCDA60 or CSA68 definition could be

lawfully sited on the land and occupied for human habitation, whether by holiday makers or permanently. The phrase 'caravan and camping site' should be read in an ordinary way, to mean that the land can be used for caravans only, tents only or both, the type of caravan not being restricted if it meets the statutory definition; *Wyre Forest* applied.

The interpretative principles applicable to planning permissions apply to LDCs, and the courts have been 'extremely cautious' in permitting the admittance of extrinsic evidence for the purpose of interpreting ambiguous planning document. The lawfulness of the use set out in the LDC is "conclusively presumed", *Broxbourne* applied – and that case was similar on the facts, with the LPA trying to import limitations into a historic LDC.

- *See also Adams v SSHCLG & Huntingdonshire DC [2020] EWHC 3076 (Admin)*

Royale Parks Ltd v SSHCLG [2021] EWCA Civ 1101

The Court held that the view taken by Sullivan J in St Anselm v First Secretary of State [2003] EWHC 1592 (Admin) is correct. The Court rejected the Claimant's contention that a breach of condition on a "well defined and identifiable" part of the land had to be treated as a breach of that condition across the land as a whole. The Inspector had been entitled to conclude that the caravan site as a whole had not become immune from enforcement because four caravans/plots on it had accrued immunity.

PTA refused at the CoA

Norfolk Caravan Park Ltd v SSHCLG & Broadland DC [2021] EWHC 2114 (Admin)

The Inspector was entitled to accept the evidence before him and to have regard to the ordinary meaning of the word "holiday" in finding that the permitted holiday use could not be widened out to include the proposed residential use. Further, he was entitled to find that the relevant condition imposed a clear restriction on all the caravans, and to find that the proposed use would be a material change. The Court held that the Inspector had given adequate reasons for his conclusions.

Hedges v SSHCLG & Cornwall Council [2021] EWHC 2392 (Admin)

The challenge in the High Court was that the inspector required evidence of actual use of the land as a campsite in order to give rise to a material change of use and that such a requirement is contrary to case law which discourages a focus on actual use and requires the evidence to be considered in the round. The contention was that the inspector failed to take into account factors other than actual use, such as the presence of mobile toilet and shower facilities on the land, signs, advertisements and bookings, which point to the land being used as a campsite from July 2009.

The judge said: "In my judgment the inspector did have regard to the factors other than actual use and expressly referred to the case of Mrs Hedges on these in paragraph 12 of his decision letter."

The inspector had been entitled to reach his conclusion and "did not overly focus on use on a day to day basis.

"To the extent that he did so focus, then on the particular facts of this case, he was entitled to do so."

In the present case, there was no building. The previous use of the land had been agricultural. In considering when a material change of use occurred so as to provide a footing for enforcement action, regard also had to be had to the permitted temporary uses under the GPDO".

COMPLETION NOTICES

Cardiff CC v NAW & Malik [2006] EWHC 1412; [2007] JPL 60

The incomplete operations remaining on land after a failure to comply with a s94 completion notice are lawful and cannot be enforced against. Serving a s102 discontinuance notice is the only remedy available to the LPA.

CONCEALED DEVELOPMENT

Welwyn Hatfield BC v SSCLG & Beesley [2011] UKSC 15; [2011] JPL 1183

Law should serve the public interest; there is a public policy principle that one cannot benefit from the application of a statutory rule for which qualification was procured by fraud (the *Connor* principle). Planning law is a comprehensive code but the principle may apply in extreme cases where there was '*positive deception in matters integral to the planning process…[which] was directly intended to and did undermine the regular operation of that process*'. Mr Beesley's deliberate concealment of his dwellinghouse meant that he could not rely on the time limits for taking enforcement action in s171B.

- *Case Law Updates 7, 10, 14 & 15*

R (oao Fidler) v SSCLG & Reigate and Banstead BC [2011] EWCA Civ 1159

The clandestine building of a house behind straw bales, with the intention of concealing it from the LPA for four years, amounted to a 'paradigm case of deception' and fell squarely within exemptions to s171B(2) delineated by the Supreme Court in *Welwyn*.

- *Case Law Updates 10, 11, 12 & 17*

Meecham v SSCLG & Uttlesford DC [2013] HC

It is a question of fact as to whether there has been positive deception in the planning process and, if so, whether the immunity provisions are ten or four years. It was good practice for the Inspector to draw the parties' attention to *Welwyn* before the inquiry, although the judgment had not been raised by the Council.

- *Case Law Update 13*
- *This does not mean that the Inspector ought to cast around for evidence of deliberate concealment in order to rely on the Welwyn principle.*

Jackson v SSCLG & Westminster CC; Bonsall v SSCLG & Rotherham MBC [2015] EWCA Civ 1246; [2016] JPL 506

The language used by Parliament to insert s171BA-s171BC does not indicate an intention to alter the scope of s171B, so that concealment can only be dealt with via Planning Enforcement Order (PEO). There is not a complete overlap between the *Welwyn* principle and the PEO procedure; the latter could not displace the meaning given to s171B in *Welwyn*, or application of *Welwyn* to ensure compliance with the HRA98. The PEO code is a supplementary procedure available to LPAs, not replacement for the *Welwyn* principle.

The *Welwyn* principle is not confined to cases where the owner uses the building for a different purpose from completion; it also applies to MCU of an existing building.

- *Case Law Updates 25, 26, 27 & 28*
- *Knowledge Matters 16*

Cole & Cole v Lichfield LDC [2016] EWHC 3059 (Admin)

The HC upheld a PEO granted by the Magistrates Court.

R (oao Matilda Holdings Ltd) v SSCLG [2016] EWHC 2725 (Admin)

The Inspector was right to reject the claim that *Welwyn* could not apply because the use had not been physically concealed and the caravans could be seen. The four matters identified by Lord Mance are sufficient for *Welwyn* to apply, but not necessary tests. There are no

‘exceptionality’ or ‘egregious’ tests for determining whether there has been deliberate concealment.

- *Case Law Update 30*

CONDITIONS – GENERAL

Fawcett Properties v Buckinghamshire CC [1960] All ER 503; [1961] AC 636

Per Lord Denning: '…*a planning condition is only void for uncertainty if it can be given no meaning or no sensible or ascertainable meaning, and not merely because it is ambiguous or leads to absurd results. It is the daily task of the Courts to resolve ambiguities of language and to choose between them, and to construe words so as to avoid absurdities or to put up with them…as with by-laws so with planning conditions. The Courts can declare them void for unreasonableness, but they must remember that they are made by a public representative body in the public interest. When planning conditions are made, as here, so as to maintain the green belt against those who would invade it, they ought to be supported if possible. And credit ought to be given to those who have to administer them, that they will be reasonably administered*.'

Wilson v West Sussex CC [1963] 2QB 764

There is no doctrine of an implied condition in planning law; an 'agricultural permission' is limited in scope, but it does not impose any enforceable condition or limitation.

- *See also Trump International Golf Club Scotland Ltd v the Scottish Ministers [2015] UKSC 74 & Lambeth LBC v SSCLG [2019] UKSC 33*

Kingston-on-Thames RBC v SSE [1973] 1 WLR 1549

Conditions can validly restrict existing use rights.

R v Hillingdon LBC ex parte Royco Homes [1974] 1 QB 720; [1974] JPL 359

A condition requiring that dwellings on a new housing estate be reserved for those on a Council waiting list was invalid.

Sutton LBC v SSE & Pierpoint and Sons [1975] JPL 222

A condition requiring the approval of materials imposed to safeguard visual amenity did not contain or imply any obligation on the standard of completion of works.

A I and P (Stratford) v Tower Hamlets LBC [1976] JPL 234

PP granted for warehouse and industrial units subject to a condition that the existing office accommodation should be used only for purposes ancillary to the business on the site, to prevent an increase in office floor space contrary to policy. The condition was held to be valid since, if the offices could be used for 'outside' purposes, the firm might use part of the newly built warehouse and industrial units as offices.

Bizony v SSE [1976] JPL 306

Difficulties in enforcement do not render a condition invalid.

- *See also Bromsgrove DC v SSE [1988] JPL 257; R v Rochdale MBC ex parte Tew [1999] 3 PLR 74*

Penwith DC v SSE [1977] 34 P&CR 269

A condition may regulate the use of land within the appellant's control outside the site.

Hildenborough Village Preservation Society v SSE [1978] JPL 708

If a condition is imposed pursuant to an undertaking given by the developer, the developer cannot then claim the undertaking is unenforceable.

George Wimpey & Co v SSE & New Forest DC [1979] JPL 314

A condition may be imposed in respect of land in the applicant's 'control' through ownership or an agreement or licence sufficient to allow compliance with the condition.

- *Applies to land outside of the site, if it can be shown that the appellant had control at the date of the decision; Atkinson v SSE & Leeds CC [1983] JPL 599*

Newbury DC v SSE [1980] 2 WLR 379, [1981] AC 578; [1980] JPL 325

HoL: conditions must: be imposed for a planning and no other purpose, however desirable; be fairly and reasonably related to the development permitted; and not so unreasonable that no reasonable authority would impose them. There is a duty of the Inspector to interpret the condition in order to give it a sensible meaning if he can.

- *Applied in R (oao Wright) v Resilient Energy Severndale Ltd & Forest of Dean DC [2019] UKSC 53*

Peak Park JPB v SSE & ICI [1980] JPL 114

Conditions may derogate from an existing PP.

- *Not where the Newbury principle applies; if the PP is not required, the condition does not bite or is not valid*

Bernard Wheatcroft Ltd v SSE & Harborough DC [1982] JPL 37

An amendment to the plans can accepted on appeal and approved through a conditional PP, provided there is no substantial difference between what was originally applied for and the amended scheme. It is necessary to ask whether accepting the amendments would deprive those who should have been consulted of an opportunity for comment.

- *See also Ioannou v SSCLG [2014] EWCA Civ 1432*

Irlam Brick Co v Warrington BC [1982] JPL 709

A condition requiring the cessation of tipping after 10 years if the site had not been re-instated by that time was valid and did not derogate from the grant of PP itself.

Jillings v SSE & the Broads Authority [1984] JPL 32

SoS (or Inspector) should not impose conditions without first canvassing the parties.

'*If in the calm of his study, writing up his report, the Inspector is suddenly inspired by the thought that all the planning problems can be solved by an ingenious use of conditions, he will have to suppress the thought, or go back to the parties before finishing his decision*.'

Wessex Regional Health Authority v SSE [1984] JPL 344

A condition limiting the number of permitted dwellings to 37 was invalid since the application had been made for 48 dwellings. A condition cannot be imposed which makes the development different to that applied for.

Bromsgrove DC v SSE [1988] JPL 257

Practical or potential difficulty in enforcing a condition is not a separate or discrete ground of challenge and does not make a condition void for uncertainty.

- *See also R v Rochdale MBC ex parte Tew [1999] 3 PLR 74*

Camden LBC v SSE & PSP Nominees [1989] JPL 613

A condition can exclude the operation of s55(2)(f) and Article 3(1) of the UCO to fulfil a planning policy purpose.

Ashford BC v SSE & Hume [1991] JPL 362

If a condition does not pass all the six policy tests, it does not necessarily follow that the condition is invalid. To be invalid, a condition must have no ascertainable meaning.

Turner v SSE & Macclesfield BC [1992] JPL 837

CoA: a condition limiting the number of parking spaces at a recreational fishing lake was valid; it did not derogate from the PP and would not be unduly difficult to enforce.

Dunoon Developments Ltd v SSE & Poole BC [1992] JPL 936

CoA: a condition can only exclude the operation of the GDO/GPDO by express reference and not by implication.

- *See Dunnett Investments Ltd v SSCLG & East Dorset DC [2017] EWCA Civ 192*

R v Newbury DC ex parte Stevens & Partridge [1992] JPL 1057

At the reserved matters stage, further conditions may be imposed provided they arise directly from the RM application and do not materially derogate from the outline PP.

Christoforou v SSE & Islington LBC [1994] JPL B44

An Inspector is under no obligation to cast around for solutions to overcome a planning objection and impose a condition not suggested by either of the main parties.

- *See also Ludlam v SSTLR & Derbyshire Dales DC (QBD 18.7.02)*
- *It was also held in Christoforou that there is no duty on the Inspector to consider a limited [temporary/personal] grant of PP when not suggested by a party. Treat that point with care because the judgment predates the HRA98.*

Forest of Dean DC v SSE & Howells [1995] JPL 937

PP granted for 'holiday' caravans with no condition to restrict the use. There may be no material difference between caravans occupied as holiday or permanent residences, but it is a matter of fact and degree, and off-site effects should not be disregarded.

Handoll & Suddick v Warner & Goodman & Street & East Lindsay DC [1995] JPL 930

CoA: dwelling subject to AOC was not built as approved. The PP was not implemented and the AOC did not apply. The building itself was immune from enforcement action.

Davenport & Another v Hammersmith and Fulham LBC [1996] The Times 26.4.96

A condition relating to land outside the site and the applicant's control is not invalid unless it requires the carrying out of works on such land or the applicant could not be assured of securing compliance. The applicants faced no difficulty in complying with the condition since all it required was for them not to use land not in their control.

R v Rochdale MBC ex parte Tew [1999] 3 PLR 74; [2000] JPL 54

A condition was imposed with respect to land that was within the site but outside the applicant's control; the development could only have taken place if a CPO was made for land assembly. It would be unreasonable to enforce compliance with the condition against those who might derive no benefit from and be opposed to the development. A condition which is not reasonably enforceable is not reasonable for the *Newbury* test.

I'm Your Man Ltd v SSE & North Somerset DC [1999] 4 PLR 107

A planning application was made for a permanent use after PP had been granted for a similar use for 'a temporary period of seven years'. No condition had been imposed on the PP requiring cessation of the use after that time, and so the PP was permanent. A temporary condition could not be implied into the description.

- *See also Winchester CC v SSCLG [2013] EWHC 101 (Admin), [2015] EWCA Civ 56; Wood v SSCLG & the Broads Authority [2015] EWHC 2245 (Admin)*

Barlow v SSTLR & Uttlesford DC (QBD 14.11.02 Sullivan J)

Condition required demolition of the existing bungalow within one month of the first residential occupation and rating of the proposed development. There is public interest in ensuring that conditions are construed as workable whenever possible. The purpose of referring to 'rating' was not to require any specific local government taxation but establish residential occupation. The Inspector gave reasons for finding that Council Tax fell within 'rating' for the purpose of the condition; the condition still had effect.

Sevenoaks DC v FSS & Pedham Place Golf Centre [2005] 1 P&CR 13 (QBD 22.3.04); [2005] JPL 116

The condition did not expressly require the works to be carried out in accordance with the approved details and no implied requirement could be read. Since a PP is a public document, any obligation within it should be clearly and expressly imposed. Where the language of the condition is unambiguous, no extraneous words are to be implied to aid construction or for any other purpose.

- *See Trump International Golf Club Scotland Ltd v the Scottish Ministers [2015] UKSC 74 & Lambeth LBC v SSCLG [2019] UKSC 33*

Avon Estates Ltd v Welsh Ministers & Ceredigion CC [2011] EWCA Civ 553

LDC appeal for the use of a dwellinghouse. PP had been granted subject to a seasonal occupancy condition and a 'temporary' condition. An interpretation that the occupancy condition could live beyond the specified date would make the PP itself internally inconsistent. Once a temporary and implemented PP 'expires' because of a time-limiting condition, it ceases to exist. The conditions attached, other than that limiting the duration of the PP, have no life, no longer bind the land and cannot be enforced.

'It is very difficult to conceive of a condition on a temporary permission…which could sensibly relate to a development…that…has ceased to be authorised…I do regard it as very unlikely that the statutory scheme allows for what can be described as a permanent condition on a temporary permission, other than the time condition itself.'

- *Case Law Updates 12 & 14*
- *Knowledge Matters 25*

Telford and Wrekin Council v SSCLG & Growing Enterprises Ltd [2013] EWHC 79 (Admin); [2013] JPL 865

A condition which required the submission and approval of details of products to be sold was discharged by the provision of the details required. The condition did not limit the products that could be sold to those on the approved list.

- *Case Law Update 22*

Winchester CC v SSCLG & Others [2013] EWHC 101 (Admin), [2015] EWCA Civ 563; [2015] JPL 1184

PP for use of land as a 'travelling showpeople's site' was a limited grant of PP for that use. It could not be interpreted as PP for a residential caravan site and no conditions were necessary for the LPA to enforce against use by people who were not travelling showpeople. The Inspector relied on *I'm Your Man* to find the use unrestricted in principle – but the restriction in *I'm Your Man* related to the manner in which the use could be exercised, not the extent of the use.

- *Case Law Update 21*

R (oao Royal London Mutual Insurance Society) v SSCLG [2013] EWHC 3597 (Admin); [2014] JPL 458

A condition that 'the retail consent shall be for non-food sales only in bulky trades normally found on retail parks which are…' imposed a restriction on the nature of the non-food sales permitted. The words 'shall be for' permit no discretion; 'only' means solely or exclusively. The list of trades whose goods were permitted to be sold was defined. The condition excluded the operation of s55(2)(f) and Article 3(1) of the UCO.

- *Case Law Update 24*

Cotswold Grange Country Park LLP v SSCLG & Tewkesbury DC [2014] EWHC 1138 (Admin); [2014] JPL 981

PP for a caravan park described the number of caravans on the land, but no condition was imposed to limit the number. Only a condition can impose a limitation as a matter of law. PP will be required for any MCU from a permitted use. An LPA may only prevent a non-material change by restricting a use as described in the PP by way of condition.

- *Case Law Update 25*

De Souza v SSCLG & Test Valley BC [2015] EWHC 2245 (Admin); [2016] JPL 85

Where the development has commenced, care is needed to ensure that an enforceable condition is imposed when a scheme of works is required to be submitted, agreed by the LPA and implemented within a set period. '*Grampian*' conditions are not appropriate.

- *Case Law Update 28*

Wood v SSCLG & the Broads Authority [2015] EWHC 2368 (Admin)

An express PP can only be limited by way of condition in relation to both substantive and temporal limitations, as in *I'm Your Man*. The principle does not, however, displace the effect of s75(3). If PP for a building does not specify the use in the description, the lack of any

condition to limit use does not make it lawful to carry out a use that is materially different from the use for which the building is designed. The word 'designed' in this context refers to the intended purpose for the building rather than its architecture.

- *Case Law Update 28*

Trump International Golf Club Scotland Ltd & Another v the Scottish Ministers [2015] UKSC 74

Lord Hodge: "While the court will, understandably, exercise great restraint in implying terms into public documents which have criminal sanctions, I see no principled reason for excluding implication altogether."

When the court is concerned with the interpretation of words in a condition in a public document, it asks itself what a reasonable reader would understand the words to mean when reading the condition in the context of the other conditions and the consent as a whole. This is an objective exercise; the court will have regard to the natural and ordinary meaning of the relevant words, the overall purpose of the consent, any other conditions which cast light on the purpose of the relevant words, and common sense.

Whether the court may look at other documents connected with the application or referred to in the consent will depend on the circumstances of the case, particularly the wording of the document being interpreted. Other documents may be relevant if they are incorporated into the consent by reference, or there is ambiguity in the consent.

Lord Carnwath, in agreement: it is not right to regard the process of interpreting a PP as differing materially from that appropriate to other legal documents [which] must be interpreted in it particular legal and factual context. A PP is a public document which may be relied on by parties unrelated to those originally involved. Planning conditions may also be used to support criminal proceedings.

- *See Lambeth LBC v SSCLG & Others [2019] UKSC 33.*
- *The condition in Trump was imposed on a s36 consent under the Electricity Act 1989 and considered to be an 'incomplete' condition.*

Menston Action Group v City of Bradford MDC & BDW Trading Ltd (t/a Barratt Homes Yorkshire West) [2016] EWCA Civ 796

The case concerned the meaning of a condition (15) which required a scheme for surface water drainage (SWD) in accordance with "sustainable drainage principles".

Held that the condition had to be interpreted in its context, namely the permission granted; *Trump* applied. There was no need to look beyond the permission; condition no. 15 had to be read with 14 which required the design and construction of a SWD scheme in accordance with the Flood Risk Assessment which formed part of the application.

Lindblom rejected the claimant's reliance on the Flood and Water Management Act 2010 and various policy statements, none of which displaced the proper construction of the concept of "sustainable drainage principles" in the context of this condition and the permission. In any event, the Act framed "sustainable drainage" in general terms – while the policies cited did not make it obligatory for development to alleviate existing flooding on adjacent land. While the concept of "sustainable drainage principles" might have a broader meaning in a different context, it must have the specific meaning intended for it in condition 15 and could not mean "based on every principle that might qualify as a principle of sustainable drainage".

Dunnett Investments Ltd v SSCLG & East Dorset DC [2016] EWHC 534 (Admin), [2017] EWCA Civ 192; [2017] JPL 848

Paragraph 37 of the HC judgment summarises the legal principles on conditions:

1. Planning conditions need to be construed in the context of the PP as a whole.
2. Conditions should be construed in a common-sense way, so that the Court should give the condition a sensible meaning if possible.
3. Consistent with that, a condition should not be construed narrowly or strictly.
4. There is no reason to exclude an implied condition, but a PP is a public document which may be relied upon by parties unrelated to those originally involved.
5. The fact that breach of a condition may be used to support criminal trials means that a 'relatively cautious approach' should be taken.
6. A condition is to be construed objectively and not by what the parties may or may not have intended at the time – but by what a reasonable reader construing the condition in the context of the PP as a whole would understand.
7. A condition should be clearly and expressly imposed.
8. A condition is to be construed in conjunction with the reason for its imposition so that its purpose and meaning can be properly understood.
9. The process of interpreting a condition, as for a PP, does not differ materially from that appropriate to other legal documents.

A condition restricting use to B1 and 'no other purpose whatsoever, without express planning consent from the LPA first being obtained' is clear and emphatic and excludes the grant of PP by the GPDO. An 'express planning consent from the LPA' means a PP granted by the LPA on application. The reason for the condition made it clear that the LPA sought to retain control.

- *Case Law Updates 29* & *31*
- *Knowledge Matters 18* & *30*

Lambeth LBC v SSCLG & Aberdeen Asset Management, Nottinghamshire CC & HHGL Ltd [2017] EWHC 2412 (Admin), [2018] EWCA Civ 844, [2019] UKSC 33; [2020] JPL 31

The Supreme Court considered whether a condition restricting the use of the premises should be implied into a s73 PP granted by the LPA or, alternatively, whether the PP should be interpreted as containing such a condition. The sole judgment, which overturned that of the High Court and CoA, was given by Lord Carnwarth.

He summarised existing case law on interpretation as follows: *'whatever the legal character of the document in question, the starting-point - and usually the end-point - is to find "the natural and ordinary meaning" of the words there used, viewed in their particular context (statutory or otherwise) and in the light of common sense'.*

It was held that: '*the obvious, and…only natural, interpretation…is that the Council was approving what was applied for: that is, the variation of one condition from the original wording to the proposed wording, in effect substituting one for the other. There is certainly nothing to indicate an intention to discharge the condition altogether, or in particular to remove the restriction on sale of other than non-food goods*…'

- *Knowledge Matters 36, 43* and *57*

Finney v Welsh Ministers & Carmarthenshire CC & Energiekontor (UK) Ltd [2019] EWCA Civ 1868; [2020] JPL 524

- PP granted to construct two wind turbines with a height of 100mm, and subject to a condition that the development was carried out in accordance with specified plans.
- The developer applied under s73 to vary this condition and insert plans showing turbines with a height of 125m. The Inspector allowed the appeal, varied the disputed condition and changed the description of development by deleting the reference to 100m.

- The High Court dismissed a claim that the grant of PP was *ultra vires* because the imposition of this condition required a change to the height specification in the description of development. This decision was reversed by the Court of Appeal, which held that an application under s73 may not be used to obtain a PP that would require a variation to the terms of the "operative" part of the PP, ie, the description of the development for which PP had been granted.
- *43: "If the inspector had left the description of the permitted development intact, there would in my judgment have been a conflict between what was permitted (a 100 metre turbine) and what the new condition required (a 125 metre turbine). A condition altering the nature of what was permitted would have ben [sic] unlawful. That, no doubt, was why the inspector changed the description of the permitted development. But in my judgment that change was outside the power conferred by section 73."*
    - *Knowledge Matters 61 and 68*

DB Symmetry Ltd v Swindon BC & SSHCLG [2020] EWCA Civ 1331

In a challenge to the Inspector's decision to grant an LDC under s192 for the "formation and use of private access roads as private access roads" pursuant to an outline PP for development, the question was whether the roads could only be used by the public with the landowner's permission or whether the outline PP required the public to have rights of way. The High Court held that the condition at issue, requiring the developer to construct proposed access roads so as to ensure that each dwelling was served by a fully functional highway, required the provision of public roads fully functional for public use and "highway" in the condition would be understood by the informed reader to bear its usual meaning. The CA reversed the judgment.

The Inspector did not err in granting an LDC for the 'formation and use of private access roads as private access roads' although a condition required that they and all other areas 'that serve a necessary highway purpose shall be constructed in such a manner as to ensure that each unit is served by fully functional highway'.

The condition did not expressly require dedication as a public highway or refer to the grant of rights of passage. It was not clear which parts of the development were to be dedicated as highways; the obligation imposed was one which on its face related to the construction of the roads.

The power to impose conditions should not be interpreted, in the absence of clear words, as derogating from the owner's property rights. A condition that requires a developer to dedicate land as a public highway without compensation is an unlawful condition; *Hall & Co Ltd v Shoreham by Sea UDC* [1964] 1 WLR 20 applied. The reasonable reader would not suppose the LPA intended to grant a PP subject to an invalid condition. There is a statutory mechanism for securing the adoption of a way as a public highway.

Some weight must be given to the expertise of an experienced and specialist Inspector. Her interpretation of the condition was realistic if not the most natural. The validation principle applies and the condition should be given the meaning that she ascribed to it.

- *Knowledge Matters 57 & 72*

Ikram v SSHCLG & Others [2019] EWHC 1869 (Admin); [2020] EWCA Civ 2

The Inspector erred in considering ground (a) in respect of a proposed 'limited use of the mosque' but granting PP for 'something much broader', being the alleged 'change of use of land…to a mixed use as a place of worship and residential'. The conditions imposed meant that the mosque could be used more extensively than the Inspector envisaged when assessing the impact of the use. Drafting errors in the condition were not overcome by the later planning obligation.

- *Knowledge Matters 75*

Ramesh Patel v SSHCLG [2021] EWCA 2115 (Admin)

This turned on a single issue, namely whether the information that had been submitted by the appellant was sufficient to discharge additional condition 1 (AC1) in relation to soundproofing.

Interpreting AC1 one had to identify, through the eyes of the reasonable reader, the ordinary and natural meaning of the words, in the context of the other conditions. The Court found that AC1 was unambiguous and it was therefore impermissible to rely on extrinsic material that was not incorporated by reference into the permission; moreover, faced with the correct interpretation, it was also impermissible to imply requirements which were not expressly referred to in AC1.

- *Knowledge Matters 81*

Manchester CC v SSHCLG & Others [2021] EWCA Civ 1920

High Court
To what extent can the description of development act as a restriction on the planning permission?

Counsel for the Secretary of State argued that the property was one planning unit in mixed use and so did not fall within the UCO and the GPDO, and a proposed change of use of any of the units would require planning permission. The inspector had therefore been entitled to conclude that no conditions were necessary to achieve his intention of limiting the property's uses.

The Judge said: “I have come to the conclusion that…the way in which the inspector expressed his decision did not give legal effect to his intention to restrict the uses of the four units to those businesses specified in his grant of planning permission.”

Court of Appeal
Upheld in the COA. The Court ruled that “the only rational conclusion” was that there were four planning units. and that the inspector had made an error in deciding that because the description of what was permitted was expressed in limited terms, there was no need for any conditions precluding further changes of use.

Taylor-Davies & Anor v Wandsworth LB [2022] EWHC 355 (Admin)

The issue before the Court was whether, under the terms of the planning permission for a roof extension to the property, the rooflight which overlooks the Claimants’ top floor bedroom, study and bathroom, was subject to Condition 3, which required windows in the side elevations to be fitted with obscured glass in order to safeguard privacy.

The Court held that the permission was ambiguous; the reasonable reader could interpret Condition 3 as referring to both dormer windows and rooflights because it does not distinguish between different types of “windows”. However, upon considering all the documents and drawings, individually and as a whole, it was held that the correct interpretation of the permission is that Condition 3 only applies to the dormer window on side elevation 1, not to the rooflight.”

CONDITIONS – BREACH OF

Clwyd CC v SSW & Welsh Aggregates Ltd [1982] JPL 696; [1983] JPL 50

- CoA: Where there is a failure to comply with a condition imposed by the GPDO on permitted development, the EN can only be directed against the breach of condition.
- *Except that development undertaken without compliance with a prior notification (pre-commencement) condition is development without PP.*
- *See also R v Elmbridge BC ex parte Oakimber [1992] JPL 48; F G Whitley & Sons v SSW & Clwyd CC [1992] JPL 856*

Newbury DC v SSE & Marsh [1994] JPL 134

The s171B(2) four year rule cannot apply to a breach of an occupancy condition.

- *See also FSS v Arun DC & Brown [2006] EWCA Civ 1172*

Butcher v SSE & Maidstone BC [1996] JPL 636

A PP granted on a DPA must be implemented before it can come into effect; whether it is implemented is a matter of fact and degree. Some conscious action is required to implement the PP, so that the conditions bite. If it can be shown that a PP has not been implemented, there may be success on ground (c) in respect of an EN aimed at a BOC.

Nicholson v SSE & Maldon DC [1998] JPL 553

If a breach of a 'continuing requirement' condition ceases because of discontinuance of the offending activity, that breach is at an end. The clock starts again and future non-compliance amounts to a new, separate breach subject to enforcement action for ten years. Non-compliance with the condition must exist at the date of the LDC application.

- *See also Ellis v SSCLG [2009] EWHC 634 (Admin); Basingstoke and Deane BC v SSCLG & Stockdale [2009] EWHC 1012 (Admin)*

North Devon DC v SSE & Rottenbury [1998] EGCS 72

A dwelling subject to an AOC was used for over ten years as holiday accommodation but only in the summer months. The Inspector granted an LDC for a BoC without properly addressing the seasonal nature of the use. A distinction must be drawn between a use that is continuous but seasonal, and activities in BoC. There would not normally have been a BoC when the property was vacant in winter.

- *Any LDC granted in respect of a breach of a 'continuing requirement' condition should be worded to reflect the fact that, if the breach comes to an end, the LDC does not provide immunity against enforcement of a fresh breach: "occupation of the dwelling by any person continuing the same breach, which started more than ten years before the date of the application for this certificate, of condition no. x, attached to the PP ref: … dated … for …"*

St Anselm Development Co Ltd v FSS & Westminster CC [2003] EWHC 1592 (Admin); [2004] JPL 33

Condition required retention of a car park for use by certain occupiers. Most but not all spaces were used by others for over ten years. Claim that this made all spaces immune from the BoC was rejected; there must be a 'purposive' interpretation of the condition.

North Devon DC v FSS & Stokes [2004] JPL 1396

A breach of a seasonal occupancy condition can become lawful through the passage of time, even though the breach could not be continuous. The condition, by definition, would not be breached when the property is occupied during the permitted season. This principle would apply equally, for instance, to an opening hours condition.

FSS v Arun DC & Brown [2006] EWCA Civ 1172; [2007] JPL 237

The four year rule under s171B(2) applies to both development without PP and a breach of condition relating to a change of use to use as a single dwellinghouse.

Basingstoke and Deane BC v SSCLG & Stockdale [2009] EWHC 1012 (Admin); [2009] JPL 1585

In considering whether the ten-year clock had been re-started in relation to a breach of an occupancy condition, it is necessary to focus on whether there has been a continuous BoC, rather than significant breaks in occupation. There was a gap in occupation during which time refurbishment took place, in order to make the dwelling more attractive for continuing breach, and this was a period during which the breach continued. If enforcement action had been taken during the period when negotiations were being carried out for the refurbishment to be done, or while the refurbishment was being carried out, or while the property was being marketed, it would have succeeded because all would have been properly regarded as breaches of the condition, because that was the purpose behind the activities being carried out.

- *The principle applies when considering whether an MCU is immune from enforcement action. It will normally be necessary to make a fact and degree assessment of period of refurbishment and/or marketing, to establish whether enforcement action could have been successfully taken at that time. Collins J recognised in paragraph 42 of this judgment that intention by itself cannot lead to enforcement action.*
- *Case Law Updates 7 & 9*

Langmead v SSHCLG & Chichester DC & South Downs NPA [2018] EWHC 2202 (Admin); [2019] JPL 101

Conditions 4 and 5 prevented the occupation of caravans on a site other than by agricultural workers between certain dates, and removal of the caravans outside of those dates. EN alleged BOC/4 in that the caravans were not occupied as required.

The appellants argued that the Inspector failed to have regard to proposed landscape and visual mitigation measures. Held that the scope of this ground (a) appeal was limited to whether condition 4 should be removed (or replaced), and regard should be had to condition 5. No mitigation measures had been put forward which might enable the caravans to be occupied by someone unconnected with the farm.

- *Case Law Update 34*

CONSOLIDATION OF UNDESIRABLE USE

W H Tolley and Son Ltd v SSE & Torridge DC [1997] 75 P&CR

PP was refused on grounds that the development would consolidate an undesirable, but not unlawful, business use in a residential area. The concept of consolidation did not imply an increase or intensification in the current use, but a strengthening of the features that supported it. The development would have made it less likely that the use would diminish or be replaced by a less undesirable use. It was reasonable to seek to ensure that the prospect of the diminution or replacement would not be reduced by a development intended to make the undesirable use more efficient or convenient.

CROWN LAND

Hillingdon LBC v SSE & Others [1999] EWHC 772 (Admin)

The Council had approved details of an incinerator on the assumption by both parties that non-statutory arrangements for Crown development applied. Later it transpired that they did not; the Council could not resile from views previously expressed and was estopped from issuing an EN.

Mid Devon DC v FSS & Stevens [2004] EWHC 814 (Admin)

Immunity to persons other than the Crown applies to the Crown's successors in title to land which was Crown Land at the time the development took place. Such immunity does not apply to the private holders of an interest in land that was never Crown land, even where the development itself was carried out by the Crown – in this case, an emergency excavation to bury BSE-infected cattle.

R (oao KP JR Management Co Ltd) v Richmond LBC & Others [2018] EWHC 84 (Admin)

Challenge to (1) failure to issue an EN (2) grant of a LDC for the mooring of boats. The proper PU is a matter of judgment. It was open to the Council to find that there was one PU, being the ownership area of the Crown Estates, and not that each mooring was a PU.

CURTILAGE

Various definitions of 'curtilage' are set out in the GPDO 2015 for the purposes of specific Parts and Classes. For Part 1 of the Schedule 2 of the GPDO, see the definition of curtilage in the current Permitted Development for Householders: Technical Guidance.

Sinclair-Lockhart's Trustees v Central Land Board (1950) 1 P&CR 195

'*The ground used for the comfortable enjoyment of a house or other building may be regarded as being within the curtilage of the house or building and…an integral part of the same even though it has not been marked off in any way…It is enough that it serves the purpose of the house or building in some necessary or reasonably useful way.'*

Methuen-Campbell v Walters [1979] 1 QB 525

Landlord and tenant case; Buckley LJ held for the CoA at para 543F: *"In my judgment, for one corporeal hereditament to fall within the curtilage of another, the former must be so intimately associated with the latter as to lead to the conclusion that the former in truth forms part and parcel of the latter."*

HM Attorney-General ex rel Sutcliffe & Rouse & Hughes v Calderdale BC [1983] JPL 310

Listed building case heard in the CoA: Stephenson LJ held that three tests of (i) physical layout, (ii) ownership (past and present) and (iii) use or function (past and present) applied 'whatever may be the strict conveyancing interpretation'. One building and its curtilage may fall within the curtilage of another building. There is little difficulty in putting a structure near to or away from a building when it is in the curtilage, there is common ownership and the structure is used in conjunction with the building.

'*The boundaries of the area are to be determined by such factors as may be relevant to the circumstances of the particular case and by the manner in which the listed building, any related objects or structures, and the land have been, or are being, used*.'

- *Stephenson LJ's approach to curtilage in listed building cases was qualified by the HoL in Debenhams (below), as discussed in Watson-Smyth v SSE & Cherwell DC [1992] JPL 451 and Hampshire CC (below).*

Debenhams Plc v Westminster CC [1987] AC 396; [1987] JPL 344

HoL: a listing only applies to ancillary structures fixed to the listed building; a second building joined to a listed building by a bridge and subway was not listed.

- *The HoL did not lay down an 'ancillariness' criterion for the concept of curtilage.*

Dyer v Dorset CC [1988] 3 WLR 213

Another landlord and tenant case: Curtilage is constrained to a small area about a building: 'the area attached to and containing a dwellinghouse and its outbuildings'. The size of that area appears to be a question of fact and degree.

- *See also Skerritts of Nottingham Ltd v SSETR (No. 1) [2000] JPL 789*

Collins v SSE & Epping Forest DC [1989] EGCS 15 (CO 1590/88)

[An area of rough grass, beyond the well-cut lawns of a dwellinghouse, was outside the curtilage because it did not serve the purpose of the dwellinghouse in some necessary or useful manner.]

- *If the case is cited by the parties, refer to the transcript rather than summary.*

James v SSE [1991] 1 PLR 58

A tennis court at the end of a field 100m from the dwelling was not within the curtilage.

Barwick & Barwick v Kent CC (1992) 24 HLR 341

Housing Act 1985 case considered by the CoA: to ascertain whether a Council house was excluded from the statutory right to buy provisions because it lay within the curtilage of a local authority-owned fire station building, the question was not whether the house, fire station and land formed a 'functionally single unit' but whether the house could be regarded as falling within the curtilage of the fire station building; *Methuen-Campbell* and *Dyer* applied.

Skerritts of Nottingham Ltd v SSETR (No. 1) [2000] EWCA Civ 60; [2000] JPL 789

CoA: The curtilage of a substantial listed building was likely to extend to what were or had been, in terms of ownership and function, ancillary buildings. The curtilage within which a mansion's satellite buildings were found was bound to be limited, but the concept of smallness was, in this context, so completely relative as to be almost meaningless. Size is not a conclusive test of curtilage.

R (oao Sumption) v Greenwich LBC [2007] EWHC 2276 (Admin)

The LPA's decision to grant an LDC for the erection of a boundary wall and gates was quashed on the basis that the land was within the curtilage of a listed building and not PD. Held that a lack of historic connection between the land and the listed building is a relevant fact but not determinative. Over the years, land may be acquired which serves to extend a garden. It is necessary to determine the status of the land from the factual situation existing at the date of the application.

In this case, land had been acquired in 2004 and fenced; it was usable and intended to be used as an extension to the garden. It was not relevant that the garden use had not been formally approved. The reference in the application to 'recently extended garden' was accurate and fatal to the grant of the LDC.

O'Flynn v SSCLG & Warwick DC [2016] EWHC 2984 (Admin)

In refusing to grant a LDC for the existing use of land as incidental to the enjoyment of the dwellinghouse, the Inspector erred by discounting the appellant's gardening activities and use of the land for walking and sitting out. While maintenance and/or recreational use do not necessarily denote incidental residential use, it will depend on the facts of the case. These activities are quintessentially carried out by householders on land as incidental to their use of a dwelling and ought to be considered.

The Inspector also erred by addressing whether the land had been used for residential purposes for ten years, and not whether the use was lawful within s55(2)(d).

- *Case Law Update 30*

Burford v SSCLG & Test Valley BC [2017] EWHC 1493 (Admin); [2017] JPL 1300

EN appealed on the ground that the alleged building was within the curtilage of the dwellinghouse and PD under Part 1, Class E. The Inspector was entitled to conclude that land was not curtilage because it was physically separated from that which was curtilage by hedges and fences, and an LDC for 'the keeping of horses for recreational purposes…incidental to the enjoyment of the dwellinghouse as such' did not denote that the land was within the curtilage or part of the garden of the dwelling.

Paragraph 46: "*Whether something falls within a curtilage is a question of fact and degree and thus primarily a matter for the decision-maker*" and "*It was for the Inspector to decide what weight should be given to each of the relevant factors*."

- *Knowledge Matters 33*
- *The three tests laid down in Calderdale were reaffirmed and applied in this non-listed building case.*

Challenge Fencing Ltd v SSHCLG & Elmbridge BC [2019] EWHC 553 (Admin)

The HC upheld an Inspector's decision to refuse to grant an LDC for the replacement of a hard surface. The Inspector had found that the land was not within the curtilage of the industrial/warehouse building (and was not be used for the requisite purpose) and so would not be PD under Class J of Part 7 to Schedule 2 to the GPDO 2015.

Paragraph 18 of the judgment usefully sets out propositions from the relevant authorities on curtilage, summarised here as:

1. The extent of the curtilage of a building is a question of fact and degree, and a matter for the decision-maker.
2. The three 'Stephenson factors' (taken from *Calderdale*) must be considered.
3. A curtilage does not have to be small, but that does not mean that the relative size of the building and its claimed curtilage is not a relevant consideration; *Skerritts*.
4. Whether the building or land within the claimed curtilage is ancillary to the main building will be a relevant consideration, but it is not a legal requirement that the claimed curtilage should be ancillary; *Skerritts*.
5. The degree to which the building and the claimed curtilage fall within one enclosure is relevant, Sumption and OED – and this will be one aspect of physical layout, being the first *Calderdale* factor.
6. The relevant date on which to determine the extent of the curtilage is the date of the application; but this will involve considering both the past history of the site, and how it is laid out and used at the time of the application itself; *Sumption*.

- *Knowledge Matters 53*

Hampshire CC & the Open Spaces Society & Others v SSEFRA & Blackbushe Airport Ltd [2020] EWHC 959 (Admin), [2021] EWCA 398, [2020] JPL 1359

Commons Act 2006 case concerning an application to remove part of an airport from the Register of Common Land. In order to meet the statutory criteria for 'de-registration', the land had to have been, on the date of provisional registration and since, covered by a building or "within the curtilage of a building".

The Inspector allowed the application on the basis that '*the operational land of the airport and the Terminal Building formed part and parcel of the same unit and…are integral parts of the same unit'*. Mr Justice Holgate held in the High Court that the Inspector adopted the wrong test, and the CoA agreed.

The case was analogous to *Methuen-Campbell*, *Dyer*, *Barwick* and *Challenge Fencing*, where the approach was to ask not whether the land and building comprise part and parcel of the same unit but whether the land is part and parcel of the building as a matter of fact and degree. Andrews LJ found for the CoA that "on a proper reading of [*Methuen-Campbell*], the conclusion that the land and building together constitute an integral whole is the consequence of applying the intimate association…test". The approach taken in the authorities to the concept of the "curtilage of a building" is consistent with the expression in the 2006 Act as a matter of ordinary language.

There is no requirement for land to be "ancillary" to a building in order to fall within the curtilage; while that may be material, it could not rationally be said that the use of land for aircraft

movement was ancillary to the use of the terminal building, because the building was ancillary to the functioning of the airport. The true question was whether the land qualified as the curtilage of the building and the Inspector should have assessed "relative size" in terms of the size of the land relative to that of the building.

- *The High Court noted that the Inspector's 'wide approach' to the question of curtilage had been adopted in Calderdale, but only in relation to the listed building context – and that has been reconsidered by Debenhams.*
- *Knowledge Matters 67 and 77*

DECISIONS AND REASONING

Hope v SSE [1976] 31 P&CR 120

An appellant is entitled to know what conclusions the decision maker has reached on the 'principal controversial issues'.

- *Applied by the HL in Bolton MBC v SSE [1995] JPL 1043*

John Pearcy Transport Ltd v SSE & Hounslow LBC [1986] JPL 680

It is the Inspector's duty to be up to date as to the law and ensure that it is applied correctly to the facts as found.

Hill v SSE & Bromley LBC [1993] JPL 158

While an agricultural development might not satisfy the tests of GPDO Part 6, a justification might exist for it when considering the planning merits in an appeal on ground (a), based on the use of the land for agriculture as defined in s336(1).

White & Cooper & Phillips v SSE [1996] JPL B108

A suggestion that a temporary PP might cause less harm than a permanent one, which was raised for the first time in cross-examination of the LPA's witness, was a 'principal controversial issue' and should have been dealt with in the decision letter.

R v SSE & Leeds CC ex parte Ramzan (QBD 18.12.97 CO/2202/97)

An appeal proceeding on ground (d) was dealt with by WR at the appellant's request. Their witnesses gave different dates for the completion of works. All dates were more than four years before the issue of the EN but the Inspector was entitled to find the evidence inconsistent and unreliable and give it little weight. The appellant had declined an inquiry; it was not unreasonable to find their case not made out on the evidence without making any further offer of an inquiry or seeking more information.

South Buckinghamshire DC v SSETR & Gregory [1999] JPL 545

Ground (a) lapsed on s174 appeal. The Inspector allowed a linked s78 appeal, granted PP and found that, because of the effect of s180, the requirements of the EN would cease to have effect, and it was unnecessary to consider ground (g). The PP was quashed on a successful s288 application by the LPA. S180 no longer applied, but the appellant was refused leave to appeal, for being out of time, in relation to ground (g).

- *It is therefore essential that, in linked cases, any appeals on grounds (f) and/or (g) are dealt with, before upholding the EN, even if PP is granted under s78.*

Bury MBC v SSCLG & Entwistle [2011] EWHC 2191 (Admin); [2012] JPL 51

S174(f)(c) is worded in the present tense: 'those matters…do not constitute a breach of planning control'. The language of ground (c) does not prevent it from covering a case where, by the time of the appeal, there is no breach. An appellant can, if necessary, rely upon matters occurring since the date of the EN to show, and only to show, that the development which has occurred does not amount to a breach. The Inspector did not err in law in examining the planning control situation at the time of the appeal.

- *This does not apply in ground (c) where it is claimed that the development is permitted by the GPDO; Williams Le Roi v SSE & Salisbury DC [1993] JPL 1033*
- *Case Law Update 17*

Arnold v SSCLG [2015] EWHC 1197 (Admin), [2017] EWCA Civ 231; [2017] JPL 923

Works undertaken to dwellinghouse resulting in almost complete demolition were beyond scope of LDC and PD rights. EN alleged the erection of a building to be used as a dwelling. Four applications had been made to the LPA for alternative forms of development, but no decisions had been made on them. The Inspector expressed doubts as to whether he was in a position, as a matter of law, to consider the alternative schemes in relation to ground (a). He found in any event found that it was not possible to sever the dwelling into acceptable and not acceptable parts. He did not misdirect himself to his power to grant PP for an alternative scheme or fail to make adequate assessment of the alternatives before him.

- *Case Law Updates 27 & 31*
- *Knowledge Matters 31*

Davis v SSCLG & Lichfield DC [2016] EWHC 274 (Admin)

The Inspector was not bound to make a split decision on ground (a), since the power to do so under s177(1)(a) is discretionary. The Inspector could only have erred if their failure to exercise the power was *Wednesbury* unreasonable. If no alternative scheme is put, the Inspector cannot devise one by selecting from the elements, especially where it is said that all elements are necessary for the use.

- *Case Law Update 29*

DEEMED PLANNING APPLICATIONS (AND S70C)

Richmond upon Thames LBC v SSE [1972] 224 EG 1555

PP was granted on the DPA for the parking of motor vehicles rather than motor coaches as alleged. An EN cannot be corrected so that PP is granted for some alternative form of development that differs from the alleged breach.

Tapecrown Ltd v FSS & Vale of White Horse DC [2006] EWCA Civ 1744

The Inspector has wide powers to decide whether there is any solution, short of a complete remedy of the breach, which is acceptable in planning and amenity terms. It is not their duty to search around for solutions, but the enforcement procedure is intended to be remedial not punitive. Where it appears that there is an 'obvious alternative' which would overcome the planning difficulties with less cost and disruption, the Inspector should feel free to consider it, albeit with reference back to the parties.

- *Case Law Update 1*

Ahmed v SSCLG & Hackney LBC [2014] EWCA Civ 566

Building constructed not in accordance with the PP; the EN required demolition of the whole. Appeal on ground (a) that PP should be granted for the building as constructed, with lesser steps proposed under ground (f) to allow for modification of the building. PP could have been granted under s177(1) for the modified scheme if it could be regarded as 'part' of the development. The Inspector did not make that planning judgment.

- *If PP may be granted for 'part of the matters', do so and uphold the requirements of the EN, relying on s180(1) to override the effects of the EN.*
- *Case Law Update 23 & 25*
- *Humphreys v SSCLG & Essex CC [2016] EWHC 4152 (Admin)*

Ioannou v SSCLG & Enfield LBC [2014] EWCA Civ 1432

The *Wheatcroft* principle does not apply to ground (a) and PP cannot be granted under s1771(1) for an acceptable alternative scheme that is not 'part of the matters'.

Wingrove v Stratford on Avon DC [2015] EWHC 287 (Admin)

The introduction of s70C and amendments to s174(2) mean that the 'applicant cannot have "multiple bites at the cherry"'. The power afforded to LPAs under s70C to decline to determine an application is discretionary but it was not exercised in a manner challengeable on public law grounds in this instance.

Humphreys v SSCLG & Essex CC [2016] EWHC 4152 (Admin)

EN alleged and required removal of an abattoir wash tank; appealed on grounds (a) and (f). Under (f), the Inspector accepted that the tank could be put to agricultural use on the site but found that allowing retention would not remedy the breach. Held that, since it was obvious that the agricultural use would not give rise to any amenity problem, PP should have been granted for the tank but refused for the wastewater storage use. The 'obvious alternative' can be inferred from the appellant's evidence even if it is not described in those terms.

- *Case Law Update 28*

Arnold v SSCLG [2015] EWHC 1197 (Admin), [2017] EWCA Civ 231; [2017] JPL 923

Works undertaken to dwellinghouse resulting in almost complete demolition were beyond scope of LDC and PD rights. EN alleged the erection of a building to be used as a dwelling. Four applications had been made to the LPA for alternative forms of development, but no decisions had been made on them. The Inspector expressed doubts as to whether he was in a position, as a matter of law, to consider the alternative schemes in relation to ground (a). He found in any event found that it was not possible to sever the dwelling into acceptable and not acceptable parts. He did not misdirect himself to his power to grant PP for an alternative scheme or fail to make adequate assessment of the alternatives before him.

- *Case Law Updates 27 & 31*

R (oao Banghard) v Bedford BC [2017] EWHC 2391 (Admin)

An Inspector had upheld an EN against the erection of a dwellinghouse, finding that an alternative scheme for a storage building with a different design did not form 'part of the alleged breach'. The LPA declined to determine an application for the storage building.

Ms Lieven QC held that the LPA had interpreted s70C so that 'rather than the Claimant having multiple bites of the cherry [as per *Wingrove*], he has had none'. And 'there is necessarily an element of planning judgment in whether the development for which permission is being sought involves 'any part of the matters specified' in the EN…'

Chesterton Commercial (Bucks) Ltd v Wokingham DC [2018] EWHC 1795 (Admin); [2018] JPL 1347

Challenge to LPA's decision to decline to determine an application under s70C(1) because of a pre-existing EN. Held that s174(2A) and s70C(1) are complementary; the object of the provisions is not to prevent consideration of the merits of unauthorised development but to ensure that they are only considered once.

S70C(1) invites a comparison between what is alleged by the EN and what is subject to the planning application, looking at the existence not of differences but similarities between the two developments. The matters to be considered are objective; whether s70C(1) may be relied on involves an element of planning judgment, but that is limited.

R (oao Finnegan) v Southampton CC [2020] EWHC 286 (Admin)

The EN concerned an MCU to a mixed use for storage, display and sale of motor vehicles and residential use. The LPA then declined to determine an application for PP for the sale of motor vehicles on part of the site. The claimant argued that the merits of that use had not been considered but the Court upheld the LPA's decision on the basis that s70C confers a broad discretionary power; *Banghard* applied. The LPA had not erred in the exercise of its power. The question was whether the claimant had had an opportunity to canvas the merits of the alternative scheme, not if the opportunity had been taken.

Bhandal v SSHCLG & Bromsgrove DC [2020] EWHC 2724 (Admin); [2021] JPL 611

EN required demolition of a sunroom attached to the rear of a restaurant. Permission had been granted for a replacement sunroom, but a sloping roof rather than a flat roof was built, with different glazing and now including a canopy and pillars. The Inspector dismissed the appeal (which included grounds (a) and (f)) stating the alternatives were outside the scope of ground (a) as they involved new works (either new roofs or new windows). Held: (1) Whether or not new work could form part of the development was a matter of planning judgement. However, it was too narrow to say that any new work would mean that what was being proposed fell outside "part" of the matters alleged to be a BPC. The appeal was allowed and

remitted back to Pins for re-determination. The Inspector clearly considered that the work proposed could not be considered under s177(1)(a) due to the nature of that work, but the wording used was interpreted as automatically excluding any new work from consideration which the court rejected as a "very narrow view". *'Since virtually any alternative scheme is likely to involve at least some element of new work, the Inspector's approach…would have the effect not just of significantly reducing the power to grant planning permission on an appeal against an enforcement notice but also significantly reducing the application of s70C'.*

- *Knowledge Matters 72*

Ikram v SSHCLG & Others [2019] EWHC 1869 (Admin); [2020] EWCA Civ 2

The Inspector erred in considering ground (a) in respect of a proposed 'limited use of the mosque' but granting PP for 'something much broader', being the alleged 'change of use of land…to a mixed use as a place of worship and residential'. The conditions imposed meant that the mosque could be used more extensively than the Inspector envisaged when assessing the impact of the use. Drafting errors in the condition were not overcome by the later planning obligation.

- *Knowledge Matters 75*

Moskovits v SSHCLG & Hackney LBC (CO/995/2020)

Where an appeal proceeds on ground (a), consideration should be given as to whether any proposed 'slimmed down' scheme could be permitted as 'part of those matters', whether or not ground (f) has been pleaded.

DWELLINGHOUSE

Gravesham BC v SSE & O'Brien [1982] 47 P&CR 142; [1983] JPL 307

Whether a chalet limited by condition to occupation for part of the year was a dwellinghouse for GDO purposes; the distinctive characteristic of a dwellinghouse was its ability to afford to those who used it the facilities required for day to day private domestic existence. It did not lose that characteristic if it was occupied for only part of the year, or at infrequent intervals, or by a series of different persons.

- *The chalet did not have an inside WC or bathroom but stood within its own planning unit where, it is understood, there was a separate external WC.*

Sevenoaks DC v SSE & Dawe (QBD 13.11.97 CO1322-97)

A detached outbuilding may be considered as part of a dwellinghouse where it is a 'normal domestic adjunct'.

Moore v SSE & New Forest DC [1998] JPL 877

CoA: concerned the use of a house and complex as ten holiday homes. There was no requirement that a dwellinghouse had to be occupied as a permanent home; nor did the units, which could otherwise be described as single dwellinghouses, cease to be used as such because they were managed as a whole for commercial holiday or other temporary purposes. The units were single dwellinghouses subject to the four year rule.

Swale BC v FSS & Lee [2005] EWCA Civ 1568; [2006] JPL 886

There is a difference between an established dwellinghouse where an occupier does not have to be continuously or even regularly present for the dwelling to remain in use as such, and where there is no established use. The use must be 'affirmatively established' over the four year period.

The correct approach is to ask whether there was any period during the four years when the building was not physically occupied, although available for such, and the LPA could not have taken enforcement action against the use. It is also necessary to make a finding as to whether the periods of non-occupation were *de minimis*.

FSS v Arun DC & Brown [2006] EWCA Civ 1172; [2007] JPL 237

The four year rule under s171B(2) applies to both development without PP and a breach of condition relating to a change of use to use as a single dwellinghouse.

- *But see Newbury DC v SSE & Marsh [1994] JPL 134*

Grendon v FSS & Cotswold DC [2006] EWHC 1711 (Admin), [2007] JPL 275

The use of the word 'building' in s171B(2) makes it necessary to consider whether the building is physically capable of being a dwellinghouse, has the attributes of a dwelling and is used as such. The Court also endorsed *Backer v SSE [1983] JPL 167* in that use of a dwellinghouse has to be more than just 'camping out'.

- *Case Law Update 2*
- *Grendon should be considered with caution since the question of whether a building is physically a dwellinghouse appears to go beyond s171B(2). Martin Edwards argued in [2007] JPL 275: 'There is something unsettling about this decision. The factual background is far from unusual. However, the words of the relevant sub-section are clear and…the central consideration is simply whether any building is being used as a dwellinghouse. Yet for some reason the judge and counsel adopted*

a slightly different approach, i.e. first to consider whether the building is a dwellinghouse and then, if it is, whether it has been used as a single dwellinghouse for the requisite period. This difference in approach is, in my view, important and it is arguable that if the court had followed the wording of the subsection more closely a different outcome may have resulted.'

- *It should also be noted that the Inspector in Grendon addressed the appearance of the dwelling. Subsequent cases relating to deliberate concealment have shown that a building may not "look like a house" but still be used as such.*

R (oao Gore) v SSCLG & Dartmoor NPA [2008] EWHC 3278 (Admin); [2009] JPL 931

PD rights under the GPDO, Part 1 claimed for a building which had a LDC for 'use of forestry store as residential'. The Court supported the Inspector's view that, although the building was a dwelling, it was not a dwellinghouse for PD purposes. The LDC was not concerned with the definition of the term in relation to the GPDO. To benefit from Part 1 PD rights, the building must be a dwellinghouse and have a curtilage.

- *Case Law Updates 6 & 8*

R (oao Townsley) v SSCLG [2009] EWHC 3522 (Admin)

A dwellinghouse must be in existence for PD rights to be exercised. A building under construction is not a dwellinghouse for PD purposes. The appropriate test is substantial completion as described in *Sage* – the development must be carried out internally and externally in accordance with the PP. While that prescription could be taken too far, it would apply to any material variation to the PP that was granted.

- *Case Law Updates 11 & 12*

Rectory Homes Ltd v SSHCLG & South Oxfordshire DC [2020] EWHC 2098 (Admin); [2021] JPL 234

A development of 'extra care housing' within use class C2 may provide residential accommodation in the form of dwellings. For a property to fall within use class C3, it must have the physical characteristics of a 'dwelling' as defined in *Gravesham* and be used in a manner falling within that class. It follows that a property might be properly described as a 'dwelling' in *Gravesham* terms without being used within the parameters of class C3. An institutional use within use class C2 may include the provision of residential accommodation and care to occupants living in dwellings within the scheme.

- *Knowledge Matters 70*

Bansal v SSHCLG & LB of Hounslow (IP) [2021] EWHC 1604 (Admin)

The Courts found that it had been rational for the inspector to require the owner to establish that both flats had been occupied as separate dwelling houses throughout the relevant four-year period, so as to demonstrate that the local authority would have been able to take enforcement action during that time.

- *Knowledge Matters 80*

ESTOPPEL AND LEGITIMATE EXPECTATION

Res Judicata or Issue Estoppel

Thrasyvoulou v SSE & Hackney LBC (No. 2) [1988] JPL 689; [1990] 2 WLR 1; (HL 14/12/89)

HoL: If a conclusive finding was made on planning status and there has been no material change of circumstances since, the LPA is estopped from denying and re-litigating that finding. The principle probably applies to appellants; it does apply to the decision maker.

- *This principle does not apply to judgments on planning merits; an Inspector may disagree with a previous decision so long as the reasons are clear and general policies regarding consistency in decision-making are not offended; Rockhold Ltd v SSE & South Oxfordshire DC [1986] JPL 130 and North Wiltshire DC v SSE & Clover (1993) 65 P&CR 137; [1992] JPL 955,*

Watts v SSE & South Oxfordshire DC [1991] 1 PLR 61; [1991] JPL 718

For a previous appeal decision to operate as an issue estoppel, with the relevant issue determined on the facts and law, the whole matter must have been fairly and squarely before the previous Inspector, who must have fully addressed the matter and made an unequivocal decision on it. It must be clear from the face of the decision that these conditions have been fulfilled.

R v SSE & Wychavon DC ex parte Saunders [1992] JPL 753

The SoS quashed an EN under s176(3)(b) after the LPA failed to submit copies of the EN. The appellant sought to show that the Council was estopped from issuing a further EN. The Court held that, since the appeal had not been allowed on the grounds pleaded, but through non-compliance with procedural rules, this could not confer rights on the development. *Thrasyvoulou* was not relevant where merits had not been considered.

A and T Investments v SSE & Kensington and Chelsea RBC [1996] JPL B94

For issue estoppel from a previous decision to be relied upon, it is necessary to show that there had been a finding which was 'the essential foundation' for the decision. The appropriate steps should include: identification of the question determined by the first Inspector; identification of the findings of fact and/or law that provided the essential foundation for that determination; and consideration of whether the finding(s) would be contradicted by the contentions advanced in the second proceedings.

Porter v SSETR [1996] 3 All ER 693

1. The issue must have been decided by a Court or Tribunal of Competent Jurisdiction (a previous Inspector).
2. The issue must be one between parties who are parties to the decision.
3. The issue must have been decided and be of a type to which issue estoppel applies.
4. Issue estoppel must be claimed for the same issue as previously decided.

- *Forrester v SSE & South Bucks DC [1997] JPL B154*

R (oao East Hertfordshire DC) v FSS [2007] EWHC 834 (Admin); [2007] JPL 1304

The Inspector allowed the appeal on ground (c) and quashed the notice given a lack of information as to whether there had been a breach – while referring to the second bite provisions under s171B(4). The second EN was appealed on ground (c) on the basis that s171B(4) was not available. Held that issue estoppel is applicable to grounds (b) to (d) – but was not in this case. It was clear from the decision that the first Inspector had not found that there was no breach; they did not know and there was no determination.

- *Case Law Update 1*

Keevil v SSCLG & Bath and North East Somerset Council [2012] EWHC 322 (Admin)

Upheld Inspector's finding that the LPA was not estopped from contending that an LDC did not apply to where the caravans in question were sited, even though no plan was attached to the LDC and there was a site licence. The Inspector's decision was based on the evidence and the balance of probabilities; the situation was distinguished from *Thrasyvoulou*, where a conclusive finding had already been made on the same issue.

Estoppel by Representation or Proprietary Estoppel

Southend–on-Sea Corporation v Hodgson (Wickford) [1961] 12 P&CR 165

An LPA may not fetter its discretion to issue an EN by any form of agreement.

Wells v MHLG [1967] 1 WLR 1000

A determination in writing that PP is not required, that is set out in terms indicative of the ostensible authority, cannot be retracted subsequently.

- *NB – pre-dates the TCPA71 and TCPA90*

Saxby v SSE & Westminster CC [1998] JPL 1132

The provisions under ss191-196 are 'an entirely new and fully comprehensive code' and it is no longer possible to have an informal determination as to whether PP is required.

R v East Sussex CC ex parte Reprotech (Pebsham) Ltd [2002] UKHL 8; [2002] JPL 821

HoL confirmation that the concept of estoppel by representation is not appropriate in the context of statutory planning control; an application must be made under s191 or s192 for a binding determination. The public law concept of legitimate expectation may be available as a remedy against a public authority, but account must be taken of the public interest. Any representation by an LPA as to how it will or will not exercise its powers under s172 will not give rise to a binding estoppel by representation.

- *This judgment supersedes Lever Finance v Westminster LBC [1971] 1 WLR 732 and Western Fish Products v Penwith DC [1978] JPL 623 (CoA).*

Legitimate Expectation

Henry Boot Homes Ltd V Bassetlaw DC [2002] EWCA Civ 983; [2003] JPL 1030

There was an informal agreement between developers and LPA, but the statutory code has primacy in determining planning applications. Legitimate expectation is applicable to town planning, but it would be difficult in practice for there to be a legitimate expectation that the comprehensive statutory code would not be applied.

- *See also Flattery, Japanese Parts Centre Ltd v SSCLG & Nottinghamshire CC* [2010] EWHC 2868 (Admin)

Coghurst Wood Leisure Park Ltd v SSTLR [2002] EWHC 1091 Admin; [2003] JPL 206

The Courts would be slow to find that the principle of legitimate expectation operated to keep alive a PP that had on its face expired.

Keevil v SSCLG & Bath and North East Somerset Council [2012] EWHC 322 (Admin)

There was no legitimate expectation that the siting of caravans would be lawful. No plan was attached to the LDC, and the appellant had taken a risk in not clarifying on its extent before stationing the caravans in question. An administrative and genuine mistake on the part of the LPA should not automatically provide the appellant with a benefit, and the Inspector had not erred in finding this.

Estoppel by Convention

Hillingdon LBC v SSE & Others [1999] EWHC 772 (Admin)

The authority had approved details of an incinerator on the assumption by both parties that non-statutory arrangements for Crown development applied. Later it transpired that they did not; the council could not resile from views previously expressed and were estopped from issuing an EN. They had been in possession of all the facts and the procedures had been followed which also gave similar protection to third parties whether the non-statutory or statutory process was followed.

R v Caradon DC ex parte Knott [2000] 3 PLR 1

Revocation and discontinuance orders had been made and confirmed, and discussions on compensation had begun, then the LPA found that the dwelling had been erected outside the site boundaries. EN issued alleging the erection of a dwelling without PP.

The avoidance of compensation was not on its own a proper planning purpose making it expedient to issue the notice. Estoppel case made on three grounds: by representation – the appellants had relied on the council's representations when they withdrew a s73 application and their objection to the revocation order; by issue estoppel – in earlier HC proceedings, to which the LPA were a party, the judge had reached a clear conclusion that the PP was still alive and could be implemented; and by convention – the parties had conducted their dealings on the basis that the PP had been implemented and it would be wholly unjust for the LPA to proceed in a different manner.

EXISTING USES, FALLBACK POSITION AND S57(4)

Clyde & Co v SSE & Guildford BC [1977] JPL 521

CoA: the desirability of retaining an existing use was a material consideration. A refusal of PP for a change of use could not ensure that a current permitted use would continue, but there is a 'fair chance' that if Use B was refused, Use A would be resumed.

Finn v SSE & Barnet LBC [1984] JPL 734

The SSE failed to consider whether there would be a reversion to residential use in practice; given the practicalities of any residential use/the economics of conversion.

Westminster CC v British Waterways Board [1985] JPL 102

The House of Lords imposed a stiffer test; whether it was likely 'on the balance of probability' that the existing or preferred use would be resumed.

Vikoma International v SSE & Woking BC [1987] JPL 38

'Fair chance' test applied; the Inspector erred in considering whether the premises were 'necessary' rather than 'desirable' for the appellant's business.

London Residuary Body v SSE & Lambeth LBC [1988] JPL 637

There is no 'competing needs' test – it is not necessary to show that one use is preferable to the other. This is not the same as 'fair chance' - likelihood on the balance of probability that the favoured use will be implemented or resumed.

Haven Leisure Ltd v SSE & North Cornwall DC [1994] JPL 148

The fallback position need not attract much weight unless there is a real likelihood that, even if PP is refused, the same or similar planning consequences would flow.

Bylander Waddell Partnership v SSE & Harrow LBC [1994] JPL 440

An appellant's reluctance and practical difficulties in implementing a preferred use are material considerations to be taken into account in a ground (a) or planning appeal.

Sefton MBC v SSTLR & Morris [2003] JPL 632

A material fallback position could be established by applying common sense. If no enforcement action had been taken, bringing s57(4) into play, this did not mean that s57(4) should be ignored, especially where the LPA had resolved to take such action.

Mid Suffolk DC v FSS & Lebbon [2006] JPL 859

If the construction of a building has become lawful through the passage of time and the operation of s171B(1) and s191(2), its use may be liable to enforcement action. S75 applies to buildings with PP. It is possible to have a lawful building with no lawful use.

- *See also R (oao Sumner) v SSCLG [2010] EWHC 372 (Admin); Welwyn Hatfield BC v SSCLG & Beesley [2011] UKSC 15*

Hillingdon LBC v SSCLG & Autodex Ltd [2008] EWHC 198 (Admin); [2008] JPL 1486

There is a right to revert to the last lawful use after the issue of an EN. S57(4) applies to uses that are lawful through the passage of time and the effect of s171B and s191(2) which makes certain uses lawful for 'the purposes of' or the entirety of the Act.

- *Case Law Update 4*
- *The rights to reversion to the 'normal' use under s57(2) and s57(3) do not apply to uses which have only become immune from enforcement over time.*

Simpson v SSCLG [2011] EWHC 283

Summary of 'fallback' principles in paragraph 10: *"a fall-back position clearly has two elements that need to be established before it can be brought into the evaluation. The first is the nature and content of the alternative uses or operations. These need to be identified with sufficient particularity to enable the comparison that the fall-back contention involves to be made. The second element is the likelihood of the alternative use or operations being carried on or carried out."*

Kensington and Chelsea RBC v SSCLG & 38 Cathcart Ltd (CO/4492/2016)

Inspector granted PP for a change of use on the basis that a LDC previously granted under s192 for the use was a 'fallback position' – but the evidence indicated that there had been a 'material change' in circumstances since then. Held, with regard to s192(4), that the Inspector had erred in assuming that there was a continued right to make the COU pursuant to the LDC without giving due consideration to submissions that this would no longer be lawful. It was necessary to address whether the factors raised by the Council meant that the LDC could not be relied upon to have continuing effect.

- *Knowledge Matters 34*

Parvez v SSCLG & Bolton MBC [2017] EWHC 3188 (Admin)

COU from a working men's club (WMC) to a function suite; the Inspector found that the lawful and alleged uses were each *sui generis* uses; there had been an MCU; and reversion to the lawful use would have a lower impact on the locality.

The HC held that the Inspector had not failed to consider a fallback position of reversion to a WMC use with activities including wedding functions. If the lawful use is a mixed use, as with a WMC, the fallback position is reversion to a mixed use that is not materially different from that formerly carried on. The appellant did not describe a mixed use materially the same as that previously undertaken at the WMC. The Inspector considered the correct fallback position and was entitled to not deal with the irrelevant argument.

Sharma v SSCLG & Others [2018] EWHC 2355 (Admin)

EN alleged the use of land for airport parking; the appellant claimed that the Inspector had failed to address whether the LDC fallback use would be carried out to its 'full' extent in accordance with the LDC. When the decision was read fairly, the Inspector had properly applied the fallback approach. Whether the land would be used to its 'fullest' extent was not to be assumed from the LDC but was a matter of evidence.

- *Case Law Update 34*

Oates v SSCLG & Canterbury CC [2017] EWHC 2716 (Admin), [2018] EWCA Civ 2229; [2019] JPL 251

Lawful use rights attached to a building are lost when the building ceases to exist as such and is replaced. A requirement to demolish the new building cannot deprive the appellant of pre-existing lawful use rights or breach the 'Mansi' principle.

- *Case Law Update 34*
- *Knowledge Matters 37*

Afendi Baghdad Ltd v SSHCLG & Ealing LBC (CO/41/2021)

While it is not essential for an EN which alleges an MCU to identify the previous or lawful use, an Inspector may need to ascertain that in ground (c) cases in order to determine whether the change of use was material. Identifying the lawful use may also be relevant to the Inspector's duty to vary an EN that purports to take away lawful use rights.

Haytop Country Park Ltd v SSHCLG & Amber Valley BC [2022] EWHC 1848 (Admin)

Although the Inspector did not set out the fallback position 'in terms', the Court held that the Inspector's findings that the site would have to comply with the 1952 and 1966 planning permissions in order to constitute a 'lawful caravan site' for which the local planning authority could grant a modern site licence.

SPVRG Ltd v Pembrokeshire CC [2022] EWHC 143 (Admin)

The local authority had not been obliged to consider the 1987 permission, whether or not it had been implemented, as it had been superseded by the 2016 permission. The 1987 permission was spent, therefore merely part of the planning history of the site and not relevant to determining an application to varying the conditions of the 2016 permission.

EXPEDIENCY

Donovan v SSE [1987] JPL 118

That the LPA had not taken enforcement action against similar breaches was not a material consideration; there is no requirement that all breaches of planning control are enforced against consistently. In any case there was no evidence to support the allegation of inconsistency.

Ferris v SSE & Doncaster MBC [1988] JPL 777

The LPA does not need to satisfy itself beyond doubt that a breach has occurred or that there are no possible grounds of appeal.

R v Rochester-upon-Medway CC ex parte Hobday [1990] JPL 17; [1990] JPL 923

CoA: the matters subject to enforcement action must have taken place; an EN cannot be issued in relation to a prospective breach.

Britannia Assets v SSCLG & Medway Council [2011] EWHC 1908 (Admin)

A challenge to the Council's decision to issue an EN on the grounds of expediency can only be made by way of judicial review. An Inspector has no jurisdiction to determine whether the LPA had complied with its obligation under s172.

- *Case Law Update 16*

Silver v SSCLG & Camden LBC & Tankel [2014] EWHC 2729 (Admin); [2015] JPL 154

The RFEN failed to specify why the Council considered it expedient to issue the EN. The Court held that it was impermissible to look beyond the EN where the reasons for it were maintained by the LPA in substance and had been articulated as required by s172(1)(b).

FIXTURES AND CHATTELS

Holland v Hodgson [1872] LR 7 CP

Looms nailed to the floor of a woollen mill were fixtures rather than chattels, being affixed to the land other than by their own weight. In circumstances where an article so affixed was intended to be a chattel, the onus to demonstrate this would lie with those contending it to be a chattel.

Norton v Dashwood [1896] 2 Ch 497

Tapestries cut to fit the walls of a room and hung by battens let into the plaster and nailed to the brickwork were fixtures rather than chattels, since they could not be removed from the walls without injury through tearing, or injury to the brickwork.

Leigh v Taylor [1902] AC 157

Tapestries fixed to walls by a lifetime tenant for the purpose of ornament and which could be removed without causing structural injury were chattels. Their only function was to decorate the room, for the enjoyment of the tenant while occupying the house, and they were never intended to remain part of the house.

Re Whaley [1908] 1 Ch 615

Tapestries and pictures fitted to the walls of a room in order to create a specimen of an Elizabethan room were fixtures; they were not intended for mere display and enjoyment but fitted for the purpose of creating the room as a whole. The position of an owner in fee, who attaches things even by way of ornament to the freehold is different in character to the position of a tenant for life or years.

Re Lord Chesterfield's Settled Estates [1910] C.97

Wood carvings attached to the walls by nails or pegs driven through them into stiles built into the walls were fixtures.

Spyer v Phillipson [1931] 2 Ch 183

Panelling, ornamental chimney pieces and period fireplaces installed in rooms without the consent of the landlord, and which had involved slight structural alteration, were 'tenant's fixtures' and could be removed.

Copthorn Land and Timber Co Ltd v MHLG & Another [1965] QB 490

Panelling and decorative items attached to the interior of a building of great architectural interest as part of an overall architectural scheme were fixtures.

Berkley v Poultett & Others [1977] 241 EG 911

CoA: pictures fitted into recesses in panelling were chattels. Scarman LJ said:

"The early law attached great importance to [the degree of annexation]. It proved harsh and unjust both to limited owners who had affixed valuable chattels of their own to settled land and to tenants for years. The second test [the purpose of annexation] was evolved to take care primarily of the limited owner, for example the tenant for life…

In other words, a degree of annexation which in earlier times the law would have treated as conclusive may now prove nothing. If the purpose of the annexation be for the better enjoyment of the object itself, it may remain a chattel, notwithstanding a high degree of physical annexation. Clearly, however, it remains significant to discover the extent of the physical disturbance of the building or the land involved in the removal of the object. If an object cannot be removed without serious damage to, or destruction of, some

part of the realty, the case for its having become a fixture is a strong one. The relationship of the 2 tests …to each other requires consideration.

If there is no physical annexation there is no fixture… Nevertheless an object resting on the ground by its own weight alone can be a fixture, if it be so heavy that there is no need to tie it into a foundation, and if it were put in place to improve the realty.

Prima facie, however, an object resting on the ground by its own weight alone is not a fixture…conversely, an object affixed to realty but capable of being removed without much difficulty may yet be a fixture if, for example, the purpose of its affixing be that 'of creating a beautiful room as a whole…

Today, so great are the technical skills of affixing and removing objects to land or buildings that the second test is more likely than the first to be decisive. Perhaps the enduring significance of the first test is a reminder that there must be some degree of physical annexation before a chattel can be treated as part of the realty…

…It is enough to ask that the pictures were firmly affixed and that their removal needed skill and expertise if it were to be done without damage to the wall and panelling. Certainly, they were firmly enough affixed to become fixtures if that was the object and purpose of their affixing. But if ordinary skill was used, as it was, in their removal they could be taken down and in the event were taken down without much trouble and without damage to the structure of the room. The decisive question is therefore as to the object and purpose of their affixing."

Debenhams Plc v Westminster CC [1987] AC 396; [1987] JPL 344

HoL: a listing applies to ancillary structures fixed to the listed building; a second building joined to a listed building by a bridge and subway was not listed. In the TCPA71, the meaning of 'building' excludes plant, machinery and certain items that would otherwise be 'fixtures'. The word 'fixed' is intended to have the same connotation as the law of fixtures such that, for the purposes of the Act, any object or structure attached to a building should be treated as part of it. The question is whether certain things, namely objects or structures, are to be treated as part of the building.

TSB v Botham [1996] EGCS 149

Bathroom fittings and white goods in a flat were fixtures, being necessary accessories for the room to be used as a bathroom; "*viewed objectively, they were intended to be permanent and to afford a lasting improvement to the property*" (Roch LJ).

R v SSW ex parte Kennedy [1996] JPL 645

Heavy Carillon clock, formerly located within the entrance tower of a listed house, was held to be a fixture. Ognall J said:

"It was accepted that the definition of 'fixture' was the same for the purposes of the listed building legislation as for any other area of law, whether common law or statute…the definitive pronouncement most recently was to be found in the observations of the Court of Appeal in the case of Berkley…[where it was] indicated that the application of the test in question [degree of annexation or purpose of annexation] was essentially a question of fact and degree…Invariably and necessarily the inferences to be drawn depended as much on an overall impression as any detailed analysis."

- *Knowledge Matters 37*

Dill v SSCLG & Stratford-on-Avon DC [2017] EWHC 2378 (Admin), [2018] EWCA Civ 2619, [2020] UKSC 20; [2020] JPL 1421

It was held in this unanimous SC judgment that an appellant is entitled to appeal against an LBEN on the ground that a "listed building" is not a "building".

Lord Carnwath endorsed the principle laid down in *Boddington v British Transport Police* [1999] 2 AC 143 (and reflected in Article 6 of the HRA98) that '*the issue of statutory construction is subject to the rule of law that the individuals affected by legal measures should have a fair opportunity to challenge these measures.'* That principle must be read in

the context of the statutory scheme in question but, in listed building as in planning enforcement, the statutory grounds of appeal are wide enough to extend to 'every aspect of the merits' of the decision to serve the notice; *Wicks* applied.

Moreover, a "listed building" means "a building which is…included in [the] list…"; s1(5) of the Planning (LBCA) Act 1990. There are two elements, it must be a "building" and it must be included in the list. If it is not in truth a building at all, there is nothing to say that mere inclusion in the list will make it so. There is no reason why an appellant cannot make that point in an appeal made under s39(1)(c), enabling an Inspector to determine the issue on a case-by-case basis using 'workable criteria' developed with 'appropriate legal advice'.

Lord Carnwarth noted a 'disturbing lack of clarity' and 'reliable guidance' adopted by the relevant authorities regarding the criteria for determining whether an item which appears on the statutory list is in fact a building. He held that the *Skerritts* test, which involves consideration of size, permanence and attachment, is relevant to the listed building context, and remitted the appeal to the SoS.

- *Case Law Update 34*
- *Knowledge Matters 36, 50 and 68*

GPDO/GDO

Where relevant references are given to the current version of the GPDO [with references in square brackets to the Order pertinent to the judgment]

See also case law cited in the GPDO and Prior Approval Appeals Training Manual

General

Cole v Somerset CC [1957] 1 QB 23

An Article 4 Direction cannot be made after PD rights are implemented.

Garland v MHLG [1968] 20 P&CR 93

If a development exceeds PD limits, the whole development is unauthorised.

Clwyd CC v SSW & Welsh Aggregates Ltd [1982] JPL 696; [1983] JPL 50

CoA: Where there is failure to comply with a condition imposed by the GPDO, other than a prior notification condition, the EN must be directed against the breach of condition.

- *Development undertaken without compliance with a prior notification (pre-commencement) condition is development without PP; see Winters v SSCLG & Havering LBC [2017] EWHC 357 (Admin)*
- *See also R v Elmbridge BC ex parte Oakimber [1992] JPL 48 & F G Whitley & Sons v SSW & Clwyd CC [1992] JPL 856*

Fayrewood Fish Farms v SSE & Hampshire CC [1984] JPL 267

If development breaches any GDO conditions or limitations, PDR cannot apply.

Cawley v SSE & Vale Royal DC [1990] JPL 742

Headings in secondary legislation may be used as an aid to interpretation.

R v Tunbridge Wells BC ex parte Blue Boys Developments Ltd [1990] 1 PLR 55; [1990] JPL 495

A condition excluding the benefits of the 1972 UCO has a continuing effect in respect of the new order.

- *The same applies in relation to the GDO/GPDO, even if the condition does not expressly refer to 'any order revoking and re-enacting that Order with or without modification', given the provisions of s17(2) of the Interpretation Act 1978.*

Dunoon Developments Ltd v SSE & Poole BC [1992] JPL 936

A condition must exclude the operation of the GDO/GPDO expressly, not by implication.

- *See also Dunnett Investments Ltd v SSCLG & East Dorset DC [2016] EWHC 534 (Admin); [2017] EWCA Civ 192*

Williams Le Roi v SSE & Salisbury DC [1993] JPL 1033

The date on which the development commenced determines which GDO/GPDO the development is to be judged against.

- *Where it is claimed on ground (c) or in a s191 LDC appeal that the development or use is PD, it is necessary to look at the Order in force when the development or use was begun, not the Order in force when the EN was issued/application was made, or when the appeal is determined.*

R (oao Watts) v SSTLR & Hammersmith and Fulham LBC [2002] EWHC 993 (Admin); [2002] JPL 1473

The GPDO is not drafted to deal with simultaneous works or the banking of an express PP for PDR to be exercised first. In considering whether something would be PD on a specific date, it is not permissible to take account of prospective additions. The resulting building is that which exists on the date of substantial completion of the work.

R (oao Orange Personal Communication Services Ltd & Others) v Islington LBC [2006] EWCA 157; [2006] JPL 1309

The effect of the Interpretation Act 1978 is that permission granted by the GPDO is 'crystallised' when the development begins or, in the case of prior approval, when the LPA states that prior approval is not required or when the LPA has failed to make a determination at the end of the specified period.

R (oao Save Woolley Valley Action Group Ltd) v Bath and North East Somerset Council [2012] EWHC 2161 (Admin)

It may be necessary to determine not only whether something is development for the purposes of s55, but also for the EIA Regulations or EIA Directive.

- *Did not concern the GPDO but may be relevant given Article 3(10), (11) and (12).*
- *Case Law Update 19*

Evans v SSCLG [2014] EWHC 4111 (Admin); [2015] JPL 589

Article 3(5): in addressing whether 'the building operations involved in the construction of that building are unlawful', regard should be had to [*Article 1(2) in the GPDO 1995 or now*] Article 2(1) in the GPDO 2015, which defines the word 'building' as including 'part of a building'. On a simple construction of the words, if the building operations involved in the construction of any part of an existing building are unlawful, the PD rights granted in connection with the existing building do not apply.

Noquet & Noquet v SSCLG & Cherwell DC [2016] EWHC 209 (Admin)

Article 3(5) is concerned with changes from 'existing' use not potential alternative uses. Whether a notional change of use would be lawful is not relevant as to whether the GPDO would permit a proposed change of use for the purposes of a s192 application.

- *Case Law Update 29*
- *Knowledge Matters 17*

Dunnett Investments Ltd v SSCLG & East Dorset DC [2016] EWHC 534 (Admin), [2017] EWCA Civ 192; [2017] JPL 848

A condition restricting use to B1 and 'no other purpose whatsoever, without express planning consent from the LPA first being obtained' is clear and emphatic and excludes the grant of PP by the GPDO. An 'express planning consent from the LPA' means PP granted on application. The reason for the condition was clear that the LPA sought to retain control.

- *Case Law Updates 29 & 31*

- *Knowledge Matters 18 & 30*

RSBS Developments Ltd v SSHCLG & Brent LBC [2020] EWHC 3077 (Admin)

RSBS obtained PP by way of prior approval to convert office building to 16 flats. Prior to the MCU and contrary to the approved plans, a single storey extension was removed and two storey extension built on a larger footprint, so 2 of the flats had increased floor space. Following complaints RSBS demolished it and built a single storey extension like the original. The LPA refused an LDC for residential use of the flats, refused PP to retain the extension and issued EN against the CoU to 16 dwellings. Held: The Inspector did not err in finding that the benefit of PP granted by the GPDO (following a grant of prior approval) for the MCU of a building to flats had been lost. The MCU had taken place after an extension to the building, not shown on the approved plans, had been constructed. The works were unlawful, the PP was not implemented and Article 3(5)(a) was engaged, even though the PP had related to use and not operations.

Lang J held that it would be contrary to the legislative purpose of A3(5) to prevent its operation after the grant of prior approval; the submission that subsequent unlawful works are not capable of engaging A3(5) is not supported by the natural and ordinary meaning of the words used in A3(5).

The word 'existing' is defined widely in A2(1) and extends to the time immediately before the carrying out of the permitted development, not before the seeking of prior approval. The two limbs of Art 3(5) are not mutually exclusive; 'in connection with a building' can include PP for the MCU of the building. Once unauthorised works are regularised, PD rights once again apply, but the demolition and rebuilding of the unauthorised extension did not retrospectively implement the PP for the MCU.

- *Knowledge Matters 74*

Olgun Kulah v SSHCLG & LB Waltham Forest [2021] EWHC 3028 (Admin)

It is not standard practice for Inspectors to take or refer to measurements unless these are agreed by both parties. As the parties had not provided agreed measurements in respect of the height of the eaves at the site visit, the Inspector was entitled to rely on her own visual assessment. Where exact measurements are material to the decision, the Inspector should get the parties to take and agree the measurements during the site visit or in writing.

Knowledge Matters 85

London Borough of Brent v SSHCLG & Yehuda Rothchild [2022] EWHC 2051 (Admin)

Use Class C4 applies only to the use of a dwellinghouse by not more than six residents as an HMO. If a building is accepted to be in Use Class C4, it must be a dwellinghouse. Finding that a building satisfies the *Gravesham* test and is therefore a "dwellinghouse" must necessarily be a matter of fact and degree, which lies solely within the jurisdiction of the decision-maker. The Court held that the Inspector had not erred in law in concluding that, whether the property fell within Use Class C3 or C4 at the time of construction of the extension, it enjoyed permitted development rights as a "dwellinghouse" under the GPDO. He therefore made no error in concluding that it was academic whether the property was extended whilst it was still occupied as a single-family dwelling or when already an HMO, following its permitted change of use under Class L of the GPDO. The judgment confirms HMOs falling within Class C4 benefit from permitted development rights. It is also arguable that a dweliinghouse used as a sui generis large HMO benefits from permitted development rights.

The Council also claimed that even if the property was in use as a dwellinghouse at the time that the extension was built, the extension was not built in accordance with the information supplied in the prior approval notification. The Inspector should have identified the substantial differences in its external appearance, internal layout and its use at the site visit. The Court noted that the Inspector was right to record that the Council did not contend in its EN that the extension constructed was not that which had been found not to require prior approval. The Inspector was not bound to raise the matter because of the site visit, and the Council should advacnced a case on the basis that what had been built had a different layout from the plans submitted alongside the prior approval notification. The Inspector therefore committed no error of law in proceeding on that basis.

Welwyn Hatfield BC v SSHCLG & Ismail Kabala (IP)

The LPA issued an EN alleging that a breach of planning control had occurred, namely "the subdivision of a dwellinghouse into five self-contained flats". The developer disputed this, as the building had not been subdivided into five self-contained flats, but rather works to create four self-contained units and two bedrooms with access to shared bathroom, kitchen, and communal facilities and that the building remained a single dwellinghouse in use as an HMO by fewer than six persons (within class C4).

Whether the four self-contained units, the bedsits, were being used as single dwellinghouses was a question of fact and degree for the inspector to determine based on the evidence before the Inspector, including what they observed during the site visit. He said the law meant it was in principle possible for a house to remain a single dwellinghouse under Use Class C4, even with a mixture of self-contained and shared residential accommodation. It is for the decision maker to judge on the facts of the given case whether such a building remains in use as a single dwellinghouse; or whether the provision of self-contained units of residential accommodation within that building has resulted in its sub-division into two or more separate dwellinghouses, as the Appellant alleged had occurred in the present case. It was held that the Inspector was entitled to conclude that, given the existence of communal facilities in the building which were available for use by all those in occupation, including those in the self-contained flats, that the building was a single dwellinghouse in use as an HMO and had not been divided into separate dwellinghouses. Section 254 provided the definition of an HMO for the purposes of determining whether a dwellinghouse was being used as a small HMO within the scope of Use Class C4. The 1987 Order did not exclude a "converted building" HMO within the terms of s.254(4) from falling within the scope of Use Class C4 if the facts supported the contrary conclusion. The court concluded the Inspector did not make the error of law but noted the concern that the Inspector's conclusion would effectively prevent it from issuing a further EN. The judge said the Council was not bound by the Inspector's conclusion and if minded to issue a further EN could "decide for itself how best to describe the alleged breach of planning control, taking account of the evidence that is available to it for that purpose.

Prior Approval

Murrell v SSCLG & Broadland DC [2010] EWCA Civ 1367; [2011] JPL 739

The statutory period starts from the date the valid application is made. Mistakes made by the LPA when handling the application and the fact that the appellant submitted new forms and plans at the LPA's request did not stop the clock from running.

The prior approval procedure is attended by the minimum of formalities. It is not mandatory to use a standard form or provide information beyond that specified [here, under Part 6, A.2(2)(ii)]. On expiry of the [28 day] period, PP is deemed to be granted. The assessment of siting, design and external appearance must be made in a context where the principle of the development is not, itself, an issue.

- *Case Law Update 13*

Walsall MBC v SSCLG; Dartford BC v SSCLG [2012] EWHC 1756 (Admin); [2012] JPL 1502

The authorities posted notices requiring prior approval of telecoms masts within the relevant period. On appeal, the Inspector in each case accepted the operators' evidence that the notices had not been received. The presumption under s7 of the Interpretation Act 1978 that service is deemed to be effected by properly addressing, pre-paying and posting a notice is rebuttable by evidence that the notice was not in fact received.

Pressland v Hammersmith and Fulham LBC [2016] EWHC 1763(Admin)

Where prior approval is granted subject to conditions, the PP granted by the GPDO is subject to those conditions and there is a right of appeal under s78(1)(c).

Keenan v SSCLG & Woking BC [2016] EWHC 427, [2017] EWCA Civ 438

The HC and CoA held that, for development to be permitted under Article 3(1), it must come fully within the relevant description of PD. If it does not, the conditions applicable to PD cannot apply. In this case, the provisions of Part 6, paragraph A.2(2)(i), which required the developer to apply for a determination as to whether prior approval is required, did not impose a duty on the LPA to decide whether the development is PD.

- *Case Law Update 29*
- *Knowledge Matters 33*
- *See also R (oao Marshall) v East Dorset DC & Pitman [2018] EWHC 226 (Admin)*

Winters v SSCLG & Havering LBC [2017] EWHC 357 (Admin); [2017] JPL 684

Prior approval cannot be granted for development which has been commenced.

- *Knowledge Matters 29*

R (oao Marshall) v East Dorset DC & Pitman [2018] EWHC 226 (Admin)

When dealing with an application for prior approval under Part 6, an LPA '*does not have power under the prior approval…or indeed any other provision of the GPDO, to determine whether or not the proposed development comes within the description of the relevant class in the GPDO*…' The matter should be addressed via an LDC or planning application.

- *On this point, Marshall is inconsistent with Westminster CC v SSHCLG & New World Payphones Ltd [2019] EWCA Civ 2250 which was decided more recently and by a higher court.*

Gluck v SSHCLG & Crawley BC [2020] EWCA Civ 1756

The statutory period in which an LPA must determine a prior approval application may be extended with the applicant's agreement in writing under Article 7(c), whether the period is specified in the relevant provision of Schedule 2 as described in A7(a) or would be eight weeks under A7(b). The agreement in writing need not take the form of some contract; email correspondence will suffice.

- *Knowledge Matters 64 and 75*

Part 1

Sainty v MHLG [1964] 15 P&CR 452

To benefit from PDR, the dwellinghouse must exist when the operations are carried out.

- *See also Larkin v Basildon DC [1980] JPL 407; R (oao Townsley) v SSCLG [2009] EWHC 3522 (Admin); Hewlett v SSE [1985] JPL 404 (CoA); Arnold v SSCLG [2015] EWHC 1197 (Admin), [2017] EWCA Civ 231*

Street v MHLG & Essex CC [1965] 193 EG 537

Whether construction works amount to 'maintenance' or 'rebuilding' is a matter of fact and degree. Works intended to repair the property involved substantial demolition. The re-building amounted to development and was not PD by Class I(I) of the GDO.

Scurlock v SSE [1977] 33 P&CR 102

A building in mixed use (estate agent's office with flat above) is not a dwellinghouse for the purposes of GDO rights or the 1971 Act.

- *Part 3, Class F sets out PDR for the MCU of buildings in A1 use to a mixed use for A1 and two flats, but Article 2(1) affirms that a dwellinghouse for Part 1 purposes would not include a building containing flats.*

Larkin v SSE & Basildon DC [1980] JPL 407

A dwellinghouse that fell down was incapable of being 'enlarged, improved or altered'.

- *See also Hewlett v SSE & Brentwood DC [1983] JPL 155; Arnold v SSCLG [2015] EWHC 1197 (Admin), [2017] EWCA Civ 231*

Emin v SSE & Mid Sussex DC [1989] JPL 909

An outbuilding must be 'required for some incidental purpose' to be PD under Class E, but its size is not relevant. It is necessary to identify the purpose and incidental quality in relation to the enjoyment of the dwellinghouse, and whether the building is genuinely and reasonably required to accommodate the use and thus achieve that purpose.

Richmond upon Thames LBC v SSE & Neale [1991] 2 PLR 107; [1991] JPL 948

Parapet walls, railings, trellises and other barriers are generally to be regarded as additions or alterations to a roof, to be considered under Classes B or C rather than A. Walls around a flat roof can be an enlargement consisting of an addition or alteration to a roof, and so PD within Class B, even though they do not enclose a volume.

- *See also R (oao Cousins) v Camden LBC [2002] EWHC 324; railings did not enlarge the external appearance of the dwelling and so fell within Class C. The test is whether the house appears larger to those outside looking at it.*

Hammersmith and Fulham LBC v SSE & Davison [1994] JPL 957

EN alleged the construction of railings and a trellis to the perimeter of a flat roof, and an external staircase to that terrace. It was open to the Inspector to find that the staircase came within the terms of Class A, but had the works altered the roof, they would have fallen within Class C and not B as claimed by the LPA. The Inspector's finding that the railings and trellis were permitted under Class B was also supported.

Tower Hamlets LBC v SSE & Nolan [1994] JPL 1112

Judicial decision as to what constitutes 'stone cladding' under Class A. In this instance, a dressing of stone chips added to a render did not.

Pêche d'Or Investments v SSE & Another [1996] JPL 311

It cannot be assumed, as a matter of law, that a study or any other building is excluded from Class E. It is a matter of fact and degree, having regard to the particular building and accommodation. Siting and design are among the relevant considerations.

Rambridge v SSE & East Hertfordshire DC (QBD 22.11.96 CO-593-96)

An LDC was sought to use a partially completed building as a residential annex, on completion or one day afterwards. Class E permits a building only if it is required for a purpose incidental to a dwellinghouse, not for a primary residential use. The proposal was a sham – but Class E does allow a householder to erect a building genuinely required for an incidental purpose and then later change its use.

- *Where a residential annexe contains primary living accommodation, a judgment should be made on whether the use is part and parcel of the use of the dwelling or there has been an MCU to create a new self-contained dwelling in its own PU. Primary living accommodation is not incidental to the use of a dwellinghouse and, to benefit from Class E PDR, an annexe must be used for incidental purposes.*

R (oao Watts) v SSTLR & Hammersmith and Fulham LBC [2002] EWHC 993 (Admin); [2002] JPL 1473

PP granted for side and rear extension. The appellant started to build a roof extension as PD under Part 1, Class B. The LPA and Inspector found that the roof extension had not been completed before the side/rear extension had been begun; it was comprised in a single operation with the side/rear extension and exceeded the 50m^3 allowance.

Held, the Inspector failed to determine whether the cubic content of the house when the GPDO works were substantially complete exceeded that of the original house by more than 50m^3. The test of whether there had been a single building operation did not reflect the statutory wording. Whether the roof extension was PD did not depend on whether it was part of a larger operation, but on the cubic content.

The GPDO 'is not well cast so as to deal with simultaneous works' but the best sense could be made of it by measuring the roof extension at the time of its completion against the existing cubic content, not prospective cubic content, however imminent.

R (oao Gore) v SSCLG & Dartmoor NPA [2008] EWHC 3278 (Admin); [2009] JPL 931

Part 1 PD rights were claimed for a building which had a LDC for 'use of forestry store as residential'.. The Court supported the Inspector's view that, although the building was a dwelling, it was not a dwellinghouse for PD purposes. The LDC was not concerned with the definition of the term in relation to the GPDO. To benefit from Part 1 PD rights, the building must be a dwellinghouse and have a curtilage.

- *Case Law Updates 6 & 8*

R (oao Townsley) v SSCLG [2009] EWHC 3522 (Admin)

A dwellinghouse must be in existence for PD rights to be exercised. A building under construction is not a dwellinghouse for PD purposes. The appropriate test is substantial completion as described in *Sage* – the development must be carried out internally and externally in accordance with the PP. While that prescription could be taken too far, it would apply to any material variation to the PP that was granted.

- *Case Law Updates 11 & 12*

Mohamed v SSCLG [2014] EWHC 4045 (Admin); [2015] JPL 583

EN alleged the erection of a dwelling, but the appellant argued that an existing garage had been refurbished. The Inspector addressed whether the building was in residential use and not whether there had been unlawful operations. The fundamental issues were the nature of the operations and application of the GPDO, and whether the building fell outside of PD. If the operations were unlawful, the question of use was irrelevant.

- *Case Law Update 27*

Evans v SSCLG [2014] EWHC 4111 (Admin); [2015] JPL 589

The effect of paragraph A.2(c) is that, in the case of a dwellinghouse on Article 1(5) land, an extension of more than one storey which extends beyond the rear wall of the original dwelling, being that part of the wall immediately adjacent to the extension at the same vertical level as the extension, is not PD. No extension of more than one storey beyond the rear wall of the original dwellinghouse has the benefit of PD rights if the dwellinghouse is on Article 1(5) land.

Arnold v SSCLG [2015] EWHC 1197 (Admin), [2017] EWCA Civ 231; [2017] JPL 923

LDC granted for extensions but works went beyond what was described, and only part of one wall was left standing of the original dwelling. Whether the structure was a new or remodelled dwellinghouse was question of fact. The Inspector was entitled to find that what remained, given the scale of demolition and intervention, was a new building. The availability of PDR is not set in stone merely by starting the works. The dwellinghouse must be retained for PD rights to be relied upon.

- *This ground was not re-heard by the CoA*
- *Case Law Updates 27 & 31*
- *Knowledge Matters 31*

R (oao Hilton) v SSCLG & Bexley LBC [2016] EWHC 1861 (Admin)

The 'enlarged part of the dwellinghouse' is only the part included in the proposal.

- *Overturns Kensington and Chelsea RBC v SSCLG [2015] EWHC 2458 (Admin), where it was held that the 'enlarged part…' includes previous enlargements.*
- *Knowledge Matters 22*
- *The GPDO has been amended through the addition of limitation A.1(ja) such that 'any total enlargement (being the enlarged part together with any existing enlargement of the original dwellinghouse to which it will be joined) exceeds or would exceed the limits set out in sub-paragraphs (e) to (j)' is not PD.*

Eatherley v Camden LBC & Ireland [2016] EWHC 3108 (Admin); [2017] JPL 504

It may be necessary to assess whether any engineering works required for a basement extension would be permitted under Class A. There had to be a point where the excavation, underpinning and support for a basement became different in character from the enlargement, improvement and alteration of a dwelling. It is for the decision maker to ask whether there are two activities or one, and whether the engineering operations constitute a separate activity of substance as a matter of fact and degree.

Havering LBC v SSCLG [2017] EWHC 1546 (Admin)

There is no definition of 'roof space', but Article 2(1) defines 'cubic content' as meaning 'the cubic content of a structure or building measured externally'. When applying B.1(d) 'what…is clearly intended is that one looks at the roof rather than any question of roof space, and space is simply added not to…what might have been originally under the roof, but the roof itself and any addition or extension to that roof as it originally stood'.

- *Case Law Update 31*

Stanius v SSCLG & Ealing LBC (CO 11.4.17)

The Inspector erred in finding that they could not issue a LDC because the development would contravene an EN in force; they had failed to interpret the EN so that it did not interfere with the appellant's lawful use rights. The sole question was whether the development complied with Article 3 and Schedule 2, Part 1, Class E of the GPDO.

- *Case Law Update 31*

CAB Housing Ltd, Beis Noeh Ltd & Mati Rotenberg v SSLUHC [2022] EWHC208 (Admin)

Whether the controls covered all aspects of the external appearance of the proposed developments and the impact upon other premises, not just simply the subject dwelling. The Judge drew comparisons with the use of the word "including" by comparing Class A of Part 20 with Class AA of Part 1 and Classes AA to AD of Part 20. The latter group have the same matters "included" in external appearance, so if the interpretation of Part 1 Paragraph AA.2 (3)(a)(ii) had been found to be correct, then it must also apply to Classes AA to AD of Part 20. – **PTA refused by the UKSC**

Part 6: Agriculture

Belmont Farm v MHLG [1962] 13 P&CR 417

Equestrian activities are related to leisure not agriculture. To be designed for agriculture, a building must look like an agricultural building.

Hidderley v Warwickshire CC [1963] 14 P&CR 134

'For the purposes of agriculture' means the productive processes of agriculture; it does not include the buying and selling of agricultural products.

Bromley LBC v SSE & George Hoeltschi and Son [1978] JPL 45

The use of a building as a farm shop may be incidental to agriculture, but it is likely to become a separate retail use once a significant proportion of produce is imported, as a matter of fact and degree.

Jones v Stockport MBC [1984] JPL 274

CoA: the activities must constitute a trade or business within 'agriculture' as defined and be taking place before the works are begun.

Fuller v SSE & Dover DC [1987] JPL 854

An agricultural unit may comprise more than one planning unit.

South Oxfordshire DC v SSE & East [1987] JPL 868

No single factor is decisive as to whether the activities constitute a trade or business. Consideration should be given to whether this is the occupation by which the person concerned earns a living; whether the activity is carried out for pleasure or the person is an enthusiastic amateur; the keeping of accounts; turnover; and any profit made.

Hancock v SSE & Torridge DC, Tyack v SSE & Cotswolds DC [1989] 1 WLR 1392; [1989] JPL 99

CoA: Whether land constitutes a 'separate parcel' is a matter of fact and degree. If the 'primary area' is so closely linked to some adjoining agricultural land that no sensible distinction can be drawn between the two parcels, the total area must be measured.

If the primary area is divided from other land by some distinguishing feature, or if it does not adjoin the other agricultural land, it may be right to conclude that only the primary area is to be measured, even if the other is in the same occupation.

McKay & Walker v SSE & South Cambridgeshire DC [1989] JPL 590

If is nothing to suggest that a farming enterprise is in fact an eccentricity or hobby, then lack of profit does not prevent the enterprise from being a trade or business.

Size is irrelevant in deciding whether a building is 'reasonably necessary' because the GPDO permits agricultural buildings up to 465m^2.

- *In relation to trade or business, see also Kerrier DC v SSE & Stevens [1995] EGCS 40; low level of income is not conclusive*
- *The scale of engineering operations was held to be significant in Macpherson v SSS [1985] JPL 788. See also Emin v SSE [1989] JPL 909 where, in relation to Part 1, Class E, it may be necessary to consider the scale as well as nature of the proposed use, so as to adjudge whether the development is reasonably required.*

Pitman & Others v SSE & Canterbury [1989] JPL 831

CoA: A 'leisure plot' is not an agricultural use; such use of farmland involves an MCU.

Broughton v SSE [1992] JPL 550

It is necessary to have regard to what agricultural use the land might be reasonably put to, not just the appellant's intentions. Their intentions might change, or a future occupier might carry out different activities.

Clarke v SSE [1993] JPL 32

CoA: In deciding whether a building is reasonably necessary, the Inspector should consider what agricultural use the land might reasonably be put to and whether the building is designed, as a matter of fact and degree, for such activities that might be reasonably conducted. It is unnecessary to contemplate some possible but unlikely agricultural use not suggested by the appellant.

Hill v SSE & Bromley LBC [1993] JPL 158

Agricultural development might not satisfy the tests of Part 6 but be justified in terms of planning merits, based on the agricultural use of the land as defined in s336(1).

Millington v SSETR & Shrewsbury and Atcham BC [2000] JPL 297

CoA: To ascertain whether activities are 'for the purposes of agriculture', it is necessary to consider whether they could be regarded as ordinarily incidental to agriculture – or it had come to the stage where the operations were not reasonably consequential on the agricultural operations. The making of wine, cider or apple juice on the scale of this case was a perfectly normal activity for a farmer engaged in growing grapes or apples.

Taylor and Sons (Farms) v SSETR & Three Rivers DC [2001] EWCA Civ 1254

Paragraph A.1(d) applies to all works to accommodate livestock, not just to buildings or structures, and so may permit a hardstanding.

Lyons v SSCLG [2010] EWHC 3652 (Admin)

A PU in a mixed use for agriculture and other use does not benefit from Part 6 PDR.

- *May supersede Rutherford & another v Maurer [1962] 1 QB 16 and South Oxfordshire DC v SSE & East [1987] JPL 868 where it was held that PD rights under Part 6 applied where there were mixed uses.*
- *But see also Fuller v SSE & Dover DC [1987] JPL 854; Part 6 does not refer to the planning unit. The requirement is that the PD is carried out on 'agricultural land' in an 'agricultural unit' and 'for the purposes of agriculture'.*
- *Equally, the limitations to PD under Part 3, Classes Q, R and S relate to the use of 'the site' and/or building as part of an 'established agricultural unit'.*

R (oao Marshall) v East Dorset DC & Pitman [2018] EWHC 226 (Admin)

Paragraph A.1(i) excludes proposed development to be used for the accommodation of livestock i.e. where accommodation of livestock is the purpose of the development. Paragraph A.1(i) must be distinguished from A.2(1)(a) which imposes a condition on development already carried out, recognises that there may be circumstances where the use of existing development for the accommodation of livestock is legitimate and so 'provides for the exception in paragraph D.1(3)'. Paragraph D.1(3) cannot be read into paragraph A.1(i), which is not subject to the same exception as condition A.2(1)(a).

Other Parts

Prengate Properties Ltd v SSE [1973] 25 P&CR 311; [1973] JPL 313

PART 2, CLASS A: PDR do not apply to walls without some function of enclosure. A wall that does enclose will not lose that quality if it is also a structural or retaining wall.

Tidswell v SSE & Thurrock BC [1977] JPL 104

PART 4: PDR for 'temporary use' cannot apply if there is an intention to hold a permanent market, evidenced by promotional literature.

Ewen Developments v SSE & North Norfolk DC [1980] JPL 404

PART 2: Earth embankments were not a means of enclosure or, therefore, PD.

South Buckinghamshire DC v SSE & Strandmill [1989] JPL 351

PART 4 [Class IV]: Each exercise of the 14-day permission is a separate act of development, so an Article 4 direction can be issued at any stage between markets.

Kent CC v SSE & R Marchant & Sons Ltd [1996] JPL 931

PART 7, CLASS K [Part 8, Class D]: PD rights are granted for the deposit of waste resulting from an industrial process. The industrial process does not need to take place on the site; the reference to 'industrial process' is descriptive of the waste material permitted to be deposited. Demolition is an industrial process.

Caradon v SSETR [2000] QBD 12.9.00

PART 11, CLASS C [Part 31, Class B]: PD rights relating to the whole or part of any gate, fence, wall or other means of enclosure are for building and not engineering operations.

Ramsey v SSETR & Suffolk Coastal DC [2002] JPL 1123

CoA: PART 4, CLASS B: Agricultural land used for leisure purposes. PD rights are available for temporary uses, even if these are facilitated by permanent physical changes to the land, provided the works do not prevent the normal permanent use from continuing for most of the year, and it does so continue. The critical factors are the duration of the temporary use and reversion to the normal use in between times.

R (oao Hall Hunter Partnership) v FSS & Waverley BC [2006] EWHC 3482 (Admin); [2007] JPL 1023

PART 5: The housing of some 230 seasonal workers in 45 caravans did not meet the relevant tests. The infrastructure serving the caravans remained in place. Removal of the caravans did not bring the use of the land as a caravan site to an end.

- *Case Law Update 1*

R (oao Wilsdon) v FSS & Tewkesbury BC [2006] EWHC 2980 (Admin); [2007] JPL 1063

PART 4, CLASS A: The size and means of construction of a building is relevant; the larger and more permanent the building, the less likely it is to be 'required temporarily'. An appellant must show that the building is reasonably required for the temporary use; intentions are relevant, but an Inspector is entitled to accept or reject the explanation and consider whether it is realistic to expect that the building is removed.

- *Case Law Update 1*

Miles v NAW & Caerphilly CBC [2007] EWHC 10 (Admin); JPL 1235

PART 4, CLASS B: LDC sought for the use of land for recreational motorcycling activities and farming. The Inspector found that two motorcycling activities were taking place which are distinguished in Class B: individual pleasure riding, practice and testing, and event-based use. The latter had not taken place for more than 14 days pa (Class B.2(b)) continuously for ten years and could not be aggregated with the individual use.

- *Case Law Update 1*

Valentino Plus Ltd v SSCLG [2015] EWHC 19 (Admin); [2015] JPL 707

PART 3, CLASS F: the GPDO does not define 'mixed use' but it does define 'flat'; PP is granted for two flats which, by definition, must be self-contained. It cannot be said that Class F contemplates a physical relationship between the retail use and flats permitted.

- *Case Law Update 27*

Hibbitt v SSCLG & Rushcliffe BC [2016] EWHC 2853 (Admin)

PART 3, CLASS Q: For a COU to be PD under Q(b), the building must be capable of conversion without complete or substantial re-building or, in effect, the creation of a new building. It is necessary to assess the extent of the works and decide whether they fall within or go beyond the statutory limits.

- *Knowledge Matters 26*

Barton v SSCLG & Bath and North East Somerset Council [2017] EWHC 573 (Admin)

PART 11, CLASS C: Demolition of a section of wall and a gate in a Conservation Area amounts to relevant demolition under s196D of the TCPA90. The s336(1) definition of a 'building' as including 'any structure or erection' applies to s196D. Demolition of part of a wall or gate in a CA is not PD. The Inspector made no error in focussing on the part of the wall to be removed, rather than the part untouched.

- *Case Law Update 31*
- *Knowledge Matters 30*

Mawbey & Lewisham LBC & SSCLG v Cornerstone Communications [2018] EWHC 263 (Admin), [2019] EWCA Civ 1016; [2020] JPL 18

PART 16, CLASS A: To determine whether a structure is a "mast", it is necessary to ascertain whether, as a matter of fact and degree, it is an upright pole or other structure whose function is to support an antenna or aerial.

- *Knowledge Matters 57*

Westminster CC v SSHCLG & New World Payphones Ltd [2019] EWHC 176 (Admin), [2019] EWCA Civ 2250

PART 16, CLASS A: To be 'permitted development', the whole of any development must fall within the scope of a part and class in Schedule 2 by falling within the relevant definition and satisfying the conditions and limitations.

A mixed use or dual purpose development in which one purpose fell outside the scope of the class could not generally be PD. The advertisement display panel in the proposed kiosk was not to be merely incidental to the electronic communications apparatus. The panel had an entirely different purpose from the rest of the kiosk and so the kiosk as a whole would have a dual purpose for advertising and electronic communication.

- *Knowledge Matters 63*

Challenge Fencing Ltd v SSHCLG & Elmbridge BC [2019] EWHC 553 (Admin)

PART 7, CLASS J: The HC upheld an Inspector's decision to refuse to grant an LDC for the replacement of a hard surface. The land was not in the curtilage of the industrial building (and was not be used for the requisite purpose) and so would not be PD.

- *Knowledge Matters 53*

Prichard Jones & Prichard Jones v SSHCLG & Horsham DC [2022] EWHC 520 (Admin)

It was contended that the development fell within Class B of Part 2 of Schedule permitting the formation, laying out and construction of a means of access to a highway which is not a trunk road or classified road, where that access is required in connection with development permitted by any Class in Schedule 2 (other than Class A). This turned on whether the highway to which the access related was a 'classified road'.

It was held that the Inspector had not erred in law in finding that the road in question was a classified road and had addressed the question of whether development was permitted under the GDPO. Even if he had erred in law, the access was not required in connection with development, as prescribed by Class B, and so the Inspector would have been bound to conclude, as he did, that the work did not constitute permitted development.

Haytop Country Park Ltd v SSHCLG & Amber Valley BC [2022] EWHC 1848 (Admin)

Class 5B permitted development right is not to be read as authorising development on a caravan site which, although containing elements which accord with individual conditions of the site licence issued in respect of that site, is contrary to the conditions of that site licence when read and applied as a whole.

GPDO – Fallback Position

Burge v SSE & Chelmsford BC [1988] JPL 497

The extent of GDO/GPDO rights is a material consideration, although development in excess of GDO/GPDO limits is, as a whole, without PP.

- *Garland v MHLG [1968] 20 P&CR 93; Nolan v SSE & Bury MBC [1998] JPL B72*
- *PD rights will be a material consideration as a fallback position for ground (a), and PP can be granted for 'part of the matters'. If the appeal proceeds on (f) but not (a), whether the EN can be varied will depend on the purpose of the EN.*

Brentwood DC v SSE & Gray [1996] JPL 939

It is necessary to address the realistic likelihood of 'fallback' PDR being exercised.

Nolan v SSE & Bury MBC [1998] JPL B72

EN requiring the removal of a 4m retaining wall was upheld despite the appellant's assertion that he would rebuild a 2m wall as PD. The merits of retaining the lower 2m portion were claimed against the background that it was expensive to demolish the 4m wall and build a new 2m wall, but this case was not considered. The Inspector failed to apply the principle that the existence of a valid PP was a material consideration.

- *The appeal was made on grounds (a) and (f). The Inspector did not refer to the GPDO in his reasoning on (a), and then found under (f) that it was reasonable for the Council to seek to remedy the breach. The correct approach would have been to consider the PP granted by the GPDO as a fallback position under (a).*

Spedding v Wiltshire Council [2022] EWHC 347 (Admin)

Where there was no evidence to conclude that a previous use of land would be brought back into use, a true fallback position could not be considered.

Formby Parish Council v Sefton Council [2022] EWHC 73 (Admin)

The court concluded that there is no requirement for an applicant for planning permission to identify, an intention to undertake the fallback. Although no evidence had been provided by the applicant in relation to the delivery of the fallback, the court considered that the simple statement within the officer report that "the conversion could be carried out under permitted development rights" was, sufficient to show that the officer had reached the conclusion that the prospect of the fallback happening met the minimum standard of possibility, thus amounting to a material consideration

HUMAN RIGHTS

This section contains summaries of enforcement-specific cases only; see Human Rights & PSED ITM for comprehensive HR case law.

Massingham v SSTLR & Havant BC [2002] EWHC 1578 (Admin)

HRA Articles cannot be engaged in the context of a LDC appeal, because the grant of a LDC neither creates nor remove rights. An LDC is a declaration of certain existing lawful use rights; a refusal to issue a LDC is merely a refusal to grant the declaration sought.

Blackburn v FSS & South Holland DC [2002] EWHC 671 (Admin)

The same principle applies to the legal grounds of appeal against an EN.

Goodall v Peak District NPA [2008] EWHC 734 (Admin)

The NPA did not deprive the claimant of his civil rights by seeking a conviction for a failure to comply with an EN. The claimant had been deprived by his own failure to make a timely appeal. He had been aware that a second EN would be issued and should have made arrangements to receive it when out of the country.

Dill v SSCLG & Stratford-on-Avon DC [2020] UKSC 20; [2020] JPL 1421

It was held in this unanimous SC judgment that an appellant is entitled to appeal against an LBEN on the ground that a "listed building" is not a "building".

Lord Carnwath endorsed the principle laid down in *Boddington v British Transport Police* [1999] 2 AC 143 (and reflected in Article 6 of the HRA98) that '*the issue of statutory construction is subject to the rule of law that the individuals affected by legal measures should have a fair opportunity to challenge these measures.'* That principle has to be read in the context of the statutory scheme in question but, in listed building as in planning enforcement, the statutory grounds of appeal are wide enough to extend to 'every aspect of the merits' of the decision to serve the notice; *Wicks* applied.

- *Knowledge Matters 36, 50 and 68*
- *Case Law Update 34*
- *See also 'Fair Trial? the Human Rights Act and the Listing of Buildings' by Stephen Crow [2003] JPL 793*

INTENSIFICATION

Brooks & Burton Ltd v SSE & Dorset CC [1977] JPL 720

CoA: Intensification cannot be material if the pre- and post-intensification uses are within the same Use Class.

Hilliard v SSE & Surrey CC [1978] JPL 840

For a breach through intensification to be substantiated, there must be evidence of the previous and present situations in respect of the whole PU. It is not open to the LPA to arbitrarily divide the PU and serve separate EN to achieve a more restrictive effect than by serving one EN covering the whole unit.

- *De Mulder v SSE [1973] 27 P&CR 379; [1974] JPL 230*

Kensington and Chelsea RBC v Mia Carla Ltd [1981] JPL 50

If an EN relies on MCU by intensification it must say so. The EN was not correctable because a completely different breach would then be involved.

- *Would there be injustice if the parties could address corrections to the EN?*

Philglow Ltd v SSE & Hillingdon LBC [1985] JPL 318

CoA: the cessation of one element of a composite use is not in itself an MCU. There must be evidence that the remaining use has intensified such as to amount to a material change in character over the whole or part of the planning unit.

- *See also Wipperman & Buckingham v Barking LBC [1965] 17 P&CR 275*

Eastleigh BC v FSS & Asda Stores [2004] EWHC 1408 (Admin)

The doctrine of intensification for uses within the UCO is qualified by Article 3(1). There is no development if the intensified use remains within the same use class.

R (oao Childs) v FSS & Test Valley BC [2005] EWHC 2368 (Admin); [2006] JPL 1326

A simple increase in the number of caravans may involve an MCU.

- *Previously held in Guildford RDC v Fortescue [1959] 2 QB 112 and Glamorgan CC v Carter [1962] All ER 866, [1963] P&CR 88 that an increase in the number of caravans on land with a lawful use as caravan site did not involve an MCU.*
- *See also Hertfordshire CC v SSCLG & Metal and Waste Recycling Ltd [2012] EWCA Civ 1473; Reed v SSCLG [2014] JPL 725*

Elvington Park Ltd v SSCLG & York CC [2011] EWHC 3041 (Admin); [2012] JPL 556

The intensification of a use after 2000, from a benchmark position that had been established by a 1993 PP, amounted to an MCU.

- *Case Law Update 18*

Hertfordshire CC v SSCLG & Metal and Waste Recycling Ltd [2012] EWCA Civ 1473; [2013] JPL 560

The intensification of a use is capable of constituting an MCU. The test for whether there has been an MCU is whether there had been a change in the character of the use.

- *Case Law Updates 17 & 20*

Reed v SSCLG [2013] EWHC 787 (Admin), [2014] EWCA Civ 241; [2014] JPL 725

Inspector found that PP for a mixed use traveller site had been implemented but there was a difference in the number of caravans and there had been an MCU. He ought to have addressed whether there had been a BoC or development without PP against the correct test. On the facts, the uses of the site remained the same.

- *If the increase in caravan numbers contravened a condition on the PP, the EN should have been corrected to allege a BoC and require steps accordingly.*
- *Case Law Update 26*

Turner v SSCLG & South Buckinghamshire DC [2015] EWHC 1895 (Admin); [2015] JPL 1347

EN alleged intensification over a use certified by an LDC. The law permits intensification of a lawful use provided this does not amount to an MCU. If an appellant claims they can use land more intensively than the LDC permits, they can apply for PP or object that the EN is too wide. Neither the LPA nor Inspector should be required to investigate 'the whole range of speculative hypotheses' as to what would amount to an MCU. The *Mansi* principle did not preclude the LPA from issuing an EN based on the existing LDC.

The Inspector upheld the EN after taking account of off-site impacts when the parties had agreed that this was not an issue and further submissions had not been sought. Whether there had been an MCU by intensification would need to be re-determined, but what factors the new Inspector would consider and what conclusions they would reach would be for them.

- *Case Law Update 26*

R (oao KP JR Management Co Ltd) v Richmond LBC & Others [2018] EWHC 84 (Admin)

Challenge to (1) failure to issue an EN (2) grant of a LDC for the mooring of boats. In deciding whether there had been an intensification of the lawful use, it was proper for the Council to take account of changes since 2009 and their impact on the area. As the definable character of the site was not derived from or contributed to by planning policy, there was no obligation on the Council to specifically refer to planning policy.

Brent LBC v SSHCLG & Oakington Manor Primary School [2019] EWHC 1399 (Admin); [2019] JPL 1473

The Inspector erred by failing to have regard to a submission made in closing on behalf of the Council at the inquiry that the alleged MCU had occurred by intensification – an issue which was capable of defeating the ground (d) appeal.

- *The submission did not include the word 'intensification' but referenced the evidence of an objector, plus the case of Hertfordshire CC v SSCLG & Metal and Waste Recycling [2012] EWCA Civ 1473.*
- *Inspectors are advised to seek clarification of any points made in closing which are unclear and/or potentially new.*
- *Knowledge Matters 57*

LAWFUL (AND ESTABLISHED) USE AND LDCS

Glamorgan CC v Carter [1962] All ER 866; [1963] P&CR 88

A landowner cannot acquire use rights through illegal as opposed to unlawful use.

- *This principle is limited to 'planning' illegality; see also article at JPL 239 [1988].*

Square Meals Frozen Foods v Dunstable BC [1973] JPL 709

CoA: Any challenge to an EN other than by way of s174 is precluded by s285, even where proceedings for a declaration have begun.

***Broxbourne BC v SSE* [1979] JPL 308**

An EUC shall be conclusive for the purposes of an enforcement appeal. The SoS was entitled to find that there had not been an MCU because the use being enforced against was not so different to that described in an EUC. It did not matter that the EUC was 'silent as to the scope and intensity of the use'. There was no limit to where the use could take place within the site or the intensity of the use.

Unlike a PP, the EUC did not render the use lawful. If the certified use was abandoned, it could not be resumed. The EUC rendered the use immune for so long as it persisted and obviates the need to investigate what the established use was on the date of the EUC.

- *Goff J advised planning authorities to exercise care in drafting EUCs, so that they are not precluded from preventing uses for which PP would not be granted by having issued certificates in terms wider than necessary.*
- *Considered and applied in Hannan v Newham LBC [2014] JPL 1101 and Breckland DC v SSHCLG & Plumtree Country Park [2020] EWHC 292 (Admin)*

Cottrell v SSE & Tonbridge and Malling BC [1982] JPL 443

There is a distinction between the LPA's reasons for refusing and decision to refuse to grant an LDC. The SoS is only required to grant an LDC if they are satisfied that the LPA's decision was not well-founded. If the LPA grants an LDC in respect of part of the land, the SoS has no jurisdiction to revoke the certificate relating to the part.

Young v SSE & Bexley LBC [1983] JPL 465; [1983] JPL 677

HoL: Implementation of a new unlawful use extinguishes previous established and lawful use rights. Lawful use rights are preserved under s57(4) if an EN is served.

- *The library record (linked) includes the HC summary and CoA transcript only. The HoL upheld the judgments of the HC and CoA, as described at [1983] JPL 677.*

Denham Developments v SSE & Brentwood DC [1984] JPL 347

An EN should make a saving for an established as well as lawful use. When uses are intermingled, the saving for a degree of use at a certain date may be appropriate. The EN cannot properly bite on that part of the land where the use had gone on since 1963.

- *See also Lee v Bromley LBC [1983] JPL 778*

Nash v SSE & Epping Forest DC [1986] JPL 128

CoA: A s78 appeal cannot constitute an out of time appeal against an EN. It is not open to an appellant in a s78 appeal to re-open the question as to whether established use rights exist. The EN prohibits continuance of the use and has become unchallengeable on the ground of the use being established. The 'lost' lawful use rights may still be a material consideration but a minor one.

Vaughan v SSE & Mid Sussex DC [1986] JPL 840

Glamorgan applied in respect of a use continuing in contravention of an effective EN; the EUC application and appeal were not valid where there was a pre-existing effective EN.

Bristol CC v SSE & Williamson [1987] JPL 718

The SoS was entitled to grant an EUC for a lesser use than described in the application.

Davies v SSE & South Herefordshire DC [1989] JPL 601

CoA: it may be found that no breach of planning control has taken place during a period where the use was only of a 'casual intermittent and insignificant nature'.

Panton & Farmer v SSETR & Vale of White Horse DC [1999] JPL 461

Lawful use rights could only be lost by evidence of abandonment; by the formation of a new planning unit; or by being superseded by a further change of use. A use which was merely dormant or inactive could still be considered as 'existing', so long as it had already become lawful and not been extinguished in one of those three ways.

- *Thurrock BC v SSETR & Holding [2002] EWCA Civ 226*

R v Thanet DC ex parte Tapp [2001] EWCA Civ 559, [2001] JPL 1436

There is no power for LPAs or the Secretary of State/Inspector to amend the description of a proposal under s192(2) as there is under s191(4), but the terms may be modified by the LPA or SoS where the applicant agrees.

The CoA also rejected the challenge that the description of the proposed use 'of the airfield for civilian purposes' should have specified more detail as to what is lawful.

Thurrock BC v SSETR & Holding [2002] EWCA Civ 226; [2002] JPL 1278

CoA: A use could only become lawful if it continued throughout the ten year period, to the extent that the LPA could have taken enforcement action at any time. If the use ceased during that period, as a matter of fact and degree, the time could not count towards immunity. *Panton & Farmer* applies when lawful use rights had been accrued.

- *See also Swale BC v FSS & Lee [2005] EWCA Civ 1568 and Basingstoke and Deane BC v SSCLG & Stockdale [2009] EWHC 1012 (Admin).*

Waltham Forest LBC v SSETR & Tully [2002] EWCA Civ 330; [2002] JPL 1093

Where lawfulness is established at a base level and it is proposed to ratchet up, eg, the numbers of persons living together (with carers) as a single household, it is necessary to compare the proposed use with an actual existing use, not a notional use.

Sefton MBC v SSTLR & Morris [2003] JPL 632

The effect of s57(4) should not be ignored even if an EN has not been issued.

Swale BC v FSS & Lee [2005] EWCA Civ 1568; [2006] JPL 886

Use as a dwellinghouse must be 'affirmatively established' over the four year period before an occupier does not have to be continuously or regularly present in order for it to remain in such use. The correct approach is to ask whether there was any period during the four years when the LPA could not have taken enforcement action against the use, because the

building was not physically occupied, even though available. It is necessary to make a finding as to whether the periods of non-occupation were *de minimis*.

- *See Basingstoke and Deane BC v SSCLG & Stockdale [2009] EWHC 1012 (Admin) for where the property is not occupied but there is activity to further the breach.*

Mid Suffolk DC v FSS & Lebbon [2006] JPL 859

If the construction of a building has become lawful through time and the operation of s171B(1) and s191(2), the use of the building may not have become lawful. The building may be immune, but its use may be liable to enforcement action. S75 applies to buildings with PP, and it is possible to have a lawful building with no lawful use.

- *R (oao Sumner) v SSCLG [2010] EWHC 372 (Admin); Welwyn Hatfield BC v SSCLG & Beesley [2011] UKSC 15*

James Hay Pension Trustees Ltd v FSS & South Gloucestershire Council [2006] EWCA Civ 1387; [2006] JPL 1004

An LDC must substantially be in the form prescribed by statute. The LPA had issued a 'certificate' headed 'Permission for development' which was ambiguous, did not refer to s192 or clearly describe the proposal. It did not comply with s192 and was invalid.

M & M (Land) Ltd v SSCLG & Hampshire CC [2007] All ER(D) 55

A use certified as lawful through an LDC can be abandoned subsequently. An LDC does no more than certify conclusively that the use is lawful at a point in time. Whether it is later abandoned is to be assessed according to the objective test of abandonment.

- *Case Law Update 1*
- *Confirmation and clarification that lawfulness through an LDC is not in the same species of the 'hardy beast' of lawfulness in Pioneer Aggregates*

R (oao Sumption) v Greenwich LBC [2007] EWHC 2276 (Admin)

The LPA's decision to grant a LDC under s192 for the erection of a boundary wall and gates less than 1m in height was quashed on the basis that the land was within the curtilage of a listed building. The works would not be PD under Article 3 and Schedule 2, Part 2 of the GPDO, but would involve development as defined under s55.

Staffordshire CC v Challinor & Robinson [2007] EWCA Civ 864; [2008] JPL 392

LDC in force did not prevent dismissal of EN appeal but did lead HC to deny injunction. The CoA held that an EN can take away lawful use rights in some circumstances, since s285(1) provides that an EN is not to be questioned in any proceedings on any grounds on which an appeal may be brought, other by way of an appeal under Part VII of the Act. Lawful use rights can be lost if an EN is served and those rights are not raised as a ground of appeal [*(c) or (d)*]. An LDC is only 'conclusive' on the day of the application.

Hillingdon LBC v SSCLG & Autodex Ltd [2008] EWHC 198 (Admin); [2008] JPL 1486

There is a right to revert to the last use if it was lawful, following the issue of an EN. S57(4)) applies to uses that have become lawful because of the passage of time and the operation of s171B and s191(2). The effect of s191(2) is to make certain uses lawful for 'the purposes of this Act', ie, the entirety of the Act.

There is no legal requirement, despite s191(5), for the Inspector to specify the quantity of any particular item or items that are lawful.

- *The rights to reversion to the 'normal' use under s57(2) and s57(3) do not apply to uses which have only become immune from enforcement over time.*
- *Case Law Update 4*

R (oao Colver) v SSCLG & Rochford DC [2008] EWHC 2500 (Admin)

The provisions of s191 and s171B(c) cannot be applied retrospectively. A use which began after 1963 and continued for a ten year period but was inactive on 27 July 1992 cannot attain lawfulness. The use was unlawful, ceased and not dormant.

- *The earliest ten year period that can count for an LDC for existing use is 27 July 1982 to 27 July 1992. The same approach does not apply to operations or to a change of use to a dwellinghouse (in breach of condition) since these were subject to a four year rule prior to 27 July 1992.*
- *Case Law Update 5*

R (oao North Wiltshire DC) v Cotswolds DC & Others [2009] EWHC 3702 (Admin)

Challenge to Cotswold DC's decisions to issue and subsequently modify an LDC certifying 'the primary established use of Kemble Airport for general aviational purposes'. King J found no authority for the proposition that an LDC must describe the use in specific terms and did not accept that 'the wider the terms of the use described…the more difficult it will be' for an LPA to exercise control over the activities on the land.

He accepted 'the wisdom of the advice' in C10/97 that 'it is important for the [LDC] to state the limits of the use at a particular date' and not describe a use beyond that which the evidence establishes; *Broxbourne* applied. However, he did not accept there was any principle of law that it is not open to an LPA to find a lawful use described in general terms. It was open to Cotswold DC to adopt the term 'general aviational purposes', so long as they were satisfied that such lawful use had been established.

- *King J discussed the 'three main heads of illegality, irrationality and procedural impropriety' upon which administrative action may be subject to judicial review. The challenge that the use was not described in specific terms was largely based on allegations of illegality, but this would properly go to irrationality.*
- *Case Law Update 11*

R (oao Sumner) v SSCLG [2010] EWHC 372 (Admin); [2010] JPL 1014

ENs alleged: (1) the MCU of and (2) the erection of the building. The Inspector found that the building was lawful on the four year rule, but the use had begun within the past ten years. The Court rejected the claim that the immunity of the building should carry immunity for the intended use; it could not be ancillary to the operations. S75(3) is not relevant, it relates to where PP is granted for a building and the use is not specified.

'A distinction is drawn and intended to be drawn between change of use and operational development that is entirely consistent with the Act'. If a building is erected without PP and used for a purpose with no PP, there is a risk that the building will need to be removed or the use will need to cease if enforcement action is not taken in time.

- *Case Law Updates 10 & 11*
- *Welwyn Hatfield v SSCLG & Beesley [2011] UKSC 15*

Bramall v SSCLG & Rother DC [2011] EWHC 1531 (Admin)

For s57(2) to be engaged, a proximate 'temporal nexus' must exist between the former and proposed use. The right to resume a former use following a grant of PP could be

abandoned. Wyn Williams J (para 23): "*there must come a point where, as a matter of interpretation, it simply cannot be said that the resumed use occurred at the end of the period during which an alternative use was authorised*".

- *Case Law Update 16*
- *Adopts and extends Smith v SSE & Bristol CC [1984] 47 P&CR*

Keevil v SSCLG & Bath and North East Somerset Council [2012] EWHC 322 (Admin)

The LPA was not estopped from contending that an LDC did not apply to where caravans were sited, even though no plan was attached to the LDC and there was a site licence.

Turner v SSCLG & South Buckinghamshire DC [2015] EWHC 1895 (Admin); [2015] JPL 1347

The power to issue an LDC under s177(1)(c) is discretionary ("may") and the power can only be exercised in respect of a lawful existing use. There is no provision to issue an LDC setting out a use which is not the existing use but would be lawful.

- *Case Law Update 28*

R (oao Pitt) v SSCLG & Epping Forest DC [2015] EWHC 1931 (Admin); [2016] JPL 20

An LDC issued under s192 is conclusive unless there is a material change before the development begins.

- *Case Law Update 28*

Noquet & Noquet v SSCLG & Cherwell DC [2016] EWHC 209 (Admin)

Whether a notional use could be implemented without PP is not relevant as to whether the GPDO would permit a proposed change of use for the purposes of s192.

- *Case Law Update 29*

R (oao Waters) v Breckland DC & Others [2016] EWHC 951 (Admin)

The Council did not err in law in granting an LDC under s191 for buildings and other structures without first having considered whether the uses of the site were lawful.

O'Flynn v SSCLG & Warwick DC [2016] EWHC 2984 (Admin)

In considering whether an LDC ought to be granted under s191 for the existing use of land as incidental to the enjoyment of the dwellinghouse, the Inspector erred by simply addressing whether the land had been used as such for a ten year period, and not also whether the use was lawful within the meaning of s55(2)(d).

- *Case Law Update 30*
- *See also R (oao Sumption) v Greenwich LBC [2007] EWHC 2776 (Admin)*

Kensington and Chelsea RBC v SSCLG & 38 Cathcart Ltd (CO/4492/2016)

Inspector granted PP for a change of use on the basis that a LDC previously granted under s192 for the use was a 'fallback position' – but the evidence indicated that there had been a 'material change' in circumstances since then. Held, with regard to s192(4), that the Inspector had erred in assuming that there was a continued right to make the COU pursuant to the LDC without giving due consideration to submissions that this would no longer be

lawful. It was necessary to address whether the factors raised by the Council meant that the LDC could not be relied upon to have continuing effect.

- *Knowledge Matters 34*

Sharma v SSCLG & Others [2018] EWHC 2355 (Admin)

EN alleged the use of land for airport parking; the appellant claimed that the Inspector had failed to address whether the LDC fallback use would be carried out to its 'full' extent in accordance with the LDC. When the decision was read fairly, it was clear that the Inspector had properly applied the fallback approach. Whether the land would be used to its 'fullest' extent was not to be assumed but was a matter of evidence.

DB Symmetry Ltd v Swindon BC & SSHCLG [2020] EWCA Civ 1331

The Inspector did not err in granting an LDC for the 'formation and use of private access roads as private access roads' although a condition required that they and all other areas 'that serve a necessary highway purpose shall be constructed in such a manner as to ensure that each unit is served by fully functional highway'.

The condition did not expressly require dedication as a public highway or refer to the grant of rights of passage. It was not clear which parts of the development were to be dedicated as highways and the obligation imposed was one which on its face related to the construction of the roads.

The power to impose conditions should not be interpreted, in the absence of clear words, as derogating from the owner's property rights. A condition that requires a developer to dedicate land as a public highway without compensation is an unlawful condition; *Hall & Co Ltd v Shoreham by Sea UDC* [1964] 1 WLR 20 applied. The reasonable reader would not suppose the LPA intended to grant a PP subject to an invalid condition. There is a statutory mechanism for securing the adoption of a way as a public highway.

Some weight must be given to the expertise of an experienced and specialist Inspector. Her interpretation of the condition was realistic if not the most natural. The validation principle applies and the condition should be given the meaning that she ascribed to it.

- *Knowledge Matters 57 & 72*

Breckland DC v SSHLG & Plum Tree Country Park [2020] EWHC 292 (Admin)

The Inspector was entitled to find an LDC for the 'use of land as a camping and caravan site…' unambiguous. A caravan falling within the CSCDA60 or CSA68 definition could be lawfully sited on the land and occupied for human habitation, whether by holiday makers or permanently. The phrase 'caravan and camping site' should be read in an ordinary way, to mean that the land can be used for caravans only, tents only or both, the type of caravan not being restricted if it meets the statutory definition; *Wyre Forest* applied.

The interpretative principles applicable to planning permissions apply to LDCs, and the courts have been 'extremely cautious' in permitting the admittance of extrinsic evidence for the purpose of interpreting ambiguous planning document. The lawfulness of the use set out in the LDC is "conclusively presumed", *Broxbourne* applied – and that case was similar on the facts, with the LPA trying to import limitations into a historic LDC.

Adams v SSHCLG & Huntingdonshire DC [2020] EWHC 3076 (Admin)

The Inspector did not err in finding that an LDC granted in 2016 'for use as a touring caravan site' did not authorise the stationing of touring caravans as a person's sole or main place of residence. The Inspector was entitled to examine previous PPs as an aid to interpretation because the LDC made express reference to a PP and its conditions; *Trump* applied. '*Any reasonable reader of the 2016 CLEUD would have been*

put on notice that the use certified as lawful…was subject to a number of conditions in a planning permission'.

Moreover, the 2016 LDC did not describe any breach of condition and the effect of s193(5) is that conditions imposed on previous PPs would continue to apply.

- *The 2016 LDC had simply referred to 'condition 4-7 of the planning decision notice from the Planning Inspectorate'. Mrs Justice Lang acknowledged 'the importance of clarity and certainty in a certificate of this nature'. Inspectors are advised if granting an LDC on the basis that the use or development accords with the terms and conditions of a PP, to clearly identify the PP on the certificate and in the stated reasons as to why the use or development is lawful.*

London Borough of Brent v Secretary of State for Housing Communities and Local Government, Ebele Muorah [2022] EWHC 1875 (Admin)

The CLEUD Inspector had to determine whether the change of use was lawful, as defined in s.191(2), which contained two limbs. The Inspector was required to consider both limbs, but he only considered the second one. He did not consider whether enforcement action could still be taken as a result of the second bite provisions in s.171B(4). At the time when the inspector made his decision, the four year period running from the date when the Council had purported to take enforcement action had not expired. Therefore, this was not a case where no enforcement action could be taken, per s.191(2)(a), and the inspector acted outside his powers by certifying a use as lawful which did not fall within the definition set out in s.191(2).

Ocado Retail Ltd v Islington LBC [2021] EWHC 1509 (Admin)

A 4 or 10 year period can be any period, not the immediate period when the EN has been issued. Once a right has been accrued upon the expiry of a time limit in s171B, it is not lost if the right has not been exercised for a period of time, provided there has been no abandonment or new use introduced (para 162-165).

Gallagher Ventures Ltd v SSHCLG & Torbay Council [2021] EWHC 3007 (Admin)

The Inspector had incorrectly construed the site boundary. The issue concerned the correct interpretation of the 2008 planning permission: the construction works could not implement the 2008 permission if that permission was limited to the area within the red boundary on the Plan, because the works were undertaken outside that area.

Brent LBC v SSHCLG & Chaim Reiner [2020] EWHC 3620 (Admin)

This was an application for permission and the transcript is not available to the public. Care should be taken when referring to this permission hearing transcript. If the decision is material to your case, you may need to provide the appeal parties a copy of the transcript and invite comments.

The permission hearing related to an appeal against an Inspector's decision quashing an EN.
It alleged the MCU to a mixed use as three flats and a 3-bedroom HMO. There were six bedrooms in the premises. The requirements of the notice were to cease the use and to reinstate the use as a single dwelling house and to remove the extension built when the premises contained flats and so did not benefit from permitted development rights. In the contet of ground (b), the Judge agreed that the Inspector was right to consider exactly what each room was actually used. When considering evidence as to whether a building is used as an HMO or compises mix of uses including self-contained flats, it is necessary to consider:

- The *Gravesham* definition of a dwelling; and
- The definition of an HMO in s254 of the Housing Act, and

- How the building and each room is actually used.

MATERIAL CHANGE OF USE – GENERAL

Vickers Armstrong v Central Land Board [1958] 9 P&CR 33

Changes may be made between ancillary uses, such as canteens and offices in a large factory complex, without there necessarily being an MCU of the PU as a whole.

Wipperman & Buckingham v SSE & Barking LBC [1965] 17 P&CR 225

The cessation of one element in a composite use will not necessarily result in an MCU; it is a matter of fact and degree as to whether the subsequent use is materially different to the earlier composite use.

- *See also Philglow v SSE & Hillingdon LBC [1985] JPL 318*

G Percy Trentham Ltd v MHLG & Gloucestershire CC [1966] 18 P&CR 225

To determine whether there has been an MCU, consider the whole area occupied and used for a particular purpose, including any part of that area put to incidental uses. Storage in a farm building was part of the farm, not an independent storage (B8) use.

Wood v SSE & Uckfield RDC [1973] 25 P&CR 303; [1973] JPL 429

If an incidental use expands to a point that it becomes a primary use on its own, within a separate PU, or the PU takes on a new mixed use, there has likely been an MCU.

- *See also Trio Thames Ltd v SSE & Reading DC [1989] JPL 914*

Philip Farrington Properties Ltd v SSE & Lewes DC [1982] JPL 638

A change in identity of the person carrying out activities does not result in an MCU. What matters is the character of the use.

Restormel BC v SSE & Rabey [1982] JPL 785

Whether the stationing of a caravan amounts to an MCU depends on the use for which the caravan is sited and whether that is consistent with the lawful use of the land.

Westminster CC v SSE & Aboro [1983] JPL 602

It is not necessary to specify the use from which it is alleged there has been an MCU.

- *See also Bristol Stadium v Brown [1980] JPL 107; Ferris v SSE & Doncaster MBC [1988] JPL 777; Afendi Baghdad Ltd v SSHCLG (CO/41/2021)*

Philglow Ltd v SSE & Hillingdon LBC [1985] JPL 318

CoA: the cessation of one element of a composite use is not in itself an MCU. There must be evidence that the remaining use has intensified such as to amount to a material change in character over the whole or part of the planning unit.

- *See also Wipperman & Buckingham v Barking LBC* [1965] 17 P&CR 275

Wivenhoe Port v Colchester BC [1985] JPL 396

CoA: PP for an MCU does not confer PP for incidental operational development.

- *Kane Construction v SSCLG & Nottinghamshire CC [2010] EWHC 2227 (Admin)*

Panayi v SSE & Hackney LBC [1985] 50 P&CR 109; [1985] JPL 783

Considers case law on the meaning of the term 'hostel'

- *See also Commercial and Residential Property Development Co Ltd v SSE & Kensington and Chelsea RBC [1982] JPL 513 and Westminster CC v SSCLG & Oriol Badia and Property Investment (Development) Ltd [2015] EWCA Civ 482*

Lilo Blum v SSE [1987] JPL 278

A livery and a riding stable could be materially different.

There was a 'start' and a 'finish' to the process of deciding whether an MCU had occurred and it was not necessary to rely on the concept of intensification.

Wealden DC v SSE & Day [1988] JPL 268

CoA: The stationing of a caravan is not an MCU, it is necessary to identify the purpose for which the caravan is sited. No development is involved if the use is incidental.

Pitman & Others v SSE & Canterbury [1989] JPL 831

CoA: A 'leisure plot' is not an agricultural use; such use of farmland involves an MCU.

Ferris v SSE & Doncaster MBC [1998] JPL 777

An EN is not invalid if it alleges an MCU and recites the 'base use' incorrectly.

It is for the appellant to establish that there has been no MCU, whatever the character or status of the base use.

Turner v SSE & Macclesfield BC [1992] JPL 837

CoA: recreational fishing amounts to an MCU of a lake.

Forest of Dean DC v SSE & Howells [1995] JPL 937

PP granted for 'holiday' caravans with no condition to restrict the use. There may be no material difference between caravans occupied as holiday or permanent residences, but it is a matter of fact and degree, and off-site effects should not be disregarded.

- See also *Barton Park Estates Ltd v SSHCLG & Dartmoor NPA [2021] EWHC 1200 (Admin)*

Thames Heliport v Tower Hamlets LBC [1995] JPL 526; [1997] JPL 448

CoA: a mobile floating heliport was only moored at night, but this went beyond the use of the river for transport. There had been an MCU of land because the water rested on land. The length of the river was one PU which could be used under the 28 day rule.

Main v SSETR & South Oxfordshire DC [1999] JPL 195

Separate activities on land should not be regarded as incidental simply because they are small in relation to other uses.

Lynch v SSE & Basildon DC [1999] JPL 354

Change from a low-key, limited use to a use which had more components, was more intensive and covered a wider area amounted to an MCU. The limited use had not subsisted

for ten years before being superseded by the mixed use of which it was one component; it had not become lawful and could not benefit from the *Mansi* principle.

Richmond upon Thames LBC v SSETR & Richmond upon Thames Churches Housing Trust [2001] JPL 84

The extent to which a use fulfills a legitimate or recognised planning purpose is relevant in deciding whether there has been an MCU.

Beach v SSETR & Runnymede BC [2001] EWHC 381 (Admin); [2002] JPL 185

If an additional component was added to a mixed use, there was an MCU of the whole planning unit to a different mixed use. The original uses were not to be regarded as distinct and unaffected by the new use.

Waltham Forest LBC v SSETR & Tully [2002] EWCA Civ 330; [2002] JPL 1093

In deciding whether a COU was or would be material, the correct comparison is with the existing or previous use, not just the use class within which that might have fallen.

Stewart v FSS & Cotswold DC (QBD 28.7.04 Jackson J)

Whether an MCU has occurred is an objective test, unaffected by the personal circumstances of the user.

Deakin v FSS [2006] EWHC 3402 (Admin); [2007] JPL 1073

The EN alleged the stationing of caravan for a use unconnected with agriculture and of a mobile home for residential purposes. The correct approach would be to determine the lawful use of the planning unit; the effect of the introduction of the caravans and their use on the use of the PU; and whether that effect amounted to an MCU.

- *Case Law Update 1*

R (oao East Sussex CC) v SSCLG & Robins & Robins [2009] EWHC 3841 (Admin)

Where land is in mixed use, it is not open to the LPA to decouple elements of it. The use of the site is the single mixed use with all its component activities.

- *Case Law Update 13*

Winfield v SSCLG [2012] EWCA Civ 1415; [2013] JPL 455

Where an unauthorised use ceases in order to avoid threatened enforcement action by a LPA, then only a short period of non-use is required to establish cessation of the unauthorised use, with any resumption representing a new chapter in the planning history and a fresh breach of planning control.

- *Case Law Update 18*

***R (oao Westminster CC) v SSCLG & Oriol Badia and Property Investment (Development) Ltd* [2015] EWCA Civ 482; [2015] JPL 1276**

EN alleged MCU of property from hotel (C1) to a mixed use as a hotel and hostel (*sui generis*). Held that a mixed use can subsist where the different elements are not associated with particular parts of the premises, and where the uses fluctuate; on occasions, the hostel use might be minimal compared to the hotel use.

The DL described the *Panayi* factors but did not take account of evidence related to off-site impacts in relation to whether there had been a material change to the character of the use.

Hertfordshire CC v SSCLG & Metal and Waste Recycling Ltd [2012] EWCA Civ 1473 applied; consideration of off-site impacts is permissible and a relevant factor in assessing whether there had been an MCU.

- *Case Law Update 27*

Al-Najafi v SSCLG & Ealing LBC [2015] (CO/4899/2014)

A sui generis mixed use is not a 'tri-partite' use but a single mixed use.

- *Case Law Update 28*

R (oao Kensington & Chelsea RBC) v SSCLG & Reis & Tong [2016] EWHC 1785 (Admin)

Richmond did not decide that any planning consideration relevant as to whether an MCU is involved must be supported by a planning policy. It may be or may not be. The absence of support from a planning policy does not necessarily suggest that a planning consequence is of no significance.

- *Case Law Update 30*
- *Knowledge Matters 22*

***Afendi Baghdad Ltd v SSHCLG & Ealing LBC* (CO/41/2021)**

While it is not essential for an EN which alleges an MCU to identify the previous or lawful use, an Inspector may need to ascertain that in ground (c) cases in order to determine whether the change of use was material. Identifying the lawful use may also be relevant to the Inspector's duty to vary an EN that purports to take away lawful use rights.

Malcolm Payne v SSHCLG and Maldon District Council [2021] EWHC 3334 (Admin)

The case reinforces what the statute says under 172(1)(b) TCPA 1990, that if a local authority is relying on a Planning Enforcement Order (PEO), then it can only enforce against the "apparent breach" set out in the PEO. Where the PEO specified the apparent breach of planning control as residential use, and a subsequent enforcement order set out the material breach of planning control as the unauthorised material change of use to mixed use, the Inspector was wrong to conclude that the PEO covered the use enforced against. However, the Inspector had been entitled to find that the change of use of the land had taken place in 2011 and so the enforcement notice had been lawfully issued within 10 years of the breach. The Judge found that, as the Inspector was correct to find that enforcement could have occurred within a 10 year period, Ground 1 was entirely academic. As the Appellant had to succeed on both grounds in order for the appeal to be successful, the case was dismissed.

MATERIAL CHANGE OF USE – RESIDENTIAL

Birmingham Corporation v MHLG & Ullah [1964] 1 QB 178

The judge coined the phrase 'multiple (paying) occupation'. A change from a single dwellinghouse to let-in lodgings could be an MCU.

Mayflower Cambridge v SSE & Cambridge CC [1975] 30 P&CR 28; [1975] JPL 408

The use of part of a building as a hotel, when the permitted use was accommodation for students, amounted to an MCU of the building as a whole.

Lipson & Lipson v SSE & Salford MBC [1976] 33 P&CR 95; [1977] JPL 33

Houses separately let in bedsitting rooms with shared bathrooms and WCs were aptly described as multiple-paying occupation. The letting of a house in self-contained flats did not necessarily exclude multiple-paying occupation and vice versa.

Wakelin v SSE & St Albans DC [1978] JPL 769

CoA: house with a separate block used as lodge/staff flat/garages. A condition precluded separate residential use of the block but, in any event, a COU of the PU to two separate dwellings would be material. S55(3)(a) applies to sub-divisions of a single dwelling.

Blackpool BC v SSE & Keenan [1980] JPL 527

No MCU had occurred, on the facts, where a house was used as a holiday home by the owner, his friends and staff (non-paying) and by other single households for rent.

Impey v SSE & Lake District SPB [1981] JPL 363; [1984] P&CR 157

A change of use could take place as a result of the physical works but it is necessary to look in the round. '*The physical state of these premises is very important but it is not decisive. Actual or intended or attempted use is important but not decisive*.'

Backer v SSE & Camden LBC [1983] JPL 167

The Act keeps operations and COU distinct and separate. Building operations cannot give rise to an MCU, some actual user is required – but physical works can be relevant as to whether there has been an MCU. *Howell* applied: the 'before' and 'after' physical state of the building could not be disregarded.

'To sleep in particular premises at night…have one's meals upon them by day, or both, ought not ipso facto to have the effect in law of making those premises a dwellinghouse'.

Uttlesford DC v SSE & White [1992] JPL 171

A garage used as a residential annex was within the same PU; no MCU had taken place.

R v SSE & Gojkovic ex parte Kensington and Chelsea RBC [1993] JPL 139

Self-containment of bed sitting rooms by installation of own showers/sinks etc does not bring about an MCU; it is vital to consider the planning unit.

***Van Dyck v SSE & Southend on Sea BC, Doncaster MBC v SSE & Dunhill* [1993] JPL 565**

CoA: the provisions under s171B(2) for immunity from enforcement proceedings after four years for a change of use to a single dwellinghouse apply to a change of use [of a dwellinghouse] into two more separate dwellinghouses.

R (oao Hossack) v SSE & Kettering BC & English Churches Housing Group [2002] EWCA Civ 886; [2002] JPL 1206

CoA: Whether there has been an MCU from C3 use involves analysis of whether the new use falls within C3, such that there has not been development. If it would not fall within C3, the question is whether it would be materially different from the lawful C3 use.

Fairstate Ltd v FSS & Westminster CC [2005] EWCA Civ 283; [2005] JPL 1333

CoA: while a PP capable of being implemented cannot be abandoned, a use that is lawful through the passage of time could be under s25 of the Greater London (General Powers) Act 1973. S25 provides that use as temporary sleeping accommodation [less than 90 consecutive nights] of any residential premises in Greater London involves an MCU of the premises and each part thereof which is so used. Such a use could become lawful through immunity from enforcement action, but the use would be abandoned if the property was again used for lets in excess of 90 nights. Even if no MCU is involved in the change back, it would require PP by virtue of s25. The s57(4) reversion right did not apply in absence of enforcement against previous change.

- *S44 and s45 of the Deregulation Act 2015 served to amend s25 of the 1973 Act so that it is subject to s25A, which provides that, notwithstanding s25(1), use as temporary sleeping accommodation does not involve an MCU if two conditions are met. S44 and s45 came into force on 26 May 2015.*

Welwyn Hatfield BC v SSCLG & Beesley [2011] UKSC 15; [2011] JPL 1183

PP granted for a barn but the building was constructed as a dwellinghouse. No COU took place within s171B(2), which is not apt to encompass the use of a new building as a dwelling. Lord Mance expressed doubt as to whether a COU for the purposes of s171B(2) could consist of a simple departure from a permitted use. The word 'use' is directed to real or material use.

In respect of the tests for an MCU to a dwellinghouse, Lord Mance concluded: '*Too much stress, has I think, been placed on the need for "actual use"…it is more appropriate to look at the matter in the round and to ask what use the building has or of what use it is.'*

- *Case Law Updates 7, 10, 14 & 15*
- *Applied in Lawson Builders Ltd & Lawson v SSCLG & Wakefield MBC [2013] EWHC 3368 Admin, in an obiter dictum remark by Supperstone J: 'if a dwellinghouse is erected unlawfully and used as a dwellinghouse from the outset…the unlawful use can still properly be the subject of enforcement action within ten years, even if the building itself…becomes immune from enforcement action after four years'.*
- *NB: allegation of 'use of a building as…' may not be a breach of planning control as defined by the Act. ENs have been issued in respect of 'beds in sheds' which allege the MCU of the land on which the building is sited, not of the building itself.*

Moore v SSCLG & Suffolk Coastal DC [2012] EWCA Civ 2101

Whether the use of the dwelling house for commercial letting as holiday accommodation amounts to an MCU is a question of fact and degree in each case, and the answer will depend on the particular characteristics of the use as holiday accommodation.

- *Case Law Update 20*

Paramaguru v Ealing LBC [2018] EWHC 373 (Admin)

In a prosecution for failure to comply with an EN which required the cessation of a Class C4 HMO use, it was held that children counted as residents for the purposes of Class C4.

Islington LBC v SSHCLG & Maxwell Estates [2019] EWHC 2691 (Admin); [2020] JPL 532

The EN alleged that there had been an unauthorised change of use of a basement to use as a flat. The flat was first occupied more than 4 years before the EN was issued, but uninhabitable over a subsequent period of renovation works. The Inspector found that the basement had been in continuous use as a dwelling for more than 4 years, including the period of renovation, and so the use was immune under s171B(2).

Held that the Inspector erred in applying principles established in *Gravesham*, *Impey* and *Welwyn Hatfield* as to what is dwellinghouse; and failing to apply principles established in *Thurrock* and *Swale* to decide whether the use had continued substantially uninterrupted during the period of renovation.

- *Knowledge Matters 61*

Muorah v SSHCLG [2020] EWHC 649 (Admin) CO/3838/2020

The EN alleged the MCU of the premises from one to two dwellings; it required that use of the premises as flats and occupation by more than one household should cease. Since PD rights for the change of use from C3 to C4 use had not been withdrawn, and the Inspector had expressly found that C4 use was a fallback position under ground (a), the Inspector ought to have varied step 1 of the EN so that it did not purport to deprive the appellant of her lawful use rights. To fall in C4 use, the premises must be used as a single dwelling but do not need to be occupied by a single household.

Sage v SSHCLG & LB of Bromley [2021] EWHC 2885 (Admin)

The Claimant submitted that "visual disturbance" was an immaterial consideration as it did not feature in the PPG in the non-exhaustive list of "issues which [the decision maker] may wish to consider" in deciding whether there had been a material change of use.

It was held that, as a matter of fact and degree, the level of use had gone beyond that which is incidental to a dwelling house. The PPG Guidance is stated to be a list of issues which the decision-maker "may wish to consider". They are not mandatory considerations but possible ones.

The crucial test is whether there has been change in the character of the use. Environmental impact can be relevant as evidence that a material change has occurred, because a use of the new character may be capable of yielding environmental impacts or have done so already. The Guidance as written is apt to mislead as to what the real question is, and as to the true but limited relevance of environmental impact. The Judge comments that the Guidance is far too loose to reflect the true focus of the question at issue.

St Anne's Court Dorset Ltd v SSHCLG & Dorset Council [2021] EWHC 2954 (QB)

Whether use of the site for the stationing of static caravans for human habitation, as compared with use of the site for touring caravans, was a material change of use was a matter of fact and degree for the Inspector.

The Claimant's challenge used the concept "limitation" referred in *I'm Your Man* to misunderstand the effect of those line of authorities. As Sullivan LJ emphasised in *Wall*, the simple proposition which should not be lost is that the use for which a planning permission

granted must be ascertained by interpreting the words in the planning permission itself. Whether other uses would or would not be materially different from the permitted use is irrelevant for the purpose of ascertaining what use is permitted by the planning permission.

PTA refused

NOTICES – ALLEGED BREACH OF PLANNING CONTROL

Miller Mead v MHLG [1963] 2 WLR 225

The EN must tell the recipient what he has done wrong and needs to do to put it right.

Eldon Garages v Kingston-upon-Hull CBC [1974] 1 All ER 358; [1974] JPL 29

That a use had been taking place in contravention of a condition precluding car sales did not invalidate an EN which alleged an MCU. The EN could describe a breach of planning control through BoC or MCU; it only had to say which.

Copeland BC v SSE & Ross & Ross [1976] JPL 304

Where a building is constructed with material differences from approved plans, and a condition was not imposed requiring that the development is carried out in accordance with the plans, the EN should allege the construction of a building without PP.

Bristol Stadium v Brown [1980] JPL 107

The EN alleged operational development 'including' certain particular activities. It was sufficient that developer was told the general scope of what was complained about; there was no need for the EN to go into every precise detail. A generic description of an operation – or of an existing use (for example, 'shop' or 'office') is sufficiently clear.

Scott v SSE & Bracknell DC [1982] JPL 108

The EN does not have to specify whether the breach of planning control is operational development or an MCU, although the test of injustice applies to making a correction.

Westminster CC v SSE & Aboro [1983] JPL 602

The EN does not have to specify the use from which it is alleged there has been an MCU.

Coventry Scaffolding Co (London) Ltd v Parker [1987] JPL 127

This case concerned an appeal against conviction for non-compliance with an EN. The EN did not give a building number or include a plan – but it did name the street, and them building number had been given in correspondence. Held that the appellants were fully aware of which land the EN related to and the EN was not a nullity.

Harrogate BC v SSE & Proctor [1987] JPL 288

EN does not have to specify that alleged operations took place within four years.

Richmond upon Thames LBC v SSE & Beechgold Ltd [1987] JPL 509

An EN may be directed at an ancillary use but must make the main use clear.

Ferris v SSE & Doncaster MBC [1998] JPL 777

The LPA does not need to satisfy itself beyond doubt that a breach has occurred or that there are no possible grounds of appeal.

An EN is not invalid if it alleges an MCU and recites the 'base use' incorrectly; it is for the appellant to establish that there has been no MCU, whatever the nature, character or status of the base use.

R v Rochester-upon-Medway CC ex parte Hobday [1990] JPL 17

The matters subject to enforcement action must have taken place; an EN cannot be issued in relation to a prospective breach.

Collins v SSCLG & Hampshire CC [2016] EWHC 5 (Admin)

If the EN alleges the wrong breach, even if that had been a reasonable allegation for the LPA to make, the Inspector should correct the EN to reflect what has taken place, providing there would be no injustice.

- *NB – fact specific case where the form of waste disposal alleged was not that which had actually taken place.*
- *Case Law Update 29*

Ealing LBC v SSCLG & Zaheer [2016] EWHC 700 (Admin)

Success on ground (b) may lead to correction rather than quashing of the EN, providing that there would be no injustice.

***Afendi Baghdad Ltd v SSHCLG & Ealing LBC* (CO/41/2021)**

While it is not essential for an EN which alleges an MCU to identify the previous or lawful use, an Inspector may need to ascertain that in ground (c) cases in order to determine whether the change of use was material. Identifying the lawful use may also be relevant to the Inspector's duty to vary an EN that purports to take away lawful use rights.

NOTICES – CORRECTION AND VARIATION

Richmond upon Thames LBC v SSE [1972] 224 EG 1555

PP was granted on the DPA for the parking of motor vehicles rather than motor coaches as alleged. An EN cannot be corrected so that PP is granted for some alternative form of development that differs from the alleged breach.

- *See also Millen v SSE & Maidstone BC [1996] JPL 735*

Hammersmith and Fulham LBC v SSE & Sandral [1975] 30 P&CR 19

It is the duty of the Inspector to get the notice in order if he can.

Morris v SSE & Thurrock BC [1975] 31 P&CR 216

A requirement that had been omitted in error could be inserted by the Inspector, but there is a duty to go back to the parties first.

TLG Building Materials v SSE & Arthur & Carrick DC [1981] JPL 513

The power to correct the EN cannot be used to change the planning unit, if that could involve different arguments from those made as to the materiality or merits of a COU.

Woodspring DC v SSE & Goodall [1982] JPL 784

Where an EN alleges the stationing of a caravan, it should be corrected to specify the purpose for which the caravan is used.

- *See also Hammond v SSETR & Maldon DC [1997] 74 PCR 134*

Hughes and Son v SSE & Fareham BC [1985] JPL 486

An allegation that operational development has taken place within the past four years may be corrected to refer to an MCU in the past ten years, and vice versa, so long as the appellant is not deprived of the opportunity to plead ground (d).

Epping Forest DC v Matthews [1986] JPL 132

Where the recitals on the EN refer to an MCU but the particulars of the breach refer to a BOC, the recitals can be corrected so that the EN is internally consistent.

- *Unless there would be injustice; Dacorum BC v SSETR & Walsh (CO/4895/99) (QBD); [2001] JPL 420*

R v SSE & Tower Hamlets LBC ex parte Ahern (London) Ltd [1989] JPL 757

'The pettifogging has to stop'; virtually any correction can be made, the test is whether it would cause injustice.

Wiesenfeld v SSE & Brent LBC [1992] JPL 556

An EN may be corrected so as to delete an inaccurate plan, leaving the site described in words alone, without offending ENAR4(c).

Bennett v SSE & & East Devon DC [1993] JPL 134

EN required cessation of use as two dwellinghouses plus restoration of use as a single dwellinghouse. The Inspector deleted the second step, but this created uncertainty as to whether the use of the original dwelling or annex should cease. The Inspector failed to consider correcting the EN to require cessation of the use of the annex as a dwelling.

Simms v SSE & Broxtowe BC [1998] JPL B98

Miller-Mead v MHLG [1963] 2 WLR is no longer binding in the sense that any correction can be made to an EN, so long as there is no injustice to either side. It is irrelevant as to whether corrections go to the substance of the matter.

- *Miller-Mead is still the leading case when considering whether an EN meets the statutory tests set out in s173(1) and (2).*

Dacorum BC v SSETR & Walsh (CO/4895/99) (QBD); [2001] JPL 420

Where the requirements of the EN are inconsistent, eg, in requiring the restoration of pasture but not the removal of a fence that caused the loss of openness, it is necessary to consider whether injustice would be caused by widening the scope of the EN.

Taylor and Sons (Farms) v SSETR & Three Rivers DC [2001] EWCA Civ 1254

There was no obligation on an Inspector to conduct his own enquiries as to whether varying and what variation of an EN might save some of the works which were in breach of planning control. He was not obliged to state how much of a hardstanding was reasonably necessary for the purpose of agriculture. The proper course was for the appellant to submit what variation should be made to the EN.

Pople v SSTLR & Lake District NPA [2002] EWHC 2851 (Admin)

The EN alleged leisure use of a separate outbuilding. The requirement to remove the fittings and disconnect services was lawful where the fittings were an integral part of the breach. The requirement was essential to put the matter beyond doubt and eliminate the obvious difficulties of inspection and enforcement. The Inspector concluded that the building had no future use, so there was no purpose in retaining the fittings or services.

Howells v SSCLG & Gloucestershire CC [2009] EWHC 2757 (Admin); [2010] JPL 741

Inspector corrected the EN by extending the red line on the plan in two directions. The appellant relied on cases cited in the EPL at para P173.25 but they were related to earlier versions of s176 and superseded by the current words. The only test for the correction was injustice and in the instant case no injustice was caused.

- *Case Law Updates 9, 11 & 12*

O'Connor v SSCLG & Epping Forest DC [2014] EWHC 3821 (Admin)

The Inspector advised that the LPA had the power under s173A(1)(b) to extend the period for compliance in order to consider HRA98 and equality implications. The SoS found that the LPA's discretion would be an unreliable element in the process; potentially contradictory to the principles of certainty and effectiveness in EU law; and a weak foundation for undertaking the balance required under Art 8. Held that it was not strictly part of the Inspector's remit to refer to s173A – or for the SoS to offer an opinion on the desirability of the LPA invoking its power. Whether to invoke s173A is for the LPA.

- *Case Law Update 26*

NOTICES – MULTIPLE

Edwick v Sunbury on Thames UDC [1964] 63 LGR 204

A second EN may be issued even if there is an existing EN in similar terms.

Ramsey & Ramsey Sports Ltd v SSE & Suffolk Coastal DC [1991] 2 PLR 122; [1991] JPL 1148

Two ENs issued in respect of different parts of the site with some overlap; (1) was issued in relation to the whole of a farm; (2) to an area leased to the operator of the alleged motor-cross track. There was no reason why two notices should not subsist. Double jeopardy would only arise if and when the LPA decided to prosecute on both notices.

Reed v SSE & Tandridge DC [1993] JPL 249

One composite EN and nine individual ENs were directed at units in an industrial estate. The Inspector was obliged to consider the merits of each development individually and not refuse all on the basis of the overall intensity of use and traffic generation.

- *See also Collis Radio Ltd & Eclipse Radio and TV Services Ltd v SSE & Dudley MBC [1975] 29 P&CR 390*

Bruschweiller & Others v SSE & Chelmsford DC [1996] JPL 292

Similar case to *Reed* except there was no composite EN. The Inspector only considered the overall impact of the developments. He should have considered the DPAs in respect of the individual ENs first and the overall impact last. The Judge accepted that if the Inspector had considered the matters individually and then considered the effect of precedent, he might have reached the same conclusion.

Millen v SSE & Maidstone BC [1996] JPL 735

Two notices issued, both alleging an MCU to the same mixed use, but each only required one element of the mixed use to cease. Held that, as each EN had under-enforced, s173(11) came into operation in each case to give a deemed PP for the element not required to cease. But it would have been open to the Inspector to quash one EN and combine the requirements in the other.

Biddle v SSE & Wychavon DC [1999] 4 PLR 31; [1999] JPL 835

S172 imposes no restriction on the number of ENs which the LPA may issue in respect of the same breach, nor to subsequent ones covering a more extensive area.

NOTICES – NULLITIES

Miller Mead v MHLG [1963] 2 WLR 225

Upjohn LJ in the CoA: *'A 'notice is not a nullity [where] on the face of it it appears good and it is only on proof of facts aliunde [from another place] that the notice is shown to be bad…and, therefore, it may be quashed. But supposing the notice on the face of it fails to specify some period required…On the face of it the notice does not comply with the section; it is a nullity and is so much wastepaper. No power was given to the justices to quash in such circumstances for it was unnecessary. The notice on its face is bad. Supposing then upon it's true construction the notice was hopelessly ambiguous or uncertain so that the owner or occupier could not tell in what respect it was alleged that he had developed the land without permission or it what respect it was alleged that he had failed to comply with…a condition or, again, that he could not tell with reasonable certainty what steps he had to take to remedy the alleged breaches. The notice would be bad on its face and a nullity…'*

Rhymney Valley DC v SSW [1985] JPL 27

A decision that an EN is a nullity may be challenged by judicial review.

R v SSE ex parte Hillingdon LBC [1986] JPL 717

CoA: The LPA's failure to comply with its s101 standing order (Local Government Act 1972) made the EN invalid. It could not have been considered expedient to issue the EN.

Webb v Ipswich BC [1989] EGCS 27

An *ultra vires* action could be validated retrospectively where no parties' existing rights were substantially prejudiced.

McKay v SSE & Cornwall CC & Penwith DC [1994] JPL 806

An EN requiring works for which Scheduled Ancient Monument Consent was needed but not obtained was a nullity, since it required the recipient to carry out a criminal offence.

- *See also South Hams DC v Halsey [1996] JPL 761*

R v Wicks [1996] JPL 743; [1997] JPL 1049

HoL: An EN is only a nullity if the defect is evident on the face of the document. It is not open to the defence in a criminal prosecution to go behind the EN and challenge the *vires* of the LPA's decision to issue the EN in relation to *mala fides*, bias, procedural impropriety or expediency ('residual group of invalidity grounds'); that would involve complex assessment and investigation of the background to the issue of the EN, and so should be the subject of an application for judicial review.

- *The library record (linked) includes the CoA transcript and summary only. The HoL upheld the judgment of the CoA, as described at [1997] JPL 1049.*
- *See also Britannia Assets v SSCLG [2011] EWHC 1908 (Admin); Koumis v SSCLG [2014] EWCA Civ 1723; Beg v Luton BC [2017] EWHC 3435 (Admin); Dill v SSHCLG [2020] UKSC 20*

South Hams DC v Halsey [1996] JPL 761

CoA: Carrying out the requirements of the EN would be a criminal offence. Glidewell LJ disagreed with the *McKay* approach on several grounds and held that nullities should be confined to the situation where there is a patent defect on the face of the EN.

R (oao Lynes & Lynes) v West Berkshire DC [2003] JPL 1137

'Immediately' is not a 'period' for the purposes of s173(9) and a failure to specify a compliance period would make an EN a nullity.

Payne v NAW & Caerphilly CBC [2006] EWHC 597 (Admin); [2007] JPL 117

An EN containing a requirement that a restoration scheme be submitted for LPA approval failed to comply with the requirement in s173(3) to specify the steps which the authority requires to be taken. It was a nullity, incapable of being rectified by the Inspector.

- *See also Oates v SSCLG & Canterbury CC [2017] EWHC 2716 (Admin), {2018] EWCA Civ 2229*

Davenport v The Mayor and Citizens of the City of Westminster [2011] EWCA Civ 458; [2011] JPL 1325

EN alleged a BOC on a personal PP which restricted the land use at the end of the period. The EN should have referred to s57(2) rather than alleging a BOC but, on the facts, was not null. The recipient would have known the matters which appeared to constitute the breach of planning control and the activities required to cease.

- *Case Law Update 16*

Britannia Assets v SSCLG & Medway Council [2011] EWHC 1908 (Admin)

If asked to determine whether an EN is a nullity, the Inspector's jurisdiction is confined to assessing the scope of the appeal under s174. They do not have jurisdiction to deal with submissions as to whether the LPA acted outside their powers by issuing the notice. The proper course to bring that compliant is by way of judicial review.

- *Case Law Update 16*
- *Following Gazelle Properties Ltd v Bath and North East Somerset Council [2010] EWHC 3127 (Admin) but see also Beg v Luton [2017] EWHC 3435 (Admin)*

Koumis v SSCLG [2013] EWHC 2966 (Admin); [2014] EWCA Civ 1723; [2015] JPL 682

A variation notice issued by the LPA, which purported to vary the compliance period but failed to specify a period to commence on the date that the EN took effect, was a nullity. This did not render the EN a nullity, which appeared on its face to comply with the statutory requirements. A LPA which issues an erroneous s173A variation notice ought to be able to apply to withdraw and replace it, without having the EN quashed by the Court.

Sullivan LJ emphasised in paragraph 80 of his judgment: *'…Given the breadth of the current statutory power [under s176] to correct error on appeal…the Miller-Mead approach to nullity should be confined to those cases where the failure to comply with the statutory requirements in section 173 is apparent on the face of the enforcement notice itself (as varied under section 173A)'.*

- *Case Law Update 26*
- *See also Beg & Others v Luton BC [2017] EWHC 3435 (Admin)*

Silver v SSCLG & Camden LBC & Tankel [2014] EWHC 2729 (Admin) ; [2015] JPL 154

The RFEN failed to specify why the Council considered it expedient to issue the EN. The Court held that it was impermissible to look beyond the EN where the reasons for it were maintained by the LPA in substance and had been articulated by s172(1)(b).

Beg & Others v Luton BC [2017] EWHC 3435 (Admin), [2018] JPL 703

Whether LPA had the required delegations in place when the EN was issued is not ground for treating an EN as a nullity. Held in paragraph 7:

'…the planning legislation does not contain any requirement for an enforcement notice to be signed…even if there was such a requirement, an error as to whether the person taking an action is or is not authorised to do so is not an error on the face of the notice. That depends upon looking at material outside the notice. The points taken by the appellants in this case could not fall within the scope of what can amount to a nullity argument as defined in [80] of Koumis. The effect of that judgment is that the type of error which could amount to a nullity argument is that a notice fails to say anything about what the alleged breach of planning control is, or anything about what steps are required to remedy a breach of planning control, or fails to specify a time for compliance, i.e. statutory requirements as to what must be said on the face of the notice'.

Concerns regarding authority to issue an EN could be pursued by application for judicial review or submissions that the EN is invalid. The effect of *Wicks* is that such arguments cannot properly be a defence to an allegation under s179. The EN did not have to be signed by the person authorised to issue it, so the fact that it was signed by a legal assistant did not make it invalid.

Oates v SSCLG & Canterbury CC [2017] EWHC 2716 (Admin), [2018] EWCA Civ 2229; [2019] JPL 251

The Inspector corrected the EN to delete the 'vague and subjective' requirement (3) rather than concluding that the EN was a whole was null. The HC endorsed the approach, and this was not pursued in the CoA. Compliance with steps (1) and (2) would suffice to remedy the breach and (3) could be deleted without causing injustice. The Inspector was entitled to use their corrective powers to remove what she found to be unnecessary. Mr Waksman QC, sitting as a judge in the HC disagreed with the "strict approach" in *Payne* and distilled the following legal principles from *Miller Mead* and subsequent case law:

1. If an EN does not comply with "the statutory requirements" under s173(1) or (3) and (4), it is a nullity and cannot be saved by s176(1).
2. To so comply, the EN must inform the recipient with reasonable certainty what the breach of planning control is and what must be done to remedy it.
3. Some degree of uncertainty or other defect in the relevant section of the EN does not mean that there is non-compliance with the statutory requirements.
4. A decision by the Inspector as to whether a defect in the EN renders it null is a matter of judgment and should be accorded very considerable weight.
5. Whether a defect renders the EN null must be viewed in context: the importance or otherwise of that part of the EN; whether the defect is bound up with the remainder of that section; whether the EN would be valid in the absence of the defect. It is open to an Inspector to conclude that, while part of the relevant section of the EN was uncertain and could not stand, the EN as a whole complied with the statutory requirements. The Inspector could delete the offending part.
6. The Inspector and Courts should approach the exercise in a way which is not unduly technical or formalistic.

- *Case Law Update 34*
- *Knowledge Matters 37*

NOTICES – SECOND BITE/S171B(4)(B)

William Boyer (Transport) Ltd v SSE & Hounslow LBC [1996] JPL B129

CoA: the 10 year immunity period applies to further EN issued after 27 July 1992, not the earlier regime whereby the breach had to have occurred prior to 31 December 1963.

- *See also R (oao Colver) v SSCLG & Richmond DC [2008] EWHC 2500 (Admin)*

Jarmain v SSETR & Welwyn Hatfield DC [2000] EWCA Civ 126; [2000] JPL 1063

CoA: it is the physical reality of the breach that matters. If the first EN described the legal reality as a BoC, when in reality there had been unauthorised development, the second bite provisions apply as long as the facts of the allegation are the same.

A second EN can only be issued when the first had been issued within the time limit applicable to the proper facts of the case.

Fidler v FSS & Reigate and Banstead BC [2003] EWHC 2003 (Admin), [2004] EWCA Civ 1295; [2005] JPL 510

HC judgement, upheld in the CoA, that the Inspector had erred in finding that Notice I was a 'second bite' notice under s171B(4)(b). It had encompassed a wider range of components than the aggregate of the uses covered by the earlier notices, B, D and E and did not simply describe more accurately what was previously mis-described. Even if the Council had intended in the earlier notices to target the whole of the mixed use on the site, the notices themselves fell materially short of doing so, whether viewed individually or collectively. S171B(4)(b) did not apply in the circumstances.

Sanders & Sanders v FSS & Epping Forest DC [2004] EWHC 1194 (Admin)

The 'second bite' provisions do not apply where matters alleged in the second EN are less a misdescription, but more an accurate reflection of the range and nature of the uses or operations on the site at the times that the two notices were issued.

R (oao Romer) v FSS [2006] EWHC 3480 (Admin); [2007] JPL 1354

The first EN alleged 'change of use of garages to living accommodation' at no. 223 when the breach was occurring at no. 221; both sites were owned by appellant. The second EN alleged 'change of use of the storage area and garage and the erection of a single storey building to provide living accommodation' and got the site right. Held that the second EN dealt with the same development and was served on the same owner; that the first EN concerned adjacent land did not remove it from the ambit of s171B(4)(b).

R (oao Lambrou) v SSCLG [2013] EWHC 325 (Admin); [2014] JPL 538

Case indicating that the Courts will take a liberal view of 'purported'; held that an EN could be issued under s171B(4) although the first EN not been properly authorised and was technically null, and thus there had been a successful appeal against prosecution.

Akhtar v SSCLG & Barking and Dagenham LBC [2017] EWHC 1840 (Admin)

EN issued in July 2014 had failed to include an effective date and been declared null. The Inspector addressed and was correct that the second EN, issued in identical terms, would relate to the immunity period which would have arisen under the first EN.

- *Knowledge Matters 34*

NOTICES – SERVICE

Skinner & King v SSE & Eastleigh BC [1978] JPL 842

An EN alleging an MCU of a complex of buildings had been served on the owner; other ENs had been served on individual tenants alleging specific activities. It was held that no party had been substantially prejudiced by the failure to serve identical notices to all.

Porritt & Williams v SSE & Bromley LBC [1988] JPL 414

An EN which only gave 27 days instead of 28 days prior to coming into effect was not invalid. The Inspector has discretion to disregard the defect [providing that no recipient is substantially prejudiced by it].

Mayes & White & Oubridge v SSW & Dinefwr BC [1989] JPL 848

Individual occupiers were not served with copies of the EN but not been substantially prejudiced. They had been given an opportunity to make written representations before the appeal was dismissed.

Dyer v SSE & Purbeck DC [1996] JPL 740

Notices were not received by the appellant until five days before they were due to take effect. The SSE conceded that the notices had not been served in compliance with s172(3), but the appellant had not been substantially prejudiced because he had lodged his appeal in time. The decision to disregard the bad service under s176(5) was upheld.

Ralls v SSE [1998] JPL 444

Two ENs issued months apart and differently addressed to the appellant and his mother; the allegations were differently described but the requirements were the same. The HC rejected the claim that the ENs had not been properly served. If additional words are written on the EN, namely the name and address of the person being served, it does not alter the rest of the EN or prevent the rest of the EN from being a copy of the EN which is issued. There was no prejudice in any event.

- *The JPL notes that the case went to the CoA on a different ground.*

Newham LBC v Miah [2016] EWHC 1043 (Admin)

A land registry address is proper service if a LPA has not been given another address. The LPA does not need to check with other Council departments to see if they have a record of the last known address. The statutory framework points to the knowledge of the LPA as relevant for the service of an EN.

- *This judgment was made in respect of Newham's appeal against a Magistrate's Court decision to acquit the respondent of breaches of an EN. The principle should nevertheless apply in respect of ground (e) appeals.*

PLANNING CONTRAVENTION NOTICE

R v Teignbridge DC ex parte Teignbridge Quay Co Ltd [1996] JPL 828

It must appear to a LPA that there has been a breach of planning control before they are justified in issuing a PCN.

Meecham v SSCLG & Uttlesford DC [2013] HC

Appeal on ground (d) dismissed on the basis that incorrect information given in response to two PCNs amounted to deliberate concealment. Claim that the PCNs related to a different breach of planning control to that alleged in the EN was rejected. The PCNs and answers to them needed to be read as a whole. The Inspector was entitled to take the responses into account, which included that land was not being used for the purpose alleged. The evidence was relevant to ground (d).

- *Case Law Update 23*

PLANNING PERMISSIONS – COMMENCEMENT AND CONDITIONS PRECEDENT

Malvern Hills DC v SSE & Robert Barnes and Co Ltd [1982] JPL 439

CoA: The marking out of a line and the width of a road with pegs amounted to 'material operations' within s56(4)(d).

Thayer v SSE [1992] JPL 264

CoA upheld *Malvern Hills* in that the test for commencement is not the 'quantum' of work undertaken, but whether the work was 'related to the PP involved'. Excavation works entailing the removal of 12' of hedge and a gate to create an opening for access to the site were 'done with the intention of carrying out the PP' and amounted to a 'specified operation' within the meaning of s43(1) of TCPA71.

F G Whitley & Sons v SSW & Clwyd CC [1990] JPL 678; [1992] JPL 856

CoA: Quarrying commenced prior to the approval of a scheme required by condition. The question was whether the development was permitted by the PP when read with the conditions. If the development was in contravention of 'conditions precedent', it had not commenced in accordance with the PP; the '*Whitley* principle'. Enforcement action may be taken in respect of development without PP or BoC; either would be correct.

An exception (1) to that principle applied since the scheme had been submitted for approval on time. The scheme was approved after the date for implementation of the PP had passed and before the EN was issued. In these circumstances, the works in BoC constituted the 'beginning' of development. If, as was the case, details were eventually approved, the PP had been implemented.

The opening of a 12' gap in a hedge and limited ground works were sufficient to commence development.

- *See also R v Elmbridge BC ex parte Oakimber [1991] 3 PLR 35*

Agecrest v Gwynedd CC [1998] JPL 325

Exception to the *Whitley* principle (2): conditions required the submission and approval of schemes before development commenced, but the LPA subsequently agreed that development could start without full compliance with the conditions.

- *This case related to PP granted in 1967, when there was no equivalent in the TCPA of s73; Leisure GB Plc v Isle of Wight [1999] 80 P&CR 370 and Henry Boot Homes Ltd v Bassetlaw DC [2002] EWCA Civ 983*

R v Flintshire CC ex parte Somerfield Stores [1998] PLCR 336

Exception to the *Whitley* principle (3): a condition had been complied with in substance, since the relevant scheme had been submitted and approved, but the formalities including the notice of approval had not been completed by the time that work began.

Leisure GB Plc v Isle of Wight [1999] 80 P&CR 80

Roadworks pursuant to a PP were not authorised by the PP and in breach of planning control due to non-compliance with conditions requiring the approval of a programme of working and tree protection measures before the commencement of development. There was no basis for departing from the well-established principle that unauthorised works do not constitute 'material operations comprised in the development.

South Gloucestershire Council v SSETR & Alvis Bros Ltd [1999] JPL B99

Works comprising a 'material operation' could satisfy s65 of the Land Commission Act 1967 despite being carried out before the grant of PP. Since the work was part of the development applied for, it became permitted once PP was granted. Although begun for the purpose of the Land Commission Act, the work was the same as that covered by the PP; the work satisfied the sole test, which was whether it was for the purpose of the development to which the PP related.

Riordan Communications Ltd v South Buckinghamshire DC [2000] 1 PLR 45; [2000] JPL 594

The test as to whether the works undertaken were for the purpose of the development permitted was entirely objective. The intentions of the developer were not relevant. Even if the works were carried out solely to keep the PP alive, and with no intention to proceed, the works may still suffice to initiate the development comprised in the PP.

- *East Dumbartonshire Council v SSS & Mactaggart Mickel Ltd [1999] 1 PLR 53*

Connaught Quarries Ltd v SSETR & East Hampshire DC [2001] JPL 1210

The beginning of a material operation within the meaning s56(2) and s56(4), for the purposes of keeping a PP alive, has to be more than *de minimis*.

Commercial Land Ltd v SSTLR & Kensington and Chelsea RBC [2002] EWHC 1264 (Admin); [2003] JPL 358

Held that, in considering whether a material operation is 'comprised in the development' for the purposes of s56(2), it is insufficient to simply consider the material differences between what has been built and what was approved. Similarities and the degree of compliance with the approved plans are also relevant, together with the extent to which the works are substantially usable in implementing the PP.

- *The appeal was remitted following the HCC. The same findings were made in the re-determination but with better reasoning – successfully defended in Imperial Resources SA v FSS & Kensington & Chelsea RBC [2003] JPL 1346.*

Henry Boot Homes Ltd v Bassetlaw DC [2002] EWCA Civ 983; [2003] JPL 1030

Conditions imposed on an outline PP set out requirements to be complied with 'before any development commences'; works took place before the conditions were complied with. The Council had assumed that the development had started under the outline PP, but it was held that whether works carried out in BoC amount to a lawful start on the development to which the PP relates is essentially a matter of law, to be determined in the last resort by the Courts.

Field v FSS & Crawley BC [2004] EWHC 147 (Admin)

An act of demolition preparatory to re-development was the commencement of that development – in circumstances where the PP being implemented had specifically included PP for the demolition (whether or not required). Some types of development might never involve a material operation as listed in s56, and so the carrying out of such an operation is not a prerequisite to the commencement of development permitted.

R (oao Hart Aggregates Ltd) v Hartlepool BC [2005] EWHC 840 (Admin)

A distinction should be drawn between cases where no details are submitted and there is only a PP in principle, and where there is only a failure to obtain approval for one aspect of the scheme. In the former, the PP is not implemented by works undertaken; in the latter, the PP has been implemented but enforcement can be taken against BoC.

Each case must be considered on its facts; the outcome may depend upon the number and significance of the conditions not complied with. For there to be a breach of a 'condition precedent' and start of development without PP, the condition must go to the heart of the PP and expressly prohibit any development before development commences.

- *Applied in Meisels v SSHCLG & Hackney LBC [2019] EWHC 1987 (Admin)*

Bedford BC v SSCLG & Murzyn [2008] EWHC 2304 (Admin); [2009] JPL 604

Landscaping and enclosure conditions did not state that no development shall take place until a scheme was submitted. They could not be distinguished from the condition in *Hart* which was rejected as a condition precedent; and did not go to the heart of the PP.

- *Concise summary of relevant case law*
- *Case Law Updates 5 & 7*

Rastrum & Benge v SSCLG & Rother DC [2009] EWCA Civ 1340

Access works which would normally have come within s56 were commenced when the PP was no longer capable of lawful implementation; it had expired before all the required details were submitted. Neither *Whitley* nor *Hart* were relevant. Where 'conditions precedent' are not complied with then the whole PP is dead. That the works of 'commencement' were now lawful could not revive the PP.

- *Case Law Update 7*

Greyfort Properties Ltd v SSCLG & Torbay Council [2011] EWCA Civ 908; [2012] JPL 39

A condition with the wording '*before any work is commenced on site*' equated to a prohibition on the start of development and would operate as a condition precedent.

- *Case Law Update 17*

Ellaway v Cardiff CC [2014] EWHC 836 (Admin)

The *Whitley* exception may apply in an EIA case. *Whitley* is consistent with the Directive and the terms of the exception are clear and self-contained; it is obvious when the exception will apply. The exceptions are not closed, but it does not follow that these will be unpredictable or uncertain.

PLANNING PERMISSIONS – EFFECT ON NOTICE

R v Chichester Justices & Knight ex parte Chichester DC [1990] 60 P&CR 342; [1990] JPL 820

In cases of split decisions, the requirements of an EN should not be varied, but reliance should be placed on s180 to mitigate the effect of the EN so far as inconsistent with the PP granted, to avoid the rise of an inconsistent deemed PP under s173(11).

Cresswell v Pearson [1997] JPL 860

Where a temporary PP is subsequently granted for uses prohibited by the EN, the prohibition in the EN does not revive upon coming to the end of the period of the temporary PP. Once the PP is granted, the EN shall 'cease to have effect'; s180. This does not prevent an LPA from serving a fresh notice once the temporary PP has expired.

Rapose v Wandsworth LBC [2010] EWHC 3126 (Admin); [2011] JPL 600

This case was a judicial review of LPA's decision to exercise its s178/179 powers to carry out works required by an EN. The challenge succeeded because LPA had granted PP for 'part of the matters' and s180 is activated upon the grant, not implementation of PP.

- *Case Law Update 13*

Goremsandu v SSCLG & Harrow LBC [2015] EWHC 2194 (Admin)

EN issued in 2008 alleged the erection of an extension and required its demolition. PP subsequently granted for works to modify the extension, subject to conditions requiring completion within specified periods. LDC appeal for the extension as 'completed before July 2004' dismissed on the ground that, notwithstanding the effect of s180(1), enforcing the 2008 EN would not be inconsistent with the PP, because of the differences between what was enforced against and permitted subsequently.

Held that s180(1) deals with a situation where PP is granted subsequent to the issue of an EN. There is no rule that the requirements of an EN must be exercised in full for the EN to be effective. It is unrealistic to expect that an EN would be drafted with a view to a future grant of PP which might allow for retention of a building in part.

PLANNING PERMISSIONS – IMPLEMENTATION

Pilkington v SSE & Lancashire CC [1973] 1 WLR 1527; [1973] JPL 711

There can be any number of PPs covering the same area of land. If PP/A is implemented, making it physically impossible to implement PP/B in accordance with the terms of PP/B, then PP/B cannot be implemented.

- *See also Hillside Parks Ltd v Snowdonia NPA [2020] EWCA Civ 1440*

Prestige Homes (Southern) Ltd v SSE & Shepway DC [1992] JPL 842

Pilkington does not apply where there is no physical impossibility of carrying out works that are permitted, and 'incompatible' does not mean 'inconsistent'. Where it was physically possible for PP/B to be implemented, mere incompatibility with PP/A and the fact that the trees would be lost in BoC did not render PP/B incapable of implementation.

- *Compare with Orbit Development (Southern) Ltd v SSE & Windsor and Maidenhead RBC [1996] JPL B125.*

British Railways Board v SSE & Hounslow LBC [1994] JPL 32

HoL: If a condition is negative in character and appropriate in the light of sound planning principles, the fact that it appeared to have no reasonable prospects of being implemented does not mean that the grant of PP is irrational in the *Wednesbury* sense.

- *See also Stretch v SSE & NW Leicestershire DC [1994] JPL B55*

Handoll & Suddick v Warner & Goodman & Street & East Lindsay DC [1995] JPL 930

CoA: dwelling subject to an AOC was sited 90' from its permitted location. The PP was not implemented; the building was immune from enforcement, free of conditions.

Butcher v SSE & Maidstone BC [1996] JPL 636

A PP granted under s177(5) is no different in character or effect from one granted under Part III. A PP granted on a DPA must be implemented before it can come into effect, and whether it is implemented is a matter of fact and degree. The continuance of a use for which PP is granted would generally satisfy a conclusion that the PP is implemented, but some other factors may be material. Some conscious action is required to implement the PP, so that the conditions bite.

Singh v SSCLG & Sandwell BC [2010] EWHC 1621 (Admin); [2011] JPL 777

A distinction needs to be made between 'implementation' and 'completion'; a development must be regarded holistically. Where some parts are incapable of being implemented or completed, the whole development becomes unlawful.

- *Case Law Update 12*

R (oao Robert Hitchens Ltd) v Worcestershire CC [2015] EWCA Civ 1060; [2016] JPL 373

The CoA held that, for the purposes of a particular s106, implementation of a PP should be construed as meaning the completion and not the commencement of development.

Hussein v SSCLG [2017] EWCA Civ 1060

EN alleging the construction of a building without PP, given material differences between the building and 2000, 2001 and 2002 PPs, was upheld on appeal in 2012. The Inspector found

that there had been a 'material commencement' of the 2001 and 2002 PPs, but no PP had been implemented. At a second appeal, a LDC for 'alterations of the existing building to enable implementation of [the 2002 PP]' was dismissed on the basis of the first Inspector's conclusion; the PP had not been implemented and had lapsed.

Held that it is possible to commence a development for the purpose of s56 and thereby meet a deadline forming a condition of the permission, and then later to deviate from the PP in a manner that later becomes an enforcement issue, without retrospectively altering the fact that the commencement of the development had occurred for s56.

Kerr J was "prepared to assume" in the appellant's favour that the second Inspector had adopted an error made by the first, to treat the development as not 'commenced' by reference to a post-commencement deviation from the terms of the PP. The phrase 'material commencement' indicates that the works undertaken could be regarded as pursuant to some or all of the PPs granted. There is a difficulty where the verb 'implement' is used to elide commencement for s56 purposes, and whether works subsequently undertaken accord with what is permitted.

- *The challenge nevertheless failed, because the LDC had been correctly refused on the basis that it would contravene the requirements of an EN in force*
- *Case Law Update 31*

***Stanius v SSCLG & Ealing LBC* (CO 11.4.17)**

The Inspector erred in finding that they could not issue a LDC because the development would contravene an EN in force; they had failed to interpret the EN so that it did not interfere with the appellant's lawful use rights. The sole question was whether the development complied with Article 3 and Schedule 2, Part 1, Class E of the GPDO.

- *Case Law Update 31*

***Choice Place Properties Ltd v SSHCLG & LB of Barnett* Case No: CO/1756/2020**

PP was granted for the demolition of semi-detached houses and erection of a 3-storey block of flats in their place, subject to a condition the development to be carried out in accordance with specified plans, including a street elevation drawing P.04. The reason for the condition was "for the avoidance of doubt and in the interests of proper planning and so as to ensure that the development is carried out fully in accordance with the plans as assessed in accordance with" specified development plan policies.

Drawing P.04, which purported to be to scale, rather than merely illustrative, showed the proposed building as lower than the existing neighbouring property on one side and taller than that on other side, forming a stepped relationship. However, having regard to the scale on drawing P.04 and spot heights on other drawings, it would be taller than both neighbouring buildings. Inadvertently, those neighbouring buildings were incorrectly depicted on drawing P.04.

An LDC was sought under s192(1)(b) to confirm that the planning permission could be "implemented in accordance with all the approved drawings." This was refused and an appeal was dismissed.

Dove J held the development was not capable of being implemented in accordance with the approved drawings because it was not capable of being implemented in a manner which replicated the street elevations on drawing P.04, which purported to be shown to scale. That conclusion did not involve any suggestion that the permission might be capable of controlling the scale or appearance of adjacent dwellings beyond the application site.

Barton Park Estates Ltd v SSHCLG & Dartmoor NPA [2021] EWHC 1200 (Admin); [2022] EWCA Civ 833

PP granted in 1987 allowed for "…9 residential vans, 16 holiday chalets, 18 static vans & 30 touring units", with no condition to limit the number of units to those specified in that description, but subject to the following conditions:

> (e) The chalets, static holiday caravans and pitches for touring units shall only be occupied between 15 March and 15 November in each year. *Reason*: To protect the character of this part of the Dartmoor National Park during the winter months.
>
> and
>
> (f) No touring unit shall remain on the site for more than 3 weeks in each year. *Reason*: To ensure that part of the site remains available for use by touring caravans."

An LDC was sought under s192 for the stationing of up to 80 caravans on the site "for the purpose of human habitation."

This could encompass a scenario in which all 80 caravans would be used for permanent residential accommodation. Having regard to the whole of the 1987 PP, including its conditions, it was right to interpret that PP as permitting a caravan site providing both permanent residential accommodation, and holiday accommodation, the latter in the sense that year round use was prevented by condition.

The proposed use would not be of a different "type" to the existing use, namely a caravan site. Nevertheless, the Inspector applied the correct test when concluding there would be a material change of use, namely that there would be a change in the "definable character of the use", that phrase being approved in *Hertfordshire CC v SSCLG & Metal and Waste Recycling Ltd* [2012] EWCA Civ 1473. In that context she could have regard to off-site effects and this was not simply a caravan site "on a larger scale", as in *Hertfordshire*, or "simply an increase in the number of caravans", as in *Cotswold Grange Country Park LLP v SSCLG & Tewkesbury DC* [2014] EWHC 1138 (Admin); [2014] JPL 981.

Upheld in CoA

Fiske v Test Valley BC & Woodington Solar Ltd [2022] EWHC 1111 (Admin)

There is no statutory requirement for the decision maker to have regard to the consequences of granting planning permission which was incompatible with an earlier permission for the same site. It is for the developer to resolve any incompatibility and choose which permission to carry out.

Hillside Parks Ltd v Snowdonia National Park Authority [2022] UKSC 30

- express words in the master permission can make individual components of the development severable
- in a multi-unit development, part completion is not unlawful and not subject to enforcement
- where implementing a later permission renders any of the earlier permission is physically impossible, the earlier permission would then become unlawful for further development (unless the incompatibility is not material in the context of the scheme as a whole)
- a permission which departed in a material way from that scheme would make it physically impossible and unlawful to carry out any further development
- a later permission can be seen as authorising a variation of an earlier permission if it covers the whole site

PLANNING PERMISSIONS – INTERPRETATION

Slough Estates v Slough BC [1969] 21 P&CR 573

The meaning of a PP should be apparent from its face since it is the public document available. If the PP refers to a plan or application, that may be used as an aid to construction. Further extrinsic evidence may be admitted in order to resolve ambiguity but not to alter the apparent meaning of the PP.

R v SSE ex parte Reinisch [1971] 22 P&CR 1022

A PP is a public document and not to be construed like a contract. The intentions of the parties are of little or no relevance. A PP is effective if it accurately describes the development so that anyone taking it to the land will be able to see, without doubt, precisely what it is which has been authorised.

Brutus v Cozens [1972] UKHL 6; [1973] AC 854

Lord Reid held that *'the meaning of an ordinary word of the English language is not a question of law. The proper construction of a statute is a question of law.'*

Unless the context shows otherwise, an ordinary word used in statute should be taken to have its ordinary meaning. It is for a tribunal to decide whether words of the statute do or do not apply to the facts, given the ordinary usage of language and circumstances. If the decision is challenged, the '*question would normally be whether their decision was unreasonable in the sense that no tribunal acquainted with the ordinary use of language could reasonably reach that decision'.* A dictionary does not always assist.

Manning v SSE & Harrow LBC [1976] JPL 634

Where a PP contained clear references to earlier permissions, it was appropriate to look at the previous history in construing the PP.

Centre Hotels (Cranston) Ltd v SSE & Hammersmith and Fulham LBC [1982] JPL 108

A PP is not to be construed by reference to subsequent events.

- But see Lawson Builders Ltd v SSCLG & Wakefield MDC [2015] EWCA Civ 122, Wood v SSCLG & the Broads Authority [2015] EWHC 2368 (Admin); Kemball v SSCLG [2015] EWHC 3368 (Admin)

Wivenhoe Port v Colchester BC [1985] JPL 396

CoA: PP for an MCU does not confer PP for incidental operational development.

- Kane Construction v SSCLG & Nottinghamshire CC [2010] EWHC 2227 (Admin)

Calder Gravels v Kirklees MBC (1989) 60 PLR 322; [1990] 2 PLR 26,

CoA: 'The presumption of regularity' applied when copies of decisions or plans could not be found, but extrinsic evidence indicated that PP had been granted.

Wyre Forest BC v SSE & Allen's Caravans [1990] 2 WLR 517; [1990] JPL 724

HoL: The statutory definition of caravan in the CSCDA60 and CSA68 applies in construing all permissions relating to caravans.

'*If Parliament in a statutory enactment defines its terms (whether by enlarging or by restricting the ordinary meaning of a word or expression), it must intend that, in the absence of a clear indication to the contrary, those terms as defined shall govern what is proposed, authorised or done under or by reference to that enactment.'*

R v Elmbridge BC ex parte Oakimber [1991] 3 PLR 35; [1992] JPL 48

CoA: The subjective intention of the grantor and grantee, and other circumstances in which the application was made, and approval was given, could be considered in construing the PP: 'the factual matrix'.

- *See also Staffordshire Moorlands v Cartwright [1992] JPL 139; Taylor Woodhouse v Doncaster MBC [1993] JPL 1352*

Slough BC v SSE & Oury [1995] JPL 1128

CoA: outline PP for office development was granted under the TCPA General Regulations 1976. The detailed approval provided for an increase in floorspace. The Court rejected an approach that, if a PP is clear on its face, it should still be interpreted in the light of the application and plan. '*The public should be able to rely on a document which is plain on its face without being required to consider whether there is any discrepancy between the permission and the application*.' The outline PP was for an office of unlimited size.

- *Applied in Springfield Minerals v SSW [1995] EGCS 174, where a PP for 'two quarries' was held to mean just that and any attempt to define the extent by reference to the application or plan was rejected.*

R (oao Shepway DC) v Ashford BC [1998] EWHC Admin 488; JPL 1073

There is no magic formula to incorporating the application and plans into the PP but more is required than a mere reference to the application on the face of the PP. Some words are needed sufficient to inform a reasonable reader that the application forms part of the PP such as '…in accordance with the plans and application…' or '…on the terms of the application…' The words would need to appear in the operative part of the PP dealing with the development and the terms in which the PP is granted.

R (oao Campbell Court Property) v SSETR [2001] EWHC Admin 102

Sullivan J: *'The first port of call in any examination of extrinsic evidence will usually be the application for permission'.*

- *Quoted in Breckland DC v SSHCLG [2020] EWHC 292 (Admin)*

R (oao Reid & Reid Motors) v SSTLR & Mid-Bedfordshire DC [2002] EWHC 2174 (Admin)

PP granted for use in 1992 subject to 12 conditions. In 2002, PP granted under s73 for 'retention of use without compliance with condition no. 2…' and this was stated to be subject to 'Conditions: None'. An Inspector corrected and upheld an EN directed at a different use, finding that the fallback position was the use of the land as permitted in 1992 subject to all of the 12 conditions except for no. 2.

The appellant's challenge that the true fallback position was the 1992 use unconstrained by any conditions did not succeed; the 2002 PP was not ambiguous and so there could be no recourse to extrinsic materials in construing its meaning.

- *Sullivan J also cautioned in paragraph 59: 'When issuing a fresh planning permission under section 73, it is highly desirable that all the conditions to which [it] will be subject should be restated in the new permission and not left to a process of cross-referencing…'*
- *Cited in Lambeth LBC v SSCLG & Aberdeen Asset Management, Nottinghamshire CC & HHGL Ltd [2019] UKSC 33*

Barnett v SSCLG & East Hants DC [2008] EWHC 1601 (Admin), [2009] EWCA Civ 476; [2009] JPL 1598

Ashford does not apply to a full PP, which must be read with regard to the approved plans. In the absence of contrary evidence, the plans will be as listed in the application.

- *Case Law Update 6*

Lawson Builders Ltd & Lawson & Lawson v SSCLG & Wakefield MDC [2013] EWHC 3388 (Admin), [2015] EWCA Civ 122; [2015] JPL 896

A dwellinghouse was completed in BoC on a 2004 PP. A s73 appeal was made in 2010 to 'remove or vary' the conditions; again, PP was granted subject to (new) conditions which were not complied with. An LDC application was made for the development completed in BoC on the 2004 PP.

On appeal, the Inspector found that the development had been completed by 2009 and the 2010 application had sought, in effect, retrospective PP under s73A. The Council could still enforce against non-compliance with conditions attached to the 2010 PP – and, in the absence of that PP, the use of the dwelling would not be lawful.

The Court agreed that there was no purpose to the 2009 application unless it was to bring the development within planning control. The appellants could not ignore the 2010 PP or argue that they had a choice in implementation. If development is completed in breach of a pre-condition, the power to grant PP derives from s73A and s70. The 2010 PP was implemented since the application was retrospective in effect.

- *Case Law Updates 24 & 27*

Wood v SSCLG & the Broads Authority [2015] EWHC 2368 (Admin)

Inspector sought to identify the lawful use of the planning unit under several PP granted and implemented. He was entitled to consider all of the publicly available documents and drawings comprised in the various applications, as well as the decision notices. He was also entitled to have regard to the development actually carried out on the site. A 'pragmatic view' of the circumstances can be taken.

- *Case Law Update 28*

R (oao Kemball) v SSCLG [2015] EWHC 3388 (Admin); [2016] JPL 359

Further support for taking 'a pragmatic view'; post-decision events and documentation can be considered, such as development on the ground or subsequent planning decisions, which shed light on the construction or factual issues to be resolved.

- *Case Law Update 28*

Trump International Golf Club Scotland Ltd & Another v The Scottish Ministers [2015] UKSC 74

Lord Carnwath: it is not right to regard the process of interpreting a PP as differing materially from that appropriate to other legal documents [which] must be interpreted in a particular legal and factual context. A PP is a public document which may be relied on by parties unrelated to those originally involved. Planning conditions may also be used to support criminal proceedings.

When the court is concerned with the interpretation of words in a condition in a public document…it asks itself what a reasonable reader would understand the words to mean when reading the condition in the context of the other conditions and of the consent as a whole. This is an objective exercise in which the court will have regard to the natural and ordinary meaning of the relevant words, the overall purpose of the consent, any other conditions which cast light on the purpose of the relevant words, and common sense."

University of Leicester v SSCLG & Oadby & Wigston BC [2016] EWHC 476 (Admin); [2016] JPL 709

Where a PP is ambiguous, it is permissible to look at extrinsic evidence when interpreting the uses subject to the PP, even if the planning application appears to resolve the ambiguity. Also held that, if PP is granted for the erection of a building and the PP specifies the purposes for which the building may be used, s75(3) has no application.

- *Case Law Update 29*

Lambeth LBC v SSCLG & Aberdeen Asset Management, Nottinghamshire CC & HHGL Ltd [2017] EWHC 2412 (Admin), [2018] EWCA Civ 844, [2019] UKSC 33; [2020] JPL 31

The Supreme Court considered whether a condition restricting the use of the premises should be implied into a s73 PP granted by the LPA or, alternatively, whether the PP should be interpreted as containing such a condition. The sole judgment, which overturned that of the High Court and CoA, was given by Lord Carnwarth for the unanimous Supreme Court.

Lord Carnwarth summarised existing case law on interpretation: *'whatever the legal character of the document in question, the starting-point - and usually the end-point - is to find "the natural and ordinary meaning" of the words there used, viewed in their particular context (statutory or otherwise) and in the light of common sense.*

It was held that: '*the obvious, and…only natural, interpretation…is that the Council was approving what was applied for: that is, the variation of one condition from the original wording to the proposed wording, in effect substituting one for the other. There is certainly nothing to indicate an intention to discharge the condition altogether, or in particular to remove the restriction on sale of other than non-food goods*…'

- *Knowledge Matters 57 (HC and CoA judgments covered in KM36 and KM43)*

DB Symmetry Ltd v Swindon BC & SSHCLG [2020] EWCA Civ 1331

The Inspector did not err in granting an LDC for the 'formation and use of private access roads as private access roads' although a condition required that they and all other areas 'that serve a necessary highway purpose shall be constructed in such a manner as to ensure that each unit is served by fully functional highway'.

The condition did not expressly require dedication as a public highway or refer to the grant of rights of passage. It was not clear which parts of the development were to be dedicated as highways and the obligation imposed was one which on its face related to the construction of the roads.

The power to impose conditions should not be interpreted, in the absence of clear words, as derogating from the owner's property rights. A condition that requires a developer to dedicate land as a public highway without compensation is an unlawful condition; *Hall & Co Ltd v Shoreham by Sea UDC* [1964] 1 WLR 20 applied. The reasonable reader would not suppose the LPA intended to grant a PP subject to an invalid condition. There is a statutory mechanism for securing the adoption of a way as a public highway.

Some weight must be given to the expertise of an experienced and specialist Inspector. Her interpretation of the condition was realistic if not the most natural. The validation principle applies and the condition should be given the meaning that she ascribed to it.

- *Knowledge Matters 57 & 72*

Breckland DC v SSHLG & Plum Tree Country Park [2020] EWHC 292 (Admin)

The Inspector was entitled to find an LDC for the 'use of land as a camping and caravan site…' unambiguous. A caravan falling within the CSCDA60 or CSA68 definition could be lawfully sited on the land and occupied for human habitation, whether by holiday makers or permanently. The phrase 'caravan and camping site' should be read in an ordinary way, to

mean that the land can be used for caravans only, tents only or both, the type of caravan not being restricted if it meets the statutory definition; *Wyre Forest* applied.

The interpretative principles applicable to planning permissions apply to LDCs, and the courts have been 'extremely cautious' in permitting the admittance of extrinsic evidence for the purpose of interpreting ambiguous planning document. The lawfulness of the use set out in the LDC is "conclusively presumed", *Broxbourne* applied – and that case was similar on the facts, with the LPA trying to import limitations into a historic LDC.

- *See also Adams v SSHCLG & Huntingdonshire DC [2020] EWHC 3076 (Admin)*

***Choice Place Properties Ltd v SSHCLG & LB of Barnett* Case No: CO/1756/2020**

PP was granted for the demolition of semi-detached houses and erection of a 3-storey block of flats in their place, subject to a condition the development to be carried out in accordance with specified plans, including a street elevation drawing P.04. The reason for the condition was "for the avoidance of doubt and in the interests of proper planning and so as to ensure that the development is carried out fully in accordance with the plans as assessed in accordance with" specified development plan policies.

Drawing P.04, which purported to be to scale, rather than merely illustrative, showed the proposed building as lower than the existing neighbouring property on one side and taller than that on other side, forming a stepped relationship. However, having regard to the scale on drawing P.04 and spot heights on other drawings, it would be taller than both neighbouring buildings. Inadvertently, those neighbouring buildings were incorrectly depicted on drawing P.04.

An LDC was sought under s192(1)(b) to confirm that the planning permission could be "implemented in accordance with all the approved drawings." This was refused and an appeal was dismissed.

Dove J held the development was not capable of being implemented in accordance with the approved drawings because it was not capable of being implemented in a manner which replicated the street elevations on drawing P.04, which purported to be shown to scale. That conclusion did not involve any suggestion that the permission might be capable of controlling the scale or appearance of adjacent dwellings beyond the application site.

Barton Park Estates Ltd v SSHCLG & Dartmoor NPA [2021] EWHC 1200 (Admin)

PP granted in 1987 allowed for "…9 residential vans, 16 holiday chalets, 18 static vans & 30 touring units", with no condition to limit the number of units to those specified in that description, but subject to the following conditions:

> (e) The chalets, static holiday caravans and pitches for touring units shall only be occupied between 15 March and 15 November in each year. *Reason*: To protect the character of this part of the Dartmoor National Park during the winter months.
>
> and
>
> (f) No touring unit shall remain on the site for more than 3 weeks in each year. *Reason*: To ensure that part of the site remains available for use by touring caravans."

An LDC was sought under s192 for the stationing of up to 80 caravans on the site "for the purpose of human habitation."

This could encompass a scenario in which all 80 caravans would be used for permanent residential accommodation. Having regard to the whole of the 1987 PP, including its conditions, it was right to interpret that PP as permitting a caravan site providing both

permanent residential accommodation, and holiday accommodation, the latter in the sense that year round use was prevented by condition.

The proposed use would not be of a different "type" to the existing use, namely a caravan site. Nevertheless, the Inspector applied the correct test when concluding there would be a material change of use, namely that there would be a change in the "definable character of the use", that phrase being approved in *Hertfordshire CC v SSCLG & Metal and Waste Recycling Ltd* [2012] EWCA Civ 1473. In that context she could have regard to off-site effects and this was not simply a caravan site "on a larger scale", as in *Hertfordshire*, or "simply an increase in the number of caravans", as in *Cotswold Grange Country Park LLP v SSCLG & Tewkesbury DC* [2014] EWHC 1138 (Admin); [2014] JPL 981.

PLANNING UNIT

Vickers Armstrong v Central Land Board **[1958] 9 P&CR 33**

Changes may be made between ancillary uses, such as canteens and offices in a large factory complex, without there necessarily being an MCU of the PU as a whole.

G Percy Trentham Ltd v MHLG & Gloucestershire CC [1966] 18 P&CR 225

To determine whether there has been an MCU, consider the whole area occupied and used for a particular purpose, including any part of that area put to incidental uses.

Hawkey & Others v SSE & Mid Sussex DC [1971] 22 P&CR 610

An EN does not have to identify or relate to the whole PU but must identify the affected land. It is open to the appellant to show that there has been no MCU over the whole PU.

Burdle & Williams v SSE & New Forest RDC [1972] 1 WLR 1207

The PU should be determined by identifying the unit of occupation and whether there is physical and/or functional separation of primary uses as a matter of fact and degree. Bridge J suggested three broad categories of distinction: 1) a single PU where the unit of occupation is used for one main purpose and any secondary activities are incidental or ancillary; 2) a single PU that is in a mixed use because the land is put to two or more activities and it is not possible to say that one is incidental to another; and 3) the unit of occupation comprises two or more physically separate areas that are occupied for different and unrelated purposes. In such a case, each area used for a different main purpose, together with its incidental activities, ought to be considered as a separate PU.

Wood v SSE & Uckfield RDC [1973] 25 P&CR 303; [1973] JPL 429

Once an incidental use expands to become a primary use on its own, within a separate PU, or the PU takes on a new mixed use, it is likely that there has been an MCU.

A conservatory used for selling farm produce could not be isolated from the rest of the farm and treated as a separate PU.

- *See also Trio Thames Ltd v SSE & Reading DC [1989] JPL 914*

De Mulder v SSE [1973] 27 P&CR 379; [1974] JPL 230

An LPA cannot arbitrarily divide a PU and serve notices directed at different parts or different elements of an overall use if this would achieve a more restrictive effect than one EN directed at the whole activity on the whole unit.

- *See also Hilliard v SSE & Surrey CC [1978] JPL 840*

Johnston & Johnston v SSE & Haringey LBC [1974] 28 P&CR 424

44 lock-up garages that were occupied in groups could be regarded as one PU, if one person has control.

- *See also Rawlins v SSE [1989] JPL 439.*

Joyce Shopfitters Ltd v SSE & Bromley LBC [1976] JPL 236

If buildings are demolished, the area formerly covered continues to have same industrial use as the rest of the PU unless that part of the site is put to an inconsistent use.

- *See also Petticoat Lane Rentals v SSE [1971] 22 P&CR 703*

Frank Vyner & Son Ltd v SSE & Hammersmith LBC [1977] 243 EG 597; [1977] JPL 795

A caretaker's flat adjoining factory premises was not part of the same PU even though it was used 'in the gift' of the owners of the factory.

Newbury DC v SSE [1980] 2 WLR 379, [1981] AC 578; [1980] JPL 325

HoL: if the implementation of a PP leads to the creation of a new PU, then the existing use rights attaching to the former PU are extinguished.

TLG Building Materials v SSE & Arthur & Carrick DC [1981] JPL 513

An EN cannot be corrected so as to change the PU, if that could involve different arguments from those put forward as to the materiality or merits of an MCU.

Jennings Motors Ltd v SSE & New Forest DC [1982] 2 WLR 131; [1982] JPL 181

CoA: the physical alteration of part of a site through the erection of a new building does not necessarily result in a new PU or extinguish the use, but whether that is so may need to be relevant to whether there has been a break in the planning history.

Fuller v SSE & Dover DC [1987] JPL 854

An agricultural unit may comprise more than one planning unit.

Thames Heliport v Tower Hamlets LBC [1995] JPL 526; [1997] JPL 448

CoA: a mobile floating heliport was only moored at night, but this went beyond the use of the river for transport. There had been an MCU of land because the water rested on land. The length of the river was one PU which could be used under the 28 day rule.

Church Commissioners v SSE & Gateshead MBC [1996] JPL 669

A shop within a mall was held to be a separate PU, with its own individual primary use, although it was in retail use and the whole centre was occupied for retail purposes. While the COU of one unit might not be sufficiently material to change the character of a PU based on a mall as a whole, it would likely be material in relation to the shop itself.

Deakin v FSS [2006] EWHC 3402 (Admin); [2007] JPL 1073

The EN alleged the stationing of caravan for a use unconnected with agriculture and of a mobile home for residential purposes. The correct approach would be to determine the lawful use of the PU; the effect of the introduction of the caravans and their use on the use of the PU; and whether that effect amounted to an MCU.

- *Case Law Update 1*

R (oao Winchester CC) v SSCLG [2007] EWHC 2303 (Admin)

Inspector found that 'COU to the supply of eggs for research' involved the production of sterile eggs as raw material for and incidental to the production of vaccine elsewhere and by others. The UCO definition of an industrial process means a process for 'or incidental to' the making of any article; there is no limit on where that other process must be or who must carry it out. The COU was from B.1(c) to B.1(b) and was not development.

The Council challenged the decision on the basis that the use of one PU cannot be incidental to a primary use located on another site; *Bundle* applied. Held that the Council's approach was misconceived; the word 'incidental' is not used in the UCO in that context. The normal meaning of the words 'for or incidental to' must be applied, taking account of the circumstances of the uses taking place within the PU. If what is happening is, as a matter of fact and degree, a process that is for or incidental to the making of an article, albeit on a different PU, the position is clear.

- *Case Law Update 3*

Stone & Stone v SSCLG & Cornwall Council [2014] EWHC 1456 (Admin)

Whether an occupier of land that is subject to the EN has created a new PU is a question of fact and degree for the decision-maker. An existing lawful use authorised by PP is capable of being extinguished by the creation of a new PU.

- *Case Law Update 25*

R (oao KP JR Management Co Ltd) v Richmond LBC & Others [2018] EWHC 84 (Admin)

Challenge to (1) failure to issue an EN (2) grant of a LDC for the mooring of boats. The proper PU is a matter of judgment. It was open to the Council to find that there was one PU, the ownership area of the Crown Estates, and not that each mooring was a PU.

PRECEDENT

Collis Radio Ltd & Eclipse Radio and TV Services Ltd v SSE & Dudley MBC [1975] 29 P&CR 390; [1975] JPL 221

Precedent does not arise if there are legitimate reasons for permitting one development but not another. The Inspector may address the consequences of granting PP.

Tempo District Warehouses v SSE & Enfield LBC [1979] JPL 98

Any possible consequences for other sites if PP is granted are material considerations. If there is a general planning policy to restrict the growth of certain uses in the area, then a refusal of PP would not solely be on account of precedent.

Poundstretcher Ltd & Harris Queensway PLC v SSE & Liverpool CC [1989] JPL 90

Granting PP contrary to a policy to restrict retail sales, which had been adopted to protect shopping centres, would encourage further breaches and harm to such centres.

South Hams DC v Rule [1991] JPL 252

If the proposal involves an exception to policy, then the precedent argument is relevant. If it is policy-compliant, PP should not be refused simply for fear of precedent.

Consistency in Decision-making

Chelmsford BC v SSE & E R Alexander Ltd [1985] JPL 316

Inspectors have no power to lay down any policy or give a decision which could be regarded as a precedent on any other applications.

Barnet Meeting Room Trust v SSE & Barnet LBC [1990] JPL 430

An Inspector must give reasons for not following previous appeal decisions that have been referred to. It is necessary to say why, and not simply that the decisions can be distinguished or are not relevant.

North Wiltshire DC v SSE & Clover [1992] JPL 955, (1993) 65 P&CR 137

CoA: a previous decision is capable of being a material consideration, in part to ensure that like cases are decided in a like manner. Consistency is important to the parties and ensure public confidence, but like cases do not always have to be decided alike. An Inspector must exercise their judgment. Before disagreeing with a previous decision that is not 'distinguishable in a relevant respect', they must weigh the previous decision and give reasons for departing from it with regard to the importance of consistency.

R v SSE ex parte Baber [1996] JPL 1034

CoA: A previous appeal decision may be a material consideration if it is 'sufficient closely related' to the issues in the present case as to require it to be dealt with.

R (oao Fox Strategic Land and Property Ltd) v SSCLG & Another [2012] EWCA Civ 1198

The SoS gave 'no weight' to a recent decision and no reasons for making an inconsistent finding; *North Wiltshire* applied. The previous decision was subject to challenge but not on a ground relevant to the matter where there was inconsistency. The SoS should have considered the relevance and implications of the earlier findings and said why he was minded to depart from them.

Baroness Cumberlege of Newick & Cumberlege v SSCLG & DLA Delivery Ltd [2017] EWHC 2057 (Admin), [2018] EWCA 1305; [2018] JPL 1268

The relevant test for 'material considerations': It is not enough that, in the judge's view, consideration of a particular matter might realistically have made a difference; it is necessary to show that the matter was one that the statute, expressly or impliedly, requires to be taken into account. When account of a particular matter is not required by an enactment, a decision may be invalid when no reasonable decision maker in the circumstances would have failed to take account of that matter.

Did the SoS fail to have regard to a relevant previous appeal decision? Policies issued to guide the exercise of administrative discretion are an essential means of securing consistency in decision-making and should be consistently applied. Previous decisions of the SoS or Inspectors are capable of being material considerations. The HC was right to reject the submission that, when a previous decision has not been placed before the SoS, he/she is never obliged to have regard to it. There can be no "absolute rule".

Three propositions are accepted: 1) Since consistency in planning decision-making is important, there will be cases in which it would be unreasonable for the SoS not to have regard to a previous appeal decision bearing on the issues in the appeal he is considering. 2) The court should not attempt to prescribe or limit the circumstances in which a previous decision can be a material consideration. 3) The circumstances in which it can be unreasonable for the SoS to fail to consider a previous appeal decision that has not been brought to his notice by one of the parties will vary.

"*I would not accept that, as a matter of law the Secretary of State ought to be aware of every previous decision taken in his name…that concept is unrealistic and unworkable, given the number of decisions on planning appeals that have been made, year upon year, since the modern statutory code came into existence…"*

There will, however, be circumstances in which, having regard to the interests of consistency in decision-making, the Court is prepared to hold that the SoS has acted unreasonably in not taking account of a previous decision of his own. Whether this is so in a particular case will depend on the facts and circumstances.

There were at least three factors which, taken together, made it unreasonable for the SoS not to have regard to the previous decision: 1) The two proposals were for the same form of development in the same district, and the planning applications had been before the LPA for determination at the same time. 2) Both appeals had been recovered for determination by for the same reason; implicit in the recovery decision was the need for a consistent approach to their determination. 3) The appeals were before the SoS at the same time, and the two decision-making processes were largely concurrent.

There is a higher obligation on the SoS, as policy maker, to explain differences in approach from his or her own previous decisions, than an Inspector will have to explain their differences with another Inspector's decision.

- *Knowledge Matters 35 and 45*

R (oao Tate) v Northumberland CC & Leffers-Smith [2018] EWCA Civ 1519

CoA: the LPA failed to explain why it was departing from an Inspector's decision relating to the same site and granting PP for development which the Inspector had found to be contrary to policy. The LPA only had to give such explanation in a few sentences, but since it had failed to do so, it had not made a lawful decision and the PP was quashed.

The HC judge had not referred to case law on consistency in planning decisions, but her approach had been "congruent with it, and her conclusions correct".

PROCEDURAL FAIRNESS

See also the Site Visits, Hearings and Inquiries ITM chapters

Morris v SSE & Thurrock BC [1975] 31 P&CR 216

A requirement omitted from the EN in error could be inserted by the Inspector, but there is a duty to go back to the parties first.

Performance Cars Ltd v SSE [1977] JPL 585

CoA: An extended lunch break gave the appellant insufficient time to look through a petition which the LPA had declined to show previously.

Gill v SSE [1978] JPL 373

All the harm and inconvenience caused by an adjournment could be met by an award of costs; the Department's or Inspector's convenience was another matter.

Greycoat Commercial Estates v Radmore [1981] The Times 14.7.81

When asked for an adjournment, the Inspector should consider whether some of the participants might consider a refusal as unreasonable.

Bernard Wheatcroft Ltd v SSE & Harborough DC [1982] JPL 37

On appeal, an amendment to the plans can accepted and approved through a conditional PP, provided there is no substantial difference between what was originally applied for and the amended scheme. It is necessary to ask whether accepting the amendments would deprive those who should have been consulted of an opportunity for comment.

- *Ioannou v SSCLG & Enfield LBC [2014] EWCA Civ 1432*

R v SSE ex parte Mistral Investments [1984] JPL 516

It is essential to hear the arguments from all parties affected before deciding to adjourn.

Knights Motors v SSE [1984] JPL 584

Hearsay evidence is admissible at inquiry; an inquiry is not a criminal trial.

Blight v SSE & Mid Sussex DC [1988] JPL 565

Statements were received 12 days prior to the inquiry. A refusal to adjourn was not unfair in the absence of any evidence that the appellant had been prejudiced.

Majorpier Ltd v SSE & Southwark LBC [1990] 59 P&CR 453

The inquiry was adjourned to a fixed day for a planning application to be submitted. The appellant was not advised of when the application was considered, and it was refused. His solicitors forgot about the adjourned date; Counsel appeared halfway through the inquiry without their client or papers. The appellant had been deprived of an opportunity to be heard in person or call a witness. An adjournment should have been granted.

K G Diecasting (Weston) Ltd v SSE & Woodspring DC [1993] JPL 925

If a submission is to be dealt with as a serious possibility, it should be led in evidence-in-chief and cannot be left to be drawn out only in cross examination and re-examination.

- *White & Cooper & Phillips v SSE [1996] JPL B108*

R v SSE & Leeds CC ex parte Ramzan (QBD 18.12.97 CO/2202/97)

An appeal on ground (d) was dealt with by WR at the appellant's request. The Inspector was entitled to find his evidence inconsistent and unreliable, and give it little weight, without making any further offer of an inquiry or referring back for more information.

West Lancashire DC v SSE [1999] JPL 890

CoA: Whether to adjourn is at the Inspector's discretion in the circumstances. It was not unreasonable to refuse to adjourn when the LPA's witness was unable to attend, because there was no factual dispute about the evidence, no one wished to cross-examine, another expert was available and the proof had been accepted as evidence.

Mahajan v SSTLR & Hounslow LBC [2002] JPL 928

If the written procedure is followed, written evidence on legal grounds cannot be dismissed as untested, and thus of little weight, without regard to its source, content, consistency with other evidence or reliability. If written evidence is given little weight regardless, it is difficult to see how an appellant in a WR case could discharge the onus of proof. Such evidence must be properly analysed on the balance of probability test.

Hopkins Developments Ltd v SSCLG [2014] EWCA Civ 470

Six principles regarding procedural fairness in relation to planning/enforcement inquiries:

1. Any party is entitled to know the case they must meet, and to have a reasonable opportunity to adduce evidence and make submissions in relation to that case.
2. If there is procedural unfairness which materially prejudices a party to a planning inquiry that may be a good ground for quashing the Inspector's decision.
3. The Rules are designed to assist in achieving (1), avoiding (2) and promoting efficiency. The Rules are not a complete code for achieving procedural fairness.
4. A R7/16 statement identifies what the Inspector regards as the main issues at the time of the statement. It is likely to assist the parties but does not bind the Inspector to disregard evidence on other issues or oblige him to give the parties regular updates about his thinking as the Inquiry proceeds.
5. The Inspector will consider any significant issues raised by third parties, even if they are not in dispute between the main parties. The main parties should deal with such issues, unless and until the Inspector expressly states that they need not do so.
6. If a main party resiles from a matter agreed in the SoCG, the Inspector must give the other party a reasonable opportunity to deal with the issue which has emerged.

Turner v SSCLG & the Mayor of London [2015] EWHC 375 (Admin), [2015] EWCA Civ 582

The Inspector's role at inquiry has a strong inquisitorial dimension. It is appropriate and fair for them to perform robust case management and focus debate via interventions and indications. The Inspector's conduct had not given rise to any appearance of bias.

Turner v SSCLG & South Buckinghamshire DC [2015] EWHC 1895 (Admin); [2015] JPL 1347

The Inspector took account of a matter that the SoCG had shown was not an issue. The Inspector was not bound to accept the parties' position but was bound, if the matter appeared important, to draw the parties' attention to it so that they could address it. The

SoCG is compulsory under the inquiry rules, in order that the Inspector will not need to inquire into matters on which the parties are agreed.

- *Case Law Update 28*

R (oao Pitt) v SSCLG & Epping Forest DC [2015] EWHC 1931 (Admin); [2016] JPL 20 [2016] JPL 20

WR appeal where the Inspector took a different view to the parties on an agreed matter but gave no opportunity for the parties to make representations. Fairness required that the appellant be given an opportunity to argue against the Inspector's proposition. Further representations might have affected the decision.

- *Case Law Update 28*
- *R (oao Ashley) v SSCLG [2012] EWCA Civ 559; [2012] JPL 1235*

Brown v SSCLG & Others [2015] EWHC 2502 (Admin)

WR appeal where the Inspector considered issue (abandonment) not brought up by the parties. Had the appellant known that the issue would be raised, they might have wished to submit evidence on it. The Inspector should have given them an opportunity to do so but the decision did not end with the Inspector's finding on that issue; a conclusion was reached on the evidence. The DL should be read as a whole; it was not wrong in law.

- *Case Law Update 28*

Engbers v SSCLG [2015] EWHC 3541 (Admin); [2016] EWCA Civ 1183; [2017] JPL 489

Decision to dismiss an appeal on safety grounds was not unfair; local residents and the Inspector had raised the matter so that the developer could deal with it at the inquiry.

- *At the CoA, SSCLG did not appeal against a separate HC finding of unfairness.*
- *Knowledge Matters 16*

Akhtar v SSCLG & Barking and Dagenham LBC [2017] EWHC 1840 (Admin)

The SoS did not act unlawfully in refusing to accept late representations; the Regulations and PINS guidance make it clear that PINS may disregard information submitted outside of normal time limits. It is important for the effective and efficient administration of appeals that there are time limits for submission of documents; save for good reason, the limits should be abided by. The facts of this case did not lend itself to that exception.

- *Knowledge Matters 34*

Benson v SSCLG & Hertsmere BC [2018] EWHC 2354 (Admin)

The appellant referred to additional material at the inquiry but made no application to admit this evidence and gave no reasons for any such application. There could be no unfairness in the Inspector's failure to respond. The Inspector was also entitled to conclude that the documents did not establish what the appellant argued they said.

- *Knowledge Matters 48*
- *Case Law Update 34*

Farlingaye Investments Ltd v SSHCLG & Braintree DC – 1 August 2018

The Planning Inspectorate has broad power under s319A to determine the mode of appeal, with regard to criteria set out in Appendix G of the PINS Guidance. There is no statutory duty to give reasons for the procedural decision. The Courts should be wary of imposing a general duty where Parliament has chosen not to do so.

- *Case Law Update 34*

Brent LBC v SSHCLG & Oakington Manor Primary School [2019] EWHC 1399 (Admin); [2019] JPL 1473

The Inspector erred by failing to have regard to a submission made in closing the inquiry by the Council that the alleged MCU had occurred by intensification – an issue which was capable of defeating the ground (d) appeal.

- *The submission did not include the word 'intensification' but referenced the evidence of an objector, plus the case of Hertfordshire CC v SSCLG & Metal and Waste Recycling [2012] EWCA Civ 1473.*
- *Inspectors are advised to seek clarification of any points made in closing which are unclear and/or potentially new.*
- *Knowledge Matters 57*

Satnam Millenium Ltd v SSHCLG & Warrington BC [2019] EWHC 2631 (Admin)

The case concerned a s288 challenge against an Inspector's decision to dismiss a s78 appeal. The main point of interest lies in the unsuccessful ground that the Inspector's conduct during the inquiry and site visit gave rise to the appearance of bias.

Held that a fair-minded individual, knowing of all the facts, would not conclude that there was a real possibility that the Inspector was actually biased. Apparent bias cannot be considered by looking at a set of complaints in isolation from how the whole process was conducted. None of the factors relied on by Satnam, separately or cumulatively, showed a real possibility that the Inspector was biased in favour of the local residents.

If a party observes conduct that is said to give rise to apparent bias, but they decide not to raise concerns with the Inspector, they waive their right to complain. There is no public interest in having to re-run an Inquiry if the factor leading to a concern about apparent bias can be disposed of at the time. The approach might be different if a concern could not be remedied during the Inquiry or bias was apparent at the site visit.

- *The judgment provides commentary on the (legitimate) scope for informality, humour and interaction between an Inspector and parties inside and outside an inquiry, and during an accompanied site visit, without giving rise to an appearance of bias.*
- *Knowledge Matters 61*

Dill v SSCLG & Stratford-on-Avon DC [2017] EWHC 2378 (Admin), [2018] EWCA Civ 2619, [2020] UKSC 20; [2020] JPL 1421

Held in the HC that it is not necessarily unfair of an Inspector not to discuss an issue of law with the parties, although the decision would be challengeable if their interpretation of the law was wrong. Fairness is a highly fact-sensitive issue. Here, the issues were matters of law, the Inspector did not err in their interpretation and the matters were known to the parties who had had fair opportunity to make representations.

The case was not appealed to the CoA on this point, but the SC held that, in effect, the Inspector *had* erred in failing to address the question raised (whether a listed building was in fact a "building"). It is a principle that individuals affected by a legal measure should have a fair opportunity to challenge that measure. The statutory context is relevant to the application of the principle, but in listed building as in planning enforcement, the statutory grounds of appeal are wide enough to extend to 'every aspect of the merits' of the decision to serve the notice.

Lord Carnwarth remitted the appeal to the SoS but, in so doing and with regard to the circumstances of the case, urged the SoS to give serious consideration as to whether it is fair to the appellant or expedient in the public interest to pursue the enforcement process further.

- *Knowledge Matters 36, 50 and 68*
- *Case Law Update 34*

Muorah v SSHCLG [2020] EWHC 649 (Admin)

Consideration is given in this judgment, with regard to the relevant authorities, as to when the courts can accept a challenge made out of time. David Elvin QC, siting as a Deputy Judge of the High Court, found a clear public interest in extending the time and allowing this claim to have been validly brought – in order that an error of law did not go uncorrected and the appellant was not deprived of her lawful development rights. It was in the interests of SSHCLG and the LPA to ensure the law is upheld and doing so would cause no substantial prejudice to interested parties.

***Baker v SSHCLG & Bromley LBC* [2021] EWHC … (Admin)**

The Inspector erred by placing too much emphasis on the findings of the previous Inspector and not addressing the additional evidence provided by the appellant. The Inspector also observed that 'the information that has been advanced lacks clarification and precision' but the appeal procedure had been changed by PINS from a hearing to written representations. The appellant had been left without sufficient resources 'to get the point across' and thereby prejudiced.

Consistent with Mahajan v SSTLR & Hounslow LBC [2002] JPL 928

REDETERMINATION – S288 AND S289

South Buckinghamshire DC v SSETR & Gregory [1999] JPL 545

Ground (a) lapsed on s174 appeal but linked s78. The Inspector allowed the s78 appeal, granted PP and found that, because of the effect of s180, the requirements of the EN would cease to have effect, and it was unnecessary to consider ground (g). The PP was quashed on a successful s288 application by the LPA. S180 no longer applied, but the appellant was refused leave to appeal, for being out of time, in relation to ground (g).

- *It is therefore essential that, in linked cases, any appeals on grounds (f) and/or (g) are dealt with, before upholding the EN, even if PP is granted under s78.*

Oxford CC v SSCLG & One Folly Bridge Ltd [2007] EWHC 769 (Admin)

Where an Inspector grants PP on the DPA in an enforcement appeal, it is essential that, on any appeal to the court, the LPA not only seeks to have the PP set aside, but also appeals against the quashing of the EN. There must be an application under s288 and an appeal under s289, even though the time limits are different for each section.

- *De Souza v SSCLG & Test Valley* [2015] EWHC 2245 (Admin); [2016] JPL 85

R (oao Perrett) v SSCLG & West Dorset DC [2009] EWCA Civ 1365; [2010] JPL 999

Where an appeal is remitted for redetermination following a successful s289 challenge, it is to be determined *de novo* but that does not deny the SoS discretion to determine the extent of the evidence to be re-heard. Redetermination may be limited to the ground upon which the challenge succeeded, or other matters may be dealt with, particularly where there may have been a material change of circumstances.

Bowring v SSCLG [2015] EWHC 1027 (Admin)

On s289 challenge, the appeal was remitted on ground (f). The second Inspector also addressed whether the COU had been lawful, found that it was not and concluded that it was not excessive for the EN to require removal of the works. Held that the Inspector was right to reach his own conclusions on the lawfulness of the use; it is permissible in s289 re-determinations to introduce further evidence.

- *Case Law Update 22*

De Souza v SSCLG & Test Valley DC [2015] EWHC 2245 (Admin); [2016] JPL 85

The judgment affirms that it is necessary to challenge the refusal of a DPA, in the context of an appeal against an EN, through s289.

- *Case Law Update 28*

Wood v SSCLG & the Broads Authority [2015] EWHC 2368 (Admin)

The claimant made an application for s288 judicial review within the statutory period but failed to file a Part 8 claim form and issue a notice of the s289 appeal. They lodged the grounds of the claim with the Court but applied for permission to appeal under s289 after the statutory time period had passed. The Court allowed the application since there had been no significant prejudice to the second defendant or the public interest.

- *Case Law Update 28*

North Norfolk DC v SSHCLG & Others [2018] EWHC 2076 (Admin)

In s288 re-determinations, while the previous decision is quashed, unchallenged findings it contains are capable of being material considerations. *"The previous decision is a nullity in the sense that it has no legal effect. It is quite another step to say that it must be regarded as non-existent for all purposes, as blank sheets of paper, incapable of being read…I see no reason in law why the previous decision had to be ignored for the limited purpose of forming a view about the nature of the issues, bearing in mind its agreed and asserted failings."*

***Muorah v SSHCLG (No. 2)* CO/3838/2020**

Challenge to the redetermination of *Muorah v SSHCLG* [2020]. The Inspector erred on ground (f) by failing to consider the effect of the requirement of the EN to remove kitchen facilities – when changing the use of the property to C4 use would be PD, and the appellant had claimed that the facilities had been in place for more than ten years. The court order for the previously remitted appeal decision was not so confined in its wording as to prevent the Inspector from considering that issue.

RELEVANT OCCUPIER

R v SSE & South Shropshire DC ex parte Davies [1991] JPL 540

In the main, only trespassers have no right of appeal.

- *Predates the Localism Act*
- *A trespasser with no right of appeal may contest the validity of an EN in the courts; Scarborough BC v Adams [1983] JPL 673*

Buckinghamshire CC v SSE & Brown [1997] 23 QBD 19.12.97

The relevant occupier or person with the interest in the land must appeal; a company director has no right of appeal on the company's behalf.

Flynn & Sheridan v SSCLG & Basildon BC [2014] EWHC 390 (Admin)

'A person having an interest in land' in s174(1) means a person with a legal or equitable interest. It does not include a person with no such interest but some other link with the land. A person entitled to appeal under s174(2) is defined as a 'relevant occupier'.

That a person is physically in occupation, or is in occupation and has been served, does not entitle that person to a right of appeal. A lease which expires between the service of the EN and date of appeal does not provide a basis for an appeal. The person must occupy the land at the date of the issue of the EN by virtue of an express written or oral, or an implied contractual or bare licence and continue to do so when the appeal is brought. A licence within the meaning of s174(6) means a permission to enter and occupy the land in question.

- *Case Law Update 24*

REQUIREMENTS – 'ANCILLARY' OPERATIONS

Murfitt v SSE & East Cambridgeshire CC [1980] JPL 598

An EN directed at an MCU can require the removal of ancillary operational development within the ten-year immunity period applying to an MCU, even if the four year limit has passed if the works were intended to facilitate the unlawful use.

- *NB – no issue before the Court as to whether works carried out for another lawful use could be required to be removed in an MCU notice.*

Worthy Fuel Injection Ltd v SSE & Southampton CC [1983] JPL 173

Walls had first been built round a yard and then roofed over. If it could be shown that there were two distinct operations, then there could be a saving for the first.

Somak Travel v SSE & Brent LBC [1987] JPL 630

An EN could require the removal of an internal spiral staircase which was not in itself development, because it had facilitated the change of use of a first floor flat into offices associated with the existing ground floor office.

Hereford CC v SSE & Davies [1994] JPL 448

An EN could require the removal of internal works from a house used for bedsits, but it was for the Inspector as to whether such requirements were appropriate in the case.

Newbury DC v SSE & Mallaburn [1994] JPL B79

EN alleged an MCU from agriculture to mixed residential and agricultural use, including the provision of a tennis court. The tennis court had been in situ for more than 4 years and so was immune for enforcement. The Inspector deleted the reference to a tennis court from the allegation and found there had been no MCU. It was held that, if the EN had simply alleged an MCU to a residential garden, it could still have required the removal of the tennis court, applying *Murfitt*.

Bowring & Bowring v SSCLG & Waltham Forest LBC [2013] EWHC 1115 (Admin); [2013] JPL 1115

The EN required the removal of works associated with the MCU. The Inspector did not address whether the installation of the features had been undertaken for a lawful use. If the EN alleges an MCU and requires that certain works be removed, the works must have been integral to the making of the MCU. It will not be sufficient for the works to be integral to the present use if they had been undertaken for a different and lawful use.

What steps are required to remedy the breach will depend on the facts; a decision that the minimum steps necessary to remedy the breach would be likely to be proportionate.

- *Case Law Update 22*
- *See also Lough & Others v FSS [2004] 1 WLR 2557; Kestrel Hydro v SSCLG & Spelthorne BC [2016] EWCA Civ 784*

Makanjuola v SSCLG & Waltham Forest LBC [2013] EWHC 3528 (Admin); [2014] JPL 439

Where operations have been carried out in stages, it is necessary to ask what is comprised in the development alleged and whether earlier works had been undertaken for a lawful use.

The Inspector fell into error by stating that '…any operational development which enabled an unlawful use can be required to be removed'.

- *Case Law Update 24*

Mohamed v SSCLG [2014] EWHC 4045 (Admin); [2015] JPL 583

EN alleged the erection of a dwelling, challenged on the basis that the Inspector should have considered steps short of demolition. However, the appellant had not argued that the requirements were excessive or sought PP. *Mansi v Elstree RDC [1964] P&CR 154* applies to the retention of use rights and not the retention of buildings erected or altered in breach of planning control.

- *Case Law Update 27*

Kestrel Hydro v SSCLG & Spelthorne BC [2015] EWHC 1654 (Admin), [2016] EWCA Civ 784

CoA: upholds *Murfitt* & *Somak Travel* as 'good law'; *Bowring* applies but does not warrant an approach whereby works carried out after the breach and integral to the unauthorised use must be considered as potentially available for resumption of the previous lawful use.

- *Case Law Update 28*
- *Knowledge Matters 22*

REQUIREMENTS – GENERAL

Ormston v Horsham RDC [1965] 17 P&CR 105

The developer is in the best position to know the state of the property before the development was carried out. It is enough for an EN to require that land be restored to its previous use, if the owner knew what that was.

Lipson & Lipson v SSE & Salford MBC [1976] 33 P&CR 95; [1977] JPL 33

An EN cannot require a former use to be resumed.

Hounslow LBC v Indian Gymkhana Club [1981] JPL 510

An EN cannot require that the recipient 'comply or seek compliance', since that would introduce an element of uncertainty. A requirement to 'cease or cause the cessation of' is also potentially bad for uncertainty and in conflict with s179(4) – the penal section.

- *Miller-Mead v MHLG [1963] 2 WLR 255; Johnston v SSE [1974] 28 P&CR 424*

Bath CC v SSE & Grosvenor Hotel (Bath) Ltd [1983] JPL 737

An EN cannot impose a more onerous requirement than to restore the land to its previous condition.

- *LBEN case*

R v Runnymede BC ex parte Seehra [1986] LGR 250; [1987] JPL 283

An EN directed at an MCU from residential to mixed use for residential purposes and religious meetings and services required the cessation of use other than for residential purposes and purposes incidental to the enjoyment of the dwelling as such. As a matter of fact and degree, this was a valid requirement; neither the description of the breach nor requirements were uncertain.

Kaur v SSE & Greenwich LBC [1989] EGCS 142; [1990] JPL 814

The Inspector varied the EN to require the re-modelling of a roof in accordance with photographs and a scheme to be agreed with the LPA. This made the EN uncertain and rendered it null because it did not specify with sufficient particularity what was required. It was accepted that a building can be restored to its former state as far as practicable in accordance with available documentation and recollections of LPA officer and appellant.

Millen v SSE & Maidstone BC [1996] JPL 735

Two ENs alleged an MCU to the same mixed use, but each only required one element of the mixed use to cease. Held that s173(11) came into operation in each case, as both EN had under-enforced, to give a deemed PP for the element not required to cease. It would have been open to the Inspector to quash one EN and combine the requirements.

Taylor and Sons (Farms) v SSETR & Three Rivers DC [2001] EWCA Civ 1254

There was no obligation on an Inspector to conduct his own enquiries as to whether varying and what variation of an EN might save some of the works which were in breach of planning control. He was not obliged to state how much of a hardstanding was reasonably necessary for the purpose of agriculture. The proper course was for the appellant to submit what variation should be made to the EN.

Pople v SSTLR & Lake District NPA [2002] EWHC 2851 (Admin)

The EN alleged leisure use of a building. The requirement to remove the fittings and disconnect services was lawful where the fittings were part of the breach, and to put the matter beyond doubt and eliminate the difficulties of inspection and enforcement.

Fidler v FSS & Reigate and Banstead BC [2003] EWHC 2003 (Admin), [2004] EWCA Civ 1295; [2005] JPL 510

An EN cannot require an activity to cease unless it is part of the alleged breach.

Payne v NAW & Caerphilly CBC [2006] EWHC 597 (Admin); [2007] JPL 117

An EN containing a requirement that a restoration scheme be submitted for LPA approval failed to comply with the requirement in s173(3) to specify the steps which the authority require to be taken. It was a nullity, incapable of being varied by the Inspector.

- *Oates v SSCLG & Canterbury CC [2017] EWHC 2716 (Admin), [2018] EWCA Civ 2229*

Moore v SSCLG & Suffolk Coastal DC [2012] EWCA Civ 2101

Affirms that a potential or hidden appeal on ground (f) may succeed where submissions that the requirements of the EN are excessive – or the allegation should be cut down – are made in respect other grounds.

- Case Law Update 20

- *Tapecrown Ltd v FSS & Vale of White Horse DC [2006] EWCA Civ 1744*

Williams v SSCLG & Chiltern DC [2013] EWCA Civ 958; [2014] JPL 124

The Inspector is not under a duty to search for solutions; the party in breach of PP is required to put forward an alternative solution for consideration.

- *No appeal on ground (a); pre-dates Ahmed v SSCLG [2014] EWCA Civ 566*
- *Case Law Update 20, 22 & 23*

Elmbridge BC v SSCLG & Giggs Hill Green Homes [2015] EWHC 1367 (Admin)

PP granted in 2008 for nine houses. Ten houses were constructed with different designs than shown on the approved plans. The EN sought demolition of all ten houses. The appeal failed on ground (b) and the Inspector varied the EN to require compliance with the PP. The HC held that there was no part of the DL which addressed whether the 2008 PP remained capable of implementation in accordance with its conditions. If the Inspector had found that a valid PP still existed and there was evidence to that effect, the EN could have been upheld as varied, but that situation did not pertain.

- *Case Law Update 27*

Al-Najafi v SSCLG & Ealing LBC [2015] (CO/4899/2014)

Alternative requirements should be considered in two circumstances: a) where clearly put to the Inspector; and b) where the Inspector makes such a suggestion. If an alternative is raised, it must be dealt with, but there is no obligation on the Inspector to raise any possible scheme not put to them.

- *Case Law Update 28*

Camden LBC v Galway-Cooper (CO/5519/2017 22 May 2018)

Council's attempt to prosecute for non-compliance with EN failed on the grounds that the owners had taken all reasonable steps to comply, and this was a reasonable defence under s179(3). It was not feasible to reinstate the rear wall to its original condition for structural reasons. This was not a breach of s285, or effectively a ground (f) challenge, because the steps specified in the EN did not exceed what was necessary to remedy the breach; the question was whether the breach could be remedied.

- *Controversial judgment but with useful background information on the operation of the enforcement system as a whole*

Oates v SSCLG & Canterbury CC [2017] EWHC 2716 (Admin), [2018] EWCA Civ 2229; [2019] JPL 251

The Inspector was entitled to uphold an EN alleging the construction of 'new buildings' although the structures incorporated parts of existing buildings, and so there was no error in concluding that complete demolition was required to remedy the breach.

The Inspector corrected the EN to delete the 'vague and subjective' requirement (3) rather than concluding that the EN was a whole was null. The HC endorsed the approach, and this was not pursued in the CoA. Compliance with steps (1) and (2) would suffice to remedy the breach and (3) could be deleted without causing injustice. The Inspector was entitled to use their corrective powers to remove what she found to be unnecessary.

- *Knowledge Matters 37*
- *Case Law Update 34*

REQUIREMENTS – GROUND (F) AND GROUND (A)

Wyatt Brothers (Oxford) Ltd v SSETR [2001] PLCR 161

The 'or' separating s173(4)(a) and (b) is not entirely disjunctive; a LPA is not required to formulate the steps so that they correspond with either one purpose or another.

If there is no DPA, the power to vary the EN so that it would under-enforce is limited. A PP granted under the DPA can be conditioned, but the same does not apply to a deemed permission arising under s173(11). If appellants choose not to pursue ground (a), they cannot introduce general planning considerations or arguments about amenity in an appeal on ground (f). The power to vary an EN in s176(1)(b) needs to be read in such a way as not to afford a remedy that is obtainable by pursuing an appeal on ground (a).

Tapecrown Ltd v FSS & Vale of White Horse DC [2006] EWCA Civ 1744

The Inspector has wide powers to decide whether there is any solution, short of a complete remedy of the breach, which is acceptable in planning and amenity terms. It is not their duty to search around for solutions, but the enforcement procedure is intended to be remedial not punitive. Where it appears that there is an 'obvious alternative' which would overcome the planning difficulties with less cost and disruption, the Inspector should feel free to consider it, albeit with reference back to the parties.

- *There was a ground (a) appeal.*
- *Case Law Update 1*

Mata v SSCLG [2012] EWHC 3473 (Admin); [2013] JPL 546

An EN required the demolition of a building which was in a garden but not used for purposes incidental to the enjoyment of the dwellinghouse. The Inspector was entitled to conclude that as the Council's purpose in issuing the EN was to remedy the breach of planning control, the only remedy could be the demolition of the building.

- *No ground (a) appeal.*
- *Case Law Update 21*

Ahmed v SSCLG & Hackney LBC [2014] EWCA Civ 566

Building constructed not in accordance with the PP; the EN required demolition of the whole. Appeal on ground (a) that PP should be granted for the building as constructed, with lesser steps proposed under ground (f) to allow for modification of the building. PP could have been granted under s177(1) for the modified scheme if it could be regarded as 'part' of the development. The Inspector did not make that planning judgment.

- *If PP may be granted for 'part of the matters', do so and uphold the requirements of the EN, relying on s180(1) to override the effects of the EN.*
- *Case Law Update 23 & 25*
- *Humphreys v SSCLG & Essex CC [2016] EWHC 4152 (Admin)*

Ioannou v SSCLG & Enfield LBC [2014] EWCA Civ 1432

The *Wheatcroft* principle does not apply to ground (a) and PP cannot be granted under s1771(1) for an acceptable alternative scheme that is not 'part of the matters'.

The HC suggested varying the EN and relying on s173(11) to grant PP for the alternative scheme, so that the steps would remedy the injury to amenity. It was held in the CoA that the power to allow an appeal on ground (f) is not a power to grant PP. There is no free-standing

'obvious alternative' test. The Inspector's powers to vary the EN mirror those conferred on the LPA to under-enforce under s173(4)(b). It is only the buildings, works or activities in existence when the EN is issued which can benefit from s173(11) – not a different scheme. S173(11) cannot be a means to sidestep the limitation to ground (a), which is only to grant PP under s177(1).

- *Case Law Update 24 & 26*

Humphreys v SSCLG & Essex CC [2016] EWHC 4152 (Admin)

EN alleged and required removal of an abattoir wash tank; appealed on grounds (a) and (f). Under (f), the Inspector accepted that the tank could be put to agricultural use on the site but found that allowing retention would not remedy the breach. Held that, since it was obvious that the agricultural use would not give rise to any amenity problem, PP should have been granted for the tank but refused for use for storage of wastewater. The 'obvious alternative' can be inferred from the appellant's evidence, even if it is not described in those terms.

- *Case Law Update 28*

Miaris v SSCLG & Bath and NE Somerset Council [2015] EWHC 1564 (Admin), [2016] EWCA Civ 75; [2016] JPL 785

The EN was appealed on ground (f) but not ground (a) to delete a requirement to cease activities related to an unauthorised use. The HC and CoA upheld the Inspector's decision to dismiss the appeal, because the purpose of the EN was to remedy the breach and not simply the injury to amenity. The appellant had sought to achieve, in effect, PP for a future mixed use but this could not be achieved through ground (f).

Where a requirement of an EN is *solely* related to injury to amenity, ground (a) is not necessarily needed. It depends on the nature of planning objection that the step seeks to remedy, rather than the paragraph of s173(4) that the LPA relies on.

- *Case Law Update 29*
- *Knowledge Matters 17*

Keenan v SSCLG & Woking BC [2016] EWHC 427; [2017] EWCA Civ 438

Affirmed that there is no requirement to allow ground (f) on the basis that the steps exceed what is necessary to remedy the injury if the purpose of the EN is clearly to remedy the breach. On the authorities including *Miaris*, the Inspector must ascertain the purpose of the EN. In this case, the Inspector considered the two limbs and did not fail to consider any obvious alternative.

- *Case Law Update 29*
- *Knowledge Matters 33*
- *This ground of the challenge was not taken to the CoA.*
- *Alderson v SSCLG & Wealden DC [2017] EWHC 1415 (Admin)*

REQUIREMENTS – SAVINGS FOR LAWFUL OR ESTABLISHED USE

Mansi v Elstree RDC [1964] 16 P&CR 154

An EN should include a saving for any element of a lawful use. Almost any amount of sales activity on an agricultural or horticultural holding will be ancillary if the produce is not imported, or the degree of importation is small enough to not amount to an MCU.

- S*ee also Allen v Reigate and Banstead BC* [1990] JPL 340

Bromley LBC v SSE & George Hoeltschi and Son [1978] JPL 45

It is a question of fact and degree as to when an ancillary use is carried out to amount to an MCU. In this case, 20% of goods for sale were imported and so the sales use was not ancillary, but there was a saving for degree of lawful use, sales of home grown produce.

Day & Mid Warwickshire Motors v SSE & Solihull MBC [1979] JPL 538

A saving may be made for a lawful use to which reversion could be made under s57(4) and under the UCO.

Cord v SSE & Torbay BC [1981] JPL 40

There is no need to insert a saving for that which must be obvious. A householder can repair their car or boat at home if it is an obvious incidental or ancillary use.

- *As noted in North Sea Land Equipment v SSE & Thurrock BC [1982] JPL 384, Cord related to a single established use, to which the other activity was said to be incidental, whereas Mansi related to an established mixed use.*

Denham Developments Ltd v SSE & Brentwood DC [1984] JPL 347

An EN should make a saving for an established as well as lawful use. When uses are intermingled, the saving for a degree of use at a certain date may be appropriate. The EN cannot properly bite on that part of the land where the use had gone on since 1963.

- *Trevors Warehouses v SSE & Blackpool BC [1972] 23 P&CR 215, Lee v LB Bromley [1983] JPL 778*
- *Savings for established uses should be generally limited to a particular area and/or numbers; Choudhry v SSE & Westminster CC [1983] JPL 231*

Burge v SSE & Chelmsford BC [1988] JPL 497

The extent of rights permitted under the GDO/GPDO is a material consideration, even though development in excess of GDO/GPDO limits is, as a whole, without PP.

- *Garland v MHLG [1968] 20 P&CR 93, Nolan v SSE & Bury MBC [1998] JPL B72*
- *PD rights will be a material consideration as a fallback position for ground (a), and PP may be granted for 'part of the matters'. If the appeal proceeds on ground (f) but not (a), whether the EN can be varied will depend on its purpose.*

South Ribble BC v SSE & Swires [1990] JPL 808

The *Mansi* principle could apply to established uses, which were unlawful but immune from enforcement proceedings (TCPA71).

Wallington v SSW & Montgomeryshire DC [1990] JPL 112; [1991] JPL 942

CoA: keeping 44 dogs as a hobby was not incidental to the use of a dwellinghouse. The EN required the keeping of no more than six dogs; this arbitrary limit did not specify the point where a use stopped being incidental but was reasonable in the circumstances.

R v Runnymede BC ex parte Singh [1991] JPL 542

A Stop Notice requiring cessation of use 'for the purposes of religious meetings and services and for the purposes of religious devotion otherwise than as incidental to the enjoyment of the dwellinghouse as such' was upheld. While there is a need for precision in notices purporting to specify what a person may or may not do, questions of fact and degree are frequently encountered in planning law.

John Kennelly Sales Ltd v SSE & North East Derbyshire DC [1994] JPL B83

Part of the site was said to have established use rights for industrial purposes. It was essential to know what the rights were in order to adjudge the planning merits.

Lynch v SSE & Basildon DC [1999] JPL 354

Material change from a low-key, limited use to a use which had more components, was more intensive and covered a wider area. The limited use had not subsisted for ten years before being superseded by a mixed use of which it was but one component; it had not become lawful and did not have to be protected under the *Mansi* principle.

Kinnersley Engineering Ltd v SSETR [2001] JPL 1082

Ouseley DJ: '*Given that existing use rights are to be protected the question of whether it is necessary to spell those out in an EN depends upon how obvious it is that the EN can and will be construed so as to protect them, in the context of criminal prosecution*.'

Duguid v SSETR & West Lindsey DC [2001] JPL 323

CoA: enforcement powers are to be given a purposive and not literal interpretation. Their purpose is to confine or cease the activity which constitutes the breach. An EN cannot be interpreted so as to make an offence out of lawful activity, such as a temporary GPDO use. Such rights operate as a matter of law within parameters that are certain.

Lough & Others v FSS [2004] 1 WLR 2557

A decision relating to planning matters would usually involve a balancing of the interests of those wanting to develop property against the broader community interest. The process of striking that balance, and reaching a lawful decision, could be expected to satisfy the requirement that the restriction on the use of property is proportionate.

Chas Storer Ltd v SSCLG & Hertfordshire CC [2009] EWHC 1071 (Admin); [2010] JPL 83

MCU had been brought about by the importation of a different waste type and not the increase in the level of activity. Steps that purport to take away or detract from the lawful use, eg, to reduce the level of activity, are unlawful. A step to cease the importation of the new waste type would have been sufficient.

- *Case Law Update 8, 9 & 10*