Elvington Park Ltd v SSCLG & York CC [2011] EWHC 3041 (Admin); [2012] JPL 556

The SSCLG submitted to judgment because the requirements of the EN did not make an express saving for rights under an earlier PP.

- *Case Law Update 18*

Hancock v SSCLG & Windsor and Maidenhead RBC [2012] EWHC 3704 (Admin)

1993 PP for use of the land; buildings erected in 2008 were required to be demolished. The PP was for the use of the land and there were no existing rights for buildings which the EN had to protect. The EN did not prevent the lawful use from continuing.

- *Case Law Update 21*

Mohamed v SSCLG [2014] EWHC 4045 (Admin); [2015] JPL 583

The Mansi principle 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*

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.

- *Case Law Update 28*

***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.

- *Case Law Update 31*

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.

- *Knowledge Matters 37*
- *Case Law Update 34*

Muorah v SSHCLG [2020] EWHC 649 (Admin)

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 Since PD rights for the change of use from C3 to C4 use had not been withdrawn, and the Inspector had expressly found that C4 use was a fallback position under ground (a), the Inspector ought to have varied step 1 of the EN so that it did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 development 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.

***Afendi Baghdad Ltd v SSHCLG & Ealing LBC* (CO/41/2021)**

Where an EN alleges that there has been an MCU to a mixed use, it should require the alleged mixed use to cease. If the components of the mixed use are de-coupled and required to cease separately, there could be a breach of the *Mansi* principle if any of them are (claimed to be) lawful. The EN should be corrected to require cessation of the alleged mixed use, so long as no injustice would arise, so that the appellant can revert to the lawful use(s) or at least apply for and obtain an LDC for the claimed lawful use(s).

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.

USE CLASSES ORDER

Vickers Armstrong v Central Land Board [1958] 9 P&CR 33

In considering application of the UCO, it is the primary use of land which needs to be determined. A headquarters building will have a B1 use, and an ancillary staff canteen will not have a separate A3 use.

Brazil (Concrete) Ltd v MHLG & Amersham RDC [1967] 18 P&CR 396

That some element of an overall use may be within a use class does not bring the whole use within that class. A shed used for industrial purposes within a builders' yard (sui generis) was not in an industrial (B2) use.

Kwik-Save Discount Group Ltd v SSW & Others [1981] JPL 198

CoA: the benefits of s55(2)(f) and Article 3(1) of the UCO cannot apply to PP that is not implemented, or where there was a token implementation. Car showroom operated for 4 weeks after grant of PP, then the premises were used as a supermarket. The permitted use had been so minimal as to be of no significance and UCO rights did not apply.

Carpet Decor (Guildford) Ltd v SSE & Guildford DC [1981] JPL 806

No development is involved if there is a change between two uses within the same use class; s55(2)(f) and Article 3(1) of the UCO. If there is a change between uses in different use classes, there is not necessarily an MCU, but it is more likely there will be.

Cawley v SSE & Vale Royal DC [1990] JPL 742

For a use to be within Class A1, there must be a building, by reason of the use of the word 'shop' in the heading of A1. A retail use of open land is sui generis.

- *This judgment applies despite the Explanatory Note to the UCO 1987: 'that in Parts A and B of the Schedule…the uses specified are uses of buildings or land'. See article at 1996 JPL 725.*

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.

Kalra v SSE & Waltham Forest LBC [1996] JPL 850

CoA: This case concerns the differences between Classes A1 and A2. The distinction between them in individual cases is usually a matter of fact and degree, but the judgment sets out a useful analysis of the relevant considerations.

Rugby Football Union v SSTLR [2002] EWCA Civ 1169; [2003] JPL 96

refused for the use of a rugby stadium for concerts; upheld in the HC and CoA. (1) The holding of concerts did not fall within Class D2(e) as 'other sport or recreation'. The word 'recreation' is capable of having a wide meaning but D2(e) is focused on physical recreation. The stadium fell within D2(e) because it was used for sport, not because of the presence of

spectators. (2) An open air concert could not be classed as a concert hall within Class D2(b) because a concert hall has to be enclosed by a roof and walls.

R (oao Hossack) v SSE & Kettering BC & English Churches Housing Group [2002] EWCA Civ 886; [2002] JPL 1206

CoA: it is too prescriptive to conclude that people coming to a house not as a preformed group or for a predetermined period, but with a common need for accommodation and support, necessarily failed to enjoy a relationship which enabled them to be regarded as living in a single household. Homogeneity in a group of residents is not a prerequisite to their living as a single household in all cases. A group without such homogeneity can form a living relationship which allows them to be regarded as a single household for Class C3 purposes. The nature of the relationship between the residents is material but not necessarily determinative. There is no one factor which is conclusive.

North Devon DC v FSS & Southern Childcare Ltd [2003] EWHC 157 (Admin); [2003] JPL 1191

The definition of 'care' in Article 2 restricts the personal care of children to Class C2 only. Children cannot form a household without the presence of a care-giver, and a children's care home may not fall within Class C3 unless a care-giver is a resident. The same would apply to those who suffer from a disability and need care. It does not follow, however, that a C2 use would necessarily be materially different from the last C3 use.

- *See R (oao Crawley BC) v FSS & the Evesleigh Group [2004] EWHC 160 (Admin*)

Belmont Riding Centre v FSS & Barnet LBC [2003] EWHC 1895; [2004] JPL 593

With the single exception specified in Article 3(4) of the UCO (mixed B1 and B2 use), sites in mixed use do not benefit from the provisions of s55(2)(f) in respect of the UCO.

Eastleigh BC v FSS & Asda Stores [2004] EWHC 1408 (Admin)

The doctrine of intensification for uses within the UCO is qualified by s55(2)(f) and Art 3(1). There is no development if the intensified use remains within the same use class.

R (oao Crawley BC) v FSS & the Evesleigh Group [2004] EWHC 160 (Admin)

North Devon does not lay down a principle that those who suffer from disability and need care in the community can never constitute a household. It is necessary to focus first on those in occupation and ask whether they form a single household as a matter of fact and degree. It would be counter to the language of C3 and the underlying policy to conclude that where care is needed, C3 only applies where the care-givers are resident.

Fidler v FSS & Reigate and Banstead BC [2003] EWHC 2003 (Admin), [2004] EWCA Civ 1295; [2005] JPL 510

The UCO had no application to a mixed use which did not fall in any single class.

R (oao Winchester CC) v SSCLG [2007] EWHC 2303 (Admin)

COU to the supply of eggs for research involved the production of sterile eggs as raw material for and incidental to the production – elsewhere and by others – of vaccine. Article 2 of the UCO defines 'industrial process' as a process for or incidental to the making of any article or part of any article; there is no geographical limit on where that other process has to be or who carries it out. The Inspector found that the COU was from B.1(c) to B.1(b) and this did not involve development.

The LPA's ground of challenge was that the use of one PU cannot be incidental to a primary use located on another site; *Burdle* applied. Held that the LPA'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 all 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*

R (oao Tendring DC) v SSCLG [2008] EWHC 2122 (Admin); [2009] JPL 350

Condition limited use to 'nursing home' only and no other use within C2. The building was initially used as a nursing home for the elderly but then for specialist mental health services, with treatment being within a community setting for medium- and long-term rehabilitation care. It was held that there are 'no bright lines' to be drawn between hospitals, nursing homes and residential care homes within Class C2. The question was not whether the use could be described as a hospital or residential care home, but whether it was, in ordinary language, a nursing home. That term could encompass a wide variety of activities. It is necessary to avoid an overly legalistic interpretation of the UCO – and avoid imposing statutory definitions from outside the planning system. The LPA could have opted to restrict the use to a 'nursing home for the elderly'.

- *Case Law Update 6*

R (oao Harbige) v SSCLG [2012] EWHC 1128 (Admin); [2012] JPL 1128 (Admin)

In addressing whether there has been a COU between two uses within the same use class, s55(2) should not be read as though the word 'lawfully' is inserted. The previous use does not need to be lawful. If there is a COU to an unauthorised use, and then to another unauthorised use within the same use class, the ten year immunity period continues to run from the date of the original breach.

- *Case Law Update 20*

R (oao Royal London Mutual Insurance Society) v SSCLG [2013] EWHC 3597 (Admin); [2014] JPL 458

A condition which stated '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. The word 'only' means solely or exclusively. The list of trades whose goods are permitted to be sold was clearly defined. The wording of the condition excludes the operation of s55(2)(f) and Article 3(1) of the UCO.

- *Case Law Update 24*

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*

Lazari v SSLUHC & LB of Camden [2023] EWHC 2026 (Admin)

The LDC applied for the existing use of a shopping centre within Class E and without compliance with Condition 3 of a previous planning permission, which limited use to Classes A2 and A3 of the Town and Country Planning (Use Classes) Order, 1987.

Despite changes to the UCO and GPDO, it was clear that Condition 3's purpose was for control of the previous use classes A2 and A3 use into the future.

USES – INCIDENTAL OR ANCILLARY

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 so that there has been an MCU. Here, 20% of goods for sale were imported and the sales use was not ancillary, but there was a saving for degree of lawful use, sales of home grown produce.

Emma Hotels Ltd v SSE & Southend-on-Sea BC [1980] 41 P&CR 255; [1981] JPL 283

A hotel bar drew 70-80% of its customers from outside, but the bar use was still ancillary to the main hotel use.

Allen v SSE & Reigate and Banstead BC [1990] JPL 340

A nursery 'grew on' plants on a large scale which were sold from the premises. Held that the sales were still ancillary to the nursery use, however large the volume and scale of the activity, if the plants were grown on site.

Wallington v SSW & Montgomeryshire DC [1990] JPL 112; [1991] JPL 942

CoA: the keeping of 44 dogs as a hobby was not incidental to the use of a dwelling. 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.

***Croydon LBC v Gladden* [1994] 1 PLR 30**

For a use to be considered incidental to the enjoyment of a dwellinghouse and exempted from development under s55(2)(d), it must be of a scale and nature that is incidental to the reasonable enjoyment of the normal residential use of the buildings and land which comprise the dwellinghouse and its curtilage. The keynote is 'reasonableness'.

Millington v SSETR & Shrewsbury and Atcham BC [2000] JPL 297

CoA: This case concerned the production and sale of wine at a vineyard. The proper approach was to consider whether the activities could, having regard to ordinary and reasonable practice, be regarded as incidental to the agricultural operations of producing the crop. The making of wine, cider or apple juice on this scale was a perfectly normal activity for a farmer engaged in growing wine grapes or apples.

Harrods Ltd v SSETR & Kensington and Chelsea RBC [2002] JPL 1258

CoA: An LDC was sought for landing the chairman's helicopter on the department store roof. Held that what may reasonably be regarded as incidental or ancillary to a lawful use of land are activities which are 'ordinarily' incidental to uses of that sort. Extraordinary activities, even though subordinate to the lawful use, are excluded if their introduction amounts to an MCU of the planning unit.

- *The word 'ordinarily' should not be applied to s55(2)(d); Croyden LBC v Gladden [1994] 1 PLR 30 for uses incidental to the enjoyment of a dwellinghouse.*

The Planning Inspectorate

Flood Risk

Not yet updated to reflect December 2023 Framework (NPPF)

What's new since the last version

Changes highlighted in yellow made 26 July 2023:

- Updates to paragraph 20 regarding the Site-Specific FRA when considering future climate change

Other recent updates made 18 April 2023

- Updates to paragraphs 8, 25, 27-30, 33-35 regarding the Sequential Test, based on revised PPG dated August 2022 and recent cases

Contents

Information Sources

National Planning Policy Framework, Section 14
Planning Practice Guidance (Flood Risk and Coastal Change)
Environment Agency (Flooding & Coastal Change information)

Introduction

1. The Framework seeks to ensure that inappropriate development in areas at risk of flooding now, or in the future, should be avoided. The PPG explains that flood risk is a combination of the *probability and potential consequences of flooding.*

Appeals

2. When determining an appeal:

    - review the evidence before you, including from the Environment Agency (EA)
    - begin with the development plan, as per s.38(6) of the PCPA
    - consider the relevant sections of the Framework and the PPG, what follows is only intended as a broad outline
    - reach clear conclusions, including on the Sequential and Exception Tests, as appropriate.

3. You may be provided with the Strategic Flood Risk Assessment (SFRA). This will have been produced by the LPA, often with advice from the EA. You may also have a site specific Flood Risk Assessment (FRA), which will have been produced by the appellant, again the EA may have been consulted on and commented on this. The Framework and the PPG assist in defining when a site-specific FRA is needed (Paragraph 167 and Footnote 55) You may have comment on the appeal from the EA, but this is often provided through their Standing Advice, and will not necessary address all matters that are before you. Comments may also be present from the Lead Local Flood Authority (LLFA) or an Internal Drainage Board[1]. Differing sources of flood risk may be addressed by these comments.

National policy and guidance

4. The revised Framework sets strict tests to protect people and property from **all sources of flooding** and that where these tests are not met new development should not be allowed.

5. Paragraph 159 of the Framework states that:

> *"Inappropriate development in areas at risk of flooding should be avoided by directing development away from areas at highest risk (whether existing or future). Where development is necessary in such areas, the development should be made safe for its lifetime without increasing flood risk elsewhere.".*

[1] https://www.gov.uk/government/collections/flood-and-coastal-erosion-risk-management-authorities

6. The general approach to decision-taking is explained in the PPG:

   Assess flood risk *(including through a site-specific flood risk assessment)*

   Avoid flood risk *(by applying the sequential and exception tests as appropriate)*

   Manage and mitigate risk *(including by ensuring development is flood resilient and resistant, safe and will not increase flood risk overall)*

   Paragraphs 159 and 162 of the Framework make it clear that considerations of flood risk relate to both existing circumstances and any future risks, associated with for example climate change.

7. For a specific development proposal this might involve applying a Sequential Test and then, only if this is passed, an Exception Test. The approach to be taken in terms of these tests will vary depending on the risk of flooding and the *vulnerability of development* to flooding. Reasons for refusal often relate to these tests. Paragraph 161 is explicit that this is a two-stage test.

8. The revised Framework clarifies that the sequential approach and tests should take account of all sources of flood risk when allocating or permitting development. The PPG on Flood Risk and Coastal Change has now been updated to reflect this position. This is a significant change in approach regarding the Sequential Test, which should now be applied in all areas at risk, including from rivers and the sea, directly from rainfall on the ground surface and rising groundwater, overwhelmed sewers and drainage systems, and from reservoirs, canals and lakes and other artificial sources.

   It is particularly helpful that the PPG, paragraph 23, now explicitly states firstly, that the Sequential Test "*means avoiding, so far as possible, development in current and future medium and high flood risk areas considering all sources of flooding including areas at risk of surface water flooding*", and secondly, that "*Even where a flood risk assessment shows the development can be made safe throughout its lifetime without increasing risk elsewhere, the sequential test still needs to be satisfied*."

   It is relevant to note that a Sequential Test should be applied when any part of the site is at risk of flooding. While an appellant may suggest or imply that no building would take place within those areas, the parts of the site at risk may form part of the access or may include areas where property could be put at risk. Furthermore, flood risk mapping is not an exact science, and it may be that the extent of flood risk is greater than that shown. Ultimately, the Sequential Test should still be applied as such sites present greater risk than those within areas in FZ1 or outside of the risk of surface water or groundwater flooding for example. Matters such as the layout to ensure that within the site, the most vulnerable development is located in areas of lowest flood risk, can be part of any exception test, which must follow only after the Sequential Test has been complied with.

   Another result of the updates to the Framework and the PPG is that the circumstances which led to a recent high court decision[2] no longer apply. Here, amongst other matters, the judgment accepted that a Sequential Test was not considered necessary for an area at risk of groundwater flooding, with such matters left to a condition. However, the findings in this case rested on the previous version of the guidance, albeit after the revision to the Framework. The guidance is now explicit, as set out above, that the Sequential Test now applies to all sources of flood risk. Nonetheless, developers

[2] *Wathen-Fayed v Secretary of State for Levelling Up, Housing and Communities* Case No: CO/3847/2021

may refer to this decision and Inspectors should be careful to address the revisions, which have clearly changed the material considerations on these matters.

9. The PPG sets out the flood zones for river and sea flooding in table 1. In summary they are:

Flood zone	Risk of flooding	Explanation
Zone 1	Low probability	Less than 1:1000 annual probability of diver or sea flooding
Zone 2	Medium probability	Between 1:100 & 1:1000 annual probability of river flooding Between 1:200 & 1:1000 annual probability of sea flooding
Zone 3a	High probability	More than 1:100 annual probability of river flooding More than 1:200 annual probability of sea flooding
Zone 3b	Functional floodplain	The area where water is stored or flows in times of flood

The PPG explains that for the purposes of applying the Framework, 'areas at risk of flooding' is principally land within Zones 2 and 3 (but it can also include land within Zone 1 where the Environment Agency has notified that there are critical drainage problems).

10. The EA provides flood maps showing areas at risk of flooding, principally from rivers and the sea. However, these are not necessarily precise, being based, in many cases, on modelled assessments. Earlier maps ignored the presence of any flood defences. The more recent maps, notably the Flood Map for Planning[3] do show defended areas, but the presence of such defences do not mean that a proposal is 'safe', only that while the defence is maintained the risk is reduced.

11. Long term flood risk information has been produced[4] showing risks from surface water, rivers or the sea, reservoirs and some groundwater. Generally, responsibility for managing the risk of flooding from surface water, groundwater or 'ordinary' watercourses[5] lies with the Lead Local Flood Authority (LLFA). This is generally the County or Unitary authority who are tasked with developing local flood risk management strategies. LLFAs will also have a significant input to any proposals for sustainable drainage proposals (SuDS) associated with a development. SuDS are an explicit requirement for major development and development in flood risk areas, unless there is clear evidence that this would be inappropriate (Paragraphs 167 and 169).

12. The maps do not take into account the possible impacts of climate change, although there is EA guidance on how this should be reflected in any assessment of flood risk[6]. Strategic Flood Risk Assessments carried out by the LPA may refine the information on the EA maps and, if so, will provide a more up to date starting point for the application of the Sequential Test. Increasingly Flood Hazard mapping is being produced and may be presented to you.

13. There are five classes of flood risk vulnerability and these are set out in Annex 3 of the revised Framework.

    - Essential infrastructure
    - Highly vulnerable

[3] https://flood-map-for-planning.service.gov.uk
[4] https://www.gov.uk/check-long-term-flood-risk
[5] All rivers, streams, ditches, drains etc. that do not form part of the identified main river
[6] Flood risk assessments: climate change allowances - GOV.UK

- More vulnerable
- Less vulnerable
- Water compatible development

The classification of various types of development is not repeated here. However, it is worth noting that basement dwellings, caravans, mobile homes & park homes (for permanent residential use) are *highly vulnerable* to flooding and dwellings are *more vulnerable*.

Strategic Flood Risk Assessments

14. A Strategic Flood Risk Assessment (SFRA) is a study carried out by one or more local planning authorities to assess the risk to an area from flooding from all sources, now and in the future. A SFRA takes into account the impacts of climate change and assesses the impact that land use changes and development in the area will have on flood risk.

15. There are two different levels of SFRAs, which reflect the likely risk of flooding from all sources and development pressures. They are:

    - Level 1 SFRA, where flooding isn't a major issue and where development pressures are low
    - Level 2 Assessment, where land outside flood risk areas can't appropriately accommodate all the necessary development and the NPPF's Exception Test needs to be applied.

Site Specific Flood Risk Assessment (FRA)

16. The Framework (in footnote 55) sets out when a developer will be required to provide a site specific FRA including:

    - all proposals for new development (including minor development and change of use) in Flood Zones 2 and 3
    - proposals of 1 hectare or greater in Flood Zone 1;
    - land within Flood Zone 1 which has critical drainage problems (as notified to the local planning authority by the EA)[7];
    - land identified in the SFRA as being at increased flood risk in the future; and
    - where proposed development or a change of use to a more vulnerable class may be subject to other sources of flooding.

17. The PPG explains what a FRA should establish including the risks of flooding from all sources, the potential to increase flooding elsewhere, measures to deal with these effects and risks, evidence to allow the LPA to apply the Sequential Test, if necessary and in relation to the Exception Test, if applicable.

18. The Framework emphasis that flood risk must be considered on the basis of risks now and in the future (Para 159 and 162). To this end, the Environment Agency produce and update Climate Change Allowances, which set out predictions of anticipated change for river flows, peak rainfall intensity, sea level rise and offshore wind speeds and wave heights. The latest peak rainfall allowance update introduces a number of revisions, including management catchments, with specific allowances rather than

[7] Critical drainage areas are areas identified by the EA where run off can lead to flooding problems downstream. Found across the country, they are prevalent in areas of the South West, North East, East Anglia and Central London.

national sets, different time periods or 'epochs', the application for surface water flood risk assessments and a statement that "there is a focus on using the central allowance for development with a lifetime to 2100 and the upper end for development with a lifetime to 2125". The issue of which allowances to adopt in FRAs has been a live issue in some significant appeals and Inspectors should consider the EA/Defra guidance carefully[8].

19. The anticipated allowances that should be adopted represent some quite significant changes over current levels and must be reflected in FRAs. For example, peak river flow, which varies across a range of catchments, is anticipated to increase in excess of 100%, while sea level rises of up to 1.62m are predicted for the 'upper end' scenario in 2080. Even median changes, the 'central' allowances, range up to 50% for peak river flow in 2080, or up to 1.21m for sea level rise. These allowances should be reflected within both SFRAs and site specific FRAs, in accordance with the guidance and vulnerability classification.

20. The PPG states that the information in a FRA should be credible, fit for purpose, proportionate to the degree of flood risk and appropriate to the scale, nature and location of development. For example, a house extension will generally require a less detailed assessment than a proposal for several new houses. Alternatively, a site proposing a fixed, temporary period of occupation, such as a Gypsy or traveller site, may be considered on the basis of climate change impacts over the period of occupation, or even the lifetime of the development for non-residential uses.

21. The absence of FRA can sometimes be a reason for refusal.

Sequential Test

22. Paragraph 162 of the Framework states that:

> *The aim of the sequential test is to steer new development to areas with the lowest risk of flooding from any source. Development should not be allocated or permitted if there are reasonably available sites appropriate for the proposed development in areas with a lower risk of flooding. The strategic flood risk assessment will provide the basis for applying this test. The sequential approach should be used in areas known to be at risk now or in the future from any form of flooding.*

23. The PPG advises in relation to river and sea flooding that:

- *The aim is to steer new development to Flood Zone 1 (areas with a low probability).*
- *Where there are no reasonably available sites in Flood Zone 1, consider reasonably available sites in Flood Zone 2 (medium probability)*

[8] https://www.gov.uk/guidance/flood-risk-assessments-climate-change-allowances. This guidance has been updated by EA to reflect updated peak rainfall allowances and the updated guidance came into immediate effect from 10th May 2022. EA has briefed local authorities on transitional provisions for applying the new allowances:

- For development plan documents and strategic flood risk assessments that are well advanced or submitted for examination by publication of the updated allowances, EA will base its advice on the previous guidance in these cases. EA will advise LLFAs to take the same approach;
- For planning applications validated or well progressed when the updated allowances were published, EA advises LLFAs to base their advice on the previous guidance in these instances. LLFAs will provide the sole source of surface water flood risk and drainage advice to LPAs and developers on individual applications.

- *Only where there are no reasonably available sites in Flood Zones 1 or 2 should the suitability of sites in Flood Zone 3 (areas with a high probability) be considered*

[Note that this is only a summary]

24. Any development proposal should take into account the likelihood of flooding from all other sources, as well as from rivers and the sea. The sequential approach to locating development in areas at lower flood risk should be applied to all sources of flooding, including development in an area which has critical drainage problems, as notified to the local planning authority by the Environment Agency, and where the proposed location of the development would increase flood risk elsewhere.

25. The Framework and PPG provide advice on when the Sequential Test does not need to be applied, although a site specific FRA may still be needed:

- Sites allocated in development plans (if the Sequential Test was applied during plan-making)
- Proposals in flood zone 1 (unless the SFRA for the area indicates otherwise, for example flooding in the future)
- The application is for a type exempt from the test as now specified in footnote 56 of the Framework

26. The PPG acknowledges that a change of use may have flood risk implications if it involves a change to a more vulnerable category. Depending on the risk, mitigation measures may be needed. It is for the applicant to show that the change of use meets the objectives of the Framework's policy on flood risk. A number of Prior Notifications also require an assessment of flood risk.

27. Minor development is defined in the PPG:

- minor non-residential extensions: industrial/commercial/leisure etc. extensions with a footprint less than 250 square metres;
- alterations: development that does not increase the size of buildings eg alterations to external appearance;
- householder development: For example; sheds, garages, games rooms etc. within the curtilage of the existing dwelling, in addition to physical extensions to the existing dwelling itself. This definition excludes any proposed development that would create a separate dwelling within the curtilage of the existing dwelling e.g. subdivision of houses into flats.

28. The PPG[9] provides further advice on the application of the Sequential Test:

- The area the test should be applied to will be defined by local circumstances relating to the catchment area for the type of development (e.g. the catchment area for a school or affordable housing within a town centre);

- A pragmatic approach should be taken to the availability of alternatives (for example, it may be impractical to suggest alternative locations for an extension to an existing business)

Although it is not explicitly stated in the PPG, the Sequential Test should be applied even when only part of a site is identified at risk of flooding, for reasons set out in paragraph 8 above.

[9] Paragraph 027

29. The PPG states that in the first place it is the LPAs responsibility to consider if the Sequential Test has been satisfied, informed by evidence provided by the developer. The EA has published guidance[10] for developers carrying out sequential testing as part of FRA. This includes advice on searching for alternative sites, and the provision of information about potential alternative sites, but not on the extent of the search area. The revised PPG is clearer now on the responsibility for approving the Sequential Test and, for example, on how to assess "reasonably available sites".

30. There is often disagreement over the area of the test; other than as set out in paragraph 28 above, the PPG is not explicit on this. However, the test should not be constrained by landownership and realistically will often extend across a town, a housing market area or district. Arguments are sometimes made that much smaller areas should be chosen, often citing the PPG, paragraph 027, that development is necessary "to sustain the existing community". Any such arguments should be carefully scrutinised, as sustaining a community at flood risk by introducing more vulnerable development is not the ambition of the policy, and would rarely be applicable at less than a town centre scale.

31. The Sequential Test must be passed before the Exception Test can be applied. Note that while the EA may comment on an appellant's Exception Test, and the appellant may rely on this, their response does not mean they endorse the appellant's consideration of any Sequential Test. The responsibility for deciding on this rests with the LPA and the EA's response should, and usually does, clearly indicate that the Sequential Test must be passed before considering the Exception Test.

Exception Test

32. Paragraph 163 of the Framework states that:

> *If it is not possible for development to be located in areas with a lower risk of flooding (taking into account wider sustainable development objectives), the exception test may have to be applied. The need for the exception test will depend on the potential vulnerability of the site and of the development proposed, in line with the Flood Risk Vulnerability Classification set out in Annex 3[11].*

Paragraph 164 identifies the requirements for the Exception Test to be passed:

- *the development would provide wider sustainability benefits to the community that outweigh the flood risk; and*
- *the development will be safe for its lifetime taking account of the vulnerability of its users, without increasing flood risk elsewhere, and, where possible, will reduce flood risk overall.*

Both elements of the test will have to be passed for development to be allocated or permitted.

33. If the Sequential Test has been passed, Table 2 in the PPG explains whether or not an Exception Test is required depending on the flood zone and the flood risk vulnerability of the development. Essentially there are 3 options:

[10] Flood risk assessment: the sequential test for applicants - GOV.UK (www.gov.uk)
[11] Prior to the July 2021 update to the NPPF, vulnerability classifications were set out in table 2 of the PPG.

- Development is appropriate and an Exception Test is *not* required (so in flood risk terms the development is acceptable in principle)

- An Exception Test is required

- Development should not be permitted (even if the Sequential Test has been passed)

34. The Framework and PPG (Notes to Table 2) also confirm that the Exception Test does *not* need to be applied for development set out in the Framework, footnote 56.

35. The PPG provides further advice on the Exception Test. Please have regard to it. Matters to be covered include: sustainability benefits, design of any flood defences, access and egress (escape), flood warning and evacuation, and these have been revised as a result of the PPG update, most notably in relation to "wider sustainability benefits", paragraph 036, "reducing flood risk overall", paragraph 037 and "Safe for its lifetime", paragraph 005[12].

36. Paragraph 167 of the Framework states that developers must demonstrate that:

    a) within the site, the most vulnerable development is located in areas of lowest flood risk, unless there are overriding reasons to prefer a different location;
    b) the development is appropriately flood resistant and resilient such that, in the event of a flood, it could be quickly brought back into use without significant refurbishment;
    c) it incorporates sustainable drainage systems, unless there is clear evidence that this would be inappropriate;
    d) any residual risk can be safely managed; and
    e) safe access and escape routes are included where appropriate, as part of an agreed emergency plan.

37. Inspectors should consider whether proposals for flood resistant or resilient development meets the test of being able to quickly bring the development back into use without significant refurbishment (Paragraph 167b).

38. Paragraph 167e) specifically requires that safe access and escape routes are included as part of '*an agreed emergency plan'*. It is not clear from the wording in the Framework whether this means such plans should now be provided as part of the application, rather than something that can be left to a condition, as has previously been done. In absence of further detail in the PPG, Inspectors should consider any submissions on this point and should assess whether in principle a plan could be agreed. However, there is no clear driver at present to require such plans to be provided prior to a decision, rather than be conditioned.

Conditions

39. The Sequential and Exception Tests are intended to establish whether the principle of development is acceptable in terms of flood risk. It is therefore unlikely that there will be circumstances where it would be appropriate to attach a condition requiring these tests to be carried out.

40. Case files often contain conditions recommended by the Environment Agency. Sometimes these are reflected in the conditions suggested by the LPA, and sometimes

[12] This now includes explicit reference to FD2320 regarding safe depth and velocity thresholds

not. If you intend to allow the appeal you should consider all suggested conditions. However, in doing so apply the three tests set out in the Framework in paragraph 57.

Things to be aware of:

41. Flooding is not just from rivers – tidal, groundwater, surface water and sewer flooding are all issues to take into account. Any site specific FRA should address all possible flood risks.

42. No matter how much detail an appellant may provide on proving that a proposed development would be safe from flooding for its lifetime, if it is at flood risk you must apply the sequential approach and Test first.

43. The area over which the Sequential Test is considered is not fixed – for housing it may be the whole LPA area, or a specific regeneration area. It is rarely acceptable to consider just land in control of, or owned by, the appellant.

44. While some changes of use or minor applications do not have to address specific FRA or necessarily address the Sequential Test, they still have to address flood risk policies in the development plan and the Framework.

45. The lack of a FRA is sufficient on its own to lead to dismissal of an appeal.

The Planning Inspectorate

The General Permitted Development Order & Prior Approval Appeals

Updated to reflect December 2023 Framework (NPPF)

What's new since the previous version

Changes highlighted in yellow made on 5 December 2023:

- Further clarifications in relation to European Sites and UK Protected Habitats and Species.
- Clarifications of advice on 'cumulative floorspace' and 'brought into use'
- Other minor corrections and clarifications throughout

Other recent updates

- Paragraph 61 of Annex A added to give further information on Principal Elevation
- Paragraph 78 of Annex B (Class MA: Commercial, Business and Service Uses to Dwellinghouses) updated.
- Revisions to paragraphs 206-216 and advice on 'development commenced'.
- Revisions to paragraphs 297-301 and the relationship between Regulation 77 and prior approval applications and appeals.

Contents

Background

1. This training material is designed for use in all casework concerning 'permitted development' including enforcement as well as planning appeals in England.

2. S55(1) of the Town and Country Planning Act 1990 (the TCPA90) as amended sets out that 'development' means the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land. S57(1) provides that planning permission is required for the carrying out of any development of land.

3. Clarifications, exclusions and inclusions to the definition of development are set out in s55(1A), s55(2) and s55(3) of the TCPA90. S55(2)(f) provides that where buildings or other land are used for a purpose of any class specified in an order made by the Secretary of State (SoS), under this section, the use of the buildings or other land for any other purpose of the same class shall not be taken to involve development.

4. 'Use classes' are set out in Schedules 1 and 2 to the Town and Country Planning (Use Classes) Order 1987 as amended (UCO). A change from one use to another within the same use class is not 'development' that requires planning permission.

5. Where planning permission **is** required for development, s58(1)(a) of the TCPA90 provides that this may be granted by a development order; s59(1) states that the SoS shall by order provide for the granting of planning permission. S60(1) specifies that permission granted by a development order may be granted unconditionally or subject to conditions and limitations as specified.

6. General [permitted] development orders and amending orders are statutory instruments (SIs). The first GDO was made in 1948. In this chapter, the term 'Order' is used to refer to any or all general [permitted] development orders.

7. The Town and Country Planning (General Permitted Development) (England) Order 2015 (GPDO 2015) is a development order passed by Parliament through SI 2015/596, as secondary legislation to the TCPA90. As with previous Orders, the GPDO 2015 grants planning permission for certain classes of development, described as permitted development (PD).

8. Unless transitional or saving provisions are in place, Inspectors must determine prior approval appeals with regard to the Order as in force at the date of the appeal decision and not the date of the local planning authority's (LPA's) decision. This is due to the fact that previous relevant provisions may have been revoked. Indeed, the LPA should determine prior approval applications on the basis of legal and policy framework in force at the time of their decision, not the date of the application.

9. In enforcement appeals proceeding on ground (c) – whether the matter alleged constitutes a breach of planning control – and where it is claimed that the development is PD, it is necessary to look at the Order in force when the development was begun; *Williams Le Roi v SSE & Salisbury DC* [1993] JPL 1033. The onus is on the appellant to show when that was.

10. If a breach was found at that time, but the development would be permitted under a subsequently amended or replacement Order, the position would not change. This is because, as noted below, the Order does not grant retrospective planning permission. The appellant might have a fallback position of undertaking the same development as PD, but this would only be relevant to grounds (a) and perhaps (f).

11. Lawful development certificate (LDC) appeals made under s191 on the basis that existing use or development is PD should be determined with regard to the Order as in force when the development was carried out. LDC appeals made under s192,

concerning proposed use or development, should be decided on the Order as in force at the date of the application.

12. When dealing with the GPDO or any other legislation, **Inspectors should always refer to the wording of the legislation itself**. The Knowledge Library contains these versions of the Order:

    - The consolidated (up-to-date) GPDO 2015
    - The un-amended (pre-6 April 2016) version of the GPDO 2015
    - Amending orders to the GPDO 2015
    - The current (up-to-date) GPDO 1995: as still in force in Wales, and with some saved provisions for England
    - The GPDO 1995 as current in England immediately prior to its replacement (i.e. as on 14 April 2015)

13. It should be noted that some of the case law referred to in this chapter pre-dates the current Order but should remain of general application.

14. S58-60 of the TCPA90 empower LPAs to make Local Development Orders (LDOs) to grant planning permission for development not permitted by a general [permitted] development order. While LDOs are rare, normally being made only in respect of Enterprise or Employment Zones, it may be necessary to know whether a LDO covers the appeal site.

15. Most GPDO 2015 casework relates to Article 3, Schedule 2, Parts 1, 3, 4 and 6; advice on these is set out in Annexes A, B, C and D respectively. Advice on Part 16 is set out in the Mobile Telecommunications chapter.

The Construction and Operation of the GPDO 2015

The Grant of Planning Permission

16. Article 3(1) of the GPDO 2015 provides that, subject to the provisions of the Order, planning permission is granted for the classes of development described as permitted development in Schedule 2. In other words, Article 3(1) is the mechanism by which planning permission is granted for PD. Planning permission was previously granted via Article 3(1) in the GPDO 1995, but that will largely be relevant now only to enforcement and LDC appeals.

17. Article 3(1) provides that the planning permission is granted subject to Regulations 75-78 of the Conservation and Habitats and Species Regulations 2017, as discussed below. Article 3(2) of the GPDO 2015 provides that any permission granted by Article 3(1) is subject to any relevant exception, limitation or condition specified in Schedule 2. Some classes of PD are conditional that a prior approval procedure being followed.

18. In paragraph 33 of *Keenan v Woking BC & SSCLG* [2017] EWCA Civ 438, Lindblom LJ affirms that **"crucially", the grant of planning permission made under the Order is made through the operation of Article 3(1) and the provisions for PD in the relevant class** – not through any procedure to be followed under Article 3(2), or through provisions for conditions set out in relation to the relevant class[1].

[1] *Keenan* concerned an appeal pertaining to the GPDO 1995 but is applicable to the GPDO 2015.

19. Since it is Article 3(1) of the GPDO which permits the classes of development set out in Schedule 2, an application for prior approval, or for a determination as to whether prior approval is required, is not an application for planning permission. It is an application made to comply with a 'pre-commencement' condition attached to that permission under the relevant Class.

20. The appeal provisions in s78(1) of the Town and Country Planning Act 1990 distinguish between where the LPA decided to (a) "refuse an application for planning permission or grant it subject to conditions" – and where they decided to (c) "refuse an application for any approval…required under a development order…or grant it subject to conditions". On a normal reading of s78(1), an appeal made in respect of an application for prior approval falls within s78(1)(c), whereas an appeal made in respect of an application for express planning permission falls within s78(1)(a).

The 'UCO Amendment Regulations'

21. 'The Schedule' to the UCO as originally enacted in 1987 and subsequently amended set out use classes in Parts A, B, C and D. On 1 September 2020, the Town and Country Planning (Use Classes) (Amendment) (England) Regulations 2020 came into force and provided that:

- Uses which previously fell under classes A4 and A5 are included in the list of uses outside of any class set out in Article 3(6) to the UCO.
- The Schedule is now Schedule 1.
- Parts A and D of Schedule 1 are revoked while Part B is modified.
- Classes A1, A2, A3, B1, D1 and D2 are replaced by Class E in Part A of Schedule 2.
- New 'learning and non-residential institutions' and 'local community' use classes, F.1 and F.2, are created in Part B to Schedule 2.

22. For the 'material period' beginning 1 September 2020 and ending on 31 July 2021, the following transitional provisions applied:

- Any references in the GPDO to uses or use classes specified in the Schedule to the UCO are to be read as if those references were to the uses or use classes which applied on 31 August 2020 – that is, before the UCO Amendment Regs came into force; Regulation 3(2).
- Any references to uses or use classes specified in the Schedule to the UCO are to be read as meaning the uses or use classes that applied on 31 August 2020 for the purposes of making a prior approval application; Regulation 3(3)(a).

The Effect of Planning Conditions

Conditions Restricting the Operation of the GPDO and UCO

23. The GPDO 2015 does not permit development contrary to any condition on an express or deemed planning permission; Article 3(4). And conditions may be imposed on any express permission to withdraw PD rights or the right to make future changes of use within the same use class[2]. The statutory power to impose conditions regulating the use of land is not limited to what constitutes 'development' or requires express permission; *City of London v SSE* [1971] 23 P&CR 169.

[2] Subject to the test of reasonableness; PPG paragraph 21a-017-20190723.

24. Existing conditions which purport to invoke Article 3(4) should be assessed based on their wording; the condition must not only specify what is being permitted, but also contain 'something more' which explicitly or implicitly restricts future development.

25. When **imposing** a condition to restrict development or PD rights, it is best practice to construct the condition in clear terms and refer specifically to the relevant provisions (as things stand) of the Order and/or the UCO plus any equivalent provision in any statutory instrument revoking or re-enacting that Order with or without modification[3]. When **interpreting** a condition, the question will be whether the condition as a matter of fact restricts development and/or PD rights or not.

26. In *Dunnett Investments Ltd v SSCLG & East Dorset DC* [2017] EWCA Civ 192, a condition was imposed that: 'This use of this building shall be for purposes falling within Class B1 (Business) as defined in the [UCO 1987], and for no other purpose whatsoever, without express planning consent from the [LPA] first being obtained'.

27. The High Court and Court of Appeal (CoA) held that 'express planning consent from the LPA' means a permission granted the LPA on receipt of a planning application. Taken with the phrase 'and for no other purpose whatsoever', the condition excluded a grant of permission by the operation of the Order. The second part of the condition was designed to and does prevent the operation of the Order.

28. If a PD right is restricted by a condition on a previous permission, the Inspector's finding might be:

- In order to benefit from any planning permission granted by Article 3 of the GPDO 2015, the development must not be contrary to any condition on an existing planning permission; Article 3(4). Here, condition [x] attached to planning permission [y] restricts such development by …
- The [development] is not permitted by the GPDO 2015. Express planning permission is required for the development and that can only be granted on application made to the local planning authority in the first instance.

29. Conditions should **never** be imposed to remove PD rights which do not in fact exist on the date of your decision; always check current PD rights in the consolidated GPDO before imposing conditions for their removal.

30. Older permissions may be subject to conditions that do not reflect current PD rights set out in the relevant Part or Class. Whether a previously imposed condition that restricts PD rights set out under Part 1 would have the effect of restricting development permitted by Class AA, for example, will be a question for the decision-maker with regard to the wording of the condition and the purposive approach to interpretation adopted by the courts as discussed in the Enforcement chapter.

Conditions Imposed by the GPDO

31. Most Classes of PD set out under the various Parts of Schedule 2 of the GPDO are subject to limitations and/or conditions. Such conditions are to be treated as conditions imposed on a planning permission.

32. As discussed further below, and while the wording is varied in different Parts and Classes, any requirement to seek prior approval is always imposed as a pre-

[3] See PPG paragraph 21a-017-20190723 and Carpet Decor (Guildford) v SSE [1981] JPL 806; *Dunoon Developments Ltd v SSE & Poole BC* (1993) 65 P&CR 101; *Rugby Football Union v SSTLR* [2002] EWCA Civ 1169; *Royal London Mutual Insurance Society Ltd v SSCLG* [2013] EWHC 3597

commencement condition. In other words, the prior approval procedure must be complied with before the development is commenced – otherwise, it will not be PD.

33. Some PD rights are removed by conditions and limitations within Schedule 2 of the GPDO 2015; for example, Part 1, Class A, paragraph A.1(a) provides that the enlargement, improvement or other alteration of a dwellinghouse is not permitted if permission to use the dwellinghouse as such was granted by Part 3, Class M, N, P, PA or Q.

34. Where it appears that development could not be PD because of a condition within the GPDO 2015, the Inspector's findings might be:

- In order to benefit from the provisions of [ref to relevant Part of Schedule 2] the proposed [development] must comply with paragraph [insert relevant condition or limitation]. In this case [explain how the development does not comply].
- The [development] is not permitted by the GPDO 2015. Express planning permission is required for the development and that can only be granted on application made to the local planning authority in the first instance.

35. Where these issues have not been raised by the parties, but nevertheless it is clear from the evidence that a condition or a limitation in an Order has been breached, the parties may well need to be given an opportunity to make representations in the interests of natural justice.

Matters of Lawfulness

36. Article 3(5) provides that the planning permission granted by the GPDO 2015 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 or (b) in the case of permission granted in connection with an existing use, that use is unlawful. The purpose of this provision is to prevent unlawful development from acquiring PD rights, so that, for example, an unlawful dwellinghouse could not be extended under Part 1, Class A.

37. It was held in *Evans v SSCLG* [2014] EWHC 4111 (Admin) that, where the word 'building' is defined for the purposes of an Order as including 'part of a building', and the operations involved in the construction of any part of a building are unlawful, Article 3(5) serves to disapply PD rights granted in respect of that building.

38. It was further held in *RSBS Developments Ltd v SSHCLG & Brent LBC* [2020] EWHC 3077 (Admin) that the two sub-paragraphs of Article 3(5) are not mutually exclusive. The change of use of the building to flats had been granted prior approval but taken place after the construction of an extension not shown on the plans. The Inspector was entitled to find that the permission granted by the GPDO for the change of use did not apply because of the effect of Article 3(5)(a) and the unlawful operations involved in the construction of the building that the permission was granted in connection with[4].

39. Under Part 4, Class A of the GPDO 2015, the provision of buildings, moveable structures, works, plant or machinery required temporarily in connection with and for the duration of operations being or to be carried out is PD. Paragraph A.1(b), however, provides that development is not permitted by Class A if planning permission is required but not granted or deemed to be granted for the operations.

[4] The Inspector's decision to uphold the enforcement notice did not rest entirely on the application of Article 3(5)(a); the operations carried out were such that the change of use was not carried out in accordance with the plans approved through the prior approval procedure.

40. PD rights apply to lawful operations and uses, being those which have planning permission, are immune from enforcement action under s171B of the TCPA90 or are subject to an LDC granted under s191(1) and 192(1). S191(6) provides that lawfulness as specified in an LDC is 'conclusively presumed' unless there has been a subsequent breach of planning control or other material change in circumstances.

41. If lawfulness is disputed, it should not be assumed simply from the absence of a planning permission or LDC that the operation or use is unlawful. Inspectors may have to come to a view based on the evidence before them as to whether Article 3(5) probably precludes the PD rights in question. It should be stated that your deliberations are strictly for the purposes of the prior approval appeal.

42. In *Arnold v SSCLG* [2015] EWHC 1197 (Admin), an Enforcement case, works began to a dwellinghouse following the grant of LDCs for proposed extensions – but the works did not directly implement the LDCs, and few elements of the original house remained. The High Court held that the parent dwelling must be retained in order for the householder to benefit from the PD rights relied upon. The rights assumed the continuing existence of the original structure; if that was lost, so were the rights[5].

43. PD rights only apply when the development fully accords with the limitations set out in the Order. Any claim of PD rights must be measured against each of the sub-clauses of the relevant part of Schedule 2. If development is commenced but any limitation is exceeded, the whole development would be unlawful, not just the element in excess of PD rights; *Garland v MHLG* [1968] 20 P&CR 93.

44. Limitations to, for example, the size of development are expressed precisely in the Order. There cannot be a 'de minimis' infringement. PD rights cannot be claimed retrospectively by the removal of an element so as to return the residual development to the permitted tolerance, as held in *R (oao Watts) v SSETR & Hammersmith and Fulham LBC* [2002] JPL 1473, summarised in the Enforcement Case Law chapter.

45. An exception would be where there are clearly severable elements, such as a ground floor extension and a loft conversion. The different elements may fall within different Parts or Classes (here, Class A and Class B of Part 1) and be subject to different limitations. Alternatively, PD rights may be claimed for one element or the other, if either on its own would meet the provisions of the Order and the two elements were not or would not be carried out as one development, as a matter of fact and degree.

46. Where PD is subject to a condition in the relevant Part and Class that an application is made to the LPA for a determination as to whether prior approval is required or simply for prior approval, but the developer starts the work without notifying or applying to the LPA as required, there will be a breach of the relevant pre-commencement condition. The development will be without planning permission and unlawful as a whole. The LPA could enforce against it on that basis, subject to the time limits set out in s171B of the TCPA90.

47. **There is no provision to grant prior approval retrospectively** or an LDC under s191 for development that already exists if the prior approval procedure was not followed. An LDC cannot be granted under s192 for proposed development if a prior approval condition has not been complied with by the date of the application. However, an LDC may be granted under s191 or s192 for PD which did or does not require prior approval.

48. Where development has begun in accordance with the Order and any prior approval conditions, but then there is a failure to comply with relevant conditions which have a

[5] Arnold went to the Court of Appeal, but without permission to appeal on this ground; [2017] EWCA Civ 231.

'continuing effect', the LPA could only enforce against a breach of a condition, just as it would enforce against a failure to comply with a condition imposed on an express planning permission[6]. This includes a breach of 'temporary' conditions.

49. PPG paragraph ref ID 13-041-20180222 states that a planning application fee may be payable where development that would otherwise be PD requires [express] planning permission[7]. While this is largely a matter for LPAs, it may be relevant to enforcement appeals where a fee is payable for a deemed planning application.

Repeal, Re-Enactment, Revocation & Transitional Arrangements

50. Under s17(2)(b) of the Interpretation Act 1978, where an Act repeals and re-enacts a previous enactment, with or without modification, then in so far as any subordinate legislation made under the enactment so repealed could have been made under the provision re-enacted, it shall have effect as if made under that provision – unless the contrary intention appears.

51. Thus, if development was permitted or granted prior approval under a previous Order, and could be so under the Order as re-enacted, it shall be treated as if permitted under the Order as re-enacted.

52. A planning permission granted by the Order 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 – or failed to make a determination within the specified period; *R (oao Orange Personal Communication Services Ltd & Ors) v Islington LBC* [2006] EWCA Civ 157.

53. Under s61D(1) of the TCPA90, a development order may provide for the completion of development if that was permitted by the Order but the permission is withdrawn [through revocation or amendment of the Order] after the start but before the completion of the development. However, s61D(2) provides that the permission granted by an Order is withdrawn where the Order is revoked or amended so as to cease to permit the development, or materially change any condition or limitations.

54. The GPDO 2015 revoked the GPDO 1995 through Article 8(1) and Paragraphs 1 and 12 of Schedule 4[8]. It made no provisions under s61D in respect of development that was permitted and started but not completed under the GPDO 1995. However, even if such development would not be permitted by the GPDO 2015, it can still be lawfully completed because the permission granted by the GPDO 1995 was 'crystallised' when the development began. The LPA would need to issue a completion notice or a discontinuance order to halt the development.

55. Beginning works in accordance with the GPDO 1995 would not help an appellant where an LDC is sought under s192 for proposed development under the GPDO 2015. Any such appeal could only succeed if the development is permitted under the current Order, because s192(2) provides that the use or operations described in the application would be lawful **if instituted or begun** at the time of the application.

56. Similarly, prior approval cannot be granted for development which would not be permitted under the GPDO 2015, even if it commenced in accordance with the GPDO 1995, because the conditions requiring prior notification must be complied with before development is begun.

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[6] *Clwyd v SSW* [1982] JPL 696; *R v Elmbridge BC ex parte Oakimber* [1992] JPL 48; *Whitley & Sons v SSW* [1992] 3 PLR 72

[7] PPG: When is Permission required?

[8] Except as specified in Article 8(2), which concerns a 2015 amendment to the GPDO 1995.

‘Article 4’ Directions

57. Article 4(1) of the GPDO 2015 provides that, if the SoS or an LPA is satisfied that it is expedient that any development described in any Part, Class or paragraph of Schedule 2 – with exceptions for Part 17 – should not be carried out unless permission is granted on application, they may make a direction that the permission granted by Article 3 does not apply either to all or any development of the Part, Class or paragraph in an area specified, or any particular development falling within that part of the paragraph.

58. An ‘Article 4 Direction’ must be expressly made under Article 4(1). Article 4(2) provides that a Direction would not affect the carrying out of PD within specified classes before the Direction comes into force; it would neither affect the carrying out of prior approval development where the prior approval date occurs before the Direction comes into force and the development is completed within 3 years of the prior approval date.

59. To have effect, an Article 4 Direction must be made before the PD rights are implemented. However, since the GPDO 2015 permits up to 28 (temporary) changes of use on as many days in the year under Part 4, a Direction can be made at any time to take effect prior to the next exercise of the right; *South Bucks DC v SSE & Strandmill* [1989] JPL 351.

60. An Article 4 Direction may give rise to compensation under s108. The procedures to be followed when making, modifying or cancelling a Direction are set out in Article 4(4) and Schedule 3 of the GPDO 2015.

61. The transitional provisions set out in the UCO Amendment Regs apply to the making, modifying or cancelling of an Article 4 Direction, whereby any references to uses or use classes specified in the Schedule to the UCO are to be read until 31 July 2021 as if those references were to the uses or use classes which applied on 31 August 2020; Regulation 3(3)(b).

62. Regulation 3(4) provides that where any Article 4 Direction made prior to 1 September 2020 included references to uses or use classes specified in the Schedule to the UCO on 31 August 2020, the references should continue to be read as being to those uses or use classes.

63. The Written Ministerial Statement: Revitalising high streets and town centres made by the SoS on 1 July 2021 sets out measures to ‘ensure that our policy on Article 4 Directions is used in a highly targeted way to protect the thriving core of historic high street areas, but does not necessarily restrict the ability to deliver much needed housing through national permitted development rights.’

64. Paragraph 53 of the National Planning Policy Framework was thus amended as follows: ‘The use of Article 4 directions to remove national permitted development rights should:

- Where they relate to change from non-residential use to residential use, be limited to situations where an Article 4 direction is necessary to avoid wholly unacceptable adverse impacts (this could include the loss of the essential core of a primary shopping area which would seriously undermine its vitality and viability, but would be very unlikely to extend to the whole of a town centre)

- In other cases, be limited to situations where an Article 4 direction is necessary to protect local amenity or the well-being of the area (this could include the use of Article 4 directions to require planning permission for the demolition of local facilities)

- In all cases, be based on robust evidence, and apply to the smallest geographical area possible.'

65. Any existing Article 4 Directions will be unaffected by the new policy.

Other Exceptions to PD

66. Under Article 1(2), the GPDO 2015 applies to all land in England except where land is the subject of a Special Development Order, whether made before or after the commencement of the GPDO 2015, Then the GPDO 2015 applies to that land only to such extent and subject to such modifications as may be specified in the Special Development Order.

67. Under Article 1(3), nothing in the Order applies to any permission deemed to be granted under s222 of the TCPA90 for the display of advertisements.

68. Article 3(6) excludes permission for any development, other than under certain classes of Parts 9 and 18, which 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.

69. In an LDC or indeed a prior approval case, the Inspector may find that express planning permission is required for building or works that would otherwise be PD, because it would be necessary to create a new access or materially widen that existing to a trunk or classified road. It is for the Inspector to ascertain whether such works are 'required'. A decision as to whether development would result in danger to highway users is likewise for the Inspector's judgment. If these matters are not already raised, representations should be sought from the parties.

70. Development within the meaning of the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 is not permitted under the GPDO 2015 unless relevant requirements of Articles 3(10), 3(11) and/or 3(12) are satisfied; see also Other Statutory Duties below.

Interpretation

General

71. PD rights are granted in accordance with the definitions set out in Article 2(1). It is also necessary to pay attention to paragraphs which set out the interpretation of particular Parts and Classes, such as Part 1, paragraph I.

72. Where a term is defined for the specific purposes of one Part or Class of an Order, it should not be taken as applying to other Parts or Classes. The Technical Guidance: Permitted Development for Householders assists in the interpretation of **Part 1 only**, as set out below in Annex A.

73. Articles 2(3) to 2(12) set out further definitions and provisions, including that the meaning of Article 2(3), 2(4) and 2(5) land is described in Parts 1, 2 and 3 of Schedule 1 respectively. Such land includes Conservation Areas, AONBs, areas specified by the SoS for the purposes of s41(3) of the Wildlife and Countryside Act 1981, the Broads, National Parks, World Heritage Sites, and other named areas where Special Development Orders apply so as to modify PD rights under the Order.

74. Definitions set out in an Order relate **only** to the Order and not to primary legislation. Where a term is defined in the s336(1) of the TCPA90 and not qualified or adapted in an Order, the s336(1) definition will apply.

75. If neither the Order nor the TCPA90 gives a term a precise meaning, the 'ordinary' meaning of the word(s) should be applied as in the Oxford English Dictionary. It was held in Evans v SSCLG [2014] EWHC 4111 (Admin) that the ordinary meaning of the language is to be ascertained when constructing the Order in a broad or common sense matter.

76. The Order refers in various places to a list 'including'. For example, prior approval is required in respect of development permitted under Part 1, Class AA as to the 'impact on the amenity of any adjoining premises including overlooking, privacy and the loss of light'.

77. Such provisions should be interpreted on the basis that 'including' denotes that the list is not closed – but if a matter not mentioned in the list is to be considered, it should be 'of the same kind'[9]. In this example, a matter other than overlooking, privacy or loss of light could be addressed in a prior approval determination, so long as it is 'of the same kind' in the sense of being clearly relevant to the amenity of any adjoining premises.

78. Regard may also be had to the purposive approach adopted by the Courts to the interpretation of legislation. In *Cawley v SSE & Vale Royal DC* [1990] JPL 742, it was held that headings in secondary legislation can be used as an aid to interpretation.

Building

79. The term 'building' is given a different meaning in Article 2(1) of the GPDO 2015 than in s336(1) of the TCPA90 as follows:

    (a) Includes any structure or erection and, **except in relation to specified Parts and Classes**, includes any part of a building; and

    (b) Does not include plant or machinery or, **except in relation to specified Parts and Classes**, any gate, fence, wall or other means of enclosure.

80. The meaning of 'building' is further qualified in respect to demolition in Article 3(9). As highlighted in *Havering LBC v SSCLG* [2017] EWHC (Admin) 1546, Article 2(1) defines 'cubic content' as meaning 'the cubic content of a structure or building measured externally'.

External Appearance

81. Where prior approval is required in relation to the effect of development on the 'external appearance' of a building or dwellinghouse, it will be a matter of planning judgment as to whether consideration is given to the effect in terms of the building's intrinsic design and/or to the effect in terms of the building's relationship with adjoining or nearby properties; see *CAB Housing Ltd v SSLUHC & Broxbourne BC* [2023] EWCA Civ 194.

82. It is not necessary and will not always be sensible or appropriate to consider the external appearance of the building in isolation; the street context may be relevant. What is acceptable on one site may not be on another.

Height

83. Article 2(2) explains that 'any reference in this Order to the height of a building or of plant or machinery is to be construed as a reference to its height when measured from ground level' – and that 'ground level' in this context means 'the level of the surface of the ground immediately adjacent to the building or plant or machinery in

[9] 'Of the same kind', also known as *ejusdem generis*, is the fifth principal rule of statutory interpretation.

question or, where the level of the surface of the ground…is not uniform, the level of the highest part of the surface of the ground adjacent to it'.

84. *McGaw v the Welsh Ministers & the Council for the City and County of Swansea* [2020] EWHC 2588 (Admin), [2021] EWCA Civ 976 concerned an LDC appeal where the appellant sought to ascertain that the construction of a garden room under Part 1, Class E of Schedule 2 (as applicable to Wales) would be PD. Whether the proposed building would meet the height restrictions set out in paragraph E.1 depended on how height was to be measured.

85. The High Court held that the Inspector was wrong to base his assessment on existing ground levels; the appellant intended to backfill the land and was seeking an LDC for *proposed* development as shown on the plans. That judgment stands since the point was not reconsidered in the CoA.

86. The question for the CoA was what ground should be considered 'adjacent' to the southern flank of the proposed building when that would abut the curtilage boundary. The boundary wall could not be taken as the adjacent ground. It was held that the adjacent ground did not have to be within the curtilage of the appeal dwellinghouse. If ground on the other side of a boundary wall must be ignored, no building constructed on the boundary could ever fall within Class E because there would be no relevant ground that could be used to apply the height limits.

87. It was accepted that there could be problems or difficulties in having to rely on a neighbour's land but that was not considered 'a valid objection in principle to the proposition that such land can be the ground immediately adjacent to the relevant part of the new building'. In this case, on the facts, it was right to identify the neighbour's garden as the immediately adjacent ground for the purposes of Class E.

88. See Annex A for further discussion of the McGaw case.

89. Article 2(2) does not apply if measuring the height of any structure that is neither a 'building' as defined in Article 2(1) nor plant or machinery. When deciding, for example, whether a fence is PD under Part 2, Class A, the 'height above ground level' should be given its ordinary meaning with regard, where applicable, to the ground level of the adjacent highway. There is no prescribed measurement method in such cases, but any breach of the limits would take the whole structure outside of the PD right.

Highway

90. S336(1) provides that, for the purposes of the TCPA90, 'highway' has the same meaning as in [s328] of the Highways Act 1980. It states that, except where the context requires, 'highway' means the whole or any part of a highway other than a ferry or waterway and that, where such a highway passes over a bridge or through a tunnel, that bridge or tunnel is to be taken to be part of the highway. A 'highway maintainable at the public expense' is to be construed accordingly.

91. Common law has established that a highway is a defined route over which the public can pass and repass without hindrance or charge. The use must be "as of right", meaning without force, secrecy, or permission. The public right to pass and repass as of right may be limited to a particular class of user or mode of transport.

92. In the absence of any contrary statutory definition, a privately-owned or maintained or an unmaintained way may be a highway if the public can use it "as of right". This applies to the GPDO 2015 except in relation to Part 1, but is not the case, given s328, for a ferry or waterway.

93. For the purposes of Part 1, 'highway' is defined in paragraph I as including an unadopted street or a private way. Since those terms are not qualified, paragraph I would appear to include unadopted streets or private ways where the public do not have a right of use.

Dwellinghouse

94. The term 'dwellinghouse' is not defined in the TCPA90 and it may be used in practice to denote:

- The **use** of a building as a dwellinghouse **and/or**
- The **building** itself.

95. It is not wrong for an Inspector to utilise the word either way, so long as their meaning in each instance is clear and precise. It is normally critical that there is use as a dwellinghouse but the Order itself adopts the word in relation to buildings.

96. For example, the PD rights granted under Class AA of Part 1 do not apply if 'the dwellinghouse was constructed before 1 July 1948 or after 28 October 2018'; paragraph AA.1(c). This limitation should be interpreted as referring to the construction or erection of the building that is now used as a dwellinghouse.

97. The '*Gravesham* test' or distinctive characteristic of a dwellinghouse is that it can afford to those who use it the facilities required for day-to-day private domestic existence[10]. A building may have such facilities and be a 'dwellinghouse' in Gravesham terms, but not be used as a dwellinghouse in practice or for the purposes of the GPDO.

98. A building may meet the Gravesham test but not be a 'C3 dwellinghouse' for the purposes of the UCO. It was held in *Rectory Homes Ltd v SSHCLG & South Oxfordshire DC* [2020] EWHC 2098 (Admin) that for a building 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. A building might be properly described as a 'dwelling' in Gravesham terms without being used within the parameters of class C3.

99. It is not a condition of qualifying for Part 1 PD rights that a 'dwellinghouse' is of a particular type or used in accordance with use class C3. It is likely that a dwellinghouse in use as a [small] HMO, as defined by use class C4, will fit within the GPDO 2015 definition and benefit from Part 1 PD rights.

100. It will be a matter of fact and degree as to whether larger HMOs meet the definition of a dwellinghouse for Part 1. Provided that the premises are in use as a dwellinghouse in the Gravesham sense, and not caught by the exception for 'flats' in Article 2(1), the PD rights granted under Part 1 would normally apply to these large houses.

101. However, while the 'Gravesham' definition would normally include flats, Article 2(1) of the GPDO states that a 'dwellinghouse' does not include a building containing one or more flats, or a flat contained within such a building, except in Parts 3, 11, 12A and 20[11]. The term 'flat' is defined in paragraph C.(1) of Part 20 as 'a separate and self-contained premises constructed for use for the purposes of a dwellinghouse'.

102. Thus, there are no PD rights under Part 1 for development within the curtilage of a building that is in mixed use with one or more flats or is entirely used for separate

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[10] *Gravesham BC v SSE & O'Brien* [1984] 47 P&CR 142; [1983] JPL 307

[11] Article 2(1) is amended so as to extend the exemption to Part 11 with effect from 21 April 2021 under the Town and Country Planning (General Permitted Development etc.) (England) (Amendment) Order 2021.

self-contained flats. However, if a flat is used as a C3 dwellinghouse as defined by Schedule 1 of the UCO, it may be subject to a change of use to a use that is specified in Part 3.

103. Whether (part of) a building is **already** used as a dwellinghouse for the purpose of Part 1 is a question of fact. Housing space standards are not relevant to this test. A dwelling which is too small to meet the standard might be 'substandard' in policy terms but still a dwelling in legal terms, unless it is so small that it fails to provide the 'facilities required for day-to-day private existence'.

104. However, from 6 April 2021, Article 3(9A) of the GPDO provides that Schedule 2 does not permit any **new** dwellinghouse where the gross internal floorspace is less than 37m^2 or the dwellinghouse does not comply with the nationally described space standard issued by DCLG on 27 March 2015[12].

105. Where PD rights are based on the 'original dwellinghouse', the definition in the GPDO 2015 or relevant previous Order must be used. Where there is a 'missing piece' of a pre-1948 dwelling, it will be for the Inspector to ascertain from the available evidence what the dimensions were in 1948, in order to determine the extent of the PD right; for example, where the rear wall of the original dwelling was for the purposes of A.1(h).

106. It is not possible to assess what comprised the original dwellinghouse until it came into being; the GPDO 2015 does not mention 'original building'. Where the building was previously in a different use, and then there was a material change of use to dwellinghouse use, the 'original dwelling' for the purposes of the GPDO should be taken as the building upon the change, not the building as it may have been before.

107. Finally, care should be taken in casework in considering whether the term 'dwellinghouse' could mean 'dwellinghouses'. The singular in law includes the plural[13], but Part 1 relates specifically to 'development within the curtilage of a dwellinghouse' and operations such as dormers which straddle two adjoined dwellinghouses could not be PD. However, the change of use permitted under Class M of Part 3, for example, is not limited to the creation of one dwellinghouse; the floorspace is limited, via M.1(c) and M.1(d), but not the number of dwellings.

Curtilage

108. 'Curtilage' is a legal concept, **not** a use of land. The term generally refers to land which serves the purpose of a building in some reasonably necessary or useful manner given the tests of physical layout, ownership (past and present) and use (past and present)[14]. The question is whether, as a matter of fact and degree, the land is part and parcel of or has an intimate association with the building to which it is attached. It is not necessary for the curtilage to be small or enclosed[15].

109. The GPDO 2015 makes several references to 'curtilage', but only gives a definition of this term for the purposes of Part 3, Classes Q, R, P, PA and S; see Annex B. For the purposes of Part 1, 'curtilage' is defined in the Technical Guidance, as described in Annex A, but not the GPDO itself.

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[12] Town and Country Planning (General Permitted Development) (England) (Amendment) Regulations 2020

[13] S6(c) of the Interpretation Act 1978.

[14] *Sinclair-Lockhart's Trustees v Central Land Board* [1950] 1 P&CR 195; *Attorney General ex rel Sutcliffe, Rouse & Hughes v Calderdale BC* [1983] JPL 310

[15] From a review of authorities pertaining to the exercise of PD rights in *McAlpine v SSE* [1995] JPL B43; *Skerritts of Nottingham Ltd v SSETR* [2000] 2 PLR 102

110. If there is any difficulty defining the extent of the curtilage, it should be borne in mind that the interpretation of whether a development is within the curtilage is a matter of law; further advice on curtilage is set out in the Enforcement and the Historic Environment chapters.

Agriculture

111. For development to be PD under Part 3, Class Q, the 'site' must have been used solely for an agricultural use as part of an established agricultural unit on 20 March 2013, or the 'building' must have been in such use when last in use, or the 'site' must have been in such use for at least ten years if brought into use after the specified date; paragraph Q.1(a). 'Site' is defined in paragraph X as 'the building and any land within its curtilage'.

112. Part 3, Classes R and S set out PD rights in relation to a change of use of a 'building and any land within its curtilage from use as an agricultural building', but R.1(a) and S.1(a) only require that the 'building' was used solely for an agricultural use as part of an established agricultural unit on the specified dates.

113. For development to be PD under Part 6, Classes A or B, it must be on 'agricultural land comprised in an agricultural unit' and 'reasonably necessary for the purposes of agriculture within that unit'. The PPG at paragraph ref ID 13-115-20180222 offers guidance on whether express planning permission is required for a farm track.

'Agriculture', 'Agricultural land' and 'Agricultural Buildings'

114. Since there is no definition in the GPDO 2015, the meaning of 'agriculture' should be taken from s336(1) of the TCPA90, which sets out examples of agricultural activities. The s336(1) list is not exhaustive but includes:

    'Horticulture, fruit growing, seed growing, dairy farming, the breeding and keeping of livestock…the use of land as grazing land, meadow land, osier land, market gardens and nursery grounds, and the use of land for woodlands where that use is ancillary to…agricultural purposes…

115. 'The use of land as grazing land' as an agricultural use may include the use of land for grazing horses. However, 'the breeding and keeping of livestock' as an agricultural use does not include the breeding and keeping of horses, where the 'keeping of horses' involves activities other than putting them out to graze; *Belmont Farm v MHLG* [1962] 13 P&CR 417.

116. 'For the purposes of agriculture' means the productive processes of agriculture and not food processing – or the buying and selling of agricultural products; *Hidderley v Warwickshire CC* [1963] 14 P&CR 134. A 'leisure plot' is not an agricultural use; *Pitman v SSE* [1989] JPL 831.

117. For Part 3, paragraph X states that '"agricultural building" means a building (excluding a dwellinghouse) used for agriculture and which is so used for the purposes of a trade of business; and "agricultural use" refers to such uses'.

118. The meaning of 'agricultural land' for Part 6 is given under paragraph D.1 as "land which, before development permitted by this part is carried out, is…in use for agriculture and…so used for the purposes of a trade or business and excludes any dwellinghouse or garden".

119. For Part 3, Classes Q, R and S, the site or building, as the case may be, must have been used **solely** for agriculture as defined on the specified dates. Development proposed under Part 6 must also be on land used solely for agriculture as described. If the site, building or land is in a mixed use – put to one or more primary uses which are not incidental to each other – PD rights will not apply under Parts 3 or 6.

120. Where there is one or more activity on the site or land, the CoA held in *Millington v SSETR* [1998] EGCS 154 that the correct approach was to consider whether the activities could be regarded as ordinarily and reasonably incidental to agriculture, or consequential on the agricultural operations of producing the crop. The "instinctive view" was that the making of wine, cider or apple juice on this scale was a perfectly normal activity for a farmer engaged in growing wine grapes or apples.

121. The use of a building as a farm shop can be ancillary to an agricultural use but, once a significant proportion of produce is imported, it is likely to become a separate retail use; *Bromley LBC v Hoeltschi & SSE* [1978] JPL 45. The assessment should be made on a fact and degree basis rather than by setting an arbitrary percentage. Commercial lairage and storage of EU reserves are not agricultural uses; *Warnock v SSE* [1980] JPL 590 and [1989] JPL 290.

122. The residential use of land or a building would not normally be incidental to another primary use. If there is a requirement for a worker to live on a farm, the **occupation** of their dwelling or caravan might regarded as functionally related to the primary agricultural use, but the residential **use** would normally be a separate main use of the planning unit or taking place within a separate planning unit.

123. For Part 3, the land must have been used for a trade or business on the specified dates; for Part 6, the land must have been so used before the works are begun; *Jones v Stockport MBC* [1984] JPL 274. However, commercial viability is not a prerequisite to PD rights under Part 6.

124. *Customs and Excise Commissioners v Lord Fisher* [1981] 2 All ER 147 is often cited as authority that the primary meaning of 'trade or business' is an occupation by which a person earns a living – but it was held in *South Oxfordshire DC v East & SSE* [1987] JPL 868 that no one factor was decisive as to whether the activities constitute a trade or business. Other factors such as whether the activity was carried out for pleasure, the person concerned was an enthusiastic amateur, the keeping of accounts, size of turnover and any profit made should also be considered.

125. A profit may not be made in the early stages of a business. If a farming enterprise is being established, and it does not appear that this is being done as a hobby, then it may be a trade or business even if there is little or no profit; *McKay & Walker v SSE & South Cambridgeshire DC* [1989] JPL 590[16]. In *Kerrier DC v SSE* [1995] EGCS 40, it was affirmed that low level of income is not conclusive. But if there is no intention to make a profit, that may be evidence of recreational rather than business activity.

'Agricultural Unit'

126. An 'agricultural unit' is defined for the purposes of Part 6 as agricultural land which is occupied as a unit for the purposes of agriculture but including specified dwellings. An 'established agricultural unit' for Part 3 means agricultural land occupied as a unit for the purposes of agriculture for specified periods for Classes R, Q and S.

127. The definition set out in Part 3, Paragraph X only requires that the land is occupied as an agricultural unit at the particular point in time as specified in the relevant Class. The requirement that the agricultural unit be 'established' on a particular date is not a requirement that the unit is established for a given period prior to the date and there is no requirement for the established agricultural unit to be of a particular size.

[16] In a s64 SSE decision reported at [1993] JPL 395, it was accepted that a trade or business existed even though no income had been received from a recently planted orchard on the basis that "such a situation is common in farming, and an income should be provided in due course from the apple trees".

128. An agricultural unit is not the same thing as the planning unit; it may comprise more than one planning unit; *Fuller v SSE and Dover DC* [1987] JPL 854. It is a question of fact as to whether land is part of an agricultural unit, meaning agricultural land occupied as a unit.

129. It was held in *Lyons v SSCLG* [2010] EWHC 3652 (Admin) that a planning unit in a mixed use of agriculture and other primary use does not benefit from Part 6 rights. While this judgment stands, the Order itself makes no mention of 'planning unit' in relation to Part 6 or Part 3. The tests relate to whether the site, building or land is solely in agricultural use, and whether the site, building or land is comprised in an agricultural unit.

130. Indeed, it was held in *Rutherford v Maurer* [1962] 1QB 16 that the 'trade or business' being conducted on the land does not need to be an agricultural business; Part 6 PD rights applied on land where horses were grazed as an agricultural use but the business was a riding school.

131. In *South Oxfordshire*, the judge was "inclined to the view" that Part 6 rights could apply where there was a mixed use for agriculture and recreation, provided that the area of 'agricultural land comprised in agricultural unit' was of the size required by the Order (5ha or more for Class A), even if it is not used 'exclusively' for agriculture.

132. *Rutherford* and *South Oxfordshire* precede *Lyons* and the GPDO 1995 as well as the GPDO 2015; they should be treated with caution. Nonetheless, where it appears that the planning unit is in a mixed use, it should not be assumed that the development could not be PD. If the site, building or land is in agricultural use, but other land within the planning unit is in other uses, it will be necessary to address whether or not there is an agricultural unit for the land, site or building to be part of.

133. It is not necessary for the occupier to own the agricultural land in order for it to form a unit, but the terms of occupation are relevant; generally, some security of tenure would be required. Temporary grazing that varies from season to season would not form part of the unit but separation of parcels within the unit is acceptable.

134. The purpose of an Agricultural Holdings Certificate is to ensure that anyone with an agricultural tenancy is notified of a planning application. The Certificate is not evidence of the use of land or any buildings as 'agriculture' or whether the land is part of an 'agricultural unit'.

Floorspace

135. Under s55(2) of the TCPA90, operations which affect only the interior of the building shall not be taken to involve development. But s55(2A) and (2B) enable the SoS to specify or describe circumstances, in a development order, where the exemption should not apply in respect of operations which would have the effect of increasing 'gross floor space' by such an amount or percentage amount as is specified.

136. Article 2(1) of the GPDO 2015 provides that, for the purposes of the Order, 'floor space' means the total floor space in a building or buildings. Various classes of PD are subject to limitations in relation to floorspace, but the language used is not consistent, as follows:

- '(cumulative) floor space of the (existing) building(s)'
- 'gross floor space of the (original / existing / new) building'
- 'floor space (with)in the (existing) building'

137. In Schedule 2, the only reference to 'gross floor space' is in Part 3, Class P; all other classes refer to 'floor space'. Except in cases where the GPDO 2015 specifies that

floor space should be based on an external calculation, Inspectors may adopt the following interpretations:

- 'gross floor space' includes the external walls (RICS Gross External Area)
- 'floor space' is measured to the internal face of the perimeter walls, so as to exclude the external but include internal walls (RICS Gross Internal Area)

138. Further advice on floorspace for Part 3 is provided in Annex B below.

Demolition

139. In prior approval or enforcement appeals involving (proposed) demolition, the first question to ask is whether this would be 'development' that requires planning permission under s55 of the TCPA90. If so, the next question is whether the demolition is or would be permitted by the GPDO.

140. S55(1) and (1A) of the TCPA90 provide that 'building operations' include 'demolition of buildings', but s55(2)(g) provides that the demolition of any description of building specified in a direction made by the SoS shall **not** be taken to involve the development of land.

Demolition of Buildings

141. The Town and Country Planning (Demolition – Description of Buildings) Direction 2014 (the 2014 Direction) provides in paragraph 2(1) that the demolition of (a) any building of which the cubic content, measured externally, does not exceed $50m^3$ shall not be taken to involve the demolition of land for the purposes of the TCPA90.

142. If the demolition of a building is not 'exempted' from development under s55(2)(g) and the 2014 Direction, Part 11, Class B permits any building operation consisting of the demolition of a building (Under Article 3(9), demolition is not permitted by the GPDO except as under Part 11, Classes B and C). Thus, Class B covers buildings which exceed $50m^3$, but not any engineering operations involved in demolition; *Caradon v SSETR* [2000] QBD 12.9.00. Articles 2(1) and 3(9) provide that, in Part 11, 'building' does not include part of a building.

143. The Class B rights are subject to conditions and limitations, such that prior approval is required in most cases. Paragraph B.1(b) precludes 'relevant demolition' as described under s196D of the TCPA90, relating to unlisted buildings in conservation areas. It was held in *Barton v SSCLG & Bath and North East Somerset Council* [2017] EWHC 573 (Admin) that the definition of 'building' in s336(1), as including 'part of a building', applies to s196D.

144. Class 11, paragraph B.1(c) provides that demolition of any building that is or was last used as a drinking establishment under use class A4 as defined in the UCO prior to 31 August 2020, or as a 'drinking establishment with expanded food provision' under Part 3, Class AA is not PD; PPG 13-065-20190722 and 13-117-20180222.

Demolition of Gates, Fences, Walls or other Means of Enclosure

145. The 2014 Direction provides in 2(1)(b) that the whole or any part of any gate, fence, wall or other means of enclosure shall not be taken to involve the demolition of land for the purposes of the TCPA90. This does not apply to the whole or any part of any gate, fence, wall or other means of enclosure in a conservation area.

146. If not 'exempted' from development under s55(2)(g) and the 2014 Direction, Part 11, Class C sets out PD rights for any building operation consisting of the demolition of the whole or any part of any gate, fence, wall or other means of enclosure. Again, the PD right precludes engineering operations and 'relevant demolition'; paragraph C.1.

147. In *Barton*, the Inspector upheld an enforcement notice relating to the demolition of a wall in a conservation area, on the basis that removal works amounted to demolition and not alteration. It was held that the Inspector made no error in law in focussing on what had been removed and had clearly concluded that the works involved would amount to demolition without any aspect of alteration. The Inspector was entitled to reach that conclusion, which is not vitiated by a failure to spell out that the demolition did not *at the same time* amount to works of alteration.

148. The Enforcement chapter gives further guidance on demolition.

Prior Approval Applications and Appeals

Introduction

149. The Town and Country Planning (Permitted Development and Miscellaneous Amendments) (England) (Coronavirus) Regulations 2020 added a new Part 20 to Schedule 2; it permits development under Class A from 1 August 2020 for the construction of up to two additional storeys of new dwellinghouses immediately above the existing topmost residential storey on a building which is a purpose-built, detached block of flats.

150. The Town and Country Planning (General Permitted Development) (England) (Amendment) (No. 2) Order 2020 and the Town and Country Planning (General Permitted Development) (England) (Amendment) (No. 3) Order 2020 introduced new PD rights from 31 August 2020 for the enlargement of a dwellinghouse by the construction of additional storeys, under Class AA of Part 1, and other works for the construction of new dwellinghouses in Classes ZA, AA, AB, AC and AD of Part 20.

151. The developer must apply **for** prior approval in respect of development permitted under Part 1, Class AA or any class of Part 20. By contrast, the prior approval procedure for other Parts and Classes, including Part 1, Class A, requires the developer to make an application to the LPA for a determination as to whether prior approval is required.

152. The prior approval procedure for all Classes under Part 3 is provided at Part 3, paragraph W, and the procedure for all Classes under Part 20 is set out in Part 20, paragraph B. In other cases, the procedural requirements are set out in paragraphs specific to the Class such as paragraph A.4 for Part 1, Class A.

153. As indicated above, and while the wording is varied in different Parts and Classes, **the requirement to seek prior approval is a requirement to seek approval pursuant to a pre-commencement condition imposed on the planning permission granted under Article 3(1) and the relevant Part and Class**. Where the prior approval procedure applies, development cannot lawfully begin until:

    a) The LPA has confirmed that prior approval is not required; or

    b) The LPA gives their prior approval; or

    c) The period prescribed in the Order expires without the LPA having given or refused prior approval.

154. Even if no other limitations to that class of PD are failed, a failure to follow the notification procedure or a refusal of prior approval would mean that the condition is not discharged. Any development that is begun will be in breach of planning control.

The Statutory Period

155. Article 7 of the GPDO 2015 provides that where, in relation to development permitted by any Class in Schedule 2 which is subject to prior approval, and an application has

been made to the LPA for such approval or a determination as to whether such approval is required, the decision must be made by the LPA:

(a) Within the period specified in the relevant provision of Schedule 2

(b) Where no period is specified, within a period of 8 weeks beginning with the day immediately following that when the application is received by the LPA

(c) Within such longer period than is referred to in paragraph (a) or (b) as may be agreed by the applicant in writing.

156. In *Gluck v SSHCLG & Crawley BC* [2020] EWCA Civ 1756 the Court of Appeal declined to follow *R (oao Warren Farm (Wokingham) Ltd) v Wokingham BC* [2019] EWHC 2007 (Admin) and held that the provision is structured so that Article 7(c) applies to decision-making on both types of prior approval procedure, whether they fall entirely within limb (a), entirely within (b) or within both.

157. The language of limb (a) does not preclude an extension of time under (c) simply because the time period is specified in Schedule 2 rather than in Article 7. This means that Article 7 of the GPDO does permit an extension of the statutory period for determining a prior approval application under Parts 3 and 20 by written agreement between the applicant and the LPA.

158. The Town and Country Planning (General Permitted Development) (England) (Amendment) Order 2018 introduced Article 7ZA, which sets out a modified procedure in relation to call-in applications.

159. The statutory periods under Article 7(a) pertaining to the most common case work types are: 42 days in respect of Part 1, Class A; 56 days for Parts 3 and 20; and 28 days for Part 6, Class A. The periods are exclusive so that, for example, in Part 6, Class A, day 1 would be the day following the application date, and clock would stop at midnight on day 28.

160. The effect of Article 7 and the relevant parts, classes and paragraphs in Schedule 2 is that where an application is made for a determination as to whether prior approval is required, the applicant can proceed with the PD if the LPA determines that they do not require prior approval to be given or does not make a determination or notify the appellant of their decision within the statutory period. Prior approval is then **deemed** to be granted.

161. It was held in *Murrell v SSCLG* [2010] EWCA Civ 1367 that 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 in the Order. The assessment of the prior approval matters must be made in a context where the principle of the development is not, itself, an issue.

162. Where an application for a determination as to whether prior approval is required complies with the statutory requirements and is valid, the statutory period for determination of the application runs from that date. In *Murrell*, handling mistakes by the LPA and that the applicant submitted a new form and further plans (as requested) did not stop the clock running. On the expiry of the statutory period, prior approval was deemed to be granted. (Prior approval is **expressly** granted or refused only where the LPA makes a determination to that effect within the statutory period).

163. For Class A of Part 6, conditions at A.2(2)(iii) state that the LPA has 28 days within which to decide whether or not prior approval is required. If the LPA fails to do so, then the development may go ahead. If the LPA **does** notify the applicant, either by post or email, that prior approval is required within that period, then the LPA gains **another** period during which it can determine whether to grant prior approval (and

arrange for the publication of the application enabling neighbours to make representations). This extra period will end after 56 days under Article 7(b). Annex D sets out issues specific to Part 6 applications.

164. It is worth repeating here that development may only be lawfully begun after prior approval is deemed to be or expressly granted, and the development is carried out in accordance with the submitted plans and it is in fact PD.

165. And there is no provision for a deemed grant of prior approval if the application relates to Class AA of Part 1 or any class under Part 20. As noted above, paragraph AA.2(3)(a) of Part 1 and paragraph B(1) of Part 20 require the developer to make an application to an LPA for prior approval, not a determination as to whether prior approval is required. Paragraph AA.3(13) of Part 1 and paragraph B(16) of Part 20 state that the development must not begin before the applicant has received written notice of the LPA's prior approval. Development cannot begin if and when the LPA fails to determine the application before the expiry of some period.

Appeal Template

166. The correct templates for prior approval appeals in DRDS/DaRT are 'DEV order appln – refusal' or 'DEV Order appln – conditional grant'. Annex G sets out an example template for Part 1, Class A, but you should always adapt the banner heading and relevant paragraphs to reflect the actual appeal.

167. The template for a costs application relating to a prior approval appeal is the same as for any costs application pursuant to an s78(1)(c) appeal.

Prior Approval Appeals

168. There can be no appeal against a grant of unconditional prior approval or where the LPA states that prior approval is not required. However, an appeal can be made under s78(1)(c) of the TCPA90 where the LPA 'refuse an application for any approval…required under a development order…or grant it subject to conditions.'

169. Planning decisions should be construed as though read by a reasonable reader, and not subject to overly forensic analysis. If the decision notice can be reasonably read as a refusal, it should be. While it is best practice for a LPA to say so explicitly, it may be implicit in a refusal that the LPA considers prior approval was required.

170. The following wording may be adopted if applicable:

'The Council's decision notice states that prior approval is required but does not explicitly state that prior approval is refused. Looking at the notice as a whole, including the reason as set out and the statement of the applicant's rights, it is reasonable to read the notice as a refusal of prior approval.'

171. If the notice cannot be read as a refusal, and unless the application was made for development permitted by Class AA of Part 1 or any class under Part 20, a check should be made as to whether prior approval is deemed to be granted due to the expiry of the statutory period.

Appeals against Conditions imposed on Prior Approvals

172. *Pressland v Hammersmith & Fulham LBC* [2016] EWHC 1763 (Admin) confirms that if prior approval is granted subject to conditions, the resulting permission granted by the Order is subject to those conditions, and therefore a right of appeal arises under s78(1)(c). This is the case even if the conditions were imposed by mistake.

173. Where an appeal is made against refusal of an application to carry out development without complying with a condition imposed on a prior approval, the appeal is made

under s73 or s73A – depending on whether the breach of the condition has taken place – and Inspectors should use the standard s73 or s73A template as appropriate. It should be noted that any application made under s73 or s73A is an application for planning permission. Allowing the appeal would involve granting express planning permission for the development, subject to the conditions imposed. There is no power under s73 to grant a new prior approval.

174. It follows that the question as to whether permission should be granted subject to disputed condition(s) should be considered on the same basis as in any other s73 or s73A appeal. The appeal should be considered on a s38(6) basis and the constraint on prior approval appeals – that conditions must be 'reasonably related' to the prior approval matters – does not strictly apply.

175. If such cases, Inspectors may need to give the parties opportunities to comment on any implications of the appeal being made under s73 or s73A. Inspectors should also include a preliminary paragraph in the decision, setting out that planning permission was initially granted under the GPDO 2015 subject to the prior approval process, that the conditions were imposed under the prior approval process, but the power to remove or vary the conditions is afforded under s73 or s73A (as appropriate); see the Appeals against Conditions chapter for more information.

176. In relation to Part 1, Class A, where a developer seeks approval of the LPA for a change in approved details and this is refused, an appeal might be made against that refusal. There is no scope for further limitations to be placed on the developer under this deemed condition.

Procedural Validity and Fees

177. An LPA's decision to refuse prior approval is not normally invalidated by a failure to give reasons. Regulation 35(1)(b) of the Town and Country Planning (Development Management Procedure) (England) Order 2015 (the DMPO) requires that a LPA give reasons for their refusal of an application for planning permission, or approval of reserved matters, but this will not apply to an application for prior approval.

178. Regulation 7 of the Openness of Local Government Bodies Regulations 2014 imposes a general requirement on LPAs to give reasons for decisions made by officers under delegated powers. However, the requirement is to produce the reasons 'as soon as reasonably practicable after the decision-making officer has made the decision', not with the decision itself (The Supreme Court judgment in Dover DC v CPRE Kent [2017] UKSC 79 concerns the duty of a local authority to give reasons where it grants permission contrary to the advice of officers).

179. It was held in *Maximus Networks Ltd v SSHCLG & Others* [2018] EWHC 1933 (Admin) that PINS has the discretion to turn away an appeal because a procedural step was not complied with during the application, but may choose to consider the matter afresh under s79 of the TCPA90.

180. The main factors to consider would be any prejudice that is caused by the procedural omission, and the need for the rules to be respected, bearing in mind that an LPA is obliged to turn away a procedurally incorrect application under s327A. These are normally matters for the case officer.

181. A fee is payable on the making of a prior approval application under Regulation 14 of the Town and Country Planning (Fees for Applications, Deemed Applications, Requests and Site Visits) (England) Regulations 2012, except in the circumstances set out under Regulation 14(1A).

182. While it was held in *Pressland* that an appeal against the refusal of a prior approval application will be made under s78(1)(c) of the TCPA90, it does not follow that all s78

appeals should be treated as the same for fee purposes. The exceptions to requirements for fees set out under Regulations 4-9 apply to planning but not prior approval applications.

183. The Town and Country Planning (Development Management Procedure) (England) Order 2015 provisions relating to dishonoured cheques do not apply to prior approval applications; Article 27(3). There are no statutory provisions requiring the acceptance of payment by particular methods – but an LPA may set out its own such provisions.

184. Once the fee is paid on a valid prior approval application, the statutory period for determination of the application will commence – unless the LPA has published clear guidance that the particular payment method is not acceptable, or if payment was by cheque and that is dishonoured.

Information Requirements and Failure to Determine Cases

185. The statutory period for determination as to whether prior approval is required will not start unless and until all the required information has been received – including, for example, the statement specifying the 'net increase in dwellinghouses' required in respect of development proposed under Part 3, Classes M, N, O, P, PA and Q.

186. LPAs have some powers to request additional information, eg, under Part 3, paragraph W(9), but this does not 'stop the clock' on the statutory determination period. If the LPA requests additional information, but does not receive it, they should issue a refusal before the end of the period in order to avoid the deemed grant of prior approval (Unless the application is made for development permitted by Class AA of Part 1 or any class of Part 20).

187. If the LPA fails to issue a refusal in the statutory period on an application as to whether prior approval is required, the principle established in *Murrell* holds good. The appeal should be allowed on the basis that prior approval is deemed to be granted by the GPDO. When allowing an appeal in this scenario, the recommended wording is: '…the appeal is allowed and prior approval is deemed to be granted…

188. If prior approval is deemed to be granted on this basis, **then it does not matter whether the Council objects that the development is not PD**. You should say in a preliminary paragraph that the LPA's failure to refuse the application within the statutory period means that you cannot address any questions of lawfulness or about the prior approval matters.

189. If there is a dispute as to whether a prior approval application was refused by the LPA within the statutory period, it will be for the Inspector to decide, based on the facts and evidence provided, whether and when each required element of the application was received – including the payment of the fee.

190. It will also be for the Inspector to determine on the facts whether or not the applicant, on the balance of probabilities, had been notified of the decision within the specified period. 'Notification' does not necessarily occur on the same day that the decision is taken and issued.

191. If you find on the evidence that the LPA made a decision and notified the applicant of that decision within the statutory period, prior approval would not be deemed to be granted due to the expiry of the period – irrespective of whether you also uphold the LPA's reasons for refusing prior approval.

192. S7 of the Interpretation Act 1978 states that:

'Where an Act authorises or requires any document to be served by post… then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and,

unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.'

193. The absence of proof that the notices were actually received within the specified period is not necessarily determinative. If the LPA can provide evidence that the notice was posted with enough time to allow for 'the ordinary course of post', notice may be deemed to have been given.

194. Article 2(9) of the Order and paragraph 2(7) of Schedule 1 to The Town and Country Planning (Electronic Communications) (England) Order 2003 are 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.

195. Hand or courier delivery can occur up until midnight because this is not covered by e-mail or postal rules. It will be a question of fact as to whether the time limit was met. If there is any doubt, the Inspector may wish to seek the parties' views on this matter.

Publicity and Consultation

196. Different publicity requirements pertain to different Parts and Classes. Paragraph W.(8) of Part 3 requires **LPAs** to (a) display on site and (b) serve notice of the proposed development[17]; paragraphs B.(11) and (12) require much the same for Part 20. Yet Part 6, Class A, paragraph A.2(2)(iv) requires the **applicant** to display a site notice in the event that they are informed by the LPA that prior approval is required.

197. It may be necessary to adjudge whether relevant publicity requirements have been complied with, and any prejudice arising from non-compliance, bearing in mind that PINS has the discretion to turn away an appeal because a procedural step was not complied with during the application However, it would not follow from any failure to display a site notice that the development could not be PD. The relevant conditions in the GPDO are not worded to that effect.

198. Where consultation is required as part of the prior approval procedure, our experience to date is that LPAs will have carried this out in most cases, even where they have concluded that the development would not be PD.

199. If the LPA has not carried out the necessary consultation, it must be asked to do so via the Case Officer if the Inspector is minded to allow the appeal. Prior approval cannot be granted if the correct consultation has not been carried out (*Coventry Gliding Club Ltd v Harborough DC* [2019] EWHC 3059 (Admin).. The only exception would be where the LPA failed to make a determination or notify the appellant of its determination within the statutory period from the date when it received the application.

200. A requirement to serve notice on an adjoining owner or occupier means 'any owner or occupier of any premises **or land** adjoining the site'; Article 2(1).

Lawfulness

201. In prior approval appeals, as in any others concerning the Order, it is necessary to ensure the operations or use would not contravene Article 3(4) or any condition imposed on a separate planning permission; would be lawful under Article 3(5)(b);

[17] From 21 April 2021, paragraph W.(8)(b) is amended to clarify that notice must be served on any adjoining owner or occupier or, where the proposed development relates to part of a building, on any owner or occupier of the other part or parts of the building.

and would be permitted insofar as the PD right has not been removed by an Article 4(1) Direction in force[18].

202. It is also necessary in prior approval appeals, where any trigger date is defined in the PD right, to ensure that the relevant use was occurring on that trigger date. For example, Part 3, Class J.1(a) looks at the use on 5 December 2013, and Class O.1(b) looks at the use on 29 May 2013.

203. The existing operations or use must be as specified in the PD right at the time of the application. For example, the Part 3, Class Q right will only apply if the building was solely in agricultural use – and not in any mixed use with some agricultural element – on 20 March 2013, or when last in use. There must have been no intervening change of use by the time that the appeal is considered.

204. In cases such as Class Q where the site was in the relevant (agricultural) use on the relevant date (20 March 2013), but the agricultural use was ceased, and then the use was resumed again, in order to take advantage of the PD right, the site should be treated as having been brought into the relevant use after the relevant date. For Class Q, that would mean Q.1(a)(iii) applies and the agricultural use would need to be carried out for a period of at least ten years before prior approval is granted for the change of use to C3. The use on a particular date will be a question of fact to be determined on the evidence provided.

Development Commenced

205. Where there is any failure to adhere to the requirements of the prior approval conditions, the appeal should be dismissed. Prior approval cannot be granted for development that has already **begun**, even if it is not completed; *Winters v SSCLG & Havering LBC* [2017] EWHC 357 (Admin). This applies even if the development was begun after the PA application was made or during the appeal process.

206. Where it is obvious that development has commenced, appeals may be 'screened out' in the office. However, any dispute as to whether the development was begun will normally be before the Inspector and should be a main issue in the decision letter. The main issue will be 'whether the prior approval [application/appeal] was made "before beginning the development" as required by [the relevant condition]'.

207. Questions of commencement are normally addressed with regard to s56(2) of the TCPA90. It provides that development shall be taken to be begun on the earliest date on which any 'material operation comprised in the development' begins to be carried out and that term is defined in s56(4).

208. S56(4) provides that 'material operations' means (a) any work of construction in the course of the erection of a building, (b) the digging of a trench which is to contain the foundations or part of the foundations of a building, (c) the laying of any underground main or pipe to [part of] the foundations or (d) any operation in the course of laying out or constructing a road or part of a road.

209. Thus, where prior approval is sought in respect of building operations permitted by the Order, say for the erection of an agricultural building under Part 6, Class A, and there is a question as to whether those works have been begun, it will be necessary to consider whether the works related to the appeal development (as a matter of fact and degree) and involved any material operation.

[18] Where an Article 4(1) Direction removes PD rights, the LPA should refuse prior approval, even if the Direction came into force after the application was made.

210. However, where prior approval is sought for a change of use, s56(2) will not help you determine whether that was begun before the application was made. Under 56(4)(e), 'material operation' also means 'any change of use in the land which constitutes material development' but that is defined under s56(5)(a) as not including development for which planning permission is granted by the GPDO.

211. A change of use may have been begun even if the use itself has not started. It was held in *Impey v SSE & Lake District SPB* [1981] JPL 363 that, to decide when the use of a building is changed to a dwellinghouse, regard must be had to two factors: the physical state of the premises and the actual, intended or attempted use. Neither factor is decisive, and it should not be assumed that a change of use has not occurred simply because a building is unoccupied.

212. The Supreme Court endorsed *Impey* in *Welwyn Hatfield BC v SSCLG & Beesley* [2011] UKSC 15. Lord Mance held 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.' A change of use may have been **begun** if works have been carried out to change the layout of the building in line with the appellant's intentions for the use as objectively evidenced.

213. Occasionally, an appeal may be made where some development has taken place, and some has not. Such an appeal can only be determined on its merits if it is clear, that the development for which prior approval is sought has not been begun **and** can be clearly severed from what has taken place as a matter of fact and degree.

214. If the appeal is being allowed expressly for a part of a development only, it will be essential to make a clear 'split' decision, supported by careful reasoning, to only approve what has not been started, and to refuse development begun in breach of the prior approval condition. It would then be for the parties to consider what further action, if any, should occur in respect of the development which has taken place.

215. The Enforcement ITM provides further advice on the commencement of development and the implications where that is carried out in breach of condition.

Failure to Comply with Other Limitations and Conditions

216. A developer seeking prior approval ought to have come to their own conclusion that the proposed development would be permitted by the GPDO subject to compliance with all relevant limitations and conditions.

217. *Keenan v Woking BC & SSCLG* [2017] EWCA Civ 438 concerned an enforcement case where the appellant claimed the development subject to the notice was PD because the LPA had failed to determine a prior approval application – made under Part 6, Class A of the GPDO 1995 before the works were carried out – within the statutory 28-day period.

218. Lindblom LJ held in the CoA that the provisions of Part 6, paragraph A.2(2)(i), which require the developer to apply for a determination as to whether prior approval is required, do not embody a grant of planning permission under Class A. Development is permitted through the operation of Article 3(1).

219. The effect of Part 6, paragraph A.2(2)(i) is simply that development which is PD under Article 3(1), Schedule 2, Part 6, Class A, and within the scope of A.2(2), is subject to conditions. For those conditions to come into play, and the development to be PD under Article 3(1), it had to come fully within the description of PD in the relevant Part and Class.

220. The pre-commencement condition which required the developer to apply for a determination on prior approval did not impose a duty on the LPA to decide whether

the development is PD or confer a power on the LPA to grant permission for development outside of the defined class.

221. If an LPA fails to determine any prior approval application within the statutory period, the developer can proceed with development which is PD – but they would not have permission for development that is not, in fact, PD. The principle upheld in *Keenan* is that development cannot become PD by default if the LPA does not determine a prior approval application within the statutory period.

222. In *New World Payphones Ltd v Westminster City Council* [2019] EWCA Civ 2250, the CoA held that 'on an application to an authority for a determination as to whether its "prior approval" is required, the authority is **bound** to consider and determine whether the development otherwise falls within the definitional scope of the particular class of permitted development'. *New World Payphones* concerned Part 16, which is drafted so that any prior approval kiosk appeal would previously have been considered as a 'Part 6 type case'.

223. *New World Payphones* was applied in *R (oao Smolas) v Herefordshire Council* [2021] EWHC 1663 (Admin), where it was held that the LPA did not act unlawfully in deciding that the proposed development would fall outside of the scope of Part 6, Class A and so prior approval should be refused for the proposed development. The Council also did not err in proceeding to refuse prior approval when determining the prior notification application as to whether prior approval was required:

    'Once the Council had concluded that the Claimant's application could not progress further because the proposed development fell outside the scope of the permitted development in paragraph A of Part 6, it was rational…to determine the application for prior notification and prior approval on the same occasion. There was no purpose in going on to consider whether to grant prior approval for siting, design and external appearance at a later date, when the application did not come within the scope of permitted development under paragraph A of Part 6'.

224. In **any** prior approval appeal, therefore, if the LPA and/or another party disputes that the development could be PD, so long as the LPA refused the application within the statutory period, you must determine whether the proposed development complies with the applicable conditions, limitations or restrictions. Given *New World Payphones* and *Smolas*, it will not matter whether or not the Part in question expressly provides for you to do so.

225. Some LPAs will 'cover their backs' by advising that the proposed development would not be PD but nevertheless consulting on, considering and then refusing the prior approval application. This approach is encouraged by the introduction of Part 1, Class A.4(3) and Part 3, Paragraph W(3), and would not alter your decision.

226. If the LPA failed to determine the application within the statutory period, any dispute as to whether the development would be PD should be dealt with in a preliminary paragraph. You would not be able to deal with the matter because prior approval is deemed to be granted on the expiry of the statutory period.

227. Otherwise, any question as to whether the development is permitted should be addressed as the first main issue in the appeal decision. If it is found that the development would not comply or the developer has provided insufficient information for you to make a determination on compliance, the appeal should be dismissed on the basis that the development falls outside the PD right. It would normally be unnecessary and inappropriate to proceed to consider the prior approval matters.

228. The applicable 'conditions, limitations and restrictions' will include those set out in the Articles of the Order. For example, there may be a question as to whether a change

of use proposed under Part 3 would be PD, given the wording of a condition imposed on a previous planning permission and the provisions of Article 3(4).

229. If you find that the development would comply with the applicable conditions, limitations or restrictions, the next question will be whether to grant prior approval, including whether any conditions should be imposed. Annex F summarises the approach to take in any prior approval appeal where a question is raised as to whether the development would be PD.

230. There is an untested question for enforcement casework as to whether a grant of prior approval should be construed as a determination that the development would be PD. That was held to be the case in *R v Sevenoaks DC ex parte Palley* [1994] EG 148, but that pre-dates the current Order[19].

231. As noted above, Lindblom LJ held in *Keenan* that a duty is **not** imposed on LPAs to decide whether the proposed development subject to a prior approval application is in fact permitted development under the GPDO. That remark was considered in *New World Payphones* but Hickenbottom LJ still held, given the 'thrust of that paragraph of Lindblom LJ's judgment' that whether the development is PD is something 'the authority is bound to consider and determine'.

232. If addressing any contested claim in an Enforcement or LDC case that development which was previously granted prior approval is in fact PD, it will be necessary to start with an assessment of the development as built and the Order itself. The prior approval decision will be a material consideration and one that carries significant weight if it was clearly made on the basis that the same development would accord with the applicable 'conditions, limitations and restrictions'.

Additional Submissions

233. For some classes of PD, the Inspector may seek further information from the developer; for example, under Part 1, paragraph A.4(8) or Part 3, paragraph W(9) of the Order. However, and although Inspectors must deal with the application for approval as if it had been made to them in the first instance, a request for further information would be exceptional.

234. Amended plans can be accepted and considered by Inspectors on prior approval appeals, subject to the usual caveat that relevant parties have opportunity to comment in the interests of natural justice.

Development Outside of the Prior Approval Application

235. It may be the case that plans submitted with a prior approval application show development not subject to the application; for example, plans for a 'large extension' under Part 1, Class A may also show a roof extension. If works would fall outside the remit of the prior approval procedure, the Inspector cannot grant approval for them.

236. In such a case, it may be noted in the decision letter what is shown in the plans, but the Inspector should avoid making any comment as to whether or not the roof extension would be PD, so as not to fetter the appellant, LPA or even another Inspector in any future actions, such as a LDC application for, or enforcement notice concerning the roof extension.

[19] *Palley* pre-dates *R v East Sussex CC ex parte Reprotech (Pebsham) Ltd* [2002] UKHL 8 where it was held that, in the context of statutory planning control, a formal application must be made under s191 or s192 if a binding determination of lawfulness is required.

Matters under Appeal

237. When making a determination as to whether or not to grant prior approval for a proposed operation or use, and there is no dispute that the operation or use would be PD, the deliberations will be confined to the matters set out under the relevant Part and Class as subject to the determination.

238. For example, in relation to Part 1, Class A, deliberations are confined under paragraph A.4(7) to the impact of the development on the amenity of any adjoining premises. It is good practice to identify the relevant matter[s] in a procedural paragraph, as in Annex G.

National Planning Policy Framework

239. Part 1, paragraphs AA.(11) and AA.(12); Part 3, paragraph W(10)(b); Part 4, paragraph E.3(10)(b); Part 7, paragraph C.2(7)(b); Part 14, paragraph J.4(8)(b) and Part 20, paragraph B.(15)(b) of the GPDO refer to 'the National Planning Policy Framework'.

240. LPAs must determine prior approval applications under Class AA of Part 1, plus Parts 3 and 20 with regard to the Framework 'so far as relevant to the subject matter of the prior approval, as if the application were a planning application.'

241. However, reference should be made to the Framework **only** as far as it is relevant to the development and prior approval matters, bearing in mind that the 'matters' must be interpreted through 'the prism of the purpose of the legislation'. The Framework and indeed development plan policies cannot be applied so as to frustrate the purpose of the grant of PD rights through the Order in the first place[20].

242. The case of *East Hertfordshire DC v SSCLG* [2017] EWHC 465 (Admin) concerned an Inspector's decision to grant prior approval for a change of use under Part 3, Class Q. The appeal turned on whether 'the location or siting of the building makes it otherwise impractical or undesirable for the building to change from agricultural use to a use falling within C3' because the site was inaccessibly located.

243. Mr Justice Dove held that whether development is 'undesirable' calls for an exercise of planning judgment but 'it is necessary…to examine the purpose of the legislation and in particular requirements of an individual class to properly interpret its provisions'. The Inspector did not err in disregarding policy set out in the Framework to limit new dwellings in the countryside because applying that 'would have the potential to frustrate the purpose of the introduction of the class, namely to increase the supply of housing through the conversion of agricultural buildings which by definition will very frequently be in the open countryside'.

244. Other policies in the Framework, such as those protecting Green Belts, are also irrelevant to what is 'impractical or undesirable'; see Annex B.

The Development Plan

245. A prior approval appeal should not be determined, expressly or otherwise, on the basis of s38(6) of the Planning and Compulsory Purchase Act 2004 or as though the development plan must be applied. The principle of development is established through the grant of permission by the Order.

246. It was held in *R (oao Patel) v SSCLG & Johal & Wandsworth BC* [2016] EWHC 3354 (Admin), paragraph 52, that:

[20] PPG paragraphs 13-026-20140306 to 030-20140306; and 13-101-20150305 to 109-20150305

'…s70 of the [TCPA90] does not apply to an application for prior approval, and there is no other provision to like effect for applications for prior approval…[Thus,] there is no means whereby s38(6) can supply the hook for the application of its decision-making duty. It only applies 'If regard is to be had to the development plan…' [T]here is no such statutory requirement in relation to prior approvals'.

247. Development plan policies may be relevant in prior approval cases, but only insofar as they relate to the matters, and only as evidence to support (rather than being the basis of) the planning judgment to be made. For example, the development plan might be relevant to a Part 1, Class A prior approval appeal insofar as it sets out material which assists in assessing the impact of extensions on the amenity of adjacent properties.

Contamination

248. Where contamination is a prior approval matter, the Inspector must determine whether – after the development takes place, taking account of proposed mitigation – the site will be contaminated land as described in Part 2A of the Environmental Protection Act 1990, with regard to Contaminated Land Statutory Guidance issued in accordance with s78YA of that Act[21]. If the site will be contaminated, it is necessary to refuse prior approval.

Flood Risk

249. As outlined in Annex B below, 'flooding risk on the site' is a prior approval matter in relation to Classes M, N, O, P, PA, Q, R and S of Part 3; Classes CA and E of Part 4 and all classes under Part 20 of the Order.

250. The PPG states in paragraph 7-001-20140306 that, in areas at risk of flooding or for sites of 1ha or more developers must undertake a site-specific Flood Risk Assessment (FRA) to accompany PA applications for certain types of PD.

251. This requirement is affirmed in paragraph 7-049-20150415, which also notes that, when considering the potential impacts of PD on flood risk, a LPA may consider making an Article 4 direction to remove PD rights, in order to protect local amenity or the well-being of an area.

252. The PPG paragraph 7-007-20140306 notes that applications for a change of use of land or buildings are not subject to the Sequential or Exceptions test, even where the change may be – for example, from a 'less' to 'more' vulnerable use according to Table 2; paragraph 7-066-20140306.

253. While applications for prior approval are, by definition, not applications for planning permission, those made under Part 3 are likely to be considered as 'change of use applications' for the purposes of the PPG paragraph 7-033-20140306, making it unnecessary to apply the Sequential Test.

254. However, the PPG also expects LPAs to consider, when formulating policy, which changes of use will be acceptable with regard to paragraph 165-175 of the Framework, and taking into account the Strategic FRA. This is likely to depend on whether developments can be designed to be safe and that there is safe access and egress.

255. Where a prior approval application under Part 3 would lead to an increase in the vulnerability classification of the development on the site, it may be necessary to take account of local plan policies as a form of evidence for that prior approval matter.

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[21] Environmental Protection Act 1990: Part 2A (Contaminated Land Statutory Guidance), DEFRA (April 2012)

256. Where a change of use would change the vulnerability classification and thus cause an increase in flood risk, PPG paragraph 7-048-20140306 expects the applicant to show in their FRA that users of the development will not be placed in danger from flooding throughout its lifetime. The applicant should show that the change of use will comply with the Framework's flood risk policies, and how any mitigation measures will be safeguarded and maintained effectively for the life of the development.

257. In the GPDO 2015, Part 3, paragraph W.(6) and Part 20, paragraph B.(6), requires the LPA to consult the Environment Agency on applications where flood risk is a prior approval matter and the site would fall within Flood Zone 2, FZ3 or 'notified' areas in FZ1. Paragraphs W(10) and B(15) of Parts 3 and 20 respectively require that any consultation response is taken into account; W.(13) and B.(18) empower the decision-maker to impose conditions reasonably related to the prior approval matters.

258. If a prior approval appeal relates to Class M, N, O, P, PA, Q, R and S of Part 3 or any class under Part 20, the site is in an area at risk of flooding and the change of use would increase the vulnerability of development, the FRA should identify how the flood risk can be mitigated. If the risk can be mitigated by imposing conditions or via a planning obligation, prior approval can be granted. Otherwise, it should be refused.

259. Part 4, Class CA permits development for the provision of a state-funded school for up to three years. Educational establishments are classified as 'more vulnerable' in Table 2 of the PPG. If prior approval is sought for development under Part 4, Class CA, and the site is in FZ2 or FZ3, the Sequential Test and, if necessary, the Exception Test, ought to be applied.

260. Part 4, Class CA is subject to the provisions of Part 3, paragraphs W(2) to W(13), as modified by paragraph CA.2(2), meaning that the Environment Agency should again be consulted where appropriate, and conditions may be imposed in relation to the prior approval matters.

261. Part 4, Class E permits the temporary use of any land for buildings for commercial film-making, or the provision on such land of temporary structures, works, plant or machinery. The former would be considered a change of use, but latter would be operational development.

262. The Sequential Test need not be applied to applications for minor development; PPG paragraph 7-033-20140306. If substantial temporary structures are proposed under Part 4, Class E, the development would be classed as 'less vulnerable' and permitted everywhere except FZ3B, where the Exception Test would be required.

263. Part 4, paragraphs E.3(6), (9), (10) and (13) set out provisions relating to consultation, information required from the developer and conditions.

264. PPG paragraph 13-116-20180615 notes that Part 6, Class A of the GPDO sets out the applicable thresholds for PD for the excavation and deposit of waste material to carry out flood protection or alleviation works on a farm which are reasonably necessary for agricultural purposes.

Transport and Highways

265. 'Transport and highways impacts' is a prior approval matter for Classes C, J, M, N, O, P, PA, Q, R, S and T of Part 3; Classes CA and E of Part 4, and all classes of Part 20. Regard should be had to the *direct* transport and highways impact of the development, not wider matters such as whether the location is accessible.

266. The 'transport impacts of the development, particularly to ensure safe site access' is a prior approval matter for Class MA of Part 3 from 1 August 2021.

Adequate Natural Light in all Habitable Rooms

267. The GPDO was amended by the Town and Country Planning (Permitted Development and Miscellaneous Amendments) (England) (Coronavirus) Regulations 2020 so that, for any prior approval application made on or after 1 August 2020, the matters for a change of use to a dwelling under Part 3, Classes M, N, O, PA and Q include the provision of 'adequate natural light in all habitable rooms'.

268. NB –this prior approval matter has **not** been added to Part 3, paragraph P.2 since development is not permitted under Class P if the prior approval date falls on or after 10 June 2019; paragraph P.1(c).

269. The prior approval matters for all classes of PD under Part 20 also include the provision of adequate natural light in all habitable rooms. Paragraph W.(2A) of Part 3 and paragraph B.(9) of Part 20 provide that prior approval must be refused in relevant applications if adequate natural light is not provided in all the habitable rooms of the dwellinghouse.

270. When assessing lighting levels, it is important to note that obscure (or textured) glass has better light transmittance properties than clear class, because clear glass has a more reflective outer surface, so less light passes through it. The Glass Handbook 2014 (Pilkington) states that obscure glass achieves transmittance of 0.86 for 6mm thick glass, whilst active clear glass (the clear glass with the highest light transmittance value) achieves only 0.83 (ie 3% less).

271. Where clear evidence is not available for assessing the amount of available light, it is important to seek the views of the parties before coming to a conclusion; *Bounces Properties Ltd (Mr S Posen) v SSLUHC & Enfield LBC* [2023] EWHC 735 (Admin).

272. The term 'habitable rooms' is defined in Part 3, paragraph X and Part 20, paragraph C.(1) as meaning 'any rooms used or intended to be used for sleeping or living which are not solely used for cooking purposes, but does not include bath or toilet facilities, service rooms, corridors, laundry rooms, hallways or utility rooms'.

273. As noted above, from 6 April 2021, Article 3(9A) of the GPDO provides that Schedule 2 does not permit any new dwellinghouse where the gross internal floorspace is less than 37m^2 or the dwellinghouse does not comply with the nationally described space standard issued by DCLG on 27 March 2015[22].

Formal Decision

274. If a prior approval appeal is allowed – or there is a split decision – it is necessary to specify the nature of the development approved in relation to the correct Parts or Classes of the Order. For example, if dealing with a change of use to a dwelling under Part 3, Class Q, it would be necessary to specify if prior approval is granted for Q(a) only or Q(a) and Q(b).

275. It is essential that the decision refers not only to the relevant Part and Class, but also to Article 3(1) of the GPDO 2015, because it is that which grants planning permission for the development; see Annex G.

276. Consistent with decisions on s78 appeals, a decision allowing the appeal should refer to the date and reference of the application; it may be helpful in some instances to also incorporate plan reference numbers.

277. If the appeal is dismissed, irrespective of whether the LPA refused or failed to determine the application, the standard decision will suffice – although it will be

[22] Town and Country Planning (General Permitted Development) (England) (Amendment) Regulations 2020

necessary to specify the element of the development which is refused prior approval if there is a split decision.

Conditions

278. The Order imposes conditions on planning permissions granted under certain Parts and Classes. Such conditions should not be set out in the formal decision on a prior approval appeal, because the decision is not to grant planning permission but prior approval only. The decision will enable the conditions to bite by stating that '… prior approval is granted under the provisions of Article 3(1) and Schedule 2…'

279. To assist the parties, however, particularly the appellant, any relevant conditions imposed by the Order should be described in the Conclusion or Conditions section when allowing a prior approval appeal; see Annex G.

280. Decision-makers have sometimes imposed conditions on prior approval cases that are not imposed by the GPDO 2015. The GPDO itself does not provide any general authority for doing so, but there are specific powers available to LPAs and Inspectors. These will be given in the conditions section of the relevant class, so it is crucial that you check that particular class has the powers to impose such conditions.

281. So, it would be unnecessary and unreasonable to impose a matching materials condition in a Part 1, Class A case, because paragraph A.3 requires that the materials used in any exterior work other than in the construction of a conservatory shall be of a similar appearance to those used in the construction of the exterior of the existing dwelling.

282. It might be necessary and reasonable to restrict hours of operation, but only if required to address noise or traffic impacts where such matters are included in the prior approval requirements.

283. It would never be appropriate to require that development is commenced within a specified period, as per the s91 condition imposed on express permissions. A permission granted by the Order is continuous while the Order is in force or re-enacted, and unless the permission is revoked or withdrawn. Some PD is subject to a condition as to when the development must begin, and that should be set out in the conclusion to the decision.

284. The GPDO 2015 generally provides that, in respect of relevant Parts and Classes, development must be carried out in accordance with the approved details, or with the submitted details submitted where prior approval is not required. A 'plans' condition should only be imposed where necessary to ensure certainty, perhaps if minor amendments were a consideration.

285. As in any other appeal, it is not possible to impose a positively worded condition which requires the making of a planning obligation. Given the relevant PPG tests, a negatively worded condition may be imposed which prevent development from taking place until a specified matter has occurred. The Appeals against Conditions ITM advises on appeals against non-standard conditions imposed on prior approvals.

286. It was held in *R (oao LW Zenith Ltd) v SSLUHC & Hart DC* [2022] EWHC 3317 (Admin) that an Inspector erred in refusing to grant prior approval for a change of use under Class O on the basis that the proposed flats would lack adequate natural light as required under condition O.2(1)(e). Since planning permission had been granted and was still extant for operational development to install additional windows in the building, imposing a negatively worded condition to prevent occupation of the proposed flats until the approved works had been carried out 'was an obvious solution to allowing the change of use…by failing to have regard to this, the Inspector failed to have regard to a material consideration'.

287. As noted above, appeals may be made under s73 or s73A of the TCPA90 in respect of conditions imposed on a prior approval.

Planning Obligations

288. The PPG advises that, since PD should by nature be generally acceptable in planning terms, planning obligations would ordinarily not be necessary. Any entered into should concern matters requiring prior approval and not, for instance, affordable housing; paragraph ref ID: 23b-005-20190315.

289. Regulation 122(1) of the Community Infrastructure Levy Regulations 2010 applies where a determination is made which results in a grant of planning permission. It does not apply to prior approval determinations where permission is granted under the Order and not by the LPA or Inspector.

290. Regulation 122(2), which specifies that a planning obligation may only constitute a reason for permitting the development if it is necessary, directly related and fairly and reasonably related in scale and kind, does not apply to prior approval determinations.

291. A planning obligation may be proffered, and should be considered in the planning balance, in mitigation of the matters that are the subject of the prior approval. Such an obligation would not be caught by the Regulation 123(3) pooling restriction. This is again because that provision only applies to the grant of planning permission.

292. Where applications are made for express planning permission, positively worded conditions to require an applicant to enter into a planning obligation should not be imposed. Negatively worded conditions may be imposed to that end 'in exceptional circumstances' and in relation to complex and strategically important development.

293. In prior approval appeals, it would not be necessary or reasonable to secure the provision of an obligation even by way of a negatively-worded condition. It is only necessary to consider whether any obligation provides the necessary mitigation to prevent the refusal of prior approval.

Other Statutory Duties

European Sites

294. Regulation 9(1) of the Conservation of Habitats and Species Regulations 2017 requires an appropriate authority – including Inspectors – to exercise their functions which are relevant to nature conservation so as to secure compliance with the requirements of the Habitats and Wild Bird Directives. For the purposes of prior approval or other appeals concerned with GPDO, however, Inspectors only need to be aware that Article 3(1) of the GPDO 2015 grants planning permission for the classes of development described as PD in Schedule 2 subject to Regulations 75-78.

295. Regulation 75 provides that it is a condition of any planning permission granted by a general development order on or after 30 November 2017 that development which is (a) likely to have a significant effect on a European site, alone or in combination with other plans or projects and (b) not directly connected with or necessary to the management of the site **must not be begun** until the developer has received the LPA's written notification of approval of an application made under Regulation 77[23].

296. Regulation 8(1) defines 'European sites' as Special Areas of Conservation (SACs) and candidate Special Areas of Conservation (cSACs) designated pursuant to the Habitats Directive; and Special Protection Areas (SPAs), designated pursuant to the

[23] Regulation 75 also applies to European offshore marine sites, within the meaning of Regulation 18 of the Offshore Marine Conservation Regulations.

Wild Birds Directive. Regulation 8(1) does not encompass, and therefore Regulations 75-78 do not apply to potential Special Protection Areas (pSPAs), sites identified or required as compensatory measures for adverse effects on European sites, proposed SACs (pSACs) and proposed or listed Ramsar sites[24].

297. An application made to the LPA under Regulation 77 must include details of the development intended to be carried out, and a copy of any relevant notification by the appropriate nature conservation body – here being Natural England – under Regulation 76. The LPA must send a copy of the application to Natural England and take account of any representations that they make.

298. Unless Natural England finds that the development is not likely to have a relevant effect, the LPA must make an appropriate assessment of the implications of the development for the European site in view of that site's conservation objectives. The LPA may approve the Regulation 77 application only having ascertained that the development will not adversely affect the integrity of the European site.

299. Under Regulation 78(3)(a), a Regulation 75 (via Regulation 77) approval is to be treated as an approval required by a condition imposed on a grant of planning permission for the purposes of the appeals provisions of the TCPA90. In other words, Article 3(1) and Regulations 75-78 operate to impose a pre-commencement condition on **all** development that is permitted by the GPDO and would affect a European site. PD cannot be lawfully begun until the developer has made a Regulation 77 application and received written notification from the LPA to the effect that the development would have no adverse effect on the integrity of the European site.

300. As noted above, any requirement to seek prior approval before beginning PD is also a requirement to seek an approval required by a condition imposed on a grant of planning permission. However, neither the GPDO nor Regulations 75-78 prescribes the sequencing of prior approval and Regulation 77 applications. The requirements of both procedures must be met before the development can be lawfully begun, but it is not the case that the developer must have written notification of a Regulation 77 approval before seeking prior approval, or vice versa[25].

301. Thus, the Regulation 77 application may be submitted and approved after prior approval is given for the development. If the LPA objects to a prior approval appeal on the basis that a Regulation 77 application would be required, because the development would affect a European site, but no such application has been made or approved, it does not follow that the prior approval appeal must be dismissed. The Inspector should point out that development cannot be begun until the developer has received written notification of the approval of the LPA under Regulation 77, but that does not need to precede the prior approval process.

302. That said, a Regulation 77 application may be made and determined before or at the same that the prior approval appeal is submitted. If a Regulation 77 application has been approved, the Inspector may wish to note that the provisions of Article 3(1) and the Regulations have been complied in a 'Preliminary Matters' section of their decision letter. The Inspector can accept the LPA's evidence as to whether they have received and approved any Regulation 77 application in respect of the European site; it is not necessary to go behind that conclusion.

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[24] PSPAs and pSACs, and sites identified or required as compensatory measures for adverse effects on European sites and proposed or listed Ramsar sites are given the same policy protection as European sites, under paragraph 180-184 of the Framework, for the purposes of any appeal made for express planning permission.

[25] PPG paragraph 13-019-20190722 refers to the limitations on PD under Article 3(1) and Regulations 73-76, but it does not specify any sequence for Regulation 77 and prior approval applications.

303. There is a right of appeal against any decision by an LPA to refuse a Regulation 77 application, to be treated as an appeal against a refusal of an approval required by a condition imposed on a grant of planning permission under Regulation 78(3)(a) and s78(1)(b) of the TCPA90. It is therefore possible that linked prior approval and Regulation 77 appeals will both before an Inspector.

304. There is no power to impose conditions on a Regulation 77 approval. Any necessary mitigation measures must be secured by way of a planning obligation or other legal agreement which will again be for the LPA to determine and outside of the prior approval process. Conditions imposed on grants of prior approval must be reasonably related to the prior approval matters.

UK Protected Habitats and Species

305. S40 of the Natural Environment and Rural Communities Act 2006 requires that 'every public authority must, in exercising its functions, have regard, so far as is consistent with the proper exercise of those functions, to the purpose of conserving biodiversity'. However, the GPDO does not – in Article 3(1) or otherwise – provide that PD is subject to the s40 duty.

306. While there is no legal authority to this effect, it is unlikely that any prior approval appeal, even where the matters include siting, location or amenity, could be seen as relating to the conservation of biodiversity for the purposes of s40 or planning policy.

Listed Buildings

307. S66 of the Planning (Listed Buildings and Conservation Areas) Act 1990 provides that: '…in considering whether to grant planning permission for development which affects a listed building or its setting, the local planning authority…shall 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'.

308. The s66(1) duty does not generally apply to GPDO casework and is not directly relevant for prior approval applications because planning permission is granted by Article 3(1) of the GPDO. Some developments which would otherwise be PD are not so, however, if the building is listed.

309. Where the prior approval matters include amenity, siting or location, or design and external appearance, the impact of a development on the setting of a listed building will need to be taken into account, applying the tests set out in paragraphs 195-199 of the Framework.

Conservation Areas

310. S72 of the Planning (Listed Buildings and Conservation Areas) Act 1990 provides that: 'in the exercise, with respect to any buildings or other land in a conservation area, of any [functions under the Planning Acts]…special attention shall be paid to the desirability of preserving or enhancing the character or appearance of that area'.

311. The impact of development on a conservation area must be considered in prior approval cases where the matters are amenity, siting or location, or design and external appearance. As noted above, demolition of part of a gate or a wall in a conservation area will not be PD.

Human Rights and the Public Sector Equality Duty

312. Human rights and PSED considerations do not come into play when simply making a determination as to whether development is or would be PD since there is no discretion; the finding is a matter of law.

313. The SoS considered the applicability of the Human Rights Act 1998 (HRA) to prior approval appeals in an appeal by Utopia Village Sales Ltd; APP/X5210/A/14/2212-605 which concerned a Part 3 change of use from offices to dwellinghouses; then Class J, now Class O.

314. It was argued by local residents that the development would harm their living conditions and violate their rights under Article 8 to respect for their private and family life, home and correspondence.

315. The SoS found in paragraph 14 of his decision that "when an application for prior approval under Class J is determined the Framework can only be considered in so far as it addresses the subject matter of prior approval in question". The matters for Class J/O do not include impact on amenity.

316. He therefore stated that "even if there was a case where a grant of prior approval would lead to a breach of Article 8…section 3 of the [HRA] does not permit an interpretation of the GPDO whereby the matters relevant to Article 8, but outside of the subject matter of the prior approval, can be treated as a basis to refuse prior approval and so avoid the breach."

317. However, the SoS found in paragraph 15 that the above does not mean "as a matter of law, the SoS would be obliged to grant prior approval if to do so would lead to a breach of Article 8… If [he] had concluded that to grant prior approval in this case would lead to a breach of Article 8, then he would be prevented from doing so by section 6(1) of the HRA".

318. The SoS clarified in paragraph 37 that "Class J itself is intended to strike a balance between the competing interests protected by Article 8, and the wider interests of the community…including the advancement of the policy aims underlying Class J".

319. The SoS concluded in paragraph 44 of his decision that he:

    'has considered it appropriate to consider this case on its individual merits…and… to test his expectations about the operation of Class J by reference to the facts of this case…Having done so, however, he does not consider it to be appropriate for the same process to be followed in each and every case where an issue is raised about whether a grant of prior approval would lead to a breach of Article 8…on grounds of interference with privacy.

    'In future, the Secretary of State expects local planning authorities, and Inspectors hearing appeals against their decisions, to proceed on the basis that Class J is compatible with Article 8, so that the grant of prior approval in a particular case will be justified under Article 8(2) by the general benefits of the legislation, even in a case where there is a sufficiently substantial impact to raise an issue under Article 8(1).'

320. Inspectors should proceed in prior approval appeals on the basis that the relevant Parts and Classes of the Order are compatible with Article 8, so that the grant of prior approval in a particular case will be justified under Article 8(2) by the general benefits of the legislation, even where there is a sufficiently substantial impact to raise an issue under Article 8(1).

321. In cases relating to Part 1 and 'large extensions', where amenity is a prior approval matter, it may necessary to consider the impact of a decision to allow the appeal on the human rights of adjacent residents who made representations. However, the question would be the impact of the development, and not whether Part 1 itself is compatible with Article 8.

322. It was held in *R (oao Patel) v SSCLG & Johal & Wandsworth BC* [2016] EWHC 3354 (Admin) that the Inspector is not obliged by s149 of the Equality Act 2010 to find

some countervailing public benefit to set against a greater disadvantage before they could reach a lawful decision on the prior approval appeal. The determination was the same.

323. S149 requires decision makers to have due regard but not ascribe particular weight to the needs of people with protected characteristics, or to achieve an outcome which advantages them or disadvantages them the least. Further information is provided in the Human Rights and Equality chapter.

Annex A: Part 1 – Development in the Curtilage of a Dwellinghouse

Interpretation of Part 1

General

1. Part 1 appeals casework must be considered in the light of the definitions set out in Article 2(1); Schedule 2, Part 1, Paragraph I of the Order; and in the latest or relevant version of the Technical Guidance.

2. The Technical Guidance is only relevant to Part 1 and cannot be read across to provide guidance for any other Part. Even if the development is within the curtilage of a dwellinghouse, if the relevant Part is not Part 1 (for example, the question is whether a fence is PD under Part 2) then the Technical Guidance does not apply.

3. As noted above, the **entire** demolition of dwellinghouses constitutes development which requires planning permission. Such works would be PD if compliant with Article 3 and Schedule 2, Part 11, Class B. The rebuilding of a dwellinghouse also falls outside of the permission granted by Article 3 and Schedule 2, Part 1[26].

4. The PD rights granted under Part 1, Class A and Class AA do not apply if the permission to use the dwellinghouse as such was granted only by virtue of Part 3, Class M, N, P, PA or Q; Part 1, paragraph A.1(a). If the use was permitted by virtue of Part 3, Class MA[27], the PD rights granted under *all* classes of Part 1 do not apply – and the same is true if the dwellinghouse was constructed under Part 20.

5. Certain types of development are not permitted under Classes A, B, E, G or H in respect of dwellinghouses on Article 2(3) land. The same applies to Class AA, where development is also not permitted in SSSIs.

Permitted Development for Householders: Technical Guidance

6. The current edition of the Technical Guidance was published in September 2019. As with the Order, prior approval appeals should be considered with regard to the current Technical Guidance. In enforcement and LDC appeals, however, it may be necessary to refer to the Technical Guidance in force on the relevant date. It is guidance, and not a statutory instrument like the Order itself.

7. The Knowledge Library has retained copies of the original August 2010 version, and the updated versions from January 2013, October 2013, April 2014, April 2016 and April 2017. NB: the October 2013 version was itself modified twice. All versions are available via the catalogue entry within the Library.

8. Where parties cite an interpretation of the Technical Guidance in a past appeal decision, Inspectors should establish whether a different version of the Guidance then existed, and if the present appeal can be distinguished.

9. Where the Technical Guidance is material, this is as an aid to interpretation and application of the Order. The starting point should still be, so far as possible, the wording of the Order itself. That said, where the Guidance clearly covers the issue at hand, it should be followed unless it has been overturned by the Courts, or demonstrably does not apply to the particular facts of the case.

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[26] Sainty v MHLG [1963] 15 P&CR 432; *Larkin v SSE & Basildon DC* [1980] JPL 407; and *Hewlett v SSE* [1983] JPL 155.

[27] From 1 August 2021

10. The Technical Guidance not only sets out definitions of terms as in the Order, but also guidance on terms which are not defined in the Order. Some terms are listed in the General Issues section at the start; others are defined in relation to particular Classes. The Guidance also includes diagrams to illustrate terminology and whether development would be PD.

11. The phrase 'so far as practicable' in Part 1, paragraphs A.3(c), B.2(b) and H.2(b) is not defined in the GPDO 2015 or Technical Guidance, but the latter gives some assistance in respect of B.2(b); see below. The onus in all cases is on the applicant to show that it would not be 'practicable' to comply with the conditions.

12. The Technical Guidance advises that, when considering whether a proposal is PD, all relevant Parts and Classes within those Parts need to be taken into account.

Eaves

13. There are two definitions for eaves in the Technical Guidance. In relation to Class A, the Guidance explains that for the purpose of measuring 'height' from 'ground level', 'the eaves of a house are the point where the lowest point of a roof slope, or a flat roof, meets the outside wall.

14. Eaves height is measured from natural ground level at the base of the outside wall to the point where that wall would meet the upper surface of the roof slope. Parapet walls and any overhang should be ignored for the purposes of measurement'; see also Article 2(2). There is nothing in Schedule 2, Part 3, Class Q or Article 2 to suggest that eaves would not be counted in 'dimensions'.

15. The Technical Guidance also states that, for the purposes of Class B and condition B.2(b), the measurement of an enlargement to the roof should be made along the original roof slope from the outermost edge of the eaves (or edge of the tiles or slates) to the edge of the enlargement. Any guttering that protrudes beyond the roof slope should not be included.

16. The latter interpretation of the Order in the Technical Guidance was successfully challenged in the High Court[28] but the Order itself was then amended such that the Technical Guidance is correct. For enforcement and LDC appeals, the GPDO 2015 is stricter than the GPDO 1995 in relation to retention of eaves under B.2(b).

Obscure glazing

17. Conditions A.2(b)(i), B.2(c)(i) and C.2(a) require particular windows to be 'obscure-glazed'. That phrase is not defined in the Order but is in the Technical Guidance: 'Glazing to provide privacy is normally rated on a scale of 1-5, with 5 providing the most privacy. To be permitted development, side windows should be obscure glazed to minimum of level 3. Obscure glazing does not include one-way glass'.

18. The phrase 'level 3' does not refer to any British Standard; it is likely to be a manufacturer's (such as Pilkington) categorisation. Whether development with a relevant window that is obscure glazed to less than level 3 is PD would be a question for the decision-maker.

Implementing a Separate Planning Permission & Part 1 PD Rights

19. Where express planning permission has been given, say for a ground floor extension to a dwelling, the owners may seek to use their Part 1 allowance first, perhaps by constructing a dormer extension.

[28] Waltham Forest LBC v SSCLG (QBD) 18 June 2013

20. It was held in *R (oao Watts) v SSETR* [2002] JPL 1473 that, in order to assess whether the latter development was in fact permitted by the Order, the question to be answered is whether, from the start of the development until the time at which it has been substantially completed, the building has been otherwise enlarged, improved or altered by more than the specified allowances. If it has, the development would cease to be permitted by the Order and can be enforced against.

21. Sometimes it is claimed that changes from the permitted plans made to a dwelling during its erection have been made with the benefit of PD rights under Part 1. The general principle is that PD rights are not available until a dwellinghouse has been substantially completed, even if the changes would have been PD had they been carried out to the completed dwelling; *R (oao Townsley) v SSCLG* [2009] EWHC 3522.

22. The underlying logic is that the dwellinghouse does not exist as such until it has been substantially completed. It follows from the *Gravesham* test that a partly constructed building could not provide all the facilities necessary for day to day living. Moreover, once the construction of the dwellinghouse has departed in a material way from what permission was granted for, the building has become unlawful and PD rights do not apply by virtue of Article 3(5).

23. The meaning of 'substantial completion' is as set out in *Sage v SSETR* [2003] UKHL 22: that the building operation would need to be carried out, both externally and internally, fully in accordance with the permission. A different definition applied in Watts has been superseded by *Sage*.

Class A – General Considerations

Curtilage

24. The Technical Guidance defines curtilage as '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…properties with large grounds, it may be a smaller area'.

25. Since PD rights only apply when the development fully accords with the limitations set out in the GPDO 2015, it is implicit that works subject to Part 1 are within the curtilage of **a** dwellinghouse. There cannot be any, even a 'de minimis' infringement of that requirement.

'Enlarged Part of the Dwellinghouse'

26. It was held in *Kensington and Chelsea RBC v SSCLG* [2015] EWHC 2458 (Admin) that the 'enlarged part of the dwellinghouse' does not include the 'original' building but does include previous enlargements. That judgment was contradicted in *Hilton v SSCLG & Bexley LBC* [2016] EWHC (Admin), where it was held that the term refers only to development comprising the enlargement of a dwellinghouse proposed to be carried out under Class A.

27. Thus, the term 'enlarged part of the dwellinghouse' is defined in the Technical Guidance as 'the enlargement which is proposed to be carried out under Class A'.

28. The Town and Country Planning (General Permitted Development) (England) (Amendment) Order 2017 amended the GPDO 2015 by inserting paragraph A.1(ja): development is not PD where '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)'.

29. A.1(ja) applies to extensions subject to prior approval appeals under A.1(g) except where information was provided to the LPA under A.4(2) before 6 April 2017.

30. Paragraph A.2 provides that development is not permitted under Class A if the dwellinghouse is on Article 2(3) land and it would consist or include 'the cladding of any part of the exterior of the dwellinghouse with stone, artificial stone, pebble dash, render, timber, plastic or tiles'. The term 'dwellinghouse' is not qualified here and thus is not restricted to meaning the original dwellinghouse.

31. It follows, for Class A, that if a house on Article 2(3) land is already (eg) clad in render, and an extension is proposed to be rendered in order to comply with the matching materials condition under A.3(a), the extension would not be PD because it would conflict with A.2(a).

Demolition

32. If operations proposed under Part 1 would involve partial demolition, it will be a matter of fact and degree as to whether the works would be excluded from development under s55(2)(g) and Article 3(9).

33. If it is proposed to build an extension under Part 1, Class A following the partial demolition of the dwellinghouse, the part to be demolished should be considered as a part of the original dwelling, even if the demolition works themselves would not require planning permission.

34. For example, if it is proposed to demolish an original outrigger and replace it with a wider rear extension, then the replacement extension should be assessed on the basis that it would 'extend beyond a wall forming a side elevation of the original dwellinghouse' for the purpose of A.1(j).

Principal, Rear and Side Elevations

35. The limitations set out in A.1(e) to A.1(j) refer to the 'principal', 'rear' and 'side' elevations of the original dwellinghouse; the Technical Guidance assists in interpretation of those terms. There may be more than one 'rear wall', for example, where the original rear wall is stepped. Measurement must be taken from the part of the wall being extended from.

36. Similarly, Inspectors are advised to measure the width or depth of the 'enlarged part of the dwellinghouse' for the purposes of A.1(e)-(j), and also for A.1(ja), A.2(b)-(d) and A.4(2), by measuring between the elevations of the enlargement – and discounting any roof overhang[29].

37. Where the enlarged part would extend beyond a wall forming a side elevation of the original dwellinghouse, failure to meet any of the limitations in A.1(j)(i) to (iii) would take the development out of PD. The Technical Guidance indicates that a wall forming a side elevation will be any that cannot be identified as being a front wall or a rear wall. A.1(j) will apply where a passageway wall forms a side wall to the original dwellinghouse, notwithstanding that the wall is covered by a first floor.

38. If part of the original dwellinghouse has been demolished since the relevant date, the remainder of the dwelling would still count as part of the original. Any adjoining structure would not be considered as part of the dwellinghouse, unless the contrary is shown to be the case as a matter of fact and degree on the evidence.

39. If the proposed extension would extend beyond the line of an original side elevation, but that wall was previously demolished or would be demolished as part of the

[29] The roof of the enlargement would be taken into account when measuring height, for example, for the purposes of A.1(c) and (d). The roof would also be taken into account where there are limitations pertaining to "any part of the structure"; for example, in Part 1, Class D, paragraph D.1(d).

proposed development, the restrictions in A.1.(j) would apply. The limitations to PD are based on the original dwellinghouse and apply if part of the original is removed.

40. Inspectors should note that rear extensions need to be assessed against the restrictions on side extensions where they also extend beyond a side wall. Whether there is a side wall or not is a question of fact and degree. Inspectors should be aware that even a very short and/or shallow wall could constitute a 'side wall' for the purposes of the Order.

41. The only possible exception would be if an Inspector found, as a matter of fact and degree, that the protrusion was too shallow to constitute a wall. A window sill, for example, would not normally constitute a side wall, but a projection in the brickwork might be identifiable as such.

Opposite Boundary

42. *Kensington* established that the test in A.1(h)(ii) means that there must be 7m from the rear wall of the application dwelling to the opposite boundary. This judgment was not contradicted by *Hilton*.

43. Paragraph A.1(h)(ii) was amended in April 2016 to preclude development with more than a single storey within 7m of any boundary of the curtilage of the dwelling being enlarged opposite the rear wall of that dwelling[30]. The Technical Guidance states that an enlargement with more than one storey 'must be a minimum of 7m away from any boundary of its curtilage which is opposite the rear wall of the house being enlarged.'

Subterranean or Basement Extensions

44. The planning permission granted by Part 1, Class A, for enlargements, improvements or alterations to a dwellinghouse could potentially allow for a basement extension subject to the limitations set out in A.1(e) to (ja).

45. It was held in Eatherley v Camden LBC [2016] EWHC 3108 (Admin) that it may be necessary to assess whether engineering works required for a basement extension would be PD under Class A. There had to be a point where the excavation, underpinning and support for a basement differed in character from the enlargement, improvement and alteration of the dwelling. It is for the decision-maker to decide whether there were one or two activities of substance as a matter of fact and degree.

Class A – Prior Approval Matters

No Consultation by LPA

46. If the LPA did not carry out the necessary consultation, they must be asked to do so via the Case Officer if you are minded to allow the appeal. Prior approval cannot be granted if the owners or occupiers of any premises or land adjoining the site were not properly consulted.

Objections and Impact on Amenity

47. For Part 1, Class A, paragraph A.4(7) is triggered where an objection is before the decision-maker, or the developer is required to submit further information. An Inspector cannot raise their own concerns or have regard to the question of amenity unless there had been a representation from a neighbour which triggers the need for the prior approval.

[30] Town and Country Planning (General Permitted Development) (England) (Amendment) Order 2016/332

48. If the LPA notified neighbouring properties, no objections were received, and the development could be PD, the appeal should be allowed on the basis that prior approval is not required, and it would not be possible to impose conditions.

49. If the need for prior approval is triggered by a relevant representation, the development should be assessed on the basis of its impact on the amenity of **all** 'adjoining' premises and land, including those where the occupiers did and did not make representations.

Fallback Position

50. While A.4(7) is only triggered when there is an objection or the developer is required to submit further information, it is still worth bearing in mind that – when addressing any fallback position – the outcome of the prior approval procedure cannot be guaranteed in the same way as PD without a pre-commencement condition. Neighbours may change, and so may the opinions of neighbours.

51. Where a proposal might result in injury to amenity, the LPA must have regard to whether the development would be compatible with Article 8 of the European Convention on Human Rights as incorporated into domestic law in the Human Rights Act 1998. The GPDO must be read under s3 of the Human Rights Act in 'a way which is compatible with the Convention rights', making it necessary to have regard to impacts on residential amenity where that is within the prior approval matters.

Objective Test

52. Overall, the assessment of impact on amenity must be objective, ie, consider the amenities that should reasonably be enjoyed by occupiers of neighbouring properties generally, rather than subjective preferences.

53. Objections often made in such cases include a claim to a 'right to a view' or of a loss in value of adjoining property. It is useful to bear in mind the observations of Ouseley J in *R (oao) Cummins & others v Camden LBC & SSETR* [2001] EWHC Admin 1116:

> '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.'

Class AA

54. The GPDO was amended on 31 August 2020 to introduce Class AA to Part 1 of Schedule 2, setting out PD rights for development consisting of works for the construction of up to two additional storeys on an existing dwellinghouse that consists of two or more storeys, or one additional storey on an existing single storey dwellinghouse, together with any reasonably necessary engineering operations.

55. Development is permitted under Class AA subject to limitations and conditions including a requirement to apply for prior approval. The development must not begin until written notice is received of the grant of prior approval.

56. Paragraph AA.1(c) provides that development is not permitted under Class AA if 'the dwellinghouse was constructed before 1 July 1948 or after 28 October 2018'. AA.1(c) should be interpreted as referring to the date of the construction or erection of the building that is now used as a dwellinghouse – even if the dwellinghouse use commenced upon a later change of use of the building.

57. Paragraph (d) (AA.1) states that development is not permitted by Class AA if the additional stories are constructed other than on the principal part of the building.

58. The definition of principal part states that extensions of a lower height are excluded whether they form part of the original building or are a later addition. However, what is an extension in this context is also not exhaustively defined in the GDPO.

59. Principal part should not be taken to mean that all parts of the building which are of a lower level are automatically extensions. This will be a matter of planning judgement to determine whether something is an extension or part of the main building

60. Following Counsel's advice in *Woodcote Estates Ltd v SSLUHC & RB Kingston Upon Thames*, the "main part of the building" and "extension" are mutually exclusive. The building can either be an "extension" or it can be or be included within "the main part of the building", but not both. Extensions of equal or greater height are not excluded, and by may be included.

61. Clear reasons must be given for concluding whether the development is proposed to be constructed on the main part of the building or an extension of a lower height.

62. The Permitted development rights for householders Technical Guidance 2019 contains guidance on establishing the principal part of a building. Although this refers to its usage in Class A cases, there is no reason that this should not also apply to Class AA.

63. Development is in any event not permitted under Class AA if permission to use the dwellinghouse as such was granted by virtue of Part 3 of the Order – or if the building contains more than a single dwellinghouse. None of the PD classes set out under Part 1 apply to flats or buildings containing flats because of how the term 'dwellinghouse' is defined in Article 2(1).

Classes B and C

64. Class B permits 'additions' and Class C permits 'alterations' to a roof; works may fall under either or both classes. Parapet walls, railings, trellises and other barriers will generally be regarded as additions or alterations to the roof, to be considered under Classes B or C, rather than Class A; see *Richmond-upon-Thames LBC v SSE & Neale* [1991] JPL 948. Class B does not apply at all to Article 1(5) land; only Class C grants any PD rights to the roofs of dwellings in such areas.

65. Class C permits works such as re-roofing in a different style, material or colour where that would constitute 'development' by virtue of a material effect on the external appearance of the building; s55(2)(a)(ii).

66. Class C PD rights apply to the installation of roof lights or other alterations that would protrude by no more than more than 150mm beyond the plane of the slope of the original roof and be no higher than the highest part of the original roof. If roof lights would as a matter of fact and degree alter the shape of roof or materially enlarge the dwelling viewed as a whole, the development should be considered under Class B.

Class B

67. Works do not need to have a volume to be regarded as an "enlargement" for the purposes of Class B. In *Richmond*, the Court held that, even though they provided

no more usable space for the dwelling, the parapet walls appeared to the objective observer as an enlargement of the dwelling house and so within Class B, provided they met all the limitations of that Class.

68. In such cases, it is not right to regard the whole empty space enclosed by (for example) parapet walls as increasing the cubic content for the purposes of provisos B.1(c) and (d). But the Richmond case also indicates that, for the purposes of proviso B.1(a), the height of the highest part of the existing roof refers to the roof as a whole and not just the flat roof of the extension.

69. In *R (oao Cousins) v Camden LBC* [2002] EWHC 324 (Admin), it was confirmed that the correct test is set out in Richmond*:* does the house appear larger to those outside looking at it? It was held that particular railings did not enlarge the external appearance of the dwelling and so fell within Class C – but the position might have been different had a brick parapet wall been constructed, as in *Richmond*. The question of whether parapet walls, railings, trellises and other barriers fall within Class B or C will need to be assessed as a matter of fact and degree.

70. It is sometimes argued that walls, railings and trellises are means of enclosure and are permitted under Class A of Part **2**. DCLG (as then) advice, which has not been challenged in the High Court, is that the top of a parapet wall or other means of enclosure on a flat roof of a single storey extension must by definition be more than 2m above ground level and therefore cannot be PD under that heading.

71. Development is not PD under paragraph B.1(d) if the cubic content of the resulting [from the enlargement to the] roof space would exceed the cubic content of the original roof space by more than (i) 40m^3 in the case of a terrace house, or (ii) 50m^3 in any other case. There is no definition of 'roof space' – but 'cubic content' is defined in Article 2(1) as 'the cubic content of a structure or building measured externally'.

72. It was held in Havering LBC v SSCLG [2017] EWHC (Admin) 1546 that, 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 require going into the what might have been originally under the roof, but the roof itself and any addition or extension to that roof as it originally stood". In this case, the proposed dormer should be measured externally and it would breach B.1(2)(d).

73. Paragraph B.2(b) provides that the enlargement must be constructed so that:

    (i) Other than in the case of a hip-to-gable enlargement or an enlargement which joins the original roof to the roof of a rear or side extension (aa) the eaves of the original room are maintained or reinstated; and (bb) the edge of the enlargement closest to the eaves of the original roof is, so far as practicable, not less than 0.2 metres from the eaves, measured along the roof slope from the outside edge of the eaves; and

    (ii) Other than in the case of an enlargement which joins the original roof to the roof of a rear or side extension, no part of the enlargement extends beyond the outside face of any external wall of the original dwellinghouse[31].

74. The Technical Guidance advises on the meaning of "so far as practicable" for B.2(b)(i)(bb):

    "This 0.2m set back will be required unless it can be demonstrated that this is not possible due to practical or structural considerations…[for example] where a dormer

[31] Paragraph B.4 exempts roof tiles, guttering, fascias, barge boards and other minor roof details overhanging the external wall of the original dwellinghouse from B.2(b)(ii)

on a side extension of a house joins an existing or proposed dormer on the main roof of the house".

75. The Technical Guidance can also be interpreted to suggest that an 'L-shaped dormer' which connects the main roof of a dwellinghouse to that of an outrigger or extension would normally be "an enlargement… which joins the original roof to the roof of a rear or side extension", meaning that it is exempt from conditions B.2(b)(i)(aa) and (bb) and B.2(b)(ii).

76. In Enforcement and LDC appeals concerning B.2(b), it will be necessary for the Inspector to consider how the enlargement is constructed on a fact and degree basis, and explain their conclusion accurately, including why that might differ from other appeal decisions which appear to concern the same type of enlargement.

Class E

77. In enforcement and LDC appeals concerning Class E, it may be necessary to consider whether the development is or would be within the curtilage of the dwellinghouse as described above.

78. Another dispute which arises in such appeals is whether the proposed building is required for 'a purpose incidental to the enjoyment of the dwellinghouse as such'.

79. The meaning of 'incidental' uses is considered in full in the Enforcement chapter. In short, the essential feature of an incidental use is that it should have a functional relationship with the primary use, and the relationship should be one that is normally found. It is not founded on the personal choice of the person carrying out both activities together; Harrods v SSETR [2002] JPL 1258.

80. Where a building within the curtilage of a dwellinghouse would contain primary living accommodation, such as bedrooms or a kitchen, it would not normally be considered to be in incidental use or be PD under Class E.

81. In *Peche D'or Investments v SSE* [1996] JPL 311 it was acknowledged that while a study would normally be regarded as an integral part of an ordinary use as a dwellinghouse, a fact and degree assessment should be made as to whether that was the case in each instance. There was no warrant in the legislation for exclusion of a particular type of room or building from Class E rights as a matter of law.

82. It was subsequently held in *Rambridge v SSE & East Herts DC (*QBD 22.11.96 CO-593-96) that, in order to comprise PD, all of the building proposed under Class E must be required for purposes incidental to the dwellinghouse. A building that is in a mixed use or used for a primary residential purpose, such as a bedroom, cannot be PD under Class E.

83. The Court in *Emin v SSE* [1989] JPL 909 confirmed that regard should be had not only to the use to which the Class E building would be put, but also to the nature and scale of that use in the context of whether it was a purpose incidental to the enjoyment of the dwellinghouse.

84. The physical size of the building in comparison to the dwellinghouse might be part of that assessment but is not by itself conclusive. It is necessary to identify the purpose and incidental quality in relation to the enjoyment of the dwelling and answer the question as to whether the proposed building is genuinely and reasonably required or necessary in order to accommodate the proposed use or activity and thus achieve that purpose.

85. Paragraph E.1(c) provides that buildings are not PD if they are on 'land forward of a wall forming the principal elevation of the original dwellinghouse'. This limitation covers all of the area in front of the 'principal elevation' as defined in the Technical

Guidance, being usually but not always the elevation which fronts the 'main highway serving the house'.

86. Paragraph E.1(e) applies a height limitation to a 'dual pitched roof'; the Technical Guidance specifically states that this limitation should be applied to hipped roofs, but it does not mention any other roof type. Inspectors should take the term as encompassing gabled as well as hipped roofs but not mansard or gambrel roofs, or roofs with two pitches on each side.

87. The restriction under E.1(e)(ii) on the height of the building within 2m of the boundary applies to the whole building. It is not possible to sub-divide the building into parts of differing heights. E.1(e) also applies if the development would comprise works for the 'maintenance, improvement or other alteration' of an existing building which already exceeds the height limitations – and even if the proposed works would not make serve to make the building any higher.

88. As explained above, it was held in *McGaw v the Welsh Ministers & the Council for the City and County of Swansea* [2020] EWHC 2588 (Admin) that where an LDC was sought for proposed development under Class E and the appellant proposed to backfill the land, the Inspector was wrong to base his assessment of height on existing ground levels. The judgment was not appealed on that point.

89. The case was considered by the CoA with respect to what ground should be considered 'adjacent' to the southern flank of the building when it would abut the curtilage boundary. The boundary wall could not be taken as the adjacent ground. It was held in *McGaw v Welsh Ministers* [2021] EWCA Civ 976 that the adjacent ground did not have to be within the curtilage of the appeal dwellinghouse. On the facts, it was right to identify the neighbour's garden as the immediately adjacent ground for the purposes of Class E.

90. The approach set out in these judgments should be followed bearing in mind that:

- Class E does not expressly permit engineering operations and so it may be necessary to assess whether any proposed works to alter land levels would in fact be PD as per Eatherley described above.

- Class E and indeed Part 1 is concerned with development in the curtilage of a dwellinghouse. Neither the Order nor Technical Guidance indicates that land outside of the curtilage may be the reference point for measuring height. Any decision to measure height from the level of the surface of the ground in the neighbouring property should be fully justified on the facts of the case.

Annex B: Part 3 – Changes of Use

1. Part 3 of the GPDO 2015 sets out material changes of use which are granted planning permission. There have been a number of recent amendments and additions. All of the permitted changes are subject to limitations and conditions; in some cases, PD rights which would normally apply under other Parts to the permitted uses (or buildings in such use) have been removed. Certain classes of permitted change of use import planning permission for associated building operations.

Prior Approval Requirements

2. Part 3, Class W sets out the procedure for applications for prior approval under Part 3. Note that paragraph W.10(b) requires the decision-maker to 'have regard to the National Planning Policy Framework…so far as relevant to the subject matter of the prior approval, as if the application were a planning application'.

3. This means that the policies of the Framework which are relevant in considering transport, contamination, flood risk and noise etc should be taken into account, but not policies of the Framework which are not defined as relevant to particular Classes.

4. Additional definitions, including of 'state-funded school' are given in paragraph X.

Limitations

5. Some Classes in Part 3 provide that development is not permitted where the site is on Article 2(3) land, in a SSSI, in a safety hazard area, a military explosives storage area[32], or if the building is a listed building or the building / site is or contains a scheduled monument[33].

6. Various classes of PD set out below are subject to limitations as to the previous use of the building, sometimes on specified dates. For example, Classes M, MA, N, O, P, PA and Q are subject to limitations that the previous use of the building or site was that from which the change of use to a dwellinghouse would be permitted from on specified dates, to ensure that this was the last use of the building and indeed it was a lawful use. This is a question of fact to be established based on the evidence.

7. In such cases, the previous use which needs to be determined is that which was subsisting and lawful. Taking Class O as an example, a change of use from an office to a dwellinghouse will only be PD if the building was actually and lawfully used as an office at the relevant date. The change of use would not be PD if the building was used as an office unlawfully or if a permitted office use had not taken place.

8. Consideration may need to be given as to whether the building had become divided into separate planning units, bearing in mind – where relevant to the Part and Class – that 'building' includes 'part of a building', as defined in Article 1(2).

9. Using Class O as an example again, paragraph O.1(b) requires that the last use was one falling within class B1(a). If the last use of the building or part of the building subject to the proposed change of use was a mixed use, the PD right granted under Class O would not apply. If several uses are carried out within the whole building, but the part of the building subject to the proposed change of use can be deemed a

[32] The definition of "military explosives storage area" in Article 2(1) is amended by the Town and Country Planning (General Permitted Development) (England) (Amendment) Order 2018

[33] The LPA should refuse any application for prior approval where such restrictions apply. Information regarding a safety hazard area or military explosives storage area should be included in the LPA's Questionnaire, as Health & Safety issues relating to any site visit.

separate planning unit which was last in B1(a) use, as a matter of fact and degree, O.1(b) would be complied with.

10. If there is insufficient evidence to adjudge the planning unit, the appeal can be refused on this basis with reference to paragraph W.(3))b).

Statement on the 'Net Increase in Dwellinghouses'

11. Prior approval applications to the LPA in relation to Part 3, Classes G, M, MA, N, O, P, PA and Q must be accompanied by a statement specifying the net increase in dwellinghouses proposed. This does not apply to applications made on or before 5th April 2016. The 'net increase in dwellinghouses' is the number of dwellinghouses proposed that is additional to the number on the site immediately prior to the development; Part 3, W.(2)(ba)[34].

12. The Town and Country Planning (General Permitted Development) (England) (Amendment) Order 2018 inserted paragraph W.(2)(bb) to amend the requirements for the Statement on the Net Increase in Dwellinghouses for Class Q development.

Curtilage

13. For Classes Q, R and S, 'curtilage' is defined in paragraph X as meaning '(i) the piece of land, whether enclosed or unenclosed, immediately beside or around the agricultural building, closely associated with and serving the purposes of the agricultural building, or (ii) an area of land immediately beside or around the agricultural building no larger than the land area occupied by the agricultural building, whichever is the lesser.'[35]

14. Similar definitions of 'curtilage' are set out in paragraphs P.3 and PA.3 for the purposes of Classes P and PA. It should be clear on any prior approval application relating to Classes P, PA, Q, R or S which land is subject to the proposed change of use. If it is not, the application should be treated as relating to the building only, since 'any land' can comprise 'a building'.

15. The extent of the curtilage should be determined as a preliminary matter and in accordance with the statutory rather than any common law definition. The land which can be subject to the change of use is limited by paragraphs P.3, PA.3 and X.

16. If the application is for a change of use of land which encompasses an area of land that is larger than the curtilage as defined, the development cannot be PD; this is the purpose of the text, 'whichever is the lesser'.

17. This definition has the effect that even a particular piece of land which is closely associated with the building should be excluded for the purposes of defining the subject matter of the proposal, if including it would mean exceeding the tolerance set out in the second limb of the definition. The curtilage must also be 'immediately beside or around the building'.

Curtilage: Change of Use of the Building only

18. It is open to an applicant to propose a change of use of the building, along with any associated conversion works, without requesting any change of use of the land within the curtilage of the building at all. The effect of this would be that the use of the building would change, but the surrounding land would remain in the previous use.

[34] Town and Country Planning (General Permitted Development) (England) (Amendment) Order 2016/332

[35] GPDO, Schedule 2, Part 3, paragraph X

19. Under the GPDO 2015, an applicant can propose **a later** change of use of land near to the converted building; this would need to be assessed on the basis that the land described as being within the curtilage of the building meets the relevant definition.

20. There is no requirement for a proposed development to include a curtilage and so an appeal should not be dismissed simply because there is no curtilage within the red line of the site. An appeal can be determined within the terms of the Order and without the need for reference to a curtilage.

Curtilage: Building or Part of a Building

21. Parties may attempt to argue that the entire building, even parts being demolished or not subject to the proposed change of use, should be included for the purposes of defining the area of curtilage under paragraphs P, PA and X (where appropriate). But the area to be considered as within the curtilage of the building should be taken as limited to the part of the building which is subject to the proposed change of use.

Curtilage: Excluded from the Site Edged Red

22. Where the proposed development relates to land within the curtilage of the building, the Inspector should ensure compliance (where appropriate) with the definition in paragraphs P.3, PA.3 and X, even if the 'curtilage' is not shown within the site edged red. It is not a requirement to identify the curtilage by a red line, as long as the area is made clear as part of the application.

23. If it is clear that the land does not match the definition of curtilage, for example because it is too large or not immediately beside or around the building, the Inspector could refuse the application.

24. Alternatively, the Inspector might define a more restricted curtilage. The key point is that the decision must make the extent of the curtilage clear, so it is apparent which land is subject to the permitted change of use.

Curtilage: Proposed 'Curtilage' is Unclear

25. If it is not clear what land the appellant seeks to include within the curtilage, the Inspector should conclude that there is no curtilage, and this need not prevent approval of the change of use of the building. It is possible to approve those parts of the curtilage which are clear and acceptable – and to refuse the remainder.

Curtilage: Whole Site

26. Where it is proposed to change the use of land beside or around the building, the correct approach is to assess the area identified as curtilage on a plan, rather than the whole site edged red, against (where appropriate) paragraphs P.3, PA.3 and X. The Inspector should then expressly state that the curtilage shown on the plan is the area where the change of use is permitted, in order to remove doubt. If the entire site is subject to the proposal, however, then the entire site should be considered as the proposed curtilage – and it will probably fail the curtilage definition.

Curtilage: Curtilage too Large

27. If the land proposed to fall within the curtilage of the building exceeds the limits of the PD right, it is open to the Inspector to consider whether a smaller curtilage could be granted or, if that cannot be reasonably established, whether to dismiss the appeal.

Curtilage: Proposed Access

28. Where it is proposed to create a new access to the building subject to the change of use, there will likely come a point where the access would not be 'immediately beside

or around the building'. Where this is the case should be assessed on a site-specific, fact and degree basis.

29. Any area of land to be included in a proposed access, or any part of an existing access intended to serve the proposed dwelling, which does not fall within the curtilage, will remain in its existing lawful use. A change of use of the land to use for residential purposes may require a separate grant of planning permission.

30. Schedule 2, Part 2, Class B permits the formation, laying out and construction of a means of access to a highway which is not a trunk road or classified road – and this PD right would apply in situations where such an access is required to serve a dwellinghouse permitted under Part 3. The access would need to be 'required' to serve the dwelling, but not restricted in terms of length.

Curtilage: Reasoning and Formal Requirements of the GPDO 2015

31. Where requested in the application or appeal representations, it is best practice to set out your reasoning with regards to curtilage, in order to remove any doubt. However, this is not required by the GPDO 2015.

Classes C, M, N and Q – Building Works

Types of Application

32. In the GPDO 2015 as originally made, Classes C, M, N and Q permitted (a) a change of use of a building; **and** (b) building operations reasonably necessary to use or 'convert' the building. If using the words 'convert' or 'conversion', Inspectors are advised to do so only when describing operations or works which facilitate the change of use – and not when referring to the change of use itself.

33. The Town and Country Planning (General Permitted Development) (England) (Amendment) Order 2018 has amended Classes C, M, N and Q so as to permit (a) the change of use; **or** (b) development referred to in paragraph (a) **together** with building operations reasonably necessary.

34. For change of use only applications, Q(a) only, for example, Inspectors should not address matters relating to building operations, because the works fall outside of the application. This applies even if it appears that building operations may be required to facilitate the change of use.

35. W.(2)(a) states, following the April 2018 amendment, 'the application must be accompanied by… a written description of the proposed development, which, in relation to development proposed under Class C, M, N or Q of this Part, must [in the same application] include **any** building or other operations'; emphasis added. For a Q(a) only appeal, there are not any building or other operations proposed.

36. Where C(b), M(b), N(b) or Q(b) applications are made for a change of use and facilitating operations, the works should then take place with the change of use. If an applicant applies for prior approval for a change of use only under Classes C(a), M(a), N(a) and Q(a), and later finds that works are required, they must submit a new prior approval application for the change of use and operations before the development is commenced.

37. Where prior approval is sought for a change of use and operations under Class C, M, N or Q, prior approval may be granted for the former but not the combined proposal, even if the operations are necessary.

38. For example, if an appeal is made in respect of Class Q(a), and the Inspector is satisfied that the prior approval matters in Q.2(1)(a) to (e) have been adequately dealt with, the Inspector can grant prior approval for the change of use only.

However, if any of those matters require more information, this could be a ground for refusal under W.(3)(b) for the combined appeal. If a change of use appeal is to be dismissed, it is not necessary to consider proposed works.

39. If the LPA has refused the application on grounds relating to operational development when the applicants had made clear that the application related to a change of use only, but the appellant then submits further information during the appeal process pursuant to operations, the proper course of action in the interests of openness and fairness would be for the appellants to make a further application to ensure that interested parties are aware of all of the relevant information.

40. Multiple prior approval applications can be made for the same building over time, subject to the relevant limitations for Classes C, M, N and Q.

Internal and Structural Alterations

41. Limitations to the 'operations reasonably necessary' are set out in Class C(b) and paragraphs M.1(e) and (f), N.1(d) and Q.1(h) and (i); see also discussion of demolition or development affecting floorspace below.

42. Some defined operations, for example, the installation or replacement of exterior walls under Q.1(i)(i)(aa), are permitted 'to the extent reasonably necessary for the building to function as a dwellinghouse'. You may need to adjudge whether the works fall within the list of defined operations and, if so, whether the works are 'reasonably necessary' from the evidence and on a fact and degree basis.

43. The PPG provides guidance on what building works are allowed under Class Q in paragraph ref ID: 13-105-20180615:

'…the right assumes that the agricultural building is capable of functioning as a dwelling…It is not the intention of the permitted development right to allow rebuilding work which would go beyond what is reasonably necessary for the conversion of the building to residential use. Therefore it is only where the existing building is already suitable for conversion to residential use that the building would be considered to have the permitted development right'.

44. Paragraph ref ID: 13-105-20180615 also notes that

For the building to function as a dwelling, it may be appropriate to undertake internal structural works, including…for a floor, the insertion of a mezzanine or upper floors within the overall residential floor space permitted, or internal walls which are not prohibited by Class Q.

45. However, the GPDO 2015 makes no such distinction between structural and non-structural works, and it places no restriction on whether works are structural or not. Nevertheless, the PPG should be taken into account when considering whether operations are 'reasonably necessary' or not.

46. From the limited legal authority as to what 'reasonably necessary' means, the operations do not need to be absolutely necessary, in that there may be several possible courses of action. It is then a question of whether the course chosen was one that a reasonable person would choose.

47. Based on this, if a building is capable of use as a dwelling, it is likely that the works to facilitate the change of use would be considered reasonably necessary. However, the nature of those works would still need to fall within the operations permitted under C(b), M.1, N.1 or Q.1.

48. Parties might seek to argue that some works are not subject to PD limitations, because they would comprise internal alterations which are exempted from the

definition of 'development' under s55(2)(a) of the TCPA90 meaning that planning permission is not required for such works, and is not therefore granted by Order.

49. However, s55(2)(a) applies to works of 'maintenance, improvement or other alteration which affect only the interior…or do not materially affect the external appearance of the building'. However, case law[36] indicates that there is a difference between 'maintenance' and rebuilding.

50. The nature and extent of proposed building operations should be assessed as a matter of fact and degree, to inform a conclusion as to whether they would amount to development and, if so, be 'reasonably necessary' to facilitate the permitted change of use – or fall outside of the PD right.

51. If the operations would amount to a rebuilding, the prior approval appeal should be refused on the basis that the proposed development is outside the relevant Class. It was held in *Hibbitt v SSCLG* [2016] EWHC 2853 that the building must be capable of conversion to residential use without operations amounting to complete or substantial re-building of the pre-existing structure or, in effect, the creation of a new building; see also PPG paragraph ref ID: 13-105-20180615.

52. Once a permitted change of use has occurred under Classes C, M, N and Q, the building may be altered internally without reliance on PD rights or other permission.

Demolition and New Foundations

53. The total demolition of the existing building is not permitted under Classes C, M, N or Q, but partial demolition may be to the extent that is reasonably necessary for the building to function as a dwelling.

54. The excavation and installation of foundations are not included in the list of permitted operations set out in N.1(d) or Q.1(i). New foundations are likely to go beyond 'maintenance, improvement or other alteration' which would be exempted from the meaning of 'development' under s55(2)(a) of the TCPA90 since they would lead to the construction of a new building.

55. Underpinning involves the strengthening of the foundations of an existing building or structure. Such works would be excluded from PD under N.1(d) and Q.1(i), although it might be necessary to consider whether such works would be excluded from the s55(2)(a) exemption as a matter of fact and degree.

56. There may be cases where, using Class Q again as an example, the replacement of exterior walls is reasonably necessary for the building to function as a dwellinghouse, but the works would involve the construction of new foundations. If it is argued that such development would require planning permission and is not permitted by the GPDO, you would need to look at what operations are proposed **as a whole**.

57. If the only foundations to be installed are those which are integral to a replacement wall which is reasonably necessary, it may be that the works are PD. However, the opposite could be true if the foundations would also support the existing building – or the totality of works, in any other respect, would amount to complete or substantial re-building as per Hibbitt. Any structural evidence before you will be crucial, and your judgment should be made on a fact and degree basis.

Floorspace

58. Given the definition of floorspace set out in Article 2(1) of the GPDO 2015, the term would include any existing mezzanines or additional storeys. However, an additional

[36] *Street v Essex CC* [1965] 193 E.G. 537; *Larkin v Basildon DC* [1980] JPL 407

internal floor may be added to the building following an initial change of use under Class C, M, MA, N or Q, since the works would not constitute 'development' under s55(2) of the TCPA90.

59. For internal improvements or extensions to be carried out under Class C, M, MA, N or Q, the resulting floorspace is subject to limitations under C.1(a) and (b), M.1(c) and (d), MA.1(1)(c), N.1(b) and (c), and Q.1(b), (c), (d) and (h) and Q.3. If prior approval is granted for a change of use up to the limitation, C.1, M.1, MA.1, N.1 and Q.1 could prevent any further change of use under Class C, M, MA, N or Q development because the cumulative floorspace in the new use would exceed the relevant limitations.

60. However, the limitations under paragraphs C.1, M.1, MA.1, N.1 and Q.1 are to the floorspace subject to the change of use and 'not on the size of the building or buildings in which the change of use occurs'; *Mansell v Tonbridge and Malling BC & others* [2017] EWCA Civ 1314. And the word 'building' in this context must be treated as including 'part of a building' as set out in Article 2(1).

61. In other words, the change of use of part of the building is permitted under Classes C, M, MA, N and Q. It may be argued that the limitation on cumulative floorspace therefore does not apply to a proposed development even if a different part of the building was subject to a previous change of use permitted under Class C, M, MA, N or Q. The Inspector will need to look at the relationship between the previously approved and now proposed changes of use on a fact and degree basis.

62. From 21 April 2021, paragraph W.(2) requires, in relation to Classes M, MA, N, O, PA and Q, the floor plan to indicate "the total floor space in square metres of each dwellinghouse" as well as the dimensions and proposed use of each room, the position and dimensions of windows, doors and walls, and the elevations of the dwellinghouses.

Class A: Restaurants and Cafes, Drinking Establishments or Hot Food Takeaways to Shops or Financial and Professional Services

63. Class A was amended in May 2016[37] to omit drinking establishments from the scope of the PD right. Class AA was introduced to permit changes of use between drinking establishments and restaurants and cafes described as 'drinking establishments with expanded food provision'.

64. The sale of food will not necessarily suffice for the use of an A4 pub to be changed to an A3 restaurant; the provision of bar snacks and meals can be ancillary to an A4 use as a matter of fact and degree, even when it is a substantial part of the business.

Class C: A1, A2 or Betting or Payday Loan Shop or Casino to A3

65. As noted above, the Town and Country Planning (General Permitted Development) (England) (Amendment) Order 2018 has amended Class C, so as to permit (a) the change of use; **or** (b) the change of use and building operations that are reasonably necessary for the use.

Class J: Retail or Betting or Payday Loan Shop to Assembly & Leisure

66. Under paragraph J.1(a), development is not permitted by Class J if the building was not lawfully used for one of the purposes referred to in Classes J(a) or J(b) on 5

[37] Town and Country Planning (General Permitted Development) (England) (Amendment) (No. 2) Order 2017/619

December 2013, or when last in use, or – if brought into use after 5 December 2013 – for at least five years before the date that the development under Class J begins.

Class M: Retail and Specified *Sui Generis* Uses to Dwellinghouses

67. As noted above, the Town and Country Planning (General Permitted Development) (England) (Amendment) Order 2018 amended Class M so as to permit (a) the change of use; **or** (b) the change of use and building operations that are reasonably necessary for the conversion.

68. Class M was previously amended in April 2016[38] to include launderettes within the scope of the right. Under paragraph M.1(a), development is not permitted by Class M if the building was not lawfully used for one of the purposes referred to in Class M(a) on 20 March 2013 or when last in use.

69. Under Class M, the floorspace is limited but not the number of dwellings; M.1(c) and (d). The units created must fall within the definition of dwellinghouse – that is, they must be self-contained units of habitation.

70. For any prior approval application made on or after 1 August 2020, the prior approval matters for Class M include the provision of adequate natural light in all habitable rooms of the dwellinghouse(s). Paragraph W.(2A) provides that prior approval must be refused if adequate natural light is not provided in all habitable rooms as defined in paragraph X.

71. From 6 April 2021, Article 3(9A) of the GPDO provides that Schedule 2 does not permit any new dwellinghouse where the gross internal floorspace is less than 37m^2 or there is not compliance with the nationally described space standard issued by DCLG on 27 March 2015[39].

72. Any application for prior approval under Class M must have been made on or before 31 July 2021.

Class MA: Commercial, Business and Service Uses to Dwellinghouses

73. From 31 August 2021, Classes M and O will be superseded by a new Class MA which will permit the change of use of commercial, business and service uses falling within Class E of Schedule 2 to the UCO to a use falling within Class C3 of Schedule 1 to the UCO[40]. Unlike Class M, Class MA does not permit operations required to facilitate the change of use.

74. The PD right only applies if the building has been vacant for a continuous period of at least three months and was (previously) used for Class A1, A2, A3, B1, D1(a), D1(b), D2(e) or E for at least two years; paragraphs MA.1(1)(a) and (b) and MA.1(2)(a) and (b). Unlike Class M, Class MA does not permit the change of use from a hot food takeaway, betting or payday loan shop or launderette.

75. Development is not permitted under Class MA if, before 1 August 2022, it would have fallen within but not been permitted under Class O (described below) before 1 August 2021 by virtue of an Article 4 Direction.

76. The PD right is limited in relation to floorspace but not the number of dwellings; MA.1(1)(c). The General Permitted Development etc) (England) (Amendment) Order 2021/428 explanatory memorandum states that:

[38] Town and Country Planning (General Permitted Development) (England) (Amendment) Order 2016/332

[39] Town and Country Planning (General Permitted Development) (England) (Amendment) Regulations 2020

[40] Town and Country Planning (General Permitted Development etc.) (England) (Amendment) Order 2021

"No more than 1,500 sq m of floorspace in any building may change use. Part of the building may change use under the right, including where the lower floors are in Commercial, Business and Service use and the upper floors residential."

77. The prior approval matters for Class MA include the provision of adequate natural light in all habitable rooms of the dwellinghouse(s). Paragraph W.(2A) of Part 3 provides that prior approval must be refused if adequate natural light is not provided in all habitable rooms. The term 'habitable rooms' is defined in Part 3, paragraph X.

78. From 6 April 2021, Article 3(9A) of the GPDO provides that Schedule 2 does not permit any new dwellinghouse where the gross internal floorspace is less than 37m^2 or there is not compliance with the nationally described space standard issued by DCLG on 27 March 2015.

79. Under paragraph MA.2(6), any building permitted to be used as a dwellinghouse by virtue of Class MA is to remain in use as a C3 dwellinghouse and is to be used 'for no other purpose, except to the extent that the other purpose is ancillary to the use as a dwellinghouse'.

Class N: Specified "Sui Generis" Uses to Dwellinghouses

80. As noted above, the Town and Country Planning (General Permitted Development) (England) (Amendment) Order 2018 has amended Class N, so as to permit (a) the change of use; **or** (b) the change of use and building operations that are reasonably necessary for the conversion.

81. Development is not permitted by Class N if the building was not lawfully used for one of the purposes referred to in Class N(a) on 19 March 2014 or when last in use; paragraph N.1(a). The PPG was updated in March 2015 in relation on Class N; paragraph ref ID: 13-102-20150305.

82. For any prior approval application made on or after 1 August 2020, the prior approval matters for Class N include the provision of adequate natural light in all habitable rooms of the dwellinghouse(s).

83. From 6 April 2021, Article 3(9A) of the GPDO provides that Schedule 2 does not permit any new dwellinghouse where the gross internal floorspace is less than 37m^2 or there is not compliance with the nationally described space standard issued by DCLG on 27 March 2015.

Class O: Offices to Dwellinghouses

84. Any application for prior approval with respect to Class O must be made on or before 31 July 2021.

85. For any prior approval application made on or after 1 August 2020, the prior approval matters for Class O include the provision of adequate natural light in all habitable rooms of the dwellinghouse(s).

86. Paragraph O.1(a) indicating that building on Article 2(5) land is not permitted development was revoked on 31 May 2019 due to Article 2(5) land no longer existing. Paragraph O.1(b) provides that development is not permitted by Class O if the building was not lawfully used for a use within class B1(a) on 29 May 2013 or when was last in use.

87. Following DCLG's (as then) announcement on 13 October 2015, paragraph O.1(c) was removed in April 2016, so as to rescind the 30 May 2016 time limit for the use to

begin[41]. PD rights under Class O are now permanent. Developers who already have planning permission have three years from the prior approval date to complete the change of use.

88. Paragraph O.3 provides a definition for 'commercial premises' – but makes no provision for any demolition or rebuilding of the office building.

Class P: Storage and Distribution Centres to Dwellinghouses

89. Under paragraph P.1(a) and (b), development is not permitted by Class P if the building was not lawfully used solely for a storage and distribution use on 19 March 2014, or when it was last in use, and the building was not so used for a period of least four years before the date that development under Class P begins.

90. Since Class P only permits a change of use, and given the limited prior approval matters set out in P2.2.(b), court cases relating to conversion or rebuilding, such as Hibbitt, are not relevant to Class P prior approval applications. Any building works which amount to development will require express planning permission.

91. The Town and Country Planning (General Permitted Development) (England) (Amendment) Order 2018 has extended this temporary PD right by amending paragraph P.1(c) and introducing P.1(k), which provide that development will not be permitted by Class P if the prior approval date falls on or after 10th June 2019, or the development is not completed within a period of 3 years starting with the prior approval date[42].

92. The 2018 amendment also amended Article 2(1) so that the definition of 'building' as including part of a building excludes Class P. Under P.1(d), development is not permitted if the gross floor space of the existing building exceeds 500m^2, and that must now be taken as a limit to the size of the building as a whole. Class P previously permitted the change of use of up to 500m^2 of a larger storage and distribution depot.

93. Since the term 'gross' floorspace is used in paragraph P.1(d), walls should be included in the measurements in accordance with the RICS Gross External Area. The measurement of gross floorspace should also include any communal residential areas, for example, lifts, stairs and corridors.

Class PA: Premises in Light Industrial Use to Dwellinghouses

94. Class PA was added to the GPDO in April 2016[43] to introduce a temporary rPD ight. Development is not permitted under Class PA if:

- The application was received by the LPA on or before 30 September 2017.
- The prior approval date falls on or after 1 October 2020; paragraph PA.1(c).

95. The change of use had to be made within 3 years of the prior approval date and so all changes of use permitted under Class PA and granted prior approval should have been completed by 1 October 2023. Similar PD rights have been set out since 1 August 2021 under Class MA but still subject to a prior approval procedure and with different prior approval matters to be considered.

[41] Town and Country Planning (General Permitted Development) (England) (Amendment) Order 2016/332

[42] Paragraph P.1(c) previously provided that the C3 use must not be begun after 15 April 2018.

[43] Town and Country Planning (General Permitted Development) (England) (Amendment) Order 2016/332

96. Article 2(1) was amended so that a building does not include 'part of a building' for the purposes of Class PA[44]. It was still necessary to address the prior approval matters set out in PA.2(1)(b)(iv) except in relation to 'any other part of the building'.

97. Paragraph PA.1(b) provided that development is not permitted under Class PA if the building was not used solely for a light industrial use on 19 March 2014 or when last in use. For any prior approval application made on or after 1 August 2020, the matters for Class PA included the provision of adequate natural light in all habitable rooms of the dwellinghouse(s).

Class Q: Agricultural Buildings to Dwellinghouses

Limitations

98. As noted above, the Town and Country Planning (General Permitted Development) (England) (Amendment) Order 2018 has amended Class Q so as to permit (a) the change of use; **or** (b) the change of use and building operations that are reasonably necessary for the development.

99. Under paragraph Q.1(a), development is not permitted by Class Q if the site was not used solely for an agricultural use as part of an established agricultural unit on 20 March 2013, or when last in use, or – if brought into use after 20 March 2013 – for a period of at least ten years before the date that development under Class Q begins. The agricultural unit should not be confused with the planning unit.

100. In the GPDO 2015 as made, Q.1(c) provided that development was not permitted if: 'the cumulative number of separate dwellinghouses developed under Class Q within an established agricultural unit exceeds 3'. The 2018 amendment introduced the terms "larger" and "smaller dwellinghouses" as defined in paragraph Q.3.

101. Development is not PD under Class Q now if, within an established agricultural unit:

Q.1(b) – the cumulative number of separate larger dwellinghouses developed under Class Q exceeds 3 or cumulative floorspace of existing building(s)…subject to a change of use to a larger dwellinghouse or dwellinghouses exceeds 465m^2

Q.1(c) – the cumulative number of separate smaller dwellinghouses developed under Class Q exceeds 5, or the floorspace of any one separate smaller dwellinghouse exceeds 100m^2

Q.1(d) – the development under Class Q, together with any previous development under Class Q would result in either or both of: (i) a larger dwellinghouse or dwellinghouses having more than 465m^2 of floorspace; (ii) the cumulative number of separate dwellinghouses exceeding 5.

102. As noted above, the 2018 amendment introduced paragraph W.2(ba) to require the submission of a Statement on the Net Increase in Dwellinghouses. The April 2018 Planning Update Newsletter indicates that the Class Q PD right 'allows only for: up to 3 larger homes within an overall floor space of 465 square metres; or up to 5 smaller homes each no larger than 100 square metres; or a mixture of both providing that no more than 3 larger homes are delivered within a maximum total of 5 homes.'

103. It can be construed that the five dwellinghouses permitted under Q.1(d)(ii) could comprise one "larger" dwellinghouse that has up to 465m^2 floorspace, plus four "smaller" dwellinghouses which each have 100m^2 floorspace, creating a total of 865m^2 residential floorspace. However, the definitions of "smaller" and "larger

[44] The Town and Country Planning (General Permitted Development) (England) (Amendment) Order 2018

dwellinghouses" in paragraph Q.3 only cover dwellinghouses with up to 100 m^2 and 100-465m^2 respectively, whereas Class Q more broadly permits a change of use of an agricultural building to a use falling within Use Class C3 (dwellinghouses).

104. It follows that, if development is proposed under Class Q for a change of use of an agricultural building to a dwellinghouse or dwellinghouses with floorspace exceeding 465m^2, the limitations under Q.1(b), (c) and (d)(i) would not apply. The only restriction would be that set out in Q.1(d)(ii) – the cumulative number of such separate dwellinghouses could not exceed 5.

105. The limitations under Q.1 – as originally made and amended – apply only to the creation of dwellings under Class Q. Any existing dwellings within the established agricultural unit are excluded from calculations of number and floorspace of dwellings; PPG paragraph ref ID: 13-104-20150305.

106. For any prior approval application made on or after 1 August 2020, the prior approval matters for Class Q include the provision of adequate natural light in all habitable rooms of the dwellinghouse(s).

107. From 6 April 2021, Article 3(9A) of the GPDO provides that Schedule 2 does not permit any new dwellinghouse where the gross internal floorspace is less than 37m^2 or there is not compliance with the nationally described space standard issued by DCLG on 27 March 2015.

Planning Policy and Guidance

108. The PPG was updated in March 2015 and February 2018 to provide guidance specifically in relation to Class Q; paragraphs ref ID: 13-104-20180615 to 13-109-20150305. It is made clear that the Class Q PD right does not apply a test on – or the prior approval matters do not relate to sustainability of location[45].

109. The prior approval matters set out under Q.2(1) do not include 'amenity, but the effect of the development on living conditions may be relevant to 'whether the location of siting of the building impractical or undesirable' for the change of use to occur. The PPG advises in paragraph ref ID: 13-109-20150305 that:

    'Impractical reflects that the location and siting would "not be sensible or realistic", and undesirable…that it would be "harmful or objectionable"…the location of the building…may be undesirable if it is adjacent to other uses such as intensive poultry farming buildings, silage storage or buildings with dangerous machines or chemicals.'

110. Planning policy on green belts in the Framework is not relevant to Class Q, and nor are matters such as housing land supply, agricultural occupancy etc. Such issues should not be referred to except where it is necessary to state that they are not relevant and have not been given weight; see the advice on the Framework above.

111. As per East Hertfordshire, judgments about prior approval matters should be framed by the context that this is not an application for planning permission, but for the prior approval of development that is permitted by the GPDO for the purpose of increasing the supply of housing. It is reasonable to expect that planning judgment will be exercised against the backdrop of the purpose for creating this class in the first place.

Class R: Agricultural Buildings to a Flexible Commercial Use

112. There are no restrictions within Class R relating to Article 1(5) land. There is no time limit on when the permitted flexible uses may be begun. However, development must

[45] Following *East Hertfordshire DC v SSCLG & Tepper* [2017] EWHC 465 (Admin)

be considered *sui generis* after the change of use, such that it would be excluded from any use class as set out in the Use Classes Order; paragraph R.2(b). PD rights under Part 3 would no longer apply to the building and a grant of express planning permission would be required for any further change of use.

113. The exception to this is in R.2(c), which allows for further changes of use within Class R, subject to R.3 which requires that notice is given to the LPA for small sites; or for larger sites, prior approval for specific aspects of the development. Class R permits a change of use to a flexible *sui generis* use subject to prior approval, and any further change to a different 'flexible use' will also be permitted subject to prior approval.

114. It would not be reasonable to impose a condition limiting the development to, for example, use class B1(c), as this is already achieved by Class R. If prior approval is granted for the change to B1(c), Class R would require prior approval for any later change of use. This would include changes of use to B1(a) or (b), for example.

115. Under paragraph R.1(a), development is not permitted by Class R if the building was not used solely for an agricultural use as part of an established agricultural unit on 3 July 2012, or when last in use, or – in the case of a building brought into use after 3 July 2012, for a period of at least ten years before the date development under Class R begins.

116. Class R does not permit any operational development associated with the change of use. Any changes that would materially affect the external appearance of the building would require express planning permission and should not be controlled by condition. A condition to limit lighting would not be reasonable under Class R, as that is not reasonably related to the prior approval matters.

117. When assessing the limit of cumulative floorspace, any previous development under Class R (including that in Class M) must be considered.

Class S: Agricultural Buildings to State-Funded Schools or Registered Nurseries

118. Under paragraph S.1(a), development is not permitted by Class S if the site was not used solely for an agricultural use as part of an established agricultural unit on 20 March 2013, or when last in use, or – if brought into use after 20 March 2013 – for a period of at least ten years before the date that development under Class Q begins.

119. The PPG was updated in March 2015 to provide guidance on Class S; paragraph ref ID: 13-103-20170728.

Annex C: Part 4 – Temporary Buildings and Uses

Class A

1. The size and means of construction of a building is highly relevant to Part 4, Class A PD rights; the larger and more permanent the building, the less likely it is to be genuinely 'required temporarily' in connection with the carrying out of development. It is for the appellant to show why the building is reasonably required. His or her intentions are relevant to that assessment but must be objectively assessed; *R (oao Wilsdon) v FSS and Tewkesbury BC* [2006] EWHC 2980 (Admin); [2007] JPL 1063.

2. Where a building or structure is said to be 'required temporarily' in connection with operations, the operations themselves need to be lawful – as stated in paragraph A.1(b) – and to have commenced or be about to commence. It will be a matter of fact and degree as to whether the operations are continuing or can reasonably be held to have ceased at the time an enforcement notice was issued, such that the building or structure is in breach of condition A.2(a).

3. The tolerances for temporary uses in Part 4 do not apply when the intention is that the development should be permanent; *Tidswell v SSE & Thurrock BC* [1977] JPL 104. It will be for the appellant to show that the use was temporary, and the PD right was genuinely implemented.

4. Where an enforcement notice is upheld in respect of a caravan site, motocross, war games, market or other transitory use of land, on the basis that – on the facts – there is an intermittent permanent rather than a temporary use, and there is no Article 4(1) Direction in force, the developer can still implement PD rights. Again, it is for the developer to show that it is a genuine implementation of temporary use rights and not a recommencement of the prohibited permanent use[46].

5. The developer could still utilise Part 4 rights even if there is no express saving in the requirements of the enforcement notice; *Cord v SSE* [1981] JPL 40. A notice cannot take away lawful use rights. Under s181(2), a notice can only require that an alleged use be discontinued permanently 'to the extent that it is in contravention of Part III'. The implementation of a temporary use permitted under the Order (and thus in accordance with s60) is not in contravention of Part III of the Act.

6. In other words, while unlawful uses do not benefit from PD rights under Article 3(5)(b), this does not apply where the unlawful permanent use is carried out on a temporary basis in accordance with Part 4, Class B. The temporary use rights in Class B subsist alone and are not related to any other existing unlawful use.

7. The presence of permanent buildings and facilities, and changes to the character of the land may be relevant as to whether the proposed use is temporary within Part 4 or a permanent change of use – but only when the permanent building or changes would make it impossible to revert to the previous normal use between occasions when the new use occurs[47].

8. If physical changes have occurred such that it would be impossible to revert to the previous normal use, a material change of use will have occurred from the previous use, even if the new use takes place on 28 days or less a year.

9. If physical changes take place which do not prevent the normal use from being carried out for most of the year, Part 4 Class B PD rights would apply to another use

[46] In that situation, s180(1) would apply such that the enforcement notice would cease to have effect so far as inconsistent with the permission for temporary use granted under Part 4.

[47] See the Enforcement chapter for the meaning of 'normal use'.

which does not take place for more than 28 days; *Ramsay v SSETR & Suffolk Coastal DC (No. 2)* [2002] EWCA Civ 118.

10. Class B provides that 'the use of land for any purpose for not more than 28 days in total is PD, except in relation to the uses specified in Class B(a) and B(b), where the limit is 14 days. In considering whether either or both limits have been exceeded, it is appropriate to look at the planning unit and take into account the aggregate of the occurrence of different uses.

11. In a LDC appeal under s191, where uses undertaken were similar to B(b) uses but did not comply with the limitations in B.1(d), it was held that they could not be aggregated with permitted B(b) uses to claim activity in excess of 14 days in any one year over the necessary ten year period, such that the uses would be immune from enforcement action; *Miles v NAW & Caerphilly CBC* [2007] EWHC 10 (Admin).

Annex D: Part 6 – Agriculture and Forestry

1 Advice in this and indeed the other Annexes applies to Enforcement and LDC appeals as much if not more than prior approval appeals. Any given paragraph may be relevant to Enforcement appeals but not prior approval appeals, or vice versa, or to both.

2 If there is a dispute as to whether development is permitted under Part 6, the first questions may be whether the site is 'agricultural land' and in an 'agricultural unit' as discussed in the main part of this chapter above. The next matter to establish is whether the development would be of the type permitted under Class A(a) and (b), or Class B(a) to (g).

3 From there, if you find that there is or would be a breach to a limitation to PD as set out in paragraphs A.1 or B.1; it would be appropriate to go straight to that point; *Fayrewood Fish Farms Ltd v SSE & Hants CC* [1984] JPL 267. It is only necessary for there to be failure on one limitation in Part 6 for development to be unlawful.

4 In such a situation, even if it is questioned as to whether the development would be 'reasonably necessary for the purposes of agriculture', the following text could be used: 'Even if I were to accept the contention that the development was reasonably necessary…it would not benefit from Part 6 because…'

5 It is critical to show clear and logical analysis of each test in Part 6, and conclude on each appropriate, particularly where the representations are less than adequate in identifying the correct criteria.

6 The types of agricultural development for which prior notification is required under Part 6, Class A are set out at paragraphs A.2(2)(a) to (d) and further qualified at A.2(3). The limits to the size of floorspace permitted under Classes A and B have been extended by the Town and Country Planning (General Permitted Development) (England) (Amendment) Order 2018.

Classes A & B: 'reasonably necessary'

7 For a building to be 'reasonably necessary for the purposes of agriculture within that unit', the structure itself and uses carried on within it must be reasonably necessary for the use of the land as an agricultural unit. The whole agricultural unit is the reference point.

8 There is no requirement that the building is intended to accommodate an existing agricultural activity, provided there is an agricultural use of the land and the building is reasonably required for agriculture; *Jones v Stockport MBC* [1984] JPL 274. The applicant is expected to demonstrate the need for the development.

9 The Inspector is not obliged to contemplate some possible but unlikely agricultural activity that is not suggested; *Clarke v SSE* [1993] JPL 32. However, he or she should consider what agricultural use the land might reasonably be put to and take account of more than the applicant's intentions – since they might change, or a future occupier might carry out different activities; *Broughton v SSE* [1992] JPL 550. The assessment can be based on future agricultural use, unlike that for 'agricultural land'.

10 The 'reasonably necessary' assessment does not carry with it any connotation of profit or business viability. It also relates to the particular building on the particular unit, as defined at the time, and cannot be justified in terms of some future larger agricultural unit.

11 The size and nature of the unit may be crucial, as may be the nature of the proposed building. The size of the building, however, is unlikely to be a determinative factor;

whether a smaller or simpler building would suffice would be a question of 'absolutely' rather than 'reasonably' necessary.

12 It was held in *McKay & Walker v SSE & South Cambridgeshire DC* [1989] JPL 590 that size was irrelevant in deciding whether a building was reasonably necessary because the Order permits agricultural buildings up to 465m^2. However, the scale of engineering operations was held to be significant in *Macpherson v SS for Scotland* [1985] JPL 788.

Class A: 'of 5 hectares or more in area'

13 In measuring the agricultural unit, the extent of any dwelling (with its garden) or other building that is occupied for the purposes of farming by the person who occupies the unit, and the extent of any dwelling on the land that is occupied by a farm worker can be included; paragraph D.1.

14 However, if the development is to be carried out on a separate parcel of land which is less than 1ha in size, it is not PD; A.1(a). Even if it would be carried out on a parcel that is at least 1ha, that land must not include any dwellinghouse or garden, because it has to be on **agricultural land**.

15 Whether land forms a 'separate parcel' is a matter of fact and degree, but a substantial feature of separation would be necessary, e.g. a road rather than fences or hedges, for it to be regarded as a separate parcel; *Hancock v SSE* [1989] JPL 99; *Tyack v SSE* [1989] 1 WLR 1392.

A.1(c): 'not designed for agricultural purposes'

16 A building is 'designed' for the purpose for which its physical layout and appearance fit; *Belmont Farm Ltd v MHLG* [1962] 13 P&CR 417 DC. The importance of the building's external appearance and layout was confirmed in *McKay & Walker*.

17 In *Harding v SSE* [1984] JPL 503, the Court accepted that 'designed' related to appearance and not function. However, the CoA later held in *Clarke* that 'designed for agricultural purposes' was for the Inspector to decide as a matter of fact and degree.

18 It is necessary to consider appearance, layout and stated intentions, although greater weight may be given to one factor over the others. The test in law is whether the building is designed for the purposes of the agricultural activities which might reasonably be conducted on the unit.

A.1(d): any works or structure (other than a fence) for accommodating livestock

19 The definition applies to all works for accommodating livestock and is not limited to some form of habitation or shelter. A hard standing used for feeding sheep falls within that definition; *Taylor v SSETR* [2002] JPL 248.

A.1(i): …for the accommodation of livestock or the storage of slurry or sewage sludge…within 400m of the curtilage of a protected building

20 Lang J held in paragraph 37 of *R (oao Marshall) v East Dorset DC & Pitman* [2018] EWHC 226 (Admin) that 'Paragraph A.1(i) excludes from the scope of permitted development a proposed development ("the erection or construction of, or the carrying out of any works to, a building, structure or an excavation") which is used or to be used for the accommodation of livestock i.e. where accommodation of livestock is the purpose of the development'.

21 Paragraph A.1(i) must be distinguished from paragraph A.2(1)(a) which imposes a condition on the use of a development that has already been carried out. The

condition again prevents use as accommodation for livestock but recognises that there may be circumstances where such use of existing development would be legitimate “and so it provides for the exception in paragraph D.1(3)”.

22 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).

Annex E: Part 20 – Construction of New Dwellinghouses

1. On 1 August 2020, the GPDO was amended to introduce a new Part 20 to Schedule 2 permitting 'works for the construction of up to two additional storeys of new dwellinghouses immediately above the existing topmost residential storey on a building which is a purpose-built, detached block of flats under Class A.

2. On 31 August 2020, Part 20 was amended to permit:

    - Works for the demolition of one or other of (a) any building comprising a single purpose-built detached block of flats, and (b) any other single detached building, comprising premises established for any combination of B1 uses, and the replacement of the building by a single building to comprise one or other of (a) a purpose-built detached block of flats or (b) a purpose-built detached dwellinghouse – Class ZA.

    - Works for the construction of up to two additional storeys of new dwellinghouses immediately above the topmost storey on a detached building that is used for any purpose within Classes[48] A1, A2, A3 or B1(a), or as a betting shop, payday loan shop or launderette; or in a mixed use combining two or more of the above or one or more of the above with a use falling within C3 – Class AA.

    - Works for the construction of up to two additional storeys of new dwellinghouses immediately above the topmost storey on a terrace building that is used for any purpose as in Class AA – Class AB.

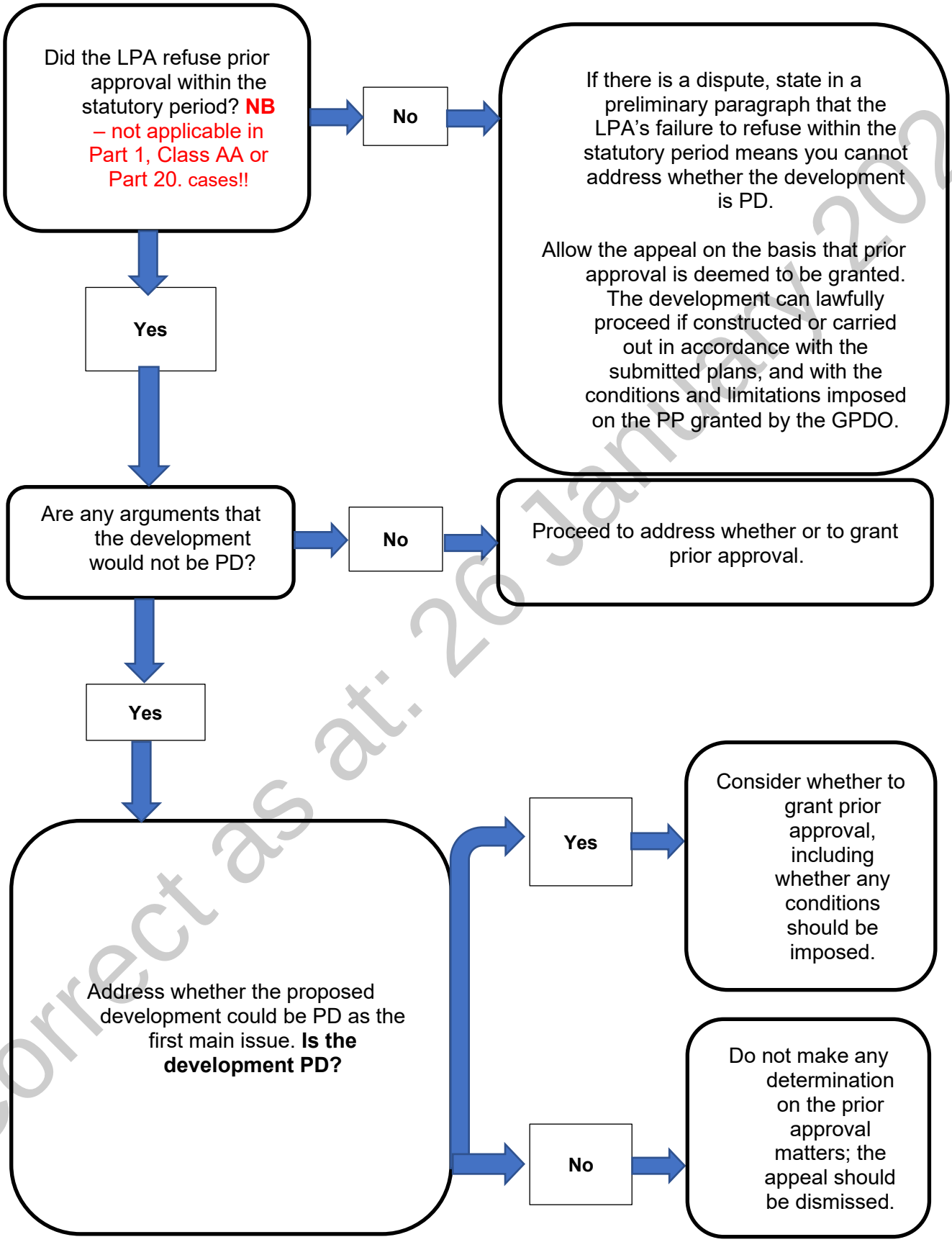
    - Works for the construction of up to two additional storeys of new dwellinghouses immediately above the topmost storey on a terrace building in use as a single dwellinghouse (C3) where the development comprises up to two additional storeys on an existing dwellinghouse that consists of two or more storeys, or for one additional storey on an existing single storey dwellinghouse – Class AC.

    - Works for the construction of up to two additional storeys of new dwellinghouses immediately above the topmost storey on a detached building in use as a single dwellinghouse (C3) where the development comprises up to two additional storeys on an existing dwellinghouse that consists of two or more storeys, or for one additional storey on an existing single storey dwellinghouse – Class AD.

3. The new PD rights are subject to limitations and conditions, with all Classes under Part 20 being subject to requirements for prior approval; the development must not begin before the receipt of written notice of prior approval. There is no provision for development to begin after receipt of a notice that prior approval is not required, or after the expiry of some prescribed period without the LPA making a decision.

[48] Part 20 refers to use classes as set in the UCO prior to amendment by the UCO Amendment Regulations.

Annex F: Flowchart for dealing with whether the Development is PD in Prior Approval Appeals



Annex G: Template – Part 1, Class A example

Appeal Ref: []
[Address]

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant approval required under Article 3(1) and Schedule 2, [Part 1, Class A, Paragraph A.4] of the Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended).
- 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 development proposed is [].

Decision

1. The appeal is allowed and prior approval is [not required] [deemed to be] [granted] under the provisions of Article 3(1) and Schedule 2, [Part 1, Class A, paragraph A.4] of the Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended) for [development] at [address] in accordance with the application [ref] made on [date], and the details submitted with it [including plan nos…], pursuant to Article 3(1) and Schedule 2, [Part 1, Class A, paragraph A.4(2)] [and subject to the following conditions:]

   OR

2. The appeal is dismissed.

Preliminary Matters

3. Under Article 3(1) and Schedule 2, [Part 1, Class A] of the Town and Country Planning (General Permitted Development) (England) Order 2015 as amended (the GPDO), planning permission is granted for [the enlargement of a dwellinghouse] subject to limitations and conditions.

4. Where an application is made for [a determination as to whether] prior approval [is required] for development [which exceeds the limits in paragraph A.1(f) but is allowed by paragraph A.1(g) to Part 1], [paragraph A.4(3) provides that the local planning authority may refuse the application where it considers that the proposed development does not comply – or that the developer has provided insufficient information to enable the authority to establish whether the proposed development complies with the conditions, limitations or restrictions that are applicable to such permitted development.]

5. [Paragraph A.4(7) to Part 1] requires the local planning authority to assess the [impact of the proposed development on the amenity of all adjoining premises, taking into account any representations received].

Main Issue[s]

6. I consider that the main issue[s] in this appeal are [whether the proposed development would be granted planning permission by Article 3, Schedule

2, Part 1, Class A of the GPDO] [and] [the impact of the proposed development on the amenity of adjoining premises] [with regard to…].

Reasons

7. [add reasons]

Conclusion

8. For the reasons given above, I conclude that the appeal should be allowed and prior approval [is not required] [is deemed to be granted] [should be granted].

OR

9. For the reasons given above, I conclude that the appeal should be dismissed.

Conditions – where the appeal is allowed

10. [Any conditions to be imposed that are necessary and reasonable (etc) and related to the prior approval matters]

Green Belts

Updated to reflect December 2023 Framework (NPPF)

What's new since the last version

Changes highlighted in yellow made 01 December 2023:

- Para 70 - clarification regarding NPPF para 11
- Para 95 and 96 - clarification on extensions and alterations to buildings and the impact of the Guildford judgment

Other recent updates

- Para 47 added to give advice on considerations to Heritage Assets
- Para 70 amended following *Monkhill Ltd v SSHCLG & Waverley BC*
- Para 96 amended following G*uildford BC v SSLUHC & Mr C Weeks*

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. All of the legal cases referred to pre-date the National Planning Policy Framework (NPPF; "the Framework").[1] However, they have been included because they remain relevant.

3. This training material applies to casework in England only.[2]

4. Both experienced and comparatively new Inspectors will be aware of the apparent complexities that have been encountered in the course of dealing with Green Belt casework in the past. This training material is therefore intended to provide a ready reference to a wide range of useful pointers which we hope you will find helpful and which you will be able to build upon as you gain or increase your experience.

National policy

5. You will find that national planning policy in England is currently set out in the NPPF.

6. English national policy regarding the Green Belt can also be found in Planning policy for traveller sites (PPTS).[3]

7. **Be aware that in order to help show that national policy has been correctly applied, you should always use the terminology in the current NPPF in your decisions and reports. Do not substitute alternative words or phrases.**

8. Further advice is also given in the government's Planning Practice Guidance.

The NPPF, the development plan and Metropolitan Open Land

9. In dealing with Green Belt casework the NPPF is a material consideration (paragraph 224 NPPF). However, the starting point is that appeals should be determined in accordance with the development plan unless other material considerations indicate otherwise[4]. Where development plan policies dealing with the Green Belt significantly pre-date the NPPF they might be based on Planning Policy Guidance 2 *Green Belts* (DETR, 1995) (PPG2) or the original (2012) NPPF.

10. In your approach to development plan policies you may need to consider whether the relevant development plan policies are different from those in the NPPF. If so, what weight should be given to them? This will depend on the degree of consistency with the NPPF. The closer the policies are to the NPPF, the greater the weight they may be given (paragraph 225 NPPF).

11. This might be especially important in deciding the basis on which you will consider whether a proposal is inappropriate development. However, you should bear in mind that paragraph 16 f) of the NPPF indicates that local plans should avoid unnecessary

[1] 24 July 2018; updated February 2019
[2] PINS Wales produces separate material for Wales which summarises differences in policy.
[3] August 2015
[4] Section 38(6) Planning and Compulsory Purchase Act 2004 as amended ("the PCPA")

duplication including the policies within it. Furthermore, that through the examination process there may have been particular circumstances that justified a local policy that was not the same as national policy. The position will vary depending on the age of the policy and any supporting evidence provided such as the examining Inspector's report. However, policies that follow the broad approach in the NPPF but merely add to it should not be regarded in the same way as those that are directly contrary to it. Policies might not be the same as the NPPF but still consistent with it.

12. Paragraph 11 d) of the NPPF deals with situations where there are no relevant development plan policies, or where the policies which are most important for determining the application are out-of-date. This issue may occur in Green Belt cases. In that event, permission should be granted unless the application of policies in the NPPF that protect areas or assets of particular importance provide a clear reason for refusing the development proposed. These assets are referred to in footnote 6 to paragraph 11 and include land designated as Green Belt.

13. Therefore, before applying paragraph 11 d) to development in the Green Belt you should first go through the steps outlined in this chapter. If it is determined that the proposal would be inappropriate development and no very special circumstances exist, then this will provide a "clear reason for refusing the development proposed". The most logical way to structure a decision is to undertake the Green Belt balance before paragraph 11 is referred to (if at all). If the view is reached that very special circumstances do exist, then Step 5b may be relevant.

14. Metropolitan Open Land (MOL) is given protection equivalent to Green Belt in the London Plan. It has been common and accepted practice to consider MOL as equivalent to Green Belt in terms of the application of national policy. However, it is not mentioned in footnote 6 of the NPPF.

General approach

15. If you are coming to this type of work afresh, or even after much experience, a valuable question to ask yourself is, in order to comply with the NPPF, have you approached your reasoning in a structured manner as follows:

    1. Is the development inappropriate? How should effects on openness be considered?
    2. Would there be any other harm (ie non-Green Belt factors, for example to character & appearance), that weigh against the development?
    3. If the development is inappropriate, are there any 'other considerations' which would weigh in favour of it?
    4. If any 'other considerations' exist, do they clearly outweigh the harm to the Green Belt, and any other harm? (ie carry out the 'Green Belt balancing exercise').
    5. If 'other considerations' clearly outweigh the harm, do 'very special circumstances' exist?
    6. In following this approach, have you reached clear conclusions on your main issues, relevant development plan policies, any SPD, and the NPPF?

16. These steps are set out in the flow diagram in Annex 1 and are considered in more detail below.

Defining main issues

17. Your definition of the main issues should reflect the general approach set out above and described in more detail below. For example:

    1. Whether the proposal would be inappropriate development in the Green Belt having regard to the NPPF and any relevant development plan policies.

    2. The effect of the proposal on the openness of the Green Belt.

    3. The effect of the proposal on [*insert any main issues relating to non-Green Belt concerns – eg 'the character and appearance of the area'*].

    4. Whether any harm by reason of inappropriateness, and any other harm, would be clearly outweighed by other considerations, so as to amount to the very special circumstances required to justify the proposal'.

Step 1a: Is the development inappropriate?

18. Remember that you will firstly need to decide what type of development you are dealing with and assess it against relevant development plan policies, any relevant SPD and the NPPF (paragraphs 152-156). Are the development plan policies and SPD consistent with the NPPF? If not, you will need to explain what weight you attach to them. If the inconsistency is significant, the critical judgement is likely to be whether the proposal complies with the NPPF.

19. Further advice about particular development types is provided later in this chapter. Note that the general position established by case law on the original NPPF is that development in the Green Belt is inappropriate – and so needs to be justified by very special circumstances – unless it is within one of the exceptions set out in paragraphs 154-155 of the NPPF. If the proposed development would fall within any of those exceptions then there is no need to consider it against any of the others – even if they might be applicable. However, where there are arguments about which exception should apply and you are finding that the proposal would be inappropriate development it is likely to be necessary to consider all of those cited or which are clearly relevant.

20. Avoid using the term 'appropriate'. It is best to describe proposals as being 'inappropriate' or 'not inappropriate'.

21. If you consider that the development is 'not inappropriate':

    - You will go on to deal with the proposal as you would for any other s78 or s174 ground (a) appeal.

    - You will not need to carry out steps 3 (other considerations), 4 (the Green Belt balancing exercise) or 5 ('very special circumstances'). See below for advice on dealing with 'openness' (step 1b).

    - You will still need to address any other alleged non-Green Belt harm (for example, to character and appearance) in the usual way. A finding that a development is 'not inappropriate' does not automatically mean that it is acceptable in terms of other planning issues (step 2).

Inappropriateness by reason of effects on openness

Openness

22. The NPPF states that "the fundamental aim of Green Belt policy is to prevent urban sprawl by keeping land permanently open; the essential characteristics of Green Belts are their openness and their permanence" (para 142).

23. Openness may be a consideration in identifying exceptions to inappropriate development. Certain exceptions[5] within paragraph 154 of the NPPF, and all exceptions within paragraph 155, require the decision maker to first assess the effect of the development on openness. It may also be a matter that requires consideration for proposals that are found to be inappropriate development but do not require this initial assessment.

What is 'openness'?

Spatial and visual aspects

24. The Court of Appeal in *Turner v SSCLG & East Dorset Council* [2016] EWCA Civ 466 has confirmed that the openness of the Green Belt has a spatial aspect as well as a visual aspect. This means that the absence of visual intrusion does not in itself mean that there is no impact on the openness of the Green Belt as a result. But equally this does not mean that the openness of the Green Belt has no visual dimension (paragraph 25).

25. The Supreme Court in *R (on the application of Samuel Smith Old Brewery (Tadcaster) and others) (Respondents) v North Yorkshire County Council* (Appellant) [2020] UKSC 3 endorsed paragraph 14 of Turner to the effect that the word openness is open textured and a number of factors are capable of being relevant when it comes to applying it to the particular facts of a specific case. However, how to take account of the visual effects is a matter of planning judgement rather than one of legal principle (paragraph 26). In this case it was concluded that there was no error of law in the officer report as there is no express or implied requirement to refer to visual impact. The Supreme Court also highlighted that openness is the counterpart of urban sprawl and that it does not imply freedom from *any* [emphasis added] form of development. Furthermore, the visual qualities of the land may be an aspect of the planning judgement in applying this broad policy concept (paragraph 22).

26. In conclusion the Supreme Court confirmed that "the matters relevant to openness in any particular case are a matter of planning judgement, not law" (paragraph 39). So whilst visual impact can be relevant to openness it is not necessarily relevant in every case. Nevertheless, Inspectors are best advised to have regard to potential visual impacts rather than simply to ignore or not refer to them at all.

27. The *Turner* judgment also clarified that "The visual dimension of the openness of the Green Belt does not exhaust all relevant planning factors relating to visual impact when a proposal for development in the Green Belt comes up for consideration" (paragraph 16). This means that it is possible that a development which would harm openness could be acceptable visually and vice versa. Therefore, it is advisable that

[5] Provision of appropriate facilities (in connection with the existing use of land or a change of use) for outdoor sport, outdoor recreation, cemeteries and burial grounds and allotments (sub-section a)) and limited infilling or the partial or complete redevelopment of previously developed land, whether redundant or in continuing use (excluding temporary buildings) (sub-section g))

you clearly separate out your assessment of any effects on openness from any assessment of effects on character and appearance.

Other openness considerations

28. The High Court in *Europa Oil and Gas Limited v SSCLG* [2013] EWHC 2643 (Admin) (as quoted in paragraph 33 of *Fordent*[6]) has recognised that the impact of a development on openness is not necessarily related to its size but also its purpose. For example, a large building would be 'not inappropriate' if it was an agricultural building but might be 'inappropriate' if it was a sports pavilion whose scale was such that it did not preserve openness.

> "Secondly, as Green Belt policies NPPF 89 and 90 demonstrate, considerations of appropriateness, preservation of openness and conflict with Green Belt purposes are not exclusively dependent on the size of the building or structures but include their purpose. The same building, as I have said, or two materially similar buildings; one a house and the other a sports pavilion, are treated differently in terms of actual or potential appropriateness. The Green Belt may not be harmed necessarily by one but is harmed necessarily by another. The one it is harmed by because of its effect on openness, and the other it is not harmed by because of its effect on openness. These concepts are to be applied, in the light of the nature of the particular type of development." (paragraph 66 of *Europa Oil*)

29. The effect on openness might not be confined solely to permanent physical works. For example, cars in a car park, boats in a marina and play equipment in a garden might all have some effect on openness. The extent of the effect on openness may vary depending on the extent of any car parking or mooring of boats and the frequency.

Whether openness would be preserved or whether there would be a greater impact on openness

30. Paragraph 154 b) and paragraph 155 of the NPPF, contain a specific test about whether openness is preserved, in determining whether the proposal should be categorised as inappropriate development. Paragraph 154 g) refers to not having a greater impact on the openness of the Green Belt than the existing development. These tests need to be applied to determine whether a proposal should be categorised as inappropriate development. In so doing, regard should be had to the aspects of openness outlined above.

31. In *Samuel Smith Old Brewery (Tadcaster) & Oxton Farm v North Yorkshire CC & Darrington Quarries Ltd* [2018] EWCA Civ 489 it was acknowledged that some forms of development, including mineral extraction, may in principle be appropriate, and compatible with the concept of openness. Similarly in *Euro Garages Ltd v SSCLG & Anor* [2018] EWHC 1753 (Admin) the judge indicated at paragraph 42 that rather than treating any change as having a greater impact on openness of the Green Belt, the correct approach is to consider the impact or harm, if any, wrought by the change. Whether or not any change will have an adverse impact, and so cause harm to openness, might depend on factors such as the scale of the development, its locational context, and its spatial and/or visual implications (paragraph 32).

32. In *R (oao Amanda Boot) v Elmbridge BC* [2017] EWHC 12 (Admin), a proposal for a new football stadium and athletics facility was considered in the context of paragraph 89 of the original NPPF. It was held that because there was a finding of a "limited adverse impact on openness" then that would mean that openness was not

[6] *Fordent Holdings Limited v SSCLG & Cheshire West and Chester Council* [2013] EWHC 2844 (Admin)

'preserved', and that very special circumstances would be required to justify it. That was so even though the identified adverse impact was found to be 'limited' or 'not significant'. It would appear, therefore, that openness cannot be preserved if there is a finding that there would be an adverse impact on it of any kind.

33. Similar considerations will apply to the test of whether development would have a greater impact on openness under para 154 g) of the NPPF as indicated by the *Euro Garages* judgment. If, as a matter of judgement, there would be a greater impact, then that exception cannot apply.

Step 1b: Should effects on openness be further considered?

34. You will have determined under Step 1a whether or not the development is inappropriate.

If the development is 'not inappropriate'

35. In *Lee Valley Regional Park Authority, R (on the application of) v Epping Forest District Council & Anor (Rev 1)* [2016] EWCA Civ 404, the Court of Appeal endorsed the conclusion of Dove J in the High Court[7]. Where development is found to be 'not inappropriate', applying paragraphs 89 or 90 of the original NPPF, it should not be regarded as harmful either to the openness of the Green Belt or to the purposes of including land in the Green Belt (see para 17 of judgment).

> "Development that is not, in principle, "inappropriate" in the Green Belt is, as Dove J. said in paragraph 62 of his judgment, development "appropriate to the Green Belt". On a sensible contextual reading of the policies in paragraphs 79 to 92 of the NPPF, development appropriate in – and to – the Green Belt is regarded by the Government as not inimical to the "fundamental aim" of Green Belt policy "to prevent urban sprawl by keeping land permanently open", or to "the essential characteristics of Green Belts", namely "their openness and their permanence" (paragraph 79 of the NPPF), or to the "five purposes" served by the Green Belt (paragraph 80). This is the real significance of a development being appropriate in the Green Belt, and the reason why it does not have to be justified by "very special circumstances"." (Paragraph 24)

36. Impact on openness is implicitly taken into account in the exceptions unless there is a specific requirement to consider the **actual effect on openness**. Therefore, for those exceptions within paragraph 154 where the effect of the development on openness is not expressly stated as a determinative factor in gauging inappropriateness, there is no requirement to assess the impact of the development on the openness of the Green Belt.

37. The judgment makes it clear that there is no place for a subsequent assessment of the effect of the development on Green Belt openness.

> "the fact that an assessment of openness is "a gateway in some cases to identification of appropriateness" in NPPF policy indicates that "once a particular development is found to be, in principle, appropriate, the question of the impact of the building on openness is no longer an issue" " (Paragraph 20)

[7] *Lee Valley Regional Park Authority v Epping Forest District Council* [2015] EWHC 1471 (Admin)

38. However, you should be aware that a finding that a development is 'not inappropriate' does not automatically mean that it is acceptable in terms of other planning issues.

"That is not to say, of course, that proposals for the erection of agricultural buildings in the Green Belt will escape other policies in the NPPF, and in the development plan, including policies directed to the visual effects of development and the protection of the countryside or the character of the landscape. Policies of this kind will bear not only on proposals for development that is inappropriate in the Green Belt but also on proposals for development that is appropriate." (Paragraph 26)

39. In light of the *Lee Valley* judgment, you will also only need to consider whether the proposal would conflict with the purposes of including land in the Green Belt where this is part of the assessment of whether or not a proposal is inappropriate. That is the case for the development types listed in paragraph 148 of the NPPF and sub-paragraph b) of paragraph 154. For other development types that are 'not inappropriate' development, the impact on Green Belt purposes will already have been taken into account in their classification as 'not inappropriate' in the NPPF.

If the development is 'inappropriate'

40. If the development is 'inappropriate' you should go on to explain what the effect would be on openness (if not explicitly considered already because the effect on openness is an integral part of considering whether a development type is inappropriate – eg the six development types listed in paragraph 150. In many, but not necessarily all, cases the effect on openness could be harmful. For example, a disproportionate addition to a building might also have an unacceptably adverse effect on openness.

41. Paragraph 153 of the NPPF indicates that substantial weight should be given to any harm to the Green Belt (it therefore distinguishes between *weight* and *harm*). The Court of Appeal judgment in *SSCLG & Others v Redhill Aerodrome Ltd* [2014] EWCA Civ 1386 confirmed that the interpretation given to "any other harm" in paragraph 88 of the original NPPF (December 2023 NPPF paragraph 153) is such that it is not restricted to harm to the Green Belt (paragraphs 32-33).

42. Consequently, if you find that there would be harm to the Green Belt, it will inevitably carry (at least) substantial weight. However, it is good practice to quantify the degree of any *harm* to openness and the purposes of including land in the Green Belt (where relevant) – for example, 'moderate' or 'significant' harm to openness. But in doing so avoid attributing *weight* individually to these factors – instead your finding about *weight* should relate to the totality of any Green Belt harm. A finding of 'no harm' or 'no effect' would be a neutral factor.

Step 2: Would there be any non-Green Belt harm?

43. Experience shows that common concerns include the effect on the character and appearance of the area, the living conditions of neighbours and highway safety.

44. If there would be an adverse effect, it is helpful to explain the degree of harm – for example 'significant' or 'moderate'. This will help demonstrate that you have carried out the Green Belt balancing exercise correctly.

45. A finding of 'limited' harm would not weigh very heavily against a proposal. But in assessing the totality of harm in Step 4 there will be a balancing exercise that takes into account all such harms.[8]

46. A finding of 'no harm' would be a neutral factor which would not weigh for or against the proposal.

47. However, if the proposal involves consideration of a **heritage asset**, then even if you were to find that any harm to the heritage asset has been outweighed by other benefits, that does not constitute a finding of 'no harm' (and thus a neutral factor) for Green Belt purposes. Instead, it would remain a harmful impact which has to be weighed in the balance when applying the very special circumstances test below.

Step 3: If the development is inappropriate, are there any 'other considerations' which would weigh in favour of it?

48. Even though they may also be 'material considerations', it is best to use the terminology given in the NPPF and so referred to as 'other considerations'. There is no restriction on what might be considered as an 'other consideration'.[9]

49. Arguments which you might encounter include:

- personal circumstances (eg relating to accommodation, health, education, family life)
- the existence of a fallback position - for example, permitted development rights or an extant planning permission[10] (see 'The approach to decision-making' for advice)
- visual or environmental improvements - for example, the removal of existing buildings might be argued to improve appearance and/or increase openness (see below for further advice on how to deal with arguments relating to openness)
- economic benefits (for example sustaining or expanding an existing business or creating jobs)
- meeting a need for a particular type of development (for example, a rural worker's dwelling, tourist accommodation, housing, telecommunications equipment etc)
- the lack of a suitable site for the development outside the Green Belt (if so, has it been demonstrated that the proposal needs to be located in the Green Belt or that it would not be feasible to find a suitable site elsewhere?)

[8] The Court of Appeal judgment in *SSCLG & Others v Redhill Aerodrome Ltd* [2014] EWCA Civ 1386 confirmed that harms, even if less than the thresholds for refusal set out in the original NPPF, are "material considerations" for the purposes of deciding whether to grant planning permission. This position is the same both outside the Green Belt and within the Green Belt, save that the very special circumstances test applies if the proposal is for inappropriate development in the Green Belt (paragraph 32).

[9] "the decision maker is required to look for factors having the character or quality that they lie in the balance *against harm*. …Those factors can vary widely. They can be green belt factors as such; for example, that the development may preserve or increase openness or contribute to green belt functions. They can be other planning factors, such as, perhaps, a building of exceptional architectural quality. They can be factors derived from national or other economic needs. They can be factors relating to personal circumstances. The list is endless and it would not be for the court to restrict it." Paragraph 68 of *Brentwood BC v SSE* [1996] 72 P&CR 61

[10] See *David and Edith Lloyd v SSCLG & Dacorum Borough Council* [2013] EWHC 3076 (Admin) – paragraph 17 discusses the approach to be taken when considering a fallback – ie firstly assess the effect of the development itself and secondly whether any benefits that would be achieved by avoiding the fallback position amounted to 'very special circumstances'.

- enhancing the beneficial use of the Green Belt, for example by improving access, providing opportunities for outdoor sport and recreation etc[11]
- enabling the restoration of a listed building

50. These arguments may not specifically have been advanced, or referred to, as 'other considerations' which might amount to 'very special circumstances', particularly if the appellant is unrepresented. Nevertheless, you should always consider them as potential 'other considerations'.

51. If benefits have been advanced, you might need to consider whether the scale of the proposed development is the minimum necessary to achieve the benefit. This might affect the weight you can attach to a benefit.[12]

52. It can be helpful to explain what weight you attach to these 'other considerations.' This is a matter of planning judgement. Terms you could use include: 'minimal', 'limited', 'significant' or 'considerable'. This will help with the balancing exercise although such terminology does not have to be used each and every time.

53. It is also vital that other considerations are treated separately and discretely and are not referred to as very special circumstances in themselves. There is also no requirement for them to be 'very special' or to compare them to the harm identified by means of a min-balance as you go through them. Rather deal with each one in turn and make clear the importance you attach to each individual consideration.

54. In order for other considerations to clearly outweigh the totality of harm these must be positive factors that weigh in favour of the proposal. An absence of harm or a reduced level of harm should be treated as such and should not be counted as positive considerations in support of the scheme. In *R (Lee Valley Regional Park Authority) v Broxbourne BC [2015] EWHC 185 (Admin)* (para 47) it was stated that the absence of a severe harm cannot reduce the harm by reason of inappropriateness or the harm actually done to the openness of the Green Belt. In addition and for example, if the proposal would not harm the character and appearance of the area that is an absence of harm and should be regarded as neutral in the balance.

55. In connection with a proposal to replace horticultural glasshouses with 40 dwellings, permission to pursue a legal challenge was refused[13]. This was on the basis that the Inspector was entitled to assess the impact of the proposed development on openness by reference to its actual effect on the Green Belt and not by reference to an assessment on the alleged difference in impact between the proposed inappropriate development (the new dwellings) and the existing "appropriate" development (the glasshouses - which were agreed to be agricultural development).

Step 4: If any 'other considerations' exist, do they clearly outweigh the harm to the Green Belt, and any other harm?

56. Carry out the 'Green Belt balancing exercise'. Balance the combined weight of any 'other considerations' against the totality of the harm (both Green Belt and other).

[11] See *Fordent Holdings Limited v SSCLG & Cheshire West and Chester Council* [2013] EWHC 2844 (Admin)

[12] In *Hayden-Cook v SSCLG* [2010] EWHC 2551 (Admin) the Court supported the Inspector's finding that the weight to be given to the advantages in terms of reduced noise and highway safety was lessened as it had not been shown that development of the scale proposed was required to obtain those benefits.

[13] *Bewley Homes PLC v SSHCLG & Surrey Heath* (refused at permission hearing)

Does the weight of the 'other considerations' 'clearly outweigh' the totality of the harm? There is no 'formula' for doing this. The balancing is one of judgement.

Step 5a: Do 'very special circumstances' exist?

57. If the 'other considerations' do not clearly outweigh the totality of the harm, 'very special circumstances' cannot exist (paragraph 153 of NPPF) and the appeal should be dismissed

58. If the weight of the 'other considerations' 'clearly outweighs' the totality of the harm, it is likely that very special circumstances exist. This would lead to the appeal being allowed.

59. Before reaching this conclusion, do a 'common sense' check. Do the factors in support of the proposal 'clearly outweigh' the harm? It is not sufficient for them to merely 'outweigh'. Remember that the NPPF states that 'substantial weight' should be given to any harm to the Green Belt. Does your reasoning clearly and logically take you to your conclusion?

60. 'Other considerations' do not have to be rare or uncommon to be special. However, rarity may be a relevant consideration. In *Wychavon v SSCLG & Butler* [2008] the Court of Appeal found that the High Court judge was wrong:

> "to treat the words "very special" in the paragraph 3.2 of the guidance as simply the converse of "commonplace". Rarity may of course contribute to the "special" quality of a particular factor, but it is not essential, as a matter of ordinary language or policy. The word "special" in the guidance connotes not a quantitative test, but a qualitative judgment as to the weight to be given to the particular factor for planning purposes. Thus, for example, respect for the home is in one sense a "commonplace", in that it reflects an aspiration shared by most of humanity. But it is at the same time sufficiently "special" for it to be given protection as a fundamental right under the European Convention." (paragraph 21)

61. This is consistent with the comments of in *Basildon v FSS & Temple* [2004] EWHC 2759 (Admin)[14] and in *Basildon v SSETR & Ors* [2000][15]. The circumstances do not have to be unique, and the possibility that similar circumstances might arise elsewhere does not prevent a finding of very special circumstances in any particular case.

62. The NPPF makes clear that most development in the Green Belt is inappropriate and should be approved only in very special circumstances.

63. In *Sefton Metropolitan Borough Council v SSHCLG & Jerry Doherty* [2021] EWHC 1082 (Admin) it was held that the exercise of planning judgement was not an artificially sequenced two-stage process but a single exercise of planning judgement, to assess whether there were very special circumstances which justified the grant of permission notwithstanding the particular importance of the green belt. Furthermore, it was alleged that the Inspector should have applied substantial weight to each of the Green Belt harms identified but it was found that there was no error in not attaching separate substantial weight to each element of harm (paragraph 61). This might include harm

[14] "there is no reason why a number of factors ordinary in themselves cannot combine to create something very special" (paragraph 18)

[15] "The fact that similar circumstances might apply to other gypsy families simply meant that very special circumstances might be found to exist again. That is a matter for assessment on a case by case basis" (paragraph 39.)

by reason of inappropriate development or the effect on Green Belt openness or purposes. There is therefore no need to attach substantial weight to each of those harms individually. The judge said (paragraph 34) that:

> "When paragraphs 143 and 144 are read together they can be seen as explaining that very special circumstances are needed before inappropriate development in the Green Belt can be permitted. In setting out that explanation they emphasise the seriousness of harm to the Green Belt in order to ensure that the decision maker understands and has in mind the nature of the very special circumstances requirement. They require the decision maker to have real regard to the importance of the Green Belt and the seriousness of any harm to it. They do not, however, require a particular mathematical exercise nor do they require substantial weight to be allocated to each element of harm as a mathematical exercise with each tranche of substantial weight then to be added to a balance. The exercise of planning judgement is not to be an artificially sequenced two stage process but a single exercise of judgement to assess whether there are very special circumstances which justify the grant of permission notwithstanding the particular importance of the Green Belt."

64. The Written Ministerial Statement (WMS) of December 2015 indicates that (subject to the best interests of the child) personal circumstances and unmet need are unlikely to clearly outweigh harm to the Green Belt and any other harm so as to establish very special circumstances. The Secretary of State's decision reference APP/M1520/A/14/2216062 (issued 21 April 2017) maintained that this is now national policy (paragraph 12). However, this decision pre-dated the revised NPPF which does not include this provision and similar guidance in the PPG has been removed. Therefore, whilst the WMS is a material consideration the fact that this provision has not been translated into national policy and the associated guidance removed is likely to affect the weight to be given to it if it is referred to.

65. This provision is found at paragraph 16 of the Planning Policy for Traveller Sites (PPTS) and therefore solely relates to that type of development. In *Doncaster MBC v SSCLG* [2016] EWHC 2876 (Admin) it was held that whilst policy at paragraph 16 of the PPTS states that it was unlikely that unmet need and personal circumstances would overcome harm to the green belt, that did not mean that they could not do so (paragraph 69).

66. A possible outcome of the balancing exercise is that you find that there are 'very special circumstances'. It is a conclusion you reach after the balancing exercise and so should only feature towards the end of your reasoning.

67. Terminology – in England, do not:

- state that it is the 'very special circumstances' that outweigh/don't outweigh the harm (it is the 'other considerations')
- use the phrase 'exceptional circumstances' when referring to development proposals. The NPPF uses this term in relation to the establishment of new Green Belts and alterations to the boundaries of existing ones.

68. Make your conclusion clear – for example:

Very special circumstances do not exist - *I find that the other considerations in this case do not clearly outweigh the harm that I have identified. Consequently, the very special circumstances necessary to justify the development do not exist'*

Very special circumstances do exist - *I find that the other considerations in this case clearly outweigh the harm that I have identified. Looking at the case as a whole, I consider that very special circumstances exist which justify the development.*

69. Your conclusions on 'very special circumstances' should come towards the end of your reasoning. Do not return to any 'other matters' or 'other considerations' after this conclusion. It is possible to have separate sections of your decision dealing with 'other considerations' and 'other matters'. The former would include considerations advanced in support of the proposal. The latter would typically include any alleged harm which you have not addressed in a main issue but which you need to cover (for example, this might include concerns from interested persons where you are allowing the appeal).

Step 5b: Paragraph 11 of the NPPF

70. If you find that very special circumstances exist, then the Green Belt will not provide a clear reason for refusing the development proposed as per paragraph 11 d) i. of the NPPF. Paragraph 11 d) ii. then comes into play and you should go on and consider the proposal against that test. However, all relevant considerations will already have been considered in concluding that very special circumstances exist and realistically the outcome of the paragraph 11 d) ii. balancing exercise is not liable to be any different. Therefore, anything other than a finding that the adverse impacts would not significantly and demonstrably outweigh the benefits when assessed against the policies in the NPPF taken as a whole is extremely unlikely. Consequently, your reasoning in relation to paragraph 11 d) ii. can be very brief and refer back to the previous balancing exercise. To comply with the NPPF a clear finding that the presumption in favour of development applies should nevertheless be made before a final S38(6() balance. See the Housing chapter of the ITM for further advice on paragraph 11.

Step 6: Conclusions

71. Remember to conclude on the relevant development plan policies and, if necessary, on the NPPF. You might do this at the end of your consideration of each main issue and/or towards the end of your decision – whichever works best in terms of the flow of your reasoning.

Is the development in the Green Belt?

72. In some cases the parties may not agree about whether all, or part, of the proposed development would be in the Green Belt. If this would affect how you approach the case, you will need to reach a finding at the start of your reasoning. Do you have sufficient information to do so? You will need a copy of the proposals or Policies Map from the development plan, clearly showing the appeal site at an appropriate scale. All relevant parts of the development plan should be considered including the map(s) and the text. Where the evidence is inconclusive, you will need to make a judgement based on the balance of probabilities.

73. Regulation 9 of The Town and Country Planning (Local Planning) (England) Regulations 2012 provides that the adopted Policies Map must illustrate geographically the application of the policies in the adopted development plan. It also provides that where the adopted Policies Map consists of text and maps, the text prevails if the map and text conflict. Note that this provision relates to situations when the Policies Map itself comprises both text and maps. Additionally, *Fox Land and Property Limited v SSCLG & Castle Point BC* [2014] EWHC 15 (Admin) held that the Proposals Map (now known as the Policies Map) of a Plan is not in itself policy, but

illustrates detailed policies and assists in understanding the geographical areas to which it relates. *R (Cherkley Campaign Ltd) v Mole Valley DC* [2014] EWCA Civ 567 held that to fully understand planning policies, it is permissible and possibly necessary to consider supporting text and other illustrative material. Therefore, whilst the adopted Policies Map will generally be definitive[16], if there is a dispute then it will be permissible to consider other relevant evidence including the circumstances and history behind the drawing of the boundary including any errors made and the provisions of paragraphs 152-156 of the NPPF.

74. Inspectors should be mindful of the Secretary of State's decision in *Avon Drive* (APP/C2741/W/16/3149489) where the Secretary of State found that, "… the lack of a defined boundary is insufficient justification to arbitrarily exclude any site contained within the general extent of the Green Belt…" (paragraph 11, page 2). This was however in the context that the RSS key diagram provided a firm basis for finding that the appeal site was within the general extent of the Green Belt. Paragraph 144 of the NPPF confirms that Green Belts should be established in local plans. Depending on the evidence available it may not always be the case that a site is within the general extent of the Green Belt if, for example, it is on the periphery of any broad notation or if it is far from certain where the inner boundary of the Green Belt would be. Previous appeal decisions may also be relevant. However, the Secretary of State's approach implies that the boundaries do not necessarily have to be formally defined in a subsequent development plan document.

What if the parties have agreed that the proposed development would be inappropriate?

75. Sometimes the main parties will agree that a proposal would be inappropriate development. If you reach the same conclusion, you will not need to deal with this as a separate main issue, subject to dealing with any 3rd party views to the contrary. However, you may need to briefly explain your position early in your decision perhaps with reference to relevant parts of the NPPF; for example:

The main parties have agreed that the proposal would represent inappropriate development in the Green Belt [as defined in development plan policy and the NPPF]. I concur with that position.

What if the parties have not raised the question of inappropriateness?

76. Sometimes, although the site is in the Green Belt, the question of inappropriateness may not have been raised. If you think it is an important issue (perhaps because you consider that the proposal might be inappropriate), you would need to seek the views of the parties. You should consider whether, to not mention or deal with the question of inappropriateness, would unnecessarily provide an opportunity for challenge

77. Alternatively, it might be clear to you that the proposal would not be inappropriate or that the location in the Green Belt is immaterial to your consideration of the appeal (for

[16] See *Hundal v South Bucks DC & SSCLG* [2012] EWHC 791 (Admin) "The 1999 Local Plan was adopted without any challenge to its validity. In the absence of any successful challenge to its validity, it is and was valid and lawful. The First Defendant is and was entitled to proceed on that basis" (para 85).

example, this might be the case where the appeal is against a condition which would not have any implications for openness).

Development types - buildings

78. The NPPF states that a local authority should regard the construction of new buildings as inappropriate in the Green Belt unless it is for one of 7 specified exceptions (paragraph 154). These are considered in more detail below. All other buildings are, therefore, inappropriate development.

79. The term building is defined as follows in section 336 of the 1990 Act:

- "building" includes any structure or erection, and any part of a building, as so defined, but does not include plant or machinery comprised in a building.

80. It was established in *LB Bromley v SSCLG [2016] EWHC 595 (Admin)* that the mere fact that permission for a new building may also involve a material change of use does not mean that it ceases to be not inappropriate development. Therefore, if a proposal meets one of the exceptions under paragraph 154 of the NPPF then you should not go on and also consider that same development against paragraph 154 e).

81. Applying this definition would mean that walls, fences, telecommunications equipment, wind turbines, floodlights and structures attached to buildings, should be regarded as 'buildings' for the purposes of the NPPF. This may be a reasonable approach depending on the particular circumstances but note that s336 defines what a building is for the purposes of the Town and Country Planning Act 1990 where references to a building appear therein – not to the NPPF. The Glossary in the NPPF does not define "building" and it may exceptionally be that the context demands a different approach.

Buildings for agriculture and forestry

82. The NPPF does not set out any limiting criteria relating to size or any other matters [paragraph 154 a)]. Consequently, if the proposed building is for agriculture or forestry, it would not be inappropriate development.

83. If raised by the parties, you will need to consider whether the proposed building would be for agriculture or forestry. However, a proposal should generally be determined as applied for, unless the evidence firmly indicates that it would not be a building for agriculture or forestry.[17]

84. The requirement in The Town and Country Planning (General Permitted Development) (England) Order 2015 (Part 6, Classes A and B - 'Agricultural and Forestry') that buildings and other works must be "*reasonably necessary for the purposes of agriculture within that unit*" relates solely to the consideration of whether a proposal would be permitted development. It should not be applied when considering the merits of a planning application seeking permission for an agricultural building in the Green Belt.

85. Separate advice on 'dwellings for rural workers' (agricultural workers dwellings) is provided below.

[17] This was considered in *Belmont Farm Ltd v MHLG* [1962]

Facilities for outdoor sport, outdoor recreation, cemeteries and burial grounds and allotments

86. The NPPF states that the following are not inappropriate in the Green Belt:

"the provision of appropriate facilities (in connection with the existing use of land or a change of use) for outdoor sport, outdoor recreation, cemeteries and burial grounds and allotments; as long as the facilities preserve the openness of the Green Belt and do not conflict with the purposes of including land within it" [paragraph 149 b)]

87. Paragraph 154 b) of the NPPF relates solely to the construction of new buildings. Therefore, this exception relates only to 'facilities' which are buildings. Proposals for, vehicular access and car parking areas[18], artificial all-weather equestrian exercise areas[19] and embankments may be engineering operations. These would be considered under paragraph 155 of the NPPF.

88. Paragraph 154 b) of the NPPF sets up 5 tests which must be satisfied before such a new facility can be regarded as not inappropriate. The facility must:

- be a building;
- be for outdoor sport, outdoor recreation, cemeteries and burial grounds and allotments[20];
- be 'appropriate' for the intended purpose;
- preserve the openness of the Green Belt; and
- not conflict with the purpose of including land in the Green Belt

Extensions and alterations to buildings

89. The extension or alteration of a building is not inappropriate development provided that it does not result in a disproportionate addition over and above the size of the original building [paragraph 154 c)]. Thus, the questions to ask are:

- What was the size of the original building?

- Would the proposal represent a disproportionate addition over and above the size of the original building? This requires you to assess whether the proposal would, when taken in combination with any previous additions to the original building, result in a disproportionate addition in terms of its size. In other words, when taken together, would the sum total of existing and proposed extensions to the original building be disproportionate in size? This exercise should not consider the visual impact of the proposal or any effect on openness.

90. It may logically follow that a small extension could potentially represent a disproportionate addition if the building has previously been extended (see Curtilage buildings section for further advice on extensions).

[18] *Bromley v SSE & Wates Leisure* [1997]
[19] *Bravebyte Ltd v FSS & Barnet* [2004] – see paragraphs 12-14
[20] See High Court judgment *Timmins & Anor v Gedling Borough Council* - "For all the above reasons in my view a change of use from agricultural land to a cemetery constitutes a development which is prima facie "inappropriate" and to be prohibited in the absence of "very special circumstances". Further, for the reasons that I have already given, the creation of a cemetery does not fall within one of the exceptions in paragraphs 89 and 90 NPPF." (paragraph 32).

91. PPG2 only regarded extensions and alterations to existing '*dwellings'* as being potentially not inappropriate. The original NPPF and the NPPF have extended this provision to all '*buildings*'. Consequently, pre-NPPF development plan policies might only refer to extensions or alterations to *dwellings*. Some may go further and state that extensions to buildings which are *not dwellings* are 'inappropriate'. In these circumstances, if you are dealing with an extension to a building which is not a dwelling you may need to consider the degree of consistency between the development plan and the NPPF as a material consideration (see paragraph 213).

92. The term 'original building' is defined in the Glossary to the NPPF:

A building as it existed on 1 July 1948 or, if constructed after 1 July 1948, as it was built originally.

93. Therefore, extensions which were added to a building before 1 July 1948 should be regarded as part of the 'original building'. Where an extension to a building constructed after 1 July 1948 is proposed, the comparison will be between the building as first built and the building as proposed to be extended, together with any existing extensions constructed since the building was first built.

94. In some cases, you may be dealing with a proposal to extend a building which replaced a previous building (most commonly a replacement dwelling). In relation to buildings constructed after 1 July 1948, the definition of 'original building' in the Glossary to the NPPF does not expressly deal with replacements. For the purposes of the NPPF it may be possible to conclude that the 'original building' in such a case would be the replacement dwelling itself, as originally built, and that should form the baseline against which subsequent extensions and alterations should be measured. However, the development plan may contain more detailed policies relating to replacement dwellings in the green belt, which can be given weight depending on their degree of consistency with the NPPF.

95. In Guildford BC v SSLUHC & Mr C Weeks [2023] EWHC 575 (Admin) the Court held that the definition of "original building" in the Local Plan Policy required consideration of the original building as it existed on 1 July 1948 or the first building as originally built after that date, and it was this which fell to be considered and not the replacement building that existed at the time of application. The decision was quashed as the Inspector misinterpreted the policy and took the replacement dwelling on the site as the baseline for assessing whether the proposal would be disproportionate.

96. You will find that there are different ways of assessing and measuring 'proportionality'. Development plans and SPDs may contain specific limits in terms of floorspace and/or volume. However, the NPPF refers to 'size'. Consequently, you should look at the overall size increase in terms of volume and external dimensions (as well as considering floorspace).

97. Many buildings will have permitted development rights[21] which will allow some extensions to be added without requiring planning permission. However, your role is to assess whether, or not, what is now proposed would represent a disproportionate addition. Your assessment should be against the 'original building', not the 'original building' plus extensions potentially allowed under permitted development rights. If the existence of permitted development rights is argued in favour of a development, you should consider this as an 'other consideration'.

[21] Under The Town and Country Planning (General Permitted Development) (England) Order 2015

98. The question of how to define the relevant 'building' may arise. For example, this might occur when dealing with a terraced or semi-detached dwelling. The definition in s336, referred to above, states that a building includes "any part of a building." However, no judicial authority exists to the effect that there is a requirement to interpret this word as meaning, for example, that the entire terrace of which a dwelling forms part should be considered to be the original building for this purpose. Therefore, in the context of NPPF paragraph 145 c), the word "building" should be construed as relating to the individual building to be extended, as shown within the appeal site.

Replacement of a building(s)

99. The NPPF sets up 2 tests [paragraph 154 d)]. In order to be 'not inappropriate', a replacement building must be:

- for the same use as the building it will replace; and
- not materially larger which should not consider the visual impact of the proposal or any impact on openness ("The exercise was 'primarily an objective one by reference to size'. Which physical dimension is most relevant for the purpose of assessing the relative size of the existing and replacement dwellinghouse, will depend on the circumstances of the particular case. It may be floor space, footprint, built volume, height, width, etc."[22])

100. The decision maker's role is to assess whether or not the proposed replacement building would be materially larger than the existing building to be replaced (the baseline) – see *Athlone House Ltd v SSCLG* [2015] EWHC 3524 (Admin)[23], in which the Judge said that he had:

"no doubt that the Inspector's interpretation of the phrases 'the one it replaces' [4th bullet/exception paragraph 89 of the NPPF] and 'the existing building' [6th bullet/exception paragraph 89 of the NPPF] were correct, and that they set as the baseline, as the Inspector found, the extent of physical built development on the site as the basis for comparison for the purposes of the consideration of the fourth and sixth exceptions within paragraph 89 of the NPPF. That extent of physical built development is essentially a question of fact and does not engage the need for the exercise of any planning judgment. Planning judgment will come at the next stage, when that baseline is compared with the proposal and the extent of any change gauged against the tests which are set out in the exceptions." (paragraph 37)

101. As to whether an unimplemented planning permission (which may include permitted development rights) could, as a material fallback, count as part of the baseline, the Judge in *Athlone House* concluded that it could not, but that it would probably be relevant at the stage of considering whether very special circumstances existed:

" … it would not affect the baseline which was the basis of comparison set out in paragraph 89. Paragraph 89, as I have already observed, is clear; an unbuilt permitted development which a developer may be keen to implement could not, on the basis of the interpretation of the plain words of the policy, be included in such an assessment. That is not to say that such a material fallback would be irrelevant. It would probably be

[22] See *R (oao Heath and Hampstead Society) v Camden LBC* [2007] subsequently supported in CoA as *R (oao Heath and Hampstead Society), Camden LBC and Vlachos*.

[23] In the *Athlone House* case, although the site was not in the Green Belt, it was on Metropolitan Open Land, to which the development plan gave the same level of protection as Green Belt. The case proceeded on the basis that the Green Belt policies in the original NPPF applied to Metropolitan Open Land.

relevant at the stage of considering the question of very special circumstances, taking account of the weight to be attached to it, bearing in mind the likelihood of its implementation and the extent of its impact on openness if it were developed." (paragraph 42)

102. A further consequence of the baseline established by *Athlone* is that, if there is no building currently existing on site, then paragraph 154 d) cannot apply as there is no building to be replaced.

103. It may also be argued that a larger single building cannot replace a group of existing buildings. However, in *Tandridge DC v SSCLG & Syrett* [2015] EWHC 2503 the Deputy High Court Judge discussed the approach to understanding and interpreting paragraph 89 of the original NPPF (para 154 d) in the revised NPPF).[24] The Judge stated that:

"I do not consider that "building" should be read as excluding more than one building, providing as a matter of planning judgment they can sensibly be considered together in comparison with what is proposed to replace them" (paragraph 61).

104. However, this judgment does not imply that words in the singular could or should always be interpreted as also being in the plural as this case was solely in relation to the replacement of existing buildings. For example, in cases involving an extension to a building where there are other buildings within the curtilage.

105. It may also be argued that the provision of a basement within a proposed replacement building should not be used to calculate whether the proposed replacement building is materially larger than the existing building. However, in *Feather v Cheshire East Borough Council v Mr Christopher Wren and Mrs Susan Wren* [2010] EWHC 1420 (Admin) the judge concluded:

- "that in this case, I cannot be satisfied that the council had regard to what was, it is accepted, a material consideration; namely, the size and scale of the basement. I, therefore, cannot be satisfied that the council took that into account in determining whether the building was or was not materially larger."

Limited infilling in villages

106. In line with the NPPF [paragraph 154 e)], you will need to consider whether the proposal:

- would be in a village;
- would represent infilling; and, if so:
- would that infilling be limited?

107. In the CoA case in *Julian Wood v SSCLG and Gravesham Borough Council* [2015][25] it was common ground between the parties that the boundary of a village defined in a local plan may not be determinative for this purpose. Therefore, when considering whether a settlement is a village or whether a site is in a village Inspectors should having regard to the situation "on the ground" as well as any relevant policies. Such a judgment is likely to depend on factors such as the number of buildings or properties that are grouped together, their inter-relationship and spacing, the facilities and services

[24] See, in particular, paragraphs 53, 54, 58 and 60 in the judgment
[25] *Julian Wood v SSCLG, Gravesham Borough Council* [2015] EWCA Civ 195

available and the juxtaposition of the site with surrounding buildings and any open land beyond.

108. In the CoA case in *Julian Wood v SSCLG and Gravesham Borough Council* [2015][26] it was common ground between the parties that the boundary of a village defined in a local plan may not be determinative for this purpose. Therefore, when considering whether a settlement is a village or whether a site is in a village Inspectors should having regard to the situation "on the ground" as well as any relevant policies. Such a judgment is likely to depend on factors such as the number of buildings or properties that are grouped together, their inter-relationship and spacing, the facilities and services available and the juxtaposition of the site with surrounding buildings and any open land beyond.

109. The terms 'limited' and 'infilling' are not defined in the NPPF and these will be essentially a question of fact and planning judgement for the planning decision-maker having regard, for example, to the nature and size of the development itself, the location of the application site and its relationship to other, existing development adjoining and adjacent to it (see paragraph 37 of *R (Tate) v Northumberland County Council* [2018] EWCA Civ 1519).

Limited affordable housing for local community needs

110. In line with NPPF paragraph 154 f), you will need to consider whether the proposed affordable housing is 'limited' and whether it would meet local community needs, as set out in the development plan (including policies for rural exception sites).

Limited infilling or the partial or complete redevelopment of previously developed land

111. In line with paragraph 154 g) of the NPPF you will need to consider:

- Is the proposed development site previously developed? (see the definition in Annex 2 to the NPPF)?
- If so, does it amount to limited infilling or partial or complete redevelopment of the site? – and;
- Would it have a greater impact on the openness of the Green Belt than the existing development? (also see relevant paragraphs above); or
- Where the re-use of previously developed land would contribute to meeting an identified affordable housing need within the area of the LPA, whether it would cause substantial harm to the openness of the Green Belt.

112. The definition of previously developed land in the glossary[27] to the revised NPPF at Annex 2 has changed slightly compared to the original NPPF. The relevant exclusion no longer relates to "land that is or has been occupied by agricultural or forestry buildings", but to "land that is or was **last** occupied by agricultural or forestry buildings" (emphasis added).

113. Therefore, where land is no longer occupied by a permanent structure or the building upon it is no longer used, but that land was **last** occupied by a building for an agricultural or forestry use, it **will not** be previously developed land.

[26] *Julian Wood v SSCLG, Gravesham Borough Council* [2015] EWCA Civ 195
[27] Annex 2

114. Further, where land is currently occupied by a permanent building which has a different use, having changed its use from agricultural or forestry use, it **will** be previously developed land. The exception will not apply, as the building would no longer be considered agricultural or for forestry.

115. In *R (Lee Valley Regional Park Authority) v Broxbourne Borough Council and Britannia Nurseries*[28] (judgment based on original NPPF) the exact meaning of the words, particularly with regard to exclusions from the definition was considered (see paragraph 40 in particular). This found that where land **is** occupied by a permanent structure, it will not be previously developed land if that permanent structure **is** (lawfully and solely) an agricultural or forestry building.

116. Previously developed land is or was occupied by permanent structures, and includes any associated curtilage. Simply because a site contains structures that would meet the definition of previously developed land does not mean that the whole site should be considered as such (and vice versa). Within a site, for example, there may be structures such as agricultural buildings which are excluded from the definition and it will be necessary to consider the different parts of the site accordingly.

117. Residential gardens which are not in 'built-up areas' are not excluded from the general definition of previously developed land in Annex 2 to the NPPF (as held in *Dartford BC v SSCLG* [2017] EWCA Civ 141). However, if this is a relevant issue, then a view will have to be reached as to whether the site in question is within a 'built-up area' as this is not defined in the NPPF.

118. It may be argued that residential gardens of properties in the countryside can constitute previously developed land because the definition only excludes such land 'in built-up areas'. You need to consider:

- That residential gardens which are not in 'built-up areas' are not excluded from the general definition of previously developed land (as held in *Dartford BC v SSCLG* [2017] EWCA Civ 141);
- that 'built-up areas' are not themselves defined so you will have to come to a view; and,
- if it is not, you will have to decide whether it falls within the general definition of previously developed land in the context of the particular circumstances you are considering.

Development types – other forms of development

119. Paragraph 150 says that:

Certain other forms of development are also not inappropriate in Green Belt provided they preserve[29] its openness and do not conflict with the purposes of including land within it. These are:

- Mineral extraction[30]

[28] *R (Lee Valley Regional Park Authority) v Broxbourne Borough Council* [2015] EWHC 185 (Admin)
[29] See paragraph above regarding *R (oao Amanda Boot) v Elmbridge BC* [2017] EWHC 12 (Admin).
[30] See *Europa Oil & Gas Ltd v SSCLG & Surrey CC & Leah Hill Action Group* [2013] EWHC 2643 (Admin) where the Court of Appeal held that 'the phrase "mineral extraction" in the NPPF is not synonymous with and exclusively confined to "production", but also covers the inevitable precursor steps of exploration and appraisal where they are necessary'.

- Engineering operations[31]
- Local transport infrastructure which can demonstrate a requirement for a Green Belt location
- The re-use of buildings provided that the buildings are of permanent and substantial construction
- Material changes in the use of land (such as changes of use for outdoor sport or recreation, or for cemeteries and burial grounds); and
- Development brought forward under a Community Right to Build Order or Neighbourhood Development Order.

120. Compared to the original NPPF, the NPPF now includes material changes in the use of land at paragraph 155 e).

121. The Courts have confirmed in *Fordent Holdings Ltd v SSCLG & Cheshire West and Chester Council* [2013] that paragraph 90 of the original NPPF was a closed list and this will be the same for the NPPF. Consequently, any proposal, which does not fall within the scope of the specific exceptions set out in paragraphs 154 and 155 of the December 2023 NPPF would be inappropriate development.[32] Closed lists were explored further in the CoA judgment in *Timmins and Lymn Family Funeral Service v. Gedling Borough Council and Westerleigh Group Limited* [2015][33]. Whilst Lord Justice Mitting's comments suggest his view is that paragraph 90 of the original NPPF was not a closed list, the comments of Lord Justices Richards and Tomlinson do not support this. Given the different judgments expressed, until such time as there is a definitive view to the contrary, *Fordent* should hold good in this regard.

122. The judgment in *Fordent* also explored, at paragraph 28, the relationship between the original NPPF paragraphs 89-90 and 81 which urges LPAs to enhance the beneficial use of the Green Belt by looking for opportunities to provide for outdoor sport and recreation, amongst other things. The argument made by the claimant was that development encouraged in paragraph 81 could not logically be regarded as inappropriate. The Judge rejected this view. Consequently, although a proposed development may result in the beneficial use of the Green Belt, this does not mean that it cannot also be 'inappropriate'. However, the fact that a development would be a beneficial use could be an 'other consideration' that weighs in favour of the proposal.

The re-use and extension of buildings

123. Under NPPF paragraph 154 d) such proposals (including any associated uses of land or minor operations such as external storage, garden areas, hardstanding or car parking or boundary walling or fencing) are not inappropriate development, **provided that**:

- the buildings are of permanent and substantial construction;
- the development would preserve the openness of the Green Belt; and;
- It would not conflict with the purposes of including land in the Green Belt.

[31] Engineering operations tend to include works which change the physical nature of the land – for example a hardstanding, all weather surfacing, car park, road, track or embankment. Section 336 of the 1990 Act states that "engineering operations" includes the formation or laying out of means of access to highways.

[32] A material change of use would not be inappropriate if it were for one of the exceptions in paragraph 90 – eg mineral extraction – see paragraph 20 of *Fordent Holdings Ltd v SSCLG & Cheshire West and Chester Council* [2013] EWHC 2844 (Admin).

[33] *Timmins and Lymn Family Funeral Service v. Gedling Borough Council and Westerleigh Group Limited* [2015] EWCA Civ 10

124. If a proposal to re-use a building includes any extensions or alterations, these would also stand to be considered under paragraph 154 c) ie:

- Would the extension or alteration result in a disproportionate addition over and above the size of the original building?

125. In *Smith v SSCLG* [2017] EWHC 2562 (Admin) the judgment confirmed that there was no legal error by the Inspector in concluding that proposed fencing, bin storage, car parking space and domestic paraphernalia would fail to preserve openness.

126. Also in *Baynham v SSCLG & East Herts DC* [2017] EWHC 3049 (Admin) the Judge endorsed the Inspector's approach to the consideration of urban sprawl and openness in relation to the re-use of a building for residential purposes (paragraph 26). The Judge also found that there is no need to identify a particular large built-up area in deciding whether there would be urban sprawl.

Local transport infrastructure

127. The term "local transport infrastructure" was introduced in the original NPPF. It was/is not defined in the original NPPF or in the NPPF. However, in order to fall within Paragraph 148 c) of the NPPF all 3 elements (local, transport, infrastructure) need to be met. Furthermore, the evidence needs to demonstrate a requirement for a Green Belt location which will be a matter of judgment for the decision-maker.

128. Section 216 of the Planning Act 2008 gives a definition of "infrastructure" which includes (amongst other things) roads and other transport facilities, although this is provided as part of the requirement for Community Infrastructure Levy Regulations to require a charging authority to apply CIL, and for no other purpose. The Impact Assessment for the 2012 NPPF indicates that 'Park and Ride' schemes were permissible under PPG2 but that it is proposed to extend this to a wider range of local transport infrastructure. Furthermore that "There are other local transport infrastructure schemes that could be beneficial to communities in the Green Belt. This includes, for example, infrastructure to support more public transport, such as opening new routes, providing bus shelters and small public transport interchanges. The policy change would enable local infrastructure schemes to be considered in the Green Belt without damaging the principles or protections of the Green Belt."

129. Whether particular proposals fall within the definition of "local transport infrastructure" should be assessed on a case-by-case basis having regard to the evidence put forward by the parties. Nevertheless, the Impact Assessment gives an indication of the Government's intent when including this provision in the original NPPF in 2012.

Curtilage buildings

130. The NPPF does not make any specific reference to ancillary outbuildings within the curtilage of a dwelling or other buildings. Therefore, if a new curtilage building is proposed, you will need to decide if it would fall within any of the exceptions in paragraph 154. If not, it would be inappropriate development.

131. Given that outbuildings are buildings, paragraph 154 c) logically applies to any proposal to extend an outbuilding (i.e. an extension or alteration of a building would be not inappropriate provided that it does not result in a disproportionate addition). Furthermore, providing that the new building would be in the same use, proposals to

replace an existing curtilage building could reasonably be considered under paragraph 154 d) and the test of whether it would be "materially larger" applied.

132. Some development plans may define the circumstances in which an outbuilding might form part of the dwelling. However, if this is not the case then the provisions of the NPPF should be applied. In *Warwick DC v SSLUHC, Mr J Storer & Mrs A Lowe [2022] EWHC 2145 (Admin)* the judge concluded that paragraph 154 (c)

> "…. *is not to be interpreted as being confined to physically attached structures but that an extension for the purposes of that provision can include structures which are physically detached from the building of which they are an extension*." (paragraph 52)

In other words, it would be unlawful to find that an outbuilding should not be treated as an "extension" for the purposes of paragraph 154 (c) solely on the basis that it was not linked to another building. Whether a detached structure would amount to an extension of the existing building is a matter of fact and degree.

133. For residential outbuildings, it would be reasonable to take into account whether the proposal was a "n*ormal domestic adjunct*" (an expression used in the earlier judgment of Sevenoaks DC v SSE & Dawe [1997]). In addition, consideration could be given to the purpose and use of the proposed building, its relationship with the original building and its size.

134. If a curtilage building is held not to be an "extension" then it would not fall within paragraph 154 (c) and so would be inappropriate development. If it does amount to an "extension" then an assessment should be made as to whether it would result in disproportionate additions over and above the size of the original building.

Removal of existing buildings

135. Sometimes it will be argued that the demolition of existing buildings would either increase openness or would balance any loss of openness caused by the proposal. It will be for you to judge whether such arguments are most appropriately considered under step 1 ('Is the development inappropriate? What would be the effect on openness?') or Steps 3-5 ('other considerations'). This will depend on the circumstances. However, in most cases it will be preferable to consider the overall consequences for openness in Step 1. However, if you conclude in Step 1 that the proposal would bring about a positive outcome in terms of openness, this should also be weighed in the balance within Steps 3-5.

136. It may also be argued that the removal of existing buildings could lead to a visual improvement. However, this is a separate matter to openness and is likely to be an 'other consideration'. Any conclusions that are reached in relation to issues of character and appearance should be consistent with the weight attached to them in any Green Belt balance.

137. If you accept that the demolition of existing buildings is necessary to allow permission to be granted, you must impose a condition that requires the buildings to be demolished within a reasonable time frame. You may also need to consider whether a building could be erected in any event under permitted development rights.

Dwellings for rural workers

138. Dwellings for rural workers in agriculture or forestry are primarily intended for residential use. Consequently, they are not buildings *for* agriculture or forestry (even though they are intended to support such a use). Unless a proposed rural worker's dwelling specifically falls within one of the exceptions in the NPPF paragraphs 154 or 155 (for example, because it is the re-use of a building) it would be inappropriate development. If you conclude that there is an 'essential need' for a rural worker's dwelling you will need to consider whether this would be an 'other consideration' which would clearly outweigh any harm to the Green Belt and any other harm so amounting to 'very special circumstances'.

139. Issues relating to the Green Belt may arise in proposals seeking to remove an agricultural occupancy condition. However, the dwelling will already exist and a potential change in occupancy from an agricultural to a non-agricultural worker would not be a material change of use or an act of development. Accordingly, it would be reasonable to conclude that the question of inappropriateness is not relevant to such proposals.

Renewable energy

140. This is covered in paragraph 158 of the NPPF.

Advertisements

141. 'Advertisements are subject to control only in the interests of amenity and public safety.[34] Consequently, issues relating to 'inappropriateness', 'other considerations' and 'very special circumstances' do not apply. As a result, development plan and NPPF policies dealing with these matters will not be relevant to your decision. If such issues are raised, you will need to explain your position.

Temporary permissions

142. In some cases, permission will be sought for a temporary period after which the development would cease[35]. See paragraph 56 of *Europa Oil and Gas Limited v SSCLG, Surrey County Council, Leath Hill Action Group* [2013] EWHC 2643 (Admin):

"*It is plain that temporary development can be inappropriate. Equally, it will not always be inappropriate. That is what the inspector in substance says. If he had said that the temporary nature of a development was irrelevant to its inappropriateness he would have been in error, as I shall come to.*"

143. Consequently, if a development is inappropriate, the harm to the Green Belt would still be substantial (paragraph 153 of the NPPF). However, the degree of any other harm could potentially be reduced. This would be a matter for your judgement. For example, the harm to openness or character and appearance from a development

[34] Regulation 3 of The Town and Country Planning (Control of Advertisements) (England) Regulations 2007

[35] In some other cases, eg for solar farm developments, it is argued that the loss of land is not irreversible albeit the permission sought is for an extended period eg 30 years and the effect of such a long period should be considered.

which would last 3 years would inevitably be less than from one which was permanent. This might affect your overall Green Belt balancing

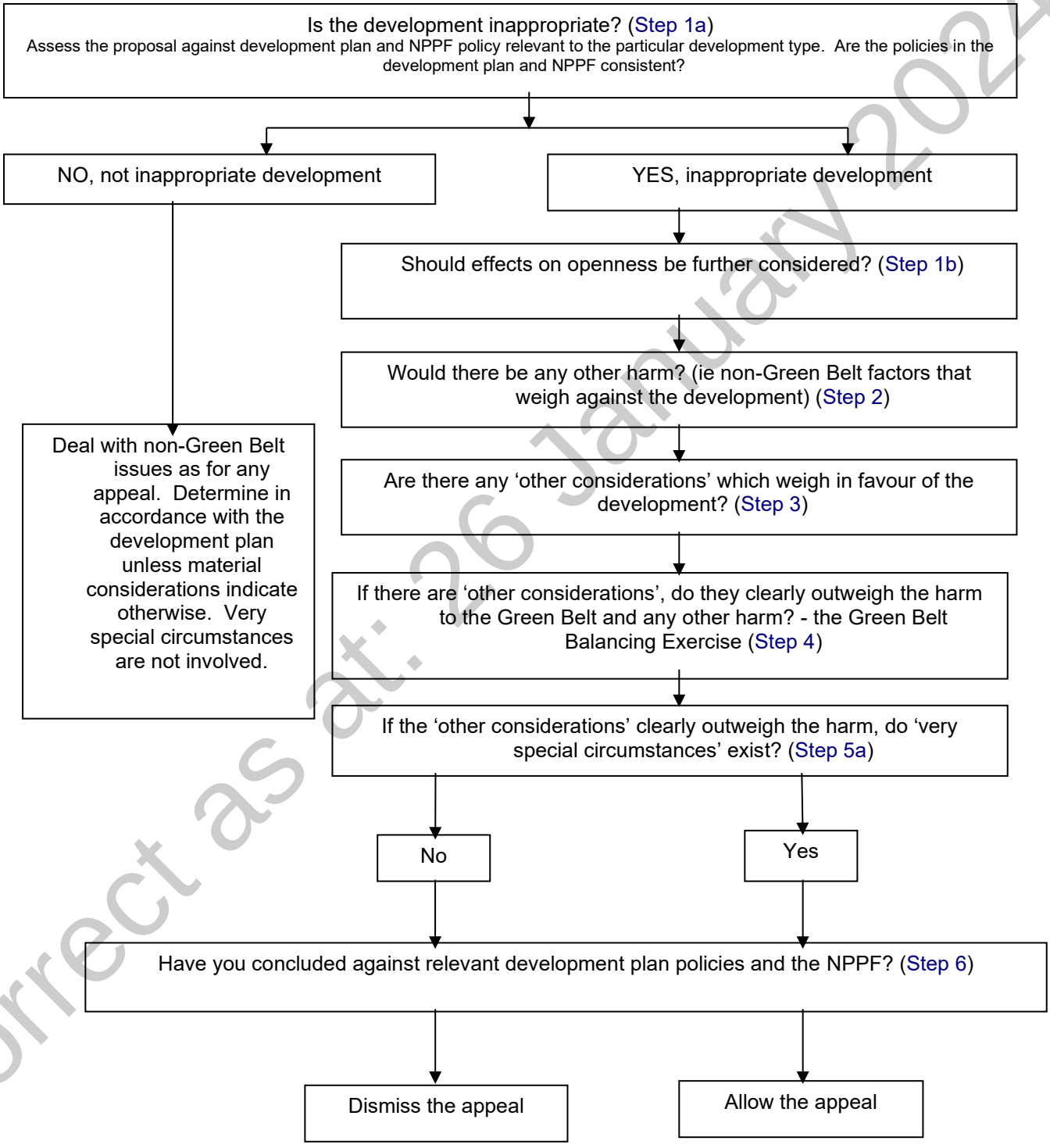
Removal of permitted development rights

144. There are appeal cases where the LPA suggests conditions which would remove permitted development rights on new buildings in the Green Belt or where permission is sought for extensions. There will also be appeals against conditions cases where conditions removing permitted development rights are in dispute. Permitted development rights can in some circumstances permit sizeable extensions that would exceed the disproportionate test in paragraph 154c) of the NPPF.

145. However, permitted developments rights have not been withdrawn (in total or in part) in the Green Belt in the GPDO. The NPPF states that planning conditions should not be used to restrict national permitted development rights unless there is a clear justification to do so (paragraph 54). In addition, the PPG (21a-017-20190723) says that conditions restricting the future use of permitted development rights may not pass the tests of reasonableness or necessity. These provisions should be borne in mind when considering proposals where such conditions are at issue.

Annex 1 – Green Belt Flow Diagram

This diagram sets out a structured approach for dealing with Green Belt issues. It should be read alongside the sections in the main body of this chapter which provide more advice on each step. In reaching the final decision consideration may need to be given to paragraph 11 d) of the NPPF and other material considerations.



The Planning Inspectorate

Gypsy, Traveller and Travelling Showpeople's Casework

Not yet updated to reflect December 2023 Framework (NPPF)

What's new since the last version

Changes highlighted in yellow made 26 July 2023:

- Paragraphs 98-103: Updated guidance to the flood risk assessment when considering temporary or permanent occupation alongside climate change considerations.

Other recent updates made 16 Jan 2023:

- Paragraphs 9-11: Updated guidance following the *Smith* ruling and application of the PPTS definition.
- Paragraphs 22-25: Section 60C-E of the Police, Crime, Sentencing and Courts Act, which came into effect in July, introduces a criminal offence of residing or intending to reside on land, without consent, in or with a vehicle.
- Revisions at paragraphs 242-245 & 295-297 to provide context and clarity of the *Smith* Judgement and implications.

Contents

Glossary

CJPOA94	Criminal Justice and Public Order Act 1994
CoA/EWCA	Court of Appeal
CSA68	Caravan Sites Act 1968
CSCDA60	Caravan Sites and Control of Development Act 1960
EA10	Equality Act 2010
The Framework	National Planning Policy Framework
GPDO	The Town and Country Planning (General Permitted Development) (England) Order 2015
GTAA/GTANA	Gypsy & Traveller Accommodation (Needs) Assessment
HA85	Housing Act 1985
HC/EWHC	High Court
HPA16	Housing and Planning Act 2016
HRA98	Human Rights Act 1998
PD	Permitted development
PPTS	Planning Policy for Traveller Sites
The Guild	The Showmen's Guild of Great Britain
TCPA90	Town and Country Planning Act 1990
Unauthorised development	Development undertaken on land owned by the developer or with the landowner's consent but without planning permission. The development is unlawful but not illegal – unless and until an enforcement notice is issued, in force and not complied with, and the non-compliance is successfully prosecuted against.
Unauthorised encampment	Use as a caravan site without planning permission and without consent of the landowner, usually on public land. Trespass is a civil offence which only becomes illegal if the occupiers refuse to comply with a court or police order to leave.

Introduction

1. This chapter sets out legal, policy and practical considerations for English casework involving Gypsies, Travellers and travelling showpeople (PINS Wales produces separate training material for Wales). Inspectors make decisions on the evidence before them and that may sometimes justify departure from advice given here.

2. Except where more precision is required, the terms 'Traveller sites' and 'Traveller appeals' in this chapter should be taken as shorthand for Gypsy, Traveller or Travelling Showpeople's sites and appeals.

3. This chapter is written with planning and enforcement appeals in mind. It does not duplicate advice pertaining to Traveller site policies or allocations set out in the Local Plan Examinations ITM chapter.

4. The aim is that an Inspector, in dealing with an appeal pertaining to the use of land as a Gypsy, Traveller or travelling showpeople's site, shall have the information necessary to determine:

    - Whether, or to what extent, the development complies with the development plan and national policy set out in Planning Policy for Traveller Sites (PPTS), the National Planning Policy Framework (the Framework) and the Planning Practice Guidance (PPG).

    - What harm, if any, is or would be caused by the development and, which conditions, if any, should and could be imposed to make the development acceptable.

    - The need for sites in the relevant area, plus current and likely future levels of provision. When considering the 'relevant' area, see Annex B and Linfoot v SSCLG & Chorley BC [2012] EWHC 3514 (Admin), Beaver v SSCLG & South Cambridgeshire DC [2015] EWHC 1774 (Admin) and Sykes v SSHCLG & Runnymede BC [2020] EWHC 112 (Admin).

    - Whether the Council has a five-year supply of specific, deliverable sites against their locally set targets.

    - The accommodation needs of the appellant and alternative accommodation options realistically available to them.

    - Personal circumstances which are relevant to the decision.

    - If necessary, whether the intended occupants are 'Travellers' or 'Travelling Showpeople' for planning purposes.

    - Whether a temporary and/or personal permission should be granted, and the appropriate length of a temporary permission.

    - The planning balance, including whether to make a split decision.

    - The relevant factors to take account of when addressing human rights, including the best interests of the child(ren).

- The aims of the public sector equality duty (PSED).

Who are Gypsies, Travellers & Travelling Showpeople?

Travellers Groups and PPTS Status

5. This chapter concerns the land use and accommodation requirements of the following groups of people:

   - Romany or ethnic Gypsies[1]
   - Irish Travellers or other ethnic Travellers[2]
   - 'New Age' and other travellers, and
   - Travelling Showpeople

6. Romany Gypsies and Irish Travellers are ethnic minorities subject to the PSED. Use initial capitals when referring to an ethnic group or someone as a member of such.

7. Gypsies and Travellers of different ethnic backgrounds or traditions do not usually want to share the same site, but it is not unknown for Irish Travellers to marry into Romany Gypsy families and vice versa. It is uncommon but not unknown for Gypsies or Travellers to join a group of travelling showpeople.

8. Annex 1 of PPTS defines 'gypsies and travellers' and 'travelling showpeople' for planning policy purposes[3]. In this chapter, individuals who meet the definitions are said to have 'PPTS status'[4]. Annex 1 defines 'gypsies and travellers' as:

> 'Persons of nomadic habit of life whatever their race or origin, including such persons who on grounds only of their own or their family's or dependants' educational or health needs or old age have ceased to travel temporarily but excluding members of an organised group of travelling showpeople or circus people travelling together as such'. (Paragraph 2.4 of *Consultation: Planning and Travellers* (September 2014) stated that 'for planning purposes the Government believes a traveller should be someone who travels')

9. The Court of Appeal issued the *Smith v SSLUHC & Ors [2022] EWCA* Civ *1391* judgment (dated 31st October 2022) regarding the interpretation of the Planning Policy

[1] Romany in this context may be spelt with a 'y' or 'i'; the Romani language is often spelt with an 'i'. 'Roma' is another word for Romany people (and does not have any connection with Romanian) while the term 'Sinti' refers to Romany people of Central Europe

[2] The traditional Irish Traveller language is known as Shelta, De Gammon or Cant. Other ethnic groups include Scottish Gypsy Travellers or Welsh Gypsy Travellers (Kale).

[3] There is also a statutory definition of 'gipsies' [sic] in s24(8) of the Caravan Sites and Control of Development Act 1960 as amended, but that is for the purposes of s24 only and is based on the high court judgment in Mills v Cooper [1967] 2 QB 459. The statutory definition was adopted for planning policy purposes in Circular 28/77: Gypsy Caravan Sites but the policy definition was amended in Circular 01/06 and PPTS 2015.

[4] The term used in this chapter has been changed to 'PPTS status' because, as members of ethnic minority communities, Romany Gypsies and Irish Travellers will consider themselves to have 'Gypsy status' or 'Traveller status' irrespective of whether they meet the PPTS definition.

for Traveller Sites 2015 ("PPTS") and the application of that policy to gypsies and travellers who have ceased to pursue nomadic lifestyles.

10. The thrust of the judgment was that the PPTS definition change was unlawfully discriminatory. The Court found that its main objective was to make it harder for elderly and disabled ethnic Gypsies and Travellers to obtain planning permission. The definition change was found unlawful for this reason alone but was found to be disproportionate in any event as its purported justification of making the planning system fairer did not outweigh its harsh effects.

11. Although the PPTS 2015 itself was not the subject of the litigation, and has not been quashed or declared unlawful, it remains extant policy even though this judgment severely undermines the definition change it enacted. As a result, Inspectors should only need to refer back to the parties in cases where the PPTS 2015 definition is clearly in dispute, or where the judgment may impact on a needs assessment where the latter is material to your decision.

12. Travelling showpeople are members of a small, tightknit community of self-employed people who travel the country to hold circuses or amusement or entertainment fairs, and/or to run rides or kiosks at shows, festivals, markets, fetes or even shopping centres.

13. Individuals must fall within the following definition to have status as a 'travelling showperson' for PPTS purposes:

    - 'Members of a group organised for the purposes of holding fairs, circuses or shows (whether or not travelling together as such). This includes such persons who on the grounds of their own or their family's or dependants' more localised pattern of trading, educational or health needs or old age have ceased to travel temporarily but excludes Gypsies and Travellers as defined…'

14. Advice is given below on dealing with 'PPTS status' in appeals.

Travellers, Caravans and Travellers Culture

15. Gypsies, Travellers and travelling showpeople usually live in caravans as an integral and necessary part of their nomadic lifestyle; living in a caravan facilitates travel for work. However, being nomadic does not preclude having a permanent base which an individual or family can return to and live on for periods of time; PPTS is thus concerned with sites rather than caravans.

16. Romany Gypsy and Irish Traveller communities have some common cultural values[5], including a tradition of nomadism and living in caravans; it is part of their ethnic and cultural identity to have their moveable homes. Whether or not they move every day is immaterial; their aspiration is to always have the ability to be mobile. Living in a building

[5] The Knowledge Library holds material on Gypsy and Traveller Culture, such as the Derbyshire Gypsy Liaison Group's 'I know when it's raining'

with a sense of enclosure can be distressing to people who are used to freer and more outdoor living[6].

17. The dominant position of the family is integral to Romany Gypsy and Irish Traveller culture. Where possible, Gypsies and Travellers live and travel in extended family groups for mutual support and care. Their strongly held belief and practice is to care for elderly, sick or disabled members within the family without external help. Gypsies and Travellers take their caring responsibilities very seriously and may experience profound isolation if separated from their families.

18. Another important element of Gypsy and Traveller culture, especially for Romany Gypsies, is a high emphasis on maintaining cleanliness through various customs, including by having separate places to wash cooking and eating items and to wash clothes[7]. Living in a bricks and mortar house may compromise cultural traditions with regard to cleaning, sanitary, cooking and sleeping arrangements.

19. For all of these reasons, 'aversion to bricks and mortar' is a recognised condition for some Gypsies and Travellers. Many Romany Gypsies and Irish Travellers live in conventional housing, but not always by choice; some were accommodated there by their local authority when homeless. Gypsies have had varying degrees of success in adapting to life in bricks and mortar[8], and some wish to return to living in caravans. Many Travellers have never lived in a house and are unwilling to consider doing so.

20. While Inspectors should be aware of these aspects of Traveller culture and identity, do not assume that they apply to all Travellers or would be relevant in any given case. Which considerations are material to a decision should be set out in and supported by the appeal evidence.

The Use and Occupation of Land

21. Planning permission is required for 'development' as defined by s55 of the Town and Country Planning Act 1990 (TCPA90). 'Development' includes the carrying out of operations and of a material change of use. It does not include the 'occupation' of land.

22. Section 60C-E of the Police, Crime, Sentencing and Courts Act, which came into effect 1 July 2022, introduces a criminal offence of residing or intending to reside on land without consent in or with a vehicle. This effectively prevents roadside and/or unauthorised camping and gives the Police powers to seize vehicles and caravans, and to arrest occupiers.

23. The conditions in the new section 60C may involve any of the following: where the occupant is residing on the land, that significant damage or significant disruption has been caused or is likely to be caused as a result of that residence; (b) where an occupier is not yet residing on the land, it is likely that significant damage or significant

[6] Romany Gypsies have likely been in the UK since the late fifteenth century. They initially travelled on foot and lived in 'bender' tents (or "under canvas" for the purposes of birth certificates etc) made from hazel branches. Families later began to travel with bender tents placed on top of horse-drawn carts, and these evolved into the archetypal bow-top wagons associated with Gypsies to this day. The English Romani word 'vardo' or 'varde' can mean a Romany wagon or caravan.

[7] The 'Romanipen' is a collective noun for a wealth of Romany customs, including those on cleanliness. Other cultural values shared by Gypsies and Travellers relate to early and close kin marriage, rituals surrounding death and marriage, language and relationship with settled society/experience of discrimination.

[8] *R (oao Clarke) v SSTLR & Tunbridge Wells* [2002] EWCA Civ 819

disruption would be caused as a result of that residence if an occupier were to reside on the land; (c) that significant damage or significant disruption has been caused or is likely to be caused as a result of conduct carried on, or likely to be carried on, by an occupier while they are on the land; or (d) that significant distress has been caused or is likely to be caused as a result of offensive conduct carried on or likely to be carried on by an occupier while they are on the land.

24. This is also an offence if, without reasonable excuse, they enter or re-enter the land within 12 months of a request to leave with an intention of residing there without the consent of the occupier and they have or intend to have at least one vehicle with them on the land.

25. Inspectors need to be aware of potential implications raised by these provisions. Arguments about the effect of s60 of the Act may need to be taken into account and assessed in the overall planning balance.

Caravan Sites

26. Caravan sites have particular features in planning law:

- A caravan is not a building, and the siting of a caravan is normally undertaken to facilitate a material change of use of the land.
- Caravans may be sited for different purposes (residential, farming, storage etc) and so the proposed land use should be specified in the description of development.
- Once land is in lawful use as a [residential] caravan site, the use may be the same regardless of the number of caravans on it. Any restriction on the number of caravans must be secured by means of planning condition; see below and the Conditions ITM chapter.
- For a structure to be considered a caravan, it must be movable, whether by towing or lifting. Any restriction on where caravans are sited on land must be secured by condition.
- A caravan must meet size and other requirements set out in the Caravan Sites and Control of Development Act 1960 (CSCDA60) and Caravan Sites Act 1968 (CSA68); see Annex A. There are different types of caravan, notably touring and static caravans; the latter are often referred to as mobile homes. Any restriction on the type of caravans to be sited must be secured by condition.
- Likewise, any restriction on the people or group who can occupy a [residential] caravan site – including that a site may only be occupied by Travellers – must be secured by means of condition.
- A grant of permission for the use of land as [residential] caravan site is required for a local authority to grant a site licence.

27. Further information on the statutory meaning of a caravan is set out in Annex A, while key judgments on whether structures should be considered caravans are listed in the Enforcement Case Law chapter.

Gypsy and Traveller Sites

28. Gypsies and Travellers generally live on residential 'pitches', each of which is typically occupied by one household (a single adult or two plus adults living together as a family or household, with or without children) with a static and a touring caravan. Some private sites contain two+ pitches for extended family groups to live together.

29. Travellers may also seek to develop pitches next to existing sites, in order to live closer to family or friends. They may seek to develop pitches next to land that can be used for the keeping of horses, as is traditional in Traveller culture, and/or some other land use(s) related to their nomadic work.

30. Operational development may be required to facilitate the use of land as a Traveller site; this may include the laying of hardstanding for access, parking vehicles and/or stationing caravan(s), the erection of buildings such as utility blocks or dayrooms, the erection of fences or walls and the installation of sewerage and/or lighting facilities.

31. A grant of permission for the use of land as [residential] caravan site would not necessarily be construed as a grant of permission for associated operational development.

32. Thus, the majority of Gypsy or Traveller appeals concern:

    - A change of use of the land to residential use [for Gypsies or Travellers] facilitated by the siting of [x number of] caravans.
    - A change of use to a mix of uses comprising residential use as above plus (for example) the keeping of horses and/or [specified] business use(s).
    - Operational development – on its own or with the change of use.

33. It will be necessary to establish at the outset what is before you:

    - What is/are the proposed use(s)?
    - How many pitches?
    - How many and what types of caravan?
    - What, if any, works have been carried out and/or are proposed?
    - Whether, if necessary, it would be possible to make a split decision, for some pitches but not all, or some use(s) but not all[9].

34. Other types of appeal pertaining to Gypsy or Traveller sites concern:

    - Whether to vary or remove conditions, including temporary or personal conditions, imposed on a previous permission for a Gypsy or Traveller site.

[9] See the Approach to Decision-making ITM chapter

- A change of use **from** such a use, causing the loss of a site.

- The construction of a permanent dwelling in place of a site.

Transit Sites, Temporary Stopping Places and Negotiated Stopping

35. **Transit sites** are sites that are in permanent use but only for the provision of temporary accommodation, normally for Gypsies and Travellers, rather than travelling showpeople. Transit sites are required in most planning authority areas to meet the needs of Travellers who resort to the district.

36. Transit pitches may be provided on sites that are otherwise used as the permanent base of one or more families. The owner may wish to reserve the pitches for relatives, friends and/or colleagues, or rent them out on a commercial basis to other Travellers.

37. Some transit sites have individual plots of tarmac hard standing and a utility shed with bathroom and toilet facilities. Others are more basic but still by definition remain in situ permanently.

38. The length of stay on a transit site or pitch can vary but is usually set at between 28 days and three months. The requirements may be more relaxed where transit pitches are provided on private family sites but, even then, there must be some limitation to ensure that they are not used as permanent bases for individual households.

39. When permission is granted for a transit site or pitch(es), conditions must be imposed to specify the length of time any occupier may reside on the site or pitch(es); the interval before which they may return; and how this is to be monitored by the planning authority[10].

40. Transit sites should not be confused with **temporary stopping places**[11], where any person travelling with a caravan may bring the caravan onto the land for no more than two nights, so long as:

    - During that period, no other caravan is stationed for the purposes of human habitation on that or any adjoining land in the same occupation, and

    - In the period of 12 months ending with the day on which the caravan is brought onto the land, the number of days on which a caravan was stationed on that or the adjoining land for the purposes of human habitation did not exceed 28.

41. Such use of land may be permitted development (PD) under Article 3 and Schedule 2, Part 5, Class A of the Town and Country Planning (General Permitted Development)

[10] See model conditions 179 and 180 in the PINS Suite of Suggested Conditions, with regard to advice in the Conditions ITM chapter on the use of 'registers' in conditions.
[11] It has been suggested that there are or were thousands of stopping places ("atchin tans" in English Romani) in Britain, including those where a family could stop for one or two nights, and others where they could stay for longer, usually if carrying out seasonal work on the owner's land.

(England) Order 2015 (GPDO)[12] and paragraph 2 of the First Schedule to the CSCDA60; see Annex A.

42. Negotiated stopping is a relatively new concept whereby local authorities make agreements with Gypsies and Travellers to manage unauthorised encampments or [roadside] stopping. The agreement can apply to the land camped on or, if that is unsuitable, another location that the authority directs the Travellers to. The terms of the agreements vary but can include:

    - The local authority ensures the supply of water and provides and services temporary sanitation and waste disposal facilities.

    - The occupiers agree to 'good neighbourliness' and proper use of the facilities provided.

43. The length of the agreement can vary from two weeks to several months but tend to be around 28 days. An example of negotiated stopping has been provision of dedicated temporary stopping facilities on routes to and from the Appleby Horse fair.

44. The existence of a negotiated agreement does not prevent a local authority from making a direction under s77 (and seeking an order under s78) of the Criminal Justice and Public Order Act 1994 (CJPOA94) to require that occupiers leave the land and remove their vehicles or property.

Travelling Showpeople's Sites

45. Travelling showpeople live on 'plots' or 'yards' that are in a mixed use for the siting of caravans for residential use plus use for the storage, maintenance and repair of rides, vehicles and equipment[13].

46. Again, there will be one plot per household and travelling showpeople tend to live in family or working groups. Plots are traditionally known as 'winter quarters', but the work of travelling showpeople has become less seasonal in recent years.

47. Since they often now work more or less all year round, and there is a shortage of suitable stopping places, showpeople may return to their sites between any and every trip to fairs or other attractions. Yards are certainly occupied by families with school age children during term times, and throughout the year by retired showpeople. If an appeal is described as being for 'winter quarters', clarify at an early stage whether occupation is sought for only part of the year; *Smarden Parish Council v SSCLG & John Lawson's Circus [2010] EWHC 701 (Admin).*

[12] In *Bromley LBC v Persons Unknown & London Gypsies and Travellers & Others* [2020] EWCA Civ 12, the Court of Appeal upheld the decision of the High Court that an application for a final injunction prohibiting the entering onto land for residential purposes would not strike a fair balance or be proportionate. The case was focussed largely on human rights considerations, but the challenge also included a ground that the injunction would 'cut against' PD rights under Part 5. The High Court judge remarked that this issue had '*not been satisfactorily addressed by the local authority*'; the CoA found that the HC judge was 'plainly entitled' to reach that conclusion and PD rights were 'a factor which was relevant to proportionality'.

[13] Paragraph 5 of Annex 1 of PPTS states: '…"pitch" means a pitch on a "Gypsy and traveller" site and "plot" means a pitch on a "Travelling Showpeople" site (often called a "yard"). This terminology differentiates between residential pitches for "Gypsies and Travellers" and mixed-use plots for "Travelling Showpeople" which may/will need to incorporate space or to be split to allow for the storage of equipment.'

48. It has been held that use as a travelling showpeople's site 'may be a significant and separate land use' and, in the case before the court, a grant of planning permission for a change of use to a 'travelling showpeople's site' had been a grant of 'permission only for that use'. The permission did not authorise use of the land as a general residential caravan site even though there was no condition limiting occupation to travelling showpeople – see *Winchester CC v SSCLG & Others* [2013] EWHC 101 (Admin) upheld in [2015] EWCA Civ 563

49. Travelling showpeople's sites must be secure enough that fairground equipment can be maintained free from vandalism. Most travelling showpeople are members of the Showmen's Guild of Great Britain (the Guild) and must follow the Guild's Code of Rules which includes stringent safety requirements.

50. Members of the Guild can exercise PD rights which exempt them from the need to gain a caravan site licence in respect of their occupation of yards in winter months or when travelling for business purposes; see Annex A. However, planning permission for the use of land must still be granted in the first place.

51. A small group of showpeople specialise in holding travelling circuses. Their permanent quarters often differ from those of fairground showpeople in that they may need enclosed areas for training plus larger areas of land to exercise animals. Members of their trade associations do not enjoy the same PD rights as those of the Guild.

52. Travelling showpeople are increasingly reliant on finding sites in the countryside because their traditional urban sites have often been redeveloped. Their sites tend to be larger and perhaps have a wider access, relative to Gypsy or Traveller sites, in order to accommodate amusements, vehicles and maintenance activity. Otherwise, the site requirements of the different communities are similar. A useful review of national guidance and the distinction between Gypsies and Travelling Showpeople is found in *Winchester CC v SSCLG & Others [2013] EWHC 101 Admin*, although this judgment pre-dates PPTS 2015.

53. As with Gypsies and Travellers, appeals may be made to vary or remove conditions imposed on a planning permission for a travelling showpeople's site, or for change of use **from** such a use.

Policy Context

The Development Plan

54. The statutory provisions in s70(1)(a) of the TCPA90 and s38(6) of the Planning and Compulsory Purchase Act 2004 mean that the determination must be made in accordance with the development plan unless material considerations indicate otherwise. The Framework and PPTS are material considerations.

55. As set out below, in appeals casework, you will need to establish whether the development plan contains a criteria-based policy for Traveller sites as required by PPTS; if so, whether the development would comply and/or conflict with the criteria; and the degree of consistency between the policy and PPTS and the Framework.

56. Paragraph 11 of PPTS states that the policy criteria should be set to guide land supply allocations where there is an identified need, and to provide a basis for decisions on

applications that might come forward even where there is no identified need. As with bricks and mortar housing, identified need is not a prerequisite for a grant of permission for a Traveller site. The starting point is simply whether the development would accord with the development plan.

57. Inspectors may also need to establish in an appeal whether there is an adopted development plan document (DPD) which includes allocations for housing, including Traveller sites. The Local Plans ITM Chapter advises on meeting the needs of Travellers in the examination of development plans.

The National Planning Policy Framework

58. Paragraph 23 of PPTS states that applications for Traveller sites should be assessed and determined in accordance with the presumption in favour of sustainable development and the application of specific policies in the Framework as well as PPTS.

59. It follows that the presumption in favour of sustainable development set out in paragraph 11 of the Framework applies to Traveller casework but must be considered through the prism of PPTS.

60. Where there are no relevant development plan policies or the policies which are most important for determining a Traveller appeal are out of date, the tilted balance under paragraph 11d)ii) will apply, provided that there is no clear reason to refuse permission under paragraph 11d)i) **and** subject to a crucial qualification.

61. The question of whether the development plan policies which are most important are out-of-date should **not** be determined in accordance with footnote 8 to paragraph 11 of the Framework **if** the site would be occupied only by Gypsies or Travellers in accordance with a condition imposed on the permission. In other words, it would be occupied only by Gypsies or Travellers who have PPTS status and/or would benefit from the *Smith* judgment.

62. This is because footnote 27 to paragraph 62 of the Framework states that '[PPTS] sets out how Travellers' housing needs should be assessed for those covered by the definition in Annex 1 of that document.' Footnote 38 to paragraph 74 of the Framework also establishes that a five year supply of deliverable sites for Travellers should be assessed separately.

63. It follows that, in a Traveller case, **a shortfall in the supply of general housing land does not 'trigger' the provisions of paragraph 11d).**

64. Furthermore, **the absence of a five-year supply of Traveller sites** – although that is required by paragraph 10 of PPTS – **does not** in itself trigger the provisions of paragraph 11d) or render the policies most important for determining the appeal out of date[14].

65. Footnote 8 to paragraph 11d) of the Framework does apply where planning permission is sought for a residential caravan site to be occupied by persons who do **not** have PPTS status. This is because footnote 8 deals with 'applications involving the provision of housing'. In most cases, however, it will be expressly proposed that the site is to be

[14] *Swale BC v SSHCLG & Maughan & Others* [2018] EWHC 3402 (Admin)

occupied by Gypsies or Travellers, and so the appeal should be determined with regard to PPTS.

66. In considering whether development plan policies are out-of-date, account should be taken of PPTS as a whole and any relevant provisions of the Framework, including paragraph 219.

Planning Policy for Traveller Sites (PPTS)

67. Inspectors should ensure that they are familiar with the entirety of this document but a few of the sections are highlighted briefly below.

68. Paragraph 3 of PPTS sets out that the 'Government's overarching aim is to ensure fair and equal treatment for Travellers in a way that facilitates the traditional and nomadic way of life of Travellers while respecting the interests of the settled community'. Paragraph 4 sets out how this aim will be achieved in terms of plan-making and decision-taking.

69. PPTS Policy B, paragraph 11 advises that local plans should include criteria-based policies to provide a basis for decisions in planning applications, such policies should be fair and facilitate the traditional and nomadic life of Travellers while respecting the interests of the settled community. Policy H, paragraph 25d) also indicates that locally-specific policy criteria should be used to assess applications that may come forward on unallocated sites

Planning Issues Arising in Traveller Casework

Traveller sites in the Green Belt

Inappropriate Development

70. Green Belt policy set out in paragraphs 137-151 of the Framework and advice in the Green Belts ITM Chapter applies to Traveller casework.

71. It is rarely necessary to deliberate as to whether a change of use to create a Gypsy, Traveller or Travelling Showpeople's site would be inappropriate development in the Green Belt. In most cases, the site will be occupied, wholly or in the main, by Travellers with PPTS status and PPTS will apply. Policy E, paragraph 16 of PPTS is emphatic and reflects previous findings made in planning appeals by confirming that Traveller sites in the Green Belt are inappropriate development.

72. It may be argued that there is a tension between paragraph 16 of PPTS and paragraph 150e) of the NPPF, since the latter provides that a material change of use of land is not inappropriate development in the Green Belt provided that openness is preserved and there is no conflict with the purposes of including land within the Green Belt. In other words, the NPPF gives the decision-maker some discretion whereas PPTS does not. PPTS should prevail unless the site would be clearly and only occupied by Gypsies or Travellers who do not have PPTS status. This was also confirmed in *Kingston Upon Thames (RB) v SSLUHC & (IP) Mrs Laura Williams* [2023] EWHC 2055 (Admin).

73. In practice, however, it is highly unlikely that **any** material change of use of land to use as a residential caravan site would preserve the openness of the Green Belt. Where

PPTS applies, the site will be inappropriate development because of Policy E, paragraph 16. In most of those cases anyway, **and** in most cases relating to Travellers without PPTS status, the use will not preserve openness and will be inappropriate development under the Framework as well.

74. It should be established at the outset of a hearing or inquiry, as well as in the decision letter, that the Traveller site would be inappropriate development in the Green Belt in accordance with the PPTS or the Framework as applicable. The use would thus be harmful to the Green Belt by definition and that harm carries substantial weight.

Openness and Purposes of the Green Belt

75. It is usually necessary to determine whether a Traveller site or associated development would cause any other harm to the Green Belt, with regard to the fundamental aim of Green Belt policy to prevent urban sprawl by keeping land permanently open, and the purposes of the Green Belt – including safeguarding the countryside from encroachment (Paragraphs 137 and 138 of the Framework).

76. Any Traveller site is likely to cause a loss of openness in the Green Belt through the (sometime) presence of caravans (at least) on the land. Indeed, this is essentially the reason why the development of a Traveller site is inappropriate development as set out above. Where PPTS applies, Inspectors do not need to make any separate finding as to whether or not the Traveller site before them will cause a loss of openness, but it will normally be necessary to address the **extent** of any loss of openness caused by the development, so as to identify the actual (in addition to the definitional) harm for the purposes of the planning balance.

77. In most cases, the Traveller site will reduce openness to such an extent as to cause actual, in addition to the definitional, harm to the Green Belt. Sometimes, however, the use may cause no net loss of openness, or even a gain in openness, depending on the previous use of the site and other factors as set out below. Weight should be attributed to any actual harm or benefits to the openness of the Green Belt in the planning balance. PPTS paragraph 26b) states that weight should be attached to sites being well planned or soft landscaped in such a way as to positively enhance the environment and increase its openness.

78. Factors that may be relevant to the impact on openness include:

- The number of caravans on the site and how many would be touring and/or static caravans.
- Whether the site would be in a mixed use and, if so:
- Whether non-residential use(s) such as the keeping of horses would preserve openness and accord with the purposes of the Green Belt.
- The extent to which non-residential use(s) such as business storage would cause a loss of openness and conflict with the purposes of the Green Belt.
- The proposed or likely requirements for vehicular parking, with regard to the number of pitches and any other use(s).

- The nature and extent of any operational development that is proposed or likely to be needed.

- The likelihood of domestic 'paraphernalia' such as children's play equipment being used on the site.

- Whether any existing structures on the land which reduce the openness of the Green Belt would be removed.

- The openness of the immediate surroundings, or the impact of the development on spatial openness in its context.

- The impact of the development on the visual openness of the Green Belt within the surrounding area.

- The previous use of the land; any buildings, structures or chattels associated with that use; and whether any existing buildings or structures which presently reduce the openness of the Green Belt would be removed under the proposed development.

Other Considerations and 'Very Special Circumstances'

79. Traveller casework must be determined in accordance with the Framework; inappropriate development should not be approved except in very special circumstances, which will not exist unless the potential harm to the Green Belt by reason of inappropriateness and any other harm is clearly outweighed by other considerations.

80. PPTS Policy E, paragraph 16 states:

> 'Subject to the best interests of the child, personal circumstances and unmet need are unlikely to clearly outweigh harm to the Green Belt and any other harm so as to establish very special circumstances'.

81. Policy E should not be interpreted as meaning that 'little' or indeed any other given level of weight should be given to personal circumstances or unmet in Green Belt cases. The weight attached to any consideration remains a matter for the decision-maker based on the evidence, albeit that the cumulative weight attached to personal circumstances and unmet need will be 'unlikely' to outweigh the 'substantial' weight which must be attached to Green Belt harm[15]. Other considerations in favour of the appeal may be raised alongside or instead of personal circumstances or unmet need.

82. In accordance with advice in the Green Belts ITM Chapter, it is vital that other considerations are treated separately and discretely. Weight should be attributed to each consideration in favour of the appeal, but they should not be referred to as very special circumstances in themselves or individually compared to the identified harm. In the final balance, it should also be remembered that 'other considerations' do not have to be unique, rare or uncommon to amount to very special circumstances[16].

[15] See *Sefton MBC v SSHCLG & Doherty* [2021] EWHC 1082 (Admin) discussed in Annex B and the Green Belts chapter.
[16] *Wychavon v SSCLG & Butler* [2008] EWCA Civ 692

83. The final balancing exercise in any Green Belt case for a Traveller site will simply be whether the harm to the Green Belt, which carries substantial weight and any other harm is clearly outweighed by other considerations, such that very special circumstances are or are not shown to exist. Some of the judgments summarised in Annex B concern Green Belt Traveller cases.

Traveller Sites in the Countryside

84. PPTS sets out no presumption against a change of use of land in the countryside to use as a Gypsy or Traveller site – but PPTS Policy C is:

85. 'When assessing the suitability of sites in rural or semi-rural settings, local planning authorities should ensure that the scale of such sites does not dominate the nearest settled community.'

86. Under Policy H, PPTS says at paragraph 25:

87. 'Local planning authorities should very strictly limit new Traveller site development in open countryside that is away from existing settlements or outside areas allocated in development plans…[and] ensure that sites in rural areas respect the scale of, and do not dominate, the nearest settled community and avoid placing an undue pressure on the local infrastructure.'

88. Whether a site would be in 'open' countryside should be considered in the round with regard to the characteristics of the area, including the position of the site in relation to any settlement boundary or area allocated in a development plan. PPTS does not require any specific relationship with a settlement or allocation, only that the site is not 'away from' such areas. In such circumstances, Traveller sites should be 'very strictly' limited.

89. Whether a site would 'dominate' the nearest settled community should be assessed with regard to their relative sizes and perhaps their proximity. The key issue here is to ensure that the site would 'respect the **scale'** of and not be unduly large by comparison to the nearest hamlet or village.

Character and Appearance

90. It is not uncommon for authorities to object to Traveller sites on the basis of conflict with development plan policies which seek to protect the character and appearance of the appearance of the countryside, or indeed require that Traveller sites cause no such harm.

91. Paragraph 4k) of PPTS expects authorities and, by extension, Inspectors to have due regard to the protection of local amenity and the environment. As noted above, however, Paragraphs 14 and 25 of PPTS implicitly accept that Traveller sites – with all that they include – may be located in rural areas. While caravans may have some adverse visual and/or landscape impact, they are nonetheless frequently seen in the countryside, whether on farms, holiday caravan sites or established Traveller sites.

92. In R (oao Dowling) v SSCLG & Chichester CC & Keet [2007] EWHC 738 (Admin), the judge endorsed an Inspector's finding that a Traveller site would not result in unacceptable harm although the local plan policy required that Gypsy sites 'do not

detract from the undeveloped and rural character and appearance of the area'. A literal reading of the policy would:

> 'render it unworkable because it is difficult to conceive in practice and reality that there would be any kind of development with regard to Gypsies which would not, at least in some way, detract either from the character, or from the appearance, or from both, of the countryside…there…certainly can properly be, a legitimate modification of the literal wording…it is reasonable to construe the policy as embracing detractions which are perhaps significant or material. That would give the policy real purpose and bite and at the same time would make it workable'.

93. Thus, the extent of and weight attached to any harm to the character and appearance of a rural area should be based on an assessment of the scale, characteristics and visual impact of the development in its context, rather than some generalised objection to caravans urbanising the countryside.

94. Policy H, paragraph 26 of PPTS expects planning applications to be considered with weight attached to specified matters relating to the character and appearance of sites: effective use of previously developed (brownfield), untidy or derelict land, and sites being well-planned or soft landscaped in such a way as to positively enhance the environment and increase its openness.

95. On travelling showpeople's sites, it will be necessary to make provision for the secure storage and repair of equipment as an integral part of the whole development. If this cannot be properly assimilated into its surroundings, the entire development may be regarded as unacceptable; the scale and visual impact of the use will be one of the main issues in almost every case.

Flood Risk and Drainage

96. Gypsy, Traveller and travelling showpeople's appeals should be determined with regard to the policies on flood risk set out in the Framework, the PPG chapter on Flood Risk and Coastal Change and the Flood Risk ITM chapter.

97. Table 2 in the PPG is clear that caravans, mobile homes and park homes intended for permanent residential use are 'highly vulnerable' to flood risk.

98. In accordance with footnote 55 of the Framework, an application for a Traveller site would introduce a more vulnerable use. Consequently, in an area at risk of flooding from any source, including Flood Zones 2, 3a or 3b, it should include a site specific Flood Risk Assessment. Paragraph 168 and footnote 56 also expect that the sequential and exception tests are applied as appropriate to any application for a change of use to a caravan, camping or chalet site, or to a mobile home or park home site.

99. Under the sequential test, development should not be permitted in areas known to be at risk now or in the future from any form of flooding if appropriate sites are reasonably available in areas with a lower risk of flooding. The assessment of reasonably available and appropriate sites in relation to flood risk should be consistent with the assessment of general and/or personal need for Traveller sites.

100. If site is in Flood Zone 2 and the sequential test is passed, a Traveller site would be subject to the exception test. It should be shown that:

a) the development would provide wider sustainability benefits to the community that outweigh the flood risk; **and**

b) the development will be safe for its lifetime taking account of the vulnerability of its users, without increasing flood risk elsewhere, and, where possible, will reduce flood risk overall. This risk should be balanced whether temporary or permanent permission is sought, and it may be legitimate, depending on the circumstances before you, to set aside (rather than ignore) any "climate change" assessment for a temporary permission, depending on the period of that permission. Your balancing exercise could change in that respect.

101. In considering whether there are 'wider sustainability benefits', regard may be had to any relevant evidence that may be before you on the need for or supply of Traveller sites, and how the site performs against the criteria set out in paragraph 13 of PPTS.

102. If site is in Flood Zone 3a or 3b, the PPG advises that 'highly vulnerable development' should not be permitted even if the sequential test is passed. See PPG Table 2: Flood risk vulnerability and flood zone 'incompatibility' - Flood risk and coastal change - GOV.UK (www.gov.uk)

103. Although paragraph 159 of the Framework allows for development that is necessary in areas at the highest risk of flooding, so long as it is made safe for its lifetime without increasing flood risk elsewhere, Paragraph 167 of the Framework advises that development should only be allowed in areas at risk of flooding where specified mitigation measures can be demonstrated and in the light of a site specific flood risk assessment, and the sequential and exception tests, as applicable.

104. As the Flood Risk ITM Chapter points out, flooding is not just from fluvial or tidal sources. The development of a Traveller site may involve the laying of hard surfacing which could increase surface water run-off. Traveller sites also often lack connection to mains sewers and require the installation of a septic tank or cesspit. You should always establish the existing or intended foul and surface water drainage arrangements and consider whether the development would or could incorporate a sustainable drainage system.

Highway Safety

105. The effect of the use of land as a Gypsy or Traveller site on highway safety, with regard to matters such as the safety of the proposed access or effect on traffic congestion may be relevant.

106. You may need to have regard to:

- Characteristics of the (rural) road network.
- Any proposed mix of uses, and the nature and size of vehicles that would be moved on and off the land.
- Whether or not the number of residential pitches would generate similar trips per day than the equivalent number of dwellings, being in mind that Travellers tend to rely on their private vehicles, but do not commute daily for work, and there may be potential for shared trips on multi-pitch sites.

107. Travelling Showpeople's vehicles tend to be large and slow moving; projected vehicle movements from proposed Travelling Showpeople's sites should be assessed on an individual basis.

Access to Services and Facilities

108. It is not unusual for local authorities to suggest that proposed Traveller sites would lack adequate access to shops or services by foot, bicycle or public transport. Any such objection should be assessed and concluded upon with regard to relevant policies in development plans.

109. However, even if you find that the development conflicts with some accessibility policy requirement(s), you may need to address other matters in order to decide what weight you attach to the harm. Appellants will sometimes argue that a site is 'sustainable' even when it is inaccessible by public transport. In considering this, Inspectors may wish to take account of the following:

- Paragraphs 14 and 25 of PPTS implicitly accept that Traveller sites may be located in rural areas when this will lessen opportunities for sustainable travel, and the intended site occupants will, by definition, travel by caravan.
- Paragraph 110 of the Framework expects that, in assessing applications, it should be ensured that appropriate opportunities to promote sustainable transport modes can be or have been taken up, given the type of development and its location.
- The Framework is clear that achieving sustainable development means that the planning system has economic, social and environmental objectives. Paragraph 7 describes the United Nation's 17 Global Goals for Sustainable Development as addressing 'social progress, economic well-being and environmental protection'.
- The 'sustainability' criteria set out for Traveller sites in paragraph 13 of PPTS do not include distance from or means of transport to shops and services – but do refer to considerations which are unique to Traveller site applications[17].

110. Gypsies, Travellers and Travelling Showpeople rely on use of private vehicles for work. The number, size and fuel consumption of the vehicles needed for work may be argued in support of a case for developing a site that is not necessarily close to shops and schools but is in an area with good access to the motorway network and large catchment for work.

111. A main argument in favour of a Traveller or Travelling Showpeople's site will usually be having access to medical or educational facilities. Promoting access to appropriate health services, in PPTS paragraph 13b), is taken to meaning access as in 'ability to use' rather than the means of making the journey to the service. This is consistent with paragraph 4j) which aims to enable the provision of suitable accommodation from which Travellers can access education, health, welfare and employment infrastructure.

[17] PPTS paragraph 13d) indicates that provision of a settled base can reduces the need for long-distance travelling; paragraph 13h) notes that traditional lifestyles, whereby some Travellers live and work from the same location, can omit travel to work journeys and contribute to sustainability.

112. Any question as to whether the site would be suitable in access terms may need to be considered in the light of the circumstances of the case as a whole. With regard to development plan policies and PPTS paragraph 13, and to the pros and cons of the site, you may need to conclude as to whether accessibility is a consideration for, against or neutral in the appeal balance.

Living Conditions and Community Integration

113. Matters relating to living conditions, such as effect of the development on outlook, light and privacy at adjacent properties, should be considered in the same way as for any residential development, including whether any harm can be overcome by imposing conditions.

114. The same usually applies to noise, although on mixed use Traveller or Travelling Showpeople's sites, regard should be had to the potential for noise and disturbance from vehicle movements on and off the site, vehicular parking on the site, and any other on-site business activities.

115. It is not unusual for Travellers to enclose their sites with high hedges or walls, which may prompt objections on the grounds of visual harm and/or overshadowing. Conversely, there may be objections that Traveller sites are insufficiently screened from adjoining properties.

116. PPTS Policy H, paragraph 26d) advises that weight should be attached to Traveller sites not being enclosed with so much hard landscaping or high walls or fences that the impression may be given that the site and its occupants are deliberately isolated from the rest of the community. Subject to that criterion, the acceptability of the boundary treatment should be assessed as on any residential site.

117. PPTS paragraph 13a) seeks to promote peaceful and integrated co-existence between Traveller sites and the local [settled] community. While not all Traveller sites are subject to objections, and you may indeed see letters of support, it is not usual for such appeals to attract considerable complaints from interested parties, including groups and/or politicians.

118. In dealing with concerns as to the impact of a Traveller site on a settled community, regard should be had to:

- The fact that a Traveller site is a form of residential use.
- Any effect of the development on the living conditions of nearby occupiers.
- Whether the site, if it is or would be in a rural and semi-rural location, would respect the scale of and not dominate the nearest settled community in accordance with PPTS.
- Also in accordance with PPTS, whether the development would place undue pressure on or, conversely, help to sustain local infrastructure and services.
- Peaceful and integrated co-existence depends, by definition, on Travellers living in the same area as members of the settled community, so that they can interact

and have shared interests in the use of shops, schools and facilities such as churches.

119. Fear of crime is only material if there is some reasonable, cogent evidential basis linking the proposed use or occupiers with criminal activity. It was held in *Smith v FSS & Mid Bedfordshire BC [2005] EWCA Civ 859* that unjustified fear motivated by prejudice can never be a material consideration; it follows that unsupported submissions which link fear of crime to the characteristics of future occupiers would never justify a refusal of permission for a Traveller site but see also 'the Approach to Decision–making' ITM Chapter

120. When considering the living conditions of future occupiers, regard should be had to PPTS paragraphs 13 and 26; the latter provides that weight should be attached to the promotion of opportunities for healthy lifestyles, such as ensuring adequate landscaping and play areas for children.

Intentional Unauthorised Development

121. A 'Dear Chief Planning Officer' letter was issued on 31 August 2015 to introduce a planning policy to make 'intentional unauthorised development' a material consideration to be weighed in the determination of planning applications and appeals received since 31 August 2015. This policy was confirmed in a Written Ministerial Statement made on 17 December 2015.

122. The reason behind the policy is that the Government is concerned about the harm caused where the development is undertaken in advance of obtaining planning permission, such that there is no opportunity to appropriately limit or mitigate harm that is caused.

123. In deciding whether there has been 'intentional unauthorised development' and the weight to be attached to this consideration, it may be useful to have regard to:

- Whether the appellant did 'intend' that the site be unauthorised, given that they have sought to regularise the development by applying for a grant of retrospective planning permission.
- Likewise, in Enforcement cases, it should be noted that the appellant has sought to regularise the development by pleading ground (a) and paying a fee for consideration of the deemed planning application.
- The appellant's reasons for developing the land without waiting to obtain planning permission, for example, if they had anywhere else to live.
- The extent to which the appellant carried out works beyond, for example, what was needed to create a habitable environment.
- Whether any harm caused can be limited or mitigated by imposing necessary and reasonable planning conditions.

124. When addressing the weight to be attached to any finding that there has been intentional unauthorised development, bear in mind that the TCPA90 makes provision

through s73A for a grant of retrospective permission, and through Part VII for planning enforcement that is 'remedial not punitive'.

Other Issues

125. It is sometimes necessary to address whether the appellant or intended site occupants are living in structures which meet the **statutory definition of a caravan** as set out in s29(1) of the CSCDA60 and s13(1) and s13(2) of the CSA68; see Annex A.

126. PPTS refers to caravans in paragraphs 13 and 28 but does not specifically say that Travellers must occupy a caravan. However, it is normally expected that they will do so in order to facilitate a nomadic lifestyle, which is in turn a prerequisite for PPTS to be a material consideration when considering a proposal for a Traveller site.

127. If there are concerns or it seems to you that what is on the site is not a caravan, have regard to the statutory criteria and relevant case law when visiting the site and/or preparing questions for the hearing or inquiry[18]. It may be necessary to invite representations on whether the structure is a caravan and, if not, whether the appeal should be determined on the basis of what is there or as if for a caravan site, assuming that the latter was the basis of the (deemed) application[19] and case law on caravans is summarised in Annex B and the Enforcement Case Law ITM chapter.

128. It is not unusual for local authorities or residents to raise fear that allowing an appeal would set an undesirable **precedent** and thus limit the ability of the authority to control development on other sites, particularly in the Green Belt. As in any casework, it is necessary to show that any decision to allow the appeal is made strictly on the merits of the case[20].

129. Situations may arise, however, where it will appear that the circumstances could be replicated elsewhere, perhaps because the appeal concerns one or a small number of potential or unauthorised pitches on a larger site, or there are simply similar sites close by.

130. In such cases, it will be necessary to consider the cumulative impact of your decision with respect to the analogous pitches or sites. In *Holland & Smith v SSCLG & Taunton Deane DC [2009] EWHC 2161 (Admin),* the Court upheld an Inspector's 'unimpeachable' finding that precedent and cumulative impact were decisive considerations which justified dismissal of the appeals on four out of 16 pitches.

131. Rarely, appeals may be made for **bricks and mortar houses**, perhaps for a Traveller family to settle in. It would rarely be reasonable to restrict occupation of any such dwelling to Gypsies or Travellers since they are nomadic whether by definition or tradition. Personal conditions should also be avoided, since the PPG advises that a condition requiring the demolition after a stated period of a building that is clearly intended to be permanent is unlikely to pass the test of reasonableness.

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[19] *R (oao Green on behalf of the Friends of Fordwich and District) v FSS & Canterbury CC & Jones* [2005] EWCA Civ 1727

[20] See *Basildon DC v SSETR & Others* [2000] CO/3315/2000 (HC) and *Basildon DC v FSS & Temple* [2004] EWHC 2759 (Admin)

132. It follows that appeals for bricks and mortar houses that are ostensibly for Travellers should normally be considered as appeals for general housing – that is, in accordance with the development plan and the Framework. It may be necessary, however, to have regard to PPTS and/or personal considerations if a new dwelling is proposed on a large Traveller site for a site manager, or near to an existing Traveller site for family reasons and likewise, Traveller sites may be proposed near to existing houses occupied by family members.

Loss of a Traveller site

133. Where planning applications are made for a change of use **from** a Gypsy, Traveller or travelling showpeople's site, it is not unusual for the authority to refuse permission on the basis of harm caused to the supply of housing through the loss of pitches or plots.

134. In such cases, the proposal may conflict with any development plan policy that specifically seeks to safeguard existing Gypsies, Travellers and/or travelling showpeople's sites, or which generally seeks to safeguard residential uses or floorspace.

135. Even if there is no such conflict, you may need to have regard to evidence of the need for and supply of the relevant kind of Traveller site – and then weigh in the balance the benefits of the proposed development against the loss of the pitches or plots. If the proposal is to construct bricks and mortar housing on the land, it may be necessary to compare and contrast the five year supply of land for general housing and the five year supply traveller sites.

136. If a major development proposal would require the relocation of a Traveller site, whether permanently or temporarily, PPTS Policy G, paragraph 21 expects local authorities to work with the applicant and affected Traveller community to identify a suitable site or sites. The applicant is expected to identify and provide an alternative site, providing the development on the original site is authorised.

The Need for and Supply of Traveller Site

137. The need for and supply of Traveller sites is a main issue or consideration in almost all Traveller appeals concerning the change of use of the land.

138. It is necessary to distinguish between and deal separately with the 'general' need for sites by the authority, and the 'personal' need of the appellant(s) and/or site occupier(s)[21]. With respect to general need, the key matters to test at hearing or inquiry and address in the appeal decision are:

- The need for pitches (and/or plots) over the relevant period.
- The supply of land for pitches or plots.
- Whether there is a shortfall of sites to meet existing needs, or unmet need and, if so, the broad extent of the shortfall.

[21] *Hedges v SSE & East Cambridgeshire DC* [1996] EWHC Admin 240

- Whether the authority has a five year supply of specific deliverable sites for pitches and plots against locally set targets.

- Any proposals from the authority to redress any shortage of sites or lack of five-year supply through the development plan process or other means.

139. It may be necessary to have regard to need over a wider geographical area than just the local authority boundaries[22]. Some authorities co-operate when carrying out the assessments of need and supply described below.

Assessments of Need and Supply

140. Local authorities have a statutory requirement under s8 of the Housing Act 1985 (HA85) to undertake reviews of housing needs in their district. S225 of the Housing Act 2004 (HA04) required that such reviews would include assessments of the accommodation needs of Gypsies and Travellers residing in or resorting to their district. This is the origin of the term 'Gypsy and Traveller Accommodation (Needs) Assessment' (GTAA/GTANA).

141. Prior to PPTS, local authorities were required to undertake GTAAs to inform core strategies and allocations in development plan documents; see Annex A. The duty on authorities now is to consider the needs of people residing in or resorting to their district with respect to the provision of sites on which caravans can be stationed; s124 of the Housing and Planning Act 2016 (HPA16) repealed s225 and amended s8 to this effect.

142. PPTS expects local authorities to make a quantitative assessment of the need for Gypsy and Traveller sites in their area and make provision to meet that need through their policies and decisions. The assessment is the usual starting point for appeal decisions; indeed, the lack of any reliable or up to date assessment may be a material consideration in favour of an appeal.

143. It follows that authorities should assess their needs for Traveller sites as a sub-set of their assessment of needs for caravan sites generally, which in turn should be part of the overall assessment of housing needs in a Strategic Housing Market Area Assessment (SHMA).

144. Since these assessments should form part of the evidence base for the development plan, advice is given in the Local Plans ITM Chapter as to how they should be prepared and what they should include.

145. The quality of assessments is often subject to scrutiny in appeals casework. There is no requirement for Inspectors to make any finding on that matter at appeal, and it will rarely be appropriate to do so where the assessment was tested at the examination of a recently-adopted local plan. It should also be noted that these assessments, for the most part, contain the best evidence of need and supply in the local area.

146. Even so, it will be necessary to address any arguments that, due to deficiencies in the assessment, there is or will be a materially greater or different need for pitches or plots than anticipated. Appellants may raise concerns on some or all of the following:

[22] *Linfoot v SSCLG & Chorley BC* [2012] EWHC 3514 (Admin)

- Whether the assessment relates only to those with PPTS status or it relates to all Travellers in accordance with s124 and s8[23].

- How the assessment deals with persons whose status is unknown.

- The appropriateness of the methodology and/or reliability of the evidence informing the assessment.

- Whether the assessment factors in any backlog of need that was known or likely to have existed on the base date.

- Whether or how the assessment addresses need arising from overcrowding – perhaps from 'doubling-up'[24] or 'hidden' or 'concealed' households[25].

- Whether the assessment misses any known need, for example, if the appeal site was occupied but not counted on the base date.

- Whether future need that is likely to arise is properly factored in, for example, when temporary permissions are due to lapse.

- Whether the assessment addresses the range of needs, such as for private and public sites, for small and large family groups, for permanent and transit sites, and for different Traveller communities including showpeople.

- The reliability of assumptions made, for example, on migration of Travellers in and out of the area[26] or vacancies on public sites – where turnover is usually low and waiting lists are usually long.

- Reliance for supply from Travellers moving into bricks and mortar housing, bearing in mind that PPTS seeks to facilitate the Traveller way of life.

- Reliance for supply on Travellers moving onto privately-owned sites that are unlikely to be made available in practice.

- Whether planning permissions are properly factored in, by excluding any granted on a temporary and/or personal basis.

- Reliance for supply on sites which are 'tolerated' but not immune from enforcement action – or which may not be 'deliverable'.

- The likelihood of and timescale for delivery of new site provision.

- The reliability of estimates of new household formation.

[23] See also the **draft** '*Guidance to Local Housing Authorities on the Periodical Review of Housing Needs: Caravans and Houseboats'*– DCLG 2016
[24] Where caravans that accommodate two or more households are stationed on one pitch.
[25] Where one pitch or even caravan accommodates an extended family, including adult children who are still at home through lack of access to a pitch of their own.
[26] Difficulties in predicting migration are such that some assessments assume nil net migration.

147. While considerable evidence may be presented, bear in mind that it is usually unnecessary – if not inappropriate – to go into extensive detail on these issues in an appeal decision. You will only need to give reasoning to support conclusions as to:

- Whether the Council's assessment is broadly accurate or there is likely to be a greater or lesser need for pitches or plots.
- Prospects and timescales for the anticipated supply coming forward.

148. On the whole, it can be more straightforward to assess need for Travelling Showpeople's sites than for Gypsies or Travellers, because there is little doubt about their status through their membership of trade associations.

149. However, since there are relatively few Travelling Showpeople, and they are traditionally concentrated across widely scattered districts, assessments may not be useful unless carried out by authorities co-operating across sub-regions. Wide variations between numbers of showpeople in adjoining authorities, leading to localised needs for additional, alternative or enlarged sites are a frequent aspect of showpeople distributions.

150. If your findings in respect of need and/or supply would differ from those set out in the assessment relied on by the authority, it may be prudent to state that your conclusions are made on the evidence before you and are only for the purposes of this appeal decision, so as to avoid tying the hands of the authority or other Inspectors in future proceedings.

Other Evidence and 'Need on the Ground'

151. Other evidence pertaining to the need for or supply of Traveller sites may be given at appeal.

152. The Gypsy Caravan Count has been undertaken every year in January and July since 1979[27]; it is carried out for DLUHC, usually by local authority Gypsy and Traveller Liaison, Housing or Environmental Health Officers. It provides a record of the number of caravans on authorised public and private sites and on unauthorised developments and encampments.

153. The accuracy and consistency of the count varies between local authorities, and it is in any event only a record of occupation; it is best regarded as a snapshot of the number of caravans present in that area on those dates. In that regard, however, the counts may indicate general (patterns of) need over time, and whether there is likely to be any 'need on the ground'.

154. Information may also be submitted with regard to changes in circumstances that have occurred since the assessment base date:

- Planning permissions granted, and whether any sites permitted would be available to Travellers not known to the land owner.

[27] The counts typically show fewer caravans in July than in January, since Travellers are more likely to be on the road in the summer months.

- The progress of a site allocations development plan document, the prospects of draft allocations being permitted and the likely date(s), if known, at which such new sites may come forward.

- Evidence of need arising from unauthorised developments or encampments, or the loss of Traveller sites to redevelopment.

155. Any evidence of 'need on the ground' or changes in circumstances since the base date should be considered if and when addressing the reliability of the authority's needs assessment. Outside of the assessment process, counts of Travelling Showpeople tend to be carried out on an irregular basis.

Unmet Need

156. The Council's assessment and/or other evidence, including that of need on the ground, may show that the local authority does not have sites available to meet the current needs of Travellers residing in or resorting to the district. This situation may be variously described as a 'backlog of need' or 'unmet need' or 'shortfall of sites'.

157. It is normally necessary to make a finding in an appeal decision as to whether there is an outstanding need for pitches/plots and, if so, the broad scale of the unmet need relative to the Traveller population.

158. Inspectors should be aware that unmet need can indicate an immediate and pressing need for Traveller sites. As with any material consideration, however, the actual weight attached to unmet need is a matter for the decision-maker with regard to all of the evidence.

Five Year Land Supply Issues

159. After making a finding as to whether there is any unmet need for Traveller pitches or plots, it will usually be necessary to decide and ascribe weight as to whether the authority has a five-year supply of specific deliverable sites against their locally set targets in accordance with paragraph 10a) of PPTS.

160. Footnote 38 to the Framework is clear that whether there is a five-year supply of deliverable sites for Travellers as defined in PPTS should be assessed in line with PPTS, rather than paragraph 74 of the Framework.

161. Other matters which may need to be addressed when considering whether an authority has a five-year supply include:

- Whether the supply includes a mix of public and private, large and small sites.

- Whether the Council intends to allocate existing unauthorised sites or sites with temporary permissions – which would ensure deliverability but only address the needs of the existing occupiers.

- Evidence of the deliverability of new sites.

- Whether there is a provider of and funding for any proposed affordable pitches.

- The acceptability of the sites for residential use, with regard to the development plan and PPTS.

- Constraints such as the need for or cost of environmental mitigation work.

- Clarity over what would be delivered by who and when, where it is proposed that pitches would be provided within mixed allocations.

- Whether allocations would meet identified needs for different Traveller groups.

162. As with unmet need, it is not necessary to describe the Council's supply of sites with arithmetical precision. In *Swale BC v SSHCLG & Maughan & Others [2018] EWHC 3402 (Admin),* it was held that an Inspector did not err in law in deciding to grant temporary planning permission for a Traveller site partly on the basis of there being a 'substantial shortfall' of pitches.

163. As noted above, in Traveller casework, neither a shortfall in the supply of general housing land nor the absence of a five-year supply of Traveller sites will 'trigger' the provisions of paragraph 11d) of the Framework or automatically render the development plan policies that are most important for determining the appeal out of date.

164. However, paragraph 27 of PPTS requires that where an authority cannot demonstrate an up to date five-year supply of deliverable sites, this should be a significant material consideration when considering applications for temporary permission except in relation to land within a designated Green Belt or other specified areas. Paragraph 27 applies if the appellant seeks permanent permission in the first instance but you have found against that and so are considering a grant of temporary permission instead.

Emerging Plans

165. If there is an emerging local plan and/or DPD you should seek to establish the stage(s) these are at, and whether they contain any policies and/or allocations that are proposed in order to bring forward a supply of Traveller sites. Other questions to address may include:

- Whether there is or will be a new accommodation needs assessment.

- Whether the Council accepts that there is a need for more Traveller sites.

- The likelihood of and timescales for the plan being adopted in its current form.

- The prospects of and timescales for any proposed allocations being granted planning permission and made available for occupation.

166. Weight should be attached to emerging local plans and their policies or allocations in accordance with paragraph 48 of the Framework.

'Large Scale Unauthorised Site[s]'

167. PPTS Policy B, paragraph 12 states that:

168. 'In exceptional cases, where a local planning authority is burdened by a large-scale unauthorised site that has significantly increased their need, and their area is subject to strict and special planning constraints, then there is no assumption that [they are] required to plan to meet their Traveller site needs in full.'

169. After the Government consulted on the introduction of that policy[28], it responded that 'the consultation indicates that there is only one local authority caught in this position (Basildon District Council in respect of Dale Farm)'[29]. Since Dale Farm was an exceptional site with some 80 unauthorised pitches, there will be a high threshold for 'large scale unauthorised site' to be a material consideration.

170. If there is such a large scale unauthorised site in the area, the implications should properly be addressed at the local plan examination. If that has not happened, perhaps because of when the development took place, you may need to hear representations as to whether the unauthorised site is indeed 'large scale' and, if so, to what extent the authority would be reasonably required to plan to meet their Traveller needs.

Alternative Sites

171. Whether an appellant relies on general need, personal need or both, there is no requirement for them to prove a need to live specifically on the appeal site, or that no other site is available. The Court of Appeal held in *South Cambridgeshire DC v SSCLG & Brown* [2008] EWCA Civ 1010 that:

> 'In seeking to determine the availability of alternative sites for residential Gypsy use, there is no requirement in planning policy, or case law, for an applicant to prove that no other sites are available or that particular needs could not be met from another site. Indeed such a level of proof would be practically impossible…'

172. However, the existence of otherwise of alternative sites is typically a material consideration in Traveller appeals for two reasons:

- Evidence as to the availability of alternative sites may assist in understanding the general position in relation to the supply.
- Evidence that the appellant has conducted an unsuccessful search for an alternative site, or other evidence that such accommodation options are limited can add weight to the case for an appeal, for example, from Council planning or housing records, or from Council housing or Gypsy and Traveller liaison officers, or from site managers, estate agents, landowners or other Travellers.

173. Any potential alternative sites should be explored with the parties at hearing or inquiry. The Council in particular should be asked:

- For suggestions or knowledge of other sites.
- Whether any suggested other sites are realistic.

[28] Consultation: Planning and Travellers – DCLG, September 2014
[29] Planning and Travellers: Proposed Changes to Planning Policy and Guidance – DCLG, August 2015

- The chances of obtaining permission to develop another site.
- The likelihood of and timescale for other sites becoming available.

174. In summary, but subject to the advice below, alternatives to the appeal site which may be realistic can include:

- Obtaining planning permission for another site.
- Buying a site subject to an extant permission or lawful development certificate.
- Renting a vacant pitch on an existing private site.
- Going on the waiting list for an existing public site.

175. However, there should be evidence of specific alternative sites, and they must be suitable, affordable, acceptable and available to be a genuine or realistic alternative[30]. This is a matter on which you may need to canvas all parties' views, although not in any depth in most cases; the lack of any realistic alternative is not usually disputed.

176. If it is necessary to look at whether suggested alternative sites are not realistic, bear in mind that the appellant's evidence does not have to be corroborated or detailed; their case should be accepted if it is clear and there is nothing to suggest that it is wrong.

177. This is important because many Travellers have difficulties with reading and writing. Most land deals between Gypsies are by word of mouth and a handshake – which does not absolve them of the need to register details of the land transfer with the Land Registry but does mean that there will be less written evidence before you.

178. Moreover, landowners and estate agents are unlikely to provide written statements of the non-availability of sites. Local authorities may not concede that there are problems on any public sites. There will rarely be documentary evidence of personal matters that might make it impossible for an appellant to move onto sites owned by other Travellers in the area.

Suitability

179. The appellants should be asked to explain why any suggested alternative sites are 'unsuitable' in their view and Inspectors should judge whether their case is reasonable. Key matters to explore are usually the size, characteristics and/or location of such sites, with regard to planning merits and/or the appellant's requirements.

180. To be considered realistic in planning terms, alternative sites should be capable – in principle – of being used for residential purposes without causing unacceptable harm to the environment or community in conflict with the development plan, the Framework or PPTS.

[30] *Doncaster MBC v FSS & Smith* [2007] EWHC 1034 (Admin)

181. In terms of size and needs, if permission is being sought for land large enough to include more than one pitch or plot, to accommodate more than one household, you may need to establish facts such as:

- How long the group has been together, if applicable.
- The consequences for them of living apart.
- How important it is for them to remain together.
- Whether they could live separately on smaller sites that are relatively close by[31].

182. Similarly, you may need to address whether and why the appellant requires a site that is large enough and includes suitable space to meet other needs, for example, the stabling of horses or storage of business equipment.

183. In terms of location, PPTS paragraph 24e) is clear that authorities should determine applications for sites from any Travellers and not just those with local connections. However, you should address any evidence that the appellant requires a site in the appeal area when considering whether there are suitable alternative sites, for example:

- Work related reasons for living in the appeal area, such as road links or proximity to sources of work.
- Education or health-related reasons, such as children attending a particular school, or any occupier being treated at a local hospital.
- Proximity to family and/or upbringing in the area.

184. If the appellant or occupiers have connections with or could otherwise live in an area beyond the jurisdiction of the authority, it may be necessary to consider the likelihood of accommodation becoming available elsewhere. It was held in *Linfoot v SSCLG & Chorley BC* [2012] EWHC 3514 (Admin) that the option of a temporary permission should not have been discounted on the basis that a change in planning circumstances would not occur when there was in fact a possibility of changes across the county.

185. The needs to use, store and/or move plant, machinery and heavy vehicles on travelling showpeople's sites may mean that commercial areas are acceptable or even favourable to avoid harming the living conditions of nearby residential occupiers. However, Showpeople themselves will require a reasonable residential environment and all of their needs will need to be considered when considering the suitability of alternative sites.

Affordability

186. The importance of affordability was addressed in *Chapman v UK* [2001] ECHR 43, albeit with regard to human rights considerations:

[31] *Moss v FSS & South Cambridgeshire DC* [2003] EWHC 2781 (Admin)

- ‘The cost of a site compared with the applicant’s assets, and its location compared with the applicant’s desires are clearly relevant. Since how much the applicant has by way of assets, what outgoings need to be met by her, what locational requirements are essential for her and why they are essential are factors exclusively within the knowledge of the applicant, it is for the applicant to adduce evidence on these matters.’

187. While is reasonable to ask how much was paid to purchase a site, detailed questions about assets and the affordability of another site may be unduly intrusive. The answers may not be reliable in any event, or recordable in a decision without compromising data protection regulations.

188. It is usually appropriate to focus questions on the price of land in the area and whether there is any reasonable prospect of the appellant being able to afford another site, whether with or without permission.

Availability and Acceptability

189. If you are given evidence to the effect that other sites are or will soon become available, you may need to judge whether they can be realistically considered as available or acceptable.

190. It is reasonable to ask appellants if they have considered joining a Council waiting list, and to try to establish the likelihood and time scale for getting a pitch or pitches. Grounds put forward for not seeking or accepting a Council pitch may include:

- Poor prospects of being offered a pitch or pitches in the foreseeable future.
- Restrictive qualifying criteria for sites.
- Poor condition of the site.
- History of poor management or violence on the site.
- Animosity between groups and/or individuals.
- Distance of the site from schools or other crucial services.

191. Animosity may arise from family or ethnic differences and be described in terms of the dominance of the site by a single family, a fear of violence or intimidation, or a falling out between family members. Animosity between or within some families can go back generations and be a real bar to living on the same site, bearing in mind that living in a caravan on a rented public site is likely to be less private or secure than living in conventional housing.

192. Animosity may also be a reason why pitches on private rented sites are not available or acceptable to the appellant. In any event, Travellers who own private sites tend to keep ‘vacant’ pitches for friends and family members, in the same way that occupiers of bricks and mortar homes rarely let out spare bedrooms.

193. Where the appellant seeks permission to develop a site for their family, they may say that they only wish to live on their own property. The claim will carry limited weight if the

appellant is homeless, although it should also be treated with sensitivity, since PPTS promotes more private Traveller site provision, and the appellant may have lived experience of being moved on.

Weighing the Options

194. In your decision, you will need to reach a reasoned conclusion as to whether there are alternative sites with regard to the above and:

- Whether any alternative sites would be less, more or similarly harmful in planning terms than the appeal development.
- Whether any alternative sites would meet the needs of the appellant and/or intended site occupants, with regard to their private and family life, including their Traveller way of life.
- Whether dismissing the appeal would be likely to make the appellant and/or intended occupants homeless – and lead to camping on unauthorised sites that is not in the public interest.
- If the site is already occupied, the prospects for or stage of enforcement action.

195. Alternatives which are rarely realistic in the long-term include:

- Staying on another site while the occupiers are travelling; this would normally be a temporary measure at best and could not take place in breach of any 'personal' condition that the site is subject to.
- 'Doubling-up' on an existing pitch; this would likely be in breach of condition and result in overcrowding.
- Moving into bricks and mortar housing; this option may need to be explored but will often be contrary to the Traveller way of life and unaffordable. It is not uncommon to find that families have tried bricks and mortar accommodation before but, for a variety of reasons, found it unworkable.
- Moving onto a Park Home or static caravan site, where occupiers buy a caravan that is already on the land and pay a monthly rent to live there. Such sites are often occupied by older members of the settled community seeking affordable retirement housing and so subject to rules which set a minimum occupier age and prevent the parking of other caravans and/or the keeping of dogs. From the legislative and practical controls, financial aspects and social make up, such sites are rarely suitable, affordable, available or acceptable to Travellers.

Policy Failure

196. It is sometimes argued by appellants that 'policy failure' on the part of the local authority should be treated as a material consideration in favour of an appeal for a Traveller site. Whether that is the case and, if so, the weight to be attached to the consideration will depend on the evidence and be for the judgment of the decision-maker.

197. There must be more to policy failure than giving a different name to any existing unmet need or shortfall on a five year supply of pitches or plots. For a claim to be supported, there must be evidence of a **persistent** failure of the authority to put policies or other measures in place to meet the accommodation needs of Travellers **and** of a corresponding long-standing unmet need for sites[32].

198. As set out in Annex A, the CSCDA60 was designed to regulate and control private caravan sites. S23 of the Act gave local authorities the power to close common land to Gypsies and Travellers – and this led to a shortage of stopping places, although s24 had given local authorities a power to provide (compensatory) caravan sites.

199. Accordingly, s6 of the CSA68 imposed a duty on local authorities to provide sites for Gypsies[33]. However, s6 was repealed by s80(1) of the CJPOA94 – which also amended by the CSCDA60 by inserting s24(2)(c) so that local authorities would have the power to specifically provide sites for Gypsies.

200. Circular 1/94: Gypsy Sites and Planning (C1/94) made it clear that, after the repeal of the s6 duty:

> '…planning authorities should continue to indicate the regard they have had to meeting Gypsies' accommodation needs…in their development plans, through appropriate use of locational and/or criteria-based policies'.

201. Since C1/94, through C1/06: Planning for Gypsy and Traveller Caravan Sites and C4/07: Planning for Travelling Showpeople, PPTS 2012 and PPTS 2015, local authorities have been continually required to plan to meet the accommodation needs of Travellers.

202. There may be scant information as to whether or how the authority has planned to meet Traveller needs, and how long there has been any backlog of need. However, if the appellant pursues a case based on policy failure, they may submit evidence in the form of historic development plan documents, GTAAs and/or appeal decisions.

Personal Circumstances

Facts to (Try to) Establish

203. Personal circumstances are often pleaded in aid of Traveller site appeals– and were a key factor in the judgment of the House of Lords in *South Buckinghamshire DC v SSTLR & Porter (No. 2)* [2004] UKHL 33 to uphold an Inspector's decision to grant permission, subject to a personal condition, for a Traveller site in the Green Belt.

204. When addressing personal circumstances at hearing or inquiry, and in the decision, bear in mind that you will need to have regard to the best interests of the child(ren) in

[32] The report (5 April 2019) of the House of Commons Women and Equalities Select Committee inquiry into 'Tackling inequalities faced by Gypsy, Roma and Traveller communities' criticised a 'persistent failure by both national and local policy-makers to tackle inequalities in any sustained way', albeit with regard to policy issues other than those related to Traveller sites or encampments.

[33] *R v Lincolnshire CC ex parte Atkinson* (1996) 8 Admin LR 529

your overall conclusion and for the avoidance of doubt, children are those under 18 years old, whether or not they leave education or start work before that age.

205. The first question is whether the appellant and/or intended occupants has or have a personal need for a settled base. As noted earlier, the fact that Travellers have nomadic lifestyles does not preclude them from needing a base to which they can return during periods between work. It follows from paragraphs 4f), 4h) and 13d) of PPTS that the under-provision of Traveller sites can lead to unauthorised encampments, environmental damage and community tensions.

206. The starting point will be whether the appellant and/or intended occupants has or have anywhere else to live lawfully. It will be necessary to establish:

- Where they are living now, if not on the appeal site.
- Whether they have ever had a settled base.
- If not, where they lived in the past.
- If so, why they left their former settled base, with regard to issues set out under 'Alternative Sites' above.
- Whether they can return to any other site in any event.

207. You may need to look at any personal circumstances which would add weight to the case for a grant of permission for their residential use of the appeal site, having regard to the significance of any individual's particular situation on the appellant group as a whole[34], and indeed the Traveller tradition of living in extended family groups for mutual care and support.

208. The definitions set out in PPTS Annex A allow Travellers and travelling showpeople to cease travelling temporarily 'on grounds only of their own or their family's or dependants' educational or health needs or old age'. The appellant does not need to show that such educational or health needs are in some way 'special' in order for you to conclude that they have a personal need for a site or indeed a personal need to live on this site.

209. It will be necessary for the appellant to describe the considerations that they wish you to take account of in your decision. It follows that you will need establish the relevant facts in the case – starting with:

- The names of and relationships between the intended site occupants[35].
- Which occupiers, if any, have parental and/or caring responsibilities or are 'dependants'.

[34] *Dartford BC v FSS & Lee* [2004] EWHC 2549 (Admin)

[35] Married women in Traveller communities may use their birth and married surnames interchangeably. Men may also have two surnames and a family group may have a 'clan' name.

- The number and ages of any children, noting particularly any under 5.
- Any adults who need particular support and/or are aged 65+.
- In the case of an extended family group, how long they have lived together or why they need to do so now.

210. Turning to **education**, the usual assessment required in Traveller cases is of the benefits of the child(ren) continuing or starting education from the appeal site compared with the likely ramifications of refusing permission. You will need to establish:

- How many children are currently enrolled at school.
- Whether the children are enrolled at primary and/or secondary school(s).
- The location of the school(s) and how they are or would be accessed from the site.
- How the children have settled at the school and their attendance.
- Whether any children are on a register of special educational needs (SEN) or receiving any other special/extra help at school.
- The children's educational history: when they were first enrolled at school, any previous schools attended, any previous or continuing home schooling.
- The consequences for the children's education of the appeal being dismissed, with regard to the availability of alternative sites and, if the appellants are already living on the appeal site, the prospects or stage of enforcement action.

211. Many children successfully change schools when their parents move home, but it is difficult for Travellers to enrol children in school and/or maintain the children's attendance if they have no fixed address or need to move between a series of temporary and/or unauthorised sites[36]. Children are likely to have lower educational attainment and suffer from the disruption if they miss school regularly or have to move between different schools[37].

212. Inspectors should make reasoned findings[38] on whether dismissing the appeal would be likely to render children homeless and what effects this would likely have on their access to and stability of education. You should consider the likelihood and degree of disturbance to education, the number of children involved, the strength of connection

[36] Notwithstanding that s13(1) of the Education Act 1996 imposes on local authorities a general responsibility to make primary, secondary and further education available to meet the needs of the population of their area. It was held in *Hughes v FSS & South Bedfordshire DC* [2006] EWCA Civ 838that 'it is safe to assume that the Inspector was well aware of the local authority's obligations under the Education Act 1996 to make provision for the education of children in its area.'

[37] "A change of home, carer, social worker or school almost always carries some risk to a child's development and welfare", paragraph 1.6 of the Children Act 1989: Guidance and Regulations Volume 2 (June 2015)

[38] *Coyle & Others v SSCLG & Basildon DC* [2008] EWHC 2878 (Admin)

with existing school(s), and the transferability of any special help to another school. These are all factors which may carry weight depending on the circumstances.

213. It has been accepted that educational needs carry significant weight even when they are not special or unusual[39], as well as when there are special educational needs[40]. But even where this consideration is significant **and** there is no realistic alternative site, the balance may still be against the appellant if sufficient harm is or would be caused by the development[41].

214. Inspectors have granted temporary permission in cases where there was a clear end point or key date for what were decisive educational needs. However, most appeals casework relates to Traveller families which include adult women of child-bearing age and/or children of different ages, and so there will usually be no obvious change in circumstances as to justify a grant of temporary permission on educational grounds alone.

215. Traveller communities have worse **health** outcomes than the population as a whole[42]. In 2006, it was recorded that Traveller life expectancy is lower by ten years for men and 12 years for women compared to the settled population; 42% of Travellers had a limiting long-term illness compared to 18% for the settled population; 18% of Traveller mothers had experienced the death of a child, compared to less than 1% of settled mothers[43] [44].

216. Since sick, disabled or elderly Travellers are cared for by their families, it is not unusual for health matters to be raised in Traveller appeals. Since there is a public health interest in universal access to basic health care, you will need to establish in each case:

- Whether the intended site occupants are registered with a GP.
- The location of the practice and how it is or would be accessed from the site.
- If applicable, why the occupiers are not registered with a GP[45].

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[39] *Basildon DC v SSETR & Others* [2000] CO/3315/2000 (HC)
[40] *Dartford BC v FSS & Lee* [2004] EWHC 2549 (Admin)

[41] *Doran v SSCLG* [2010] EWCA Civ 1798
[42] See the *Health Status of Gypsies and Travellers in England*, University of Sheffield on behalf of the Department of Health, 2004; The report (5 April 2019) of the House of Commons Women and Equalities Select Committee inquiry into '*Tackling inequalities faced by Gypsy, Roma and Traveller communities* affirmed that 'Gypsy , Roma and Traveller people have the worst outcomes of any ethnic group across a huge range of areas, including education, health, employment, criminal justice and hate crime'.

[43] Annex A (Race Equality Impact Assessment) to the Explanatory Memorandum to the *Housing (Assessment of Accommodation Needs) (Meaning of Gypsies and Travellers) England Regulations 2006* (SI 2006/3190).

[44] Although overcrowding can be a major problem on many travelling showpeople's sites, especially from family growth and larger sized equipment, this community does not appear to have the same concentrations of major health problems and high morbidity as there are amongst Gypsies and Travellers.
[45] The then Secretary of State for Health, Jeremy Hunt confirmed in a letter of 26 March 2015 to Friends, Families and Travellers that GP practices cannot refuse an application to join its list of NHS patients on the grounds of race, gender, social class, age, religion, sexual orientation, appearance, disability or medical condition, and there is no requirement for an applicant to have a permanent address or a provide identification when registering with a GP.

- If the occupants are living on the appeal site, why they are not registered with a **local** GP.

- Whether any intended occupants have health problems and, if so, the effects or limitations of these conditions[46].

- Whether any intended occupants are receiving regular treatment from a GP, clinic or hospital and, if so, the frequency and location of appointments.

- Whether any occupiers require full or part-time care from another occupier or relative living close to the site.

217. As with education, it is usually necessary to establish the benefits for the individuals involved of being allowed to stay on the site compared to the consequences of a dismissal of the appeal – in terms of routine health care and/or particular health problems or caring needs, and with regard to the availability of alternative sites and, if the occupiers are already living on the appeal site, the prospects or stage of enforcement action.

218. If no alternative, available and affordable site has been identified, consider what the health and day-to–day living implications for the occupiers would be. Where it is likely that dismissing the appeal would render the occupiers homeless, this may:

- Make it difficult to access health care on a consistent basis.

- Make it difficult to access fresh water, sanitation and washing facilities.

- Make it difficult for family members to stay together and sustain caring responsibilities.

- Lead to frequent moves from various unauthorised sites, and thus a lifestyle which is inherently insecure and physically demanding.

219. As with education, health problems or caring needs do not have to be 'special' to be given significant weight, although acute or unusual problems or needs may attract additional weight.

Dealing with People: Issues when Hearing Evidence

220. Where personal circumstances are raised, it is helpful if documentary evidence is provided from appropriate professionals. The authority should be asked if they accept the contents of such material.

221. At hearings or inquiries, appellants and witnesses may agree to be cross examined or asked questions. As in any other type of casework, Inspectors should be alert to the inherent sensitivities in dealing with personal circumstances and consider whether, or the extent to which it is necessary for such details to be aired orally in public. Questions

[46] Bearing in mind that the definition of disability in s6 of the Equality Act 2010 focusses not on the diagnosis but on the effect of the 'impairment' on ability to carry out normal day-to-day activities.

and discussion should be limited to the minimum needed for you to understand and assess the implications of their circumstances for the appeal decision.

222. You should curtail unduly intrusive questioning of appellants or others on personal matters – or on the Traveller way of life, including that Travellers live and work in family groups; care for the elderly, sick or disabled members within the family; and require particular sanitation facilities. If necessary, you can clarify what these traditions are for the benefit of settled persons who are interested parties.

223. You should ensure that any person with difficulties in reading and writing is able to fully participate in the hearing or inquiry, perhaps by giving their agent time to talk them through documents or, if they are unrepresented, giving clarifications yourself throughout the event. If appropriate, explain to the parties that giving the individual time and assistance is necessary to ensure that proceedings are fair, and that you get the evidence needed.

Dealing with Information: Data Protection

224. As public events, hearings and inquiries must be conducted to avoid the publication of sensitive personal information. You may require that any filming or recording of a hearing or inquiry is paused when any personal matters are to be described in evidence or submissions.

225. Full advice on writing decisions to enable publication which does not contravene data protection regulations is set out in the Approach to Decision-making chapter. The approach in summary is:

- If personal information is relevant, you should **not** describe it in detail but only in general terms, by reference to the relevant documents or verbal evidence. It would suffice to say, for example, that you have had regard to the letters submitted by the appellant concerning the [educational] needs of the [children] and then set out what weight you give to the evidence.

- 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 mentor, manager or professional lead. Any such information should be set out in one place in the decision for ease of redaction.

It is accepted, in relation to data protection regulations, that some personal information is likely to be more sensitive, based on the potential harm or impact on the individual(s). 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. Similarly, you should be alert to the risk of hate crime against Travellers, whether or not they are or are not perceived to be ethnic Romany Gypsies or Irish Travellers.

PPTS Status

226. It is not unknown for authorities to cite lack of PPTS status as a reason for refusing an application for a Traveller site. However, planning permission normally runs with the land, and so it is not necessary for an appellant or developer to have PPTS status in

order to apply for permission to use of land as Traveller site; any individual or company may do so.

227. The starting point is whether the use of land as a Traveller site is acceptable in planning terms, irrespective of any personal needs and with regard to the fact that the identity of the occupants could change. If the use is acceptable on its merits, the question of status will be immaterial.

228. Furthermore, where permission is granted for the use on the basis of need for Traveller sites and/or other matters related to PPTS, a condition should be imposed to restrict occupation to persons with PPTS status. If it later appears to the authority that the site is occupied by persons who do not have PPTS status, they can take enforcement action against a breach of the condition.

229. It follows that PPTS status will normally be relevant to a decision only where the appellant relies on personal circumstances as a consideration in favour of a grant of permission. That said, if there is any objection to a grant of permission on grounds of PPTS status, it will be necessary for you to test the evidence at a hearing or inquiry.

230. Where they are represented, appellants will often supply some information pertaining to PPTS status with their appeal; this should be accepted unless it is disputed by the authority or interested party.

Facts to (Try to) Establish

231. If it is necessary to establish PPTS status the following should be borne in mind. While most relevant legal judgments now post-date PPTS 2015, a common and still applicable theme of them is that the determination of Traveller status is a question of fact and degree[47].

232. Paragraph 2 of Annex 1 to PPTS states that 'consideration should be given to the following issues amongst other relevant matters':

- whether they previously led a nomadic habit of life
- the reasons for ceasing their nomadic habit of life
- whether there is an intention of living a nomadic habit of life in the future, and if so, how soon and in what circumstances.'

233. A 'nomadic habit of life' must have an economic purpose; it was held in in *R v South Hams DC ex parte Gibb* [1994] QB 158 (Court of Appeal) that for the purposes of the CSA68, Gypsies are 'persons who wandered or travelled for the purposes of making or seeking their livelihood…not…persons who moved from place to place without any connection between their movement and means of livelihood'.

[47] See Annex B, and particularly *Wrexham v NAW & Berry* [2003] EWCA Civ 835 or *Medhurst v SSCLG* [2012] EWHC 3576 (Admin), [2012] JPL 598.

234. Living away in a caravan from time to time for work, akin to a builder, may be insufficient to establish PPTS status[48]. However, travelling for work does not need to be the main or primary source of family income; trading at horse fairs for up to two months of the year can maintain status, so long as it has an economic purpose and is more than a hobby[49]. Travelling can be undertaken seasonally with regular return(s) to the settled base for part of the year[50].

235. You may therefore need to ask questions such as:

- What kind of paid work is carried out by the occupiers.
- Patterns of travelling for work – and whether these have changed or would change on living on the site.
- Whether the occupiers own any horses and, if so, are they kept as a hobby or for breeding and/or trading.
- Where they keep their horses, and do they own or rent that land.
- Do they go to horse fairs to buy or sell horses, or trade in any other respect?

236. The relevant time to consider whether the appellant has PPTS status is at the date of the decision[51] although their previous lifestyle is relevant. The PPTS definitions do not embrace those who have never had a nomadic habit of life, even if they are now living in a caravan; they are catered for instead through general planning policies for housing, which embrace residential caravan and mobile home sites.

237. The inclusion of the word 'temporarily' in the definitions indicates that people who have ceased travelling should have done so for reasons related to education, health or old age – and will resume travelling at some point in the future. If the appellant or others have ceased travelling temporarily, you will need to establish whether they 'ever qualified as persons of nomadic habit of life', why they stopped travelling[52] and, crucially, how long they will cease travelling for.

238. Some members of a family or group may travel more than others; working age men typically travel routinely, but women, children and older men tend to travel less often, perhaps only for holidays. Inspectors should investigate the extent to which each occupier travels, the reasons for not travelling where applicable and the relationships between the individuals.

[48] *Clarke-Gowan v SSTLR & North Wiltshire DC* [2002] EWHC 1284 (Admin)
[49] *Maidstone BC v SSE & Dunn* [1995] HC CO/2349/94
[50] *Greenwich LBC v Powell* [1989] 1 AC 995, (1989) 57 P&CR 49 (UKHL)
[51] *Hearne v SSW & Carmarthenshire CC* [1999] EWHC 494 (Admin); [2000] JPL 161 (CoA); it would not necessarily be relevant if the appellants would (have to) start leading a nomadic lifestyle upon dismissal of the appeal.
[52] *R (oao Massey & Others) v SSCLG & South Shropshire DC* [2008] EWHC 3353 (Admin), paragraph 23.

239. If you find that all occupiers have PPTS status, the final decision will be based on all considerations, including any general need for Traveller sites as well as the relevant personal circumstances. The same may apply if some occupiers have PPTS status and some do not or are dependant, and there is an overriding need for the family to stay together[53].

240. Individuals who do not have PPTS status cannot benefit from any policies aimed at providing for Travellers, although the proposal should be considered on the basis of its description[54]. A grant of permission for the development could be justified if the use would be acceptable on its merits as described above or the harm is outweighed by personal circumstances alone, with regard to human rights and equality implications.

241. Mr Justice Pepperall held in paragraph 83 of *Smith & Others v SSHCLG & NW Leicestershire DC* [2021] EWHC 1650 (Admin) that 'the exclusion of permanently settled Gypsies from PPTS 2015 was objectively and reasonably justified' for reasons including that the cultural needs and personal circumstances of settled Gypsies must be taken into account upon any planning application'. However, this decision was overturned in the Court of Appeal.

242. In *Smith v SSLUHC & Ors [2022] EWCA Civ 1391,* the Court of Appeal held that the PPTS 2015 definition was unlawfully discriminatory. That definition remains extant despite this and in some cases, there may still be discussion between the parties on matters relating to the PPTS 2015 definition, for example, whether the supply/needs assessment is robust, who can benefit from local plan/PPTS policies, whether the appellant has PPTS status and how to word any occupancy condition.

243. In addressing such questions, the Inspector must bear in mind that the definition is discriminatory and has no legitimate aim. It follows that the definition cannot be applied and the Inspector cannot consider whether it would be 'proportionate' to apply the definition in any reasoning or aspect of any particular case.

244. However, since the rest of PPTS is untouched by the *Smith* judgment, it will normally remain necessary for the Inspector to address in their overall conclusion whether it is 'proportionate', in Human Rights and PSED terms, to grant planning permission for the development at all.

245. Local authorities do not often challenge whether Travelling Showpeople meet the PPTS definition, since most are members of the Guild. A regional representative of that organisation will often make written representations and/or attend the hearing/inquiry not only to support the appellant but also to provide an overview on need generally and whether there are realistic alternative sites.

[53] The House of Lords defined 'dependants' as persons living in family with the person defined and dependent on him (or her) in whole or in part for their subsistence and support; *Fawcett Properties Ltd v Buckingham CC* [1961] AC 636. It was held in *Shortt & Shortt v SSCLG & Tewksbury BC* [2015] EWCA Civ 1192 that, as a matter of ordinary language, 'dependants' is capable of referring to relationships without financial dependency.

[54] *Hearne v SSW & Carmarthenshire CC* [1999] EWHC 494 (Admin), [2000] JPL 161 (Court of Appeal); *South Cambridgeshire DC v FSS & McCarthy & O'Rourke* [2004] EWHC 2933 (Admin)

Temporary and Personal Conditions

246. When considering an appeal for a change of use of land for a Traveller or Travelling Showpeople's site, appellants will often ask you to grant permission, if not on a permanent, then **temporary** basis. Even if they do not, you should address this possibility[55].

247. As with any other casework, most Traveller appeals will be dismissed or allowed with a grant of permanent permission. Where the latter outcome would be unacceptable[56] but considerations of hardship arise from the difficulties of finding alternative accommodation, you have the option of granting a temporary permission.

248. The PPG states that circumstances where a temporary permission may be appropriate include where it is expected that the planning circumstances will change in a particular way at the end of that period[57]. You should have regard to the likelihood of any change that may occur during the potential timescale of a temporary permission whether through adoption of an emerging local plan or otherwise, in respect of any of the main issues for the appeal, particularly the supply and availability of sites.

249. It will always be necessary to explain why you will impose a temporary condition and why it will last for whatever period is specified. There should be a realistic prospect that by the end of that period the circumstances will have changed. If there is no realistic prospect of that, you should either dismiss the appeal or grant permanent or personal permission[58]. As noted above, you may need to take account of possible changes across a wider geographical area than just that of the local authority[59].

250. The period chosen will depend upon the circumstances of the case, but often depends on when alternative sites seem likely to become available. Relatively few temporary permissions have been granted for more than three years by Inspectors.

251. The PPG also provides for '*exceptional occasions where granting planning permission for development that would not normally be permitted on the site could be justified…because of who would benefit from the permission*'[60]. As indicated above, if personal circumstances would be critical, planning permission should be granted subject to a **personal** condition which refers to the names of the beneficiaries and their dependants.

252. Those named in the condition need not be restricted to or even include the appellant. The condition should list the names of the leading members of each family or group per pitch; where the leading members are an adult couple, their names should be separated by an 'and/or' (eg, Henry and/or Mary Smith) to take account of possible family breakdown or death.

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[55] *R (oao Jordan) v SSCLG & Thurrock BC* [2008] EWHC 3307 (Admin)

[56] If the development would be acceptable at the date of the decision, permanent permission should be granted even if it appears that alternative and possibly more suitable sites will be available in the future; *Doncaster MBC v FSS & Smith* [2007] EWHC 1034 (Admin); *Clee v FSS & Stafford BC* [2008] EWHC 117 (Admin)

[57] PPG paragraph 21a-014-20140306

[58] *Bromley LBC v SSCLG & Friend* [2008] EWHC 3145 (Admin)

[59] *Linfoot v SSCLG & Chorley BC* [2012] EWHC 3514 (Admin)

[60] PPG paragraph 21a-015-20140306

253. The condition should refer to the 'dependants' of the leading members of the family group – but not name them in case, for example, more children are born. The implication of using the term dependant is that when and if those people are no longer dependant on the named individuals, or when those named are no longer resident, the continued occupation of the site by the one-time dependants is in breach of that condition.

254. A personal condition should apply for the lifetime of the beneficiaries but may be adapted so that it can be imposed alongside a temporary condition. Personal conditions are time-limited in any event because of eventual death. If personal and/or temporary conditions are imposed, these should be worded to ensure that the use is ceased, and the land is restored to its previous condition in accordance with a scheme to be submitted and agreed upon the expiration of the condition. This is so that the authority can enforce against the continued use of the land as a breach of condition.

255. The condition should include an early timetable for the submission of the restoration scheme, when the previous state of the land can be more easily established, the site occupants are present and there is a clear incentive for them to avoid the potentially serious consequences of not complying with the condition. The submission of a scheme at the end of time-limited condition is less likely, and moreover a scheme that is approved early will be enforceable against any subsequent owners of the land.

256. When considering a grant temporary or personal permission, you will also need to address what other conditions would be necessary and reasonable, with regard to the scale and nature of any works that might be required and the duration of the permission. For example:

- If highway safety concerns could only be overcome through significant alterations to the site access, consider whether it would be reasonable to impose the burden of the works on the appellant when the duration of the permission would be short – and if not, whether temporary permission should be granted at all.

- If harm to the character of the area would be mitigated but not overcome by landscaping, and it would not be reasonable to impose the burden of the works on the appellant when the duration of the permission would be short, consider whether the condition is necessary at all, bearing in mind that the shorter duration of the permission will also mitigate harm.

257. The PPG states that imposing conditions on planning permissions for a change of use so as to require the demolition of buildings are unlikely to relate fairly and reasonably to the development permitted[61]. It may be necessary to canvas with the parties what elements of the proposed development should be permitted and/or required by condition in the event that the decision is to grant temporary and/or personal permission:

- Whether day or utility rooms could be provided in temporary structures.

[61] PPG paragraph 21a-014-20140306

- Whether hardstanding could be required to be removed.
- What drainage facilities and/or boundary treatments would be required.

The Planning Balance

258. The overall conclusion in Traveller appeals will normally involve carrying out a balancing exercise in the usual way, starting with the planning balance before carrying out any human rights and/or equality assessments.

259. Set out your findings on each of the main issues, including the weight that you attach to each harm or benefit of the development with regard to the possibility of imposing conditions. You should also address, where appropriate, the possibility of making a split decision.

260. As advised above, the decision should be made in accordance with s38(6) and the material considerations of paragraph 11d) of the Framework as appropriate and PPTS. In Green Belt cases, you would address whether the other considerations clearly outweigh the harm caused to the Green Belt by reason of inappropriateness and any other harm and so amount to very special circumstances with regard to PPTS paragraph 16.

261. If you have considered and rejected, a grant of permanent permission, it will be necessary to undertake a second balancing exercise as to whether a grant of a temporary and/or personal permission would be justified given:

- The substantial weight to be attached to any harm to the Green Belt is the same for a temporary as for a permanent permission.
- Whether the limited period of the permission would result in reduced harm in respect of other matters, perhaps to the character of the area.
- Paragraph 27 of PPTS: where a planning authority cannot demonstrate an up–to-date five year supply of deliverable sites, this should be a significant material consideration when considering applications for temporary permission except in the Green Belt and other prescribed areas.
- Any reasonable expectation of a change in planning circumstances, such as alternative sites becoming available through the plan process within what could be the period of a temporary permission.
- What would happen to the occupiers once evicted[62].

Human Rights in Traveller Casework

262. Comprehensive advice on the application of the Human Rights Act 1998 (HRA98) is provided in the Human Rights and Equality ITM Chapter. Human rights issues must be dealt with as an integral part of the reasoning that leads to the final decision; it must be

[62] *Moore v SSCLG & Bromley LBC* [2012] EWHC 3192 (Admin)

clear that the assessment of human rights is weighed against all other material considerations before a decision is made.

Article 8 and Traveller Casework

263. Article 8 of the European Convention on Human Rights, incorporated into UK law through the HRA98 provides:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others

264. Article 8 is frequently engaged in Traveller casework in relation to the appellant and/or intended site occupiers, irrespective of whether they have PPTS status or not[63]. It is typically relevant in the following, sometimes interrelated respects:

- The practical consequences for the individuals concerned from losing their home if the appeal is dismissed.
- The effects on family life from the loss of the home, including being unable to live – as had been proposed – with or close to members of the extended family.
- Respect for private and family life: the duty to facilitate the Gypsy way of life[64].
- The implications of the above for the best interests of the child(ren).

265. If the appellants or intended occupiers are living on the site, it should be regarded as their home. A decision that would necessitate their having to leave would result in a significant interference with their Article 8 rights. There would also be an interference, albeit to a lesser extent if:

- The individuals are not occupying the land but have nowhere lawful to live[65];
- A decision to grant temporary permission could result in homelessness later

[63] The claim in *McCann v SSCLG & Basildon DC* [2009] EWHC 917 (Admin) that the definition of traveller in Circular 01/2006 was in breach of Article 8 was not accepted; relying on *Chapman v UK* [2001] ECHR 43, the judge held that the qualified right in Article 8 has to be balanced with the need for planning regulation to control impacts on the environment from development. A challenge to the revised definition set out in PPTS was withdrawn after the claimant found a permanent site.

[64] 'The vulnerable position of gypsies as a minority means that some special consideration should be given to their needs and their different lifestyle both in the relevant regulatory planning framework and in arriving at the decisions in particular cases…there is thus a positive obligation imposed on the Contracting States by virtue of Article 8 to facilitate the gypsy way of life'; *Chapman v UK* [2001] ECHR

[65] *Rafferty & Jones v SSCLG & North Somerset DC* [2009] EWCA Civ 809

266. In each case, Inspectors should assess the nature and degree of any such interference and reach a conclusion following the 'Bingham Checklist' and 'Proportionality Assessment'. In particular, regard should be had to:

- The effects of the decision on the individuals with regard to your findings on general need and the availability of alternative sites. You should address not only any shortage of provision and/or the likelihood of planning permission being granted for another site[66], but also the (un)acceptability of conventional housing[67].
- The effects on the individuals given your findings on their personal circumstances.
- The timescales in relation to any enforced departure and to the time that may be necessary to look for alternative accommodation[68].
- Whether the imposition of conditions would protect the public interest by means which are less interfering of an individual's rights: see advice below on temporary and personal conditions.
- In Enforcement cases, if there is no case for a grant of conditional permission, whether an extended period of compliance with the notice would protect the public interest by means which are less interfering of an individual's rights: if there is any possibility of the appeal being dismissed and a consequential interference with the appellant's rights under Article 8, the Inspector should canvas views on extending period of compliance and, if so, for how long[69].
- Any unlawful use of the site can be relevant to the Article 8 balance[70] with regard to the reasons for the use and the Government's policy regarding intentional unauthorised development; see above.

267. An absence of alternative sites will not necessarily make it disproportionate to dismiss the appeal[71]. All of the facts must be weighed in the balancing exercise[72]. The effects on the appellant will need to be considered against what is necessary in a democratic society in accordance with Article 8(2):

- Public safety can include highway safety and flood risk issues.

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[66] *FSS & Doe & Yates & Eames v Chichester DC* [2004] EWCA Civ 1248
[67] *R (oao Clarke) v SSTLR & Tunbridge Wells BC* [2002] EWCA Civ 819
[68] There can never be any guarantee of **finding** an alternative site.
[69] Even if there is no appeal on ground (g), an Inspector may exercise their powers of variation under s176(1)(b) to extend the time for compliance, if there would be no injustice to the authority or appellant. However, any option of granting temporary planning permission via ground (a) should be considered first, not least so that conditions can be imposed, including to limit the number of caravans on the land.
[70] *Chapman v UK* [2001] ECHR 43
[71] *Egan v SSTLR* [2002] EWHC 389 (Admin)
[72] 'A further relevant consideration…is that if no alternative accommodation is available, the interference is more serious than where such accommodation is available. The more suitable the alternative accommodation is, the less serious is the interference constituted by moving the applicant from his or her existing accommodation…the cost of a site compared with the applicant's assets, and its location compared with the applicant's desires are clearly relevant'; *Chapman v UK* [2001] ECHR 43.

- The economic well-being of the country has been accepted as encompassing the protection of the environment, including the protection of the Green Belt and the countryside, plus general character and appearance issues.

- The rights and freedoms of others can include the living conditions of neighbours and, again, the preservation of the environment.

268. The human rights balance will, therefore, generally be based on your findings on the main planning issues in the decision, but you must be alert to the possibility of different matters being involved, or different weightings being applied. The human rights assessment must be carried out in substance and if you conclude that dismissing the appeal would violate an appellant's human rights, this would, in most cases, logically indicate that the appeal should be allowed.

Best Interests of the Child(ren)

269. Article 3(1) of the United Nations Convention on the Rights of the Child provides that the best interests of the child shall be a primary consideration in all actions by public authorities concerning children. Article 3(1) applies to decisions made by Inspectors and your reasoning on Article 8 should be in the context of Article 3(1).

270. In *Stevens v SSCLG* [2013] EWHC 792 (Admin), the judge derived key propositions from case law which apply to appeal decisions; these were confirmed in *Collins v SSCLG* [2013] EWCA Civ 1193.

271. To be a 'primary' consideration means that no other consideration can be *inherently* more important than the best interests of the child[73], that is, the need to safeguard and promote their welfare[74]. However, the importance or weight given to the best interests of child and any other consideration will depend on all of the circumstances in the case[75]; their interests can be outweighed by other factors when considered in context.

272. In examining all material considerations, and whether or not this has been raised by the parties, you must keep the best interests of the child at the forefront of your mind. It is expected that the health, education and general welfare needs of children are properly addressed as part of the reasoning and in the overall balance. You must assess whether any adverse impact of a decision on the interests of the child is proportionate, and this again is a duty of substance rather than form.

273. Further advice is given in the Human Rights and Equality ITM and PPG paragraph 21b-028-20150901.

Other Articles

274. Other human rights which may be raised in Traveller casework are:

[73] In this respect, planning decisions made with regard to the Humans Rights Act 1998 differ from proceedings under the Children's Act 1989 where the child's welfare shall be the court's paramount consideration.

[74] *ZH (Tanzania) v SSHD* [2011] UKSC 4

[75] *Dear v SSCLG* [2015] EWHC 29 (Admin)

275. **Article 6: the right to a fair trial (or hearing)**; this is an absolute right, but certain minimum rights set out in Article 6 apply only to criminal and not civil cases such as planning appeal proceedings.

276. Article 6 requires positive steps to be taken to ensure (1) the right of access to proceedings, including effective access, and (2) the principle of "equality of arms". Every party "shall have a reasonable opportunity of presenting his case to the court under conditions which do not place him at substantial disadvantage vis-à-vis his opponent". Barriers to participation which are difficult or impossible to surmount must not be imposed.

277. If, for example, the appellant lacks financial resources to make their case, an Inspector may take a positive step to adjourn the inquiry so that the appellant can apply for public funding for representation – so long as this would not lead to unreasonable delay[76].

278. Likewise, if you know or are unsure whether appellant or others lack literacy skills, you should establish this at an early stage of the hearing or inquiry. Other family members or friends may be able to help, and, in any event, it may be necessary to take certain matters more slowly or read out documents. You should ascertain that the persons understand and agree the contents of any written statements submitted on their behalf.

279. Article 6 also establishes the right to (3) a hearing within a reasonable time, including the right to a decision within a reasonable time[77], and (4) an independent and impartial tribunal.

280. **Article 14: prohibition of discrimination**; Article 14 may be invoked alongside Article 8 in Traveller casework, since a breach of Article 14 may only occur if another Convention right or freedom is affected. It is not necessary for the other article itself to be breached but the Courts have taken a restrictive approach to the issue[78].

281. Discrimination means treating persons in 'relevantly' similar situations differently, without an objective and reasonable justification. For a claim of violation of Article 14 to succeed, it must be established that the situation of the alleged victim can be considered similar to that of persons who have been better treated.

282. **Article 1 of the First Protocol: protection of property**; like Article 8, this is a qualified right where interference may be permissible if done to secure an aim set out in the relevant article.

283. However, Article 1 is wider than Article 8 in that the protection offered is not limited to the 'home'. In Traveller casework the most common grounds of claim are likely to be:

- In the case of the appellant: loss of property without compensation and/or available alternative accommodation[79].

[76] A costs applications may be made even if an Inspector allows such an adjournment.

[77] *Moore & Coates & the EHRC v SSCLG & Bromley LBC & Dartford BC* [2015] EWHC 44 (Admin)

[78] *Chapman v UK* [2001] ECHR 43

[79] *Chapman v UK* [2001] ECHR 43

- In the case of third parties: interference with peaceful enjoyment of a property and/or loss of property value without compensation.

284. The right to compensation is not expressed in Article 1, but the existence of compensation is an important factor in the balancing of the general interests and private rights.

285. **Article 2 of the First Protocol: the right to education**; it may be argued that access to education would be denied to Traveller children by disruption resulting from the family being moved.

286. No successful court cases have been brought in respect of Article 2 of the First Protocol. There are educational support services for Traveller children, including provisions for home-based learning; it would be difficult for a claimant to prove that even a decision which would force a family 'on the road' would deny access to education – so long as the decision is based on the evidence and not 'Wednesbury' unreasonable.

287. It is crucial for the Inspector to establish the facts and address the sustainability benefits or public interest in all children having access to education, as expressed in paragraph 13 of PPTS, as well as the importance of education in the context of personal circumstances and the best interests of the child.

Equality Issues in Traveller Casework

288. Comprehensive advice on the application of the Equality Act 2010 (EA10) is provided in the Human Rights and Equality ITM and not duplicated here.

289. As with human rights, equality issues must be dealt with as an integral part of the reasoning that leads to the decision. It must be clear that due regard is had to the three aims of the PSED, as set out under s149(1) of the EA10, before a decision is made. Consideration of equality principles must underlie the decision as a whole.

290. The three aims as set out under s149(1) are to:

- Eliminate discrimination, harassment, victimisation and any other conduct prohibited under the Act.
- Advance equality of opportunity between persons who share a protected relevant characteristic and persons who do not.
- Foster good relations between persons who share a relevant protected characteristic and persons who do not.

291. Romany Gypsies[80] and Irish Travellers[81] are ethnic minorities and thus have the protected characteristic of race under s149(7) of the EA10, whether they have PPTS status or not.

[80] *CRE v Dutton* [1988] EWCA Civ 17
[81] *O'Leary v Allied Domecq* [2000] (unreported) 29 August 2000 (Case No CL 950275–79), Central London County Court, Goldstein HHJ

292. The appellant and/or intended site occupants may have other protected characteristics that could be relevant in the circumstances, such as age, disability, pregnancy, and maternity and/or sex.

Conditions

293. This chapter does not duplicate advice in the Conditions ITM. The PINS suite of suggested planning conditions includes model conditions for Traveller sites.

294. In most cases, permission is granted for Traveller sites based on the special accommodation needs of Travellers. Although *Smith* held the PPTS (2015) definition to be discriminatory, it is still part of national policy and future cases must be decided on their own facts and circumstances. It is recognised that the effect of applying the PPTS definition to exclude those who aspire permanently to live in a caravan with other members of the Gypsy and Traveller community, could mean that those persons without family connections would no longer be able to do so, and that people more likely to be affected by the exclusion are the elderly, disabled, and women, particularly those from single parent families, without family connections.

295. In such circumstances it may be necessary to consider how best to control the use of land via a condition. The following text might be considered: "The site shall not be occupied by any persons other than Gypsies and Travellers, defined as persons of nomadic habit of life whatever their race or origin, including such persons who on grounds only of their own or their family's or dependants' educational or health needs or old age have ceased to travel temporarily or permanently, but excluding members of an organised group of travelling showpeople or circus people travelling together as such."

296. The reasons for the condition, which can be adapted as appropriate, should also be clearly explained. For example, the grant of planning permission should be subject to a condition limiting occupation of the site to Gypsies and Travellers as defined in Annex A of the PPTS. However, the Court of Appeal in Smith held that the exclusion of Travellers who have ceased to travel permanently is discriminatory and has no legitimate aim [(delete as appropriate) in this case, some of the occupiers have ceased to travel permanently]. [There is [also] no foretelling as to whether any occupiers might be forced to cease travelling permanently during the anticipated lifetime of the permission.] Imposing the suggested condition would [be liable to] result in unlawful discrimination, with members of the family being unable to live on this site. I shall therefore grant PP subject to a condition which restricts occupation to Gypsies and Travellers, defined so as to not exclude those who have ceased travelling permanently.

297. Where personal permission is granted, imposing **both the 'traveller' and 'personal' conditions** could lead to enforcement difficulties if a named occupier ceases travelling and loses PPTS status. Yet there can be instances where it is reasonable and necessary to impose both conditions, perhaps on multi-pitch sites where some occupants have PPTS status, and a general need for Traveller sites lent weight to a grant of permission – but there would also be occupiers who do not meet the definition. In these cases, the conditions may need to be adapted to ensure compatibility.

298. Since the grant of permission will generally be for the use of the land as a residential caravan site, it is usually necessary to impose a condition specifying the either the maximum **number of caravans**, or the maximum pitches together with maximum

number of caravans per pitch. The condition may also need to specify the **types of caravan**; typically there will be a minimum of one static caravan and one touring caravan per pitch.

299. If it is necessary to control the **position of caravans** within the site, perhaps for visual reasons, this should be achieved by imposing a condition which ties the permission to the approved plans or requires details to be submitted to the Council for approval. Site licensing regulations require minimum distances between caravans for reasons of fire safety.

300. **Amenity** or toilet blocks, and day or utility rooms may also be required for site licensing reasons, as well as to meet the appellant's own needs. If these are needed but not shown on submitted plans, a condition may again need to be imposed which requires the submission and approval of details.

301. **Other matters** which often need to be controlled by condition for Traveller sites, including through the submission of further details include:

- Hard and/or soft landscaping
- Boundary treatments
- External illumination
- The means of access into the site
- The layout and surfacing of parking and turning areas
- Foul and surface water drainage, including sustainable drainage.

302. Travellers are less likely than in the past to need space for **business activities**, but where this is needed and acceptable – particularly in cases pertaining to Travelling Showpeople, conditions may need to be imposed covering the extent of work areas, the height and/or nature of outdoor storage, hours of operation and/or controls on noise, odour and burning.

303. In some cases, Travellers will accept conditions to the effect that **no commercial activity** takes place on the site. If there is no such proposed use, however, and the grant of permission would only be for residential use, you should carefully consider the necessity of the condition bearing in mind the Council's powers to enforce against a future material change of use.

304. Travellers often own vehicles larger than domestic scale, for towing a caravan, transporting horses or working away. It is customary to impose a condition which limits **the weight of vehicles and the number of large vehicles** that may be parked or stored on a Traveller site. The usual upper weight limit is 3.5 tonnes, but sometimes a higher upper limit of 7.5 tonnes is accepted depending on the occupiers' needs and any concerns regarding character and appearance, living conditions and/or highway safety.

305. When planning permission is to be granted for a **transit site** or transit pitches on a permanent site, conditions must be imposed to specify the length of time any occupier

may reside on the site, and the interval before which they may be permitted to return, and how such occupation is to be monitored by the local planning authority.

ANNEX A: CHRONOLOGY OF LEGISLATION AND POLICY

This Annex sets out legislation relating to planning for Gypsies, Travellers and travelling showpeople, with summaries of key provisions.

This Annex also includes a chronology of policy statements but does not summarise their contents.

Caravan Sites and Control of Development Act 1960 **(CSCDA60)**	
Section 1(1)	no occupier of land shall…cause or permit any part of the land to be used as a caravan site unless…the holder of a **site licence**…
s1(4)	…**"caravan site" means** 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.
s2	No site licence shall be required for the use of land as a caravan site in any of the circumstances specified in the First Schedule…
s23	Power of rural district councils to prohibit caravans on commons.
s24(2)(c) **inserted by CJPOA94**	**Power of local authorities to provide**, in or in connection with **sites for the accommodation of gipsies [sic]** working space and facilities for the carrying on of such activities as normally carried on by them.
s24(8) **inserted by CJPOA94**	…"gipsies" [sic] means persons of nomadic habit of life, whatever their race or origin, but does not include members of an organised group of travelling showmen, or persons engaged in travelling circuses, travelling together as such.
s29(1)	**Meaning of caravan**
First Schedule	Cases where a caravan site licence is not required

	[1: see also s55(2)(d) of the TCPA90] [2-10: see also Schedule 2, Part 5, Class A of the GPDO 2015]
Caravan Sites Act 1968 **(CSA68)**	
s6 **repealed by CJPOA94**	~~**Duty** of local authorities to provide sites for Gypsies~~
s13(1)	Meaning of twin-unit caravan
s13(2)	Maximum dimensions of a caravan (a) length (exclusive of any drawbar):- 65.616 feet (20m); (b) width:- 22.309 feet (6.8m); (c) overall height of living accommodation (measured internally from the floor at the lowest level to the ceiling at the highest level):- 10.006 feet (3.05m)
DOE Circular 28/1977: Gypsy Caravan Sites	
Circular 28/77 was the first planning policy related to Gypsies and Travellers (as opposed simply to caravan sites) and it adopted the statutory definition of 'gipsies' in the CSA68 for planning purposes. Replaced by Circulars 22/91 and 1/94.	
Mobile Homes Act 1983 **(MHA83)**	
Housing Act 1985 **(HA85)**	

s8(3) **inserted by HPA16**	a **duty on local housing authorities in England to consider the needs of people** residing in or resorting to their district with respect to the provision of (a) **sites on which caravans can be stationed,** or (b) places on inland waterways where houseboats can be moored
s8(4) **inserted by HPA16**	'caravan' has the meaning given by s29 of the CSCDA60 and 'houseboat' means a boat or similar structure designed or adapted for use as a place to live.
DOE Circular 22/1991: Planning for Travelling Showpeople Replaced by Circular 4/07	
DOE Circular 1/1994: Gypsy Sites and Planning Replaced by Circular 1/06	
DOE Circular 18/1994: Gypsy Sites Policy and Unauthorised Camping Replaced by Circular 1/06	
Criminal Justice and Public Order Act 1994 **(CJPOA94)**	
s60	Criminal offence of residing or intending to reside on land without consent in or with a vehicle.
s77	Power of local authority to direct unauthorised campers to leave land.
s78	Orders for removal of persons and their vehicles unlawfully on land
s80(1)	repealed s6 (duty of local authorities to provide sites) and s16 (meaning of Gypsy) of the CSA68

s80(2)	inserted s24(2)(c) and s24(8) into the CSCDA60 so local authorities have the power to provide sites for Gypsies.
Housing Act 2004 (HA04)	
s225(1) **repealed by HPA16**	~~Every local housing authority must, when undertaking a review of housing needs in their district under section 8 of the HA85 carry out an assessment of the accommodation needs of Gypsies and Travellers residing in or resorting to their district.~~
s226 **repealed by HPA16**	~~Guidance in relation to s225~~
ODPM Circular 01/2006: Planning for Gypsy and Traveller Caravan Sites Replaced by PPTS 2012	
ODPM Circular 04/2007: Planning for Travelling Showpeople Replaced by PPTS 2012	
National Planning Policy Framework Published in March 2012, revised in July 2018, February 2019, July 2021 and September 2023	
Planning Policy for Traveller Sites Published in March 2012, revised in August 2015	
Planning Practice Guidance **(PPG)** Published in March 2012, see below for relevant updates	

Written Ministerial Statement – 1 July 2013	
Written Ministerial Statement – 17 January 2014	
Dealing with Illegal and Unauthorised Encampments: A Summary of Available Powers 2015 **– DCLG, Home Office & Ministry of Justice**	
'Dear Chief Planning Officer' letter **– 31 August 2015**	
Written Ministerial Statement **– 17 December 2015**	
PPG **– Update 1 September 2015**	
17b-066-20150901	Enforcement and Post-permission matters: Does the absence of authorised sites prevent local authorities from taking enforcement action against unauthorised encampments?
17b-067-20150901	Enforcement and Post-permission matters: What powers do local authorities and the police have to take against unauthorised encampments?
Housing and Planning Act 2016 **(HPA16)**	
s124(1)	Amends s8 of the HA85 by inserting s8(3) and s8(4)
s124(2)	Amends the HA04 by repealing s225 and s226.
DRAFT 'Guidance to Local Housing Authorities on the Periodical Review of Housing Needs: Caravans and Houseboats**' – DCLG 2016**	

ANNEX B: CASE LAW ON PLANNING FOR GYPSIES, TRAVELLERS AND TRAVELLING SHOWPEOPLE

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. The facts of individual cases vary, and you should consult a transcript of the judgment if you seek to rely on it in a decision.

Please also note:

This Annex does not provide a conclusive or exhaustive list of relevant case law.

Care should be exercised in relying on older judgments since there may be more recent authorities, legislation and/or policy.

A court is bound by the decisions of a court above it; a House of Lords or Supreme Court 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, they should not come as a surprise to the parties.

Greenwich LBC v Powell [1989] 1 AC 995, (1989) 57 P&CR 49 (UKHL)

This case concerned whether the occupiers of a Traveller site set up pursuant to the duty under s6 of the CSA68 were 'protected' – or had security of tenure – for the purposes of the Mobile Homes Act 1983 (MHA83). The Powell family had a permanent base on the site but were absent for 4-5 months of the year when they travelled to undertake seasonal fruit picking, and then lived in a caravan with no fixed abode.

The House of Lords held that **a person of only seasonal nomadic habit, settled for part of the year, remained within the definition of a Gypsy** set out in the CSA68 – and was not protected for the purposes of the MHA83.

The MHA83 was amended by the Housing Act 2004 following *Connors v UK* (2005) 40 EHRR 9, and again by the Housing and Regeneration Act 2008 to give security of tenure to Travellers living on local authority, as well as privately-rented sites.

However, *Greenwich* is still relevant in that a Traveller with a seasonal nomadic lifestyle can meet the statutory or policy definition of Travellers.

R v South Hams DC ex parte Gibb [1994] QB 158 (Court of Appeal)

Cited in Circular 18/94 as the basis for refining the statutory definition of 'gipsies' in the CSCDA60. The CoA held that the CSA68 **definition does not apply to persons who move without any connection between the movement and their means of livelihood**. Neill LJ identified the following matters as relevant to a decision on whether or not any particular group is composed of Gypsies:

1) The links between members of the group and between the group and other groups who are either at or visit the site (provided under s6 of the CSA68); living and travelling together is a feature of nomadic peoples.

2) The **pattern of journeys** made by the group. While Gypsies may have a permanent residence as per *Greenwich*, a nomadic habit of life necessarily involves travelling from place to place.

3) The **purpose of the travel**; the s16 (CSA68) definition of 'Gypsies' imports a requirement for some recognisable connection between the group's travelling and the means of making their livelihood.

While *South Hams* remains relevant, it is not necessary for a Gypsy to travel as part of a group, see *Maidstone* below.

Maidstone BC v SSE & Dunn [1995] HC CO/2349/94

The Court upheld an Inspector's decision that the appellant, whose main source of income was from landscape gardening, but who also bred horses and travelled to horse fairs for up to two months in the year, met the policy definition of a Traveller. His travelling had a pattern and a purpose connected to his livelihood. **It is possible to lead a nomadic life seasonally by visiting the horse fairs**.

'Mr Dunn had remained a Gypsy, in the sense that he continued his nomadic life seasonally, albeit he had managed to achieve a degree of stability for his children's education and medical attention.'

The Court also rejected the Council's argument, based on *South Hams*, that the appellant could not be a Gypsy because he was not part of a cohesive group.

More recently, in *Basildon District Registry v FSS & Cooper* [2004] EWCA Civ 473, the CoA accepted that Mrs and Miss Cooper, who travelled to and sold craft items at traditional Gypsy fairs in the summer months, were Gypsies for planning purposes.

Buckley v UK [1996] ECHR 39, (1996) 23 EHRR 101

The European Court of Human Rights dismissed a claim that an Inspector and the SoS had not correctly addressed **the appellant's rights under Article 8** in refusing planning permission and upholding an enforcement notice preventing continued residential use.

Proper regard had been had to the appellant's predicament under the terms of the regulatory framework, which contained adequate procedural safeguards, and by the responsible authorities when exercising their discretion. It was not the Court's task to address the merits of that decision. The reasons relied on by the responsible authorities were relevant and sufficient to justify the interference with the exercise by the appellant of her right to respect for her home.

Article 8 is not limited to respect for the home; see *Chapman v UK* [2001] ECHR 43.

Hedges v SSE & East Cambridgeshire DC [1996] EWHC Admin 240

The Inspector erred by failing to consider the general need for the provision of sites for Gypsies independently of the question of personal circumstances, contrary to Circular 1/94 and the Structure Plan.

Hearne v SSW & Carmarthenshire CC [1999] EWHC 494 (Admin), [2000] JPL 161 (Court of Appeal)

The Inspector found that, although the appellant had fallen within the statutory definition of a Gypsy before moving to the site, his stated intention to settle on the land and abandon his nomadic way of life meant that he had given up his status as a Gypsy in planning policy terms. The Inspector considered the deemed planning application on the basis of general rather than Traveller planning policies. He dismissed the appeal, refused permission and upheld the enforcement notice.

The High Court and CoA upheld the decision; the Inspector was entitled to find, on the evidence, that **the appellant had given up status on moving to the land, and policies concerning Gypsy caravan sites were not appropriate**. Circular 1/94 was aimed at applications to provide accommodation for Gypsies; it did not apply to applications which were not for Gypsy use.

Basildon DC v SSETR & Others [2000] CO/3315/2000 (HC); [2001] JPL 1184

The SoS had concluded that the substantial harm to the Green Belt was clearly outweighed by the families' personal circumstances and need for more Gypsy sites in the area. He gave these factors considerable and significant weight, more so than the Inspector, who had recommended dismissal of the appeal.

Ouseley J held, in dismissing the challenge, that the needs of these Gypsy families were material because they had a need for the development in this location. **The SoS did not have to find that the personal circumstances of these families were exceptional** among the population at large or among Gypsies in particular; **the weight to be given them was for the SoS in the specific circumstances**.

It was not irrational for the SoS to give such weight as he had to the personal circumstances. That other Gypsy families might claim similar circumstances simply meant that very special circumstances might arise again; that was a matter for assessment on a case by case basis. The imposition of 'personal' rather than 'temporary' conditions was not irrational or inconsistent.

The Council's concern on **precedent** did not arise from the adequacy of the reasoning but its consequences; that was not a matter of law.

Cited in *Smith & Others v SSHCLG & NW Leicestershire DC* [2021] EWHC 1650 (Admin)

Chapman v UK [2001] ECHR 43

The European Court of Human Rights unanimously held that a decision to dismiss an appeal for a Traveller site, when no obvious alternative accommodation was available, had not violated the appellant's rights under Articles 6 or 14, or Article 1 of the First Protocol. The majority of the judges found the same with respect to **Article 8** – but a minority found (paragraph 130 onwards) that there had been a violation of the Mrs Chapman's Article 8 rights.

Chapman is notable for its approach to Article 8. In *Buckley*, where retrospective permission had been refused for a Traveller site, the ECHR had held that the case concerned the appellant's "home", and so it was unnecessary to consider whether it also concerned her "private" or "family life". In Chapman, the court **did** address this point and held that:

'[T]he applicant's occupation of her caravan is an integral part of her ethnic identity as a Gypsy, reflecting the long tradition of that minority of following a travelling lifestyle…Measures which affect the applicant's stationing of her caravans have therefore a wider impact than on the right to respect for home. They also affect her ability to maintain her identity as a Gypsy and to lead her private and family life in accordance with that tradition'.

Chapman remains the leading case for consideration of human rights in Gypsy cases.

The judgment summarises site provision and policy in the UK, past failed initiatives, the European approach to Gypsies/Roma and the facts of the case in question.

On the facts, or perhaps because no information was available to the court as to any efforts Mrs Chapman had made to find alternative sites, her financial situation, or on the qualities a site must have to be suitable, the majority took a notably hard line on the availability of alternative accommodation.

Mrs Chapman was successful on a fresh appeal four years later.

Egan v SSTLR [2002] EWHC 389 (Admin)

Challenge that there had been a failure to **adopt a two-tiered approach to dealing with Article 8** issues was dismissed; both the Inspector and the FSS had correctly considering not merely the question of whether dismissing the appeal was necessary, but also whether it would place a **disproportionate** burden on the appellants. The **lack of an identified alternative site** does not automatically make dismissing an appeal disproportionate in Article 8 terms.

R (oao Clarke) v SSTLR & Tunbridge Wells BC [2002] EWCA Civ 819

The Inspector gave inadequate reasoning in finding that an offer of bricks and mortar housing detracted from the appellant's contention that the only alternative to the appeal site was a roadside pitch.

If it can be established that the Gypsy and/or his family subscribe to the relevant tenet or feature of Gypsy life – proscription of, and/or an aversion to, conventional housing, then conventional housing if offered will be unsuitable. **It would therefore be contrary to Articles 8 and 14 to expect such a person to accept conventional housing** and to hold it against him/her that he/she has not accepted, or is not prepared to accept it, even as a last resort…the Inspector must…carefully examine the objections of this Gypsy family to living in conventional housing in order to determine the extent to which Article 8 is truly engaged…'

Clarke-Gowan v SSTLR & North Wiltshire DC [2002] EWHC 1284 (Admin)

The High Court upheld an Inspector's decision that **the appellant did not have status, since he travelled only to pre-arranged work** as a bricklayer and stonemason, although some trips necessitated staying away in a caravan.

'…there was not that essential connection between wandering and working…[he is] in fact permanently resident at the appeal site and his work related travel is no different in character to that undertaken by many people looking for work in the building trade who are manifestly not Gypsies in any sense of the word.'

Coyle v FSS & Kingston upon Thames RBC [2003] EWHC 816 (Admin)

While the relevant development plan policy, on the face of it, was not wholly compliant with Circular 1/94, that did not mean that the application for a Traveller site in the Green Belt should be permitted.

Wrexham BC v NAW & Berry [2003] EWCA Civ 835

The appellant had not travelled for three years due to ill-health; medical advice was that his condition was unlikely to improve. The Court of Appeal held that whether the appellants were Gypsies for planning purposes depended on whether they were of a nomadic way of life, and this was a functional test to be applied at the time the decision was to be taken.

Being temporarily confined to a permanent base through illness did not necessarily deprive an appellant of status. **If they retired permanently from travelling for whatever reason, they were no longer of a nomadic habit of life**, although that was not to say that they could not recover it later.

This judgment influenced the revised definition of Gypsies and Travellers in Circular 1/06 which included those who had ceased travelling for reasons of health needs or old age.

The judgment is consistent with the revised definition in PPTS 2015.

Moss v FSS & South Cambridge DC [2003] EWHC 2781 (Admin)

Case involving eight conjoined s78 appeals, each for a separate Traveller pitch that had been developed at the same time within the same site, and shared a common access. The Inspector concluded that the development as a whole would harm the rural character of the Fenland area, and the personal circumstances of the appellants – who wanted to live together – did not justify the number of caravans proposed and resulting harm.

Held that the **Inspector erred in describing personal circumstances globally and generally**. It is difficult to be sure what the result would have been if the Inspector had addressed whether it would have been possible to allow some pitches where the occupiers' personal circumstances were the most compelling.

Lee v FSS & Dartford BC [2003] EWHC 3235 (Admin)

The **FSS erred in failing to address requests for temporary permission** to allow time for an alternative site to be sought or the children's education to be finished. The Inspector had concluded on the latter but not former request. The FSS had made no explicit conclusions on either, or on the related issue of proportionality in human rights.

The redetermined appeal decision was challenged; see EWHC 2549 (Admin) below.

South Buckinghamshire DC v SSTLR & Porter (No. 1) [2003] UKHL 26

The CoA quashed three injunctions granted under s187B of the TCPA90 to evict Gypsies from unauthorised sites, having set out and then applied an approach for the courts to follow, so that applications for injunctions are considered in a way that is consistent with the duty of the courts under s6 of the HRA98 to act compatibly with Convention rights. The House of Lords unanimously supported the CoA approach.

South Buckinghamshire DC v SSTLR & Porter (No. 2) [2004] UKHL 33

The Inspector found that the lack of an alternative site within the area and the chronic ill-health of Mrs Porter, which had worsened since a previous appeal in 1998, clearly outweighed harm to the Green Belt and thus amounted to **very special circumstances** which justified a grant of personal planning permission.

The House of Lords held that the Inspector's **reasoning was clear and ample**. Not everyone would have reached the same decision, but there was no mystery as to what had moved the Inspector. It was not clear why the CoA had thought some fuller explanation was demanded; the principle was that the standard of reasoning required was not dependent on the importance of the issues involved.

It was impossible to say that the unlawfulness of the use of the site could never be a material consideration – but **the appellant had not relied on continuing unlawful occupation as constituting part of the claim of hardship**. It was of little, if any materiality in the circumstances of the case, and in any event, the Inspector had clearly been aware of the nature and extent of the unlawful use, which had not given rise to a main issue in dispute.

FSS & Others v Chichester DC [2004] EWCA Civ 1248

The CoA upheld a decision to grant permission to the three named Gypsy families. The Inspector had not imposed a non-existent and impermissible duty on the Council to exercise its planning powers to help achieve the end of providing an adequate number of Gypsy sites.

The Inspector found that the Council had not made adequate provision for Gypsies in accordance with national policy, and the consequence was little credible prospect of any private Gypsy site being permitted by the Council. The Inspector was entitled to take these factors into account and weigh them in the **Article 8** equation in the appellants' favour.

Dartford BC v FSS & Lee [2004] EWHC 2549 (Admin)

The site included pitches occupied by the appellant and his brothers with their respective wives and children. The FSS found, after seeking further information, that there was a strong case for the appellant to remain in the area because of the special **educational needs** of his children. He also concluded that personal circumstances plus the need for Gypsy sites in the area clearly outweighed the harm to the Green Belt. He allowed the appeal and granted permission subject to a 'personal' condition naming the appellant, his brothers and their families.

The Council challenged the decision on the basis that the permission should have been personal to the appellant only, since the brothers' children did not have special educational needs. The Court disagreed, since the Council had not raised this issue during the appeal.

'Once some members of the extended family had been shown to have particular needs…then, absent any representations to the contrary, it was not unreasonable for the

[SoS] to proceed on the basis that **the extended family should be permitted to remain together**, absent any obvious planning advantage in requiring them to split up…Each case is bound to be fact sensitive…'

Basildon BC v FSS & Temple [2004] EWHC 2759 (Admin)

Personal permission had been granted on appeal for a single family Gypsy site in the **Green Belt** on the basis of various considerations. The Council challenged the decision on the basis that each factor relied upon in a finding that there are '**very special circumstances**' must itself be of a quality that can reasonably be called 'very special'. Sullivan J held, in rejecting the claim, that there is no reason why a number of factors that are ordinary in themselves cannot combine to create something very special; the weight to be given to any particular factor will be a matter of degree and planning judgment.

On **precedent**, it was held that the balancing exercise required will be specific to each case; a combination of factors which might clearly outweigh the harm that would result from development on one site might be insufficient to justify a grant of permission for a site that would be more harmful in planning terms.

South Cambridgeshire DC v FSS & McCarthy & O'Rourke [2004] EWHC 2933 (Admin)

Having found that **the appellant no longer had status**, since they had ceased travelling, the Inspector erred in considering the development under a draft Local Plan policy explicitly intended to apply to sites for those exercising a nomadic lifestyle.

The Inspector should have considered more rigorously which were **the relevant development plan policies**. Since the appellant did not have status, regard could still be had to their **personal circumstances** but they should have been weighed against the conflict with countryside rather than Gypsy site policies.

Smith v FSS & Mid Bedfordshire DC [2005] EWCA 859

The Inspector refused permission for a Gypsy caravan site, taking account of the local residents' **fear of crime** as a discrete and important issue. The CoA held that the **evidence** before the Inspector did not suffice to establish real concern of the kind required for that concern to enter into the planning judgement.

'…the fear and concern must have some reasonable basis...and the object of that fear and concern must be the use, in planning terms, of the land…**a caravan site is not like a polluting factory or bail hostel, likely of its very nature to produce difficulties for its neighbours**…the concern as to future events was or may have been based in part on the fact that the site was to be a Gypsy site. It cannot be right to view land use for that purpose as inherently creating the real concern that attaches to an institution such as a bail hostel.'

FSS v Simmons [2005] EWCA Civ 1295

The CoA upheld the decision of the SoS to dismiss an appeal for a Traveller site in the Green Belt. The appellant had made no real effort to find an **alternative site** despite the fact that his pattern of travel took him to areas of the country that were not within the Green Belt.

But see *South Cambridgeshire DC v SSCLG & Brown* [2008] EWCA Civ 1010

R (oao Green on behalf of the Friends of Fordwich and District) v FSS & Canterbury CC & Jones [2005] EWCA Civ 1727

The Inspector granted permission for the development alleged in the enforcement notice: 'the use of the land for the stationing of three units of mobile living accommodation and ancillary storage', subject to a condition requiring that no more than three units falling with the statutory definition of a caravan shall be stationed on the land.

On the ground that **a person had to live in a caravan to qualify as a Gypsy**, the CoA made it clear that there is no such requirement in the statutory (CSA68) or policy (Circular 1/06) definition of 'Gypsy'.

On **whether the structures were caravans**, the Inspector had dealt comprehensively with one but not the other units – when the second had a timber extension and the third consisted of two static caravans linked by a timber structure. The CoA agreed with the High Court that:

'…for the purposes of framing the planning permission which she was to grant and the condition which she was to impose, the Inspector was…bound to enter into and determine this question as to the status of units 2 and 3.'

Hughes v FSS & South Bedfordshire DC [2006] EWCA Civ 838

The Inspector recommended a grant of temporary permission for a Gypsy site in the Green Belt with regard to a short-term need for sites in the area in the short term, a lack of available alternative sites, and the disruption to education and healthcare. The FSS noting (but not spelling out) **the legal obligations of the local education authority** to make appropriate educational provision for school age children resident within its area, found that appropriate education would be available to the children notwithstanding a refusal of permission and a lack of immediately available alternative sites; the appeal was dismissed.

The appellant's challenge succeeded in the High Court, but the appeal decision was reinstated by the CoA. The FSS, in his planning judgment, had to strike a balance between the interests of the community at large, and those of the applicants and their families. The FSS differed from the Inspector in the **weight that he gave to educational needs** but he did not take account of any matters other than those to be found in the Inspector's report or differ from the Inspector on any material fact.

Doncaster MBC v FSS & Smith [2007] EWHC 1034 (Admin)

Challenge that the Inspector ought to have granted temporary rather than personal permission for a ten pitch Gypsy site, to avoid long-term harm to the openness of the Green Belt and character of the area, and to comply with Circular 1/06. The judge upheld the Inspector's finding that **temporary permission** is only justifiable where there is likely to be a material change in circumstances, in particular a realistic likelihood of suitable, affordable and acceptable **alternative accommodation becoming available** before the end of that time; this was 'entirely in accord with the policy…and with *Chapman*'.

R (oao Dowling) v SSCLG & Others [2007] EWHC 738 (Admin)

An Inspector granted permission for a Gypsy site subject to a condition that no more than six caravans, with no more than four static caravans, could be stationed on the site at any time.

The decision was challenged on the basis that the application had been for the siting of four mobile homes; **the condition unlawfully enlarged the development**.

Held that the condition, rather than enlarging the permission, had the effect of regulating and controlling it since any number of caravans could otherwise have been brought onto the site not unlawfully, provided this did not constitute a change of use. C1/06 referred to Gypsies having one caravan to live in and another for travelling to enable a nomadic lifestyle.

The Inspector did not err in finding that a literal reading of a **Local Plan policy** which required that Traveller sites 'do not detract from the undeveloped and rural character and appearance of the countryside' would virtually render the policy unworkable:

'…it is difficult to conceive in practice and reality that there would be any kind of development with regard to Gypsies which would not, at least in some way, detract either from the character…appearance or from both of the countryside…it is reasonable to construe the policy as embracing detractions in the sense of detractions which are perhaps significant or material. That would still give the policy real purpose and bite and at the same time would make it workable.'

Clee v FSS & Stafford BC [2008] EWHC 117 (Admin)

The only 'obligation' on the decision-maker is to 'give consideration' to whether to grant **temporary permission**. The Inspector had done so in this case. despite dealing with the matter in brief.

R (oao Baker) v SSCLG & Bromley LBC [2008] EWCA Civ 141

Unsuccessful challenge, notable mainly for the then novel ground considered in the CoA concerning **race equality and s71(1) of the Race Relations Act 1976**, which required the decision-maker to have due regard to the need: (a) to eliminate unlawful racial discrimination; and (b) to promote equality of opportunity and good race relations between persons of different racial groups.

While neither the RRA76 nor issue of race equality had been raised at the inquiry, this did not remove the s71(1) duty on the Inspector. However, s71(1) did not impose a duty to achieve a result, but rather to have due regard to the need to achieve the statutory goals. There was no breach of the duty; the Inspector 'was alive to the plight of Gypsies and Travellers and the disadvantages under which they labour as compared with the general settled community.'

Wychavon v SSCLG & Butler [2008] EWCA Civ 692

A **Green Belt** case concerning the adequacy of the Inspector's approach to and reasoning on **very special circumstances**. Lord Carnwath in the CoA found that it was wrong for the High Court judge to treat the words 'very special' as the converse of 'commonplace'.

The word 'special' connotes not a quantitative test but a qualitative judgment as to the weight to be given to the particular factor for planning purposes. Whether or not any particular factor or factors are sufficient to justify the grant of permission in any case is a balance which involves issues of 'complexity and sensitivity' and a judgment of policy not law.

R (oao Smith) v South Gloucestershire DC [2008] EWHC 1155 (Admin)

This case concerned the Council's decision to adopt Local Plan Policy H12 after C1/06 had been published. Policy H12 provided that 'Gypsy sites will not be appropriate within the Green Belt or the Cotswolds AONB' on the basis of an earlier Structure Plan prepared when C1/94 was extant. It was held that, given a change in emphasis in C1/06 so that '**there is still a presumption against such development in the Green Belt and AONB but it is not an absolute prohibition**…the absolute prohibition in Policy H12 is no longer appropriate."

South Cambridgeshire DC v SSCLG & Brown [2008] EWCA Civ 1010

There is **no requirement for the appellant to prove that alternative sites are not available** before permission can be granted contrary to development plan policy. The Inspector was entitled to come to the conclusions she did as to the realistic availability of alternative sites.

'The position is governed by s38(6)…the Development Plan is determinative unless material considerations indicate otherwise. There is no burden of proof on anyone. It is a matter for the planning authority, or in this case the inspector, to decide what are the material considerations and, having done so, to give each of them such weight as she considered appropriate. That, so it seems to me, is a matter of planning judgment.'

Coyle & Others v SSCLG & Basildon DC [2008] EWHC 2878 (Admin)

The High Court rejected this challenge to an Inspector's finding that significant education and health needs only carried limited weight:

'Whether or not the Inspector's description…could be criticised…**it was for him to judge the weight** that should be attached to these matters. It is only if it can be shown that he failed to have regard to a material matter that a claim such as this could succeed…'

Bromley LBC v SSCLG & Friend [2008] EWHC 3145 (Admin)

The Inspector did not refer to *Circular 11/95: Use of Planning Conditions* but still gave adequate reasoning to justify the grant of **temporary permission**. The Inspector referred to relevant advice in C1/06 and identified an expected **change in planning circumstances** at the end of the temporary period.

Langton & McGill v SSCLG & West Dorset DC [2008] EWHC 3256 (Admin)

In considering whether to grant **temporary permission**, with regard to paragraph 46 of C1/06, the Inspector had to ask: (a) Was there an unmet need for pitches? (b) Was there any available alternative provision? (c) Was there a reasonable expectation that new sites which would meet that need were likely to become available at the end of the period in the area?

R (oao Jordan) v SSCLG & Thurrock BC [2008] EWHC 3307 (Admin)

The Inspector erred by not considering whether to grant **temporary permission**, although the appellant had not asked her to:

'There are some issues that are only material if a point has been made about them…there are other matters which are material…because of their intrinsic nature. [Article 8] is relevant…by operation of law…a temporary permission would have permitted the claimant and his wife to live for longer in the dwelling than…if permission were refused…As the Inspector did accept that Article 8 rights were engaged…she did have to consider whether or not there was a means short of a full planning permission whereby they could be protected.'

However, the challenge did not succeed since it was 'inconceivable' in this case that the Inspector would have granted temporary permission.

R (oao Massey) & Derbyshire Gypsy Liaison Group v SSCLG & South Shropshire DC [2008] EWHC 3353 (Admin)

The Inspector granted personal permission for pitches for individuals who were found to have **status** under C1/06, but not for those persons found to not meet the definition. They challenged the decision.

It was held that the Inspector had correctly applied the *South Hams* tests to determine whether the individuals had a nomadic habit of life. To be considered as a Traveller who had ceased travelling for the purposes of C1/06, a **nomadic habit of life** must have previously been established. On the facts before him, the Inspector found that it had not – and the reasons why the claimants may not have been travelling at the time of the determination were immaterial.

South Staffordshire DC v SSCLG & Dunne [2008] EWHC 3362 (Admin)

The Inspector granted **permanent permission** since there was 'no degree of certainty that new sites were likely to become available…within a reasonable timescale…' The decision was consistent with paragraph 45 of C1/06. The Inspector was entitled to look at the evidence of delivery, the date of the intended delivery and the place.

Stanley v SSCLG & Rother DC [2009] EWHC 404 (Admin)

The Inspector **rejected the possibility of granting temporary permission** for a Traveller site on the basis that harm to the AONB outweighed the personal circumstance of the claimants. Held that the Inspector had properly considered paragraph 45 of C1/06 and found no 'reasonable expectation' of sites becoming available in the foreseeable future. The Inspector was also entitled to give the weight that he did to personal circumstance of the claimant.

Rafferty & Jones v SSCLG & North Somerset DC [2009] EWCA Civ 809

The appellants' rights under **Article 8** were engaged although they did not live on the site. To find otherwise, the appellants would have to have used the land unlawfully for Article 8 to be in issue. The appellants' right to carry on their private lives from their home, being their caravan, was being infringed whether or not they were already on the land.

Peters v SSCLG & Surrey Heath BC [2009] EWHC 1125 (Admin)

The Inspector refused to grant temporary permission for a **travelling showpeople's** site on the basis of harm to the Green Belt; likelihood of a significant adverse effect on a **Special**

Protection Area (SPA), and there being no reasonable prospect of **alternative sites** becoming available in the area within 3-5 years.

The High Court held, in dismissing the challenge, that the Inspector did not consider sites simply in local authority area but had looked more widely in accordance with C4/07. The Inspector was entitled to find that special local circumstances meant the authority could rely on lack of sites, despite their failures to make provision or respond to evidence of need.

The Inspector did not err in his approach to the SPA; he dealt with the measures proposed but decided that the combined effect of residential developments surrounding the SPA was likely to have a significant effect upon it; it would have been difficult for him to decide otherwise in the light of English Nature's advice.

R (oao Holland & Smith) v SSCLG & Taunton Deane DC [2009] EWHC 2161 (Admin)

A challenge was rejected to an Inspector's 'unimpeachable' finding that **precedent and cumulative impact** were decisive considerations, justifying dismissal of the appeals on four out of 16 pitches on the site.

Smarden Parish Council v SSCLG & John Lawson's Circus [2010] EWHC 701 (Admin)

The Inspector granted permanent permission for a **travelling showpeople's** site, giving reasons for *not* imposing conditions that would restrict occupation either to named persons or to certain months of the year. The Parish Council challenged the decision on the basis that the application had been for "**winter quarters**" and, by allowing for year-round occupation, the Inspector enlarged the scope of the permission.

Held that the Inspector granted what was applied for; the appellant had made it clear that, while the circus would not likely be on the site between March and October each year, there would be occupation by children, elderly relatives and those involved in their care outside of the winter months. The Inspector had also referred to Circular 4/07 in deciding it would be unreasonable to preclude summer occupation.

Medhurst v SSCLG [2011] EWHC 3576 (Admin)

The Inspector's finding that the appellant did not have an established nomadic lifestyle or sufficient periods of travelling to have **status** was rational and based on the evidence. The Inspector did not need to deal with each and every piece of evidence. Moreover, although C1/06 did not apply, the Inspector went on to consider the general unmet need for caravan sites, the personal circumstances of the family and the wish to avoid returning to bricks and mortar – but found that this did not clearly outweigh the Green Belt harm.

Moore v SSCLG & Bromley LBC [2012] EWHC 3192 (Admin)

An Inspector's decision to refuse **temporary permission** for a Gypsy site was irrational and unreasonable, because he had applied the same reasoning to this question as he had to whether to grant permanent permission, although the balancing exercise would have changed. Firstly, the harm arising to the Green Belt would be limited in time.

Secondly, the Inspector had found that 'some weight' should be attached to the level of unmet need for sites in the area in relation to whether permanent permission should be

granted. C1/06 advised that substantial weight should be attached to that consideration when considering a grant of temporary permission.

Further, the vulnerable position of Gypsies and the special consideration to be given to their needs had a particular focus in relation to temporary permission; *Wychavon* applied. The Inspector seemed to recognise the best interests of the children as important and so whether there was likely to be suitable alternative accommodation went directly to the balancing exercise required under Article 8 when considering temporary permission.

It was incumbent on the Inspector to make clear findings as to what would happen once the appellant was evicted: whether it was more likely that she and her children would have a roadside existence or be offered accommodation on a suitable alternative site.

Linfoot v SSCLG & Chorley BC [2012] EWHC 3514 (Admin)

Another challenge against a refusal of **temporary permission** for a Traveller site. The Inspector focused on the prospect of sites becoming available in the Council's area, when temporary permission had been sought on the basis of **a reasonable expectation of alternative sites becoming available in the wider area**. The Inspector failed to address whether the circumstances would change in the wider area within the period for which permission was sought. There was a real possibility that considering that matter would have made a difference to the decision.

But see also *Beaver v SSCLG & South Cambridgeshire DC* [2015] EWHC 1774 (Admin) and *Sykes v SSHCLG & Runnymede BC* [2020] EWHC 112 (Admin).

Hughes v SSCLG & Sedgemoor DC [2012] EWHC 3743 (Admin)

The Inspector was entitled to refuse permission for a Traveller family to remain on the site, on the basis that visual and highway safety harm outweighed the family's best interests. The Inspector could not be criticised for taking the view that it would be unwise to rely for remediation of the harm on county council powers set out under **other legislation**, namely s79 of the Highways Act 1980. He did not address the provisions of s154 of the same Act but, had he done so, he would probably have approached it as he had approached s79.

The Inspector had regard to the appellant's family situation; it was mentioned in seven paragraphs of his decision. In substance, he accorded primacy to the **rights of the children** but, in balancing those rights against the other factors, he found that permission should not be granted.

Collins v SSCLG & Fylde BC [2013] EWCA Civ 1193

The Secretary of State dismissed planning and enforcement appeals for a site for 78 Travellers. The claimant submitted that the SoS was required to – but did not, in substance or form – treat the **best interests of children** as a primary consideration, which would involve deciding whether any of the other factors, either individually or collectively, outweighed that consideration.

The CoA referred to *ZH (Tanzania) v SSHD* [2011] UKSC 4 as authority for the proposition that the need to safeguard and promote the welfare of children requires that the relevant authorities treat the best interests of children affected as a primary consideration – but this

did not mean that identifying their best interests would lead inexorably to a decision in conformity with those interests.

The failure of the SoS to identify the interests of children as being a primary consideration was not material because he took that approach as a matter of substance. Neither the SoS nor the Inspector treated the considerations which pointed towards a refusal as inherently more significant than the interests of the children. There was no failure to consider Article 8 as an integral part of the decision-making process.

The Inspector's report described the circumstances and accommodation needs of the occupiers; the number of children; and problems including lack of a settled base from which to access health facilities and education. The approach of the decision maker was consistent with that contemplated in *ZH*; following a fact-sensitive analysis of the relevant considerations, the SoS concluded that the negative factors cumulatively outweighed the best interests of the children.

The CoA also referred to and endorsed (paragraphs 10-11) the list of propositions given in *Stevens v SSCLG & Guildford BC* [2013] EWHC 792 (Admin) as an accurate and helpful summary of the impact of the principle of considering the best interests of children on the approach to be taken by a planning decision-maker.

Dear v SSCLG & Doncaster MBC [2015] EWHC 29 (Admin)

The **weight** to be attached to a particular consideration in an appeal, including the **best interests of the children**, is for the decision maker.

Moore & Coates & the Equalities and Human Rights Commission v SSCLG & Bromley LBC & Dartford BC [2015] EWHC 44 (Admin)

The Secretary of State's approach to the recovery of two Traveller appeals was in breach of Article 6 and the public sector equality duty because it prevented the appeals being determined in a reasonable time.

Winchester CC v SSCLG & Others [2013] EWHC 101 (Admin), [2015] EWCA Civ 563

A grant of planning permission for the use as a '**Travelling Showpeople's site'** was a limited grant of permission for that use. It could not be interpreted as permission for a residential caravan site; no conditions were necessary for the authority to enforce against use by people who were not Travelling Showpeople.

Wenman v SSCLG & Waverley BC [2015] EWHC 925 (Admin)

The phrase '**housing applications**' set out in paragraph 49 of the Framework 2012 should not be interpreted narrowly so as to be restricted to bricks and mortar houses. Section 6 of the Framework 2012 was intended to cover homes and dwellings in a broad sense; it would be inconsistent with that interpretation if an application for a caravan site was excluded from the scope of paragraph 49.

A technical adjustment to the Framework 2012 was made following this judgment, through a Written Ministerial Statement issued on 22 July 2015, to the effect that those persons who fall within the PPTS definition of 'traveller' cannot rely on the lack of a five year supply of deliverable housing sites under the Framework to show that relevant policies for the supply

of housing are not up to date. Such persons should have the lack of a five year supply of deliverable traveller sites considered in accordance with PPTS.

Footnote 38 of the Framework 2021 states that a five year supply of deliverable sites for Travellers, as defined in Annex 1 to PPTS, should be assessed separately in line with the policy in PPTS.

Beaver v SSCLG & South Cambridgeshire DC [2015] EWHC 1774 (Admin)

Paragraph 46 of C1/06 provided a justification for the grant of **temporary permission** for Gypsy sites where it was expected that, at the end of the period, the **planning circumstances would change in relation to the provision of permanent sites**. The Circular did not permit unrealistic or false assumptions to be made simply because the authority had failed to meet the need for sites in the past.

Linfoot did not support a contention that the Inspector ought to have considered the wider area. The shortfall of sites in this case arose in the area of the District Council; whether or not it arose in other areas was not relevant to the argument about the right approach to the likelihood of changes in planning circumstances.

***O'Brien v South Cambridgeshire DC & SSCLG* [2016] EWHC 36 (Admin)**

An Irish Traveller challenged the local authority's decision to exercise their powers under s70c of the TCPA90 to decline to determine her planning application. The claim failed but the judgment includes useful analysis on the underlying statutory purpose of the power and the question of proportionate enforcement action under Article 8.

Allen v SSCLG & Bedford BC [2016] EWCA Civ 767

The appellant made an appeal under s73 for use of land as a Traveller site without complying with conditions limiting the use to a temporary period of three years. The Inspector recommended allowing the appeal, but the SoS refused permission. The High Court found did not give **adequate reasons**, but that decision was overturned by the CoA.

The SoS' reasons were "proper, adequate and intelligible"; they expressed and explained his conclusions on the "principal important controversial issues". They made it clear to the appellant why the appeal was lost and the application for planning permission was refused; *Porter* applied.

Doncaster MBC v SSCLG & AB [2016] EWHC 2876 (Admin)

The Inspector properly applied the provisions of **PPTS 2015** regarding the Green Belt. Although PPTS stated that it was unlikely that unmet need for Traveller sites and personal circumstances would outweigh harm to the Green Belt, it did not prevent the decision-maker from giving what weight they felt they should to such considerations.

The Inspector gave reasons for finding that the authority had **underestimated the need for sites and overestimated the supply**. The Inspector's assessment was based on expert evidence from both sides. The Inspector did not wrongly give weight to **policy failure** or thus "double-count" the need for Traveller sites; the failure of policy had made it difficult to identify alternative sites. The Inspector had express regard to PPTS and gave ample reasons for

finding that there were very special circumstances that outweighed the harm to the Green Belt.

Connors & Others v SSCLG & Others AND *Mulvenna & Smith & EHRC v SSCLG & Hyndburn DC* [2017] EWCA Civ 1850

Following *Moore & Coates*, these two cases, conjoined in the CoA, addressed the validity of the SoS' decisions to dismiss planning and enforcement appeals that had been unlawfully 'recovered' under a discriminatory policy or practice for recovery. Lindblom LJ upheld the decisions of the High Court to dismiss both challenges.

The decisions to recover the appeals could not be said to have generated an automatic conflict with s19 of the Equality Act 2010, a failure to perform the PSED, or any breach of the appellants' human rights in his decisions on the appeals themselves. The appeal decisions fell to be reviewed by the court in accordance with familiar public law principles.

None of the appellants had made a timely challenge to the recovery directions or policy before the SoS decided the appeals. The contention that PPTS was a discriminatory policy was found to be untenable and also impermissible in these proceedings against dismissal of planning appeals.

In his appeal decisions, the SoS gave significant weight to unmet need for Traveller sites and to five-year supply shortfalls as material considerations in the positive side of the balance, so far as permanent and temporary permission was concerned. It was also clear that the SoS had due regard to the matters referred to in the PSED but concluded that any impact on the appellants by reason of their protected characteristics was justified and proportionate. There was no breach of the PSED.

Swale BC v SSHCLG & Maughan & Others [2018] EWHC 3402 (Admin)

As with unmet need, it is not necessary to describe the Council's supply of sites with arithmetical precision. The Inspector did not err in law in deciding to grant temporary planning permission for a Traveller site partly on the basis of there being a 'substantial shortfall' of pitches.

Bromley LBC v Persons Unknown & London Gypsies and Travellers & Others [2020] EWCA Civ 12

This case concerned 'a "de facto boroughwide prohibition of encampment…in relation to all accessible public spaces in Bromley except cemeteries and highways"…it was common ground that the injunction was aimed squarely at the Gypsy and Traveller community'.

The HC judge granted a restricted 'injunction prohibiting fly tipping and disposal of waste…' but held that the prohibition of encampment did not strike a fair balance and was not proportionate.

The CoA rejected Bromley's appeal, holding 'that **the Gypsy and Traveller community have an enshrined freedom not to stay in one place but to move from one place to another**. An injunction which prevents them from stopping at all in a defined part of the UK comprises a potential breach of both the Human Rights and Equality Acts and in future should only be sought when, having taken all the steps noted above, a local authority

reaches the considered view that there is no other solution to the particular problems that have arisen or are imminently likely to arise'; paragraph 109.

In paragraph 104, Coulson LJ outlines considerations that 'should be at the forefront of a local authority's mind' when considering whether to seek a *quia timet*[82] injunction that is directed against the Gypsy and Traveller community, in order to ensure that proportionality is met. He described such injunctions as 'inherently problematic' (paragraph 105) but rejected submissions that they should never be granted, offering guidance instead (paragraph 108):

'a) When injunction orders are sought against the Gypsy and Traveller community, the evidence should include what other suitable and secure alternative housing or transit sites are reasonably available. This is necessary if the nomadic lifestyle of the Gypsy and Traveller community is to have effective protection under article 8 and the Equality Act.

b) If there is no alternative or transit site, no proposal for such a site, and no support for the provision of such a site, then that may weigh significantly against the proportionality of any injunction order.

c) The submission that the Gypsy and Traveller community can "go elsewhere" or occupy private land is not a sufficient response, particularly…in circumstances where multiple nearby authorities are taking similar action.

d) There should be a proper engagement with the Gypsy and Traveller community and an assessment of the impact of an injunction might have, taking into account their specific needs, vulnerabilities and different lifestyle…the carrying out of a substantive [Equality Impact Assessment]…should be considered good practice, as is the carrying out of welfare assessments of individual members of the community (especially children) prior to the initiation of any enforcement action.

e) Special consideration is to be given to the timing and manner of approaches to dealing with any unlawful settlement and as regards the arrangements for alternative pitches or housing'.

The judgment refers to but makes no express finding on the compatibility of blanket injunctions with PD rights set out under Schedule 2, Part 5 of the GPDO 2015.

In *Canterbury CC v Persons Unknown & Friends, Families and Travellers* [2020] EWHC 2122 (QB), the Court agreed to extend a 'proportionate' final injunction made against persons unknown subject to review at a later hearing. In [2020] EWHC 3153 (QB), the Council accepted that the Claim Form had not been validly served and that they had 'been enforcing interim and final injunctions…where [they had] failed to establish jurisdiction over any defendant'. The injunction was discharged.

See *Barking and Dagenham LBC & Others v Persons Unknown & Others* [2021] EWHC 1201 (QB) for possibly the final word on injunctions against persons unknown.

Sykes v SSHCLG & Runnymede BC [2020] EWHC 112 (Admin)

This challenge to an Inspector's refusal for permission for a Traveller site was not contested by the SSCLG but successfully defended by the Council. The Inspector did not err in failing

[82] "Because he fears" or to quiet present apprehension of probable future injury to property.

to take account of the likelihood of the appellants being able to find suitable accommodation elsewhere within the County. On the facts, the case was comparable to *Beaver* and not *Linfoot*; the appellants had claimed there was unmet need in the Borough and that was the focus of the appeal.

The Inspector did not fail to properly consider whether to permit fewer than 13 pitches on the site. The appellants had not presented a proposal for a reduced number of pitches/households, and so the Inspector was entitled to deal with the issue in general terms. He 'gave careful and conscientious consideration to the personal circumstances of the members of the Group, both on an individual basis and collectively' – and gave due consideration to interference with Article 8. His assessment of the planning balance was intelligible and adequately explained.

Nixon & East Hertfordshire DC v SSHCLG & Mahoney [2020] EWHC 3036 (Admin)

This challenge to an Inspector's decision to allow the appeal was made on multiple grounds but did not succeed. The case generally turns on its facts but an interesting feature is that the development plan included two policies (HOU9 and HOU10) which related to nomadic and non-nomadic Gypsies and Travellers respectively (those with and without 2015 status) but were otherwise identical.

The Inspector found that the Traveller site would comply with both policies, in part because it would be in a sustainable location for nomadic and non-nomadic Travellers. Since there was compliance with the development plan, the Inspector did not need to consider whether the Council had met its need for sites, or whether the occupiers of the site would have PPTS status. Given the identical wording of Policies HOU9 and HOU10, there was also no need for a condition to restrict occupation to Travellers with PPTS status.

Braintree DC v SSHCLG & Nicholls [2021] EWHC 651 (QB)

The Inspector did not err in her interpretation or application of the relevant development plan policies and her reasoning was adequate.

Sefton MBC v SSHCLG & Doherty [2021] EWHC 1082 (Admin)

The Inspector did not err in finding that the factors in favour of the Traveller site clearly outweighed the harm caused by the development to the **Green Belt** so as to constitute very special circumstances.

The Council challenged the decision on the basis that the Inspector had failed to apply, as paragraph 144 of the Framework 2019 expected, substantial weight to each of the individual Green Belt harms that he identified. The Court held that the Council's argument did not proper account of the nature and purpose of the Framework, which is not statute and not to be construed as such.

The first sentence of paragraph 144, which required that substantial weight is given to any harm to the Green Belt, had to be read in the light of the preceding and following sentences. It was intended to elucidate paragraph 143. It required the decision-maker to have real regard to the importance of the Green Belt, not to carry out a mathematical exercise whereby substantial weight is allocated to element of harm and each tranche of substantial weight is then added to a balance. The exercise of planning judgment is not to be an artificially sequenced two-stage process but a single exercise to assess whether there are

very special circumstances which justify the grant of permission notwithstanding the particular importance of the Green Belt.

Paragraphs 143 and 144 of the Framework 2019 are reproduced as 147 and 148 in the Framework 2021.

See the Green Belts ITM chapter.

Smith v SSLUHC & Ors [2022] EWCA Civ 1391

Case concerning an Inspector's decision to dismiss a planning appeal and refuse planning permission for a permanent site for Gypsies or Travellers, with regard to the definition of "Gypsies and Travellers" set out in Annex 1 of the Planning Policy for Traveller Sites 2015 (PPTS 2015).

The PPTS contains policies addressed at meeting the land-use needs of Gypsies and Travellers. It defines "gypsies and travellers" for the purposes of the policy as:

"Persons of nomadic habit of life whatever their race or origin, including such persons who on grounds only of their own or their family's or dependants' educational or health needs or old age have ceased to travel temporarily but excluding members of an organised group of travelling showpeople or circus people travelling together as such".

(Note: Prior to 2015, the definition also included people who had permanently ceased travelling).

Ms Smith contended that, by excluding those who had ceased to travel permanently, the definition and thus the Inspector's decision, amounted to unlawful indirect discrimination contrary to Articles 8 and 14 of the Human Rights Act 1998 and s19 and s149 of the Equality Act 2010. The Secretary of State argued that the discriminatory effect was lawful.

Reversing the finding of the lower court, the CoA held that:

a) Ms Smith was making a claim for indirect discrimination as an affected person. Accordingly, the burden of proof was on the Secretary of State to justify the discrimination that he had admitted to.

b) The claim concerned discrimination on the ground of race as well as age and disability.

c) For the discrimination to be lawful, the Secretary of State had to show it was a proportionate means of achieving a legitimate aim. The evidence before the court did not support the contention that 'fairness' could realistically be regarded as to the objective of the exclusion.

d) Since the Secretary of State had not established that the exclusion had a legitimate aim, it was not strictly necessary to address proportionality. Nonetheless, the CoA concluded that the severity of the effect on the rights of aged and disabled Gypsies and Travellers outweighed the alleged aims.

Since the PPTS 2015 itself was not the subject of the litigation, it has not been quashed or declared unlawful. It remains extant. Inspectors should continue to apply PPTS 2015 in

casework except, following *Smith*, they should cease to apply the definition of "gypsies and travellers" set out in Annex 1 of PPTS 2015.

Other personal circumstances of Gypsy applicants are also material considerations, see *Basildon DC v SSETR* [2001] JPL 1184.

Barking and Dagenham LBC & Others v Persons Unknown & Others [2021] EWHC 1201 (QB)

Case concerning injunctions that had been granted to 38 local authorities against 'persons unknown' and had targeted, principally, unauthorised encampments on land.

Mr Justice Nicklin held that the Courts have the power to case manage proceedings and/or to vary or discharge injunctions that have previously been granted by final order where the terms of the order provide for continuing jurisdiction and the injunctions apply to newcomers who were not party to the proceedings when the order was granted.

'…it is a fundamental requirement of justice that, where an injunction has been granted by the Court, whether interim or final, that has the potential to bind people who have not had the opportunity to be heard before the order was granted, the Court must retain jurisdiction to set aside or vary that order, whether on application by the person affected or, if necessary, on its own initiative.'

A final order cannot bind persons who were not party to the proceedings.

'Nothing in s.222 [of the Local Government Act 1972], s.187B [of the TCPA90], or s.1 [of the Anti-Social Behaviour, Crime and Policing Act 2014] (or any of the authorities) suggests that Parliament has granted to local authorities, exceptionally, the ability to obtain final injunctions in civil proceedings against "Persons Unknown" which apply to and bind newcomers. Given that, in my judgment, the granting of such a power would represent a radical (and unprecedented) departure from the principles of civil litigation in this jurisdiction, one would have expected to see such a power granted by express words. There is no hint of such a power in the legislation.'

While the Courts have a power to grant orders which bind the whole world, the circumstances in which they would exercise that power are very limited. The injunctions in this case did not 'fall into the exceptional category'. **Interim** injunctions could be granted against persons unknown but only where the Court was satisfied that people existed who could be identified and served with the proceedings, and there was a sufficiently real and imminent risk of a tort being committed to justify the order.

St Anne's Court Dorset Ltd v SSHCLG & Dorset Council [2021] EWHC 2954

Whether use of the site for the stationing of static caravans for human habitation, as compared with use of the site for touring caravans, constituted a material change of use and was a matter of fact and degree judgement for the inspector.

The original planning permission was granted in 1980 for a “site for use for Touring Caravans”. A certificate of lawful use was granted in April 2016 confirming use for touring caravans and one mobile home for residential use in connection with the day-to-day operation of the site as a touring caravan park (this was based on the existing lawful use for at least 10 years).

In 2018 the Claimant applied for a second certificate of lawful use, to confirm use of the site "for the stationing of caravans for human habitation (a caravan site)". East Dorset District Council (the relevant authority at the time) refused the application and the Claimant appealed, with the inspector refusing the appeal in February 2020.

The inspector found that one of the conditions on the permission (condition 4) prohibited the use of touring caravans on the site being used as permanent residential units. The certificate of lawful use which allowed the mobile home to be used for residential use did not breach condition 4 because that condition applied to touring caravans (not mobile homes, otherwise known as static caravans, and the use of one for human habitation was allowed by the certificate). The main issue related to the terms of the certificate and whether the “unfettered stationing of mobile homes for human habitation” would amount to a material change of use. Whilst the unfettered stationing of touring caravans for human habitation would amount to a material change of use, the certificate specified only a ‘mobile home’. The certificate only specifies one mobile home so it would be a change of use if there were multiple mobile homes / static caravans on the site, being used for human habitation.

The Planning Inspectorate

Hedgerow Casework

Updated to reflect December 2023 Framework (NPPF)

What's new since the last version:

First edition: 26 July 2023

Contents

Introduction and summary of the process

1. Hedgerow casework is a very small and niche area of work with only a handful of appeals lodged in any year. These notes summarise the legislation and appeals process[1] associated with the protection of hedgerows, but far more detailed and comprehensive guidance is provided by *The Hedgerow Regulations 1997 – A Guide to the Law and Good Practice* (the guidance) and *The Hedgerow Regulations, your questions answered* These are available in the Library, where there is also a Reading List with other publications you may find useful/interesting, as well as online[2], and should be read alongside these notes. There is also additional guidance regarding management, maintenance and replanting in the online Countryside Stewardship pages[3] and The Hedgerow Survey Handbook[4].

2. The Hedgerow Regulations 1997 (the Regulations) and Section 97 of the Environment Act 1995 (the Act) are designed to protect the countryside landscape and its wildlife from the loss of hedgerows[5]. Hedgerows are often key features in the landscape. They may be associated with historic features such as rights of way, ditches, earthworks and former administrative boundaries and also have wildlife, and in the case of older hedgerows, considerable biodiversity value.

3. Regulation 5(1) states that subject to exemptions set out in Regulation 6, the removal of a hedgerow to which the Regulations apply is prohibited. When wishing to remove a hedgerow, landowners and managers are required to give the local planning authority prior notice in the form of a ***Hedgerow Removal Notice***. This requires the applicant to identify the hedgerow, and the reasons for the hedgerow's removal. There is a strong presumption in favour of protecting and retaining hedgerows[6], and the circumstances in which hedgerows are allowed to be removed are likely to be exceptional[7].

4. The Hedgerow Removal Notice triggers the procedure set out in the Regulations. This gives the local planning authority 42 days to respond and to give or refuse consent for the notified works. Regulation 5(3) also requires the local planning authority to consult with the relevant parish council in England, or the community council in Wales. A longer period of consultation may be allowed if this is agreed between the person giving notice and the local planning authority. In deciding whether to give consent or not, the local planning authority will take account of whether the hedgerow is *important* according to criteria set out in the Regulations.

5. If the hedgerow is not important according to those criteria, the local planning authority is not able to refuse consent for the hedgerow's removal. If the local planning authority does not respond within 42 days, the hedgerow may be removed.

[1] Hedgerows – Retention and Replacement Notices: Guidance on the Appeal Procedures - GOV.UK (www.gov.uk)
[2] Hedgerows, retention and replacement notices: the appeal procedures - GOV.UK (www.gov.uk)
[3] BN5: Hedgerow laying - GOV.UK (www.gov.uk),BN6: Hedgerow coppicing - GOV.UK (www.gov.uk), BN7: Hedgerow gapping-up - GOV.UK (www.gov.uk)
[4] The Hedgerow Survey Handbook
[5] Chapter 2, A Guide to the Law and Good Practice
[6] Regulation 5(5)(b)
[7] Chapter 8, A Guide to the Law and Good Practice

6. If the local planning authority determines that the hedgerow may not be removed, it will issue a ***Hedgerow Retention Notice*** (HRtN). There is a right to appeal against the issuing of the HRtN.

7. Where it appears that a hedgerow has been removed in contravention of Regulation 5(1) or (9), a ***Hedgerow Replacement Notice*** (HRpN) may be issued, setting out a requirement to plant another hedgerow. An appeal can also be lodged against the issuing of a HRpN.

8. There are no other grounds on which an appeal can be lodged. Occasionally the local planning authority may issue the incorrect notice (for example a HRtN for a hedge that has already been removed). In such circumstances there are no grounds for appeal and the parties would be advised of that situation. If a HRpN is issued for a hedge that has not been removed, the notice would not be legitimate and the appeal would be dismissed largely on procedural grounds.

Procedure

9. The right to make an appeal is given in Regulation 9 of the Regulations. The Inspector may allow or dismiss the appeal as to the whole, or in part, and may also give directions necessary to give effect to the determination including directions for quashing or modifying a notice.

10. Appeals may be determined through written representations, hearings or inquiries, and it is worth noting that unlike S78 appeals, the Regulations give the appellant the right to be heard (For example through a hearing or inquiry). The appeal form allows the parties an opportunity to accompany the Inspector on the visit. Unless there are access restrictions or it is important to clarify particular details on site in the presence of the parties, for WRs it is worth asking the case officers to enquire whether the parties would be satisfied with an unaccompanied visit.

11. However, establishing whether a hedgerow meets the given criteria to identify whether it is important or not, can require detailed site investigation and verification. It may be helpful to have the parties at the visit, particularly if there is dispute around the length of the relevant hedgerow or species composition. It is also useful to consider whether species identification is critical. If so, events might be better scheduled during the growing season.

12. It is also the case that the Regulations do not define a hedgerow. This may be of relevance when deciding which sections of a hedgerow fall within the Regulations. The guidance[8] states that in the absence of a statutory definition, the courts are likely to give the word its ordinary, natural meaning, concluding that a hedgerow is *a row of bushes forming a hedge, with the trees etc. growing in it; a line of hedge.* It is also commonly understood that a hedge-line contains closely spaced shrubs or bushes, sufficient to create a barrier, and mark a boundary. These loosely accepted definitions can be critical in deciding whether or not what is before you is actually a hedgerow and therefore covered by the Regulations.

[8] Chapter 3, A Guide to the Law and Good Practice

13. For site visits – give some thought to safety footwear and thornproof outerwear, and ensuring locked gates are open. Unless a hedgerow is alongside a metalled road, site visits can involve tramping across very rough ground and fields, and through undergrowth.

14. The Survey Handbook[9], published by Defra, sets out a very useful guide to carrying out surveys to a standard format, as well as useful information regarding the different types of hedge you might be presented with, their condition and how to assess former management

The Appeal Process

Appeals against the issuing of a Hedgerow Retention Notice

14. The main issue for appeals against the issuing of a HRtN will be whether the hedgerow is deemed important and whether sufficient justification has been demonstrated for its removal. The appeal will generally be lodged on the grounds that:

    a) The parties dispute whether the hedgerow is important, with the appellant claiming that the hedgerow does not meet the criteria set out in the Regulations.

    b) It is agreed between the parties that the hedgerow is important, but the appellant considers that the local planning authority has given insufficient weight to the reasons for its removal.

    c) The appellant argues that the hedgerow's proposed removal is for reasons that fall within one of the exemptions set out in Regulation 6 and Chapter 4 of the guidance. These include a need for access, carrying out consented planning works, carrying out statutory works.

15. Even if the parties agree that a hedgerow is deemed to be important according to the criteria in the Regulations, it is important to check the following:

Is the hedgerow covered by the Act?

16. Regulation 3 sets out in more detail which sections of a hedgerow are included within the Regulations. In order to fall within the Regulations, the relevant hedgerow must be more than 20 metres long, or if less than 20 metres in length, is connected at each end by another hedgerow. The length of the adjoining hedgerows is immaterial as it is the connection that is the significant factor. A gap that has arisen through contravention of the Regulations and any gap not exceeding 20 metres will fall within the Regulations. Chapter 1 of the guidance adds the notes that the relevant hedgerow must be on or adjoin land that is used for agriculture or forestry, the breeding or keeping of horses, ponies or donkeys, common land, village greens, Sites of Special Scientific interest of Local Nature Reserves. Garden hedges are excluded. A hedgerow that separates a domestic garden and agricultural land would not be covered by the Regulations.

[9] Hedgerow Survey Handbook

Is the hedgerow important?

17. When assessing a Hedge Removal Notice, the local planning authority will base its decision making on a series of criteria set out in detail in the Regulations. A hedgerow is deemed to be important if

    a) It has existed for 30 years or more, **and**
    b) It satisfies at least one of the archaeological, historical, wildlife or landscape criteria set out in Part II of Schedule 1.

18. If the applicant is unable to demonstrate that the hedgerow is less than 30 years old, the local planning authority will go on to make the assessment against Part II Schedule 1.

19. Part II Schedule 1 sets out a very comprehensive and detailed list of attributes which inform the status of the hedgerow. Verifying these attributes may involve checking measurements on site or on a scaled plan to establish, for example, species mix within a given stretch of hedgerow, the number of standard trees, the extent of associated ditches and parallel hedges.

a) Hedgerow Age

20. If the age of the hedgerow is in dispute, an assessment would need to be made at the visit of the size of individual plants, particularly the girth of individual stems, including whether there is evidence of former or current hedge-laying and assessing the framework of stems within the body of the hedge. Angled or horizontal branches generally suggest laying at some point, even if recent growth is predominantly vertical, and tends to indicate age in excess of 30 years.

21. Growth rates will vary depending on the circumstances, but it may be necessary to exercise judgement. There is however a presumption in the Regulations that if the appellant cannot verify that a hedgerow is less than 30 years old the local planning authority may proceed on the basis that it is.

22. Documentary evidence may include aerial shots, photographs, representations from parish councils or other interested parties, and invoices for planting. It should be remembered that the presence of a boundary on a map does not necessarily indicate that there was a physical hedgerow. However, historic boundary lines are an attribute which can define whether a hedgerow is important or not, as set out in Part II, Schedule 1, Section 1).

b) Defining criteria

23. The Regulations set out the defining criteria in very great detail. They fall into four categories, set out in Part II Schedule 1:

    i) *Archaeology and History*
    Section 5 sets out specific associations between a hedgeline and the boundaries of historic parishes or townships; archaeological features; pre-1600 estate boundaries; a document that pre-dates the Inclosure Act.

Field boundaries often reflect the line of old roads, sometimes dating back to Roman times, or are linked to the layout of ancient earthworks. If the Council has argued that the hedgerow has archaeological or historic value, evidence to that effect should be supplied to support field observations. If it has not been supplied in map form to enable it to be verified, it is important to ask for it. Archive evidence that has informed the Council's decision making should be available to the Inspector and the appellant. This can be difficult to interpret, so ask the Council to highlight the relevant boundaries on what has been submitted.

ii) *Wildlife and Landscape*

Sections 6 – 8 set out additional criteria giving weight to the wildlife and landscape value of a hedgerow. Section 6 is concerned with the presence of important, protected and rare flora and fauna, and requires verification from local biological records and the Red Data Books.

Section 7 requires importance to be based on species diversity and/or in combination with specific topographic features such as ditches, footpaths, banks. The relevant species are listed in Part II Schedules 2 (woodland perennials) and 3 (woody species). Where weight is given to species diversity, specialist evidence should be supplied and may require verification on site. The threshold for meeting the species diversity criteria is reduced for specific counties, listed in paragraph 2.

Section 8 requires the hedgerow to be adjacent to a public right of way, **and** to include at least 4 woody species and 2 of the topographic features set out in Section 7.

24. If it is established that the hedgerow is not important according to its age and additional attributes, there is no requirement to carry out further reasoning. The appeal would be allowed and the HRtN would be quashed.

25. If it is confirmed that the hedgerow is important, the decision needs to investigate the proposed reasons for removal and carry out a balancing exercise. Where a hedgerow falls within an Area of Outstanding Natural Beauty or Special Landscape Area, its positive contribution to the landscape may add weight to the arguments in favour of retention. However, such designations are not part of the assessment of importance.

26. The arguments presented in support of an appeal against a HRtN are generally concerned with field rationalisation, or laying of utilities, or to provide access for other development. All these reasons may have a sound economic base but do not necessarily justify the removal of a historic hedgerow.

27. If the hedgerow is found to be important and the justification given for its removal is insufficient to outweigh its loss, the appeal would be dismissed.

28. If there are reasons of such weight to allow the hedgerow's removal, the appeal would be allowed and the HRtN would be quashed.

Exemptions

29. Regulation 6 and Chapter 4 of the guidance sets out exemptions from the need to notify the local planning authority of hedgerow removal. It is not unusual for appellants to argue that the removal was carried out to improve field drainage. However, it is only statutory works covered by the Land Drainage Act 1991 or the Environment Act 1995, which have no need for prior notification.

Appeals against the issuing of a Hedgerow Replacement Notice

30. Where a hedgerow has been removed in contravention of regulation 5(1) or (9), the local planning authority may give notice to the owner or utility operator, requiring the planting of another hedgerow, through the issuing of the HRpN. The HRpN shall specify the species and positions of shrubs, trees and the period within which the planting is to be carried out. The hedge that is planted will subsequently be treated as if it was an important hedgerow from substantial completion.

31. The main issues for these appeals will generally be:

    a) whether the HRpN was legitimately issued, (based on whether the hedgerow was important, and whether it has actually been removed/destroyed).
    b) The requirements of the HRpN in terms of specification; such as species mix, maintenance, the inclusion of works not directly related to the replanting of a rural hedgerow, for example that the requirements are too onerous.

Definition of removal

32. It is not uncommon for appeals to be lodged on the basis that the hedgerow has not actually been destroyed and the guidance gives a definition of removal[10]. A hedgerow that has been coppiced or cut to ground level may well regenerate and therefore it cannot be presumed that it has been removed. Paragraphs 3.14 – 3.16 of the guidance and BN6: Coppicing are useful references in this regard. It is not unknown for councils to allege hedgerow removal when in fact the hedge in question has been appropriately managed. Similarly, the lopping or removal of hedgerow trees does not necessarily amount to the removal or destruction of the hedgerow.

33. It is therefore important to do a rigorous survey, be satisfied that the hedgerow has gone and will not regenerate. This requires an understanding of what has happened and how it affects the importance of the hedge, as well as how likely it is to regenerate. Notwithstanding the imperative to deal promptly with appeals, it is often beneficial to visit a site during the growing season following the alleged removal, to be sure that the hedgerow is destroyed.

[10] Chapter 3, A Guide to the Law and Good Practice

34. However, other works such as grubbing up, nearby earthworks, use of chemicals, and inappropriate management which prevents regeneration, would usually be considered to result in removal/destruction.

Specification for replanting

35. If it is determined that the hedgerow has been unlawfully removed, the HRpN will include a replanting specification. This should be checked to ensure its requirements tally with the Inspector's conclusions regarding the extent of the hedgerow that has been destroyed, (which might be less than set out in the HRpN), and that its requirements in terms of plant size, density, and establishment maintenance are reasonable for rural hedge planting. (If specialist help is required this can be sought through the specialist inspector list for someone with a landscape/horticultural background. The countryside stewardship advice is also useful in this regard).

36. Generally, the key issues are ensuring planting is carried out in the correct season, there is protection from grazing through rabbit guards, protection from weeds through the use of a mulch strip and/or pesticides. The HRpN should also require approval with the council of an establishment/maintenance and beating up phase to ensure that failures are addressed.

ANNEX A: Appeal against Hedgerow Retention Notice – dismiss/allow

Please note that the SoS for hedgerow appeals is Defra.

The Planning Inspectorate

Appeal Decision

Site visit made on

by

an Inspector appointed by the Secretary of State

Decision date:

Appeal Ref: APP/HGW/XXX

XXXXXX

- The appeal is made under Regulation 9 of The Hedgerow Regulations 1997.
- The appeal is made by XXXX against the decision of XXXX.
- The application Ref: XXXX, dated XXXX, was refused by notice dated XXXX.
- The proposal is XXXX.

Decision

1. The appeal is dismissed OR The appeal is allowed and the Hedgerow Replacement Notice is quashed.

Background and Main Issues

1. XXXX
2. The Hedgerow Regulations 1997 (the Regulations) seek to address the ongoing loss of hedgerows from the countryside as they can make a positive contribution to the character and appearance of the landscape and may have historic and biodiversity value.
3. XXXX
4. As such, the main issues are whether the hedges are deemed important and whether sufficient justification has been demonstrated for their removal.

Reasons

Conclusion

5. On the basis of the arguments before me I conclude that the grounds of appeal do/do not add up to the *exceptional* circumstances required by the guidance*,* and that insufficient justification has been demonstrated for the hedgerow's removal. Consequently, the appeal is dismissed/allowed and the Hedgerow Replacement Notice is quashed.

ANNEX B: Appeal against Hedgerow Replacement Notice – dismiss

Please note that the SoS for hedgerow appeals is Defra.

The Planning Inspectorate

Appeal Decision

Site visit made on xxxx

By XXXX

an Inspector appointed by the Secretary of State

Decision date:

Appeal Ref: APP/HGW/XXX

XXXX

- The appeal is made under Regulation 9 of the Hedgerows Regulations 1997 against a Hedgerow Replacement Notice.
- The appeal is made by xxxx against the issuing of the notice by xxxx.
- The Hedgerow Replacement Notice is dated xxxx.
- The Hedgerow Replacement Notice indicates that the Council considers that a hedgerow has been removed in contravention of Regulation 5. The location of the hedgerow is shown xxxxxx on the plan attached to the Hedgerow Replacement Notice.
- The Hedgerow Replacement Notice requires that XXXX

Decision

1. The appeal is dismissed.

Background and Main Issue

2. The Hedgerow Regulations 1997 (the Regulations) seek to address the ongoing loss of hedgerows from the countryside, as they can make a positive contribution to the character and appearance of the landscape and may have historic and biodiversity value.
3. The purpose of the legislation contained in the Regulations is to protect hedgerows which are considered to be important, allowing their removal only in certain exceptional circumstances. Where it appears to a local planning authority that a hedgerow has been removed in contravention of
Regulation 5 (1) or 5 (9) of the Regulations, the authority may issue an HRN, under Regulation 8 of those Regulations, requiring the owner of the land to plant another hedgerow.
4. XXXX
5. As such, the main issues are (whether the hedge was important as defined by the Regulations, whether prior consent was required for its removal, and therefore) whether the HRN has been legitimately issued.

Reasons

Conclusion

6. In the light of the above I conclude that the HRN has been legitimately issued with regard to the provisions of Regulation 8 and consequently the appeal is dismissed.

ANNEX C: Appeal against the issuing of Hedgerow Replacement Notice – allowed in Part

Please note that the SoS for hedgerow appeals is Defra.

The Planning Inspectorate

Appeal Decision

Site visit made on XXXX

by XXXX

an Inspector appointed by the Secretary of State

Decision date:

Appeal Ref: APP/HGW/XXX

XXXX

- The appeal is made under section 97 of the Environment Act 1995 and Regulation 9 of the Hedgerows Regulations 1997 against a Hedgerow Replacement Notice.
- The appeal is made by XXXX against the issuing of the notice by Wealden District Council.
- The Hedgerow Replacement Notice, Ref: XXXX, dated XXXX, indicates that the Council considers that a hedgerow has been removed in contravention of Regulation 5(1).
- The Hedgerow Replacement Notice requires that XXXX.

Decision

1. The appeal is allowed/allowed in part and the Hedgerow Replacement Notice (HRN) is modified as set out in Appendix XXXX to this decision.

Background and Main Issue

2. The Hedgerow Regulations 1997 (the Regulations) seek to address the ongoing loss of hedgerows from the countryside, as they can make a positive contribution to the character and appearance of the landscape and may have historic and biodiversity value.
3. The purpose of the legislation contained in the Regulations is to protect hedgerows which are considered to be important, allowing their removal only in certain exceptional circumstances. Where it appears to a local planning authority that a hedgerow has been removed in contravention of
Regulation 5 (1) or 5 (9) of the Regulations, the authority may issue an HRN, under Regulation 8 of those Regulations, requiring the owner of the land to plant another hedgerow.
4. The main issue is therefore whether the HRN was legitimately issued.

Reasons

Conclusion

5. In the light of the above, I conclude that some sections of the hedgerow have been removed and the HRN has been legitimately issued having regard to the provisions of Regulation 8. As such, the appeal is dismissed in part and the HRN is modified as set out in Appendix 1.

APPENDIX 1 – this is an example where the Hedgerow Replacement Notice, the specification and the drawing were required to be amended. (Each case will differ).

I direct that the Hedgerow Replacement Notice (HRN) be modified as shown below:

Amendments to Hedgerow Replacement Notice

Paragraph 2:

Delete the second sentence and insert: XXXX

Paragraph 3:

Insert XXXX

Paragraph 6: Period required for compliance:

Delete the second sentence and substitute with XXXX

Amendments to Written Specification

Shrub and Tree Hedge Planting: Delete the first sentence, substitute with XXXX.

Wildflower Seeding: delete

Management Plan: Delete and substitute XXXX

Amendments to Drawing No WEA-WNL-L-001-A

Delete and amend Planting Notes as set out above.

Delete seeding notes

Delete plant schedule and tags, substitute with XXXX

The Planning Inspectorate

High Hedge Casework

Updated to reflect December 2023 Framework (NPPF)

What's new since the last version

Changes highlighted in yellow made 08 February 2017:

- New paragraph 77 regarding accompanying plans;
- Formatting changes to the template notices and decisions at Annexes B, C, D and E;
- The template notice at Annex C now refers to an attached plan;
- Annexes C & E now include a plan page.

Contents

NOTE: all references to trees include shrubs. The following abbreviations are used throughout:

AHH = action hedge height

BRE = Building Research Establishment

HH = high hedge

HH&LL = Hedge Height and Light Loss

P&C = Prevention and Cure

RN = remedial notice

Introduction

1. The right to make high hedge (HH) complaints and appeals was introduced by Part 8, sections 65 to 97 of the Anti-social Behaviour Act 2003. This part of the Act was brought into force in 2005, along with The High Hedges (Appeals) (England) Regulations 2005. ODPM (subsequently DCLG, now DLUHC) published 'High Hedges Complaints: Prevention and Cure' (P&C), which provides policy advice and guidance on the complaint and appeal processes. In relation to light loss issues, ODPM published 'Hedge height and light loss' (HH&LL), which sets out the Building Research Establishment (BRE) methodology for calculating, in a range of scenarios, the height above which a hedge is likely to cause a significant loss of light to a nearby property. In 2008, DCLG published 'Matters relating to High Hedges' as a supplement to P&C.

2. Where numbers appear in brackets [1, 2.2 and so on] within this text, it is referring the reader to 'High Hedges Complaints: Prevention and Cure' stored in the Library

An outline of the process

3. A person who believes that they are affected by a HH can ask the Council to consider their complaint. The Council will first determine whether the hedge is a HH within the meaning of the legislation[1] and then satisfy itself that sufficient effort has been made by the complainant to resolve the problem by negotiation or mediation with the hedge owner beforehand. Assuming the complaint is valid the Council will give the main parties [5.36-5.38] the opportunity to state their case, before carrying out a site visit, and issuing a decision and usually a report. It can either:

    - uphold the complaint and issue a Remedial Notice (RN) to require works to the hedge;
    - decide the hedge is not having an adverse effect and so not issue a RN; or
    - decide that although the hedge is causing an adverse effect it would not be reasonable to issue a RN.

4. Where a hedge runs along the boundary of several properties each owner/occupier can complain. In these circumstances the Council must issue individual decision letters and RNs. If there are several complainants there could be several appeals relating to the same hedge. In such cases the appeals will be linked, but different decisions could be reached on each one, depending on the circumstances of the case. There can also be multiple owners [5.19-5.20, 6.42-6.49 and 8.36-8.44]. For ease, this chapter assumes that there is only one complainant and one owner.

5. Both the hedge owner and the complainant have the right to lodge an appeal on a number of grounds[2]; the most common ones of which are set out here.

6. The hedge owner can appeal on the basis that:

    - a RN should not have been issued (Regulation 3 appeal);
    - a RN is unnecessarily onerous (Regulation 3 appeal);

[1] See s65-67 of the Anti-social Behaviour Act 2003.
[2] See Regulations 3-5 of the High Hedge (Appeals)(England) Regulations 2005.

- insufficient time has been allowed for the works specified in the RN (Regulation 3 appeal).

7. The complainant can appeal on the basis of:

   - the RN that has been issued does not go far enough (Regulation 3 appeal);
   - the withdrawal of a RN (Regulation 4 appeal);
   - the waiver or relaxation of a RN's requirements (Regulation 4 appeal);
   - a Council's decision not to issue a RN (Regulation 5 appeal).

8. Often, both parties will appeal where a RN has been issued.

9. Regulation 3 and 4 appeals are dealt with on a 'de novo' basis – all the original issues should be considered as well as taking into account any new evidence or changes in circumstances (see paragraphs 15-19 below). Regulation 5 appeals are determined on the basis of a review of the Council's decision. Advice on the approach to take in respect of Regulation 5 appeals is set out in Annex A.

Inspector' powers

10. Once PINS has received all of the Council's case papers, an Inspector will be appointed to carry out a site visit and then issue a decision. Where an appeal is allowed to any extent, the Inspector can quash a RN; vary one to make it more onerous or to relax any of its provisions; or issue one where none had been issued before, as considered appropriate (see paragraphs 65-66 below). Whatever the decision on an appeal relating to a RN, the Inspector can revise the notice to correct any defect, error or misdescription, providing this will not cause injustice (see paragraphs 65, 72-73 below).

11. However it is important to note that, where only one party appeals, the decision should not leave that appellant worse off than if they had not appealed. For example if only the complainant appeals, on the basis that the RN did not go far enough, an Inspector cannot quash or relax the RN in favour of the hedge owner. The requirements of an RN could be varied, but the Inspector would need to be satisfied that the extent of variation would not result in the appellant being worse off. If the Inspector decides that a more onerous RN is not warranted, the appeal can only be dismissed. Where both parties appeal then the Inspector has discretion to deal with the appeals as he/she sees fit but can only quash or vary a RN where he/she is allowing an appeal.

Location and composition of the hedge

Is it a 'high hedge'?

12. The first consideration is whether the hedge falls within the ambit of the legislation. This should have been established beyond doubt by the Council, but Inspectors may have to satisfy themselves that a hedge qualifies as a HH. This is determined by the number and species of trees comprising the hedge, its height, and its density:

    a) a hedge can be a mix of tree species, including some deciduous, but the predominant type must be evergreen or semi-evergreen. Leyland cypress is probably the most common conifer, but it could be any species of evergreen or semi-evergreen tree or shrub. Thus laurel, holly and bay are included. Semi-evergreens

are those which retain some foliage, such as privet (which can be evergreen in the south, but lose its leaves in the north). In such cases it could be a matter of fact and degree whether a tree is semi-evergreen or not. The Inspector should have evidence from the parties on this if it is in dispute.

It should be remembered that some conifers, such as larch or swamp cypress are deciduous and so fall outside the ambit of the Act, as do beech and hornbeam as any foliage they retain in the winter is dead, unless any of these form part of a predominantly evergreen/semi-evergreen hedge. Climbing plants such as ivy and grasses such as bamboo fall outside the Act, regardless of whether they form part of a predominantly evergreen/semi-evergreen hedge.

b) the hedge must be more than 2m high. The 2m is measured from ground level on the side where the hedge is planted. Ground level is the natural level at the base of the hedge, unless the hedge has been planted on a mound or in containers, in which case the natural level of the surrounding ground should be used. The relevant measurements should have been taken by the Council, but it is possible for these measurements to be disputed on appeal, in which case the Inspector will need to satisfy him/herself of the correct measurements on site.

c) the hedge must be made up of a line of 2 or more trees.

d) the hedge must be a barrier to light or access above 2m. If a hedge contains gaps it will be a matter of judgement whether the gaps are sufficient so that a barrier is not maintained. DLUHC advice is that it is *less likely* to be a HH if no branches are touching and it is possible to clearly see through the gaps. Where there are gaps the hedge may be considered to be a number of shorter hedges, each one of which could come within the scope of the Act.

13. In cases where the make-up of the hedge is disputed it is important for the Inspector to deal with this as a first step as it could affect the HH&LL calculations or even bring the validity of the appeal into question. If an Inspector considers that only a small part of a much longer hedge which is the subject of an appeal is covered by the Act the appeal should still be determined, but only the impact of that part of the hedge that is within the parameters of the legislation can be considered.

14. Inspectors should not usually raise issues that have not been mentioned by the parties. However if, for instance, at a site visit an Inspector becomes firmly convinced that the hedge is not a HH, and this has not been raised by the parties, he/she should ask the Tree & Hedge Team to canvas it with the parties before the decision is issued. As with planning appeals, there should be no surprises in the decision.

Changes made so that the hedge is no longer a high hedge

15. It is not uncommon, following the issue of a RN by a Council, for a hedge owner to carry out works to a hedge such that it no longer meets the legal definition of a HH. This will often include the removal of trees. If this appears to be the case on receipt of a HH appeal, the Tree & Hedge Team will ask the Council to verify the situation. If they confirm that the hedge is no longer a HH the Tree & Hedge Team will write to the appeal parties to explain the situation and ask if they wish to reconsider their position.

16. This may result in the Council withdrawing the RN, in which case no further action will be taken on the appeal, or the appellant withdrawing their appeal. However if the changed

status is not confirmed at that stage, or if the appeal stands because the RN/appeal has not been withdrawn, the appeal must proceed to a decision and a site visit will be arranged.

17. In these particular cases where it appears that the hedge is no longer within the scope of the Act, an Inspector's decision can only be based on the physical features of the hedge as he/she observes them at the time of the visit. If his/her observations at that time lead him/her to conclude that the hedge is no longer a HH, his/her decision should contain those observations and that finding, but cannot require any action to be taken in relation to the remaining trees or shrubs. The Inspector cannot deal with the grounds of appeal or the merits of the case. The decision should indicate that the Inspector is unable to consider the effect of the hedge on the reasonable enjoyment of the complainant's property and/or whether the requirements of the RN are appropriate and reasonable. The decision should include wording to the effect that as the Inspector considers that the hedge is no longer a HH as defined in s66 of the Anti-social Behaviour Act 2003 he/she can take no further action on the appeal.

18. The Tree & Hedge Team will send a covering letter to the Council with the decision (copied to the other parties) suggesting that they may wish to consider withdrawing the RN, and drawing their attention to paragraphs 7.47 to 7.49 of P&C.

19. If works to the hedge have been carried out such that it is no longer a HH (for example reduced to under 2m), but could, if allowed to grow, become one again in the future, the decision should note that the hedge is no longer a HH, and, if there are no other reasons for quashing any RN, it should remain in force so that the preventative action will bite if the hedge becomes a HH again

Hedge still a high hedge but changes made since Remedial Notice issued

20. Where a hedge is still a HH but the initial action specified in a RN has been undertaken prior to the site visit it may be difficult for an Inspector to judge whether, at the time the Council was considering the complaint, the hedge was adversely affecting the complainant's reasonable enjoyment of their property. In these circumstances, an Inspector need only decide whether or not the preventative action specified in the RN is appropriate. If an Inspector does not consider that it is appropriate he/she may vary the RN if in so doing he/she is allowing or allowing in part the appeal. If the appellant would be put in a worse position than before they appealed the Inspector should record his/her observations in the decision but cannot vary the RN and can only dismiss the appeal

Location of the hedge

21. The Act is solely concerned with the effect of a hedge on a domestic property and its associated garden. According to P&C [4.33] the associated garden or yard must be legally linked to the property. So for example, land that is in other ownership but has been, over time, incorporated into a garden cannot be considered unless there is clear evidence that the land has been legally acquired by adverse possession. Similarly a portion of a neighbour's garden that is used by verbal agreement cannot be considered. If it appears to an Inspector that part of a complainant's garden may not be owned by them, the Inspector should ask the Tree & Hedge Team to clarify the position with the parties.

22. A hedge which a complainant considers is causing an adverse effect does not have to be on the boundary of the complainant's property or even on their immediate neighbour's land. However the effect is likely to be lessened the further away the hedge is from the complainant's boundary.

23. A hedge can extend along the boundaries of a number of properties. Although the location of the hedge is not restricted by the Act, there is an issue of natural justice if a hedge which is the subject of a complaint borders others' property. Councils should canvas other neighbours at complaint stage whom they consider could be affected by any action that they may specify. If an Inspector considers that neighbours who may be affected have not been canvassed by either the Council or PINS, he/she should raise it with the Tree & Hedge Team immediately.

24. The hedge need not be on domestic property to be caught by the Act. It could be on land in public ownership such as a park, or on commercial land, or on Crown land. However, the complainant's property must be a domestic property, which is either occupied as a dwelling or is intended to be so occupied. Equally, a complaint can only be made about the effect of a hedge on a dwelling or its garden. Where a property contains both commercial and domestic uses a complaint can only be considered in respect of the domestic use. A complaint cannot be made about a hedge that is alleged to affect a shed, storage building or any ancillary building that is not used as living accommodation [4.27-4.33].

25. At appeal stage Inspectors can only consider the hedge, or portion of the hedge that was the subject of the complaint. Occasionally the hedge as described in a RN, or drawn on the accompanying plan or described by the Council in their report where no RN was issued, appears different to that observed on site. If an Inspector considers that a Council was wrong not to include particular trees/portions of the hedge in their decision/RN, he/she can consider those as long as they fall within the definition of a HH and were included in the complaint. An example of this is a Council mistakenly (or intentionally) deciding that a deciduous tree within or at one end of a predominantly evergreen hedge cannot be considered part of a HH and that any remedial action imposed would not apply to it

Groups or lines of trees

26. A high hedge does not have to be a single line of trees; however a group of trees would not usually form a hedge unless they are planted in such a formation that collectively they form a barrier to light. Groups large enough to form a copse or small wood are not caught by the Act.

27. If more than one line of trees have been planted parallel to each other they can be treated as one hedge if they are planted in such a formation that collectively they form a barrier to light: for example such as where rows of trees are staggered.

28. If several hedges were the subject of one complaint they can all be considered under one appeal, and a single decision letter issued, but separate RNs must be issued in respect of each hedge [5.111 & 6.47-6.49].

The Main Issues

29. The primary test according to the Act in deciding whether to issue, vary or quash a RN is whether a HH is affecting a complainant's reasonable enjoyment of their property (s68(3)). What constitutes 'reasonable enjoyment' should be assessed against a general standard of 'reasonableness', taking into account all the circumstances of the case. It should not be judged solely on the basis of the complainant's interpretation.

30. There are generally four main issues that arise: the obstruction of light to gardens and/or windows; privacy; hedge health; and visual amenity. HH&LL provides a methodology for assessing the 'action hedge height' (AHH) for light loss to gardens or windows. Privacy and visual amenity are more subjective issues. DLUHC have advised that the issues to consider can only be those raised by the parties and Inspectors cannot raise additional issues

Gardens

31. Light loss to gardens relates to direct sunlight and indirect daylight. HH&LL provides an objective methodology for calculating the AHH but there may be other important considerations [5.67 – 5.68] which lead to an Inspector deciding that it would be appropriate to moderate the AHH. For example, a hedge might completely overshadow a small side garden to a property that has extensive and sunny gardens to front and back. Consequently, an Inspector may conclude that there is a less adverse effect on the complainant's reasonable enjoyment of their property and that although a height reduction is required, the hedge can be retained at a higher height than that indicated by the BRE-derived AHH. Alternatively, a garden might be long and narrow with a hedge only bordering the half near the house. This can result in a high AHH figure but if the other half of the garden is unusable and the house half includes eg a patio (as is typical for many gardens), an Inspector may decide that the BRE-derived AHH may not mitigate the adverse impact on the reasonable enjoyment of the garden and that a lower height is justified.

32. A common argument from hedge owners is that a hedge on a northern boundary of a complainant's property has little impact and that the house itself casts most shadow. While this may be true in some cases, care needs to be taken to identify concerns relating to direct sunlight and the collective effect of sunlight and indirect daylight. The daylight needs of a north facing garden, where there is limited direct sunlight, are correspondingly greater than other orientations and a tall hedge could have a serious impact

Windows

33. BRE methodology addresses the obstruction of light to main rooms such as living and dining rooms, kitchens and bedrooms. Other issues that may be raised include that a room is dual aspect or that a house has been designed to harness passive solar energy. The BRE calculations only provide an AHH in respect of light obstruction, and if an Inspector is going to depart from them he/she must explain clearly their reasoning for doing so.

34. The BRE methodology does not apply to non-main rooms such as halls, bathrooms, utilities etc. but the effect of the hedge on those rooms may still be a consideration.

Sometimes these areas can provide light to other parts of the house. If all the rooms on one side of the house are always dark because of a hedge, even if they are not main rooms the cumulative effect on the main rooms could be harmful. Conservatories are not treated as main rooms and are specifically excluded from the BRE calculations, but there can be dispute as to what constitutes a conservatory. A room with three solid walls and only the front and roof glazed could be considered to be a garden room or a living room. Where a house has a conservatory, the opening between it and the house is taken as the window position for calculating the AHH – not the front side of the conservatory.

Privacy

35. Privacy is often the main ground of appeal for a hedge owner. P&C states that a hedge height of 2m usually provides privacy from ground floor windows and 3.5 – 4m from upstairs windows, but this depends on the relative ground levels, the size of the building and its distance from and alignment to the hedge.

36. Privacy can be an emotive issue and it must be balanced with the need to ameliorate any possible adverse effects of the hedge. There is no right to absolute privacy, especially in urban or suburban situations.

Health of the hedge

37. The Act (s69 (3)) states that action specified in a RN cannot 'require or involve…the removal of the hedge'. P&C states that this 'includes action that would result in the death or destruction of the hedge'. P&C suggests that 'healthy Leyland cypress hedges will usually respond well to a reduction of up to one-third of their height'. This has often been incorrectly referred to as the 'one-third rule'. Baroness Andrews, on behalf of DCLG, wrote to all Councils in April 2006 to explain that this was not an absolute rule and that each case must be treated on its merits, depending on height, health and the variety of trees that make up the hedge.

38. As a rule of thumb a healthy hedge should withstand a reduction of 50% and have a good chance of regenerating. The younger the hedge the more tolerant it will be to such a reduction. This will also depend on the height, health, past management and the variety of trees that make up the hedge.

39. It is common for hedge owners to suggest in their grounds of appeal that the reduction required by the RN will kill the hedge. Arboricultural advice is often provided for the hedge owner which advises that a reduction to X metres (usually that required by the RN) will be fatal, albeit the Council's own tree expert has sanctioned a cut to that height. It is not always possible to be certain whether particular action will result in the death of a hedge. Inspectors have to make a judgement, based on the evidence before them, and adopting a precautionary approach. For most coniferous species it can be safely assumed that cutting a tree down below the crown height, so that there is little or no growth left on the stump, will kill it, and that the more crown is left the better the chances of survival. This is true for most conifers like cypress, pine, fir, spruce and cedar which grow only from the apical tips. However a few species such as yew and coast redwood can regrow from the trunk and would therefore probably survive such pruning. Broadleaved evergreens or semi-evergreens like laurel, holly and privet can also normally regrow even if all green foliage is removed. A good arboriculturist will take a precautionary view and will advise that reducing to a height of X metres '…will be likely

to...' or '…will increase the chances of…' killing or ensuring the continued growth of the hedge.

40. For example:- a 12m high hedge has a crown height of 2m. The AHH is 3m. The hedge owner's arboriculturist suggests that a reduction to 3m would be likely to kill the hedge and that trimming to 10m would be acceptable. Common sense suggests that a cut to 3m, leaving only 1m of growth, would indeed be very likely to kill the trees. The Council issue a RN requiring a cut to 4m as a compromise. On appeal, further advice from the hedge owner's arboriculturist suggests the 4m cut will also be fatal. Were the Inspector to be convinced by the hedge owner's arboricultural evidence he/she could decide that a reduction between 4m and 10m would be appropriate. Whatever the conclusion, it is important to demonstrate that it has been reached by rational means and based on a thorough review of all the evidence.

41. DLUHC legal advice is that a Council should not specify work that they could **reasonably foresee** would lead to the death or destruction of the hedge. Each hedge should be considered as a unit, so if there is a risk that individual unhealthy specimens could die, as long as it is considered that the majority will survive so that what remains is still a hedge, then the hedge has not been removed for the purposes of the Act.

Visual amenity

42. Visual amenity is largely a subjective matter but it can be an issue for both complainant and hedge owner. For a complainant the effect of the hedge could be the blocking of outlook from windows, or a perception from inside the house or garden of overbearing and over-dominant trees eg if an area is generally open with wide-ranging views across upland moors a high hedge may be viewed as incongruous and intrusive. The oppressive effect of a hedge could, in some instances, lead an Inspector to specify a lower height than the BRE-derived AHH. However, P&C advises that loss of a specific view should not generally be given great weight [5.87].

43. The hedge owner may be using the hedge to screen an unsightly building or view. Severe pruning of a row of attractive specimen trees could also affect their visual amenity value and the outlook of the hedge owner. These issues will have to be weighed against the complainant's issues.

44. If an Inspector considers that visual amenity issues are sufficient to justify moderation of the BRE-derived AHH, the reasoning leading to this conclusion must be very carefully set out in the decision.

Other Issues

45. Complaints about harm caused to a property can only be based on the height of the hedge. Root damage is specifically excluded from the Act [4.38]. Other issues that are regularly raised such as: leaf litter blocking gutters; difficulty growing plants; fear of falling branches; general nuisance; and depression caused by pursuing the complaint and worrying about the hedge, should not usually be given any weight [5.56-5.73; 5.89].

46. Issues associated with the width of the hedge may also arise. Common law allows a neighbour to remedy a nuisance caused by overhanging branches by cutting back to the boundary and it is assumed that a neighbour should be able to undertake this work up to

a height of 2.5m without too much inconvenience. Where the height of the hedge is so high that the Complainant could not be reasonably expected to trim the branches, the width of the hedge could be considered, providing the height of the hedge has an adverse effect on the Complainants enjoyment of their property [5.69-5.71]. In such cases, it may be appropriate to include works to reduce the width of the hedge as well as its height in the management solution for the hedge.

47. The fact that the complainant's house itself may cast most shadow, or that the complainant blocked his own light by building an extension are largely irrelevant. The issue is the effect of the hedge on the garden and house as it stands at the time of the Inspector's site visit. Similarly arguments that the hedge has been there for years or that controlling it is too expensive for the owner are irrelevant.

48. Hedges do not generally provide protection from noise, smell or smoke, but they can provide a psychological barrier. Thus a hedge that plays a role in protecting privacy could ameliorate these problems [5.62]

49. A hedge can be effective in providing shelter from the wind for a distance of up to 10 times its height [5.59]. Therefore a 2m hedge can provide shelter for a 16-20m garden.

Public amenity

50. Councils should consider the effect of the hedge on the amenity of the area as a whole [5.91]. This might involve seeking the opinion of the parish council or specialist organisations. It should be clear from the file papers whether this consultation has taken place.

51. Where neither party has raised public amenity as an issue, the Inspector does not need to consider the contribution the hedge makes to the character and appearance of the area (see at paragraph 31 above).

Planning conditions and covenants

52. A RN will not override the requirements of a planning condition or a covenant but the existence of either is not a barrier to the issue of a RN [5.95, 5.96 & 5.98]. A separate application would have to be made to vary a condition which prevented the execution of action required by a RN. Covenants are also dealt with under separate legislation. Any possible conflict between a RN and a covenant is a matter for the parties outside of the HH process and is not a matter for the Inspector

Protected trees

53. In contrast, works to protected trees required by a RN will be exempt from the need for consent under a Tree Preservation Order (TPO) or to give the Council notice in respect of trees in a conservation area. Any protected trees in the hedge will need to be considered by the decision maker in the same way as if an application or notification had been made under the tree protection legislation [5.92-5.94]. So a RN that includes protected trees effectively gives consent for the works to them.

BRE Guidance – Hedge Height and Light Loss

54. HH&LL is a very useful guide but only deals with light loss issues and so the methodology cannot be applied to other issues. It provides a way of calculating the height above which a hedge is likely to cause significant loss of light to a neighbouring house or garden. The AHH can be calculated with reference to house windows or a garden, depending on the grounds of complaint. The remedial works can make provision that the hedge is initially reduced below the AHH (or other height if justified) to allow for regrowth (a growing margin), so the AHH becomes the maximum height to which the hedge should be allowed to grow. Where the AHH is 2m an Inspector cannot require the hedge to be reduced below 2m but should include a note in the RN informative recommending that the hedge is reduced below 2m annually to allow for regrowth.

55. Where the grounds of complaint include light restriction to windows and garden both calculations must be carried out. The lower of the two results will form the AHH and the basis for determining the height to which the hedge should be cut. Where only light restriction to windows has been raised by the parties, there is no need to consider the AHH for the garden – and vice versa

Calculating action hedge heights – gardens

56. The underlying principle is to calculate a figure based on the amount of garden that is affected by the hedge. Many houses have small patches of ground that are unlikely to be affected by the hedge because of their location, for example between a garage and house, where they are effectively just access ways. It could be unfair to include these portions because the complainant cannot escape the effect of the hedge by using this part of the garden instead. If they have chosen to store builders sand or compost on a part of the garden that part should still be included in the calculations. The methodology is not designed to ensure adequate light is provided to chosen parts of a garden, nor specific uses, but to the garden as a whole. The effect on different parts can be considered when balancing the results.

57. The key figure required for the calculation is the ‘effective depth of the garden’. This is multiplied by a factor for orientation (dependent on whether the hedge is to the west or south etc. of a complainant’s garden) to reach the AHH. This can be further refined to deal with cases where the hedge is on a slope or is set back from the boundary.

58. For a rectangular garden with a hedge along one boundary the ‘effective depth’ is the distance from that boundary to the opposite end of the garden. So, for a hedge along the bottom of a garden with a house that fills the width of the plot, the ‘effective depth’ is the distance from that boundary to the house. For a hedge along the side of the garden it is from that boundary to the opposite side of the garden. For any other shape of garden the ‘effective depth’ is calculated by dividing the area of the garden by the length of the hedge.

59. Various examples of the hedge lengths that should be used in the calculations are given in HH&LL. Only hedges that are on or parallel to the shared boundary can be included in the calculations. A distant, but parallel, hedge can be dealt with by using the set back calculation. For a hedge at right angles to a boundary the calculations can only be applied to the portion of the hedge abutting the boundary. For a hedge that runs down a shared boundary and then turns at right angles away from it, only the portion on the

shared boundary can be used in the calculations. For a hedge that has no physical relationship to a boundary the HH&LL calculations cannot be applied, although a judgement may still be required on the effect on light loss. Therefore, such hedges could be included in a RN.

60. The advice in HH&LL has been amended to include advice on where a hedge grows only along part of a boundary. In such cases, whatever the shape of the garden, the formula for non-rectangular gardens should be used; such as the area of the garden divided by the length of the hedge. Because the hedge does not cover the full length of the boundary the AHH will be higher than if it did. The logic is that the part of the garden unaffected by the hedge will offset the restricted light to the rest.

Calculating the action hedge heights – windows

61. The calculations only apply to windows to main rooms. Where a hedge is opposite the affected window the distance between the window and the hedge is halved and 1m added to reach an AHH. Different allowances are made for windows at different angles to a hedge. For first floor windows the height above ground of the first floor level (not the window level) should be added to the AHH to reach a corrected AHH. In addition amendments can also be made where the house is at a different level from the base of the hedge. The advice also covers the effect on windows of hedges with gaps and where a hedge only blocks part of a window. A lower AHH may be justified where a property incorporates solar energy features [5.78]; HH&L includes advice on the calculation of AHH for passive solar dwellings and on the setting of AHH for solar thermal installations.

Using the action hedge height

62. In the majority of cases AHH calculations will have been made by the Council. The calculations are often challenged on the basis that certain factors have not been included, wrongly included, or misapplied. If there is a dispute about the measurements inspectors must **always** take measurements on site and agree them verbally with the parties. If the measurements have not been challenged, but on site they appear to be wrong an Inspector can re-measure them but is not obliged to do so. Some arguments can be disregarded as their resolution will not affect the decision eg if it is clear to the Inspector that action needs to be taken and the AHH is 4m, a dispute about whether the trees are 10m or 12m high is immaterial unless the health of the hedge leads an Inspector to consider the proportion of healthy to dead vegetation. (The only exception to this would be where a hedge is growing at right angles to the window wall, where the current height of the hedge determines the length of hedge to be cut.)

63. Where an Inspector has undertaken AHH calculations, the basis of those calculations should be set out in the decision, so that the parties are clear how the AHH was derived. Once the AHH has been determined (which only applies to matters relating to light) he/she must consider whether that height is appropriate depending on the other issues raised by the parties and his/her own observations at the site visit. The conclusion will need to be balanced on the basis of the written evidence provided by the parties against the Inspector's own assessment of the effects of the hedge, which parts of the garden are most affected, privacy for the neighbour, and the appearance of the hedge itself. The following examples might be helpful in demonstrating how to apply the AHH:

a) A 5m hedge overshadows a narrow side garden and the facing windows in the house. The AHH for the garden specified by the Council is 2.5m and is lower than that for the windows. The hedge owner has appealed in relation to privacy issues. The complainant's house is at right angles to and set lower than the hedge owner's bungalow, and the complainant's upstairs windows look directly into the neighbour's garden and house. The side garden is clearly little used as there is a large sunny south facing rear garden. The main downstairs room is dual aspect with plenty of light from the front. For these reasons the AHH can be moderated. The AHH for the upstairs windows is 4.3m, so the RN is revised to require an initial cut to 4m and retention at 4.5m. At 4m, views from the upstairs windows will just be restricted and privacy retained, but the hedge brought under control.

b) A bungalow is situated sideways on its plot, facing a 5.5m high hedge at the bottom of a neighbour's garden. The bungalow garden is quite large, but part of it has been paved. The Council AHH is 4m, based on a light loss issue. The complainant appeals on the grounds that the hedge is overbearing to anyone using the patio in front of the bungalow or the lawn and that it appears dominant from inside the bungalow. There are no privacy issues for the owner, who has let the hedge become straggly and unkempt. The Inspector issues a RN requiring retention at 3m because of the visual impact of the hedge which is a more significant issue than the light loss issue which resulted in the Council's 4m AHH.

64. A hedge does not necessarily need to be reduced to a common height along its whole length. In some circumstances it may be appropriate to require works only to a section of the hedge or to reduce different sections of it to different heights, or to require alternative remedies such as crown lifting and/or thinning [6.26 and 6.28-6.32].

The Remedial Notice

65. RNs can only be sent at appeal stage in the following circumstances [AsBA S73(2)]:

a) if an Inspector decides to allow an appeal against a Council's decision not to issue a RN[3];

b) if an Inspector decides to allow an appeal (either in whole or in part) and needs to vary a RN issued by a Council;

c) if an Inspector needs to correct any defect, error or misdescription in a RN issued by a Council.

66. An Inspector can only issue a RN on behalf of a Council in scenario a). In scenarios b) and c) an Inspector cannot issue a RN; instead he/she will need to send a varied or corrected RN to the parties. This will supersede the Council's RN. Accordingly, the wording on any RN must correctly reflect the scenario. Template RNs are at Annex C [scenario a)] and Annex E [scenario b) and c)]. In addition, an Inspector can only quash a RN if he/she decides to allow an appeal.

67. Any new or varied notice should be appended to the Inspector's decision[4]. The notice should set out the address of the property on which the hedge is located, its location

[3] See advice in Annex A in relation to Regulation 5 appeals.
[4] Decision templates can be found at Annex B (regulation 5 appeals) and Annex D (regulation 3 & 4 appeals).

and length and, if necessary, its constituent species. Any specimens within the hedge which are exempt from remedial action should be clearly identified.

68. The RN should go on to describe the initial action (ie the first or a series of staged cuts), and then the preventative action (if required). The purpose of the preventative action is to ensure that the hedge is maintained so that it does not exceed a specified height. Suggested wording is set out in the sample RN at the Appendix to P&C. The hedge should be described in the same way in the initial action and the preventative action paragraphs eg a hedge should not be referred to as 'the hedge' in the initial action paragraph and 'Leylandii' in the preventative action paragraph.

69. Where a hedge could give rise to complaints in the future, but at the time of your site visit has not reached actionable height, you have no powers to issue a RN. The Act does not make provision for a purely preventative RN. A RN can only be issued where you consider that the height of a hedge is adversely affecting the complainant's reasonable enjoyment of their property at the time of your site visit. A RN may only include action to prevent the recurrence of the adverse effect ('preventative action') if an initial action to remedy the adverse effect ('remedial action') has been specified in the RN.

70. Finally the RN must include a period for compliance, which has to be specified as a number of weeks/months from the date the notice takes effect.

71. Where a RN has been issued by the Council but is not being varied on appeal, the Inspector will still need to change the date on which the RN takes effect (the operative date), as the original date will be in the past. The position must be stated in the decision letter. See paragraphs 76-77 below for further advice about setting the operative date.

Errors in Council Remedial Notices

72. Regardless of whether an Inspector allows or dismisses an appeal, he/she may revise a RN in order to correct errors, defects or misdescriptions in the original RN provided he/she is satisfied that the correction will not cause injustice to any of the parties. This can include anything from correcting minor discrepancies (such as typing mistakes) to more extensive corrections to get the notice into proper order. Inspectors should not, however, correct notices which are so fundamentally defective that correction would result in a substantially different notice. This will be an individual judgement based on the merits and circumstances of the particular case and Inspectors should seek advice from the Tree & Hedge Team if in any doubt about the appropriate course of action.

73. If an Inspector considers that a correction may cause injustice to a party or parties, he/she cannot send a corrected RN but should draw attention to the error, defect or misdescription in the decision. Where the decision contains such observations, the Tree & Hedge Team will send a covering letter to the Council suggesting that they may wish to consider withdrawing the RN. An Inspector cannot include such a recommendation in their decision

The actions required by the Remedial Notice

74. The initial action can be to simply reduce the hedge to a certain height along its whole length. But it could just apply to part of the hedge or even particular trees in the hedge [6.31]. The initial or remedial cut should be below the calculated or moderated AHH (the

maximum height for the hedge) to allow the hedge to grow before the next seasonal cut is due. The preventative action height should not exceed the intended maximum height of the hedge. For Leylandii the preventative action height should be at least half a metre higher than the initial cut hedge height, but this can be varied depending on the species.

75. Sometimes staged cuts will be appropriate, for example such as reducing a hedge from 10m to 8m and then 6m. A RN can specify that a hedge is reduced in stages and suggest a timetable for the reduction. However, the compliance period can only be a single period, within which the final stage must be completed, and the individual dates for staged cuts cannot be enforced. It is only the final outcome required by the initial action that can be enforced if the works are not completed by the end of the compliance period

The operative date

76. Whatever an Inspector's decision on an appeal relating to a RN issued by a Council, he/she must revise the 'operative date', that is the date that the RN takes effect, as the original date will be in the past. The new operative date should either be set as the date of the decision or such later date as the Inspector may set to avoid seasonal factors, such as the nesting season (see paragraph 75 below). Either way, the position must be explained in the decision and the revised date specified where it is different from the date of the decision, and the revised date must be set out in any varied RN. An Inspector should not send out a revised RN simply to change the operative date.

77. The Wildlife and Countryside Act 1981 makes it illegal to disturb nesting birds or to damage or destroy their nests, so when amending the operative date consideration should be given to avoid requiring the works to take place during the bird nesting season such as between March and August. In these circumstances an Inspector may decide to stipulate an operative date that avoids the compliance period falling within nesting season. In such instances, similar wording to the following could be included in the decision:

    - 'I have taken the potential impact on birds and/or other wildlife into account in my formal decision by ensuring that the notice does not come into effect until after the nesting season. The compliance period of 'X' months remains the same';
    - 'I dismiss the appeal and hereby specify that the operative date of the remedial notice shall be ……'.

78. Only where the Inspector is convinced that nesting birds are not present in the hedge should works be allowed to proceed during the nesting season

The Compliance period

79. The compliance period should be expressed as a period of time, not specific dates. For example: 28 days or three months. It should not be expressed, for example, as September to December 2016. This is because the Act states that the compliance period runs from the operative date. Thus the compliance period is always expressed as a number of weeks/months from the operative date.

80. The compliance period should be long enough to allow the owner the opportunity to arrange for contractors and get competitive quotes, and then to carry out the work. The best time for pruning most coniferous hedge species is April to September. This is not appropriate in the bird nesting season and so may have to be delayed until August or September. Pruning may be carried out over the autumn and winter but severe reduction should be avoided during periods of extreme cold if possible.

81. If an Inspector dismisses an appeal he/she cannot vary the compliance period, only revise the date the RN takes effect. Where this is the case, the revised operative date should take into account the timing of the compliance period and any seasonal considerations

Accompanying plan

82. There is no requirement to attach a plan to a RN. However, as referred to in paragraph 25 above, Councils routinely attach an accompanying plan to show the location and extent of the hedge subject to the RN. Where Inspectors are varying or correcting a RN to which a plan had been attached, the Councils plan should be retained in the varied or corrected notice unless the plan needs to be revised to reflect the Inspectors decision. If the plan needs to be revised, the Inspector should prepare and attach a new plan which takes account of the variation or correction. Inspectors should also prepare and attach a plan to any RN they issue. The RN templates at Annexes C and E include a plan page into which such a plan can be inserted.

Annex A – Appeals against unfavourable decisions (Regulation 5)

1. Where an appeal has been made against the Council's decision not to issue a RN, the appeal must be determined on the basis of a review of the Council's decision. Consideration of whether the Council 'could not have reasonably concluded….' should be undertaken on the basis of a subjective assessment of the reasonableness of the Council's decision.

2. Regulation 5 appeals should be considered on the basis of the situation that existed at the time the Council made its decision. Changes in circumstances, such as the growth of the hedge cannot be a reason for issuing a RN. In such circumstances you can only draw attention to the change and indicate that the Council may wish to revisit their original decision in light of the change in circumstances.

3. Only the evidence that was before the Council at the time it made its decision not to issue a RN should normally be considered, unless the complainant can demonstrate that the Council has failed to take account of evidence that it should reasonably have been aware of. In undertaking a subjective assessment, you are entitled to consider the quality of the evidence that the Council considered, including the accuracy of the AHH calculations, particularly where this has been disputed by the complainant.

4. To demonstrate that you have determined the appeal on the basis of a review, it is recommended that your decision should conclude either:
   a. 'On the basis of the evidence available it was reasonable for the Council to have concluded that either (i) the height of the high hedge specified in the complaint is not adversely affecting the complainant's reasonable enjoyment of their property; or (ii) no action should be taken with a view to remedying the adverse effect to the complainant's reasonable enjoyment of their property or preventing its recurrence.'

   Or

   b. 'For the reasons set out above, I find that the Council could not have reasonably concluded that …'

Annex B - Decision Template: Regulation 5 appeal against Council decision not to issue an RN

Appeal Decision

Site visit made on <<date >>

by

an Inspector appointed by the Secretary of State for Communities and Local Government

Decision date:

Appeal Ref: APP/HH//****
Hedge at <<address of hedge >>**

The appeal is made under section 71(3) of the Anti-social Behaviour Act 2003.

The appeal is made by <<appellant>>, the complainant, against <<Council>>'s decision not to issue a Remedial Notice.

The complaint, reference <<ref number >>, is dated <<date>>.

Decision

1.

Main issue(s)

2.

Reasons

3.

Inspector

INSPECTOR

Annex C - Remedial Notice issued by Inspector

IMPORTANT: this Notice affects the property at

<< >>.

ANTI-SOCIAL BEHAVIOUR ACT 2003

PART 8: HIGH HEDGES

REMEDIAL NOTICE

ISSUED BY <<Inspector>>

Appointed by the Secretary of State for Communities and Local Government under Section 72(3) of the above Act.

1. THE NOTICE

This notice is sent under Section 73 of the Anti-social Behaviour Act 2003 and pursuant to a complaint about the high hedge specified in this notice.

The notice is sent because it has been decided that the hedge in question is adversely affecting the reasonable enjoyment of the property at <<complainant's address>> and that the action specified in this notice should be taken to remedy the adverse effect and to prevent its recurrence.

2. THE HEDGE TO WHICH THE NOTICE RELATES

The hedge <<description and location>> and marked red on the attached plan.

3. WHAT ACTION MUST BE TAKEN IN RELATION TO THE HEDGE

3.1 Initial Action

I require the following steps to be taken in relation to the hedge before the end of the period specified in paragraph 4 below:

<<initial action required>>.

3.2 Preventative Action

Following the end of the period specified in paragraph 4 below, I require the following steps to be taken in relation to the hedge:

<<preventative action required>>.

4. TIME FOR COMPLIANCE

The initial action specified in paragraph 3.1 to be complied with in full within <<number of months>> of the date specified in paragraph 5 of this Notice.

5. WHEN THIS NOTICE TAKES EFFECT

This Notice takes effect on <<specific date or 'date my decision is issued'>>.

6. FAILURE TO COMPLY WITH THE NOTICE

Failure by any person who, at the relevant time is an owner or occupier of the land where the hedge specified in paragraph 2 above is situated:

a. to take action in accordance with the Initial Action specified in paragraph 3.1 within the period specified in paragraph 4; or

b. to take action in accordance with the Preventative Action specified in paragraph 3.2 by any time stated there,

may result in prosecution in the Magistrates Court with a fine of up to £1,000. The Council also has power, in these circumstances, to enter the land where the hedge is situated and carry out the specified works. The Council may use these powers whether or not a prosecution is brought. The costs of such works will be recovered from the owner or occupier of the land.

Signed:

Dated: <<leave blank – date will be entered before issue>>

Informative

It is recommended that:

All works should be carried out in accordance with good arboricultural practice, advice on which can be found in BS 3998: 'Recommendations for Tree Work'.

Skilled contractors are employed to carry out this specialist work. For a list of approved contractors to carry out works on trees and hedges, see the Arboricultural Association's website at www.trees.org.uk or contact 01242 522152.

In taking action specified in this Notice, special care should be taken not to disturb wild animals that are protected by the Wildlife and Countryside Act 1981. This includes birds and bats that nest or roost in trees. The bird nesting season is generally considered to be 1 March to 31 August.

The Planning Inspectorate

Plan

This is the plan referred to in my decision dated:

by

Hedge at:

Reference:

Scale: Not to scale

Annex D - Decision Template: Regulation 3 appeals against a Council issued RN & Regulation 4 appeals against withdrawal etc

The Planning Inspectorate

Appeal Decision

Site visit made on <<date >>

by

an Inspector appointed by the Secretary of State for Communities and Local Government

Decision date:

Appeal Ref: APP/HH//****
Hedge at <<address of hedge >>**

The appeal is made under section 71(1) of the Anti-social Behaviour Act 2003.

The appeal is made by <<appellant>>, <<the hedge owner / the complainant>>, against a Remedial Notice issued by <<Council>>.

The complaint, reference <<ref number >>, is dated <<date>>.

The Remedial Notice is dated <<date>>

Decision

1.

Main issue(s)

2.

Reasons

3.

Inspector

INSPECTOR

Annex E - Remedial Notice corrected or varied by Inspector

IMPORTANT: this Notice affects the property at

<< >>.

ANTI-SOCIAL BEHAVIOUR ACT 2003

PART 8: HIGH HEDGES

REMEDIAL NOTICE

VARIED/CORRECTED (delete as appropriate) BY <<Inspector>>

Appointed by the Secretary of State for Communities and Local Government under Section 72(3) of the above Act.

1. THE NOTICE

This notice is sent under Section 73 of the Anti-social Behaviour Act 2003 and corrects/varies (delete as appropriate), and supersedes, the Remedial Notice dated <<date>> issued by <<Council>> under section 69 of the 2003 Act pursuant to a complaint about the high hedge specified in this notice.

The notice is sent because it has been decided that the hedge in question is adversely affecting the reasonable enjoyment of the property at <<complainant's address>> and that the action specified in this notice should be taken to remedy the adverse effect and to prevent its recurrence.

2. THE HEDGE TO WHICH THE NOTICE RELATES

The hedge <<description and location>>, and marked red on the attached plan.

3. WHAT ACTION MUST BE TAKEN IN RELATION TO THE HEDGE

3.1 Initial Action

I require the following steps to be taken in relation to the hedge before the end of the period specified in paragraph 4 below:

<<preventative action required>>.

3.2 Preventative Action

Following the end of the period specified in paragraph 4 below, I require the following steps to be taken in relation to the hedge:

<<preventative action required>>.

4. TIME FOR COMPLIANCE

The initial action specified in paragraph 3.1 to be complied with in full within <<number of months>> of the date specified in paragraph 5 of this Notice

5. WHEN THIS NOTICE TAKES EFFECT

This Notice takes effect on <<specific date or 'date my decision is issued'>>.

6. FAILURE TO COMPLY WITH THE NOTICE

Failure by any person who, at the relevant time is an owner or occupier of the land where the hedge specified in paragraph 2 above is situated:

a. to take action in accordance with the Initial Action specified in paragraph 3.1 within the period specified in paragraph 4; or

b. to take action in accordance with the Preventative Action specified in paragraph 3.2 by any time stated there,

may result in prosecution in the Magistrates Court with a fine of up to £1,000. The Council also has power, in these circumstances, to enter the land where the hedge is situated and carry out the specified works. The Council may use these powers whether or not a prosecution is brought. The costs of such works will be recovered from the owner or occupier of the land.

Signed:

Dated: <<leave blank – date will be entered before issue>>

Informative

It is recommended that:

All works should be carried out in accordance with good arboricultural practice, advice on which can be found in BS 3998: 'Recommendations for Tree Work'.

Skilled contractors are employed to carry out this specialist work. For a list of approved contractors to carry out works on trees and hedges, see the Arboricultural Association's website at http://www.trees.org.uk/ or contact 01242 522152.

In taking action specified in this Notice, special care should be taken not to disturb wild animals that are protected by the Wildlife and Countryside Act 1981. This includes birds and bats that nest or roost in trees. The bird nesting season is generally considered to be 1 March to 31 August

The Planning Inspectorate

Plan

This is the plan referred to in my decision dated:

by

Hedge at:

Reference:

Scale: Not to scale

The Planning Inspectorate

Highways and Transport Chapter (Appeals Casework)

Updated to reflect December 2023 Framework (NPPF)

What's new since the last version

Changes highlighted in yellow were made on 28 October 2022

- Updated section on Highway Safety for non-SRN roads

This chapter is a complete replacement of the Highway Safety Chapter and issued on: 25 June 2020

Comprehensive update dealing with highway safety and incorporating the National Planning Policy Framework's approach to promoting sustainable transport. It therefore addresses accessibility of location, highway standards, parking provision, car-free housing and consideration of movement patterns when assessing the layout of schemes.

Contents

Introduction

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

2. Matters relating to traffic, parking, and highway safety crop up frequently in appeals. This training material is primarily intended to assist in addressing those issues in a practical manner having regard to both technical and non-technical evidence.

Information sources

- National Planning Policy Framework
- PPG – Transport evidence in plan making
- PPG – Travel plans, Transport Assessments and Statements
- Manual for Streets (MfS) March 2007
- Manual for Streets 2 (MfS2) September 2010
- Design Manual for Roads and Bridges (DMRB)
- National Design Guide: Movement – accessible and easy to move around
- Planning for walking: Chartered Institution of Highways and Transportation (CIHT) 2015
- Providing for journeys on foot: The Institution of Highways and Transportation 2000
- Planning for Cycling: CIHT 2014

Policy

3. Specific policies on transport are set out in Section 9 of the National Planning Policy Framework (NPPF) 'Promoting sustainable transport'. You should be familiar with all these policies and with what is said about transport in Section 8 'Promoting healthy and safe communities and Section 12 'Achieving well-designed places' as well as within the Framework as a whole.

4. The most commonly referred to technical evidence in many appeals can be found in Manual for Streets (MfS) and Manual for Streets 2 (MfS2). MfS provides standards on lightly trafficked residential streets, whereas MfS2 extends their application to busier streets and non-trunk roads. The Design Manual for Roads and Bridges (DMRB) sets out standards for trunk roads and motorways which are the responsibility of Highways England. Highway authorities may adopt a combination of these standards.

Common Issues in Appeals

Access to services

5. Accessibility to services and facilities can be a determining factor in appeals. It may be a main issue where the LPA is contesting the location of a development, particularly where a site lies outside a settlement boundary or would be at odds with its overall spatial strategy. There may also be specific development plan policies to promote walking, cycling, the use of public transport and to reduce dependence on travel by car. It will be necessary to consider the convenience and practicality of travel choices

that people will have available. These will relate to the site's location and whether future occupiers/users have access to a private car. In doing so you should have regard to development plan policies and the policies of the NPPF.

6. The likely use of sustainable modes is closely related to the location of the development. If the chosen location results in high car dependency, this will be difficult to change retrospectively. Providing access by sustainable modes also has health benefits. Chapter 8 of the NPPF advocates the creation of places that promote social interaction and encourage walking and cycling, thereby helping to provide inclusive and safe places which support healthy lifestyles.

7. If accessibility to facilities and services (including education, employment, leisure, health and retail) is a main issue, it could be defined as: whether the site is suitable for the proposed development, having regard to a) relevant policies for the location of housing/the Council's spatial strategy and/or b) its accessibility to services and/or facilities.

a) Walking

8. Land use patterns that are most conducive to walking are where there are a range of facilities within a 10 minute walk or 800m (Paragraph 4.4 of MfS). The attractiveness of the destination and the purpose of the journey will determine how far people will walk to reach it. The propensity to walk will not only be influenced by distance but by the quality of the experience. Above all, pedestrians need to feel safe when walking, particularly if they are alone. It will therefore be helpful to consider the following issues when assessing the likelihood that walking will be used as a mode of travel on a regular basis.

    - Connections: provide a means to reach destinations (e.g. shops/schools)
    - Convenience: direct routes along pedestrian design lines without significant obstacles, such as busy or frequent road to cross, steep gradients, blind corners
    - Conspicuous: visible, clear, well lit, adequate surveillance, legible with street names and signs
    - Comfort: safe, well maintained footways, adequate crossing points, active frontages with people but not crowds, attractive street scene, greenery, street furniture, and not dominated by speed or volume of traffic.

9. Much of the published information about walking relates to studies in urban areas. Walking along rural roads is a different experience. Where speeds are low, visibility good and there are verges or footways available, walking may be expected to occur to a limited extent. However, where speeds are high, there are bends, ditches, footways and verges are narrow or inadequate, roads are enclosed by hedges, drainage is limited and lighting is either poor or absent, walking is unlikely to feel attractive or safe. Any of these factors is likely to be a potential deterrent to people choosing to walk.

10. When considering pedestrian movements in any environment, it is necessary to bear in mind the needs of different people, including the young, the elderly, women and those with mobility problems.

b) Cycling

11. Although use of a bike may allow someone to travel further and faster than walking, many of the factors that discourage walking also apply to cycling. These become more acute when there are no dedicated cycle lanes and it is necessary to share road space with vehicles. Poor weather, the increased physical effort involved in cycling

and the risks associated with cycle theft add to the list of deterrents. Therefore, in addition to the distance of homes from employment opportunities and other services and facilities, the above factors should be taken into account when assessing the likelihood of cycling being a realistic alternative to the car for regular journeys.

c) Public transport

12. The use of bus/tram and train services will depend on a combination of factors including:

- Routes and destinations
- Frequency of service
- Fares
- Information (e.g. clear timetables/real-time displays)
- Quality of the bus, train, tram etc
- Distance to train stations, bus/tram stopping points
- Provision of waiting facilities, shelter and information at stations and bus/tram stops
- Parking facilities close to stations.

Highway safety for non-SRN roads

13. The NPPF requires development to provide safe and suitable access to the site for all users. It also states that if there would be an unacceptable impact on highway safety, development should be refused (paragraph 111). Whether or not a proposal will be inherently unsafe is a matter of judgement for the decision maker taking account of the evidence. This may include the recommendations of the highway authority, information about traffic flows and speeds, any record of crashes in the vicinity, representations by local people and observations on the ground. Any scheme that introduces a significant increase in the potential for conflict between road users that could result in crashes or injuries is likely to be unacceptable. Severe cumulative impacts on the road network relate to its operational performance and levels of congestion, not road safety.

a) Design standards

14. Manual for Streets (MfS), published in 2007, remains the DfT's current guidance for lightly trafficked streets but many of its principles may be applicable to other types of street for example high streets and rural roads. Although it is most commonly referred to in relation to the provision of visibility splays, the document sets out a holistic, design led approach to the provision of streets. It emphasises the multi-functional nature of streets for providing the following: a sense of place, movement, access, parking and provision of utilities. MfS sought to strengthen the link between planning policy and residential street design. The standards within it are often referred to in evidence and may be adopted by local highway authorities. MfS replaced Design Bulletin 32 (DB32) which should no longer be applied as an appropriate set of standards.

15. Manual for Streets 2 (MfS 2) was published by CIHT in 2010. It was endorsed by the DfT. It sets out examples of how to apply the principles of MfS to existing streets, particularly those that are mixed use and busier than residential streets but are not part of the Strategic Road Network (which comprise the country's motorways and trunk roads) and sometimes referred to as the SRN. MfS2 makes clear that most MfS

standards can be applied to a highway regardless of speed limit and therefore it should be used as the starting point of any scheme affecting non-trunk roads.

16. The Design Manual for Roads and Bridges (DMRB) was first published in 1992 by National Highways (NH) predecessor and sets out higher and more stringent standards which apply to the design, assessment and operation of motorways and all-purpose trunk roads in the UK. It comprises a suite of documents covering general principles, environmental assessments, road layouts, pavements, highway structures and bridges, and drainage. These individual documents, each with their own reference number, are updated regularly. Care should therefore be taken to ensure that any DMRB documents to which you are referred or use in your assessment are those which are current at the time of your decision. CD123 Revision 2: *Geometric design of at-grade priority junctions and signal-controlled junctions* is the document most likely to be referred to within S78 casework. CD123 replaced TD41/95 and TD42/95 which had been in place since 1995 and should not be relied on in decision-making.

17. While the DMRB is sometimes used to inform guidance adopted by highway authorities for roads where the speed limit is 40mph or above, MfS2 makes clear that the strict application of DMRB standards to non-trunk routes is rarely appropriate for highway design in built up areas, regardless of traffic volume. Inspectors should be aware that the DMRB standards are significantly higher than MfS as they have been specifically developed for the Strategic Road Network (SRN) and represent NH policy rather than government standards. Moreover, the Stopping Sight Distances do not reflect significant improvements in vehicle braking systems over the last 30 years.

18. The application of the advice in MfS and DMRB is ultimately a matter of judgement which should be based on the evidence presented by the parties. However, as a general rule, DMRB standards will be appropriate for motorways and all-purpose trunk roads whereas MfS should be the starting point on all other roads regardless of speed limit.

19. Ensuring you are aware of the guidance and standards set out in MfS may be important in coming to a view, but it should only be specifically referenced if it has been presented to you within the evidence. It may be necessary to for you to assess the consequences of the proposed access in the light of the site-specific circumstances of the case and the surrounding context. For example, this may include considering the impact of the required visibility splays or recommended width of carriageway on the character and appearance of the area. However, any departure from the recommended standards, particularly when asked for by a highway authority, should be clearly justified.

b) Visibility splays

20. Planning permission is only required for an access onto a classified road and when the highway authority will normally be consulted on the proposal. When assessing the highway safety concerns arising from new accesses for small developments, such as single dwellings, a key consideration will therefore be whether or not it would be safe for vehicles to exit the site in a forward gear.

21. Visibility splays are also important for pedestrians, particularly as these may be used by young children and parents/carers with children in buggies and who may be difficult to see even above low boundary treatments and planting. A common requirement is for visibility splays of 2m x 2m to be provided to ensure safety for all those on the footway. Highway authorities can also require the splays to be kept clear of

obstructions above, for example, 0.6m. Bear in mind that reversing into the street can make it particularly difficult for drivers to see a pedestrian.

22. The visibility splays discussed in MfS relate to vehicles. They are based on the assumption that a vehicle is travelling in a forward direction. They are expressed in terms of X and Y distances where X is the distance back from the carriageway 'give way' line on the minor arm (or access) and Y is the distance that a driver can see to left and right along the main road. These are clearly illustrated and can be understood by reference to the diagrams on page 93 of MfS. The minimum value of X is 2m where both speeds and flows are low. The most frequently used value of X is 2.4m. Y distances are usually based on the stopping sight distances which are set out in Table 7.1 on page 91 of MfS. However, this table only addresses situations where speeds are below 37mph (60kph). Where new accesses are proposed in areas where observed speeds exceed this or where there are speed limits above 40mph, the MfS standards may not be appropriate.

23. The evidence provided in appeals may include information relating to traffic speeds in the vicinity of the site, which may be presented in terms of the 85th percentile speed. This is the speed at or below which 85% of motorists drive on a given road and will be based on survey data. It provides an indication of the speed which most drivers consider to be reasonable and is likely to be a determining factor in deciding the appropriate Y distance. It is possible that the 85% speed is above the speed limit, suggesting that an increased visibility splay may be required. However, the converse may also be true and the 85% speed on some rural roads may be significantly below the national speed limit of 60mph. In this situation it would be appropriate to relate the requirement for visibility splays to the actual speeds observed. Speed surveys therefore may be used to justify reduced standards on rural roads where the application of DMRB standards would not be justified.

24. If you are presented with data from a speed survey it will be necessary to take account of the way in which the survey was carried out in order to assess the weight to give to the results. Issues of importance could include the period of the observations, the time of day (peak hours, throughout the day), the weather conditions, the type of equipment used (tubes on the road or radar) and whether it has been undertaken by qualified professionals.

c) Evidence of accidents/crashes

25. There may be evidence about accidents (or crashes). It is often contended that if there is no record of injury accidents, then a junction or site is safe. However, only crashes which involve personal injuries are recorded by the Police; there may still be non-technical evidence which suggests that there are perceptions of danger. These should be treated with caution but not necessarily dismissed. Whilst MfS advices that a reduction in visibility below recommended levels will not necessarily be a problem, ultimately the decision about the standard of any new access to be provided is a matter of judgement and will depend on the site-specific circumstances of the case. Further advice and understanding of this issue can be found on P92-94 of MfS. Whatever your conclusion, it will need to be supported by adequate reasoning and clearly justified in your decision with reference to the evidence.

d) Securing access arrangements

26. Highway authorities normally set out their requirements for visibility splays in responding to planning applications. If you agree that these are necessary, they, combined with any associated access provision or improvement, are usually secured

by means of a planning condition. If you intend to impose a negatively worded (Grampian style) you need consider whether the scheme is deliverable and can be implemented having regard to land ownership issues. Such a condition should not be imposed where there is no prospect of delivery within the time-limit of any permission. If you have evidence that the appellant is unable to acquire land from a third party that would be necessary to provide a justified visibility splay, this may be a reason to dismiss the appeal. For more detail on this matter refer to the paragraphs 192-199 of the ITM chapter – Conditions.

27. Section 278 of the Highways Act 1980 (S278) allows developers to enter into a legal agreement to make permanent alterations or improvements to a public highway, as part of a planning approval. You may come across references to these agreements as they may be required to ensure that works to implement the access are carried out to the appropriate standards. However, they are not referred to in planning decisions, which are only concerned with the form of any access not the methods that will be used in its construction, so there is no need to refer to them in conditions.

e) Adoption of new streets/roads

28. On large schemes developers may also enter into an agreement under Section 38 of the Highways Act 1980. The developer undertakes the construction of a new road as part of a development which is then adopted as a public highway. The agreement ensures that the road is constructed to appropriate standards for adoption, after which the highway authority becomes responsible for its maintenance. Inspectors do not have any means of requiring an appellant to offer a road for adoption by the local highway authority. Appeal decisions should focus on ensuring that the necessary standard of access is secured and maintained rather than on Section 38 as a means of achieving those objectives.

Parking provision

29. Parking provision within a particular development should be assessed in the context of how parking is managed in the wider area and how it relates to the Council's transport strategy and other development plan policies. As well as helping to ensure efficient use of land, managing parking provision (whether on or off-street), and the charges that are imposed, is a means of managing demand for travel by the private car. The implications of the proposed parking provision should be considered in terms of their likely consequences having regard to the tests in paragraph 110 of the Framework.

30. The issue of finding somewhere to park close to home frequently arises as a concern in third party representations on appeals. It can have significant effects on the quality of life of residents who live in areas that are suffering from high levels of parking demand. Inspectors need to be aware of these wider issues when framing the main issues in appeals remembering that lack of parking provision may not give rise to highway safety problems but could relate to the way in which a development functions or adversely affect the living conditions of surrounding occupiers or the wider neighbourhood.

a) On and off-street parking

31. Off-street parking is that which is either privately owned and used (such as that associated with dwellings or offices) or it can be privately owned but used by the public, for which charges may or may not apply (e.g. associated with individual shops or public car parks). In two-tier authorities, off-street public car parks are usually managed by the District Council.

32. By contrast on-street parking is usually managed by the highway authority (Unitary or County Council). It can be used by anyone. However, it is often regulated. First and foremost, regulations are imposed to keep the highway safe, such as ensuring that parking does not occur near junctions or bus stops. Single yellow lines normally prevent parking during the working day, but the hours can be extended into the evening in some locations. Double yellow lines prevent parking at all times. Away from such areas parking regulations take numerous forms: available at any time, free but time limited, pay and display, and subject to display of a permit (e.g. for residents).

33. Residential areas where there is no off-street parking are common in many towns and cities. Residents rely on parking on-street. This becomes problematic when demand exceeds supply and/or different users compete for the same on-street spaces, such as close to a station, near shops or employment areas. In some places more residents own cars than the street is capable of accommodating. When the competition for spaces causes problems for communities, local highway authorities may introduce 'Controlled Parking Zones' (CPZs). The controls in these areas vary from place to place. Some streets may be reserved solely for residents; others may be a mix of permit holders and pay and display; others may be entirely for short term parking (say up to 2 hours).

34. In all cases where a CPZ has been introduced residents will be paying an annual fee (this may be £50-£100 or more) to purchase a permit which entitles them to park in a particular street or zone. The permutations for the regulations are numerous. They will aim to provide an appropriate balance between the demand for spaces from particular groups such as residents, shoppers, commuters and traders. They will have been devised in consultation with local communities and will be implemented by Traffic Regulation Orders (TROs), which are introduced under the Road Traffic Regulation Act 1984. Access to permits is therefore overseen and enforced by the highway authority. Nevertheless, the consequences of these regulations can go beyond highway safety considerations and can affect the quality of life for residents in an area.

b) Parking standards

35. Local authorities set local vehicle parking standards for residential and non-residential development; the standards may include details of the dimensions required to provide an acceptable parking space. Chapter 8 of MfS addresses parking in some detail and sets out matters to consider and good practice arrangements (page 108). It also gives potential dimensions for spaces for parallel (6m x 2m) and perpendicular parking (2.4m x 4.8m), which may be applicable to larger schemes where parking is shared. Paragraphs 105-107 of the NPPF set out the matters that should be taken into account in setting those standards.

36. Many local authorities also adopt standards in relation to the provision of cycle parking. This often includes a requirement for those provided to be secure and covered.

37. Locally adopted parking standards will frequently be the starting point for assessing the acceptability of a scheme. Most standards require a certain amount of vehicle parking to be provided on the site. It is likely that the standards will have been developed to reflect the likely demand for parking. They may form part of the development plan or, more commonly, as an SPD linked to a development plan policy. Standards may be expressed as either minimum or maximum standards and this may be relevant to your assessment.

38. Parking standards may vary across a local authority's area and be linked to Public Transport Accessibility Levels (PTALs). In London these are set out as a scale of 1 (low) to 6 (high) provision of public transport. Elsewhere they may be expressed more simply, for example low or high. However, the parking standards that apply are likely to be different for central and outer areas and dependent to some extent on the level of accessibility to alternatives to the car.

39. In residential developments spaces may be associated with an individual dwelling; in others provision may be shared between a group of properties. Having established the number of parking spaces required by a proposal, you may also need to assess the practicality of the proposed layout. For example, are the sizes proposed sufficient? Would there be adequate space around them for manoeuvring so that vehicles can exit in a forward gear? Are the spaces against a wall or building with no room to open the vehicle's door or help a child get in and out? Highway authorities may require a minimum area such as 8mx 8m to allow a vehicle to turn around on site. Occasionally it may be suggested that turning could be achieved with a turntable. It will be necessary to take all such factors into account in coming to a view about the number of usable spaces that could be provided on site. This may be less than those shown on the submitted plans.

40. If there is a shortfall of provision you will need to consider the consequences for that on the surrounding area and any harm that may be caused. That will depend to a great degree on the level of that shortfall and the surrounding context. Evidence may be submitted to show the availability of on-street parking near to the site. The weight to be given to data from a parking survey should take account of the time and duration of the observations, bearing in mind that parking demand will vary during the day and throughout the week. Surveys therefore need to be thorough to provide reliable results. Factors to consider in your assessment might include highway safety concerns arising from reversing onto the highway, increased illegal or footway parking, introducing potentially dangerous parking due to poor road alignment or the proximity of the site to junctions.

41. The effects will also depend on the way in which parking is managed in the locality and the range, accessibility and quality of alternative travel options, such as public transport. If there is capacity on street to accommodate any excess or overspill parking safely, this could be acceptable. In other situations, there could be harmful consequences arising from increased parking contrary to the regulations or excessive demand for on-street spaces adversely affecting the living conditions of existing residents. Such harms could be a reason to dismiss the appeal. However, in making your assessment be aware that your site visit is only a snapshot in time so where possible your observations should be used to confirm other sources of evidence, such as a parking survey. There may be concerns that you are unable to see due the time of your visit. However, you should take them into account as they may still be important when evaluating the overall effect of any proposal.

42. When assessing the parking required for a particular development and its effects it may help to structure your considerations taking account the most relevant of the following matters:

    a. Context:
        i. Characteristics of the area: urban/suburban/rural
        ii. Uses of nearby buildings: schools/health facilities/commercial
        iii. Traffic: volumes/speeds
        iv. Junctions: priority/signal-controlled/roundabouts
        v. Accesses: frequency/entry-exit arrangements
        vi. People: presence of pedestrians/cyclists, crossing points

vii. Buses: routes and stops
viii. Speed: limits, traffic calming measures
ix. Street furniture: obstacles/lighting/traffic signs
x. Boundary treatments: walls/hedges/fences

b. Existing parking arrangements
   i. Road markings and parking restrictions
   ii. Amounts of and reliance on both on-street and off-street parking
   iii. Usage, capacity, effect on street scene
   iv. The extent of any existing regulations (hours/users)
   v. Residents parking – CPZ or not

c. Parking standards
   i. Development plan requirements
   ii. Justification/evidence for any departure from standards
   iii. Practicality of proposed layout – manoeuvring space

d. Implications
   i. Ability of surroundings to accommodate displaced demand
   ii. Highway safety – obstruction/effects on visibility/illegal parking
   iii. Added parking stress - demand exceeding supply
   iv. Any inconvenience for wider neighbourhood
   v. Whether or not the development will function effectively

e. Managing demand
   i. Justifications for reduced parking standards
   ii. Car-free/car-capped/low-car

Car free housing

43. Residential development which proceeds without any on-site parking is referred to as either car-free, car-capped or low-car housing. This section is relevant to any of these situations, but for simplicity will be referred to as car-free. Local plan policies may actively promote this form of development as a means of reducing congestion, improving air quality, encouraging the use of public transport and limiting parking stress (the term used when demand for space exceeds supply).

44. Car-free developments are only effective in areas that are, or are proposed to be, within a CPZ and are in locations that are close to services and facilities and/or good alternative transport options. They are predicated on the premise that an owner/occupier should not need to own a vehicle, as there are other practical, convenient and attractive means of getting around. As no parking would be provided on the site, anyone choosing to own a car would either have to find an alternative space off-street (e.g. in a public car park where fees would be incurred) or pay for on-street parking. Parking within a CPZ without a residents parking permit is usually time limited and/or expensive, making it impractical.

45. To deliver a car-free development a mechanism is required to ensure that anyone living there, other than a Blue Badge holder, would not be eligible to apply for a residents parking permit. However, access to parking permits is not something that can be directly controlled through planning legislation. The issue of permits is the responsibility of highway authorities and subject to Traffic Regulation Orders (TROs) or Traffic Management Orders (TMOs) in London. It will be the TRO within a CPZ will specify which properties/streets/ areas are eligible to apply for permits.

46. The issue of possible means of securing a car-free development is discussed in the chapters on Conditions and Planning Obligations, so it is advisable to read both relevant sections before proceeding. However, neither conditions nor obligations can be used to control the actions of individual occupiers. Any mechanism must make a clear connection to the land/property. It is this that will enable an appropriate amendment to the TRO to be enacted. Consequently, it will be necessary for you to have a degree of certainty about how and when that amendment would be done.

47. Some Councils will update their TROs on a regular basis and will not charge a developer for doing so. For example, if the amendment relates to a single dwelling or a conversion of a dwelling into several flats. This could enable the matter to be addressed through a suitably worded condition. For larger schemes, planning obligations will be more appropriate. They will be required to secure the necessary changes as the cost of amending, or introducing new TROs, is likely to be borne by the developer. The decision as to which is the most appropriate mechanism to secure car-free housing will depend on the evidence and circumstances put to you. However, if you find that to be acceptable in planning terms the development should be car-free but no suitable mechanism is provided to ensure that this would happen in practice, this may be a reason to dismiss the appeal.

48. There are occasions when the constraints of a site might prevent the provision of on-site parking and it is therefore proposed that a development should be car free even in the absence of a CPZ. This is unlikely to diminish the demand for parking if the site is in a location where there are few alternatives to the car, or the car is going to be the most practical means of future occupants/users getting about. In that scenario you will need to consider the implications for increased demand for car parking space in the surrounding streets. If there is capacity on-street, this may be acceptable, but could make a scheme unacceptable if on-street parking was limited having regard to the checklist of considerations outlined above.

Design and layout

49. Paragraph 127 of the NPPF sets out a series of criteria for achieving a well-designed place. With those principles in mind when assessing the layout of a proposal it may help to consider the following:

- Have the needs of pedestrians been considered?
- Are the connections to the surrounding area only been based on the needs of vehicles?
- Will it be possible to walk and/or cycle from the site to local facilities?
- What is the quality of those walking/cycling routes?
- Will they legible, safe and direct?
- Is the site dominated by provision hard surfacing, parking spaces?
- Is there an appropriate balance between buildings, hard surfacing and green space?
- Is there sufficient parking or will excess demand be displaced into the surrounding streets?
- Will street frontages be active?
- Will the arrangement of street, buildings and space create a strong sense of place?

Conditions

50. Conditions are commonly required to ensure that accesses are safe and parking for vehicles and bicycles is provided and retained in the long term. Such conditions, which should meet the tests set out in paragraph 55 of the NPPF, are likely to include:

On-site provision:

a) An access may be required as a pre-commencement condition;

b) Parking spaces – these should be provided in accordance with the approved plans, made available prior to occupation and retained thereafter;

c) Sightlines/visibility splays – these may be set out with specific dimensions. The condition should clarify when they should be provided and include a clause to ensure that they are retained in the future, although this is not necessary if the sightlines can be achieved within the public highway.

d) Cycle parking - if insufficient details are presented it may be necessary to ensure that details of how they are to be provided is agreed by the local planning authority and then delivered prior to occupation. Retention will also be required.

e) Electric vehicle charging points – these are increasingly being requested and the paragraph 111 of the Framework is supportive of their provision. They could therefore be justified even in the absence of a development plan policy.

Off-site provision:

a) Access to the site, which includes works to the public highway and is to be provided in accordance with a plan agreed by the highway authority, may be a secured by a Grampian style condition. There may then be a phased approach to its construction which may needed to be included in some appropriate wording. Do not impose such a condition if there is no prospect of the requirement being fulfilled, e.g. due to land ownership issues.

b) A condition could be imposed to secure car-free housing on the basis that the TRO will be updated to exclude the said property(s) from the list of those which are eligible for a residents parking permit. This is only likely to be appropriate for small scale developments, such as a single dwelling or the sub-division of an existing dwelling into flats. The possibility of such a condition should be approached with caution and the issues to consider in relation to such a condition are set out in the ITM Conditions chapter.

Obligations

51. Planning obligations may be required to provide off-site highway infrastructure. These are likely to be essential to address capacity or safety issues at nearby junctions arising from the development.

52. Payments may also be sought and secured towards a range of transport related interventions that are part of a local transport strategy. You would need to be satisfied that these meet the tests set out in paragraph 56 of the NPPF.

53. An obligation may be required to ensure that a development as ‘car free’ in the absence of on-site parking. To be effective this will need to provide an adequate link between the requirement and the land/property and the TRO/TMOs that will ensure that the new dwellings are not on the list of properties where occupants are eligible for a parking permit. In addition to making it clear that occupants of the property cannot have access to permits, the obligations may also seek contributions towards the costs of amending the TROs. Issues to consider in relation to the wording within planning obligations in relation to this matter are set out in the Planning Obligations ITM chapter.

The Planning Inspectorate

Historic Environment

Updated to reflect December 2023 Framework (NPPF)

What's new since the last version

Changes highlighted in yellow made 6 January 2023:

- Paragraph 62 has been updated, following *Council of the City of Newcastle Upon Tyne v SSLUHC* [2022] EWHC 2752 (Admin)

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. Part 1 deals with the historic environment in respect of section 78 planning appeals. Part 2 deals with proposals that involve works to a listed building.

3. This training material applies to casework in England only.[1]

What is a heritage asset?

4. This term is defined in the glossary to the revised National Planning Policy Framework (2023) (the Framework):

> **Heritage asset:** A building, monument, site, place, area or landscape identified as having a degree of significance meriting consideration in planning decisions, because of its heritage interest. It includes designated heritage assets and assets identified by the local planning authority (including local listing).

5. The glossary to the Framework defines designated heritage assets as follows:

> **Designated heritage asset:** A World Heritage Site, Scheduled Monument, Listed Building, Protected Wreck Site, Registered Park and Garden, Registered Battlefield or Conservation Area designated under the relevant legislation.

6. In terms of heritage assets, you may be referred to the Historic Environment Record (HER). This is defined in the Framework as:

> **Historic environment record:** Information services that seek to provide access to comprehensive and dynamic resources relating to the historic environment of a defined geographic area for public benefit and use.[2]

Statutory duties

7. The Planning (Listed Buildings and Conservation Areas) Act 1990 contains the following statutory duties in relation to designated heritage assets (emphasis added):

> Section 66(1) – "In considering whether to grant planning permission [or permission in principle] for development which affects **a listed building or its setting**, the local planning authority or, as the case may be, the Secretary of State shall 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.**"
>
> Section 72(1) – "In the exercise, with respect to **any buildings or other land in a conservation area**, of any [functions under or by virtue of] any of the provisions mentioned in

[1] PINS Wales produces separate material for Wales which summarises differences in policy.
[2] See also paragraph 11 in Planning Practice Guidance ID:18a-011-20190723 – 'What is a historic environment record?'

subsection (2)[3], **special attention shall be paid to the desirability of preserving or enhancing the character or appearance of that area.**"

8. For further advice see the section below 'Ensuring that you comply with the statutory duties under section 66(1) and 72(1)'. Any appeal either relating to a listed building consent or the setting of a Grade I or Grade II* listed building must be done by a heritage specialist and should be re-allocated to an appropriately trained inspector whenever necessary. See Part 2 of this chapter for further details of how to determine listed building consent appeals.

National policy, guidance and advice

9. The Framework establishes that heritage assets:

> "are an irreplaceable resource, and should be conserved in a manner appropriate to their significance, so that they can be enjoyed for their contribution to the quality of life of existing and future generations."
>
> [Paragraph 195].

10. Policy on 'conserving and enhancing the historic environment' is set out in section 16 of the Framework. Paragraph 205 advises that "great weight should be given to the [designated heritage] asset's conservation" and that "the more important the asset, the greater the weight should be". The Framework now makes clear that "This is irrespective of whether any potential harm amounts to substantial harm, total loss or less than substantial harm to its significance.

11. Paragraph 206 notes that, as heritage assets are irreplaceable, "any harm to, or loss of, the significance of [them] should require clear and convincing justification". Substantial harm to, or loss of, a grade II listed building, or grade II park or garden should be exceptional. Substantial harm to, or loss of, designated heritage assets of the highest significance, notably scheduled monuments, protected wreck sites, registered battlefields, grade I and II* listed buildings, grade I and II* registered parks and gardens, and World Heritage Sites, should be wholly exceptional.

12. Further guidance is provided in the Government's *Planning Practice Guidance* chapter Historic environment. This includes guidance on plan making, decision-taking, designated and non-designated heritage assets, heritage consent processes and consultation requirements. [Note that the PPG has not yet been updated to take account of the revised NPPF, so should be treated with caution]

13. Advice is also available from Historic England which is the Government's statutory adviser on the historic environment (until 1 April 2015 it operated under the name English Heritage[4]). Therefore, weight can be attached to its advice accordingly, although that advice is not part of the Government's guidance. Current Historic England guidance includes:

[3] The provisions include the Planning Acts (defined in section 336 of the Town and Country Planning Act 1990, as: The Town and Country Planning Act 1990; the Planning (Listed Buildings and Conservation Areas) Act 1990; the Planning (Hazardous Substances) Act 1990; the Planning (Consequential Provisions) Act 1990). The duty does not apply in relation to neighbourhood development orders.

[4] English Heritage is now a charity that cares for over 400 historic buildings, monuments and sites.

- Historic Environment Good Practice Advice in Planning: Note 1 – The Historic Environment in Local Plans
- Historic Environment Good Practice Advice in Planning: Note 2 - Managing Significance in Decision-Taking in the Historic Environment
- Historic Environment Good Practice Advice in Planning: Note 3 - The Setting of Heritage Assets[5]
- Historic Environment Good Practice Advice in Planning: Note 4 – Enabling Development and Heritage Assets[6]
- Seeing the History in the View
- Understanding Place - Historic Area Assessments: Principles and Practice
- Historic England's Heritage Planning Case Database

14. You may also find the Historic Environment Local Management (HELM) website (set up by English Heritage to help local authorities) useful for background information, including the following publications together with other advice and guidance:

- Building in context: New development in historic areas
- Understanding Place: Historic Area Assessments in a Planning and Development Context
- Constructive Conservation in Practice
- Historic England Advice Note 1 – Conservation Areas
- Historic England Advice Note 2 – Making Changes to Heritage Assets
- Historic England Advice Note 3 – The Historic Environment and Site Allocations in Local Plans
- Historic England Advice Note 4 – Tall Buildings
- Historic England Advice Note 10 – Listed Buildings and Curtilage
- Historic England Advice Note 11 – Neighbourhood Planning and the Historic Environment
- Historic England Advice Note 12 – Statements of Heritage Significance
- Historic England Advice Note 13 – Mineral Extraction and Archaeology
- Historic England Advice Note 15 – Commercial Renewable Energy Development and the Historic Environment.
- HE Advice and guidance microsite

15. Historic England has also published an Advice Note on Listed Buildings and Curtilage (HEAN 10), which gives hypothetical examples to assist decision-takers in the understanding and assessment of curtilage, based on current legislative provisions and case law. Inspectors are reminded that this Advice Note simply constitutes advice from Historic England rather than Government policy or law, although it may be raised by parties in casework.

Ensuring that you comply with the statutory duties under sections 66(1) and 72(1) Planning (Listed Buildings and Conservation Areas) Act 1990

16. The *Barnwell Manor Wind Energy Ltd v East Northants DC, English Heritage, National Trust and SSCLG* [2014] EWCA Civ 137 judgment contains important findings which have direct implications for casework where a listed building or its setting is affected or where it involves a building or other land in a conservation area. The Court emphasised the need

[5] The Good Practice Advice Notes 1, 2 and 3 are intended to supersede the guidance in Planning Policy Statement 5: Planning for the Historic Environment - Historic Environment Planning Practice Guide (2012), cancelled by government on 27 March 2015.
[6] This document replaces 'Enabling Development and the Conservation of Significant Places (English Heritage, 2008).

for decision makers to apply the intended protection for heritage assets as specified under s66(1) of the relevant 1990 Act and the parallel duty under s72(1) of that Act.

17. The CoA judgment has wider applicability than simply to wind turbines and should be taken into account in all cases where issues concern the effect of proposals on heritage assets.

18. In essence, the judgment re-iterates the previous High Court judgment[7] in this case, which stated that Inspectors need to give 'considerable importance and weight' to the desirability of preserving the setting of listed buildings when carrying out a 'balancing exercise' in planning decisions.

19. The judgment is concise and contains some very important findings impacting on sections 66 and 72, the provisions of the original Framework (2012) concerning the weight to be attached to harm thereto (although the Inspector's decision pre-dated the original Framework and hence the judgment makes no reference to the original Framework) and the overall balancing exercise that Inspectors must undertake, (paragraphs 23-29 of the judgment). There are also some important - more generally applicable - findings under grounds 2 and 3 (paragraphs 35-37 and 40-44 of the judgment).

20. The Court of Appeal held that:

    - "despite the slight difference in wording, the nature of the duty is the same under both" s66 and s72(1); and,

    - a decision-maker, having found harm to a heritage asset, must give that harm "considerable importance and weight"

21. This test goes further than simply balancing the effect on a listed building and its setting, or on the character or appearance of a conservation area, against the benefits of the proposed development, in the way you would other material considerations, even if that is the way in which development plan policies might suggest is appropriate.

22. You must first assess whether or not there is harm to the listed building or its setting (or to the character or appearance of a conservation area) and, if there is, the degree of such harm. This is a matter of planning judgment.

23. The overarching statutory duty imposed by s66 or s72 applies even where the harm to heritage assets is found to be less than substantial. You should be careful not to equate less than substantial harm with a less than substantial planning objection, as paragraph 29 of the CoA judgment makes clear.[8]

24. Your decision or report should expressly acknowledge the need, if harm has been found, to give considerable weight to the presumption that preservation is desirable and demonstrate that this has been done. Otherwise, it would not reflect the duty under s66 or s72.

[7] [2013] EWHC 473 (Admin), 8 March 2013.

[8] This is now also reflected in policy, in paragraph 199 of the Framework, which states that the great weight to be given to a designated heritage asset's conservation is "irrespective of whether any potential harm amounts to substantial harm, total loss or less than substantial harm to its significance."

25. If the harm to a heritage asset is substantial, then the weight to be attached to this will have to reflect appropriately the desirability of preserving such assets and their setting, and the requirement to have special regard to such considerations.

26. The need to apply the relevant provisions of the Framework is unaffected by this CoA judgment. As a result of it, however, any balancing exercise under the Framework, in relation to a listed building or its setting, or to the character or appearance of a conservation area, will need to be carried out against a presumption that preservation is desirable.

27. In all cases a balancing exercise of harm vs benefit must still be carried out, but the duty and the presumptive desirability of preserving the assets and their setting must be given considerable importance and weight. How that balance will be performed will depend on the factors in the case, but it will always be important to recognise the special status which s66 and s72 confers upon the relevant relationship with heritage assets and conservation areas.

28. The following practical steps may assist you:

    a. First, it will inevitably be helpful to recognise the statutory duties expressly in the decision or report.

    b. Second, the nature of the relationships between the proposal and the listed buildings/setting or conservation areas will need to be carefully assessed and clear findings made which take account of the views expressed on all sides of the debate.

    c. Third, it will be necessary to show how considerable importance and weight has been afforded to the considerations to which s66 and s72 apply and, where appropriate to explain how benefits have been weighed against such matters. (which could be achieved by working through paragraphs 203 to 208[9] of the Framework, in accordance with their terms[10]).

29. The subsequent decision of the Secretary of State on an appeal by Peel Wind Farms (UKC) Limited relating to the Former Asfordby Mine/Existing Asfordby Business Park[11] provided examples of the Secretary of State's approach to material considerations and the statutory duties (s66 and s72), following the *Barnwell Manor* Court of Appeal judgment.

30. The Court of Appeal judgment in the *Mordue* case elucidated aspects of the *Barnwell Manor* Court of Appeal judgment in relation to giving reasons in decision letters involving the application of the s66 duty.

[9] Previously paragraphs 199 to 202 of the original Framework
[10] Court of Appeal judgment in *Mordue v Jones and SSCLG & South Northamptonshire Council* [2015] EWCA Civ 1243, paragraphs 19, 20, 26 & 28. Note that this judgment refers to the analogous paragraphs in the previous (original 2012) version of the NPPF.
[11] APP/Y2430/A/13/2191290, 4 March 2014 Note that this decision refers to the analogous paragraphs in the previous (original 2012) version of the Framework.

Part 1 – Planning Casework

General casework principles

The 3-step process

31. When dealing with historic environment casework it is advisable to follow a 3-step process. This will help show that you have complied with relevant legislation, national policy and guidance. The 3 steps apply in casework involving both designated and non-designated heritage assets.

    1. Assess/describe the significance of the heritage asset (see paragraph 59, 63 and 96 below).

    2. Assess the effect of the proposed development on the significance of the heritage asset. Where a listed building or its setting is affected or where a building or other land in a conservation area is involved, see paragraphs 16 to 30 inclusive above.

    3. Conclude (and, if necessary, carry out a balancing exercise - weighing any 'harm' against any benefits). Where a listed building or its setting is affected or where a building or other land in a conservation area is involved, see paragraphs 16 to 30 inclusive above.

32. Significance (for heritage policy) is defined in the Glossary to the Framework[12] as:

    "The value of a heritage asset to this and future generations because of its heritage interest. That interest may be archaeological, architectural, artistic or historic. Significance derives not only from a heritage asset's physical presence, but also from its setting. For World Heritage Sites, the cultural value described within each site's Statement of Outstanding Universal Value forms part of its significance."

Harm – substantial or less than substantial?

33. The effect of a proposal on a heritage asset could be positive, neutral or harmful.

34. When referring to **designated heritage assets** the Framework identifies two levels of harm:

    *"Where a proposed development will lead to **substantial harm** to (or **total loss of significance** of) a designated heritage asset, local planning authorities should refuse consent, unless it can be demonstrated that the substantial harm or total loss is necessary to achieve substantial public benefits that outweigh that harm or loss, or all of the following apply:*

    a) the nature of the heritage asset prevents all reasonable uses of the site; and

    b) no viable use of the heritage asset itself can be found in the medium term through appropriate marketing that will enable its conservation; and

    c) conservation by grant-funding or some form of not for profit, charitable or public ownership is demonstrably not possible; and

    d) the harm or loss is outweighed by the benefit of bringing the site back into use".

    [paragraph 201, **emphasis** added].

[12] See also paragraph 18 of Planning Practice Guidance ID: 18a-006-20190723 – 'What is "significance"?'.

*"Where a development proposal will lead to **less than substantial harm** to the significance of a designated heritage asset, this harm should be weighed against the public benefits[13] of the proposal including, where appropriate, securing its optimum viable use."*

[paragraph 202, **emphasis** added]

35. When dealing with these matters, it is good practice to use the terms as set out in these paragraphs as this will help demonstrate that you have correctly applied the Framework. In *Shimbles v City of Bradford MBC* [2018] EWHC 195 (Admin), 08 February 2018, Mr Justice Kerr concluded that when determining planning applications, LPAs (and therefore decision-makers) were not obliged to place harm that would be caused to the significance of a heritage asset, or its setting, somewhere on a "spectrum" in order to come to a conclusion. He noted that the only requirement was to differentiate between "substantial" and "less than substantial" harm for the purposes of undertaking the weighted balancing exercise. That said, there is nothing to stop you from applying a spectrum of harm when you are dealing with multiple heritage assets as suggested by the PPG which advises that: "Within each category of harm (which category applies should be explicitly identified), the extent of the harm may vary and should be clearly articulated".

36. However, herein lies a trap for the unwary and the inexperienced. If you conclude that the level of harm to an asset or its setting would only be minor, it is critical that you still attribute considerable importance and weight to it in your planning balance, as required by the *Barnwell Manor* judgement. The use of the spectrum will not be necessary in most cases and you should bear in mind that the Framework deliberately keeps the exercise relatively straightforward in order to avoid unnecessary complexity. Consequently, you should only consider this approach if you feel it is absolutely necessary and adds clarity to your reasoning or if it is raised by one of the parties and consequently requires some engagement on your part. If you are in any doubt, then you should discuss the matter with an experienced heritage specialist

37. Further advice about assessing if there is substantial harm can be found in the Planning Practice Guidance[14] which, amongst other things, states that:

> "Whether a proposal causes substantial harm will be a judgement for the decision-maker, having regard to the circumstances of the case and the policy in the National Planning Policy Framework. In general terms, substantial harm is a high test, so it may not arise in many cases. For example, in determining whether works to a listed building constitute substantial harm, an important consideration would be whether the adverse impact seriously affects a key element of its special architectural or historic interest. It is the degree of harm to the asset's significance rather than the scale of the development that is to be assessed. The harm may arise from works to the asset or from development within its setting."

38. When considering a proposal involving a number of heritage assets, if less than substantial harm is found in respect of a number of assets, more weight can reasonably be attached in the overall planning balance to a number of "less than substantial" harms than would be the case if only one asset were (less than substantially) harmed. Whilst these separate

[13] The term 'public benefits' is explained in paragraph 20 in Planning Practice Guidance ID: 18a-020-20190723 – 'What is meant by the term public benefits?'.
For more discussion on 'public benefits' see the recent court judgments *Amstel Group Corporation v. SSCLG & North Norfolk DC* [2018] EWHC 633 (Admin) and *Good Energy Generation Ltd v SSCLG, Cornwall Council & Communities Against Rural Exploitation* (CARE) [2018] EWHC 1270 (Admin). Both of these judgments pre-date the 2021 Framework.
[14] Paragraph 18 of Planning Practice Guidance ID: 18a-018-20190723 - 'How can the possibility of harm to a heritage asset be assessed?'.

harms would not cumulatively amount to 'substantial weight' in the Framework context, each incidence of harm would need to be given 'considerable importance and weight' if the s66 and/or s72 duties apply.

39. Advice on issues relating to the viable use of a heritage asset in the context of paragraphs 201 and 202 of the Framework can be found in Planning Practice Guidance.[15]

40. Where there are proposals that contain a mixture of elements that would both harm and improve the heritage asset then those that would be beneficial should be expressly included and referred to as public benefits in the paragraph 196 balance. This advice follows the High Court judgement in *Kenneth Kay v SSHCLG and Ribble Valley Borough Council*, [2020] EWHC 2292 (Admin), 21 August 2020, which raises issues related to the consideration of the 'Planning Balance' where heritage is a consideration under paragraph 202.

41. The claim was allowed on one of two grounds and the judgment concluded that the Inspector erred in law when it was stated that there were no public benefits to be weighed against the less than substantial harm to the Grade II listed building. The Inspector found that a single storey extension and the re-painting of a gable would be harmful but that replacing an arched doorway with a window and reconfiguring terrace railings would have a positive effect. The court found that as part of the planning balance the decision maker should have had regard to the heritage benefits arising from the works that were approved by means of a split decision. To assist where this scenario occurs, the following 3-step approach can be used:

    1. Determine if there is heritage harm as per the judgment in *Safe Rottingdean Limited v Brighton and Hove City Council* [2019] EWHC 2632 (Admin), 8 October 2019;

    2. If there is heritage harm, this engages the presumption against development because of the great weight to be given to an asset's conservation. Assuming the level of harm is less than substantial, this engages NPPF para 202;

    3. Within the planning balance contained within NPPF para 202, the decision maker should then have regard for any heritage benefit (alongside other public benefits).

42. In *City & County Bramshill Limited v SSHCLG & Others* [2021] EWCA Civ 320, 9 March 2021, the CoA judgment raised questions on the interpretation and application of policies in the NPPF and the assessment of harm and benefit to heritage assets. Firstly, reference to *R(on the application of Palmer v Herefordshire Council)* [2016] EWCA Civ 1061 judgment where there was both positive and negative effects on the setting of a LB and alleged error in failing to undertake a net or internal heritage balance (heritage harms and benefits weighed against one another before weighing other public benefits against that overall harm). The CoA judgment confirmed that there is no requirement to undertake a "net" or "internal" balance of heritage-related benefits and harm as a self-contained exercise preceding a wider assessment as required under NPPF para 196. The Courts

[15] Paragraphs 15, 16 and 17 of Planning Practice Guidance ID: 18a-015-20190723 – 'What is the optimum viable use for a heritage asset and how is it taken into account in planning decisions?' & 18a-017-20190723 – 'When is securing a heritage asset's optimum viable use appropriate in planning terms?' ID: 18a-016-20190723 'What evidence is needed to demonstrate that there is no viable use?'

have not prescribed any single approach, but have highlighted the need to follow the approach in NPPF paras 193-196 (now paras 199-202), which should fulfil the legal duty.

43. Policy in respect of assessment of harm is set out in general terms. The decision-maker is not told how to assess that harm and what should or should not be taken into account. Consequently, there is no single, definitive approach. Identifying and assessing any public benefits which includes benefits to the asset itself, which are weighed against any harm that might be caused are also matters for the decision-maker. Para 78 of the judgment points out that cases will vary and how the balance is done will depend on the type of benefit. An "net" or "internal" balance could be undertaken, but it not a legal requirement. The Courts grant discretion to decision-makers as to how to undertake assessment in terms of the most suitable sequence. The key point is that all steps must be undertaken and relevant provisions must be correctly interpreted and rationally applied with no benefits omitted from the assessment.

44. Inspectors should also consider the consequences for associated heritage assets if, on appeal, an application for permission for enabling development were refused. The Planning Practice Guidance[16] states that public benefits may include heritage benefits, and that the reduction or removal of risks to a heritage asset are considerations capable of being a public benefit (see also

45. paragraphs 199 and 200, pursuant to which great weight ought to be given to any conclusion that, if permission is refused and, as a result, necessary repair works would not be delivered or would be delayed, harm could be caused to the heritage asset).

46. Inspectors should note the High Court's consideration in *Forest of Dean DC v SSCLG and Gladman Developments Ltd* [2016] EWHC 421 (Admin) of arguments concerning the interaction between the balancing test in relation to less than substantial harm to the significance of a designated heritage asset, and the presumption in favour of sustainable development, as they were set out (in paragraph 134 of the 2012 Framework).

47. The judge found that policies restricting development, such as those relating to less than substantial harm to the significance of a designated heritage asset (in paragraph 134 of the original Framework), should be considered to be within the reach of footnote 9 to original Framework paragraph 14. The judge also considered that:

> "(t)he last bullet point in paragraph 14 meant that the presumption in favour of planning permission was to be dis-applied in two separate situations. Both Limbs had to be considered. In this case, because of the harm to the designated heritage assets, Limb 2 fell to be considered first. The appropriate test was the ordinary (unweighted) balancing exercise envisaged by the words in paragraph 134".

48. It is important to note, however, that the wording of the relevant part of the presumption in favour of sustainable development contained in paragraph 11 d) of the Framework is considerably altered from that of the previous version and states that:

> "Where there are no relevant development plan policies, or the policies which are most important for determining the application are out-of-date, granting permission unless:
>
> i. the application of policies in this Framework that protect areas or assets of particular importance provides a clear reason for refusing the development proposed.

[16] Paragraph 020 of Planning Practice Guidance ID: 18a-020-20190723 – 'What is meant by the term public benefits?'

ii. any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole."

49. Footnote 7 of the Framework (analogous, but not identical, to Footnote 9 of the original Framework) sets out that the policies referred to in 11 d) i. are those in the Framework (rather than those in development plans), including, amongst other things, those related to designated heritage assets and other non-designated heritage assets of archaeological interest which are demonstrably of equivalent significance to scheduled monuments.

50. In practice, where paragraph 11 d) of the Framework applies: the exercise at the Framework paragraph 202 and paragraph 11 d) i. should therefore be undertaken where harm to heritage assets mentioned in Footnote 7 is identified, including less than substantial harm; If a decision-maker carries out the balancing exercise in the Framework paragraph 202 and concludes that there is harm, but then concludes that that harm is outweighed by identified public benefits, then the Framework paragraph 202 should no longer be taken to indicate that development should be restricted and the weighted balance in Framework paragraph 11 d) ii. should then be undertaken.

Do you have sufficient evidence?

51. Paragraph 194 of the Framework requires applicants and appellants to define the significance of the asset. However, the level of detail provided should be proportionate to the importance of the asset and no more than is necessary to understand the potential impact of the proposal on its significance. LPAs should have identified and assessed the particular significance of any heritage asset (paragraph 195).

52. In most cases you will likely have the evidence you need, including from what you see on your site visit, to reach a decision, - but if not, you will need to refer back to the parties. In the unlikely event that you do not know what you are looking at on site, you may need to consult an advisor or mentor to decide if the case needs to be re-allocated. In conservation areas, you should at least have a plan showing where the boundaries are (make sure you have this before visiting the site). Conservation area character appraisals & statements are also helpful (if they exist and are available).

53. Be particularly careful in cases where the LPA decision was against officer recommendation, and you do not have an appeal statement from the LPA. If the statement was turned away because it was late 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.

Can the condition of a heritage asset be taken into account?

54. See paragraph 196 in the Framework, and Planning Practice Guidance which advises:

"Disrepair and damage and their impact on viability can be a material consideration in deciding an application. However, where there is evidence of deliberate damage to or neglect of a heritage asset in the hope of making consent or permission easier to gain the local planning authority should disregard the deteriorated state of the asset."[17]

[17] Paragraph 014 of Planning Practice Guidance ID: 18a-014-20190723 – 'Should the deteriorated state of a heritage asset be taken into account in reaching a decision on an application?'

Good practice

55. In listed building consent refusal cases, the Inspector may find that the LPA has objected to harm to a Conservation Area as well as harm to the Listed Building. This reflects the s.72 duty referred to above, and in such circumstances, Inspectors will need to apply the appropriate listed building test, **s16(2) and/or s66(1)**, as well as the conservation area test, **s72(1)**. It is important to note that both the listed building tests refer to 'setting'.

56. When viewing the heritage asset and its setting:

- When you receive a file and carry out your pre-event check, consider if you will need access for your site visit and that it's been arranged e.g. assessing the setting of a Scheduled Ancient Monument can require judgement to be exercised from the location of the Scheduled Ancient Monument itself, which may be miles from public rights of way. The same can apply to the setting of listed buildings if, for example, you need access to look at views out or gardens etc. When looking at setting, public access isn't important, but impact is.

- Avoid relying on list descriptions too much – see what is actually there.

57. When writing your decision:

- Have you avoided describing more of the heritage asset (and its setting) than is necessary? Don't refer to details which are not relevant to your decision.

- Do not suggest that a designated heritage asset might not be worthy of its status or that a heritage asset should be designated. Local authorities are responsible for designating conservation areas under section 69 of the Act and the responsibility for listing buildings lies with the Secretary of State under Section 1 of the Act (following a recommendation from Historic England).[18] There is no power for this authority to be transferred to Inspectors. However, the potential de-listing of a listed building can be dealt with in appeals which have been recovered by the Secretary of State.

- Will it be clear from your reasoning that you have understood any relevant architectural or technical terms and have correctly applied them? Hastings Borough Council include a useful glossary of architectural terms on their website.

- Remember that a 'listed building' may be a terrace/block – if it is listed as one refer to the building as a listed building not lots of listed buildings. 'E.g. whether the proposed development would preserve the setting of 1-15 High Street, a listed grade II building,'. Likewise, it may be that only part of a building constitutes the 'listed building'.

Defining the main issue

58. Is your main issue neutrally stated and does it indicate that you are going to have regard to the relevant statutory duty? For example:

> The effect of the proposed development on the character and appearance of the conservation area.
>
> Whether the proposed development would preserve or enhance the character or appearance of the [] Conservation Area. (*Note: you will need to assess both [i.e. whether the proposal*

[18] Paragraph 22 of Planning Practice Guidance ID: 18a-022-20190723 - 'How do heritage assets become designated'.

would preserve or enhance its character and whether the proposal would preserve or enhance its appearance])

The effect of the proposed development on the setting of nearby listed buildings.

Whether the proposal would preserve a grade [] listed building (or its setting or any features of special architectural or historic interest which it possesses).
The effect of the proposed development on the character or appearance of the conservation area and on the setting of nearby listed buildings.

The setting of a listed building[19]

59. Proposals that involve works to a listed building, any buildings within its curtilage or which might affect the setting of a Grade I or II* listed building should be dealt with by Inspectors with a 'historic heritage' specialism. See relevant specialist training materials and Part 2 of this ITM on Listed Buildings.

60. The remainder of this section deals mainly with casework that could affect the setting of a listed building. The statutory duty, in s66, however, applies more widely than setting alone (see paragraphs 16 to 30 inclusive above).

61. Advice is provided in the Planning Practice Guidance[20] and the setting of a heritage asset is defined in the Glossary to the Framework:

> "The surroundings in which a heritage asset is experienced. Its extent is not fixed and may change as the asset and its surroundings evolve. Elements of a setting may make a positive or negative contribution to the significance of an asset, may affect the ability to appreciate that significance or may be neutral."

62. Further clarification on the meaning of 'setting' in the context of the Framework definition has been provided in *Steer v Secretary of State for Communities and Local Government, Catesby Estates Limited, Amber Valley Borough Council* [2018] EWCA Civ 1697. The word 'experienced' has a broad meaning, which is capable of extending beyond the purely visual, and could include, but is not limited to, economic, social and historical relationships, and considerations of noise and smell. However, an assessment should always be based on the particular facts and circumstances of the case in hand.

63. When considering issues relating to setting you should be aware that:

- The importance of a setting is how it contributes to the asset's significance.
- The setting can include land which has a visual, functional and/or historic relationship with the building.
- The size of the setting of different buildings in different locations can vary considerably. For example, the setting of a rural church or a mansion may be quite large, whereas the setting of a church or mansion in a dense urban environment may be more restricted.
- The setting of a building will often be more extensive than its curtilage.
- The setting can change over time.
- The setting will not usually be part of the heritage asset itself.
- The extent of a setting can vary with the size of the development proposed.
- It may be useful to ask yourself why the asset is located where it is.

[19] see also paragraphs 16 to 30 inclusive above
[20] Paragraph 013 of Planning Practice Guidance ID: 18a-013-20190723 – 'What is the setting of a heritage asset and how can it be taken into account?'

Historic England's publication Historic Environment Good Practice Advice in Planning: Note 3 - The Setting of Heritage Assets may help you think about what questions you need to consider in casework. Its 5-step approach to "Setting and Views" was considered by the court in Council of the City of Newcastle Upon Tyne v SSLUHC [2022] EWHC 2752 (Admin).

1) Identifying which heritage assets and their settings are affected
2) Assess the degree to which these settings and views make a contribution to the significance of the heritage asset(s) or allow significance to be appreciated
3) Assess the effects of the proposed development, whether beneficial or harmful, on the significance or on the ability to appreciate it
4) Explore ways to maximise enhancement and avoid or minimise harm
5) Make and document the decision and monitor outcomes

The Court held that:

> "The sequence in which steps 3 and 4 are addressed could vary from case to case without affecting the legality of a decision to grant planning permission. But what is significant for the purposes of ground 2(i) is that step 4 is addressed separately from the other steps, in particular step 3."

It is therefore important that your assessment of the scale of harm of the proposed scheme (step 3) is a self-contained exercise and should not feed into your assessment of the balance between the proposed scheme's harm and benefits (step 4). Enhancement and harm minimisation (mitigation) will only be relevant to the balancing of harms and public benefits in your reasoning, and should not include an assessment of harm already undertaken in step 3 above.

Minimisation considerations will only be relevant to the balance between scheme harm and benefit, not to assessing the level of harm that the proposal would cause.

63. Apply the 3-step approach when dealing with casework:

1. What is the significance of the heritage asset?

- What is the contribution of the setting to the significance of the listed building?
- What are the main characteristics of the setting which are relevant to this contribution (visual, functional, historic, etc.)?
- How is the asset appreciated?
- You do not need to reach a definitive finding on the overall extent of the setting as this might tie the hands of future decision makers. However, you will need to decide whether the proposed development would affect the setting.

2. What would be the effect of the proposed development on the visual, functional and historic aspects of the contribution which the setting makes?

- Would the effect be positive, negative or neutral?
- Would the design and siting of the proposal sustain or enhance the experience of an asset within its setting? How close would it be to the asset? Would the

proposal affect important views of the building? Would it visually compete with the asset or distract from it?
- How would it affect character (for example, in terms of noise or tranquillity if relevant)?
- If the proposal would cause harm to a designated heritage asset – would that harm be 'substantial' (NPPF 201) or 'less than substantial' (NPPF 202).

3. Balancing and conclusion

- Have you reached clear findings about the effect of the proposal on the setting of the listed building having taken account of the views expressed on all sides of the debate?
- Will it be clear that you have given any harm "considerable importance and weight"?
- Have you applied the appropriate policy in paragraphs 201 and 202 of the Framework when carrying out the balancing exercise?
- In carrying out the balancing exercise, will it be clear from your decision that you have applied the statutory duty in Section 66 and had **special regard** to the desirability of preserving the listed building or its setting or any features of special architectural or historic interest which it possesses, by attaching considerable importance and weight to that desirability?
- Have you concluded against the main issue, relevant development plan policy and the Framework?
- Have you concluded overall in terms of the development plan, in compliance with section 38(6) of the Planning and Compulsory Purchase Act 2004 ensuring that any material considerations advanced in favour of the proposal, both public benefits and other matters, are appropriately balanced against any conflict with the development plan?
- It is necessary to separate clearly listed building setting issues from conservation area setting matters and the consideration of the conservation area itself. Often, it will be easiest to set out the test, so it then gets reflected in the conclusion.

64. It is worth checking whether the scheme has been advertised as affecting the setting of the listed building, as from experience, even where this has been cited as a reason for refusal, sometimes the application hasn't been advertised. See paragraphs 103 and 104 below.

Conservation areas

see also paragraphs 16 to 30 inclusive, above

Character and appearance

65. In conservation areas the duty under section 72 requires you to consider the effect on character or appearance. These are not the same.

Character is perhaps what a place *feels* like or *is* like – this might be about how it is used – for example, is the area residential or commercial, is it busy or quiet? In terms of heritage assets, it can also include historical associations.

Appearance is what a place *looks* like – so your consideration will be about visual effects.

Legal judgments

66. The following legal cases established important principles:

A neutral effect would preserve - In *South Lakeland DC v SSE & Carlisle Diocesan Parsonages Board* [1992] 2 WLR 204, [1992] 2 AC 141, the House of Lords found that the statutory objective of preserving a conservation area could be achieved by either (i) a positive contribution to preservation or enhancement or (ii) a development which leaves character or appearance unharmed, that is to say, preserved.

You should consider the effect on the conservation area as a whole - *South Oxfordshire DC v SSE & J Donaldson* (March 1991, CO/1440/89) concerned an appeal where the Inspector had found that a proposed development site was neglected and did not contribute to the character or appearance of the area which was mainly concerned with older buildings some distance from the appeal site. In contrast, the buildings around the appeal site were mostly modern and not an essential part of the historic village core. In these circumstances he concluded that the general appearance and character of conservation area would not be affected and that the appearance of the immediate surroundings would be preserved. The Court found, amongst other things, that section 72 requires attention to be directed to the effect on the conservation area as a whole rather than on particular parts of it. The Court was satisfied that the Inspector had considered the character of the area as a whole.[21]

Where public benefits of a scheme would outweigh substantial harm to heritage assets The 'Ordsall Chord' judgment (*Whitby v Secretary of State for Transport Secretary of State for Communities and Local Government & Ors* [2015] EWHC 2804), which predates the Framework- although the wording of the paragraph to which the decision relates is largely unchanged, involved the making of an Order under the Transport and Works Act 1992 (with associated listed building consent applications) for a proposed 340m elevated chord railway linking Manchester's three main railway stations. The challenge arose from the choice of route, which would result in substantial harm to a collection of listed heritage assets associated with the historic development of the railways in the 19th century. The Inspector (and the Secretary of State for Transport in making the Order, and the Secretary of State for Communities and Local Government in granting listed building consent) found that the public benefits of the scheme would outweigh that harm, meeting the exception test in paragraph 133 of the original Framework (paragraph 201 of the Framework) - 'the substantial harm or loss is necessary to achieve substantial public benefits that outweigh that harm or loss'. The Court found that the correct policy test had been applied.

The determinations also included consideration of an alternative scheme which was found to be considerably less harmful to heritage assets. The Inspector reported that the purported alternative was undesirable for other reasons (notably its effect on wider redevelopment schemes) and that it could be discounted for these other reasons, which was supported by the Secretaries of State. The Court found that the scheme as applied for was therefore 'necessary' (as worded in the original Framework) to achieve public benefits. The Court found that the word "necessary" in the relevant original Framework test (then paragraph 133, now paragraph 201) should not be given an unduly narrow interpretation as that "could produce results which would be at odds with the [Framework] policy. For example, an alternative scheme might be technically feasible but pass through an historic town centre, thus harming a different set of heritage assets, and also businesses and homes. The harm thus caused by the alternative route ought surely to be relevant to the consideration of whether or not the Scheme was "necessary". Such a restrictive interpretation could also

[21] **Note**: Deciding the effect on the conservation area as a whole may involve assessing how the appeal site contributes to the conservation area and how the proposed development would relate to its immediate surroundings – which was the approach correctly taken by the Inspector in the South Oxfordshire case. It might also be legitimate to conclude that harm to part of the Conservation Area would fail to preserve the whole of the Conservation Area.

render the “public benefits exception” unworkable, since if there were two technically feasible schemes, it would never be possible for the applicant to establish that either was “necessary””.

Applying the 3-step process to casework in conservation areas

67. Consider:

1. What is the significance of the heritage asset?

- Is there a Conservation Area Appraisal or Statement that helps you assess this?
- What are the defining characteristics of the Conservation Area as a whole?
- In what way does the appeal site currently contribute to the character or appearance of the Conservation Area? Is the contribution positive, negative, neutral?
- Questions to ask might include: What makes the area distinctive? What defines the character and appearance of the area (buildings, spaces, landscaping, detailed treatments, views, uses)? Is it urban, suburban or rural? Commercial or residential? Busy or quiet?

2. What would be the effect of the proposed development on the heritage asset?

- Would the proposal reflect the relevant defining characteristics of the conservation area? If so, would the effect be neutral – and so one of preservation?
- Would the proposal improve the character and/or appearance of the area? If so, would the effect be one of enhancement?
- Would the proposal have an adverse effect on the character and/or appearance of the area? If so, it would fail to preserve or enhance.[22]
- Matters to consider might include – How would the proposal relate to the buildings and spaces? Would it reflect existing landscaping and detailed treatments? How would the use relate?
- Depending on the circumstances of the case do you need to consider the effect on character and appearance individually? (For example, a proposal might result in an attractive building which enhances appearance. However, a noisy use of the same building might fail to preserve the character of a quiet area?)

3. Balancing and conclusion

- Have you reached clear findings about the effect of the proposal on the conservation area having taken account of the views expressed on all sides of the debate?
- Will it be clear that you have given any harm found “considerable importance and weight”?
- Have you concluded against the main issue?
- Have you carried out any necessary balancing of benefits against harm? If you are concluding that the proposal would preserve or enhance - then there will usually be no need to assess any potential benefits in detail.
- If you conclude that the proposal would have an adverse impact – have you assessed whether the harm would be ‘substantial’ or ‘less than substantial’ in line with paragraphs 201 and 202 of the Framework?
- If any harm is ‘substantial’ - has it been demonstrated that there are substantial public benefits that would outweigh that harm (paragraph 201 of the Framework) or do the 4 stated criteria in the bullet points at the end of paragraph 201 all apply?

[22] See paragraph 19 of Planning Practice Guidance ID: 18a-019-20190723 – ‘How can the possibility of harm to conservation areas be assessed?’

- If any harm is 'less that substantial' - are there any public benefits[23], including, where appropriate, securing optimum viable use, that would justify allowing the appeal (paragraph 202 of the Framework). In carrying out the balancing act will it be clear from your decision that you have applied (with respect to any buildings or other land **in** a conservation area) the statutory duty in Section 72(1), and paid **special attention** to the desirability of preserving or enhancing the character or appearance of that area by attaching considerable importance and weight to that desirability?
- Have you concluded against relevant development plan policies and the Framework?
- Have you reached an overall conclusion on the proposal's compliance with the development plan in accordance with section 38(6) of the Planning and Compulsory Purchase Act 2004 - ensuring that any material considerations advanced in favour of the proposal, both public benefits and other matters are appropriately balanced against any conflict with the development plan?

Cases where the Conservation Area is not a main issue

68. In some cases, the LPA may not have any concerns about the effect on the Conservation Area. However, because of section 72 of the Act, you are still obliged to pay special attention to the desirability of preserving or enhancing the character or appearance of that area. Consequently, where you have not defined the effect on the conservation area as a main issue:

- You should deal with the effect on the Conservation Area in your 'other matters' section.
- Explain briefly why you consider the proposal would preserve or enhance the character or appearance of the Conservation Area (if you do). In doing so it can be helpful to note the LPA's stance.
- If you are dismissing, and the appellant has argued that the proposal would enhance the character or appearance of the Conservation Area, you will need to explain why this potential benefit would not outweigh the harm you have identified, despite you having attached considerable importance and weight to the desirability of preserving or enhancing the character or appearance of the Conservation Area.
- If you consider the proposal would cause harm to the conservation area this would need to be a main issue. If this would be a surprise to the parties – seek their views.

Cases involving demolition and replacement with new development

69. Paragraph 204 of the Framework sets out policy on such cases. See the advice below on 'the partial or complete loss of a heritage asset'.

Setting of a conservation area

70. Paragraph 206 of the Framework states that proposals that preserve those elements of the setting that make a positive contribution to, or better reveal the significance of, the asset should be treated favourably. The Glossary to the Framework defines the setting of a heritage asset as the surroundings in which it is experienced. Consequently, a key question to consider is whether the significance of the conservation area would be affected by development outside it. The Planning Practice Guidance also provides guidance.[24]

[23] See paragraph 20 in Planning Practice Guidance ID: 18a-020-20190723 – 'What is meant by public benefits.'
[24] Paragraph 13 of Planning Practice Guidance ID: 18a-013-20190723 - 'What is the setting of a heritage asset and how can it be taken into account?'

Trees in conservation areas

71. Trees in conservation areas, to the extent they are not protected by a Tree Preservation Order, are protected under sections 211 to 214 of the Town and Country Planning Act 1990. A planning permission which necessitates the removal of a tree grants permission to fell it. See also Planning Practice Guidance on trees in conservation areas[25], and the *Trees* ITM Chapter.

Scheduled monuments

72. See paragraphs 89-91 below.

World Heritage Sites

73. These designations highlight the international importance of places and their significance as a heritage asset. However, designation does not introduce any additional statutory controls. Advice can be found in Planning Practice Guidance[26] (see also paragraphs 189 to 208 of the Framework). The Framework Glossary includes the following definition of Outstanding universal value, in relation to World Heritage Sites:

"Cultural and/or natural significance which is so exceptional as to transcend national boundaries and to be of common importance for present and future generations. An individual Statement of Outstanding Universal Value is agreed and adopted by the UNESCO World Heritage Committee for each World Heritage Site."

Registered parks and gardens, battlefields and protected wreck sites

74. Registered parks and gardens, battlefields and protected wreck sites are designated heritage assets. When dealing with casework the general advice provided above will apply. Specific information is provided in the Government's Planning Practice Guidance[27] (see also paragraphs 189 to 208 of the Framework).

Non-designated heritage assets

75. There has previously been no statutory protection for non-designated heritage assets, including those on a local list compiled by the LPA. It should be noted that any non-designated heritage asset may have significance which should be taken into account. This will be for you to decide based on the evidence (see paragraph 203 of the Framework and footnote 68).

[25] Paragraph 19 of Planning Practice Guidance ID: 18a-019-20190723 – 'How can the possibility of harm to conservation areas be assessed?' and Planning Practice Guidance *Tree Preservation Orders and tree protection in conservation areas* Paragraphs 114ff 'Protecting Trees in Conservation Areas' ID: 36-114-20140306

[26] Paragraphs 026 to 038 of Planning Practice Guidance ID: 18a-026-20190723 – 'How are World Heritage Sites protected and managed in England?' to ID: 18a-038-20190723 – 'Where can I find further information about World Heritage Sites?'

[27] Paragraphs 056 and 057 of Planning Practice Guidance ID: 18a-056-20190723 – 'What permissions/consents are needed for works to scheduled monuments and protected wreck sites?' and ID: 18a-057-20190723 – 'What permissions/consents are needed for registered parks and gardens, and registered battlefields?'

76. However, following the Written Ministerial Statement of 18 January 2021 and the Government's intention to protect commemorative structures and the 'retain and explain' approach, Class B (demolition of buildings) of Part 11 (heritage and demolition) of Schedule 2 of the General Permitted Development Order 2015 has been amended[28] from 21 April 2021 to exclude from the existing permitted development right, the demolition or removal of certain commemorative structures (statues, monuments, memorials and plaques) that have been in place for 10 years or more, but not including those specified at sub-paragraph 2(e)(i) to (v). Under the new regulations, if the LPA intends to grant permission for removal of a particular structure and Historic England objects, the SoS for Housing, Communities & Local Government can call-in the application for his own determination[29]. It should be noted that the 'retain and explain' policy[30] mentioned above now forms part of national planning policy and should be applied accordingly. Paragraph 198 of the revised framework now includes this policy as follows "In considering any applications to remove or alter a historic statue, plaque, memorial or monument (whether listed or not), local planning authorities should have regard to the importance of their retention in situ and, where appropriate, of explaining their historic and social context rather than removal."

77. In terms of references to the bodies responsible for identifying non-designated heritage assets, Inspectors should be aware of the distinction between the Framework and the Planning Practice Guidance. The Glossary of the Framework establishes that non-designated heritage assets are 'those identified by the local planning authority'. However, Planning Practice Guidance[31] advises that such assets are those identified by 'plan-making bodies'; and although the scope of this term is not precisely defined, it is apparent[32] that it can be taken to include neighbourhood planning bodies. Advice is also given in Planning Practice Guidance regarding the ways in which non-designated heritage assets could be identified[33]. In the event that the status of an asset is disputed on the basis of the organisation and/or the mechanism which identified it, Inspectors should come to a clear conclusion on this matter prior to assessing any effects to the asset's significance.

78. Most archaeological remains are non-designated heritage assets. See below for further information.

Enabling development

79. Generally, this will arise where a proposal would be contrary to planning policy (for example, relating to the location of new housing) but it is argued that this is justified because the proposed development would allow a heritage asset to be conserved.

80. See paragraph 208 of the Framework and the Historic England GPA 4 referred to above. Consider:

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[28] Inserted by Article 11 of SI 2021/428.

[29] Arrangements for handling heritage applications – notification to Historic England and National Amenities Societies and the Secretary of State (England) Direction 2021

[30] Outlined by Matt Warman (Under-SoS for DCMS) on 25 September 2020.

[31] Paragraph 039 of Planning Practice Guidance ID: 18a-039-20190723 – 'What are non-designated heritage assets?'

[32] Paragraph 040 of Planning Practice Guidance ID: 18a-040-20190723 – 'How are non-designated heritage assets identified?'

[33] Paragraph 040 of Planning Practice Guidance ID: 18a-040-20190723 – 'How are non-designated heritage assets identified?'

- Would the benefits of a proposal which would secure the future conservation of a heritage asset outweigh the disbenefits of departing from other planning policies which the proposal conflicts with?
- For listed buildings and conservation areas, does this take account of the Barnwell Manor Wind Energy Ltd judgment (see paragraphs 15-29 above)?
- Is the benefit clearly defined and is the proposed development the minimum necessary to achieve that benefit? This may involve considering financial information relating to the costs of conserving the heritage asset when compared to the 'profit' from the proposed development.
- Are there any other realistic means by which conservation might be achieved?
- How would the conservation of the heritage asset be secured – i.e. what mechanism is there to ensure it will happen? Could this be achieved by a negatively worded condition or via a s106 obligation, for example which requires that the development shall not be occupied or that the use shall not begin until a schedule of agreed works for the repair and restoration has been carried out? See the PINS Suite of Suggested Planning Conditions. Would any condition suggested to you by the parties be effective?

Demolition

81. The Enterprise and Regulatory Reform Act 2013 abolished the system of Conservation Area Consent. Instead proposals to demolish certain unlisted buildings in conservation areas in England will require planning permission. This came into force on 1 October 2013. The Government's Planning Practice Guidance[34] provides further information, as does the Historic England website.

82. The difference between works of alteration and works of demolition was considered in *Shimizu (UK) Ltd v Westminster City Council*.[35] When interpreting the relevant legislation, the House of Lords found that: a "listed building" in the list compiled or approved by the Secretary of State might be a building or a part of a building; but that whether proposed works amounted to "alteration or extension of a listed building" was to be construed in the context of the whole of what was listed (so if only part of a building was listed, then in the context of the whole, not part, of that part so listed); whether works constitute "alteration" of a listed building or "demolition" was a question of fact and degree; and demolition of a part only of what is in the list as a listed building will not constitute demolition for the purposes of Part I of the Planning (Listed Buildings and Conservation Areas) Act 1990 unless the works which are to be carried out to what is listed are so substantial as to amount to a clearing of the whole site for redevelopment.

83. Their Lordships also commented that for the purposes of section 74(1) of that Act, subject to any exceptions or modifications which may be prescribed under section 74(3), reference to demolition of a building in a conservation area must be taken to mean removal of the whole of that building, but the question of what constitutes demolition of the whole is a question of fact and degree.

[34] Paragraph 55 of Planning Practice Guidance ID: 18a-055-20190723 - 'Is an application for planning permission required to carry out works to an unlisted building in a conservation area?'
[35] [1997] UKHL 3; [1997] 1 WLR 168; [1997] 1 All ER 481 (6 February 1997). The Weekly Law Reports 21 February 1997.

The partial or complete loss of a heritage asset

84. Paragraph 204 of the Framework advises that the whole or partial loss of a heritage asset should not be permitted without taking all reasonable steps to ensure the new development will proceed after the loss has occurred. If this applies (for example, because the proposal would involve the demolition of a building in a conservation area):

    - Should you impose a condition to help ensure that demolition does not take place until there is some degree of certainty that subsequent redevelopment would go ahead? See the PINS Suite of Suggested Planning Conditions.

Archaeological remains

What is archaeology?

85. Archaeology is the study of human activity in the past, primarily through the analysis of physical remains. Archaeological remains are a heritage asset. The Glossary to the Framework defines 'archaeological interest' as:

> "There will be archaeological interest in a heritage asset if it holds, or potentially holds, evidence of past human activity worthy of expert investigation at some point."

86. In casework you will be dealing with a known archaeological site or circumstances where there may be potential for archaeological remains to exist. This can include any physical remnant of the past.

87. The Historic England Advice Note 13 - Mineral Extraction and Archaeology provides a helpful overview of archaeological techniques and the planning process[36].

Archaeological remains and other Scheduled Monuments as a designated heritage asset

88. The Secretary of State has the power to list monuments in the Schedule of Monuments under section 1 of the Ancient Monuments and Archaeological Areas Act 1979. Scheduled Monuments are designated heritage assets.[37] They are, by definition, of national importance. Any works will require Scheduled Monument Consent from the Secretary of State for Culture, Media and Sport in England. PINS has only dealt with two such applications (between 2001 and 2013).

89. If you are dealing with a proposal that might affect a scheduled monument or its setting, then, even though the 1979 Act does not impose a statutory duty equivalent to sections 66(1) or 72(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990, there is force in a contention that the "national importance" of scheduled monuments is a relevant consideration. It would also be odd if an asset of national importance should be accorded less weight than a Grade II listed building.

[36] This guidance, published in January 2020 replaces the previous *'Minerals Extraction and Archaeology: A Practice Guide'*, published in 2008.
[37] See definition of 'Designated heritage asset' in the Glossary to the Framework

90. Pursuant to paragraphs 199 and 200 of the Framework "great weight" should be given to the scheduled monument's conservation and substantial harm to it or loss of it should be wholly exceptional. See also the advice in paragraphs 59 and 60 above, but read them as though references to:

> **Preservation** (in situ) - the development is designed to allow the archaeological remains to be undisturbed (or mostly undisturbed). This might be achieved by use of a particular foundation design (piling or rafting), the retention of the remains in a basement or the careful positioning of any open space within the development.
>
> **Recording** – Sometimes known as 'preservation by record'. This will usually be by means of excavation and sometimes by means of a 'watching brief'. The process of excavation is intrusive and destroys the archaeological remains.

91. In terms of 'preservation by record':

> **Excavation** is a labour-intensive process where archaeological deposits are revealed, identified, recorded and then removed. Small finds are recorded and environmental samples may be taken. In some cases, not all the archaeological remains may be recorded (for example, a 'strip, map and sample' approach may be used).
>
> **Watching brief** (sometimes known as 'archaeological control and supervision') – This is where archaeologists are present during the carrying out of the development. This will usually be where archaeological assessment and evaluation has not identified any significant remains but where it is considered there is some potential for remains to survive. Difficulties can arise if significant remains are identified at this stage (which is a reason why the emphasis is on assessment and evaluation before a planning decision is made – see below).

92. **Assessment** and **evaluation** should take place before a planning application is determined in order to predict the presence of remains and assess their potential significance. **Excavation** is a means of mitigation which takes place after permission has been granted, but before the development takes place (or in some cases alongside development in a staged process).

93. It is important that the results of archaeological investigations are made available. This requires post-excavation work in terms of assessment and analysis, the production of a report, the archiving of documents and any archaeological finds and, finally, dissemination potentially both academic and public. The Framework states that:

> "[LPAs] should require developers to record and advance understanding of the significance of any heritage assets to be lost (wholly or in part) in a manner proportionate to their importance and the impact, and to make this evidence (and any archive generated) publicly accessible. However, the ability to record evidence of our past should not be a factor in deciding whether such loss should be permitted..."
>
> [Paragraph 205]

94. It should be noted that in *R (on the application of J C Hayes) v City of York Council [2017] EWHC 1374 (Admin)* the Judge stated that the original Framework only makes sense if interpreted so that the words "should not be a factor" were taken to mean "should not be a decisive factor", in deciding whether a proposal which would result in harm to a heritage asset should be permitted. Whilst this judgment pre-dated the Framework, the relevant wording is unchanged from that previous version.

Casework and the 3-step process

95. Archaeological remains are only likely to feature as a main issue in a limited number of appeals. Generally, this will be where the LPA consider:

- there is insufficient evidence regarding the potential archaeological remains on the site; or,
- the effect on archaeological remains would be unacceptable.

96. Archaeological remains feature more commonly in casework where the LPA has requested that they are dealt with by means of a condition requiring mitigation.

97. In either case, the 3-step process can be applied as set out below. However, this should be done in a proportionate manner, particularly if issues relating to archaeological remains are not contested and the sole matter relates to the use of a condition.

1. Define the significance of the heritage asset.

- Are archaeological remains likely to be present? What evidence is there for this?
- Has the LPA used up-to-date evidence about the historic environment in their area to predict the likelihood that archaeological remains may be present on the site? (Framework paragraph 192).
- Has the developer submitted an appropriate desk-based assessment and, where necessary, a field evaluation where a site includes, or has the potential to include, heritage assets with archaeological interest (Framework paragraph 192 and Planning Practice Guidance[38]).
- What is the significance of any potential or known archaeological remains? Do you have expert views and/or evidence? Factors to consider could include scarcity and information potential. Has the applicant described the significance of the heritage asset? (Framework paragraph 194)
- Where a development requires Environmental Impact Assessment, have archaeological issues been considered?[39][40]

2. What would be the effect of the proposed development on the heritage asset?

- If archaeological remains are likely to be present, what is the most appropriate response having regard to their significance. What would be the effect of the development on the remains? The options include preservation in situ, recording or no mitigation.
- If mitigation is proposed, how would it be secured – for example, by means a condition? See the section below.
- If preservation in situ is appropriate, could this be achieved and if so, how?

3. Conclude

- Conclude against the main issue, development plan and Framework and, if appropriate, Planning Practice Guidance. If necessary, carry out the Framework balancing exercise - weighing any 'harm' against any public benefits.
- Conclude on the proposal's compliance with the development plan in accordance with section 38(6) of the Planning and Compulsory Purchase Act 2004 - ensuring that any

[38] Paragraph 40 & 41 of Planning Practice Guidance ID: 18a-040-20190723 – 'How are non-designated heritage assets identified?' and ID: 18a-041-20190723 – 'What are non-designated heritage assets of archaeological interest and how important are they?'

[39] The Town and Country Planning (Environmental Impact Assessment) Regulations 2017, Schedule 4, paragraph 4 – "material assets, including the architectural and archaeological heritage"

[40] The Town and Country Planning (Environmental Impact Assessment) Regulations 2017

material considerations advanced in favour of the proposal, both public benefits and other matters, are appropriately balanced against any conflict with the development plan.
- if allowing, attach any necessary conditions (see below).

Use of conditions

98. If you conclude that remains of significance exist or are likely to exist, but that appropriate mitigation can be achieved, you will need to ensure that this is secured by use of conditions. Options include conditions requiring:

A programme of site investigation, recording, analysis and publishing - this would be appropriate if you conclude that the remains can be destroyed but that they should be recorded first (i.e. 'preservation by record as referred to above). It would typically require the agreement and implementation of a programme of work. Consider whether the condition should include a clause to cover the possibility that remains could be revealed which were not previously identified or forecast.

Preservation of the remains in situ – this would require details of how the remains would be preserved on site. This could be used where the development has been designed so that the remains (or some of them) could be preserved. Typically, it might require the agreement of the detailed design of foundations and other underground works.

Protection of remains during construction – this would typically require that a specified area is fenced off and that no works are carried out within it. This would be appropriate where the development itself would leave the remains unaffected – but there is a risk that they could be damaged during construction (for example by construction vehicles).

In some cases, a combination of these conditions might be appropriate.

Areas of archaeological importance

99. Part II of the Ancient Monuments and Archaeological Areas Act 1979 provides for the designation of areas of archaeological importance by LPAs or the Secretary of State.

100. Only 5 areas have been designated – in the historic centres of Canterbury, Chester, Exeter, Hereford and York.

101. Within these areas, the 1979 Act requires developers to give 6 weeks prior notice to the LPA of proposals to disturb the ground, carry out flooding operations or tipping operations. The LPA then has certain powers to enter the site to excavate it. However, the Act makes no financial provision to cover any costs. As a result, issues relating to archaeological remains have tended to be dealt with more effectively through the planning system as non-designated assets along the lines outlined above. Consequently, no new areas have been designated for some time.

Procedural matters

Failure to publicise applications

102. Under Regulations 5 or 5A of the Planning (Listed Buildings and Conservation Area) Regulations 1990[41] ('1990 Regulations') the LPA are required to publicise Listed Building Consent applications, or planning applications affecting the setting of a listed building or the character or appearance of a conservation area.

103. Failure to advertise as appropriate at application stage does not invalidate any subsequent appeal, although it may call into question the validity of any decision notice issued by the LPA.[42] If the required publicity is not subsequently undertaken as part of the appeals process, this could leave the Inspector's decision vulnerable to High Court challenge. Therefore, if an application has not been advertised as required by the Regulations, the LPA will be asked to advertise it immediately and forward a copy to the casework procedure team. If you find that such action is required and has not been carried out by the time a case is allocated to you (or the physical appeal file has been delivered to you for determination), you should ask the Case Officer to contact the LPA on your behalf immediately.

Notification of Historic England

104. Regulation 5A(3) of the 1990 Regulations (as amended) also requires LPAs to notify Historic England of any application for planning permission for any development of land where the LPA think that the development would affect the setting of a listed building, or the character or appearance of a conservation area where the development involves the erection of a new building or the extension of an existing building, and the area of land in respect of which the application is made is more than 1,000 square metres. The Planning Practice Guidance[43] also confirms this requirement. There is also a requirement, arising from Article 18 and Schedule 4 of the Town and Country Planning (Development Management Procedure) (England) Order 2015 to consult the Gardens Trust (formally known as the Gardens History Society) for any applications for planning permission likely to affect any park or garden on Historic England's Register of Historic Parks and Gardens of Special Historic Interest. This requirement is also set out in the Planning Practice Guidance[44]. Where it appears that LPAs have not completed the necessary consultations at application stage Inspectors/APOs may wish to seek comments from the relevant consultees at the appeal stage. If such a course of action is taken, however, it will be important to seek the comments of the parties on any responses received from the relevant consultees.

[41] SI 1990/1519

[42] For many years Procedure teams took the approach that LPA failure to publicise applications in accordance with Reg 5 or 5A of the 1990 Regulations meant that any subsequent appeal would be dealt with as if made against 'non-determination', even where the LPA had formally made and issued its decision. Following legal advice in 2015, this approach ceased and PINS will not openly question the validity of any decision taken by the LPA.

[43] Paragraph 065 of Planning Practice Guidance ID: 18a-065-20190723 – 'Table 1: Applications for planning permission: requirements to consult or notify Historic England'

[44] Paragraph 068 of Planning Practice Guidance ID: 18a-068-20190723 – 'Table 4: Applications for planning permission: requirements to consult The Gardens Trust (formerly known as The Garden History Society)'

Part 2 – Listed Building Casework

Listed Building Consent Appeals

Philosophical basis

105. Two international charters continue to provide the foundation of architectural conservation in the 21st century. These are the Venice Charter 1964 and the Burra Charter 1999 (amended 2013). A series of more specific, subject-based charters have since emerged through the ICOMOS[45] international scientific committees, the most significant of which is the Narra Document on Authenticity 1994. This declaration makes the point that our ability to understand the value of heritage assets depends on the degree to which they may be understood as credible or truthful. This applies equally to their original form and subsequent evolution.

106. Consequently, authenticity is the degree to which a heritage asset embodies information about the past. This can be related to its physical fabric, structure, design, context or aesthetics. Authenticity is not a static value and changes over time as information accrues through subsequent additions, alterations and changing patterns of use. It can be tempting to value one period as being more authentic than another. However, returning an asset to a specific point in time, through restoration, risks eroding its authenticity and can lead to a significant loss of integrity. The conservation of heritage assets is thus the pursuit of managing change whilst preserving historic authenticity and legibility.

107. The basic principles of modern building conservation flow from these ethics and can either be framed in terms of the overall approach to an asset or a specific intervention. The first principle relates to working with the available evidence to best preserve and reveal the aesthetic and historical value of an asset. Article 9 of the Venice Charter makes it clear that restoration must stop at the point where conjecture begins. Verified evidence should be used to establish a clear basis for change whilst avoiding falsification. In other words where evidence is lacking any alterations should remain clearly differentiated over a long period of time whilst not detracting from the special interest of the asset through their incongruity.

108. The second principle relates to developing an understanding of historic layering. Article 11 of the Venice Charter stresses the need to respect all valid contributions to a heritage asset. Buildings, especially, will often comprise numerous changes that will have become part of the historic fabric. These can be informative as illustrations of specific craftsmanship or materials or they may signify important cultural history, e.g. Victorian water closet additions to Georgian buildings which may have previously relied upon cesspits. The removal of historic layers to better reveal earlier features is only justified in exceptional circumstances. However, there are times when this may be acceptable. Firstly, where later additions and alterations are causing damage to older, historic fabric and secondly where later additions are detracting from the cultural significance or integrity of a building or other heritage asset.

109. The third principle relates to ensuring that an asset does not become isolated from its setting. Article 7 of the Venice Charter highlights the fact that an asset is inseparable from

[45] The International Council on Monuments and Sites (ICOMOS) is a professional association that works for the conservation and protection of cultural heritage places around the world.

the history to which it bears witness and the setting in which it occurs. It is important to bear in mind that heritage assets are always designed within a specific context. The strength of this relationship and the degree to which it remains legible can be apparent to varying degrees. Whilst the setting of a folly at the end of a long vista in a historic garden is obvious, the relationship of a building to a historic street plan is often more subtle and nuanced. It is also important to understand that setting is not just about visual juxtaposition. It is the historic context of a building or asset, in its many forms, that contribute to a deeper sense of place and integrity.

110. The fourth principle recognises that the conservation of heritage assets is inimically linked to maintaining a viable use. Article 5 of the Venice Charter states that active use is always desirable but should not lead to fundamental changes to the layout or decoration. Whilst monuments can survive without a viable use this is not the case for buildings which can become derelict if they are no longer suited to their original purpose or cannot be adapted to accommodate new uses. However, simply altering a building to suit the preferences of modern occupants is seldom justified. In such circumstances there needs to be robust evidence that any ongoing use would cease. When alterations are necessary to enable continuity of use or a reuse then they should be sympathetic to the historic layout and fabric of the building and not detract from its cultural significance.

111. The fifth principle relates to material repairs and the need to respect existing, historic fabric. Article 2 of the Burra Charter advises that repairs should be undertaken with the least possible disturbance in a way that avoids distorting the evidential value of historic fabric. An old adage provides a good starting point when thinking about repairs: 'it is better to maintain than repair, better to repair than restore and better to restore than rebuild'. It is important to bear in mind that many buildings, as opposed to monuments, were only designed to have a limited lifespan. Consequently, sympathetic interventions have significantly extended the life of some buildings and are part and parcel of their ongoing conservation. The scale of the intervention is often dependent on the value of a building as a cohesive cultural entity and the materials it embodies. For example, every stone will be important in a seventh century Saxon church whereas a mid-20th century cinema would generally have less important fabric with its value largely being centred on its cultural symbolism. Consequently, there is a greater potential, and indeed need, to absorb larger scale interventions to the latter type of building. Repairs should not seek to return a feature or building to a pristine state. The process of aging gives rise to a patina of time that speaks to its historic context. Repairing shrapnel marks from bomb damage and 'cleaning' buildings are generally not acceptable unless retaining them would be damaging, e.g. acidic atmospheric pollution on limestone.

112. The sixth principle relates to understanding the traditions and technologies of architectural conservation. Article 4 of the Burra Charter stresses the need to use traditional techniques but also more modern approaches that are supported by robust scientific evidence. Repairs and alterations should always be carried out using original building techniques except where these are found to cause decay or failure, e.g. cement based render. Often the removal of such materials can cause more damage to the underlying masonry and are consequently not reversible. Reversibility is thus an important principle in the preservation of historic fabric but should not be used as a justification for changes that will affect the integrity of the asset. It is worth bearing in mind that alterations that use modern materials, such as resins and adhesives, will not be reversible even if earlier fabric is left *in situ*, as is the case for cementitious mortars and renders.

113. The seventh principle relates to ensuring that any alterations or repairs are clearly apparent or legible. Article 12 of the Venice Charter highlights the fact that replacements

of missing features must integrate in a harmonious manner with the whole but at the same time remain distinguishable. However, this can be disruptive to the visual aesthetic of a building when its historic phasing has already led to use of a significant range of contrasting materials. Maintaining the underlying visual unity of a building is one of the most difficult challenges in architectural conservation and can also have wider impacts on the integrity of a particular street scene or conservation area. The use of 'honest repairs' has been much debated. It is important to consider the cumulative effect of such interventions over the entire history of the building as the one you may be considering could cause permanent changes in character and lead to a substantive loss of integrity.

114. In summary, the conservation of heritage assets must be based on an understanding of their historic development, cultural significance and the variety of values that may have been attributed. Material repairs and alterations should follow established principles and be informed by the causes of decay so that this can either be avoided or remedied as required. All interventions should also be based on an ethical approach that has regard to authenticity and integrity of the asset and its setting. When considering a proposal, it is important to have these principles in mind. They are seldom stated in most casework and you will need to use your own judgement and accumulated experience in your decision-making as a consequence.

Policy and Statutory Basis

115. Paragraphs **189-208** of the Framework set out the approach to 'conserving and enhancing the historic environment'. Essentially a similar approach is applied to designated and non-designated heritage assets when it comes to considering the effect of proposals. The Framework[46] defines a designated heritage asset as:

> **A World Heritage Site, Scheduled Monument, Listed Building, Protected Wreck Site, Registered Park and Garden, Registered Battlefield or Conservation Area designated under the relevant legislation.**

116. Whilst designated heritage assets are listed under the Planning (Listed Buildings and Conservation Areas) Act 1990 (the Act), Ancient Monuments and Archaeological Areas Act 1979 and UNESCO World Heritage Convention 1972 there is no statutory listing process for non-designated heritage assets nor any formal definition in the Framework. However, they are defined in the Planning Practice Guidance 2019 (as amended) (PPG) as follows:

> **Buildings, monuments, sites, places, areas or landscapes identified by plan-making bodies as having a degree of heritage significance meriting consideration in planning decisions but which do not meet the criteria for designated heritage assets.**

117. There may be a significant number of non-designated heritage assets in a local planning authority area that make a positive contribution to local character and provide a sense of place. Although these assets may not be nationally designated or even located within the boundaries of a conservation area, they may be formally recognised by the local planning authority through a 'local list' and through the Historic Environment Record (HER). This is an information service that provides access to comprehensive and dynamic resources

[46] Annex 2: Glossary

relating to the archaeology and historic built environment of a defined geographic area. There are over 85 HER's in England that are maintained and managed by local authorities through their historic environment services.

118. Around half of all local planning authorities have produced lists of locally important buildings and sites, although not all have been adopted as part of their development plans[47]. Whilst local listing does not impose any additional planning controls, the fact that a building or site is on a local list means that it has an established value and its conservation is consequently a material consideration, as defined in paragraph **203** of the Framework. However, if this is not the case and a heritage value is clearly apparent you will need to identify why and include this in your reasoning. If this carries substantive weight and has not previously been raised, you must go back to the parties to ensure that natural justice is served.

119. Care should be taken when considering non-designated archaeological sites irrespective of whether or not they are locally listed. This is because footnote **68** of the Framework states that non-designated heritage assets of archaeological interest, which are demonstrably of equivalent significance to scheduled ancient monuments, should be considered and subject to the same policies as designated heritage assets. Consequently, if robust evidence is present to suggest that this is the case, then the site should be treated as having the highest heritage importance. An example is given in Annex 1.

120. Paragraph **8c** of the Framework identifies protecting and enhancing the built and historic environments as part of the environmental role of the planning system thus contributing to the three dimensions of sustainable development. Paragraph **8** states these roles should not be taken in isolation, because they are 'interdependent and need to be pursued in mutually supportive ways.' In effect, this requires decision-makers to come to a balanced decision, taking into consideration the significance of the heritage asset, the effect of the proposal on the significance of the heritage asset and any public benefits arising from that proposal. Be careful not apply this reasoning if you are just dealing with a listed building consent appeal as such works are not defined as development under the TCPA.

121. Paragraph **199** of the Framework gives 'great weight' to the conservation of designated heritage assets irrespective of whether that harm would be substantial or less than substantial. This weight applies to all designated heritage assets and is then amplified in proportion to the importance of the asset. Consequently, proposals that would harm scheduled ancient monuments, protected wreck sites, registered battlefields, grade I and grade II* listed buildings, grade I and grade II* registered parks and gardens and World Heritage Sites would need to have a compelling justification and achieve substantial public benefits. Paragraph **200(b)** goes on to state that substantial harm or the loss of these assets should be 'wholly exceptional'. In terms of less than substantial harm, it follows that proposals affecting such assets would also require significant public benefits to be achieved over and above the benefits that should, in an event, be secured to justify any harm to grade II assets.

122. In effect, the Framework requires decision-makers to come to a balanced decision, taking into consideration the significance of the heritage asset, the effect of the proposal on that significance and any public benefits arising from that proposal. However, there are circumstances when substantial harm does not need to be outweighed by public benefits. These are set out in paragraph **201** of the Framework. Further details of the decision-making process will be considered at greater length in the following sections.

[47] Historic England – locally listed heritage assets

123. The approach to listed buildings and conservation areas in general casework is underpinned by the statutory requirements placed on decision-makers by the Act:

- Section **16(2)**: In considering whether to grant listed building consent for any works the local planning authority or the Secretary of State shall 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.

- Section **66(1)**: In considering whether to grant planning permission [or permission in principle] for development which affects a listed building or its setting, the local planning authority or, as the case may be, the Secretary of State shall 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.

- Section **72(1)**: In the exercise, with respect to any buildings or other land in a conservation area … special attention shall be paid to the desirability of preserving or enhancing the character or appearance of that area.

124. Although no statutory protection for the setting of a conservation area is present within the Act, paragraph **200** of the Framework establishes the need to consider the negative impact of development within the setting of all designated heritage assets which includes conservation areas as well as battlefields, ancient monuments, parks and gardens and World Heritage Sites. It is important to emphasise that the statutory duty set out in **s72(1)** applies to listed building appeals even when there is no linked planning appeal. Consequently, if relevant, the effect of a proposal on the character or appearance of a conservation area should be considered even if the parties have not addressed this in their submissions.

125. Generally, where conservation area effects would not be determinative it should be possible to discharge the **s72(1)** duty without having to go back to the parties. Nevertheless, Inspectors should consider whether their conclusions on a conservation area would come as a surprise to the parties, and if so whether further comments on the matter should be sought. When relevant, a clear conclusion should be reached at the end of your decision in terms of whether or not the proposal/works would be contrary to the Act after having first set out which duties apply in a preliminary paragraph at the beginning of your decision.

126. The approach to listed buildings, conservation areas and scheduled ancient monuments in Nationally Significant Infrastructure Project (NSIP) casework is underpinned by the statutory requirements placed on decision-makers by the Infrastructure Planning (Decisions) Regulations 2010:

- Section **3(1)**: When deciding an application which affects a listed building or its setting, the decision-maker must have regard to the desirability of preserving the listed building or its setting or any features of special architectural or historic interest which it possesses.

- Section **3(2)**: When deciding an application relating to a conservation area, the decision-maker must have regard to the desirability of preserving or enhancing the character or appearance of that area.

- Section **3(3)**: When deciding an application for development consent which affects or is likely to affect a scheduled monument or its setting, the decision maker must have regard to the desirability of preserving the scheduled monument or its setting.

127. These provisions only apply in relation to development that meets the criteria for nationally significant infrastructure, as set out in the Planning Act 2008 (PA).

Decision Making Criteria

128. Appeals against the refusal of listed building consent are made under section **20** (s20) of the Act. These are frequently linked to appeals against refusal of planning permission under section **78** (s78) of the TCPA. Many of the issues will be common to both and should be considered together. However, it is important to remember that a clear decision must be reached on each appeal within the same decision template and it should be structured accordingly, see example in Annex 2. In any reasoning associated with the planning appeal, references should be made to 'the development' whilst references should be made to the 'the works' in any reasoning associated with the consent appeal. This should be done to reflect the different legislative basis of your reasoning. Alternatively, a more neutral term, such as 'the proposal', can be applied. See the examples in Annex 1.

129. Listed building appeals are not subject to section **38(6)** of the Planning and Compulsory Purchase Act 2004. Consequently, they do not need to be determined in accordance with the development plan although relevant provisions can nevertheless be material considerations. This is further confirmed by the lack of a requirement in section **16(2)** of the Act to have regard to the development plan when determining applications and appeals for listed building consent. However, you need to be careful when a proposal might affect more than just the integrity of a listed building as this might also require a conclusion against relevant development plan policies. One such example that you will encounter are replacement windows in conservation areas.

130. Examinations under section **74(2)** of the PA that relate to NSIPs are largely underpinned by a series of National Policy Statements that set out, sector specific, historic environment policy tests. Conflict with the Framework and local development plan policies relating to the historic environment are set out in Local Impact Reports. Section **104(2)** of the PA requires decision makers to have regard to these in addition to the general duty outlined in the previous section.

131. As with general Secretary of State casework, members of the panel, which comprise the Examining Authority, are appointed representatives rather than decision-makers. Consequently, professional expertise and experience must be brought to bear on the merits of the application which lead to a clear recommendation that has regard to all the necessary policy tests and duties relating to the historic environment. The recommendation report represents your professional judgment as a historic environment specialist and your reasoning should be no different to what would be applied within the appeals casework arena. It should be sufficiently detailed and objective to enable the Secretary of State to take a different view.

132. The granting of a Development Consent Order under Part 7 of the PA obviates the need for consent under the Ancient Monuments and Archaeological Areas Act 1979 or **s20** of the Act. However, any consents that are necessary under the Protection of Wrecks Act 1973 must be referred to the Department for Digital, Culture, Media and Sport and those

under the Protection of Military Remains Act 1986 must be referred to the Ministry of Defence.

133. Returning to appeals casework, listed building consent is required for all internal and external works that have the potential to affect the special architectural or historic interest of a building or structure. These not only cover large scale works, involving demolitions and extensions, but also a range of smaller works. These typically include changing windows and doors, altering external surfaces, insertion of dormer windows or roof lights, the installation of solar panels, satellite dishes and burglar alarms, vents and flues, changing roofing materials, moving or inserting internal walls, insertion of new door and window openings and the removal or alteration of fireplaces, panelling, staircases or any other historic features.

134. Architectural interest includes the quality, nature and significance of the design as well as aspects of plan form, decoration, materials and craftsmanship. Additionally, it can relate to important examples of particular building types and historic construction techniques. Architectural significance does not need to be related to a single period to be important as there is often value in the juxtaposition of different styles and techniques that will contribute to the historical layering of a building. You are expected to be able to identify any such phasing and its relative importance as a specialist in your own right so that you are able to make informed judgements about what you see during a site visit. Historic interest is another important consideration and includes buildings or structures that might illustrate aspects of the nation's history, or which have close historical associations with nationally important people or events. Age and rarity are also important considerations.

135. In some cases, proposals can relate to a discrete property within a larger listed building, such as a house within a terrace or a flat within a sub-divided dwelling. In such instances, it is important to establish that the appeal relates to part of a wider listed building in your decision. The effect of any works should be considered within the context of the listed building when taken as a whole. Particular attention should be paid to the consistency of different architectural features and materials across the whole building during the site visit as this can provide important insights into the phasing and historic interest of the appeal property and thus its capacity to accommodate the proposed change. As a general rule, you should not leave the site until you have understood the building and the impacts that would occur. Consequently, you should plan to be on site for up to an hour for all but the simplest proposals.

136. The list description is a useful starting point for identifying a building or structure, but it should never be taken as a definitive description of the interest features that are present. This is because the description is primarily for identification purposes. Consequently, your professional judgement plays an important role in defining the special interest. You should, however, use the name as entered in the National Heritage List for England for the avoidance of doubt because these can change over time and outdated list entries are still used by some local planning authorities. Consequently, you should ensure that your case officer always obtains a copy of the definitive list entry if one has not been provided, as well as any entries for other listed buildings that have been identified by interested parties in terms of potential impacts on their setting.

137. A good heritage statement from an appropriately qualified and accredited heritage specialist can be invaluable in helping you to frame the special interest and significance of a building although these are rarely encountered in smaller proposals. Consequently, you will need to undertake your own assessment based on the limited information you have available and your observations during the site visit. Similarly, representations from local

heritage groups or knowledgeable individuals can provide invaluable insights and can be easily missed when working electronically. On a wider point, you must make sure you look in all of the folders where cases are linked and you should never assume that documents, such as the officer's report, will necessarily be the same for each of the linked appeals. You should also take care to ensure that the application and appeal references are correct as these also differ.

138. It is important to bear in mind that the listing includes any object or structure fixed to the building and any free-standing object or structure erected before 1 July 1948 within the curtilage of the listed building under section **1(5)** of the Act. This applies irrespective of whether or not it has been explicitly identified in the list description. Although only a 'building' may be listed, the term 'building' is broadly defined in section **336(1)** of the TCPA. A building being 'any structure or erection, and any part of a building as so defined, but does not include plant or machinery comprised in a building'. Over the years, listings have included many unusual structures and erections, as well as the obvious whole, or parts of qualifying buildings. These have included, for example, milestones, telephone kiosks, pill boxes, post boxes, shipyard cranes and pieces of sculpture or statuary.

139. When considering the significance of fixtures it is reasonable to expect some degree of physical and gravitational annexation (*i.e.* connection to the place or its context) together with indications that this was carried out with the intention of making the object an integral part of the land or building *e.g.* chimney pieces, wall panelling and painted or plastered ceilings. Free-standing objects may be fixtures if they were put in place as part of an overall architectural design, this could include objects specially designed or made to fit in a particular space or an individual room. However, you should bear in mind that it is not enough that an object may be of special artistic or historic interest in of itself because the special interest must be linked to its status as a building. That is implicit in the reference to architectural interest and the concept of historic interest in the Act. The historic interest must not be founded merely in the object itself, but also in its erection in a particular place.

140. Curtilage can be thought of as the area of land associated with the listed building and necessary for the function or enjoyment of that building when it was first built. However, it is important to understand that this may have evolved over time. Relevant matters are likely to be related to the physical layout of the principal building and any other buildings as well as current and historic patterns of ownership and function. Not all land in the same ownership as the principal building will necessarily be included and conversely some land now in separate ownership may be included.

141. It is important to bear in mind that not every structure will have a curtilage. As a consequence, considerable care must be taken when dealing with curtilage issues. A significant body of case law (including the Dill judgement below) addressing curtilage as well as fixtures can be found and should be consulted as the need arises. There is currently conflicting guidance from Historic England in this regard and you should exercise extreme caution and consult with an experienced heritage Inspector at the earliest opportunity.

142. Even if a building is listed by virtue of being within the curtilage (curtilage listing), this does not necessarily mean that it has any significant value in contributing to the character or special interest of the principal building. This will depend on matters such as its history, use and appearance. Nevertheless, its preservation carries the same considerable importance and weight and its contribution to significance, either in its own right or as part of the listed group. Consequently, the merits of such a building should be explicitly addressed in your reasoning if so required. The question of whether a building, structure

or object is within the curtilage or fixed to the principal building is a matter of fact and degree unless it is specifically included in the listing, notwithstanding the recent Dill judgement. You may have to come to a judgement but it is ultimately a matter for the Courts to decide.

143. The Dill Supreme Court Judgement[48] makes clear that there are two different tests depending on whether you are assessing whether something is:

    a) "a building" which the Court says, in this particular legislative context, is based **not** on property law concepts but on ones relating specifically to planning law as derived from Skerritts Judgement[49], **i.e.** size, permanence and degree of physical attachment; or

    b) within the extended definition of "listed building" by virtue of being "any object or structure within the curtilage of the building…which… forms part of the land…since before 1st July 1948" (which **is** based on property law concepts).

144. Following the outcome of the Dill Judgment, an item's designation as a listed building on the statutory list cannot be deemed conclusive as to whether or not it is a 'building' for the purposes of the Act and therefore capable of being a listed building. As a consequence, you will need to make an evaluative judgement as to whether an item is a 'building' and capable of being listed in its own right on a case-by-case basis, having regard to the relevant criteria set out in the Dill Judgment and any evidence on this matter presented by the parties.

145. The judgment confirms that the criteria set out in the so-called *Skerritts* Test (a three-fold test which involves considering size, permanence and degree of physical attachment) are determinative as to whether an item may qualify as a listed building in its own right (as opposed to property law concepts where an object or structure is considered as part of the curtilage). In this particular aspect, the practical implication of this judgement in appeals casework (both for consents and enforcement notices[50]) is that if an appellant successfully demonstrates that an item is not a 'building' for the purposes of the Act, then it follows that it ought to be removed from the list in accordance with the procedure set out below.

146. It seems clear[51] that SoS and HE guidance will need to be amended regarding the scope of listing and the definition of 'building' for the purposes of the Act following the judgment. This chapter will be updated if and when the Government respond to the judgment and/or relevant guidance is updated. Should evidence be presented at appeal that calls into question whether any items, either included on the list in their own right, or by virtue of their presence within the curtilage of a listed building, are 'buildings' for the purposes of the Act then you should treat this with caution and seek the advice of an experienced heritage Inspector at the earliest opportunity.

147. Notwithstanding the above, there may also be circumstances where it is argued that the building should not be listed at all. Such cases are comparatively uncommon and must be treated with great care. In particular, consideration must be given to any new evidence that the building does not possess, or no longer possesses, special architectural or historic

[48] Dill v SoS HCLG & Stratford-upon-Avon DC [2020] UKSC 20
[49] Skerritts of Nottingham Ltd v SoS ETR (No.2) [2000] WL 389505
[50] See the Listed Building Enforcement ITM Chapter for further advice on implications for LB Enforcement casework.
[51] See paragraph 59 of Dill v SoS HCLG & Stratford-upon-Avon DC [2020] UKSC 20

interest. A recent listing or re-survey that retains a building on the statutory list may be helpful in confirming its importance. You should remember that the merits of curtilage buildings are irrelevant to any such consideration because it is the principal building that is the list entry. If you consider that there is no justification for removing the building from the list, your conclusion may be phrased along the following lines:

> 'I have considered the evidence about whether this building should be de-listed. In my judgement the building is [continues to be] of special architectural or historic interest for the following reasons...XXX. I therefore find no substantive justification for removing this building from the list.'

The merits of the proposed works should then be considered in the normal manner in the subsequent parts of the decision.

148. An appeal on the ground that the building should be de-listed carries a heavy burden of proof and a recommendation for a building to be removed from the statutory list should rarely, if ever, be made. Furthermore, only the Secretary of State (SoS) may remove a building from the statutory list. There may be cogent reasons for doubting the qualities that the building was previously thought to possess, *e.g.* there may have been a significant error in the original dating of the building or it may have deteriorated to such an extent that it no longer retains its special architectural or historic interest or it may simply not have passed the *Skerrits* Test. However, the power to remove a building from the list cannot be transferred to Inspectors. In order for this to occur it would have to be recovered and a report to the SoS prepared, setting out the reasons why the building should be de-listed. You must discuss the matter with an experienced heritage Inspector at the earliest opportunity, ideally before you visit the site.

149. Unlike the Planning and Compensation Purchase Act 2004, there is no provision under the Act to establish retrospectively whether listed building consent was required for works of alteration or extension to a listed building that have already been carried out. It is only after listed building enforcement proceedings have begun that an appeal may be made on the ground that the works did not affect the architectural character or historic interest of the listed building. (See ITM Listed Building Enforcement Chapter Appeals on Ground (c)). There is no provision for seeking a certificate confirming that the demolition of a listed building would be authorised. Consequently, there may be some cases in which this matter is in dispute between the parties. In such instances you will need to reach a view on it before deciding whether or not you need to consider the merits of the case. If you conclude that listed building consent is not required you can simply state that this is the case, the reason why and that you propose to take no further action. Treat any such cases with caution and ensure that your reasoning and interpretation of the facts is robust as there is an increased risk of a complaint or High Court challenge from local planning authorities under such circumstances. See the example in Annex 1.

150. Section **8(3)** of the Act provides for 'retrospective' listed building consent but this is only effective from the date of consent rather than at any prior point in time. The carrying out of any works requiring listed building consent beforehand constitutes a criminal act. Consequently, any consent that is subsequently issued cannot alter this fact and cannot logically by classed as retrospective. As a result, any appeal against the refusal of consent after such works have been carried out is better described in terms of 'retention' or 'regularisation' of the work.

151. The Enterprise and Regulatory Reform Act 2013 introduced s.26 to the Planning (listed Buildings and Conservation Areas) Act 1990 and this includes, at s.26H the provision for

making an application for a certificate of lawfulness of proposed (*i.e.* not existing) works for the alteration or extension of a listed building. S.26K allows for an appeal to be made against the refusal of, or failure to determine such and application. Provision is also made in this Act for a list entry to specify part of a building or structure that is not of special interest. Although infrequent, this may be evident in some of the more recent list descriptions that you come across.

152. Sections **16** and **66** of the Act require decision-makers to have special regard to the setting of a listed building and the way in which this should be done has been clarified by the Courts[52]. The Framework also requires consideration of the effect of development on the setting of a heritage asset, as previously stated. The special interest of a heritage asset derives not only from its physical presence and historic fabric but also from its setting which comprises the surroundings in which it is experienced. It is important to understand and to clearly communicate that setting is not a heritage asset or a heritage designation in-of-itself. However, land within a setting may well be designated in its own right. Its importance lies in what it contributes to the significance of the heritage asset and is discussed at greater length in published guidance.

153. The Framework[53] defines setting as:

> **The surroundings in which a heritage asset is experienced. Its extent is not fixed and may change as the asset and its surroundings evolve. Elements of a setting may make a positive or negative contribution to the significance of an asset, may affect the ability to appreciate that significance or may be neutral.**

154. As should be the case with significance, be very careful not to categorically define the limits of a particular setting. Rather consider those aspects of setting that are directly relevant to the proposed works and simply state that the setting is X, Y or Z insofar as it applies to the proposal. This is because a setting can change over time and you must not fetter future decision-makers. A similar consideration applies when you are defining the special interest of a listed building.

155. In practical terms, the setting of an asset may be land that includes the surrounding landscape or townscape that is in physical proximity or experienced as the building is approached. This is commonly associated with more immediate areas or skylines where there is inter-visibility. However, be careful not to limit your consideration to just visual linkage given how the Courts have viewed this issue[54]. For example, setting may also be related to land that contributes to the history of an asset or complements its design or function, as can be the case in country estates. This is discussed in greater length in the published guidance and will not be addressed further.

The Three Step Approach

[52] Barnwell Manor Wind Energy Ltd v East Northants DC, English Heritage, National Trust and SSCLG [2014] EWCA Civ 137 and
Catesby Estates Ltd vs Steer et al. [2018] EWCA Civ 1697.
[53] Annex 2: Glossary
[54] Steer v Secretary of State for Communities and Local Government, Catesby Estates Limited, Amber Valley Borough Council [2018] EWCA Civ 1697.

156. The following steps will enable you to reach a decision in accordance with the Framework and a reasoned conclusion in relation to the statutory tests.

Step 1: Identify the significance/special interest of the heritage asset.

157. For listed building cases this means identifying the special interest and significance of the building. This should include the extent to which setting contributes to its value when relevant. The first place to start is the listing description. As previously stated, you should not treat them as being definitive given that they were originally created for identification purposes only and they frequently do not include any internal features. Consequently, they may not describe all that is relevant to your assessment and there will inevitably be other features or aspects of the building that are of equal or even greater interest. That said, as a result of the re-survey from the mid-80s onwards many listing descriptions are now more complete than was previously the case.

158. You are entitled and expected to note and take account of all aspects of a listed building that add to its special interest during your site visit and apply this understanding of the evidence in your decision. However, if you wish to rely upon features that have not been described or addressed elsewhere and this would be determinative in your decision-making then you must consult with the parties so that natural justice can be served. You may want to discuss this with an experienced heritage Inspector if the need arises.

159. Paragraphs **194** and **195** of the Framework set out a requirement for both applicants and local planning authorities to assess the significance of any heritage asset. The amount of information that is submitted will inevitably vary. The Framework requires only a level of detail proportionate to the asset's importance but does require consultation with the HER as a minimum requirement. It is for you to make a reasoned technical and professional judgment as to what constitutes the significance and special interest of the building or the features it possesses.

160. If, as a result of a lack of evidence, you cannot reach a conclusion, or it would be unfair to do so without going back to the parties then it may be impossible to do anything other than dismiss the appeal. However, you should first consider whether the situation could be remedied by going back to the parties if the missing information is not of a substantive nature.

Step 2: Assess the impact of the proposed works/development on the special interest

161. Having given an overview, your considerations should focus on those elements of the significance and special interest that are relevant to the proposed works. This overview should always be predicated in terms of being defined as 'insofar as relevant to the proposal' in order to avoid fettering future decision-makers, as previously discussed.

162. Consider the impact of the proposed works on the special interest of the building in detail, not forgetting the setting of other buildings when relevant. This must be based on the features that you have already identified in Step 1. Reach a clear conclusion on the nature and scale of the impact. This will involve examining the extent and quality of the evidence that is before you, including what you are able to glean from your site visit. An ability to

undertake rapid field assessment is an essential skill that you will need to cultivate as a heritage Inspector. Publications that can assist in this task are listed in Annex 3.

163. You should bear in mind that conservation is about managing change to a building and its setting in ways that sustain, reveal or reinforce its cultural and heritage values. The adaptation of a building over time is often apparent and this change can either be neutral, positive or harmful depending on how it affects the special interest. It only becomes harmful if this is eroded.

164. Bear in mind that change can also alter the importance of historical layering that exemplifies past change which may have significant evidential value, *e.g.* Victorian water closet extensions. Also think about the how the indirect consequences of the proposal can cause harm. For example, steam from vents can impact on the appearance of a main façade even if the vent is hidden from view and there is no significant loss of fabric from the vent itself. A number of different documents provide relevant guidance[55] on these issues and local planning authorities may also refer to their own guidance which should accompany their appeal statement.

165. As with historic adaptation, the impact of a proposal may be positive, neutral or harmful. Positive change may be derived from removing later, inappropriate, additions to historic buildings which harm their significance. Neutral change may be related to more recent parts of the building or features that do not have any intrinsic historical or architectural significance. However, if any harm is likely to occur you must determine whether harm to the significance of the heritage asset would be 'substantial' or 'less than substantial' as set out in paragraphs **200-202** of the Framework.

166. The PPG[56] advises that substantial harm is a high bar and may not arise in many cases. In determining whether works to a listed building constitute substantial harm, an important consideration is whether the adverse impact would seriously affect a key element of its special architectural or historic interest. It is the degree of harm to the asset's significance rather than the scale of the development that should be assessed. It is important to bear in mind that substantial harm may arise from works to an asset as well as from development within its setting. However, this is something that you will only rarely encounter.

167. Less than substantial harm should be considered in a similar manner and again, not simply related to the scale of the proposed works. This will be the 'level' of harm that you will encounter most frequently. The PPG advises that even partial destruction or loss can be considered less than substantial. Consequently, your judgement must be based on a well-founded and informed understanding of the architectural and historic significance of a building and precisely how the proposal would affect its function and fabric. Consider what fabric would be lost, whether the changes would be reversible and how they would alter the historic legibility of the building or structure.

168. If the proposal would lead to 'less than substantial' harm, paragraph **202** of the Framework states that this harm must be weighed against the public benefits of the proposal. You are likely to see a range of benefits advanced that should be considered on their individual merits. However, you need to bear in mind that the Framework seeks to weigh public rather than private benefits. Whilst private wishes may coincide with public benefits, they

[55] English Heritage (2008) Conservation Principles, Policies and Guidance for the Sustainable Management of the Historic Environment and Historic England (2015) Managing Significance in Decision-Taking in the Historic Environment - Historic Environment Good Practice Advice in Planning: 2.
[56] Paragraph: 018 of Planning Practice Guidance ID: 18a-018-20190723

are unlikely to attract significant weight on their own. Where the benefits are entirely private you should say as much and conclude accordingly in your overall balance.

169. If the proposal would lead to 'substantial harm' paragraph **201** of the Framework sets out the approach that should be followed. If this is the case, you should be clear that only substantial public benefits or all of the specified circumstances (a-d) would be capable outweighing such harm. An example is given in Annex 1. Both types of harm are often outweighed by public benefits associated with NSIP projects and an example of this is also given in Annex 1.

Step 3: Overall conclusion

170. If the impact of the works would result in a positive or neutral outcome then they would preserve the special interest of the listed building and the appeal should be allowed, all other things being equal. Where relevant, Inspectors should also reach conclusions on whether such works would preserve or enhance the character or appearance of a conservation area.

171. If the impact would be harmful but the harm would be 'less than substantial' paragraph **202** of the Framework states that the harm must be weighed against the public benefits of the proposal. These can include, among other things, enabling development or works that secure the future of the asset, reversing or removing harmful alterations, reducing carbon emissions, meeting a housing shortfall or improving public access.

172. All benefits put forward must be considered on their individual merits. In considering these and the weight you give to them, be aware that the policy seeks public benefits. Private wishes may coincide with public benefits but are unlikely on their own to attract significant weight.

173. Paragraph **201** of the Framework sets out the approach where substantial harm or total loss of significance would occur. If this is the case only substantial public benefits or all of a specified set of circumstances would outweigh such harm. See the PPG for further details on what are considered to be public benefits[57] .

174. In undertaking this balance you should be mindful of the '*Barnwell Manor Wind Energy Ltd'* Court of Appeal judgement[58] that emphasises the need for decision makers to explicitly apply the intended protection for heritage assets as specified under section **66(1)** of the Act as well as the parallel duty under section **72(1)** of the Act for conservation areas. The judgment re-iterates the previous High Court judgment which stated that Inspectors need to give 'considerable importance and weight' to the desirability of preserving the setting of listed buildings when carrying out a 'balancing exercise' in appeal decisions. See the beginning of this chapter for further details.

175. If harm is found, the judgement emphasises that it does not mean that you can give that harm such weight as you choose when carrying out the balancing exercise. You should be careful not to equate less than substantial harm with a less than substantial planning objection. The weight to be apportioned is not a matter of unfettered discretion on your part

[57] Paragraph 020 of Planning Practice Guidance ID: 18a-020-20190723
[58] Barnwell Manor Wind Energy Ltd v East Northants DC, English Heritage, National Trust and SSCLG [2014] EWCA Civ 137

and you should clearly demonstrate that considerable weight has been given to the presumption in favour of preservation.

176. You should also be aware of the *Shimbles v City of Bradford MBC* [2018] EWHC 195 (Admin) Judgement, where Mr Justice Kerr concluded that when determining planning applications, local planning authorities and therefore decision-makers, were not obliged to place harm that would be caused to the significance of a heritage asset, or its setting, somewhere on a "spectrum" in order to come to a conclusion. He noted that the only requirement was to differentiate between "substantial" and "less than substantial" harm for the purposes of undertaking the weighted balancing exercise.

177. That said, there is nothing to stop you from applying a spectrum of harm when you are dealing with multiple heritage assets as suggested by the PPG which advises that: "Within each category of harm (which category applies should be explicitly identified), the extent of the harm may vary and should be clearly articulated". However, there is a tension with the *Bedford BC v SSCLG* [2012] EWHC 4344 (Admin) judgement where Mr Justice Jay concluded that the test for the grant of planning consent varies according to the quantum of harm to significance. There is a presumption against granting consent if the harm to significance is substantial or there is a total loss of significance. But if the harm is less than substantial, it is simply a question of weighing that harm against the public benefits of the proposal according to this judgement. The submission that the Inspector made no attempt to differentiate the degrees of harm and simply indicated that it was less than substantial was found to be "wholly without merit" because matters of fact and degree were viewed as matters of planning judgment.

178. Herein lies a trap for the unwary and the inexperienced. If you conclude that the level of less than substantial harm to an asset or its setting would only be minor or 'at the lower end of the spectrum', it is critical that you still attribute considerable importance and weight to it in your balance whether this is an internal heritage balance or an overall planning balance. This is essentially a matter of calibration and you should be clear that less than substantial harm does not necessarily amount to a less than substantial planning objection. Accounting for the considerable importance and weight to be given to the desirability of preserving an asset and its setting anticipated by the Act, and the expectation that great weight be afforded to their conservation in the Framework, the measure of the harm should necessarily be assessed as being of great importance and the weight to that harm characterised as considerable. The use of the spectrum will not be necessary in most cases and you should bear in mind that the Framework deliberately keeps this exercise relatively straightforward in order to avoid unnecessary complexity. As a result, you should only consider this approach if you feel it is absolutely necessary and adds clarity to your reasoning or if it is raised by one of the parties and consequently requires some engagement on your part. If you are in any doubt, then you should discuss the matter with a more experienced heritage specialist.

179. Following on from the *Forest of Dean* Judgement[59] you should bear in mind that where paragraph **11(d)** of the Framework applies and harm to a heritage asset specified in footnote **7** applies, then paragraph **202** and paragraph **11(d)(i)** come into play. If you carry out the balancing exercise in paragraph **202** and conclude that there is harm but that this is outweighed by other benefits then this indicates that development should not be restricted and the weighted balance in paragraph **11(d)(ii)** should then be considered.

[59] Forest of Dean DC v SSCLG and Gladman Developments Ltd [2016] EWHC 421 (Admin)

180. You should also bear in mind that the overarching statutory duty imposed by **s66** or **s72** the Act applies even where the harm to heritage assets is found to be less than substantial. You should be careful not to equate less than substantial harm with a less than substantial planning objection, as paragraph **29** of the Barnwell Manor Judgment makes clear. Your decision or report should expressly acknowledge the need, if harm has been found, to give considerable weight to the presumption that preservation is desirable and demonstrate that this has been done. Otherwise, it would not reflect the duty under **s66** or **s72** of the Act. See the beginning of this chapter for further details.

Writing a Decision

181. From the outset it is crucial that you bear in mind the central principle of the Inspector's role. Namely, that you are an impartial decision-maker drawing upon all of the evidence before you as well as your own specialist knowledge. Your experience and expertise on matters concerning the historic built environment must also be brought to bear and statutory requirements and policy principles applied appropriately. This differs in routine casework which is why specialist training and ongoing CPD is essential for this type of casework.

182. During site visits, make sure that you leave enough time to thoroughly check the evidence and the detail of the submitted drawings. Bear in mind that a tablet may not be suitable for this purpose if it is raining or if you are in an urban area. Consequently, you should always try to ensure that you have plans printed by the office at an appropriate scale so that all text and features are clearly legible. For written representations you should generally allow at least an hour at each site and ensure that you are able to undertake internal inspections as required. This is because an ARSV may be required to determine impacts on internal fabric and enable a closer inspection of even if the works are minor, *e.g.* replacement window.

183. You will find it useful to maintain a photographic record of your site visit and you should make it clear to any parties present that you only intend to use it as an *aide memoire*. Unless already submitted as evidence, you should not use any other photographs, including aerial photography from websites such as Google Maps, to inform your decision-making in relation to areas that you were not able to view on your site visit unless this has been agreed is advance. A failure to do so will lead to your decision being quashed because you will have erred in law by introducing new evidence.

184. Inspections can require access to parts of buildings that may be potentially unsafe and appropriate personal protective equipment should be used at all times. If you need to see something that is central to your reasoning and it is not safe then the site visit should be terminated and another one undertaken when the necessary safety measures are put in place.

185. The need to undertake such inspections should have been the subject of a risk assessment by the appellant or site owner. Check whether one is present when preparing for the site visit or simply confirm the necessary arrangements at the hearing or inquiry before proceeding to the site. If necessary, agree with the parties what measures will be needed to provide safe access, *e.g.* access to roof spaces.

186. Discussion on site can often be extremely useful when undertaking physical rather than virtual hearings and you should consider adjourning to the site and keeping the event open if matters cannot be resolved during the course of the event.

187. It is important to be confident and accurate in your use of architectural language and the exposition of any relevant history. Knowing the range of building materials and building elements associated with different architectural styles and periods is extremely important and is often a determining factor in decisions concerning alterations or extensions. In this regard, you should seek to consolidate and extend your knowledge of vernacular, Georgian and Victorian buildings and associated architectural styles through further self-directed learning.

188. You should have a clear understanding of how the main building types are constructed and the traditional forms and variations of doors and windows from different periods. An understanding of how alterations can affect breathability and the perils of modern materials, such as cementitious mortars, will also be important. This is also the case for how modern techniques can be used in a sympathetic manner to improve the thermal performance of walls, roofs and windows without harming significance. The potential impact of replacement glazing on the surrounding street scene and the historic integrity of interiors should also be clearly understood.

189. A similarly careful approach to evidence and to the language of decision-making applies to any mitigation that might be achieved though conditions or planning obligations. It will rarely be the case that a less than fully detailed set of drawings will be appropriate for a more complex listed building application. Even in simpler cases concerning window replacement, scaled, cross-sectional drawings of the window units and elevational drawings at an appropriate scale that show exactly how they will be fitted is often essential if their effect is to be robustly determined. Extracts from window sales catalogues are seldom acceptable and can be encountered. Accordingly, there may be circumstances where the absence of essential information and/or drawings may inevitably lead to dismissal of an appeal for no other reason, as previously discussed.

190. Where satisfactory drawings and details are available, the consent can be conditioned accordingly in order to mitigate potential harm. It may be acceptable in smaller cases to rely on the submission of large-scale drawings or samples of elements for approval (*e.g.* materials, doors and windows) where you can be confident of that any impact could be controlled by this means.

191. Remember that where the effect on the setting of other listed buildings or the character or appearance of a conservation area is an issue, these must form part of your reasoning with clear conclusions reached demonstrating how you have had regard to your statutory duties and relevant development plan policies. It will be necessary for you to define significance, insofar as relevant, when a conservation area appraisal is absent. This is not an infrequent occurrence and you should allow additional time when you find yourself in this situation. You should always check to see whether a conservation area appraisal is present before you undertake your site visit as these are often omitted from evidence. If this is the case, then ask your case officer to request a copy so that it is to hand when you come to write your decision.

192. You are likely to occasionally come across enabling development which is designed to secure the future of a heritage asset but which may contravene other planning policy objectives or the viability of a new use. Paragraph **208** of the Framework states that local planning authorities should assess whether the benefits of a proposal for enabling development outweigh the 'disbenefits' of departing from policies with which it would otherwise conflict. In such cases the economic arguments will need to be painstakingly assessed and are seldom suitable for consideration as a written representation.

Consequently, you should consider changing the procedure to a hearing or inquiry after taking appropriate advice from you Mentor. Recently published guidance[60] is available on enabling development in addition to the guidance in the PPG[61].

193. The separate decisions may share some of the conditions but you must ensure that you do not apply conditions to a listed building consent for matters that are properly controlled through a planning permission or outside the listed building regime. For example, if the control of materials or details is necessary to ensure the significance of the building is preserved then these conditions should be attached to the listed building consent.

194. It may be that 'plans' conditions are included as part of a LBC. Such conditions are not necessary because the LBC is for the works and plans as approved, as set out in the formal decision in the template. Unlike Planning Permission, there is no provision for an application for a minor material amendment to a LBC and so such a condition would plainly have no purpose. Therefore, no plans condition need be attached as it would fail the test of necessity set out in paragraph 56 of the NPPF (clarity on plans should exist within your decision if there are negotiated changes to plans on which your decision is based, this can be reflected in a procedural paragraph for clarity).

195. Where there is an LBC conditions appeal in which such a plans condition exists, it may safely be omitted. If allowing a variation of other conditions it should be explained such a condition is not necessary (as set out above). A variation of a plans condition should not be considered without great thought. It may be appropriate for the appeal to be dismissed and it explained that the consent is for the works approved and therefore a new LBC with all necessary accompanying details should be sought. This is particularly important if there is any lack of clarity within the plans provided. If the appeal is to be allowed, because it is expedient to do so, and the necessary degree of information supplied, it should be explained that a plans condition will not be reimposed, rather, any future amendments should be sought through a new LBC application. In such circumstances it should be made very clear within the decision precisely which plans are being approved. It may be that a variation of a plans condition is accompanied by plans that are plainly unacceptable. In such circumstances it would be expedient to dismiss the appeal, with reasoning making it clear what is wrong with the revised scheme sought, and an explanation which establishes that in any event an appeal against a plans condition is not the correct way to deal with an amended scheme for LBC, rather that a new application for LBC should be made.

196. Be wary of being overly prescriptive and failing to ensure that a balance is attained between preserving the building's special interest and its continued use and maintenance. The purpose of listing is not to prevent changes to buildings, but to ensure that the special architectural or historic interest of a building is taken into account and preserved.

197. There is no need to recite the provisions of the Act or the Framework or to refer directly to the weight to be attached to development plan policies. However, this may help structure your decisions initially until you gain greater experience and are able to clearly demonstrate that you have implicitly taken account of the necessary requirements when you frame your main issue, set out your reasoning and reach your conclusion. See Annex 1 for differing approaches and Annex 2 for a decision template.

[60] English Heritage (2020) Enabling Development and Heritage Assets. Historic Environment Good Practice Advice in Planning:4.
[61] Planning Practice Guidance ID: 18a-017-20190723

198. Main issues can be framed in a number of ways, as can be seen from the following examples, but you must understand that works subject to a listed building consent are still works under the terms of the planning acts. Consequently, you should also consider the impact of a proposal on a conservation area if one is present. Even if the parties do not address potential impacts, it remains your statutory duty to do so. You may need to go back to the parties but equally you might be able to find suitable wording to avoid this course of action. In this respect you would show that you have had regard to the impact but that it was not determinative. If you find yourself in this situation then discuss the matter with an experienced heritage Inspector if the need arises.

    - The main issue is the effect of the proposed works on the special interest of the Grade II listed building (s20).

    - The main issue is whether the proposed works would preserve the special architectural and historic interest of the Grade II listed building (s20).

    - The main issue is the effect of the proposal on the special interest of the Grade II listed building and the character and appearance of the XYZ Conservation Area (s20 & s78).

    - The main issue is whether the conflict with relevant local policies is outweighed by the enabling nature of the proposal with regard to the restoration of the Grade II listed building and whether the associated works would preserve its special interest (s20 & s78 – enabling development).

    - The main issues are the effect of the proposal on: the special interest of a Grade II listed building, XXX, and the setting of a Grade I listed building, YYY; the character and appearance of the wider area; living conditions with regard to the outlook from the neighbouring property; and highway safety with regard to the secondary access that would be created (s20 & s78 – multiple issues).

    - The main issues in this appeal are: whether the proposal constitutes 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 character and appearance of the area bearing in mind the special attention that should be paid to the desirability of preserving the setting of the nearby Grade I listed building, XXX, and the extent to which it would preserve or enhance the character or appearance of the XYZ Conservation Area; and if the proposal is inappropriate development, whether the harm to the Green Belt by reason of its inappropriateness, and any other harm, is clearly outweighed by other considerations, so as to amount to the very special circumstances necessary to justify it (s20 & s78 – green belt).

199. Bear in mind that there is generally no need to describe any more of the listed building and/or its setting than is necessary in order for you to reach a sound conclusion. However, tempting it might be to expound on the architectural qualities of a fine building, this inclination must be firmly resisted. This is not only in the interests of concise decision-making but also because it reduces the risk of factual inaccuracies and errors that are likely to generate a complaint and/or a high court challenge.

200. Appeals against the refusal of listed building consent may be linked with planning appeals, as previously highlighted. This distinction will need to be followed in the language used in your reasoning and in the wording of decisions. The reasoning in less complex linked

cases can be woven together. More complex linked cases may require separate reasoning under sub-headings. However, all appeals must be concluded upon separately. Separate decisions must be clearly reached and expressed that apply the appropriate statutory tests in your reasoning. It is acceptable for you conclude that one should be dismissed and the other allowed.

201. The separate decisions may share some of the conditions, but you must ensure that you do not apply conditions to a listed building consent for matters that are properly controlled through a planning permission or outside the listed building regime. For example, if the control of materials or details is necessary to ensure the significance of the building is preserved then these conditions should be attached to the listed building consent. Plans, on the other hand, are a matter for planning control and there is no power to impose such a condition under the Act[62]. It follows that any appeal to vary such a condition would be invalid and should be the subject of a new application for listed building consent irrespective of the materiality of any changes to the plans an appellant wishes to make. You should dismiss any such appeal on these grounds and talk to an experienced heritage Inspector if you are in any doubt. As with all areas of casework, the principle applies that if a matter is properly controlled under one regime then there is no need to condition it under another. Remember that listed building consent conditions must refer to 'works' and planning conditions to 'development'.

202. And finally, there is no better advice on decision writing than that of Lord Brown of Eaton-under-Heywood[63] who noted that:

> "36. 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. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

[62] s17 - power to impose conditions on grant of listed building consent
[63] South Bucks DC v Porter (No 2) [2004] 1WLR 1953

Annex 1 – Appeal Decision Examples

The following decisions were all written after the 2019 revision of the Framework (but before the July 2021 revised framework, so references to NPPF paragraph numbers may be misleading), and therefore may not reflect the most recent policy and changes in case law. Most of the following hyperlinks will not work unless you change your default browser to Internet Explorer or have this browser open and paste the link into the address bar. This is a known and long-standing IT fault. Whilst the style and length inevitably vary, each decision applies the 3-step approach:

3239620	Roof extension, London. Additional floor and roof on London terrace. Restoration of alleged, original features (s20/s78 – dismissed).
3235080	Window insertion, Shropshire. New window openings in converted outbuilding (s20/s78 - allowed). Ignore s20 plans condition.
3232301	Court house extension, Sheffield. Removal of existing pitched roofs and replacement with a two-storey flat roof extension. Listed building and conservation area issues (s20/s78 – dismissed).
3234522	House extension, Southwark. Split height rear extension to semi-detached dwelling. (s20/s78 – allowed)
3240584	Roof terrace, London. Glass balustrade installation (s20/s78 – dismissed).
3239512	Roof alteration, Braintree. Vertical extension with extensive glazing (s20/s78 – dismissed).
3244079	Replacement windows, Basingstoke & Deane. Double glazed wooden windows (s20 – allowed). Ignore s20 plans condition.
3238464	Replacement windows and doors, Bradford. Double glazed uPVC replacements (s20/s78 – dismissed).
3238095	Garden room, East Suffolk. Gable end extension (s20 – dismissed).
3234757	Extension, Islington. Second floor extension to semi-detached Victorian villas (s20/278 – dismissed).
3230332	Fence, Camden. Erection of wooden fence on top of wall (s20/s78 – dismissed).
3254023	Miscellaneous alterations, Newcastle-upon-Tyne. Variable effects on different features (s20/s78 – dismissed).

3257559	Single dwelling house, Northumberland. Effect on setting of II* LB and a non-designated heritage asset (s78 – allowed).
3249440	Single dwelling house, Suffolk. Effect on listed wall and register park as well as the setting of multiple assets (s20/s78 – dismissed).
Hornsea 3	Norfolk & North Sea. Recommendation report for a 100 megawatt, offshore windfarm with up to 300 wind turbine generators. Offshore archaeology and onshore setting (s74(2) - refusal)

Annex 2 – Model Decision

This is intended to help you structure your decisions until your reasoning flows more readily. You are not obliged to follow this format, it has only been included to assist if so required.

Decision

Appeal A

1. The appeal is dismissed.

2. The appeal is allowed and planning permission is granted for [ ] at [ ] in accordance with the terms of the application, Ref: [ ], dated [ ], subject to the following condition[s]: [ ].

Appeal B

3. The appeal is dismissed.

4. The appeal is allowed and listed building consent is granted for [ ] at [ ] in accordance with the terms of the application Ref: [ ] dated [ ] and subject to the following condition[s]: [ ].

Preliminary Matter

5. As the proposal is in a conservation area and relates to a listed building I have had special regard to sections 16(2), 66(1) and 72(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 (the Act).

6. As the appeal relates to a listed building consent I have had special regard to section 16(2) of the Planning (Listed Buildings and Conservation Areas) Act 1990 (the Act).

Procedural Matter

7. Paragraph 194 of the National Planning Policy Framework 2021 (the Framework) requires applicant's to describe the significance of any heritage assets that may be affected by a proposal [including any contribution made by their setting]. It goes on to advise that this should be proportionate to the assets importance and sufficient to understand the potential impact of a proposal on its significance when assessed using appropriate expertise. In this particular instance no such assessment was undertaken [only a cursory assessment was undertaken] and insufficient information has therefore been provided to determine the potential harm. As a result, the appeals must be dismissed on that basis.

Paragraph 7 should only to be used in exceptional circumstances when you are not dismissing for other reasons. You would not set out any main issues under these circumstances and go straight to the conclusion, much like you would with an invalid appeal.

Main Issue(s)[64]

8. The main issues are whether the proposal would preserve a Grade [I II* II] listed building, XXX, and any of the features of special architectural or historic interest that it

[64] See earlier examples of main issues as well.

possesses and the extent to which it would preserve or enhance the character or appearance of the X Conservation Area.

9. The main issue is the effect of the proposal on the character and appearance of the local area bearing in mind the special attention that should be paid to the desirability of preserving the setting of the nearby Grade [I II* II] listed building, X, and the extent to which it would preserve or enhance the character or appearance of the X Conservation Area.

Reasons

10. The X Conservation Area (CA) covers an area encompassing….. Its significance is derived from…. Given the above, I find that the significance of the CA, insofar as it relates to these appeals, to be primarily associated with XYZ.

11. The nearby building was listed in Y (Ref: XXX) and dates from the Z century……. Given the above, I find that the setting of the building, insofar as it relates to these appeals, to be primarily associated with XYZ and that this directly contributes to its special interest for the reasons given.

12. The building was listed in Y (Ref: XXX) and dates from the Z century……. Given the above, I find that the special interest of the listed building, insofar as it relates to these appeals, to be primarily associated with XYZ.

13. [For the purposes of the Act, a listed building includes any structure that is within its curtilage which has existed since before 1st July 1948. As structures within the curtilage that have a principal and accessory relationship to the main building, the outbuildings are also consequently listed. Whilst not in the list description, listings are primarily for identification purposes and do not provide an exhaustive or complete description of the special interest.]

14. The harm to the building and the defence…

15. [The appellant has suggested that the proposal would not harm the listed building because it would not be more widely visible. However, listed buildings are safeguarded for their inherent architectural and historic interest irrespective of whether or not public views of the building [or any of their curtilage structures] can be gained.

16. The harm to the CA and the defence….

17. [Despite the harm that would be caused to the listed building I do not find that the proposal would be detrimental to the character or appearance of the CA. This is because the proposed changes would not be visible from the public domain and only have limited prominence from the private domain. Unlike listed buildings, the significance of a CA is dependent upon how it is experienced. Under such circumstances case law[65] has established that proposals must be judged according to their effect on a CA as a whole and must therefore have a moderate degree of prominence. Given the above, I find that the proposal would not be detrimental to the CA and thus preserve its significance.]

18. [The appellant has suggested that the proposed changes would be acceptable because the building is not in a prominent position. However, I observed that the proposed changes would be clearly visible from X and thus capable of harming the wider character and appearance [character or appearance] of the CA.]

[65] South Oxfordshire DC v SSE & J Donaldson [1991] CO/1440/89

19. Given the above, I find that the proposal would fail to preserve the special interest of the listed building and the significance of the CA. Consequently, I give this harm considerable importance and weight in the planning balance of these appeals.

20. Paragraph 199 of the National Planning Policy Framework 2021 (the Framework) advises that when considering the impact of development on the significance of designated heritage assets, great weight should be given to their conservation. Paragraph 200 goes on to advise that significance can be harmed or lost through the alteration or destruction of those assets or from development within their setting and that this should have a clear and convincing justification. Given XYZ, I find the harm to be less than substantial in this instance but nevertheless of considerable importance and weight.

21. Under such circumstances, paragraph 202 of the Framework advises that this harm should be weighed against the public benefits of the proposal, which includes the securing of optimal viable use of listed buildings. The appellant is of the opinion that the proposal would be beneficial because of XYZ. However, these are private benefits/not sufficient to outweigh the harm that I have identified. In any event, the continued viable use of the appeal property as a residential dwelling is not dependent on the proposal as the building has an ongoing residential use that would not cease in its absence. [In the absence of any substantiated evidence to the contrary neither would any public benefits accrue in relation to the CA.]

22. [Setting: Paragraph 199 of the National Planning Policy Framework 2021 (the Framework) advises that when considering the impact of development on the significance of a designated heritage asset, great weight should be given to the asset's conservation. Paragraph 200 goes on to advise that significance can be harmed or lost through alteration or destruction of the heritage asset or development within its setting and that this should have a clear and convincing justification. Given XYZ, I find the harm to be less than substantial in this instance but nevertheless of considerable importance and weight. Under such circumstances, paragraph 202 of the Framework advises that this harm should be weighed against the public benefits of the proposal. The appellant is of the opinion that the proposal would be beneficial because of XYZ.]

23. Given the above and in the absence of any defined [substantiated/significant] public benefit, I conclude that, on balance, the proposal would fail to preserve the special historic interest [setting] of the Grade [I II* II] listed building and the character or appearance of the X Conservation Area. This would fail to satisfy the requirements of the Act, paragraph 197 of the Framework and conflict with policy X of the Y that seeks, among other things, to ensure XYZ. As a result the proposal would not be in accordance with the development plan.

24. Given the above I conclude that, on balance, the proposal would preserve the special historic interest [setting] of the Grade [I II* II] listed building and the character and appearance of the X Conservation Area. This would satisfy the requirements of the Act, paragraph 197 of the Framework and would not conflict with policy X of the Y that seeks, among other things, to ensure XYZ. As a result the proposal would be in accordance with the development plan.

25. [S20: Given the above, I conclude that the proposal would fail to preserve the special historic interest of the Grade [I II* II] listed building and the character and appearance of the X Conservation Area, thus failing to satisfy the requirements of the Act, paragraph 197 of the Framework and development plan policies insofar as relevant.]

26. [S20: Given the above, I conclude that the proposed works would preserve the special architectural interest of the Grade [I II* II] listed building as well as the character and appearance of the X Conservation Area, thus satisfying the requirements of the Act, paragraph 197 of the Framework and development plan policies insofar as relevant.]

Conclusion

27. For the above reasons and having regard to all other matters raised I conclude that the appeals should be dismissed.

Inigo Jones

INSPECTOR

Annex 3 – Recommended Reading

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- Historic England Advice and Guidance Catalogue
- Historic England (2020) Conserving Georgian and Victorian Terraced Housing.
- Historic England (2020) Energy Efficiency and Traditional Homes.
- Historic England (2020) Enabling Development and Heritage Assets.
- Historic England (2019) Statements of Heritage Significance: Analysing Significance in Heritage Assets.
- Historic England (2019) Conservation Area Appraisal, Designation and Management: Historic England Advice Note 1 (Second Edition).
- Historic England (2018) Energy Efficiency and Historic Buildings: How to Improve Energy Efficiency.
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- A Pevsner for your favourite area….

Annex 4 – Glossary of Terms

Ashlar
Finely finished blocks of stone masonry, laid in horizontal courses with vertical joints, creating a smooth, formal effect

Bay
A vertical division of the exterior of a building marked by fenestration, an order, buttresses, roof compartments etc.

Bay Window
An angular or curved projecting window.

Barge Board
Board fixed to the gable end of a roof to hide the ends of the purlins.

Butterfly Roof
A roof formed by two gables that dip in the middle, resembling butterfly's wings. The roofs were particularly popular in Britain during the 19th century, as they have no top ridges and were usually concealed on the front façade by a parapet, giving the illusion of a flat roof.

Buttress
A mass of masonry or brickwork projecting from or built against a wall to give additional strength.

Canted
Term describing part, or segment, of a façade, which is at an angle of less than 90° to another part of the same façade.

Casement Window
A metal or timber window with side hinged sashes, opening outwards or inwards.

Cast Iron
An iron-based alloy containing more than 2% carbon. The molten iron is poured into a sand or cast mould rather than being hammered into shape. This allows for regular and uniform patterns and high degrees of detail to be represented. The finished product is chunkier, though more brittle, than wrought iron.

Cill
Horizontal base of a window opening or door frame, usually timber or stone.

Chimney Stack
Masonry or brickwork containing several flues, projecting above the roof and terminating in chimney pots.

Classical (neo-Classicism)
A revival of the principles of Greek or Roman architecture. Begun in Britain c. 1616 and continued up to the 1930s, though most popular during the mid 18th -19th centuries.

Console

An ornamental bracket with a curved profile and usually of greater height than projection.

Corbel
A projecting block, usually of stone, supporting a beam or other horizontal member.

Cornice
In Classical architecture, the top projecting section of an entablature. Also any projecting ornamental moulding along the top of a building, wall, arch etc., finishing or crowning it.

Coursing
Continuous horizontal layer of masonry, such as brick or coursed stone.

Dentil Course
Projecting and intended course of brick or stone at the eaves, carrying gutter. Various patterns are created by different laying techniques.

Door Surround
Timber assembly around a door, usually based on the classical motif of column, frieze and cornice.

Dormer Window
A window placed vertically in a sloping roof and with a roof of its own.

Dressings
Stone worked into a finished face, whether smooth or moulded, and used around an angle, window, or any feature.

Entablature
The upper part of an order, consisting of architrave, frieze, and cornice.

Façade
The frontage of a building.

Fanlight
A window, often semi-circular, over a door in Georgian and Regency buildings, with radiating glazing bars suggesting a fan. Or any window over a door to let light into the room or corridor beyond.

Fascia
A flat board, usually of wood, covering the ends of rafters or a plain strip over a shop front, usually carrying its name.

Fenestration
The arrangement of windows in a building's façade.

Flashing
Strip of metal, usually lead, used to prevent water penetration through a roof or dormer.

Flue
Smoke duct in chimney.

Gable

The upper portion of a wall at the end of a pitched roof; can have straight sides or be shaped or crowned with a pediment (known as a Dutch Gable).

Georgian
The period in British history between 1714-1830 i.e. from the accession of George I to the death of George IV. Also includes the Regency Period, defined by the Regency of George IV as Prince of Wales during the madness of his father George III.

Glazing Bars
Bars, usually of timber, which subdivide a casement or sash window.

Gothic
A style of European architecture, particularly associated with cathedrals and churches, that began in 12th century France. The style emphasizes verticality, glass, and pointed arches. A series of Gothic revivals began in mid 18th century, mainly for ecclesiastical and university buildings.

Hipped Roof
A roof with sloped instead of vertical ends.

Jambs
Side posts or side face of a doorway or window.

Lightwell
A shaft built into the ground to let light into a building's interior at basement level.

Lintel
Horizontal beam, usually of timber or stone, bridging an opening across the top of a door or window.

Mansard Roof
Takes its name from the French architect Francois Mansart. Normally comprises a steep pitched roof with a shallower secondary pitch above and partially hidden behind a parapet wall.

Mortar
Mixture of lime, sand and water, used for bonding bricks or stones.

Pantile (& Double Roman)
Roofing tile, of clay, with curved 'S'-shaped or corrugated section. Double Roman tiles are flat in the middle, with a concave curve at one end at a convex curve at the other, to allow interlocking.

Parapet
A low wall, placed to protect from a sudden drop – often on roofs – and a distinctive feature of Classical architecture.

Pediment
A Classical architectural element consisting of a triangular section or gable found above the entablature, resting on columns or a framing structure.

Pilaster

Rectangular column projecting slightly from a wall.

Pitched Roof
A roof consisting of two halves that form a peak in the middle where they meet.

Plinth
The projecting base of a wall or column generally angled at the top.

Pointing
Mortar filling between stones and bricks in a wall, which acts as adhesive and weatherproofing.

Portland Stone
A light coloured limestone from the Jurassic period, quarried on the Isle of Portland in Dorset.

Quoins
Cornerstones of buildings, usually running from the foundations up to the eaves.

Render
Covering material, e.g. plaster, over a stone or brick surface.

Reveal
The wall structure exposed by setting-back window or door joinery from the face of the building.

Ridgeline
The apex of the roof continued along the length of the roof span.

Roof Pitch
Angle at which rafters form an apex from the supporting walls.

Roofscape
View resulting from a blend of roof pitches, sizes and heights within the built environment.

Sash Window
A window formed with sliding glazed frames running vertically (strictly speaking a sliding sash window).

Setts
A small rectangular paving block made of stone, such as Pennant or Granite, used traditionally in road surfacing.

Stallriser
A key element in a traditional shopfront, usually wood, which protects the lower part of the shopfront and encloses the shop window and entrance.

Voussoir
A brick or wedge-shaped stone forming one of the units of an arch.

Victorian
Refers to architectural styles of the middle and late 19th century taking its name from Queen Victoria's reign (1837-1901).

Wrought Iron
Made by iron being heated and plied by a blacksmith using a hammer and anvil. Predates the existence of cast iron and enjoyed a renaissance during the late 19th century.

The Planning Inspectorate

Householder, advertisement and minor commercial appeals

Updated to reflect December 2023 Framework (NPPF)

What's new since the last version

Changes highlighted in yellow made 27 July 2018:

- Updated text regarding viewing the appeal site from a neighbouring property (Paragraph 35).

Contents

Introduction

1 The 2009 Regulations[1] introduced a faster procedure for dealing with householder appeals. This is known within PINS as the 'Householder Appeals Service' (HAS).

2 The 2013 Amendment Regulations[2] extended this procedure to appeals against the refusal of express consent for the display of an advertisement and against the refusal of planning permission for minor commercial development (mainly relating to shopfronts). This is known in England as the 'Commercial Appeals Service' (CAS), in Wales as Minor Commercial Appeals.

3 Part 1 of the Regulations relates to HAS and CAS appeals and Part 2 applies to all other appeals dealt with by written representations.

4 The relevant procedures are set out in the Town and Country Planning (Development Management Procedure) (England) Order 2015 and the Procedural Guide – Planning Appeals – England[3].

The scope of householder, advertisement and minor commercial appeals

5 The cases which fall within the scope of householder and commercial appeals are set out in the Regulations, the Town and Country Planning (Development Management Procedure) (England) Order 2015 and in the Procedural Guide – Planning Appeals April 2023 – England (see Section 9). For Wales - The Town and Country Planning Development Management Procedure)(Wales) (Amendment) Order 2015 2015 WSI 2015 No.1330 (W.123) which is consolidated into The Town and Country Planning (Development Management Procedure (Wales) Order 2012 SI 2012/801 and the Procedural Guidance -Planning appeals and called-in Planning applications - Wales.

6 In summary this includes appeals relating to:

- extensions and alterations to dwelling houses and incidental development within the curtilage (which might, for example, include domestic garages, walls, fences and vehicular accesses)
- advertisements
- ground floor alterations (such as shop fronts and security shutters) to commercial buildings, including shops and uses falling within Use Classes A2, A3, A4 and A5

[1] Town and Country Planning (Appeals) (Written Representations Procedure) (England) Regulations 2009. In Wales it was introduced for applications made after 22 June 2015.
[2] The Town and Country Planning (Appeals) (Written Representations Procedure and Advertisements) (England) (Amendment) Regulations 2013
[3] 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. There is also the *Procedural Guide – Called-in planning applications – England* which applies to all applications which are 'called-in'. See the Planning Inspectorate's homepage on GOV.UK for more information.

- prior approval of larger single-storey rear extensions (under Class A.1(g) of The Town and Country Planning (General Permitted Development) (England) Order 2015)

- a local planning authority's decision to refuse to remove or vary a condition or conditions attached to a previous planning permission for householder or minor commercial development or advertisement consent.

7 Some appeals fall outside the scope of this procedure. Examples include applications:

- to change the use of land or buildings

- relating to flats

- to alter the number of dwellings or units in a building

- for commercial development which would extend above ground floor level or which would increase the gross internal area of the buildings

- where the appeal is against non-determination

The appeal process

8 The appeal process is set out in the Regulations, in the *Procedural Guide – Planning Appeals – England and in the* Procedural Guidance -Planning appeals and called-in Planning applications – Wales

9 In summary, it is as follows:

Process	**Timescale**
Appeal made	Householder – within 12 weeks of LPA decisions Advertisement – within 8 weeks of the LPA decision Minor commercial – within 12 weeks of the LPA decision
Appellant's grounds of appeal	Provided with the appeal
PINS confirm appeal suitable for HAS/CAS (the start date)	Within 7 working days of the receipt of a valid appeal
LPA provides questionnaire and relevant documents including the officer/committee report (Rule 5)	Within 5 working days of the start date of the appeal
LPA tells interested people about the appeal (Rule 6)	Within 5 working days of the start date of the appeal
Case details available to Inspector	7 days before the site visit
Inspector visits the site	Between 2 and 6 weeks after the start date
Inspector makes decision	The target is for the decision to be issued within 8 weeks after the start date

Information and evidence

10 The process is based on the assumption that in HAS and CAS cases a decision can reasonably be made on the basis of:

- The plans which were before the LPA when it made its decision. If there is any doubt about the correct plans – ask the Case Officer to seek clarification from the parties.
- The LPA's case as set out in the reasons for refusal and in any officer/committee report/minutes.
- The appellant's grounds of appeal.
- Third party representations made in connection with the planning or advertisement application.
- Any other relevant documents provided with the LPA questionnaire, including development plan policy.

11 The process does not allow any opportunity for:

- the LPA to comment on the appellant's grounds of appeal (the assumption being that the LPA's case should be clear and adequately documented at the time their decision was made – even if the decision has been made contrary to the officer's recommendation).
- third parties to make any additional comments during the appeal process.

12 However, Regulation 8 does allow you to require further information relevant to the appeal.

13 The LPA will notify third parties of the appeal and offer them the option of withdrawing any representations made in response to the planning application. The LPA is also responsible for advising third parties of the outcome of the appeal.

Transfer of cases out of HAS/CAS

14 Regulation 9 allows the Secretary of State to determine that an appeal is not suitable for HAS or CAS and should be dealt with under Part 2 of the Regulations.

15 The Explanatory Memorandum to the 2009 Regulations states that:

> Where a determination has been made under section 319A[4] of the 1990 Act that a householder appeal will proceed on the basis of representations in writing it is expected that most householder appeals will proceed through the expedited procedure. However, there may be circumstances where issues arise as the appeal progresses which require further information to be sought from the parties or other interested persons. In such instances the appeal will be transferred out

[4] Determination of procedure – inquiry, hearing or by representations in writing

of the expedited procedure and will either follow part 2 of the Written Representations Regulations or, after a further determination under section 319A of the 1990 Act, the rules governing the hearings or inquiry appeal procedure. This flexibility will ensure that all relevant material considerations are taken into account.

16 The Explanatory Note attached to The Town and Country Planning (referrals and Appeals)(Written Representations Procedure)(Wales) Regulations 2015 WSI 2015 No.1331 (W.124) states that:

- Paragraph 3 "The main changes made by the regulations are the introduction of a new, expedited procedure in Part 1 of the Regulations. This applies where the Welsh Ministers have determined under section 319B of the Town and Country Planning Act 1990 that a householder, advertisement consent or minor commercial appeal is dealt with on the basis of representations in writing.

- Paragraph 8 "the Welsh Ministers may, where appropriate transfer an appeal from part 1 procedures and continue to deal with it under Part 2. If it is determined that an appeal should no longer proceed on the basis of representations in writing, the Welsh ministers may make a subsequent determination under section 319B(4) of the Act to vary the original determination as to procedure so that the appeal is considered at a local inquiry or at a hearing".

17 Examples of cases that will not be suitable for HAS/CAS include where:

- The case falls outside the scope of HAS/CAS.

- There is an issue of natural justice – for example, if new material evidence has been raised in the appellant's grounds of appeal, which the LPA should be given the opportunity to comment on.

- The appeal includes amended plans on which the LPA and possibly interested parties would need to be consulted (see 'The approach to decision-making' on amended plans and proposals).

- The case raises more complex issues that require the parties to make further representations.

- The appeal should be linked with a related enforcement appeal.

18 However, Regulation 8(1) allows that:

'The Secretary of State[5] may in writing require the appellant, local planning authority and other interested persons, to provide such further information relevant to the appeal as may be specified.'

[5] "Welsh Ministers" rather than Secretary of State.

19 Consequently, in some cases it may be appropriate to seek the views of the parties if the issue is a straightforward one and it would be reasonable to require comments to be made within a restricted time period (for example, 7 days). For example, this might include cases where it is necessary to seek clarification about a newly adopted development plan policy or to seek comments about the potential imposition of a non-standard condition.

20 Case officers will look to see if the parties have provided any evidence which might mean the case should be taken out of HAS/CAS. However, responsibility also rests with you, and you need to make sure the principles of natural justice are adhered to. You should not take into account evidence which other interested parties (ie the appellant, LPA and/or neighbours) would not have been aware of and ought to have been given the opportunity to comment upon. Consequently, when you are preparing for the site visit, you should consider whether there might be any reasons that require the appeal to be transferred out of HAS/CAS.

21 If you consider that a case should be taken out of HAS/CAS you should contact the Case Officer as soon as possible. The case will need to be re-started as a Part 2 appeal (see Annexe D of the Procedural Guide – Planning Appeals – England; Annex C of Procedural Guidance -Planning appeals and called-in Planning applications – Wales.

Appeal documents

22 All the appeal documents should be available on the Appeals Casework Portal and the Case Officer will forward you a direct link. If you think a document is missing contact the Case Officer.

Site visits

23 There are two types of site visit in HAS/CAS casework:

- unaccompanied (USV)
- access required (ARSV)

Unaccompanied site visits (USV)

24 A USV will be arranged where you can see everything you need to from a public area such as a road and so have no need to go on to the appeal site. None of the parties to the appeal will attend.

25 If, when carrying out a USV, you decide that it is essential to go on the appeal site, the Procedural Guide – Planning Appeals – England indicates that you can "approach the occupants to gain permission/access". If you follow this approach you will need to explain very clearly the purpose of your visit and that you cannot enter into any dialogue. You must inform the Case Officer so they can make a note on the Horizon file.

26 If you are unable to see everything you need to from a public place and have not been able to gain access to the site, you will need to abandon the site visit. You should

inform the Case Officer explaining why an access required site visit (ARSV) is necessary.

Access required site visits (ARSV)

27 An ARSV will be arranged where you need to go onto the appeal site. Given the tight timescales for HAS and CAS it is important that you respond quickly when you are asked for site visit times.

28 The principles are as follows:

- The Procedural Guide – Planning Appeals – England *paragraph C.9.5* states that "If the appellant's or agent's presence is required at the appeal site it will be required solely to provide access to the site" and that "The local planning authority will not attend the site visit".

- The appellant will be told the day of the site visit and whether the Inspector or his/her representative will call in the morning (between 0830 and 1300) or in the afternoon (1300-1730).

- The appellant will be asked in advance to make arrangements for you to access the site. They may be present themselves, they may arrange for someone else to be present to allow access or they may provide a written agreement that you can go on the site (preferably beforehand in writing via the Case Officer and occasionally, by leaving a note pinned to the door).

- When you arrive at the site you should always ring the doorbell[6]/knock on the door even if you think it would be possible to do the visit unaccompanied. This is because the appellant will be expecting you and may have waited in.

- You should make it clear that the appellant's attendance is only required to allow you to access the site. Politely discourage any attempt to engage in conversation or discussion.

- If it has been arranged that you will also view from a neighbouring site – explain to the appellant that this will take place without them being present, that it is merely to allow you to view the relationship between the two sites and that there will be no opportunity for the neighbour to engage you in conversation or discussion.

- The appellant can be asked to wait inside while you carry out the site visit. However, it is best to be accompanied if you intend to enter any rooms inside the appellant's property.

29 If the appellant or their representative is not present:

- Has the appellant confirmed in writing that you can go on the site - either by leaving a note on site or, preferably, via the Case Officer?

[6] It is possible that an individual may rely upon a doorbell as an adaptive measure due to a sensory impairment eg for a deaf person the doorbell may make lights flash or a device vibrate.

- If not, could you carry out the site visit unaccompanied without going on the appeal site? If so, you must inform the Charting Officer so they can make a note on the Horizon file.

- If you need to go on site, are you able to contact the appellant via the Case Officer (if you have time without delaying your programme)?

- If the appellant is not present and you need to go on the appeal site but you have no clear permission to do so - you will need to abandon the site visit and it will need to be rearranged. Inform the Case Officer by email explaining the circumstances.

- Where the site visit is abandoned and arrangements have been made to view the appeal site from a neighbouring property – you should visit the third party and explain that the ARSV has been abandoned, and why, and that they will be advised of the new arrangements (if alternatively you carry out the site visit unaccompanied and view the appeal site from the agreed neighbouring property you must inform the Case Officer so they can make a note on the Horizon file. The Inspector must also provide a written explanation as to why the site visit had to be abandoned as the Case Officer will need to write to the parties to explain what has happened and that a new site visit will be arranged.

- The Inspector should use the Calling Card if there is no answer see paragraph 33 below. PINS Wales has its own calling card which Inspectors can get from Wales Chart team.

Viewing the appeal site from a neighbouring property

30 The questionnaire asks the LPA if it considers "the reasons for refusal/grounds of appeal **require** the Inspector to enter a neighbour's land or property to judge the appeal proposal." If the LPA considers this essential, PINS will notify the neighbour of the date and time (am or pm) of your site visit.

31 If a third party has been asked to provide access you must ring the doorbell[7]/knock on their door even if you think it would be possible to do the visit unaccompanied. This is because the neighbour will be expecting you and may have waited in.

32 When you visit:

- briefly explain the purpose of your visit.

- politely discourage any attempt to engage you in conversation or discussion.

- you then can ask the neighbour to wait inside while you carry out the site visit. However, as noted above in paragraph 28, it is best to be accompanied if you intend to enter any rooms inside the neighbour's property.

33 If the neighbour is not present at the notified time:

[7] It is possible that an individual may rely upon a doorbell as an adaptive measure due to a sensory impairment eg for a deaf person the doorbell may make lights flash or a device vibrate.

- Complete your inspection from the appeal site and public land.

- If you have enough information to make your decision inform the Case Officer who will note it on the Horizon file.

- If you consider that it is essential to visit the neighbouring site provide the Case Officer with a clear explanation as to why so that they can to write to the parties to inform them the site visit will be re-arranged.

34 PINS provides a 'calling card' 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, then 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. PINS Wales has its own calling card which Inspectors can get from Wales Chart team.

35 If you consider it is essential to view from a neighbouring site in order to arrive at a sound decision and this has not been arranged beforehand you should abandon the site visit. You should inform your Case Officer straightaway and explain the reasons for not completing the site visit. The case will either be allocated to another Inspector or a further visit will be scheduled in your programme where an appointment will be made to gain the necessary access to the relevant site(s). However, before pursuing this option you should very carefully consider whether it really is necessary that you view from the neighbouring site. You should not do this unless it is essential to allow you to make your decision.

Conditions

36 The questionnaire prompts the LPA to consider whether conditions are necessary regarding the time limit for development to begin and the use of matching materials. It also asks whether any other conditions are necessary – and if so, why.

37 If the LPA suggests any non-standard conditions you should consider whether the appellant should be given the opportunity to comment on them. However, some conditions would be unlikely to come as a surprise and so you would not need to seek comments - for example, obscure glazing a bathroom window or the 'plans condition'.

Submitting the decision

38 Given the short timescales and targets you may need to give priority to writing and submitting HAS/CAS decisions.

39 The LPA may notify third parties that they have a right to withdraw any representations made within 4 weeks of the date the LPA letter is sent. Consequently, when sending your decision to despatch, it is helpful to note when this 4 week period will have passed (if it has not already).[8]

[8] The reasoning in a decision should not rely on a representation that has been withdrawn.

40 Your completed decision should be sent to the Case Team for the Case Officer (or Decisions Wales if appropriate) in the normal way. However, it is helpful to identify that it is a 'HAS/CAS Decision' in the subject bar of your e-mail. This helps the team identify and prioritise HAS/CAS cases.

Costs applications

41 The 2008 Planning Act permits costs applications to be sought and awarded in written representations cases. However, this does not apply in Wales where cost awards are only possible in cases dealt with at hearings and inquiries.

42 The appellant's claim for costs should be made at the same time as the appeal. The LPA has 14 days from the start date of the appeal to make a claim. The party against whom the costs application has been made will then be given an opportunity to comment within a set timescale. National guidance on the award of costs is provided in the Appeals section of the government's 'Planning Practice Guidance'.[9]

43 It is usual practice, where possible, to issue the appeal and costs decisions at the same time. However, given the tight targets for householder, advertisement and minor commercial appeals, it can be acceptable to issue the appeal decision first, so that the target is met.

Wales

44 The Town and Country Planning (Development Management Procedure (Wales)(Amendment) Order 2015 introduced the provision for Household and Minor commercial appeals. The appeals will follow the new expedited procedure introduced in Part 1 of the regulations[10].

45 However, there are some minor differences to the statutory scheme in England which Inspectors should be aware of.

- The target is for 90% of cases to be determined within 12 weeks (this is because additional third party representations can still be made until the legislation is amended).
- Site visits are being arranged on the basis of 2 hour time slots. For cases in Wales we encourage Inspectors to give narrower time slots or a specific time where they are able.
- All documentation is dealt with electronically. If hard copies of plans are needed, they should be requested.

[9] In Wales, see *Circular 23/93 Awards of Costs Incurred in Planning and Other (Including Compulsory Purchase Order) Proceedings*

[10] *The Town and Country Planning (Referrals and Appeals) (Written Representations Procedure)(Wales) Regulations 2015*, *The Town and Country Planning Development Management Procedure)(Wales) (Amendment) Order 2015 2015 WSI 2015 No.1330 (W.123) which is consolidated into The Town and Country Planning (Development Management Procedure (Wales) Order 2012 SI 2012/801* and the *Procedural Guidance -Planning appeals and called-in Planning applications - Wales.*

The Planning Inspectorate

Housing

Not yet updated to reflect December 2023 Framework (NPPF)

What's new since the last version

Changes highlighted in yellow made 15 December 2023:

- Updates to paras 11, 20, 21, 41, 56, 63 and 64.

  These primarily deal with the point that development plan policies are not automatically out of date if there is no 5YHLS or failure to meet HDT expectations, the legal view that they are deemed out of date and the need to address para 11 d ii even if there has been a balancing exercise to determine that there is no clear reason for refusal.

Other recent updates

- Revised wording in paragraph 50 so that it is consistent with the approach to decision making chapter

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 chapter.

2. Housing casework is likely to be encountered in various guises throughout an Inspector's career. This training material is based on practical experience and is intended to cover the range of issues that you will encounter both in early cases and also in more demanding work as your allocation level increases. It is primarily directed at appeals casework but will also be relevant in the conduct of development plan examinations.

3. The general advice in the ITM chapter The approach to decision-making applies to housing appeals as much as to any other type of appeal. The advice below should be read alongside the general advice in that chapter.

4. This training material applies to casework in England only[1] and incorporates key points from caselaw.

Legislation, national policy and guidance

5. At the outset it is important to remember that the statutory provisions in s70(1)(a) of the 1990 Act[2] and section 38(6) of the 2004 Act[3] apply to all planning appeals, including housing appeals. Those provisions are not displaced by paragraph 11 or by any other part of the National Planning Policy Framework [the Framework], as Framework paragraph 12 makes clear. In the context of s38(6), the Framework has the status of a material consideration which (when considered together with any other relevant material considerations) may or may not indicate that an appeal should be determined otherwise than in accordance with the development plan.

6. Specific policies on housing are set out in Section 5[4] (paragraphs 60-80) of the Framework. You should be familiar with those policies and also with what is said about planning for housing in Framework Section 3 'Plan-making' (paragraphs 15-37) as well as with the Framework as a whole.

7. You should also have regard to relevant sections of the government's Planning Practice Guidance [PPG], including:

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[1] PINS Wales produces separate material for Wales which summarises differences in policy

[2] [s70(2)(a) Town and Country Planning Act 1990]

[3] "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**".
[s38(6) Planning and Compulsory Purchase Act 2004 – **emphasis added**]

[4] "Delivering a sufficient supply of homes"

- Housing and economic land availability assessment
- Housing and economic needs assessment
- Housing supply and delivery[5]
- Housing – optional technical standards
- Housing needs of different groups
- Housing for older and disabled people
- Neighbourhood planning
- Rural housing
- Self-build and custom housebuilding
- Build to rent[6]
- Effective use of land
- Viability
- First Homes
- Fire safety and high-rise residential buildings (from 1 August 2021)

8. Some of the implications of this national policy and guidance are explored in the rest of this chapter. The chapter also reflects the extensive caselaw concerning housing appeals since the publication of the 2012 Framework. A new and extensively revised Framework was published in July 2018 with an updated, revised Framework following in February 2019, and a further update to the Framework being published in 2021. However, some of the caselaw referring to the 2012 Framework remains relevant, since many of its provisions have been carried forward into the Framework, albeit with modifications and, in most cases, different paragraph numbers. Inspectors may need to refer back to the 2012 Framework to understand how the caselaw relates to the new edition. The footnotes to this chapter provide extracts from, and references to, key judgments.

The implications of paragraph 11 of the Framework for housing appeal decisions

Framework paragraph 11, decision-taking section and the presumption in favour of sustainable development

[5] Formerly part of the Housing and Economic Land Availability Assessment PPG
[6] First published September 2018

9. Paragraph 11 of the Framework states that plans and decisions should apply a presumption in favour of sustainable development. This section provides an overview and there is more detail about the steps to take in decision-making in the subsequent section on structure.

10. Paragraph 11 goes on to say, in its "decision-taking" section:

For **decision-taking** this means:

c) approving development proposals that accord with an up-to-date development plan without delay[7]; or

d) where there are no relevant development plan policies, or the policies which are most important for determining the application are out-of-date[8], granting permission unless:

i. the application of policies in this Framework that protect areas or assets of particular importance provides a clear reason for refusing the development proposed[7]; or

ii. any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole.

Footnote 7 sets out an exclusive list of the policies in the Framework that paragraph 11 d) i. refers to and makes it clear that paragraph 11 d) i. does not refer to development plan policies. Footnote 8 (to paragraph 11) is explained later in this section.

11. If the development proposal accords with an up-to-date development plan, paragraph 11 c) indicates that it should be approved without delay. The presumption in favour of sustainable development would apply and would be a material consideration in favour of the proposal in the event that there is a need to undertake a further balance under s38(6). Furthermore, if the proposal falls within paragraph 11 c) it will not fall within 11 d) and so, in reaching a decision, you should not consider the matters raised by paragraph 11 d) and associated footnotes including whether or not there is a five year housing land supply.

12. If the development proposal is in conflict with a development plan which contains a relevant development plan policy, and the policies which are most important for determining the application are not out of date (including cases when footnote 8 does not apply), the proposal will not benefit from the presumption in favour of sustainable

[7] *East Staffordshire BC v SSCLG & Barwood Strategic Land* [2016] EWHC 2973 (Admin) confirms that local plans are intended to be the means by which sustainable development is secured and that up-to-date plans promote sustainable development.

development[8]. Framework paragraph 12 advises that *where a planning application conflicts with an up-to-date Local Plan permission should not usually be granted.*

13. Framework paragraph 11 d) applies where there are no relevant policies in the development plan, or the policies which are most important for determining the application are out of date. This includes situations where footnote 8, which relates to applications involving the provision of housing, applies.

14. It is for the decision-maker to determine if there are "no relevant development plan policies". The existence of a single relevant development plan policy is sufficient to prevent the application of this trigger in paragraph 11 d). There is no requirement that the relevant policy is up-to-date and it may exist in a time-expired plan as a saved policy. The relevant policy/policies do not need to be sufficient for determining the application and general development control policies are capable of relevance provided that they are not of wholly tangential significance.[9]

15. If there is a relevant policy the decision maker must then determine whether the policies which are most important for determining the application are out-of-date. This involves firstly identifying which policies are "most important" for determining the application. Once identified the decision-maker must examine each of these policies to determine whether they are out of date. An overall judgement must then be made as to whether the most important policies taken as a whole, are to be regarded as out of date for the purpose of the decision.[10] In reaching that view it may be some of the "most important" policies are more important than others in determining that appeal because of the bearing they have on the decision to be made. It would be reasonable to give more weight to those policies when considering the overall "basket" of policies.

16. Individual policies should not be treated as out of date for the purposes of paragraph 11 d) simply because of their age or because the development plan is time expired or because there is an absence of strategic policies in the plan. Rather, whether a policy becomes out-of-date and, if so, with what consequences are matters of pure planning judgement, not dependent on issues of legal interpretation[11]. Whether a policy is out-of-date or not can be assessed against the way in which it operates in relation to the determination of the particular proposal rather than solely in a generic manner[12].

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[8] This is clear from the judgments in *Barwood Strategic Land v East Staffordshire BC and SSCLG* [2017] EWCA Civ 893 and *Trustees of the Barker Mill Estates and Test Valley BC & SSCLG* [2016] EWHC 3028 (Admin) and is supported by the approach advocated in *Cheshire East BC v SSCLG* [2016] EWHC 571 (Admin) (paras 19-25).

[9] *Paul Newman Homes Ltd v SSHCLG & Aylesbury Vale District Council* [2021] EWCA Civ 15. Permission to appeal this Court of Appeal decision was refused by the Supreme Court.

[10] *Wavendon Properties Ltd v SSHCLG and Milton Keynes Council* [2019] EWHC 1524 (Admin)

[11] In Peel Investments (North) Ltd v SSHLG and Salford CC [2020] EWCA Civ 1175 the Court of Appeal endorsed the position in *Bloor Homes v SSCLG* [2017] PTSR 1283 with outdatedness depending on whether the substance of policies have been "overtaken" on the ground as a matter of fact rather than on their age or whether the plan had expired. The Court considered that it was common to have policies in a local plan relating to environmental protection whose objectives would, and were intended to, continue well beyond the plan period.

[12] Ewans v Mid Suffolk DC

Policies can be out-of-date for reasons which may include a significant change in circumstances on the ground, the housing land supply position, or the emergence of later national policy, including the Framework itself (see paragraphs 218-219 of the Framework)[13]. An example is where a policy is alleged to be out-of-date by reason of changes in the distribution of housing across 3 local planning authority areas originally established by a joint plan[14]. In considering the question of whether an individual policy is out-of-date or not it is advisable to take a 'rounded' view of all relevant factors. It does not automatically follow that a policy is up-to-date if there is a five-year housing land supply.

17. Assessing the consistency of policies with the Framework, as the principal statement of national policy, is one of the matters to consider in determining whether a policy is 'out of date' under 11d). Paragraph 219 of the Framework provides that existing policies should not be considered out-of-date simply because they were adopted prior to its publication and that due weight should be given to them according to their degree of consistency with the Framework. There is no definitive guidance or caselaw on the degree to which a policy must be inconsistent with the Framework before it becomes 'out of date'. Therefore, determining whether a policy's inconsistency with the Framework renders it 'out of date' or not for the purposes of paragraph 11 d), will be a matter of planning judgement, based on the particular circumstances of the case.

18. In addition, footnote 8 to Framework paragraph 11 d) states that:

    This includes, for applications involving the provision of housing, situations where the local planning authority cannot demonstrate a five-year supply of deliverable housing sites (with the appropriate buffer, as set out in paragraph 74); or where the Housing Delivery Test indicates that the delivery of housing was substantially below (less than 75% of) the housing requirement over the past three years.

19. Therefore paragraph 11 d) should be applied in cases where you have determined that the LPA cannot demonstrate a five-year housing land supply, and/or where the delivery of housing in its area has been substantially below the requirement over the past three years as indicated in the Housing Delivery Test results published by DLUHC.

20. So, if either of the criteria in footnote 8 apply, then paragraph 11 d) is immediately triggered. As a result, there is no discretion for Inspectors to consider for this purpose whether there are relevant development plan policies or whether policies that are most important for determining the application are out-of-date and so potentially disapply paragraph 11 d)[15].

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[13] See *Suffolk Coastal DC v Hopkins Homes Ltd & SSCLG and Richborough Estates Partnership LLP & SSCLG v Cheshire East BC* [2017] UKSC 37, para 55; *R (Wynn-Williams v SSCLG* [2014] EWHC 3374 (Admin); *Colman v SSCLG* [2013] EWHC 1138 (Admin); *Gladman Developments Ltd v Daventry DC* [2016] EWCA Civ 1146; *Borough of Telford and Wrekin v SSCLG* [2016] EWHC 3073 (Admin).

[14] Wainhomes (North West) Ltd v SSHCLG & South Ribble BC

[15] The matter was further clarified in a conceded legal challenge in 'Gatwick Bedsits Limited v SSLUHC & Anor' (Consent Order CO/3855/2021 dated 15 July 2022), namely that the application of the paragraph 11 d) ii balance is not a matter of discretion for Inspectors, where the criteria in Footnote Note 8 of the NPPF applies and paragraph 11 d) is triggered.

21. If there is no five-year housing land supply or if the Housing Delivery Test results are below 75% then this does not automatically mean that the most important development plan policies are out-of-date. You should avoid statements to this effect as this is not what the Framework says. In these circumstances, the courts have indicated that the most important policies are deemed to be out-of-date for the purpose of paragraph 11 d)[16]. However, explaining this is not necessary as a matter of course unless contested by the parties. In all cases you are nevertheless likely to have to consider the weight to be given to the conflict with development plan policies including whether or not they are in substance out-of-date elsewhere in your decision[17]. If the footnote 8 criteria are not met you should simply apply all of paragraph 11 d).

22. You will firstly need to consider whether there are areas or assets of particular importance under paragraph 11 d i. and as defined in footnote 7. If the policies in the Framework provide a clear reason for refusing permission[18], the proposal will not benefit from the presumption in favour of sustainable development. If that is not the case, then apply the test in paragraph 11(d) ii.

23. If you conclude that any adverse impacts of granting permission would not significantly and demonstrably outweigh the benefits, when assessed against the policies in the Framework as a whole, Framework paragraph 11 d) makes it clear that the presumption in favour of sustainable development will weigh in favour of the proposal.

24. On the other hand, if you reach the opposite conclusion (that any adverse impacts of granting permission **would** significantly and demonstrably outweigh the benefits, when assessed against the policies in the Framework as a whole), the proposal will not benefit from the presumption in favour of sustainable development.

25. Your conclusion on whether or not the proposal benefits from the presumption in favour of sustainable development will then be a material consideration to be weighed in the final balance when considering whether material considerations exist to outweigh the conflict with the development plan, in accordance with section 38(6).

26. The Courts have determined that paragraph 14 in the previous (2012) Framework explains in clear and complete terms the circumstances in which, and the way in which, the presumption in favour of sustainable development is intended to operate. There is no other "presumption in favour of sustainable development" in the Framework either explicit or implicit[19]. Logically this must also apply to paragraph 11

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[16] *Monkhill Ltd V SSHCLG & Waverley Borough Council* [2019] EWHC 1993 (Admin) (para 3)

[17] Gladman v SSHCLG, Corby BC and Uttlesford DC [2020] EWHC 518 (Admin) (para 82)

[18] Monkhill Ltd V SSHCLG & Waverley Borough Council [2021] EWCA Civ 74 held that the first part of paragraph 172 (National Parks, the Broads, AONBs) of the Framework was capable of sustaining a clear reason for refusal. The fact that it does not include a self-contained criteria or test (in terms of a reason to refuse), other than if major development, does not disqualify it as a relevant policy under paragraph 11(d)(i). When considered in its context clear that the policy is of a protective nature.

[19] *Barwood Strategic Land v East Staffordshire BC and SSCLG* [2017] EWCA Civ 893. This judgment of the Court of Appeal means that parties should not seek to rely on the lower (High Court) judgment in *Wychavon DC v SSCLG & Crown House Developments Ltd* [2016] EWHC 592 (Admin) to support an argument that the presumption in favour of sustainable development exists independently of Framework paragraph 11.

in the Framework, which carries forward the provisions of former paragraph 14 with minor modifications.

27. In appeal casework it is not necessary or appropriate, therefore, to make a separate assessment of whether or not the development proposal constitutes sustainable development, outside the tests contained in paragraphs 11 c) and d).[20] Furthermore, it will not be necessary to conclude in every case whether the proposal benefits from the presumption in favour of sustainable development or not.

28. If a development proposal conflicts with an up-to-date development plan and where none of the provisions in Framework paragraph 11 d) and footnote 8 apply, it cannot benefit from the presumption in favour of sustainable development. But planning permission may nonetheless be granted for it, if other material considerations indicate that the decision should be made otherwise than in accordance with the plan[21]. Whether or not this is the case is a matter of planning judgement.

29. In order to apply paragraph 11 correctly, it is important to be careful about the use of the term "sustainable development" when defining your main issues. For example, when considering proximity and access to shops and services it would be good practice to define the issue along the following lines: "whether occupants of the proposed development would have adequate access to shops and services" (rather than by reference to "sustainable development", "sustainable location" or "a sustainable form of development").

The need to determine whether or not there is a five-year housing land supply, and the extent of any shortfall

30. Because of Framework footnote 8, determining whether or not there is a five year housing land supply [5YHLS] will be an important first step in many housing appeals. It is particularly important that Inspectors clearly set out their findings in this respect by giving adequate and intelligible reasons which address the main arguments made by the parties about matters in dispute. Specific advice on assessing 5YHLS is given in the next main section of this chapter. If there is not a 5YHLS, it is likely to be necessary to determine the extent of the shortfall in supply if the plan is used to set the requirement.

31. The extent of the shortfall does not affect the operation of footnote 8 and its triggering of paragraph 11(d). However, this and other matters connected with it, must be

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[20] See *Cheshire East BC v SSCLG* [2016] EWHC 571(Admin), paras 20-24, in which Jay J said "In my judgment, this is not, and cannot be, a question of assessing whether the proposal amounts to sustainable development before applying the presumption within paragraph 14. This is not what paragraph 14 says, and in my view would be unworkable. Rather, paragraph 14 teaches decision makers how to decide whether the proposal, if approved, would constitute sustainable development."

[21] See Framework paragraph 12 and *Barwood Strategic Land v East Staffordshire BC and SSCLG* [2017] EWCA Civ 893, which confirmed the judgment in *East Staffordshire BC v SSCLG and Barwood Strategic Land* [2016] EWHC 2973, and also *Trustees of the Barker Mill Estates and Test Valley BC & SSCLG* [2016] EWHC 3028 (Admin). Parties may seek to rely on the earlier judgment in *Reigate & Banstead BC v SSCLG & Amtrose Ltd* [2017] EWHC 1562 (Admin) as authority for the proposition that there is only scope for an overall assessment of the sustainability of a proposal in cases where paragraph 14 applies. However, Lang J's reference to this in paragraph 22(ix) of the *Reigate* judgment does not reflect other judicial authorities, including *Barker Mills* to which she refers.

determined so that the exercise of planning judgement is properly carried out. This is because the degree of any shortfall will inform the weight to be given to the delivery of new housing in general, alongside other factors such as how long the shortfall is likely to persist, the steps being taken to address it and the contribution that would be made by the development in question. The degree of precision required in calculating HLS will not be the same in every case, but the broad magnitude of the shortfall should be determined[22].

32. In order to determine the weight to be given to the benefit of the development in providing additional housing, the circumstances when an Inspector can avoid dealing with this matter are limited. They may include where critical data is missing or where a conclusion would be "hopelessly speculative" but this will be the exception rather than the rule.[23]

33. However, in cases where one or both main parties assert that the LPA can demonstrate a 5YHLS, and there is no evidence to the contrary, it will not usually be necessary to consider the matter further.

34. Equally, if the parties agree that there is not a 5YHLS and also agree on the extent of the shortfall, you will not need to probe the matter further unless there is other evidence casting doubt on that agreed position.

35. Even when there is a dispute about whether or not a 5YHLS exists, or on the extent of any shortfall, it may not always be necessary for you to reach an express finding on that question or the extent of any shortfall. For example:

- If you are concluding that the proposal would cause harm, consider whether the adverse impacts would significantly and demonstrably outweigh the benefits (this is the test in Framework paragraph 11 d) ii.) even if there were a shortfall in five-year supply to the extent argued by the appellant.[241] If you consider this to be the case, you would not need to reach a firm conclusion about 5YHLS. Instead your conclusions could be expressed along the following lines: "Even if I were to conclude there is a shortfall in the five- year housing land supply on the scale suggested by the appellant, the adverse impacts of granting permission would significantly and demonstrably outweigh the benefits …" Provided that your planning balance is made on this basis there would be no conflict with relevant judgments, because your decision will be based on the maximum possible shortfall in five year supply that has been put to you and, therefore, on the maximum weight that could be attached to any benefit through increasing the supply of housing.

- Conversely, you may be able to conclude that any adverse impacts of the proposed development would not significantly and demonstrably outweigh the

[22] See judgments in *Phides Estates (Overseas) Ltd v SSCLG* [2015] EWHC 827 (Admin)*; Shropshire Council v SSCLG & BDW Trading Ltd* [2016] EWHC 2733 (Admin); *Crane v SSCLG* [2015] EWHC 425 (Admin) and *Suffolk Coastal DC v Hopkins Homes Ltd & SSCLG and Richborough Estates & SSCLG v Cheshire East BC* [2016] EWCA Civ 168 *and Hallam Land Management v SSCLG* [2018] EWCA Civ 1808

[23] *Gladman Development Ltd v SSHCLG* [2019] EWHC 128

[24] On the assumption that the appellant is arguing for a higher shortfall than the LPA.

benefits, even if the shortfall is as small as the LPA claim.[25] This is effectively the reverse of the situation described in the previous bullet point. In such circumstances you would not need to reach a definite finding on the extent of the shortfall, as the proposal would benefit from the presumption in favour of sustainable development in any event. This is provided that Framework paragraph 11 d) i, which protects areas or assets of particular importance, is not relevant.

- If the application of policies in the Framework that protect areas or assets of particular importance as listed in footnote 7 provide a clear reason for refusing the development proposed, then is no need to reach a conclusion on the 5 YHLS for the purpose of applying the balance in paragraph 11(d)(ii) because this will not apply.

36. However, the provision of additional housing and the amount of deliverable supply is likely to relevant if undertaking an ordinary balance under S38(6) of the Act or when considering the weight to be given when assessing the impact on some of the assets or areas of particular importance. For example, as a public benefit when considering heritage assets or as an other consideration when considering whether very special circumstances exist to justify development in the Green Belt.

37. If there is evidence before you that a 5YHLS is absent, then you must take the ramifications of this into account even if this is not specifically brought to your attention as part of the cases of the parties. This is because the provisions of paragraph 11 d) represent a fundamental requirement of planning policy[26]. If necessary, this test should be applied, or reasons given for disapplying it. The failure of the parties to raise it as a specific issue does not justify a decision- maker in failing to identify and apply the correct test if there is any information to indicate that a 5YHLS is lacking.

Appeal procedure

38. Where the existence of a 5YHLS or the extent of any shortfall is disputed, you may be presented with a considerable amount of evidence regarding the deliverability of particular sites. There may also be disagreement over what the 5YHLS requirement is.

39. In any such cases you will need to consider:

- Are issues relating to 5YHLS likely to be material to your decision?
- If so, does the evidence need to be tested by questioning?

40. If the answer to both these questions is yes, you are likely to judge that the appeal should be dealt with by means of a hearing or inquiry. You should discuss this with your Case Officer who will notify the parties. The same is likely to apply if the parties have

[25] On the assumption that the LPA is arguing for a lower shortfall than the appellant.

[26] *Green Lane Chertsey (Developments) Ltd v SSHCLG & Runnymede BC* [2019] EWHC 990 (Admin) (para 31)

not addressed the issue of 5YHLS in any detail, but you consider that it is material to your decision and that you need to hear evidence on it. Inspectors and case officers should be pro-active in identifying and discussing such cases well before the event date. The appeal may need to be re-allocated to another Inspector if you are not yet trained to deal with hearings or inquiries.

The Housing Delivery Test and the extent of any shortfall

41. Footnote 8 indicates that Framework paragraph 11 d) is also triggered in circumstances where the Housing Delivery Test [HDT] indicates that the delivery of housing has been substantially below the housing requirement over the past three years. Therefore, when dealing with housing appeals you also need to determine whether or not this criterion applies. The phrase "substantially below" is defined in footnote 8 as "less than 75%"[27]. The percentage of delivery achieved and the numerical extent of the shortfall will be material factors in any balancing.

42. A rulebook setting out the method for calculating the HDT result was published alongside the 2018 Framework and remains extant. Conformation of the implications if the identified housing requirement is not delivered is set out in the PPG.[28]

43. The HDT does not apply to National Park Authorities, the Broads Authority, or to development corporations without full powers. The level of detail set out in the rulebook, and the fact that the results are published by DLUHC, should mean that there is little, if any, scope for dispute over whether the test is met and the extent of any shortfall in delivery. However, the advice in the previous sub-section of this chapter should be followed in any cases where there is a significant disagreement.

Structure of decisions where Framework paragraph 11 d) applies

44. The following, broad structure is likely to be appropriate for appeal decisions in which the Framework paragraph 11 d) approach is to be followed, in order to properly reflect the statutory role of the development plan and the status of the Framework as a material consideration. It assumes that all the steps need to be taken in order to reach your decision, but this may not always be the case. Furthermore, the approach taken in individual cases will vary according to the circumstances and is ultimately a matter for the decision-maker provided that all important considerations and legal requirements are covered.

45. In the Court of Appeal *Gladman Developments Limited v SSHCLG and Corby Borough Council and Uttlesford District Council* [2021] EWCA Civ 104 it was confirmed that there is no legal justification for the court to prescribe that the balance in paragraph 11(d)(ii) of the Framework and the presumption in S38(6) must be applied in two separate stages in sequence (paragraph 65).[29] However, in order to provide clarity that

[27] For transitional years 2018 and 2019, this threshold was set at 25% and 45% respectively

[28] PPG ID: 68-042-20190722

[29] Permission to appeal this Court of Appeal judgment was refused by the Supreme Court.

both exercises have been undertaken, Inspectors are advised to deal with them distinctly in line with the steps below.

Step 1: Assess the proposal against the main issues and development plan policy

Step 2: Deal with other considerations

Step 3: Conclude on whether the proposal conflicts with the development plan as a whole

Step 4: Undertake the paragraph 11d) balance

Step 5: Make the final S38(6) balance

46. The rest of this section provides more detail about each of the steps. There is also a flow-chart at Annex 2 to this chapter summarising the overall approach. In the judgment in Monkhill Ltd V SSHCLG & Waverley Borough Council [2019] EWHC 1993 (Admin) there is a "practical summary"[30] to assist practitioners in the field and also a fuller summary of the meaning and effect of paragraph 11 of the Framework (paras 39 and 45).

Step 1 – Assess proposal against main issues and development plan policy

47. Assess the development proposal against your main issues and relevant development plan policies in the usual way (see the ITM chapter The approach to decision-making), reaching conclusions on each main issue and identifying whether or not there is a conflict with any relevant development plan policies on each issue.

48. If you find any harm when concluding against any relevant development plan policies in respect of the main issues give some indication of the magnitude of that harm. The harm identified in respect of the main issues may also include 'stand alone' harm where no relevant development plan policies apply or where the harm arises from a conflict with the Framework itself.

Step 2 – Other considerations that might amount to benefits of the proposal

49. Consider the other considerations that might weigh in favour of the proposal having regard to any weight to those benefits prescribed in the Framework and any conformity with development plan policies. In so doing, indicate the importance or weight that you give to each individual factor.

50. In considering the benefits that would occur with any proposal, careful regard should be paid to the evidence provided in support and a realistic view taken of the likelihood of those benefits materialising and the impact they would have bearing in mind their scale and consequences.

[30] Endorsed by the Court of Appeal *Monkhill Ltd V SSHCLG & Waverley Borough Council* [2021] EWCA 74 Civ. Permission to appeal this Court of Appeal judgment was refused by the Supreme Court.

51. Consideration should also be given as to whether those benefits are short-term or can be expected to endure. Furthermore, care should be taken to consider the significance of any benefits arising from the proposal separately from the harm that might also ensue. 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.

52. The level of benefit associated with a particular development will also be affected by the number of dwellings proposed and therefore the extent of their contribution to the supply of housing. The type and tenure of any new houses may also be relevant. In cases where the HDT demonstrates that the delivery of housing has been below the housing requirement over the past three years, and especially where it has been "substantially below" (Framework footnote 8), the extent of the shortfall in delivery may be a relevant consideration when assessing the benefits.

Step 3 – Whether the proposal conflict with the development plan as a whole

53. This step requires a conclusion to be reached as to whether the proposal conflicts with the development plan as a whole taking into account policies that both oppose or support the proposed development. As part of this process consideration may need to be given to how many policies are engaged, whether they are central or peripheral, whether they are out of date and the degree of conformity or not with them.

54. As part of this process, you may need to give weight to the degree to which the development either conflicts or accords with the individual policies. This approach is advocated rather than giving weight to the policies themselves as this will avoid giving the impression that you are reducing the statutory weight which the development plan carries in the final section 38(6) balance. Furthermore, the level of conflict will be related to the particular proposal in question rather than providing a general statement about the weight to be given to individual policies.

55. In this regard, Framework paragraph 219 states that due weight should be given to relevant policies in existing plans according to their degree of consistency with the Framework. This may require an analysis of in what way, and to what extent, the policies in question are or are not consistent with the Framework, in order to determine the weight to be accorded to each policy conflict.[31] The fact that a particular development plan policy may be chronologically old is, in itself, irrelevant for the purposes of assessing its consistency with policies in the Framework.

56. Footnote 8 of the Framework 'triggers' the need for a development proposal to be considered against paragraph 11 d) ii. but this, in itself, does not determine the weight to be attached to the conflict with any development plan policies relevant to that proposal. If there is no 5YHLS then paragraph 11 d) applies but the Framework does not prescribe the weight which should be given to the conflict with those development plan policies in those circumstances. Whether they are in fact out-of-date and, if so, in

[31] See *Daventry DC v SSCLG and Gladman* [2015] EWHC 3459 (Admin), subsequently confirmed in the Court of Appeal – *Gladman Developments Ltd v Daventry DC* [2016] EWCA Civ 1146.

what respects and how much weight should be attached to them is a matter to be assessed. Such policies are not simply left out of account[32] although any such assessment is likely to take account of the absence of a 5YHLS.

57. The weight given to conflicts with development plan policies may also be affected by the circumstances of the case, including the particular purpose of the policy, whether there is a failure to achieve a 5YHLS and the reasons for this, the extent of the shortfall and any steps being taken to address it.[33] Thus it will usually be necessary also to consider how far the housing land supply falls short of the five-year requirement, as this could affect the weight you give to any conflict with development plan policy. This is the point where the need to give an indication of the extent of any shortfall highlighted in the judgments at footnote 17 could be expressed.

Step 4 – Paragraph 11 d) balance

58. Make the assessment required by Framework paragraph 11 d) having previously established that it applies because of the 5YHLS position, the HDT, the absence of any relevant development plan policies or as the policies which are most important for determining the application are out-of-date. This will involve consideration of whether the application of policies in the Framework that protect areas or assets of particular importance provide a clear reason for refusal and the paragraph 11 d) ii. balance. This should be undertaken distinctly and separately from Step 5. This step will, however, lead to a conclusion as whether or not the proposal benefits from the presumption in favour of sustainable development which is a material consideration.

Framework paragraph 11 d) i.

59. The first step in applying Framework paragraph 11 d) is to consider, under paragraph 11 d) i., whether there are any policies in the Framework which protect areas or assets of particular importance that are relevant to the proposed development before you. If there are, the test in paragraph 11 d) i. should be applied.[34] If there are not, you should move on directly to the test in paragraph 11 d) ii.

60. Framework footnote 7 provides a complete and exhaustive list of those Framework policies to which paragraph 11 d) i. refers: there are no others, and footnote 7 specifically indicates that paragraph 11 d) i. does not refer to development plan policies. Where any of the footnote 7 Framework policies are relevant to the proposed development, it should first be assessed against those relevant policies. The

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[32] Gladman v SSHCLG, Corby BC and Uttlesford DC [2020] EWHC 518 (Admin) (paras 82, 97 103), subsequently confirmed in the Court of Appeal - Gladman v SSHCLG, Corby BC and Uttlesford DC [2021] EWCA Civ 104 (paras 51-53, 59, 60 & 61)

[33] See the Crane judgment above, and *Suffolk Coastal DC & SSCLG v Hopkins Homes Ltd & Richborough Estates & SSCLG v Cheshire East BC* [2016] EWCA Civ 168.

[34] This approach, of dealing with paragraph 11 d) i. first, is informed by the judgments in *Forest of Dean DC v SSCLG & Gladman Developments Ltd* [2016] EWHC 421 (Admin), and in *Borough of Telford & Wrekin v SSCLG* [2016] EWHC 3073 (Admin).

provisions in Framework paragraph 11 d) ii. do not apply to paragraph 11 d) i. Instead, any relevant footnote 7 Framework policies should be applied in their own terms.[35]

61. Where the Framework policies listed in footnote 7 require a balance to be struck, such as paragraph 148 relating to very special circumstances in the Green Belt and in paragraphs 201 and 202 which relate to heritage assets, that balance must not be confused with the one in Framework paragraph 11 d) ii. and should be undertaken first and separately. The Court of Appeal judgment in Monkhill (paragraph 34) also indicates that a balance of harm and benefits for non-major development in Areas of Outstanding Natural Beauty should be undertaken to determine whether there is a clear reason for refusing the development proposed.

62. Where the outcome of the assessment against the footnote 7 Framework policies provides a clear reason for refusing the development proposed,[36] this will be an important material consideration in the final section 38(6) balance (step 5 below). The proposal will not benefit from the presumption in favour of sustainable development. This includes habitats sites unless an appropriate assessment has concluded that integrity of the site will not be adversely affected as set out in paragraph 182 of the Framework. In any scenario where there is a clear reason for refusing the development proposed paragraph 11 d) ii. is irrelevant and must not be applied.[37]

63. If, on the other hand, the assessment against those footnote 7 Framework policies does **not** provide a clear reason for refusing permission, it will be necessary to go on and apply Framework paragraph 11 d) ii. If the application of the footnote 7 Framework policies requires all relevant considerations to be weighed in the balance before deciding that there is no clear reason for refusing permission (such as Green Belt) then the outcome will be the same. However, a clear finding in relation to paragraph 11 d) ii. and the presumption in favour of sustainable development may need to be made. Any reasoning in this respect can nevertheless be very brief and refer back to the previous balancing exercise. A fuller paragraph 11 d) ii balance will be required if all relevant considerations have not previously been taken into account.

Framework paragraph 11 d) ii.

64. Where there are no footnote 7 policies that are relevant to the proposed development then paragraph 11 d) ii. should be applied. The test in Framework paragraph 11 d) ii. is whether any adverse impacts of granting permission would significantly and demonstrably outweigh the benefits, when assessed against the policies in the Framework taken as a whole. This test, which is commonly referred to as "the tilted

[35] See *Forest of Dean DC v SSCLG & Gladman Developments Ltd* [2016] EWHC 421 (Admin), para 37.

[36] In *Monkhill Ltd V SSHCLG & Waverley Borough Council* [2021] EWCA 74 Civ the Court of Appeal held that the first part of paragraph 172 (new paragraph 176) of the Framework was capable of sustaining a clear reason for refusal. The fact that it does not include a self-contained criteria or test (in terms of a reason to refuse), other than if major development, does not disqualify it as a relevant policy under paragraph 11(d)(i).

[37] *Monkhill Ltd V SSHCLG & Waverley Borough Council* [2021] EWCA 74 Civ

balance", must not be reversed.[38] Although the courts have used this term it is not part of national policy and you should consider whether using it in your decision will be understood by all parties.

65. Note that the paragraph 11 d) ii. test refers to the policies in the Framework taken as a whole. You should therefore consider the development proposal against those Framework policies which weigh against the development proposal as well as those that weigh in favour of it. The Court of Appeal judgment in *Gladman Developments Limited v SSHCLG and Corby Borough Council and Uttlesford District Council* [2021] EWCA Civ 104 confirms that paragraph 11 d) ii. does not require any development plan policies to be excluded from the "tilted balance". Whilst development plan policies are therefore not irrelevant and may give support to the policies in the Framework, the wording of paragraph 11 d) ii. is clear that the adverse impacts and benefits should be assessed against the policies in the Framework taken as a whole. In order to distinguish this part of the decision from the subsequent S38(6) balance in Step 5, it is recommended that the focus should be on the importance to be attached to the adverse impacts and benefits themselves rather than simply a reliance on whether a proposal accords or conflicts with the development plan.

66. At this stage you are simply determining whether the presumption in favour of sustainable development is relevant to the case as a material consideration. In so doing, paragraph 9 of the Framework advises that the economic, social and environmental objectives of sustainable development are not criteria against which every decision should be judged.

67. Balancing all these various considerations against one another and the attribution of weight is a matter of judgement for you as the decision-maker. as the Courts have repeatedly emphasised. However, Inspectors should remember that the starting point[39] is that permission should be granted unless the adverse impacts would significantly and demonstrably outweigh the benefits and these terms should be applied and given their proper meaning.

68. In applying the paragraph 11 d) ii. test, there is, however, no need to attempt a quasi-scientific exercise, allocating finely-calibrated degrees of weight to each consideration. However, it should be clear how much importance or weight you give to each relevant factor. In that way it should be apparent why you have concluded, either that any adverse impacts of granting permission would significantly and demonstrably outweigh the benefits, when assessed against the policies in the Framework taken as a whole, or that they would not. That will require you to exercise your planning judgement and to explain clearly and succinctly how his has been done.

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[38] In *Wenman v SSCLG* [2015] EWHC 925 (Admin) the Court held that the Inspector erred in applying the wrong test when concluding that that "the overall significant benefits do not and could not outweigh the substantial harm to the surrounding area".

[39] *Suffolk Coastal DC v Hopkins Homes Ltd & SSCLG and Richborough Estates Partnership LLP & SSCLG v Cheshire East Borough Council* [2017] UKSC 37 (para 85).

Framework paragraph 14: application of the paragraph 11 d) with regard to neighbourhood plans

69. Paragraph 14 of the Framework applies in situations where paragraph 11 d) is triggered and where the proposed development conflicts with a neighbourhood plan. In such circumstances, paragraph 14 advises that the adverse impact of allowing development that conflicts with the neighbourhood plan is likely to significantly and demonstrably outweigh the benefits, provided all of the following apply:

    a) the neighbourhood plan became part of the development plan two years or less before the date on which the decision is made;

    b) the neighbourhood plan contains policies and allocations to meet its identified housing requirement;

    c) the local planning authority has at least a three year supply of deliverable housing sites (against its five year housing supply requirement, including the appropriate buffer as set out in Framework paragraph 74); and

    d) the local planning authority's housing delivery, as measured by the HDT from November 2018 onwards, was at least 45% of that required over the previous three years.

70. It is important to be aware that paragraph 14 does not change the footnote 8 criteria under which Framework paragraph 11 d) may be triggered. But the statement that "the adverse impact of allowing development that conflicts with the neighbourhood plan is likely to significantly and demonstrably outweigh the benefits" is a statement of Government policy, and so it will be an important material consideration in any appeal to which paragraph 14 applies. This does not mean that every such appeal must automatically be dismissed. But your decision must make it clear that the policy statement in paragraph 14 has been considered when applying paragraph 11 d) and that appropriate weight has been given to it.

71. Inspectors also need to be very aware of the fact that paragraph 14 a) makes "the date on which the decision is made" one of the criteria for determining whether or not the paragraph 14 policy statement applies. Accordingly, Inspectors and PINS need to make every effort to issue promptly decisions to which the policy statement may apply. This will avoid a situation arising in which accusations could be made that the decision had been delayed so that the policy statement did not apply.

Step 5 – the final S38(6) balance

72. In step 5 you should undertake the final s38(6) balance, by determining whether or not the outcome of the assessment at Step 4, and any other material considerations, indicate that planning permission should be granted notwithstanding any conflict with the development plan as a whole identified at Step 3.

73. Applications for planning permission must be determined in accordance with the development plan unless material considerations indicate otherwise, in accordance with section 38(6) of the Planning and Compulsory Purchase Act (2004). The Framework is only one such material consideration and even where paragraph 11 applies, it remains necessary to reach a final conclusion against section 38(6).

74. Assuming you have concluded in Step 3 of your decision that the development proposal conflicts with the development plan as a whole,[40] you will therefore need to consider explicitly whether the outcome of the Framework paragraph 11 d) process indicates that your decision should be taken otherwise than in accordance with the development plan. That will not be the case if the outcome of the paragraph 11 d) process indicates that permission should be refused. But if the outcome of that process indicates that the development proposal benefits from the presumption in favour of sustainable development, that may well be a material consideration of sufficient weight to indicate that planning permission should be granted notwithstanding the conflict with the development plan. That is a matter for your planning judgement.

75. Note that in the *Barwood Strategic Land v East Staffordshire* judgment the Court of Appeal also made it clear that the presumption in favour of sustainable development is not a statutory presumption and that it is not irrebuttable. When the section 38(6) duty is lawfully performed, a development which does have the benefit of the "tilted balance" may still be found unacceptable, and equally a development which does not have the benefit of the "tilted balance" and cannot earn the presumption in favour of sustainable development may still merit the grant of planning permission. Again, this is a matter of planning judgement.

76. You must also consider whether there are any other relevant material considerations, apart from the Framework, that might indicate that your decision should be taken otherwise than in accordance with the development plan. If there are, they must also be weighed in the section 38(6) balance.

77. Your final conclusion against section 38(6) will therefore be either that the decision should be taken in accordance with the development plan, or that material considerations indicate that the decision should be taken otherwise than in accordance with it. That conclusion will determine the outcome of the appeal.

Assessing whether or not a five-year housing land supply exists, in accordance with Framework paragraph 74, and the extent of any shortfall in supply

78. This section provides guidance on assessing whether or not the LPA can demonstrate a five-year supply of housing land (5YHLS). Assessing this will be necessary where

[40] Note that if there are no relevant development plan policies you will not have been able to reach such a conclusion.

the existence or otherwise of a 5YHLS, and/or the extent of any shortfall in that supply, is material to your decision.

79. The Framework provides guidance on this topic. Furthermore, the PPG chapters on Housing and economic needs assessment, Housing and economic land availability assessment and Housing supply and delivery are relevant These provide details on calculating housing need via the standard method, five year land supply and the HDT.

80. The process of assessing whether a five year housing land supply exists essentially consists of establishing on the one hand the **requirement** for housing land over the relevant five-year period (henceforth "the 5YHLS requirement" for short), and on the other the **supply** of deliverable sites to meet that requirement. To avoid ambiguity, it is good practice to use the terms "requirement" and "supply" consistently with these meanings. You should ensure that you and the parties are clear which five-year period is being assessed.

81. Paragraph 75 of the Framework provides LPAs with specific means by which a 5YHLS can be demonstrated. However, this is not the only way that this can be achieved as the PPG explains that this can also be done by using the latest available evidence such as land availability assessments or monitoring reports[41]. This section provides guidance on assessing whether a 5YHLS exists in cases where this has not been established in accordance with paragraph 75.

82. If no 5YLS exists, it will be important to gauge how large it is at least in broad terms[42]. There may be some cases where it is not possible to determine this because of, for instance, missing data but these will be the exception rather than the rule. Cogent and clearly justifiable reasons are needed for not reaching a finding in respect of the 5YHLS position.[43]

83. The requirement to demonstrate a 5YHLS is purely quantitative and therefore does not require an assessment of the qualitative nature of the supply in relation to housing need. For example, if there is a significant shortfall in affordable housing provision notwithstanding the existence of a 5 year supply.[44] However, this consideration is likely to be relevant to the overall planning balance.

84. Be aware that any conclusion you reach on the existence or otherwise of a 5YHLS may be cited as evidence in subsequent appeals in the same local authority area. However, caselaw has made it clear that an Inspector at a section 78 appeal is not

[41] Para 68-004-20190722

[42] *Hallam Land Management v SSCLG* [2018] EWCA Civ 1808

[43] *Gladman Development Ltd v SSHCLG* [2019] EWHC 128 (Admin)

[44] *Peel Investment Ltd v SSHCLG* [2019] EWHC 2143 (Admin)

"making an authoritative assessment which binds the local planning authority in other cases"[45].

85. Where you find there is less than a 5YHLS, you should avoid commenting about what the position might have been had there been a 5YHLS.

86. Annex 1 contains a useful flow-chart to assist in identifying whether a 5YHLS exists.

Demonstrating a 5YHLS in accordance with Framework paragraph 75

87. Para 004 of the PPG on Housing Supply and Delivery sets out that for decision- taking purposes a local authority will need to be able to demonstrate a 5YHLS when dealing with applications and appeals. This can be done either by using the latest available evidence or by confirming it using a recently adopted plan or subsequent annual position statement as set out in paragraph 75 of the Framework.

88. Framework paragraph 75 says that a 5YHLS can be demonstrated in either of the following circumstances:

- The 5YHLS has been established in a recently adopted plan; or
- The 5YHLS has been established in a subsequent annual position statement which has produced through engagement with stakeholders, has been considered by the SoS, and incorporates any recommendations made by the SoS.

89. Note that if the LPA wishes to use either provision of paragraph 75 to demonstrate that it has a 5YHLS, the 5YHLS requirement must include a minimum 10% buffer. This is made clear in Framework paragraph 74 b). A 20% buffer should, however, be added if the HDT indicates that delivery has fallen below 85% of the requirement.[46]

90. The PPG indicates that when confirming their supply through the examination process, local planning authorities will need to be clear that they are seeking to do this and to undertake engagement at the draft plan stage.[47]

91. For the purposes of paragraph 75, plans adopted between 1 May and 31 October in one year will be considered "recently adopted" until 31 October of the following year, and plans adopted between 1 November in one year and 30 April in the following year will be considered "recently-adopted" until 31 October in the same year. In other words, a plan adopted in December in one year will be "recently adopted" until 31 October in the next. These timings reflect the fact that the HDT results are due to be published in November.

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[45] *Shropshire Council v SSCLG and BDW Trading Ltd* [2016] EWHC 2733 (Admin), para 30.

[46] PPG ID: 68-010-20190722

[47] PPG ID: 68-010-20190722

92. Annual position statements, as referenced in paragraph 75, are not obligatory but LPAs may choose to prepare them if they want to establish that they can demonstrate a 5YHLS. They are examined by PINS on behalf of the SoS and LPAs must make any modifications to them that PINS recommends. Further details about this are in the PPG on Housing supply and delivery at paras 012- 018.[48] Information to aid Inspectors when considering and making recommendations on Annual Position Statements is at Annex 7.

93. Provided all the relevant requirements of Framework paragraph 75 are met, a recently adopted plan or an up-to-date annual position statement will conclusively demonstrate that the LPA has a 5YHLS. In these circumstances there will be no need to investigate the matter further.

What is the 5YHLS requirement figure?

94. Framework paragraph 74 says:

> Local planning authorities should identify and update annually a supply of specific deliverable sites sufficient to provide a minimum of five years' worth of housing against their housing requirement set out in adopted strategic policies, or against their local housing need[49] where the strategic policies are more than five years old, unless the strategic policies have been reviewed and found not to require updating (Framework footnote 39). The supply of specific deliverable sites should in addition include a buffer (moved forward from later in the plan period) of:
>
> a) 5% to ensure choice and competition in the market for land; or
>
> b) 10% where the local planning authority wishes to demonstrate a five year supply of deliverable sites through an annual position statement or recently adopted plan, to account for any fluctuations in the market during that year; or
>
> c) 20% where there has been significant under delivery of housing over the previous three years, to improve the prospect of achieving the planned supply. Framework footnote 41 confirms that this will be measured against the HDT where this indicates that delivery was below 85% of the housing requirement.[50]

95. From this it can be seen that the approach to setting the 5YHLS requirement will depend on whether or not the strategic policies that set out the LPA's housing requirement figure for the plan period as a whole are more than five years old. If those policies are five years old or less, the housing requirement figure they contain will form the basis for calculating the 5YHLS. (This approach will also apply if those policies are more than five years old but have been reviewed by the LPA and found not to need

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[48] PPG ID: 68-012-018-20190722

[49] As defined in the Framework Annex 2 Glossary

[50] PPG ID: 68-022-20190722

updating – Framework footnote 39.) If, on the other hand, those policies are more than five years old, the 5YHLS requirement will be based on the figure set by the local housing need assessment for the LPA area.

96. In *East Riding of Yorkshire Council v SSLUHC & Gladman Developments Ltd* [2021] EWHC 3271 (Admin), it was found that paragraph 74 of the Framework represents a clear binary approach depending on whether or not the local plan is five years old. The judge in this case essentially rejected the use of a 'hybrid approach' to calculating housing requirement (that is, one which used a combination of the housing requirement figure from the local plan and the local housing need assessment figure). This judgment also clarifies the distinction between the use of the local housing need figure due to the approach of the fifth anniversary of the adoption of the plan, and the housing requirement set out in an emerging local plan which will be imminently adopted (see paragraphs 42 and 44 of judgment).

97. The PPG confirms that there are exceptions where the strategic policy-making authorities do not align with local authority boundaries such as National Parks and the Broads Authority. These authorities may continue to use a method determined locally.[51] The PPG also provides advise about calculating the 5YHLS in Development Corporation areas and where local government reorganisation has taken place.[52] Areas with joint plans have the option to monitor 5YHLS over the entire plan area or as individual authorities but this should be established through plan-making.[53]

98. Both the Framework and the PPG[54] make it clear that the national policy expectation is that either one method or the other should be used in calculating the requirement. If faced with arguments that the housing requirement should be different from either of these two methods of calculation, Inspectors should consider these very carefully and critically given the straightforward provisions of national policy in this respect. This might arise if an emerging plan is under preparation and has a different figure or if specific local circumstances are cited. Paragraph 61 of the Framework refers to exceptional circumstances that might justify an alternative approach but that relates to strategic policy making. Indeed, a plan examination will take a broader overview in a way that cannot be replicated in an appeal and is the proper forum for determining whether exceptional circumstances exist. Whilst other considerations may justify a departure from national policy the provisions of paragraph 61 should not be relied upon to justify this.

99. In accordance with S38(5) of the Planning and Compulsory Purchase Act 2004 the most recently adopted policies will need to be used for the purposes of calculating

[51] PPG ID: 2a-014-20190220

[52] PPG ID: 68-024 & 025-20190722

[53] PPG ID: 68-028-20190722

[54] PPG ID: 68-005-20190722

5YHLS if there is a conflict between adopted strategic housing requirements. Such a situation might arise when a new spatial development strategy is published.[55]

100. In order to establish the 5YHLS requirement figure, it is necessary first to work out how much housing is required to be provided in the relevant five-year period, and then to determine whether a 5% or 20% buffer should be applied.[56] To avoid the danger of errors, you should aim to avoid the need to calculate the 5YHLS requirement figure, or any other figures, yourself. Instead it is advisable, wherever possible, to ask the parties to make any necessary calculations and to agree them between themselves as far as is possible.

Calculating the 5YHLS figure based on plan policies

101. In plan policies, the housing requirement is usually expressed as an average number of dwellings that should be developed in each year of the plan period. But it is important to be aware that in some cases the annual requirement varies throughout the plan period – this is sometimes referred to as a "stepped requirement" or "stepped trajectory". Any such variation or "stepping" in the annual requirement figure should be set out in the plan policies and you should take account of it when calculating the 5YHLS requirement figure for any given five-year period.[57]

102. If the housing requirement figure in the plan policies is set out as a range, the lower end of the range should be taken as the basis for calculating the 5YHLS requirement figure.[58]

103. If there has been any shortfall in housing provision since the start of the plan period, this should also be taken into account when calculating the 5YHLS requirement figure. The PPG[59] makes clear reference to shortfalls in completions against planned requirements which should be calculated from the base date of the adopted plan. Furthermore, the PPG advises that the shortfall should be added to the plan requirement for the next five-year period. Dealing with past under delivery over a longer period may be made as part of the plan- making and examination period rather than on a case by case basis on appeal.

104. Plan policies establish the full housing requirement from the plan's start date. It would not be appropriate therefore to add any under-supply (or "backlog") from before the start date of the local plan to the 5YHLS requirement, because it will already have been taken into account in setting the requirement for the plan period.

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[55] PPG ID: 68-006-21090722

[56] A 10% buffer is required only if the LPA are seeking to establish the 5YHLS using the method set out in Framework paragraph 75.

[57] PPG ID:68-026-20190722

[58] PPG ID:68-027-20190722

[59] PPG ID:68-031-20190722

105. You may find that the terms “under-supply”, “shortfall” and “backlog” are used interchangeably by the parties. The key distinction is between any under- supply occurring before the plan’s start date and any occurring after it. If the terminology is unclear, seek clarification.

106. The PPG also says that where areas deliver more completions than required, the additional supply can be used to offset any shortfalls against requirements from previous years.[60] In *Tewkesbury Borough Council v SSHCLG, J J Gallagher Limited and Richard Cook* [2021] EWHC 2782 (Admin) the judge observed that this advice related to a particular circumstance where there has been some shortfall as well as oversupply in previous years. The judgment also confirmed that there is no requirement in the Framework for oversupply prior to the period for which a five-year housing land supply is being calculated, to be taken into account.

107. The judge said: “Whilst it is clear that the intention of the Framework is that planning authorities should meet the housing requirements set out in adopted strategic policies, that does not necessarily mean that any oversupply in earlier years as in the present case will automatically be counted within the five-year supply calculation.” Rather, both the Framework and the PPG are silent on the matter or do not deal with it. Therefore, because there is a gap in the coverage of relevant policies, the judgment explains that the exercise of planning judgement by the decision-maker as to whether to take oversupply into account is called for.

108. Having regard to the PPG, “oversupply” can be taken to be the delivery of additional housing units over and above those required by the annualised requirement since the base date of the development plan. The effect of taking oversupply into account would be to reduce the future requirement rather than add to future supply. However, any housing delivered before the base date of the plan will be irrelevant.

109. If the inclusion or exclusion of past oversupply would make no material difference to the five-year housing land supply position or to the outcome of the appeal, then it will be unnecessary to make detailed findings on the point.

110. In deciding whether to take future supply into account if this is necessary, the particular circumstances of the case should be borne in mind. As postulated by the Secretary of State in the Tewksbury judgment there may be several ways of dealing with oversupply so that it is not simply a binary choice. These include:

- Not taking oversupply into account as there is no requirement to do so in paragraph 74 of the Framework; or

- Take oversupply into account to reduce the requirement over the next 5 years; or

[60] PPG ID:68-032-20190722

- Take oversupply into account but apply this over the remaining plan period so that identified housing need is met over that timespan in line with paragraph 66 of the Framework; or

- Take some oversupply into account.

111. In deciding whether, and to what extent, to take oversupply into account, consideration should be given to relevant paragraphs of the Framework as well as the evidence presented. How this is dealt with might have regard to the following:

    - What were the findings of the local plan Inspector in relation to five-year housing supply as set out in their report? Was the housing requirement set to take account of any oversupply since the base date of the plan? Was the plan adopted with a shortfall in supply to be addressed by a review? (see detailed guidance in the chapter on Housing for Local Plan Examinations);

    - What is the base date of the plan? (this may also be referred to as the start of the plan period but it may not be the same) This is when the housing supply calculation was made although the plan might have been adopted some years later. When did the oversupply take place in relation to the base date and to the date of the appeal?;

    - What does the oversupply comprise? Were the additional housing units allocations brought forward more quickly than expected or were they unexpected windfall developments?;

    - What is the general picture regarding housing land supply? For example, is reliance being placed on development that took place some years ago or is the future supply position healthy with the expectation that the full housing requirement across the plan period will be met?

112. Evidence in these respects should not be requested as a matter of course and the issue will only arise if raised by the parties. However, where such information is available then it will assist in deciding whether any, all or just some of the additional units of the past oversupply should be taken into account.

113. If the requirement in the local plan has been set with reference to the local housing need assessment then it is based on the most recent workplace-based affordability ratios and therefore can be taken to be an up-to-date assessment of need. Accordingly any oversupply claimed since before the assessment was made should be discounted because the latest position on need is reflected in the calculation. The next section deals with this in more detail.

Calculating the 5YHLS based on the local housing need assessment

114. If the plan policies which set out the housing requirement for the plan period are more than five years old, and a review has not found that they do not need updating, the 5YHLS requirement will be based on the local housing need assessment for the plan area. The local housing need assessment uses a standard method set out in the PPG chapter *Housing need assessment.* In essence, for all LPAs apart from those in the 20 most populous cities and urban centres, the standard method takes a baseline of

national household projections and applies an adjustment to take account of affordability based on the most recent workplace-based affordability ratios. Any increase is capped at 40% above whichever is the higher of the projected household growth for the area over the 10 year period or the existing annual average housing requirement figure.

115. For local authorities in the 20 most populous cities and urban centres only, the standard method includes an additional step, known as the "cities and urban centres uplift". This consists of adding a 35% uplift to the figure resulting from the previous steps described above. This uplift applies in decision-making from 16 June 2021. The PPG provides a list of the local authorities to which the cities and urban centres uplift applies, as of December 2020. Inspectors should, however, be aware that because of the method used to draw up the list, places can move in and out of the list as population estimates change[61].

116. The standard method produces an annual figure, which then needs to be multiplied by 5 to give the 5YHLS requirement in relevant appeals (subject to the addition of a buffer, as described in the next sub-section). As it is based on known data from specific sources and an exact formula there should be limited scope for disagreement about the final figure arising from the standard method. However, where the strategic policies are less than 5 years old then the housing requirement should be taken from the local plan in accordance of paragraph 74 of the Framework.

Should the buffer be 5% or 20%?

117. Paragraph 74 of the Framework requires that an additional buffer of 5% is included in the 5YHLS requirement, to ensure choice and competition in the market for land. This additional buffer is moved forward from later in the plan period (and so it does not constitute an addition to the housing requirement for the plan period as a whole).

118. However, a buffer of 20% (also moved forward from later in the plan period) should be added where there has been "significant under delivery of housing over the previous three years". Framework footnote 41 makes it clear that a 20% buffer will be required if delivery has been less than 85% of the requirement over the past three years, as measured by the HDT.

At what point should the 5YHLS be calculated?

119. Very often a LPA will use the monitoring year as the basis for the calculation of the 5YHLS. However, the PPG indicates that when dealing with appeals they should use the "latest available evidence"[62]. This may include formal land availability assessments or the Annual Monitoring Report but should not preclude further information from being taken into account as necessary.

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[61] See PPG ID: 2a-033-20201216

[62] PPG ID: 68-004-20190722

Which sites can be included in the five-year supply?

120. In order for housing sites to be included in the five-year supply, paragraph 74 of the Framework requires them to be deliverable. The Framework's Glossary defines "deliverable" as follows:

    To be considered deliverable, sites for housing should be available now, offer a suitable location for development now, and be achievable with a realistic prospect that housing will be delivered on the site within five years. In particular:

    a) sites which do not involve major development and have planning permission, and all sites with detailed planning permission, should be considered deliverable until permission expires, unless there is clear evidence that homes will not be delivered within five years (for example because they are no longer viable, there is no longer a demand for the type of units or sites have long term phasing plans).

    b) where a site has outline planning permission for major development, has been allocated in a development plan, has a grant of permission in principle, or is identified on a brownfield register, it should only be considered deliverable where there is clear evidence that housing completions will begin on site within five years.

121. This provides a clear division between sites considered in be deliverable in principle under a) and others. In one category sites are assumed to be deliverable unless there is "clear evidence" to the contrary and under b) "clear evidence" of their deliverability is required. The PPG chapter on Housing supply and delivery gives advice on what might constitute the "clear evidence" referred to in the Framework.[63]

122. The words "in particular" shows that categories a) and b) do not set out the only types of site covered by the definition. Therefore it does not contain a closed list. This has been accepted by the Secretary of State case in submitting to judgment following a legal challenge (*East Northamptonshire Council v Secretary of State for Housing, Communities and Local* Government case number CO/917/2020 – Consent Order sealed 12 May 2020). The Order says: *"The proper interpretation of the definition is that any site which can be shown to be 'available now, offer a suitable location for development now, and be achievable with a realistic prospect that housing will be delivered on the site within five years' will meet the definition; and that the examples given in categories (a) and (b) are not exhaustive of all the categories of site which are capable of meeting that definition. Whether a site does or does not meet the definition is a matter of planning judgment on the evidence available."* The Order does not have the same status as a judgment made by the courts but it nevertheless provides clarity.

123. This means that provided there is "clear evidence" about deliverability and a "realistic prospect" that completions will occur within 5 years, there is no reason to exclude sites that are not specifically mentioned in categories a) and b) as a matter of course. Furthermore, as noted above, the PPG refers to the use of the "latest

[63] PPG ID: 68-007-20190722

available evidence" and so there is no barrier in principle to consider information about sites after any base date for assessment.

124. National policy or advice makes no mention of lapse rates or optimism bias as considerations which justify reducing the level of supply. Given that the definition of deliverable requires there to be clear evidence in this respect this is unlikely to be justified.

Prematurity

125. It may be argued that a development proposal would be premature because it would undermine the plan-making process. Consider any such arguments against the advice in the PPG which answers the question, "in what circumstances might it be justifiable to refuse planning permission on the grounds of prematurity?"[64]

Affordable housing

Background

126. The Glossary to the Framework provides a definition of affordable housing, which includes affordable housing for rent, starter homes, discounted market sales and other affordable routes to home ownership. These are different to the 2012 Framework which previously excluded low cost market housing. If development plan policies are based on the 2012 definition, then it may be necessary to consider whether those policies are consistent with the revised Framework or out-of-date and the weight to be given to any conflict with them (paragraph 219 of the Framework). If there is conflict with existing policies because of the type of provision proposed, then the Framework will be a material consideration to weigh in the balance. Similar considerations also apply to other provisions of the Framework set out below as development plan policies may also not fully accord with them.

127. Although it also contains other references to affordable housing the Framework provides, in summary, that:

- The need for affordable housing should be assessed and reflected in planning policies. [paragraph 62];
- Policies should specify the type of affordable housing required applying the definitions in the Glossary and expect it to be met on-site unless both of the specified exceptions applies. [paragraph 63];
- Provision of affordable housing should not be sought for residential developments that are not major developments (where 10 or more homes will be provided or where the site area is 0.5 hectares or more according to the Glossary). In designated rural areas (National Parks, Areas of Outstanding Natural Beauty and

[64] PPG ID 21b-014-20140306

other areas designated under s157 of the Housing Act 1985[65] as per the Glossary) the threshold may be set at 5 units or fewer. [paragraph 64];

- To support the re-use of brownfield land, any affordable housing contribution should be reduced by a proportionate amount where vacant buildings are being reused or redeveloped. [paragraph 64];

- Where major development includes housing at least 10% of the homes should be available for affordable home ownership unless this would exceed the level of affordable housing in the area or significantly prejudice the ability to meet the identified affordable housing needs of specific groups. There are also further other listed exceptions to the 10% requirement. [paragraph 65];

- The development of entry-level exception sites offering one or more types of affordable housing, as defined in the Glossary, should be supported. [paragraph 72]; and

- In rural areas opportunities to bring forward rural exception sites to provide affordable housing to meet identified local needs should be supported, including considering whether allowing some market housing on these sites would help to facilitate this. [paragraph 78]

128. The Framework also allows for limited affordable housing for local community needs as an exception to inappropriate development in the Green Belt and where infilling or redevelopment of previously developed land would contribute to meeting an identified affordable housing need subject to the impact on the openness of the Green Belt (paragraph 149 f) and g)).

129. The PPG chapter Housing and economic needs assessment covers the calculation of affordable housing need and supply as follows and provides further detailed guidance:

- How can affordable housing need be calculated?[66]

- How can the current unmet gross need for affordable housing need be calculated?[67]

- How can the current total affordable housing supply available be calculated?[68]

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[65] The Housing (Right to Buy) (Designated Rural Areas and Designated Regions) (England) Orders 2016 (SI 2016/587) and 2018 (2018/265) have designated specific listed parishes within a number of regions (Chichester, Malvern Hills, Shropshire, Wychavon, North Kesteven and Stroud) as rural areas under s157(3) of the 1985 Act.

[66] PPG ID: 2a-019-20190220

[67] PPG ID: 2a-020-20190220

[68] PPG ID: 2a-022-20190220

130. Many development plans contain a policy requiring affordable housing in relation to all or some new housing developments. Quite often the policy accepts that the amount of affordable housing could vary depending on the financial viability of the development. There may also be a Supplementary Planning Document which sets out the LPA's approach in more detail.

131. The Written Ministerial Statement (WMS) of November 2014 dealt with the matter of thresholds beneath which affordable housing contributions should not be sought from small scale and self-build development. However, this statement of national planning policy has now been overtaken by the threshold specified in paragraph 64 of the Revised Framework. This refers to not seeking affordable housing provision for residential developments that are not major developments (less than 10 being provided) rather than 10 or less as per the WMS.

132. The thresholds in the development plan may not accord with the Framework and may seek the provision of affordable housing for schemes of less than 10 dwellings. In deciding the weight to be given to the conflict with the relevant development plan policy Inspectors should give appropriate weight to the Framework as national policy and have regard to paragraph 219 which indicates that the date of the policy is not determinative. Otherwise in deciding whether to determine an appeal other than in accordance with that policy of the development plan Inspectors should take account of the evidence put to them. Relevant factors might include when the policy was prepared in relation to the WMS, consideration given to the issue at a local plan examination, affordable housing need in the area as an overall proportion and the amount of development from small sites compared to other areas. Furthermore, the WMS refers to the "disproportionate burden" of developer contributions on small-scale developers, custom and self-builders and this may also be relevant when considering any conflict between the threshold in the Framework and that in the development plan.

133. The PPG chapter *Planning obligations* also contains details of specific circumstances where contributions should not be sought from developers. It provides that planning obligations for affordable housing should only be sought for major developments of 10 or more homes[69]. However, this restriction does not apply to rural exception sites (as defined in the Glossary to the Framework)[70].

134. Paragraph 65 of the Framework sets out an expectation that on major developments (where 10 or more dwellings and sites over 0.5 ha) at least 10% of the homes should be available for affordable home ownership. Exemptions to this 10% requirement include specialist accommodation for groups of people with specific needs, such as purpose-built accommodation for the elderly or students. However, it is important to note that these provisions relate to affordable home *ownership* as opposed to housing for rent. Inspectors may need to consider whether national policy is a material consideration that outweighs the provisions of the development plan, in terms of either

[69] PPG ID:23b-023-20190901

[70] PPG ID: 23b-024-20190315

the type or amount of affordable housing to be provided, and whether the exceptions apply.

135. The paragraph 65 exemption also applies to schemes providing solely Build to Rent homes. However, Built to Rent PPG advises that, "20% is generally a suitable benchmark for the level of affordable private rent homes to be provided (and maintained in perpetuity) in any build to rent scheme"[71]. The PPG does allow developers to make a case for a scheme to differ from this benchmark if it is demonstrated a scheme cannot viably support the provision of affordable housing. This includes the provision of no affordable housing, where viability evidence supports this conclusion.

136. Detailed guidance on the application of vacant building credit (VBC) is given in the PPG[72] and indicates that national policy provides an incentive for brownfield development containing vacant buildings. Paragraph 64 and footnote 30 of the revised Framework do not specifically refer to VBC but set out the approach to be followed where vacant buildings are reused or redeveloped.

137. The PPG makes it clear that in considering how VBC should apply to a particular development, LPAs should have regard to the intention of national policy to incentivise brownfield development. In doing so, it may be appropriate to consider whether the building has been made vacant for the sole purposes of redevelopment, and whether the building is covered by an extant or recently- expired planning permission for the same or substantially the same development.

138. There is further guidance about securing affordable housing in the section on planning obligations and conditions of this chapter.

Casework issues

139. When affordable housing arises in casework consider the following:

- Should affordable housing be a "main issue" or an "other matter"? It is likely to be a main issue where the LPA contends that affordable housing should be provided but it is not – or where the LPA considers the provision being made is not sufficient or is not of the right mix – i.e. if it is a contested issue. In these circumstances, the appellant may have argued that the development would not be viable if a specific level of affordable housing were to be provided.

- If affordable housing is a main issue, could it be defined as: whether or not the proposed development would make adequate provision for affordable housing?

- Should the provision of affordable housing be a factor that is weighed in favour of the proposal? (This may be argued by, for example, a developer promoting residential development, including a proportion of affordable housing, in a location

[71] PPG ID: 60-002-20180913

[72] PPG paragraphs 23b-026-20190315, 23b-027-20190315, & 23b-028-20193015

that does not accord with the Local Plan.) Affordable housing should generally be regarded as a benefit as it would address the needs of a group with specific housing requirements. This may be particularly the case if it would help meet an identified and outstanding need even if the provision of affordable housing is already required by development plan policy.

- The need for affordable housing will have been comprehensively assessed in the preparation and examination of the local plan, including in the setting of the plan's housing requirement. Where the plan does not seek to meet the full need for affordable housing, this may be for sound reasons which have been endorsed by the Local Plan Inspector. Accordingly, if the proposed development would be in conflict with a recently adopted local plan, the decision maker should take particular care to establish why it might be justified to set aside a recently adopted plan in order to provide more affordable housing.

Choice of appeal procedure

140. Consider whether the case is suitable for the written representations procedure:

- Is affordable housing likely to be central to your decision?
- Has substantial evidence been provided about viability?
- Have experts reached differing conclusions about viability? If the answer to these questions is yes, then a hearing or inquiry may be necessary to allow the evidence to be properly tested.

Viability

141. The Revised Framework says the following about viability at paragraph 58:

"Where up-to-date policies have set out the contributions expected from development, planning applications that comply with them should be assumed to be viable. It is up to the applicant to demonstrate whether particular circumstances justify the need for a viability assessment at the application stage. The weight to be given to a viability assessment is a matter for the decision maker, having regard to all the circumstances in the case, including whether the plan and the viability evidence underpinning it is up to date, and any change in site circumstances since the plan was brought into force. All viability assessments, including any undertaken at the plan-making stage, should reflect the recommended approach in national planning guidance, including standardised inputs, and should be made publicly available."

142. The PPG chapter *Viability* gives specific guidance on viability and decision taking in terms of how it should be assessed and reviewed during the lifetime of a project.[73] This should be taken into account if viability is a contested issue and an assessment is required.

[73] PPG ID: 10-(007-009)-20180724

Planning obligations and conditions

143. In order for affordable housing to be provided effectively, arrangements must be made to transfer it to an affordable housing provider, to ensure that appropriate occupancy criteria are defined and enforced, and to ensure that it remains affordable to first and subsequent occupiers. The legal certainty provided by a planning obligation (either a section 106 agreement or unilateral undertaking) makes it the best means of ensuring that these arrangements are effective. However, there is nothing in national policy or advice that requires an obligation to be entered into in order to assure the delivery of affordable housing.

144. If the evidence in a given case indicates that affordable housing should be provided you should, therefore, normally expect that a completed planning obligation providing the affordable housing is submitted with the appeal, or at the hearing or inquiry. However, where the parties have been genuinely unable to complete the planning obligation before a hearing or inquiry closes, you may allow limited time after the close (a maximum of one or at most two weeks) for the obligation to be submitted so that you may take it into account in your decision.

145. There is a detailed checklist for planning obligations in PINS' Planning obligations: good practice advice.

146. In the absence of a planning obligation, it may be possible in limited circumstances to use a planning condition to secure affordable housing. However, you should be aware of the advice in the PPG that a positively-worded condition that requires the applicant to enter into a planning obligation is unlikely to be enforceable. The PPG chapter Use of Planning Conditions further advises that:

> "A negatively worded condition limiting the development that can take place until a planning obligation or other agreement has been entered into is unlikely to be appropriate in the majority of cases. […] However, 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 must also be met."
>
> "Where consideration is given to using a negatively worded condition of this sort, it is important that the local planning authority discusses with the applicant before planning permission is granted the need for a planning obligation or other agreement and the appropriateness of using a condition. The heads of terms or principal terms need to be agreed prior to planning permission being granted to ensure that the test of necessity is met and in the interests of transparency."[74]

147. It is a matter of judgement for the decision-maker as whether all these tests in the PPG are met, so that the use of a condition to secure affordable housing is appropriate. They are quite specific and only occur in exceptional circumstances and

[74] PPG ID: 21a-010-20190723

so the reasoning to support the use of a condition should address the relevant tests directly.

148. Even if a proposed condition does not explicitly require a legal agreement, but leaves the method of securing the affordable housing vague, it will be reasonable to conclude that a legal agreement will be required and that the PPG tests regarding the use of conditions to secure obligations should still be applied. This is because the judgment in *R (on the application of Skelmersdale Ltd Partnership) v West Lancashire BC* [2016] EWCA Civ 1260 confirmed that the interpretation of a condition is based on "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".

149. In particular, in *Skelmersdale*, the phrase "submits a scheme which commits to retaining their presence as a retailer" was interpreted as requiring a legally- binding obligation. Consequently, a condition such as that at Annex 4 to this chapter requiring a scheme to "ensure" that dwellings remain as affordable housing (or other similar wording) could also be reasonably interpreted as requiring a legal agreement, and so engage the PPG tests. In order for it to meet those tests, therefore, you would need to be satisfied, before imposing the condition, that there are exceptional circumstances to justify this and that the tests set out at para 010 of the PPG are met.

150. An example condition that could be used where the PPG's exceptional circumstances are met is set out in Annex 4. Before the condition is applied, the numbered points in it should be expanded to include relevant details that have been provided as heads of terms, and in particular to set out the mechanism by which the housing will be secured as affordable. This is necessary in order to meet the PPG requirement that *the heads of terms or principal terms need to be agreed prior to planning permission being granted to ensure that the test of necessity is met and in the interests of transparency* (see above).

151. For example, the condition might need to set out the overall percentage of affordable housing, the respective percentages of social and affordable rented and shared ownership housing, the phasing arrangements – linking delivery of affordable housing to specified stages in the commencement or occupation of the market housing – and arrangements for involvement of a registered social landlord. The level of detail required will be for you to determine, having regard to the PPG guidance on necessity and transparency.

152. If you are presented with a condition to which the PPG "exceptional circumstances" tests apply, but those tests are not met, it is unlikely that the use of the Annex 4 condition – or any other condition requiring a legal agreement – to secure affordable housing would be appropriate. In the absence of an alternative means (such as a completed planning obligation) of securing affordable housing which is required as part of the development, it may be that the appeal would have to be dismissed. This is not automatic but will depend on the level of harm caused by any shortfall in affordable housing, the development plan conflict and other material considerations.

153. If you are presented with a condition setting out a method of securing the affordable housing and you are satisfied that it does not require a legal agreement notwithstanding the *Skelmersdale* judgment, the PPG tests will not apply. However, the condition should be very carefully scrutinised to ensure that it will be effective in securing affordable housing. If there is any doubt on this matter you will need to

consider whether – in the absence of a planning obligation – the appeal should be dismissed.

154. In hearing or inquiry cases where it appears to you that there will need to be discussion over the means of securing affordable housing and their compliance with guidance in the PPG, it is good practice to draw the parties' attention to the PPG in advance and give them advance notice of the questions that you will need to ask.

155. There have been past appeal decisions, including by the Secretary of State, in which conditions have been used to secure affordable housing even though the PPG "exceptional circumstances" tests have not been met. Many of those decisions, however, pre-date the PPG and/or the *Skelmersdale* judgment. In any event, whatever may have been done elsewhere, it is for you to satisfy yourself that, in cases where affordable housing is required, it is capable of being delivered by the method that is proposed.

First Homes

Background

156. On 24 May 2021, the Government introduced a new First Homes policy through a Written Ministerial Statement and accompanying Planning Practice Guidance. The WMS constitutes national policy alongside the National Planning Policy Framework and should be treated as such. This First Homes policy comes into effect on 28 June 2021, subject to transitional arrangements, as outlined below.

157. First Homes are a kind of discounted market sale housing which:

    a) must be discounted by a minimum of 30% against the market value;

    b) are sold to a person or persons meeting the First Homes eligibility criteria;

    c) on their first sale, will have a restriction registered on the title at HM Land Registry to ensure this discount (as a percentage of current market value) and certain other restrictions are passed on at each subsequent title transfer; and,

    d) after the discount has been applied, the first sale must be at a price no higher than £250,000 (or £420,000 in Greater London).[75]

158. Homes meeting the criteria for First Homes are considered to meet the definition of affordable housing for planning purposes.

159. First Homes are the Government's preferred discounted market tenure and should account for at least 25% of all affordable housing units delivered by developers

[75] PPG ID: 70-001-20210524

through planning obligations, in line with affordable housing requirements of para.65 of the Framework.

160. As First Homes are an affordable housing product, the guidance in the Affordable Housing section of this ITM chapter is relevant. Where developments are exempt from delivering affordable home ownership products under the Framework para.65, they are also exempt from the requirement to deliver First Homes. Developers of First Homes may also obtain an exemption from the requirement to pay CIL under the Community Infrastructure Regulations 2010.

161. The PPG states that First Homes should be physically indistinguishable from equivalent market homes in both quality and size. They are therefore expected to comply with any other applicable policies such as those relating to space, accessibility, and design.

162. Paragraph 014 of the PPG states that a policy compliant planning application for First Homes is one which:

- Has a minimum of 25% of affordable units on-site as First Homes (where on-site affordable is required), and
- Seeks to capture the same amount of value as would be captured under the local authority's up-to-date published policy.[76]

163. Further advice can be found in First Homes Planning Practice Guidance.

164. A Model S106 Agreement has been published by DLUCH. These model clauses are for use by local authorities and home builders preparing s106 agreements delivering First Homes through developer contributions.

Transitional Arrangements for Appeals

165. Paragraph 020 of the PPG outlines the circumstances in which the First Homes policy requirement does not apply. These include areas that are subject to the transitional arrangements for plan-making; applications where significant pre-application engagement has taken place before 28 March 2022, and sites where planning permission is already in place or determined by 28 December 2021.

166. If appeals include First Homes then local planning authorities are advised to take a flexible approach in accepting them as an alternative tenure type.

167. The WMS states that where the transitional arrangements do not apply then local planning authorities should make clear how existing policies should be interpreted using the most appropriate tool available to them. This could include (but is not limited to) an interim policy statement or updating development plan policies.

[76] PPG ID: 70-014-20210524

168. If there is a dispute about the inclusion of First Homes in developments or their proportion as part of the affordable housing contribution then Inspectors will need to decide the weight to be given to the national policy requirement for First Homes when judged against existing development plan policies and any interim policy statement.

Exception Sites

169. The WMS and PPG outline a First Homes Exception Site policy. These exception sites may be on land which is not already allocated for housing. They should:

- Comprise First Homes, and
- Be adjacent to existing settlements, proportionate in size to them, not compromise the protection given to areas or assets of particular importance in the National Planning Policy Framework[77], and comply with any local design policies and standards.

170. The WMS states that these exception sites should be supported by Local Authorities unless the need for such homes is already being met within the local authority's area. First Homes exception sites may deliver a small proportion of market housing provided it is necessary to ensure overall viability of the site. This should be backed up by evidence.

171. Guidance states that what constitutes a 'proportionate development' will vary depending on local circumstances. Plan-makers are encouraged to set policies which specify their approach to determining the proportionality of First Homes exception site proposals.

172. PPG makes clear that First Homes exception sites cannot come forward in areas designated as Green Belt or in designated rural areas as defined by Annex 2 of the Framework.

Starter Homes

173. Inspectors should be aware that Starter Homes Planning Practice Guidance was withdrawn on 7 February 2020, however reference to Starter Homes remains within the definition of affordable housing in the National Planning Policy Framework and the Housing and Planning Act 2016.

174. On 2 March 2015, the Government introduced a new national starter homes exception site planning policy through a Written Ministerial Statement to provide more discounted, high quality homes for young first time buyers without burdening the tax payer. Chapter 1 of the Housing and Planning Act 2016 sets out various provisions relating to starter homes including a general duty to promote the supply of starter homes. There is a definition in section 2 that a starter home is a building or part of a building that:

[77] That is, those areas referred to in footnote 7 of the Framework.

a) is a new dwelling,

b) is available for purchase by qualifying first-time buyers only,

c) is to be sold at a discount of at least 20% of the market value,

d) is to be sold for less than the price cap, and

e) is subject to any restrictions on sale or letting specified in regulations made by the Secretary of State.

175. Starter homes are included within the definition of affordable housing in the Glossary to the Framework. This confirms that the definition of a starter home should reflect the meaning set out in statute and any such secondary legislation at the time of plan-preparation or decision-making. Where secondary legislation has the effect of limiting a household's eligibility to purchase a starter home to those with a particular maximum level of household income, those restrictions should be used.

176. Furthermore, paragraph 72 of the Framework indicates that development of entry-level exception sites, suitable for first time buyers should be supported, unless the need for such homes is already being met. Further parameters for such development are also given.

177. The National Starter Homes Register, managed by the Home Builders Federation allowing first time buyers to register their interest in the scheme, provides a valuable source of information about potential demand for starter homes and identifying who may be eligible for starter homes developments. Local planning authorities can use this as evidence when developing their Local Plan and associated documents. However, consultation on proposed *Starter Homes Regulations* took place in 2016 but the Regulations are not yet in force. Therefore, local plans are unlikely to contain policies setting detailed requirements for starter homes.

178. Withdrawn PPG on Starter Homes referred to an exception site policy which enabled applications for development for starter homes on under-used or unviable industrial and commercial land that has not been currently identified for housing. Such exception sites are likely to be under-used or no longer viable for commercial or industrial purposes, but with remediation and infrastructure costs that are not too great so as to render Starter Homes financially unviable. The PPG also encouraged local planning authorities not to seek section 106 affordable housing and tariff-style contributions that would otherwise apply.

179. PPG indicated that the types and sizes of site suitable for Starter Homes are likely to vary across the country, and will reflect the pattern of existing and former industrial and commercial use as well as local market conditions. Land in both public and private ownership can be considered.

180. The guidance stated that applications for Starter Homes on such exception sites should be approved unless the local planning authority can demonstrate that there are overriding conflicts with the Framework that cannot be mitigated.

181. Local planning authorities should work with landowners and developers to secure a supply of starter homes exception sites suitable for housing for first time buyers. As

such homes will come forward as windfall sites, local planning authorities should not make an allowance for them in their five-year housing land supply until such time as they have compelling evidence that they will consistently become available in the local area. Local planning authorities can count starter homes against their housing requirement and can use their discretion to include a small proportion of market homes on starter homes exception sites where it is necessary for the financial viability of the site. The market homes on the site will attract section 106 or Community Infrastructure Levy contributions in the usual way.

Self-build and custom housebuilding

Background

182. The Government is actively seeking to increase the supply of custom- and self-build housing[78]. In October 2014 the Government published a consultation on various measures (including a 'Right to Build') to improve the availability of suitable, serviced plots of land for custom-build. This led to the Self-Build and Custom Housebuilding Act 2015 which received Royal Assent in March 2015. The Act requires local planning authorities to establish and publicise a local register of custom-builders who wish to acquire suitable land to build their own home. If an LPA elects to set a "local connection" test then it will be required to have two parts to the register: Part 1 will include all those individuals and associations who meet all the eligibility requirements, and these count towards the demand for suitable serviced plots for which the LPA must grant permission (see paragraph below); and Part 2 includes those who meet all the edibility criteria **except** for the local connection test – the entries on Part 2 do not count towards the demand, but the LPA must have regard to them when exercising their planning, housing and other relevant functions. The detailed requirements are set out in the Self-build and Custom Housebuilding Regulations 2016 (SI 2016/950).

183. The Housing and Planning Act of 2016 added a duty to grant planning permission subject to exemptions at S2A. This provides that authorities must give suitable development permission in respect of enough serviced plots of land to meet the demand for self-build and custom housebuilding in the authority's area arising in each base period. However, there is scope for an exemption under S2B of the 2016 Act which may be applied for under Regulation 11.

184. The legislation does not specify how LPAs must record suitable permissions, but the PPG[79] provides examples of what methods an LPA may wish to consider to determine whether an application or development is for self-build or custom housebuilding:

[78] Custom-build housing typically involves individuals or groups of individuals commissioning the construction of a new home or homes from a builder, contractor or package company or, in a modest number of cases, physically building a house for themselves or working with sub-contractors. This latter form of development is also known as "self-build" (i.e. custom-build encompasses self-build).

[79] PPG 038: 57-038-20210508

- Whether developers have identified that self-build or custom build plots will be included as part of their development and it is clear that the initial owner of the homes will have primary input into its final design and layout;

- Whether a planning application references self-build or custom build and it is clear that the initial owner of the homes will have primary input into its final design and layout; and

- Whether a Community Infrastructure Levy or Section 106 exemption has been granted for a particular development.

185. There is further guidance in the PPG chapter Self-build and Custom Housebuilding including how relevant authorities can increase the number of planning permissions which are suitable for self-build and custom housebuilding. It also indicates that at the end of each base period authorities have 3 years to give permission for an equivalent number of plots of land. The PPG chapter Housing Needs of Different Groups also provides advice about how local planning authorities should obtain a robust assessment of demand for this type of housing in their areas.[80]

Issues in casework

186. Depending on the circumstances of the case, including any relevant development plan policies, it may be necessary for planning permission to incorporate some means of ensuring that custom-/self-build proposals are constructed in this manner. As it is not clear how certain matters relating to self-build (e.g. CIL exemption and ownership for a period of 3 years) could be secured through a planning condition, a section 106 obligation is likely to the most appropriate method to secure these. This would also bind the requirement to successors in title (should the property be sold in the future).

187. If insufficient permissions have been given to meet demand in accordance with the statutory duty, then this will be a material consideration in favour of granting permission.

188. The Right to Build task force which is supported by DLUHC produces good practice guidance which can be accessed here:

https://righttobuild.org.uk/resources/planning_good_practice_guidance/

Development of garden land and density

National planning policy

189. The Framework states that:

- “land in built-up areas such as private residential gardens” is excluded from

[80] PPG ID: 67-003-20190722

- the definition of previously developed land in the Glossary81

- Plans should consider the case for setting out policies to resist inappropriate development of residential gardens, for example where development would cause harm to the local area

[paragraph 71]

- Planning decisions should support development that makes efficient use of land, taking into account (amongst other things) the desirability of maintaining an area's prevailing character and setting (including residential gardens)

[paragraph 124]

- Where there is an existing or anticipated shortage of land for meeting identified housing needs, it is especially important that planning decisions avoid homes being built at low densities and ensure that developments makes optimal use of the potential of each site

[paragraph 125]

- LPAs should refuse applications which they consider fail to make efficient use of land, taking into account the policies in the Framework

[paragraph 125]

- A flexible approach should be taken in applying policies or guidance relating to daylight and sunlight which would otherwise inhibit the efficient use of a site as long as the resulting scheme would provide acceptable living standards.

[paragraph 125]

Casework issues

190. A significant proportion of appeal cases involve proposals to develop garden land. Such proposals often give rise to local concerns about the effect on the character and appearance of the area, the living conditions of neighbours, parking and highway safety. Consideration should be given to the arguments raised by the parties as well as relevant development plan policies and any Supplementary Planning Documents or Guidance.

191. If the effect on character and appearance is an issue you will need to assess the contribution that the garden currently makes before moving on to look at the potential effects on the streetscene and/or the wider character and appearance of the area. Depending on the circumstances and the evidence provided - consider:

[81] *Dartford BC v SSCLG [2016] EWHC 635 (Admin)* confirmed that this does not extend to private residential gardens that are not located in built up-areas, e.g. in open countryside.

- Would the proposed development fit in locally? How would it compare in terms of plot sizes, the width of road frontages and density?
- How would it compare in terms of distances between buildings and the spatial relationships between houses?
- How would it compare in terms of spaciousness?
- Would it affect the extent and nature of garden planting?
- Would it comply with the Framework guidance on achieving well-designed places in section 12 (paragraphs 126 – 136)?

192. In some cases you may be referred to examples where the development of garden land has previously been permitted in the surrounding area. Look carefully at the evidence. Questions to consider might include:

- How similar are the proposals and the circumstances? (if you have evidence on this)
- Do the examples provide a local context for the appeal proposal or help define the character of the area?
- Have such examples added to or detracted from the character and appearance of the area?
- Have there been any material changes in circumstances, including in respect of policy?

Development plan policy

193. As ever, the starting point for decision-making will be any relevant policies in the development plan. In particular:

- Are the policies consistent with the revised Framework?
- Does the policy specifically refer to gardens and/or previously developed land? If so, does a policy which prioritises the development of previously developed land or which precludes the development of greenfield sites offer any support in principle to the development of garden land?
- Does the policy accept the development of unallocated land within settlements regardless of whether or not it is previously developed? If so, does it continue to offer support, in principle, to the development of garden land?

194. Some older development plans may pre-date the 2012 Framework and include reference to definitions under *Planning Policy Statement 3: Housing.* Any such policies are now likely to be out-of-date although any such judgement should be based on the provisions of paragraph 219 of the revised Framework. Paragraph 71 of the revised Framework is, however, largely unchanged from the previous version (paragraph 53) in relation to residential gardens. Nevertheless, it does not in itself,

resist inappropriate development of residential gardens but rather indicates that LPAs should consider the matter for themselves. Paragraphs 124 and 125 of the revised Framework aim to achieve appropriate densities and are more specific than paragraph 47 of the 2012 Framework which referred to LPAs setting out their own approach to housing density to reflect local circumstances. These paragraphs will be important material considerations.

Definitions

195. The Framework definition of previously developed land explicitly excludes "land in built-up areas such as private residential gardens". See the *Dartford* judgment at footnote 14 which confirmed that this does not apply to private residential gardens in open countryside. A definition of "built-up" is not included in the Framework although "built-up areas" are not synonymous with urban areas and may be found in rural locations if there is development around the site or within the wider area. It will be for you to determine whether a site falls within the Framework definition of previously developed land based on the facts and circumstances of the particular case. This will include whether or not the area is "built-up", if the site should be regarded as a "private residential garden" and if the relevant part of the site is developed or not. However, if these matters are not central to the outcome of the appeal then it may not be necessary to reach a firm conclusion on this point.

Feasibility of resumption of use

196. Paragraph 99 of the Framework sates that existing open space, sports and recreational buildings and land, including playing fields, should not be built on unless:

    a) An assessment has been undertaken which has clearly shown the open space, buildings or land to be surplus to requirements; or

    b) The loss resulting from the proposed development would be replaced by equivalent or better provision in terms of quantity and quality in a suitable location; or

    c) The development is for alternative sports and recreational provision, the benefits of which clearly outweigh the loss of the current or former use.

197. When considering whether the existing site is surplus to requirements as per 99 a), the likelihood of resumption of existing use is a material consideration in the balancing exercise undertaken between loss of that use and benefits of the development proposals.[82] Inspectors should carefully consider evidence put forward to them about the prospect of a site remaining redundant, should the application fail.

198. Likelihood of resumption of use may also be a factor to consider when other protected recreational uses are at risk of being lost due to fragmentation. The weight to be given

[82] See paragraph 35 of *Millwood Designer Homes Ltd v SSCHLG* [2021] EWHC 3464 (Admin)

to any evidence provided as to the feasibility of resuming this use is a matter for the decision-maker.

Housing in the countryside and villages

National policy and guidance

199. Rural housing is covered at paragraphs 78 to 80 of the Revised Framework. In summary, planning decisions should be responsive to local circumstances in rural areas, support opportunities to bring forward rural exceptions sites, locate housing where it will enhance or maintain the vitality of rural communities and avoid the development of isolated homes in the countryside unless one of the five listed circumstances applies.

200. According to the Court of Appeal in *Braintree DC v SSCLG, Greyread Ltd & Granville Developments Ltd* [2018] EWCA Civ 610 *"…*the word "isolated" in the phrase "isolated homes in the countryside" simply connotes a dwelling that is physically separate or remote from a settlement. Whether a proposed new dwelling is, or is not, "isolated" in this sense will be a matter of fact and planning judgment for the decision-maker in the particular circumstances of the case in hand" (paragraph 31)[83]. However, paragraph 80 does not imply that a dwelling has to be "isolated" in order for restrictive policies to apply and there may be other circumstances when development in the countryside should be avoided. So a proposed development may not be "isolated" as defined but this does not mean that it will accord with development plan policies that seek to prevent the location of new housing outside of settlements.

201. In relation to paragraph 80 d) (paragraph 79 d) of the 2019 version of the Framework) the judgment in Wiltshire Council v SSHCLG & Mr W. Howse [2020] EWHC 954 (Admin) is relevant. The appeal concerned the change of use of annexed accommodation from ancillary to independent residential accommodation. The court established that the subdivision of an existing residential dwelling within paragraph 80 d) should be taken to mean the dwelling as one physical building rather than a wider residential unit encompassing other buildings. Allowing the sub-division of residential units by allowing separate buildings to become separate dwellings is beyond the limited exception allowed for in national policy.

202. Further guidance is set out within the PPG chapter *Housing needs of different groups.*

Development plans

203. You may need to consider whether or not the development plan policies can reasonably be regarded as consistent with the revised Framework. Are they distinctive local policies that promote sustainable development? Plan policies may also identify which rural settlements are appropriate to receive housing development,

[83] The CoA's finding on this matter was endorsed in City and Country Bramshill Ltd v SSHLG and others [2021] EWCA Civ 320

and at what scale. Provided they are supported by appropriate and robust evidence, such policies need not necessarily be inconsistent just because they adopt a particular approach (such as the use of settlement boundaries or development limits) which is not specifically referred to in the Framework or the PPG. In particular, there is nothing in the revised Framework to indicate that the definition of settlement boundaries is no longer a suitable policy response and therefore that such policies are bound to be out-of-date having regard to paragraph 219.

Casework

204. Common concerns expressed by LPAs are that new housing would be located outside existing settlements and would conflict with development plan policy regarding development in the countryside. This often arises in cases where the appeal site is located at or near the edge of a settlement - whether or not defined by a settlement boundary.

205. Depending on the cases advanced by the parties - questions to consider could include:

- What is the underlying concern behind the reason for refusal? What are the objectives of the relevant development plan policies? For example, is the aim of policy to protect the character and appearance of the countryside and rural settlements, to ensure that car-reliant development is avoided or to focus development where it would support the vitality of settlements?[84] Do any of those issues arise in your case?

- What is the relationship between the site and the settlement – visually, physically and functionally? What is the relationship between the site and open countryside surrounding the settlement? Is the site more closely related to the settlement or to the surrounding countryside?

- Is there evidence that the proposal would enhance or maintain the vitality of rural communities? Are there existing services, such as a shop, pub or school, in the settlement or in a nearby village, which residents of the new housing could reasonably be expected to use and thereby support?

- Would occupants be reliant on the use of a car? What options would there be to travel without using a car? What services are there within walking distance? Would they meet some everyday needs? Would the walk feel safe to users? Is there a bus service? Where does it go and how often? What about options for cycling?

[84] In *Ribble Valley Borough Council v SSHCLG & Oakmere Homes* [2021] EWHC 3092 (Admin), the judge found that interpreting a policy in context requires the court to consider the aim of the policy, which in turn requires consideration of the aim of the core strategy and adopted plan. In this case, the clear aim of the core strategy to protect the open countryside from development meant that a development plan policy should be understood as restricting consideration of 'consolidation' or 'rounding off' of proposed developments to principle settlements only (see paragraphs 22-25 of judgment).

206. In considering the issues in this last bullet point, paragraph 105 of the Framework provides that opportunities to maximise sustainable transport solutions will vary from urban to rural areas and that this should be taken into account in decision-making.

207. Evidently you would not expect the same level of bus service, for example, in a village as in an urban area. It will be a matter for your judgment in each case whether there are realistic alternatives to the car for any of the journeys that future residents of the development are likely to make. Even if there are no evening bus services, for example, it may be possible to travel to and from the nearest town by bus for work or shopping. In cases where there are few or no alternatives to the car, you will need to consider the extent of any negative consequences, for example in terms of increased traffic levels or isolation for those without a car. However, locational considerations should encompass a range of relevant matters as outlined in paragraph 52 above and not be solely focussed on the likelihood of future occupiers being able to access services and facilities by means other than the car.

208. It will also be important to bear in mind that conflict between a proposal and a development plan policy or policies that seek to achieve a particular distribution of development across an LPA area is also likely to result in harm in achieving the planned strategy. Even if the proposed development is visually acceptable then this aspect of the scheme should be conspicuously identified and weighed in the overall balance. See High Court judgment in *East Staffordshire BC v SSCLG and Barwood Strategic Land* [2016] EWHC 2973 (Admin).[85]

Housing for rural workers

Background

209. The revised Framework allows for isolated homes in the countryside where there is an essential need for a rural worker, including those taking majority control of a farm business, to live permanently at or near their place of work in the countryside (paragraph 80).

210. The PPG chapter *Housing needs of different groups* sets out some considerations which could be taken into account when assessing the need for isolated homes in the countryside for essential rural workers[86]. These include:

- evidence of the necessity for a rural worker to live at, or in close proximity to, their place of work to ensure the effective operation of an agricultural, forestry or similar

[85] The Court of Appeal ([2017] EWCA Civ 893) subsequently concurred with this judgment in relation to the presumption in favour of sustainable development. But the High Court judge's comments are nonetheless pertinent and were not contradicted "But he [the Inspector] needed to address the "*cons*" inherent in his acceptance that the Proposed Development collided with these policies and did not generate exceptional benefits, in some appropriate and reasoned manner. As to the level of detail required this will be case specific and will take into account the arguments advanced. One indication of the level of detail required would be whether the Inspector has addressed the "*cons*" in a level of detail which is commensurate or proportionate with that with which he has addressed the "*pros*" (paragraph 52).

[86] PPG ID 67-010-20190722

land-based rural enterprise (for instance, where farm animals or agricultural processes require on-site attention 24-hours a day and where otherwise there would be a risk to human or animal health or from crime, or to deal quickly with emergencies that could cause serious loss of crops or products);

- the degree to which there is confidence that the enterprise will remain viable for the foreseeable future;
- whether the provision of an additional dwelling on site is essential for the continued viability of a farming business through the farm succession process;
- whether the need could be met through improvements to existing accommodation on the site, providing such improvements are appropriate taking into account their scale, appearance and the local context; and
- in the case of new enterprises, whether it is appropriate to consider granting permission for a temporary dwelling for a trial period.

211. The PPG also makes it clear that employment on an assembly or food packing line, or the need to accommodate seasonal workers, will not generally be sufficient to justify isolated rural dwellings[87].

212. The 2012 Framework replaced the detailed policy on agricultural, forestry and other occupational dwellings which was previously in Annex A to *Planning Policy Statement 7: Sustainable Development in Rural Areas.* This set out functional and financial tests for permanent and temporary dwellings. The criteria previously set out in Annex A no longer have any status as national planning policy but they are nonetheless retained in some development plans. There is nothing in the Revised Framework to preclude LPAs from devising local policies setting out how the question of "essential need" is to be judged although there is no longer any national policy requirement relating to financial considerations. Nevertheless there may be a need to consider the degree to which relevant policies are consistent with the revised Framework.

Issues in casework

213. Your framing of the main issue will depend on the circumstances of the case. However, having regard to the Framework, the following examples might be useful:

- whether there is an essential need for a dwelling to accommodate a rural worker
- whether, having regard to national planning policy that seeks to avoid isolated new homes in the countryside, there is an essential need for a rural worker to live permanently at or near their place of work

214. Appeals casework can often focus on one or both of the following questions:

[87] PPG ID 67-010-20190722

- Is it necessary for a worker to live at or near their place of work in order for that work/enterprise to function properly?

- Is the work/enterprise in question likely to endure in the long term? (i.e. is there a significant risk that the enterprise might cease in the near future, leaving behind a new dwelling that would not otherwise have been approved?)

215. Depending on the cases put by the parties, you may need to consider the following:

    - Does a worker need to be on or near the site at most times, including during the night – i.e. outside regular hours of work? Have other measures been considered (e.g. automatic alarms in the event of power failure)? Would they be effective?

    - What adverse effects might arise if a worker were not present at most times? How serious might these effects be? Could they materially affect the functioning of the enterprise or the viability of the business?

    - If there is a need to be on site, does this require a worker to be present all year round or only at specific times of the year? If a need to be present at most times of the day is seasonal, could this requirement be accommodated without providing a dwelling? For example, by providing temporary overnight facilities in an existing building?

    - If a worker does need to live at or near the site, is there any existing accommodation, or accommodation which could be improved, on the site, on the holding or in the area that might reasonably meet that need?

    - What evidence is there that the work/enterprise is likely to endure in the long term? How long has it been carried out for? What investments have been made in the enterprise? Has it been profitable?

    - If the work/enterprise has not yet been established – what evidence is there that it will be established and that it is likely to be sustained over time?

    - Would the dwelling be of a size which is appropriate to the essential need or would it be unnecessarily large? If allowing the appeal, is it necessary to restrict permitted development rights by condition?

      If the enterprise is new or has not yet been established – would it be appropriate to provide temporary accommodation for an initial period (e.g. in a static caravan or mobile home)? If so, for how long?

216. Appellants will often submit detailed evidence about the viability of an enterprise in order to demonstrate that it will be likely to endure. This might include accounts showing income/expenditure and profit/loss in recent years and/or business plans forecasting future performance. There is no one standard formula for assessing viability and you will need to consider each case on its merits looking carefully at the cases of each party. However, you may need to consider:

    - Have all the costs of establishing (if relevant), running and maintaining the enterprise been taken into account and justified (for example, land, buildings,

stock, feed, vets, power & utilities, maintenance, repairs, transport, marketing, insurance, wages, financing)?

- What income is (or would be) generated? Have allowances been made for wages? Are predictions realistic and justified?

217. Evidence about costs and income will often be based on industry standard reference books such as the John Nix Farm Management Pocketbook or the Agricultural Budgeting and Costing Book. Have up to date versions been used? Some appellants will argue that they are prepared to accept an income that is less than the minimum agricultural wage. This is a material consideration but determining such matters against an objective standard will lead to more consistent decision-making and accords with the principle that planning permission runs with the land.

Green Belt

218. Framework paragraph 149 states that new buildings are inappropriate in the Green Belt unless for a specified exception. New buildings for agriculture and forestry are listed as exceptions, but dwellings are not included in that category (even if they are intended to support such a use). Consequently, if the site is in the Green Belt, you should consider any established essential need as another consideration that may clearly outweigh the harm to the Green Belt (and any other harm) and so amount to very special circumstances. See ITM chapter on Green Belts.

Conditions

219. If you intend to allow the appeal, should a condition be imposed to restrict occupation? You need to consider:

- is there a proven 'essential need' for a rural worker? – and

- would permission for an unrestricted dwelling be refused because it would conflict with paragraph 80 of the Framework and/or relevant development plan policy? If so, then a restrictive occupancy condition would be necessary.

220. If you intend to impose a condition you will need to consider if it would be appropriate to limit occupation:

- specifically to a worker in connection with the enterprise/place of work (for example, the specific farm) or

- to rural workers in the locality (ie so it could help meet a local need for rural worker accommodation if no longer needed by the original enterprise) and,

- to any dependants, widow, widower or surviving civil partner?

221. If the work or enterprise has not yet been established or is new – and depending on the evidence provided - you may need to consider whether the accommodation should be provided initially on a temporary basis to allow the work/enterprise time to get established? If so, a condition should be imposed to achieve this.

222. There may be a demonstrable need for an additional agricultural dwelling on farms where an existing farmhouse is not subject to such a condition. The Courts have held, in *Macklin and others v SSE and Basingstoke and Deane Borough Council* [27 September] 1995 that it can be appropriate to impose a condition restricting occupancy on the existing farmhouse as well as the new dwelling, if this is necessary to ensure both dwellings remain available to meet the need and to protect against the risk of further pressure for new dwellings. If you consider that such a condition may be necessary, and the matter has not been raised, then you should seek the views of the parties.

223. Sometimes an existing farm house is occupied by the farmer who proposes to retire. The proposal may be for a new dwelling for the person who is going to take over running the farm, for example a son or daughter and their family. In such circumstances it is relevant to take account of the judgment in *Keen v SSE and Aylesbury Vale DC* [12 May] 1995[88] where it was found to be unreasonable to expect a farm worker to relinquish his property on retirement to provide accommodation for the functional need on the holding. On the other hand, a retired farmer may still intend to play an active role in the management of the holding. He or she may therefore be able to undertake those tasks that require a continuous presence. In such circumstances there may not be sufficient justification to support a further dwelling.

Choice of procedure

224. You will find that it is not unusual to be provided with detailed evidence regarding the nature and operation of the enterprise (in order to establish a need for a worker to be present at most times) and its financial viability and future business planning (to establish it will endure). As such evidence is likely to need to be tested by questioning then a hearing is often the most effective procedure.

Deleting or varying an agricultural occupancy condition

225. In this type of case you will need to decide whether it is still necessary to continue to limit occupancy to a rural worker? (if not, the condition is unlikely to be necessary)

226. Depending on the cases put by the parties, you may need to consider:

- Is there evidence of a need for a dwelling in relation to the specific work/enterprise or in the wider area – now and/or in the longer term?
- Has the dwelling been offered for sale and/or rent for a reasonable period at a price that reflects the occupancy restriction imposed by the condition? If so, were there any offers or interest?

[88] [1996] JPL 753

- Are there any assessments of the need for farm, or other work related, dwellings in the area?

227. The following legal cases dealt with issues relating to conditions. However, note that they all predate the 2012 Framework:

The Inspector was entitled to consider whether the original imposition of the condition was appropriate as this was capable of being a material consideration. However, the Inspector was also required to consider the current planning circumstances and to decide whether there was currently an (agricultural) justification. (*Sevenoaks DC v SSE & Mr & Mrs Geer [1995]*)

The Inspector was entitled to take account of the probability that the condition would not have been imposed had there been a contemporary application for planning permission. In this case the condition might not have been imposed because the site now fell within the settlement limits of the village. (*Hambleton v SSE & Others [1994])*

The Inspector concluded the principal issue was to establish if the condition had outlived its usefulness. To do this, three possible options needed to be considered – potential sale to a bona fide occupant, renting the dwelling to a bona fide occupant and continuing local need. The Court held that the possibility of letting was material and went to the heart of the issue, namely whether or not there was any demand for an agricultural workers dwelling. (*Thomas v NAW and Monmouthshire CC 1999*).

There may be disagreements over the interpretation of the words “mainly working in agriculture” and “dependants*”*. The House of Lords has defined "dependants" as persons living in a family with the person defined and dependent on him / her in whole or in part for their subsistence and support (*Fawcett Properties Ltd v Buckingham County Council 1961).* Further information is provided in the ITM *Enforcement* chapter.

Holiday Cottages

228. There is no definition of dwellinghouse in the Act, but in *Gravesham BC v SSE and O’Brien* [1983] JPL 306 it was accepted 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. 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. Consequently, a holiday cottage that meets the *Gravesham* test will usually be treated as a dwellinghouse for the purposes of applying planning policies and not as a commercial leisure use, even if its occupation is restricted by condition.

Living Conditions

229. Paragraph 130 f) of the Framework requires that planning policies and decisions should ensure that developments create places with a high standard of amenity for existing and future users.

230. Common living conditions issues, such as whether development is overbearing, or its impact on outlook and privacy, require the use of planning judgement in any assessment. There may be local policies or guidance for some of these matters (e.g. a

minimum distance between windows). However, generally, they require a site specific assessment of the issue, and a site visit will be very helpful in coming to a decision. Noise and disturbance from a neighbouring proposed use or passing traffic may also be cited as a reason for refusal. Living conditions may also be a main issue in relation to the environment that would be created for future occupiers with regard to matters such as internal space, lighting and amenity areas.

231. For some topics there is technical guidance which can provide further detail. These include Housing Standards (see the 'Housing Standards' section below) Noise (Noise Chapter), and daylight/sunlight (below).

Main Issues

232. When defining a main issue it is helpful to be specific about the particular living conditions issue and property that may be affected. Below are some examples but these must be adapted to specific cases. (see also the 'Housing Standards – Casework' section)

- The effect of the proposal on the living conditions of the occupiers of ……., with particular regard to …….
- The effect of the proposal on the living conditions of nearby residents, particularly those at ……, with particular regard to noise and disturbance.
- Whether the proposal would provide acceptable living conditions for the future occupiers of the dwellings proposed with regard to……. .

Daylight and Sunlight

233. Daylight and Sunlight are not the same thing. Daylight is the 'visible part of solar radiation'[89] i.e. natural light (how bright and light a space feels). Sunlight is the 'part of direct solar radiation capable of causing a visual sensation'[90] i.e. the amount of direct sunshine in a space. New development may affect light to existing windows/rooms and may also need to be assessed with regard to the light that will be received in new windows/rooms.

234. Paragraph 125 c) of the Framework advocates a flexible approach in applying policies or guidance relating to daylight and sunlight, where they would otherwise inhibit making efficient use of a site, provided the resulting scheme would provide acceptable living standards.

[89] BS EN 17037:2018+A1:2021 (paragraph 3.1)

[90] BS EN 17037:2018+A1:2021 (paragraph 3.18)

235. When assessing new development, the BRE guide[91] is often referred to, and this was comprehensively revised in 2022. This advice is not mandatory and should be interpreted flexibly. The British Standard BS EN 17037:2018+A1:2021[92] is also used but again, this is not mandatory. Both comprise ways of assessing daylight and sunlight on an empirical basis. The BRE and BS provide alternative methods of assessment and the updated BRE guide does not supersede the BS.

236. The following paragraphs provide an overview of the tests included in this guidance:

BRE Guide basic tests:

- Loss of light to existing windows need not be analysed if the distance of each part of the new development from the existing window is three or more times its height above the centre of the existing window. For example, if the new development were 10m tall, and a typical existing ground floor window were 1.5 m above the ground, the effect on existing buildings more than 3 x (10 – 1.5) = 25.5 m away need not be analysed.

- The 45 degree line can be used to assess T and L shaped layouts. Light would be blocked if an extension is within the 45 degree line in plan AND elevation, taken from the centre of the window. (Figure 1)

- The 25 degree line can be used to assess windows opposite a new development. Light would be blocked if a 25 degree line drawn from the centre of the lowest window were obstructed. (Figure 2)

- At least half of the open space, including gardens, should receive at least two hours of sunlight on 21 March, or should not be less than 0.8 times its former value.

[91] Site Layout Planning for Daylight and Sunlight – a guide to good practice (2022). PDF copy available on request from Knowledge Centre

[92] Details of how to access the BS via a British Standards Online account are on the Intranet here: https://intranet.planninginspectorate.gov.uk/task/access-british-standards-online/

Figure 1[93]

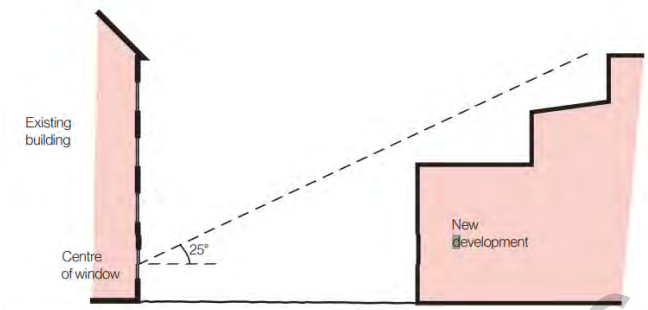

Figure 14: Section in plane perpendicular to the affected window wall

Figure 2[94]

237. If the proposed development passes these tests, it is likely that an acceptable level of daylight and sunlight will be achieved. If these tests are failed it does not necessarily mean that daylight and sunlight would be unacceptable, but more detailed tests may be required.

BRE Guide detailed tests:

238. These results require technical calculations, often using computer software. The figures are likely to be presented to you as part of any daylight and sunlight report.

    - Light from the sky. This is an assessment of daylight in an existing building and represents how bright a particular window feels. This can be measured using Vertical Sky Component (VSC), or the visible sky angle (θ) and the obstruction angle. VSC is a technical calculation expressed as a percentage. The visible sky angle is illustrated below. The obstruction angle is the angle the obstruction makes

[93] Figure 18 from Site Layout Planning for Daylight and Sunlight – a guide to good practice (2022)

[94] Figure 14 from Site Layout Planning for Daylight and Sunlight – a guide to good practice (2022)

from the centre of the window measured from the horizontal i.e. 90 – θ = obstruction angle.

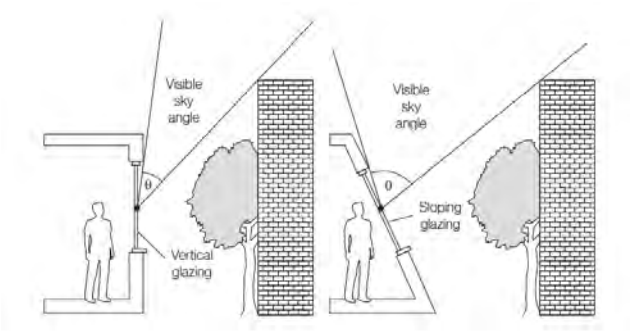

Figure 3[95]

VSC value	θ	Result
At least 27% or no less than 0.80 times its former value.	Greater than 65° (obstruction angle less than 25°)	Conventional window design will usually give reasonable results. Any reduction below this level should be kept to a minimum.
Between 15% and 27%	Between 45° and 65° (obstruction angle between 25° and 45°)	Special measures (larger windows, changes to room layout) are usually needed to provide adequate daylight
Between 5% and 15%	Between 25° and 45° (obstruction angle between 45° and 65°)	It is very difficult to provide adequate daylight unless very large windows are used.
VSC less than 5%)	Less than 25° (obstruction angle greater than 65°,	It is often impossible to achieve reasonable daylight, even if the whole window wall is glazed

[95] Figure 1 from Site Layout Planning for Daylight and Sunlight – a guide to good practice (2022)

- No Sky Line (NSL). This is another assessment of daylight and represents where in the room you cannot see the sky from. The working plane[96] within a room with no sky line should be no less than 0.8 times its former value. Supplementary electric lighting will be needed if 20% of the room or more lies beyond the no sky line.

- Sunlight for new buildings. A building will appear reasonably sunlit where at least one main window wall faces within 90° of due south and it satisfies the BS 'exposure to sunlight' test, detailed below.

- Annual Probable Sunlight Hours (APSH). This represents the amount of sunlight received at a window, using an assessment of the average number of hours in which direct sunlight reaches a particular point and should be used for sunlight to existing dwellings. However, all rooms with a window within 90 degrees of due south should be checked. In summer, windows should receive at least 25% of the total available sunlight hours, in winter they should receive 5%, the overall annual loss of APSH should not be greater than 4% and they should not be less than 0.8 times their previous value.

239. The test Average Daylight Factor (ADF) test included in the 2011 BRE guidance has been removed and is no longer recommended.

240. The BRE guide also gives guidance on considerations for a proposed new building next to a development site. As well as site layout for solar energy it also briefly reviews issues including privacy, enclosure, microclimate, road layout and security.

BS tests:

241. The BS sets both European and UK standards for the following tests:

- Daylight Provision - Illuminance method: A target illuminance level achieved across the majority of the reference plane for at least half of the daylight hours, i.e. how bright the majority of the room feels.

- Daylight Provision - Daylight factor method: Based on calculating the daylight factors achieved over specified fractions of the reference plane. There are different targets for different locations.

- Exposure to sunlight. At least one habitable room in a dwelling should receive sunlight for a minimum of 1.5 hours measured on a date between February 1st and March 21st.

242. The BS also includes standards for Glare Protection. These are relevant to spaces where activities such as reading, writing or using display screen devices take place and the occupants are not able to choose position and viewing direction.

[96] A level 0.85m above floor level.

Casework considerations

243. The BRE guide and BS provide useful tests which indicate when a window or room may not feel well lit. However, they are guidance and an overall judgement about living conditions will need to be made bearing in mind the Framework and any development plan policies.

244. You may have evidence about whether a development would satisfy these requirements. If so, that will be an important material consideration. If not, the guidance may be helpful to bear in mind if this matter is in dispute and may assist with your assessment. However, the BRE guide and BS should not be referred to directly unless it is raised by the parties, and it is unlikely that it should be requested (although be aware of any tests or requirements which may have been written into local policy).

245. There is also a separate legal 'Right to Light' which may be mentioned in representations. This refers to situations where there is a right to light through a window, where that light has passed over a neighbour's land. This may be established as an express grant or more commonly with the passage of time. If light to a window which has a right to light is obstructed by a new building, then the person is entitled to a remedy which may be an injunction to prevent (or reverse) the infringement, or damages by way of compensation for the continuing infringement.

246. However, "in general [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 … loss of private rights to light could not be material considerations"[97].

Housing Standards

Background

247. A national system of housing standards commenced in 2015, following the Written Ministerial Statement (WMS) *Planning Update March 2015*. This set out the Government's policy on the setting of technical standards for new dwellings.[98] The WMS has not been replaced by the revised Framework and provides relevant background.

248. The system means that additional optional standards for water efficiency, access and internal space, over and above the mandatory minimum standards contained in the Building Regulations, can be required.

249. The system defines specific additional optional Building Regulations requirements on water efficiency and access, and a new national space standard – known collectively as 'the optional national technical standards'. The optional access standards comprise Building Regulations Requirements M4(2) (accessible and adaptable

[97] PPG Paragraph 008 Reference ID: 21b-008-20140306.

[98] MHCLG confirmed that "new dwellings" includes dwellings resulting from a change of use or conversion, as well as newly erected dwellings.

dwellings) and M4(3) (wheelchair user dwellings). The Lifetimes Homes standards (which mainly relate to accessibility to and within a dwelling) and the withdrawn Code for Sustainable Homes (CSH)[99] are not included in the system.[100]

250. The way that the optional national technical standards may be applied to residential development is through condition(s) on a planning permission, in appropriate circumstances. Therefore planning permissions can lawfully trigger certain aspects of the Building Regulations.

251. Care needs to be taken in respect of any conditions to be imposed relating to housing standards. 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 be achieved without significantly amending the scheme. More detail is set out in the Conditions chapter.

252. Responses to common questions in respect of the national technical standards are provided in Annex 5 of this chapter.

253. A summary of how the national technical standards should be applied is provided in Annex 6 to this chapter.

Housing for older and disabled people

254. The PPG chapter *Housing for older and disabled people* is mainly focussed on the preparation of planning policies. However, it does include references to the factors which decision makers should take into account when assessing planning applications for specialist housing for older people[101]. It also sets out some inclusive design principles which would be relevant in considering the needs of occupants, and makes specific reference to design criteria for dementia friendly housing[102].

National planning policy and guidance

255. Paragraph 154 b) of the Framework provides that any local requirement for the sustainability of buildings should reflect the Government's policy for national technical standards. Footnote 49 provides that planning policies for housing should make use of the Government's optional technical standards for accessible and adaptable housing, where this would address an identified need for such properties. Policies may also make use of the nationally described space standard, where the need for an internal space standard can be justified. These are concerned with plan-making rather than decision- taking.

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[99] The CSH was withdrawn in March 2015, except in the management of legacy cases.

[100] Note that Building for Life 12 remains extant. It is about urban design rather than the technical standards for new dwellings.

[101] PPG ID 63-016-20190626

[102] PPG ID 63-018-20190626 and 63-019-20190626

256. There is guidance in the PPG in *Housing: optional technical standards*.

257. For decision-taking, the WMS states that:

> Existing Local Plan, neighbourhood plan and supplementary planning document policies relating to water efficiency, access and internal space should be interpreted by reference to the nearest equivalent new national technical standard. Decision takers should only require compliance with the new national technical standards where there is a relevant current Local Plan policy.

258. Therefore, in deciding whether to determine an appeal other than in accordance with any existing development plan policy and according to the WMS, reference should only be made to the national technical standards and compliance can only be justified when adopted policies are in place. Policies that refer to local or other standards for water efficiency, access and internal space, such as CSH or Lifetime Homes, that different from the national technical standards will not be consistent with the WMS.

259. Whilst BREEAM[103] is commonly used as a sustainability standard for non- domestic buildings, it could previously be applied to domestic conversions and change of use projects, though not newly constructed dwellings. Some local plans may also have set BREEAM sustainability standards for new housing (for instance, for mixed used developments). However, as BREEAM is a technical standard, it should no longer be applied to housing.

260. In respect of energy efficiency standards, the WMS says:

> For the specific issue of energy performance, local planning authorities will continue to be able to set and apply policies in their Local Plans which require compliance with energy performance standards that exceed the energy requirements of Building Regulation[104] until commencement of amendments to the Planning and Energy Act 2008 in the Deregulation Bill [now Act] 2015.

261. The relevant amendment is not yet in force, which in practice means that for the time being LPAs can require an energy performance standard equivalent to former CSH level 4. The current mandatory Building Regulations Part L 2013 requirement is equivalent to former CSH level 3. This is consistent with paragraph 154 of the Framework.

262. There are separate legal provisions enabling LPAs to include policies in their Local Plans imposing reasonable requirements for a proportion of energy used in

[103] Building Research Establishment Environmental Assessment Method

[104] See the *Planning and Energy Act 2008,* s1(c)

development in their area to be energy from renewable sources in the locality of the development, or low carbon energy from sources in the locality of the development.[105]

Casework

263. How you define the issue will depend on the specific concerns raised. You may wish to consider whether any of the following examples could be adapted to meet the circumstances of your case:

- Whether the proposed development would provide acceptable living conditions for future residents in terms of the provision of internal living space, private outdoor space and access for people with disabilities.

- Whether the proposed development would provide acceptable living conditions for future occupants with particular reference to accessibility and suitability for changing needs.

- Whether the external areas would be sufficient to meet the day to day needs of occupants for outdoor living space.

264. When assessing these issues questions to consider include:

- If a proposal falls short of a particular requirement, what harm would result? Would the living conditions of occupants be unsatisfactory? If so, in what ways? For instance, would the dwelling be sufficiently accessible? Would it continue to be accessible as occupants get older? Would there be sufficient internal or external space to meet day to day needs?

- How are the relevant policies phrased? Do they express minimum requirements as absolutes? Or do they include any caveats or exceptions (including in the supporting text), such as 'wherever it is practicable'?

265. If you intend to allow the appeal, despite a shortfall against specified requirements in a development plan or SPD, consider:

- Have you acknowledged the conflict with policy and very clearly explained why that conflict is not leading you to dismiss? Perhaps, for example, because any shortfalls are minor and you are satisfied that, overall, acceptable living conditions would be provided, in this particular case?

Conditions

266. Please refer to the ITM chapter *Conditions* for advice on conditions in relation to housing standards. If you are imposing a condition requiring space or access

[105] *Planning and Energy Act 2008,* s1(a)&(b)

standards to be met are you satisfied that the relevant criteria could be achieved without significantly amending the scheme before you?

Fire Safety (Planning Gateway One)

267. Several new requirements have been introduced into the planning system as part of a new building safety regime in England.[106] A new chapter of PPG, 'Fire safety and high-rise residential buildings (from 1 August 2021)', sets out background information on the introduction of the policy and how new measures are to ensure fire safety matters as they relate to land use planning are incorporated at the planning stage. 'Planning gateway one' has two key elements:

- To require the developer to submit a fire statement with a relevant application for planning permission for development which involves one or more relevant buildings; and

- to establish the Health and Safety Executive (HSE) as a statutory consultee for relevant planning applications. HSE have established a new Building Safety Regulator (BSR) to fulfil this task.

268. From 1 August 2021, applications for planning permission for development which involves the provision of one of more relevant building, development of an existing relevant building, or development within the curtilage of a relevant building, must be accompanied by a fire statement.

269. Relevant buildings contain two or more dwellings or educational accommodation and satisfy the height condition of being 18 metres or more in height or containing 7 or more storeys.[107]

270. Fire statements should contain information about the fire safety design principles, concepts and standards that have been applied to the development. They must be on a form published by the Secretary of State[108], which includes information regarding (but not limited to) site layout, emergency vehicle access locations, consultation undertaken on issues relating to fire safety of the development, and how local policies relating to fire safety have been taken into account.

271. Exemptions from the requirement to submit a fire statement are outlined in paragraph 010 of the PPG. For example, it is not mandatory to submit a fire statement where the application is for outline planning permission.

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[106] Article 9A of the Town and Country Planning (Development Management Procedure) (England) Order 2015

[107] Please see PPG ID:71-004-20210624 for further details regarding how to measure height and number of storeys for the purposes of planning gateway one

[108] Available at: https://www.gov.uk/government/publications/planning-application-forms-templates-for-local-planning-authorities

272. Local planning authorities will also be required to consult the HSE regarding relevant planning applications which involve one or more relevant building from 1 August 2021.

273. Further details can be found in fire safety and high-rise residential buildings PPG.

Residential Annexes

274. This type of casework most commonly involves proposals for "granny flat" type accommodation either as an extension to the main house or as an outbuilding. Occasionally you may encounter proposals for domestic staff accommodation.

275. "Granny annexes" tend to fall into one of two categories:

- Additions to dwellings which are simply extensions in the usual sense of the word – i.e. the 'granny' would be part of the family or household and there is no suggestion (in terms of the physical layout or otherwise) that an independent planning unit would be provided. The same might apply with an outbuilding to a house.

- Annexes (either by means of an extension or an outbuilding) which would provide for independent living – for example by including a kitchen and a shower- or bathroom – and so could potentially be occupied as a separate dwelling house (so forming a separate planning unit).

276. Concerns from local planning authorities and others tend to fall into two categories:

- Where the ancillary nature of the accommodation proposed is not an issue – but there are concerns about the local effect on character/appearance, living conditions or other matters

- Where there are concerns that the accommodation would be unlikely to be ancillary and so would, in reality, be used as an independent/separate dwelling – this might give rise to concerns of principle (for instance, if countryside policies seek to prevent new dwellings) or that use as a separate dwelling might cause other problems (eg through additional traffic, noise and disturbance or an unsatisfactory relationship with the main dwelling).

277. The judge in *Uttlesford DC v SSE & White [1992]* considered that, even if the accommodation provided facilities for independent day-to-day living, it would not necessarily become a separate planning unit from the main dwelling – instead it would be a matter of fact and degree. In that case the accommodation gave the occupant the facilities of a self-contained unit although it was intended to function as an annex with the occupant sharing her living activity in company with the family in the main dwelling. There was no reason in law why such accommodation should consequently become a separate planning unit from the main dwelling.

278. Consequently, if it is argued that the accommodation would be used as an independent or separate dwelling, you will need to assess whether it could also be capable of being occupied as an annex. The following questions might help you decide:

- Would occupants live as part of the household in the main house? (in which case the use would be ancillary)
- Would the annex share any facilities with the main house (eg access for drivers and pedestrians, parking, garden, services/utilities)
- How would it compare in size to the main house (smaller or not)?
- What facilities would it contain (e.g. kitchen, bathroom, living space, bedrooms)?
- How close would it be to the main house (near or far)?

279. The starting point is to consider the proposal as applied for and on the basis that any planning permission runs with the land irrespective of the circumstances of the intended occupier(s). Even if the development could be used as a separate dwelling, and a party has raised sound planning objections for such use, it should suffice to point out that there is no separate dwelling before you. If the structure is not built or used as proposed, or if there is a material change of use in the future to create a separate dwelling, then a separate grant of planning permission would be required, and the building would be at risk of enforcement action if such permission is not granted.

Houses in Multiple Occupation and Permitted Development Rights

Background

280. Houses in Multiple Occupation (HMOs), including those which fall within Class C4,[109] can benefit from the permitted development rights granted to dwelling houses by the *Town and Country Planning (General Permitted Development) (England) Order 2015* [GDPO].

Issues in casework

281. Case law[110] has established that the distinctive characteristic of a "dwelling house" is its ability to afford to those who use it the facilities required for day- to-day private domestic existence. Whether a building is or is not a dwelling- house is a question of fact and degree. A "dwelling house" does not include a building containing one or more flats, or a flat contained within such a building.

282. In the case of Goodman v SSHCLG [2019] EWHC 2226 (Admin) the claimant sought to challenge an Inspector's decision to dismiss an appeal on the grounds of failure to provide adequate reasons for rejecting the claimant's evidence of need for HMOs in the area. The judge found that the Inspector had adequately addressed the need issue

[109] The Town and Country Planning (Use Classes) Order 1987 (as amended) defines Class C4 as use of a dwelling house by not more than six residents as a "house in multiple occupation"

[110] *Gravesham Borough Council v The Secretary of State for the Environment (1982).*

but that in any event the appeal would have been dismissed on other matters. If put to you, it will be necessary for you to come to a view on the strength of evidence of need.

Design

283. The revised Framework introduces new policy for achieving well-designed and beautiful places, as part of the overarching social objective of the planning system (NPPF 8 b)). The Framework now places a requirement on local planning authorities to produce design guides or codes which are consistent with the principles set out in the National Design Guide (NDG) and National Model Design Code (NMDC) (para.128).

284. Paragraph 73 c) of the Framework states that, when planning for larger-scale [housing] development, policy-making authorities should set clear expectations for quality of places and ensure appropriate tools such as masterplans and design guides or codes are used to secure a variety of well-designed and beautiful homes to meet the needs of different groups in the community.

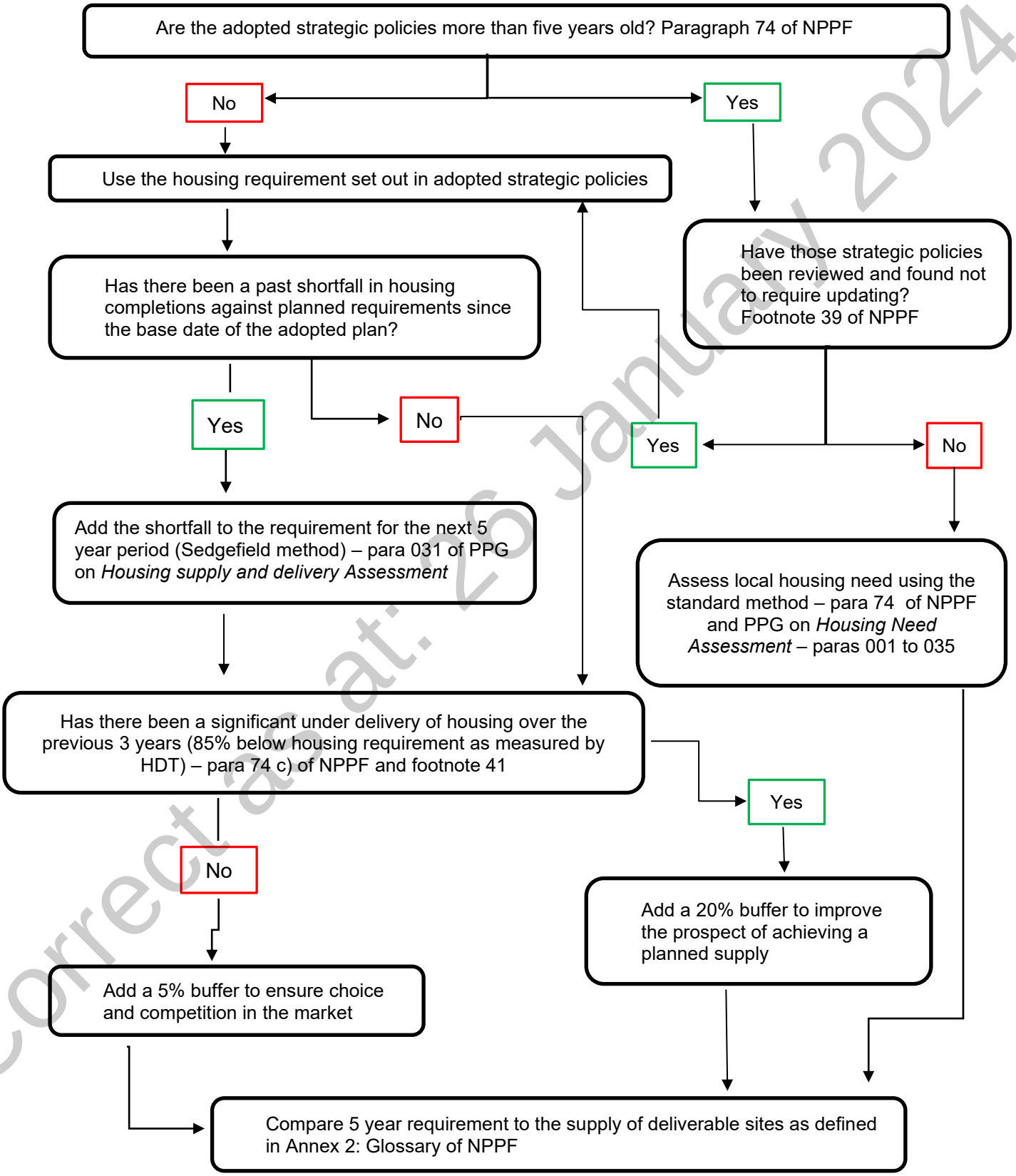
285. Paragraph 134 of the Framework states, “development that is not well designed should be refused, especially where it fails to reflect local design policies and government guidance on design, taking into account and local design guidance and supplementary planning documents such as design guides and codes”. The Framework also makes clear that applications that demonstrate early community engagement regarding design issues should be looked at more favourably than those that cannot (para.132).

286. Paragraph 131 states, “Planning policies and decisions should ensure that new streets are tree-lined, 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.”

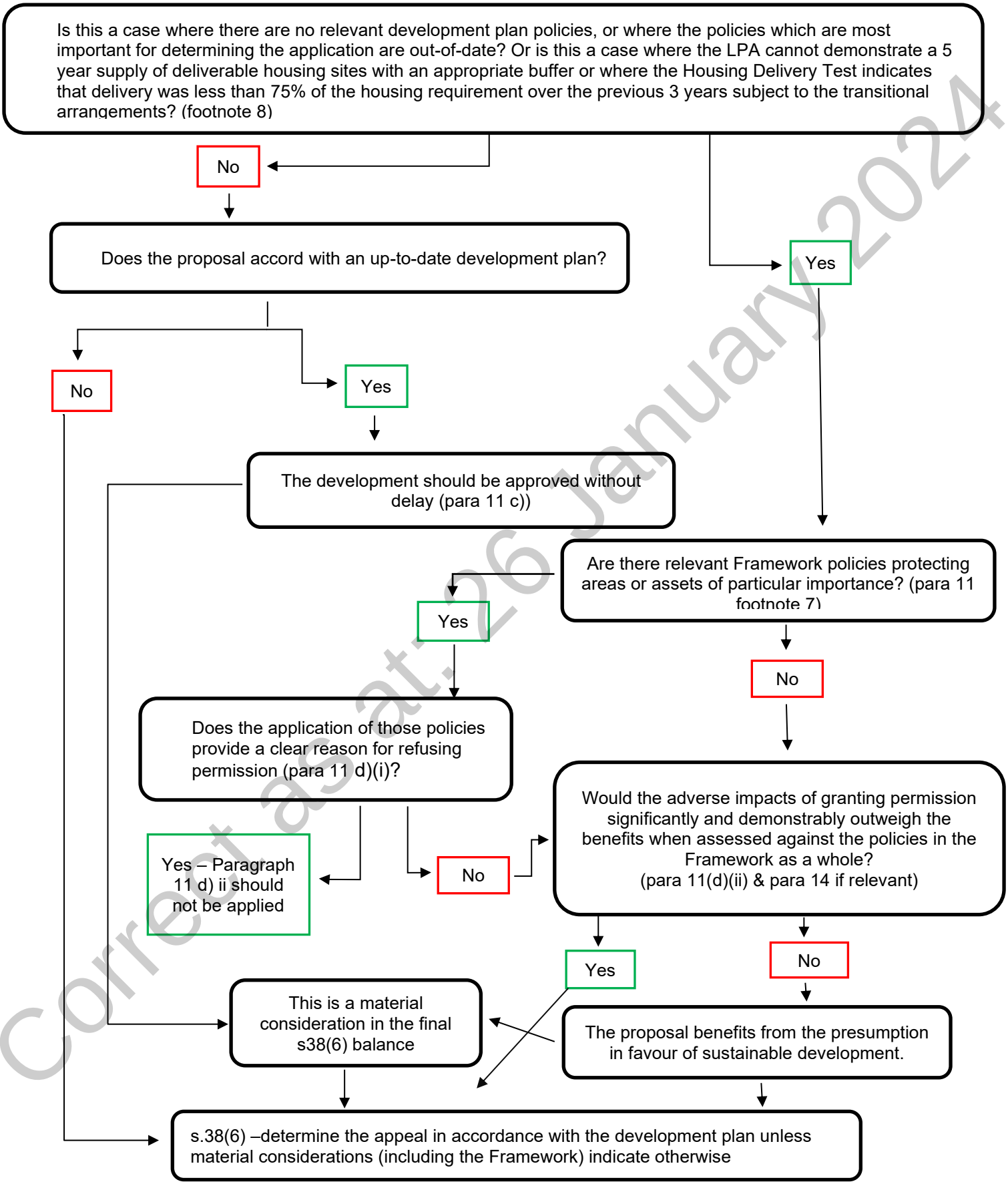
287. For further information please refer to the Design chapter of the ITM.

Annex 1: Is there a minimum of 5 years' worth of housing?

(In cases where the LPA is unable to demonstrate a 5 year supply of deliverable sites through an annual position statement or recently adopted plan - para 74 b) of NPPF)



Annex 2: Application of framework paragraphs 11 c) & d)



Annex 3: Considerations when determining whether housing sites are deliverable

Definition of deliverable in Glossary to revised Framework and guidance in para 036 of PPG on *Housing and Economic Land Availability Assessment*

Sites should be available now, offer a suitable location for development and be achievable with a realistic prospect that housing will be delivered on site within 5 years

Distinction between sites that are not major development, sites with detailed planning permission, sites with outline planning permission, permission in principle, site allocations, identified on brownfield register

- Any progress towards submission of an application
- Progress with site assessment work
- Relevant information about viability, ownership or infrastructure
- A statement of common ground with developer confirming intentions, anticipated start and build-out rates
- Any planning performance agreement re submission and discharge of reserved matter

Other relevant considerations in establishing whether there is clear evidence may also comprise:

- If there is a resolution to grant planning permission how long has the planning obligation been outstanding? When is it likely to be concluded?
- If there is an outline permission, what progress has been made with discharging conditions?
- What have build-out rates been historically and might this be expected to change?
- How many outlets will there be on larger sites?
- How long has a site been allocated for development and why has it not come forward previously?
- Are sites in an emerging plan about to be allocated or has the examination not progressed sufficiently?

Annex 4: Model condition requiring affordable housing

See the relevant paragraphs of the Housing chapter above (in the Affordable Housing section, under the sub-heading “Planning obligations and conditions”) for guidance on when it may be appropriate to use this condition to secure affordable housing.

Please note that the numbered points in this condition should be expanded to include relevant details that have been provided as heads of terms, and in particular to set out the mechanism by which the housing will be secured as affordable.

No development shall take place [111]until a scheme for the provision of affordable housing as part of the development has been submitted to and approved in writing by the local planning authority. The affordable housing shall be provided in accordance with the approved scheme and shall meet the definition of affordable housing in Annex 2: Glossary of National Planning Policy Framework or any future guidance that replaces it. The scheme shall include:

i. the numbers, type, tenure and location on the site of the affordable housing provision to be made which shall consist of not less than [**]% of housing units/bed spaces;

ii. the timing of the construction of the affordable housing and its phasing in relation to the occupancy of the market housing;

iii. the arrangements for the transfer of the affordable housing to an affordable housing provider [or the management of the affordable housing] [if no Registered Social Landlord involved];

iv. the arrangements to ensure that such provision is affordable for both first and subsequent occupiers of the affordable housing; and

v. the occupancy criteria to be used for determining the identity of occupiers of the affordable housing and the means by which such occupancy criteria shall be enforced.

The affordable housing shall be retained in accordance with the approved scheme.

[111] See PINS Note 13/2018 for advice re use of pre-commencement conditions

Annex 5: Responses to questions regarding the national technical standards

Question	Response
The technical requirements provide a minimum floor area for a single bedroom (7.5m2) and a double or twin room (11.5m2). If a one bedroom flat is proposed and the bedroom has a floor space of 11.5m2 or greater (and meets the minimum width for a double bedroom) is the 1 bedroom 2 person overall floor space standard in table 1 (50m2) then applied? It is possible that an applicant could claim that despite providing quite a generous bedroom the flat is only intended as a single person flat and so the 37/39m2 floor space should be applied.	The intention is that the size of the bedroom determines how occupancy is defined. So a bedroom exceeding 11.5m2 is always counted as a double bedroom and a bedroom between 7.5m2 and 11.5m2 is always a single bedroom (all subject to minimum room widths). A room less than 7.5m2 cannot be counted as a bedroom.
Whether it is acceptable if a home meets the overall gross internal (floor) area but one or more of the bedrooms does not meet the floor area set out in the Nationally Described Space Standard (e.g. large living area with bedroom(s) below the standard).	The Nationally Described Space Standard sets an overall minimum gross internal area for the home and minimum floor areas and room widths for bedrooms and minimum floor areas for storage – it does not set standards for the size of any other rooms (e.g. kitchen or living area). To meet the Space Standard the home must meet the overall minimum gross internal area AND the minimum floor areas and room widths for bedrooms AND minimum floor areas for storage, as set out in the section on Technical Requirements and Table 1 of the Nationally Described Space Standard. If the home meets the overall minimum gross internal area but a bedroom(s) does not meet the required minimum floor area and/or width then the Space Standard would NOT have been met.
Are the built-in cupboards included in the gross floor space areas in the Nationally Described Space	Yes, the built-in storage space is included in the gross internal floor area in the Nationally Described Space Standard.

Standard (NDSS) or are they in addition to it?	
Do the NDSS apply to permanent mobile homes?	The answers to these questions depend on whether and how the LPA chooses to apply the NDSS. The NDSS is not mandatory – it is up to authorities if they want to put it in their plan and they have discretion on how to apply it. They need to justify the need for it, and whether there is any adverse effect on development viability, and affordability. The LPA has discretion over how the NDSS is applied and can choose whether or not to apply it to mobile homes or bed-sits. The NDSS can be applied to conversions as long as express planning permission is required for it (unlike the optional technical standard on access which can only be applied to newly constructed dwellings).
The NDSS do not refer to bed-sits. Does this mean bed-sits are not considered acceptable in principle?	
Do NDSS apply to new dwellings converted from existing buildings?	

Annex 6: The national technical standards and how they should be applied

	Planning Practice Guidance on Optional Technical Standards	Written Ministerial Statement, March 2015 and the National Planning Policy Framework 2018
Accessibility and wheelchair housing	Policies for enhanced accessibility or adaptability should refer to Requirement M4(2) and /or M4(3) of the optional requirements in the Building Regulations and it should be clear what proportion of new dwellings should comply with the requirements. Policies should also account for factors which may make a site less suitable for the standards (e.g. flood risk, topography), particularly where step-free access cannot be achieved or is not viable. Policies for wheelchair accessible homes only apply to dwellings where the local authority is responsible for allocating or nominating a person to live in that dwelling. Policies can set different requirements from the wheelchair accessibility standard to meet a specific and clearly evidenced need of an individual. The requirements should only be applied to homes where a local authority allocation policy applies (and be subject to viability considerations).	WMS Existing Local Plan, neighbourhood plan, and supplementary planning document policies relating to water efficiency, access and internal space should be interpreted by reference to the nearest equivalent new national technical standard. Planning policies relating to technical security standards for new homes will be unnecessary because all new homes will be subject to the new mandatory Building Regulation Approved Document on security (Part Q). Policies relating to the external design and layout of new development, which aim to reduce crime and disorder, remain unaffected by this statement. Where policies relating to technical standards have yet to be revised, local planning authorities are advised to set out clearly how the existing policies will be applied in

Water efficiency standards	Policies can require new homes to comply with the optional standard (which is tighter than that required by building regulations), where there is a clear and justified local need.	decision taking in light of this statement. NPPF Planning policies for housing should make use of the Government's optional technical standards for accessible and adaptable housing, where this would address an identified need for such properties. Policies may also make use of the nationally described space standard, where the need for an internal space standard can be justified.
Internal space standards	Internal space standards can only be applied if there is a relevant plan policy. Such policies can only require compliance with the Nationally Described Space Standard.	
Energy Performance		WMS Policies requiring compliance with energy performance standards that exceed the energy requirements of Building Regulations can be applied until commencement of amendments to the Planning and Energy Act 2008 in the Deregulation Bill [now Act] 2015. At this point the energy performance requirements in Building Regulations will be set at a level equivalent to the (outgoing) Code for Sustainable Homes Level 4. Until the amendment is commenced conditions should not set requirements above a Code level 4 equivalent.

		NPPF Any local requirements for the sustainability of buildings should reflect the Government's policy for national technical standards.

Annex 7: Information to aid Inspectors when considering and making recommendations on Annual Position Statements (APS)

1. As set out below, paragraph 75 of the National Planning Policy Framework (the Framework) sets out how a local planning authority, if it so wishes, can confirm its five year supply of deliverable housing sites (5 year HLS) position once in a given year following, initially, a recently adopted plan.

> 75. A five year supply of deliverable housing sites, with the appropriate buffer, can be demonstrated where it has been established in a recently adopted plan, or in a subsequent annual position statement which:
>
> a) has been produced through engagement with developers and others who have an impact on delivery, and been considered by the Secretary of State; and
>
> b) incorporates the recommendation of the Secretary of State, where the position on specific sites could not be agreed during the engagement process.

2. The PPG sets out (as shown below) what constitutes: a deliverable housing site; the circumstances where further evidence would be needed (the first 4 bullet points); and what that evidence may include (the last 4 bullet points), albeit being a non-exhaustive list. This is as follows (although it should be noted that in submitting to judgment in a recent High Court case[112] the Secretary of State accepted that the Framework definition of a deliverable housing site is not a closed list but leaves room for decision-makers to exercise planning judgement – stating that "the proper interpretation of the definition is that any site which can be shown to be 'available now, offer a suitable location for development now, and be achievable with a realistic prospect that housing will be delivered on the site within five years' will meet the definition; and that the examples given in categories (a) and (b) are not exhaustive of all the categories of site which are capable of meeting that definition)":

> What constitutes a 'deliverable' housing site in the context of plan-making and decision-taking?
>
> In order to demonstrate 5 years' worth of deliverable housing sites, robust, up to date evidence needs to be available to support the preparation of strategic policies and planning decisions. Annex 2 of the National Planning Policy Framework defines a deliverable site. As well as sites which are considered to be deliverable in principle, this definition also sets out the sites which would require further evidence to be considered deliverable, namely those which:

[112] East Northamptonshire Council v Secretary of State for Housing, Communities and Local Government case number CO/917/2020 – Consent Order sealed 12 May 2020

- have outline planning permission for major development;
- are allocated in a development plan;
- have a grant of permission in principle; or
- are identified on a brownfield register.

Such evidence, to demonstrate deliverability, may include:

- current planning status – for example, on larger scale sites with outline or hybrid permission how much progress has been made towards approving reserved matters, or whether these link to a planning performance agreement that sets out the timescale for approval of reserved matters applications and discharge of conditions;
- firm progress being made towards the submission of an application – for example, a written agreement between the local planning authority and the site developer(s) which confirms the developers' delivery intentions and anticipated start and build-out rates;
- firm progress with site assessment work; or
- clear relevant information about site viability, ownership constraints or infrastructure provision, such as successful participation in bids for large-scale infrastructure funding or other similar projects.

Plan-makers can use the Housing and Economic Land Availability Assessment in demonstrating the deliverability of sites.

Paragraph: 007 Reference ID: 68-007-20190722

Revision date: 22 July 2019

3. The process of confirming the 5 year HLS is set out in Annex A, taken from the PPG https://www.gov.uk/guidance/housing-supply-and-delivery#confirm-5-year. A template for the APS report, including some suggested wording (with instructions in blue type), is in Annex B. The template also includes some guidance notes which have therefore not been repeated below.

4. In respect of the aspect of stage 1 of the process concerning whether the APS relates to a recently adopted plan[113], the APS notification template in Annex C, produced by PAS, helps to explain this (note: the dates in the Annex C document relate to APSs submitted in 2020, being the year these notes were produced - so for subsequent APSs, it will be necessary to adjust the dates accordingly; and section A of the Annex C template is not applicable if the APS concerned follows an APS from the previous year where the 5 year HLS was confirmed). If the APS concerned does not relate to a recently adopted plan or

[113] See definition of 'recently adopted plan' in footnote 40 of the Framework

follow an APS from the previous year where the 5 year HLS was confirmed, then the Council cannot confirm its supply.

5. Also in respect of the above aspect of the process, it may be that exceptional circumstances dictate that the Inspector's APS report is completed and dated after 31 October (ie the date beyond which the plan is not considered to be recently adopted). As set out in the Annex B template, in such circumstances it would be appropriate to add that the plan is deemed to be recently adopted at the point of submission of the APS. However, this would be the exception rather than the norm especially given that the PPG states that the Inspector's report will be issued in October[114].

6. Some more detailed advice concerning stage 2 of the process, based on experiences of dealing with the first two APSs in 2019, is as follows:

Housing Requirement

6.1 It may be the case, as happened with the two 2019 APS cases dealt with by PINS, that the Liverpool Method, spreading the shortfall in housing delivery over the remainder of the plan period, was used in deriving the housing requirement figure within the recently adopted Local Plan. In both of the 2019 APSs, it was disputed that this method, rather than the Sedgefield approach spreading the shortfall over just the five year period, should continue to be used in respect of the APS processes concerned. The PPG[115] indicates that any shortfall should be dealt with by the Sedgefield approach, then the appropriate buffer added. However, it goes on to say that if a strategic policy-making authority wishes to deal with past under delivery over a longer period, then a case may be made as part of the plan-making and examination process rather than on a case by case basis on appeal.

6.2 In one of the above cases, the disputed position related to the 5 year HLS figure set out in the APS having fallen from that at the time of the Local Plan examination. The other concerned the changes in national policy since the Local Plan was examined. In particular, paragraph 74 of the Framework sets out, amongst other things, that "local planning authorities should identify and update annually a supply of specific deliverable sites sufficient to provide a minimum of five years' worth of housing against their housing requirement set out in adopted strategic policies, or against their local housing need where strategic policies are more than five years old". The concern raised was that the Local Plan Inspector did not accept the Liverpool method in that updated context relating to the change of process once the policies are more than five years old.

6.3 The first of the above cases, partly due to the APS Inspector considering that the Liverpool method could not be justified for the purposes of the APS process, instead using Sedgefield, resulted in the conclusion the Council could no longer

[114] PPG Paragraph: 012 Reference ID: 68-012-20190722

[115] PPG Paragraph: 031 Reference ID: 68-031-20190722

demonstrate a 5 year HLS. That decision was subject to a High Court Challenge and subsequently quashed.

6.4 The High Court Order (HCO) highlighted that the APS Inspector's finding turned on his decision that Sedgefield should be used, as opposed to Liverpool, the method endorsed by the Local Plan Inspector. The HCO sets out that the APS Inspector was not entitled to use a different housing requirement from that set out in the relevant policy of the recently adopted Local Plan. The HCO draws attention to paragraph 74 of the Framework, in particular that section referred to above. It goes on to highlight that consequently, paragraph 74 defines the "housing requirement" against which an authority's 5 year HLS should be assessed i.e. it is the housing requirement set out in adopted strategic policies where (as was the situation for both of the above APS cases) those policies are less than five years old. It states that the Inspector erred in law by using a housing requirement that differed from the minimum housing requirement in the relevant policy of the recently adopted Local Plan.

6.5 The HCO is therefore useful in clarifying the situation in respect of use of a different method to that used in the Local Plan. If the Liverpool approach to dealing with past under delivery was used in the Local Plan under these circumstances this is therefore the basis upon which the APS must be considered.

6.6 In respect of the buffer, paragraph 74(b) of the Framework highlights that this should be 10%. However, that is a minimum and as set out in the PPG[116] an appropriate buffer should be applied. The buffer (even if 10% was used for the Local Plan) could therefore be 20% where there has been significant under delivery (below 85% of the housing requirement) over the previous three years measured against the Housing Delivery Test (HDT) (see paragraph 74(c) of the Framework). Equally, if the Local Plan utilised a buffer of 20%, this could be changed to 10% under the APS process if the HDT suggests that to be appropriate.

6.7 If the APS follows a previous year's confirmed APS rather than a recently adopted Local Plan, and the strategic policies in that plan are more than five years old, paragraph 74 of the Framework sets out that supply of deliverable sites should be identified against local housing need as opposed to housing requirement.

Housing Supply

6.8 Look out for obvious anomalies not picked up by the Local Planning Authority (LPA) relating to individual sites. For example, for a site relating to one of the previous APS cases, the LPA had a higher total supply figure than the site owner/developer had previously indicated. However, there was no explanation to

[116] Paragraph: 013 Reference ID: 68-013-20190722

support the higher figure. On the same site there was an indication that delivery over a certain number of dwellings depended on the highway authority undertaking significant junction improvements i.e. finalising the design, obtaining planning permission, preparing tender documents, completing the legal arrangements and appointing a contractor – significant factors. There was nothing whatsoever from the LPA to say what and if any of this had been progressed.

6.9 On assessing each individual site (focussing on those in dispute) you can adjust the deliverable 5 year supply or remove sites from the supply assessment altogether, depending on the evidence provided.

ANNEX A - Confirming 5 year housing land supply (from PPG)

How can authorities confirm their 5 year housing land supply?

When local planning authorities wish to confirm their 5 year housing land supply position once in a given year they can do so either through a recently adopted plan or by using a subsequent annual position statement.

Paragraph: 009 Reference ID: 68-009-20190722

Revision date: 22 July 2019

How can a 5 year housing land supply be confirmed as part of the examination of plan policies?

The examination will include consideration of the deliverability of sites to meet a 5 year supply, in a way that cannot be replicated in the course of determining individual applications and appeals where only the applicant's / appellant's evidence is likely to be presented to contest an authority's position.

When confirming their supply through this process, local planning authorities will need to:

- be clear that they are seeking to confirm the existence of a 5 year supply as part of the plan-making process, and engage with developers and others with an interest in housing delivery (as set out in Paragraph 75a of the Framework), at draft plan publication (Regulation 19) stage.

- apply a minimum 10% buffer to their housing requirement to account for potential fluctuations in the market over the year and ensure their 5 year land supply is sufficiently flexible and robust. Where the Housing Delivery Test indicates that delivery has fallen below 85% of the requirement, a 20% buffer should be added instead.

Following the examination, the Inspector's report will provide recommendations in relation to the land supply and will enable the authority, where the authority accepts the recommendations, to confirm they have a 5 year land supply in a recently adopted plan.

Paragraph: 010 Reference ID: 68-010-20190722

Revision date: 22 July 2019

Can 'recently adopted plans' adopted under the 2012 Framework be used to confirm a 5 year land supply?

Plans that have been recently adopted (as defined by footnote 40* of the Framework) can benefit from confirming their 5 year housing land supply through an annual position statement, including those adopted under the 2012 Framework.

Authorities should be aware that sites counted as part of the supply will need to be assessed under the definition of 'deliverable'** set out in the revised National Planning Policy Framework.

Paragraph: 011 Reference ID: 68-011-20190722

Revision date: 22 July 2019

> *(40) For the purposes of paragraphs 74(b) and 75 a plan adopted between 1 May and 31 October will be considered 'recently adopted' until 31 October of the following year; and a plan adopted between 1 November and 30 April will be considered recently adopted until 31 October in the same year.

> **Deliverable: To be considered deliverable, sites for housing should be available now, offer a suitable location for development now, and be achievable with a realistic prospect that housing will be delivered on the site within five years. In particular:
>
> a) sites which do not involve major development and have planning permission, and all sites with detailed planning permission, should be considered deliverable until permission expires, unless there is clear evidence that homes will not be delivered within five years (for example because they are no longer viable, there is no longer a demand for the type of units or sites have long term phasing plans).
>
> b) where a site has outline planning permission for major development, has been allocated in a development plan, has a grant of permission in principle, or is identified on a brownfield register, it should only be considered deliverable where there is clear evidence that housing completions will begin on site within five years.

How is a 5 year housing land supply confirmed through an annual position statement?

Where a local planning authority has a recently adopted plan (as set out in the National Planning Policy Framework) and wishes to confirm their 5 year land supply position through an annual position statement, they will need to advise the Planning Inspectorate of their intention to do so by 1 April each year.

To ensure their assessment of the deliverability of sites is robust, the local planning authority will also need to carry out an engagement process to inform the preparation of the statement, before submitting their statement to the Planning Inspectorate for review by 31 July of the same year.

So long as the correct process has been followed, and sufficient information has been provided about any disputed sites, the Planning Inspectorate will issue their recommendation in October of the same year. The local planning authority can then confirm their housing land supply until the following October, subject to accepting the recommendations of the Planning Inspectorate.

Paragraph: 012 Reference ID: 68-012-20190722

Revision date: 22 July 2019

How will an annual position statement be assessed?

When assessing an annual position statement, the Planning Inspectorate will carry out a 2 stage assessment:

- first, they will consider whether the correct process has been followed, namely whether:
    - the authority has a 'recently adopted plan' (defined by footnote 38 of the Framework) or they are renewing a confirmed land supply following a previous annual position statement; and
    - satisfactory stakeholder engagement has been carried out.
- second, they will look at whether the evidence is sufficient to demonstrate a 5 year supply of deliverable housing sites (with the appropriate buffer), using 1st April as the base date in the relevant year. In doing so, they will consider whether the sites identified in the assessment are 'deliverable' within the next five years, in line with the definition in Annex 2 of the Framework.

The Planning Inspector's assessment will be made on the basis of the written material provided by the authority, and the Inspector will not refer back to the local planning authority or other stakeholders to seek further information or to discuss particular sites. It is therefore important that the authority has carried out a robust stakeholder engagement process and that adequate information is provided about disputed sites.

Paragraph: 013 Reference ID: 68-013-20190722

Revision date: 22 July 2019

What information will annual position statements need to include?

Assessments need to be realistic and made publicly available in an accessible format as soon as they have been completed. Assessments will be expected to include:

- for sites with detailed planning permission, details of numbers of homes under construction and completed each year; and where delivery has either exceeded or not progressed as expected, a commentary indicating the reasons for acceleration or delays to commencement on site or effects on build out rates;
- for small sites, details of their current planning status and record of completions and homes under construction by site;
- for sites with outline consent or allocated in adopted plans (or with permission in principle identified on Part 2 of brownfield land registers, and where included in the 5 year housing land supply), information and clear evidence that there will be housing completions on site within 5 years, including current planning status, timescales and progress towards detailed permission;
- permissions granted for windfall development by year and how this compares with the windfall allowance;

- details of demolitions and planned demolitions which will have an impact on net completions;

- total net completions from the plan base date by year (broken down into types of development e.g. affordable housing); and

- the 5 year housing land supply calculation clearly indicating buffers and shortfalls and the number of years of supply.

Paragraph: 014 Reference ID: 68-014-20190722

Revision date: 22 July 2019

What engagement will an authority need to undertake to prepare an annual position statement?

Authorities will need to engage with stakeholders who have an impact on the delivery of sites. The aim is to provide robust challenge and ultimately seek as much agreement as possible, so that the authority can reach a reasoned conclusion on the potential deliverability of sites which may contribute to the 5 year housing land supply. Those authorities who are seeking to confirm a 5 year housing land supply through an annual position statement can produce an engagement statement and submit this to the Planning Inspectorate, including:

- an overview of the process of engagement with site owners / applicants, developers and other stakeholders and a schedule of site-based data resulting from this;

- specific identification of any disputed sites where consensus on likely delivery has not been reached, including sufficient evidence in support of and opposition to the disputed site(s) to allow a Planning Inspector to reach a reasoned conclusion; as well as an indication of the impact of any disputed sites on the number of years of supply;

- the conclusions which have been reached on each site by the local planning authority in the light of stakeholder engagement;

- the conclusions which have been reached about the overall 5 year housing land supply position.

Paragraph: 015 Reference ID: 68-015-20190722

Revision date: 22 July 2019

Who can the authority engage with?

Local planning authorities will need to engage with developers and others who have an impact on delivery. This will include:

- small and large developers;

- land promoters;

- private and public landowners;
- infrastructure providers (such as utility providers, highways, etc) and other public bodies (such as Homes England);
- upper tier authorities (county councils) in two-tier areas;
- neighbouring authorities with adjoining or cross-boundary sites; and
- any other bodies with an interest in particular sites identified.

Beyond this, it is for the local planning authority to decide which stakeholders to involve. This may include any general consultation bodies the authority considers are appropriate.

Local planning authorities may wish to set up an assessment and delivery group which could contribute towards Housing and Economic Land Availability Assessments, annual 5 year housing land supply assessments and Housing Delivery Test action plans for the delivery of housing. Delivery groups can assist authorities to not only identify any delivery issues but also help to find solutions to address them. They may also set out policies in their Statement of Community Involvement setting out who will be consulted when applying to confirm their 5 year housing land supply.

The Planning Inspectorate will publish on their website a list of local authorities who have notified them of their intention to seek confirmation of their 5 year housing land supply. However, interested parties who wish to be involved in the process should contact the local planning authority directly.

Paragraph: 016 Reference ID: 68-016-20190722

Revision date: 22 July 2019

What happens where there is disagreement about sites?

Where agreement on delivery prospects for a particular site has not been reached through the engagement process, the Planning Inspectorate will consider the evidence provided by both the local authority and stakeholders and make recommendations about likely site delivery in relation to those sites in dispute.

Paragraph: 017 Reference ID: 68-017-20190722

Revision date: 22 July 2019

What can an authority do once the Planning Inspectorate has reached a conclusion and provided recommendations?

When considering an annual position statement, the Planning Inspectorate will assess whether the evidence provided by the local authority is sufficient to demonstrate that there is a 5 year housing land supply, including the appropriate buffer. If this is the case, the Planning Inspectorate will then recommend that the authority can confirm that they have a 5 year housing land supply for one year. This will be a material consideration in the determination of planning applications and appeals.

The local planning authority will need to publish their annual position statement incorporating the recommendations of the Planning Inspectorate in order to confirm their 5 year housing land supply position for a one year period.

Paragraph: 018 Reference ID: 68-018-20190722

Revision date: 22 July 2019

ANNEX B – APS Report template

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The Planning Inspectorate

Report to xxxx Council

by xxxxxx

an Inspector appointed by the Secretary of State

Date xxxxx

Report on the Council's Annual Position Statement (APS)

Recommendation to the Council

1. That xxxx Council can/cannot (delete as appropriate) confirm that they have a 5 year supply of deliverable housing sites (5 year HLS) [for one year, ie until 31 October 20xx] (ie the year following the APS) (delete text within[] if cannot confirm 5 year HLS).

2. The annual housing requirement is xx dwellings per annum (dpa). (if recommending that cannot confirm a 5 year HLS then don't include this para as the APS is not fixing a shortfall in supply and the annual housing requirement would have been set out in the main body of the report).

3. (if recommending that can confirm a 5 year HLS but the supply has found to be different to that claimed by the Council then include the following, otherwise if no changes to supply on individual sites, or recommending that cannot confirm a 5 year HLS, then delete) That the 5 year HLS is reduced/increased (delete as appropriate) by xxx dwellings (leaving a supply of xxx units and reducing/increasing (delete as appropriate) the supply in years to xxx years) due to the removal/addition of units from that supply relating to the following sites:

    i) [site ref & address cross ref to that in analysis section] – remove/add (delete as appropriate) xx units;

    ii) etc

Context to the Recommendation

4. Paragraph 75 of the National Planning Policy Framework (the Framework) introduced an Annual Position Statement (APS). The Housing Supply and Delivery Planning Practice Guidance (PPG) in September 2018, and updated in July 2019, sets out the process that local planning authorities should follow if they wish to confirm their housing land supply through an APS. Paragraph 011[117] of the PPG indicates that plans that are recently adopted, including those adopted under the 2012 Framework, can benefit from confirming their 5 year HLS through an APS. The Council advised the Planning Inspectorate of its intention to do so by the required 1 April 2019 (double check that was the case).

5. The PPG says that when assessing an APS, the Planning Inspectorate will carry out a 2-stage assessment – whether the correct process has been followed and the sufficiency of the evidence submitted.

6. I have assessed the submitted APS solely on its merits, and have not considered any other material other than the supporting evidence relating to stakeholder engagement.

[117] Reference ID: 68-011-20190722.

Stage 1

Does the Council have a recently adopted plan? Suggested wording below - use the relevant paragraph and delete the other

7. For the purposes of paragraph 75 of the Framework, a plan adopted between 1 May and 31 October will be considered 'recently adopted' until 31 October of the following year[118]. The [Council] [Local Plan] was adopted on xxxxxx and [, as of the date of submission of the APS,] (include [] if this report is dated after 31 October, otherwise delete), it is therefore [deemed to be] (again include [] if this report is dated after 31 October, otherwise delete) a recently adopted plan.

8. For the purposes of paragraph 75 of the Framework, a plan adopted between 1 November and 30 April will be considered 'recently adopted' until 31 October in the same year[119]. The [Council] [Local Plan] was adopted on xxxxxx and [, as of the date of submission of the APS,] (include [] if this report is dated after 31 October, otherwise delete) it is therefore [deemed to be] (again include [] if this report is dated after 31 October, otherwise delete) a recently adopted plan.

Has satisfactory stakeholder engagement been carried out?

9. The PPG[120] identifies what engagement a Council will need to undertake and who the Council can engage with.

10. Explain what and how engagement took place, in chronological order, and briefly what was done with the data in producing the final APS; and assess and conclude as to whether it was satisfactory.

11. This section could conclude with a form of words such as, or as appropriate:

Based on the above methods, extent of engagement and response rates, I conclude on this matter that satisfactory stakeholder engagement has been carried out. Furthermore, an appropriate schedule of response data has been produced and submitted, including in relation to remaining disputed sites with the Council's comments added in each case. The Council has also provided a schedule of, and its comments on, general responses concerning the nature of the APS process and general deliverability matters.

Stage 2

Is the evidence submitted sufficient to demonstrate a 5 year HLS?

Requirement (or Local Housing Need if dealing with subsequent APSs where the strategic policies are more than 5 years old, having regard to para 73 of the

[118] Framework footnote 40

[119] Framework footnote 40

[120] Housing Supply & Delivery ID: References 68-015-20190722 & 68-016-20190722.

Framework, in which case the below para would need to be altered to reflect footnote 37 of the Framework)

12. As the Local Plan is less than five years old, the Council's housing land supply is to be assessed against the housing requirement contained in its strategic policies. The calculation of a 5 year HLS has 2 elements. The first is the requirement, which includes the annual requirement, any shortfall in delivery and the appropriate buffer (10% unless there has been significant under delivery of housing over the previous three years in which case it would be 20%)[121]. May need to refer to the latest Government published Housing Delivery Test (HDT) results with regard to the buffer.

Then explain how the Council reached its annual requirement figure and resultant total supply with a form of words such as, or as appropriate:

The Local Plan sets out a housing requirement figure of xxx dwellings per annum, amounting to xxx over the five year period. The annual five year requirement, having taken account of a shortfall in delivery since 2011, spread over the [remaining years of the Local Plan period (the Liverpool approach)][five year period (the Sedgefield approach)] (delete as appropriate), plus [10%][20%](delete as appropriate) buffer, is xxx dwellings. The Council's position as set out in the APS, following the stakeholder engagement, is that there is a total supply of xxx dwellings thereby equating to xxx years' worth of supply.

13. It may be necessary to address any necessary change to the buffer from that used for the Local Plan, as a result of the latest HDT. This could obviously result in a different annual requirement and total supply to that set out by the Council in its APS if this has not been accounted for in the APS.

14. It may also be necessary to address any disputed position as to the use of the Liverpool approach in the Local Plan as opposed to Sedgefield – in respect of not being able to alter the approach used in the Local Plan. This could include a form of words such as, or as appropriate:

The Council's continued use of the Liverpool Approach is disputed. The PPG[122] when considering how past shortfalls in housing completions against planned requirements should be addressed indicates that any shortfall should be added to the requirement for the next 5 years (Sedgefield Approach) then the appropriate buffer added. However, the guidance continues to say that if: "… a strategic policy-making authority wishes to deal with past under delivery over a longer period, then a case may be made as part of the plan-making and examination process rather than on a case by case basis on appeal." That is the process followed in this case and the LP incorporates the Liverpool approach to dealing with past under delivery. This is the basis on which the APS must be considered.

[121] Framework paragraph 73.

[122] PPG Paragraph: 031 Reference ID: 68-031-20190722

15. The five year housing requirement for the purposes of considering this APS is xxx dwellings or xxx dpa.

Supply

16. Briefly set out the components of supply within the Council's 5 year HLS figures, taking account of demolitions and assumptions made about windfalls (and potentially empty homes returning to occupation), before analysing the information. Two examples of a possible form of words as follows:

    The components of supply within the Council's 5 year HLS figures comprise xxx dwellings on known deliverable sites as of the base date of 1 April 20xx (insert APS submission year) and an allowance for xxx windfalls, a total of xxx dwellings. The Council also confirms that all dwelling figures in the 5 year HLS position are net, taking account of demolitions.

    In the APS, the supply comprises: deliverable sites (xxx) and allowances for windfalls (xx), empty homes (xx) and a demolitions allowance (xxx). Having regard to the Framework definition of deliverable sites, it is unnecessary to include an allowance for the non-implementation of small sites. Taken together, these components amount to a 5-year supply of xxx dwellings within the APS.

Analysis of the Housing Sites in Dispute

17. The APS submitted by [Council] has identified xx (ie the number of sites) sites that remain in dispute and where engagement comments claim that the site should either be removed from the supply as undeliverable or that the contribution to the supply should be adjusted (delete/amend as appropriate). I have considered the deliverability of these sites below, having regard to the glossary entry in the Framework relating to the term 'deliverable'. The remaining sites included within the APS disputed sites schedule are those stated in that document to be no longer disputed by the Council, which I have therefore not considered (delete/amend as appropriate).

18. Also have regard to and address any other general issues raised by stakeholders relating to how supply figures were arrived at for the sites. It may be that you can also say, if appropriate, that you have considered each of the disputed sites on its merits, taking account of these issues where they are relevant.

    Then go onto analyse the figures for each site, taking account of all representations, and reaching a conclusion on each in terms of what you find the site's 5 year supply to be.

    Heading for each site comprising [Site ref and address]

Windfalls

19. Analyse and conclude on assumptions taking account of the fact that the Framework and PPG provide for the inclusion of a windfall allowance subject to there being compelling evidence that they will provide a reliable source of supply. If a windfall allowance was agreed for the purposes of the Local Plan then it has recently been forensically looked at if the APS concerned follows a recently adopted plan. If the

APS concerned follows a previous APS, it would be prudent to ensure there is evidence of windfall rates having continued and that they remain a reliable source of supply. Two examples of wording from previous APS reports (both relating to a recently adopted plan) are as follows:

The windfall allowance in the APS amounts to 50 dpa for sites of less than 25 dwellings not specifically identified in the development plan, relating to the last two years of the five year period to avoid double counting of commitments. This figure is the same as for the Local Plan and is based on evidence showing a trend for such developments to exceed 50 dwellings per annum (dpa) over recent years. The Framework and PPG provide for the inclusion of a windfall allowance subject to there being compelling evidence that they will provide a reliable source of supply. Based on the submitted evidence, the inclusion of the figure of 100 dwellings is reasonable and realistic.

The allowance for Years 4 and 5 is based on a finding by the LP Examining Inspector that 40 dwellings per annum in Years 4 and 5 was justified by the evidence. Windfall development generally relates to small sites that unexpectedly become available. Therefore, from year to year their contribution cannot be reliably anticipated. Having regard to the levels of windfalls permitted in each of the years from 2014 to 2019, the inclusion of 80 dwellings appears reasonable.

Empty Homes (where relevant)

20. An example of wording used from a previous APS is:

The housing trajectory for the years 2011 to 2019 shows no long-term empty homes returning to occupation. The 5-year trajectory for 2019 to 2024, which replicates the Plan Period Housing Trajectory, shows an allowance for 50 dwellings (10 per annum). There is however, no information contained within the APS to justify or moderate the allowance of 50 dwellings. Accordingly, 50 dwellings should be removed from the supply.

Conclusion on deliverable housing supply

21. Based on the above findings, xxx dwellings should be removed/added from/to (delete as appropriate) the total 5 year HLS reducing/increasing (delete as appropriate) it to xxx units against a requirement of xxx and reducing/increasing (delete as appropriate) the supply in years to xxx years. (if recommending that cannot confirm a 5 year HLS then add the following for clarity, as it would not be appropriate to put this in the recommendation as the APS is not fixing a shortfall in 5 year HLS – don't include if recommending can confirm as it will be included in the recommendation section) In respect of individual sites where the supply has been found to be differ from the Council's figures, these are summarised as follows:

    i) [site ref & address cross ref to that in analysis section] – remove/add (delete as appropriate) xx units;

    ii) etc

Conclusion

22. For the reasons given above, I conclude that the Council can/cannot (delete as appropriate) demonstrate that it has a 5 year HLS.

[Signed]

INSPECTOR

ANNEX C – APS Notification Template

An Annual Position Statement (APS)

Is a document setting out the 5 year housing land supply position on 1st April each year, prepared by the local planning authority in consultation with developers and others who have an impact on delivery. The local planning authority needs to advise the Planning Inspectorate of their intention to produce an APS by 1st April each year followed by submission of the APS to the Planning Inspectorate by the 31st July.

Is the APS process for you?

There are a number of questions you will need to ask yourselves and risks which need to be considered. The questions in this guide will help determine if the APS process is for you.

A: Is your plan considered 'recently adopted'?	
You will need to be sure that the plan is considered 'recently adopted' inline with the NPPF. You will need to demonstrate on the notification template when the plan was adopted and till when it is considered recently adopted.	
A1: Was the plan adopted prior to 1 May 2019?	☐ Yes. The plan is not considered as being recently adopted and you should not apply. ☐ No. You can think about applying. Go to QA2
A2: Was the plan adopted between 1 May and 31 October 2019?	☐ Yes. The Plan will be considered recently adopted until 31st Oct 2020. ☐ No. Go to A3.
A3: Was the plan adopted between 1 November 2019 and 30 April 2020?	☐ Yes. The Plan will be considered recently adopted until 31st Oct 2020. ☐ No. If you answered No to A2 and A3 the plan is not considered as being

	recently adopted and you should not apply.

B: Stakeholder Engagement	
The APS process requires stakeholder engagement to be carried out and the PPG gives guidance on this. Think about how you intend to undertake the engagement process to inform the preparation of the statement.	
B1: Are you confident this can be completed prior to the 31st July 2020?	☐ Yes. ☐ No. Then you should not apply.

C: Transparency, FOIs and Webpages	
The APS including any draft version, the version submitted to PINS, the Inspectors Report and the finalised version can all be subject to FOI and should be made publicly available on your website.	
C1: Do you understand you will need to make all the stages of the APS process and documents available on your webpages?	☐ Yes. ☐ No. Then you should not apply.
C2: Do you understand the APS prior to the Inspectors report and after will be subject to FOI and you will need to make it publicly available?	☐ Yes. ☐ No. Then you should not apply.

C3: Do you understand that the Inspectors Report will be subject to FOI and you will need to make it publicly available?	☐ Yes. ☐ No. Then you should not apply.

D: What the Planning Inspectorate will do	
The Planning Inspectorate will carry out a 2 stage assessment:	
Stage 1: The Planning Inspector will answer the following questions Is it a recently adopted plan Y/N Is it renewing a previous APS Y/N Has satisfactory stakeholder engagement been carried out Y/N D1: Are you confident they will be able to answer these questions?	☐ Yes. ☐ No. Then you should not apply.
Stage 2 :The Planning Inspector will answer the following questions Is the evidence submitted sufficient to demonstrate a 5 year supply of deliverable housing sites (with the appropriate buffer), using 1st April 2020 as the base date. Y/N Are the sites identified in the assessment are 'deliverable' within the next five years, in line with the definition in Annex 2 of the Framework. Y/N D2: Do you understand that the Inspector can adjust the deliverable supply within the	☐ Yes. ☐ No. Then you should not apply.

next five years or remove sites from the supply assessment?	
D3: Do you understand there is a risk that the Planning Inspectorate may determine there is not a five year supply of deliverable sites?	☐ Yes. ☐ No. Then you should not apply.

The Planning Inspectorate

Housing Compulsory Purchase 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:

- Minor Amendments to text throughout chapter in reference to the publication of updated MHCLG "Guidance on compulsory purchase process and the Crichel Down Rules" in July 2019
- New section 8.2 clarifies a position regarding compliance with relevant legislation and formalities.

Contents

Introduction

1. This chapter of the Inspector Training Manual is a guide to the work of PINS in handling Compulsory Purchase Orders (CPOs) under the Housing Acts. The work is undertaken by all Inspectors, although the larger cases are reserved for those with more experience. This chapter concentrates on the main operational principles of Housing Act casework and the practical application of present legislation. See 'Compulsory Purchase and Other Orders' for the general background and procedures in dealing with CPOs. As the process of writing Housing and Planning decisions is new to PINS (as opposed to the drafting of reports for the Secretary of State), this ITM Chapter will be regularly updated with lessons learnt.

2. This chapter advises on:
   (a) The general background to Housing Act CPO work;
   (b) Orders made under Parts II and IX of the Housing Act 1985 (as amended) and Part VII of the Local Government and Housing Act 1989;
   (c) Listed Buildings;
   (d) Conduct of Housing CPO inquiries;
   (e) Site inspections including health and safety considerations (largely by cross-reference);
   (f) Written representation procedure;
   (f) Costs; and
   (g) Reporting.

Relevant Statutory Sources and Guidance

England

The Acquisition of Land Act 1981 (as amended)
Housing Act 1985 (as amended)
Housing Act 1988
Local Government and Housing Act 1989
Housing Act 2004
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 2007 No. 3617 The Compulsory Purchase (Inquiries Procedure) Rules 2007
SI 2004 No. 2594 Compulsory Purchase of Land (Written Representation Procedure) (Ministers) Regulations 2004
National Planning Policy Framework (paragraph 51)
SI 2005 No. 3208 Housing Health and Safety Rating System (England) Regulations 2005
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, July 2019)

Wales

The Acquisition of Land Act 1981 (as amended)
Housing Act 1985 (as amended)
Housing Act 1988
Local Government and Housing Act 1989
Housing Act 2004
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)

Subject-specific sources

Housing Health and Safety Rating System Operating Guidance (OPDM, February 2006)
Housing Health and Safety Rating System Enforcement Guidance: Housing Act 2004 Part 1 – Housing Conditions (OPDM, August 2006)

[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 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.

Glossary of Abbreviations Used

The following standard abbreviations are used in this section.

ALA Acquisition of Land Act 1981 (as amended)
HAT Housing Action Trust
HHSRS Housing Health and Safety Rating System
HMO House in Multiple Occupation
LA Local Authority
LHA Local Housing Authority
LPA Local Planning Authority
PCU Planning Casework Unit
NPPF National Planning Policy Framework
PINS Planning Inspectorate
PSED Public Sector Equality Duty
RSL Registered Social Landlord
SSHCLG Secretary of State for Housing, Communities and Local Government

Definitions

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).

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, decisions have been delegated to PINS Inspectors (under Section 14D of the ALA), who now act as the Confirming Authority in most CPO cases, rather than the SoS.

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). Note that from 6 April 2018, decisions have been delegated to PINS Inspectors, who now act as the Confirming Authority in most CPO cases, rather than the SoS.

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 ALA 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.

General Background to Housing Act CPO work

3. Local Authorities (LAs) have a wide variety of housing powers and duties, which include powers of compulsory acquisition. The principal empowering Acts are the Housing Act 1985 and the Local Government and Housing Act 1989. The Housing Act 1988, as amended, creates similar powers for Housing Action Trusts (HATs). The Housing Act 2004 sets out the enforcement powers of LAs. The Housing Health and Safety Rating System Enforcement Guidance provides guidance on enforcement powers. The principal guidance on CPOs is the MHCLG's *Guidance on the compulsory purchase process and the Crichel Down Rules*, which deals generally with CPOs (but in its Section 5 contains advice about CPOs made under housing powers). The NPPF (footnote 48 to paragraph 120d) commends the use of CPOs where appropriate to bring back into residential use empty homes and other buildings.

4. Inspectors hold inquiries or carry out written representation site visits into, and take decisions or report to the Secretary of State on, opposed CPOs, which are usually promoted under Part II or Part IX of the Housing Act 1985 or, more rarely, Part VII of the Local Government and Housing Act 1989. The Acquisition of Land Act 1981 (as amended) applies, together with the appropriate Inquiries Procedure or Written Representation Procedure Rules.

5. 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 Secretary of State. It is estimated that more than 90% of CPO casework will be delegated to Inspectors and the Secretary of State will only intervene in the most complex and/or controversial cases.

6. Once a date for an inquiry or a site visit is fixed, administration of the case within PINS is the responsibility of the Environment and Transport Team. Inspectors' reports when the confirming authority is the Secretary of State are submitted via PINS to PCU (which is part of MHCLG) for the consideration of the Secretary of State.

7. Housing CPOs differ in certain respects from CPOs made under other powers. Orders normally fall into four main kinds:
   (i) acquisition of land (and buildings) for housing;
   (ii) acquisition of sub-standard or vacant properties to bring them into acceptable condition or use;
   (iii) minor environmental works in Renewal Areas;
   (iv) clearance.

8. Categories (i) and (iii) follow broadly the standard compulsory purchase procedures. Most Orders for acquisition of land are for onward disposal to an RSL or the private sector. Category (ii) shows important contrasts with general CPO initiatives; there is often no disagreement as to the need to achieve the objectives of the CPO, the issue usually being whether the Order is necessary or whether it should be left to the owner to achieve it. The Inspector needs to provide a judgement on which party is likely to prove more dependable. The Secretary of State will rely on this judgement in cases where he/she remains the confirming authority. Category (iv) Orders present a range of unusual factors, some of a highly technical nature. Sometimes there will be disagreement over the condition of the

dwellings under consideration. Assessments of this kind demand a sound knowledge of the Housing Health and Safety Rating System (HHSRS) guidance set out in the relevant HHSRS Regulations and Enforcement and Operating Guidance. However, since the introduction of the HHSRS, CPOs under category (iv) (Part IX) are very rare.

9. 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.

10. 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 with a protected characteristic is clearly understood. Where a decision is likely to have an impact on a person / persons with a protected characteristic, the Inspector must address this specifically in their report and the report 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 of the Inspector Training Manual.

11. 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, there must be no referral **in detail** to this information in decisions and reports (please see *Sensitive Information* in Annexe 1 of The approach to decision-making chapter, for more information).

Part II Orders – Acquisition for housing purposes

General

12. The powers to acquire land for housing are contained in Section 17 of the Housing Act 1985 (1985 Act). A LHA may acquire by agreement or, on the authority of the Secretary of State, compulsorily:
    - land as a site for the erection of houses ('land' includes buildings);
    - houses or buildings (and land occupied therewith) to be made suitable as houses;
    - land for providing facilities in connection with housing accommodation;
    - land for works to an adjoining house.

13. Part II Orders are used mainly to acquire land for housing and ancillary development, to bring empty or underused properties into housing use and to improve substandard or

defective properties. Acquisition can include leasehold or freehold interests being re-purchased to facilitate redevelopment of old municipal estates. Rights over land may also be acquired. Provided the acquisition of the commercial part is incidental to the acquisition of the residential part of the property, a purchase under this Section of a property with mixed residential and commercial use will be lawful. LAs are normally expected to arrange for their disposal to an RSL or private agency for action or improvement within a defined timescale.

14. Orders need to be specific in purpose. Section 17 of the 1985 Act should not be used, for example, where the construction of a road is the main purpose of the Order rather than road building as an integral part of a housing scheme. However, where an authority has a choice between the use of housing or planning CPO powers refusal to confirm an Order should not be solely on the grounds that it could have been made under another power. An Order under Section 17(a) of the 1985 Act with the purpose of clearing buildings and redevelopment cannot be switched to rehabilitation under Section 17(b) of the Act without a fresh start with all those affected. The motives of an authority in promoting an Order may sometimes be called into question and, if so, the matter must be thoroughly investigated, and a conclusion reached. On acquisition under Section 17(b) the acquiring authority, normally the LA, must ensure forthwith that the building is made suitable and used as a house as soon as practicable.

Housing Gain

15. The powers under Section 17 of the 1985 Act are justified only where the policy objectives of a quantitative or qualitative housing gain would be achieved (paragraph 136 in Section 5 of the MHCLG Guidance on compulsory purchase process). This may be by new building, restoration or upgrading. A numerical loss in housing stock can be outweighed by the improved quality of accommodation to be provided. The powers do not extend to acquisition for the purpose of the management of housing accommodation. Acquisition for housing use of empty properties may be justified as a last resort where there appears to be no other prospect of a suitable property being brought into residential use (paragraph 140 in Section 5 of the MHCLG Guidance on compulsory purchase process). Compulsory purchase of sub-standard properties may also be justified as a last resort in cases where: a clear housing gain will be obtained; the owner has failed to maintain the property or bring it to an acceptable standard; and other statutory measures have failed (paragraph 141 in Section 5 of the MHCLG Guidance on compulsory purchase process). The Objector's proposals and their track record will be highly relevant factors. An owner-occupied house would not be expected to be included in an Order (other than one in multiple occupation) unless the defects in the property adversely affected other housing accommodation (paragraph 141 in Section 5 of the MHCLG Guidance on compulsory purchase process). It is important that decisions and reports explicitly state whether a quantitative or qualitative housing gain would be achieved.

Housing Need

16. As Part II Orders are to provide housing accommodation, acquiring authorities must establish a housing need; adverse environmental impact from lack of maintenance is not an appropriate ground for confirmation. The need for further housing accommodation within an authority's area should be included in its Statement of Reasons. This information

should normally include the total number of dwellings in the district, the quantity with Category 1 and 2 hazards under the HHSRS, others vacant and in need of renovation, total number of households and the number for which provision should be made. Details of the LA's housing stock can also be helpful. Inspectors should examine evidence of need critically and, if it has not been adequately provided, should ask questions at an inquiry and, if necessary, adjourn for answers to be provided. In a written representations case the Inspector should go back to the acquiring authority and seek this information if it hasn't been provided. Land can be acquired up to ten years in advance of it being required (Section 17(4) of the 1985 Act). Paragraph 138 in Section 5 of the MHCLG Guidance on compulsory purchase process also states that the Secretary of State may not confirm an Order unless he is satisfied that the land is likely to be required within 10 years of the date the Order is confirmed.

Harassment

17. Aside from the criminal offence of harassment, it has been held that the conduct of a landlord towards tenants may be so unreasonable as to give rise to conditions of unsatisfactory housing (*R –v- Secretary of State for the Environment ex parte Royal Borough of Kensington and Chelsea* (1987)). Section 29 of the Housing Act 1988 describes the statutory circumstances of harassment. Part II CPOs arising from harassment are very rare. Inspectors dealing with an Order where harassment is alleged should discuss the case with their Professional Lead before the inquiry and be alert to the possible need for evidence to be taken on oath.

Undertakings

18. Undertakings are a regular feature of Housing CPOs. They are commitments, normally given by the acquiring authority, that acquisition of a property by implementation of the Order will not take place if works specified are completed satisfactorily within a given time. Some acquiring authorities have adopted the practice of offering to the owner an undertaking that, if their objection to a CPO is withdrawn and they agree to improve the property and bring it into an acceptable use within a specified period, the Order, if confirmed, will not be implemented. Undertakings are matters between the acquiring authority and the owner and the Inspector or Secretary of State has no involvement. An Order subject of such an undertaking will still be considered by the Inspector or Secretary of State on its individual merits.

19. The Inspector or Secretary of State has no powers to confirm an Order subject to conditions. However, Inspectors can properly have regard to undertakings (often referred to as cross-undertakings if the undertaking also involves the Objector's withdrawal of objection and commitment to works) in their decisions or in deciding their recommendations. They should be examined carefully and the requirements of an undertaking should be reasonable and realistic. Undertakings offered by Objectors should be taken as part of their case and should be tested critically. Undertakings should be filed as evidence to the case.

Part VII Orders – Acquisition in Renewal Areas

20. The Local Government and Housing Act 1989 (as amended) gives LHAs the powers to declare Renewal Areas. Specific guidance on the enabling powers is given in paragraph 146 of the MHCLG Guidance on compulsory purchase process. Renewal Areas are areas consisting principally of a specified minimum number of dwellings with a defined proportion of private houses where living conditions are unsatisfactory.
21. Section 93(2) of the 1989 Act empowers agreed and compulsory acquisition by LHAs of land consisting of or including housing accommodation in Renewal Areas; and the provision of housing accommodation. The objectives of acquisition are:

    - the improvement or repair of premises;
    - the proper and effective management and use of housing accommodation by the LHA or some other person; and
    - the well-being of persons resident in the area.

22. Provision is also made, in Section 93(4) of the 1989 Act, for LHAs to acquire land in the area for the purpose of effecting or assisting the improvement of the amenities in the area.

23. Renewal Areas replaced the previously-existing types of improvement areas of Housing Action Areas and General Improvement Areas in which broadly similar objectives were pursued by Orders promoted under Part VIII of the Housing Act 1985. In practice, Renewal Area CPOs have been promoted only very infrequently.

Part IX Orders – Clearance Areas

24. Guidance on the use of clearance area compulsory purchase powers is given at paragraph 145 of the MHCLG Guidance on Compulsory purchase process. Section 5 of the Housing Act 2004 places a general duty on LHAs to take enforcement action to remedy any Category 1 hazard identified after the assessment of a dwellinghouse under the HHSRS. There are various options for action, one of which is the declaration of a Clearance Area under Section 289 of the 1985 Act, which is often a precursor to compulsory purchase action.

25. A Clearance Area can be declared where a LHA is satisfied that each of the residential buildings in the area contains a Category 1 hazard and that other buildings in the area (if any) are dangerous or harmful to the health and safety of the inhabitants of the area or by reason of the bad arrangement of the residential buildings or the narrowness and bad arrangements of the streets (Section 289 of the 1985 Act). There are also discretionary powers to declare such areas in other specified circumstances under Section 289.

26. The declaration of a Clearance Area places the LHA under a duty to demolish all the properties in that area (the pink land on the Clearance Area Map). In order to provide a satisfactory cleared area or redevelopment site it may be necessary when promoting a CPO under Part IX to include 'added lands' (coloured grey on the Order Map) adjoining or enclosed by that occupied by the 'pink' properties. The 1985 Act provides for compulsory purchase of the pink and grey lands (and extinguishment of rights of way if necessary).

Acquisition is on the basis of market value but objections by owners of any of these interests are common. It should be noted that failure to confirm the CPO will, effectively, nullify the Clearance Area declaration.

27. The procedure for determining whether houses in a Clearance Area contain Category 1 hazards is set out in the HHSRS Operating Guidance. This procedure applies also to flats and HMOs. The HHSRS contains 29 Hazard Profiles, listed in seven groups:

    - HYGROTHERMAL CONDITIONS: Damp and mould growth; excess cold; excess heat;
    - POLLUTANTS (NON-MICROBIAL): Asbestos (and multi-mode fibre); biocides; carbon monoxide and fuel combustion products; lead; radiation; un-combusted fuel gas; volatile organic compounds;
    - SPACE, SECURITY, LIGHT & NOISE: Crowding and space; entry by intruders; lighting; noise;
    - HYGIENE, SANITATION & WATER SUPPLY: Domestic hygiene, pests and refuse; food safety; personal hygiene, sanitation and drainage; water supply;
    - FALLS: Falls associated with baths etc; falling on level surfaces etc; falling on stairs etc; falling between levels;
    - ELECTRIC SHOCKS, FIRES, BURNS & SCALDS: Electrical hazards; fire; flames, hot surfaces etc;
    - COLLISIONS, CUTS & STRAINS: Collision and entrapment; explosions; position and operability of amenities etc; structural collapse and falling elements.

28. The HHSRS Operating Guidance gives a full explanation of the methodology of the assessment system, including the identification and rating of hazards using risk assessment techniques, and inspection guidance.

29. Unlike the previous 'Housing Fitness Standard' it has replaced, it is clear that the more comprehensive and sophisticated HHSRS assessment (although itself not a standard) contains a predictive element as well as recording actual conditions at the time of the assessment, particularly in relation to the 12 months following an inspection.

Listed Buildings

30. General principles relating to listed buildings are discussed in the Inspector Training Manual on the Historic Environment. Guidance on procedures for acquiring authorities in respect of Orders containing listed buildings, building subject to building preservation notices or those of list quality, or buildings in a conservation area is given in section 21 of the MHCLG Guidance on compulsory purchase process, related to the requirement to submit a Protected Assets Certificate with a CPO. If a LHA has not already clarified matters, Inspectors' decisions or reports must indicate whether listed buildings are affected.

31. Demolition Orders under Section 265 of the 1985 Act, a course open to a LHA where it is satisfied a Category 1 hazard exists in a dwelling or, in specified circumstances, where there is a Category 2 hazard, cannot be made in respect of listed buildings. The Inspector Training Manual on the Historic Environment includes advice on demolition, including for unlisted buildings in conservation areas, and a cross-reference to the Government's Planning Practice Guidance.

Housing Action Trusts (HATs)

32. HATs were introduced by the Housing Act 1988. Their main purposes are to repair or improve housing accommodation and manage it effectively. Trusts may provide housing, shops and advice centres and other facilities for the benefit of the community and have wide powers associated with land, buildings, services and businesses expedient for their objectives.

33. HATs may be empowered by the Secretary of State to administer the functions conferred on an LHA under the Housing Acts including (under Section 77) compulsory purchase powers involving land within and adjacent to the designated area and other land outside the area. Inspectors dealing with HAT cases should consult their Group Manager.

Conduct of Housing CPO Inquiries

34. The conduct of inquiries generally is dealt with in the Inspector Training Manual 'Inquiries' and there is advice on CPO procedures in Compulsory Purchase and Other Orders. The following points relate to inquiries into Housing Act CPOs initiated by LAs or other authorised agencies. Because of the individual and sometimes unpredictable nature of Housing CPO inquiries Inspectors should be prepared to be flexible in their approaches against the normal background principles of fairness, openness and impartiality and having regard to the provisions of the Public Sector Equality Duty (PSED). This is particularly the case given the often emotional and strongly-held views of those whose properties stand to be possibly taken from them compulsorily.

35. 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 SSMHCLG or other Minister as 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).

36. The 2007 Inquiries Procedure Rules[3] have brought CPO inquiries into line with planning inquiries generally. This includes the requirement for the main parties involved to submit

[3] In Wales, the Compulsory Purchase (Inquiries Procedure) (Wales) Rules 2010 (SI 2010 No 3015)

statements of evidence (as referred to in the Rules (not proofs)) before the opening of the inquiry.

37. Pre-inquiry site visits are always desirable. Housing CPOs can include oddities like 'flying freeholds' and other interlocking or abutting buildings that may give rise to questions that should be put at the inquiry. In the case of Part II inquiries, the Inspector may be alerted to what very recent action by an Objector (if any) might have taken place to improve a property or bring it back into residential use and so prime themselves to ask pertinent questions.

38. Inquiry openings and general procedures are covered in the Inspector Training Manual 'Inquiries' and more specifically for CPO inquiries in Compulsory Purchase and Other Orders. Inspectors should ascertain the interests of late Objectors who, if permitted to speak, normally have similar inquiry rights to 'Remaining Objectors'. The acquiring authority is heard first and Objectors next, in the Inspector's preferred sequence, followed by interested persons (if any). Depending on the numbers of witnesses appearing for the acquiring authority, the usual order of events should be adopted for the examination of evidence. Non-appearances are dealt with on the basis of the written objections and a response by the acquiring authority.

Site Inspections

39. The general guidance in the Inspector Training Manual on Site Visits applies. However, it is not always possible in Housing casework, particularly with Part IX Orders (Clearance Areas), to adhere strictly to the general principle that the Inspector should never be accompanied by one party without the presence of the other party/ies. Inspectors may find they have no option but to undertake the inspection with the acquiring authority representative alone. In these circumstances the Inspector must remain as detached as possible and avoid any contact or conversation other than that essential for the proper execution of his or her duties.

40. At all times Inspectors must have regard for their own personal safety when conducting site inspections and be mindful of the safety of those who may be accompanying them. Inspectors should be particularly aware that Housing CPO casework often involves visits to properties which may be in serious disrepair and structural dilapidation and which may present particular potential hazards. The need to be prepared with appropriate safety clothing and equipment should be especially borne in mind.

41. In Clearance Area CPOs Inspectors must have regard only to the defects alleged by the acquiring authority and the judgement should be made solely on those grounds even if other defects are discovered. It would be contrary to natural justice to identify a new Category 1 hazard for reasons unsupported by evidence. The same would apply in the case of houses in the 'added lands' which might appear to have become the subject of one or more Category 1 hazards.

42. Where Objectors initially decline requests for entry, Inspectors must rely on persuasion and where entry is not possible determine the case, or report to the Secretary of State, on as much as can be seen and concluded upon without such access.

Written Representation Procedure

43. When there are objections to the authorisation of a CPO the written representation procedure may be used as an alternative to an inquiry. Only if all remaining Objectors agree will this procedure be used. The Inspector will determine the case or report to the Secretary of State following the holding of a site visit.

Costs

44. The advice on costs in the Government's Planning Practice Guidance applies generally. Where Remaining Objectors are successful 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 be made by the Objector for an award to be made. Where Remaining Objectors are successful then an award will be made in their favour (unless there are exceptional reasons for not doing so). 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).

Reporting to the Secretary of State and Decision Writing

45. The general principles of decision-writing and reporting to the SSHCLG apply. In the latter case the aim must be to give concisely all the information necessary for him/her to understand all the issues, and to advise on any technical implications of the case.

46. When reporting to the SSHCLG the Inspector must take account of objections to a proposal, report on those objections, reach conclusions and, unless there are convincing 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. The SSHCLG relies heavily on the Inspector's report, and very few Inspectors' recommendations on CPOs are not agreed to.

47. The form of report may vary according to the case, but a general guide to the kind of format that will assist decision officers is set out in Annex 2. Reports should be as succinct as possible, readable and fairly reflect the parties' cases. Separate templates are provided through the Decision and Report Document System (DRDS) for reports under Parts II, VII and IX of the Acts. For Part IX reports, following the description sections of individual properties, there should be included a setting out of a finding as to whether, having regard to the reasons alleged by the acquiring authority, the property has been correctly identified as containing a Category 1 hazard. A separate opinion should then be included as to whether the property has been correctly included within the Clearance Area

48. If the only remaining objections are withdrawn shortly before the opening of an inquiry, or a site visit under the Written Representation procedure, there will be no need to write a decision. Instead, the Inspector should attach a short minute to the file to explain the situation. The Environment and Transport Team will then deal with the Order as an unopposed Order. Where the Secretary of State is the Confirming Authority the file will be

forwarded by the Environment and Transport Team to PCU for the SoS to deal with the Order unopposed.

49. If the only remaining objections are withdrawn at an inquiry then a short report, which should include the summary of the case for the making of the Order, and any other representations, should be produced giving the Inspector's conclusions and recommendation.

50. The Housing and Planning Act 2016 inserted a new subsection 3 into section 24 of the ALA 1981 Act, to introduce statutory reporting targets for housing 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:

For written representation 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;
- 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 quality control process. If, whilst writing their reports, Inspectors think they will not be able to comply with this, the Environment and Transport 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;

[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).

- 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.

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 Team to carry out the quality control checks, 12 weeks for the PCU 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 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.

Information Required from PCU/PINS and Other Government Departments for CPOs submitted by acquiring authorities on or after 6 April 2018

51. Reporting period – 6 April 2018 to 31 March 2019 (then financial year for future reports)

52. Enabling power under which CPO made whether:

- Secretary of State case or
- delegated case (currently only MHCLG cases)

For written representations procedure cases:

- date CPO received by the confirming authority for confirmation
- date of issue of 'starting date' letter
- date of site inspection where applicable
- where there has been no site inspection, the date of final exchange of representations
- the date the Inspector's report is submitted to the Secretary of State (for Secretary of State cases only)
- date of issue of decision letter

For inquiries procedure cases:

- date CPO received by the confirming authority for confirmation
- date of issue of notice of intention to hold a local inquiry
- date inquiry opened
- date inquiry closed
- date the acquiring authority and other parties to the inquiry notified of expected date of issue of decision letter
- the date the Inspector's report is submitted to the Secretary of State (for Secretary of State cases only)
- actual date of issue of decision letter

53. These targets are also applicable to other CPO casework, e.g. DfT, Defra, BEIS.

Modification of an Order

54. Inspectors will need to be aware of the importance of accuracy, when required to occasionally modify an Order[5]. When modifications are required, it needs to be ensured 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.

General Data Protection Regulations

55. Due to the type of issues that may occur in housing CPO cases e.g. health, criminal records, it may be required to draft a decision according to the requirements of the UK GDPR.

[5] When an Order is made, the original document has a wax seal. Sometimes the acquiring authority makes two, but in most instances only one. As a result, to minimise the risk of loss/damage it is not usually sent to the Inspector or the inquiry/event. Additionally, the Environment & Transport Team is responsible for annotating any modifications needed on the sealed Order and Map. The reason for this being that i) if it looks complicated or there is uncertainty the Office can directly approach PCU, or ii) if there are errors, the Office can directly contact the Council and negotiate another sealed Order.

Annex 1: Check List

Inspectors are asked to check the following (in addition to the usual checks for Secretary of State Casework):

Inquiries

Pre-Inquiry

- The allocation level of the case;
- The date and time arranged for the inquiry or visit. NB in Housing cases especially, the Objector does not always live in the CPO property. Therefore, if there are clearly other contact addresses for the Objector, then the Inspector needs to be satisfied that notification of the event has been sent to every possible address.
- Venue for the inquiry; are there likely to be any access issues, particularly for any known disabled or impaired participants?;
- Any essential but missing information;
- From what can be seen on the file, the nature and extent of the cases, and number 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 the case officer to ascertain the parties' views;
- Understand the nature of the Order and the relevant 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; and
- Note any correspondence on the file between PCU and the acquiring authority about the making of the Order which may require modifications to be specified and recommended if the Order was to be confirmed (e.g. names, addresses, interests, correct colouring of the Order Map). Even if there is an incorrect postcode in the schedule to the Order, the Order, if confirmed, will need to be modified.

At the inquiry

- Check whether the Statutory Formalities have been complied with and whether there are any questions arising;
- Make clear that objections will remain until they are withdrawn in writing. There is no such thing as a conditional withdrawal;
- Decide which method of proceeding is appropriate i.e. if there are many appearing Objectors is 'Method B' the better option? (see 'Compulsory Purchase and Other Orders'); and
- If an Order Map requires amendment has an amended Map been produced before the close of the inquiry?

The Report

- 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?;
- Do the conclusions 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?;
- Are there sufficient cross-references in the conclusions to source paragraphs in the earlier part of the report?;
- The conclusions should contain no new facts or introduce evidence not summarised in the earlier part of the report;
- Has a conclusion been reached that there is or is not a compelling case in the public interest for confirmation of the Order?;
- 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 and has reference to the Public Sector Equality Duty been made, if necessary?;
- In the recommendation is the name of the Order exactly as written on the Order?;
- If confirmation with modifications is recommended is it clear within the recommendation what those modifications are?; and
- When submitting the report has the CIR1 form been completed? (This deals with the recovery of costs.)

Written representation cases

Pre-event

- The allocation level of the case;
- The date and time arranged for the visit. NB in Housing cases especially, the Objector does not always live in the CPO property. Therefore, if there are clearly other contact addresses for the Objector, then the Inspector needs to be satisfied that notification of the visit has been sent to every possible address;
- Any essential but missing information;
- Understand the nature of the Order and the relevant 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; and
- Note any correspondence on the file between PCU and the acquiring authority about the making of the Order which may require modifications to be specified and recommended if the Order was to be confirmed (e.g. names, addresses, interests, correct colouring of the Order Map). Even if there is an incorrect postcode in the schedule to the Order, the Order, if confirmed, will need to be modified.

The decision

- Is the name of the Order correctly and precisely recorded?;
- Do the conclusions flow logically from the assessment of the cases and address the whole of the Order, not simply those parts to which objection has been made?;
- Has a conclusion been reached that there is or is not a compelling case in the public interest for confirmation of the Order?;
- 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 and has reference to the Public Sector Equality Duty been made, if necessary?;
- In the decision is the name of the Order exactly as written on the Order?;
- If confirmation with modifications is decided is it clear within the decision what those modifications are?; and
- When submitting the report has the CIR1 form been completed? (This deals with the recovery of costs.)

Annex 2: CPO Report Template

CPO Report /00000/

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][6]

ACQUISITION OF LAND ACT 1981

[NAME OF LOCAL AUTHORITY IN WHOSE AREA THE ORDER LIES]

APPLICATION [BY THE[7]]

[NAME OF ORDER MAKING AUTHORITY][8]

FOR CONFIRMATION OF [THE[9]]

[NAME OF ORDER][10]

Inquiry held on
Inspections were carried out on

File Ref(s): /00000/

File Ref: /00000/

[*name of Order exactly as cited in the sealed Order, including punctuation*]

[6] As in heading to the sealed Order, including use of capitals.
[7] These two words used only if the acquiring authority is not the local authority.
[8] If not the local authority.
[9] Omit this word if the word 'The' is included in the title of the Order.
[10] 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.

- The Compulsory Purchase Order was made under [*name of enabling Act, including Section*] and the Acquisition of Land Act 1981 by [*name of acquiring authority*] on [*date*].
- [*if appropriate under Part VII*]The Order is related to the [ ] Renewal Area[s] declared by the Council on [ ].
- The purposes of the acquisition 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 mainly on the grounds that [*briefly summarise*]. There were [*number]* additional non-qualifying objections. [*Number*] objections were withdrawn.

Summary of Recommendation: that the Order be [confirmed with / without modification / not confirmed]

Procedural Matters and Statutory Formalities (see also paragraph 5.3 of Compulsory Purchase and Other Orders)

[*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[11]. The Acquiring Authority (AA)/Council confirmed its compliance with the Statutory Formalities. There were no submissions on legal or procedural matters. [*If 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 decision officer to understand those physical features of the land(s) and buildings that may have a bearing on the case. 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.*]

---

[11] The public notice providing details of the date, time and place for the inquiry.

[*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 (i.e. heritage assets) affected; details should be on the Protected Assets Certificate submitted by the Acquiring Authority;*]

The Case for the *[name]* [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. 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 and 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) Acquiring Authority

[*Do not repeat anything already in the authority's case whether general or particular 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

[*Particularly for Part II and IX Orders, more detailed description of the state/condition of the property/properties will be necessary to supplement the general description provided earlier. If a description is given, expressions of opinion within this section should be avoided.*]

Other Submissions opposing the Council

[*See comment on Submissions supporting the Acquiring Authority above*.]

Response by the Council

[*See comment on response by the (Council) Acquiring Authority 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 to the SSHCLG, the facts on which the Inspector's conclusions are based must be clear. The origin of every factual statement should be identifiable from the text, generally by indicating the source paragraph in parentheses*.]

[*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 acquiring authority 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 it is necessary to*

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, it is necessary to 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. You should also conclude on interference with Human Rights.]

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.*]

[*Include appearances, documents, and list of plans*]

Annex 3: CPO Decision Template - W/Reps

The Planning Inspectorate

Compulsory Purchase Order Decision

Site visit made on <<date >>

by

An Inspector appointed by the Secretary of State

Decision date:

Case Ref: PCU/CPOH/<<LPA Ref>>/<<xxxxxxx>>

- The Order <title of order> was made under section 17 of the Housing Act 1985 and the Acquisition of Land Act 1981 by <<the Acquiring Authority>>.
  The purpose of the acquisition is the provision of housing accommodation.
- There is x objection(s) from x & y
- The main grounds of objection were <<.....>>

Procedural /Preliminary Matters

Decision

Reasons

For the reasons given above and having to all matters raised I therefore confirm/confirm with the following modifications/ do not confirm the Compulsory Purchase Order.

The attention of the Acquiring Authority is drawn to Section 15 of the Acquisition of Land Act 1981 (as amended), about the publication and service of notices now that the Order has been confirmed.

Please inform the Planning Inspectorate and the Secretary of State of the date on which notice of confirmation of the Order is first published in the press.

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

an Inspector appointed by the Secretary of State

Decision date:

Case Ref: PCU/CPOH/<<LPA Ref>>/<<xxxxxxx>>

- The Order <title of order> was made under section xx of the Housing Act 1985 and the Acquisition of Land Act 1981 by <<the Acquiring Authority>>.
  The purpose of the acquisition is the provision of housing accommodation.
- 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 /Preliminary Matters
Decision
Reasons

For the reasons given above and having to all matters raised I therefore confirm/confirm with the following modifications/ do not confirm the Compulsory Purchase Order.

The attention of the Acquiring Authority is drawn to Section 15 of the Acquisition of Land Act 1981 (as amended), about the publication and service of notices now that the Order has been confirmed.

Please inform the Planning Inspectorate and the Secretary of State of the date on which notice of confirmation of the Order is first published in the press.

Inspector

INSPECTOR

DOCUMENTS

The Planning Inspectorate

Human Rights and Equality

Updated to reflect December 2023 Framework (NPPF)

What's new since the last version:

Changes highlighted in yellow made 1 December 2023:

- Reference to the Neighbourhood Planning Act 2017 and National Design Guide,
- Examples of 'main issues' where Article 8 or the PSED is engaged and capable of being decisive.
- Amendments to Annex A including advice on language and disability.
- Other corrections, clarifications and updates throughout.

Other recent updates – 22 September 2023

- New information on the United Nations Convention on the Rights of Persons with Disabilities.
- New information on 'safeguarding'.
- Updated information on the protected characteristics in the light of the Census of England and Wales 2021 and employment case law.
- Updated advice, particularly in relation to the 'victim' in terms of human rights, and 'due regard' and 'reasoning' on the PSED, following West Berkshire [2016], Gathercole [2020], Liquid Leisure [2022], Smith [2022], Addison [2022], Devonhurst Investments [2023] and other high court judgments.

CONTENTS

SOURCES AND ABBREVIATIONS

Other sources of information are referenced throughout the chapter.

Please see Annex A plus the PINSnet Equality, Diversity and Inclusion glossary for further information on terminology.

CoA or EWCA	Court of Appeal
Census 2011	The 2011 Census of England and Wales
Census 2021	The 2021 Census of England and Wales
EA10	The Equality Act 2010
ECHR or the Convention	European Convention on Human Rights
ECtHR or ECHR (in citations) or the Strasbourg Court	European Court of Human Rights
EHRC or the Commission	Equality and Human Rights Commission
EqIA	Equality Impact Assessment
HC or EWHC	High Court
HRA98	Human Rights Act 1998
JCHR	Joint Committee on Human Rights (appointed from the House of Commons and House of Lords)
MoJ	Ministry of Justice
NPPF	The National Planning Policy Framework
ONS	Office for National Statistics

PCP	Provision, criterion or practice
PPG	Planning Practice Guidance 32: Air Quality 17b: Enforcement and Post-Permission Matters 53: Healthy and Safe Communities 67: Housing Needs of Different Groups 63: Housing for Older and Disabled People 21a: Use of Planning Conditions
PPTS	Planning Policy for Traveller Sites
RDU	Race Disparity Unit (Cabinet Office)
The Review	Independent Human Rights Act Review
SoS	Secretary of State
TCPA90	Town and Country Planning Act 1990
UDHR	Universal Declaration of Human Rights
UKHL	The House of Lords
UKSC	Supreme Court of the United Kingdom
UNCRC	United Nations Convention on the Rights of the Child
WEC	Women and Equalities Committee (for the House of Commons)

Introduction

1. This chapter of the Inspector training manual (ITM) concerns human rights and equality considerations in Appeal, Application, Notice and Order casework, with regard to the Human Rights Act 1998 (HRA98) and the Equality Act 2010 (EA10). For Local Plan Inspectors, this chapter supplements that on the Public Sector Equality Duty in the Local Plan Examinations ITM.

2. This chapter is written primarily for Inspectors but will also be relevant to APOs, Appointed Persons and others with casework duties at the Planning Inspectorate. Any reference to 'Inspectors' in this chapter may be read as encompassing such others.

3. Inspectors must act in accordance with the law, that is, meaning that they must correctly apply the law as it stands to the evidence. The HRA98 and/or EA10 may be relevant when making **any decision or recommendation where the decision-maker exercises discretion**. That applies to all procedural and casework decisions except where the latter concerns what is lawful or what public rights exist in law.

4. However, there is no scope to consider human rights or equality implications in a Lawful Development Certificate appeal, a 'legal' ground or ground (f) in an Enforcement appeal or in relation to a Definitive Map Modification Order, as set out in the Enforcement and Public Rights of Way chapters.

5. Inspectors can expect to determine cases brought by or involving diverse people with myriad circumstances and needs. Inspectors can also expect to see evidence concerning traditions and cultures that they are not personally familiar with. It is always better to seek advice from Knowledge Centre, a topic adviser, or your line manager or mentor as appropriate – and/or to seek further evidence from the parties – than risk making an error or giving other cause for complaint.

The Legal Framework

International Human Rights Law

6. The Universal Declaration of Human Rights (UDHR) was adopted by the United Nations (UN) General Assembly on 10 December 1948. It recognises the '*inherent dignity and…equal and inalienable rights of all members of the human family*' and sets out those 'universal' rights in thirty articles. Universalism is a key principle underlying the concept of human rights. The UDHR is not binding on member states but its contents are reflected in treaties which are.

7. The European Convention on Human Rights (the Convention) came into force on 3 September 1953. It drew on the UDHR as well as national documents such as the 1689 Bill of Rights (England) and 1789 Declaration of the Rights of Man and the Citizen (France). Section I of the Convention sets out the main rights and freedoms, while Section II established the European Court of Human Rights (Strasbourg Court or ECHR).

8. Article 1 of Section I of the Convention binds the signatory parties to secure the rights under Articles 2-18. Protocol 1 to the Convention sets out rights that the signatories could not agree to place in the Convention itself.

9. All Council of Europe member states are party to the Convention, and judgments of the Strasbourg Court are binding on them. The Belfast (Good Friday) Agreement of 10 April 1998 refers to the Convention as a safeguard and includes a commitment by the UK Government to incorporate the Convention into the law of Northern Ireland.

10. The HRA98 was passed to 'give further effect' in UK law of the '*rights and freedoms guaranteed'* under the Convention. It came into force in October 2000. Article 2 of the 'Northern Ireland Protocol' to the Brexit Withdrawal Agreement provides that there shall be no diminution of rights, safeguards or equality of opportunity as set out in the Good Friday Agreement.

11. The amended protocol, set out in the Windsor Framework of 23 February 2023, also recognises '*the need…to protect all dimensions of the Belfast (Good Friday) Agreement'*. It states that 'the Protocol, as amended, will be subject to the general principles of public international law as set out under the Vienna Convention on the Law of Treaties. This underlines that the fundamental underpinning of this arrangement is in international law, not EU law and the EU institutions'.

12. The United Nations Convention on the Rights of the Child (UNCRC) came into force on 2 September 1990. Article 3(1) provides that '*in all actions concerning children… undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration'*. The Equality and Human Rights Commission (the Commission) provides guidance on the UNCRC.

13. Article 3(1) is not incorporated into the Convention, the HRA98 or any legislation under which Inspectorate casework is made. However, the Supreme Court considered Article 3(1) in a public law context in *ZH (Tanzania) v SSHD* [2011] UKSC 4 and held that 'in making the proportionality assessment under Article 8 [of the Convention], the best interests of the child must be a primary consideration'. That principle was distilled and applied in a planning context in *Stevens v SSCLG & Guildford BC* [2013] EWHC 792 (Admin) as described below[1]. That judgment was endorsed by the Court of Appeal (CoA) in *Collins v SSCLG & Fylde BC* [2013] EWCA 1193.

14. The UN Convention on the Rights of Persons with Disabilities (UNCRPD) came into force on 3 May 2008. Its purpose under Article 1 is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons

[1] *ZH* specifically concerned s55 of the Borders, Citizenship and Immigration Act 2009, which did not expressly refer to Article 3(1) but did require the [Home Secretary] to arrange to discharge their functions in relation to immigration, asylum or nationality with 'regard to the need to safeguard and promote the welfare of children who are in the' UK.

with disabilities, and to promote respect for their inherent dignity. The UK agreed to follow the UNCRPD in 2009 and the Commission again provides guidance.

The Human Rights Act 1998[2]

15. Since the HRA98 is UK law, Inspectors should make decisions in accordance with the Act rather than Convention. However, it may be appropriate to describe, for example, '…rights under Article 8 of the [Convention] as set out in Schedule 1 of the [HRA98]'.

16. Section 6(1) of the HRA98 provides that it is unlawful for a public authority to act in a way which is incompatible with a Convention right. The word 'act' in that context, under s6(6), includes a failure to act.

17. S6(3) provides that a 'public authority' includes (a) a court or tribunal and (b) any person certain of whose functions are functions of a public nature. Inspectors work in that capacity[3], with 'functions of a public nature' including procedural as well as appeal and other casework decisions.

18. The rights as set out in Schedule 1 of the HRA98 are, in summary:

- Article 2 – right to life
- Article 3 – prohibition of torture
- Article 4 – prohibition of slavery and forced labour
- Article 5 – right to liberty and security
- Article 6 – right to a fair trial
- Article 7 – no punishment without law
- Article 8 – right for respect for private and family life
- Article 9 – freedom of thought, conscience and religion
- Article 10 – freedom of expression
- Article 11 – freedom of assembly and association
- Article 12 – right to marry
- Article 14 – prohibition of discrimination
- Article 1 of the First Protocol – protection of property

[2] Vol 3 (2-3851 to 2-3919) of the Encyclopaedia of Planning and Environment Law
[3] Paragraph 48 of *Stevens v SSCLG & Guildford BC* [2013] EWHC 792 (Admin)

- Article 2 of the First Protocol – right to education
- Article 3 of the First Protocol – right to free elections

19. The rights fall into three broad categories:

    - **Absolute rights** may not be violated. Articles 3, 4 and 7 are absolute rights. The right to a fair trial is also absolute but certain specific minimum rights set out in Article 6 apply to criminal and not civil cases such as appeal proceedings.
    - **Limited rights** are rights that may be limited or curtailed in certain circumstances. Articles 2, 5 and 12 are limited rights.
    - **Qualified rights** are rights which may be 'interfered' with or 'infringed' in order to secure an aim set out in the relevant article. Articles 8, 9, 10 and 11 and Article 1 of the First Protocol (A1FP) are qualified rights. Dealing with these involves balancing the fundamental rights of individuals against the legitimate interests of others and the wider public interest[4].

20. Articles 1 and 13 of the Convention do not feature in the HRA98. The Act itself fulfils the rights set out under Article 1 that signatory states must secure the Convention rights in their own jurisdiction. S7 of the HRA98 fulfils Article 13 right that victims can ensure effective remedy – through the courts – to any violation of their rights.

21. The question as to who has 'standing' to bring a 'human rights' claim in the courts was addressed in *R (oao Devonhurst Investments Ltd) v Luton BC* [2023] EWHC 978 (Admin). The claimant company argued that, when deciding to take enforcement action against the residential use of flats, the Council had not had proper regard to the best interests of the children living on the site.

22. Article 34 of the Convention provides that 'the court may receive applications from any person, non-governmental organisation or group of individuals claiming to the be victim of a violation…' The Court held that the claimant was not a victim for the purposes of s7 of the HRA98 because it made no allegation that its own Article 8 rights had been breached, and it did not represent the flat occupiers who could speak for themselves.

23. Nonetheless, the Court proceeded in *Devonhurst* to consider the merits of the Article 8 claim. Inspectors should not speculate as to whether any party would have 'standing' to bring a high court challenge on human rights grounds. Our advice to be mindful of human rights implications for persons who are not parties but would be affected by the decision, such as tenants in the appeal building, still stands.

The Equality Act 2010

24. The EA10 was introduced to 'reform and harmonise equality law'. It supersedes pre-existing statutes including the Equal Pay and Race Relations Acts of 1970, Sex Discrimination Act 1975, Disability Discrimination Act 1995 and Part 2 of the Equality

[4] Paragraphs 50 and 53 of *Stevens v SSCLG & Guildford BC* [2013] EWHC 792 (Admin)

Act 2006. Part 1 of the latter is extant because it established the Commission as a statutory non-departmental public body. The Commission has published a Statutory Code of Practice to and a guide to terms used in the EA10.

25. S149(1) of the EA10 imposes the 'public sector equality duty' (PSED) on 'a public authority…in the exercise of its functions'. The duty is applied under s149(2) on any person who is not a public authority but who exercises public functions which are, under s150(5), functions 'of a public nature for the purposes of the Human Rights Act 1998'. Inspectors and other decision-makers are therefore subject to the PSED.

26. The PSED is that 'a public authority must, in the exercise of its functions, have due regard to' what are known as the three aims, namely the need to–

    a. Eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under [the EA10].

    b. Advance equality of opportunity between persons who share a relevant protected characteristic and…do not share it.

    c. Foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

The Public Order Act 1986 (and Article 10)

27. Part III of the Public Order Act 1986 (POA86) is concerned with 'racial hatred' as defined in s17. Under s18(1), a person who uses threatening, abusive or insulting words or behaviour, or displays any written material which is threatening, abusive or insulting, is guilty of an offence if (a) they intend thereby to stir up racial hatred or (b) having regard to all the circumstances, racial hatred is likely to be stirred up. S19(1) makes similar provision with respect to the publication or distribution of threatening, abusive or insulting written material.

28. Part 3A of the POA86 is concerned with 'religious hatred' and 'hatred on the grounds of sexual orientation' as defined in s29A and s29AB respectively. S29B and s29C make it an offence to use threatening, abusive or insulting words or behaviour, or to display, publish or distribute threatening, abusive or insulting written material with the intention to stir up religious hatred or hatred on the grounds of sexual orientation.

29. Article 10 of the Convention, enshrined in the HRA98, is clear that the right to freedom of expression is a qualified right:

    1) Everyone has the right to freedom of expression…[including] freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

    2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation

or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

30. Thus, the right to freedom of expression does not trump or supersede the protection afforded under the POA86 against racial or religious hatred or hatred on the grounds of sexual orientation. Article 10 likewise does not reduce the protection against prohibited conduct under the Equality Act 2010 – and the rights set out under Article 9 also need to be balanced against the rights of others, as discussed below in relation to religion and belief.

31. Inspectors have no remit in relation to the POA86 and should not get drawn on any question as to whether a party commits a public order offence. Equally, however, Inspectors should **never** accept written representations containing or comprising threatening, abusive or insulting words or materials. Any such representations should be returned or redacted by the case teams before being distributed.

32. Inspectors should also never permit threatening, abusive or insulting behaviour at site visits, hearings, inquiries, examinations or other events such as case management conferences. Details of any oral or written threats, abuse and insults should be discussed with your manager but not recorded in decision letters or reports.

33. The Commission provides further information on Article 10.

The Neighbourhood Planning Act 2017

34. S8 of the Neighbourhood Planning Act 2017 inserted s34(2) into the Planning and Compulsory Purchase Act 2004 so that 'the Secretary of State must issue guidance for local planning authorities on how their local development documents (taken as a whole) should address housing needs that result from old age or disability'.

35. The Commission has therefore produced a toolkit for local authorities in England on Housing and Disabled People. The National Planning Policy Framework (NPPF) and Planning Practice Guidance were also revised to address this topic, as set out below and in the Local Plan Examinations ITM.

The Data Protection Act 2018

36. The Approach to Decision-Making (Part 1) sets out the approach to handling and reporting on sensitive personal information, but it is worth reiterating here that the Data Protection Act 2018 (DPA18) provides protection in relation to 'special categories of personal data' which reveal 'the racial or ethnic origin…religious or philosophical beliefs, or…data concerning health or a natural person's sex life or sexual orientation'.

37. Thus, some personal information is more sensitive by nature. It is also the case that the release of personal information could potentially have greater adverse impacts on persons with protected characteristics. When Basildon BC published sensitive personal data about individuals from an ethnic minority background, the Information Commissioner found that not only to be in breach of the DPA18 but also liable to cause legitimate fear as to how the data might be used by hostile parties.

Policy and Guidance

Overview

38. For planning and enforcement appeals, there may be local and/or national planning policies that are relevant to human rights and/or equality considerations. Whether or not that is the case, however, whether the development would comply with policy should **not** be conflated with the separate question as to whether the decision would be in accordance with the law.

39. In *R (oao Harris) v Haringey LBC* [2010] EWCA Civ 703, the Council granted permission for the redevelopment of an indoor market. The decision was challenged on the basis that the Council had failed to 'promote equality of opportunity and good relations between different racial groups'. Objections to the application had been made on the basis that the loss of the market would harm traders and customers from local ethnic minority communities for whom the market was a social and economic hu b.

40. The Council argued that they had complied with the then Race Equality Duty because their report had referred to planning policies which promoted regeneration and quality of life. Nonetheless, the CoA held that the Council had not demonstrated 'due regard' to the specific impacts on equality of opportunity and good race relations.

The Development Plan

41. Neither the HRA98 nor EA10 displaces the effect of s38(6) of the Planning and Compulsory Purchase Act 2004. It follows that:

    - Regard should be had to any development plan policies which are directly or indirectly relevant to any issues that pertain to human rights and/or equality, as well as to the [other] main issues in the case.

    - The decision should be made in accordance with the development plan unless material considerations indicate otherwise – and they may include human rights and/or equality considerations.

42. Relevant development plan policies may concern, for example, the housing needs of different groups; the impacts of development on health or living conditions; the provision or loss of social or community facilities; accessibility requirements; local economic development; and estate or area regeneration.

43. Local and neighbourhood plans, including site allocation and area action plans, and Supplementary Planning Documents, can be a useful source of demographic and other community information.

The National Planning Policy Framework

44. The NPPF makes no express reference to human rights or equality but it affirms that the social objective of the planning system to be pursued, in a mutually supportive way with the economic and environmental objectives, in order to achieve sustainable development, is:

    '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 a well-designed and safe built environment, with accessible services and open spaces that reflect current and future needs and support communities' health, social and cultural well-being.'

45. The NPPF also notes, in paragraph 193, how the 'agent of change' principle can protect existing community facilities:

> 'Planning policies and decisions should ensure that new development can be integrated effectively with existing businesses and community facilities (such as places of worship, pubs, music venues and sports clubs). Existing businesses and facilities should not have unreasonable restrictions placed on them as a result of development permitted after they were established. Where the operation of an existing business or community facility could have a significant adverse effect on new development…in its vicinity, the applicant (or 'agent of change') should…provide suitable mitigation…'

46. Other relevant provisions of the NPPF are set out in Annex B.

Planning Policy for Traveller Sites

47. The Planning Policy for Traveller Sites (PPTS) states in paragraph 3 that 'the Government's overarching aim is to ensure fair and equal treatment for travellers, in a way that facilitates the traditional and nomadic way of life for travellers while respecting the interests of the settled community'. Inspectors should bear in mind that:

- A nomadic way of life is an integral part of the ethnic identity and 'private and family life' of Romany Gypsies and Irish Travellers[5].
- A caravan stationed for residential use is (capable of being) a 'home' for whoever occupies it for the purpose of Article 8.
- Romany Gypsies and Irish Travellers are also ethnic minorities with the protected characteristic of race for the PSED.

48. PPTS states in paragraphs 16 and 24 that 'subject to the best interests of the child, personal circumstances and unmet need are unlikely to clearly outweigh harm to the Green Belt and any other harm so as to establish very special circumstances'. Inspectors should have express regard to that policy when dealing with any appeal for a Traveller site in the Green Belt. The phrase 'best interests of the child', in this or any other policy context, should be read as referring to human rights.

49. It was held in *Smith v SSLUHC & Others* [2022] EWCA Civ 1391 that the definition of Travellers set out in Annex 1 to PPTS, which excluded those who had permanently ceased to pursue a nomadic lifestyle, was unlawfully discriminatory. The objective of the definition was to make it harder for elderly and disabled ethnic Gypsies and Travellers to obtain planning permission.

[5] *Chapman v UK* [2001] ECHR 43

50. The CoA also found that the definition has no legitimate aim and is disproportionate because its purported justification of making the planning system fairer did not outweigh its harsh effects. The PPTS itself was not the subject of the litigation and it remains extant policy, but the unlawful definition cannot be applied as set out in the Gypsy, Traveller and Travelling Showpeople's Casework ITM.

Planning Practice Guidance

51. The Planning Practice Guidance (PPG) chapter on Enforcement and Post-Permission Matters states that provisions of the Convention 'such as Article 1 of the First Protocol, Article 8 and Article 14 are relevant when considering enforcement action'[6].

52. While it is for planning authorities to decide whether it is expedient to issue an enforcement notice, Inspectors may need to consider the 'potential impact on the health, housing needs and welfare of those affected by the proposed action, and those who are affected by a breach of planning control' when deciding Enforcement appeals on grounds (a) and/or (g)[7].

53. The PPG chapter on Housing Needs of Different Groups states that authorities must consider the implications of their duties under the EA10, including the PSED, when addressing the identified housing needs of specific groups[8]. The PPG chapters on Housing for Older and Disabled People and Healthy and Safe Communities do not refer to the PSED but may nonetheless be relevant to casework affecting persons with protected characteristics.

54. The National Design Guide (MHCLG), which should be read alongside the PPG chapter on Design: Process and Tools, aims to help 'create well-designed and well-built places that benefit people and communities' including 'people at different stages of life and with different abilities'. It promotes inclusion in design, 'making sure that all individuals have equal access, opportunity and dignity in use of the built environment'.

Other Policy and Guidance

55. National Planning Policy Statements do not directly address human rights or the PSED but are clear that matters such as human health and quality of life may be relevant in National Infrastructure casework – and that applicants should set out information on the likely social and economic effects of development, including effects on matters such as equality, community cohesion and well-being.

56. Guidance on the Compulsory Purchase Process and the Crichel Down Rules (DLUHC) states that 'acquiring…and authorising authorities should be sure that the purposes for which the compulsory purchase order is made justify interfering with the human rights of those with an interest in the land affected'. The Guidance also states that 'all public sector acquiring authorities are bound by the' PSED.

[6] Paragraph ref ID: 17b-003-20140306
[7] See the Enforcement ITM
[8] Paragraph ref ID: 67-001-20190722

57. The Good Practice Guidance for Local Authorities on Authorising Structures (Defra) aims to ensure that authorities discharge the PSED when providing furniture such as gates and stiles on public rights of way. The British Standard 5709:2018 gives further advice on this topic but, as the Public Rights of Way ITM indicates, public path order casework may give rise to wider accessibility and equality issues, and/or engage the rights of residents under Article 8 or landowners under Article 1 of the First Protocol.

Article 8 and Casework

Family Life and Home

58. Article 8(1) provides that everyone has the right to respect for their private and family life, their home and their correspondence.

59. The term 'family life' refers to matters that are essential for a person to enjoy a relationship with their family. The word 'family' should not be construed as only meaning nuclear families or as limited to those related by blood or marriage. Whether people are in a family depends on the nature, not legal status of their relationships. Regard should be had to the importance of family relationships in their cultural context:

60. Where relevant in casework, Inspectors may need utilise the definitions of 'single household', 'same family', 'couple' and 'relative' set out in s258 of the Housing Act 2004. S258(4)(c) and (d) are clear that 'relatives' may include those 'of the half-blood' and stepchildren.

61. That said, Inspectors should always investigate what constitutes family life in the circumstances and consider the impact of their decision on the whole family, not just the person(s) making the claim[9]. Inspectors should address evidence that those considered to be members of the family need to live with or close to each other, whether in accordance with cultural traditions and/or for practical support.

62. The word 'home' should be taken as meaning anywhere that can reasonably be regarded as the person's home; it does not need to be a 'dwellinghouse' in Gravesham terms[10]. Caravans, HMOs, 'beds in sheds' and rooms in nursing homes are capable of being homes. A person may have more than one home and not be occupying that subject to the casework in question[11].

63. Those whose home may be affected may include any tenant(s) on the site and/or local residents who may not even be party to the case. It should further be kept in mind that rights under Article 8 are likely to be engaged when someone is living in a development that was carried out without planning permission and is (liable to be) subject to enforcement action.

64. The Commission provides further guidance on Article 8.

[9] *Stevens v SSCLG & Guildford BC* [2013] EWHC 792 (Admin))
[10] The distinctive characteristic of a dwellinghouse is its ability to afford to those who use it the facilities required for day-to-day private domestic existence; It was held in *Gravesham BC v SSE & O'Brien* [1983] JPL 306.
[11] *Rafferty v SSCLG* [2009] EWCA Civ 809

The United Nations Convention on the Rights of the Child

65. As noted above, Article 3(1) of the UNCRC provides that 'in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration'.

66. In paragraph 69 of *Stevens v SSCLG & Guildford BC* [2013] EWHC 792 (Admin), Mr Justice Hickenbottom derived propositions from *ZH (Tanzania) v SSHD* [2011] UKSC 4 and other authorities. The propositions are summarised here, since they were endorsed by the CoA[12] and remain applicable to casework:

    i) Given the scope of planning decisions and the nature of the right to respect for family and private life, planning decision-making will often engage Article 8. In those circumstances, relevant Article 8 rights will be a material consideration which the decision-maker must take into account.

    ii) Where the Article 8 rights are those of children, they must be seen in the context of Article 3 of the UNCRC, which requires a child's best interests to be a primary consideration.

    iii) This requires the decision-maker, first, to identify what the child's best interests are. In a planning context, they are likely to be consistent with those of their carer.

    iv) Once identified, although a primary consideration, the best interests of the child are not determinative of the planning issue.

    v) However, no other consideration must be regarded as more important or given greater weight than the best interests of any child, merely by virtue of its inherent nature apart from the context of the individual case. Further, the best interests of any child must be kept at the forefront of the decision-maker's mind.

    vi) Whether the decision-maker has properly performed this exercise is a question of substance, not form.

67. The key points arising from i) and ii) are that, where the evidence indicates that the decision could have an adverse impact on a child or children, rights under Article 8 will be engaged and the best interests of the child(ren) should be a primary consideration.

68. To expand on point iii), in most cases decided by Inspectors, there is unlikely to be antagonism between the best interests of the child and the wishes of their primary carer(s). Unless there is evidence to the contrary, the decision-maker can assume that the primary carer will properly represent the child's best interests and evidence the potential impact of any decision upon that child's best interests. Nonetheless, the Inspector should always make their own reasoned finding as to what the best interests of the child(ren) are in the case.

[12] *Collins v SSCLG & Fylde BC* [2013] EWCA Civ 1193

69. And it is possible for the Inspector to conclude that there is some tension between the aspirations of a primary carer – as set out by their representative – and the best interests of the child(ren). For example, it might be argued that the family should be allowed to remain in substandard housing. Such issues should be addressed on the evidence and it may occasionally be necessary to invite additional representations, perhaps about the child's educational and/or health needs, in the usual way[13]. Even then, however, a decision-maker will not 'routinely be required to produce social enquiry or welfare reports on all children whose interests are or may be adversely impacted by any…decision'[14].

70. While it is for the parties to describe their circumstances and make their arguments, Inspectors should bear in mind that homelessness or living in overcrowded or unsuitable housing can generally cause children to experience disruption to their education and/or healthcare; a loss of safety or stability; emotional trauma and potentially problematic behaviour; and worsened physical and/or mental health, all of which can have lifelong repercussions[15].

71. Development may otherwise have impacts on home life which are particularly significant for children. Defra's Clean Air Strategy 2019, referenced in the PPG chapter on Air Quality (paragraph ref ID: 32-004-20191101), describes that the effects of air pollution 'are amplified in vulnerable groups including young children'.

72. Turning to point iv), the best interests of the child being in play does not determine the Inspector's conclusions on the main issues or decision. It is not necessary that the best interests of any child(ren) 'must be considered temporally or logically first'[16] or that the planning exercise involves assessing whether other considerations outweigh the best interests of the child. 'Most planning cases will have too many competing rights and interests, and will be too factually complex, to allow such an exercise'[17].

73. However, as explained in point v), that the best interests of the child must be a primary consideration, meaning that no other issue is **intrinsically** more important. Another issue might be weightier in the circumstances of the case, but it should not be presented as inherently more important. In planning casework, substantial weight must be attached to harm to the Green Belt by reason of inappropriateness, but even that is not inherently more important than the best interests of the child.

74. Keeping the best interests of the child(ren) 'at the forefront of the decision-maker's mind' means taking them into account when examining all material considerations and exercising planning judgment on each issue and then in the Conclusion on the balance. In making their decision, the Inspector must assess whether any adverse impact of their decision on the interests of the child is justified and proportionate.

[13] Further advice is given below on how an Inspector should act if they have a 'safeguarding' concern in respect of a child or any other person.
[14] Paragraph 58 of *Stevens*.
[15] See, for example, Impacts of Homelessness on Children, Shelter, 2017.
[16] Paragraph 60 of *Stevens*.
[17] Paragraph 69iv) in *Stevens.*

75. The importance or weight attributed to the best interests of the child(ren) will depend on the facts and circumstances. Even if it is found that their best interests carry substantial weight, opposing considerations may or may not prevail[18]. The decision-maker may find that harm caused to the Green Belt by a caravan site outweighs the best interests of the child(ren) to continue living on the site or vice versa. It is a question of judgment on the evidence.

76. Mr Justice Hickenbottom's final proposition in Stevens – that proper consideration of proportionality is a matter of 'substance, not form' – is qualified. He held that, if an Inspector sets out their reasoning even briefly with regard to the child's interests, that will help those involved and the court in any challenge. It will be particularly helpful if the Inspector addresses an adverse impact of the decision on the best interests of the child and concludes that the impact is proportionate in the circumstances.

77. Children have the protected characteristic of age and so casework which involves them may engage the PSED. Discrimination against children on the basis of age, however, such as the requirement to attend school, is legitimate and appropriate in some instances. The conclusion to the decision should normally address the 'best interests of the child(ren)' before the PSED.

The UN Convention on the Rights of Persons with Disabilities

78. Article 19 of the UNCRPD provides that 'states…recognise the equal right of all persons with disabilities to live in the community, with choices equal to others, and shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community, including by ensuring that:

    (a) Persons with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement.

    (b) Persons with disabilities have access to…community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community.

    (c) Community services and facilities for the general population are available on an equal basis to persons with disabilities and are responsive to their needs.

79. The provisions of a) and b) impinge on the 'home' of disabled persons in terms of Article 8. The Commission's guidance on Strengthening the Right to Independent Living notes that the presumption in favour of living in the community is qualified but also that the 'primacy of disabled person's views' is a key element of the UNCRDP.

80. In any casework decision, the Inspector will not in fact be bound to decide in favour of the representations of any disabled person(s) party to the case; such persons may disagree with each other in any event. The Inspector will need to balance

[18] Paragraphs 62, 68 and 69v) in *Stevens*.

considerations for and against the development in the usual way, and bear in mind that the proposal may not be the only or optimal way to secure 'the equal right of all persons with disabilities to live in the community'.

81. Nonetheless, when dealing with any proposal to adapt an existing dwellinghouse or residential institution for a disabled person, or for development entailing the creation or loss of adapted housing or a residential institution, Inspectors should be mindful not only of the rights of disabled persons to a family life and home under Article 8 but also their rights under Article 19 of the UNCRDP.

Cases where Article 8 may be Engaged

82. It was held in *Stevens* that 'given the nature of those rights and the scope of planning decisions, it is likely that Article 8 will be engaged in many planning decision-making exercises.' Rights under Article 8 are most commonly engaged where:

- **The decision will result in the imminent or short-term loss of someone's home**[19]. That might be the case where an enforcement notice alleges the construction of a dwelling or change to residential use, the building or land is occupied, the notice requires the removal of the building or cessation of the use, and the Inspector is minded to refuse planning permission and uphold the notice. Confirming a Housing CPO may also cause the imminent loss of a home. Any such decision is liable to result in a serious interference with rights under Article 8 in respect of family life as well as home and the best interests of any child(ren).

- **The decision could realistically lead to the future loss of someone's home.** This may arise, for example, where enforcement action is liable to follow dismissal of a s78 appeal for a retrospective grant of planning permission for residential development. It could also arise where outline planning permission or a CPO or local plan allocation or action plan is sought for the redevelopment of existing housing, but further applications or proceedings would be required. An occupier can expect to lose their home in the future if it is subject to temporary permission.

- **The decision would or could result in the partial loss of someone's home**, perhaps a house extension or annex that is already built and occupied. Inspectors should be alert to evidence that the development may be needed to alleviate overcrowding, make the home suitable for a disabled member of the family or allow an extended family to live together.

- **The development is intended to be but is not yet (part of) someone's home**. Regard may again need to be had to the suitability of the existing accommodation.

- **The decision could adversely affect the health, well-being or living conditions of persons within their home**, whether they be (related to) the appellant or an interested party living on or off the site. In planning, TPO, high

[19] See the Compulsory Purchase and Other Orders and the Housing CPOs ITM

hedge, public rights of way and indeed any Inspectorate casework, the issues may include the effects of loss of light, privacy or outlook, or of traffic congestion, pollution or flooding on the occupiers.

83. It might be thought that, for example, refusing permission for a proposed extension would give rise to less serious interference with rights under Article 8 than upholding an enforcement notice against someone's entire, only and existing home. However, the decision in every case will depend on what is proportionate.

84. Where Article 8 rights are engaged, Inspectors should be alert as to whether the affected individuals have protected characteristics and the PSED will also apply, and whether the evidence includes sensitive personal information that should not be referred to in detail.

Main Issues and Reasoning

85. Matters relating to a private and family life and home, and the best interests of the child(ren), are not always decisive but are certainly capable of being so. Article 8 rights are engaged where the development would (potentially) have a particular effect – directly or indirectly – on the individual's home or family life. That effect should be shown by the evidence, even if the parties did not refer expressly to Article 8 or human rights. Where the relevant effect result in an interference with the individual's Article 8 rights and thus be decisive, it should normally be a main issue.

86. As explained in the Approach to Decision-making ITM (Part 1), 'the main issues are the essence of the disagreement between the parties **and the matters on which your decision will turn**… although most main issues in appeal decisions will derive from the reasons for refusal, this is not always the case'. The main issues in **any** case may include matters not covered by the reasons for refusal, such as needs for or benefits of the development raised by the appellant and/or harms raised by interested parties.

87. Main issues should rarely be framed simply in terms of 'human rights'; whether your decision would accord with the HRA98 is a question for the Conclusion. The main issues provide a framework for your reasoning where the task is to properly identify and ascribe weight to the real-world effects of the development, including effects on individuals and children in relation to their private and family life and home. That assessment will then inform the balance and decision.

88. Adaptable examples of main issues in planning or enforcement appeals where Article 8 is engaged are:

- The supply of [accessible] [x bedroom plus] [sheltered] [other specialist] housing
- The availability of suitable, affordable and acceptable [accessible] [x bedroom plus] [sheltered] [other specialist] housing
- The availability of suitable, affordable and acceptable housing within [the catchment area] [commuting distance] of X [School] [Hospital]
- The [appellant's] [occupiers'] personal circumstances and need for the [proposed] [development] [with regard to…]

- The benefits of the [proposed] [development] to the [appellant's] family
- The consequences of a refusal of planning permission for the [appellant's] family
- The effect of the [proposed] [development] on the [living conditions] [reasonable enjoyment of the home] [private and family life] of nearby occupiers…

89. The PPG states that 'planning permission usually runs with the land', and it is rarely appropriate to provide otherwise. There may be exceptional occasions where development that would normally be permitted may be justified on planning grounds because of who would benefit from the permission'[20]. Regard should always be had to that guidance where any party relies in whole or part on their personal circumstances, but Inspectors should also bear in mind that 'exceptional' does not mean 'never' and personal circumstances are capable of being material to casework.

90. Lord Scarman held in *Westminster CC v Great Portland Estates* [1984] UKHL 10 that the 'personal circumstances of an occupier, personal hardship, the difficulties of businesses which are of value to the character of a community are not to ignored in the administration of planning control. When framing the main issues, focus on what is at the heart of the case for the parties and whether you will have to address potential interference with Article 8 rights in the conclusion.

91. For example, if the appellant says that the proposed extension is required to house an elderly relative or equipment for a disabled child, that will at the heart of the case for them. It will be why they are proposing to carry out what, for them, will be disruptive and expensive works. It can appear unnecessarily insensitive for the Inspector to relegate such issues to 'Other Matters'. Doing so can give the impression that the Inspector has not properly understood or had regard to the evidence, and indeed it runs the risk of actually downplaying the issue in the Inspector's mind.

92. Moreover, it will in some cases be necessary to balance competing Article 8 rights of different parties, and so care should be taken to treat participants equally. It may be hard for parties to understand, for example, why the living conditions of neighbours is a main issue, but the personal circumstances of the appellant are not, even if the appellant has not provided such evidence as to justify granting permission.

93. In planning appeals relating to a Traveller site, the main issues often include the general need for and supply of Traveller sites; whether there are suitable, affordable, available and acceptable alternative sites; the personal need of the occupier(s) for a Traveller site; and/or other personal circumstances, including the needs of the children to access health services and/or schooling. The Gypsy and Traveller Casework ITM has further information.

[20] The PPG chapter on Use of Planning Conditions, paragraph ref ID: 21a-015-20140306, states that 'a condition requiring the demolition after a stated period of a building that is clearly intended to be permanent is unlikely to pass the test of reasonableness'.

Unlawfulness and Intentional Unauthorised Development

89. In any casework concerning residential development that has taken place and is being lived in, the Inspector should address the likelihood of a refusal of permission resulting in the occupiers being made homeless[21], as may well occur if the home is unlawful.

90. It was held in *Chapman v UK* [2001] ECHR 43 that:

> 'If the home was lawfully established, this factor would self-evidently be something which would weigh against the legitimacy of requiring the individual to move. Conversely, if the establishment of a home in a particular place was unlawful, the position of the individual…is less strong. The Court will be slow to grant protection to those who, in conscious defiance of the prohibitions of the law, establish a home on an environmentally protected site…to do otherwise would be to encourage illegal action to the detriment of the protection of the environmental rights of other people…'

91. Chapman should not be read as meaning that rights under Article 8 are not engaged if the building or residential use is unlawful; it means that unlawfulness is not a point in favour of an appeal. Equally, however, unlawfulness need not count against development, given that s73A and s174 of the TCPA90 provide for grants of retrospective planning permission[22]. Article 8 rights may be engaged even in final injunction proceedings if a person continues to occupy an unlawful home after an enforcement appeal has been dismissed[23]. And children cannot be held to blame for any breach of planning control made by their parents or carers[24].

92. Any finding that a home is 'intentional unauthorised development' (IUD) must carry weigh against a grant of planning permission, in accordance with the 'Dear Chief Planning Officer' letter issued on 31 August 2015 and Written Ministerial Statement made on 17 December 2015. Even then, however, whatever weight is attached to a finding of IUD would not affect the weight attached to considerations in favour of the appeal such as, for example, the appellant's need for a home.

93. The correct approach in any planning appeal to consider each main issue separately, on its merits and in accordance with relevant policy, and attribute weight accordingly. Then the considerations against (including any harm caused by IUD) and for (such as any policy and/or personal need for the development) the appeal can be properly and fairly balanced in the Conclusion so that the decision is demonstrably proportionate.

[21] *Moore v SSCLG & Bromley LBC* [2013] EWCA 1194
[22] In Enforcement casework, evidence of the nature and length of occupation may affirm that the use was unlawful while also showing that there are Article 8 considerations for grounds (a) and/or (g); see paragraph 54 of *Buckley v UK* [1996] 23 EHRR 101.
[23] *South Buckinghamshire DC v Porter* [2004] UKHL 33, *Bromley LBC v Persons Unknown* [2022] EWCA Civ 12, *Barking & Dagenham LBC v Persons Unknown* [2022] EWCA Civ 13
[24] Paragraph 67 in *Stevens, ZH* applied.

Conditions

94. It is crucial for Inspectors in their reasoning to consider whether any conditions could be imposed to reduce or overcome any identified harm – and thus alter the proportionality assessment – as explained fully in the Conditions ITM.

95. The imposition of a personal or other time-limited condition, where appropriate, may not only reduce harm caused by the development but also mitigate the impact of the decision on persons whose Article 8 rights are engaged. For example, a grant of temporary permission for a Traveller site could reduce the duration of harm to the Green Belt, prevent homelessness in the short term and give the Council time to increase the supply of sites elsewhere.

96. Imposing a temporary or personal condition may still result in some interference with Article 8 rights, especially if the upshot will be that the appellant is made homeless in a few years' time. Crucially, however, the condition could bring the interference down to the minimum necessary.

'Interference', 'Proportionality', the Conclusion and Decision

97. Article 8(2) states that there shall be no interference by a public authority with the exercise of this right [under Article 8(1)] except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

98. In other words – and this applies to all qualified rights – it must be clear in decision letters and reports that any engaged human right was weighed against all other material considerations bearing on the legitimate interests of others and the wider public, before the decision or recommendation was made. Interference with the Article 8 right may be permissible if there is a clear legal basis for it and it is necessary in a democratic society.

99. The Courts have held that any likely interference with engaged Article 8 rights must be dealt with as an integral part of the reasoning that leads to the final decision[25]. The concept of proportionality is crucial because a disproportionate or unjustified interference can result in a 'violation' or breach of the individual's rights. The 'victim' of a violation can rely on the HRA98 to seek redress of the harm and that is in effect what an appellant or interested party is doing when they make (representations on) with regard to their home or family needs and circumstances.

100. The weight ascribed to different factors and the outcome in each case will always be for the decision-maker, but it is crucial that any decision to interfere (or not) with anyone's Article 8 rights is fully justified. For a decision to withstand challenge, it is a pre-requisite that the reasoning is adequate and not *Wednesbury* unreasonable.

[25] *Lough v FSS & Bankside Developments* [2004] EWCA Civ 905

101. If Article 8 rights are engaged, including the UNCRC Article 3(1) rights of the child or UNCRPD Article 19 rights of persons with disabilities to live independently and be included in the community, the conclusion to the decision letter or report should show:

- The Inspector's findings on each main issue, including the weight attributed to those findings and with regard, where appropriate, to potential conditions.
- The balance, and what decision that points to.
- Whether that decision will cause an interference with the right of any person under Article 8 (with regard to the best interests of the child(ren) and the 'Bingham checklist') and, if so,
- A 'proportionality assessment' to show whether the interference is justified in accordance with Article 8(2)[26].

102. The '**Bingham checklist'** is based on questions advanced by Lord Bingham in the case of *R (oao Razgar) v SSHD* [2004] UKHL 27. HHJ Thornton QC, sitting as a judge of the High Court, interpolated those questions to show their applicability to planning appeals in *AZ v SSCLG & Gloucestershire DC* [2012] EWHC 3660 (Admin):

a) Will the decision amount to interference by a public authority with a right to respect for private or family life or home?

b) If so, will the interference have consequences of such gravity as potentially to engage the operation of Article 8[27]?

c) If so, is such interference in accordance with the law?

d) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others?

e) If so, is such interference proportionate to the legitimate public end that is sought to be achieved?

103. The checklist as a whole can and should be covered concisely if there would be no or only very minor interference. Even then, however, care should be taken with the wording of the Conclusion. For example, if Article 8 is raised by a person living next door to the site, and the finding is that the development would cause no **unacceptable** harm in respect of living conditions, it would be unwise to suggest in the Conclusion

[26] This is sometimes known as the 'fair balance' test. The HRA98 does not refer to the term 'proportionality assessment' but the Courts have consistently held that this principle is inherent in the application of Convention Rights – see paragraph 98 of *AZ*.

[27] In *AZ*, the appeal decision would lead to the loss of the appellant's and his son's home, possible homelessness or relocation to an unsuitable site (given the unlikelihood of finding another suitable site) plus other adverse effects on family life. This amounted to a grave interference with their Article 8 rights.

there is no interference with the rights of adjoining occupiers at all. It would be safer to say that any interference or the decision is proportionate.

104. In more complicated cases, Inspectors should be clear, if not explicit, where they intend to make a decision that will interfere with a person's right to respect for private or family life or home, or the best interests of the child(ren). It should also be explained that the interference will be **in accordance with the law** because the TCPA90 (or whichever primary legislation governs the case) empowers the decision-maker to allow or dismiss the appeal (or equivalent).

105. In answer to d) there should be no intrinsic difficulty in finding the interference necessary in a democratic society, given that the planning, enforcement, compulsory purchase, public rights of way (etc) laws, policies and procedures exist to protect economic well-being, health and the rights and freedoms of others.

106. It will be necessary to show, however, that the interference is necessary in the circumstances. That might be so in a planning appeal where the harm caused by the development clearly outweighs the needs of or benefits to the appellant, or there is a compelling case for granting permission even if doing so will interfere with the Article 8 rights of another.

107. For example, if the Inspector intends to refuse permission for the residential use of land in the Green Belt, it should be explained that the interference is necessary to protect the Green Belt in accordance with the relevant planning policies. However, the proviso again is that the Inspector must not have erred in their reasoning which led them to conclude in favour of interference.

108. If the person whose Article 8 right is engaged is the losing party, the interference will be proportionate if it is the minimum necessary to protect economic well-being, health and the rights and freedoms of others. Demonstrating proportionality will involve consideration, where appropriate, not just of the balance between harms and benefits but also, as set out above, whether conditions could reduce the interference to the minimum possible.

109. A **proportionality assessment**, also described in *AZ*, involves:

- The identification of all relevant considerations relating to the rights of the individual(s) to private and family life and home.
- The identification of the best interests of any children.
- The identification of the particular public or community interest to be balanced against the affected.
- The weighing of all these interests, so as strike a fair balance between the rights of the individuals concerned and the interests of the community.

110. A proportionality assessment does not need to be carried out formalistically. HHJ Thornton QC noted in AZ that 'a planning case…infrequently requires a proportionality assessment and even more infrequently a finding that the proposed decision would amount to disproportionate interference with Article 8 rights'. However, as per *Stevens*,

the exercise must be carried out in substance if not form. Where the decision will lead to interference with rights under Article 8, including the best interests of the child(ren), the decision-maker should address two questions:

- Can the relevant (planning policy) objective be achieved by means that interfere less with the individual's rights?
- If the proposed action or decision is the minimum necessary, would it nonetheless have an excessive or disproportionate effect on the affected person[28]?

111. A decision that could lead to a loss of someone's home because of a conflict with planning policy will cause interference of such gravity that the conclusion should include a full proportionality assessment in the Conclusion. Inspectors should explicitly address whether the policy objectives could be met by a less intrusive action such as a grant of temporary or personal permission[29].

112. Where personal circumstances are decisive, it will normally follow that the permission should be subject to a personal condition. In cases relating to 'inappropriate development' in the Green Belt, any finding that an interference with Article 8 rights would be disproportionate would almost certainly mean that the relevant 'other considerations' amount to 'very special circumstances'[30].

113. If deciding an appeal one way would lead to a violation of a person's human rights, because there would be an unjustified interference with their private or family life or home, it should logically follow that the appeal is decided the other way. The effect on that person would be so serious – as shown clearly in the main issues and reasoning – as to outweigh competing considerations.

114. Where the interference is less grave, a simple balancing conclusion may suffice to show that (and why) the decision is proportionate[31]. To assist Inspectors, example wording for conclusions is set out in Annex C. It should be adapted to the case in hand and not treated as a template or standard wording.

Evidence and Procedure

115. It is not unusual for the rights of individuals under Article 8 to be engaged in cases proceeding by the written representations procedure. Inspectors should be alert to any claims or evidence which point to a risk of the decision resulting in an interference, whether or not the parties refer expressly to human rights.

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[28] *R (oao Samaroo) v SSHD* [2001] EWCA Civ 1139, cited in Gosbee v FSS [2003] EWHC 770 (Admin)
[29] *R (oao McCarthy & Others) v Basildon DC* [2008] EWHC 987 (Admin)
[30] Carnwath LJ (as he then was) observed in *Wychavon DC v SSCLG & Butler* [2008] EWCA Civ 692 that 'respect for the home is in one sense a "commonplace", in that it reflects an aspiration shared by most of humanity. But it is at the same time sufficiently "special" for it to be given protection as a fundamental right under the European Convention'. He held that in Green Belt cases, 'other considerations' do not need to be rare in order to amount to 'very special circumstances'.
[31] *Lough v FSS & Bankside Developments* [2004] EWCA Civ 905

116. In most written representation cases, it should normally be clear from the original file whether and how the rights of individuals to a family and private life and home may be affected. It should be straightforward for the Inspector to properly identify the main issues and make a demonstrably 'proportionate' decision.

117. Inspectors should not set too high a bar to what they treat as evidence. Assertion or anecdote is evidence that can be accepted. If it is claimed, for example, that a house extension is required to create an extra child's bedroom, the Inspector should accept that unless there is evidence to the contrary. The appellant does not need to provide copies of birth certificates or other proof as to how many children they have.

118. However, evidence that is slender, vague or unsubstantiated may carry less weight. Using the same example, the mere claim that another bedroom is essential may be accepted but would be unlikely to outweigh any harm. The appellant might need to show that the extension is needed on particular family or health grounds for their circumstances to be ascribed significant or even moderate weight. That said, having large families or living with extended families are traditions associated with particular religious and racial groups and so the PSED as well as Article 8 may be engaged where overcrowding is an issue.

119. Inspectors may seek such additional information that is needed to support a soundly-reasoned decision, as described in relation to the PSED and in the Approach to Decision-making (Part 1) ITM.

120. If there is a prospect of a serious interference with Article 8 rights, it may be necessary to determine the case though the hearing or inquiry procedure, so the evidence is properly tested and Article 8 considerations are fully aired. Inspectors must be pro-active and inquisitorial at such events so that all the main issues are identified and discussed, and all relevant evidence is secured for the proper undertaking of a proportionality assessment.

121. In *AZ*, HHJ Thornton QC held that an Inspector should probe sufficiently to ascertain the full effect of their decision on family life. Even if the parties have not expressly raised human rights, the Inspector may need to ask for oral submissions as to whether Article 8 rights are engaged and would be interfered with. It may be necessary in the interests of natural justice to give the parties an opportunity to introduce new evidence they may wish to rely upon.

122. In *Waverley BC v Gray & Others* [2023] EWHC 2161 (KB), the Council sought an interim injunction despite having 'little or no information about the personal circumstances of the defendants'. It was held that, as matters including medical needs, and the lack of alternative sites came to light, 'it was incumbent on the [Council] to investigate matters and to re-assess the balance of factors...the proportionality of the decision should have been revisited when the Council became aware of these matters' For that reason, and since planning and enforcement appeals had been made, the judge declined to make a final injunction in respect of some defendants.

123. The CoA held in *Collins v SSCLG & Fylde BC* [2013] EWCA Civ 1193 that, where an appellant is professionally represented, the Inspector may assume that relevant evidence regarding the best interests of the child(ren) is known to their representative, unless something shows a need for further investigation. In practice, an agent may not

be so well-informed, and Inspectors must consider what investigation is required where Article 8 may be engaged.

124. Inspectors should also be proactive if they suspect that there may be a 'safeguarding' issue affecting any person, including but not limited to children or disabled or elderly people on the site. In such a situation, the Inspector should inform the Police and their line manager and recuse themselves from the case.

Other Human Rights and Casework

Article 1 of the First Protocol

125. Article 1 of the First Protocol (A1FP) states that:

- 'Every natural or legal person is entitled to the **peaceful enjoyment of his possessions**. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

- 'The preceding provisions shall not…in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties'.

126. Thus, A1FP is a qualified right which should be approached on a similar basis as Article 8. The potential effects on the relevant individuals may need to be identified and assessed in the relevant main issue(s). The proportionality of any interference should be assessed, if necessary, in the overall conclusion.

127. 'Possessions' can extend beyond a person's home. Someone relying on A1FP may not live on the site and indeed residential use may not be in play at all. 'Possessions' can also extend beyond land, and rights under A1FP may be engaged even if the person does not own the site[32]. A1FP may be relevant wherever the development, local plan or order could affect the appellant's or interested person's peaceful enjoyment of any property.

128. As with Article 8, the lawfulness of the use of the possessions does not determine whether A1FP is engaged. Inspectors should not give more or less weight to an interference with A1FP rights simply because the use of the possessions is unlawful.

129. *Howard v UK* [1987] ECHR[33] concerned a CPO case. The Strasbourg Court rejected the submission that the power of appeal under s23 of the Acquisition of Land Act 1981 did not provide an adequate remedy to challenge a CPO and was not an effective remedy to a violation of A1FP. The question was whether the authority had struck a fair

[32] The claimants in *Davies & Atkins v Crawley BC* [2001] EWHC 854 (Admin) lost their challenge to a scheme which prohibited them as owners of mobile snack vans from trading on specific streets. There was no deprivation of possessions within the first paragraph of A1FP, it was a 'case of control within the second paragraph'.
[33] Unreported case no. 10825/84; cited in *Alconbury* and discussed in the Commission's guide to A1FP.

balance between the rights of the property owners and the community. The availability of compensation reflecting the value of the property is a main factor.

130. The Commission provides further guidance on A1FP.

Article 2 of the First Protocol

131. Article 2 of the First Protocol (A2FP) is that:

> 'No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions'.

132. A2FP can intersect with Article 8 and the best interests of the child(ren). If the decision could result in the family being made homeless, for example, there may be uncertainty as which school the child(ren) could be enrolled in, including whether they could attend a faith school according to their parents' convictions or a school with appropriate special educational support, or even whether they could realistically sustain attendance at any school at all.

133. A2FP may be also prayed in aid in any other case where the decision could lead to a child or children having to change school, perhaps to one which is further from home or has fewer or more limited facilities or study or support options. While it is not uncommon for children to change schools, doing so can be disruptive and particularly difficult for children whose lives are otherwise unstable or who have experienced interruptions to their education before.

134. In most cases, however, the casework decision will not result in the right to education being denied. The Commission provides further guidance on A2FP.

Article 6

135. Article 6(1) provides that in the determination of their civil rights and obligations…everyone is entitled to **a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law**…

136. It was held in *Bryan v UK* [1995] ECHR 50 that the power of the Secretary of State (SoS) to, at any time, revoke the power of an Inspector to decide an appeal is enough to deprive the Inspector 'of the requisite appearance of independence, notwithstanding the limited exercise of the power in practice…'

137. Nonetheless, the Strasbourg Court also held that appeal proceedings did not violate Article 6 given the 'uncontested safeguards attending the procedure…the quasi-judicial character of the decision-making process; the duty incumbent on each inspector to exercise independent judgment; the requirement that inspectors must not be subject to any improper influence; the stated mission of the Inspectorate to uphold the principles of openness, fairness and impartiality…[and that] any alleged shortcoming in relation to these safeguards could have been subject to review by the High Court'.

138. *Alconbury* [2001] UKHL 23 concerned three conjoined cases and whether it is compatible with the Convention for the SoS (rather than an Inspector) to determine planning appeals and act as 'both a policy maker and a decision taker'. The House of Lords held, in accordance with Bryan, that the powers of the SoS do not breach Article 6 because decisions by the SoS may be subject to judicial review determined by an independent and impartial tribunal.

139. However, Inspectors cannot rely in casework on the planning system as a whole being compatible with Article 6; each decision-maker must still ensure that the parties to the particular case have a 'fair and public hearing within a reasonable time' as described in Bryan and the Role of the Inspector ITM.

140. Article 6 requires that Inspectors exercise independent judgment, are not subject to any improper influence and ensure that the parties have reasonable 'equality of arms'. Inspectors must consider whether the choice of appeal procedure (notwithstanding that the Planning Inspectorate, on behalf of the Secretary of State, must determine the procedure under s319A of the TCPA90), other procedural decisions (such as whether to accept late evidence) and the conduct of any site visit, hearing and/or inquiry is fair to all parties, including interested parties and unrepresented appellants.

141. During an event, if a participant may be disadvantaged for any reason, perhaps because they lack professional representation, the Inspector may need to explain procedural or planning matters in more detail than would otherwise be necessary. It may be necessary to adapt a hearing or inquiry programme or give additional opportunity for questions or comments, in order that matters of particular interest to all parties are properly discussed.

142. Appellants and interested parties occasionally ask that a hearing or inquiry is adjourned so they can seek support via Planning Aid, the Citizen's Advice Bureau, a friend or family member, a translator or interpreter and/or (new) professional agent. Any such request should be considered on its merits, after the views of other parties have been canvassed, and mindful that it will be for you as the Inspector to justify the decision to delay or not delay the event.

143. As a basic rule of thumb, long adjournments should not be agreed unless there is a sensible reason as to why the party did not request or gain support earlier and Inspector assistance would not suffice to ensure that the proceedings are fair and seen to be fair. The Inspector should in all cases record in their notes of the event what support they gave to particular parties and why, and what decision was made in respect of any adjournment requests.

144. Flexibility as to how evidence is presented may be essential; for example, the Inspector may need to allow interested parties to read out pre-prepared statements, or one person to read the statement of another. Inspectors should ask questions to help unrepresented parties clarify their case and intervene to prevent aggressive or intrusive questioning, with regard to the Franks Principles, rules of natural justice and the Inspectorate's Code of Conduct as discussed in the Role of the Inspector chapter.

145. In the case of *Moore & Coates v SSCLG* [2015] EWHC 44 (Admin), the Court held that the SoS' approach to the recovery of two Gypsy and Traveller appeals was in breach of

Article 6 (and the PSED) because it resulted in delays to Traveller appeals, as discussed in the Gypsy and Traveller Casework ITM chapter.

146. The Commission provides further guidance on Article 6.

Article 9

147. Article 9 sets out the right for freedom of thought, conscience and religion. Like Article 10, Article 9 is a qualified right, with 9(2) allowing for limitations to the freedom to manifest one's religion or beliefs where necessary in a democratic society in the interests of public safety; for the protection of public order, health or morals; or for the protection of the rights and freedoms of others.

148. Article 9 is rarely cited in casework but may be engaged alongside the protected beliefs of religion and belief. The Commission provides further advice on Article 9.

Article 14

149. Article 14 is that 'the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. Thus, Article 14 does not confer any free-standing right; it should be taken as informing all actions, including failures to act, by public authorities including Inspectors.

150. There is overlap between Article 14 and the PSED but the two may need to be distinguished at times. In particular, 'political or other opinion' and 'property [and] birth' are different from any of the 'protected characteristics' set out under the EA10.

151. The phrases 'such as' and 'other status' mean that the list of grounds for protection from discrimination should not be treated as closed[34]. Article 14 does not refer to sexual orientation but it was successfully invoked – in conjunction with Article 8 – by a gay couple who sought to be treated the same as heterosexuals for the purposes of tenancy succession under the Rent Act 1977[35].

152. The Commission provides further guidance on Article 14.

The PSED and the 'Three Aims'

Overview

153. It is best in decisions, or reports, or at events, to refer initially to 'the Public Sector Equality Duty set out in s149 of the Equality Act 2010' before using the 'PSED'

[34] Human Rights, Human Lives: A Guide to the Human Rights Act for Public Authorities

[35] *Ghaidan v Godin-Mendoza* [2004] UKHL 30; the HoL used its interpretative powers under the HRA98 to read the Rent Act 1977 in a way that complied with Convention rights. Held that the Rent Act concerned the right to respect for a person's home guaranteed by Article 8 and must not be discriminatory; it must not distinguish on the grounds of sexual orientation unless this could be justified. In this case, the distinction had no legitimate aim or good reason. The policy considerations that were relevant to spouses should apply to same-sex couples.

initialism. While the HRA98 enshrines the rights and freedoms of individual 'members of the human family', the PSED protects both individuals and groups or communities. Where the word 'person' appears in s149, it should be read as meaning a person and/or persons as applicable.

154. The PSED is not a duty to eliminate discrimination, advance opportunity or foster good relations. But it is a duty to have 'due regard' to the three aims when making decisions, meaning that:

- It is a duty to understand that eliminating discrimination, advancing opportunity and fostering good relations are the aims of the law through the EA10. It is a duty to seek to achieve a positive outcome in respect of the three aims where possible.

- It is a duty to ensure that any decision giving rise to any negative impacts in relation to the three aims is informed and made with regard to any less harmful alternative outcome[36].

155. The Commission explains that 'the purpose of the PSED is to make sure that public authorities and organisations carrying out public functions think about how they can improve society and promote equality in every aspect of their day-to-day business. This means they must consider, and keep reviewing, how they are promoting equality in: decision-making, internal and external policies, procuring goods and services, the services they provide, and recruitment, promotion and performance management...'

156. In other words, the PSED places an onus on public authorities to seek to avoid discrimination[37] **and** be proactive in seeking to promote equality. The second and third aims are clearly worded to that end. S149(6) states that 'compliance with the [PSED] may involve treating some persons more favourably than others but that is not to be taken as permitting conduct that would otherwise be prohibited by or under this Act'[38].

Eliminating Prohibited Conduct

163. The first aim set out under s149(1)(a) is that a public authority must, in the exercise of its functions, have due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the EA10.

164. Prohibited conduct includes:

[36] *R (oao Baker) v SSCLG* [2008] EWCA Civ 141
[37] Earlier legislation merely enabled individuals to tackle discrimination after the event.
[38] While this is not part of the PSED, s158 of the EA10 enables a person to take 'any [positive] action which is a proportionate means of' redressing disadvantage or meeting specific needs of persons who share a protected characteristic or ensuring they can participate in activity. In *R (oao Z & Another) v Hackney LBC & Another* [2020] UKSC 40, the Supreme Court held that the policy of a charitable housing association to offer social housing only to members of the Orthodox Jewish community was lawful under s158.

- **Direct discrimination**: treating a person less favourably because of a protected characteristic (s13); the circumstances must be similar enough for a valid comparison to be made.

- **Combined discrimination**: treating a person less favourably because of a combination of two relevant protected characteristics (s14).

- **Indirect discrimination**: applying a provision, criterion or practice (PCP) to everyone so as to result in discrimination in relation to a relevant protected characteristic (s19). Indirect discrimination may be lawful if the organisation can show there is a good reason or 'objective justification' for the PCP.

- **Harassment**: engaging in unwanted conduct related to a relevant protected characteristic or of a sexual nature, and the conduct has the purpose or effect of violating the person's dignity or creating and intimidating, hostile, degrading, humiliating or offensive environment for that person (s26).

- **Victimisation**: subjecting a person to a detriment because they have done, are believed to have done or may do a 'protected act' such as bringing proceedings under the EA10 (s27).

165. Discrimination does not have to be intentional to be unlawful, and it is possible to be discriminated against by someone with the same protected characteristics. S24 also provides that, for the purposes of establishing a contravention under ss13 or 14, it does not matter whether the person being discriminated against actually has the relevant protected characteristic(s). The EA10 protects from unlawful discrimination persons who are merely perceived to have the relevant protected characteristic, or who associate with people who do.

166. So long as there is an 'occupational requirement', organisations can reserve jobs for people with particular protected characteristics, such as female support workers in women's refuges. Employers may take positive action or steps to encourage or support people with protected characteristics to, for example, be developed for promotion. Again, however, there must be an 'objective justification' for such PCPs.

167. The EA10 also sets out types of discrimination in relation to specific protected characteristics; for example, types of disability discrimination include a failure to make reasonable adjustments.

Advancing Equality of Opportunity

168. The second aim of the PSED, as set under s149(1)(b), is to have due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not. S149(3) explains that having due regard to that need involves having due regard, in particular, to the need to:

a) **remove or minimise disadvantages** suffered by persons who share a relevant protected characteristic that are connected to that characteristic.

b) **take steps to meet the needs** of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it.

c) **encourage** persons who share a relevant protected characteristic to **participate in public life** or in any other activity in which participation by such persons is disproportionately low.

169. The word 'advance' is critical; it means that meeting the second aim means actively seeking 'to increase equality of opportunity' as suggested in the preamble to the EA10.

Fostering Good Relations

170. The third aim set out under s149(1)(c) is that public authorities must have due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

171. S149(5) explains that having due regard to the need to foster good relations…involves having due regard, in particular, to the need to (a) tackle prejudice, and (b) promote understanding.

172. Thus, like the second aim, the third is worded to secure positive, not just remedial action. It reinforces the advice given in respect of the POA86 and Article 10 that Inspectors must reject threatening, abusive or insulting oral or written representations.

The Protected Characteristics

Overview

173. S149(7) sets out the protected characteristics for the purposes of the PSED: age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation.

174. The protected characteristics for the EA10 as a whole also include marriage and civil partnership. An organisation subject to the PSED must have due regard to the need to eliminate discrimination in employment because of marital status. But the three aims of the PSED do not apply to that protected characteristic[39].

175. S1 of the EA10 sets out a 'public sector duty' regarding socio-economic inequalities but that does not apply to Inspectors[40]. However, as the Guidance on the Compulsory Purchase Process and the Crichel Down Rules states, 'although low income is not a protected characteristic, it is not uncommon for people from ethnic minorities, the elderly or people with a disability to be over-represented in low income groups'.

176. Inspectors should be alert to any evidence in any casework that the local community, whether 'low income' or not, includes groups of people with protected characteristics – such as race and/or religion, as well as age and/or disability – who may be affected by the decision on the case. Similarly, the 'community' affected by the decision may not be geographical but dispersed and united by their protected characteristic(s), such as the users of an LGBTQ+ venue that is proposed to be built or demolished.

[39] The Essential Guide to the Public Sector Equality Duty

[40] Other specific duties under the EA10 apply to the Planning Inspectorate but not Inspectors; see 'Equality Act 2010: Specific Duties to Support the Equality Duty – What Do I Need to Know?', Government Equalities Office.

177. The protected characteristics should not be described or treated as a matter of lifestyle or something unusual, even where they apply temporarily, such as where someone is pregnant or in some cases of disability. The same is true where the individual has made an active choice, such as to convert to a particular religion or adopt a belief. The Oxford English Dictionary defines 'characteristic' as 'a feature or quality belonging typically to a person…and serving to identify them'. Protected characteristics are integral to who people are.

178. Inspectors should also take care to ensure that the protected characteristics or people with them are not 'othered', that is, described or treated in such a way as to mark them out as not fitting in with the dominant social group, or as different or alien to oneself. Further advice on writing about and addressing people is set out in Annex A.

179. As noted above, s14 of the EA10 affords protection from discrimination because of a combination of two relevant protected characteristics. 'Intersectionality' is a word sometimes used to refer to overlapping and interdependent discrimination or disadvantage applying to persons with more than one protected characteristic.

180. Everyone has protected characteristics and benefits from the PSED. However, given the wording of the three aims, it is always necessary to focus on 'who might most obviously be adversely affected by the proposal'[41], what protected characteristic(s) they have and, if appropriate, whether they represent a particular class within their protected characteristics.

181. If the proposed development is, for example, an Evangelical church, the Inspector should have due regard to the three aims not in terms of (say) Christians generically, but in terms of 'the [named Evangelical church] and their congregation who have the protected characteristic of religion'.

Age

180. S5 of the EA10 provides that a reference to a person with the protected characteristic of age is a reference to a person of a particular 'age group'; persons who share that protected characteristic are in the same age group. A reference to an age group is a reference to a group of persons defined by reference to age, whether that be a particular age or a range of ages.

181. As the Commission explains, age groups can be narrow or wide; for example, 'people in their mid-30s' and 'people under 65' are both age groups. The parties' terminology may be quite informal, and references to 'young people' or 'the elderly', say, can be enough to show that the protected characteristic of age is engaged.

182. The results of the Census of England and Wales 2021 (Census 2021) revealed that 'the trend of population ageing has continued'. One sixth or 18.6% of the population were aged 65+ years in 2021, up from 16.4 in 2011. The numbers of people aged less than

[41] *Bracking v SSWP* [2013] EWCA Civ 1345

15 years, or being in the 15-64 age range, had risen absolutely but fallen as a proportion of the overall population.

183. The protected characteristic of age is likely to remain relevant in casework. S13(2) of the EA10 allows for age discrimination where that is a proportionate means of achieving a legitimate aim, and such discrimination could be positive or negative. It may include, for example, the provision of housing for older people only.

Disability

184. S6(1) provides that a person has a disability if (a) they have a physical or mental impairment and (b) the impairment has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities. Schedule 1 of the EA10 contains supplementary provisions on the determination of disability, and there is also guidance from the Commission.

185. The EA10 is based on the 'social model' of disability, which is that disability is created by barriers in society, particularly environmental, attitudinal and organisational barriers. Focussing on the removal or mitigation of such barriers – by making reasonable adjustments – is a more positive and inclusive approach than the 'medical model' to try and 'fix' disabled people in order that they can participate in society.

186. The Census 2021 found that 9.8 million people representing 17.7% of the population in England were disabled; the number being higher but proportion lower than in 2011. Six million or 25.4% of households in England had at least one disabled member in 2021.

187. Advice on writing about people with disabilities or impairments is set out in Annex A.

'Impairment'

188. Government guidance (the Guidance on Matters) on matters to be taken into account by a Court or Tribunal, if a challenge to a decision or a discrimination claim raises questions relating to the definition of disability, states that:

- The term 'impairment' should be given its ordinary meaning[42].
- It is not necessary for the cause of the impairment to be established or the impairment to be the result of illness.
- Impairments may be fluctuating, recurring or progressive.
- It may not be possible or necessary to categorise an impairment as strictly physical or mental.
- The impairment may not be readily identifiable at all[43].

[42] The OED defines 'impairment' as 'the state or fact of being impaired, especially in a specified faculty'.
[43] The colloquial term is 'invisible disability'.

189. When establishing whether a person is disabled for the purposes of the PSED, it is not vital or necessarily helpful that they have a formal diagnosis[44]. A diagnosis shows the cause of an impairment, but the key questions are how a person is impaired (or what their symptoms are), how the impairment affects normal day-to-day activities, and whether the effects are substantial and long-term.

190. For example, if it is claimed that a house extension is required for a member of the family with pulmonary fibrosis, the Inspector may gain little useful information from medical records. The crucial details would be that the person is impaired by severe 'long-term' breathlessness and fatigue so that they need a separate bedroom with a hospital bed and oxygen equipment, and there is no space for that in the dwelling as it stands. A person with a different diagnosis could have the same requirements, while a person with the same diagnosis might not.

191. Similarly, if a participant asks that a hearing is adjourned because of their anxiety, evidence of a diagnosis would not aid the decision as to accept or refuse the request. The questions to ask are why anxiety would prevent the person from attending the event on the scheduled date, whether things would realistically be different on another date, and whether steps less drastic than adjournment could overcome the problem. It might be that the person experiences panic when speaking in public but could prepare a written statement for a friend or the Inspector to read out instead.

'Substantial' and 'Long Term'

192. S212(1) of the EA10 defines '**substantial'** as meaning 'more than minor or trivial'. The Guidance on Matters suggests that, when considering whether an effect is substantial, regard could be had to the time that the person takes to carry out their normal day-to-day activities, the way in which they carry them out, cumulative adverse effects of the impairment on more than one activity, how far a person can be reasonably expected to modify or reduce the effects of an impairment, and environmental conditions.

193. The effect of treatment should normally be disregarded when addressing whether an impairment has a substantial effect. Paragraph 5 of Schedule 1 of the EA10 is explicit that 'an impairment is to be treated as having a substantial adverse effect…if measures are being taken to treat or correct it and, but for those measures, the impairment would be likely to have that effect'.

194. The term 'measures' includes medical treatment and use of prosthesis or other aid, but not spectacles or contact lenses. For example, if a person has diabetes, the effect of that impairment should be adjudged on what the effect would be if the person was not taking such medication as is in fact prescribed.

195. Schedule 1 provides that the effect of an impairment is **long-term** if it has lasted or is likely to last for at least 12 months, or for the rest of the life of the person affected.

[44] Unless the person has a deemed disability or a condition that is expressly included in or excluded from the definition as described in Schedule 1 to the EA10.

‘Normal Day-to-Day Activities’

196. The EA10 does not define ‘normal day-to-day activities’ but the Guidance on Matters suggests that the term encompasses regular or daily activities such as personal care, shopping, using the phone, and work or study-related activities such as using a computer or interacting with colleagues or customers.

197. ‘Normal day-to-day activities’ do not include those which are normal only for a particular person or small group, but equally they do not need to be done by a majority of the population. Breast-feeding, for example, is a normal day-to-day activity. Activities may be normal and day-to-day even if an individual carries them out at an unusual time, such as where a shift worker sleeps during the day.

198. Participation in casework proceedings should be treated as involving normal day-to-day activities, whether or not it is actually normal for the particular party or person. That is because activities such as writing emails, letters or statements, or speaking in meetings or events, can all be considered normal and day-to-day.

199. Thus, if a person has difficulty participating in any aspect of casework by reason of disability, the Inspector must have due regard as to whether they or the Inspectorate can take reasonable steps to meet the person’s needs.

Discrimination and ‘Reasonable Adjustments’

198. For the second aim of the PSED, s149(4) states that the steps involved in meeting the needs of disabled persons…include, in particular, steps to take account of disabled persons’ disabilities. Such ‘steps’ should be considered in the context of the following other provisions of the EA10.

199. S13(3) of the EA10 states that, if the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B. In other words, making reasonable adjustments for disabled persons does not amount to discrimination against persons who are not disabled.

200. Under s15, a disabled person is discriminated against if they are treated unfavourably because of a consequence of their disability, and that is not shown to be a proportionate means of achieving a legitimate aim. This does not apply if the person treating the disabled person unfavourably did not know and could not have been reasonably expected to know of the disability.

201. The duty to make reasonable adjustments under s20(1) and (2) comprises three requirements: to take such steps as is reasonable to avoid disabled persons being put at a substantial disadvantage arising from (3) a provision, criterion or practice (PCP), (4) a physical feature or (5) provision of an auxiliary aid[45]. HMCTS provides useful information on reasonable adjustments for court and tribunal users.

[45] Including the provision of information in an accessible format.

202. Under s21(1) and (2), 'a failure to comply with the first, second or third requirement is a failure with the duty to make reasonable adjustments'. A disabled person is discriminated against if there is a failure to comply with that duty in relation to them.

203. S20(7) provides that a person who is subject to a duty to make reasonable adjustments is not entitled, unless there is express provision to the contrary, to require a disabled person to pay to any extent the costs of complying with the duty.

204. What is 'reasonable' will depend on many factors and therefore be fact sensitive but still be an objective test. Considerations may include how effective the adjustment would be in avoiding the disadvantage the disabled person would otherwise experience, its practicality, the cost, the resources and size of the organisation and the availability of financial support[46].

Gender Reassignment

205. S7(1) of the EA10 provides that a person has the protected characteristic of gender reassignment if they are proposing to undergo, are undergoing or have undergone (part of) a process for the purpose of reassigning their sex by changing physiological or other attributes of sex. It follows that a trans person does not need to have undergone any medical procedure in order to have the protected characteristic for the purposes of the PSED.

206. S7(2) describes persons with the protected characteristic of 'gender reassignment' as 'transexual'. Where it is not necessary to quote the EA10, the respectful term is 'transgender' or 'trans' as set out in Annex A, although people may also identify as non-binary[47] or gender questioning/queer/fluid.

207. Under s16(2), for the purposes of work, a trans person is discriminated against if they are absent because of gender reassignment, and they are treated less favourably by their employer than if they were absent for sickness, injury or other reason where it would be unreasonable to treat the person less favourably. In this context, under s16(3), the person does need to be proposing to undergo, be undergoing or have undergone (part of) the process of gender reassignment.

208. The Census 2021, for the first time, included a voluntary question on gender identity: 'is the gender you identify with the same as your sex registered at birth?' 262,000 people, representing 0.5% of the population aged 16+ in England and Wales, answered 'no' to the question. 93.5% answered 'yes' and 6.0% did not answer.

209. The Census gave respondents the option, when answering that question, of writing in their gender identity. Of those who did not identify with their sex registered at birth, 118,000 gave no further information, 48,000 identified as a trans man, the same number identified as a trans woman, 30,000 identified as non-binary and 18,000 gave a different gender identity.

[46] See the Commission on 'What is reasonable?'
[47] The ONS glossary states that 'someone who is non-binary does not identify with the binary categories of man or woman'.

Pregnancy and Maternity

210. 'Pregnancy' and 'maternity' are not defined in the EA10[48] but are subject to various specific provisions as explained further by the Commission.

211. S17 is concerned with pregnancy and maternity discrimination in 'non-work cases', including services, public functions and premises; it may apply to the holding of events including site visits, hearings, inquiries and examinations. A woman is discriminated against if she is treated unfavourably because of her pregnancy or giving birth in the previous 26 weeks. Such unfavourable treatment includes any for breast-feeding.

212. Under s13(6), direct discrimination in relation to the protected characteristic of sex includes less favourable treatment of a woman because she is breast-feeding, whether within 26 weeks of giving birth or not.

Race

213. S9(1) of the EA10 provides that race includes (a) colour, (b) nationality[49], (c) ethnic or national origin. S9(2) provides that a person with this protected characteristic is a person of a particular racial group; persons who share that protected characteristic are in the same racial group. Under s9(3) and (4), a racial group is a group of persons defined by reference to race, and a particular racial group may comprise two or more distinct racial groups (such as Black British).

214. S13(5) of the EA10 provides that, if a person has the protected characteristic of race, less favourable treatment (amounting to direct discrimination) includes segregating that person from others.

215. The Census 2021 showed that 81% of the population of England and Wales identified their ethnic group within the 'high level "White" category', a decrease from 86% in 2011. Those identifying as English, Welsh, Scottish, Northern Irish or British White accounted for 80.5% of the population, down from 87.5% in 2011.

216. The next largest ethnic group was Asian, Asian British or Asian Welsh, accounting for 9.3% of the population of England and Wales, up from 7.5% in 2011. The third and fourth largest ethnic groups were Black, Black British, Black Welsh, Caribbean or African and Mixed or Multiple ethnic groups which had increased by 2021 to represent 3% and 2.9% of the population respectively.

217. There were significant increases in other groups, including other white and any other ethnic group. 10.1% of households in England and Wales consisted of members identifying with two or more different ethnic groups, again up from 8.7% in 2011. Advice on writing about race and ethnicity is set out in Annex A.

218. The Census 2021 showed that English (plus Welsh in Wales) was the main language for 91.1% of the population, a fall from 92% in 2011. A further 7.1% were proficient in

[48] Although s213 does define 'maternity leave'.
[49] Including citizenship.

English (or Welsh). The most common other main languages were Polish, Romanian, Panjabi and Urdu but different main languages were spoken in 6% of households.

Religion or Belief

219. S10(1) and (2) of the EA10 provides that religion means any religion, and belief means any religious or philosophical belief; a reference to religion or belief also includes a reference to a lack of religion or belief, so that atheism and agnosticism are protected.

220. S10(3) provides that a reference to a person with a particular protected characteristic is a reference to a person of a particular religion or belief; persons who share that protected characteristic have the same religion or belief. This will include particular religious denominations such as Catholicism.

221. The Census 2021 indicated that, for the first time, less than half the population (46.5%) of England and Wales identified as Christian. While the figure had fallen markedly from 59.3% in 2011, Christianity remained the largest religion in England and Wales. The second most common response was "no religion", up from 25.2% in 2011 to 37.2% in 2021. There were also increases in the numbers of people identifying as Muslims (up from 4.8% to 6.5%) and Hindu (up from 1.5% to 1.7%).

222. The criteria for a 'protected belief' were laid down in *Grainger Plc & Others v Nicholson* [2009] UKEAT/0219/09: it must be genuinely held; it must be a belief and not an opinion or viewpoint; it must relate to a weighty and substantial aspect of human life and behaviour; it must attain a certain level of cogency, seriousness, cohesion and importance; it must be worthy of respect in a democratic society and not incompatible with human dignity or conflict with the fundamental rights of others.

223. The Commission gives belief in man-made climate change as an example of a protected beliefs; others will include humanism, pacifism and vegetarianism. Beliefs in racial superiority or that the Holocaust did not occur are not protected, however, because they are incompatible with human dignity and the rights of others.

224. The Commission notes that the 'human right to manifest their religion or belief' arises from [Article 9 of the] Convention[50] as well as the PSED. Direct discrimination against a person on the basis of their religion or protected belief cannot be legally justified except where there is an explicit exemption in the EA10.

225. However, Article 9 is a qualified right and indirect discrimination on the basis of religion or belief may be lawful where it is objectively justified as a proportionate means of achieving a legitimate aim. For example, an employer may implement a dress code, which indirectly discriminates against persons wishing to wear to work religious symbols or articles of clothing, if the dress code is proportionate and necessary perhaps for health and safety reasons, to ensure neutrality in delivering public services or to protect the rights and freedoms of others.

[50] Freedom of thought, conscience and religion.

226. In *Page v NHS Trust Development Authority* [2021] EWCA Civ 255, the CoA distinguished between direct discrimination against a person because they hold or manifest their protected belief, and indirect discrimination for manifesting or expressing the belief in such a way that objection could – on the facts – be justifiably taken. Lord Justice Underhill held that:

'The freedom to express religious or any other beliefs cannot be unlimited…there are circumstances in which it is right to expect [those] who work for an institution…to accept some limitations on how they express in public their beliefs on matters of particular sensitivity. Whether such limitations are justified in a particular case can only be judged by a careful assessment of all the circumstances…so as to strike a fair balance between the rights of the individual and the legitimate interests of the institution for which they work'.

227. Other recent cases concerning the expression of religious or protected beliefs at work have been well-publicised. In *Forstater v CGD Europe & Others* [2021] UKEAT, it was held that the view that a person's biological sex is immutable is a protected belief for the purposes of s10 of the EA10. The Employment Tribunal later found that, when Ms Forstater's contract had not been renewed, she had suffered direct discrimination on the basis of her protected belief.

228. The Employment Appeals Tribunal held in *Mackereth v DWP* [2022] EAT 99 that a benefits assessor who had resigned their role rather than use the preferred pronouns of transgender people as the Department of Work and Pensions expected, had not been subject to direct discrimination or harassment. Any indirect discrimination had been lawful since the PCPs applied by DWP were necessary and proportionate to meet a legitimate focus on the needs of potentially vulnerable service users.

229. Those decisions and advice relating to the POA86 and Article 10 are consistent with *Grainger*. Inspectors should ensure that event participants can express or manifest their religious or other beliefs but do not thereby compromise the safety, human dignity or fundamental rights of others. Inspectors should speak to their line managers if taking on a case could conflict with their own religious or protected beliefs.

Sex

230. Under s11(a) of the EA10, a reference to a person with this protected characteristic is a reference to a man or woman. The 2021 Census showed that women and men respectively make up 51% and 49% of the population of England and Wales, the figures being similar to those from 2011[51].

231. 'Sex' is recognised as having a different meaning to 'gender', although there is interaction. The World Health Organisation explains that 'gender refers to the characteristics of women, men, girls and boys that are socially constructed…sex relates to the different biological and physiological characteristics of females, males and

[51] These figures are based on information given by respondents as to their sex as registered at birth. Registration regulations do not provide for the registration of intersex babies or others whose sex is 'indeterminate'; number of babies with intersex traits - Office for National Statistics (ons.gov.uk).

intersex persons…gender identity relates to a person's deeply felt, internal and individual experience of gender'.

232. S212 of the EA10 simply defines a 'man' as a man of any age and a 'woman' as a woman of any age; thus, the EA10 does not include a 'biological' definition of sex. Indeed, there is variation in the biological attributes that comprise sex and in how those attributes are expressed[52]. It is not always the case, for example, that a person's anatomical sex will align with their chromosomes.

233. As noted above, s13(6) provides that less favourable treatment of a woman includes any because she is breast-feeding. Under s13(b), no account is to be taken of special treatment afforded to a woman in connection with pregnancy or childbirth when considering whether there is less favourable treatment of a man.

Sexual Orientation

234. S12 of the EA10 provides that sexual orientation means a person's sexual orientation towards persons of the same, opposite or either sex. A reference to a person with this protected characteristic is to a person of a particular sexual orientation. Persons who share the protected characteristic are persons of the same sexual orientation.

235. The Census 2021 question on sexual orientation was voluntary. 92.5% of the population aged 16+ in England and Wales answered the question, with 89.5% identifying as straight or heterosexual and 3.2% identifying as gay or lesbian, bisexual or 'other sexual orientation' which could encompass those identifying as queer, pansexual or asexual.

236. The Commission explains that discrimination by perception or association is relevant to sexual orientation. It can be unlawful to discriminate in respect of 'how you choose to express your sexual orientation, such as through your appearance or the places you visit'. It is similarly unlawful to discriminate against the expression of other protected characteristics, except where indirect discrimination is objectively justified as a proportionate means of achieving a legitimate aim as discussed above.

The PSED and Casework

'Due Regard'

237. The Government Equalities Office advises that 'having due regard means consciously thinking about the three aims of the Equality Duty as part of the process of decision-making. This means that consideration of equality issues must influence the decisions reached by public bodies…'[53] More informally, the Commission advises that to have 'due regard' means 'that you have made yourself fully aware of – and understood – what the PSED means, and that you have put this knowledge into practice'.

238. In *R (oao Brown) v SSWP* [2008] EWHC (Admin), a case which concerned the then disability equality duty and the impact of post office closures on disabled people, Aikens

[52] 'The Lancet, 23 November 2019
[53] Equality Act 2010: Public Sector Equality Duty – What Do I Need to Know? A Quick Start Guide for Public Sector Organisations.

LJ put forward general principles as to how a public authority could fulfil its duty to have due regard 'to the identified goals':

a. Those in the public authority who take decisions that might affect persons with protected characteristics must be made aware of their duty to have due regard.

b. The duty must be fulfilled before and when a particular policy [or decision] that will or might affect persons with protected characteristics is being considered by the public authority; 'it involves a conscious approach and state of mind'.

c. The duty must be exercised in substance, with rigour and an open mind. The duty has to be integrated with the discharge of public functions; it is not a question of 'ticking boxes'.

d. That a public authority has not specifically mentioned the duty is not determinative of whether the duty has been performed. But it is good practice for the decision-maker to refer to the provision where s149 is in play.

e. The duty is a non-delegable one.

f. The duty is a continuing one.

g. It is good practice for those exercising public functions to keep an adequate record showing that they had adequately considered the duty and pondered relevant questions. Proper record-keeping encourages transparency and those carrying out the public function to undertake the duty conscientiously.

239. In *Bracking v SSWP* [2013] EWCA Civ 1345, McCombe LJ endorsed and expanded upon the 'Brown principles':

- General regard to equality issues is not the same as specific regard by way of conscious approach to the statutory criteria.
- Officials reporting to Ministers or other decision-makers on matters material to the discharge of the duty must be rigorous in both enquiring and reporting to them.
- It is for the Courts to decide if due regard has been had, but providing this is done, it is for the decision-maker to decide what weight to give to the equality implications of the decision.
- The duty of due regard requires public authorities to be properly informed before taking a decision. If the relevant material is not available, there is a duty to acquire it and some further consideration with appropriate groups may be required.

- The duty of due regard concerns the impact of the proposal on all persons with the protected characteristic and any specific class of persons within a protected characteristic who might most obviously be adversely affected by the proposal[54].

240. The 'conscious approach' – consciously considering the three aims – has been summarised as 'a proper appreciation of the potential impact of the decision on equality objectives and the desirability of promoting them'[55]. Sir Keith Lindblom SPT held in *R (oao Sheakh) v Lambeth LBC* [2022] EWCA Civ 457 that s149:

'…does not require a substantive result [or] prescribe a particular procedure…it implies a duty of reasonable enquiry…[and] requires a decision-maker to understand the obvious equality impacts of a decision…[the] courts should not engage in an unduly legalistic investigation of the way in which a local authority has assessed the impact of a decision on the equality needs.'

241. The 'duty of reasonable enquiry' is not an express statutory duty set out in the EA10. It should be seen as flowing from the duty to have 'due regard' plus the wider public law principle that the decision-maker must ask themselves the right question and take reasonable steps to acquaint themselves with the relevant information to enable them to answer the question correctly[56].

242. It was held in *SSCLG v West Berkshire DC & Reading BC* [2016] EWCA Civ 441 that a 'relatively broad brush approach' to enquiry may be adequate in some circumstances, but that was in respect of an Equality Statement pertaining to a Written Ministerial Statement. Appeals casework, for example, is more likely to necessitate enquiry in respect of individuals.. Whether the decision-maker has complied with the PSED in any given case is a highly fact-sensitive question[57]; 'what constitutes "due regard" will depend on the circumstances'[58].

Cases where the PSED may be Engaged

243. The PSED is engaged in appeal, application, order or plan casework where the decision will involve the creation or loss of, or other significant impact in relation to **land or development that is solely or mainly used by persons with one or more protected characteristics**.

244. Such cases could include a proposed allocation or development of land for use as a Traveller site; the construction of or change of use of a building to a church, mosque or synagogue; the erection of a house extension for an elderly or disabled relative; changes to the layout of a listed building to facilitate wheelchair access; the felling of

[54] Such as elderly people within the protected characteristic of age.
[55] *R (oao Hurley & Moore) v SSBIS* [2012] EWHC 201 (Admin), following *Baker*, upheld by the Supreme Court in *Hotak v Southwark LBC* [2015] UKSC 30 and quoted in *R (oao Devonhurst Investments Ltd) v Luton BC* [2023] EWHC 978 (Admin).
[56] Judgment of the House of Lords in *SSES v Tameside MBC* [1977] AC 104, cited in *Hurley & Moore, Bracking* and *Sheakh*.
[57] *R (oao Hough) v SSHD* [2022] EWHC 1635 (Admin), cited in *Devonhurst*.
[58] *R (oao Hollow) v Surrey CC* [2019] EWHC 618 (Admin), cited in *Sheakh*.

trees within the grounds of extra care housing; the diversion of a public path to a school; or the redevelopment of the site of an existing community centre.

245. It may not be evident from the description that the case directly concerns persons with protected characteristics. In *R (oao Harris) v Haringey LBC* [2010] EWCA Civ 703, the Council simply permitted the 'demolition of existing buildings and erection of mixed use developments…' The buildings to be demolished in fact included an indoor market known as the 'Latin Village', where people from South American, Caribbean and African communities met to socialise as well as buy or sell goods and services.

246. The PSED is also engaged in casework that does not specifically concern but would have **particular impacts on persons with protected characteristics**. The list of such cases could be endless. The construction or loss of any development subject to a planning or enforcement appeal, the making of CPO, the felling of any tree or stopping up of any path may, in the circumstances, have particular implications for a person or persons with one or more protected characteristics.

247. *LDRA Ltd v SSCLG* [2016] EWHC 950 concerned a proposed office and warehouse building to be sited on an existing car park adjacent to a riverside promenade. The Inspector found that the development would cause a loss of parking and direct access to the footway, in conflict with a development plan policy that sought to preserve access to the coast, but they gave that consideration limited weight because the length of footway affected was small.

248. It was held that the Inspector had not properly considered the value of the existing car park to disabled persons. The Inspector had found that alternative parking spaces would be 'less convenient' for disabled people, but not addressed whether that would render such persons unable to access the riverside at all. Since they had made no reference, express or implied, to the three aims, it was held that they had not complied with the PSED – and it could not be said that doing so would have made no difference.

249. LDRA is noted because the question of access 'was not a main issue in the appeal', the relevant plan policy concerned 'public access' broadly and the Council had not referred to the PSED. Yet Lang J held that there was significant evidence of disadvantage to disabled persons and, if the Inspector was not 'fully appraised of the relevant information', they were obliged to seek it out'.

250. In *R (oao Buckley o/b Foxhill Residents' Association) v BANES & Curo Places Ltd* [2018] EWHC 1551 (Admin), it was held that the Council had failed to comply with the PSED when granting permission for the redevelopment of a housing estate. 'Matters concerning the impact of the loss of existing homes on the elderly and disabled' had not been 'drawn to the decision-making committee's attention'. It was not highly likely that the decision would have been the same anyway and the permission was quashed.

Main Issues and Reasoning

251. The advice given here is similar to that set out in respect of Article 8. If the PSED is engaged in casework, that will be because of how the decision might impact upon a person, group or community with one or more protected characteristics. Those real-life impacts must be addressed as an integral part of the reasoning that leads to the decision whether or not the parties referred to the PSED.

252. Given that the PSED 'must be exercised in substance, with rigour and an open mind', Inspectors should scrutinise the evidence before them so as to identify whether any persons with protected characteristics are party to the case, and whether those characteristics could be relevant to the decision because of the implications – positive or negative – for those persons.

253. If the evidence suggests that an issue related to protected characteristics is significant for those persons and/or potentially decisive, it should be a main issue or consideration in the decision letter or report. This advice particularly applies if there is a prospect of the decision being at odds with the PSED.

254. The Inspector should frame such issues not in terms of the duty – which is a matter for the Conclusion – but in terms of the real-world effects on the person(s) with the protected characteristic(s). The framing of the main issue should enable the Inspector to properly identify and ascribe weight to the effects on the person(s) and have regard to any less harmful alternative outcome'[59] or potential conditions which might lessen the impacts on those persons or alter the balance in their favour.

94. Adaptable of main issues where the PSED is engaged could be:

- The supply of [accessible] [x bedroom plus] [sheltered] [other specialist] housing
- The availability of suitable, affordable and acceptable [accessible] [x bedroom plus] [sheltered] [other specialist] housing
- The availability of suitable, affordable and acceptable housing within [the catchment area] [commuting distance] of X [School] [Hospital]
- The impact of the loss of the [community centre] [sports facility] [nightclub] on [disabled people] [young people] [the LGBTQ+ community].
- The impact of the relocation of the [centre/services] on [children with SEN] [women] [disabled people] [elderly people] [people of [minority ethnic] heritage] in the [area].
- The need for the [proposed] [development] to serve the local [[Charedi] Jewish] [Black British] [LGBTQ+] community.
- The benefits of the [proposed] [development] to [children] [in the area.
- The [appellant's] [occupiers'] personal circumstances and need for the [proposed] [development] [with regard to…]
- The consequences of a refusal of planning permission for the [appellant's] family

[59] *R (oao Baker) v SSCLG* [2008] EWCA Civ 141

- The effect of the [proposed] [development] on the [living conditions] [reasonable enjoyment of the home] [private and family life] of nearby occupiers…

255. Focussing on the real-world effects on persons with protected characteristics is key to substantive compliance with the PSED. *Webb-Harnden v Waltham Forest LBC* [2023] EWCA Civ 992 concerned an appeal against the Council's decision to offer accommodation to a homeless family in another part of England. The duty on the Council under the Housing Act 1996 was to secure 'suitable' accommodation with regard to matters set out in secondary legislation and local housing policy.

256. The Council discharged the PSED not only because the reviewing officer set out and referred to the terms of s149, but also because they 'considered all the matters that the appellant and the solicitors relied upon'. They considered the impact of moving and 'the effect of separation from family and support networks on the physical and mental health of the appellant and her children'.

257. Similarly, *R (oao Devonhurst Investments Ltd) v Luton BC* [2023] EWHC 978 (Admin) concerned whether the Council had due regard to the PSED when issuing an enforcement notice against blocks of flats. In their report, the Council had 'not teased out the potential impacts by reference to…the [occupiers'] relevant protected characteristics, and ordinarily it would be better to do so'.

258. However, the Council had assessed 'what was required by way of enquiry to enable it to assess the impact [of enforcement action] on [occupiers] with relevant characteristics'. The report acknowledged that requiring occupiers to move out would cause them disruption and distress, and impact upon their financial well-being, health and schooling as well as housing needs. The Council had 'shown a proper appreciation of the potential impact of the decision on equality objectives and the desirability of promoting [them]'.

259. In other recent cases concerning the PSED, local authorities have successfully claimed that, even if there was a breach of s149, the claimant should be denied relief on the basis that the outcome would probably have been the same anyway[60]. Again, this implies that the decision-maker understood the substantive issues.

260. *R (oao Addison) v Southwark LBC & Others* [2022] EWHC 3211 (Admin) concerned a grant of planning permission for the redevelopment of a stadium and Astroturf pitch. The Council had received objections that 'local people including many BAME people, use the Astroturf for informal sport and recreation and for them it is important that it is free and does not require booking'.

261. The Council's report considered the PSED in relation to the protected characteristics of age, disability and sex but not that of race. Elsewhere in the report, however, the Council had 'expressly considered' the issues raised by objectors and found that there would be appropriate mitigation. It was held that, 'even if there was some substance to

[60] See also *Gathercole v Suffolk CC* [2020] EWCA Civ 1179 and *(R oao Liquid Leisure Ltd) v Windsor and Maidenhead RBC* [2022] EWHC 149 (Admin); the power to dismiss a challenge on the basis that the outcome would be the same is set out under s31(2A)(a) of the Senior Courts Act 1981.

the…PSED related complaints…it is highly likely that the outcome would not be substantially different'.

262. It follows that the main issues should again reflect what is at the heart of the case for the parties or others directly affected. For example, if a planning appeal concerns a proposed mosque or madrasa[61], the main issues need not be restricted to the Council's reasons for refusal; others might be the need of the local Islamic community for that facility and whether there are any suitable alternative sites.

263. Where the case concerns the impact on an individual, the main issue may be framed in terms of the interplay between personal circumstances and that aspect of the person's identity which serves to be a relevant protected characteristic. It could be, for example: 'the appellant's need for a house extension, given their personal circumstances and Haredi Jewish faith'.

'Character and Appearance'

264. It is not unusual to receive objections to development on 'character and appearance' grounds. Inspectors should bear in mind that the people who occupy an area are part and parcel of its character. It is important to be respectful to those who live, work or play in the locality, and to avoid sweeping, ambiguous, stereotyping or pejorative statements in relation to 'character'.

265. For example, Inspectors should take care in how they describe a street with inharmonious house extensions, bearing in mind that such developments may be a sign that this is an area where families want to stay. It may be that the addition of an external wheelchair ramp would fail to preserve or enhance the appearance of a listed building, but that should not slip into a suggestion of harm to 'character' when the purpose of the ramp is to increase the presence of disabled people.

266. In reasoning on 'character and appearance', try to pinpoint what is in dispute (such as the use, design or landscaping), explain in objective terms what the harm the development might cause and show why that harm might be unacceptable with regard to relevant planning policies and guidance. An SPD or Area Action Plan may provide information to help an Inspector apply design policies in the context of the community.

Unlawfulness and IUD

267. Much the same approach should be taken here as with Article 8. Whether or not the PSED is engaged, planning permission should never be refused or approved simply because it is sought on a retrospective basis for (potentially) unlawful development.

268. Any finding that the development is 'intentionally unauthorised' must weigh against a grant of planning permission but not affect the weighting given to other considerations. Inspectors should not, for example, give reduced weight to the appellant's personal circumstances because they carried out IUD. Whether harm caused by the

[61] An Islamic school

development outweighs or is outweighed by the benefits for persons with protected characteristics is a question to address in the final balance.

Conditions

269. Again, it is crucial for Inspectors in their reasoning to consider whether conditions could be imposed to reduce or overcome any identified harm and thus alter the balancing exercise[62]. Imposing a temporary or personal condition may reduce adverse impacts on persons with protected characteristic to the minimum necessary.

270. Conditions may be imposed to ensure that development intended to meet the needs of persons with protected characteristics will do so in posterity or for an appropriate period of time[63]. Where planning permission is granted for a Gypsy site, it is normally necessary to impose a condition which restricts occupation to Gypsies or Travellers[64].

271. Conditions and/or planning obligations may be used in accordance with the 'agent of change' principle set out in the NPPF. The Joiners' Arms, a gay bar in Tower Hamlets, was closed after the land was bought by a housebuilder. The 'Friends of the Joiners' Arms' (FOTJA) secured Asset of Community Value status for the pub, objected to the initial applications for redevelopment and prompted the Council to carry out an Equality Impact Assessment (EqIA).

272. Planning permission[65] was granted for the development of the site for flats, offices and a replacement public house in June 2018. Conditions were imposed to withdraw permitted development rights to change the use of the pub, to allow late pub opening hours and to ensure the return or facsimile of the original pub sign. A s106 agreement secured the lease of the bar for 25 years plus its use as an LGBTQ+ venue for at least 12 years. The FOTJA were given first refusal on the lease and the developer committed to paying £130,000 towards fit-out costs and waived the first year's rent.

The Conclusion and Decision

273. Where the PSED is engaged, the decision must be shown to be **proportionate**.

274. Ss13, 17 and 19 of the EA10 provide that specified forms of discrimination are not unlawful if a 'proportionate means of achieving a legitimate aim'. That phrase does not appear in s149, but the concept of proportionality is nonetheless crucial. 'Legitimate aims' that are engaged in casework include those set out in the relevant planning (or other) policy and legislation, such as the protection of the Green Belt, **and** the three aims set out in the PSED.

275. The 'Bingham checklist' and 'proportionality assessment' apply strictly to Article 8 and should **not** be applied to any conclusion on the PSED. But there are similarities in

[62] See the Conditions ITM.
[63] Subject to the tests of necessity, relevance to planning and to the development to be permitted, enforceability, precision and reasonableness.
[64] In accordance with the PPTS as qualified by *Smith v SSLUHC* [2022] EWCA Civ 1391 and explained in the Gypsy, Traveller and Travelling Showpeople's Casework ITM.
[65] Tower Hamlets LBC application ref: PA/17/00250

approach and, if Article 8 is engaged as well as the PSED, the conclusion on the latter would sensibly follow that on the former.

276. In *R (oao Coleman) v Barnet LBC & Another* [2012] EWHC 3725 (Admin), it was claimed that the Council failed to discharge the PSED when deciding to grant planning permission for the redevelopment of a garden centre where the café was used as meeting place by elderly and disabled people.

277. Lindblom J (as he then was) noted that the Council officer had described consultation responses and objections to the development accurately and at length in their report. They had accepted, in reasoning on the issues and in discussion on the PSED, that elderly and disabled people relied on the facility, there was no viable alternative place for many users, and the proposed development would not replace what was lost.

278. In their conclusion to the report, the officer factored in the effect of the development 'on the identified protected groups' but found that effect would be outweighed by other considerations on balance. It was held that the Council had properly discharged the PSED 'not merely in form…but also in substance'.

279. That the weight ascribed to different factors is a matter for the decision-maker was reinforced in *R (oao Patel) v SSCLG & Others* [2016] EWHC 3354 (Admin). Mr Justice Ouseley noted that:

> '*There is no duty to give particular weight to the needs of [persons with protected characteristics], no duty to achieve the outcome which advantages them most or disadvantages them the least…[the Inspector] is not obliged by s149 to find some countervailing public benefit to set against the greater disadvantage…*'

280. On the facts in Patel, it was also held that the Inspector, in deciding a prior approval appeal, had applied their mind to the needs of the elderly and disabled, despite not referring specifically to the s149 duty. Given the Addison case discussed above, the Brown principle that the PSED is a duty to be met in substance remains good law.

281. That said, it will in some cases be necessary to refer expressly to the PSED and, where findings on the main issues point different ways, to set out a full balancing exercise in the Conclusion to a decision or report. The Conclusion should then cover:

- The findings on the main issues and the weight ascribed to those findings, with regard where appropriate to conditions.
- The balance, and what decision that points to.
- The implications of that decision for persons with protected characteristics in terms of the three aims of the PSED.
- Whether meeting the three aims justifies or adds weight to a decision that is consistent with the PSED.
- Why a decision that is not consistent with the three aims of the PSED is nonetheless proportionate.

282. Thus, as with human rights, any failure to secure the three aims will be lawful, and a proportionate means to achieve a legitimate aim, so long as there is no error in the reasoning; the Inspector has had, in accordance with Brown, conscious 'due regard' as part of the decision-making process, and the Inspector has exercised the duty in substance, with rigour and an open mind.

283. To assist Inspectors, example wording for conclusions is set out in Annex C. It should be adapted to the case in hand and not treated as a template or standard wording.

Evidence and Procedure

284. Much advice here is similar to that given in relation to Article 8:

- It is not unusual for the PSED to be engaged in cases proceeding by written representations.
- Inspectors should be alert to any claims or evidence which point to implications for persons with protected characteristics, whether or not they refer expressly to equality or the PSED.
- Assertion or anecdote is evidence that should be accepted unless it is contradicted and even if it carries little weight.
- Inspectors should request information as necessary to make a sound decision.
- It will usually be straightforward in written representation cases for the Inspector to properly identify the main issues and make a demonstrably 'proportionate' decision.
- If there is a prospect of a serious harm to persons with protected characteristics – or their needs otherwise being a decisive factor – it may be appropriate to determine the case though the hearing or inquiry procedure, so that the evidence is properly tested and the implications of the PSED are fully aired.
- Inspectors must be pro-active and inquisitorial at hearings or inquiries, to ensure that all the main issues are discussed, all relevant evidence is brought forward and there is enough information to have due regard to the three aims.

285. In Local Plan, Infrastructure and major planning appeals, the information before the Inspector may include an Equality Impact Assessment (EqiA). An EqIA should be an evidence-based document which assesses the likely impacts of whatever is subject to the case on persons with protected characteristics[66].

286. It is not for the Inspector to judge whether the EqIA is robust or the party who prepared it discharged the PSED. The EqIA alongside other evidence should inform the Inspector's own reasoning on the Main Issues as well as Conclusion on the PSED.

[66] See the 'The Public Sector Equality Duty and Equality Impact Assessments: Briefing Note No. 06591', the House of Commons Library, July 2020, for further information.

287. An EqIA may carry significant weight, but the Inspector is not bound to agree with any or all of its findings especially – but not only – if the parties do not agree either. If other evidence indicates, for example, that the EqIA underestimates the impact of a proposal on the elderly, the Inspector should canvas the matter at the event and make their own finding as to what the impact would be.

288. Given the second aim of the PSED and wording of s149(3)(c), concern may be expressed that other organisations did not encourage persons who share a relevant protected characteristic to participate in proceedings. For example, questions may be raised in examination as to whether the Romany Gypsy community was properly consulted on a Local Plan. Objectors to a planning appeal may question the public consultation on the application.

289. It will be for the authority as to whether they properly 'encouraged' participation by persons with relevant protected characteristics. It is not the role of the Inspector to decide whether any other body complied with the PSED in the exercise of their functions. However, whether the consultation was adequate in the circumstances may bear on the soundness of the Local Plan or robustness of the Council's case at appeal.

290. Inspectors must comply with the PSED[67] in procedural decisions of all kinds, ranging from whether to accept late representations up to whether to adjourn an inquiry. And it should be borne in mind that people with protected characteristics may be involved in any casework as a party or on a professional basis[68].

291. The duty set out in the EA10 to make reasonable adjustments for disabled persons applies to proceedings; the Inspector is accountable for the accessibility of hearing and inquiry venues[69]. Adjustments may also be needed, for example, when considering what the procedure is, deadlines for or formats of representations, how much time is allowed for the site visit and the frequency of breaks or length of sitting days[70]. The Judicial College's Equal Treatment Bench Book provides advice on reasonable adjustments that may be made in a court or tribunal setting.

292. Inspectors should take appropriate steps to meet the needs of any participants who are pregnant, have recently given birth or are breast-feeding. To avoid making intrusive inquiries, it may be safest to act as though any baby was born in the last 26 weeks. Inspectors should also take steps to meet the needs of older and disabled participants, which should be assessed on a case-by-case or person-by-person basis.

293. Unlike in the courts, it is for any party to Inspectorate proceedings to secure the service of a translator or interpreter as required. However, the Inspector should ensure that they can do so and accommodate the translator or interpreter as discussed in the Enforcement ITM Chapter.

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[67] And Article 6.
[68] See above for advice on how to deal with any safeguarding concerns.
[69] Public Inquiries, Hearings and Examinations – Venue and Facilities Requirements
[70] HMCTS provides useful information on reasonable adjustments for court and tribunal users.

Annex A: Names, Titles, Pronouns and Terminology

1. As set out in the introduction to this chapter, Inspectors can expect to determine cases brought by or involving diverse people with myriad circumstances and needs. We can expect to see evidence concerning traditions and cultures that we are not personally familiar with. It is always better to seek advice from Knowledge Centre, a topic adviser, or your line manager or mentor as appropriate – and/or to seek further evidence from the parties – than risk making an error or giving other cause for complaint.

2. When writing names in a decision letter or report, or asking for the name of a party or participant, Inspectors should bear in mind that:

   - Personal' names do not always come first.
   - Not everyone has a 'family' or hereditary name.
   - Not everyone in a family has the same family name.
   - A person may have a 'religious' name that they should not be addressed by alone.

3. Inspectors can ensure that events are inclusive by greeting 'everyone' (rather than 'ladies and gentlemen') and asking individuals for their preferred title and pronouns. It may reduce risk of data breach as well as offence to refer to individuals by the gender-neutral 'they' in decision letters and reports. It will also assist participants if Inspectors announce at events how they themselves wish to be addressed, whether as 'Sir', 'Madam' or 'Inspector [Preferred Name]'.

4. The Cabinet Office Disability Unit has published guidance on Inclusive Communication, including guidelines to consider when communicating with or about disabled people. Key points in the guidelines are:

   - The word 'disabled' is an adjective, so refer to 'disabled people' rather than 'the disabled'. In some situations, it may be better to use other terms such as 'people with x' or 'people with health conditions'.
   - Avoid medical labels and negative phrases such as 'suffers from…' or 'confined to a wheelchair'.
   - 'Use language that respects disabled people as active individuals with control over their own lives'.

5. As advised above and in the Approach to Decision-Making (Part 1), Inspectors should avoid unnecessarily setting out sensitive personal information. Even if a particular health condition is relevant, it may be appropriate to use an umbrella term such as 'neurodivergent' rather than 'autistic', or 'mental illness' rather than 'schizophrenia'. Subject to data protection, however, it is not stigmatising to name someone's health condition; 'condescending euphemisms' would likely be worse.

6. Civil servants are advised not to use the acronym 'BAME' (standing for 'black, Asian and minority ethnic') as an umbrella term. This is because the term emphasises some

ethnic groups over others, and also serves to homogenise distinct groups. There is concern that it has been used to 'average out' and hide discrimination and lack of representation experienced by particular racial groups[71].

7. The Cabinet Office Race Disparity Unit (RDU) has issued a Style Guide, which includes guidance on writing about ethnicity. If it is absolutely necessary to use an umbrella term, reference should be made to 'ethnic minorities' or 'people from different ethnic minority backgrounds'. Where possible, however, racial groups should be described in the same terms – with the same capitalisation – as the Census 2021.

8. The same approach should be taken to religion and so, for example, the decision letter might need to record that 'the appellant is Asian British and a Sikh'.

9. S7(2) of the EA10 provides that persons with the protected characteristic of 'gender reassignment' are 'transexual'. Where it is not necessary to quote the EA10, however, the respectful term is widely considered to be 'transgender' or 'trans' or, as the case may be, 'non-binary'.

10. The parties may use different words or phrases to describe the protected characteristics and doing so will not necessarily be wrong or inappropriate. However, it is essential that the Inspector's language is always respectful and clear. It may be necessary to agree consistent wording with the parties in hearings or inquiries, and the starting point should be the terminology used by those involved who have the relevant protected characteristics.

11. The PINSnet Equality, Diversity and Inclusion glossary provides further information on terminology. While not always relevant to Planning Inspectorate casework, the Judicial College's Equal Treatment Bench Book is a useful and dynamic source of advice on language, communication and reasonable adjustments that may be made in a court or tribunal setting. The Employers Network for Equality and Inclusion also provide various resources including guidance on Inclusive Communication.

[71] See also BAME: A Report on the Use of the Term and Responses to it, Sir Lenny Henry Centre for Media Diversity.

Annex B: Relevant paragraphs in the NPPF (December 2023)

8. Achieving sustainable development means that the planning system has three overarching objectives, 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)…

    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…

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.

16. Plans should:

    a) be prepared with the objective of contributing to the achievement of sustainable development…

    c) be shaped by early, proportionate and effective engagement between plan makers and communities, local organisations, businesses…

    e) be accessible through the use of digital tools to assist public involvement…

63. …the size, type and tenure of housing needed for different groups in the community should be assessed and reflected in planning policies (including but not limited to…families with children, older people, people with disabilities…[and] travellers…)

88. Planning policies and decisions should enable…d) the retention and development of accessible [rural] local services and community facilities, such as…meeting places…cultural buildings, public houses and places of worship.

99. Planning policies and decisions should aim to achieve healthy, inclusive and safe places which: a) promote social interaction…b) are safe and accessible…[and] do not undermine the quality of life or community cohesion…

97. To provide the social, recreational and cultural facilities and services the community needs, planning policies and decisions should:

    a) plan positively for the provision and use of shared spaces, community facilities (such as local shops, meeting places, sports venues, open space, cultural buildings, public houses and places of worship) and other local services to enhance the sustainability of communities and residential environments.

b) take into account and support the delivery of local strategies to improve health, social and cultural well-being…

c) guard against the unnecessary loss of valued facilities and services, particularly where this would reduce the community's ability to meet its day-to-day needs.

d) ensure that established shops, facilities and services…are retained for the benefit of the community; and

e) ensure an integrated approach to considering the location of housing, economic uses and community facilities and services.

98. Planning policies and decisions should consider the social, economic and environmental benefits of estate regeneration…

116. …applications for development should…b) address the needs of people with disabilities and reduced mobility in relation to all modes of transport…

132. …Design policies should be developed with local communities so they reflect local aspirations and are grounded in an understanding and evaluation of each area's defining characteristics…

135. Planning policies and decisions should…f) create places that are safe, inclusive and accessible and…promote health and well-being, with a high standard of amenity for existing and future users (Footnote 49)

Footnote 52. Planning policies for housing should make use of the Government's optional technical standards for accessible and adaptable housing, where this would address an identified need for such properties…

193. Planning policies and decisions should ensure that new development can be integrated effectively with existing businesses and community facilities (such as places of worship, pubs, music venues and sports clubs). Existing businesses and facilities should not have unreasonable restrictions placed on them as a result of development permitted after they were established. Where the operation of an existing business or community facility could have a significant adverse effect on new development (including changes of use) in its vicinity, the applicant (or 'agent of change') should be required to provide suitable mitigation before the development has been completed.

Annex C: Example Wording in Conclusions

Human Rights: no interference

Representations were made to the effect that the appellant's human rights under Article 1 of the First Protocol, as set out in the Human Rights Act 1998, would be violated if the appeal is dismissed. Since I have decided to allow the appeal and grant full planning permission for the proposed development, there will be no interference with the appellant's right to peaceful enjoyment of their possessions.

Human Rights: limited interference

Representations were made to the effect that the rights of the adjoining occupier, Ms X, under Article 8 as set out in the Human Rights Act 1998 would be violated if the appeal were allowed. However, I have found that the proposed development would not result in the neighbouring property being overlooked so that Ms X would suffer unacceptable harm to her living conditions. The development would not conflict with Local Plan Policy Z or guidance in the SPD. I am satisfied that a grant of planning permission would not unacceptably interfere with Ms X's right to a private and family life and home. It is proportionate in the circumstances to allow the appeal.

Human Rights: significant but still proportionate interference

I have found that the appeal garden building is inappropriate development in the Green Belt and harmful to the Green Belt by definition. I attach substantial weight to the harm caused to the Green Belt by reason of inappropriateness.

In favour of the appeal, I have found that the building is being used as a dwelling by the appellant's son, who has reached adulthood but is unable to afford market housing elsewhere and is ineligible for social housing. I am sympathetic and attach significant weight to the family's situation. However, their circumstances can be expected to change, whereas the building would remain on the site and continue to harm the Green Belt in posterity. The appellant also accepted at the hearing that his son could return to the main house and they could explore options such as a loft conversion.

Dismissing the appeal would interfere with the appellant's and their family's rights to peaceful enjoyment of their possessions, and to a private and family life and home, under Article 1 of the First Protocol and Article 8 as set out under the Human Right Act 1998. However, those are qualified rights; interference with them in this instance would accord with the law and be in pursuance of a well-established and legitimate aim: the protection of the Green Belt.

Since the appellant's son will not be made homeless, it is proportionate and necessary to refuse to grant planning permission. There will be no violation of the appellant's or their family's human rights. The protection of the public interest cannot be achieved by means that are less interfering with their rights.

PSED: the losing party has protected characteristics

I have found that the proposed community centre would be served by a substandard access to the main road and conditions could not be imposed to remedy the design

defects. A grant of permission for the development would give rise to an unacceptable loss of highway safety. I attach substantial weight to this finding against the appeal.

My finding that the development would cause no unacceptable harm to the character and appearance of the area does not count for or against the appeal. However, it is a positive consideration that the community centre would provide vital support services for disabled and older people in the area. Given the lack of alternative facilities, I attach significant weight to the benefits the development would afford to those persons.

However, that disabled and older people would be the main users of the community centre also reinforces my concerns that the site could not be reached in reasonable safety. The risks to life and limb which would be caused by this development must be the decisive consideration.

I have had due regard to the Public Sector Equality Duty (PSED) set out under s149 of the Equality Act 2010, but the risks caused by the proposed community centre outweigh its benefits in terms of eliminating discrimination against persons with the protected characteristics of age and/or disability, advancing equality of opportunity for those persons and fostering good relations between them and others. I conclude that it is proportionate and necessary to dismiss the appeal.

Human Rights and the PSED: limited interference but compliance with the three aims (personal permission)

I have found that the caravan site causes serious and unacceptable harm to the character and appearance of the surrounding area, in conflict with Local Plan Policy X and the NPPF. Imposing a condition to require a landscaping scheme would mitigate but not overcome that harm which carries significant weight against a grant of planning permission.

In favour of the appeal, I have found that the Council has an immediate shortage and no five year supply of Traveller sites; there are no suitable and available alternative sites; and the appellant's family have a pressing personal need for a settled base from which the children could regularly attend school. I also attach significant weight to these considerations.

On balance, I am satisfied that the harm which would be caused by the development outweighs the other considerations to the extent that permanent planning permission should not be granted. However, it is also necessary to consider whether a time-limited permission could be granted. There is a pressing case to do so in order that the children have a secure and stable upbringing and education. Granting a time-limited permission would also give the Council a period in which to increase its supply of land for Traveller sites and mean that the harm caused by the use to the appearance of the countryside comes to an end in the foreseeable future.

I have had regard to the rights of the appellants under Article 8 of the European Convention on Human Rights as incorporated into the Human Rights Act 1998. Article 8 affords the right to respect for private and family life and home, including the traditions and culture associated with the Romany Gypsy way of life and the best interests of the children. It is a qualified right, and interference may be justified where that is lawful and in the public interest. The concept of proportionality is crucial.

Dismissing the appeal or granting a time-limited permission would interfere with the appellants' rights under Article 8, since the consequence might be that the family is rendered homeless at some point. However, the interference would be in accordance with the law and in pursuance of a well-established and legitimate aim: the protection of the character and appearance of the countryside.

Given the circumstances overall, I find that a grant of personal permission would be proportionate and necessary. It would protect the appearance of this rural area in posterity and the best interests of the children now. It would avoid a violation of the appellants' rights to a private and family life and home. The protection of the public interest cannot be achieved by means that are less interfering with their rights under Article 8.

The appellants are Romany Gypsies and share the protected characteristic of race for the purposes of the Public Sector Equality Duty (PSED) under s149 of the Equality Act 2010. Given the foregoing, it is necessary and proportionate to permit the development on a personal basis to eliminate discrimination against and advance equality of opportunity for the appellants, and to foster good relations between them and the settled community.

For these reasons, I conclude that the appeal should be allowed and planning permission should be granted subject to a personal and other conditions discussed further below.

The Planning Inspectorate

Landscape and Visual Impact Assessment

Updated to reflect December 2023 Framework (NPPF)

What's new since the last version

Changes highlighted in yellow made 30 September 2021:

- Updated to take account of the revised NPPF dated 20 July 2021;
- EU departure;
- References to Highways England updated to refer to National Highways.

Contents

Information Sources

National Planning Policy Framework

The Town and Country Planning (Environmental Impact Assessment) Regulations 2017

Planning Practice Guidance:
- Environmental Impact Assessment
- Natural Environment

The European Landscape Convention

UNESCO web site:
- Operational guidelines for the implementation of the World Heritage Convention
- World Heritage List

National Highways:
- http://www.standardsforhighways.co.uk/ha/standards/index.htm

Natural England:
- Heritage Coasts: their definition, purpose and Natural England's role
- An approach to landscape character assessment[1]
- An approach to seascape character assessment[2]
- An approach to landscape sensitivity assessment – to inform spatial planning and land management[3]

The Landscape Institute:
- Guidelines for Landscape and Visual Impact assessment, Third Ed.2013, LI and IEMA (GVLIA3)
- Technical Guidance Note 1/20 - Reviewing Landscape and Visual Impact Assessments (LVIAs) and Landscape and Visual Appraisals (LVAs)
- Technical Guidance Note 06/19 – Visual Representation of Development Proposals
- Technical Information Note 05/2017 – Townscape Character Assessment (updated April 2018)

Historic England:
- Historic Landscape Characterisation, English Heritage, 2018[4]
- Understanding Place: Historic Area Assessments, Historic England 2017[5]

[1]https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/691184/landscape-character-assessment.pdf
[2]https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/396177/seascape-character-assessment.pdf
[3] https://www.gov.uk/government/publications/landscape-sensitivity-assessment
[4] https://archaeologydataservice.ac.uk/archives/view/HLC/index.cfm
[5]https://historicengland.org.uk/images-books/publications/understanding-place-historic-area-assessments/

Introduction

1. This chapter of the Manual provides background to landscape and visual impact assessment (LVIA) issues, including relevant policies and designations, methodologies for the assessment of landscape and visual impacts and what to look for when reviewing a LVIA - which may be presented either as part of an Environmental Statement (ES) or as a 'stand-alone' report.

2. The practice of assessing and categorising landscapes evolved from an increasing recognition that special designations were an incomplete and limited method of recognising and managing land-based resources. Clearly structured and rigorous methods of landscape surveying were developed to provide a factual basis to define landscape characteristics and its effects on its users. This approach gave rise to Landscape Character Assessments (LCAs) which, as well as being stand-alone assessments at local and national level, should form the basis of any LVIA.

3. Professional judgement is a very important part of LVIA. Assessment must rely on qualitative judgements; for example about the effect the introduction of a new development or land use change may have on visual amenity, or about the significance of change in the character of the landscape and whether it would be positive or negative. Professional judgements must be based on both training and experience and, in general, suitably qualified and experienced landscape professionals should carry out LVIAs. The landscape professional must take an independent stance, by fully and transparently addressing both the negative and positive effects of a scheme in a way that is accessible and reliable for all parties concerned. Just as in many areas of planning, even with qualified and experienced professionals, there can be differences in judgements.

4. There is a misconception that LVIA is very subjective and this can give rise to it being given limited weight in decision making. However, it is no more subjective than an assessment of the significance of a heritage asset or its setting. Both use published and field data upon which experienced professionals base their interpretation of the effects of a development. Both are open to misinterpretation, misuse by inexperienced authors, and the selective use of data to support a particular argument.

5. LVIA is an extensive specialist area and this chapter only presents a brief overview; the reader may also need to refer to other publications and references some of which are provided in the Information Sources and the text.

6. Landscape and Visual evidence might be suitable for a round table session at a 'Rosewell Inquiry'. However, before deciding if that is the case, you should consider carefully what is at dispute. If, for example, the questions are mainly concerned with where the development can be seen from then a round table discussion may be suitable, but if there is a dispute as to whether a landscape is a 'valued landscape', it might be more appropriate to hear evidence in chief with formal cross examination.

Why is there a need to consider landscape and visual impacts?

7. Consideration of the landscape and visual impacts of proposed developments is required by the National Planning Policy Framework (NPPF), within the remit of 'Conserving and enhancing the natural environment' (NPPF section 15). In particular, paragraph 180 of the NPPF states that 'Planning policies and decisions should contribute to and enhance the natural and local environment by: protecting and enhancing valued landscapes…'.

8. Paragraph 181 of the NPPF requires that local plans should 'take a strategic approach to maintaining and enhancing networks of habitats and green infrastructure' and 'plan for the enhancement of natural capital at a catchment or landscape scale across local authority boundaries….' Paragraph 182 states that 'Great weight should be given to conserving and enhancing landscape and scenic beauty in National Parks, the Broads and Areas of Outstanding Natural Beauty, which have the highest status of protection in relation to these issues. The conservation and enhancement of wildlife and cultural heritage are also important considerations in these areas and should be given great weight in National Parks and the Broads'. When considering development proposals in these designated areas, paragraph 183 states that 'Planning permission should be refused for major developments other than in exceptional circumstances, and where it can be demonstrated the development is in the public interest' and goes on to state how such applications should be considered. Paragraph 191 relates to light pollution and encourages that planning policies and decisions should 'limit the impact of light pollution from artificial light on local amenity, intrinsically dark landscapes, and nature conservation.'

9. For development where an Environmental Impact Assessment (EIA) is necessary, Schedule 4 of the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 requires consideration of aspects of the environment likely to be significantly affected by the development, including population (which would encompass issues of visual amenity) and landscape. Therefore, it may also be relevant to assess the landscape and visual impacts of the development on the environment where these are likely to be significant. For more information on EIA, please refer to the chapter of the ITM entitled 'Environmental Impact Assessment'.

10. However, LVIAs are also frequently provided as 'stand-alone' reports for proposals which are not 'EIA development' but where landscape and visual issues are nevertheless likely to be of concern. These are sometimes referred to as landscape and visual impact appraisals. However, as a minimum, they should set out effects on the joint concerns of the landscape and views, and proposed mitigation. This is outlined more fully in the Landscape Institute's (LI) note[6].

11. In all cases, the approach to and scope of the assessment should be proportional to the scale and nature of the proposed development.

12. The UK is a signatory to the European Landscape Convention which promotes the protection, management and planning of European landscapes.

[6] https://www.landscapeinstitute.org/technical-resource/landscape-assessment-or-appraisal/

What is the difference between Landscape and Visual impacts?

13. It is important not to confuse the difference that exists between the assessment of landscape effects and visual effects, and a comprehensive LVIA or appraisal should include consideration of both.

Landscape Impact Assessment

14. Landscape impact assessment deals with changes to landscape as a shared public resource. The LI notes that society as a whole has an interest in this and it is recognised as one of the key dimensions of environmental interest, alongside matters such as biodiversity or cultural heritage. It is concerned with issues such as protected landscapes, the contribution of landscape character to sense of place and quality of life for all, and the way that changes may affect individual components of the landscape.

15. The assessment relates to impacts occurring to individual landscape features, often referred to as receptors, and the effect that that would have on the underlying landscape character and quality. As such it encompasses consideration of the fabric of the landscape as well as its aesthetic qualities, (such as scale, sense of enclosure, diversity, pattern, colour etc.) and perceptual and experiential qualities (such as tranquillity), which go to make up its overall character.

16. Landscape impacts could result from local changes to hydrology, topography, landform, and settlement form and pattern, or the loss of, or impact upon, individual features, such as soils, trees and hedgerows. It could also include the intrusion of noisy land uses into a peaceful rural scene or illuminated development into an area of dark skies. Impact to landscape character could be quite localised, resulting from the loss of a characteristic field pattern, or wider, such as loss of rural undeveloped character which becomes apparent over a large area.

17. Individual landscapes have different qualities and values. These values determine its capacity to absorb change, ie its **sensitivity.** It is important to note that many landscapes under consideration in LVIA may seem ordinary and commonplace, but this does not necessarily justify development or justify lesser weight being given to their protection.

Visual Impact Assessment

18. Visual impact assessment relates to how people will be affected by changes to views and visual amenity at different places, including publicly accessible locations, and views from residential properties. Visual receptors are always people (although usually visual receptors are defined according to use e.g. residential, business, road, footpath etc.), rather than landscape features.

19. This element deals with assessing changes to specific views and to the general visual amenity experienced by specific people in particular places. Different categories or user groups are generally assigned different levels of sensitivity. Sensitivity is related to the receptors' expectations and their likelihood to notice or accept change.

Landscape and visual designations

International designations

20. World Heritage Site (WHS) is an international designation confirmed by UNESCO. Of the ten selection criteria for a WHS, six are cultural and four are natural. Proposed development may have a direct impact on landscape features or character which relates to natural criteria adopted for designation of a WHS, but indirect impacts, such as impact to the setting of a WHS, may also result where a site is designated under cultural criteria.

21. Wherever necessary for the protection of the WHS, an adequate buffer zone should be provided. A Buffer Zone is an area which has complementary legal and/or customary restrictions placed on its use and development to give an added layer of protection to the WHS. This should include the immediate setting of the site, important views and other areas or attributes that are functionally important as a support to the site and its protection. A map indicating the boundary of the site plus any buffer is included in the information published on the World Heritage List.

National designations

22. Natural England (NE) is the government's statutory advisor in relation to areas which are subject to national landscape designations.

23. National Parks, the Broads and Areas of Outstanding Natural Beauty (AONBs) are landscape designations of national importance. As stated above, under paragraph 182 of the NPPF, great weight should be given to conserving landscape and scenic beauty in these areas. National Parks have two purposes, both conservation and encouraging recreation, and there is a need to achieve a balance between these purposes. Where there is a conflict between these purposes, greater weight should be attached to the conservation purpose.

24. 'Special qualities' is a term used in the National Parks and Access to the Countryside Act 1949 (as amended) and the Countryside and Rights of Way Act 2000 (as amended) (the CRoW Act). For individual National Parks and AONBs, 'special qualities' may be defined in a relevant management plan. NE will expect to see how the defined 'special qualities' may be affected by a proposed development in a submitted LVIA.

25. For more information on how to approach the issues of special qualities, and NE reviews of submitted LVIAs, please see the presentation given by NE at the ATE 2016.

26. Section 85 of The CRoW 2000 requires all relevant authorities to have regard to the purpose of conserving and enhancing the natural beauty of AONBs when performing their functions. In addition, Planning Practice Guidance[7] states that the duty to 'have regard' extends to consideration of the setting of a National Park or an AONB, when development is proposed outside of but close to a National Park or AONB.

[7] https://www.gov.uk/guidance/natural-environment, paragraph 003

27. Heritage coasts are 'defined' rather than designated, so there isn't a statutory designation process like that associated with National Parks and AONBs. They were established to conserve the best stretches of undeveloped coast in England. A heritage coast is defined by agreement between the relevant maritime local authorities and NE. Paragraph 180 of the NPPF requires that planning policies and decisions should contribute to and enhance the natural and local environment by 'maintaining the character of the undeveloped coast, while improving public access to it where appropriate' and paragraph 184 states that '…planning policies and decisions should be consistent with the special character of the area and the importance of its conservation. Major development within a Heritage Coast is unlikely to be appropriate, unless it is compatible with its special character.'

Local designations

28. Local landscape designations occur as a consequence of local planning policy and the status of the local planning authority's (LPA) local plan can be of direct relevance in this regard. For example, 'old' local plans (made before 2004) may contain landscape designations such as an Area of High Landscape Value, an Area of Great Landscape Value or a Special Landscape Area. These designations are not usually found in local development frameworks prepared since Planning Policy Statement 7 (PPS7) 2004 (paragraph 24) was issued. Although PPS7 has been replaced by the NPPF, national policy has remained that planning decisions should be based on relevant criteria in relation to landscape rather than 'blanket' designations. Therefore, if these policies are 'saved', the weight to be afforded to them would depend on their degree of consistency with the NPPF, having regard to paragraph 224 of the NPPF.

29. Paragraph 180 of the NPPF requires that LPAs should 'take a strategic approach to maintaining and enhancing networks of habitats and green infrastructure, and plan for the enhancement of natural capital at a catchment or landscape scale across local authority boundaries'. Most local development framework policies now refer to published local landscape character assessments (LCAs) which identify relevant characteristics of the local landscape to be conserved and enhanced, and comment on the potential capacity of landscape character types or areas to accommodate new development (see paragraph 37). Supplementary planning guidance (SPG) may also be published by LPAs, identifying the potential for local landscape types to accommodate particular types of new development.

30. Local development framework policies may also refer to locally designated views, where the impact of proposed development within a particular view or views will be a consideration. Examples include the Oxford view cones designated by policies in the Oxford Local Plan 2001-2016, intended to protect the views of Oxford's 'dreaming spires,' and the London View Management Framework SPG (March 2012).

Valued Landscapes

31. Paragraph 180 of the NPPF states that *planning policies and decisions should contribute to and enhance the natural and local environment by protecting and enhancing **valued** landscapes, sites of biodiversity or geological value and soils (in a manner commensurate with their statutory status or identified quality in the development plan).* However, the NPPF does not provide a definition of 'valued landscape' and does not differentiate between designated or non-designated local landscapes in terms of value.

32. Different landscapes are valued by different people for different reasons, and a landscape does not have to be designated to be afforded protection from inappropriate development. Consequently, although LCAs are generally the starting point for any landscape assessment, an Inspector might be required to weigh and assess factors such as recreational value, perceptual value and cultural associations and function as well as the more recognised factors such as landscape quality and condition, scenic quality, rarity and representativeness[8]. The wide range of factors that might contribute to a valued landscape, and their assessment, are covered in more detail in a presentation given at the 2020 ATE[9]. Practitioners also suggest that local consensus can be a factor to be taken into account.

33. Consequently, this can be a problematic area in casework, and previous case law has found[10] that the NPPF is clear that 'designation' and 'valued' in relation to landscapes do not mean the same thing. As there are no clear parameters, particularly where it might be claimed in objections that a potential development site is a valued landscape despite a lack of national or local designation, Inspectors should ensure their reasoning clearly evaluates the evidence and supports their conclusion.

Other designations

34. Green Belt is not a landscape designation. It does not deal with intrinsic landscape character, value or quality. However, the impact on openness is one element in consideration of the potential impact to Green Belt from new development, and an issue that may be covered by a LVIA. Please refer to the Green Belts chapter of the ITM for more information.

35. Other designations that may be considered in a LVIA include conservation areas, registered parks and gardens, and listed buildings. In this regard, there is a close inter-relationship with the assessment of impact to heritage assets, including impacts to the settings of heritage assets. Generally, one might expect to find the assessment of impact to the setting of heritage assets in a cultural heritage assessment, and the assessment of impacts to the visual amenity of users of those heritage assets (for example, visitors to a Scheduled Monument) in a LVIA. However, there is no hard and fast rule in this respect, and there is often a crossover, duplication or contradiction between landscape and visual and heritage reports or ES chapters on these topics.

[8] Box 5.1, Guidelines for Landscape and Visual Impact assessment, Third Ed.2013, LI and IEMA (GVLIA3)
[9] Valued Landscapes, Carly Tinkler
[10] *Stroud DC v SSCLG & Gladman Developments Ltd* [2015] EWHC 448 Admin

36. There may also be crossover with sites designated for their biodiversity value. The contribution of particular vegetation types or landscapes occurring in European sites, National Nature Reserves or Sites of Special Scientific Interest (SSSIs) may play an important role in the landscape character and/ or views in an area.

National and district-wide landscape character assessments, availability and use

37. The diversity of the British landscape has arisen from complex geology, land use and management over centuries. Landscape character assessment (LCA) is the process of identifying and describing variation in the character of the landscape. LCA documents identify and explain the unique combination of elements and features that make distinctive landscapes, by mapping and describing character types and areas.

38. Their use goes beyond formal LVIAs to sometimes informing decisions on more general S78 casework where character and appearance is a key concern. They can be a valuable resource in decision making, even where LVIAs are not required, as they can identify key elements of a local landscape and assist the decision maker in cases involving character and appearance, proposed modifications to designated or valued landscapes, protected trees and hedgerows, or heritage assets. LCAs are also increasingly being used to inform landscape capacity and sensitivity studies, as part of larger development and infrastructure planning, eg sand and gravel extraction in the Trent valley.

39. NE is the government's statutory advisor in relation to landscape issues, and has published National Character Area maps and profiles for England which divide England into 159 distinct natural areas. Each of these is defined by a unique combination of landscape, biodiversity, geodiversity, history and cultural and economic activity. The profiles also include statements of environmental opportunity identifying where actions can be best targeted to conserve and improve the natural environment. However, these are large scale assessments which are useful to inform regional and spatial planning or infrastructure, and they have limited use when considering smaller and individual sites.

40. County and/or district LCAs sit below these national profiles and are usually hosted on LPA web sites. They are finely grained and have more detail. The best examples set out the key features of a particular landscape, much in the same way that a conservation area appraisal does in relation to a CA. Survey work often includes ecological and historical data, and perceptual information, as well as a consideration of actual physical features. They often also 'rank' landscapes in terms of quality or local importance, condition or sensitivity, and may recommend actions on a spectrum such as *restore/enhance/conserve*, or give guidance to decision makers as to what may or may not be acceptable or desirable as development. Such information can be invaluable to the decision maker.

41. However, it is also the case that even when and where they exist, they are not necessarily submitted as evidence by LPAs or are submitted in incomplete form, even where they would help the LPA's case. If a character analysis is submitted without

development guidelines, or arguments are made about the value of a landscape without a substantiating LCA, it can be worthwhile asking if an LCA exists.

42. Submitted LVIAs, particularly where part of a formal EIA submission, should reference existing published national, regional and/or local LCAs to set the context for their own assessment of the effects of a proposed development on landscape character. A fully objective LVIA should also outline any conflict with published guidance and recommendations for a particular landscape, and set out appropriate mitigation. In some cases, the LVIA may conclude that the development could enhance or improve a particular landscape by undertaking actions set out in the local LCA.

43. NE also publishes guidance on how to undertake area-wide landscape and seascape character assessments. The links to these are given in the information sources.

44. Guidance on seascape character assessment 'An approach to seascape character assessment' was published by NE in 2012. You may also find references made to NE Landscape Character Assessment Topic Papers[11] (particularly Topic paper 6, 'Techniques and criteria for judging capacity and sensitivity'). Please note that The Countryside Agency and Scottish Natural Heritage (2002) Landscape Character Assessment: Guidance for England and Scotland (CAX 84), which is often quoted as guidance referred to in LVIAs, has been replaced by the 2014 guidance 'An approach to landscape character assessment'. More information on landscape character assessment is contained in the Landscape Institute Technical Information Note 08/2015, published February 2016.

45. It is worth pointing out here that Landscape Capacity and Landscape Sensitivity Assessments are quite different and separate from both a Landscape Character Assessment and a LVIA. If a sensitivity or capacity assessment is referred to in a LVIA, you should be very careful to check the relevance of these documents to the proposal that you have before you.

Landscape and visual impact assessment

Methodologies

46. There is no mandatory standard for undertaking LVIAs, except in relation to trunk roads and motorways (see below). However, most consultants will have regard to the industry standard guidance 'Guidelines for Landscape and Visual Impact Assessment' published by the Landscape Institute and the Institute of Environmental Management and Assessment, which is generally regarded as best practice. The current version is the third edition, published in April 2013 (often referred to as GLVIA3), which supersedes the second edition (GLVIA2).

[11] http://publications.naturalengland.org.uk/publication/5601625141936128

Changes between GVLIA2 and GVLIA3

47. The Landscape Institute summarises the main changes between GLVIA3 and GLVIA2[12] as follows: '*In general terms the approach and methodologies in the new edition are the same. The main difference is that GLVIA3 places greater emphasis on professional judgement and less emphasis on a formulaic approach.*' In this regard, you should now expect to see clearly reasoned narrative explaining the findings of the assessment, rather than reliance on mechanistic or formulaic matrices, although matrices and tables may also form a part of the assessment. Examples of completed assessments that were included in GLVIA2 have also been removed from GLVIA3.

48. There is more detail on the differences between GLVIA2 and GLVIA3 in the presentations[13] given to PINS by the authors of the guidelines.

49. The introduction of the 3rd edition has given rise to queries from landscape consultants and you may also need to refer to the 'Statements of Clarification' which are published on the LI website.

50. Reference to the presentation and the guidelines is needed to gain a full understanding of GLVIA3, but the recommended approaches to landscape and visual assessments are outlined in the paragraphs below.

51. GLVIA3 recommends changes to terminology with 'impacts' changed to 'effects'. This is in line with the EIA Directive[14] in which impact assessment generally refers to the process of an EIA, whilst effects refers to the changes arising from the development that is being assessed. GVLIA3 distinguishes from impact (the action) and effect (the effect of that action) and recommends that these terms be used consistently. However, it is recognised that many people, including practitioners, use the terms, interchangeably.

52. LVIAs rely on professional but qualitative judgment and even trained professionals can disagree. For this reason, it is generally recommended that LVIAs are carried out by qualified and experienced landscape professionals. In any case, notwithstanding the element of subjectivity the LVIA should set out and explain the step by step methodology, which should demonstrate and justify the reasoning and conclusions. As with any other specialist report, this gives the decision-maker an opportunity to reach their own conclusions.

Components of the LVIA

53. Whether a formal LVIA sitting within an EIA or a less formal LVIA/landscape appraisal, the assessment should contain two strands; the effects of a development on a landscape, and the effects on visual amenity, both referred to as **receptors**. Each

[12] https://www.landscapeinstitute.org/news/landscape-institute-issues-guidance-on-transition-to-glvia3/
[13] Video of the presentation delivered by the authors Carys Swanwick and Mary O'Connor to PINS (Part 1; Part 2; Part 3) (February 2015). Slides of the presentation delivered by Mary O'Connor to the Inspector Annual Training Event (March 2015) are available via the Knowledge Library.
[14] Following EU departure on 1/1/2021, the directive as it applied on 31/12/2020 is carried over into UK law ('Retained EU law') to ensure the operability of the EIA Regulations.

should be considered separately, and the two strands brought together in a conclusion which sets out the impact and significance of the overall effect.

54. Although GLVIA3 is not prescriptive, a thorough assessment should contain the following elements in one form or another.

Baseline Landscape Assessment

55. County or district-wide LCAs are usually the key tool for understanding the landscape, and consequently should be the starting points for baseline surveys, with additional fieldwork where required. The baseline landscape description should contain a contextual site assessment, individual features, and aesthetic and perceptual qualities. It should also conclude on condition and value.

56. Key points to look for are the contribution the site makes to its local landscape character and the value of that landscape. Any underlying LCAs should be referenced and taken into account. Local Authorities also often outline what might constitute acceptable development in a particular character area. These can be very helpful in decision making.

57. **Value** is the relative importance attached to a landscape. This can reflect national or local consensus because of its quality, but also includes perceptual aspects and localised social, cultural or conservation issues. Mention might also be made to **condition** or **strength.** These indices provide a measure of local distinctiveness and/or conformity with the underlying features of the character area. There are parallels with conservation area appraisals which set out key characteristics even though these may or may not be present across the whole conservation area.

58. The parties may refer to Box 5.1 in GLVIA3. This sets out a range of factors that can help in the assessment of landscape value and includes landscape quality, scenic quality, rarity, representativeness, conservation interests, recreational value, perceptual aspects and associations (eg artistic or literary). For example, local communities might refer to a valued landscape for its local associations or recreational value. On the other end the landscape witness for a developer might present evidence that the same landscape is not rare and does not present a positive contribution to the overall landscape character. It falls to the Inspector to apply their reasoned judgement on how much weight to give to each argument.

Baseline Visual Assessment

59. The baseline for assessing visual effects should establish the area in which the development may be visible, (usually, but not always, a digitally prepared Zone of Theoretical Visibility (ZTV)). The ZTV is usually generated using specialist software based on a digital terrain model and shows the extent of a site or development's visibility across a specified radius. Its accuracy can vary according to the base information used and whether the base data is topographic only, often referred to as "a bare earth model", or whether it includes structures and major blocks of vegetation.

60. The ZTV should be used to inform the selection of viewpoints from which different groups of people may experience views of the development, the nature and approximate or relative number of different groups of people who will be affected by changes in views of visual amenity. These are interrelated and need to be considered in an integrated way. There may also be important relationships with the setting of heritage assets.

61. The viewpoints might include points on public footpaths, from dwellings or public open space, or from nearby roads. Viewpoints may be representative, or specific. The selection of viewpoints is usually agreed with the determining authority beforehand to ensure that the full effects of the development are included in the assessment from the outset. It is best practice to present the 'worst case' scenarios. Where key views are determinative it is useful to check the actual views at a site visit. It is often worthwhile to satisfy yourself how images of a proposed development have been created and how the presented images were selected (all of which should be set out in the methodology of the report). This will assist you in deciding the weight that you give to them as representative of a proposed development's visibility. If you are at an event it is not unreasonable to ask a witness if an image represents the worst case scenario if you are in any doubt.

62. The Zone of Visual Influence (ZVI) is similar to the ZTV but is established manually from maps and/or field work. It has the same function as the ZTV but is often used and is appropriate for smaller developments.

63. Baseline studies should provide a factual record and analysis of the nature and value of the landscape and visual amenity. Although it is a common flaw in LVIAs and appraisals, this stage of the assessment must not be conflated or combined with prediction and assessment of effects. It is also relevant to note that the baseline assessment may be dynamic and may be changing for reasons unrelated to the proposal.

Evaluation

64. The effects of the proposed change relevant to the baseline arise from a systematic analysis of the range of possible interactions throughout the development's lifecycle.

65. The development is likely to result in change and/or partial or complete loss of features, aesthetic or perceptual aspects that contribute to the character and quality of the landscape. The development may also introduce new features that will influence the quality of the landscape and later perceptions. The components of the landscape likely to be affected are the **landscape receptors.**

66. The development is also likely to affect views and experiences of a particular landscape. Affected users are the **visual receptors**, eg walkers, drivers, or residents of nearby property.

67. In most cases, it will be necessary for the LVIA to show equal and detailed consideration of the effects of the landscape as a resource and the effects on views and visual amenity as experienced by the receptors. Sometimes there may be significant

effects on one aspect with minimal effects on the other, eg there may be major effects on a landscape that is not very visible.

68. The report needs to identify the ***sensitivity*** of receptors to the specific change proposed, as well as their ***importance***.

Sensitivity

69. The National Highways document LA 107 has adopted the GLVIA3 definition of **landscape sensitivity,** ie 'Applied to specific landscape receptors, combining judgements of the susceptibility of the receptor to the specific type of change proposed and the value related to the receptor'. It reflects the vulnerability of the landscape to accommodate the proposed change. It is also based on its importance in relation to national and local designations, perceived value and intrinsic aesthetic, social or cultural qualities. The LVIA should outline the reasoning behind the criteria for sensitivity and this is where the consultant's professional judgement and experience comes into play.

70. Some LCAs may ascribe levels of sensitivity to particular landscapes. However, sensitivity is predicated upon the type of development proposed. The particular change or development proposed may not compromise the reason why a landscape is valued or designated.

71. **Visual sensitivity** is based on the receptor's familiarity with the scene, the activity or occupation that brings them into contact with the view and the nature of the view, whether full or glimpsed, near or distant. It is also determined by the importance of the receptor, the importance of the view, the perceived quality of the view and its ability to accommodate change.

72. Receptors are usually ranked from high to low sensitivity with, for example, high sensitivity being attributed to occupiers of affected dwellings or users of footpaths, to low sensitivity for drivers along an affected road (unless the road is known for its scenery).

73. For both landscape and visual receptors, the criteria used to assess sensitivity should be clearly set out. The scale of sensitivity should be from negligible to major, and usually has 3 – 5 gradations.

Magnitude

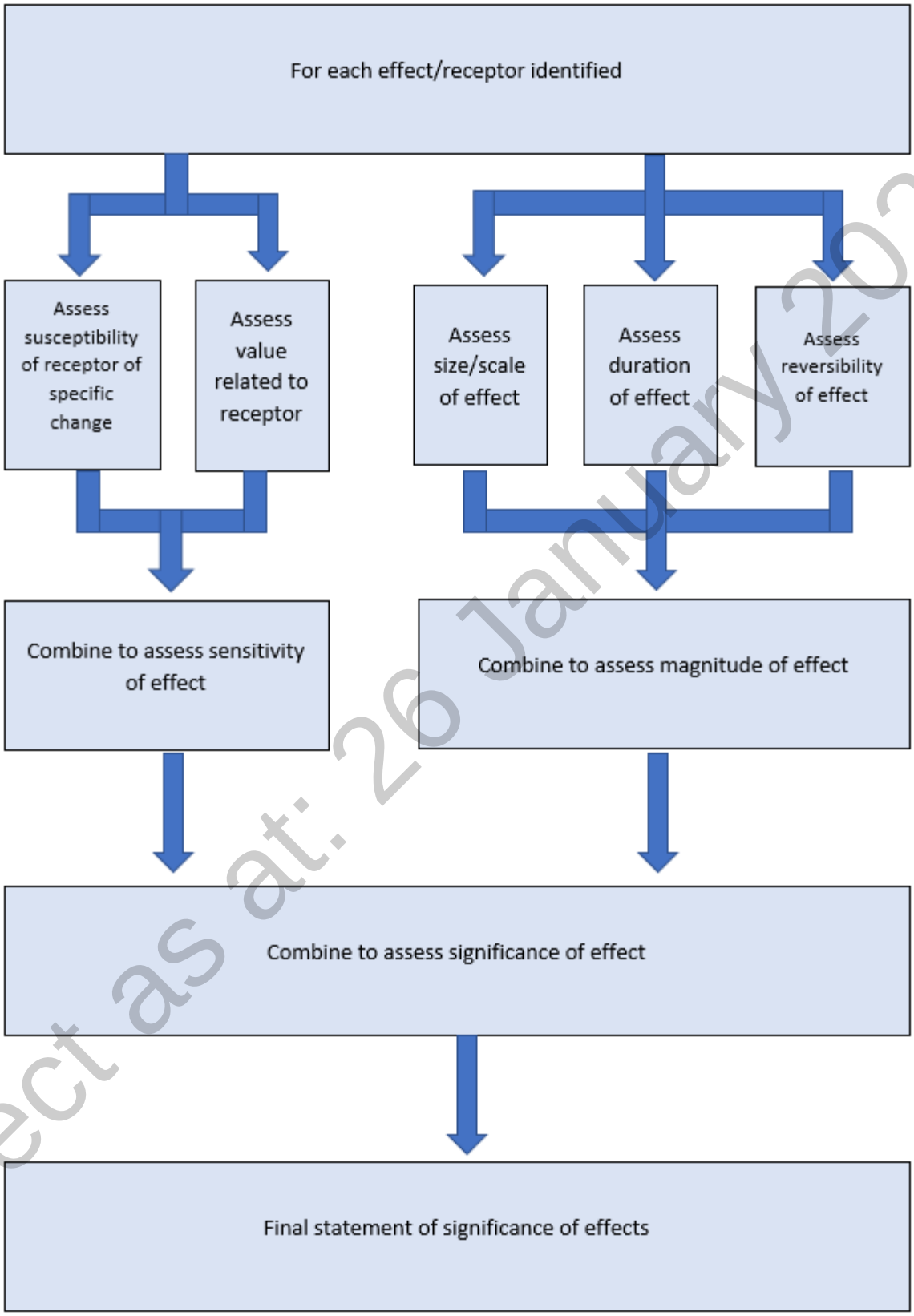
74. The magnitude of effects is determined through consideration of the size/scale, duration and reversibility of impacts. It should be stated whether the magnitude is adverse or beneficial. The magnitude of change should also be set out on a simple spectrum. Only when sensitivity and magnitude has been completed for each receptor can significance be assessed. As with sensitivity, the LVIA should clearly set out the criteria for determining magnitude.

Statement of Significance

75. As with other elements of an EIA the effects must be assessed in a way that allows reasonable judgement to be made about their significance. The two scales of sensitivity and magnitude are combined to reach a conclusion regarding overall significance.

76. GLVIA3 recommends a clear narrative to reach conclusions for significance and less reliance on matrices summarising judgments about magnitude and sensitivity. However, that is not to say that the matrices have no place and they can be a very useful summary to identify common issues amongst a range of receptors.

77. Flow diagram showing stages to work through to assess significance:



Methodology for highway schemes

78. For highway schemes relating to trunk roads and motorways, the relevant guidance is published by National Highways[15]. It supersedes DMRB Volume 11 Part 5 - Landscape Effects, and Interim Advice Note 135/10 – Landscape and visual effects assessment, which are now withdrawn.

Review of LVIAs and common issues

79. There may be two or more LVIAs prepared by different parties. LVIA involves a degree of subjective judgement but the assessment should contain all the strands outlined above and be consistent with the methodology which sets out to reduce subjectivity as far as is practicable. Most experienced landscape professionals will have a background in this field.

80. Assessments could be prepared by landscape expert(s) appointed by the appellant, by objectors to the proposed development, by the LPA and/or by statutory consultees. The LI's Technical Guidance Note 1/20 on how to review LVIA suggests a framework for carrying out reviews that reflects the GLVIA3 approach.

81. Even within the framework set out by the GLVIA3, individual LVIAs might take slightly different approaches for the same development, particularly for thresholds and criteria. If that is the case these should be openly set out and justified in the narrative. There may also be genuine differences of opinion between parties where the same method is applied. In both scenarios you will need to understand the differences, and eventually take a position.

82. For clarity, and to avoid confusion between the two, it is essential for a LVIA to report the assessment of landscape impacts and visual impacts separately.

83. Common faults in LVIAs are a failure to establish the baseline, or to fail to move on from the assessments of sensitivity and magnitude of change to significance. Other flaws might be to focus on one set of receptors only, or to conflate landscape and visual impacts. In some instances, it may be appropriate to focus on one or other set of receptors but if this is the case that approach should be justified. It is also worthwhile to check the qualifications and experience of the authors of LVIAs and appraisals. It is a field often expropriated by other professionals.

84. When reviewing a LVIA, there are a few commonly arising issues to look for:

    - The description of the baseline environment and extent and presentation of the Zone of Theoretical Visibility (ZTV)

[15] Design Manual for Roads and Bridges (DMRB), Sustainability & Environment, LA 107 - Landscape and visual effects (revision 2, February 2020)

- The description of the development
- Consistent application of the stated methodology
- Year 1, Year 15 and residual impacts; are mitigation measures realistic and achievable?
- Photography and photomontages

These issues are considered in more detail below.

The description of the baseline environment and extent and presentation of the Zone of Theoretical Visibility

85. Whether the baseline description and consideration of the area affected is sufficiently wide will be an important consideration, and this is not necessarily readily established by desk study alone. It is good practice for the landscape consultant to agree the extent of the ZTV (if prepared) and locations of photograph and photomontage viewpoints with relevant consultees:
    - NE where there may be an impact to a national landscape designation or long distance path; and
    - The relevant LPA/s in all other respects.
86. If a computer generated ZTV is produced, the resolution of the Digital Terrain Model (DTM) should ideally be 5m or 10m, rather than 50m, which provides a less than accurate representation of the potential visibility of the development, due to the increased interval between data points. A DTM is also a 'bare earth' model and does not indicate screening that may be provided by existing vegetation blocks or built form, so it does represent a 'worst case'. The LVIA may also present a ZTV based on a Digital Surface Model (DSM), which represents not only the earth's surface but also the objects on it. Nevertheless, computer generated ZTV models always need checking on site for accuracy and the actual extent of visibility of the proposed development from individual viewpoints.
87. The data used to represent trees and vegetation can vary hugely depending upon age and scale. If you are to rely on this information you should be careful to check the methodology used and be aware of any limitations. For example, if data is quite old, trees may have grown considerably or may have been removed.

The description of the development

88. The description of the development should ideally be summarised in the LVIA, to give confidence that the assessment carried out has been based on the anticipated impacts of the application or appeal development. A well written assessment should either refer

back to another chapter containing the description or have its own description which confirms the basis of the assessment. Matters such as the locations of construction compounds and construction plant and equipment, and the materials proposed for elevational treatments may be of particular relevance to the preparation of LVIAs. The description of development will usually include reference to a landscape master plan confirming the mitigation measures that have been considered in preparation of the assessment of the residual effects. An assessment of effects before and after mitigation will often be included to demonstrate the difference made by the mitigation.

89. The mitigation described may not solely refer to planting or landscape schemes. It may also include design features of any buildings such as massing, colour etc. which would be considered as embedded mitigation, responding to adverse visual effects.

90. Mitigation proposals may be included for the construction stage as well as operational stage. These might include temporary screening or advance planting where early installation of mitigation planting would achieve screening of construction activities. Phasing and restoration may also be an aspect of mitigation which is considered for proposed developments such as quarries and landfill sites.

91. A description of the alternative sites considered on landscape and visual grounds may also be included.

Consistent application of the stated methodology

92. Under the GLVIA3 framework, there is flexibility for those undertaking the LVIA to develop their own methodology and criteria for the assessment of impacts. You may need to consider whether the stated methodology and criteria are appropriate for the assessment in each case, and, if they are, whether they have been applied consistently throughout. Common mistakes include new criteria being introduced in the text of the LVIA that are not defined in the methodology, or the downplaying of the sensitivity of landscape and visual receptors to result in reduced significance of effect in the assessment.

93. The methodology often comprises a series of steps, some of which are evidence-based and some the opinion of the expert undertaking the LVIA. The way the steps are combined is often presented on a matrix or series of matrices. You need to follow these steps in the methodology description and ensure they are applied. GLVIA states that LVIAs should always distinguish clearly between what are significant and non-significant effects.

94. The LVIA will often state that it presents a worst case scenario. This might relate to a Rochdale Envelope[16] approach where uncertainty exists and flexibility has been sought, or the way limits of deviation have been incorporated, or the season during which the assessment was undertaken. You should satisfy yourself that the worst case has been presented.

[16] See ITM EIA chapter ; and PINS Advice Note 9: Using the Rochdale Envelope

Year 1, Year 15 and residual impacts; are mitigation measures realistic and achievable?

95. The terms Year 1 and Year 15 are commonly used in describing the assessment of effects (these were originally derived from DMRB Volume 11). Winter of Year 1 usually represents the 'worst case' impact immediately following completion of construction, before the establishment of screen planting, whilst Summer of Year 15 is usually taken as representing the longer term 'average' residual effect, although in practice new planting will not be fully mature until sometime after Year 15.

96. It is also useful to note and ask whether the assumptions made about the proposed landscape mitigation measures are realistic and achievable. Screen planting needs to be in character with the landscape of the surrounding area or it may instead draw attention to the development. Realistic assumptions also need to be made about the growth of planting in the first 15 years (or such other period as may be assumed for the residual effects assessment) particularly if climatic or soil conditions at the site are extreme or if proposed planting is on bunds, which tend to provide less than ideal growing conditions. The continued maintenance of new planting will also be a factor in its successful establishment, and it may be appropriate to make this the subject of a planning condition if an appeal is to be allowed. There may be a difference of opinion as to how long any maintenance period should extend.

97. There is a difference between landscape or visual mitigation and enhancement. Some schemes may also include enhancement proposals, which generally are not deemed necessary to mitigate the adverse effect[17], but which you may wish to give some weight to if there is evidence the proposed enhancement would be secured and delivered.

Cumulative effects

98. Cumulative landscape and visual effects must be considered in a LVIA carried out as part of an EIA. This can be defined as effects that result from changes to the landscape or visual amenity caused by the proposed development in conjunction with other developments (associated or separate from it), or actions that occurred in the past, or present, or are likely to occur in the foreseeable future.

99. The baseline for assessing cumulative effects should include existing schemes and those under construction, as well as any at intermediate stages, for example any valid planning applications yet to be determined.

Photography and photomontages

100. The production and presentation of photographs and photomontages is often a matter of dispute between parties. Visual representations are a good means of representing

[17] Whilst the EIA Regulations 2017 requires that mitigation measures are considered (see schedule 4(7)), there is no requirement to consider enhancements.

development proposals but there are multiple 3D programmes in use, and it is relatively easy to mispresent what people would perceive in the field. The accuracy of features shown is only as good as the accuracy with which they were inputted.

101. The Landscape Institute has published Technical Guidance Note 06/19 'Visual Representation of development proposals'[18] which supersedes Advice Note 01/11 'Photography and Photomontage for LVIA' and Technical Guidance Note 02/17 'Visual Representation of development proposals'. The detail and sophistication deployed in visualisation also needs to be proportionate to factors such as purpose, use, user, sensitivity and the magnitude of the potential effect.

102. Guidance Note 06/19 significantly updates and changes the guidance for the technical work that underpins a LVIA, from camera equipment required to presentation of images. If you are to rely on the visual evidence in a LVIA, including baseline photographs, you must be careful to check that you are not relying on images that have been prepared under the old guidance; if necessary you might need to clarify with the parties the extent to which you can rely on the images and visualisations evidence.

103. Scottish Natural Heritage has also published Visual Representation of Wind Farms: good practice guidance (2017)[19]. This also sets out guidance for photomontages which may be used for other forms of development.

104. All visualisations and photomontages should cite the parameters used to produce the images and compliance with one or other of these documents.

105. The developer's own methodology of how the computer model has been built, and what safeguards have been adopted to ensure accuracy, should also be checked and compared against the photomontages presented. The photomontages should ideally present the data used in their construction (angle of view, grid reference of location, date of photograph etc.) in the title block.

106. Visualisations which show the effects of shading or screening from trees can be misleading. Most architectural software packages do not have more than a very limited library of landscape features and generic trees/fencing/hedges are often poor representations of what might exist in the landscape. Moreover, height and canopy width can be set at any dimension and can be amended to influence a particular desired outcome eg trees shown at a lesser/taller height than will be the case depending on their purpose, shading patterns on one particular day and at one particular time.

[18] https://landscapewpstorage01.blob.core.windows.net/www-landscapeinstitute-org/2019/09/LI_TGN-06-19_Visual_Representation.pdf
[19] https://www.nature.scot/visual-representation-wind-farms-guidance

Trees

107. Issues relating to existing trees on site which may be affected by a proposed development are explored in the Trees chapter of the ITM, which contains latest case law on the definition of a tree, relevant references and other useful information.

General considerations

108. If the LVIA is contested, Inspectors may find that they disagree with the findings of an assessment, either in the methodology or approach, or in the judgements which have been made with regards to the sensitivity of receptors or the expected magnitude of change resulting from the proposed development. Sometimes this may be because the report fails to work through the recommended procedure or attributes weight to magnitude or sensitivity with which the Inspector disagrees. If this is the case these reasons should be clearly set out in the decision.

109. In writing decisions, Inspectors should avoid the use of new criteria which are not already defined in the submitted assessment, as this will cast doubt on the basis of the judgement made. In reporting impacts/effects, Inspectors should make it clear how they have determined likely harm or benefits and the judgements they have made. If the findings of the LVIA are the basis on which a planning judgement is made, then direct reference to the relevant sections/paragraphs in the assessment should be provided for the avoidance of doubt. If the Inspector disagrees with the findings of the submitted LVIA then clear reasons to support this judgement should be provided including reference to any pertinent supporting information e.g. experience from a site visit, technical guidance, or expert witness statement. If presented with more than one LVIA, the Inspector will need to set out reasons for agreeing or disagreeing with the findings of all the LVIAs.

110. Inspectors should be aware that they should not comment on the impact to a particular view without visiting that view. Those included in a LVIA are usually located in publicly accessible locations. It is unusual for access to be granted to residential properties to an appellant when they are producing a LVIA and the methodology in the assessment will usually contain a caveat that where impacts such as private views have been assessed, these have necessarily been assessed on the basis of the information available and by visiting local representative, publicly-accessible viewpoints. As the Inspector may on occasion be invited into a private property to see a view that may be affected, where the appellant has not previously had access, it should be made clear in the report where access has and has not been available to the Inspector.

111. Photomontages are not intended to be viewed in isolation from a visit to the viewpoint in question. It will be necessary to visit any photomontage viewpoints which are intended to be referenced in the report, and look at the photomontage, reproduced at the appropriate size, and held at the appropriate distance (this information should be stated on the photomontage), before making any judgement on the likely magnitude or significance of impact. The nature of a photomontage and the way that this is perceived

by the human eye is such that it is only a representation of the likely impact and an aid to decision making.

112. The Inspector should ensure that any mitigation relied upon within the LVIA is secured either:

- as 'in built' or 'inherent' or 'embedded' mitigation; or
- through other suitably robust means, including planning conditions as necessary.

It may be appropriate for conditions to provide for the future management of planting to ensure its proper establishment and long term survival.

113. In conclusion, the outcome of a LVIA is largely a matter of judgement as subjectivity is involved. It may be difficult to say that the findings of a LVIA are 'wrong' but there may be obvious omissions of fact or judgements made that may be questionable. It may also be apparent that the methodology adopted is not robust, appropriate, or that it has not been applied systematically in the presented assessment.

Green Infrastructure (GI)

114. GI is a network of interconnected spaces and features and can include parks, open space, playing fields, woodland, street trees, allotments, private gardens, green roofs and walls, and SuDS systems. It can also include rivers and canals and other water bodies, although this is sometimes called blue infrastructure. It promotes multi-functionality.

115. This is a term often misused; it is not an alternative means of describing a parcel of open space even though this is increasingly terminology used in applications where developers overstate the landscape/visual and ecological benefits of features such as highway verges and play areas.

116. NE has published guidance which sets out a comprehensive overview of the concept and benefits of GI[20].

[20] Natural England Green Infrastructure Guidance: http://publications.naturalengland.org.uk/publication/35033

The Planning Inspectorate

Listed Building Enforcement

Updated to reflect December 2023 Framework (NPPF)

What's new since the last version

Changes made 17 April 2023

- Significant updates throughout this chapter

Contents

Legal Framework

1. The legal framework for the enforcement of listed building control is mainly contained in sections 38-46 of the Planning (Listed Buildings and Conservation Areas) Act 1990 [LBCA], as amended by section 25 and schedule 3 to the Planning and Compensation Act 1991 [PCA]. The provisions relating to Conservation Area Enforcement Notices [CAENs] have been withdrawn in England and are now only relevant in Wales. In England, demolition of unlisted buildings in Conservation Areas is now controlled through the Town and Country Planning General Permitted Development) Order 2015 (SI 2015/596).

2. Listing is a central government function and national policies apply. The Courts have accepted that section 38(6) of the Planning and Compulsory Purchase Act 2004 [PCPA], does not apply to decisions on applications for listed building consent since in those cases there is no statutory requirement to have regard to the provisions of the development plan. But in all cases involving development as defined by section 55 of the principal Act, the development plan would be relevant and should usually be the starting point in making any determination concerning the granting of planning permission.

3. As with general enforcement of planning control under Part VII of the Town and Country Planning Act 1990, local planning authorities have wide powers under section 38 of the LBCA to issue listed building enforcement notices (LBENs) in the event of contraventions of listed building control. Similar powers are available to the Secretary of State under section 46. Appeals against LBENs are made on the grounds set out in section 39(1) of the LBCA (as amended)

4. Section 7 of the LBCA provides for listed building consent to be obtained for any works "for the demolition of a listed building or for its alteration or extension in any manner which would affect its character as a building of special architectural or historic interest". It follows that the execution of works to a listed building which do NOT affect its character as a building of special architectural or historic interest do not require listed building consent. Material changes of use do not, of themselves, require LBC, though works which may be resultant upon them may.

5. The power to issue an LBEN under section 38 of the LBCA is dependent, among other things, upon the works involving a contravention of section 9(1) or (2). 9(1) refers back to Section 7, any contravention of which is an offence. Having regard to the above provisions, works carried out before 1 January 1969 cannot have involved a contravention of section 9(1) and cannot, therefore, be enforced against under the current LBCA (see section on Time Limits paragraphs 54 on below). Failing to comply with a condition attached to a listed building consent, however, constitutes an offence under section 9(2) in respect of which there is no time-limit as a consequence of the above, or any other, provisions.

Definitions

Building and Listed Building

6. The term “building” is defined in section 336 of the Town and Country Planning Act 1990.

TCPA 1990

336. - (1) In this Act, except in so far as the context otherwise requires and subject to the following provisions of this section and to any transitional provision made by the Planning (Consequential Provisions) Act 1990 - "building" includes any structure or erection, and any part of a building, as so defined, but does not include plant or machinery comprised in a building.

7. The term "listed building" is defined in section 1(5) of the Planning (Listed Buildings and Conservation Areas) Act 1990 (as amended).

LBCA 1990

1 - (5) In this Act "listed building" means a building which is for the time being included in a list compiled or approved by the Secretary of State under this section; and for the purposes of this Act

a. any object or structure fixed to the building;

b. any object or structure within the curtilage of the building which, although not fixed to the building, forms part of the land and has done so since before 1st July 1948 shall be treated as part of the building.

It should be noted that in overturning the CoA, the SC held in Dill[1] that it is appropriate to question via a LBEN appeal whether a listed building is actually a building or not. To be listed it must both be on the list and a building. Apply the tests in Skerritts[2]. See HH ITM paragraph 144 for further info.

Fixtures and Chattels

8. An object or structure not fixed to the listed building or if freestanding and within its curtilage was erected on or after 1 July 1948 is NOT part of the listed building. Whilst such an object or structure would not be subject to listed building control, planning permission may be required for development, in which case, Section 66(1) of the LBCA (the section that imposes a general duty to have special regard to the desirability of preserving etc a listed building when granting planning permission) should be taken into account.

9. There is no statutory definition of an "object" or "structure". The courts have given some direction through various judgments[3]. In particular Skerritts sets out the tests for whether a structure is a building or not and warns that permanence in planning terms does not mean everlasting – something can be place for a sufficient length of time to be significant.

Works, Alterations, Repairs, Painting

LBCA 1990: Section 7

[1] Dill v SSCLG & Stratford-on-Avon DC [2017] EWHC 2378 (Admin), [2018] EWCA Civ 2619, [2020] UKSC 20; [2020] JPL 1421
[2] Skerritts of Nottingham Ltd v SSETR & Harrow LBC (No. 2) [2000] EWCA Civ 5569; [2000] JPL 1025
[3] eg *Barvis Ltd. v SSE & Essex CC, Skerritts of Nottingham Ltd v Secretary of State for the Environment, Transport and the Regions (No 2)* [2000] 2 PLR 102; [2000] JPL 1025; [2000] EGCS 43

7. - Subject to the following provisions of this Act, no person shall execute or cause to be executed any works for the demolition of a listed building or for its alteration or extension in any manner which would affect its character as a building of special architectural or historic interest, unless the works are authorised.

10. There is no statutory definition of “works” in the context of section 7 of the LBCA. However, a distinction is drawn between works of alteration and demolition. Consideration should also be given to whether works are repairs rather than alterations. Again there is no definition of either, but there is often a fine line between the two. If the works for repair are sufficient to affect the building’s character, they are likely to require consent. But see ground (d) below in case they were urgently required.

11. Works undertaken by others without the owner’s consent such as theft of fixtures from a listed building are generally held to constitute a breach of listed building control, for which the owner may still be held liable.

12. Alterations to listed buildings can be subject to arguments about whether or not there has been a contravention of listed building control. Several common building works (which may not need express planning permission or advertisement consent) could involve a contravention of section 7 of the LBCA. Consent is required for any works to a listed building that would affect its character as a building of special architectural or historic interest. The effect does not have to be a negative one; works that would be beneficial to the character would nevertheless have an effect and would need to be authorised through the grant of listed building consent.

13. Arrangements for Handling Heritage Applications – Notification to Historic England and National Amenity Societies and the Secretary of State (England) Direction 2015 makes provision for certain national amenity bodies to be notified of applications for listed building consent and the decisions taken on them. However, that requirement does not extend to LBEN appeals.

    Examples of some works generally requiring LBC:

    - Alteration of a listed building's fenestration or other wall openings
    - Removal of glazing bars in windows or the replacement of sash and case windows with casements (or vice versa)
    - The fitting of shutters
    - Painting, rendering or coating of brick or stone walls or decorative interior plasterwork
    - Re-painting/redecoration of the exterior or interior of listed buildings
    - Protective coating of roofing materials with bitumen or other waterproofing compounds
    - Pointing of previously unpointed masonry walls or the removal of protective rendering
    - Use of synthetic modern materials to replace natural stone slates or tiles
    - Installation of shop awnings or their replacement with modern folding blinds or plastic canopies resembling blinds
    - Removal of chimneys
    - Erection of external walls (if they actually touch the listed building)
    - Removal of interior walls, beams or staircases

14. The determining factor in all these cases is whether it affects the building’s character as a listed building.

Demolition

15. Demolition of, or damage to a listed building arising through an accident which was outside the control of the owner, such as being struck by a motor vehicle, is generally regarded as not constituting a contravention of control (see [1990] JPL 444)[4]. In such circumstances an LBEN cannot require reinstatement of the damaged property. The use of the word "works" in section 7 of the LBCA indicates that they are to be premeditated.

16. All enforcement appeals concerning demolition of unlisted buildings in conservation areas are now dealt with under section 174 of the principal Act (see the Enforcement chapter).

17. Demolition of listed buildings should be considered in the light of the judgment in *Shimizu (UK) Limited v Westminster City Council* [1997] JPL 523 and 1 All ER. Put simply this judgement clarifies that for works to amount to demolition will be a matter of judgement, but that they would have to be so substantial as to amount to clearing the site for redevelopment. That is because the phrase 'listed building' in this context refers to the building as a whole, not to a part of the building. Anything less, such as the demolition of up to 50% of external walls, or all of the interior are considered as alterations.

18. Where a listed building has been demolished it can be required to be rebuilt as long as there is at least some remaining material to be reused[5]. Restoration of a building to its former state (see section 38(2)(a) LBCA) may be taken to mean its former "authorised" state. Its former authorised state is its state at the time of listing or as approved through listed building consents. Although this word is not used in the Act, to do otherwise would impart a perverse interpretation on the law and merely create a series of steps back to the authorised state.

Curtilage

19. Appeals under Grounds (a) and (c) may raise the question of what is within the curtilage of a listed building. In the case of *Debenhams plc v Westminster City Council* [1987] AC 396 the House of Lords held that the word "structure" in section 1(5) of the LBCA meant only a structure that was ANCILLARY or SUBORDINATE to the listed building itself and which was fixed to the main building or within its curtilage (and erected prior to 1 July 1948). For example, the fact that one building in a terrace was listed would not normally result in the entire terrace being listed.

20. A useful commentary on objects or structures within the curtilage of listed buildings is found in the Encyclopaedia of Planning Law paragraph L1.09. In practice it may be helpful to consider the ancillary/subordinate question first, and then, only if necessary, the curtilage question. A building which is not listed in its own right and is not ancillary or subordinate to a listed building cannot be the subject of an LBEN.

21. In *Attorney-General ex rel Sutcliffe v Calderdale Borough Council* [1983] JPL 310 the Court of Appeal considered the following factors relevant in deciding whether a

[4] SoS decision regarding the demolition of a K6 Telephone box in a car crash. Held the crash didn't lead to "works for the demolition of a listed building". Works implies some premeditated or planned action. The remains of the box were still a listed building but removing them also didn't amount to works of demolition as it had already been demolished accidentally.

[5] *Leominster District Council v British Historic Buildings and S.P.S. Shipping* [1987] JPL 350; and *R v Leominster DC Ex p. Antique Country Buildings Ltd* [1988] JPL 554

structure was within the curtilage of a listed building and thereby statutorily protected:

a. the physical layout of the listed building and the structure;

b. ownership, past and present;

c. use or function, past and present.

22. As to items (b) and (c), it has been successfully argued at inquiry that the curtilage of a listed building can change over a period of time. For example, a pre-July 1948 free standing building which may have been within the curtilage of a listed building at the time the main building was listed might, due to other development which has since taken place, no longer be regarded as within the listed building's curtilage.

23. Judgments in the cases *of Watts v Secretary of State for the Environment* [1991] JPL 718 and *R v Camden LBC ex p Bellamy* [1992] JPL 255 indicate that the curtilage of a listed building should be taken to be that which existed at the time of listing, regardless of subsequent development. This is based on the principle that if a pre-July 1948 subordinate building was within the curtilage of a listed building at the time of listing, the tests of section 1(5) of the LBCA would be met.

24. These judgments and that in *Attorney-General ex rel Sutcliffe v Calderdale Borough Council* [1983] JPL 310, have since been contradicted by *Sumption & Sumption v LB Greenwich & Rokos* [2007] EWHC 2776 (Admin) which gave greater weight to the situation at the time of the application, even though the land was only recently included within that associated with the listed building. (See also paragraph 72 for commentary on Sumption and the section on Curtilage in the Enforcement ITM).

25. In the case of *London Residuary Body v Secretary of State for the Environment, Lambeth LBC and the Inner London Education Authority*

[1990] 1 WLR 744 [1990] 2 All ER 309 (1991) 61 P&CR 65 [1988] JPL 737, the extent of the curtilage of County Hall was at issue. The judge stated that it was for the Inspector to hear the detailed evidence upon the facts, to make findings of fact and to reach a view.

26. It seems, therefore, that the question of whether the building to which an LBEN is directed is a "curtilage building" (ie a pre-July 1948 building which should itself be treated as being part of the listed building because it is within the curtilage of a listed building) is a matter for the Inspector, on the basis of the factual evidence submitted. A recommended approach is to assume that if the subordinate building the subject of the LBEN would, at the time of listing, have met the tests of section 1(5) of the LBCA, it should continue to be treated as part of the listed building unless there are overriding arguments to the contrary.

Contents of a Listed Building Enforcement Notice

27. The required contents of the notice are set out in section 38 of the LBCA. They have similarities with those for planning enforcement notices in section 173 of the principal Act.

LBCA: Section 38

> (2) A listed building enforcement notice shall specify the alleged contravention and require such steps as may be specified in the notice to be taken within such period as may be so specified
>
> *(a)* for restoring the building to its former state; or
>
> *(b)* if the authority consider that such restoration would not be reasonably practicable or would be undesirable, for executing such further works specified in the notice as they consider necessary to alleviate the effect of the works which were carried out without listed building consent; or
>
> *(c)* for bringing the building to the state in which it would have been if the terms and conditions of any listed building consent which has been granted for the works had been complied with.
>
> (3) A listed building enforcement notice shall specify the date on which it is to take effect (in this section referred to as "the specified date").

28. The steps specified can require one of three options (a), (b), or (c). It is usual for the main recital of the LBEN to say on which of these provisions the steps are based. If not, the appropriate sub-section should be clarified at the inquiry/hearing since it has a bearing upon grounds of appeal (i), (j), and (k) and may be relevant to others. In a written representations case you may have to draw your own conclusions from the council's submissions and, if necessary, correct the notice.

29. An LBEN should always provide a clear statement of the alleged breach and what is needed to put it right. As with enforcement notices generally there are 4 key dates:

    a. the date on which the notice was issued;

    b. the date on which it was served;

    c. the date on which it becomes effective; and,

    d. the date or period for compliance with its requirements.

30. Section 41(1) of the LBCA, as amended, provides for the LBEN to be corrected or varied (see Recovery and Recovery) subject to no injustice being caused to the parties. A useful test is to ask yourself whether the correction or variation under consideration would leave one or both parties with a substantially different case to answer. If "no", it is unlikely that the correction and/or variation would cause injustice.

Listed Building Enforcement Notices – procedure

Issue of an LBEN

31. Under section 38 of the LBCA the planning authority may issue a notice if they judge it to be expedient in circumstances where unauthorised works to a listed building have been carried out in contravention of section 9(1) or (2). Section 9(1) refers back to section 7 which sets out the requirement to obtain LBC. The issue of whether or not the unauthorised works amount to a contravention of listed building control can only be resolved by reference to all the particular circumstances of an individual case. As in other aspects of enforcement, such matters are questions of fact and degree.

Service of a copy of an LBEN

32. The service of a copy of an LBEN is covered by section 38 of the LBCA. These requirements are similar to those set out in section 172 of the principal Act for planning enforcement notices as regards time limits for service after issue and persons on whom a copy of the LBEN should be served. There are comparable powers given to the planning authority to withdraw an LBEN at any time before it becomes effective.

> **LBCA: Section 38**
>
> (4) A copy of a listed building enforcement notice shall be served, not later than 28 days after the date of its issue and not later than 28 days before the specified date
>
> (a) on the owner and on the occupier of the building to which it relates; and
>
> (b) on any other person having an interest in that building which in the opinion of the authority is materially affected by the notice.
>
> (5) The local planning authority may withdraw a listed building enforcement notice (without prejudice to their power to issue another) at any time before it takes effect.
>
> (6) If they do so, they shall immediately give notice of the withdrawal to every person who was served with a copy of the notice.

Nullity and Invalidity

33. Similar considerations of nullity and invalidity arise as in section 174 appeals (see the Enforcement Chapter). As with section 174 appeals, there is an obligation to try to remedy defects in LBENs *(Bath City Council v Secretary of State for the Environment and Grosvenor Hotel (Bath) Ltd* [1983] JPL 737 and [1984] JPL 285) where the notice is not a nullity.

34. In *McKay v SSE* [1994] a notice which was valid on its face included requirements which would themselves have been a breach of s2 of the Ancient Monuments and Archaeological Areas Act 1979, and so a criminal offence. It was held to be a nullity and so not correctable or variable. However, in the case of *South Hams DC v Halsey* [1996] JPL 761, the Court of Appeal specifically disagreed with the decision in *McKay*. They held that if the requirements of a notice did put the recipient in that position, which he was unable to resolve, he would have a defence to the notice if prosecuted. Such a notice was therefore valid and not a nullity.
The notice would be variable.

35. Where a notice has been found to be a nullity the summary of decision should state: I take no further action. The decision should state: Since I

find the notice to be a nullity I take no further action in connection with this appeal. In the light of this finding, should the Local Planning Authority have kept a record of this listed building enforcement notice on any register, they should consider reviewing it. If the notice is to be upheld, the steps to be undertaken should be precise. A requirement to carry out works in accordance with a scheme to be agreed with the planning authority is not acceptable and has been found to render the notice a nullity.

36. The Courts, in *Miller-Mead v Minister of Housing and Local Government* [1963] 2QB196, have held that “the subject, who is being told he is doing something contrary

to planning permission and that he must remedy it, is entitled to say that he must find out from within the four corners of the document exactly what he is required to do or to abstain from doing." The judgment continues "Supposing then … that the owner or occupier … 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." The classic statement in *Miller-Mead* of the test for the validity of an enforcement notice is "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?"

37. In the judgment given in *Clive Payne v The National Assembly for Wales and Caerphilly County Borough Council* [2006] EWHC 597 (Admin) the enforcement notice required that details of a scheme be submitted to the local planning authority for written approval, and then that this scheme be implemented. Periods for compliance with each requirement were specified. However, the notice failed to comply with section 173(3) of the TCPA (paralleled by section 38(2) of the LBCA), as it did not specify the steps which the authority required to be taken. The notice was bad on its face and a nullity, and there is no power in the Acts to correct such a notice. This supersedes the judgment in the case of *Kaur v SSE and Greenwich LBC* [1989] EGCS 142; EPL 2-3653 where it was held that a requirement of an enforcement notice which provided for the subsequent submission and approval of a scheme introduced an unacceptable degree of uncertainty.

38. If the notice is uncertain, the council should have been sent a standard letter by the Inspectorate's casework team when the appeal was received. If this has not been picked up by casework before the inquiry/hearing there will be no choice but to make a determination as to whether the notice is a nullity, and this should be stated at the opening of the inquiry/hearing. A notice which is a nullity does not exist in law and cannot be corrected nor does it need to be quashed. The *Payne* judgment should be referred to as your authority for this. Similarly, it will be necessary to make such a determination in a written representations case. See above for the wording for nullity cases.

39. However, it may be that only part of the requirements are uncertain, and the notice can be saved by deleting only that part, so long as the remaining part of the notice achieves what is sought. A fuller discussion of issues that might lead to nullity, including Court cases such as Payne and Oates is in the 'Nullity' section of the Enforcement ITM. This also discusses issues of incorrect delegations and how to deal with them.

Requirement for removal with no replacement

40. This is where the notice requires removal of an element eg windows or a shop front, but no replacement. The approach under s174 enforcement appeals is different from s39 appeals. This situation is not necessarily fatal to the validity of an enforcement notice issued under s174 of the Town and Country Planning Act 1990 as amended (the principal Act). If a Notice requires windows to be removed, but not replaced, then once removal is completed the building in that state has planning permission.

41. There is no similar provision in the LBCA. Since removal of windows from a listed building would inevitably affect the character of the building they would be regarded as works in contravention of the LBCA. Whilst the requirement of a listed building enforcement notice might be considered proper authorisation, the consequence, in the absence of specific authority for the windowless state, would probably be considered a breach of listed building control.

42. Such a circumstance is also more serious under the LBCA Act since, by virtue of s9(1), it is a criminal offence, whereas a breach of planning control under the principal Act is not, until failure to comply with a Notice occurs.

43. In the wider context, the primary purpose of the LBCA Act is to provide a framework within which listed buildings, their settings or any features of special architectural or historic interest are preserved from harmful alterations or demolition. By any standards, the removal of windows without their replacement would be in direct conflict with that purpose. Even if the windows themselves were harmful, the lack of any windows would be more harmful due to the inevitable risks to the historic fabric. The same approach should be taken with the removal of windows in a conservation area where appropriate replacement has not been specified, as a windowless building would be unlikely to preserve or enhance the character or appearance of a conservation area.

44. While it may appear to be a simple matter to add a provision requiring reinstatement of windows matching materials, style and appearance of those removed, thereby restoring the building to its former state in accordance with S38(2)(a), it has been held by the courts that where a Notice is uncertain in its requirements it is a nullity. Therefore the notice should be quashed.

Penalties for non-compliance with an LBEN

45. Section 43 of the LBCA provides that failure to comply with the steps specified in an LBEN can be the subject of criminal prosecution. But, there is no obligation to prosecute. On summary conviction (conviction in a magistrates court) the offence may be punished by imprisonment for a term not exceeding six months or a fine not exceeding £20,000, or both; or on indictment (conviction in the crown court) by imprisonment for a term not exceeding two years or an unlimited fine, or both. A further fine may be imposed for each day following the first conviction on which any of the requirements of the notice remain unfulfilled.

Locus Standi

46. At an inquiry or hearing the question of *locus standi* (whether the appellant **has** an interest in the land) may arise. Section 39(1) of the LBCA provides the right of appeal to a person having an interest in the building to which the LBEN relates or a relevant occupier. This is similar to the provisions of section 174(1) in the principal Act. An "interest in the building" may be presumed to be a legal interest. A "relevant occupier" is defined in section 174(6) of the principal Act.

47. If the appellant has no *locus*, the Secretary of State will turn the appeal away. It is not incumbent upon the Inspector to explore or challenge the adequacy of an appellant's *locus* and this issue should not be raised at the inquiry/hearing by the Inspector. If it is raised by one of the parties, hear the submissions, say that you will take the matter into account and proceed to hear the cases in the usual manner. After the inquiry/hearing, if necessary, discuss the *locus* point with your SGL or GM. If there is anything to it, the case will be recovered.

Limitations on the effect of a Listed Building Enforcement Notice

48. Section 44 of the LBCA provides for the requirements of an LBEN to be overridden by the grant of LBC permitting the retention of works, or retention without compliance with some previous condition. If, after the issue of an LBEN, LBC is granted for any of the works referred to in the notice, the notice ceases to have effect in relation to those

works.

LBCA 1990: Section 44

44.(1) If, after the issue of a listed building enforcement notice, consent is granted under section 8(3)

(a) for the retention of any work to which the notice relates; or

(b) permitting the retention of works without compliance with some condition subject to which a previous listed building consent was granted,

the notice shall cease to have effect in so far as it requires steps to be taken involving the works not being retained or, as the case may be, for complying with that condition.

49. Where remedial works under section 38(2)(b) of the LBCA are carried out in compliance with the requirements of the notice, section 38(7) indicates that they (and only they) are deemed to have LBC. There are no similar provisions in respect of LBENs to section 173(11)(b) of the principal Act where, if the requirements of a section 172 notice are complied with, planning permission is deemed to have been granted for the unauthorised development described in the allegation. Any breaches mentioned in the allegation of an LBEN but not covered in the requirements do not attract deemed LBC. However, if you are dealing with a ground (e) appeal against an LBEN, the wording of section 39(1)(e) indicates that the appeal would apply to all the works covered in the allegation; it would not be restricted only to those mentioned in the requirements.

LBCA: Section 38

(2) A listed building enforcement notice shall specify the alleged contravention and require such steps as may be specified in the notice to be taken within such period as may be so specified …

(b) if the authority consider that such restoration would not be reasonably practicable or would be undesirable, for executing such further works specified in the notice as they consider necessary to alleviate the effect of the works which were carried out without listed building consent; or …

(7) Where a listed building enforcement notice imposes any such requirement as is mentioned in subsection (2)(b), listed building consent shall be deemed to be granted for any works of demolition, alteration or extension of the building executed as a result of compliance with the notice.

Listed Building Enforcement Notices - legal process

Prosecution or enforcement

50. If unauthorised works are carried out, or the conditions of an LBC are not complied with, an offence has been committed. The planning authority may then prosecute, issue an LBEN (under section 38 of LBCA), or both, and in either order. Although a private prosecution is feasible, it is usually the planning authority that would prosecute the offender through the courts.

51. The powers of prosecution and enforcement are frequently both used in individual cases. The latter are necessary because on a prosecution the courts have no power to undo or rectify the damage caused by unauthorised works.

Stop Notices

52. There is no power in listed building enforcement to issue a Stop Notice but, under section 44A of the LBCA, the planning authority may apply to the court for an injunction to restrain any contravention of section 9(1) or (2).

LBCA 1990: Section 44A

53. Where a local planning authority consider it necessary or expedient for any actual or apprehended contravention of section 9(1) or (2) to be restrained by injunction, they may apply to the court for an injunction, whether or not they have exercised or are proposing to exercise any of their other powers under this Part.

54. On an application under subsection (1) the court may grant such an injunction as the court thinks appropriate for the purpose of restraining the contravention.

55. Rules of court may, in particular, provide for such an injunction to be issued against a person whose identity is unknown.

56. The references in subsection (1) to a local planning authority include, as respects England, the Commission.

57. In this section "the court" means the High Court or the county court."

Breach of Condition

58. As there are existing powers of prosecution for the failure to comply with the conditions of a listed building consent, breach of condition notices under section 187A of the principal Act do not apply.

Time Limits

59. With the one exception outlined below, there is in law no limit on the length of time between an offence being committed and the service of an LBEN by the council or the Secretary of State. As set out in section 43 of the LBCA, the responsibility to comply with the notice rests with the person who is the owner at the end of the compliance period. This applies even though the unauthorised works may have been carried out by a previous owner.

60. There is no limitation on the period within which a LBEN must be issued for all recent, current and future breaches. However, there is one important exception relating to older breaches. No LBEN can be issued under the LBCA in respect either of works for the demolition, alteration or extension of a listed building if the works in question were executed before 1 January 1969.

61. If the works were executed before that date, the enforcement notice is invalid and should be quashed under ground (c) in section 39(1) of the LBCA. This is because the matters do not constitute a contravention of section 9(1) (that the works are contrary to section 7). This limitation on the issue of a LBEN does not, however, apply to a notice based on a contravention of section 9(2) (failure to comply with any condition attached to a listed building consent).

62. The reason for the limitation stems from paragraph 23 in Part V of Schedule 24 to the 1971 TCPA. This provided that section 55(1) of the TCPA 1971 did not apply to any works executed before 1 January 1969.

63. Section 55(1) was the forerunner to the current sections 7 and 9(1) of the LBCA. There was no exactly equivalent offence before 1 January 1969 under either the 1947 or 1962 TCPAs. Paragraph 3 of Schedule 3 to the Planning (Consequential Provisions) Act 1990 provides that the provisions of Schedule 24 to the 1971 Act continue to have effect.

Strict Liability

64. 58. A present owner may claim ignorance of the fact that the building is listed. However, it was held in the case of *R v Wells Street Metropolitan Stipendiary Magistrates ex p Westminster City Council* [1986] JPL 903 that this is not an acceptable defence. The carrying out of unauthorised works to a listed building is an offence of "strict liability". Intention is irrelevant.

Grounds of Appeal

Recommended sequence

65. The grounds of appeal against LBENs are set out in section 39(1) of the LBCA as amended, Grounds (a) to (k). The sequence is different from that used in section 174 appeals. After considering any informality, defect or error in the notice itself, such as the allegation, which might require correction, the most logical sequence to follow is:

Ground (f) were copies of the notice correctly served?

Ground (b) has the alleged contravention taken place?

Ground (a) is the building of special architectural or historic interest?

Ground (c) are the matters alleged a contravention of sections 9(1) or (2)?

Ground (d) were the works to the building urgently necessary in the interests of safety or health or, as the case may be, the preservation of the building by works of repair or works affording temporary support or shelter and were the works carried out limited to the minimum measures immediately necessary?

Ground (e) should listed building consent be granted for the works, conditions discharged, or different conditions substituted?

Ground (i) would the steps required by the notice restore the character of the building to its former state?

Ground (g) do the requirements of the notice under section 38(2)(a) exceed what is necessary for restoring the building to its former state?

Ground (j) do the steps required under section 38(2)(b) exceed what is necessary to alleviate the effect of the alleged works?

Ground (k) do the steps required under section 38(2)(c) exceed what is necessary to bring the building to the state in which it would have been if the terms and conditions of the listed building consent had been complied with?

Ground (h) is the period for compliance reasonable?

Grounds of Appeal

Ground (a)

That the building is not of special architectural or historic interest.

66. This implicitly attacks the listing of a building. The vast majority of appeals on this ground are without merit and can be simply dealt with. To succeed the appellant would have to convince you the statutory listing was wrong in the first place or the building has since been so altered or deteriorated it no longer was worthy of listing. In either case the outcome would be a report to the Secretary of State with a recommendation to de-list the building. This is a highly unlikely outcome. However, if convincing evidence has been provided which requires consideration then you should take account of the Principles of Selection set out in Principles of Selection for Listing Buildings, (and more general advice on the Historic England website under Listing) together with the state of the building before unauthorised works were carried out. An extract from General Principles s below.

Principles of Selection for Listing Buildings Statutory Criteria

67. The Secretary of State uses the following criteria when assessing whether a building is of special interest and therefore should be added to the statutory list:

- **Architectural Interest.** To be of special architectural interest a building must be of importance in its architectural design, decoration or craftsmanship; special interest may also apply to nationally important examples of particular building types and techniques (eg buildings displaying technological innovation or virtuosity) and significant plan forms;
- **Historic Interest.** To be of special historic interest a building must illustrate important aspects of the nation's social, economic, cultural or military history and/or have close historical associations with nationally important people. There should normally be some quality of interest in the physical fabric of the building itself to justify the statutory protection afforded by listing.

68. When making a listing decision, the Secretary of State may take into account the extent to which the exterior contributes to the architectural or historic interest of any group of buildings of which it forms part. This is generally known as group value. The Secretary of State will take this into account particularly where buildings comprise an important architectural or historic unity or a fine example of planning (eg squares, terraces or model villages) or where there is a historical functional relationship between a group of buildings. If the building is designated because of its group value, protection applies to the whole of the property, not just the exterior.

General Principles

69. Age and rarity. The older a building is, and the fewer the surviving examples of its kind, the more likely it is to have special interest. The following chronology is meant as a guide to assessment; the dates are indications of likely periods of interest and are not absolute. The relevance of age and rarity will vary according to the particular type of building because for some types, dates other than those outlined below are of significance. However, the general principles used are that:

- before 1700, all buildings that contain a significant proportion of their original fabric are listed;

- from 1700 to 1840, most buildings are listed;
- after 1840, because of the greatly increased number of buildings erected and the much larger numbers that have survived, progressively greater selection is necessary;
- particularly careful selection is required for buildings from the period after 1945;
- buildings of less than 30 years old are normally listed only if they are of outstanding quality and under threat.

70. Often the date of listing or re-survey will be helpful; a recent resurvey and the decision to retain the building on the list would confirm its importance.

71. The merits of "curtilage" buildings are irrelevant to a ground (a) appeal. Ground (a) is directly comparable to the ground of appeal (contained in section 21(3) of the LBCA) against a refusal of LBC. These are the only statutory means available at present for challenging the listing of a building, although anyone may write to the Secretary of State requesting the removal of a building from the statutory list. A ground (a) appeal carries with it a heavy burden of proof.

72. A recommendation that a building be removed from the statutory list is likely only ever rarely to be made. Only the Secretary of State may list a building and only the Secretary of State may remove a building from the list (sections 1(1) and 41(6)(c) of the LBCA). If, exceptionally, in a transferred case an Inspector considers that a ground (a) appeal directed at a listed building should succeed, the matter should be discussed initially with the Inspector's SGL and the GM in the Enforcement Group as the appeal would have to be put in abeyance while it was recovered and most likely a (fresh) inquiry arranged.

LBCA: Section 1(1)

(1) For the purposes of this Act and with a view to the guidance of local planning authorities in the performance of their functions under this Act and the principal Act in relation to buildings of special architectural or historic interest, the Secretary of State shall compile lists of such buildings, or approve, with or without modifications, such lists compiled by the Historic Buildings and Monuments Commission for England (in this Act referred to as “the Commission”) or by other persons or bodies of persons, and may amend any list so compiled or approved.

LBCA: Section 41(6)(c)

(6) On the determination of an appeal the Secretary of State may—

(c) if he thinks fit, exercise his power under section 1 to amend any list compiled or approved under that section by removing from it the building to which the appeal relates.

73. Note that a free standing building erected on or after 1 July 1948 within the curtilage of a listed building is not to be regarded as listed (section 1(5)(b) of the LBCA). If such a building is the subject of an LBEN, an appeal under ground (a) would succeed. As the building is not listed, a success on ground (a) in these circumstances would not require the case to be recovered. However, it should be noted that planning permission for any such building may also be required but that would require the issue of an enforcement notice and is beyond the scope of an LBEN appeal.

Accuracy of list description

74. In *Barratt v Ashford Borough Council* [2011] EWHC CIV 27 the appellants claimed that, as the name and road of the house was incorrect the description was not accurate and the building was not listed. The Court did not accept that argument. The LBCA 1990 clearly envisaged there being a "list" of listed buildings, and although listing by the correct name and address should be the general practice, there was no statutory requirement that the name or address took precedence over other identifying detail. Information such as descriptions in the text of the listing, map references, post codes, explanatory notes and photographs, singly or combined, could enhance the clarity and precision of the list, and might suffice to identify a building even where the stated name and address was wrong.

Ground (b)

That the matters alleged to constitute a contravention of section 9(1) or 9(2) have not occurred.

75. This ground is directly comparable to a ground (b) appeal against a planning enforcement notice under section 174(2)(b) of the principal Act, as amended. The essential question is whether the alleged works, as a matter of fact, have taken place at all. This ground is frequently confused with ground (c) by appellants. If the works have taken place then, irrespective of other circumstances, this ground cannot succeed. It is however relevant where for example the notice is directed against the removal of original lathe and plaster ceilings and the evidence is they were removed prior to the original listing, the current owner has only removed modern ceilings so the matters alleged have not occurred.

Ground (c)

That those matters (if they occurred) do not constitute such a contravention.

76. In the case of an LBEN, the principal consideration under this ground is whether or not there has been a breach of listed building control. This usually involves the question of whether the alleged works have been such as to affect the character of the building as one of special architectural or historic interest. Where relevant, the de minimis nature of works may be fairly narrowly interpreted. The matter is one of fact and degree. This ground is not concerned with merits, which arise under ground (e). If an LBEN alleges the execution of works to a listed building which do not affect its character or special architectural or historic interest this would amount to a success under ground (c) and the notice should be quashed. If the character or appearance of the listed building has been affected (whether positively or negatively), then, unless the works took place before 1 January 1969, there has been a contravention of section 9 of the LBCA and the ground (c) appeal must fail. If, on the other hand, the works were executed before 1 January 1969, the appeal will succeed under ground (c) for the reason explained above paragraphs 55-57.

77. It is relevant to take into account whether parts of the building not normally visible to the public (such as the interior, inward facing roof slopes or elevations to internal courtyards) nevertheless contribute to the integrity and intrinsic character of the building.

78. Appellants sometimes confuse grounds (b) and (c). At an inquiry/hearing the appropriate ground can be settled. In a written representations case the decision

should proceed on the basis of the correct ground, even if not pleaded, so long as no injustice would thereby be caused. The reasons for changing the ground of appeal must be explained in the decision.

79. If it is found that a building whether constructed before or after 1948, is not within the curtilage of the listed building then the appeal should succeed on ground (c).

80. The case of *R(East Riding of Yorks) v Hobson* [2008] EWHC 1003 (Admin) has raised concerns about the point at which an assessment on whether the character and appearance of a listed building has been affected should be taken. In this case permission was granted for relatively minor alterations to a curtilage listed building, but it was then demolished and rebuilt. It was common ground that the issue related to alterations and not demolition (but it was not made clear why that was so). The judge found that the character of the building had not been affected and that the time to decide this was not after the 'demolition' aspect of the work had been completed, but when it had been rebuilt. The court of appeal agreed. It is generally thought that this was a poor judgement and that the appeal court, because of the way the case was presented had little choice but to agree. A caveat was put in at the end of the judgement that this is not a charter to demolish and rebuild a listed building without permission, but there could still be a conflict between that caveat and the indication that the effect on character cannot be assessed until rebuilding is complete. If this case is referred to in representations it should be treated with caution as each case will depend on its own facts and it would obviously be dangerous to allow uncontrolled demolition of a listed building to continue on the grounds that any future replacement might not affect its character. Even if historic fabric is reused, the original patina and craftsmanship will have been irrevocably lost and the general rules are that any demolition should have prior justification and the method and detail of rebuilding should be approved before it is carried out.

81. *Sumption & Sumption v LB Greenwich & Rokos* [2007] EWHC 2776 (Admin) highlights one of the difficulties in identifying the curtilage of a listed building, which can be important in some ground (c) appeals where it may be claimed that the building or structure is not within the curtilage of a listed building and does not, therefore, require listed building consent for alterations to it. The judge found that land that had been annexed into the garden of a listed building and surrounded by a fence had been brought into the curtilage, even though the use of the land as a residential garden was not authorised. He found that the construction of a wall to replace the fence confirmed that the land was within the curtilage of the listed building and would therefore require listed building consent. This judgement appears to confirm that, irrespective of the historical basis for a particular curtilage, it can, in fact, expand on annexation of other land. The Court considered that the works, in any event, also fell within the second limb of the exemption to the rights granted by the Permitted Development Order, namely, that they involved development *to* an enclosure surrounding a listed building. Although the Court conceded that the wording of this exemption was not particularly clear, it took the view that it cannot have been intended that persons could remove and replace a fence surrounding a listed building without permission, whereas they would need permission if they were simply adding works to it. The strategy of leaving a small gap at either end was not, therefore, successful. The practical consequence of the Court's rulings is that, at least in towns and cities, the improvement or erection of a boundary enclosure to a listed building is unlikely to be authorised under the General Permitted Development Order.

Ground (d)

That the works to the building were urgently necessary in the interests of safety and health or for the preservation of the building, that it was not practicable to secure safety or health or, as the case may be, the preservation of the building by works of repair or works for affording temporary support of shelter, and that the works carried out were limited to the minimum measures immediately necessary.

82. This is a very common ground of appeal which should only succeed where, as a matter of fact and degree:

    a) the works carried out were urgently necessary in the interests of safety or health or the preservation of the building, **AND**

    b) it would have been impractical to carry out inoffensive repairs or provide temporary support or shelter, **AND**

    c) the works were limited to the minimum measures immediately necessary.

83. Note that this list is similar to that in s9, which makes it an offence to carry out any works unless urgently necessary etc, plus a further stipulation that notice in writing justifying in detail the carrying out of the works should also have been given to the local planning authority as soon as reasonably practicable. This is not repeated in ground (d) as almost by definition such notice would not have been given.

84. A ground (d) appeal based on the argument that, for example, new UPVC window frames should be approved because they replace former timber frames which were rotten, will invariably fail. The standard of proof will be high. Good evidence may reasonably be required. For example, that a 'dangerous structures' notice or order has been served. However, such an order may well have been couched in terms which allow alternative means of satisfying it. Even works specified in a dangerous structures order require LBC.

85. It is likely that a ground (d) appeal will fail. Circumstances are difficult to envisage where prior consultation between the owner and the council could not have been undertaken. If, however, an appeal on this ground were to succeed, it would be insufficient simply to quash the notice, as that would leave the works without the benefit of LBC. This problem could be overcome by going on to grant LBC as provided for in section 41(6)(a) of the LBCA.

Ground (e)

That listed building consent ought to be granted for the works, or that any relevant condition of such consent which has been granted ought to be discharged, or different conditions substituted.

86. Section 7 of the LBCA indicates that LBC is required for any works to a listed building undertaken "in any manner which would affect its character as a building of special architectural or historic interest". Similar words are used in section 38(1) with respect to LBENs. Section 72(1) imposes the duty referred to in the preceding paragraph concerning conservation areas.

87. The main issues on which the decision will turn are, accordingly, self-evident from the statute. They are invariably concerned with the effect of the works, firstly on the

special architectural or historic interest of the listed building and secondly, on the special character or appearance of the conservation area.

88. Detailed advice on dealing with heritage assets and ensuring the statutory and policy tests are carried out is in the Historic Environment ITM at paragraphs 157 on – the Three Step Approach.

89. Listed building appeals are not subject to section 38(6) of the Planning and Compulsory Purchase Act 2004. Consequently, they do not need to be determined in accordance with the development plan although relevant provisions can nevertheless be material considerations. This is further confirmed by the lack of a requirement in section 16(2) of the Act to have regard to the development plan when determining applications and appeals for listed building consent. It is useful to acknowledge the policy background in the decision letter before going on to identify the main issue(s). It is often sufficient to say that the policies in the development plan reflect the statutory duties in seeking to safeguard listed buildings and the character or appearance of conservation areas.

90. The National Planning Policy Framework is also relevant and requires an applicant for listed building consent to describe the significance of any heritage assets affected, including any contribution made by their setting. It also notes that where there is evidence of deliberate neglect or damage the deteriorated state of the heritage asset should not be taken into account in any decision. These factors will also apply to considerations of whether LBC should be granted for works that are the subject of a LBEN.

91. A ground (e) appeal is approached in the same way as an application for LBC or an application to discharge LBC conditions previously imposed. The latter is covered in section 19 of the LBCA (see below). Economic considerations may be relevant. An application for LBC can be an application for a collection of separate works, each of which could have been the subject of a separate application. Consideration should be given to the merits of each of the separate works covered by the LBEN.

LBCA 1990: Section 19

(1) Any person interested in a listed building with respect to which listed building consent has been granted subject to conditions may apply to the local planning authority for the variation or discharge of the conditions.

(2) The application shall indicate what variation or discharge of conditions is applied for.

(3) Sections 10 to 15 apply to such an application as they apply to an application for listed building consent.

(4) On such an application the local planning authority or, as the case may be, the Secretary of State may vary or discharge the conditions attached to the consent, and may add new conditions consequential upon the variation or discharge, as they or he thinks fit.

92. In considering an appeal on this ground, it should be remembered that consent for the retention of the works may be made subject to conditions designed to ameliorate the worst effects of the contravention. The council's statement of reasons for issuing the LBEN will usually be attached to the notice. To all intents and purposes these are equivalent to the reasons for refusal of LBC and all the points raised therein should be

covered in your conclusions on the ground (e) appeal.

93. Where the works involve the total or substantial demolition of the listed building additional considerations must be taken into account; advice is contained the Planning Practice Guidance (When is Permission Required).

94. Consent may be granted for the retention of part only of the works in question (section 41(6)(a) LBCA). Under section 41(6)(b), conditions attached to a previous LBC may be discharged. New conditions may be imposed but they should go to precisely the same point as the condition(s) discharged. In law the new conditions may be more onerous, but in practice they should not be so unless the parties have had the opportunity of making representations regarding the form of the proposed substitute condition(s). Conditions must meet the legal and policy tests (necessary, relevant to planning, relevant to the development to be permitted, enforceable, precise, and reasonable in all other respects. Further advice is in the Conditions ITM. They should also be relevant to listed buildings and not deal with general planning matters.

LBCA: Section 41

(6) On the determination of an appeal the Secretary of State may—

(a) grant listed building consent for the works to which the listed building enforcement notice relates or for part only of those works;

(b) discharge any condition or limitation subject to which listed building consent was granted and substitute any other condition, whether more or less onerous;

95. There is no deemed application for LBC. Ground (e) should only be introduced in the decision letter if the ground is specifically pleaded or if the parties make other representations which, in effect, go to the substance of this ground. See also Corrections and Variations to the Notice below.

Ground (f)

That copies of the notice were not served as required by section 38(4).

96. Since the provisions of section 172(2) and (3) in the principal Act and section 38(4) in the LBCA are virtually the same, it follows that the advice on the service of enforcement notices in the Enforcement chapter is of direct relevance. In the case of listed buildings, it may be of importance to be given or to request evidence of the use of the planning authority's powers under section 330 of the principal Act to obtain information on the ownership of the building.

97. 88. Even if the LBEN was not served as specified in section 38(4) of the LBCA, section 41(5) allows for this fact to be disregarded if no substantial prejudice **has resulted.** Hence, an appeal on this ground will hardly ever succeed. If the appellant or other person is present at the inquiry/hearing or responded in a written representations case it is likely that he has been given adequate notice.

LBCA 1990: Section 38

(4) A copy of a listed building enforcement notice shall be served, not later than 28 days after the date of its issue and not later than 28 days before the date specified in it as the date on which it is to take effect -

(a) on the owner and on the occupier of the building to which it relates; and

(b) on any other person having an interest in that building which in the opinion of the authority is materially affected by the notice.

LBCA 1990: Section 41

(5) Where it would otherwise be a ground for determining an appeal in favour of the appellant that a person required to be served with a copy of the listed building enforcement notice was not served, the Secretary of State may disregard that fact if neither the appellant nor that person has been substantially prejudiced by the failure to serve him.

Grounds (g) and (i)

(g) Except in relation to such a requirement as is mentioned in section 38(2)(b) or (c), that the requirements of the notice exceed what is necessary for restoring the building to its condition before the works were carried out.

(i) That the steps required by the notice for the purpose of restoring the character of the building to its former state would not serve that purpose.

98. These grounds arise when the notice seeks the restoration of the building under section 38(2)(a) of the LBCA. Appellants often confuse grounds (g) and (i). Ground (g) is limited to the works described in the notice and to the question of whether the requirements to restore the building to its previous **condition** before those works were carried out are excessive. Whereas (i) deals with a situation where the requirements are to restore the **character** of the building to the state it was in before **any** unauthorised works, not just those subject to the LBEN, were carried out and questions that the requirements will actually achieve the aim of restoring the character.

99. In essence (g) involves an objective assessment, do the works required restore the building to its previous state – removing and replacing modern roof tiles with the original stone tiles for example. Sometimes not all the requirements are needed for full restoration and some may be improvements the LPA have thought of that are not really related to the allegations at all.

100. (i) is more of a subjective opinion, where restoration of the character of the building is sought, because for example original materials are not available, or the works are such that it is impossible to return the building to its original state. It can be argued that the modern replacements enforced against are better than the previous (perhaps un-historic) materials or structures and so better represent the original character.

101. When ground (g) and/or (i) are pleaded, it may be difficult to determine the appearance or character of the building before unauthorised works were executed. In such cases, the best available evidence should be obtained. It is often possible to find other similar buildings in the locality to which reference can be made. The appellant is likely to have more detailed knowledge than the planning authority but may prefer not to reveal it. Possibly the planning authority (or others) will have had photographs taken of the allegedly unauthorised works. These may be on the appeal file together with photographs or drawings of the building before any unauthorised demolition, alteration or extension. At an inquiry/hearing, interested parties (eg national or local amenity groups) may be in a position to assist. Conclusions may ultimately have to be based on the balance of probabilities. Adjournments or the seeking of further representations should be avoided if possible.

102. Both grounds (g) and (i) are directed at the condition or state of the building in architectural terms and not to its state of repair. It could not be the intention of the

legislation that an LBEN could be defeated because the requirements of the notice would restore the building to a better state of repair than existed formerly. So for example, if rotted sash windows are replaced with UPVC then the requirement can be to remove the modern windows and replace with new sash windows. But beware betterment, if the historic sash windows were already replaced with metal casements before listing, and the casements replaced with UPVC, the requirements cannot be to restore sash windows, as that would be an improvement. Of course the owner might prefer to go back to wooden sashes and then a view would need to be taken on the significance of the metal casements, as they would be part of the listed building. If this would be acceptable it might be better to deal with it under (e) and grant consent. See 103 below for further advice on betterment.

103. Remember that (g) is specific to the condition of the building whereas (i) is to its character.

104. If the notice is seeking works of alleviation, the appropriate ground of appeal would be (j), not (i). Where ground (i) is pleaded in a breach of condition case, it should normally be dealt with as if the appeal had been made under ground (k).

Ground (h)

That the period specified in the notice as the period within which any step required by the notice is to be taken falls short of what should reasonably be allowed.

105. Success on this ground will often depend on whether or not the LBEN calls for building works of a specialised kind, requiring a longer than usual period to ensure that the works are carried out to a satisfactory standard.

It may also be unreasonable to require the carrying out of building works in the winter months. On the other hand, it may be that continuing damage would be caused to the building if such works were unduly delayed. The expertise and judgement of the Inspector are of importance in this context.

106. If the LBEN gives an actual date for compliance and that date has already passed or would clearly be unachievable, a revised period should be given even if ground (h) is not specifically pleaded.

Ground (j)

That steps required to be taken by virtue of section 38(2)(b) exceed what is necessary to alleviate the effect of the works executed to the building.

107. Ground (j) may only be pleaded when the LBEN requires steps to alleviate the effect of the unauthorised works (section 38(2)(b) LBCA). This would arise in cases where restoration, as referred to in section 38(2)(a), would not be desirable or reasonably practical.

LBCA 1990: Section 38:

(2) A listed building enforcement notice shall specify the alleged contravention and require such steps as may be specified in the notice to be taken within such period as may be so specified

(a) for restoring the building to its former state; or

(b) if the authority consider that such restoration would not be reasonably practicable or would be undesirable, for executing such further works specified in the notice as they consider necessary to alleviate the effect of the works which were carried out without listed building consent; or

(c) for bringing the building to the state in which it would have been if the terms and conditions of any listed building consent which has been granted for the works had been complied with.

108. Cases may arise where ground (j) has not been specifically pleaded but the Inspector is of the view that compliance with the notice would not alleviate the effect of the unauthorised works and considers that works of a more substantial nature are required. In those rare cases, it is open to the Inspector to introduce ground (j) and go on to quash the notice but NOT TO GRANT LBC. The decision letter would have to fully explain the Inspector's reasons for adopting this course of action. It would then be open to the council to initiate enforcement proceedings afresh, with new requirements. However, there is also the risk that the council would decide to take no further action.

109. This action should not come as a surprise to the parties. Although ground (j) need not specifically have been mentioned, there should have been some reference to the issue that compliance might not be sufficient to alleviate the harm.

Ground (k)

The steps required to be taken by virtue of section 38(2)(c) exceed what is necessary to bring the building to the state in which it would have been if the terms and conditions of the listed building consent had been complied with.

110. This ground may only be pleaded when the LBEN requires steps to comply with the terms and conditions of a prior LBC (section 38(2)(c) LBCA). The word "terms" covers those cases where unconditional LBC was granted. In a ground (k) appeal it will be necessary to consider whether the works required by the LBEN are excessive as a means of achieving the appearance of the building that would have existed if the terms and conditions of the original LBC had been complied with. A copy of both the (conditional) LBC and its supporting plans would normally need to be available. You must fully understand what was required by the terms and conditions which are alleged not to have been complied with.

111. As there is no deemed application or fee involved in LBEN appeals, the problems associated with condition cases under section 174 of the principal Act do not arise. The advice on conditions in respect of ground (e) appeals in paragraph 78-84 above applies equally to appeals on ground (k).

Differences between Grounds (g), (i), (j) and (k)

112. These grounds are mutually exclusive and cannot simultaneously be pleaded in relation to the same requirement within a LBEN. However, in cases where there are a number of different allegations and requirements, the appeal may plead a combination of them. A Notice issued under section 38(2)(a) of the LBCA seeks restoration of the building to its former state. Ground (g) claims that the requirements of the Notice exceed what is necessary to achieve this and can, therefore, only apply when restoration is required. In addition, ground (i) relates only to restoration.

113. A Notice issued under section 38(2)(b) requires **alleviation** of the effect of the works and this corresponds to ground (j) which can apply only to such requirements.

114. A Notice issued under section 38(2)(c) requires bringing the building to the state it would have been if the terms and conditions of any LBC granted had been complied with. This corresponds to ground (k).

115. Whilst a LBEN should state which part of section 38 of the LBCA it is issued under, this is not always the case and it is often necessary to determine this from the actual stated requirements before the grounds of appeal can be properly dealt with.

116. It is not unusual for more than one notice to be issued in respect of a single building. Conflicting grounds of appeal should have been resolved in the procedure stages prior to inquiry/hearing or site inspection. In an inquiry/hearing case the question of any conflicting grounds which have been pleaded and not withdrawn should be discussed and settled by the Inspector. In a written representations case the decision letter should proceed on the basis of the correct ground, even if not pleaded, so long as no injustice would thereby be caused. Also see Different Appeal Types.

117. It would be unreasonable for an LBEN to be used to secure an improvement to the listed building compared to its state prior to the carrying out of unauthorised works. This would include its state prior to listing. The test in *Bath City Council*[6] was whether compliance with the requirements of the notice would be more 'burdensome' than restoring the building to its former [authorised] state. In that case a roof of mixed asbestos and stone tiles was re-roofed wholly in asbestos. As it was agreed 2/3rd of the tiles were originally stone, the notice could have required re-roofing in that proportion without knowing exactly which tiles were which (ground (i). But could not require re-roofing entirely in stone as that would be burdensome.

118. In certain cases considerable variation in the requirements of the notice may be called for. An appeal allowed on any of these grounds would succeed only to that extent. The notice would be upheld, but in a varied form.

Split Decisions and mixed Success on Different Grounds

119. It may be the case that in complex cases there is a long list of detailed allegations and requirements. Some will be upheld, some found not to have taken place, others not to affect the historic character of the listed building and others to have an effect but the harm is justified so consent ought to be granted. In such cases it is important to make sure your decision is clear as to which is which. Those matters that have not taken place will succeed underground (b) and those that have taken place but do not affect the historic character will succeed underground (c). The notice can be corrected to remove them from the allegation and the requirements. A split decision can then be issued, granting consent where it is applicable and upholding the corrected notice for the remainder.

Conduct of Inquiries and Hearings

120. Secretary of State Casework and transferred Inquiries and Hearings in section 39 appeals in England are dealt with as for enforcement casework.

121. Inspectors must be fully equipped not only to test the validity of an LBEN itself but also to evaluate arguments relating to the economics of restoration works. Care must be exercised when assessing evidence relating to past or future money values. Financial

[6] *Bath City Council v Secretary of State for the Environment and Grosvenor Hotel (Bath) Ltd* [1983] JPL 737 and [1984] JPL 285

considerations can often be simplified if all cost information is obtained at current prices. Economic questions may be complicated by the presence of an unrepresented appellant faced with expert evidence given on behalf of the council or interested bodies. In such circumstances, testing the validity of the expert evidence will fall to the Inspector.

122. A discussion of the merits of the appeal commonly involves judgement on matters of aesthetics, architectural scholarship and traditional building technology. The Inspector must make a positive effort to see that unrepresented appellants fully grasp the evidence being given by the planning authority and others. Jargon should be avoided. Under no circumstances should they be left with the damaging impression that the inquiry or hearing has been conducted on the basis of a sophisticated discussion between witnesses, advocates and the Inspector.

123. All grounds pleaded and not withdrawn must be adequately explored and the Inspector's list of questions must be drawn up with this end in view. It is frequently helpful to ask the parties to address you separately on each ground of appeal in their closing submissions.

124. On many occasions the works which are the subject of the LBEN will not be visible from the public domain. In such circumstances, if apparent early enough, it may be beneficial to arrange for the pre-inquiry site visit to be accompanied so that the works can be looked at. This gives the Inspector a better impression of what is to be dealt with and its context at the outset.

125. Where discussion may be required in order to clarify the extent of works and such like, it would be more prudent to make an inspection immediately after opening the inquiry or hearing, provided both parties are properly represented and the elements discussed are explained to those attending the inquiry on your return. Experience has proved that the parties generally welcome these processes because they save inquiry time and simplify the way in which evidence can be given. It is generally prudent to make a further site inspection after hearing all the evidence, though this may well be a much briefer event that would otherwise have been the case.

Non-transferred and Recovered Cases

Format of Report

126. Inquiries in England are dealt with under the provisions of The Town and Country Planning (Enforcement) (Inquiries Procedure) (England) Rules 2002 SI 2002/2686. In all cases the preamble should set out the details of the LBEN and grounds of appeal. The date and grade of listing, the statutory listing description, the title of the conservation area and the date of designation should be given as appropriate as part of the preamble. However, if the listing description is lengthy it may be attached as an appendix to the report or included as a document and a suitable reference to it made in the preamble. Otherwise the format should follow that for S78 or S174 casework as appropriate – see template.

127. A full description of the site/appeal building and its surroundings must be given, but the writing can often be simplified by making appropriate reference to photographs/plans that may have been submitted by the parties. Since the grounds of appeal might be based on an assertion that the building is not of special interest, it is essential not to rely merely on the contents of the listing description unless it is comprehensive. The list details are essentially for identification and guidance. They are not exhaustive.

Significant features only seen on an inspection of the rear or interior of the building may have been omitted. In most cases, the description in the report should be rather more extensive than in sections 78 or 174 appeals.

128. If the listing description is inaccurate or not up to date this should be pointed out in the report. If it was impossible or unwise to gain access to any part of the building (eg because the structure was unsound), this fact should also be reported. The surroundings assume relatively greater importance in the case of demolition within a conservation area, where the general character and appearance of the area should be described.

Inquiry or Hearing Cases

129. The reporting format and procedure contained in the ITM chapters on Enforcement, Inquiries and Hearings should be followed. The main difference is that the long form of reporting is very seldom needed because the facts are not often in dispute and evidence is, therefore, not usually taken on oath. At a hearing, where the adversarial format of an inquiry should be avoided, evidence cannot be taken on oath. A hearing should normally take the form of an informal discussion where there are no disagreements as to fact. All grounds the subjects of appeal should be covered in the report. Listed building cases quite often involve considerations of the economics of the restoration and future use of such buildings and relevant arguments, when they arise from the parties' cases or Inspectors' own questions, must be fully and accurately reported. In a case involving a conservation area the parties' views on what they regard as the essential character and appearance of the relevant area should be obtained.

130. The nature of the report's recommendations will reflect the particular grounds pleaded. The recommendations available to the Inspector are as follows:

- to dismiss the appeal on the grounds pleaded and to uphold the notice, if necessary after correcting any informality, defect or error or to recommend that its terms be varied if satisfied that the correction or variation can be done without injustice to the parties;

- to allow the appeal, quash the notice and grant LBC or conservation area consent for the works which have been carried out, as if an application had been made under section 10 of the LBCA, or that section as applied by section 74(3);

- to allow the appeal, quash the notice and discharge any condition subject to which LBC was granted (whether or not that condition was the subject of the LBEN), and add new conditions if they are consequential upon the variation or discharge (section 19 LBCA).

- to remove the building from the statutory list compiled under section 1(1). Such a recommendation should only rarely be made and then only when an appeal against an LBEN has been made on ground (a).

Written Representations Cases

131. For written representations cases the form of the report should be generally as for section 174 appeals, described in the ITM chapter on Enforcement and in the ITM chapter on secretary of state casework. Confusion often arises amongst grounds (g), (j) and (k), which are mutually exclusive. Care should be taken to note the grounds on

which the appeal has been accepted by the Secretary of State rather than those originally pleaded by the appellant or agent. If an Inspector finds that other or different grounds should have been pleaded, s/he should comment on the grounds accepted as well as such other grounds as seem more appropriate. The appraisal section should set out in positive and unambiguous terms your conclusions on the impact of the works. The conclusions should take into account the representations made in addition to what was observed at the site inspection.

Transferred Cases

Exceptions

132. All appeals under section 39 and section 74 of the LBCA are now transferred to Inspectors for determination under the provisions of the Town and Country Planning (Determination of Appeals by Appointed Persons) (Prescribed Classes) (Amendment) (England) Regulations 1997 (as amended) (see SI 1997/420).

Recovery

133. On receipt of a file the Inspector should study the completed appeal form and other papers carefully to ensure that the case has been correctly transferred for decision. In some cases the possibility that the decision should properly be made by the Secretary of State will only become evident at the inquiry/hearing or site visit itself. However, if it appears from the file that the case should not have been transferred, eg because it involves a building the subject of a grant under the Historic Buildings and Ancient Monuments Act 1953, the Inspector should consult the case officer and, if necessary, their IM before the inquiry/hearing or site visit takes place. In most cases it will be appropriate for the Inspector to continue with the inquiry/hearing or site visit in the normal way but to submit a report for the Secretary of State rather than a decision letter. Arrangements would then be made for the case to be recovered.

134. A case might be considered for recovery if the Inspector is of the opinion that an appeal should succeed on ground (a) (*that the building is not of special architectural or historic interest and should be removed from the statutory list*) or that one or more of the criteria for recovery apply either to the case itself or to a run-in appeal being considered with it. For recovery criteria see the written answers on the Gov.UK site.

Procedure

135. 126. As in the case of transferred section 174 appeals, Rule 20(1) of the Town and Country Planning (Enforcement) (Determination by Inspectors) (Inquiries Procedure) (England) Rules 2002 requires the appointed person to notify his decision and his reasons therefor in writing to all persons who were entitled to appear and did so, and to anyone else who appeared and asked to be notified.

Decision Format

136. It may be necessary to deal with procedural matters at the outset. For example, if the allegation in the LBEN is inaccurate or incorrect, then it should be corrected to accord with the facts at the outset and it should be made clear that the appeal will be determined on that basis. Any grounds of appeal added or withdrawn at the hearing or inquiry should be recorded in this part of the decision.

137. Where there are identical appeals made by, say, a husband and wife, they can be

dealt with together, but this should be explained in the preliminary or procedural matters, with some form of words such as: The two appeals relate to identical works, and the grounds of appeal are the same. Consequently, the issues and material considerations will be similar. I shall, therefore, deal with both appeals together, referring if necessary to the particularities of each.

Legal Advice

138. If legal advice is required, the request should be directed through your IM who will then pass it to PINS Legal team. Detailed advice on listed buildings and conservation area matters may be obtained from the Specialist advisors in the Enforcement Group.

Different Appeal Types

139. Inspectors should understand and make clear the distinction between notices alleging a contravention of sections 9(1) and 7 of the LBCA (works for the demolition, alteration or extension of a listed building in any manner which would affect its character as a listed building and section 9(2) (failure to comply with a condition under which listed building consent was granted)). Details of any related section 174, section 78 (principal Act) and section 20 (LBCA) appeals also being considered should be set out in the normal way.

Corrections and Variations to the Notice

140. The Secretary of State's powers in section 41(1) of the LBCA for correcting and varying the notice (see section 3) and in section 41(5) concerning the service of the copies (see section 4) are exercisable also by Inspectors to whom the determination of appeals has been transferred. Corrections or variations should not go to the substance of the notice; they should be limited to such aspects as the correction of factual matters, the variation of the requirements of the notice or the period for compliance and must not cause injustice to either party.

141. If, following the inquiry/hearing/visit, the Inspector considers that there may be good reason to vary the terms of the notice in a manner not discussed or not covered in written representations, reference back to the parties through the case officer may be necessary. A similar course might have to be followed if the Inspector considers that there is the prospect of success on a point which has not been mentioned in the written representations. But reference back should be avoided if possible, subject to the rules of natural justice. There should of course be no discussion of any of these matters at the site visit.

142. Variations to the notice often arise from consideration of the various grounds of appeal. These should be noted in the appropriate section of the decision and it should be made clear that the notice will be varied to reflect those factors and that you have considered any injustice.

143. It is the Inspector's duty to get the notice in order if he/she can, under the powers available in section 41(1) of the LBCA, so long as the notice itself is not a nullity and the corrections will not cause injustice to the parties. If the steps are imprecise, suggestions for specific requirements should be invited at the inquiry/hearing. A short adjournment may well be justified. In a written representations case it may be necessary to go back to the parties. This should be done by the casework team before the file reaches the Inspector but may have been overlooked. If works have to be carried out which are not specified in the notice, it will rarely be satisfactory to quash the notice and grant conditional listed building consent.

Description of the Site and Buildings

144. The description of the appeal building and its surroundings should be as full as the subject matter of the case requires. It will usually be necessary to cover such aspects as the grade and date of listing, particular features mentioned in the listing description and title (eg group value), the date of designation or resurvey and the general character and appearance of the conservation area. The description should be limited to the particular salient features which you note at the site visit, are relevant to the question of significance and which you consider have a direct bearing on the outcome of the appeal. The history of the appeal building and its surroundings may also be relevant. These matters may be set out in separate descriptive paragraphs early in the letter, or woven into the discussion section, followed by your conclusions.

Other matters

145. Any matter considered important by one of the parties should preferably be dealt with in the record of the cases and your conclusions. It should be made clear that the other matters referred to are not sufficient to outweigh or are not outweighed by the considerations which have led to the decision, and the Template text amended as necessary. If it has not been dealt with earlier, this paragraph should make it clear that the statutory requirements under section 16(1), section 66(1) and/or section 72(1) are properly concluded on and the tests set out in paragraphs 137 – 139 of the Framework relating to whether any harm is outweighed by public benefits has been carried out.

Informal Opinions

146. The advice given in the ITM Enforcement chapter regarding informal opinions, applications for costs and lists of appearances, documents, plans and photographs applies equally to LBEN cases as to section 174 appeals.

Conditions

147. Although the power to attach conditions is wide, it is governed by the same considerations as in a s78 case and should abide by the standard 6 tests. In addition if a condition is attached to any LBC the principles are:

    a. the condition must fulfil some LISTED BUILDING purpose;

    b. it should fairly and reasonably relate to the matter for which LBC is being granted; and

    c. the condition should not be so unreasonable that no reasonable Secretary of State could have imposed it.

148. Conditions should not come as a "bolt from the blue" but should relate to a matter which has been raised at the inquiry or in the written representations. Section 41(6) of the LBCA empowers the Secretary of State to impose conditions which are more or less onerous but they must have first been canvassed with the parties to give the appellant a chance to protest.

    LBCA 1990: Section 41

    (6) On the determination of an appeal the Secretary of State may -

(b) discharge any condition or limitation subject to which listed building consent was granted and substitute any other condition, whether more or less onerous;

149. Conditions are referred to in sections 17-19 of the LBCA. The duration of LBC is normally 3 years (section 18(1)(a)). However, in most LBEN cases the application embodied in a ground (e) appeal is **for consent** works already carried out (equivalent to an application under section 8(3)(b)). Accordingly, in such cases it is not appropriate to impose a condition requiring the works to be begun by a specified date. It is also not usually desirable or enforceable to specify a date by which works already begun shall be completed. But if a condition is being imposed to require remedial action, or other works to heal scars to be carried out as part of the authorised works, it will usually be reasonable to set a time period by which those works should be carried out. Section 8(3) of the LBCA allows LBC to be sought even though the works have already been completed. However, if consent is granted, it is not retrospective; the works are authorised only from the date of the consent. A prosecution may still be brought for the initial offence.

LBCA 1990: Section 8

(3) Where -

(a) works for the demolition of a listed building or for its alteration or extension are executed without such consent; and

(b) written consent is granted by the local planning authority or the Secretary of State for the retention of the works, the works are authorised from the grant of that consent.

150. If a notice under section 38(2)(b) of the LBCA is upheld in whole or in part for the purpose of alleviating the effect of the works carried out without LBC, the period for compliance would be that which is set out in the notice or which is varied as a result of the appeal. Such works as are referred to in the steps have deemed LBC by virtue of section 38(7):

LBCA 1990: Section 38

(7) Where a listed building enforcement notice imposes any such requirement as is mentioned in subsection (2)(b), listed building consent shall be deemed to be granted for any works of demolition, alteration or extension of the building executed as a result of compliance with the notice

151. Under section 17(3) of the LBCA, LBC for the demolition of a listed building may be granted subject to a condition that the building **shall not be demolished before**:

a. a contract for the carrying out of works of redevelopment of the site has been made; and

b. planning permission has been granted for the redevelopment for which the contract provides.

152. Each case needs to be considered on its merits and adequate reasons must be given in the conclusions to justify any condition imposed. Any work to be carried out with the benefit of LBC must be described in sufficient detail for its effect on the listed building to be assessed.

153. Except where it refers to works that have already been carried out, a LBC must always be granted subject to a condition that the work to which it relates must be begun not

later than three years (five years in Wales) (or whatever longer or shorter period is considered appropriate in a particular case) from the date on which the consent is granted (section 18 of the LBCA). If any consent is granted without a time limit, the three year period will automatically apply. Conditions requiring the preservation of particular features, or the making good of damage caused by works, or the reconstruction of the building (with the use of original materials so far as practicable) may also be imposed. A listed building consent will normally enure for the benefit of the building regardless of ownership, but where appropriate a condition limiting the benefit of the consent to a specified person or persons may be imposed. See also the conditions (in the PINS suite of suggested Planning Conditions) recommended for restricting premature demolition and for recording features or buildings due to be altered or demolished.

154. It can be acceptable to quash the notice and grant LBC subject to a condition that further details be submitted for the approval of the local planning authority or for work to be carried out in accordance with a scheme to be agreed with the local planning authority. Care needs to be taken that such a scheme is possible and reasonable and the standard enforcement condition for use when the development has already been carried out should be used and tailored accordingly. NB while this may be acceptable as a condition it is not acceptable as a requirement of the LBEN.

Local Plan Examinations

Important advice about this chapter

This ITM chapter relates to local plan examinations which were submitted for examination on or before 24 January 2019. The 2019 NPPF states that for the purpose of examining these plans, the policies in the previous (2012) Framework will apply.

Please note that this chapter is not now being updated

A new ITM chapter to cover plans submitted after 24 January 2019 is being prepared. Several sections have been completed and can be found here.

Inspectors examining plans submitted for examination from 25 January 2019 may continue to use this chapter as a source of general advice in relation to the 2012 NPPF and for topics not yet covered within the new version of the chapter.

However, please note that the new 2019 local plans ITM sets out best practice which applies to any plan examination, including, for example, on main modifications and the policies map.

[Annex 15 sets out answers to some frequently asked questions relating to the 2019 NPPF, where this might have some bearing on the examination of plans submitted before 24 January 2019]

Contents

Information Sources

Planning and Compulsory Purchase Act 2004 (as amended)

Town & Country Planning (Local Planning) (England) Regulations 2012 (as amended)

National Planning Policy Framework

Planning Practice Guidance

PINS Procedural Practice in the Examination of Local Plans (June 2016)

Ministerial Statements

Introduction to the Examination Process

Purpose and scope

1. This training manual is concerned with the professional aspects of the examination of Local Plans (LPs/the plan) and also with the running of efficient and effective examinations. It will form the basis for training Inspectors to conduct examinations and updating Inspectors about key matters that are pertinent to the examination of LPs.

2. Whilst other training material produced by the Planning Inspectorate (PINS) is held on the Knowledge Library, the aim of this chapter is to consolidate all existing LP material apart from PINS *Procedural Practice in the Examination of Local Plans* into one document. It will be a 'living document', updated as a result of lessons learned from casework and changes in policy and legislation.

3. The chapter includes within its remit the examination of full local plans under paragraph 153 of the Framework, and any other plan dealing with development management policies, area action plans, site allocation plans, strategic plans or thematic plans. Where the examination of a particular type of plan involves specific considerations that differ from the norm, a separate section is included detailing those considerations.

4. This chapter does not include training material for Community Infrastructure Levy (CIL) examinations which are covered by a separate chapter of the training manual. Also, it does not include consideration of the examination of neighbourhood plans, as to date PINS has not been called upon to carry out this function, although matters related to the interaction between LPs and neighbourhood plans are covered.

Procedural Practice in the Examination of Local Plans

5. The Procedural Practice (PP) document sets out in detail the procedural aspects of the examination of plans and is aimed at all those involved in the process of examining a plan. It is produced by PINS and is available to our external customers. This training manual chapter does not replicate its content. Therefore for a comprehensive picture Inspectors will need to refer to both documents although references will be included.

Legislation

6. The main legislation setting out the process for LP examination and matters that the Inspector must decide upon is the Planning and Compulsory Purchase Act 2004 (PCPA) (as amended) and the Town & Country Planning (Local Planning) (England) Regulations 2012 (the Regulations)(as amended).

7. The starting point for the examination of LPs is s20 of the PCPA, which sets out that each Local Planning Authority (LPA) must submit every development plan document (DPD) within the Local Development Scheme to the Secretary of State (SoS) for independent examination. For historic reasons the Act refers to DPDs whereas the NPPF and the Regulations refer to local plans but the meaning of these terms is the same. The plan will be submitted directly to PINS and the SoS will appoint an Inspector to carry out the examination.

8. Under s20, s21 and s21A the SoS has the power to intervene in a plan examination. That intervention may occur at any point before the document is adopted, and may include directions to modify the plan or direct that the document is submitted to the SoS for approval. After the examination has commenced and before the plan is adopted the SoS may also direct that the plan is withdrawn.

9. S20(5) sets out the fundamental matters that an Inspector must determine during the examination, including whether the plan is 'sound'. Another fundamental determination before the Inspector, specified at s20(5)(c), is whether the LPA has met the duty to cooperate (DTC) as set out in s33A. Inspectors must also consider whether the plan satisfies the requirements of s19, 24(1) and 17(7), which set out amongst other matters that in preparing a plan the LPA must have regard to national policies and guidance and that, in the case of London Borough plans, they must be in general conformity with the London Plan.

10. If the Inspector has determined that the plan satisfies the requirements set out in s20(5), he or she must recommend that the plan is adopted. If any of the requirements have not been met, the Inspector must recommend non-adoption. However, this is extremely rare because, if asked to do so by the LPA, the Inspector must recommend main modifications to the document that would ensure it meets the requirements of s20(5) (see s.20(7) to (7C)). Nevertheless the requirement to meet the DTC must be carried out prior to the plan being submitted for examination, and therefore modifications cannot be used to rectify a legal failing in this respect. In practice main modifications should only be recommended by the Inspector when they are fundamental to the soundness or legal compliance of a plan.

11. Part 6 of the Regulations (Reg(s)) sets out further details relating to the examination process. Regs 18-21 set out the process by which the LPA must publicise the plan before submission and submit the documents to the SoS. Regs 22-25 set out steps that must be carried out during the examination and duties

that are imposed upon the appointed person. Regs 26-31 cover other matters including adoption, withdrawal, revocation and call-in.

12. The Regulations sets out the following requirements with regard to the examination. Reg 22 sets out a list of documents which must be submitted alongside the DPD. This includes the sustainability appraisal report, a submission policies map, a statement setting out details of the LPA's pre-submission consultation including a summary of the main issues raised, copies of pre-submission consultation representations, and any other supporting documents. In addition to the duties contained in s20(5) of the PCPA, Reg 23 sets out that the Inspector must consider any pre-submission representations. In accordance with s20(6) of the Act, any person who makes representations seeking to change the plan must (if he so requests) be given the opportunity to appear before and be heard by the person carrying out the examination.

National Policy and Guidance

13. In preparing a plan the LPA must have had regard to national policies and advice contained in guidance issued by the SoS (s19(2) of the Act). In practice this currently means the National Planning Policy Framework (NPPF), Planning Policy for Travellers Sites (PPTS), National Planning Policy for Waste, Written Ministerial Statements (WMS), the Planning Practice Guidance (PPG) and any associated technical guidance and other policy.

14. The NPPF sets out specific policy relating to LPs at paragraphs 150-182, including details of the areas policies should cover, what principles LPAs should follow in writing their plan, and what an appropriate evidence base would look like. Paragraph 151 in particular should be noted; it states that LPs should be consistent with the principles and policies set out in the NPPF, including the presumption in favour of sustainable development (this latter duty is also imposed by s39(2) of the PCPA).

15. Paragraph 153 specifies that each LPA should produce a LP for its area, which can be reviewed in whole or in part to respond flexibly to changing circumstances. Supplementary planning documents (which do not form part of the statutory plan) can be used to assist applicants for planning permission.

16. Inspectors should have particular regard to paragraph 182, which details criteria for what constitutes a 'sound' plan, namely that the plan should be:

- positively prepared
- justified

- effective
- consistent with national policy

17. The entirety of the NPPF is relevant but Inspectors should refer to the relevant section depending on the subject matter of the plan. The same principle applies to the PPTS.

18. The WMS statement of 21 July 2015 on *Local Plans* is of particular relevance to LP examinations. It sets out amongst other matters that Inspectors should support LPAs in the examination process and identify significant issues at an early stage. It also reinforces the fact that an early review of an LP may be appropriate as a way of ensuring that the plan is not unnecessarily delayed. Others that may have a bearing are concerned with wind farms (18 June 2015 *Local Planning (Wind Farms*)) and the *Planning Update* (25 March 2015), particularly the sections on parking and housing standards.

19. On 7 February 2017, the Government published the Housing White Paper entitled "Fixing our broken housing market". The White Paper is a consultation document on a number of proposed policy changes to NPPF as well as to the regulatory framework for plan making and the proposals do not yet form part of Government policy. In taking account of the White Paper, Inspectors should have regard to this overall context and adopt a proportionate approach that ensures that plans that are at examination stage are not unnecessarily delayed.

20. In light of this, it is for Inspectors to consider whether it would be appropriate to seek the LPA's view in the first instance on any implications of the White Paper for the draft plan. Inspectors should then consider whether it is necessary to take any steps to deal with these matters. It is likely, however, that the appropriate steps will be for the LPA to take in due course, since it will be incumbent on it to review its plans in the light of the Government's changes to NPPF, and any regulatory changes that come into effect.

21. The PPG provides further detail relevant to LPs that Inspectors will need to have regard to, particularly in the following sections:

    - Local Plans
    - Duty to cooperate
    - Housing and economic development needs assessment
    - Housing and economic land availability assessment
    - Strategic environmental assessment and sustainability appraisal

22. Although this first edition of the chapter does not specifically cover minerals and waste plans, the National Planning Policy for Waste may be relevant across a range of development plan documents. The policy sets out that LPAs should use a proportionate evidence base (paragraph 2), identify opportunities to meet the needs of their areas (paragraph 3), and identify suitable sites (paragraph 4).

Other considerations

23. Other considerations for LP Inspectors will include case law. There is a considerable volume of them arising from s113 (PCPA) challenges and relevant judgments are considered throughout the chapter.

An Outline of the Plan Making Stages

24. The main plan making stages for a LPA are preparation, publication, examination and adoption which are covered briefly in turn.

25. A LPA will typically start the local plan process by identifying the issues facing the locality over the plan period and by considering what their priorities are. At the same time it will begin to assemble the evidence base required to inform the plan and to demonstrate compliance with statutory requirements. This evidence base must include a Sustainability Appraisal (SA) which will incorporate a Strategic Environmental Assessment (SEA)[1] and plans may also require a Habitats Regulations Assessment (HRA), in which case its findings should be taken into account in the SA. The development and appraisal of proposals in a local plan should be an iterative process, with the proposals being developed and refined to take account of the findings of the SA. These assessments may have various iterations as the plan develops and evidence emerges so that they inform the plan making process rather than waiting until the later stages before they are produced. This evidence will ultimately be submitted to the examination as supporting documents (see Reg 17(c)).

26. Under s15 of the PCPA 2004 the LPA will need to prepare (or revise) its Local Development Scheme (LDS), which will specify the documents which are proposed to be development plan documents. The timetable for the preparation and revision of the development plan documents must be published as per s15(2)(f). Where the scope of a particular plan is being criticised by representors as failing to address other matters considered important, the Inspector may need to have regard to the LDS to be clear about the role of the

[1] See Section 2 of PPG on Strategic Environmental Assessment and Sustainability Appraisal (ID 11-paras 005 to 025)

particular plan under examination and how it is intended to sit within the overall development plan which may be comprised of a number of DPDs.

27. Whilst the LDS is not a document on which the Inspector can make any recommendations, the LPA may need to amend the LDS to ensure that it is up to date and properly reflects the subject matter of its proposed plans. The legal requirement is that plans are prepared in accordance with the LDS as per s19(1) of the Act. For example, if the LPA had originally intended to include site allocations in its Local Plan but subsequently decided to deal with the matter in a separate plan, the LPA should make this clear by updating the LDS.

28. During this initial period and throughout the preparatory period the LPA will be complying with the DtC by collaborating with a wide range of organisations (s33A of the PCPA 2004) as prescribed at Reg 4.

29. The LPA must prepare a Statement of Community Involvement (s18 PCPA 2004), which will set out how the LPA intends to consult the community and other groups. In preparing the local development documents the authority must comply with their Statement of Community Involvement.

30. Consultation at the initial plan making stages is carried out under Reg 18, which specifies that an LPA must notify each of the consultation bodies about the subject of its proposed plan and invite each of them to make representations about what a local plan with that subject ought to contain. In practice a LPA has wide discretion to consult as they see fit. Many LPAs choose to use an iterative approach including an initial consultation on the plan's key priorities followed by a series of further consultations as they build up the detail of the plan. Frequently LPAs choose to do an initial consultation where they present a preferred option and multiple alternatives but it is important to note that there is no longer a legal requirement for consultation on a preferred options document.

31. The next stage will be carried out under Reg 19, where the authority will publish the draft plan in its final version, taking into account feedback from community involvement at the preparation stage. A public consultation involving all of the bodies consulted during the preparation stage will be carried out for a minimum of 6 weeks. The published draft plan and representations received will then be submitted for examination.

32. The provisions for the adoption of a local plan are in s23 of the PCPA 2004. LPAs may adopt the plan only in accordance with the recommendation of the independent examiner. This may either be the plan as submitted or with modifications that do not materially affect its policies (known as 'additional

modifications') or with the Inspector's recommended main modifications and any additional modifications. In accordance with Reg 25 the LPA must publish the Inspector's recommendations and in accordance with Reg 26 make available the plan, associated documents, and an adoption statement.

Overview of the Examination

33. The key focus of an examination should be on soundness and compliance with the legal requirements. In considering issues of soundness the starting point is that the LPA has submitted what it considers to be a sound plan. Therefore attention should be directed towards deciding whether the plan as submitted is sound rather than whether it would benefit from improvements. In so doing the aim should be to carry out examinations in an efficient and effective manner that is proportionate to the nature and scale of the plan.

34. The PPG on Local Plans underlines that Inspectors should work proactively with LPAs. There are also expectations[2] that issues not critical to soundness or legal requirements should not cause unnecessary delay; that fundamental concerns should be identified at the earliest possible stage and that Inspectors should work with LPAs to clarify and address these; that suspension of the examination should be considered so that LPAs can remedy outstanding issues and that consideration should be given to the option of the LPA making a commitment to review. Further guidance on what should happen when an Inspector has significant concerns about a Local Plan can be found at Paragraph 022 of the PPG[3]. See also paragraph 5 of the Introduction to the PP and paragraphs 3.7-3.10 on fundamental flaws.

35. At all times the undergirding principles of openness, fairness and impartiality should be kept in mind. This means that the various stages of the examination should be conducted in a transparent manner. This may involve setting out a provisional line of thinking if that would help the examination to progress. Another key theme for Inspectors undertaking examinations is to adopt a pragmatic and flexible approach as highlighted in the letter from the Minister to the Chief Executive of PINS dated 21 July 2015.

36. As part of this it is essential that Inspectors should flag up important issues at an early stage and work with LPAs to allow plans to be adopted if at all possible. This may involve proposing various alternative solutions in a pro-active manner or providing LPAs with different options as to how a plan might proceed. Indeed, in general terms the use of questions to the LPA at any time or

[2] ID: 12-004-20160519
[3] ID: 12-022-20160519

consulting with it about intended courses of action can often provide necessary information or assist in dealing with matters effectively. An unfavourable finding from an Inspector should, however, never come as a surprise to a LPA. Nevertheless, the scrutiny of the supporting evidence and the justification for particular courses of action that have been selected should be rigorous.

37. Subject to considerations of natural justice and the PCPA and Regulations, Inspectors have a reasonable degree of discretion as to how to conduct examinations. Nevertheless there are a number of main stages that can be identified. These comprise the initial preparation and examination; preparation prior to the hearings; the hearings themselves; preparation of the schedule of main modifications and other post hearing matters and reporting. These are covered in more detail under the heading of the role of the Inspector but they will not necessarily always follow in the same order particularly if time is required to address critical matters before moving on to other parts of the examination.

38. If, at any time, having considered the guidance in the PPG, you consider there may be fundamental difficulties with the plan and/or that a suspension may be required in order to re-visit significant issues, you must advise and discuss this with your mentor, manager or GM and ensure that the Plans Team are aware. It is essential that a draft of your letter/note is seen by the GM, who may wish to comment before it is published, and that the final version is copied to the Plans Team so that they can update DCLG at least 24 hours in advance of publication of the letter/note. These principles also apply to the production of interim findings and post hearing advice as described in paragraphs 94 and 94A.

39. A key role in the examination process is played by the Programme Officer (PO) who should have been appointed by the LPA prior to submission of the plan. The PO provides invaluable administrative support and acts as an impartial officer of the examination under the direction of the Inspector. She or he is the link between the Inspector and the LPA and the point of contact for representors. Briefly, the main tasks of the PO are to liaise with all parties to ensure the smooth running of the examination, to organise the hearings and to ensure that all documents are recorded and distributed as necessary. Further references to the PO role are made later but a good working relationship is important for the effective running of the examination. Many POs have considerable previous experience over a number of years[4].

[4] 4th bullet point of paragraph 3.30 of PP and footnote 8 provides further information

40. If the PO is not experienced then refer them to the material referenced in the PP. In these circumstances it is unlikely that any specific training could be arranged for them by PINS. It might also be possible to find another PO to mentor them and you should suggest that they observe another examination. Ultimately, however, it can be expected that the Inspector will be asked more questions by the PO than might otherwise be the case.

Examining for Soundness

41. At the heart of the examination process is whether the plan is sound as referred to at paragraph 182 of the NPPF. However, the concept is not defined in the 2004 Act.

42. As stated in the judgment on *Grand Union Investments Ltd v Dacorum BC* [2014] EWHC 1894 (Admin) at paragraph 59:

But the guidance as to "soundness" in the NPPF is policy, not law, and it should not be treated as law. As Carnwath L.J., as he then was, said in Barratt Developments Plc v The City of Wakefield Metropolitan District Council [2010] EWCA Civ 897 (in paragraph 11 of his judgment), so long as the inspector and the local planning authority reach a conclusion on soundness which is not "irrational (meaning perverse)", their decision cannot be questioned in the courts, and the mere fact that they have not followed relevant guidance in national policy in every respect does not make their conclusion unlawful. Soundness, he said (at paragraph 33) was "a matter to be judged by the inspector and the local planning authority, and raises no issue of law, unless their decision is shown to have been "irrational", or they are shown to have ignored the relevant guidance or other considerations which were necessarily material in law".

43. Further insight can be gained from paragraph 67:

The assessment of soundness was not an abstract exercise. It was essentially a practical one. If the core strategy as submitted was unsound, the inspector had to consider why and to what extent it was unsound, what the consequences of its unsoundness might be, and, in the light of that, whether its unsoundness could be satisfactorily remedied without the whole process having to be aborted and begun again, or at least suspended until further work had been done.

The Role of the Inspector and Good Practice to Achieve Efficient Examinations

44. This section provides an overview of these matters specific to Inspectors and does not repeat the PP. It is therefore essential that this is referred to for more detail.

Initial Preparation and Examination

45. During the initial stages there are likely to be a number of different strands requiring attention at the same time. Whilst this section deals with them separately Inspectors should be aware of all of them during this part of the examination and prioritise the action to be taken depending on the particular circumstances. At the end of this stage the direction of the examination should have been set. Initial clarification questions should have been asked of the LPA and addressed by them; matters, issues and questions to form the basis of the examination and the hearings completed; dates for the hearings and a provisional programme arranged; and procedural guidance about progressing representations and the content of any hearing statements provided.

Practical and procedural matters

46. On appointment there are some initial administrative checks to be done of the confirmation letter and PO details. Furthermore, it is essential to check that the key relevant documents have been provided or are available. Any omissions should be rectified by the LPA and the Plans Team should be able to assist with this. If it has not done so already consider whether the LPA should be requested to provide a statement confirming that the relevant procedural and legal requirements have been complied with[5].

47. It is advisable to make early contact with the PO if only to introduce yourself and exchange details, ascertain whether there is an examination website and arrange for it to be set up if not. This may include a numbering system/protocol for publication of examination documents on the website. It is also important to ensure that ways of working are established with the PO as soon as possible and that the expectations of them are made clear. Unless the large numbers make this impractical the PO should also be asked to draft a first letter to representors[6] informing them of the Inspector's appointment and giving details of the website or any other matters that can be confirmed at that stage.

48. The first task in undertaking an examination is to read the plan in order to get an overall sense of it and to make notes of any particular questions that it raises

[5] Paragraphs 1.13 & 3.21 of PP
[6] Paragraph 3.1 of PP

in your mind. Subsequently a good way to become familiar with the likely issues is the consultation statement that is required to be submitted under Reg 22(1)(c). In particular, there is a requirement to provide a summary of the main issues raised in representations. This is particularly important in larger examinations and should be insisted upon. In some instances the local planning authority will provide a commentary on its response to the representation which should be taken into account and which may explain why further changes to the plan are proposed or not. Copies of the representations are also required to be provided under Reg 22(1)(d).

49. Although not a legal requirement it is vitally important for representations to be organised and arranged in policy order with a separate set by representor number. They should also be clearly indexed with a searchable electronic database. In large examinations this should be required as a pre-requisite and Inspectors should not take up time dealing with such matters[7]. The assistance of the PO should be requested if the local planning authority is unable to do this.

50. Many local planning authorities use a standard template for representations with a tick box option for those that wish to be heard[8]. Whether this is the case or not it will be important for the PO to establish the numbers wishing to attend the hearings and the policies or matters that the representation relates to. However, as the examination progresses POs should check with participants that they still wish to attend given that equal weight is given to written representations. This is best done once a draft programme has been published alongside the Inspector's guidance note when it should be apparent which session(s) will be most relevant to the representation.

Data Protection and Local Plans

51. The General Data Protection Regulations (GDPR) took effect from 25 May 2018. These are intended to increase the control that individuals have over their personal data, and the transparency and accountability of bodies in their use of personal data. The main area where these will affect Inspectors examining a Local Plan is in relation to documentation (mainly representations) which includes contact and other personal details relating to individuals.

52. Advice on the disposal of any such representations after the High Court challenge period for the Local Plan has expired (or after the conclusion of any such challenge), may be found at Annex 14.

[7] Paragraph 1.11 of PP
[8] Annex 1 of PP

Clarifying problems and identifying issues

53. A first task is to undertake a thorough read of the plan and any suggested changes to become familiar with it and to determine the basis of the examination if necessary. This may involve confirming whether an addendum of focussed changes should be considered as part of the submitted plan or whether a schedule of suggested changes that are potential main modifications should proceed alongside the plan. LPAs may also keep a list of minor changes but additional modifications are not before the Inspector. Advice about the approach to take is in the PP at paragraphs 1.2 and 3.3 and this has regard to the scope of the changes and whether they alter the strategy of the plan and whether consultation has been undertaken. Either way participants should be left in no doubt as to the stance the Inspector is taking, although before reaching a settled position it may be prudent to seek the views of the LPA. Dealing with other post submission changes instigated by the LPA separately from changes that it suggests in response to the Reg 19 representations are covered at paragraphs 5.20 to 5.23 of the PP.

54. Inspectors should not hesitate to ask initial clarifying questions of the LPA to aid their understanding of what the statutory or soundness issues are. Where is it not readily apparent from the submitted material, these could relate to establishing the particular parts of the evidence the LPA is relying on to support specific matters in the plan; whether it has addressed relevant statutory requirements; a summary of the LPA's reasons for choosing a course of action if not (apparently) supported by the main evidence or to check the understanding of more fundamental matters that underpin the examination. Questions of this nature should be specific rather than general and should concentrate on the soundness of the submitted plan rather than on alternatives. All questions should also be neutrally phrased but of an inquisitorial nature. Basic factual queries (e.g. is there a viability assessment of the plan? where can a document be found in the list of the evidence base documents?) can be raised by e-mail via the PO whilst others would need to be a formal examination document. These questions should be posed as they occur rather than 'saved up' and raised all at the same time.

See *Inspector's Preliminary Comments and Questions* West Oxfordshire Local Plan July 2015 IN001 and *Inspector's Preliminary Questions Clarification and Comments and Questions* Cornwall Local Plan 20 February 2015

See also Annex 1 and 2

55. It will also be important at this early stage of preparation to obtain an overview of the representations or allegations of unsoundness and determining those who wish to be heard at the hearing under s20(6) of the Act.

56. Concerns that there may be potential major flaws should be identified as soon as possible in accordance with the PPG and PP. Such matters might include possible failure to meet the DtC, serious conflict with the NPPF in relation to, for example, objectively assessed housing need or apparent defect in the sustainability appraisal. The GM should be advised accordingly. However, the Inspector should not express any firm conclusions as something may have been missed (or evidence documents not provided). The aim is to flag such concerns as early as possible to avoid late surprises for the LPA. Options as to how to proceed include seeking further written evidence from the local planning authority to respond to specific concerns or holding relevant hearing sessions in order to reach a conclusion on that matter if it cannot be resolved by written means. Exploratory meetings should be exceptional since in the majority of cases it has been found more effective to seek written clarification in the first instance and then, if necessary, explore the concerns through a hearing. Ultimately the examination may need to be suspended[9].

Arranging hearings

57. As soon as possible the Inspector should decide on provisional dates for hearings in conjunction with the LPA and PO and establish whether suitable accommodation is available[10]. It is advisable to explore dates in the earliest stage of preparation but do not publicise these until the initial preparation has been done so that it is known whether there may be delay whilst clarification/further evidence is sought from the LPA on any significant matters of concern.

58. When examining a full local plan where there is substantial dispute about DtC/OAHN/housing requirement, as well as allocations, it is recommended that the hearings are split into stages to deal first with statutory and strategic issues before individual sites and other policies. The first set of hearings would normally cover statutory compliance (including the DtC, the overall scope of the SA, Habitat Regulations); the positively prepared test of soundness in relation to any unmet needs of adjoining authorities; the assessment of the OAHN/housing requirement and the economic strategy. If there is a distinct *spatial* strategy (e.g. the plan makes major choices between market towns and other settlements) which could be discussed without considering individual sites, this might also be worthy of inclusion in the first stage of hearings. Inspectors should also try and cover any other matters where they have initial serious

[9] Paragraphs 3.8 & 3.9 of PP
[10] Paragraph 3.1 of PP

concerns, which might result in further work being required from the LPA during any post-hearing suspension.

59. The benefits of such a staged approach include:

- making the process more manageable in terms of preparation and allowing time for preliminary findings if there are significant matters to be addressed;
- avoiding abortive work if the plan has such significant flaws that it needs to be withdrawn;
- establishing whether the OAHN/housing requirement is about right. If it is about right then this can provide a greater focus for testing the adequacy of the allocated sites. If it is not, then further work can be required from the LPA to produce a revised figure and identify what further sites may need to be allocated to deliver it.

60. The second stage of hearings could be provisionally booked at the outset, but to be most effective there should be sufficient separation to enable the inspector to publish preliminary findings where necessary, and to set out the issues to be addressed in the stage 2 hearings and define the agendas, as appropriate. Depending on the Inspector's conclusions from the first stage of hearings, the examination might need to be suspended immediately for further work. If the Inspector is satisfied that there is no substantial unsoundness, then the publication of preliminary findings will not be necessary and the next stage of hearings can proceed.

61. Experience also shows that sitting on 4 consecutive days is very onerous so normally Inspectors should sit from Tuesday to Thursday only[11]. The LPA is required to give at least 6 weeks' notice of the start of the hearings (Reg 24). Normally where you are setting out pre-hearing questions for parties to respond to with written statements a little longer will be required. In most cases a pre hearing meeting (PHM) is not necessary as relevant matters can be covered by the Inspector's guidance note[12]. If exceptionally a PHM is necessary because, for example, of the scale of the examination or because certain procedural matters are complicated then the date should be set at this time. There is further advice in the PP at paragraphs 9.18 – 9.24.

[11] Paragraph 5.5 of PP
[12] Paragraph 14 of the Introduction to the PP and paragraph 3.19

62. In some smaller examinations hearings may not be necessary although the principles of asking initial questions and setting out matters, issues and questions to structure the examination process is still appropriate.

Initial preparation for the hearings

63. The next stage of preparation is to identify the matters and issues that are critical to the examination having regard to the criteria for soundness in the NPPF with reference to the plan, key representations and relevant sections of the evidence base. These will help to inform the basis of the hearing sessions and provide the examination with shape and purpose. The convention of raising matters, issues and questions as referred to at paragraph 3.5 of the PP, should not become a straightjacket but should be used flexibly and positively. This is because they should be refined in the light of evidence received as the examination progresses and should not automatically be translated into matters to be dealt with at the hearings. Also, matters, issues and questions should be specifically relevant to the examination in hand and therefore while examples of how Inspectors have approached this task are of interest, they should not be used uncritically in other cases. Issues should generally take the form of a question to be answered around the criteria for soundness rather than simply defining topic areas. See Annex 3 and 4.

64. At the same time, prepare any further preliminary questions for the LPA. These could relate to initial matters to be explained, requests for extra information or points which may be pursued at the hearings. A deadline should be given for any reply and this may need to allow time for representors to assimilate and respond to any information provided especially if it relates to critical matters. Questions could relate to plan preparation or matters where there is obvious dispute or where you have concerns of your own in relation to soundness. Inspectors should avoid asking 'standard' or general questions but should aim for focused and specific ones based on careful preparation. Where possible matters of fact should be clarified before the hearings. Careful thought should be given to whether certain points can be answered in advance of the preparation of any hearing statements to avoid them being covered in detail unnecessarily. Generally speaking there should not be a need for further topic papers to be provided by the LPA since the assumption is that the evidence base is complete on submission.

65. Start to think about the way that the hearing sessions should be organised and the most effective way of including the representors who have asked to be heard. This will depend on the complexity of the issues and the number of representors wishing to attend. Topics may be covered in half a day or less. Experienced Inspectors will develop a sense of how long topics are likely to take

but newer Inspectors may wish to review example agendas from similar examinations. It is better to allow more time rather than less time to begin with because of the difficulties that 'over-running' can create. Sitting should be for two 3 hour sessions each day and for up to 3 days a week. Longer than this is unduly onerous. A fourth or final day can be included for site visits or to allow for the need for certain topics to have to be resumed. Once you have a draft programme ask the PO to allocate participants accordingly and review if necessary.

66. A guiding principle is that hearings should be focused events to assist the Inspector in reaching a view about soundness rather than simply an opportunity for everyone to have their say. There is a right to be heard but not a right to speak about every single matter or repeat what has already been set out in writing. Those who are not seeking changes to the plan or who have not objected but who still wish to speak should be firmly but politely declined on the basis than an examination is distinct from other types of planning procedure. The attendance of other parties where necessary to assist the Inspector in considering particular matters of soundness should ideally be requested at an early stage[13]. This is especially as such participants are likely to be public bodies with a technical expertise such as the Environment Agency and Natural England. In the unlikely event that land in an adjoining LPA area needs to be discussed the Inspector should ensure that the relevant LPA is available to participate in the session and has had the opportunity to submit a written statement.

67. The landowner/developer of an allocation included in the plan may support that proposal and thus not have a right to be heard. However, if your questions relate to matters such as the deliverability of the allocation then you may wish to confirm with the LPA that in order to test these matters you are specifically inviting the landowner/developer for that purpose and will consider their evidence as part of the LPA's case for the plan. In a similar way, if there is cogent opposition/objection to any allocation such that you might be considering it unsound, then it would be best to invite the landowner/developer to assist in answering your questions to the LPA on the matter. This is because, if the deletion of the allocation were proposed as a modification, the landowner would be likely to object and, not having had any say the first time round, a further hearing might be needed.

68. Dealing with 'omission' sites can be time consuming. These are pieces of land that representors consider should be allocated but which are not so allocated in

[13] Paragraphs 3.11 and 3.13 of PP

the plan. However, the purpose of the examination is to consider whether the submitted plan is sound. Therefore it is not appropriate at the beginning of the examination and in setting up the hearings to include in the programme the consideration of alternative sites. This should be made clear at the outset to representors. Instead the focus will be on whether or not the process followed by the LPA in selecting the allocated sites is sound. This is likely to involve looking at both the process of site selection, including the underlying evidence base, and the soundness of individual sites where they are challenged (or the inspector him/herself has doubts about them). Promoters of omission sites will be allowed to put arguments on these issues but not to promote the merits of their own site.

69. If it is concluded that additional sites are needed in order to meet a development requirement or if proposed sites are not sound then the LPA should be requested to put forward alternatives. Alternatively if the site selection process as a whole is unsound then the LPA should be invited to fix it and re-run the process.

70. This advice on the approach to omission sites also applies to representations seeking to alter development boundaries, or the boundaries of locally-designated green gaps and the like. In such instances the soundness of the LPAs proposed boundaries and the methodology underlying them should be examined first.

71. A significant exception to this approach might be a situation in which the LPA is proposing to under-provide for housing against their OAN. In the situation where the proposed strategy is capacity led it might be necessary, depending on the circumstances, to examine whether – in principle – there are other, non-allocated sites that could contribute to the housing supply.

72. More than 20 representors at a time are difficult to manage. Various strategies can be used to manage this successfully starting by confirming that everyone still wishes to participate having regard to the programme set and the matters being pursued by the Inspector. The model representation form has a box to tick to indicate a wish to take part in the hearing but this should not automatically be taken as something that must be accommodated. Rather the Inspector should prepare the draft hearings programme by listing the matters and issues for discussion and any specific questions, and the proposed dates on which the hearings will be held, but not listing any participants or the dates for individual sessions.

73. The PO should send the draft programme to all representors asking them to say which matters and issues they wish to attend the discussion on (with the proviso that of course the matters and issues must be relevant to their original

representations). The PO's letter will need to make it clear that this is their opportunity to express their wish to be heard, irrespective of what they said on the comment form.

74. Only those representors who reply at this stage will be invited to attend; others will not be, even if they ticked the YES box on the comment form. The legal basis for this approach is that Reg 20(6) does not specify at what stage and in what form a request to be heard by the inspector must be made. This approach is most relevant in cases where large numbers of representors are anticipated. A form of words to express this is at Annex 12. Such an approach may also be beneficial where numbers are smaller and correspondence could invite representors to confirm their need to attend.

75. In addition, those with common interests should appoint a spokesman to have a place round the table. Two people from the same organisation could 'hot-seat'. Alternatively two sessions could be held divided between a technical one for professional representors to address detailed evidential matters and others with a broader interest in the topic. Another option is to accommodate those raising peripheral points in a general session towards the end of the hearings. This could be done by giving them their right to be heard, allowing the LPA to respond and asking any questions before moving on to the next group. However, a robust approach may have to be taken to ensure that attendance is essential especially if it is apparent that an individual or organisation's contribution is unlikely to assist the Inspector[14].

76. If hearings are necessary on a large number of site allocations it is advisable to group these together to avoid them taking up a disproportionate amount of time.

77. Once a preliminary hearing programme has been prepared with representors allocated to appropriate sessions it is advisable to seek the views of the LPA before finalising. Furthermore, the hearing programme should be kept under review and could be subject to change if participants withdraw or it becomes apparent that individual sessions would serve no purpose at the time originally scheduled. The first published version of the hearing programme which assigns parties to specific hearing sessions should be treated as a draft with parties asked to confirm (within a short fixed deadline) whether they will attend and/or consider that their representation justifies attending any other session. See Annex 5 and 6.

[14] See also paragraphs 5.2-5.4 & 5.18 of PP

78. As part of the preparation consider whether it would be useful or practical to visit the area. This could be tied in with an initial meeting with the PO or to inspect the proposed venue but lengthy journeys should not be undertaken solely for this purpose.

Material to be prepared before the hearings

79. There is no legal requirement for written statements to be produced in advance of the hearings. They should only be requested if they would assist in addressing any of the specific, outstanding issues or questions by covering matters not tackled previously or, in some cases, by bringing together disparate sources of evidence in a coherent fashion. Statements need not be requested on every issue or from every representor who are only entitled to address issues pertaining to their original representation. Do not seek further material from any of the participants, including the LPA, if you already have the information that you need. Posing general questions to be covered in hearing statements should therefore be avoided as this is likely to lead to the submission of further extraneous material.

80. Consideration should also be given to encouraging the use of Statements of Common Ground setting out matters of agreement or statements confirming specific matters of disagreement. This will encourage the parties to engage with one another and explain their differences[15]. The hearings should not be the place to settle factual matters or to explore the underlying assumptions behind a party's case especially where technical issues are concerned. The use of a technical seminar or meeting could also be helpful although these would need to have clear 'ground rules' and direction.

81. An Inspector Guidance Note should be produced setting out procedural arrangements for the examination and confirming the timetable and format for representors and the LPA to submit any hearing statements[16]. See Annex 7 and 8.

82. Unless there are major problems raising uncertainties as to how the examination will proceed, then by the end of the Inspector's initial period of preparation the PO should be able to issue a letter to representors highlighting the availability of the Inspector's Guidance Note; the draft hearing programme (for stage 1 only if there are to be staged hearings) and the Inspector's issues and pre-hearing

[15] Paragraph 3.17 of PP
[16] Paragraph 3.20 of PP

questions. Ensure that there are clear deadlines for parties to confirm whether they wish to attend and for the submission of any written statements. Be realistic about the time you will have available to read those further statements and prepare hearing agendas in advance. Representors should also be advised that it is incumbent on them to check the website for details of any changes to the hearings programme.

83. Bear in mind that where you have sought clarification material from the LPA as part of your initial preparation or where the LPA submitted new or updated evidence which had not been published alongside the Reg 19 Plan, then representors will not have had the opportunity to comment on it. Accordingly, make sure that any such important new material is weaved into your pre-hearing questions or attention is drawn to it.

Preparing for the hearing sessions

84. Inspectors often find it useful to produce agendas for each hearing session[17]. They give direction to the discussion and can be used to alert the participants to matters that you wish to raise particularly if there is a need to probe beyond any previously posed questions. The larger and more complex the hearing, the more detailed the agenda should be in order to assist the Inspector in providing a focus on the day. There is no need for them to replicate previously identified issues if these have been resolved satisfactorily in terms of meeting the criteria for soundness by the hearing statements or by other evidence. Where that is the case it is helpful to make this clear so as to forestall discussion. Indeed, agendas should be 'bespoke' and should be as specific as possible in setting questions that remain to be resolved in order to reach a view on soundness or where a verbal clarification is necessary to ensure full comprehension. However, this can sometimes be done by adapting or referring to the matters, issues and questions. Where they are used they should be posted on the website in advance but best practice would be for the PO to forward them direct to the relevant representor. See Annex 9 and 13 for examples.

85. If having issued the agenda you identify any further significant questions that you wish to pose on the day do not hesitate to raise them but in order to avoid disadvantaging any party and to help elicit the most informed response it is best to give as much notice as possible of such questions or lines of enquiry . Also write a very brief opening announcement to set the scene for the examination[18].

[17] Paragraphs 4.2-4.4 of PP
[18] Paragraph 5.7 of PP

At the outset have in mind the likely way that the examination might develop and any steps the LPA is likely to be asked to take at the end of the hearings.

86. Check that the PO is ready and that rooms are available. Ask the PO to prepare name plates for participants to provide structure and formality to the proceedings. Consider whether an additional note taker is required[19]. Some POs are prepared to do this if only to confirm 'action points' but it is best to get the LPA to provide someone as the PO is usually too busy with other tasks.

87. Consider whether there are any sites or places that need to be visited and, if necessary, seek the parties' views. Visits should only be carried out if the Inspector has reasonable grounds for concern that the allocation or policy designation is unsound and that determining this would be aided by an inspection. The undertaking of visits should therefore be proportionate and there should be no expectation that all sites or boundaries will be visited by the Inspector or by another PINS member of staff such as a Planning Officer. The number of alternative sites or omission sites visited should be kept to the absolute minimum since the primary focus of the Inspector should be on the soundness of the allocated sites. Subject to this if visits are required the presumption is that they will be made unaccompanied unless it is essential to go onto private land.

Hearing sessions

88. The hearings should give the information needed to decide if the plan is sound. Consequently the Inspector should constantly probe and, if necessary, challenge what s(he) is told. The Inspector has a very active and not a passive role in the examination and should not allow others to dictate the agenda. The discussion should be focussed on matters relating to soundness and should be actively led by clarifying/questioning participants whose input is required first before inviting, where necessary, any further relevant contributions. This can require a firm hand in managing the discussion and it is helpful to explain initially how the hearing will be run.

89. Without going over agreed matters ensure that you fully understand the key issues and relevant evidence. If necessary this can be done by asking the participants to draw attention to salient parts of their previous written submission without reciting it. Summarise your understanding of the position where necessary and question anything that is not clear. Do not hesitate to ask

[19] Paragraph 5.19 of PP

follow up questions. The aim is to have enough material to come to a succinct conclusion on the matter in hand[20].

90. Whilst adopting an inquisitorial role remember that the plan belongs to the LPA and ensure that it has plenty of opportunity to comment. Raise any concerns about soundness as soon as possible, even if not raised by others, and give the LPA a chance to respond and suggest remedies. This may require giving an initial indication of your preliminary view which can be done without jeopardising your impartiality given that your final recommendation is contained in the report. In the same vein be prepared to test the implications of possible conclusions on soundness.

91. Be disciplined in confining the discussion as far as possible to matters of soundness rather than improvements to the plan. Direct representors to the criteria for soundness; confirm how their points relate to them and the changes they are requesting, if this is not already clear. Inspectors should not feel obliged to go round the table to seek the views of everyone present on a particular point as the examination is not driven by objections. To assist, it might be worth explaining that in this respect the process is different from other types of planning events. The involvement of lawyers or barristers at the hearings is covered at paragraphs 5.11 to 5.14 of the PP.

92. If it becomes apparent that further written evidence is required because, for example, additional matters need to be investigated this can be requested. A timetable should be set for submission. In the interests of fairness other participants should have the opportunity to comment on it either at the hearing or subsequently in writing (possibly as part of the consultation process for any main modifications).

93. Unsolicited evidence should not be submitted. The expectation is that all written evidence should previously have been provided in accordance with your requirements. However, in the interests of natural justice, Inspectors should be wary about refusing to accept material that is clearly germane to the plan's soundness. Establish why it is late and how it is relevant. If accepted and unless purely factual an opportunity must be given to other affected parties to respond to any new evidence.

94. Main modifications (MM) are considered in more detail in paragraphs 103-123 but it needs to be stressed at the outset that they can only be recommended to

[20] See also paragraph 5.15 of PP

make the plan sound if the Inspector is requested to do so under s20(7C). These should only be made if the plan would be unsound without them and consequently should be limited to matters that are fundamentally important to the soundness of the plan. It is important that, through the hearings, the Inspector, the LPA and participants gain the fullest possible understanding about the scope of any main modifications that may be required.

95. During the hearings, especially if they are spread across a number of weeks, the LPA can be requested to provide wording for proposed main modifications and these might be agreed with other relevant participants. However, be careful about endorsing a particular approach or form of words 'on the hoof' when a more considered response after the close of the hearing might be more beneficial in the long run. It may be necessary to give the LPA 'pointers' as to possible forms of wording, especially if this is requested, but Inspectors should guard against appearing to impose something uninvited.

96. Even if detailed wording has not been put forward, it is vital that the scope or gist of any main modifications that are likely to be required to make the plan sound are clearly signalled and fully discussed at the hearings with the aim of reaching a clear conclusion on them. It is good practice at the end of a hearing session to list the MMs that have been tentatively agreed, to ensure that the LPA has a note of each of them. If time allows during the hearings the Inspector may confirm the running list of MMs in writing via the PO but if so, this should not be published on the examination website since its status is informal and may be subject to change.

97. Before the hearings close, Inspectors should consider if it would be beneficial to have a short 'mop up' discussion. This can normally be added on to the end of the final hearing session since its purpose is primarily administrative. This enables the Inspector to identify any 'loose ends' and confirm any further evidence that may be required and the timetable for its completion. If it has not been possible to clarify sufficiently the scope of all the main modifications that may be required, the Inspector should confirm when s/he intends to write to the LPA about any outstanding matters. For example, in the case of complex and/or controversial main modifications, further reflection by the Inspector may be required, or the outcome may be dependent on the consideration of further evidence or a site visit. With these points in mind, arrangements for the finalisation of the schedule of main modifications and the consultation process should be made and a brief explanation of these processes should be given if necessary. The Inspector should emphasise the importance of the LPA preparing the MMs schedule quickly and making an early start on it even though the details of some MMs may remain to be fleshed out through further exchanges.

98. In some instances preliminary hearings may have been held to consider matters relating to, for example, DtC and OAN. In these circumstances Inspectors will be expected to give an early indication either that there is unsoundness or a failure to comply with the DtC or that there appears to be no such issues and the examination can proceed. The latter should be done briefly by informing the LPA and updating the website. In any scenario Inspectors should not issue interim findings unless there is a need for further significant work to be undertaken by the LPA and the examination needs to be paused or suspended for that reason. Interim findings should go no further than they have to in pro-actively guiding the course of the examination in relation to potential matters of unsoundness and should avoid commenting on other matters, even if they are controversial, that are considered sound at that time. See for example the letter in Annex 10. But in all such cases it is essential that Inspectors submit any proposed interim findings document for reading before it is issued. Draft interim findings should be sent to the GM and copied to the Inspector's SGL and Plans Team. The Plans Team will, in turn, inform DCLG. The Inspector should also have discussed the need for interim findings as early as possible with his/her SGL or mentor and, where necessary, with the GM. This process is necessary for quality assurance and consistency.

99. It should be emphasised that Inspectors should not agree to issue what amounts to an early version of their report to indicate to participants their views on all controversial topics. These should be tackled in the final report itself.

Attendance and participation of MPs at hearing sessions

100. It is appropriate to allow an MP, seeking to represent their constituents, to participate in a hearing session, even if they did not make a representation.

101. MPs may wish attend the appropriate hearing session. However, this may not be possible (for example, given parliamentary duties) and, if their intention is solely to deliver a statement, it is best to fit this in wherever possible.

102. MPs may simply wish to make a statement or to participate in the hearing discussion. Either is acceptable, as it is for any participant.

103. It is reasonable for Inspectors to ask MPs questions at the hearing session (if they have confirmed they are willing to answer questions). This should be approached with the same degree of tact and sensitivity as for any other participant and bearing in mind that MPs are unlikely to have the same degree of planning knowledge as planning consultants and LPA officers.

104. Given the above, it is helpful for Programme Officers to establish the intentions of the MP beforehand. If the MP has not previously made a representation it is reasonable for the PO to ask what they will be speaking about. This should be communicated to the LPA so they are aware. It will also be helpful for the PO to send the MP the examination guidance notes and provide any other clarification about the examination that might be relevant.

Attendance Sheets

105. A long established practice has been for Programme Officers to ask those attending the hearing sessions, including as spectators, to fill in an attendance sheet. However, this is not necessary in relation to the running of the examination.

106. Consequently, and to avoid any potential data protection issues, it is not necessary to use an attendance sheet. The only exception would be if the venue requires a record for security or building evacuation reasons.

Main Modifications and other post hearing matters

107. Following the close of the hearings, formal written advice by the Inspector about the content of the main modifications should be strictly limited to any that it has not been possible to scope adequately in the hearings discussions eg where it is required to clarify what may need to be dealt with by a main modification, perhaps because additional evidence is required on certain matters or the Inspector requires time to reach a conclusion on the way forward. If it is necessary to give reasons for any changes outlined in a post-hearings letter, these should be kept as brief as possible. An example of specific matters where further advice from the Inspector was required is in the annex to the note in Annex 11. A post-hearings note may also be required to confirm if any further steps need to be taken such as the provision of additional evidence. The note should set out the timetable for any such work to be completed and whether any representations on the evidence will be invited by the Inspector.

108. Apart from the situations outlined above, there should be no need for the Inspector to set out draft main modifications in writing following each hearing session or after the close of the hearings. Drafting of the proposed main modifications is for the Council to undertake in the first instance. It will be sufficient for the Inspector to confirm briefly in writing that the Council will draft the schedule of proposed main modifications as identified during the hearings, that the Inspector will need to see the draft schedule and may have comments on it, and that s/he will need to agree the version that is published for

consultation in due course. The note should also confirm that the Inspector will take account of the responses to the consultation before reaching final conclusions on the main modifications that are required and that his/her reasons will be set out in the report.

109. The term "Main Modifications" is not defined in the legislation. However it is used to describe the modifications that are necessary in accordance with s20 (7C) of the Act.[21] Additional Modifications are those that (taken together) do not materially affect the policies of the Plan[22]. These are often referred to as minor modifications but Inspectors should use the official term.

110. The request to recommend main modifications under s20(7C) must be made during the examination process. However, it is advisable for this to be done towards the end because if requested there is no option but for an Inspector to make such a recommendation. This may be problematic if more fundamental issues arise that cannot be resolved by main modifications[23].

111. The judgment in *Performance Retail Ltd Partnership v Eastbourne BC & SSCLG* [2014] EWHC 102 (Admin) reviews the role of the Inspector in relation to s20 (7C). It found that the Inspector's duty is to do what (and only what) is necessary in order to modify the document into one that is sound (paragraph 17). Moreover, the Inspector is entitled to recommend the modifications that are needed and not be restricted to a scheme of modifications recommended by a LPA (paragraph 24). However, as outlined later, that does not imply that an Inspector has 'carte blanche' because of the legitimate expectation that such main modifications will be publicised and the need to consider whether further sustainability appraisal or Habitats Regulations Assessment should be undertaken.

112. Main modifications can therefore be taken to be those that do materially affect the policies or the interpretation of them. Deciding whether this is the case is ultimately a question of judgement for the LPA but Inspectors may occasionally need to give guidance about the distinction. The examination is solely concerned with the need for main modifications and Inspectors should not

[21] Section 20 (7C) makes clear that, if asked to do so by the LPA, the person appointed to carry out the examination must recommend modifications of the document that would make it one that a) satisfies the specified legal requirements and b) is sound.
[22] Section 23 (3) of the 2004 Act
[23] Paragraph 5.28 of PP

involve themselves with additional modifications since these are matters for the LPA.[24]

113. The schedule of proposed main modifications may include some of the proposed changes put forward by the LPA after the Reg 19 consultation or from Statements of Common Ground. However, the schedule should be developed as a new and entirely separate document to avoid any subsequent blurring of the distinction that the Inspector needs to maintain between main modifications and additional modifications.

114. By the time the hearings are well underway it will have become clearer to the Inspector (as well as the LPA and other participants) which elements of the plan will be likely to require main modifications. LPAs should be asked by the Inspector to maintain a running list of these probable MMs and it is advisable that these are checked at the end of the examination or periodically if it is a long one. The Inspector should check the contents of the MM schedule thoroughly before inviting the LPA to publish it for consultation.

115. In practice the process for finalising the schedule will be an iterative one, commencing in some cases with the LPA developing an initial draft list prior to submission of the plan, adding to it during the hearings on the basis of the Inspector's advice, and subsequently adding to it and refining the wording of the specific MMs as advised by the Inspector following the close of the hearings. Exchanges between the Inspector and the LPA at this stage may involve some 'batting around' of the wording of policies or text. This should be done by e-mail via the PO and need not be published although could be subject to FOI requests and should therefore be retained.

116. The point at which an Inspector will feel confident about defining the list of MMs and their content and then advising the LPA accordingly will vary, depending on the scope, complexity and length of the examination. In the most straightforward of cases it may be that the content of the draft schedule of MMs will have been established to the Inspector's satisfaction by the close of the hearings or very shortly afterwards. However in more complex/lengthy examinations the Inspector will not be in a position to finalise the draft schedule with the LPA until sometime after the hearings have taken place. Whether the Inspector will be able to do so before drafting the report on the key issues is a

[24] However, see paragraph 45 above. During the initial preparatory work the Inspector should check any schedule of proposed changes submitted by the LPA with the Reg 19 Plan in order to ensure that none of the proposed changes would fall outside the definition of an additional modification.

matter of careful judgement for the Inspector. LPAs' procedures for securing the approval of their elected members on the draft MMs can be complex and time-consuming, added to which is the statutory 6-week public consultation period, and therefore the earlier that the Inspector is able to give the 'green light' on the draft schedule the better. However it is very important that the Inspector does not do so before being satisfied that the draft schedule includes all the MMs that he/she considers are necessary to make the plan sound and/or legally compliant.

117. The Inspector may need to be quite firm in seeking the inclusion of a MM in a consultation schedule which he/she considers is likely to be needed for soundness, even if the LPA is opposed. This is because of the need to ensure that all possible changes are included since main modifications cannot be added in later without further consultation and hence delay. But of course, all of the proposed MMs should have arisen as a result of discussion at the hearings or written exchanges during the course of the examination and they should not come as a surprise. It is recommended that Inspectors include words along the following lines in any communications about proposed MMs and especially when the schedule is published for consultation: *I will need to take into account the consultation responses before finally concluding whether or not a change along these lines is required to make the plan sound*.

118. Where the Inspector is highlighting likely unsoundness in relation to allocations the approach to main modifications might need to be much more circumspect. First of all it is necessary to consider whether, if an allocation is unsound and should be deleted, the plan would be unsound if a replacement site were not identified and allocated in the plan. If the Inspector considers that replacement or additional allocations are required then s/he should not normally suggest the new sites to be allocated, even if some such alternatives have been raised by other parties at the hearings. This is because the Inspector will not be aware of the views of all interested persons about those alternative sites including any neighbours unaware of any such proposals, or there might be further options not previously canvassed. In such cases, the Inspector should ask the LPA to select and propose for consultation further allocations and it is almost inevitable that further hearings on those new sites will be required. In such circumstances consultation on the new sites should therefore be undertaken in advance of and separately to the MM process but having gone through that process and heard further views at a hearing there should be no need to accept further comments as part of the MM consultation.

119. Turning to the way in which the draft MMs should be structured and laid out, there is no need for each proposed change to wording to be identified

individually; instead, the total number of individual MMs should be limited by grouping together all the changes that apply to a particular policy, even if the need for them arises under different issues in the report. This can be readily dealt with by cross-referencing. Inspectors should also look for ways of reducing the number of MMs that are, in effect, no more than straightforward consequential changes following on from the principal MM. In some cases this can be done by a single MM that sweeps together all the policy or paragraph references that should be changed to accord with the principal MM. This is also the time to ensure that the format of the schedule is as required with a numbered list of main modifications and the changes dealt with by means of strike through and underlining. It is advisable for the LPA to include a column that briefly explains the reasons for the MMs to assist consultees but this should be removed in the final schedule of recommended main modifications which accompanies the Inspector's report (along with any LPA logo or material relevant only to the consultation stage). Whilst recognising that the schedule is produced by the LPA, Inspectors should maintain control of the process throughout in order to ensure that the final draft for consultation contains all the necessary MMs and that they are clearly expressed.

120. Some LPAs also wish to publicise additional modifications for the sake of completeness. If so, the Inspector must ensure that these are set out in a separate table and it should be made clear to those consulted that the Inspector is not concerned with these.

121. Consultation on the main modifications should be for a minimum of 6 weeks to be consistent with the reference in Reg 17 and also have regard to the principles in paragraph 5.27 of the PP. It is nevertheless a matter for the LPA as to the timing and duration of the consultation period having regard to any local circumstances and the Statement of Community Involvement. Similar consultation arrangements would apply if the LPA undertakes a similar exercise mid-way through the examination in order, for example, to ascertain views on a schedule of focussed changes.

122. Inspectors should also remind LPAs of the likely need to update the Sustainability Appraisal in order to assess the proposed main modifications. This is common practice. However, Reg 5(6) of the Environmental Assessment of Plans and Programmes Regulations 2004 says that environmental assessment is not needed for a "minor modification" to a plan unless it has been determined under Reg 9 (1) that the plan is likely to have significant environmental effects. Before making a statement of determination under Reg 9 there is a requirement to consult the bodies listed in Reg 4 that still subsist (Historic England, Natural England and the Environment Agency). Where an update of the Sustainability

Appraisal report has been prepared to assess the MMs, this document should be published as part of the public consultation on the proposed MMs.

123. In some instances, where there is likely to be consequences for European sites, the Habitats Regulations Assessment may also need to be updated to inform the preparation of the MMs and an updated report should be published at the consultation stage.

124. The expectation is that further hearing sessions after the consultation on the main modifications will be the exception rather than the norm. Representors should not have any guarantee that there will be another opportunity to address the Inspector. Unlike at Reg 19 stage, therefore, the consultation response form should not invite representors to indicate whether or not they wish to be heard by the Inspector. However, the nature of the issues raised or representations made may occasionally require this. This is likely to occur when the proposed main modifications are significant and when further discussion would assist in reaching a final view on soundness. Natural justice may also require a further hearing. For example, if the modifications include a new allocation, some parties would have had no possibility of being heard on the matter previously (including any "omission" sites) and would need to be heard if they wanted to be.

125. Occasionally there may be a need, in the interests of fairness or to assist in resolving matters by responding to factual points raised, to allow the LPA to comment on certain responses to the consultation on the proposed main modifications. However, this should not be routinely done but only when specific input is required.

126. After the hearings significant new evidence may emerge or there may be major changes in Government policy that might affect the plan under examination. The approach to this will depend on the specifics of the matter but, at the very least, the LPA may be asked to comment or to set out its revised position. In the light of this further, wider consultation may be required especially if national policy changes herald the need to consider further material changes to the plan.

127. The Policies Map is not a development plan document and it is not before the Inspector for examination. Consequently the Inspector should not recommend main modifications to the Policies Map, which is to illustrate geographically the application of policies in the development plan. Specific advice on dealing with the Policies Map can be found in the relevant section of this chapter.

Report writing

128. The report should be structured around the Local Plan template which includes a non-technical summary, introduction and assessments of the duty to co-operate, soundness and legal compliance. This should be broadly followed to ensure a consistent approach and to accord with paragraph 6.4 of the PP. Account should also be taken of the PINS Style Guide and of the specific conventions in the template. There should be clearly defined issues relating specifically to matters of soundness rather than to broad topics. Sub-headings should be used as necessary to give clarity. The main issues may be derived from those previously identified but if these have been settled by written answers provided prior to the hearings or following discussion at the hearings or if it would be more appropriate in the light of all that has been considered through the examination to amend them or integrate them in some other way, this should be done in the interests of producing a concise, focused report. The purpose of the report is to address the principal controversial issues that are still outstanding and to reach clear conclusions on the identified main issues.

129. The table for legal compliance should be kept at the end of the report and is intended to provide a succinct way to cover these matters, especially when they are relatively straightforward. However, if there are substantive issues about legal compliance then these should be dealt with in greater detail separately and at an earlier stage of the report. The table should then reflect any findings made previously.

130. Key principles for reporting are contained in the PP[25]. In broad terms the report should be kept as concise as possible in order that it is accessible and readable by all rather than an overly lengthy and dry tome. The writing style should be punchy and business-like with short sentences and paragraphs of limited length. Bearing in mind that it is directed towards the informed reader it should scrupulously avoid unnecessary detail and description. It should not summarise the cases of individual parties, recite national policy or include quotes from the evidence. Specific representations should not be referred to. Instead there should be a relentless focus on soundness (rather than improvements to the Plan) in explaining both why parts of the Plan are sound and why parts of it are not such that main modifications are required. Where an Inspector is identifying a particular matter as unsound it is good practice to be explicit about which of the tests it has failed.

[25] Paragraphs 6.1-6.3

131. The lawfulness of the approach to report writing contained in the PP is endorsed by the judgment in *Cooper Estates Strategic Land Ltd v Royal Tunbridge Wells Borough Council*. This confirms that "short form reasoning" conforming to the PP guidance is appropriate and that an Inspector "is not required to spell out why it is not unsound in the light of every participant's/ objector's argument". (paragraph 61) Furthermore that in order to support planning judgements:

> *The obligation to give reasons does not require the Inspector to treat each objection as an Inquiry into an application for planning permission. It is not suggested that the Inspectorate Guidance on the approach to the parties' cases and the extent of reasons required is unlawful. It obviously is not. I also accept that the Inspector had a great deal of written material, and although I was taken to some of the oral argument and submissions, I am very conscious that the judgment on the merits of these issues is very much for the planning judgment of the Inspector, who heard and read all the evidence over a number of days on these and related issues.* (Paragraph 55 and also see paragraphs 28 and 29)

132. In dealing with main modifications the reasoning should firstly seek to explain why the submitted Plan under examination is unsound rather than to start with the main modification itself. However, a short explanation may be required as to how the main modification would overcome this deficiency. Reasoning should be clear and concise, drawing together the determinative factors in a way that leads to convincing conclusions. Matters that have no bearing on soundness, even if raised at the hearings, and any proposed additional modifications should be omitted. In particular, references to 'omission' sites or alternative sites need only be given a cursory mention if the sites proposed to be allocated are sound.

133. As a brief checklist Inspectors should therefore:

- Keep the summary of changes as short as possible;
- Stick to the MMs and leave out anything connected with additional or minor changes as they are not examined;
- Not just agree with the LPA or any other party but make it clear that these are the Inspector's findings and recommendations;
- Use soundness words as part of the reasoning rather than "reasonable" or "appropriate";
- Try to conclude in a positive fashion rather than doing something because there is no evidence to the contrary;
- Eliminate or minimise the reference to representors – the focus should be the Inspector's view of soundness;
- Avoid providing a commentary of who said what;

- In dealing with MMs the focus should be on why the submitted plan is unsound rather than on justifying the MMs.

134. An extensive use of footnotes should be avoided. Material mentioned in the report should only be referenced where it would serve a clear purpose in informing readers of the source rather than as a matter of course. There is no need to cross-refer every fact to the evidence base or to include detailed calculations, especially given the risk of inaccuracy. If lengthy explanations are required in footnotes then their use is questionable. They can, however, be useful in detailing specific sections of the PPG or in giving details of legal judgments but, in general, their use should be limited.

135. Remember also that main modifications are, for the most part, proposed by the LPA but are recommended by the Inspector and this should be the emphasis throughout the report.

136. The Inspector is entitled to adjust the proposed main modifications if this is necessary to address issues of soundness raised through the public consultation on them or for any other reason. However, any such change should not be of such a magnitude to significantly alter the Plan and thus require further consultation or be of a scale or a type that would warrant fresh Sustainability Appraisal.

137. The schedule of proposed main modifications provided by the LPA should form the basis of the recommended main modifications. It should be produced as a separate Appendix and referred to throughout the report. The wording of the individual main modifications should be precise as the report's recommendations on the MMs are binding if the LPA decides to adopt the plan. If the LPA has included a column giving 'Reasons' for a proposed main modification this should be omitted as the reasons should be given in the report. Furthermore, the origin of the individual main modification (whether instigated by the LPA or by the Inspector) should not be specified[26].

138. The report should be submitted for QA and the Plans Team should be kept informed of progress so that this can be organised. This process will be undertaken in accordance with the latest QA protocol. A version should first be submitted for that purpose and a response should be expected within 2 to 3 weeks. Any suggested amendments should be responded to as soon as possible. The report is then submitted to the LPA by the Plans Team for 'fact

[26] Further advice at paragraphs 6.5-6.7 of PP

checking'[27] and similarly any matters raised should be dealt with promptly before the final report is delivered[28] via the Plans Team.

139. Paper documents, hearing notes and e-mails should be retained for at least 6 weeks after the adoption of the plan in case of any subsequent legal challenge. LPAs are requested to inform the Plans Team when the plan is adopted. However to ascertain the progress towards adoption it may be necessary to check the LPA's website. If a challenge is made material will need to be retained until it is finally resolved.

Keeping in touch with the Plans Team

140. It is important that Inspectors remain in contact with the Plans Team throughout the examination process. This is in order that they are aware centrally of the progress of the examination and any major issues that are likely to arise so that PINS as a whole is not taken by surprise at a particular turn of events. It will also enable the Team to advise DCLG in these respects as necessary.

141. In particular:

- How examinations should be charted into an Inspector's programme in conjunction with the Plans Team in terms of preparation, sitting and reporting;
- As part of this process identifying any timetabling problems or clashes if examinations overlap, for instance, and also identifying any gaps so that alternative work can be found;
- If significant departure occurs from the charted time as significant discrepancies between anticipated and actual time taken can cause audit and finance problems;
- Confirmation of when the hearings will take place;
- Details of any correspondence to be sent to LPAs outlining potential problems with a plan in terms of soundness or legal compliance;
- Dates when reports can be expected to be submitted for QA and fact checking by LPA; and
- Completing the monthly tracker in a timely fashion before the end of the month.

[27] Section 7 of PP
[28] Section 8 of PP

142. Furthermore, if the PO is away or indisposed for any reason then the Plans Team may be able to act as a short-term substitute in order than the examination is not unduly delayed.

Public Sector Equality Duty in Local Plan Examinations

What is the PSED and what relevance does it have for Inspectors carrying out local plan examinations?

143. The Public Sector Equality Duty (PSED) flows from s149 of the Equality Act 2010. Section 149 requires *'public authorities'* to have *'due regard'* to what are known as the *'three aims'* when exercising their functions.

144. PINS has accepted that an Inspector examining a local plan is carrying out a 'public function'[29] for the purposes of s149 and, in doing so, must personally comply with the PSED.

What is my public function?

145. Your role is to consider whether the plan is sound as defined in legislation (s20 of the PCPA 2004) and national policy. In this case, the 'public function' is the examination of the plan. It therefore follows that the PSED requires you to have 'due regard' when assessing whether or not the plan is sound and when considering any main modifications to make it so.

146. The requirement to have 'due regard' does not require you (or specifically empower you) to depart from s20 of the PCPA 2004, from national planning policy or the planning practice guidance which explains how the national planning policy should be implemented.

What are the 3 aims?

147. The 'three aims'[30] are the need to:

(a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Act;

(b) advance equality of opportunity between persons who share a *relevant protected characteristic* and persons who do not share it;

[29] 'Public functions' are functions which are functions of a public nature for the purposes of the Human Rights Act 1998 (s150(5) EA2010).
[30] S149(1)

(c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

What are relevant protected characteristics?

148. The 'relevant protected characteristics' are defined by s149(7):
    - age;
    - disability;
    - gender reassignment;
    - pregnancy and maternity;
    - race;
    - religion or belief;
    - sex;
    - sexual orientation

What does having 'due regard' mean?

149. This is set out in section 149(3)-(5). Please make sure you are aware of this part of the Act. The equality duty is a duty "to have due regard to the need" to achieve the three aims. It is "not a duty to achieve a result".[31] [32]

150. In *R. (Brown) v. Secretary of State for Work and Pensions [2008] EWHC 3158* the court considered what a relevant body has to do to fulfil its obligation to have *due regard* to the three aims. The 'Brown principles' have been accepted by courts in later cases. In summary they are:

- The public authority must be aware of the duty under the Act
- Due regard must be exercised before as well as at the time a decision is taken.
- It is not sufficient to justify it after the event
- The duty is a continuing one
- Due regard must be exercised consciously, with 'rigour' and an open mind, and not just as a tick box exercise
- It is good practice to make specific reference to the duty
- It is good practice to keep an adequate record showing that the duty was considered. If records are not kept, it may make it more difficult,

[31] R (Baker) v Secretary of State for Communities and Local Government [2008] EWCA Civ 141, [2008]

[32] In *Hotak v London Borough of Southwark* - *"....in the light of the word "due" in section 149(1) , I do not think it is possible to be more precise or prescriptive, given that the weight and extent of the duty are highly fact-sensitive and dependant on individual judgment."*

evidentially, for a public authority to persuade a court that it has fulfilled the duty

Due regard might also involve considering whether the LPA should be requested to provide more evidence/information.[33]

What should I do to ensure I have complied with the PSED?

151. To comply with the Brown Principles, it is important to have 'due regard' throughout the examination from the start until its completion. This can be achieved by taking the following steps:

1. During your initial preparation consider whether the policies within the plan would have an effect on the three aims and anyone with a relevant protected characteristic. In addition, has the plan failed to address any relevant policy areas which it should reasonably have addressed, given the intended scope and purpose of the plan? Examples of relevant policy areas could include:

    - age – housing need and supply for the elderly
    - disability – need for, and supply of, accessible housing - and policies relating to accessible external spaces
    - race – housing need and supply for gypsies and travellers

2. If those with relevant protected characteristics are affected by the plan (or alternatively, if relevant policy areas have been omitted), ensure that appropriate questions are set out in the matters, issues and questions (MIQs) and then explored at the hearing sessions. Consider whether more evidence/information may be necessary.

3. Be alert to your PSED duties throughout the examination, and not only when reaching conclusions and in respect of main modifications.

4. Address the PSED as integral part of your reasoning in your final report, having regard to your role in assessing whether the plan is sound and legally compliant.

[33] "[*T*]*he duty of due regard under the statute requires public authorities to be properly informed before taking a decision. If the relevant material is not available, there will be a duty to acquire it and this will frequently mean that some further consideration with appropriate groups is required*" – LDRA Ltd v Secretary of State [2016] EWHC 950 (Admin) – quoting an earlier judgement.

5. Briefly summarise how you have complied with the PSED in the legal compliance section of your final report.

Does the PSED require that a particular outcome is achieved?

152. Having 'due regard' does not necessarily mean that a particular outcome or result must be achieved. Instead, the weight to be given to the equality implications, when reaching your conclusions about the soundness of the plan, is a matter of judgement for you.

153. The courts will not interfere with such judgements unless the decision was outside the limits of reasonableness. In *Bracking*, McCombe LJ approved the following extract from the judgement in *R (Hurley & Moore) v Secretary of State for Business, Innovation and Skills* [2012] EWHC 201 (Admin):

The concept of 'due regard' requires the court to ensure that there has been a proper and conscientious focus on the statutory criteria, but if that is done, the court cannot interfere with the decision simply because it would have given greater weight to the equality implications of the decision than did the decision maker. In short, the decision maker must be clear precisely what the equality implications are when he puts them in the balance, and he must recognise the desirability of achieving them, but ultimately it is for him to decide what weight they should be given in the light of all relevant factors.

However, your approach to the exercise of your PSED duties must be rigorous.[34]

How should questions be phrased in my Matters, Issues, and Questions?

154. Questions should generally be phrased having regard to the tests of soundness. As an example, the section in the ITM on assessing the needs of particular groups includes some suggested questions on meeting housing needs and on accessible design.

However, in some examinations Inspectors may find it helpful to ask a question to help bring PSED issues out into the open. This might be the case where the LPA has not produced an equality assessment. It could be asked as an initial question or in the MIQs. Two possible examples are set out below:

[34] Officials reporting to or advising Ministers/other public authority decision makers, on matters material to the discharge of the duty, must not merely tell the minister/decision maker what he/she wants to hear but they have to be "rigorous in both enquiring and reporting to them" - *Stuart Bracking & Ors v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345

- In what way do the policies in the plan affect those with relevant protected characteristics as defined in s149 of the Equality Act 2010?

- In what way does the plan seek to ensure that due regard is had to the three aims expressed in s149 of the Equality Act 2010 in relation to those who have a relevant protected characteristic?

How should I record that I have complied with the PSED in line with the **'Brown principles'?**

155. Your compliance should be implicit from the approach you have taken from the start of the examination, including in the MIQs and at the hearing stage. In addition, you should briefly set out the issues you have considered against the PSED in your final report. Two illustrative examples of wording you might use are set out below:

Example 1:

Throughout the examination, I have had due regard to the aims expressed in S149(1) of the Equality Act 2010. This has included my consideration of several matters during the course of the examination including [*eg - the provision of traveller sites to meet need and accessible and adaptable housing*].

Example 2:

Throughout the examination, I have had due regard to the equality impacts of the *[insert plan name]* in accordance with the Public Sector Equality Duty, contained in Section 149 of the Equality Act 2010. This, amongst other matters, sets out the need to advance equality of opportunity and foster good relations between people who share a protected characteristic and people who do not share it.

There are specific policies concerning specialist accommodation for the elderly, gypsies and travellers and accessible environments that should directly benefit those with protected characteristics. In this way the disadvantages that they suffer would be minimised and their needs met in so far as they are different to those without a relevant protected characteristic. There is also no compelling evidence that the RLP as a whole would bear disproportionately or negatively on them or others in this category.

How does my PSED duty as an Inspector relate to the PSED duty of the LPA when preparing the plan?

156. As a public authority the LPA is required to comply with the PSED. It is not your role to assess whether or not the LPA has complied with the PSED. However, the LPA may have prepared an equality assessment or similar to help show their

compliance. If so, this will form part of the evidence base and it could help inform the issues you wish to examine, the questions you ask and your assessment of soundness and legal compliance.

Does the PSED relate to my consideration of whether the plan is legally compliant?

157. The PSED is most likely to apply when assessing soundness. However, there may be some circumstances where the PSED has relevance for legal compliance issues.

Is the PSED covered in any other sections of the ITM?

158. The PSED is also covered in the sections on Human Rights and Public Sector Equality Duty and on Gypsy and Traveller Casework.

Where can I find more advice on the PSED?

159. The Equality and Human Rights Commission publishes guidance about the PSED. Principal documents include:

The Essential Guide to the Public Sector Equality Duty
Meeting the Equality Duty in Policy and Decision-Making
Technical Guidance on the Public Sector Equality Duty: England

Duty to Co-operate

Background

160. The duty to co-operate (DtC) was introduced by the Localism Act 2011 and is now enshrined at s33A of the Planning and Compulsory Purchase Act 2004.

161. In the preparation of development plan documents local authorities are required to engage constructively, actively and on an on-going basis with prescribed bodies, such as other local planning authorities. However, this relates only to strategic matters which are defined as the sustainable development or use of land that has or would have a significant impact on at least two planning areas or on a county matter in a two-tier area. Sub-section (4) makes particular reference to infrastructure in this regard. The underlying purpose of co-operation is set out in sub-section (1) as maximising the effectiveness of plan preparation.

162. S20(5)(c) of the 2004 Act requires that examiners determine whether the DtC has been complied with. The key aspects to test in this regard based on the legislation are whether the LPA has maximised the effectiveness of plan-making activities by engaging constructively, actively and on an on-going basis in the preparation of local plans in the context of strategic matters having a significant impact on at least two planning areas or on a county matter in a two-tier area. Whether there would be a significant impact is a matter of planning judgment.

163. The NPPF refers to setting out strategic priorities (paragraph 156) and public bodies have a duty to cooperate on planning issues that cross administrative boundaries (paragraph 178). Furthermore, joint working should enable LPAs to meet development requirements which cannot wholly be met within their own areas (paragraph 179). They will be expected to demonstrate evidence of having effectively cooperated when plans are submitted for examination (paragraph 181).

164. The PPG on the *Duty to cooperate* (ID9) provides detailed guidance and regard should be given to it in full. Its aim is that co-operation should produce effective and deliverable policies on strategic cross-boundary matters (ID9-001-20140306). Other main points are that there is not a duty to agree (paragraph 003) and that co-operation should take place throughout plan preparation (paragraph 012). It is especially important to note that as the duty applies to the *preparation* of local plans a failure to comply cannot be corrected after submission and in those circumstances an Inspector will not be able to recommend that the plan is adopted (ID9-018-20140306).

165. The judgment in *Samuel Smith Old Brewery (Tadcaster) v Selby DC* [2015] EWCA Civ 1107 also established that the legal DtC only applies to the preparation of the plan before submission for examination and not to any work done after submission, even if the examination is suspended.

166. S20(7)(b)(ii) of the 2004 Act stipulates that where an Inspector considers that it would be reasonable to conclude that the LPA complied with the DtC then that person must recommend that the plan is adopted and give reasons for the recommendation. In *Zurich Assurance v Winchester CC & South Downs NPA* [2014] EWHC 758 (Admin) it was confirmed that the role of the court was limited to review whether the Inspector could rationally make the assessment that it would be reasonable to conclude that there had been compliance with the duty by the LPA (paragraph 113).

167. S33A(6) also requires a LPA to consider "joint approaches" to plan making and the preparation of joint local development documents. However, the *Zurich*

Assurance judgment confirms that LPAs have a substantial margin of appreciation or discretion in those respects (paragraph 111).

Practical considerations

168. The DtC applies to all examinations, but often assumes particular significance in full local plans in relation to meeting housing needs within the overall Housing Market Area (HMA)(or beyond).

169. Although the DtC is separate from the soundness test of *positively prepared* there is clearly scope for a substantial overlap with that element concerning the unmet requirements from neighbouring authorities (paragraph 182 of NPPF). In some cases representors are unclear about the distinction between the two and contend that the legal duty has been failed even when the matter at issue appears to be solely about positive preparation. Thus whilst being mindful of the separate tests to be applied, these matters may best be discussed together in a single hearing. However if there are clear indications of DtC difficulties then it is usually preferable to focus on those matters alone to avoid potentially abortive work.

170. Inspectors should be alert at an early stage to the following which might indicate a potential DtC or *positively prepared* problem:

- The Council has assessed its objectively assessed needs (OAN) on a district-only basis when there is no clear evidence that the district forms a realistic HMA on its own. There will often be a loose fit between HMA boundaries and Council boundaries. It is a judgement based on evidence as to what is the "best fit" between them. This should normally be a matter agreed with adjoining Councils. See PPG on *Scope of Assessments - How can housing markets areas be defined?* (ID 2a-011-20140306)
- The Council is unable to meet its own needs within its boundaries and there is no agreed apportionment of unmet needs to other districts in the HMA or beyond (see recent Inspectors' reports on the Brighton City Plan https://www.brighton-hove.gov.uk/content/planning/planning-policy/city-plan-part-one-examination and the Birmingham City Plan http://www.birmingham.gov.uk/plan2031/examination
- Whilst the Council is able to meet its own needs, there are unmet needs in the HMA as a whole (eg as identified in a joint strategic housing market area assessment (SHMA)), but no agreed apportionment of unmet needs to other districts. Beware agreement among adjoining authorities to defer addressing unmet need (where they are already identified) until future reviews of local plans, which may be trying to delay difficult decisions. See Warwick Examination Inspector's letters, 1 June 2015 - 26 October

2015: http://www.warwickdc.gov.uk/info/20410/new_local_plan/973/local_plan_examination

- That said, none of the Inspectors dealing with the above cases (Brighton, Birmingham and Warwick) concluded that the legal duty to co-operate had been failed.

171. Because a failure to meet the DtC cannot be rectified, particular thoroughness and care is required where it appears that this might be the case. Detailed attention should be paid to the specific wording in the legislation, as well as in NPPF and the PPG, and the Inspector's questions and conclusions should be carefully framed in these terms. *To ensure a consistent approach, no finding of a failure to meet the DtC should be issued until the matter has been discussed with the Group Manager (Plans).*

172. In smaller or single issue examinations the DtC might not be engaged because the plan does not relate to a strategic matter. For example, in relation to the Basement Revision of the Westminster City Plan the Inspector concluded:

Basement development is likely to have some wider cross-boundary consequences including construction traffic. The effects of noise, vibration, dust and air pollution could also be directly experienced by those living in neighbouring Boroughs. However, these manifestations do not have a significant impact on any other planning area. As a result the duty to co-operate imposed by section 33A of the 2004 Act is not engaged. Nevertheless because of the increasing trend for basement development across London the Council has liaised with other Boroughs and agencies in a constructive way.

173. When reporting, the Local Plans template (available from this page) provides a form of words to be used to cover this issue which should be followed as far as possible. To avoid giving the impression of applying a presumption in favour of finding compliance with the DtC, Inspectors should make their findings in a positive fashion rather than stating that in the absence of anything to the contrary the DtC can be said to have been met.

174. Furthermore, it should be borne in mind that because the DtC is distinct from soundness it is advisable that this section addresses the legal test specifically but at a level which does not delve into extensive detail about outcomes. This is more likely to be part of whether the plan has been positively prepared which refers to meeting objectively assessed development and infrastructure requirements, including unmet requirements from neighbouring authorities

where it is reasonable to do so and consistent with achieving sustainable development.

Examples

175. Set out below are outlines of various examples of findings made by Inspectors where the DtC was failed. They are for guidance only since each case will, of course, be dependent on its own facts and circumstances. But in general terms factors which might inform such a judgement are:

- Has the LPA done all it reasonably could to maximise the effectiveness of plan making?
- Has it genuinely, based on its actual actions and attitude, tried to resolve issues through co-operation and what have been the outcomes?
- Was the process meaningful or had decisions already been taken?
- Has it been diligent and is there robust evidence to support its claims about what has taken place?
- The position of other authorities is an important indicator but is not definitive.

North London Waste Plan, (Inspector's report – 14 March 2013 recommending non-adoption) In a very early case, the Inspector found that the North London Boroughs who prepared the joint plan failed to engage constructively and actively with 5 County Councils to the north of London which would be receiving the significant volumes of waste proposed to be exported from London for management or disposal. This case is interesting not least because it illustrated that the DtC may be engaged not only with adjoining authorities but over a wider geographical area.

Oxfordshire CC Minerals and Waste Core Strategy, withdrawn July 2013 Contrary to NPPF para 145, no Local Aggregate Assessment (LAA) existed at the time of submission. A draft LAA prepared after submission was incomplete and lacked critical elements. If a pre-submission LAA had existed, engagement over its contents would have been necessary with the Aggregates Working Party and other Minerals Planning Authorities. Since none of this was done, the DtC was not met.

Hart Local Plan, withdrawn August 2013The Council accepted that it was part of a wider HMA with two other authorities. There was no up-to-date joint SHMA. The Council accepted that the proposed level of housing provision which was based on zero net migration was not sufficient to meet the full OAN in the District as zero net migration was not actually realistic. No attempt had been made to identify OAN for the HMA.

Mid Sussex Local Plan, withdrawn May 2014 The Council understood its duty, but there was no robust framework for monitoring the outcomes of co-operation. Its processes had been ad hoc and insufficiently transparent. Discussions with neighbours were necessary to clarify positions and agree mechanisms for addressing cross-boundary issues, but these were not established and precluded discussion of issues which could conflict with the Council's strategy and objectives of self-containment.

There was evidence of joint working with Councils to the north (within the HMA) but not with the coastal HMA to the south where a number of LPAs would not be able to meet their needs sustainably. The Council's approach had not been diligent and objections by four nearby authorities showed that no mutual benefit had been derived from the engagement.

Runnymede Local Plan, withdrawn July 2014 The Council's DtC statement sought to identify 'strategic cross-boundary issues and evidence of how these have been addressed' but did not identify housing and employment issues as 'strategic' even though the plan sought to accommodate only 37% of the OAN. A pre-submission consultation e-mail to nearby LPAs did not confirm Runnymede's inability to meet its need, but simply asked *'If it emerged that Runnymede was unable to... (meet its OAN)... would your Council be prepared to accept that a proportion… could be provided for in your area?'*

The Council already knew that it could not meet its need. There were no positive responses to the question and the Council `gave up' at this stage. Elected members had little involvement in the engagement and, overall, it was not focussed or thorough and lacked impetus to address strategic priorities. Nor was it active, collaborative, constructive, frequent or diligent.

Aylesbury Vale Core Strategy, withdrawn February 2014 No resolution was reached about the extent of potential unmet needs from other authorities and how they would be accommodated, particularly in relation to future growth of Milton Keynes.

The Council had been aware of these issues from early in the plan preparation process, if not before. Even so, there was a lack of specific evidence on these matters. Joint-working is a two-way process, but a substantial amount of time had elapsed since the coming into force of the DtC and the publication of the NPPF. The Council had not engaged on these matters constructively, actively and on an on-going basis

NW Leicestershire Core Strategy, withdrawn Oct 2014 There was no SHMA for the housing market area, which also covered other Districts. This absence,

coupled with the substantial difference which existed between the Council and several other authorities on housing, meant that the DtC topic paper contained no information on the approach to this important cross-boundary strategic matter.

Bolsover Local Plan, withdrawn June 2014 The site of a large ex-chemical works with viability and remediation concerns is split between two Districts Bolsover (30ha) and NE Derbyshire (30ha) and close to a third (Chesterfield). The landowner suggested that there was a need for comprehensive development of the site for a wide mix of uses. The Council accepted the site's future was a 'strategic matter' but the two authorities decided to deal with it separately in their local plans.

Bolsover and NE Derbyshire Councils had a shared senior management team but there was no evidence of joint or proactive planning for the site either together or with Chesterfield. Meetings were purely consultative and information-sharing. NE Derbyshire's plan was moving forward on different timescale, but without evidence of the kind of activities envisaged in PPG (para 9-017) where this is the case.

Central Bedfordshire Development Strategy, withdrawn November 2015 The key factor here was the existence of unmet housing need in an adjoining authority (Luton). There was no mechanism or consideration in place as to how this need might or could be met within C Beds. There was a failure of the duty process to influence the plan and there was limited involvement of the elected members. Necessary steps to secure effective policy delivery on cross-boundary strategic matters had not been taken in respect of housing. Also, there was almost no evidence of active, constructive and on-going engagement in relation to employment matters. The High Court refused permission to bring judicial review proceedings of the Inspector's findings on the DtC. The Court of Appeal granted permission to appeal but the LPA did not pursue this.

Sustainability Appraisal, Strategic Environmental Assessment and Habitats Regulations Assessment

Background

176. S19(5) of the Planning and Compulsory Purchase Act, 2004 requires local authorities to carry out a Sustainability Appraisal (SA) of the Local Plan. SA incorporates a process set out in European Directive 2001/42/EC ('the SEA Directive') and related UK Regulations (Environmental Assessment of Plans and

Programmes Regulations 2004 – S.I. 2004 No. 1633) called Strategic Environmental Assessment (SEA).

177. The PPG on *Strategic Environmental Assessment and Sustainability Appraisal* (ID 11) defines SA as:

… a systematic process that must be carried out during the preparation of a Local Plan. Its role is to promote sustainable development by assessing the extent to which the emerging plan, when judged against reasonable alternatives, will help to achieve relevant environmental, economic and social objectives[35].

178. SA is therefore a wide exercise, addressing economic and social as well as environmental effects, but it has to be carried out in a manner which satisfies the SEA Regulations. To do this, SA should identify, describe and evaluate the likely significant effects of implementing the plan and reasonable alternatives, with the aim of establishing that the plan is the most appropriate. Reasonable alternatives are the different options considered in developing the policies; they must be sufficiently distinct to enable comparisons to be made of their different sustainability implications, and they must be realistic and deliverable.

179. SA applies to all Local Plans but not to Neighbourhood Plans or SPD. It is an iterative process carried out at each stage of plan preparation[36]. SA is only required to focus on what is needed to assess the likely significant effects of the plan. Thus it should be proportionate – it does not need to be done in any more detail than is appropriate for the content and level of detail in the plan.

180. SA lends itself to a check-list, tick-box approach in which numerous individual effects are assessed against various plan objectives in terms commonly ranging from significantly positive through negligible/neutral to significantly negative. Typically a Local Plan SA will appraise separately the overall strategy, the individual policies and site-specific allocations, in each case considering also the reasonable alternatives.

181. As a result of this approach, SA can be a large and potentially daunting document, often split into more than one volume. But by understanding the structure of the document and the methodology adopted it is usually possible to focus on the critical elements of the SA (such as where the balance of effects is negative). The Non-Technical Summary, a requirement of the SA process, can be useful in explaining the approach adopted.

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[35] ID 11-001-20140306
[36] See flow chart at ID 11-013-20140306

182. On submission, the SA is before the Inspector as part of the evidence base underpinning the plan. It can be used to test that evidence and help in understanding whether the tests of soundness have been met. Unlike the duty to co-operate, it can be corrected or added to during the examination. The LPA and the Inspector have joint responsibility for ensuring that SA is carried out on the final plan to be adopted. If modifications are significant and were not previously subject to SA, further SA is likely to be required.

183. However, the SEA Directive makes it clear that it is to be applied with pragmatism and flexibility and not to become an obstacle course. The NPPF also says that SAs should be proportionate (paragraph 167) and the PPG confirms that SA does not need to be done in any more detail , or using more resources than is appropriate for the content and level of detail in the Plan[37].

Legal challenges to SA

184. Because SA is a statutory requirement and includes the complex legal steps involved in SEA, it is the means by which plans have been most challenged in the courts. Challenges are generally from parties pursuing an alternative strategy or site, so in most cases the issue is whether the SA has properly taken into account the reasonable alternatives.

185. In the earliest cases, parts of two Core Strategies were quashed because there was either a marked lack of assessment of reasonable alternatives and a failure to explain why alternatives had been rejected (*Save Historic Newmarket v Forest Heath DC & SSDCLG* [2011] EWHC 606 (Admin)), or the assessment was imbalanced, with alternatives receiving merely notional treatment (*Heard v Broadland DC & others* [2012] EWHC 344 (Admin)).

186. The most comprehensive judgement is *Ashdown Forest Economic Development v Wealden* DC. The High Court ([2014] EWHC 406 (Admin)) held that the LPA is the primary decision−maker in identifying what is a reasonable alternative, and it has substantial discretion in that task; the alternatives chosen should be realistic, and the LPA need only provide an outline of the reasons for selecting them. However, part of this judgement was overturned in the Court of Appeal ([2015] EWCA Civ 681), where a policy requiring mitigating measures for new housing within 7km of Ashdown Forest SPA/SAC was quashed on the ground

[37] ID 11-00920140306

that no alternatives to the 7km zone had been considered, despite the fact that nobody had suggested any alternatives.

187. The *Ashdown Forest* judgment also clarified that it is not the function of the separate Habitat Regulations Assessment to consider alternatives – HRA is concerned with assessing whether a policy (such as the 7km zone) would be effective in preventing adverse effects on the SPA/SAC. But under SEA, there is a requirement to consider reasonable alternatives.

188. The only other successful challenge to SA is *Satnam Millennium v Warrington* [2015] EWHC 370 (Admin), where the LPA omitted certain key sections when carrying out a supplementary SA for a new site, thereby failing to implement the 2004 SEA Regs.

189. In other cases the Courts have afforded LPAs (and Inspectors) wide latitude in preparing and correcting SAs. *Cogent Land v Rochford DC* [2012] EWHC 2542 (Admin) found that an addendum SA requested by an Inspector was capable of curing the defects in earlier iterations of the SA, though it must not be an exercise to justify a predetermined strategy. This was confirmed in *No Adastral New Town v Suffolk Coastal* [2015] EWCA Civ 88, where it was stated that the corrections can address "any deficiencies" in earlier SAs. And whilst it is not acceptable when reading the final SA to have to go on a paper chase to find information (a *Save Historic Newmarket* point), there can be some reference back to previous documents provided it is intelligible. In *Chalfont St Peter PC v Chiltern DC* [2014] EWCA Civ 1393 the Court of Appeal held that only a low threshold is required when disregarding an alternative as unreasonable.

190. In the context of a challenge to the adoption by the Welsh Ministers of a plan to extend provide a new section of the M4 motorway around Newport the judge stated that reasonable alternatives are "... options which are considered by the decision-maker to be viable in the sense of being capable of meeting the objectives to which the decision-maker is working to such an extent that that option is viable." *R. (on the application of Friends of the Earth England, Wales and Northern Ireland Ltd) v Welsh Ministers* [2015] EWHC 776 (Admin) (para 113). This judgment also contains further consideration of the meaning of reasonable alternatives.

191. In *IM Properties Development v Lichfield* [2015] 2077 (Admin) the Inspector's handling of complex SA issues at examination was upheld. Following the Inspector's call for an additional strategic allocation in the plan to meet the OAHN, the promoter of a site not selected sought to challenge that omission. Because the SA had been the subject of considerable comment throughout the

examination, including legal submissions regarding SEA, the Inspector addressed the SA in detail in his report and concluded that it was reliable and legally compliant.

192. Whilst the Inspector in *IM Properties* accepted that the SA was complex and some errors had crept in, there was no evidence of major flaws and he felt that its main points were clearly drawn out in the non-technical summary. All options had been assessed against the same sustainability objectives, and a range of alternative sites were assessed in an equal manner and on a like-for-like basis. The Inspector found that the promoter's site was not unsustainable, but less sustainable than those selected. Disagreements about the SA came down to honest differences in planning judgement for which there was a reasonable basis. The Court found no fault with this treatment of the SA issue.

193. In particular that the Inspector had fully complied with the statutory duty under s20(5) PCPA; that the information cut-off was not unfair; that the SA had taken into account current knowledge and that there had been no breach of Reg 13 of the SEA Regulations in respect of consultation.

194. *Calverton PC v Nottingham CC* [2015] EWHC 1078 (Admin), contains a helpful summary of established law regarding the treatment of alternatives in SA reports:

(1) It is necessary to consider reasonable alternatives, and to report on those alternatives and the reasons for their rejection;

(2) While options may be rejected as the Plan moves through various stages, and do not necessarily fall to be examined at each stage, a description of what alternatives were examined and why has to be available for consideration in the environmental report;

(3) It is permissible for the environmental report to refer back to earlier documents, so long as the reasons in the earlier documents remain sound;

(4) The earlier documents must be organised and presented in such a way that it may readily be ascertained, without any paper chase being required, what options were considered and why they had been rejected;

(5) The reasons for rejecting earlier options must be summarised in the final report to meet the requirements of the SEA Directive;

(6) Alternatives must be subjected to the same level of analysis as the preferred option.

Dealing with SA in examinations - checklist

195. The following is a check list of matters to consider having regard to the legal back ground and judgments set out above. However, it should be borne in mind that SA is just one part of the evidence and that an Inspector is not required to examine it as a separate entity. Rather the SA is part of establishing whether the Plan is the most appropriate strategy when considered against the reasonable alternatives. Against that background Inspectors should:

- Read the representations on the SA to get an idea of any problems;
- Check that an up-to-date SA has been submitted and that it covers the following matters:

    - Scope and objectives of the SA
    - Summary of baseline conditions
    - Identification of key sustainability issues
    - Nature and extent of SA at previous stages of plan making
    - Appraisal of likely significant effects of plan proposals
    - Appraisal of likely significant effects of realistic alternatives
    - Mitigation measures to offset any significant adverse effects
    - Details of post-adoption monitoring
    - Statement of consultation
    - Non-technical summary

- Check in particular that the SA is sufficiently comprehensive without requiring undue reference to other documents (not a "paper chase");
- Have reasonable and unreasonable alternatives been properly handled. Reasonable alternatives must be realistic as a reasonable way of fulfilling the Plan's objectives although there is wide discretion in this. Reasons should be given for not selecting unreasonable alternatives;
- Does the SA assess proposals on a like-for-like basis? (as per *Heard*);
- Has the SA followed the correct processes in terms of consultation and content? (*Satnam*);
- Raise any concerns about the SA in your written questions and at any legal compliance hearing session;
- If deficiencies need to be corrected, identify them clearly for the LPA and ask for an additional SA to be prepared, covering all relevant procedural matters;
- Check the draft SA before publication (to avoid *Satnam's* failure);

- Ensure consultation on any additional SA takes place (usually at same time as Main Mods consultation) in accordance with the 2004 Regs and the SCI;
- If necessary, include a section on additional SA in your report in sufficient detail to show that the legal duties have been discharged (as per *IM Properties*). In particular, refer to any new SA in your report and explain what was wrong and how it was corrected.

196. The PPG gives advice on whether the SA should be updated if the draft Local Plan is to be updated, at paragraph ID 11-021-20140306. Changes to the Local Plan that are not significant will not require further SA work. In most cases LPAs should be encouraged to undertake this in order to avoid any prospect of conflict with the relevant legal provisions due to an omission.

Habitats Regulations Assessments

197. Reg 102 of the Conservation of Habitats and Species Regulations 2010 (as amended) (the "Habitats Regulations") requires that competent authorities assess the potential impacts of land use plans on the Natura 2000 network of European protected sites to determine whether there will be any 'likely significant effects' on any European site as a result of the plan's implementation (either alone or 'in combination' with other plans and projects). The process by which the effects of a plan or programme on European sites are assessed is known as Habitats Regulations Assessment (HRA).

198. In accordance with the Habitats Regulations, what is commonly referred to as a HRA screening exercise will be undertaken to identify the likely impacts of a Local Plan upon European sites, either alone or 'in combination' with other projects or plans, and to consider whether these effects are likely to be significant. Where there are likely significant effects, a more detailed Appropriate Assessment will be required. Appropriate Assessment has been historically used as an umbrella term to describe the process as a whole, but should now be correctly termed HRA. The HRA screening exercise is reported separately from the SA of the Local Plan, but helps inform the appraisal process, particularly in respect of potential effects on biodiversity.

199. Inspectors should note the judgment in March 2017 in the case of Wealden DC's challenge to the adoption of the joint core strategy for Lewes DC and South Downs National Park Authority which has particular importance in considering

whether the requirements of the Habitat Regulations are met. In the light of the judgment all plans where the effects of nitrogen deposition (alone or in-combination with other plans or projects) may be an issue must be carefully reviewed by Inspectors. The impact of the judgment is not limited to the Ashdown Forest. Particular care needs to be exercised where a plan or project may result in effects (alone or in-combination) there or at other sites where increased deposition may affect a European site. Inspectors should refer to PINS Note 02/2017 for more detail and its annex contains guidelines on questions that the Inspector may need to pursue.

200. Further advice will be added to the manual regarding HRA in due course.

The SEA Directive

201. The SEA Directive sets out the following topics for assessment with a view to promoting sustainable development :-

Biodiversity, Population*, Human Health, Fauna, Flora, Soil, Water, Air, Climatic Factors, Material Assets*, Cultural Heritage including architectural and archaeological heritage, and Landscape (* these terms are not clearly defined).

202. Typically, in the UK, these lead to the following SA Objectives :-

1. Biodiversity and Geodiversity – to conserve and enhance biodiversity and geodiversity

2. Housing – to meet the housing needs of xxxxx and deliver decent homes

3. Economy, Skills and Employment – to achieve a strong and stable economy which offers rewarding and well located employment opportunities to everyone

4. Sustainable Living and Revitalisation – to promote urban renaissance and support he vitality of rural centres, tackle deprivation and promote sustainable living

5. Health and Wellbeing – to improve the health and wellbeing of those living and working in xxxxx

6. Transport – to reduce the need to travel, promote more sustainable modes of transport and align investment in infrastructure with growth

7. Land Use and Soils – to encourage the efficient use of land and conserve and enhance soils

8. Water – to conserve and enhance water quality and resources

9. Flood Risk and Coastal Erosion – to reduce the risk of flooding and coastal erosion to people and property, taking into account the effects of climate change

10. Air – to improve air quality

11. Climate Change – to minimise greenhouse gas emissions and adapt to the effects of climate change

12. Waste and Natural Resources – to promote the waste hierarchy (reduce, reuse, recycle, recover) and ensure the sustainable use of natural resources

13. Cultural Heritage – to conserve and enhance the historic environment and cultural heritage, etc.

14. Landscape and Townscape – to conserve and enhance landscape character and townscapes, etc.

Each objective generates guide questions, e.g.:-

7. Land Use and Soils

Will it promote the use of previously developed land (brownfield) land and minimise the loss of greenfield land?

Will it avoid the loss of agricultural land including best and most versatile land?

Will it reduce the amount of derelict, degraded and underused land?

Will it encourage the re-use of existing buildings and infrastructure?

Will it prevent land contamination and facilitate remediation of contaminated sites?

203. The SA Framework generally comprises the following matrices :-

- A compatibility matrix, which tests the Vision and Objectives of a Local Plan with the SA Objectives
- An appraisal matrix (usually numerous matrices) which test the Spatial Strategy (including reasonable alternatives) and Plan Policies with the SA Objectives and the guide questions, leading to a score – often expressed as:-

Significant Positive Effect = ++

Minor Positive Effect = +

Neutral = 0

Minor Negative Effect = -

Significant Negative Effect = --

No Relationship = ~

Uncertain = ?

204. The matrices are accompanied by a commentary on likely significant effects (including cumulative, synergistic and indirect effects, as well as the geography, duration, temporary/permanence and likelihood of any effects), followed by recommendations on any mitigation or enhancement measures.

205. Potential Site Allocations (including reasonable alternatives) are generally appraised using tailored appraisal criteria with associated thresholds of significance to determine the type and magnitude of effect against each SA Objective, for example :-

5. Health and Wellbeing

Access to GP surgeries and Open Space

within 800 m walking distance of a GP surgery and open space = ++

within 800 m of a GP surgery or open space = +

within 2,000 m of a GP surgery or open space = 0

in excess of 2,000 m from a GP surgery and/or open space = -

Outputs

206. SA/SEA is an iterative process involving the development and refinement of a Local Plan by testing the sustainability strengths and weaknesses of emerging Plan options.

Reflecting the requirements of Schedule 2 of the SEA Regulations, good practice is that SA Reports will consist of:-

- a Non-Technical Summary;
- a chapter setting out the scope and purpose of the appraisal and including an overview of the emerging Local Plan;
- a chapter detailing the evolution of the Local Plan;
- a chapter summarising the key objectives of other plans and programmes and socio-economic and environmental issues relevant to the Local Plan;

- a chapter setting out the approach to appraisal and any difficulties encountered;
- a chapter outlining the likely effects of the implementation of the Local Plan and reasonable alternatives, including cumulative effects, mitigating measures, uncertainties and risks. Reasons for selecting the preferred Local Plan options and rejection of alternatives should be identified; and
- a chapter presenting views on implementation and monitoring.

Climate Change

207. Inspectors should be aware that in addition to the consideration given to climate change in sustainability appraisal of plans, Section 19(1A) PCPA 2004 requires that development plan documents must (taken as a whole) include policies designed to secure that the development and use of land in the local planning authority's area contribute to the mitigation of, and adaptation to, climate change. This requirement should be noted in the section of the report dealing with legal compliance and the LP report template (available from this page) includes suggested wording that can be amended to reflect the findings of the examination.

208. The degree to which s19(1A) will bear on plans will vary according to their scope and content and Inspectors should test compliance with the requirement in a proportionate way having regard to its purpose and any evidence and representations that are relevant. It may be helpful to include an over-arching question in the MIQ that reflects the wording of s19(1A) and where there are policy-specific concerns, more detailed questions may be necessary to explore the matter. It is for the Inspector to decide how best to reflect his/her conclusions in the report. An example of report wording on this is as follows:

> *"Several policies will help secure that the development and use of land will contribute to the mitigation of, and adaptation to, climate change. These include the various policies setting out the approach in relation to coastal flood risk, the policy relating to renewable and low carbon energy. In addition, the overall spatial focus on large settlements is intended to reduce the need to travel. Accordingly, the plans taken as a whole, achieve this statutory objective".*

Objective Assessment of Housing Need and Housing Requirement

Objective Assessment of Housing Need (OAHN)

209. Alongside statutory matters such as HRA and DtC, the OAHN will normally be the major issue for the first part of the examination for any strategic or full local plan except in the case of London Borough plans. NB It is particularly important that Inspectors understand this important difference when examining London Borough plans since the average annual housing target for each of the boroughs is laid down by the London Plan. In order to be in general conformity with the London Plan the borough plans should seek to achieve or exceed the housing target set out in the London Plan (Policy 3.3).

210. Returning to OAHN for plans outside London, it is essential to recognise at the outset that there is a 2 stage process. Firstly, the objective assessment of housing need and secondly the identification of the housing requirement - what the plan is seeking to deliver. In many plans these may be the same figure, but in some the requirement may be higher (because, for example, of needs from elsewhere or lower, because of capacity/environmental constraints). The terms 'policy-on' and 'policy-off' are not used in policy or guidance and can cause confusion. If the parties rely on them heavily then it may be advisable to clarify what they mean by those terms and indicate that the words in national policy should be used instead.

211. NPPF, paragraph 47:

"To boost significantly the supply of housing, LPAs should … ensure that their Local Plan meets the full, objectively assessed needs for market and affordable housing in the housing market area, as far as is consistent with the policies set out in this Framework …"

And paragraph 159:

Local planning authorities should have a clear understanding of housing needs in their area. They should:

prepare a Strategic Housing Market Assessment to assess their full housing needs, working with neighbouring authorities where housing market areas cross administrative boundaries. The Strategic Housing Market Assessment should identify the scale and mix of housing and the range of tenures that the local population is likely to need over the plan period which:

–– meets household and population projections, taking account of migration and demographic change;

–– addresses the need for all types of housing, including affordable housing and the needs of different groups in the community (such as, but not limited to, families with children, older people, people with disabilities, service families and people wishing to build their own homes);and

–– caters for housing demand and the scale of housing supply necessary to meet this demand;

212. The PPG(ID02a) explains how to undertake *housing and economic development needs assessments.* This Guidance provides a checklist of matters which a SHMA should cover. It is essential to read this Guidance and use it to pose questions on the evidence (see below).

213. The **Planning Advisory Service's (P**AS) *Technical Advice Note* (2nd edition, July 2015) provides a helpful discussion of a number of matters. However, it has no particular status and should only be referred to in an Inspector's preliminary findings/report if possible reliance on it was highlighted at the hearing. Be aware that on some matters the Note deviates from NPPF/Practice Guidance. For example, in table 4.1 (and explained in paragraph 4.50) *affordable housing need* is shown as an input after the OAHN, but as highlighted above, NPPF paragraph 47 refers to *meeting the full, objectively assessed needs for market and affordable housing*.

214. The SHMA is the key evidence document and reading it should be an early priority. Most plans being submitted for Examination are accompanied by an up to date SHMA based on a justified Housing Market Area (HMA), which has been undertaken by experienced consultants (eg G L Hearn, ORS, Peter Brett, to name a few) who will have explored and made recommendations on all the matters referred to in the Practice Guidance. Challenges to those assumptions (informed by evidence) provide the context for framing matters for discussion at the hearing.

215. SHMAs often identify a range of possible OAHN options (often the case where the work has been done by consultants). If so, there should be another evidence document (eg Housing Topic Paper) to explain why the Council has selected a particular option. Where the housing requirement is different from the identified OAHN in the SHMA, a topic paper should preferably bring together the evidence which justifies that decision.

216. Housing needs should be assessed on the basis of a HMA agreed with adjoining authorities and justified by evidence (see Practice Guidance). Increasingly, comprehensive SHMAs are being commissioned for a whole HMA by constituent

Councils. This means that the same evidence may be used in several different examinations. The need for a consistent approach becomes critical. Depending on individual progress with plans, the same SHMA might be considered at different examinations over a period of time (eg Oxfordshire). Far preferable is co-ordination to enable joint hearing sessions on the SHMA and the apportionment of the overall OAHN between constituent Councils. (eg Amber Valley/South Derbyshire November 2014/October 2015 https://www.south-derbys.gov.uk/assets/attach/2583/Inspectors%20HMA%20Position.pdf). However, this is likely to be outside the control of an individual Inspector and it may not be feasible or pragmatic to insist on joint SHMA examinations elsewhere.

217. Where there is a well-structured, up to date, comprehensive SHMA on which the representations have been made and there has been no subsequent updating evidence or need for post-submission clarification from the Council, then there may be little need for pre-hearing questions/further statements. But the agenda (published in advance) should be comprehensive. A good example is that for the Arun Local Plan http://www.arun.gov.uk/local-plan-examination (Document IDED16). This agenda includes quotes from Practice Guidance, but it is not necessary to do this. However, if the evidence base is less coherent pre-hearing /questions and or the agenda may need to explore variations in the evidence eg Inspectors agenda for the Hearing on the Housing Requirement for the West Oxfordshire Examination November 2015. http://www.westoxon.gov.uk/media/1301978/IN-010-Agenda-Issue-2-Housing-Requirement.pdf

218. If, following initial preparation, it is obvious that the Council's evidence is confused or out of date, or the Council's reasons for selecting an OAHN/housing requirement are opaque, then it is important to seek clarification as soon as possible. It may, for example, be necessary to seek an update/explanatory note from the Council in advance of finalising pre-hearing questions. In this way other parties will be able to comment on the new evidence in their statements.

219. Typical questions an Inspector will need to address either in pre-hearing questions, or on the agenda, or both, are discussed below and are summarised in the check list at the end of this chapter. They should ensure that all the stages in determining the OAHN have been undertaken or persuasive evidence given as to why they have not been. But do not ask a question if the evidence on a matter is not in dispute. Where an important technical point appears undisputed seek confirmation for clarity: *It appears generally accepted that* …..It is important to remain focussed on the purpose of this exercise - whether the housing requirement in the plan is sound. The OAHN is not intended to be

an academic exercise. In practice, various combinations of different assumptions may result in a similar overall OAHN and thus justify a chosen housing requirement. It is important to conclude on the OAHN in the round.

220. The Office for National Statistics (ONS) produces population projections to local authority level every 2 years. These are based on ONS' Mid-Year Estimates of population for each year following the Census. DCLG then produce household projections based on the ONS population projections. Consultants producing SHMAs for Councils (and producing alternative projections for representors) are likely to use specialist software for modelling purposes (e.g. POPGROUP, Chelmer) as these enable inputs assumptions to be varied to test alternative scenarios. These models will use the raw ONS population data. Such models will be particularly useful/necessary in the period when ONS population or DCLG household projections are becoming a little out of date prior to their next 2 year update.

221. *Has the SHMA used the most up-to-date Government projections?* Is any update or sensitivity check required against more recent projections? Where there is an obvious shortcoming in this respect, it may be necessary to ask the Council to produce further evidence well in advance of any hearing so that it can be commented on by other parties in writing.

222. *Is any adjustment required, as a result of local factors, to the ONS/DCLG projections to form the demographic starting point for OAHN?* ONS projections are largely based on the 5 years predating the projection. If those 5 years were particularly unusual in terms of population change in the area (distinct from wider trends), then they might be an inappropriate basis for a forward demographic projection. But this question is inviting only specific adjustments, not a fundamental rejection of ONS modelling.

    Eg should the migration component of future change be based on a longer past period (eg 10 years) if short-term factors are likely to have significantly affected migration in the last 5 years (NB ONS' own figures indicate that recent international migration is much higher than the annual average modelled in the 2012 projections, which has only been modestly increased in the 2014 national projection.)

223. *Should ONS' Unattributable Population Change (UPC) be taken into account or ignored?* (Only ask this question if it is a matter significantly disputed in technical reps.)

    UPC is a correction factor applied by ONS to recalibrate its Mid-Year Population Estimates between 2001-2011 so that there is alignment between the 2001 and

2011 Censuses. It can be a significant component of change (positive or negative) in some areas over this period. The question that can arise is whether it should be ascribed in whole or in part to a component of migration, typically international migration, given that it is generally accepted that the latter has been inaccurately recorded over this period. ONS do not ascribe it to any particular factor, but some SHMAs/consultant do so; hence it becomes a topic for debate. It is of more relevance if a 10 year period is being used for the migration component. With the next set of projections, UPC will be of reducing relevance. Inspectors have come to varying conclusions as to whether to include UPC in the demographic modelling. There is no "right" answer.

224. *Should any adjustment be made to the household formation rates used by DCLG to convert the population projection to a household projection?*

The projected future propensity for the projected population to form households is determined by the household representative rates (HRR) or headship rates. These are the key factor in determining the future number of households from a given population. They are a complex element of modelling, varying by age, sex and over time.

The PAS Technical Note (6.36 -6.43) generally endorses the latest HRRs as a new starting point and discourages any attempt to blend these with earlier rates - a practice that emerged because of the perceived shortcomings of the rates used in ONS' interim 2011 population projections. Criticism of the 2014 HRRs focus on the 25-34 age group. The 2014 HRR still shows a substantial difference from the 2008 HRR for this group, whereas for all other age groups they are more closely aligned.

The debate is whether the HRR trend used in the 2014 projection still reflects some suppression of household formation as a result of the recession, or whether it reflects a more fundamental and permanent shift in household formation among the young. This is difficult to judge. The matter should have been considered in the SHMA. Modest uplifts for this reason have been accepted by some Inspectors. However, arguments for a crude blending/averaging of HRRs from 2012 and 2014 have generally been resisted.

Rather than making an adjustment directly to HRRs, some SHMAs may make an uplift to the demographic projection based on data for overcrowded or concealed households as a proxy for household formation that may have been be supressed. Alternatively, these matters may be considered under market signals.

225. *What is total affordable housing need over the plan period including existing backlog?*

The PPG gives a very detailed methodology, which is used by most consultants in producing SHMAs. Where this Guidance has been followed the resulting figure for affordable housing need is separate from, and sits alongside, the OAHN derived from the demographic starting point. (An alternative approach is used by *Opinion Research Services* who derive an assessment of affordable need from their overall projection.) In any case the need for affordable housing must be explicitly assessed as part of the process of arriving at the OAHN as per *Satnam Millennium v Warrington BC* [2015] EWHC 370 (Admin).

Inspectors should bear in mind the relationship and overlap between the basic demographic OAHN figure and the affordable housing figure. The demographic OAHN figure will include new households who will require affordable housing and these households will also be in the affordable housing requirement figure. The affordable housing figure will also include existing households who are in need of affordable housing but who currently live in a non-affordable home. As an existing household in a dwelling they are unlikely to feature in the demographic based OAHN. If there is a large number of such households the affordable housing requirement can be higher than the OAHN.

There may be limited criticism of the resulting figure of overall affordable housing need (with more focus on the appropriate response to that need). Any critical assumption used (eg the proportion of income it is assumed reasonable to spend on housing) that is different from those most commonly used is likely to be contested and will need testing.

Some SHMA's suggest discounting the calculated figure of affordable housing need by deducting a future proportion of those in need who could be accommodated within the private rented sector (PRS) and receive public subsidy (housing benefit). However, since the PRS is not affordable housing as defined in the NPPF, affordable housing need should not be discounted in this way. This position has been supported directly in a High Court judgement (albeit in the context of a S78 housing appeal) *Oadby and Wigston BC v Secretary of State for CLG and Bloor Homes Limited* HC 3 July 2015, CO/139/2015, paragraph 34 (ii) and 50.

It is important to establish whether there is a shortfall between the (net) need for affordable housing and the likely supply of such housing, taking into account the policy requirements on market sites, plus any other sources of new affordable housing eg 100% schemes or new Council-funded building. Where there is a delivery gap, has the Council appropriately considered whether an

uplift should be made in market housing to provide additional affordable housing (PPG ID2a-029-20140306)? The *Satnam Millennium* judgment confirms that this must be done. Is the conclusion reasonable? There is no "right" answer. It is important to note that this specific uplift, if justified, should be added to the housing requirement figure, not to the OAHN figure. As such it is an uplift that would only be appropriately considered by an Inspector who is examining the housing requirement in a local plan. It is not a factor that could reasonably be considered by an Inspector in addressing any OAHN issues in an appeal.

Be alert to the fact that an uplift for any other reason, such as to respond to market signals or to increase the workforce to match job growth will deliver more affordable housing, even though not explicitly done for that reason.

226. *Should an uplift be made for market signals?*

The PPG gives a very detailed resume of market signals to take into account and addresses the question: *How should plan makers respond to market signals?* (Paragraph: 020 Reference ID: 2a-020-20140306)

There have been differing conclusions by Inspectors, partly because of the tension in interpretation of the Guidance with regard to whether the emphasis is placed on absolute differences in market signals or comparative rates of change in market signals. Many recent SHMAs, particularly those undertaken by experienced consultants, are likely to have reviewed evidence of market signals and where there are market pressures made some uplift (eg of 10% or 20%). The most important summary market signal is likely to be the affordability ratio (lower quartile earnings to lower quartile house prices).

Examples of how this matters has been assessed include Crawley (Inspector's report November 2015, paragraph 25)
http://www.crawley.gov.uk/pw/web/pub270981

Overall the information on market signals is mixed – the price indicators show a marginally improving situation over the recent past, whereas some indicators of quantity have worsened over the same period. The Council has made a specific adjustment for potential suppressed demand over the 2001-2011 period; this responds directly to the overcrowding indicator, so the main worsening trend has been separately addressed. On this analysis it is questionable whether the additional 10% uplift is justified, particularly as the Council acknowledges that the chosen percentage was not derived directly from the evidence base. I appreciate that there is a strong demand for new homes in Crawley and that affordability remains a significant problem, but that is the situation across the whole of the South East. In relative terms, the situation in Crawley is not as severe as in other NWS authorities, nor has it worsened in recent years.

227. *Would the demographic starting point (plus any uplifts) provide sufficient workers to support projected economic growth?*

NPPF 158 states:

Local planning authorities should ensure that their assessment of and strategies for housing, employment and other uses are integrated, and that they take full account of relevant market and economic signals.

The PPG addresses the question: *How should employment trends be taken into account?* (Paragraph: 018 Reference ID: 2a-018-20140306)

Plan makers….Where the supply of working age population that is economically active (labour force supply) is less than the projected job growth, this could result in unsustainable commuting patterns (depending on public transport accessibility or other sustainable options such as walking or cycling) and could reduce the resilience of local businesses. In such circumstances, plan makers will need to consider how the location of new housing or infrastructure development could help address these problems.

The PAS *Technical Note* (Fig 8.2) gives an outline of the process that could be followed (but that is not a required methodology). This has been a particularly difficult and contentious area to address. Some Councils have ignored the relationship; been too optimistic about the growth of the locally generated workforce (to minimise any uplift of the housing projection); or over-optimistic about local job growth.

Leading economic forecasts for particular areas (eg by Experian, Oxford Econometrics, Cambridge Forecasting) can fluctuate quite widely over a short space of time and between the different forecasters. It is right to acknowledge considerable uncertainty about such forecasts and to be cautious about undue reliance on any particular one which seems excessively optimistic.

Conversely, a major thrust of the NPPF is to facilitate economic growth and areas with the greatest potential for economic growth should not be held back by labour shortages. There should normally be a reasonable alignment between the economic growth projections reflected in the plan and the strategy of the relevant LEP. Not all areas can expect to have above trend population growth/in-migration. Those additional people have to come from somewhere.

In estimating what local workforce the household projection would provide, the key assumptions are: the economic activity rate (eg increasing among over 60s with rising pension age); the long term unemployment rate; and the commuting ratio (the proportion of local workers to local jobs). Any assumptions made

which differ from clear trends or are otherwise optimistic are likely to be challenged and need consideration. Assumptions about significant changes in commuting ratios inevitably have implications for adjoining areas and therefore should not be made by one Council in isolation (PAS *Technical Note* 8.16).

In relation to all the topics for which an uplift from the demographic starting point might be made (affordable housing need, market forces and workforce) it is important to remember that an uplift for any one reason also provides a benefit in relation to the other factors. The uplifts do not have to be added cumulatively. The largest justified uplift would also be likely to meet the aims of smaller uplifts required for other reasons.

228. *Has there been adequate assessment of the needs of particular groups and does any adjustment need to be made to the household projections for them?*

The PPG has a lengthy section under the heading: *How should the needs for all types of housing be addressed?* (Paragraph: 021Reference ID: 2a-021-20160401). This concerns needs of groups such older people, students, those with special needs, such as the disabled, and those wanting to self/custom build.

The House of Commons Women and Equalities Committee published its report on Building for Equality: Disability and the Built Environment on 25 April 2017 and it includes recommendations on the examination of local plans and compliance with the Public Sector Equality Duty (PSED) in respect of provision for the needs of people with disabilities

The Government will make its response to the committee report in due course. However, as an interim measure, Inspectors should take a precautionary approach by making explicit that consideration is being given to the plan's role in providing for the needs of all sections of the community, and the following advice is included here for convenience although it includes design matters as well as needs assessment. For example, this can be done, if appropriate, by including questions in the Matters, Issues and Questions (MIQs) along the following lines:

Does the local plan adequately address the needs for all types of housing (excluding affordable housing) and the needs of different groups in the community (as set out in paragraphs 50 and 159 of NPPF)?*

**Note: affordable housing will be considered under Question x*

Does the local plan make sufficient provision for inclusive design and accessible environments in accordance with paragraphs 57, 58, 61 and 69 of NPPF?

It will also be helpful, where relevant, to include a reference in the report to make clear that you are satisfied that the plan's provisions for inclusive design and accessible environments are consistent with NPPF and that in this matter and all other relevant matters (*you may need to expand this to refer to the other relevant matters you have considered, since the PSED applies not only to people with disabilities but to a number of other protected groups)* you have had due regard to the equality impacts of the plan in accordance with the PSED. If your examination is at an advanced stage and you have not had reason to raise inclusive design and accessible environments as a soundness issue at the earlier stages it would nonetheless be advisable to include a brief reference in the report to confirm that the plan positively addresses these matters.

Inspectors will need to consider the relevance of these matters to the plan being examined. For example, where the role of a site allocations plan or an area action plan is to provide for the needs identified in a core strategy the above advice does not apply in relation to the assessment of needs for particular types of housing. Nonetheless, the Inspector should consider whether the detailed policies for the site allocations/area action plan have a means of addressing inclusive design issues even if just by way of broad criteria to say this. See also the section of this chapter relating to housing standards and plan making.

For the most part, meeting the needs for all types of housing does not alter the overall quantum of housing needs, only the type of accommodation required to meet it.

The exception is the communal population. These are persons who are not part of conventional households and who live in communal establishments (also called the *institutional* population). Communal establishments include care homes, students' halls of residence, prisons and barracks. See DCLG Methodological Report February 2015

The communal population will be included in the ONS population projection, but not in DCLG household projection or the household projection using other models. Putting aside prisons and barracks, the OAHN should identify what assumption has been made about the size of the communal population of students and of older persons. These figures do not mean that institutional accommodation of that scale needs to be provided for them, since as a matter of policy or practice their needs may be met by various types of accommodation (some of which may be classified as institutional and some as housing - see below). At this stage the important point is to ensure that the numbers are not "lost" and any assumptions made are explicit so that need can be fairly compared with the planned and actual delivery of different forms of

accommodation on the supply side. *See Inspector's Interim Report Gloucester, Cheltenham Tewkesbury Joint Core Strategy 31 May 2016 (paragraph 11)*

If a local university has plans for significant expansion, the planned growth in student numbers will need to be separately identified. If purpose-built student accommodation is also planned to accommodate this growth there would be no increased demand on the general housing stock. However, as above, it is best to separately identify this need first so that it can be compared with what is planned to meet that need and what is eventually delivered.

In as much as the Gypsy and Traveller population have been recorded in the Census and counted in the ONS Mid-Year Estimates, that population will be reflected in population projections and household projections. However, because of the particular needs of this group it is now established practice that future need is assessed by other, more direct, methods (see separate section on Travellers in this chapter). Whilst there will therefore be an overlap between the global OAHN figure and the separate assessment of Traveller needs, for most authorities this can be ignored because the numbers are proportionally so small such as to make no practical difference to the housing requirement. However, there may be one or 2 small authorities with a large Traveller population where the overlap may be material and require more carful articulation.

229. *In converting the final household projection into a dwelling requirement has an appropriate vacancy rate been used and other allowances made?*

The household projection needs adjustment to reflect the number of dwellings to actually meet that need allowing for vacant dwellings and dwellings lost to other factors, most significantly in some places, holiday homes and second homes. This can controversial, but is an entirely logical adjustment.

Eg Arun Local Plan *Inspector's Conclusions on OAN* 2 February 2016 - *This comprises vacancies arising both from the 'normal' turnover of stock (2.5%) and from second home ownership (3.1%). This is the standard form of approach to the issue of vacancy. Although second home ownership is not a housing 'need', such dwellings are not available to meet the needs of Arun residents. Given the District's coastal location and consequent attraction to a certain level of second home ownership (and since ADC cannot prevent such purchases) it is reasonable to assess the overall level of need for new homes by assuming a continuing proportion of vacancy in the overall stock at the level of the last Census.*

http://www.arun.gov.uk/local-plan-examination (IDED18 2 February 2015)

See also Cornwall Local Plan Inspector's Preliminary Findings June 2015:

3.23 The National Planning Policy Framework (NPPF) does not identify second/holiday homes as a "need" and therefore such homes should not be counted as part of the

objectively assessed need (OAN) required by the NPPF. But the acquisition of future new dwellings as holiday/second homes would remove those dwellings from the stock available for the needs which have been assessed. More generally, if at 2030 the proportion of the total housing stock occupied as holiday/second homes is similar to now, additional existing homes would have been acquired as holiday/second homes and be unavailable to meet assessed needs, even if newly built homes in some locations are not attractive for such use.

https://www.cornwall.gov.uk/environment-and-planning/planning/planning-policy/cornwall-local-plan/local-plan-examination/2015-examination-suspension/ ID.05 11 June 2015

The inclusion of holiday homes in the overall OAHN calculation was supported in a High Court judgement (albeit in the context of a S78 housing appeal) *Borough Council of Kings Lynn and West Norfolk v Secretary of State for CLG and ELM Park Holdings Ltd* HC 9 July 2015, CO/914/2015, paragraph 36.

Future changes affecting OAHN

230. ONS published 2014 based Sub National Population Projections (SNPP) on 26 May 2016. These provide population (not household) projections for each local authority to 2039 based on the population at 30 June 2014. They replace the 2012 based SNPP on which SHMAs produced in 2014/2015 will have been based. Subsequently DCLG published 2014 based household projections on 12 July 2016.

231. For plans already submitted, but where no conclusion has yet been reached on OAHN, and for all plans submitted after this date, it would be reasonable to ask the Council to compare the new ONS 2014 SNPP and DCLG household projections for the district/HMA (dependent on the basis of their evidence) and to invite comment from parties (at an appropriate stage in the process) as to whether any difference in projections has significant implications for OAHN.

232. Depending on: the stage the Examination has reached, the significance of any differences between the projections, and comments made, it might be necessary to hold a further hearing or consult on further changes. But these are likely to be the exception rather than the norm. The approach appropriate for particular Exams will depend on its context. Inspectors should bear in mind PPG which says:

*Housing and economic development needs assessments - Methodology assessing housing needs (*Paragraph: 016Reference ID: 2a-016-20150227)

How often are the projections updated?

The Government's official population and household projections are generally updated every two years to take account of the latest demographic trends. The most recent published Household Projections update the 2011-based interim projections to be consistent with the Office for National Statistics population projections. Further analysis of household formation rates as revealed by the 2011 Census will continue during 2015.

Wherever possible, local needs assessments should be informed by the latest available information. The National Planning Policy Framework is clear that Local Plans should be kept up-to-date. A meaningful change in the housing situation should be considered in this context, but this does not automatically mean that housing assessments are rendered outdated every time new projections are issued. (emphasis added)

233. Finally the Local Plan Expert Group (LPEG) Report recommends that the Government prescribes a specific methodology for housing needs assessments in Appendix 6 accompanying the report. If adopted, this would greatly reduce the scope for debate and judgement. Whilst the report and recommended model makes interesting background reading, Inspectors should not yet require assessments based on the suggested model, nor rely on it in concluding on the OAHN, until the Government has made clear its position. As the White Paper published in February 2017 has made clear, the Government intends to publish details of the proposed methodology for consultation in due course.

Housing requirement

234. Determining the OAHN is but one step in considering the soundness of the housing requirement in the plan. The requirement in the plan may be above or below OAHN. It may be above the district's OAHN so as to accommodate some or all of the unmet need arising from adjoining authorities (that can include need from authorities outside the HMA). It can be below OAHN because of environmental constraints (where NPPF paragraph 14 is met) or because of capacity within tightly bound cities (eg Brighton and Birmingham).

235. It is particularly essential in assessing this factor (but also for many others) that the plan makes clear the period over which the housing requirement is being set out - the base date of the plan and its end date. Furthermore the Inspector must be clear of the base date (and end date) of any evidence used to assess future needs and to ensure that needs for the whole plan-period have been taken into account (along with development already built/permitted which could meet those needs). Best practice is that the evidence base date and the start of the plan period should be the same, but this is often not the case. How the

Council have dealt with any gaps or overlaps between the plan-period and the main evidence base should be very carefully explained by the Council and scrutinised by the Inspector.

236. The housing requirement will normally be expressed as a total figure for the whole plan period with a constant annual rate of delivery. The first step is to determine whether there has been any *shortfall* in delivery from the start of the plan-period against the (sound) annualised plan requirement. If there has been, this should normally be addressed within the first 5 years (the *Sedgefield* method) (PPG ID3-035-20140306). If this cannot be achieved, national guidance indicates that the Council should talk to its duty to cooperate neighbours to assist delivery (PPG ID3-026-20140306). However, often Councils will not have identified the problem at a sufficiently early stage to secure any meaningful increase in delivery in the short term from adjoining areas. Accordingly, the Council/Inspector will need to consider how quickly the shortfall can be addressed within the district.

237. Whether or not the shortfall is being tackled in the first 5 years or distributed over a longer period of time, the position should be explained in the plan so that it is clear for future decision makers. Where a shortfall has been identified, the 5% or 20% flexibility allowance used in calculating the 5 year supply should be include the shortfall. There is at least one SoS appeal decision that does it differently, but note:

    The joint letter from Ms Kingaby and myself dated 10 December referred to appeal ref 2199085 as the SoS's model for adding the buffer to the sum of the 5 year target and the shortfall. Although the Council refers to the Cheshire East decision ref 2209335 (Gresty Lane) where the SoS took a different approach, PINS is not aware of any other SoS decision in which the calculation was made in that way. The Cheshire East method is outside the SoS's 'normal' approach. The model set out in 2199085 is therefore the one which should be followed.

    (Extract from letter from Inspector Roy Foster to Amber Valley BC, 10 August 2015.)

238. *Shortfall* in delivery of housing within the present plan-period must not be confused with some parties referring to a *backlog* (or other words) of under delivery in earlier plan-periods. The consequences of any failure to deliver what was the housing requirement for previous plan periods should have been taken into account in the SHMA. This does not normally mean that that any such shortfall should simply be added on to the initial OAHN calculation, but that a proper assessment of future needs will have regard to the reality of what has

happened in the past in determining what is a sound basis for projecting into the future.

239. Alongside addressing how to deal with any *shortfall* in delivery in the present plan, there may be a wider issue about whether a constant annual delivery is achievable or whether delivery has to be stepped (usually *backloaded* towards later in the plan-period) in order to ensure delivery is in sustainable locations eg large urban extensions which have to be removed from the Green Belt which will take some years to get underway. If a backloaded approach is justified, the plan (not just the Inspector's report) must make the position clear, leaving no doubt in the future as to how the 5 year supply should be calculated eg *Housing delivery will step-up over the plan period with XX annul delivery for 2013-2023 and YY annual delivery 2023-2033. The 5 year supply will be assessed on the basis of this stepped delivery* (or whatever the justified periods are). The position will also be shown in the housing trajectory, but this is not sufficient alone. The trajectory is normally an expression of what is expected to happen (and typically may show considerable variations year-to-year over the plan period even when the plan assumes a constant annual rate). It is only a policy which can stipulate what must happen. That is why any intended (sound) stepped delivery must be identified in policy.

240. A checklist of questions to ask or matters to pursue based on the above is at Annex 1.

Establishing 5 year housing land supply (HLS)

241. Having regard to paragraph 47 of the NPPF the issue in an examination of a full local plan is likely to be whether at adoption it will ensure a supply of land capable of delivering five years' worth of housing against the LPA's housing requirement, with flexibility to respond to changing circumstances. Inspectors should have this in mind and, if possible, adopt this wording during the examination.

242. Comprehensive strategic plans should establish nearly all the factors which determine how the 5 year HLS will be calculated. For the benefit of future decision makers in s78 appeals and following a thorough testing of relevant matters it is very important that both the plan and the report clearly express the key assumptions/parameters which are relied on to calculate the 5 year HLS. These comprise the findings in relation to OAHN, the housing requirement, how any shortfall in delivery since the start of the plan period has been addressed, whether delivery is an annual average or stepped, the buffer and sources of housing land supply including windfalls. Regarding the latter the plan should

set out the component sources of supply that will make up the overall housing requirement for the plan period. This can be done in a policy and an accompanying table.

243. Furthermore, to avoid the need for such questions to be re-visited in the context of subsequent s78 appeals the plan period should be clearly stated, the date given at which the buffer is established and if a stepped requirement is accepted this must be set out in the policy so that 5 year supply can be assessed on that basis. The report should also make clear the date of all the information which has been tested in establishing the 5 year HLS so it is clear what has been relied upon and whether in a subsequent s78 appeal there has been a change in circumstances. For similar reasons the testing of windfall assumptions should be robust and this should also be clearly stated in the report. Overall the policies in the plan should ensure an on-going 5 year HLS with flexibility to respond to changing circumstances.

244. Paragraph 47 of the NPPF confirms that sites should be deliverable and footnote 11 clarifies that:

- *To be considered deliverable, sites should be:*
- *available now; offer a suitable location for development now;*
- *be achievable with a realistic prospect that housing will be delivered on the site within five years.*
- *In particular, development of the site should be viable.*

245. The Court of Appeal found, in *St Modwen Developments Ltd v SSCLG, East Riding of Yorkshire Council and Anor* [2017] EWCA Civ 1643, that it did not mean that, for a site properly to be regarded as 'deliverable', it must necessarily be certain or probable that housing will in fact be delivered, or delivered to the fullest extent possible, within 5 years.

246. The CoA recognised that the fact that a particular site is capable of being delivered does not necessarily mean that it will be. Identifying a supply of specific deliverable sites sufficient to provide 5 years' worth of housing does not inevitably involve "an assessment of what would probably be delivered. Sites may be included if the likelihood of housing being delivered within five years is no greater than a 'realistic prospect'.

247. To rigorously test the supply side two key points should be explored by Inspectors (further detail is contained in Annex 2):

- Realistically, when will development start and the first houses be completed?

- What is the rate of development, taking into account local market evidence and the likely number of developers/distinctive parts of the development?

248. Where continued (rapid) progress on implementing a large site is likely to be critical for the 5 year supply in the future, this should be highlighted in the Inspector's report as a caveat to any favourable conclusion made on the supply position eg *whether or not there will be an on-going 5 year supply will depend on the developer/Council making continued good progress with X Y Z*. In the scenario where the assessment undertaken suggests that there will only just be over 5 years supply in the future, this should be highlighted as a weakness, as the plan will have no or limited flexibility to respond to changing circumstances. Whilst in isolation that would not be a reason to find a plan unsound, if suspension is required for other work to be done, the vulnerability of the Council on this matter should be made clear.

Green Belt and exceptional circumstances

249. Any changes to the Green Belt, whether for housing, economic or other needs, are a strategic matter and should be addressed as such in the development plan. The Government attaches great importance to Green Belts (paragraph 79 of the NPPF). Furthermore, land designated as Green Belt is one of the examples of where specific policies indicate development should be restricted under paragraph 14. Paragraphs 83 and 84 are also relevant in confirming that Green Belt boundaries should only be altered in exceptional circumstances and that when drawing them up or reviewing them LPAs should take account of the need to promote sustainable patterns of development. These tests apply both when land is proposed to be added or removed from the Green Belt as evidenced by the judgment in *Gallagher Homes Ltd v Solihull MBC* [2014] EWCA Civ 1610. It should be noted that the test of "very special circumstances" referred to in paragraph 87 of the NPPF is not relevant in this context.

250. The PPG on *Housing and economic land availability assessment* provides that in preparing a SHLAA LPAs should *"take account of any constraints such as Green Belt, which indicate that development should be restricted and which may restrain the ability of an authority to meet its need."* (Ref ID3-045-20141006). However, paragraph 034 of the PPG regarding unmet need and the Green Belt is concerned with decision taking and not plan making.

251. The Parliamentary under Secretary of State (Planning) wrote to the Chief Executive of PINS on 3 March 2014 and said:

It has always been the case that a local authority could adjust a Green Belt boundary through a review of the Local Plan. It must however always be transparently clear that it is the local authority itself which has chosen that path – and it is important that this is reflected in the drafting of Inspectors' reports.

252. If a LPA is unable to meet its OAHN there is no policy *requirement* for it to review its Green Belt boundaries although there may be pressure to do so when neighbouring authorities are reviewing theirs. However, it may be justified to request that a LPA give consideration to undertaking such a review in order that all reasonable alternatives have been explored to ensure that the strategy of the plan is justified.

253. If proposals to re-draw the Green Belt boundary are put forward by a LPA in a strategic plan Inspectors should generally expect that a two stage approach will have been followed. The first stage is the evidence gathering and assessment that leads to an in-principle decision by the LPA that review of the Green Belt boundary is necessary to help meet development needs in a sustainable way (see NPPF paragraphs 84-85). The second stage determines which site or sites would best meet the identified need having regard to Green Belt harm and other relevant considerations. It is only after satisfactory completion of the two stages that exceptional circumstances are capable of being fully demonstrated. For further advice about "exceptional circumstances" see below.

254. Typically the first stage involves a number of steps, starting with a thorough investigation of the capacity of the existing urban areas and whether this has been maximised. Subtracting this from the OAHN leaves the amount of development to be provided outside the urban areas. The next step is to consider whether there is any non-Green Belt rural land which could meet all or part of the unmet need in a sustainable manner and having regard to any other significant constraints. These two steps address the requirements of NPPF paragraph 84 and give a scale of unmet need which can only be met by Green Belt release. In some situations it may then be necessary to consider whether, in principle, this residual need is one which <u>should</u> be met by GB release. This might involve examining not only the justification for meeting the OAHN (or the consequences of not meeting it) but also addressing sustainability considerations and consistency with the overall strategy of the Plan reflecting NPPF paragraphs 84 and 85.

255. There is limited technical advice for LPAs on undertaking Green Belt reviews. It is contained in LGA/PAS: *Planning on the Doorstep: The Big Issues – Green Belt* and POS: *We need to talk about the Green Belt*.

256. At the site specific level or second stage, the focus is nevertheless on Green Belt purposes at paragraph 80 of the NPPF because these are the characteristics where differences between sites are most apparent. It is usually not necessary to consider the effect on openness (the essential characteristic of Green Belts) because this will be broadly proportionate to the scale of development and the same amount of development will have a similar effect on openness wherever it is located.

257. In some cases the impact on Green Belt purposes will cause such harm to the Green Belt that it outweighs all other considerations, leading directly to the finding that exceptional circumstances do not exist. In most cases where the review of the Green Belt boundary is justified in principle, , the impact on Green Belt purposes is one of many factors to be weighed in the balance. Given the importance of Green Belts in national policy, any harm to the Green Belt should nonetheless be given appropriate weight in this process. There is no clear 'ranking' of considerations in national policy.

258. So it does not necessarily follow that sites which cause little harm to the purposes of the Green Belt will be preferred over sites where the harm is greater. For example, a site that would cause little Green Belt harm may have to be rejected because it fails the flood risk Sequential Test and/or has major biodiversity constraints. Equally a site which causes some harm to Green Belt purposes may have such weighty other benefits and no constraints such that it is preferred over a site which causes lesser harm to Green Belt purposes but has few other benefits and/or substantial constraints. Other factors that may come into play are whether the site is previously-developed land or benefits from an existing planning permission.

259. In the absence of a recognised methodology there is no one 'right' way to undertake such an exercise and it will be a matter of judgement as to how robust and credible it is. Other planning constraints including landscape designation will need to be taken into account in considering whether sites should be allocated for development, but this may be done through the SHLAA process, rather than a Green Belt review. It is nevertheless reasonable to expect that Green Belt reviews will be undertaken on a comprehensive basis, which may necessitate cross-boundary working.

260. By way of an example the Inspector's report at Rushcliffe concluded in relation to an urban extension near Clifton:

The proposed urban extension would not materially conflict with the five purposes of Green Belts. Although some loss of greenfield land would occur, it

would not result in the towns of Derby and Nottingham merging into one another, or harm the setting and special character of historic towns. From an objective perspective, the landscape is not so scenic and special that it should be preserved. To my mind, and reflecting the Council's own decision in this regard, the need for a significant uplift in new housing provision and for positive action to support economic growth in Greater Nottingham including Rushcliffe provide the exceptional circumstances for a change to Green Belt boundaries in this locality. There is no alternative approach that would be as sustainable as releasing the Green Belt land. I agree with the authors of the Appraisal of Urban Extensions 2008 that the opportunities for the development of this land outweigh the constraints. I consider that the sustainable urban extension south of Clifton is justified, deliverable and consistent with positive planning to meet housing needs.

261. Other instances of reports endorsing significant changes to the Green Belt to accommodate development in sustainable locations include:

- Inspector's report for the Cheshire West and Chester Local Plan December 2014, paragraphs 72-96
- Inspector's report on the Core Strategy for Gateshead and Newcastle upon Tyne February 2015 (paragraphs 46-53)
- Inspector's report on the Core Strategy for Bath and North East Somerset June 2014 (paragraphs 118-119, 134-139)

262. There is no definition of exceptional circumstances but court judgments referred to in *Gallagher Homes Ltd* are instructive. For example, in *Carpets of Worth Ltd v Wyre Forest DC* (1991) 62 PCR 334 the judge made the point that an alteration must be justified by exceptional circumstances rather than general planning concepts. *Gallagher* itself was concerned with the inclusion of safeguarded land with the Green Belt which had previously been removed from it rather than the release of land from the Green Belt. In that scenario the Court of Appeal found that:

The fact that a particular site within a Council's area happens not to be suitable for housing development cannot be said without more to constitute an exceptional circumstance, justifying an alteration of the Green Belt …

(paragraph 36)

263. In cases where the Green Belt boundary is to be moved back, the high tests implicit in the relevant judgments should be applied. Nevertheless, important considerations are likely to be the scale of any unmet need and whether there are other opportunities to meet that need across the HMA under the duty to co-

operate; whether the use of non-Green Belt land has been maximised; the implications for the strategy for the area in not meeting identified need by means of Green Belt releases; the sustainability issues arising from different patterns of development and the impact on Green Belt purposes of releasing any particular parcels of land from the Green Belt.

264. In writing reports Inspectors should have particular regard to the balance to be struck in paragraph 14 of the NPPF, confirming that exceptional circumstances exist even when sites are put forward by the LPA and explaining why the site selection outcome is justified.

265. Paragraph 85 of the NPPF refers to the possibility of identifying 'safeguarded land' between the urban areas and the Green Belt in order to meet longer-term development needs stretching well beyond the plan period. This will ensure that Green Belt boundaries can endure in the longer term. The fourth bullet point sets out the conditions for such a designation. In any event, this may not always be justified as per the Bath and Chester reports referred to earlier.

National Parks, The Broads, Areas of Outstanding Natural Beauty and Exceptional Circumstances

266. NPPF paragraph 115 refers to the particular consideration that should be given to these areas and paragraph 116 states that planning permission should be refused for major developments in these designated areas except in exceptional circumstances and where it can be demonstrated that they are in the public interest. In order for a plan policy to be effective there needs to be a reasonable prospect that a development in accordance with an application would have a reasonable prospect of gaining planning permission in principle. Therefore, where a local plan proposes development in such areas the examination should test whether in principle exceptional circumstances exist in order to justify any such allocation in the public interest, having regard to the first and second criteria in paragraph 116, and if so, whether the detailed policy requirements set out in the plan are sufficient to avoid or minimise any detrimental impacts on the designated areas. This means that the principle of the allocation would not need to be re-visited at planning application stage although the details of the application would remain to be assessed against the relevant LP policy and, so far as they are relevant, the criteria listed in the third bullet point of paragraph 116.

Check list of questions

Is the Housing Market Area (HMA) agreed with adjoining authorities or suitably defined having regard to the PPG (ID2a-011-20140306?)

Has the plan period been established and does it coincide with housing projections?

Have the most recent household projections been used as the starting point (PPG ID2a-015-20140306)?

Should any demographic adjustment be made to the household projections due to specific local circumstances (PPG ID2a-017-20140306) or due to the conversion of population projections to household projections?

If mentioned in evidence, should the unattributable population change be taken into account?

Have employment trends been taken into account (PPG ID2a-018-20140306)?

Has the housing need number suggested by household projections been adjusted to reflect appropriate market signals relative to local or national averages? These may include land prices, house prices, rents, affordability, rate of development and overcrowding (PPG ID2a-019 & 020-20140306).

Has an allowance been made for vacancy and second home ownership of existing and future housing stock?

Has the need for all types of housing been assessed for the following groups? – private rented sector, self-build, family housing, older people, those with specific needs (PPG ID2a-021-20140306)

Has the need for affordable housing been calculated in accordance with the PPG? (ID2a-022 to 028-20140306)

Has the total need for affordable housing been considered in the context of the likely delivery as a proportion of mixed developments and has an increase in the total housing figures been considered as a means to increase delivery? (PPG ID2a-029-20140306)

Establish the full objectively assessed housing need

Should this be the housing requirement or do either of the exceptions in paragraph 14 of the NPPF apply?

Does the plan confirm that there is a 5 year supply of specific deliverable sites?

Is there a housing trajectory and a housing implementation strategy to maintain a 5 year supply across the plan period (paragraph 47 of the NPPF)?

Considerations in Assessing Deliverability

Sites with and without planning permission

How long has been allowed for submission of a signed s106? What happens if a s106 is not submitted in time? How close is the Hearing/Inquiry to the required submission date?

If it is an outline permission, what progress has been made with discharging conditions?

Is the site still available for development?

Is there very convincing written or verbal evidence that the intentions of the owners/developers have changed. Hearsay is not enough.

When is development likely to commence and what are the build-out rates likely to be?

Does development of a site rely on the delivery of critical infrastructure (e.g. new roads, new water infrastructure, significant pre-commencement work)? Is the delivery of any such infrastructure delayed?

Are sites without planning permission outside development boundaries? Are they in sustainable locations? Are they subject to environmental constraints which have been considered in a SHLAA?

Sites allocated or not allocated in the development plan

How long has the site been allocated?

Why has it not come forward for development?

Is the site allocated in an emerging plan? If so, what weight can be attached to the draft allocation?

What does the SHLAA say about the site constraints?

Windfall sites

Were they considered as part of the SHLAA?

What are the historic windfall delivery rates and expected future trends (not including residential gardens)?

Housing standards and planmaking

267. This section should be read in conjunction with paragraphs 110-127 of the Housing chapter of the ITM and Annexes 3 and 4 which is concerned with the application of the standards by decision-makers. It sets out the key

considerations and provides specific advice for Inspectors conducting examinations.

268. The Written Ministerial Statement (WMS) of March 2015 Planning update March 2015 - Written statements to Parliament - GOV.UK contains a new approach for the setting of technical standards for new housing:

269. *"The new system will comprise new additional optional Building Regulations on water and access, and a new national space standard (hereafter referred to as "the new national technical standards"). This system complements the existing set of Building Regulations, which are mandatory."*

270. As a result local planning authorities should not set any additional local technical standards or requirement relating to the construction, internal layout or performance of new dwellings. As part of this new system the Code for Sustainable Homes has been withdrawn. Furthermore, the optional new national technical standards should only be required through any new Local Plan policies if they address a clearly evidenced need and where their impact on viability has been considered.

271. The PPG on *Housing – Optional Technical Standards* was introduced on 27 March 2015. It contains sections on the new optional technical standards, accessibility and wheelchair housing standards, water efficiency standards and internal space standards.

272. In July 2015 the Productivity Plan *Fixing the Foundations: Creating a More Prosperous Nation* was published:

"The government does not intend to proceed with the zero carbon Allowable Solutions carbon offsetting scheme, or the proposed 2016 increase in on-site energy efficiency standards, but will keep energy efficiency standards under review, recognising that existing measures to increase energy efficiency of new buildings should be allowed time to become established."

273. The key points emerging for plan-making from the WMS, PPG and Productivity Plan are that references to Code for Sustainable Homes, Lifetime Homes Standards and achieving zero carbon should not be included in any new policies. Furthermore, there is an overriding requirement for policies that expect the higher optional requirements for energy, water or accessibility or for the nationally described space standard to be met to show a clearly evidenced need and to have considered viability.

274. Some LPAs have proposed policies that expect residential conversions to meet BREEAM Excellent standard or similar. BREEAM sets sustainability standards for non-domestic buildings which are not affected by the WMS. However, it also includes standards for domestic refurbishment including domestic conversions and change of use projects.

275. The wording of the WMS is nevertheless clear:

"… local planning authorities should not set in their emerging Local Plans … any additional local technical standards or requirement relating to the construction, internal layout or performance of new dwellings." [emphasis added]

276. The WMS therefore applies to new homes of all types and not just new build homes or newly erected homes. The intention of the WMS is to stop local authorities from setting additional technical standards on new homes, other than the technical standards set out in the WMS on water efficiency, access and space. As BREEAM is a technical standard, it should not be applied to housing. Policies that refer to it in relation to domestic conversions are not consistent with national policy.

277. The WMS also allows for energy policies to contain provisions that exceed the current Building Regulations but their requirements should not go above Code for Sustainable Homes Level 4 equivalent. Given that the Code has been withdrawn some authorities have experienced difficulties in expressing this.

278. The Building Regulations of 2013 set energy requirements at the equivalent of Level 3 of the Code. Level 4 represents a 19% improvement above this in terms of carbon emission reduction (figure found at paragraph 2.3.56 of the Mayor of London's *Housing* Supplementary Planning Guidance of March 2016.

279. So if a policy is justified in terms of need and viability then it could be worded along these lines:

Housing development should achieve at least a 19% improvement in energy performance over the requirements of the Building Regulations (2013).

280. The table below sets out the specific relevant provisions and their source:

	Energy	Water	Access	Space
WMS	Able to set and apply policies which exceed B Regs Not above CSH Level 4 equivalent (19% above Part L of B Regs) Zero carbon abandoned in Productivity Plan			
PPG	N/A	Where a clear need policies can require tighter requirement of 110 litres/ person/ day – para 014 How to establish a clear need and sources of evidence – paras 015 & 016	For LPAs to show need for accessible dwellings having regard to published data - para 007 LPAS should clearly state the proportion of new accessible and adaptable or wheelchair user dwellings to comply with the B Regs – para 008 Policies only apply where LPA nominate or allocate – para 009	Need for space standard established taking account of need, viability and timing – para 020 LPAs should only require an internal space standard by referring to the Nationally Described Space Standard – para 018

B Regs	Part L Equivalent to CSH Level 3	Part G 125 litres/ person/ Day is baseline standard – optional higher standard of 110 litres/ person/ day	Part M Baseline M4(1) = visitable dwellings (Category 1) Optional requirements M4(2) = accessible and adaptable (Category 2) and M4(3) = wheelchair user (Category 3)	No

Non-Strategic Plans, Policy Wording and the Policies Map

Non-Strategic Plans

281. Paragraph 153 of the NPPF encourages each LPA to produce a single Local Plan for its area. Additional development plan documents should only be used where clearly justified. However, many LPAs still produce multiple plans including site allocations, development management (DM) policies and area action plans (AAP) both singly and in various combinations. There is nothing in the NPPF or the Regulations to preclude this.

282. As a starting point Inspectors will need to be clear about the type of plan they are examining, its intended purpose and its relationship with other, existing plans. There is a requirement in Reg 8(4) for the policies contained in a local plan to be consistent with the adopted development plan. In London under s24(4) of the 2004 Act local development documents must be in general conformity with the spatial development strategy which equates to The London Plan. There are related provisions in this respect in Reg 21 regarding making a request to the Major.

283. Some representors may see the examination of a subsequent or subsidiary plan as an opportunity to re-open matters that have previously been dealt with. These are typically to the effect that the original plan was not based on an objective assessment of need.

284. The Court of Appeal considered such arguments in *Oxted Residential Ltd v Tandridge DC* [2016] EWCA Civ 414 which also supports the earlier judgment in *Gladman Development Ltd v Wokingham BC* [2014] EWHC 2320 (Admin). In *Wokingham* it was found that a site allocation plan did not need to reconsider objectively assessed need provided that its scope is clearly limited to allocating sites to meet the need established in a Core Strategy.

285. The *Oxted Residentia*l judgment confirms this and Lindblom J states in paragraph 38:

An inspector conducting an examination must establish the true scope of the development plan document he is dealing with, and what it is setting out to do.

286. The judgment also confirms that development plan documents are not required by statute, or in the light of government policy in the NPPF, to rectify any shortcomings in the core strategy's approach to housing land supply (paragraph 28). There is no support for this in the statutory scheme and a development plan may comprise several development plan documents (paragraph 31). Furthermore paragraph 32 said:

the relevant policies in the NPPF, properly understood, do not require every development plan document within its broad definition of a "Local Plan" to fulfil all the requirements described in paragraph 47. Where one of the necessary purposes of a particular development plan document is to identify the level of housing need that requires to be met in the relevant area, "as far as is consistent with the policies set out in [the NPPF]", the provisions of the NPPF bearing on that purpose, including paragraphs 158 and 159 as well as paragraph 47, will be engaged. However, as Lewis J. aptly put it, "[properly] read, … [the NPPF] does not require a development plan document which is dealing with the allocation of sites for an amount of housing provision agreed to be necessary to address, also, the question of whether further housing provision will need to be made" (paragraphs 63 to 65).

287. As well as the assessment of objectively assessed need these principles also apply to the provision of a five year housing land supply. In *Oxted Residential* the claimant submitted that the Council could not rationally adopt the local plan, because, in the absence of a five-year supply of housing land, its policies would be, upon adoption, immediately out of date (paragraph 25). A further contention was that the disputed policies were policies for the supply of housing and therefore within the scope of paragraph 49 of the NPPF. However, this "*is a question that will arise in the making of a decision on an application for housing development*" (paragraph 45) and the Court of Appeal endorsed the comments of Dove J that not only did the question of setting objectively assessed need not

arise but also that questions of five year land supply were not in point. In addition, paragraph 38 of the *Oxted Residential* sets out the High Court judge's view that the Inspector was not required to embark upon an inquiry as to whether or not the defendant had a five year housing supply and does not dissent from that approach.

288. Therefore, as a first step, Inspectors should be clear what the plan is purporting to do. This might need clarifying with the Council and reference to the LDS may assist in this respect. Once this is established Inspectors should stick closely to examining the plan in that context and should not allow the examination to be unnecessarily 'side-tracked'. This may require explaining to representors the legal position in the light of *Oxted Residential*. However, if an allocations plan, DM or other subsidiary plan does say something which misrepresents the adopted plan in relation to the NPPF then the Inspector should seek to remove it on the basis that it is inconsistent with the limited role of the plan.

289. Nevertheless, Inspectors will need to satisfy themselves that the proposals in the subsequent plan are such that the aims of the parent plan will be met and development delivered in accordance with it. For example, the distribution and capacity of sites and the pace of providing them in a site allocations plan should be in line with any adopted plan which might include the provision of a five year housing land supply. If it is not or if some of the proposed sites are not sound then Inspectors are likely to have to seek modifications to incorporate further sites in order to ensure consistency with the adopted plan. In this limited sense, the site allocations plan may play a role in helping to maintain a rolling five year supply of housing land but this should not be confused with demonstrating that the Council has a five year supply at any particular point in time.

290. In dealing with these issues in the report on the Tunbridge Wells Site Allocations Local Plan the Inspector said:

Further to representations focussed on the delivery of land for housing development and for provision for the elderly, I have also considered whether the nature of the changes in evidence and policy that have taken place since 2010 mean that the SALP should allocate additional land that would have the effect of materially modifying the strategy in the adopted CS, or alternatively be withdrawn. However, having regard to the Wokingham judgment (and the recent finding in the Court of Appeal on the Tandridge case which confirms the correct approach) there is no basis in law for me to consider this matter further.

I have not considered any additional land for allocation (omissions sites) over and above that proposed to be allocated in the SALP, on the basis that the SALP

meets the land requirements of the CS and there have been no circumstances in which my consideration of individual proposed site allocations in the remainder of this report have led to a shortfall of land against the requirement set out in the CS.

291. Inspectors may also be faced with arguments that a site allocations plan does not provide for a 5 year supply of housing land. If a housing requirement has been established in a strategic plan then any daughter plan should be consistent with the strategic plan and show how it will contribute to the achievement of the housing requirement and its timescale for delivery. However, a site allocations plan is not the place to undertake a review of the existence or not of a five year housing land supply especially if the starting point is the need to decide the housing requirement. The legal principles set out above should be used to rebuff this. Even if the housing requirement has been set recently and is not in dispute, it is unlikely that such a plan will contain sufficient information on, for example, past delivery and windfall sites to allow such an assessment to be properly made.

292. The NPPF at paragraph 47 also indicates that LPAs should identify and update annually a supply of specific deliverable sites sufficient to provide five years' worth of housing. The PPG provides further advice about how this should be undertaken (ID3-033-20150327) and this is the mechanism for review. Furthermore, if the LPA is unable to demonstrate a 5 year supply then the provisions of paragraphs 49 and 14 of the NPPF will come into play when determining individual applications.

293. A further scenario is that representors allege that the findings of an earlier examination were incorrect in recommending the extent and location of development now included in an adopted plan and may seek to introduce additional evidence to support this claim. In dealing with this in the Rochford Allocations Submissions Document the Inspector said:

Many representations argue that the housing developments proposed are wrong in principle as they would, amongst other things, intrude into the Green Belt. This includes the sites at Canewdon, Hullbridge (where a plea is made to withdraw the policy) and Rayleigh. However, the CS considered the need for housing within the District until 2025 and confirmed how this would be distributed across a number of different areas. It also accepted that Green Belt land would need to be allocated for residential development. So the broad approach to the location of new housing has already been definitively settled by the process of examining and finally adopting the CS. There is no overriding evidence to justify fundamental revisions to it.

Examination of non-strategic plans and policy wording

294. This section provides some general principles to apply in testing the soundness of development management policies and other non-strategic plans such as site allocations and area action plans. It also focuses on policy wording generally.

295. As a starting point the NPPF indicates that Local Plans should set out clear policies on what will and will not be permitted and where. Only policies that provide a clear indication of how a decision maker should react to a development proposal should be included in the plan (paragraph 154). Furthermore, plans should identify areas where it may be necessary to limit freedom to change the use of buildings and support such restrictions with a clear explanation and identify land where development would be inappropriate (paragraph 157).

296. Many ordinary policies in a plan may appear uncontroversial and may not be subject to many or any representations. However, as part of the Inspector's inquisitorial role the policies should be reviewed to ensure that they are sound, particularly in relation to *effectiveness* (are they clearly expressed so they can be applied in day to day decision-making?) and for *consistency* with national policy. Inspectors should not shy away from raising such matters and should also scrutinise carefully any revised policy wording agreed between the LPA and representors rather than merely accept it.

297. The NPPF states that local plans should set out policies on some topics to achieve certain aims (eg town centres, paragraph 23; wildlife and geodiversity sites and landscape areas, paragraph 113; and the historic environment, paragraph 126). On these and other topics, the NPPF also sets out very clear development management considerations eg what is not inappropriate development in the Green Belt (paragraph 89); the approach to major development in AONBs (paragraph 116); how to weigh the impact of development on the significance of a designated heritage asset (paragraph 132). Ensuring consistency with national policy thus requires careful consideration of what the NPPF says and how the policy in question relates to it.

298. Experience to date indicates that, unfortunately, many policies are poorly drafted. For example, important tests in national policy may be summarised or only partly replicated in the policy, thus altering their meaning; key words (*substantial harm*/*less than substantial harm*/*exceptional*) may be used too loosely, widening their application; long policies may have a poor structure making it unclear to what proposals various sub-categories apply; and policies may overlap on some matters, but not on others, making it unclear whether

such differences are intended to signal a difference in significance/weight to be applied to the included or excluded factor. The meaning of a policy may turn on a single word and so the policies should be read critically and the whole plan under examination reviewed for internal consistency.

299. Accordingly, Inspectors should have in mind the following over-arching questions:

- Are policies consistent with any adopted development plan in accordance with Reg 8(4) of the Town and Country Planning(Local Planning) (England) Regulations 2012? In London there is a more general requirement for conformity with The London Plan in s24(4) of the 2004 Act. More specifically, have the strategic aims and objectives of any existing plans been complied with? Would the plan deliver the type and amount of development anticipated in any existing development plan? Would it bring forward and manage development as set out? Are proposed boundaries of the Green Belt consistent with the intentions of the parent plan?
- Is the meaning of the policy clear as to what type of development it applies to and what is required to comply with the policy? Would a future decision maker (such as an Inspector dealing with an appeal) be uncertain as how to apply the policy? Are policies positively worded and flexible? Are the policy criteria capable of being adhered to?
- Is the policy consistent with or in conflict with the aims of the NPPF and policy in Written Ministerial Statements or with its detailed approach to development management considerations? Particular areas to be alert to are in relation to car parking, housing standards, wind turbines, affordable housing and the implications arising from the implementation of the Housing and Planning Act 2016.
- Does the plan have a reasonably consistent approach to the structure of policies and to any overlap between policies to avoid ambiguity as to the weight to be given to different considerations?
- Is there sufficient, robust and convincing evidence to support any restrictions on the use of land or buildings?
- Do policies provide an indication of how a decision maker should react or are they simply statements or intent?
- In site allocations are sites deliverable with regard to viability and infrastructure and is the indicative minimum capacity specified and realistic? For larger sites that are likely to be developed over a number of years is there a housing trajectory? Are any caps on the capacity of sites justified? Do any broad parameters for site development avoid excessive

and unnecessarily prescriptive detail? Are phasing policies to restrict development to later in the plan period justified?

- Is monitoring adequate? Does it consider steps to be taken if sites do not come forward?

300. Where any concerns arise these should be taken up with the Council in writing at the earliest opportunity, particularly where such matters are not the subject of major controversy requiring discussion at hearings. The Inspector should seek to resolve/clarify as far as possible any concerns about detailed policy wording in advance of the hearings. Whilst unnecessary discussion about such matters should be avoided equally it may not be possible to deal with them all and some explanation of the intention of policy and its potential pitfalls may be required.

301. Where the concern is possible inconsistency with national policy, it is important to establish at the outset whether the Council intends to diverge from national policy or whether any such conflict arises simply due to poor drafting. If the Council intends to be consistent with national policy then it can be asked to put forward changes to address any concerns highlighted. If a deviation from national policy is intended then the Council needs to provide a succinct local justification and the matter may need to be explored at a hearing.

302. There may well be informed representations from parties such as Natural England or Historic England highlighting what they regard as fundamental flaws in policy wording. Where the Inspector broadly shares those concerns, then the Council can be requested to work with such relevant representors to try and agree a revised policy wording. Any such wording can be taken forward as the basis for discussion at a hearing if it is controversial. If others have made specific representations on the policy then it may be advisable to circulate any changes for comment in advance of the hearing. Otherwise the revised policy can be included in the schedule of proposed modifications for consultation.

303. Nevertheless, any encouragement to discuss or agree on wording should not be seen as the Inspector abdicating his/her responsibility to ensure that the policy is sound. The Inspector should be reasonably satisfied with any new wording prior to consultation to avoid subsequent difficulties. Where a party has decided not to appear at a hearing on the basis of a substantially revised policy wording agreed with the Council, Inspectors should be alert to potential unfairness if that wording is likely to be disregarded. In those circumstances they may wish to invite that party to appear.

304. Where hearings for an examination of a comprehensive local plan are in 2 parts, but the examination is suspended for further work after the first stage, the

Inspector may not be able to make any substantive preliminary findings on generic policies not covered in the first stage hearings. However, to try and maximise the benefit of the suspension and of any related consultation on changes, the Inspector should try and alert the Council to any serious concerns he/she has about the wording of other policies. Eg *The Council should carefully consider whether the wording of policy X is consistent with NPPF paragraph Y …* or *the Council may wish to give careful thought to the alternative wording suggested by Natural England/ English Heritage* (or whatever the Inspector considers would best focus the Council's mind on the problem).

305. Where a policy includes words such as *major* or *strategic proposals* it should be clear within the covers of the plan to what scale of development such wording applies and why that level has been set. Where a policy introduces a specific criterion as a test of acceptability eg *no more than X*, *no closer than Y*, there should be a clear explanation justifying the choice of that threshold. The degree of justification required will be dependent on the significance of the criteria/policy. For many such thresholds there may be a variety of possible alternatives and the question then is whether the Council's chosen threshold is reasonable.

306. A supplementary planning document (SPD) does not have statutory force and is not the subject of examination. It is defined at Reg 2 of the Town and Country Planning (Local Planning) (England) Regulations 2012 as something that is not a local plan. Consequently policies should not simply devolve fundamental matters to SPD although they may legitimately add further detail to policies or to provide guidance as per the definition in the NPPF. Policies that *require* compliance with an SPD on matters such as car parking are unlikely to be consistent with national policy.

307. The PPG on local plan preparation states (Paragraph: 010 Reference ID: 12-010-20140306):

    In drafting policies the local planning authority should avoid undue repetition, for example by using generic policies to set out principles that may be common to different types of development. There should be no need to reiterate policies that are already set out in the National Planning Policy Framework.

308. Inclusion of policies in a development plan gives them statutory force and therefore most Councils have not been content to rely on the wording in the NPPF for a development management policy and seek to replicate the wording in their plan. This duplication does not make the policy unsound but the wording used must not arbitrarily truncate the NPPF's approach and the PPG advice can

be pointed out. There is therefore no need for policies to recite the presumption in favour of sustainable development at paragraph 14 of the NPPF.

309. There is very wide variation in the number and scope of policies included within different local plans. Where a Council has divided up its local plan into several DPDs and includes a separate development management DPD, the number of separate policies is likely to be far greater than in a single comprehensive plan focusing on strategic matters. However, whilst a large number of detailed policies is not to be encouraged, detail and repetition within policies does not make the plan unsound (provided the repetition is consistent).

    Example of consideration of this issue from an Inspector's report:

    The NPPF sets out various principles for plan-making in paragraphs 154 and 157. The PPG on Local Plans encourages them to be as focused, concise and accessible as possible. There are 72 policies in the DMP. There is some force in the argument that this is too many. Equally there should be sufficient detail and the Council prefers that policies are complete rather than requiring extensive cross-referencing. The coverage and extent of the DMP is a matter for the Council and any repetition does not go to soundness. (Inspector's Report April 2016 North Somerset Council Sites and Policies Plan Part 1: Development Management Policies.)

310. Provided that the local plan has addressed those topics on which the NPPF says local plans *should* set out policies, then representations that a plan should include additional policies on bespoke topics are unlikely to be fundamental to the soundness of the plan provided that the principles which might need to be applied to any such proposals are set out in the broad generic policies.

    Policies Map

311. The LPA should have an adopted policies map which shows the geographic application of the policies in the adopted development plan. Each time the LPA submits a new local plan for examination, it should provide a map showing how the adopted policies map would be changed when the new plan is adopted. This is referred to as the 'submission policies map'.

312. The policies map is not a development plan document as set out in the legal and guidance context in Annex 1. Consequently, it is not appropriate for Inspectors to recommend main modifications to the policies map as such. Instead the Regulations and PPG make it clear that the role of the policies map is to illustrate geographically the application of policies in the development plan. This applies to all examinations including plans where the proposed changes to the policies map are set out as a series of insets included within the plan, as well as where

one or more maps are produced in separate documents. However, if a diagram or illustration within the body of the plan itself is not part of the policies map but is part of the expression of a policy and is flawed, then it needs to be corrected and is likely to be a MM since it could otherwise make the policy unclear or ineffective.

313. In terms of a general approach where a policy has a geographic application which is illustrated on the policies map, this should be made clear in the policy. For example, by stating:

The settlement boundaries are shown on the policies map.

314. Where the policy does not make it clear that its geographic application is illustrated on the policies map, this may need to be rectified by a modification. This link between the policy and the map is important, particularly where map changes are necessary to ensure that the policy is sound. If the geographic illustration of a policy is flawed, it may mean that the policy is not justified or effective.

315. In these circumstances, it is important that any resulting main modifications (MMs) relate to the policy (and to its geographic illustration) rather than to the policies map. However, to ensure fairness, changes to the geographic illustration of policies which are necessary to achieve soundness should be consulted upon, along with the main modifications to which they relate. But any changes to the policies map should not be advertised or referred to as MMs.

316. Where necessary, this context should be explained in an introductory section to the report along the following lines:

The Council is required to maintain an adopted policies map which illustrates geographically the application of the policies in the adopted development plan. When submitting a local plan for examination, the Council is then required to provide a submission policies map showing the changes to the adopted policies map that would result from the proposals in the local plan. In this case, the submission policies map comprises the set of plans identified as [insert title] as set out in [insert document reference].

The policies map is not defined in statute as a development plan document and so I do not have the power to recommend main modifications to it. However, a number of the published MMs to the Plan's policies require further corresponding

changes to be made to the policies map[38]*. [In addition, there are some instances where the geographic illustration of policies on the submission policies map is not justified and changes should be made to the policies map to ensure the relevant policies are effective*[39]*.][delete as appropriate].*

These further changes to the policies map were published for consultation alongside the MMs [insert document title or link to website]. [In this report I identify any amendments that are needed to those further changes in the light of the consultation responses][delete as appropriate].

When the Plan is adopted, in order to comply with the legislation and give effect to the Plan's policies, the Council will need to update the adopted policies map to include all the changes proposed in [insert document title] and the further changes published alongside the MMs [incorporating any necessary amendments identified in this report][delete as appropriate].

317. The text in italics above is included in the DPD Report template but should be deleted if not required e.g. where the Inspector's findings on soundness will not give rise to a need for corresponding changes to the policies map. Where there is such a need, an appendix of changes to the policies map should not be included in the Inspector's report as any necessary changes should be contained within the MMs even if they indicate that to be effective the geographic illustration of the policy should be amended in a certain way. The only exception to this might be where the responses to the MMs consultation lead the Inspector to conclude that some amendment to the proposed changes to the policies map is required (for example, to correct an inaccuracy) and that the nature of the amendment cannot be adequately described in words in the report.

What is the legal status of the policies map?

318. S20(5) of the Planning and Compulsory Purchase Act 2004 makes provision for the independent examination of Development Plan Documents (DPDs). Consequently, only DPDs can be examined.

319. S17(7) of the Act enables Regulations to prescribe which documents are DPDs.

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[38] This situation would arise if, for example, a site allocation policy is deleted from, or added to, the Plan by a MM. It would require a corresponding alteration to be made to the policies map.
[39] An example of this situation would be where a site allocation policy in the Plan is itself unchanged (so there is no MM), but the site boundary needs to be altered for soundness reasons. Similar considerations might apply to Green Belt or town centre boundary alterations.

320. Reg 2 (1) of the 2012 Regulations states that any document of the description referred to in Reg 5 (1) (a) (i), (ii) or (iv) or 5 (2) (a) or (b) – is both a local plan and a DPD. (The term "local plan" is generally used in the Regulations in preference to "DPD", but the two terms mean the same thing.)

321. Reg 5(1)(b) refers to a map accompanying a Reg 5(1)(a) document showing how the adopted policies map would be amended if it were adopted. This map (referred to as the "submission policies map" in Reg 2(1)) is not defined as a DPD or local plan under Reg 2(1).

322. Reg 6 "Local plans" describes which documents are included in the description of local plans. In doing so it sets out the documents in Reg 5, but again omits sub-section (b). This confirms that the policies map is not a development plan document.

323. Reg 9 sets out the form and content of the adopted policies map and explains that it must illustrate geographically the application of the policies in the adopted development plan. It also says that where the adopted policies map consists of text and maps, the text prevails if there is a conflict.

What does Planning Practice Guidance (PPG) advise?

324. In the section titled 'How detailed should a Local Plan be?' the PPG (ID 12-010-20140306) states: "The policies map should illustrate geographically the policies in the Local Plan and be reproduced from, or based on, an Ordnance Survey map. If the adoption of a Local Plan would result in changes to a previously adopted policies map, when the plan is submitted to the Planning Inspectorate for examination an up to date submission policies map should also be submitted, showing how the adopted policies map would be changed as a result of the new plan."

What does an LPA have to do on submission?

325. Under Reg 22, a "submission policies map" is one of the prescribed documents that are to be submitted with the local plan for independent examination.

Employment Development

Relevant guidance

NPPF, sections 1 & 3, and paras 160-161

PPG, sections entitled *Housing and economic development needs assessments* and *Housing and economic land availability assessments*

Introduction

326. This section provides advice on issues that are likely to arise when considering a local plan's approach to employment development. It focusses on B1, B2 and B8 uses, as these are the main categories of employment development. The NPPF uses the term "economic development" to include development within the B use classes, public and community uses and main town centre uses, excluding housing. Main town centre and public and community uses are considered separately in the next section. While the terms "economic development" and "employment development" are to some extent interchangeable, it is preferable to use "employment development" when referring specifically to the B use classes.

327. NPPF section 1 emphasises the importance of sustainable economic growth and the role of planning in supporting it. LPAs should plan effectively to meet the development needs of business. Planning policy expectations should not stifle business investment and policies should address potential barriers to it. In drawing up their Local Plans, LPAs are advised to set out a clear and proactive economic vision and strategy for their area.

328. NPPF paragraph 21 advises that plans should set criteria, or identify strategic sites, for local and inward investment to meet anticipated needs over the plan period. Existing business sectors should be supported, taking account of whether they are expanding or contracting, and new and emerging sectors should be identified and planned for, where possible. Plans should be flexible enough to accommodate unanticipated needs and to respond to rapid economic change.

329. The sections of the PPG referenced above provide specific guidance on assessing needs for employment development and on identifying a future supply of land to meet those needs. The evidence base for a submitted plan will usually contain both assessments, either as separate reports or in a combined document.

Assessing needs for employment development

330. The PPG stresses that the needs assessment must cover both the quantitative need for employment land or floorspace and the qualitative and locational

requirements of each market segment. Needs should be assessed across the "functional economic area". There is no standard method of defining such an area but relevant factors to be taken into account are listed[40]. Among other things, these include the extent of any Local Economic Partnership (LEP), travel-to-work-areas, housing market areas and administrative areas.

331. In practice, most employment needs assessments cover a single LPA area, a group of adjacent LPAs or a LEP area. It is not usually necessary to ask for a wider area to be covered, unless there is strong evidence that a substantial level or category of need has been overlooked. Where the assessment covers more than one LPA, the overall need figure should be broken down to provide figures for each LPA.

332. The PPG sets out a detailed methodology for the assessment[41]. Inspectors should satisfy themselves that the key elements of this have been followed. In particular, it is important that an adequate range of quantitative and qualitative indicators are used to assess future needs for employment land and floorspace. There should also be evidence that likely changes in the local economy over the plan period have been taken into account. NPPF paragraph 21 advises that LPAs should plan positively for clusters or networks of knowledge-driven, creative or high-technology industries. This should be taken into account as appropriate to the local circumstances.

333. The outputs from the assessment will normally include separate needs figures for offices (usually in square metres of floorspace), and for land for other employment uses (usually in hectares of employment land). Depending on the complexity of the assessment, these may be broken down further by, for example, employment use class, quality of site and location. Inspectors should make sure that the assessment and its outputs reflect the nature of the local economy. In general, the bigger and more varied the local economy is, the more complex the assessment is likely to need to be. Given the difficulty of forecasting future economic conditions, it is acceptable for employment development needs to be expressed as a range.

334. A local plan will sometimes express its economic aims in terms of job creation – to provide enough land to support X number of new jobs. Participants wishing to see a higher or lower employment land allocation may then raise arguments about employment densities, ie the amount of land or floorspace needed for

[40] ID 2a-008-20140306, 2a-009-20140306 & 2a-012-20140306
[41] ID 2a-030-20140306 onwards

each new job. The Inspector will need to be satisfied that there is sufficient evidence to support the employment density assumptions made by the LPA, and be prepared to challenge those assumptions if that is not the case.

335. The needs assessment must be sufficiently up-to-date. If it is not, the Inspector should consider whether it is necessary for the LPA to commission an update. The PINS Procedural Practice document advises that assessments that are three or more years old when the plan is submitted are at risk of being overtaken by events[42]. However, it may often be possible for the LPA to rectify this by means of an update report rather than a full review.

336. Needs forecasts that greatly exceed, or fall below, past trends in employment land take-up should be carefully scrutinised. If different employment forecasts are used for the employment needs assessment and the housing needs assessment, an explanation should be sought for any significant discrepancy between them. Provided it is satisfactorily explained, such a discrepancy does not necessarily render the plan unsound, as is illustrated by this edited extract from the South Worcestershire Development Plan report[43]:

The Councils' Economic Prosperity Background Paper (CD.070) sets a goal of 25,000 additional jobs in South Worcestershire between 2011 and 2030. That implies an annual employment growth rate of around 1%, comparable with the rate experienced during the decade of strong economic performance between 1998 and 2008. This rate is significantly higher than the growth rates implied in the economic forecasts provided to the examination for the discussion of housing need. Nonetheless the Background Paper makes it clear that the Councils have deliberately chosen an optimistic figure in order to ensure that there is no planning barrier to economic growth, reflecting guidance in NPPF paragraph 19.

Employment land take-up rates between 1998 and 2008 were somewhat higher than the 1992-2013 average, and on this basis the Background Paper's goal of 25,000 jobs provides further support for the Plan's 280ha requirement figure. Even if, as seems likely, actual employment growth is lower than that goal, the requirement will help promote economic development by ensuring that a wide range of sites is available for developers and businesses. It will provide flexibility to accommodate unanticipated needs and rapid economic change.

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[42] PINS, *Procedural Practice in the Examination of Local Plans,* June 2016 (4th Edition v.1), para 1.15

[43] Report on the Examination of the South Worcestershire Development Plan (Feb 2016), Appendix A, paras 101-102.

337. It is very unusual for a plan to set requirement figures for employment development that are lower than the needs identified by the needs assessment. If this does occur, it is likely to require very robust justification given the emphasis of national policy on promoting economic growth.

Economic land availability assessment

338. The *Housing and economic land availability assessments* section of the PPG provides a detailed methodology for conducting such assessments, and lists the core outputs that should be produced. Inspectors should be satisfied that it has been generally followed.

339. Especially in bigger urban areas, the assessment may show that a significant proportion of the available employment land is previously-developed land. Given that employment buildings generally have a much shorter lifespan than housing, it is not unusual for plans to propose that a greater proportion of employment development takes place on previously-developed land than is the case for new housing. Nonetheless, Inspectors should ensure that the qualitative and locational needs of businesses are also taken into account in determining the future balance between greenfield and brownfield development.

Site allocations

340. The plan should normally allocate sufficient sites of appropriate quality and in appropriate locations to meet the assessed needs for employment development over the plan period. One of the key tasks for the Inspector is to assess whether adequate and appropriate provision has been made, paying particular attention to the deliverability and viability of the allocated sites.

341. So that they are effective, site allocation policies should clearly state which employment uses are to be permitted on the allocated sites. If any sites outside designated centres are allocated for office development, policies should make it clear that the sequential and impact tests would not apply to office development proposals there (see the next section of this chapter).

342. NPPF paragraph 21 also advises that plans should identify priority areas for economic regeneration, infrastructure investment and environmental enhancement. These are likely to reflect specific local circumstances.

Duty to co-operate

343. Providing for future employment development will almost always involve strategic, cross-boundary issues. Inspectors will need to be satisfied that the requirements of s33A have been met in assessing employment development needs and land availability, and in allocating sites to meet those needs. It is relatively unusual for disputes to arise over whether the duty has been met in these respects. Where this does occur, the relevant advice on *Duty to co-operate* elsewhere in this chapter of the manual should be followed.

Development management policies

344. As well as allocating new sites for employment development, many plans include policies seeking to protect existing employment land from redevelopment for other uses. Such policies will need to be examined in the light of NPPF paragraph 22, which advises that policies should avoid long-term protection of this kind where there is no reasonable prospect of the site being used for employment purposes.

345. The employment land availability assessment should have identified any previously-developed employment land that is available and suitable for redevelopment. However, other "windfall" sites will come forward for redevelopment during the plan period as businesses close or relocate. Inspectors should ensure that policies for assessing redevelopment proposals for non-employment uses strike the right balance between maintaining an adequate stock of employment land and avoiding the overly restrictive approach that the NPPF counsels against.

346. NPPF paragraph 21 advises that plan policies should facilitate flexible working practices such as live/work units. To ensure they are effective Inspectors may need to be alert to policies that place excessive restrictions on such developments in pursuit of the legitimate goal of weeding out bogus proposals.

347. Inspectors should also ensure that policies for business development in rural areas are consistent with the advice in NPPF section 3. This stresses the need to support economic growth here, taking a positive approach to sustainable new development with reference to all types of business and enterprise both though conversion of existing buildings and well-designed new buildings.

Retail Development and Other Main Town Centre Uses

Relevant guidance

NPPF, section 2 & para 161

PPG, sections entitled *Ensuring the vitality of town centres* and *Housing and economic development needs assessments*

Introduction

348. This section provides advice on issues that are likely to arise when considering a local plan's approach to retail development and other main town centre uses. The term "main town centre uses" is defined in the NPPF Glossary. It includes retail development, offices and a wide range of other uses. Inspectors should always use the term correctly and ensure that it is used correctly in the plan. The same applies to other relevant terminology defined in the NPPF Glossary, including "town centre" or "centre", "edge of centre", "out of centre", "out of town", "primary shopping area" and "primary and secondary shopping frontages". The term "town centre uses" should not be used, as it is not sufficiently precise.

349. At paragraph 23, the NPPF emphasises that planning policies should be positive and promote competitive town centre environments, recognising town centres as the heart of communities and supporting their viability and vitality. A range of suitable sites should be allocated to meet the scale and type of development needed in town centres. Needs for main town centre uses should be met in full and not compromised by limited site availability.

350. The PPG advises that a positive vision or strategy for town centres, articulated through the local plan, is key to ensuring successful town centres. It sets out a series of questions that strategies should answer[44]. Some of these are considered further below.

Evidence base

351. In practice, when a plan is submitted detailed evidence on retail development needs is usually available, in the form of a retail needs assessment (see below). The need for office floorspace is also usually covered, normally as part of an economic development needs assessment (see previous section). If these two assessments are not present, the Inspector should find out why, as it may

[44] ID 2b-002-20140306 & 2b-003-20140306

indicate a gap in the evidence base – unless there are particular circumstances that make them unnecessary.

352. The need for other types of main town centre development is normally considered in the same report as the retail needs assessment. There can be considerable variation in the level of detail to which assessments of needs for uses other than retail and offices are carried out. It is usually unnecessary to seek additional evidence on those other needs, unless it is crucial to a point of soundness – for example, if significant allocations are proposed without evidence of a need for them.

353. The PPG also advises that existing centres should be audited to assess their role, vitality, viability and potential to accommodate development. It provides advice on market signals and other indicators that are relevant to assessing the health of town centres[45]. For examinations, this evidence is sometimes provided as part of the retail needs assessment report and sometimes as a separate document.

Retail needs assessments

354. Advice on the assessment of economic development needs in general, including needs for main town centre uses, is given in the section of the PPG entitled *Housing and economic development needs assessment.*

355. The PPG advises that needs for main town centre uses should be assessed in relation to "area of trade draw[46]", defined as follows:

Trade draw is the proportion of trade that a development is likely to receive from customers within and outside its catchment area. It is likely that trade draw will relate to a certain geographic area (i.e. the distance people are likely to travel) and for [*sic*] a particular market segment (e.g. convenience retail)[47].

356. The rest of the advice in that section of the PPG focusses on the assessment of need for employment land rather than main town centre uses as such. In practice most retail needs assessments follow the methodology in Appendix B to the cancelled *Practice Guidance on* *Need, Impact and the Sequential Approach* (December 2009).

[45] ID 2b-003-20140306, 2b-004-20140306 & 2b-005-20140306
[46] ID 2a-008-20140306
[47] ID2b-017-20140306

357. Reference is made here to that document, which has been cancelled and does not represent Government policy, solely to enable Inspectors to understand the methodology underlying evidence that is likely to be presented to them.

358. As with any assessment of future needs, the outputs from a retail needs assessment are sensitive to the assumptions and variables that the assessment contains. Inspectors should therefore sense-check the key inputs, which are likely to include the definition of the study area, the adequacy of the household surveys, "benchmark" turnovers, and productivity and market share assumptions. If any of these are disputed by other informed representors, it is likely they will need to be discussed at a hearing session.

359. An example from an examination in 2014, while it pre-dates the PPG, is instructive in its assessment of the retail capacity and market share evidence:

The 2014 work also included sensitivity testing by increasing the SFT market share to 18% compared with the Experian forecast of 15.9% and by introducing various increases in expenditure retention from the 33% assumed in the baseline through to 34%, 35% and 36% by 2026. This resulted in a range of gross capacity figures from 2011 to 2026 of between 41,982 m^2 reflecting a rise in SFT market share and 77,666 m^2 reflecting an increase in expenditure retention to 36%. When existing commitments and completions since 2006 are added in, the overall requirement ranges from 80,095 m^2 to 115,779 m^2 in these scenarios.

The higher levels would represent a significant uplift in the city centre's market share and I am not convinced this is realistic. An existing market share of 33% has been assumed but it is not backed up by empirical evidence from a new household survey. There is likely to be ongoing competition from other centres within the region. Furthermore, the influences pull in different directions with a decrease in capacity as SFT market share rises and an increase in capacity as expenditure retention rises. Unfortunately there was no sensitivity testing undertaken of a combined scenario. However, taking all of the above factors into account I have considerable concern that the PR floorspace figure of 100,000 m^2 is likely to be too high.

Whilst it is important to be forward looking and plan for growth, it is also necessary to be realistic. There is a danger of encouraging retail developments in unsustainable out of centre locations if the "need" figure is unrealistically high. The evidence base gives confidence that 90,000 m^2 is a robust figure that can be supported. It is still an ambitious target that will encourage growth and investment. I consider that the proposed changes to the PR and the CCAP are

necessary to ensure that the retail policies are justified, effective and consistent with national policy (MM 1-MM3; MM8).[48]

360. It is also crucial that the retail needs assessment is up-to-date. If it is not, the Inspector should consider whether it is necessary for the LPA to commission an update. The PINS Procedural Practice document advises that assessments that are three or more years old when the plan is submitted are at risk of being overtaken by events[49]. However, it may often be possible for the LPA to rectify this by means of an update report rather than a full review.

Duty to co-operate

361. Many centres will draw in customers from beyond the LPA's boundaries. Policies and site allocations for retail and other main town centre developments may therefore involve strategic matters that require co-operation with other authorities. The Inspector must establish that the requirements of s33A have been met in respect of any such matters. Disputes over whether the duty has been met with regard to main town centre policies and proposals are rare, but where they do arise Inspectors should have regard to the advice on *Duty to co-operate* elsewhere in this chapter of the manual.

362. For example, at Bristol the fundamental question was whether the duty had been engaged in regard to the preparation of a retail study:

Drawing floor space to the city centre may have a significant effect on The Mall in commercial terms and in relation to employment. However, as little was offered to show the Plan proposes to bring forward city centre retail on sites that were not suitable or viable, I have no basis to consider that, as a planning judgement, any effect on The Mall would be significant. Indeed, given their respective positions in the retail hierarchy, it is difficult to see how a possible effect on The Mall arising from the Plan's approach could be deemed strategic or how it could, in some way, have fettered BCC's decisions in relation to retail allocations in the city centre. It therefore follows that engagement on this matter with South Gloucestershire Council under the DtC was not necessary and would not have maximised the effectiveness of the Plan. Accordingly, the preparation of the RS13 did not engage the DtC. [50]

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[48] Report on the Examination of the Southampton Core Strategy Partial Review and the Southampton City Centre Action Plan, December 2014, paras 28-30

[49] PINS, *Procedural Practice in the Examination of Local Plans,* June 2016 (4th Edition v.1), para 1.15

[50] Report on the Examination of the Bristol Central Area Plan, February 2015, para 13

Town centre hierarchy

363. At paragraph 23, the NPPF advises that in drawing up local plans, LPAs should define a network and hierarchy of centres that is resilient to anticipated future economic changes. The PPG advises that, as part of its town centre strategy, the local plan should set out the appropriate and realistic role, function and hierarchy of town centres in the area over the plan period, based on the audit of existing centres, and a vision for the future of each town centre.

364. The NPPF Glossary definition of "town centres" or "centres" includes city centres, town centres, district centres and local centres but excludes small parades of shops of purely local significance. Existing out-of-centre developments are not town centres unless they are defined as such in a local plan.

365. The plan's hierarchy of centres should reflect the area covered by the plan. For example, in a dense urban area there might be a city centre, one or more substantial town centres and a large number of district and local centres. By contrast, in a rural area there might be only one town centre, in the chief market town, with a few district or local centres in other settlements. Normally the terminology used to define each tier of the hierarchy will follow the NPPF Glossary order "[city]-town-district-local" but this is not prescriptive. Other terms may be used as long as they are logical and clearly explained in the plan.

366. The role and function of each tier in the hierarchy should be explained in the plan, and the position of each centre within the hierarchy should be consistent with the role and function that it is expected to play during the plan period. Inspectors should assess the realism and appropriateness of the hierarchy, taking account of the audit of existing centres. If there are significant anomalies, it may be necessary to recommend main modifications to correct them.

367. In most cases the hierarchy will reflect the existing relationship between the centres. But it is acceptable for the LPA to "promote" a centre to a higher tier in anticipation of planned development there, provided that there is sound evidence that it is deliverable and that appropriate site allocations are made.

368. Representors may dispute the position of a given centre in the hierarchy. Any main modifications to the hierarchy that the Inspector may recommend must be justified by evidence that the hierarchy is unsound in its submitted form. For example:

The recent planning permission for major retail development at Longbridge means that it would be unrealistic to continue to regard it as a Local Centre.

MM55 therefore promotes it to the District Centre tier of the hierarchy and makes the necessary cross-references to policy GA10, where an updated retail floorspace figure for the centre is set out. That updated figure, all of which is already built out or committed, is double the amount of floorspace envisaged in the 2009 Longbridge AAP, and is comparable with the scale of retail floorspace in other District Centres.[51]

Defining town centres, primary shopping areas, and primary & secondary frontages

369. As the NPPF Glossary makes clear, it is the local plan policies map that defines the geographical extent of each centre. The bigger town centres will usually include a designated "primary shopping area" (the area where retail development is concentrated) together with areas predominantly occupied by main town centre uses within and adjacent to the primary shopping area. District and local centres will usually comprise mainly retail uses.

370. Bigger centres are also likely to include designated "primary and secondary frontages" – see NPPF Glossary for definitions. There are likely to be specific development management policies applying to these frontages (see below) so Inspectors should ensure that they are designated appropriately.

Site allocations

371. As the NPPF advises, the plan should make site allocations to meet the assessed need for main town centre uses over the plan period. Wherever possible those allocations should be within defined centres. The size of any allocation should reflect the role and function of the centre within the hierarchy.

372. In accordance with advice in the PPG[52], if the assessment indicates a need for more development land than is available in an existing centre, the plan should set out how that need will be met. This may involve, for example, extending the boundary of the centre or promoting the redevelopment of existing buildings within the centre. If suitable town centre sites are not available, edge-of-centre sites that are well connected to the town centre should be allocated. If sufficient edge of centre sites cannot be identified, the plan should set policies for meeting the identified needs in other accessible locations that are well connected to the town centre. Thus there is no requirement to allocate sites in such "other accessible locations", although the LPA is not precluded from doing so. The plan should seek to ensure that any proposed main town centre uses which are not in

[51] Report on the Examination of the Birmingham Development Plan (March 2016), para 242
[52] NPPF para 23 ID 2b-003-20140306, 2b-006-20140306 & 2b-009-20140306

an existing town centre are in the best locations to support the vitality and vibrancy of town centres, and that no likely significant adverse impacts on existing town centres arise.

373. Advice on land availability assessments for economic development, including main town centre uses, is given in the section of the PPG entitled *Housing and economic land availability assessments.* See also the Employment Development section of this chapter.

374. Inspectors will need to assess the soundness and deliverability of site allocations, including consideration of their viability and the timescale over which they are expected to come forward.

Public and community uses

375. These include schools, health care premises, administrative buildings, community centres, publicly-owned leisure centres and theatres. Some are main town centre uses but others, including schools and local community centres, are likely to be located in residential areas. Inspectors should assess whether the plan makes appropriate provision, including site allocations, for any identified future growth needs. Policies to protect existing public and community premises should be sufficiently flexible to allow for redevelopment where there is clear evidence that the premises are no longer needed or suitable replacement provision is made.

Development management policies

376. At paragraph 23, the NPPF advises that local plans should set policies to make it clear which uses will be permitted in town centres, primary shopping areas, and primary and secondary frontages. For town centres and primary shopping areas these permitted uses will usually reflect the definitions in the NPPF Glossary.

377. For primary and secondary frontages it is common for local plan policies to set minimum thresholds for certain use class types (most often A1 retail), and to state that changes of use that cause those thresholds to be breached will not be permitted. Such policies should be scrutinised to ensure that they realistically reflect the current situation in the relevant centres, and that they achieve an acceptable balance between maintaining the retail function of the centres and allowing flexibility to accommodate an appropriate range of uses.

378. At paragraph 24, the NPPF advises that a sequential test should be applied to planning applications for main town centre uses that are not in an existing

centre and are not in accordance with an up-to-date local plan. The PPG advises that local plans should contain policies to apply the sequential test to such proposals[53]. Inspectors should satisfy themselves that any such local plan policies properly reflect national policy and guidance. The sequential test does not apply, however, to small-scale rural offices and other small-scale rural development (NPPF paragraph 25).

379. At paragraph 26, the NPPF advises that when assessing applications for retail, leisure and office development outside town centres, which are not in accordance with an up-to-date local plan, LPAs should require an impact assessment if the development is over a proportionate, locally-set floorspace threshold. There is a default threshold of 2,500sqm if no threshold is set locally. Any local threshold must be set out in a plan policy and justified by the evidence. The PPG contains advice on setting a local threshold[54] and Inspectors should ensure that it has been taken into account.

380. For example, in Carlisle a Retail Impact Threshold Assessment was commissioned having regard to the PPG advice. It concluded that the City Council should not rely on the NPPF default threshold and proposed a lower locally set threshold through the Local Plan to reflect the circumstances relevant to Carlisle. On the basis of this analysis, it was found that a requirement for a retail impact assessment for proposals in the urban area which exceed 1000sqm (gross) for convenience retail and 500 sq.m (gross) for comparison retail was justified and a separate impact threshold of 300 sq.m (gross) for convenience and comparison retail proposals was also demonstrated to be justified for the towns of Brampton, Dalston and Longtown.

Planning Policy > Local Plan Examination > Carlisle District Local Plan 2015-2030 Examination

Complementary strategies and parking provision

381. According to the PPG[55], the town centre strategy should also consider what complementary strategies are needed to enhance centres, and how parking provision can be enhanced in order to encourage the centres' vitality. Inspectors should be aware of any such complementary initiatives as they may have implications for site allocations and policies in the plan.

[53] ID 2b-009-2014006
[54] ID 2b-016-2014006
[55] ID 2b-003-2014006

Gypsy and Traveller Provision

Overview

382. The context for considering the soundness of gypsy and traveller provision in Local Plans is that the treatment of the issue should be comparable to the approach taken in that plan to general housing provision.

383. There should normally be an objective and reasonably up-to-date assessment of need; that need should be translated into a policy confirming pitch/plot requirements over the full plan period; there should be a realistic assessment of supply (including whether potential sites are achievable/deliverable) and, where there is a gap between need and supply, proposals to meet that gap, including achieving a deliverable 5 year supply of pitches/plots and identifying developable sites or broad locations beyond that period.

384. Experience of examinations has shown that in some cases evidence of need may be very old and not cover the full plan period; that the plan does not clearly respond to the need; and that there is delay in providing needed sites by postponing allocations to a later DPD. Unlike with normal housing provision, there may be few if any informed representations on these matters. This places a greater onus on the Inspector to take an inquisitorial approach in the context of the Public Sector Equality Duty. For further detail on this see the Human Rights and the Public Sector Equality Duty chapter.

385. Terminology is important. The convention is that a *pitch* is the land occupied by one gypsy or traveller household; a *plot* is the land occupied by one travelling showperson's household. Households will often have more than one caravan on a pitch or plot eg a static caravan or mobile home and a touring caravan, but various combinations are possible (and plans should not be prescriptive on such a matter). The twice yearly Council caravan counts for DCLG counts caravans, not pitches, plots or households. Variations in numbers can typically arise between winter and summer counts as families are more likely to be away in the summer in their tourer and thus fewer caravans will be counted on permanent sites.

386. The Government's aims in respect of traveller sites are set out in paragraph 4 of *Planning Policy for Traveller Sites* (PPTS) August 2015 (Paragraph 4). Those aims most relevant to development plans are:

- Local planning authorities (LPAs) should make their own assessment of need;

- LPAs working collaboratively should develop fair and effective strategies to meet need through the identification of land for sites;
- LPAs to plan for sites over a reasonable time scale;
- Ensure that local plans include fair, realistic and inclusive policies
- To increase the number of traveller sites in appropriate locations with planning permission to address under supply and maintain an appropriate level of supply.

387. Furthermore, the PPTS indicates that LPAs should engage and collaborate with the community and use a robust evidence base to establish need and to inform the local plan (paragraph 7); requires that LPAs should identify a 5 year supply of deliverable sites, and a supply of developable sites for years 6-10 and 11-15 where possible (paragraph 10); ensure that traveller sites are sustainable and sets out how LPAs should achieve this in their LP policies (paragraph 13) and if an LPA wishes to make an alteration to the Green Belt (for exceptional reasons such as to accommodate a traveller site) it should only do so through the plan-making process and the land should be specifically allocated as a traveller site (paragraph 17).

388. Inspectors conducting a development plan examinations where issues involving travellers arise, but who are who are unfamiliar with traveller casework generally, will wish to familiarise themselves with additional background set out in the Gypsy and Traveller Casework chapter. It is particularly important that Inspectors are aware of the terms of the planning definition of travellers as set out in Annex 1 of the PPTS and that travellers such as Romany Gypsies and Irish Travellers are recognised ethnic groups and therefore share a protected characteristic under the Equality Act 2010.

Assessment of Need (formerly GTAAs)

389. Local planning authorities are required to use evidence to plan positively and manage development (PPTS paragraph 7). This matter is relevant for full Local Plans or strategic Local Plans in which the housing need/requirement is being established.

390. Guidance on needs assessment was formerly set out in: *Gypsy and Traveller Accommodation Needs Assessments – Guidance (DCLG, 2007).* But this has since been withdrawn and following the enactment of the *Housing and Planning Act 2016* the assessment of the needs of travellers must be seen in the wider context of the needs of people with respect to the provision of sites on which caravans can be stationed. Section 124 of this Act amends section 8 of the *Housing Act 1985* and requires each local housing authority in England to

consider the needs of people residing in or resorting to their district with respect to the provision of:

(a) sites on which caravans can be stationed, or

(b) places on inland waterways where houseboats can be moored.

391. The section also deletes reference in s8 of the Housing Act 1985 to the accommodation needs of gypsies and travellers as these needs will be considered as part of a more general assessment of sites for caravans.

392. The current guidance on needs assessment is the *Draft guidance to local housing authorities on the periodical review of housing needs - Caravans and Houseboats*, published by DCLG on 11 March 2016.

393. In the above context, it is likely that in the future, the assessment of need for traveller sites will be a sub-set of the needs assessment for caravan sites generally and be part of the overall assessment of housing needs in a SHMA. But to date and for examinations in the near future the assessment of the needs of travellers is usually in a stand-alone assessment. Such assessments might be expected to include:

- Existing (ie backlog) need eg unauthorised sites and travellers living in bricks and mortar who need a pitch.
- Overcrowding including households with insufficient living accommodation in terms of size/number of caravans; authorised, but cramped sites with small pitches/plots; and 'doubling-up' on a pitch - sites being occupied by more than the authorised number of pitches/plots.
- Known future needs eg temporary planning permissions which will expire; any loss of existing sites from redevelopment.
- Other future arising needs eg household formation.
- Migration - there must have been appropriate cross-border collaboration. Has the Duty to Co-Operate on this matter been met?
- The needs of travelling showpeople should usually be assessed separately to the needs of other travellers because their specific accommodation needs differ from other travellers.

394. There should have been early and effective engagement with both settled and traveller communities about needs. Engagement with travellers on need should be ongoing (PPTS paragraph 7).

395. In addition to an assessment of overall numbers, a needs assessment could, and preferably should, provide useful information about the likely type of sites required, eg:

- The split between privately funded sites and sites for affordable provision (eg sites provided for rent by the Council or another housing provider).
- The make-up of the traveller community as to whether a particular variety of sites is required eg Irish Travellers, ethnic Romany Gypsies, 'new age' travellers, as well as for travelling showpeople;
- Whether there are large family groups requiring multi-pitch sites.

396. If assessments are out of date, Inspectors will need to judge the significance of that shortcoming and how it might best be addressed in the context of any other work required on the plan. But the expectation should be that the needs of travellers and others who require caravan sites are assessed in the same way as others in need of housing. Even where there is an up to date assessment of the needs of most groups of travellers, the needs of travelling showpeople and for transit sites may have been overlooked/not updated and Councils will be reliant on work done for the former Regional Strategies. The key test is whether there is evidence to indicate that such earlier work is, or is not, adequate and particular considerations might include:

- Travelling showpeople are a particularly distinct group and their local representative organisations may have a very good knowledge of local needs. Has the Council actively sought their recent input/corroboration of "old" work?
- Was the previously assessed need substantial? If so, subsequent family formation may have significantly changed overall need.
- The need for transit sites is very difficult to assess and is best done on a sub-regional basis. Often little or no provision will have been made since regional assessments were made in 2006/7. The priority may be to ensure that progress is being made on some provision in the short term, with the need reassessed thereafter.
- Any "old" assessment would not have covered the full plan period and, if accepted as a starting point, would need to be extrapolated to give a full plan figure.

397. The PPTS August 2015 introduces 2 new factors relevant to assessments of need/supply. Firstly, in paragraph 12, *in exceptional cases, where a local planning authority is burdened by a large-scale unauthorised site that has significantly increased their need, and their area is subject to strict and special planning constraints, then there is no assumption that the local planning*

authority is required to plan to meet their traveller site needs in full. The DCLG's "Consultation response" August 2015 in paragraph 3.29 refers to Basildon Council and Dale Farm as the only such exceptional case that has arisen - so a very high threshold is set for this factor coming into play.

398. Secondly, the definitions of 'gypsies and travellers' and 'travelling show people' in Annex 1: Glossary to the PPTS have been amended. Previously included within the definition were those who had ceased to travel temporarily or permanently for reasons of health, education or old age. "Permanently" has been deleted from the definitions. So, persons who came within the previous definition, but who have permanently ceased to travel should not now be counted as in "need" of a pitch or plot in terms of the PPTS. However, such persons will still be in need of a site for a caravan and their needs must be assessed in accordance with s8 of the Housing Act and paragraph 159 of the NPPF. Inspectors should ascertain whether this is reflected in the consideration of need.

399. A combination of outdated assessments, changes to the PPTS and the introduction of the Housing and Planning Act might be put forward as reasons why the assessment of need is incomplete. Inspectors are encouraged to take a pragmatic approach which suggests that requiring further work to be undertaken should be carefully considered because of the likely delay entailed. Equally they must also have regard to the provisions of the Equality Act 2010 if LPAs propose to leave assessment of need and site provision entirely to another day. At the very least there should be a suitably robust assessment of need even if this does not extend across the entire plan period and a clear indication that the plan would provide a means for making real progress on meeting short term needs.

400. In relation to the potential *supply* of pitches (see below), theoretically at least, the changed definition might increase the number of vacancies expected to arise on existing authorised sites as those who had ceased to travel might no longer comply with the particular gypsy occupancy condition applying to that site (although that would depend on the precise wording of any such condition and whether it would be reasonable or expedient for LPAs to evict existing occupiers in the circumstances). Furthermore, this will depend on how compliance with such conditions is interpreted in the Courts where it has yet to be tested. In any event, there are likely to be a range of questions to explore in order to understand the effect of the changed definition on the planned provision and the implications for plans at examination stage.

401. In the future it will be particularly important to consider the need for pitches/plots for travellers (as defined in the PPTS) in the wider context of the

identified need for caravans generally. In short, the greater the number of households who are culturally or ethnically gypsies, but fall outside the planning definition and are thus not included in the assessment of traveller needs, the greater will be the number of people needing sites where they can live in caravans which are free from any planning conditions limiting occupation to those who are travellers in planning terms. Development plans should address how this general need will be met, as well as that for travellers as defined in the PPTS. Other than for the number of households who were previously included as travellers in needs assessment, but are now excluded from the new definition, Councils may currently have little or no evidence of the needs of those who reside in caravans (which of course include mobile home parks).

402. In as much as the traveller population has been accurately recorded in the Census and counted in the ONS Mid-Year Estimates, that population will be reflected in population projections and household projections undertaken to produce the overall objective assessment of housing need for the plan (see separate section in this chapter). However, because of the particular needs of this group, it is now established practice that future need is assessed by other, more direct, methods. Whilst there will therefore be an overlap between a district's overall OAHN figure and the separate assessment of traveller needs, for most authorities this can be ignored because the numbers are so small such as to make no practical difference to the housing requirement. However, there may be one or 2 small authorities with a large traveller population where the overlap may be material and require more careful articulation.

403. Where the development plan under examination is addressing strategic issues and setting an overall housing requirement, then it should also set out the requirement over the plan-period for traveller sites. Plans vary in the extent to which they articulate the specific needs of different groups, such as students and older people with specialist needs. However, given the close relationship between the needs of travellers as defined in planning terms and many of those who are outside that definition, but who also have need of sites for caravans, Inspectors may need to explore whether the plan should identify a specific target for caravan sites (and also for houseboats, given their constrained site opportunities).

Assessment of Supply

404. Future supply may have been weaved into the assessment of need, but there should be a clear assessment of forthcoming supply (i.e. a mini "SHLAA" for pitches and plots):

- Are existing authorised sites being counted as part of the supply actually available to and occupied by gypsies, travellers or travelling showpeople? Any site without an effective occupancy condition, even if occupied by travellers in the past, may become unavailable. Some such sites are being converted to conventional mobile home parks excluding travellers (but see below in relation to the needs of caravan dwellers generally).
- Is there any spare capacity on existing sites? What are the landowners' intentions? (Beware of apparent "capacity" on private gypsy sites which may well be held back by the owner for personal reasons or long-term family needs.)
- It is commonly accepted in s78 appeals that gypsies and travellers of different ethnic backgrounds or traditions often do not want to share the same site. Travelling showpeople will want and need their own sites.
- Are there sites with planning permission not yet built? If so, are they deliverable/developable?
- What contribution is being ascribed to future vacancies on public sites? If this is a significant part of future supply, is there clear evidence that such vacancies will arise and be available to families in need of a pitch not currently on a public site? Evidence based solely on past new tenancies may reflect moves within an existing site, between public sites, or changes in heads of households, rather than actual vacant pitches available for new families.

405. Councils will also need to assess the supply of sites for people who live in caravans who do not/no longer come within the planning definition of travellers. These households will not be able to occupy sites which are subject to gypsy and traveller occupancy conditions that are linked to the PPTS definitions. However, they may well be long-standing residents of such sites. In addition, it is the cultural tradition of many travellers to live in extended family groups and to care on-site for ageing relatives. Accordingly, sites may be required which enable travelling, younger family members and elderly/retired (non-travelling) gypsies to live on the same site. But at least some of the pitches on these sites will need to be conditioned for PPTS travellers only, since without any such restriction such sites could be used for general mobile home parks which are likely to have higher value than many travellers could afford or where common-place restrictions by the managing landlords (eg no children, no pets) in practice exclude most traveller families.

Creating a future supply of sites

406. The PPTS encourages local planning authorities to plan for sites over a reasonable timescale (detailed advice is in paragraph 10 of the PPTS).

407. Where there are unmet needs, sites must be allocated to meet that need. NPPF paragraph 14, 2nd bullet provides the exception, but if not meeting its own needs in full, the Council must ask adjoining authorities to meet the remaining need (NPPF paragraph 179). Where the development plan is identifying an overall requirement for travellers (and/or caravans) it should also make clear how the 5 year supply should be calculated. In many areas there is a large current unmet need (unauthorised sites and temporary planning permissions). Inspectors should explore over what period this need should be met. It is suggested that within 5 years should be the starting point, similar to the Practice Guidance on making-up any shortfall in delivery of housing within the first part of the plan period.

408. For the 5 year supply, sites will need to be suitable, available and deliverable[56]:

- Is provision intended to be wholly private or with some public provision? Is there likely to be any funding to deliver the latter? Councils may allocate existing unauthorised sites or sites with temporary permissions to ensure deliverability.
- For new sites, availability/deliverability may be the crucial factor and the landowners' intentions should be clear.
- Sites should have an acceptable environment for residential use. But the existing traveller owner/occupiers of a proposed allocation which has a poor environment (eg road noise) may be content to live there in preference to the cost and uncertainty of moving to a site they do not own. How realistic (eg cost) is any proposed environmental mitigation work?

409. Some Councils are proposing the provision of pitches as part of new residential allocations, but often there is a lack of clarity about what exactly is required and who is responsible for costs/delivery.

- If affordable provision is required/intended, provision by the developer could be part of the overall affordable housing provision made on that site. Is that made clear? Have any differences in cost/income from rent and larger land take than dwellings been taken into account in the viability assessment? Is there a housing provider willing to be involved?

[56] See *St Modwen Developments Ltd v SSCLG, East Riding of Yorkshire Council and Anor* [2017] EWCA Civ 1643

- Where private provision is required/intended, the provision of serviced plots might be seen as comparable to an element of self-build provision, but again differences in costs/income will need to be reflected in viability assessments.
- Provision of only 1 or 2 pitches on various smaller allocations may not meet the identified need (eg for provision of extended family groups).
- What weight, if any, should be given to arguments of incompatibility or wider effects on the sale prices of new homes (and thus on viability)?
- Delivery associated with larger sites may be too slow to contribute to immediate needs.
- Some allocations may need to be of a hybrid form to accommodate those travellers who no longer come within the planning definition, alongside their family members who are within the definition.

410. PPTS paragraph 11 says *criteria should be set to guide land supply allocations where there is an identified need*. But:

- If there is a need and the issue is being dealt with in a single comprehensive local plan or a bespoke gypsy and traveller DPD then that plan has to make the allocations anyway and criteria would serve no purpose.
- If it is still a strategic Local Plan, with an allocations DPD to follow, criteria for allocations might be useful, but the danger is that they are too restrictive. In which case ask on what evidence is the Council confident that sufficient sites can be found that meet the policy criteria? Often there is no such evidence. The policy may have to be amended to acknowledge the need for a flexible approach to ensure that sufficient sites can be found and not be expressed as "requirements".
- For reasons of deliverability, some of the new sites to be subsequently allocated may be existing unauthorised sites which are not in the most accessible locations.

411. The PPTS in paragraph 11 goes on to say: *Where there is no identified need criteria-based policies should be included to provide a basis for decisions in case applications nevertheless come forward.*

- Such policies are likely to be the exception rather than the rule - not a substitute for allocations.
- Beware criteria which, when applied to a single pitch family site, would be more constraining than policies for single dwellings.

- However unlikely (because of land value), a single gypsy pitch should be acceptable wherever a single dwelling would be permitted, since it is a residential use. More onerous requirements on a single pitch traveller site compared with a dwelling would be unjustified having regard to the Equality Act 2010.

412. When reporting Inspectors should give a clear indication of the level of assessed need, how this is to be met by the supply of sites and whether there is a 5 year supply.

413. Note that compliance with DCLG's *Designing Gypsy and Traveller Sites Good Practice Guide* (2008) cannot be required by LPAs as the guide has now been cancelled (see DCLG *Dear Chief Planning Officer* letter of 31 August 2015).

The Green Belt

414. Traveller sites are inappropriate development in the Green Belt (PPTS paragraph 16). This is nothing new. Over many years, s78 appeals universally found this to be the case and the issue was rarely disputed.

415. If a plan proposes to allocate a site in the Green Belt (which might well be a temporary site or an existing unauthorised site) it should be removed from the Green Belt and specifically allocated as a traveller-only site (or hybrid site to accommodate some travellers not within the definition). If it remains washed-over by the Green Belt, any application would still need to pass the very special circumstances test and need alone would not be sufficient to do this, thus fatally undermining the effectiveness of the allocation. See paragraphs 13-16 in the Inspector's report on the examination into the Solihull Gypsy and Traveller Site Allocations DPD.

416. If a Green Belt review has been done or is being done for housing sites, consider if it should also include gypsy and traveller sites, even if such sites are being dealt with in a separate DPD, given that Green Belt boundaries should not be frequently changed.

417. Where sites are proposed to be removed from the Green Belt to enable effective allocations for traveller sites there needs to be a clear explanation of the "exceptional circumstances" which justify these deletions (NPPF paragraph 83).

418. Not all, most or necessarily any of the allocated sites will be on the inner or outer edges of the Green Belt. Accordingly, a consequence of the above may be

that there are pin-prick removals from within the Green Belt (see Solihull Gypsy and Traveller Site Allocations DPD).

419. The previous Ministerial Statement to the effect that, subject to the best interests of children, personal circumstances and unmet need are unlikely to clearly outweigh harm to the Green Belt and any other harm so as to establish very special circumstances, has been added to the PPTS (paragraph 16). However, given that this is in the context of very special circumstances, it relates to decisions on applications, not the test of *exceptional circumstances* (NPPF paragraph 83) necessary to make an amendment to the Green Belt boundary through plan-making.

The role of different Development Plan Documents and possible delay in provision

420. The NPPF envisages a single document forming a comprehensive Local Plan. *Any additional development plan documents should only be used where clearly justified* (NPPF paragraph 153). However, the Secretary of State has no supervisory role over the content of a Council's Local Development Scheme (LDS). Many Councils are still working with a mix of DPDs originally formulated prior to the NPPF. Where a separate DPD on gypsies and travellers was proposed some time ago this has often been retained in the LDS, even if a Council has combined a previous Core Strategy with site allocations. Such gypsy and traveller DPDs are often progressing several years behind the main plan.

421. As already indicated, the plan under Examination should seek to treat the policies and allocations for traveller sites in a comparable way to what it is proposing for conventional housing sites. A comprehensive Local Plan making all housing allocations for the whole plan period, should be expected to also allocate sufficient traveller sites (and caravans sites). If provision for travellers is the only "need" being delayed to a later DPD, ask what is the justification for this delay? Is it fair? How does it advance the aims of the PPTS (paragraph 4)? Equality issues will also arise and Inspectors must ensure that they comply with the Public Sector Equality Duty (PSED). This does not require a specific outcome but any negative equality impacts must be acknowledged and addressed in the report. See the separate chapter on PSED in Local Plan examinations in the Human Rights and the Public Sector Equality Duty chapter for further detail.

422. Where, having regard to all the above, some matters are postponed to another plan, the current, most strategic plan should make clear what needs to be addressed subsequently.

423. Post-NPPF, only 3 specific gypsy and traveller site allocations plans have been submitted (as at October 2015). The plans for LB Havering and Central Bedfordshire have both been withdrawn. Only the plan for MB Solihull has been found sound and adopted. General site allocation plans for Rochford, Wyre Forest and Chorley and the Sefton Local Plan have included traveller sites.

Intentional unauthorised occupation

424. Issued at the same time as the revised PPTS (and accompanying the *Dear Chief Planning Officer* letter of 31 August 2015) was a policy statement on Green Belt protection and intentional unauthorised development which came into immediate effect. The statement introduces a planning policy to make intentional unauthorised development a material consideration that would be weighed in the determination of planning applications and appeals.

425. This policy is of most relevance in decision-making on applications. However, one common option for Councils in considering what sites to allocate is existing unauthorised sites owned and occupied by travellers because they are obviously deliverable. The fact that they were the subject originally of intentional unauthorised development might now be argued against making any such allocations and the policy would still apply at application stage, even if allocated. This factor would need to be weighed against the availability/suitability/deliverability of any alternatives.

Neighbourhood Plans and Local Plans

What should neighbourhood plans and local plans cover?

426. Neighbourhood plans were introduced via the Localism Act 2011 which inserted a new s38A into the Planning and Compulsory Purchase Act 2004. Neighbourhood plans have a broad scope, as stated in s38A(2):

A neighbourhood development plan is a plan which sets out policies (however expressed) in relation to the development and use of land in the whole or any part of a particular neighbourhood area specified in the plan

427. S38 confirms that neighbourhood plans sit alongside local plans to form the development plan for the area. The NPPF sets out that local plans should set out the strategic priorities for the area (paragraph 156) whilst neighbourhood plans will develop a local vision for their community (paragraph 183/184). Para 184 stresses that a neighbourhood plan should be in alignment with the strategic priorities set out in the local plan and in general conformity with the policies of

the local plan. The PPG on Neighbourhood Planning usefully sets out what the terms strategic and general conformity should be taken to mean.

428. As well as setting out policies for neighbourhood areas, neighbourhood planning encompasses other tools for granting deemed permission, such as Neighbourhood Development Orders and Community Right to Build Orders. These Orders can specify that permission is granted for certain types of development within the neighbourhood area or smaller area as specified. These orders can be developed alongside neighbourhood plans for the same neighbourhood area.

Can a neighbourhood plan come forward before an up-to-date local plan is in place?

429. Yes, a neighbourhood plan can come forward prior to the adoption of an up-to-date local plan. If there is no up-to-date local plan in place the PPG says that the neighbourhood planning body and LPA should work proactively, positively and collaboratively; sharing evidence and seeking to resolve any issues in order to maximise the draft neighbourhood plan's chance of success at examination. Neighbourhood plans and local plans should be complementary, minimising any conflicts. This is important because s38(5) requires that any conflict must be resolved by the decision maker favouring the policy contained in the last document to become part of the development plan.

Distinctions between local plan and neighbourhood plan policies

430. A neighbourhood plan examiner's role is limited to testing whether or not the plan meets certain 'basic conditions', and other matters set out in paragraph 8 of Schedule 4B to the Town and Country Planning Act 1990 (as amended). The 'soundness' of a neighbourhood plan is not tested.

431. The 'basic conditions' are that the neighbourhood plan must:

- have regard to national policies and advice issued by the Secretary of State
- contribute to sustainable development
- be in 'general conformity' with the 'strategic policies' in the development plan
- not breach (and be otherwise compatible with) EU obligations

Questions concerning the relationship with neighbourhood plans

432. Inspectors examining local plans may wish to consider whether the following matters are already answered within the documentation, or whether further questions may need to be asked:

- Does the local plan clearly focus on strategic matters? Is there a need for clearer definition of its 'strategic policies' and for identification of any more detailed matters that are to be left to neighbourhood plans?

- In a local plan area which contains one or more neighbourhood plans that are in preparation, has the local plan avoided 'duplicating the planning processes for non-strategic policies' (NPPF 185)?

- Is there a limit on the size of a 'strategic' housing allocation? If there is, where should the balance of sites for the housing requirement for the plan period come from? To what extent should neighbourhood plans be expected/required to make this up?

- Does the local plan give an adequately clear brief to neighbourhood planning bodies about what they need to do to be in 'general conformity'?

- Does the local plan propose any policy that will supersede a policy in a made neighbourhood plan? If so, has this been clearly identified?

ANNEX 1

NORTH SOMERSET COUNCIL

Examination of Development Management Policies

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INSPECTOR'S MAIN ISSUES AND QUESTIONS TO THE COUNCIL

Following my initial examination of the Sites and Policies Plan Part 1: Development Management Policies (publication version February 2015) (DMP) and the supporting material I consider that the main issues regarding the soundness of the DMP are as follows:

Issue 1: Are the policies consistent with, and do they positively promote, the visions, objectives and spatial policies contained in the Core Strategy?

Issue 2: Are the individual policies clear, justified and consistent with national policy and will they be effective?

In this note I shall pose questions of the Council that potentially go to matters of soundness or which concern representations made. In framing them I have had regard not only to the definition of soundness at paragraph 182 of the National Planning Policy Framework (NPPF) but also the principles for Local Plans set out in paragraph 157. The NPPF also establishes that only policies that provide a clear indication of how a decision maker should react to a development proposal should be included in the plan. The DMP should therefore set out clear policies on what will or will not be permitted.

If the response to any question or comment can be given by directing me to section(s) of the supporting documents and evidence base, then it can be dealt with in that way. However, this is the Council's main opportunity to respond to these points as I shall not be inviting separate hearing statements. Brevity is nevertheless also to be encouraged. The reply to my questions should be sent to the Programme Officer by Friday 9 October 2015.

Legal compliance

The Council's statement on the duty to co-operate and joint working (SD09) states that "on the whole" the policies in the DMP do not involve any cross-boundary issues. Policy DM11 is mentioned but could the Council be specific as to which, if any, policies would have a significant impact on any other local planning authority area.

The timetable and milestones for the DMD in the Local Development Scheme (SD19) should be updated prior to the hearings.

Issue 1:

Are the policies consistent with, and do they positively promote, the visions, objectives and spatial policies contained in the Core Strategy?

Questions:

Will the DMP affect the re-examination of the remitted Core Strategy policies and is it appropriate to bring it forward at this stage? How would the DMP complement the strategic context set out in the Core Strategy?

Issue 2:

Are the individual policies clear, justified and consistent with national policy and will they be effective?

General questions:

Reference is made to the Strategic Housing Market Assessment. Could the Council explain the current position in relation to this document and any successor? How do its findings affect the DMP, bearing in mind the expectation in paragraph 50 of the NPPF that local planning authorities should identify the size, type, tenure and range of housing that is required in particular locations, reflecting local demand?

Questions and comments on individual policies:

Policy SP1: Presumption in favour of sustainable development

This policy largely reiterates paragraph 14 of the NPPF. The Planning Practice Guidance (PPG) on *Local Plans* (ID 12-010-20140306) indicates that there is no need to do this. Hence the Council should consider removing it.

Policy DM2: Renewable and low carbon energy

The Written Ministerial Statement (WMS) entitled *Local Planning* on 18 June 2015 sets out new considerations to be applied to wind energy development. Future wind energy development must now be in areas identified as suitable for wind energy in a local plan as referred to in paragraph 97 of the NPPF and as noted in the Addendum to the Supplementary Planning Document (SPD) on *Wind turbines*. No such areas are identified in the DMP although the resource assessment commissioned by the Council in May 2014 did identify areas with the greatest potential to accommodate wind turbines of different sizes. How does the Council wish to proceed with this?

If it wishes to identify suitable areas in the DMP then this would need to be taken forward by further work in terms of sustainability appraisal and probably consultation. Alternatively, to avoid delay, it could consider changes to the policy to explain that its generic provisions do not relate to wind turbines which will be considered against the WMS. The Council could then deal with the matter separately through a site allocations plan or potentially a single issue plan on wind turbines.

Does the policy properly reflect the announcement in the Productivity Plan of July 2015 that the Government does not intend to proceed with the zero carbon Allowable Solutions carbon offsetting scheme or the proposed 2016 increase in on-site energy efficiency standards?

Should the policy refer to cumulative landscape and visual impacts as mentioned in paragraph 97 of the NPPF?

Policy DM4: Listed Buildings

Section 66 of the Planning (Listed Buildings and Conservation Areas) Act 1990 sets out the general duty as respects listed buildings. This refers to the duty to have special regard to the desirability of preserving the building or its setting. The policy simply states that development should "enhance". Is the wording of the policy justified having regard to these statutory provisions?

Policy DM5: Historic Parks and Gardens

For effectiveness should proposed change PC11 require historic landscape assessments for significant development either within a historic park or garden or affecting its setting?

Policy DM6: Archaeology

Where there is good reason the policy seeks an archaeological assessment and field evaluation. To coincide more closely with Paragraph 040 of the Planning Practice Guidance (PPG) on *Conserving and enhancing the historic environment*

(ID18a) should it refer to situations where an initial assessment indicates that the development site includes or has the potential to include heritage assets with archaeological interest? Should it also make clear that an initial field evaluation as opposed to a desk-based assessment is only required where necessary?

Policy DM7: Non-designated heritage assets

What is the purpose of the policy and how would it work in practice? Does the Council have a local list of non-designated heritage assets? If not, should the Council consider producing one having regard to paragraphs 006, 039, 040 and 041 of the PPG (ID18a)? Should the policy more closely reflect paragraph 135 of the NPPF?

Policy DM8: Nature Conservation

In the final section on ecological mitigation measures is it appropriate to include a requirement for an effective lighting design within an ecological survey assessment? If necessary should the need for lighting to avoid adverse impacts on light averse wildlife be expressed separately?

Policy DM9: Trees

Should the expectation for replacement planting be included in the policy itself rather than in the justification? Whilst taking account of proposed change PC16 what is the justification for the detailed provisions within Table 1? Why are these necessary for effectiveness rather than a more generic reference to suitable replacement planting as part of an overall landscaping scheme?

Policy DM10: Landscape

If the term "designated landscape character" is intended to refer to the qualities of the various parts of North Somerset identified in the Landscape Character Assessment should the policy not say so? Should the policy explicitly refer to areas outside the AONB? Is "not adversely affect" the appropriate test as, for example, the Justification refers to resisting development that would "significantly detract" and Policy DM11 refers to an "unacceptable adverse impact"? Should the DMP identify areas of tranquillity in line with paragraph 123 of the NPPF?

Policy DM11: Mendip Hills AONB

How will the "additional overriding requirement" in the second paragraph operate in relation to development that may be deemed appropriate? Will it be

effective? Should the overall intention to protect the landscape and scenic beauty of the AONB be stated? To be effective should the third paragraph refer to minimising the harm of development?

Policy DM12: Development within the Green Belt

Extensions or replacement of existing buildings

Annex 2 of the NPPF defines "original building" as one that existed on 1 July 1948 or as originally built. What is the justification for defining this as 26 July 1985 in North Somerset for all buildings including replacements? In assessing whether development is disproportionate or materially larger case law has held that this is primarily an objective test by reference to size. Therefore should reference to the impact of the openness of the Green Belt be included as part of this assessment? What is the justification for the figure of no more than a 50% increase in floor area? Are proposals for domestic outbuildings and garages to be regarded as inappropriate development?

Redevelopment and infilling

What is the rationale for infilling to not exceed the height of existing buildings?

Material change of use

The NPPF makes no reference to material changes of use and case law has held that paragraph 90 is a closed list. In the light of this what is the justification for accepting material changes of use and is it intended that this would not be regarded as inappropriate development?

Policy DM14: Mineral working exploration, extraction and processing

What is the justification for the criteria relating to consideration of the need for the development including the provision of satisfactory evidence that it is needed and justified and how is this consistent with the NPPF?

Policy DM16: Allocation of land at The Spinney

Why do proposals need to demonstrate that there is a genuine need to work the Spinney at a particular time? What is the supporting document on minerals that forms part of the evidence base in the final sentence under Justification on p45?

Policy DM19: Green Infrastructure

What is the justification for requiring all development proposals to contribute to the quality of the environment through the creation of green infrastructure?

Policy DM20: Major transport schemes

The Justification on p56 states that many of the safeguarded schemes are identified in the Core Strategy or have been carried forward. Which of the schemes listed fall into these categories and what is the justification for any that are not included?

Policy DM27: Bus accessibility criteria

Where is the evidence base to justify this policy? What would be the implications of applying it in urban, suburban and rural areas? What is the clear policy test for the acceptability of route diversions? Is the figure for a walking distance of 400m justified and should it be expressed as a maximum?

Policy DM28: Parking standards

The requirement is that development proposals must meet the Council's standards which are set out in a SPD. This has not been the subject of examination and is not part of the development plan. The Council should therefore consider an alternative way of expressing its overall approach.

In addition, the WMS of March 2015 introduced additional text to read alongside paragraph 39 of the NPPF. In the light of this what is the clear and compelling justification that it is necessary to manage the local road network?

Policy DM30: Off-airport car parking

What is the justification to limiting airport-related parking outside the Green Belt to that associated with overnight accommodation with no more spaces than 3 times the number of bedrooms?

Policy DM31: Air safety

What are the implications of designating a safeguarded corridor linked to flight activity to and from the Helicopter Museum? Is it appropriate for parameters to be devolved to an SPD?

Policy DM33: Inclusive access into non-residential buildings and spaces

Is the requirement that this "must" be provided too prescriptive? Are the aims of the policy adequately covered by Building Regulations?

Policy DM34: Housing type and mix

Does the policy adequately explain what is meant by "mixed and balanced community" having regard to paragraphs 50 and 159 of the NPPF? Should the second paragraph under Justification on p83 be included within the policy itself? Should achieving a suitable type and mix of housing make reference to viability?

What evidence is there of demand for self-build schemes as referred to in the PPG on *Housing and economic needs assessments* (ID 2a-021-20150326)? How is demand to be assessed in line with proposed change PC42? What is the justification for applying parts of the policy to sites of over 100 dwellings?

Policy DM35: Nailsea housing type and mix

What is the "strong evidence base" justifying a specific policy for Nailsea rather than relying on the approach set out in Policy DM34? Should achieving a suitable type and mix of housing make reference to viability?

Policy DM36: Residential densities

Is the final bullet point regarding parking standards necessary? If so, in line with Policy DM28 the Council should consider an alternative way of expressing its overall approach which should also be reflected in Policies DM37, DM38, DM39 and DM43.

Policy DM39: Sub-division of properties

What is the evidence that justifies the designation of the 3 Areas of Restricted Subdivision in Weston-super-Mare and their individual boundaries?

Policy DM40: Retirement accommodation

Having regard to paragraphs 50 and 159 of the NPPF and the PPG on *Housing and economic needs assessments* (ID 2a-021-20150326) what is the justification for requiring all residential schemes of over 100 dwellings to assess the need for retirement and supported independent living? Should there be a reference to viability? What is the justification for applying parts of the policy to sites of over 100 dwellings?

Policy DM41: Nursing and care homes

Has this policy been positively prepared? Is preventing all extensions justified?

Policy DM42: Accessible and adaptable housing

Proposed changes PC49-51 seek to address the WMS of March 2015 but the optional new national standards in relation to access and space standards should only be required if they address a clearly evidence need and where their impact on viability has been considered. What is the evidence in relation to need and viability for the access and space standards? Has the Council had regard to the PPG on *Housing – Optional Technical Standards* and paragraphs 007, 008, 009, 018 and 020 in particular?

Policy DM43: Residential annexes

What is the justification for the 50% size limit outside settlement boundaries? Is this floor area? How are annexes within converted buildings to be treated?

Policy DM44: Replacement dwellings

What is the justification for the 50% size limit? Is this floor area?

Policy DM45: Conversion of rural buildings to residential use

Having regard to the NPPF and the changes to permitted rights in Class Q of the 2015 Order what is the justification for the criteria regarding traditional construction, reasonable attempts to secure an appropriate economic use and sustainable location? What is the justification for 70% of the original exterior walls to be standing?

Policy DM46: Rural workers dwellings

What is the justification for the requirement to provide an independent appraisal and the floor space limit of 150 sq. m?

Policy DM48: Broadband

Paragraphs 42 and 43 of the NPPF refer to high speed broadband. Given that superfast broadband will be provided by others how will the policy support its expansion given the evidence to date of provision across North Somerset? What is the justification for the preparation of a connectivity statement for all residential and employment development?

Policy DM50: Bristol Airport

Is it more accurate to say that the Policy aim relates to further development at the Airport rather than further expansion?

Policy DM51: Agriculture and land-based rural business development

According to the PPG on *Use of planning conditions* (ID 21a-014-20140306) conditions requiring the demolition after a stated period of a building that is clearly intended to be permanent is unlikely to pass the test of reasonableness. In the light of this is the final paragraph justified?

Policy DM53: Employment development on greenfield sites in the countryside

Should a cross-reference be included to Policy DM55 which is concerned with business expansion that could involve new buildings? Should the penultimate

paragraph be adjusted to reflect Policy DM67 which allows for small scale retail development of up to 200 sq. m?

Policy DM54: Employment development on previously developed land in the countryside

Should the final paragraph be adjusted to reflect Policy DM67 which allows for small scale retail development of up to 200 sq. m?

Policy DM55: Extensions, ancillary buildings or intensification of use for existing businesses located in the countryside

Is the final sentence of the penultimate paragraph regarding further expansion or intensification consistent with the expectation for policies in the NPPF and as set out above? Should the final paragraph be adjusted to reflect Policy DM67 which allows for small scale retail development of up to 200 sq. m?

Policy DM56: Conversion and reuse of rural buildings for employment development

What is the meaning and purpose of the third bullet point? What is the justification for the criterion regarding a sustainable location? Should the final bullet point be adjusted to reflect Policy DM67 which allows for small scale retail development of up to 200 sq. m? What is the justification for 70% of the original exterior walls to be standing?

Policy DM57: Conversion, reuse and new build for visitor accommodation in the countryside

What is the justification for criterion iii. regarding traditional construction? Why should applicants need to demonstrate a business case and/or show evidence of demand under criterion iv given that paragraph 28 of the NPPF supports sustainable tourism? What is the evidence to support a minimum 10 year period of use and is the reference to Policy DM43 correct? What is the justification for 70% of the original exterior walls to be standing?

DM58: Camping and caravan sites

Why should applicants need to demonstrate a business case and/or show evidence of demand under the second bullet point?

Policy DM59: Garden centres

Paragraph 23 of the NPPF provides that policies should be set for the consideration of proposals for main town centres uses which cannot be accommodated in or adjacent to town centres. Does the Council consider that

garden centres fall into this category? What is the evidence in terms of the vitality of town centres that justifies the restrictions on non-garden related goods to 15% of net sales floorspace and that they must be products made or grown within a 30 mile radius?

Policy DM60: Town centres

How have the boundaries of the town and other retails centres referred to in Policies DM61 and DM62 been arrived at?

Policy DM61: District centres and Policy DM62: Local centres

The limits of 500 sq. m and 300 sq. m for district and local centres respectively are set out in the supporting text of the Core Strategy and define retail development that is of a scale appropriate to the size and role of the centre. In the light of the NPPF and PPG are these limitations justified in principle and what is the rationale for the floor area specified? How do these relate to the size of the existing centres? Are the provisions of Policies DM61 and DM62 consistent with the original purposes of the Core Strategy in that they refer to the impact on the centre in which the development would be located?

Policy DM64: Primary shopping frontages

What is the distinction between primary shopping areas (Policy DM63) and primary shopping frontages? Have the designated frontages been adjusted compared to the existing development plan? If so, in what ways and what were the criteria for any changes? Is the provision that there would not be fragmentation by means of a significant break in the active frontage sufficiently clear so as to be effective? How will the criteria that there should not be a harmful loss of retail floorspace be assessed and will this be effective?

Policy DM65: Development at the retail parks

What is the justification for requiring an impact assessment for all proposals? Are the retail parks regarded as town centres for policy purposes?

Policy DM66: The sequential approach for retail development

Should the policy apply to main town centre uses as defined in the Glossary of the NPPF as opposed to just retail development? Has there been a thorough assessment of the suitability, viability and availability of locations for main town centre uses in line with the PPG on *Ensuring the vitality of town centres* (ID 2b-009-20140306)? What scope is there to accommodate additional retail or town centre development within the town centres?

The NPPF provides that a sequential test should be applied to planning applications that are not in an existing centre and not in accordance with an up-to-date Local Plan. The impact assessment is a separate exercise as explained in the PPG (ID 2b-013-20140306). Has the requirement for an impact test been applied in accordance with paragraph 014 of the PPG? In setting a local threshold have the Council considered the matters listed in paragraph 016 of the PPG and is this justified?

Policy DM67: Retail proposals outside or not adjacent to town, district or local centres

Should the policy apply to main town centre uses as defined in the Glossary of the NPPF as opposed to just retail development? Does the allowance for retail development of up to 200 sq. m apply everywhere or does this equate to small scale rural development as referred to in paragraph 25 of the NPPF? Is an impact assessment required for all proposals?

Policy DM69: Location of sporting, cultural and community facilities

Is it justifiable to expect all proposals to show that the sharing of existing facilities is impractical? To be consistent with retail policies should reference be made to a significant adverse impact in the last line?

Schedule of changes

A schedule of proposed changes to the publication version has been produced (Document SD14 of the submission documents). Some of these respond to representations made during the pre-submission consultation exercise. This table should be kept up-to-date throughout the examination process, including any alterations that arise from my questions, and posted on the Examination website. The latest version should be available just prior to the hearings.

Finally

I have attempted to be comprehensive at this stage in order to assist the progress of the examination. If anything is not clear or further explanation is required of what I am asking then please contact me via the Programme Officer.

David Smith

INSPECTOR

24 August 2015

ANNEX 2

Yorkshire Dales National Park Local Plan

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Mr Peter Stockton
Head of Sustainable Development
Yorkshire Dales National Park Authority

By email only

21 March 2016

Dear Mr Stockton

Examination of the Yorkshire Dales Local Plan 2015-2030

Subsequent to your submission of the Yorkshire Dales Local Plan (the LP/the plan) for examination, I have undertaken a preliminary review of the LP and the evidence produced. I am writing to you seeking clarification on a number of points and to raise some initial concerns.

Plan period

The plan period is 2015 to 2030. Please could you clarify the rationale for these start and end dates.

The objective assessment of housing need

It is not clear to me what the National Park Authority (NPA) considers to be the objective assessment of housing need (the OAN). Two documents are produced in evidence, the Housing Need, Land Supply and Housing Target (December 2015) paper and the Demographic Forecasts (November 2015) paper by Edge Analytics. Neither gives a definitive opinion about the level of need or the specific basis upon which it should be set. The Housing Need paper, from my reading, seems tentatively to indicate that 38 dwellings per annum should be regarded as the OAN. Is that the NPA's position? Whatever the case may be, I would be grateful for a clear and concise explanation of what the NPA considers the OAN to be and precisely what evidence is relied on in that regard.

The plan requirement/target

It is apparent that the requirement set by the LP is 55 dpa. The basis for this,

however, is less explicitly stated. Does this figure represent a 'rounding-up' of the Dwelling Growth +52 scenario considered in the Demographic Forecasts paper?

Affordable housing

I would welcome your confirmation of what the NPA considers to be the objectively assessed need for affordable housing, and what the plan requirement/target is for affordable housing. Again, please clarify the evidence relied on to support the figures given. Is the need and plan requirement for affordable housing included within the figures for housing in general?

Policy C1 sets requirements for the provision of affordable housing on the basis of site size thresholds. Supporting this, paragraph 4.8 says "*these viability issues, together with the changes to national planning policy that prevent the Authority from requiring on-site delivery of affordable housing on sites of fewer than 11 dwellings, have led the Authority to adapt its policy …*". I understand the reference here to be to the Written Ministerial Statement of 28 November 2014 and alterations to the Planning Practice Guidance (PPG), which altered national policy relating to affordable housing. Under these changes, for sites of 10 houses or less, and with a maximum floorspace of 1,000 square metres, affordable housing should not be sought.

However, you will be aware of the High Court's decision in *West Berkshire*[57] concerning the Written Ministerial Statement and the PPG changes. The Declaration Order issued on 4 August 2015 confirms that the policies in the Written Ministerial Statement must not be treated as a material consideration in development management and development plan procedures and decisions, or in the exercise of powers and duties under the Planning Acts more generally. The PPG has been updated accordingly. The Secretary of State has been granted leave to appeal the judgement.

In the light of this, I would welcome confirmation of the NPA's position in relation to the thresholds in Policy C1. Perhaps the main question is whether the thresholds are supported by the evidence. If they are not, what thresholds, if any, would be so justified?

Housing sites and land supply

As I understand it, all of the housing sites in the LP are presently allocated in the Housing Development Plan 2012 – many remain unchanged, some are proposed to be enlarged and some reduced. Moreover, from my reading of the NPA's

[57] West Berkshire DC & Reading BC v Secretary of State for Communities and Local Government [2015] EWHC 2222 (Admin)

Housing Land Assessment (December 2015), the current gross supply is from extant planning permissions and sites proposed to be allocated through the LP. Could you clarify whether my understanding is correct?

Unless I have missed something, I am not aware of any housing trajectory illustrating the expected rate of housing delivery for the plan period, nor of any housing implementation strategy of the kind demanded in paragraph 47 of the National Planning Policy Framework. I would be grateful if you could direct me to these. If they have not been produced, I would be grateful to know of your intentions to ensure that they are.

The housing implementation strategy should clearly and concisely indicate the sources of land supply, when it is expected to be delivered and how this will meet the plan target. A robust justification for the significant reliance on windfall should be included. Although I do note the arguments put in the papers already submitted, expansion of this drawing on specific monitoring data would be helpful.

In addition, I would be grateful for clarification of any shortfall or over-provision to be taken into account. At present, I am unclear as to the 'delivery against target' situation at the beginning of the LP period in 2015, and I also do not know the present situation – that is, the delivery performance since the start of the LP period until now. Where relevant, I will also need to know how the NPA proposes to deal with any shortfall – whether the 'Liverpool' or 'Sedgefield' method is to be used – and the justification for the chosen approach. I suggest that much, if not all, of this could helpfully be within the housing implementation strategy.

The settlement hierarchy and the spatial distribution of housing
Table 1 of the LP sets out the settlement hierarchy. From the evidence, I am not adequately clear about the methodology used to decide which settlements sit within each of the three tiers. Please could you explain this.

Policy SP3 seeks to direct new build housing to allocated sites and sites inside the Housing Development Boundaries of the Local Service Centres and Service Villages listed in Table 1. However, this involves over forty settlements. From my reading, there is no indication in the plan of how the NPA anticipates new housing should be distributed among them. Delivery of the plan's housing target relies rather heavily on windfall sites. But there is nothing in the LP, so far as I can see, to control or direct windfall delivery in spatial terms. As a consequence, the likely level of new homes to be built in each settlement, or in each of the three tiers of the hierarchy, is not clear to me, even in broad terms.

This raises a question of whether the spatial strategy should provide a firmer steer, for example by illustrating the expected apportionment of housing between the settlements or across the tiers of the hierarchy. I would be grateful to know the NPA's position in this regard, and particularly why the chosen approach is regarded by the NPA to be the most appropriate.

Housing Development Boundaries

Paragraph 2.16 of the plan says that "*Housing Development Boundaries have been saved from the Housing Development Plan 2012 and are identified on the Policies Map*". But both paragraph 1.1 and Appendix 1 of the LP say that the plan supersedes all policies within the 2012 Housing Development Plan. Please clarify the NPA's position on this.

I have concerns about the notion of 'saving' the Housing Development Boundaries from the Housing Development Plan 2012. You will appreciate that the Policies Map is not a discrete document in its own right. Rather, from Section 9 of the 2012 Regulations[58], its purpose is to illustrate geographically the application of the policies in the adopted development plan. The policies in the Housing Development Plan which rely on the illustration of the Housing Development Boundaries on the Policies Map will be replaced by new LP policies. The Housing Development Boundaries will expire with the Housing Development Plan policies they illustrate. Consequently, it seems to me that the LP will introduce new Housing Development Boundaries, even if they are no more than a re-drawing of the previous boundary lines.

This may seem an academic issue. But the point is that because the Housing Development Boundaries are not 'saved', they are squarely a matter for consideration through this examination.

This leads me to two matters. Firstly, I would be grateful if you could explain the justification for the delineation of the Housing Development Boundaries. What methodology or criteria have been used and what evidence does the NPA rely on in this respect? How has the Sustainability Appraisal process influenced matters?

Secondly, I am concerned that people may not have realised that the delineation of the boundaries was a matter on which they could comment. The wording used in paragraph 2.16 of the LP – that the "*Housing Development Boundaries have been saved*" – may have given people the impression that the boundaries were 'saved' and therefore not something their comments could influence.

[58] The Town and Country Planning (Local Planning) (England) Regulations 2012 (as amended)

Much will depend on how this has been presented through public consultation on the plan. I ask that you provide me with a full and open account in this regard. If there is any risk that the consultation process may have been compromised to any degree in relation to the Housing Development Boundaries, this must be remedied. In such circumstances, further public consultation will be necessary before the examination can progress to hearings.

Provision for Gypsies and Travellers

The national Planning Policy for Traveller Sites is clear that local planning authorities should use a robust evidence base to establish the accommodation needs of Gypsies and Travellers and, in short, to ensure that those needs are met. National Park authorities are not exempted from this.

I note that a number of Gypsy and Traveller Accommodation Assessments have been produced in evidence. However, there is not one among them that provides any meaningful up-to-date analysis of Gypsy and Traveller accommodation needs in the NP. Consequently, while it may be that "*levels of need are negligible*", as paragraph 4.45 of the LP puts it, so far as I can see there is no sufficiently robust or adequately recent evidence to justify that stance. Please could you explain what evidence the NPA relies on to show that there is no need to make provision for Gypsies and Travellers through the LP?

Policy L2 – conversion of traditional buildings

Policy L2 says:

"*Proposals for change of use to a dwellinghouse for continuous occupation will be subject to a local occupancy restriction unless the applicant agrees to pay a conservation levy to fund the conservation of other significant buildings within the National Park …"*

Through Appendix 7 of the plan, the levy is set at 50% of the uplift in value brought about by the conversion. Appendix 7 also sets out the reasons why the NPA considers this approach to meet the tests in the Community Infrastructure Levy Regulations 2010 (as amended) (the CIL Regulations).

At present, I am not persuaded that the conservation levy would meet the CIL Regulations. It is neither necessary to make the development acceptable in planning terms nor is it directly related to the development.

In considering compliance with the CIL Regulations, Appendix 7 appears to regard the conversion of a traditional building to be the development involved. But it is quite clear that Policy L2 regards such a conversion to be acceptable, so long as it is subject to a local occupancy restriction. Indeed, it is only the waiver/absence of such an occupancy restriction that 'triggers' the levy.

It seems to me that the development in question, in effect, is the conversion of a traditional building without the imposition of a local occupancy restriction. However, imposing the levy and using the receipt to conserve another building elsewhere in the National Park has nothing to do with who occupies the building being converted into a dwelling. These are unrelated matters. Moreover, spending the levy on conserving another building would not overcome any problem caused by the absence of a local occupancy restriction. It is therefore difficult to see how it is necessary to make the development acceptable.

Furthermore, I am concerned that the policy in effect allows the option of paying a fee in order to avoid the NPA imposing an occupancy restriction. But restricting occupancy is either necessary to make the development acceptable in planning terms or it is not. If it is, a planning condition or obligation should be used. If not, then no such restriction should be imposed. Whether or not the applicant will pay a levy to the NPA is neither here nor there, and has no bearing on the need or otherwise for such a restriction to be imposed. Indeed, suggesting that such a payment can be made implies that the local occupancy restriction set out in Policy L2 is not necessary. That in itself raises further concerns.

I have set out here my initial thoughts and concerns on this issue. Has the NPA sought legal advice in relation to Policy L2? If so, it would help to produce it in evidence. If not, I suggest that a legal opinion may well be instructive and of assistance to the examination.

Moreover, following on from my point above, I would be grateful if you would clarify, for the avoidance of any doubt, the evidence relied on to justify the plan's intentions concerning the use of local occupancy restrictions, including in Policies C1 and C2. If you intend to continue pursuing the conservation levy, I would be grateful if you could explain the justification for waiving the local occupancy restriction in instances where the levy is to be paid.

Renewable and low carbon energy

You will be aware of the Written Ministerial Statement of 18 June 2015 entitled 'Local Planning'. This says that when determining planning applications for wind energy development involving one or more wind turbines, local planning authorities should only grant planning permission if:

the proposed development site is in an area identified as suitable for wind energy development in a Local or Neighbourhood Plan; and

following consultation, it can be demonstrated that the planning impacts identified by affected local communities have been fully addressed and therefore the proposal has their backing.

The PPG has been updated to reflect this and to add further detail.

Policy CC1 permits proposals for small scale renewable and low carbon technologies that met the energy needs of communities and businesses in the National Park, but does not identify any suitable areas for wind energy developments. The LP does not, therefore, meet the Government's expectations in this regard. Consequently, it seems to me that the LP as presently drafted is not sound in this respect.

To my mind, there are three options open to the NPA:

delete any criteria-based policy (or part thereof) that looks to approve wind turbines, leaving future planning decisions to rely on the WMS;

add to the criteria-based policy the additional WMS tests saying a wind turbine proposal must be in area identified as suitable for wind energy development / fully address the planning impacts identified by local communities. This would mean the plan would include the up-to-date policy, and support any future part of the development plan (including a neighbourhood plan) that identifies suitable areas. The rationale could be provided in the supporting text (otherwise it might appear that the plan was requiring wind turbines to be in identified areas but not identifying any area as suitable for wind energy); or

amend the plan to make it clear that any generic policy on renewable energy development does not relate to wind turbines, that the wind turbine issue will be dealt with in a subsequent review of the plan or single issue DPD, and that in the meantime wind turbine proposals will be considered against the WMS.

I would be grateful to know your thoughts on this matter, and for confirmation of the NPA's intentions.

The Yorkshire Dales Design Guide

Policy SP4 says that "*all development proposals should be consistent with the guidance set out in the Yorkshire Dales Design Guide …*". But the Design Guide has not been drawn up as a development plan document and has not undergone the scrutiny of examination. Demanding consistency with it as a matter of development plan policy, as Policy SP4 does, effectively gives it development plan status. In my view, that is not appropriate.

The NPA should give consideration to an alternative form of wording for Policy SP4. The application of the policy should not rely on the Design Guide. I suggest removing reference to it from the policy, and simply pointing out the Design Guide's existence in the supporting paragraphs.

Habitats Regulations Assessment

I note the letter from Natural England dated 18 January 2016, withdrawing the objections it had previously raised in relation to the Habitats Regulations Assessment (HRA). It appears that Natural England's concerns have been overcome as a result of further information provided in the updated HRA report dated November 2015 and in an email from the NPA dated 12 January. The HRA report I have in evidence is dated January 2016. For clarification, is this the same as the HRA report referred to in Natural England's letter?

Moreover, the email to which Natural England's letter refers appears to be not in evidence. I would be grateful if you could explain the situation to me, for the avoidance of doubt, and provide a copy of the email in question.

Overall and looking forward

Overall, I have identified a number of shortcomings that must be addressed, one way or another. That being said, it seems to me that all of the issues I have raised can be addressed – that is to say, they relate to soundness problems that are capable of remedy.

I recognise that some of the points I have raised may well take some time to fully address. I ask that you now consider the next steps and the timescales involved in progressing the matters I have raised. Please rest assured that I will do all I can to assist, and to give the NPA every opportunity to address these issues.

I trust that you find this letter helpful, and in the spirit of assistance I am happy to answer any questions you may have in relation to procedural issues. I will do all I can to help the NPA in relation to the way forward, although you will appreciate the restricted nature of my role in this regard and that any advice given is without prejudice.

I look forward to hearing from you at the earliest opportunity in relation to your view about the next steps and timescales involved.

Yours sincerely

Simon Berkeley

INSPECTOR

ANNEX 3

IPSWICH LOCAL PLAN

EXAMINATION OF:

the Core Strategy and Policies Development Plan Document Review

and

the Site Allocations and Policies (incorporating IP-One Area Action Plan) Development Plan Document

Malcolm Rivett BA (Hons) MSc MRTPI – Inspector

Annette Feeney – Programme Officer

The Examination will take place in two stages. Stage 1 will consider the legal and strategic issues addressed in the two Matters listed below, primarily concerning the Duty to Co-operate and policies CS6, CS7, CS11 and CS13.

If, following the Stage 1 hearing sessions, I conclude that in relation to **these issues the DPDs (ie "the plan") are likely to be capable of being** found legally compliant and sound (having regard to the potential for me to recommend modifications) Stage 2 will then commence. Stage 2 will consider all other matters relating to the plan.

STAGE 1 - MATTERS AND QUESTIONS

Matter 1 - Legal Requirements, Duty to Co-operate and Cross-Boundary Issues

Are the likely environmental, social and economic effects of the plan adequately and accurately assessed in the Habitats Regulations Assessments and the Sustainability Appraisals (SAs)? Do the SAs test the plan against all reasonable alternatives?

Is the plan compliant with:

the Local Development Scheme?

the Statement of Community Involvement?

the 2004 Act and the 2012 Regulations?

Has the Council engaged constructively, actively and on an ongoing basis with all relevant organisations on strategic matters of relevance to the plan's preparation, as required by the Duty to Co-operate?

Does the plan provide effective outcomes in terms of cross-boundary issues? In particular, is the approach of policies CS2 and CS7 that 3,378 dwellings will be provided for by working with neighbouring local authorities later in the plan period (in line with policy CS6) soundly based and in accordance with national policy? Is there sufficient certainty that these housing needs will be provided for? If you consider that the plan is not sound in this respect could it be modified to make it so?

Matter 2 – Objectively Assessed Needs for Housing and Employment Land

Is the identified objectively-assessed need (OAN) for housing of 13,550 new dwellings (an average of 677 per year), as set out in policy CS7, soundly based and supported by robust and credible evidence? In particular:

Does the OAN take appropriate account of the 2012-based DCLG Household Projections?

Does the OAN appropriately consider the likelihood of past trends in migration and household formation continuing in the future?

Does the OAN take appropriate account of 'market signals'?

Is the OAN appropriately aligned with forecasts for jobs growth?

Does the OAN take appropriate account of the need to ensure that the identified requirement for affordable housing is delivered?

Is the plan clear as to the identified need for additional pitches for gypsies and travellers (policy CS11) and is the identified need soundly based and supported by robust and credible evidence?

The soundness of proposals for the Ipswich Garden Suburb and the land allocations for housing set out in policy SP2 (and the case for 'omission sites') will be considered at Stage 2 of the Examination. However, on the basis of the plan as submitted, is it realistic that they would provide for:

A supply of specific deliverable sites to meet the housing requirement for five years from the point of adoption?

A supply of specific, developable sites or broad locations for growth for years 6-10 from the point of adoption?

If you contend that the plan would not provide for either (a) or (b) above (or both) could it be appropriately modified to address this?

The soundness of individual employment sites set out in policies CS13 and SP5 will be considered at Stage 2 of the Examination. However, on the basis of the plan as submitted, is policy CS13's aim of encouraging the provision of approximately 12,500 jobs soundly based and supported by robust and credible evidence?

ANNEX 4

Examination of Luton Local Plan

Inspector's Matters, issues and questions

Stage 2

29 July 2016

Introduction

At the Stage 1 hearing I heard discussion on the duty to cooperate. I have already provided my preliminary findings on the duty.

Stage 2 will consider strategic matters and these are set out below. If after the Stage 2 hearing sessions, I consider the plan is legal compliant and sound on these matters (or capable of being made so), the examination will move on to Stage 3. Stage 3 will consider all remaining matters. A provisional list of topics to be covered is set out towards the end of this document.

The Council has prepared a list of potential minor modifications. These will be considered, as appropriate, when the relevant matter is discussed.

Important note

In connection with Matter 6 the Council provided a *Revised Strategic Housing Land Availability Assessment 2016 and associated update note on 29 July 2016.* The Council considers that this potentially increases the housing capacity of Luton to 8,500.

Stage 2 hearing sessions

The Stage 2 hearings will be held between Tuesday 20 Sept and Friday 23 Sept and Tuesday 27 Sept and Friday 30 September. Please see the separate Hearing Timetable and Guidance Notes for details. Please note that Matter 1 was considered at the Stage 1 hearings.

Please check very carefully to see if you have been allocated to the correct session. The deadline for doing this is set out in the accompanying Guidance Notes.

Matter 2 – Local Development Scheme, consultation, Habitats Regulations, accordance with the Act and Regulations and consistency with national policy

Participants: Luton Council

Main issue: is the Plan legally compliant in these areas?

Questions:

Has the plan been prepared in accordance with the Local Development Scheme, including in terms of timing and content?

Has consultation been carried out in accordance with the Statement of Community Involvement and the relevant Regulations?

Is it likely that the Plan would have a significant effect on a European site (either alone or in combination with other plans or projects)? If so, has an appropriate assessment been carried out in accordance with the Conservation of Habitats and Species Regulations 2010? [Note SUB 004A states that the nearest relevant location is the Chiltern Beechwoods Special Area of Conservation, approximately 7 miles to the south-west of Luton, which is unlikely to be significantly affected.]

Has the plan been prepared in accordance with the relevant Act and Regulations?

Are there are any significant departures from national policy in respect of the Stage 2 matters? If so, have these been justified?

Is the plan period of 2011 to 2031 justified? Is the plan period set out with sufficient clarity in the Plan?

Matter 3 - Sustainability Appraisal

Main issue: Is the Sustainability Appraisal legally compliant?

Questions:

Note: see also Matter 15 on selection of sites allocated for development – methodology and process

Does the sustainability appraisal (SA) adequately assess the environmental, social and economic effects of the plan?

Does the SA adequately consider reasonable alternatives where these exist, including in respect of the scale of housing and employment provision and the balance between them?

Matter 4 - Spatial development strategy, vision and strategic objectives (Policy LP 2 and sections 2, 3 and 4)

Context: Some representors have expressed concerns about the balance of provision between job creation and housing and the effects on commuting and on the strategic road network, including the M1.

Main issue: Does the plan clearly and correctly define the sub-regional role of Luton in terms of housing, employment and retail/town centre uses up to 2031? Is the overall balance proposed between providing for housing, employment and retail/town centre uses, within and outside of Luton, justified and appropriate?

Questions:

Is the sub-regional role of Luton in terms of housing, employment and retail/town centre uses justified, including as expressed in sections 2, 3 and 4 of the Plan?

Has the correct overall balance been struck between providing for economic development, retail and housing needs, having regard to the potential effects on transport infrastructure, commuting and the environmental role of sustainability?

Is it appropriate to seek to meet all of Luton's economic and retail needs within Luton when a substantial proportion of the housing need would have to be met outside Luton?

Is the sub-regional role of Luton adequately articulated and explained in the plan?

Are the vision and strategic objectives of the Plan appropriate?

Should there be an objective to set out Luton's commitment to meeting housing needs which cannot be provided for within Luton?

Matter 5: Objectively assessed need for housing (OAN) (LP 2 and section 4) and any uplift to meet affordable housing needs

Context

The Plan states that the OAN for Luton is 17,800 out of 31,200 for the Luton Housing Market Area (HMA) for the period 2011-31 (Policy LP 2)

The 2015 SHMA Update assesses OAN across the combined whole local authority areas for Luton and Central Bedfordshire. This is described as a 'best fit' for the Luton functional HMA (para 1.2). The OAN for this combined area is 47,237.

This has been disaggregated into an OAN figure of 17,800 for Luton and 29,500 for Central Bedfordshire.

The SHMA sets out how the OAN for the combined Luton and Central Bedfordshire administrative areas was arrived at. This is summarised in Figure 62 and is broadly as follows:

CLG household projections		*53,336 households*
Adjust for long term migration trends	*-11,991*	*41,345 households*
Adjust for vacancies	*+1,538*	*42,883 dwellings*
Adjust for suppressed household formation	*+1,053*	*43,936 dwellings*
Adjust to balance jobs and workers	*+3,301*	*47,237 dwellings*
Adjust for market signals (+3,175)	*0#*	*47,237 = OAN*

 # Uplift of +3,175 is less than job/worker uplift and is not applied separately

The SHMA then considers the OAN (in dwellings) for the Luton local authority area (page 90):

Baseline household projections (out of c42,900 dwellings)	*14,800*
Adjust for suppressed household formation (74% of 1,050 = 700)	*15,500*
Adjust to balance jobs/workers & market signals (2,300 out of 3,300)	*17,800*
	= OAN

Main issues: Has the HMA been appropriately defined? Does the plan appropriately identify the objectively assessed housing needs for the HMA in accordance with national policy and guidance? Is the identified OAN of 17,800 net additional dwellings for Luton soundly based and supported by robust and credible evidence? Does it correctly take into account demographic factors, economic factors and market signals? Should there be an uplift to meet affordable housing needs?

Note: references are generally to the Strategic Housing Market Assessment (SHMA) Update of Summer 2015.

Questions: Housing market area

Has the Luton functional HMA (which includes all of Luton, a large part of Central Bedfordshire and parts of North Hertfordshire and Aylesbury Vale) been correctly defined?

The Luton and Central Bedfordshire administrative areas are regarded as a "best fit" for the Luton functional HMA. What are the key factors that justify this being a 'best fit' and is this justified?

Is the Luton HMA correctly and accurately described in paras 1.18, 4.5 and 4.7 of the Plan? In particular, is any part of Dacorum Borough Council within the Luton HMA? [see Council's 'minor modifications' MOD9 & MOD29]

Should the extent of the Luton HMA be shown on a map or diagram and explained in the Plan? Is the precise extent of the Luton HMA within Central Bedfordshire a matter for this plan?

Questions: OAN - baseline household projections (new population and household projections released in 2016)

The OAN is based the 2012-based household projections (DCLG February 2015). DCLG released its 2014-based household projections (2014-2039) for England on 12 July 2016. These update the household projections that were released in February 2015 and are based on the 2014-based sub-national population projections (SNPP) that were published by ONS in May 2016. The Council's states the CLG 2014-based projection identifies a growth of 59,801 rather than 53,336 households.[59] The Council's response to my initial questions indicates that this increase will be mostly offset if the migration adjustments in the SHMA are applied. Is this justified? What bearing, if any, should the latest household projections have on the assessment of OAN?

The national Planning Practice Guidance states that Local Plans should be kept up-to-date and advises that a meaningful change in the housing situation should be considered in this context, but this does not automatically mean that housing assessments are rendered outdated every time new projections are issued. (ID 2a-016-20150227) How should this guidance be applied here?

Questions: OAN – demographic downward adjustment to baseline household projections from 53,336 households to 41,345 households

In overall terms, why does the use of a 10 year migration trend result in the baseline demographic figure being reduced from 53,336 to 41,345?

[59] Council's response to my letter of 8 July 2016

Is there a robust local justification for using 10 year migration trends (2001-11) rather than 5 year trends (say from 2007-12 or 2009-14 which respectively inform the DCLG 2012 and 2014-based projections)? Why are 10 year trends (for the inter-census period 2001-2011) likely to be more reliable and representative of what might happen over the plan period than more recent 5 year trends?

The SHMA Refresh June 2014 (Figure 21) indicates that annual in-migration to Luton was significantly higher from 2008-11 than in the years 2001-8, with a lower figure in 2011-12. In respect of Central Bedfordshire, Figure 14 of the 2015 SHMA shows annual in-migration tended to higher in the years from 2010-

13 than in the immediately preceding years back to 2001. Are any further figures available for the years after 2011-12? Which trends are most likely to be representative of what might happen in the plan period and why? Why has in-migration tended to be higher in more recent years and lower before that?

Is there robust evidence that in-migration over recent years been over-estimated in the ONS and CLG population estimates and household forecasts? What bearing should this have on any adjustments to the baseline demographic position?

The SHMA Update [page 20] indicates that the population of Luton in 2001 was at least 190,000 according to the Council and 191,800 in the SHMA refresh 2014 [para 3.41], compared to 185,900 in the 2001 Census. What is the evidence for this potential under-enumeration in 2001, what was the cause of it and what effect does this have on migration assumptions, including those that inform the 2012 and 2014-based DCLG household projections (given they are based on population figures for 2007-12 and 2009-14) and the SHMAs preferred period of 2001-11?

Why does this potential data accuracy problem regarding the population of Luton in 2001 and past levels of migration still have a bearing on the assessment of OAN from 2011 to 2031? Has this issue been resolved in recent population Mid-Year Estimates and ONS/CLG population estimates and household forecasts? Have mid-year estimates (MYE) of population addressed this issue through the use of local data such as registrations with doctors?

How significant are the variations between ONS MYE of population and the various local data sources referred to by the Council (ie school census, state pension, patient register)?

Have appropriate household formation rates (headship) been applied to convert the population projection to 2031 into a household projection? [paragraph 2.95 CLG 2012-based household representative rates have been

Overall, is the adjusted 'baseline household projection, taking account of local circumstances' of 41,435 households justified? [Figure 62]

Questions: adjustments to the baseline household projection - vacancies

Has an appropriate vacancy rate been applied in translating the figure of 41,345 households into 42,883 dwellings to allow for homes that will not be available to meet assessed needs? Is this justified? [2.8% for Luton and 4.0% for Central Bedfordshire – para 2.96]

Questions: adjustments to the baseline household projection - suppressed household formation rates

Does the assessment of OAN correctly take into account any potential for concealed or homeless households due to suppressed household formation rates? [Figure 62 indicates an uplift of 1,053 dwellings to 43,936]

What has been the annual housebuilding record in terms of completions in recent years, including in the years before the current plan period (against the relevant annual housing requirement target)? Does this indicate that that a lack of supply might have suppressed household formation?

Questions: adjustments to the baseline household projections - economic factors

Does the assessment of OAN correctly take into account projected economic growth and jobs growth? Will the demographic starting point (43,936) provide sufficient workers to support projected economic growth? [SHMA Update paras 4.33-4.49]

The SHMA Update forecasts 38,100 additional jobs (2011-31), with 11,300 of these being in Luton, based on the East of England Forecasting Model (EEFM 2014) [para 4.34]. Is this justified?

The number of additional jobs is then adjusted downwards having regard to projected increase in net out-commuting (to 28,900) and double-jobbing (to 27,200). Are these figures and the assumptions behind them justified? [net out-commuting increase of 5,200 workers – para 4.40 and 6.3% of workers 'double-job - para 4.41]

The SHMA Update states that the demographic projections (without any uplift for market signals) would provide 26,300 additional workers leaving a shortfall of

900 workers, equating to a need for 600 additional households. [4.42] Is this justified and how was the average number of workers per house (ie 1.5) established?

The SHMA then notes that the Local Plan is planning for 18,000 jobs in Luton (LP 2) rather than 11,300 from the EEFN forecast. This would lead a planned increase of c45,000 jobs [broadly 38,100 + (18,000 planned jobs - 11,300 EEFN forecast =6,700) = 45,000 – of which 18,000 in Luton and 27,000 in Central Bedfordshire] which, in turn, would lead to a need for a further 4,900 workers to live in leading to an overall shortfall of 5,800 workers (900 + 4,900). This leads to a need for an additional 4,000 households (based on commuting percentages staying constant) or 5,600 extra households to avoid any net increase in commuting (4,000 plus 1,600). Are these figures and the assumptions behind them justified? [4.43-4.44]

It is then concluded that because out-commuting is likely to increase, 3,200 extra households should be planned for, amounting to 3,300 dwellings. [4.48]. Is this conclusion justified?

Overall, is the uplift of 3,300 for economic factors justified?

<u>Questions</u>: adjustments to the baseline household projection - market signals

Does the assessment of OAN correctly take into account market signals, including on:

land prices

house prices [combined authorities - substantial increase 2001-4, further increase to 2007, reduction by 2009, largely plateaued since 2009 - 4.62]

rents [combined authorities - marginal increase lower quartile private sector rents since 2011/12 – 4.71]

affordability [ratio of lower quartile house prices to lower quartile earnings relatively stable 2004-13 – para 4.64]

rate of development [5.4% addition to stock in Luton 2001-11 & 12.2% in Central Bedfordshire v 8.3% in England – 4.72]

overcrowding [combined authorities - 5,310 overcrowded households – 4.74]

[and summary 4.77-4.88]

The SHMA concludes that an uplift of 10% on the market projections should be applied (4.86). In broad terms what should be concluded from the market signals analysis? Is an uplift of this size an appropriate response to the market signals?

The application of a 10% uplift to the baseline demographic projection of 42,883 dwellings would lead to an increase of 4,288. However, this uplift has been reduced by 1,053 dwellings (already added on to the OAN to allow for suppressed household formation rates), leading to a final uplift of 3,175 dwellings (4.88) (although 4,288 - 1,053 = 3,235?). Is this approach justified?

The figure of 3,175 (or 3,235?) for market signals is less than the 3,301 uplift for economic factors and has not been applied in addition to it. The SHMA indicates that adjustments to the demographic projections are not necessarily cumulative and should be considered collectively (4.94). What is the justification for adopting that position here and for not applying any specific additional uplift for market signals?

Questions: Conclusions on the OAN for combined local authority area

In conclusion, is the OAN of 47,237 for the combined local authority area justified?

Questions: establishing the OAN for Luton administrative area

The SHMA Update (page 90) states that the baseline household projection for Luton is 14,800 dwellings (out of 42,883 for the joint authority HMA). How was the 14,800 figure arrived at, and is it justified?

An uplift of 700 dwellings (c74% of c1,050 for the joint authority area) for concealed and homeless households has been added to the baseline figure to arrive at a figure of 15,500 dwellings for Luton. Is the 74% proportion justified? Why is the uplift 700 rather than 777 (ie 74% of 1,050 is 777)?

An uplift of 2,300 dwellings (out of 3,300 for the combined authority areas) has then been added to the 15,500 figure to allow for market signals and employment factors to arrive at a figure of 17,800 for the OAN for Luton. Is the 2,300 uplift justified?

Overall, is the 17,800 OAN figure robust?

Questions: Unmet needs and in-migration from outside the HMA, including London

Should the OAN and/or housing requirement take into account any unmet needs from areas outside the HMA and any projected out-migration from London? If not, should it? Have there been any requests from other authorities, including the Mayor of London to do so or to address this issue?

Questions: OAN for Luton Housing Market Area

The Plan refers (Policy LP 2) to a need for 31,200 additional dwellings in the Luton Housing Market Area. How was this figure arrived at and is it justified?

Does the Plan adequately set out and explain the OAN for the combined authority areas (the 'best fit'), the Luton Housing Market Area and the Luton local authority area?

Given the Luton functional HMA includes parts of North Hertfordshire and Aylesbury Vale, has any OAN arising from these areas been taken into account?

Question: Affordable housing delivery

Note: the amount of affordable housing likely to be delivered is covered in Matter 8. The Council has indicated that the application of Policy LP16 could deliver c1,250 affordable dwellings leaving a shortfall of c6,000 [answer to Inspector's initial questions]

The Planning Practice Guidance (2a-029-20140306) states that the total affordable housing need should be considered in the context of its likely delivery as a proportion of mixed market and affordable housing, given the probable percentage of affordable housing to be delivered by market housing led developments (ie under Policy LP 16). It goes on to say that an increase to the total housing figures should be considered where it could help deliver the required number of affordable homes. The Council has indicated that an uplift has been provided to the OAN in response to market signals and that, given the capacity constraints, an uplift within Luton would be academic and the issue would fall to be considered by neighbouring authorities under the duty to cooperate. [answer to Inspector's initial questions and page 114 of SHMA update] Is this position justified?

Questions: *OAN - review of the plan*

Do the varying options regarding adjustments to the baseline household projections and the recent 2014-based household projections justify an early review of the plan? If so, should the plan be modified to commit to this?

Summary of some headline positions from representors and alternative projections from the Council on OAN for Luton & Central Bedfordshire – for reference

Templeview Developments (DLP) and Claydon Developments (DLP)

OAN 69,880-87,380 plus 5,880 unmet needs from London

Home Builders Federation

OAN at least 53,336 plus allowance for vacancy rates and 2nd homes

Gladman Developments (GVA)

OAN of 2,617-2,703/year – 52,340-54,060 (HMA)

OAN of 860 to 943/year – 17,200-18,860 (Luton)

Alternative OAN projections from the Council, including 'OAN uplift'

SHMA (Plan – 10 year trend))	47,237
SHMA (5 year trend 2007-12)	49,192
CLG 2012-based projections	60,758
CLG 2014-based projections	68,138

Matter 6 – meeting objectively assessed need for housing - the housing capacity of Luton and the housing requirement (Policies LP 2 and LP15 and Appendix 5 Housing Trajectory)

Context

The Plan states that, because there is only a limited supply of land in Luton, the capacity for new homes is 6,700. This is significantly less than the OAN of 17,800.

However, the Council's Revised Strategic Housing Land Availability Assessment 2016 and associated update note (provided on 29 July 2016) indicate that the capacity of Luton could be increased to 8,500 subject to the Council giving further consideration to the effect on education infrastructure. In summary, the Council considers the following additional capacity exists:

Capacity on new sites 1,107

(including permitted development rights conversion of flats to dwellings, student accommodation, planning permissions, pre-application discussions and public sector land)

Increased capacity on four SHLAA sites 1,146 (although Table 2 states 1,016)

(Napier Park, Newlands Park, Caleb Close, Unity House)

Reduced capacity on previously assessed sites -280

High Town masterplan 190

This leads to a total additional capacity of 2,163 dwellings

The Council considers that, taking account of completions between 2014-16 and plan based capacity of 6,905, the total capacity is now 9,322.

However, the Council considers the realistic capacity should be regarded as 8,500 to allow a 5% buffer and due to uncertainties regarding Napier Park and student accommodation.

Representors and the Council should have regard to the revised SHLAA and the Council's update note when preparing their hearing statements in response to the questions below.

Note: issues relating to the need for employment land and the extent to which employment needs should be met within Luton and outside of Luton will be considered under Matters 4 and 11.

Main issue: Has the housing capacity and housing requirement figure for Luton been correctly established?

Questions: the expression of the housing requirement in the Plan

Should the capacity/provision figure of 6,700 be referred to as the housing requirement for Luton over the plan period? If so, is this made sufficiently clear in the Plan? Should the figure also be expressed as an annual average (eg 6,700 divided by 20 years = 335/year)? Is it intended that the capacity will be delivered equally over the plan period or staggered?

Are Policies LP 2 and 15 flexible enough? Should they refer to *at least* 6,700 dwellings? How likely is it that this figure might vary over time?

Questions: consistency of expression of capacity numbers

Policy LP 2 A identifies housing capacity from various sources adding up to 6,900. The same sources as expressed in LP 15 A add up to 7,000 [the difference being the capacity from *housing allocations* – 2,400 in the former and 2,500 in the latter, with the total given in Appendix 4 as 2,420] Which is correct? [see 'minor modification' MOD30 which indicates 2,400] Both overall totals exceed the stated capacity of 6,700 – so should the capacity be 6,900?

Questions: *reviews or updates to capacity assessments*

The Council has prepared an updated SHLAA (July 2016). Does this indicate that there should be any change to the stated capacity for Luton of 6,700 and any other parts of the plan? *[Note: see below for question about omission/alternative sites advanced by representors]*

Will the joint Growth Options Study be likely to have any bearing on the assessment of housing capacity in Luton given the Project Brief (February 2016) requires the consultants to review all existing and published plans, studies and topic papers with respect to land supply in the study area?

Questions*: identified sources of capacity in the plan*

Note: discussion about the specific uses and development management criteria proposed for the strategic allocations will be considered at the Stage 3 hearings.

In assessing Luton's housing capacity have the following potential sources of supply been correctly taken into account and are they based on robust evidence,

house building completions since the plan base date (2011-14) – 1,000 (LP 2 A i and LP 15 A i)

existing permissions on sites of less than 5 homes - 100 (LP 2 A ii and LP 15 A ii)

capacity for housing on the strategic allocations – 2,500 (LP 2 A iii and LP 15 A iii and Policies LP 5-12) [see also separate question below]

capacity for housing on other allocations for housing & mixed use -2,400 (LP 2 A iv and LP 15A iv)

capacity from identified non-allocated sites of at least 5 homes - 900 (LP 2 A v and LP 15 A v)

[Note: lists of sites comprising the capacity for ii to v above are set out in the answers to the Inspector's third set of initial questions]

Are the assessments of capacity above, where appropriate, based on robust evidence about planning permissions?

Are the assessments of capacity above, where appropriate, based on appropriate assumptions about densities? The 2015 SHLAA refers to 50 dph (2.14) but Table 2.4 indicates a high % of completions in recent years at over 50 dph.

Is the plan specific enough about the minimum housing densities which should be achieved on allocated sites?

Questions*: capacity in the plan from strategic allocations*

The strategic allocation policies set out housing numbers for the strategic sites listed in LP2(iii) – ie Napier Park LP8 (600), Power Court LP9 (600), High Town LP10 (750), Creative Quarter LP11 (600) and Marsh Farm LP12 (no figure). How were these totals arrived at and are they justified? What site areas were assumed to be available for housing and at what density? Have there been any changes in circumstances that justify different figures? Should the relevant sites areas be set out in the strategic allocation policies? Given the total is 2,550, should the capacity be expressed at 2,550 in Policy LP2

Questions: *capacity in the plan from existing employment land*

Note: Appendix 4 to the Council's response to my third set of initial questions sets out a list of employment land listed in the Economy & Employment Background Paper in Tables 8-13 and which source of housing capacity in Policy LP2 (i to v) each site contributes to.

Note: the development management criteria in Policy LP13D and LP14 relating to the consideration of proposed changes of use from employment to non-employment will be considered at Stage 3.

Has the potential capacity from existing land used for employment purposes (including Category A, Category B and existing unidentified sites referred to in Policy LP 14 and Appendix 3 to the plan) been robustly assessed in terms of its housing potential?

The Employment Land Review (2015) categorised existing employment sites as green (very good – suitable for employment uses), amber (good or average) and red (poor quality). In particular, has appropriate use been made of amber and red employment sites in terms of their housing potential? Are there any amber and red sites which have not been allocated for housing or which are not counted as part of the capacity set out in LP 2? If so, is this justified?

Is it possible to forecast how much housing might be delivered on Category B sites and existing unidentified employment sites through the application of Policy LP14B and has this been included in any windfall assumptions?

Questions: *windfall development*

Is there any significant potential for windfall development which has not been included in the supply set out in Policy LP 2, including from small sites and office to residential conversions under permitted development rights?

The Housing Trajectory (Appendix 5) indicates 103 dwellings from permissions of 4 dwellings or less up to 2019/20 and no supply after that. Is there likely to be any supply from this source after that date?

Questions*: Deliverability and developability*

In broad terms, what degree of certainty is there that the identified supply in Policies LP2 and LP15 will come forward within the plan period?

Questions*: potential additional sources of supply*

Has sufficient use been made of potential sites assessed through the Sustainability Appraisal and Strategic Housing Land Availability Assessment (SHLAA)?

Has the updated 2016 SHLAA considered 'omission/alternative sites' advocated by representors? [as indicated on page 219-221 of SUB 009 – Council's response to representations] and, if so, what conclusions were reached? Should any of the following sites be regarded as contributing to Luton's supply of housing?

Please note:

If the Council is now proposing that any additional sites should be allocated for housing, these will not be discussed at a hearing session until consultation has taken place on them.

It is not part of my role to examine the soundness of omission or alternative sites put forward by representors. Consequently, discussion at the hearing (and in hearing statements) on the sites listed below should mainly focus on whether the proposed allocations/designations relating to these sites in the submission Plan are sound [as indicated in brackets].

The East Luton Circular Road (LP31) will be considered under Matter 12.

Trustees of the Warden Hill Estate - *Land at the end of Weybourne Road* [Policy LP31 East Luton Circular Road/Weybourne Link in the Plan]

Trustees of Old Bedford Road Estate and Manor Farm Estate - *Old Bedford Road Estate and Manor Farm Estate* [various designations including Green Belt and East Luton Circular Link]

Claydon Land Development - *Land at Lynwood Avenue* – for 100 dwellings [County Wildlife Site and East Luton Circular Road(?) in the plan]

Templeview Developments - *Land at Luton Rugby Club* – for c1,000 dwellings [not allocated or designated in the plan]

Cooperative Group – *Land at Stockinghouse Road* – increase capacity to 339 [housing/mixed use allocation in the plan]

Cooperative Group – *Caleb Close* – increase capacity to 181 [housing allocation in the plan]

Chamberlain Holdings – *Britannia Estate* – increase capacity by 56 dwellings [mixed use employment and housing allocation in Plan Appendix 4]

Tejpartap Sahota – *Trailer park, Vauxhall Way* – allocate for mixed use (employment area in Plan)

Central Bedfordshire Council – use of part of strategic allocations for housing at *Land South of Stockwood Park* and *Butterfield Green (including around the allocation at Stopsley Common)*

Question: *the effect of school capacity and planning for school places*

Is the capacity of Luton for housing constrained by school infrastructure? How has this been taken into account in assessing housing capacity? Will sufficient school places be provided, including under Policy LP24 which include a primary and secondary school proposals at the Brache on a former tennis court and cricket ground? What would be the effect of increasing housing capacity to 8,500 as suggested by the Council as a result of the 2016 SHLAA update?

Question: conclusions on housing capacity/requirement

Having regard to all the questions above, is 6,700 the correct figure for the housing capacity and requirement for Luton? Are any changes necessary to

Policies LP 2 and 15, to the Housing Trajectory in Appendix 5 or any other parts of the Plan, including as a result of the 2016 SHLAA?

Should the housing trajectory also be shown by means of a graph, showing the annual requirement for each year of the plan period, annual completions to date, and anticipated delivery each year?

Questions: *review of the plan*

Are there sufficient uncertainties regarding the capacity of Luton to justify an early review of the Plan?

Matter 7: Meeting objectively assessed need for housing which cannot be met within Luton (Policy LP 2 and sections 4 and 6)

Context: The plan states that the housing capacity of Luton is 6,700, whereas the OAN for Luton is 17,800. This leaves a shortfall of 11,100 (or c9,300 based on the Council's 2016 SHLAA update) which cannot be met within Luton. The plan states that the Council is working to deliver these unmet needs in areas

outside the borough, through the duty to cooperate. The plan expects that a significant proportion of this unmet need will be provided for in Central Bedfordshire with a potential for some to be met in North Hertfordshire and Aylesbury Vale (4.6-4.8)

The Councils response to my initial questions indicates some existing, previous or emerging proposals that might contribute to the shortfall (although it is noted that some of this capacity would be needed to meet Central Bedfordshire's own needs):

North Houghton Regis	*c5,000 (within Central Bedfordshire)*
North of Luton	*c2,000 (within Central Bedfordshire)*
North Hertfordshire	*c2,000 (from the emerging North Hertfordshire local plan)*
Total	*c9,000 (maximum)*

A joint Growth Options Study (Luton, Central Bedfordshire, North Hertfordshire and Aylesbury Vale − brief agreed in February 2016) is intended to recommend options to meet the housing needs of the HMA, including Luton's unmet needs through broad areas of potential growth and potential sites. A concurrent Green Belt Study, commissioned by Luton and Central Bedfordshire is, in part, intended to identify land that could be released from the Green Belt to achieve sustainable development.

Statements of Common Ground (SOCG) and a Memorandum of Understanding (MoU) have been prepared with several authorities, including Central Bedfordshire and North Hertfordshire. These set out the respective positions on unmet needs.

Main issues: Does the plan adequately deal with the issue of where and **how Luton's unmet housing needs will be provided? Have there been** any effective outcomes on this matter following cooperation with neighbouring authorities? Is there sufficient certainty about how these needs will be met? Is the plan sound in this respect, including in terms of being positively prepared?

Note: This topic was discussed at the Stage 1 hearing on the duty to cooperate and it will not be necessary for participants to repeat or discuss the same evidence here, including at the hearing and in hearing statements.

Questions:

Has it been established whether Luton's unmet needs can be met in full, or in part by neighbouring local authorities? Have any agreements been reached with any neighbouring authorities about meeting housing needs which cannot be accommodated within Luton? What commitments, if any, have been given by other authorities, including Central Bedfordshire, North Hertfordshire and Aylesbury Vale, including in terms of overall numbers, broad locations for growth or specific locations/sites? Are any such commitments set out in adopted or emerging development plans for these authorities or in SOCG or MoU? Is there any agreement from neighbouring authorities to review adopted or emerging plans, if necessary, to meet Luton's unmet needs? Overall, what is the degree of commitment expressed by neighbouring authorities and what certainty is there that Luton's needs can be met in part or in full?

What is the planning and development position regarding potential major growth at North Houghton Regis within Central Bedfordshire? Will this development contribute towards meeting any of Luton's unmet needs and if so, by what amount? Has any agreement been reached on this? Are there any other committed developments outside Luton which could contribute to Luton's needs?

Is it possible that any unmet housing needs will need to be met outside the HMA and in local authority areas other than in Central Bedfordshire, North Hertfordshire and Aylesbury Vale? What is the current position on this?

An aim of the joint Growth Options Study is to identify clear conclusions and recommendations with respect to the most suitable options for accommodating housing growth from the Luton HMA and Luton's unmet housing needs. How will this study be used to inform neighbouring development plans? What process will take place to reach agreement on preferred growth options and housing numbers and how long might that take?

Should the Luton local plan identify where the un-met need will be (or may be) provided, including in respect of specific dwelling numbers for specific neighbouring authorities, broad locations for growth or areas of search (including for example, to the north, west and east of Luton, including North Houghton Regis)? Should this be set out in a policy and should broad locations and

potential transportation links be shown on the key diagram and set out in the Plan? [see Council's 'minor modifications' - MOD11 and revised key diagram]

Is it appropriate to specifically refer to the Council's support of housing west of Luton? (para 4.8) Has agreement been reached on this with Central Bedfordshire Council?

Should the Plan set out what specific actions Luton Council will take to help ensure its unmet needs are met in full or in part, including through the joint Growth Options Study? Should the Plan explain what actions will be taken if the OAN cannot be met within the HMA? Should these actions include a commitment to actively work with neighbouring authorities and to actively monitor progress? If so, should this be set out as a strategic objective and a policy? [see Council's 'minor modifications' - MOD10 & MOD11]

Should there be an early review of the Plan, for example to address any implications arising from the conclusions of the Growth Study and through the preparation of development plans in neighbouring areas? If so, what would trigger this and should there be a commitment to it within the plan?

Matter 8 – Affordable housing (LP 16 and Section 6)

Context: The plan identifies a need for 7,200 affordable dwellings in Luton (para 6.16) based on a household need of 7,096 in the SHMA Update (3.103). This is comprised of 3,016 current unmet need and a future need of 4,080 (SHMA Update Figure 47). Policy LP 16 requires housing developments to include 20% affordable housing, or an equivalent financial contribution, on all schemes delivering a net gain of 1 dwelling and above. Viability is considered in the Three Dragons Study of April 2013 and the Local Plan Viability Assessment (2015). The Council has indicated that delivery within the plan period could be between c 1,250 and 2,000, leaving a shortfall of around c5-6,000 [answer to Inspector's initial questions].

The Council has provided 4 documents post-submission which are relevant to aspects of this matter: Response to Inspector's initial questions, Evidencing the exceptional need for affordable housing' (Opinion Research Services), 'Note on viability of small sites and their role in land supply in Luton' (Three Dragons) and 'Affordable Housing on small sites: Viability of commuted sums' (Three Dragons). Representors should have regard to these when preparing hearing statements.

Main issues: Does the plan appropriately identify objectively assessed affordable housing needs in accordance with national policy and guidance? How and where will those needs be met? Is Policy LP 16 sound, including in respect of the requirement for developments of 1 dwelling and above to provide 20% of all units as affordable housing (or the financial equivalent)? What will be the effect on the viability of housing developments.

Questions: affordable housing need

Has the need for affordable housing (7,200) been correctly established and justified? Does it correctly take into account those living in the private rented sector?

Should the need figure be set out in a policy?

Questions: dwelling thresholds - consistency with national policy and guidance

The LP16 requirement for affordable housing on schemes delivering 1+ net dwellings is not consistent with the application of the Written Ministerial Statement of 28 November 2014 and the subsequent revisions to the PPG on affordable housing thresholds. [This is following the Court of Appeal judgement in SSCLG West Berkshire DC and Reading BC dated 11 May 2016. The PPG states that affordable housing contributions should not be sought from developments of 10-units or less, and which have a maximum combined gross floorspace of no more than 1,000sqm ID 23b-031-20160519]. Is there a robust local justification for departing from national policy and what weight should be applied to national policy and guidance?

Would the application of the policy to all developments (ie of 1 dwelling and above) place a disproportionate burden of developer contributions on small-scale developers? (see WMS)

If the national threshold is applied, what bearing would this have on the amount of affordable housing which could be delivered in Luton?

Questions: affordable housing policy – viability, percentage required, and off site contributions

Para 6.12 of the Plan states that the delivery of affordable housing will be challenging in the first 5 years due to high costs and relatively low sales. In addition, the Three Dragons Study concludes that a realistic target is 15-20% of units based on BCIS build costs which indicate a target of up to 15% and Gleeds build costs which indicate up to 25% or 35% in some cases. In this context how was the requirement for 20% affordable housing requirement arrived at and is it justified having regard to viability evidence?

Are there likely to have been any significant changes in the viability of market and affordable housing since the Three Dragons Study in April 2013? If so, has the Local Plan Viability Assessment of 2015 taken them into account?

What percentage affordable housing contribution has been achieved on private sector led housing schemes in Luton over recent years? Will the achievement of 20% require improved performance? If so is this achievable? [The Council's

response to my initial questions indicates that 270 affordable units have been provided out of a total of 1403 completions between 2011 and 2015 – 19%]

LP 16C includes a criterion relating to circumstances where meeting affordable housing requirements could render a proposal unviable. For clarity should this be set out as a separate criterion and to ensure effectiveness should the policy make it clear that the policy requirements would be reduced *proportionately* if it can be demonstrated that a full contribution would cause a development to be unviable?

Policy LP16A states that an equivalent financial contribution towards off-site affordable housing will be acceptable, including on sites of less than 10. What is the justification for this? How will financial contributions in lieu of on-site provision be used? Is it feasible to deliver affordable housing in this way?

Should LP16 B be amended to make it clear that the requirement for affordable housing to be phased alongside market housing on-site does not apply where affordable housing is to be provided by means of a financial contribution?

Questions: affordable housing delivery

The Council has indicated that delivery within the plan period from the application of Policy LP 16 and from any other sources could be between c 1,250 and 2,000, leaving a shortfall of around c5-6,000. Should the likely extent of unmet affordable housing needs following the applications of Policy LP 16 and from any other sources be set out in the plan?

What is the role of the private rented sector, if any, in meeting affordable housing needs?

Policy LP 16 and para 6.17 state that the Council will seek to ensure unmet affordable housing needs will be provided outside administrative boundaries. Are there any agreements or mechanisms to help ensure this need will be met? Are any unmet needs likely to be deliverable, including in terms of viability, particularly if there is a reliance on strategic allocations and significantly sized urban extensions outside Luton? Should the plan explain how and where this need will be met and that there are constraints that may affect delivery (if there are)?

Question: starter homes

Does the Plan make an appropriate response to the Government's proposals for starter homes? When this national policy is introduced will it have any bearing on Policy LP 16? Should the policy be amended to anticipate this?

Matter 9: Gypsy and traveller provision (LP 20 and section 6)

Context: the plan indicates that the recent national change to the definition of gypsies, travellers and travelling showpeople could affect need and provision. (paragraph 6.34) Accordingly, a separate Local Plan will be prepared on this topic. Policy LP 20 safeguards two sites and sets criteria for determining planning applications.

Main issue – Is the approach set out in the plan sound? Does the plan make appropriate provision for the needs of gypsies, travellers and travelling showpeople?

Questions:

Should this plan make provision to meet housing needs, including by setting pitch targets for gypsies and travellers and plot targets for travelling showpeople based on an up-to-date assessment of need? Should the plan bring forward a supply of sites to meet these needs (permanent and transit)? Alternatively, is there sufficient reason to justify establishing need and to make provision for any additional sites in a separate plan, rather than in this Local Plan?

Is there a firm commitment to preparing and adopting a separate plan? Is this set out in the Local Development Scheme? What progress has been made?

Is the safeguarding of the existing Gypsy and Traveller site at St Thomas's Road and the traveller showperson site at 14 and 72 Wigmore Lane justified? Do the areas shown on the policies map reflect existing circumstances?

Does Policy LP 20 set out clear and reasonable policy criteria to make decisions on planning applications? Do the criteria replicate those which would apply to general applications for housing? If the criteria are different, is this fair and justified? In particular, what is the justification for granting permission only if the site is previously developed or under used (iii) and is criterion v. sufficiently clear given it refers to needs?

Are the criteria intended to guide land supply allocations [para 11 of DCLG Planning Policy for Traveller Sites]? If so, is this made sufficiently clear in the plan?

Matter 10: Housing for older people, students and any other needs of different groups (LP 17A and 18 and section 6)

Context: The Plan indicates that there is a need for specialist housing to accommodate 1,000 older people in the plan period, some of which would be for leasehold schemes, extra care units, sheltered units and dementia units. The

plan does not identify any requirement to provide student accommodation. Para 6.26 refers to self-build.

Note: the development management aspects of policies LP17A and LP18 will be considered at Stage 3, as appropriate.

Main issue: Have these accommodation needs been assessed and will the plan make appropriate provision for them?

Questions:

Has the need for housing for older people in the plan been justified? The SHMA Update refers to a need for older person housing of 1,310 (Figure 80). How does this relate to the 1,000 in the Local Plan? Is the identified need a component of the overall OAN figure?

How will the plan help ensure that the housing need for older persons is met given that LP18 is a criteria based development management policy? Is delivery

expected to be through housing allocations and the strategic allocations? If so, how will this be achieved?

Why is it necessary to have a criterion (i) requiring that proposals for new accommodation contribute to identified need?

Has the need for housing for students been assessed and will the plan ensure suitable provision is made, if necessary? Is any housing capacity likely to be released from the existing housing stock through the construction of purpose-built communal student accommodation?

Does the plan appropriately address the needs of those wishing to build their own home? Should it do more?

Matter 11: Objectively assessed need for economic development and the supply of land to meet that need (Policies LP 2B, 13 & 14)

Context

The plan identifies a need for 18,000 jobs as the objectively assessed employment need. 8,000 of these would be B Use Class jobs. (4.11, LP 2 B & LP 13)

Policy LP 13 sets out the proposed strategic allocations which will provide land for development for B1 (business), B2 (general industry) and B8 (storage or distribution). The Background Paper (Table 4) refers to 69ha of employment land proposed within strategic allocations.

The relevant strategic allocations are as follows with the site areas from the Background Paper (and the Plan):

South of Stockwood Park (LP5)	*c5-6ha (LP5 - 9.5ha B1)*
Century Park (LP6)	*37.9ha (LP6 – B1, B2, B8 no site area)*
Butterfield (LP7)	*c16.9ha (LP7 - 23ha B1)*
Napier Park (LP8)	*8.58ha (LP8 – B1a, B1c no site area)*
Total	c69ha

The plan does set out floorspace figures for two allocations:

South of Stockwood Park (LP5)	*B1 no specific floorspace figures*
Century Park (LP6)	*B1, B2, B8 no specific floorspace figures*
Butterfield (LP7)	*55,000sqm B1*
Napier Park (LP8)	*35,000sqm B1a & 20,000sqm B1c*

Note: Other than the questions asked below, other matters relating to the strategic sites will be considered at Stage 3.

Main issues – Does the plan appropriately identify the objectively assessed quantitative and qualitative need for jobs, land and floorspace for economic development uses in accordance with national policy and guidance? Is the identified OAN soundly based and supported by robust and credible evidence?

Does the plan allocate the right amount of land to help ensure the need for jobs from B use class development can be met?

Questions: assessment of job needs

Is the objectively assessed need for economic development based on an appropriately defined functional economic market area (FEMA), taking into account the economic role of Luton and the factors set out in the PPG? (2a-012-2014036)

Will the forthcoming findings of the separate Luton and Central Bedfordshire FEMA studies have any bearing on the assessment of economic development needs? [2.6 of Background Paper ECON 001 indicates outputs in July/August 2016] The

Council has indicated that it is unlikely it will lead to any amendments to the Plan (response to Inspector's initial questions). Why is this?

Is the need for around 18,000 jobs based on a robust assessment and up-to-date evidence? Are the figures of 8,000 B use class jobs and 10,000 jobs in commercial and service related industries robust and justified (Policy LP 13)? Are the assumptions behind the job need assessment consistent with those used to assess the need for housing and retail development?

Table 6 of the Background Paper (ECON 001) indicates that the 2014 ONS base line forecasts 11,300 jobs whereas the 2012 Luton bespoke and 2012 ONS baseline indicate 17,600/17,800. Which are likely to provide the most reliable forecast of job needs over the plan period and why?

Do the job number targets in the plan satisfactorily take into account the sub-regional role of Luton and the airport, including as expressed in Strategic Objective 1 (page 13 of the Plan).

Questions: delivery of job needs

Is it appropriate to seek to provide for all 18,000 jobs, including 8,000 from B use classes in Luton or should some jobs be provided in neighbouring authorities, potentially in connection with the delivery of Luton's unmet housing needs? Has this option been considered and has a correct balance been achieved between housing and employment land provision having regard to the OAN for both housing and employment and the potential effects on commuting patterns? [Note: The Background Paper indicates that options for 46.5, 71.8 and 80.1 ha of B Use class land would imply some increased in-commuting from the surrounding area – Table 3 and para 5.9.]

How will the 10,000 jobs in commercial and service related industries be delivered?

Are the job number targets in the plan realistic and deliverable?

Questions: employment land/floorspace requirement (B1, B2, B8)

The Background Paper sets out five gross employment land requirement scenarios: labour demand (48.6 and 49.4) and past development rates (46.5, 71.8 and 80.1). These are based on the floorspace requirements in the ECON 003 – Employment Land Review 2013 (page 52). How was this analysis used to arrive at a figure of 69ha and is it justified? Is this amount of land aspirational but realistic (Framework para 154) given it appears to most closely reflect scenario 3 (past take up – 71.8ha) and that the Employment land Review 2013 (para 6.40) recommends a figure between scenarios 3 and 4 (46.5-71.8).

How has the objectively assessed need for 8,000 jobs from B Class uses been translated into a requirement for floorspace and land? Are the assumptions relating to floorspace worker ratios and plot ratios justified (5.6 of Background Paper)?

Table 3 in the Background Paper indicates that 48.6/49.4 ha of B use Class land would provide 7,560/7,660 jobs and that 71.8ha would provide 13,100 jobs. Given the identified jobs need from B Use Class land is 8,000, is the 69 ha figure justified to help ensure the 8,000 jobs target can be achieved?

The Background Paper indicates that 69.2 ha of employment land equates to 275,370 sq.m floorspace for B Class uses (Table 4). This is higher than the 226,200/229,400 sq.m floorspace (Table 2 and 5.6) for B class uses required to provide for jobs growth of c7, 670 (Table 1). In this context, is the 69ha figure justified?

Is the 69ha of employment land referred to in the Background Paper the requirement for land? If so, should this and any total requirement for floorspace, be clearly set out in the Plan?

Does the target of 69ha of employment land take into account any employment land which has been lost to other uses in recent years?

Questions: employment land/floorspace (B1, B2, B8) – overall supply and delivery

Will the plan help ensure that Luton's qualitative and quantitative need for jobs and sites are met? Will an adequate quantity and range of land be available? How much land will be available for development on the Category A and B sites listed in Appendix 3 to the Plan?

What certainty is there that 69ha of the strategic allocations will be made available for employment use? Should each of the strategic allocation policies set out the required land or floorspace figures?

The main focus on the strategic allocations appears to be for B1 uses. Is this justified?

Why are the land areas for South of Stockwood Park (5-6ha v 9.5ha) and Butterfield (16.9ha v 23ha) different in the Background Paper and in the Plan?

The Background Paper (Table 4 and 5.20) states that it is now anticipated that there will be a significant loss of a portion of 8.58 ha of Napier Park for employment use to vehicle storage for Vauxhall. What effect, if any, will this

have on the achievement of the 69ha and job targets? Should this circumstance be reflected in the plan, including in Policy LP 8?

Is there any evidence regarding land take-up in Luton in hectares in recent years, and prior to the economic down-turn, for B1, B2 and B8 uses? In overall terms is the amount of development proposed in the plan realistic and deliverable, including in the context of previous delivery?

What progress has been made in terms of progressing B use class development on the following strategic allocations, since they were first allocated in the Luton Local Plan 2001-2011 (where relevant), including in respect of planning permission, site preparation/infrastructure and development of floorspace. Are the following sites deliverable?

South of Stockwood Park (LP5)

Century Park (LP6)

Butterfield (LP7)

Napier Park (LP8)

Questions: other potential sources of employment land supply

Will any consented or proposed development outside Luton, for example at North Houghton Regis in Central Bedfordshire contribute to meeting any of the jobs need in Luton or in other potential growth options? [the representation from Central Bedfordshire Council refers to 15.5ha of employment land at Houghton Regis North − 3.34] Is there any agreement on this between the local authorities and does it have any bearing on the soundness of this plan?

Will the safeguarded Category A and Category B & existing unidentified employment sites be likely to generate any new net jobs? (Policy LP 14) Is the purpose for safeguarding about the retention of existing jobs or the creation of new ones, or both?

Questions: plan review

Given the assessment of employment needs dates back to 2013, should there be a commitment to an early review of the plan?

Matter 12: Transport infrastructure (LP2D, LP31 and section 11)

Context: The plan aims to provide for 18,000 new jobs and 6,700 new homes. In addition, there is potential for an unmet housing need of 11,100 (or potentially 9,300 based on the 2016 SHLAA update) to be provided in

neighbouring authorities, in addition to their own needs. The plan states that Luton faces significant traffic congestion at key junctions and through traffic conflict (2.15 & 11.1), that the town lacks east-west orbital connectivity (2.15) and that Land South of Stockwood Park (LP5) can only be developed when Highways England is satisfied the proposals do not have an unacceptable impact of Junction 10a improvements and the M1 motorway.

In their representation, Highways England has expressed concerns about the potential for the significant discrepancy in the total quantum of residential and employment development to increase in-commuting and put increased pressure on the highway network, including M1 junctions. Concern is also expressed by Highways England that there could be a significant impact on the M1 and that, in the absence of detailed assessments for all developments, it is unknown whether any adverse impacts on the strategic road network could be mitigated. A SOCG sets out the position between the Council and Highways England as of July 2016.

Main issue: Have the identified potential problems in terms of congestion and east-west connectivity been adequately considered and appropriately addressed in the plan? Has the effect of proposed development (within Luton and in neighbouring authority areas) on the strategic road network, including the M1 been adequately assessed? Has this taken into account meeting the OAN for Luton and Central Bedfordshire? Are there sufficient measures in the plan to help ensure any adverse effects will be satisfactorily mitigated? Is there a reasonable prospect that mitigation can be achieved?

In responding to the main issues and questions it would be helpful if the Council could produce a concise note summarising what the transport modelling carried out to date has taken into account in terms of proposed developments within and outside Luton, the likely effects on the strategic road network and motorway (for example, what would be the effect in terms of strategic road/motorway capacity and the effect on congestion at key junctions at peak times) and how potential adverse effects would be mitigated.

<u>Questions:</u>

What effect will providing for 18,000 new jobs and 6,700 new dwellings have on commuting patterns and on the capacity and operation of the strategic road network within and outside Luton, including the M1 at junctions 10, 10A and 11, the proposed junction at 11A and between Junctions 10 and 12? Have assessments been carried out that quantify these effects? Have these assessments taken into account the potential effects of providing for Luton's

unmet housing need outside of Luton, meeting neighbouring local authority needs for housing and jobs and committed developments outside Luton (such as at Houghton Regis), proposed roads such as the A5-M1 link road and the Sundon Rail Freight Interchange and any recent and proposed public transport improvements/infrastructure? Is any further modelling work necessary to identify impacts and mitigation as suggested by Highways England?

Are there likely to be any adverse effects to the strategic road network within and outside Luton, including the M1? Will the capacity of the M1 and any M1 junctions and link roads be exceeded at times of peak flow by the end of the plan period? If so how will these adverse effects be mitigated, for example, through transport measures and highway/junction improvements? Is any appropriate mitigation technically feasible and deliverable? In the absence of a Community Infrastructure Levy, how will any necessary mitigation be funded?

Is any required mitigation adequately set out in the plan, including in Policy LP 31 and policies for strategic allocations (LP5-12 as appropriate)? Is it sufficiently clear what the requirements will be for developers of specific development allocations, including the Strategic Allocations? In this context are the proposed allocations viable and deliverable?

What role will the road proposals shown on the policies map and set out in LP 31 E (strategic infrastructure schemes) and F (junction improvements on the priority traffic network) play in mitigating any adverse effects? How will E and F be delivered?

Policy LP31 requires transport assessments and travel plans for developments over a certain scale as set out in Appendix 7. What will be the role of this requirement in ensuring that any adverse effects are mitigated and how will potential cumulative effects (ie from all relevant development proposals in the area) be taken into account?

Are there any measures in the plan to improve east-west connectivity?

Should the plan include any reference to road schemes outside Luton, including M1 J11A, A5-M1 Link, Woodside Link and potential M1-A6 link road (Central Bedfordshire Council representation para 7.1).

Is the safeguarding of East Luton Circular Road (Weybourne Link) justified? What is the intended purpose of this safeguarded road alignment? The Council's proposed minor modifications MOD47 & 50 indicate that this is not a formal allocation, that it is a long term option that might be required and that it will only be taken forward following robust impact assessment. If so, is it correct to say the scheme is *needed* (rather than, for example, *safeguarding being*

justified)? What is the justification for safeguarding this route? Are the Council's 'minor modifications' MOD 47 & 50 necessary for soundness?

Have the potential effects of the safeguarded East Luton Circular Road route on heritage, biodiversity and landscape interests been adequately assessed, included through the Sustainability Appraisal? [Historic England refer to a scheduled monument at Stopsley Common and Natural England refer to AONB, SSSI and county & district wildlife sites] Should the plan indicate how these potential impacts will be taken into account?

Are the proposed park and ride sites at LP 5 (Stockwood Park) and LP 7 (Butterfield) intended to mitigate any adverse effects? Are these justified? How will they be delivered? Are these policy requirements?

The plan (para 11.11) states that adjoining authorities are considering park and ride sites around the periphery of the Luton/Dunstable/Houghton Regis conurbation outside the Luton administrative area. Is this intended as mitigation for any potential adverse effects of development in Luton? What commitment is there to delivering these and what progress has been made?

Matter 13: Retail (LP2C, LP 3 and section 7)

Context:

The Luton Retail Study Update 2015 identifies capacity for additional floorspace by 2031 of:

convenience - between 6,450sqm and 9,064sqm (page 41 5.7.2)

comparison - between 32,229sqm and 53,715sqm (page 42 5.7.5)

The plan sets out the net additional floorspace required for convenience and comparison retail in section 7 (page 63). To 2031 this amounts to:

convenience: 9,064 sq.m

comparison: 53,715 sq.m

Various policies set out retail provision:

LP3 – town centre – 6,279 sq.m convenience by 2020

LP3 – town centre – 30,096 sq.m non-bulky comparison by 2025

LP8 – Napier Park – 2,500 sq.m foodstore

LP9 – Power Court (within town centre) – 3,393 sq.m convenience

LP9 – Power Court (within town centre) – comparison in accordance with need for town centre

LP11 – Creative Quarter (Northern gateway – retail floorspace

LP12 – Marsh Farm – 1,000 sq.m foodstore

7.15 – foodstore allocation at Birdsfoot Lane (south)

7.15 – foodstore commitment at Sundon Park

Main issue: Are the assessments of net additional floorspace robust? Does the plan ensure that these requirements will be met in appropriate locations?

Please note: the overall balance in terms of providing for retail and housing needs, within and outside Luton will be discussed under Matter 4. Issues regarding the use of individual strategic allocations will be considered at Stage 3.

Questions:

The *Luton Retail Study Update* recommends caution in relying on longer term projections *(5.7.6).* In this context are the projected net additional floorspace figures for convenience (9,064 sq.m) and comparison (53,715 sq.m) in the plan justified and based on a robust assessment? In particular, why are the additional floorspace figures in the Plan set at the upper end of the ranges recommended in the Study Update?

Are the assumptions which inform the assessments about population/household growth consistent with those used to establish housing and employment needs? To what extent are these floorspace figures justified by an aim to increase Luton's share of retail spend, particularly in the town centre.

Policy LP3 refers to the provision of 6,279 sq.m convenience by 2020 and 30,096 sq.m comparison floorspace by 2025. What is the justification using these figures in LP3 rather than the figures in Section 7 (to 2031). Is it clear what the plan requirement is and what the plan intends should be delivered?

How will these convenience and comparison needs be met, including within the town centre and other centres, and on edge of centre or out of centre sites, including on strategic allocations. What is the floorspace breakdown between these locations?

Have sites, including Power Court and Napier Park, been allocated to meet these needs in accordance with the sequential approach set out in national policy (NPPF para 23)? Is compliance with the sequential approach set out anywhere? Is Power Court a town centre or edge of centre site (as defined in the Glossary to the Framework)?

The representation from Central Bedfordshire Council (6.5 page 25) states that outline permission has been granted at Napier Park for comparison and convenience floorspace (1788 and 1428 sq.m respectively). Does this have any bearing on the plan given that Policy LP8 does not specifically refer to comparison retail?

What bearing, if any, would the consented retail development at North of Houghton Regis Urban Extension (see 5.3.3 of Retail Study Update 2015) have on the retail requirement in Luton? Will the Houghton Regis proposals meet any of Luton's needs?

Are the relevant strategic allocation policies specific enough about the amount of floorspace to be delivered for convenience and comparison floor space? For example, LP9 (Power Court) refers to comparison floorspace being provided in accordance with the borough's overall identified need for the town centre and LP3 refers to 30,096 sq.m of non-bulky comparison goods by 2025 in the town centre? What is the overall intention in terms of floorspace delivery?

The Council's paper on 'Centres' (CEN 001) refers to a need to review 'assessed capacity' around every 5 years due to the volatility of much of the data and assumptions (para 5.53). The Luton Retail Study Update 2015 recommends caution in relying on longer term projections and also refers to a review every 5 years. In this context, should there be an early review and a commitment to this in the plan?

Matter 14: Green Belt (LP 4)

Context: Although the administrative boundary in Luton largely coincides with the built up area, there are some areas of Green Belt to the north, north-east, east and south. These adjoin wider areas of Green Belt that fall within neighbouring local authority areas. The plan indicates that no changes are proposed to the Green Belt (4.36), but that a Stage 2 Green Belt study should be undertaken on a cross-boundary basis. The Consultants Brief for a joint Green Belt Study between Central Bedfordshire and Luton was agreed in February 2016. A primary purpose of this study is to identify any parcels of land that could be released from the Green Belt in the interests of achieving sustainable development.

Main issues: Is the extent of the Green Belt appropriately defined? Is the approach to the Green Belt consistent with national policy?

Questions:

Are the Green Belt boundaries in the plan appropriately defined and consistent with national policy in the Framework?

The Framework states that one of the essential characteristics of the Green Belt is permanence and that boundaries should be capable of enduring beyond the plan period. Given the extent of Green Belt around the administrative boundaries to Luton, will meeting the unmet housing need for Luton (for example, through any emerging options from the joint Growth Options Study and Green Belt Study) be likely to result in a review of the Green Belt within or surrounding Luton? In this context are the boundaries in the plan reasonably capable of enduring beyond the plan period? Are there any exceptional circumstances that justify altering Green Belt boundaries now?

Does North Hertfordshire's emerging development plan proposal for housing to the east of Luton have any implications for the definition of Green Belt boundaries within Luton?

Should there be a commitment to an early review of the Plan, for example following the outcomes of the Growth Study and/or Green Belt review? If so, what would trigger a review and should there be a commitment to one within the plan?

Matter 15 - selection of sites allocated for development – methodology and process

Context – The approach to site selection is set out in the Sustainability Appraisal

Note: issues concerning individual site allocations will be considered at Stage 3.

Main issue: Has the site selection process for strategic sites, housing and employment allocations been based on a sound process and methodology?

Questions:

Has the site selection process for strategic sites, housing and employment allocations been based on a sound process of sustainability appraisal and the testing of reasonable alternatives?

Is the methodology appropriate?

Was an appropriate selection of potential sites assessed?

Are the reasons for selecting the preferred sites and rejecting the others clear?

What were they key factors in the site selection process for the strategic sites, housing and employment allocations?

Stage 3 hearing sessions – provisional matters

Please note:

The list of matters and policies is provisional at this stage and the hearing timetable will be confirmed after Stage 2, as appropriate.

Some of the policies listed below will have been discussed in part at Stage 2. The intention is that Stage 3 will cover only those aspects of those policies that were not discussed at Stage 2. In many cases, therefore, the focus will be solely or mainly on the development management aspects of policies.

The matters may include all or some of the following.

Cross-cutting matters

5 year supply of deliverable housing sites (Appendix 5 Housing Trajectory) – [including the annual requirement, accommodation of any unmet need since the start of the plan period, assessment of whether a 5 or 20% buffer should be applied depending on past delivery, deliverability of sites, supply of sites over the next 5 years and through-out the lifespan of the plan]

Viability and deliverability of development

Monitoring (Appendix 8)

Centres (LP 3, 21, 22, 23)

Luton Town Centre Strategy, Centre Hierarchy, Primary and Secondary, Shopping Areas and Frontages, District & Neighbourhood Areas & Shopping Parades

Strategic Allocations (LP 2, 5, 6, 7, 8, 9 10, 11, 12)

Land South of Stockwood Park

London Luton Airport

Butterfield Green Technology Park

Napier Park

Power Court

High Town

Creative Quarter

Marsh Farm

Housing allocations (LP 15)

Employment allocations/areas (LP13, 14, Appendix 3)

Other policies, including those aspects primarily related to development management (LP 1, 4, 13, 14, 16, 17, 17A, 18, 19, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, Appendix 2, Appendix 6, Appendix 7, Appendix 12)

Including for sustainable development, green belt, employment, affordable housing, other types of housing/accommodation, education & community facilities, design, open space & natural greenspace, biodiversity & nature conservation, landscape & geological conservation, historic environment, transport, parking, freight, public safety zones, communications, flood risk and climate change, pollution & contamination and infrastructure & developer contributions.

ANNEX 5

Examination of Luton Local Plan – Stage 2 hearings

Hearing timetable V5

Version 2 issued on 23 August 2016 in relation to Matter 13 (Retail) which has now been moved to the Stage 3 hearings, and in respect of the lists of participants.

Version 3 issued on 2 September 2016 with alterations to participants. Version 4 issued on 18 September with alterations to participants

Note: the Duty to Cooperate (Matter 1) was considered at a Stage 1 hearing on 19 July 2016. This timetable covers Stage 2. Stage 3 will provisionally take place in December 2016 and January 2017 and will cover all remaining Matters.

Date	Morning session 10am	Afternoon session 2pm
Day 1 Tues 20 Sept	Inspectors Opening Matter 2 – Local Development Scheme, consultation, Habitats Regulations, accordance with the Act and Regulations and consistency with national policy *Participants:* *Luton Council* *856665 Henry Boot* Matter 3 - Sustainability appraisal *Participants:* *Luton Council* *933222 Central Bedfordshire Council* *497297 Claydon Developments* *856258 Luton Town Football Club -*	Matter 4 - Spatial development strategy, vision and strategic objectives (LP 2 and sections 2, 3 and 4) *Participants:* *Luton Council* *856534 Abbey Land* *933222 Central Bedfordshire* *956602 Chamberlain Holdings* *497297 Claydon Developments* *72098 CPRE Hertfordshire* *792154 Home Builders Federation* *856258 Luton Town Football Club* *855900 North Hertfordshire District Council*
Day 2 Wed 21 Sept	Matter 5: Objectively assessed need for housing (OAN) (LP 2 and section 4) and any uplift to meet affordable housing needs *Participants: Luton Council* *856534 Abbey Land* *933222 Central Bedfordshire*	Matter 5: Objectively assessed need for housing (OAN) (LP 2 and section 4) and any uplift to meet affordable housing needs continued

	956602 Chamberlain Holdings *497297 Claydon Developments* *72098 CPRE Hertfordshire* *856720 Gladmans* *792154 Home Builders federation*	
Day 3 Thurs 22 Sept	Matter 5: Objectively assessed need for housing (OAN) (LP 2 and section 4) and any uplift to meet affordable housing needs continued	Matter 5: Objectively assessed need for housing (OAN) (LP 2 and section 4) and any uplift to meet affordable housing needs Reserve Inspector site visits
Day 4 Fri- day 23 Sept	Matter 6 – meeting objectively assessed need for housing - the housing capacity of Luton and the housing requirement (Policies LP 2 and LP 15) *Participants:* *Luton Council* *856534 Abbey Land LP2* *933222 Central Bedfordshire LP2 & LP15* *956602 Chamberlain Holdings LP2 & LP15* *497297 Claydon Developments LP2 & LP15* *72098 CPRE Hertfordshire LP2 & LP15* *792154 Home Builders federation LP2* *855900 North Hertfordshire DC LP2 & LP15* *756742 Mr. Pliskin LP15* *498776 Slip End Parish council LP15* *660493 Sport England LP15* *956915 Mr. Sahota (Vauxhall Trailer Park)*	Matter 6 – meeting objectively assessed need for housing - the housing capacity of Luton and the housing requirement (Policies LP 2 and LP 15) continued
Day 5 Tues 27 Sept	Matter 7: Meeting objectively assessed need for housing which cannot be met within Luton (Policy LP 2 and chapters 4 and 6) *Participants: Luton Council* *856534 Abbey Land - LP2, chapter 4* *955824 Arnold White - Chapters 4 & 6* *849600 Bloor Homes - chapter 4* *933222 Central Bedfordshire - LP2 and chapter 4* *956602 Chamberlain Holdings - LP2* *72098 CPRE Hertfordshire LP2* *856720 Gladmans* *856665 Henry Boot - chapter 4* *792154 Home Builders federation - chapter 6* *855900 North Hertfordshire DC* *956709 North Luton Consortium - chapter 4* *933122 Sundon Parish Council - chapter 4*	Matter 7: Meeting objectively assessed need for housing which cannot be met within Luton (Policy LP 2 and chapters 4 and 6) continued

Day 6 Wed 28 Sept	Matter 8 – Affordable housing (LP 16 and Section 16) *Participants: Luton Council* *933222 Central Bedfordshire Council* *956709 North Luton Consortium* *933122 Sundon Parish Council*	Matter 9: Gypsy and traveller provision (LP 20 and section 6) *Participants:* *Luton Council* *933222 Central Bedfordshire Council* *957083 Mr. McGrath* *954025 Miss Tindale* *954474 Mr. Duncan Lusted* *955152 Mr. T Dimmer* Matter 10: Housing for older people, students and any other needs of different groups (LP 17A and 18 and section 6) *Participants:* *Luton Council*
Day 7 Thurs 29 Sept	Matter 11: Objectively assessed need for economic development and the supply of land to meet that need (Policies LP 2B, 13 & 14) *Participants: Luton Council* *933222 Central Bedfordshire LP2 and LP14* *72098 CPRE Hertfordshire LP 13 & LP14* *856665 Henry Boot LP13* *955851 Legal and General Property* *856258 Luton Town Football Club* *792154 Home Builders Federation LP2* *956915 Mr. Sahota LP14* *933122 Sundon Parish Council LP2*	Matter 12: Transport infrastructure (LP2D, LP31 and section 11) *Participants:* *Luton Council* *933222 Central Bedfordshire* *497297 Claydon LP31* *169722 Historic England LP31* *304012 Highways England* *856258 Luton Town Football Club* *664726 Natural England* *856665 Henry Boot (re Butterfield and Park & Ride)*
Day 8 Fri 30 Sept	and section 7) *3 hearings and not at Stage 2 – amendment made 23 August 2016.* *The morning of Day 8 will now be a reserve session if necessary or for Inspector site visits.*	Participants: Luton Council *792154 Home Builders federation* *855900 North Hertfordshire District Council* *933122 Sundon Parish council* Matter 15 - selection of sites allocated for development – methodology and process Participants: *933222 Central Bedfordshire Council* *856258 Luton Town Football Club*

ANNEX 6

Examination of Newark and Sherwood District Council Allocations and Development Management Development Plan Document

Draft timetable for the hearing sessions

Commencing on Tuesday 11 December 2012

Venue: Newark and Sherwood District Council, Dining Room, Kelham Hall, Kelham, Newark, Nottinghamshire, NG23 5QX

Week 1	Morning Session 10am	Afternoon session 2pm
General Matters		
Day 1 Tuesday 11 December 2012 General non-site specific matters*	● Opening ● Matter 1:Compliance and procedural Matter 2: General issues	● Matters 3 and 4 - Housing/retail/employment
	Morning Session 9.30am	**Afternoon session 2pm**
Day 2 Wednesday 12 December 2012 General non-site specific matters*	● Matters 3 and 4 - Housing/retail/employment (continued)	● Strategic policies Gypsy and traveller

	Morning session 9.30am	Afternoon session 2pm
Area Specific Matters**		
Day 3 Thursday 13 December 2012 Area Specific Matters**	Southwell Area	Southwell Area (continued) Sherwood Area
Week 2	**Morning session 10.00am**	**Afternoon session 2pm**
Day 4 Tuesday 18 December 2012 Area specific matters**	Newark Area	Newark Area
	Morning Session 9.30am	**Afternoon session 2pm**
Day 5 Wednesday 19 December 2012 Area specific matters**	Mansfield Fringe	Mansfield Fringe (continued) Nottingham Fringe

	Morning Session 9.30am	Afternoon session 2pm
Development management policies		
Day 6 Thursday 20 December 2012	Development management policies	Development Management Policies (continued) Any other matters

Notes

* The general sessions will include an overview of the plan but not representations about other sites put forward by representors.

** The area specific sessions will include a general overview of the site allocations for the area, representations about the soundness or otherwise of specific allocations and representations about other sites that have been put forward.

Please note that the timetable is subject to change. Every effort will be made to keep to the days and times given above, but late changes may be unavoidable. Priority will be given to starting the debate on each matter at the appointed time, and it may be necessary to extend the discussion in the afternoon session. The Programme Officer will inform the participants of any late changes to the timetable, but it is the responsibility of the participants to keep themselves up to date with the arrangements and programme.

A list of people attending each session will be provided as a separate document.

If you have any queries about this timetable or anything else in relation to the examination, please to not hesitate to contact the Programme Officer,

ANNEX 7

Examination of the East Riding Local Plan Strategy Document and Allocations Document

Guidance notes for people participating in the examinations

Introduction

I am Simon Berkeley, a Planning Inspector appointed by the Secretary of State for Communities and Local Government to independently examine the soundness of the Strategy and Allocations Documents for the East Riding of Yorkshire Council. I have prepared this guidance note. Its purpose is to explain the procedural and administrative matters relating to the two examinations.

The Programme Officer for both examinations is Malcolm Wells. His contact details are given below. He is acting as an independent officer for the examination, under my direction. Malcolm will be responsible for organising the programme of hearings, maintaining the examination library, recording and circulating all material received, and assisting me with procedural and administrative matters. He will also advise on any programming and procedural queries. Any matters which the Council or participants wish to raise with me should be addressed to Malcolm.

Information about the progress of the examinations and links to documents are provided on the Council's examination website.

Purpose and scope of the examinations

My role is to consider whether the two documents meet the requirements of the Planning and Compulsory Purchase Act 2004 (as amended) and associated Regulations and whether they are sound in accordance with the National Planning Policy Framework.

To be sound the documents must be:

Positively prepared: based on a strategy which seeks to meet objectively assessed development and infrastructure requirements, including unmet

requirements from neighbouring authorities where it is reasonable to do so and consistent with achieving sustainable development;

Justified: the most appropriate strategy when considered against the reasonable alternatives and based on proportionate evidence;

Effective: deliverable over the plan period and based on effective joint working on cross-boundary strategic priorities; and

Consistent with national policy
The examination must consider whether the documents satisfy the following legal and procedural requirements: whether it has been prepared in accordance with the Local Development Scheme and in compliance with the Statement of Community Involvement and the relevant Regulations; whether it has been subject to Sustainability Appraisal and Habitats Regulations Assessment; whether it complies with national policy; whether it has regard to the sustainable community strategy for the area and whether the Duty to Cooperate has been met.

The starting point is that the Council has submitted what it considers to be sound plans. The Council should rely on evidence collected while preparing the plans to demonstrate that they are sound.

People seeking changes to either document have to demonstrate why it is not sound and how their suggested changes would make it sound. Representations to the plans will be considered insofar as they relate to soundness and legal requirements. However, my report will not refer to representations individually.

Some people have already indicated whether they wish their views to be dealt with solely on the basis of their written representation or if, in addition, they intend to participate in a hearing session. Both methods carry the same weight and I will have equal regard to each.

Only people seeking specific changes to the plans are entitled to participate in the hearing sessions of the examination. There is no need for those supporting or merely making comments on the plans to attend.

I ask that representors let the Programme Officer know by the end of 8 August whether they wish to be heard at a hearing session.

At this advanced stage of the plan preparation process, any further changes to either plan should be limited. The Council cannot itself now make any 'main modifications' – significant changes to remedy soundness problems can only come about through a recommendation in my report. However, the Council can make any 'minor' modifications considered necessary without my

recommendation. Generally speaking, minor changes are those which do not affect the substance of the plan and are not needed for soundness reasons.

For each examination, I will confirm the likely date for the submission of my report to the Council at the end of the final hearing session. The reports will set out my conclusions about the soundness of the plans and, where appropriate, will include recommendations on any actions or modifications needed to make them sound.

There are several possible outcomes of the examinations. In both cases, the submitted plan forms the basis of the examination, and it could be found to be sound as originally submitted. If it is not, it may be decided that further additional work needs to be undertaken before the examination can be completed. I may conclude that the plan could be modified to make it sound, having regard to any implications for consultation and sustainability appraisal. The most serious outcome would be a finding that either plan is not sound.

Examination programme and my matters and issues

The hearing sessions for the examination of the Strategy Document will start on Tuesday 7 October 2014. The Hearing sessions for the Allocations Document will start on Tuesday 4 November 2014. They will be held in the County Hall, Cross Street, Beverley HU17 9BA. Sessions will normally start at 9.00am and 2pm each day, with a break for lunch at about 1pm, and a finish at about 5pm. A short break will be taken mid-morning and mid-afternoon.

I have prepared two 'matters and issues' papers, one for each examination. Because of the nature of the two documents and their parallel examinations, there is some overlap, so the matters and issues papers should be read together. Both papers have been circulated to representors with this note and are also available on the Council's website. A draft timetable is set out on page 2 of each paper. Any comments on either the timetable or the scope of my matters and issues should be sent to the Programme Officer by 1 August 2014.

Every effort will be made to keep to the two draft timetables, but late changes may be unavoidable. Priority will be given to starting the debate on each matter at the appointed time, and it may be necessary to extend the discussion in the afternoon session. The Programme Officer will inform the participants of any late changes to the timetable, but it is the responsibility of the participants to keep themselves up to date with the arrangements and programme.

Procedure at the hearing sessions of the examinations

The topics selected for discussion arise from the tests of soundness and the

representations made about soundness. The hearing format will provide an informal setting for dealing with these issues, by way of a discussion led by me. I will usually begin by making a few brief comments on the matters to be covered. I will then invite participants into the debate so I can gain the information necessary to come to a conclusion on the relevant issues. Those attending may bring professional advisors with them and although they may participate there will be no formal presentation of evidence, cross-examination or formal submissions.

The discussions will focus on the relevant matters and issues I have set out. The emphasis will be on the tests of soundness and the hearings will be conducted on the basis that everyone taking part has read the relevant documents.

Submission of further written statements

If representors participating in the hearing sessions so wish, they may submit further written statements. For those who do chose to provide statements, they should directly address the matters and issues I have identified.

Those who wish to proceed solely by written representations (and are not participating in the hearings) can rely on what they have already submitted in writing. However, representors proceeding by this method may submit a written statement if they feel it necessary to respond to the matters and issues.

Statements from representors should:

relate solely to the matters raised in their earlier representations

make it clear which plan their representation is about

explain which particular part of the plan is unsound

explain why is it unsound, having regard to the National Planning Policy Framework

explain how the plan can be made sound

explain the precise change/wording that is being sought

From the Council, a written statement in response to all of the matters and issues is required. These should include full and precise references to the evidence base to justify the relevant policies and to demonstrate that the two plans are sound. They should also include references to any further main

modifications the Council considers necessary to make them sound and set out the Council's position on changes sought by other parties, where relevant.

Written statements should be succinct, avoiding unnecessary detail and repetition. There is no need for verbatim quotations from either plan, national planning policy or other core documents (references will suffice). Nonetheless, it is vital that the fundamental elements of cases are set out clearly and succinctly, since the hearings are not the place for new points or evidence to be presented for the first time. All statements should clearly indicate the relevant policy/paragraph/page of the plan being referred to.

Please note that it is not my role to 'improve' either plan. I can only recommend modifications to rectify issues of soundness.

Participants should attempt to reach agreement on factual matters and evidence before the hearings start and I strongly encourage everyone to maintain a dialogue with the Council and other participants in advance of the hearings. Statements of Common Ground can be particularly helpful and are especially welcomed.

There is no need to prepare a further statement if all the points are already covered in the original representation, but it would be helpful for participants to inform the Programme Officer if they do not intend to submit further statements.

Four paper copies (not bound) of each written statement should be sent to the Programme Officer. Where possible, an electronic copy should also be provided. Statements should be no longer than 3,000 words for each matter. Statements which are excessively long or contain irrelevant or repetitious material may be returned. Any technical evidence should be limited to appendices, and should be

clearly related to the case being made. Statements should be on A4 paper and stapled. Plans or diagrams should fold down to A4 size.

All statements must be received by the Programme Officer by 12 noon on 5 September 2014 at the latest. If material is not received by this deadline, the Programme Officer will assume that written statements are not being provided.

Participants should adhere to the timetable for submitting written statements. Late submissions and additional papers are unlikely to be accepted on the day of the relevant session, since this can cause disruption and result in unfairness, and may lead to the hearing being adjourned.

Core documents

The Council has prepared a list of core documents, which are available in the examination library. The list should represent the Council's full evidence base for the examination and will include the documents that participants are likely to need to refer to. The list will be updated from time to time and is available from the Programme Officer and on the Council's website. The Programme Officer will assist anyone wishing to see a document.

Site visit arrangements and close of the examination

I will carry out an unaccompanied tour of the district to familiarise myself with the area. I will also be visiting the sites during the examination. My site visits will generally be unaccompanied. However, if there are particular reasons for an accompanied visit, for instance because it may be necessary for me to go onto land which is not publicly accessible in order to see the site adequately, I ask that you discuss this with the Programme Officer as soon as possible.

Each examination will remain open until my report is submitted to the Council. However, I will not accept any further representations or evidence after the hearing sessions have finished unless I specifically request it. Any late or unsolicited material is likely to be returned.

If you have any further questions please contact the Programme Officer:

Malcolm Wells, Programme Officer, Room GG9, County Hall, Beverley HU17 9BA

Tel: 01482 396285

Email: Malcolm.Wells@eastriding.gov.uk

Simon Berkeley,

Inspector

Handy deadline diary for both examinations:

Comments on my matters and issues/hearings timetable: 1 August

Inform Programme Officer whether attending hearings or not: 8 August

Final statements (including from the Council): 5 September, 12 noon

Strategy Document hearing sessions open: 7 October

Allocations Document hearing sessions open: 4 November

ANNEX 8

Examination of the South Worcestershire Development Plan

Inspector: Roger Clews BA MSc DipEd DipTP MRTPI

Programme Officer: Helen Wilson BA(Hons)

32 Pennyford Close, Brockhill, Redditch,

Worcestershire B97 6TW

Tel: 01527 65741

E mail: progofficer@aol.com

STAGE 2 OF THE EXAMINATION HEARINGS

INSPECTOR'S GUIDANCE NOTE

This note is mainly for the benefit of those intending to appear at the examination hearings. Please also see the separate Explanatory Note on the Examination Process.

The Programme Officer

Helen Wilson, the Programme Officer [PO], is responsible for the administration of the Examination. This includes ensuring that all Examination documents are made available to participants and organising the hearings programme. Helen works under my direction. She is not an employee of the South Worcestershire Councils. Her contact details appear at the head of this page. Any procedural questions or other matters that you wish to raise should be directed to Helen.

The Examination webpages

The Examination has a dedicated series of webpages which can be accessed via the SWDP webpage:

http://www.swdevelopmentplan.org/

Click on the "SWDP EXAMINATION" tab at the top right corner of the homepage.

All the material produced for the examination hearings will appear on the SWDP EXAMINATION pages. If you do not have access to the internet, documents and other information can be obtained from the Programme Officer.

The Inspector's role

My role is to consider whether South Worcestershire Development Plan [SWDP] complies with relevant legislation and is sound. The *National Planning Policy Framework* [NPPF] says that in order to be found sound a Plan must be:

(a) *positively prepared* – based on a strategy which seeks to meet objectively assessed development and infrastructure requirements;

(b) *justified* – the most appropriate strategy when considered against the reasonable alternatives, based on proportionate evidence;

(c) *effective* – deliverable over its period and based on effective joint working; *and*

(d) *consistent with national policy* – able to achieve sustainable development in accordance with the NPPF's policies.

The Councils have submitted what they consider to be a sound plan, as the NPPF requires. Those seeking changes must demonstrate why the SWDP is unsound by reference to one or more of the NPPF tests.

Representations on the Plan and the proposed modifications

The Councils' statement on the representations made on the published SWDP, and all the representations received, are available on the SWDP website. The responses to the recent consultation on the Councils' proposed modifications to the Plan are also available on the website.

Attending the hearing sessions

Anyone can come and observe the hearings, but only those who have duly-made representations which propose changes to the Plan in order to make it sound or legally-compliant have the right to participate. Besides those, I may invite a small number of additional participants to attend the Stage 2 hearings because I think their representations are particularly relevant to the matters under discussion.

The hearing timetable

An overall timetable for Stage 2 is published on the Examination webpage. Detailed timetables will be published for each block of hearings, and any updates to the timetables will also be posted on the Examination webpage. It is the responsibility of individual participants to check the latest detailed

timetables, either on the webpages or with the PO, and to ensure that they are present at the correct time.

The hearing sessions will normally start at 9.30am and 2.00pm each day, but these times may vary if longer or shorter sessions are necessary. Short breaks will be taken at convenient points in the mid-morning and mid-afternoon, and there will be a lunch break at about 1.00pm.

Format of the hearing sessions

Each hearing session will consist of a structured discussion led by me and based on a list of Matters, Issues and Questions (MIQ

It just feels like hethat will be issued beforehand. I will invite particular participants to begin the discussion on each question, and others will then have a chance to contribute. There will be no formal presentation of evidence, as I will have read all the relevant representations and hearing statements beforehand, and will expect all the other participants to have done so as well. Nor will there be any cross-examination, unless I consider it is necessary to deal with a particular issue or question. Barristers and solicitors, if present, will be treated as part of the respective team.

Dealing with sites at the hearing sessions

Part of my task is to examine the soundness of the sites that are allocated for development in the submitted SWDP, and of the additional sites and the extensions to, or additions to the housing numbers on, certain allocated sites that form part of the Councils' proposed modifications. Those who have submitted representations to the effect that a site is unsound will be able to put their views to me at the hearing session, if they have made a request to do so. The Council will have the opportunity to respond.

Some of the allocated or proposed sites have already received planning permission for development. The legal status of that permission will not be altered in any way by any recommendation I may make in my report.

Sites that have been put forward for inclusion in the SWDP, but not selected for allocation by the Councils, are known informally as "omission sites". It is not part of my role to examine the soundness of omission sites, and, subject to the legal right to be heard (see paragraph 7 above), such sites will not normally be discussed in detail at the hearing sessions.

Should the situation arise that additional site(s) are needed (for example, because one or more of the allocated sites is found to be unsound), I will look to the Councils in the first instance to decide which alternative site(s) should be brought forward for examination.

Site visits

I will carry out site visits unaccompanied, except for any sites that can only be viewed adequately from private land, when I will need to be accompanied by representatives of the landowner and of the Councils. On any such accompanied site visits I will not hear additional evidence or arguments over the merits of the site.

Hearing statements

Participants may produce written hearing statements to supplement their original representations. For each matter they should be limited to (i) the issues and questions identified in the Inspector's Matters, Issues and Questions document which are relevant to their original representations, and (ii) any new matters that have arisen since the original representations were submitted.

Statements should be no longer than is necessary to deal with their subject matter, and in any event must contain no more than 3,000 words. This limit will be strictly applied.

The Councils' statement for each matter should deal with all my issues and questions. Because of this requirement, the Councils' statements are not subject to the 3,000-word limit, but they should still be succinct.

There will be separate deadlines for statements for each block of hearings. All statements, including those from the Councils, should be sent to the PO to arrive by the relevant published deadline.

Hearing statements will be posted on the Examination webpages, so that they are available to all participants and anyone else who wishes to read them. Because they will be available in this way, they will not be circulated directly to participants. However, anyone who is unable to access them on the website may request copies from the PO.

Form and content of statements

Annex B sets out the presentational requirements for all statements. Its provisions should be carefully read, and followed. Otherwise statements will be returned.

Statements of Common Ground

Statements of Common Ground, agreed between two or more hearing participants, will be welcome where they would help to identify points not in (or remaining in) dispute, and so enable the hearing to concentrate on the key issues that need further discussion. At the very latest, any Statements of Common Ground should be submitted by the published deadline together with the statements to which they are relevant.

Roger Clews

Inspector

December 2014

ANNEX 8a

Sources of relevant documents and advice

The South Worcestershire Development Plan website

All documents for and information about the Plan are available on the SWDP website at:

http://www.swdevelopmentplan.org/

Within that website, there is a series of webpages dedicated to the Examination, which you can access by clicking the "SWDP EXAMINATION" tab at the top right corner of the homepage. All the material produced for the examination hearings will appear on the SWDP EXAMINATION pages.

If you do not have access to the internet, documents and other information can be obtained from the Programme Officer whose details appear on page 1 above.

Relevant legislation

These documents can be searched for and found at: http://www.legislation.gov.uk/:

Planning and Compulsory Purchase Act 2004

Planning Act 2008

Local Democracy, Economic Development and Construction Act 2009

Localism Act 2011

The Town and Country Planning (Local Development) (England) Regulations 2012 [SI No 2012/767]

The Environmental Assessment of Plans and Programmes Regulations 2004 [SI No 2004/1633]

This document can found at:

http://ec.europa.eu/environment/eia/sea-support.htm:

European Directive on Strategic Environmental Assessment (2001/42/EC)

National Guidance and guidance from the Planning Inspectorate

See: http://www.planningportal.gov.uk/planning/planningsystem/localplans,

which provides links to the following:

The National Planning Policy Framework

Local Development Frameworks – Examining Development Plan Documents: Procedure Guidance (3rd Edition, December 2013)

Examining Development Plan Documents: Learning from Experience (September 2009)

See also the national Planning Practice Guidance.

ANNEX 8b

Format for hearing statements

Anyone submitting a statement should email an electronic copy in Word or PDF format, and send four paper copies, of it and of any appendices to the PO (one paper copy each for the Inspector, PO, Councils and Examination Library).

Statements should be succinct, avoiding unnecessary detail and repetition of the original representation. For each Matter, they should address those of the Issues and Questions defined by the Inspector that are relevant to your original representation.

No statement should be longer than 3,000 words. Longer statements will be returned by the PO for editing. Statements should be prepared on A4 paper, printed on both sides and not bound, just stapled. Any photographs should be submitted in A4 format and should be annotated (on the back or front).

All the Submission Documents, the evidence base and background papers for the Plan are available on the SWDP website. Participants should not attach copied extracts from documents to their statements, but should simply refer clearly to the document number or title and the relevant page or paragraph.

Please only submit appendices to statements where they are essential. The statement should make it clear why they are relevant. Appendices should have a contents page and be paginated throughout. The 3,000-word limit does not include the text in appendices, but they should also respect the aim of succinctness.

All participants should adhere to the timetable for submitting statements. If material is not received by the deadlines stated below, the PO will assume that you are relying only on the original representations:

All statements must be received by the PO by the deadline for the relevant block of hearings.

Statements of Common Ground: in time to feed into statements, or to be received by the PO by the relevant deadline at the latest.

Late submissions and additional material are unlikely to be accepted on the day of the relevant session since this can cause disruption and result in unfairness, and could result in the hearing being adjourned.

ANNEX 9

WANDSWORTH COUNCIL

Local Plan Review Examination

Inspector: David Smith BA(Hons) DMS MRTPI Programme Officer: Pauline Butcher

c/o Planning and Development Division

Housing and Community Services Department Tel: 07851 435836

Town Hall, Wandsworth High Street

London, SW18 2PU Email: programmeofficer@talktalk.net

HEARING AGENDA

Day 1 – Wednesday 8 July 2015 (Room 123)

10.00am start at Wandsworth Town Hall

Core Strategy and preliminary, procedural and legal matters

Issue 1

Have the relevant procedural and legal requirements been met, including the duty to co-operate and those required by the Conservation of Habitats and Species Regulations 2010?

Issue 2

Are the spatial vision and strategic objectives for Wandsworth sound having regard to the presumption in favour of sustainable development?

Issue 3

Is the overall spatial strategy sound having regard to the needs and demands of the Borough; the relationship with national policy and Government objectives; the provisions of The London Plan and the evidence base and preparatory processes? Has the Core Strategy been positively prepared?

Questions to be discussed:

Is the Core Strategy based on an up-to-date assessment of objectively assessed housing needs?

Does the publication of the 2012-based household projections make any material difference to the figures in the Core Strategy and are any amendments required to take this information into account?

Are the sites relied upon for the supply of housing deliverable in accordance with the housing trajectories? Are the expectations placed on the delivery of sites in Nine Elms Vauxhall realistic?

Is there sufficient flexibility within the allocations to accommodate unexpected delays whilst maintaining an adequate supply?

Is adequate provision made for housing for the elderly?

Does the Core Strategy strike the correct balance between residential and employment uses?

Specific policies to be discussed:

Policy PL2 – Flood risk
Should what is meant by "appropriate sites" be further explained in criterion a)? Are criteria a) and c) consistent in their treatment of the need for a Flood Risk Assessment?

Policy PL8 – Town and local centres
Should arts, culture and tourism uses including hotels be added to criterion c) to fully reflect the Main Town Centre uses defined in the Glossary to the NPPF?

Policy PL9 – River Thames and the riverside
What is the extent of the Thames Policy Area and would modification LP11 adequately protect safeguarded wharves including any waste transfer function?

Policy IS2 – Sustainable design, low carbon development and renewable energy
Is further modification LPFM40 regarding the national technical standards justified?

Policy IS5 – Achieving a mix of housing including affordable housing
Are policies for the supply of affordable housing justified having regard to viability, tenure split and the need for affordable housing in the Borough? What is the justification for setting an "expected maximum"?

Is further modification LPFM49 regarding accessible and adaptable dwellings and wheelchair user dwellings justified?

Policy IS7 – Planning obligations

Does criterion c) provide a clear indication of how a decision maker should react to a proposal in accordance with paragraph 154 of the NPPF?

Participants:

Wandsworth Society

Battersea Society

Clapham Junction Action Group

Big Yellow Self Storage Co Ltd (Quod)

ANNEX 10

Letter from the Inspectors to East Lindsey District Council – 11 October 2017

Examination of East Lindsey Core Strategy and Settlement Proposals DPD
Post Hearing Advice – Main Modifications and Related Matters

Introduction

1. During the hearing sessions a number of potential main modifications were discussed. We understand that the Council has kept a running list of all of these and is currently working on a full draft. Consequently, this letter relates solely to potential main modifications that were discussed, but not confirmed, in those sessions and to the administrative arrangements relating to all potential main modifications. This is the position we outlined to the Council in the final hearing session on 4 October.

2. At this stage we are not inviting any comments about the contents of this letter or the Annex to it.

Main Modifications

3. Potential main modifications, in addition to those clearly signalled during the hearing sessions, are set out in the Annex to this letter.

Process

4. The Council should now prepare a consolidated schedule of all the potential main modifications identified during the hearing sessions and as set out in the Annex to this letter. The Council should also consider the need for any consequential changes that might be required in connection with any potential main modifications.

5. We will need to see the draft schedule and may have comments on it. We will also need to agree the final version of the schedule before it is made available for public consultation.

6. The schedule should take the form of a numbered list of main modifications with changes shown by means of strikethrough to show deleted text and new text shown in bold or underlined (or both). It should also include a column

that briefly explains the reasons for the main modifications to assist consultees. For clarity and to avoid an excessive number of main modifications, it is best to group all the changes to a single policy together as one main modification.

7. The main modifications should be expressed as changes from the Publication Version of the plans and not from the Submission Modifications Draft, the latter of which contains changes suggested by the Council (in blue and red font) which have not been consulted upon.

8. The Council should also satisfy itself that it has met the requirements for sustainability appraisal by producing an addendum to the Sustainability Appraisal of the submitted plan in relation to the potential main modifications, as appropriate. We will need to see a draft of the addendum and may have comments on it. The addendum should be published as part of the public consultation.

9. The Council has previously prepared lists of proposed *additional minor modifications.* Some of these were discussed as potential main modifications during the hearing. Any remaining *additional modifications* are a matter solely for the Council. If the Council intends to make any *additional modifications* these should be set out in a separate document from the main modifications. If the Council intends to publicise or consult on any additional modifications it should be made clear that such changes are not a matter for the Inspectors.

10. Advice on main modifications and sustainability appraisal, including on consultation is provided in *Examining Local Plans Procedural Practice*[60] (in particular, see paragraphs 5.24 to 5.28). Amongst other things this states that the scope and length of the consultation should reflect the consultation at the Regulation 19 stage (usually at least 6 weeks). It should be made clear that the consultation is only about the proposed main modifications and not about other aspects of the plan (except as outlined in para 12) and that the main modifications are put forward without prejudice to the Inspectors' final conclusions.

11. The *Procedural Practice* also states that the general expectation is that issues raised on the consultation of the draft Main Modifications will be

[60] The Planning Inspectorate – June 2016 (4th Edition v.1)

considered through the written representations process and further hearing sessions will only be scheduled exceptionally.

Other related matters

12. The following should be made available as part of the consultation:
    - Sustainability Appraisal of the proposed main modifications
    - Sustainability Appraisal − the Gypsy & Traveller full site analysis table omitted from the original document (document ED044)
    - Sustainability Appraisal − additional appraisal relating to allocations WAI407 and SYP310 (Document ED047)
    - Habitats Regulation Assessment Addendum (Document ED024)
    - Policies Map One and Two and a key to them (Documents ED027 & 028)
    - All changes to the submission Policies Map relating to main modifications or where necessary for accuracy/clarity
    - The tables listing inland commitments, coastal commitments, allocations and the five year supply trajectory (Documents ED033, 034, 035, 036, 037) − updated as outlined in the Annex
    - Housing target table (Document ED050) − updated as outlined in the Annex.
    - Any further Habitat Regulations Assessment (see para 14)

13. Updated versions of existing documents should be given suffix numbers − eg Document ED033a) and dated to clearly differentiate the updated versions.

14. The Council should consider whether the potential main modifications necessitate any further Habitat Regulations Assessment. For example, this might include the deletion of the protected open space between Chapel St Leonards and Ingoldmells (Policy SP19).

Consideration of potential main modifications

15. The views we have expressed in the hearing sessions and in this letter on potential main modifications and related policies map changes are based on the evidence before us, including the discussion that took place at the hearing sessions. However, our final conclusions on soundness and legal compliance will be provided in the report which we will produce after the consultation on the potential main modifications has been completed. In reaching our conclusions, we will take into account any representations made in response to the consultation. Consequently, the views we expressed during the hearing sessions and in this letter about soundness and

the potential main modifications which may be necessary to achieve a sound plan could alter following the consultation process.

Timetable

16. We would be grateful if the Council could now:
    - confirm a timetable through to the publication of the main modifications for consultation, including for the update to the various housing tables
    - confirm the Council's position with regard to the housing sites where there are flood risk issues, as set out in the Annex

17. Thank you for your cooperation on this. If you need any clarification, please contact us through the Programme Officer.

Jeremy Youle and Louise Phillips
Inspectors
13 October 2017

Annex to Inspectors' letter of 11 October 2017

Examination of East Lindsey Core Strategy and Settlement Proposals DPD

Post Hearing Advice – Main Modifications and Related Matters

The following are in addition to the potential main modifications signalled as being necessary at the hearing sessions. The Council should consider the need for any consequential changes as a result of these potential main modifications.

<u>Housing land requirement</u>

1. The plan should include a housing trajectory (preferably in the form of a graph) setting out:
    - the annual target between 2011 and 2031 based on the objectively assessed need figure
    - annual completions between 2011 and 2017
    - cumulative completions between 2011 and 2017
    - forecast annual delivery between 2017 and 2031

- the annual requirement between 2017 and 2031, including the recovery of the shortfall in delivery from 2011 to 2017
- the annual requirement between 2017 and 2031 plus a buffer as required by para 47/2nd bullet of the National Planning Policy Framework

2. The shortfall in housing delivery between 2011 and 2017 (identified as 1,085 dwellings) should be recovered over the remaining *lifetime* of the plan and not over an initial 5 year period, as is proposed in para 19 of the Core Strategy.

3. The additional buffer required by para 47 of the National Planning Policy Framework should be 5%, as things stand now. However, the Council should plan for the possibility that a buffer of 20% may be necessary at some time in the future.

4. During the examination, and in Document ED049, the Council accepted that changes should be made to the housing supply likely to be provided from some commitments (sites with planning permission) and allocations in the plan. The relevant evidence documents (as set out in para 12 of the letter) should now be updated and used to inform the detail of the main modifications (for example, in relation to the Core Strategy - Policy SP3, Table A on page 25, Table B on page 26 and the supporting text on pages 21-29 and in relation to the Settlements DPD – individual housing site capacities, tables A and B on pages 12-13 and the existing commitments in the Coastal Zone on page 163).

5. The documents, policy, table and supporting text referred to above will also need to be amended as a consequence of the changes to the housing allocation sites set out below. This relates to both the overall supply over the plan period and the five year supply.

6. The supply/delivery of affordable housing set out on page 36 of the Core Strategy will also need to be re-worked having regard to the proposed changes to the overall housing supply and as discussed in the hearing sessions.

7. It is important that all the numbers in these various documents and in the plans are correct and consistent with each other.

Housing allocation – Burgh le Marsh (Site BLM310)

8. The available evidence indicates that this site meets the criteria for the designation of a local wildlife site. Unless clear evidence to the contrary is available now, this site should be deleted as a housing allocation. See the comments above about quantifying the effects of this change on the housing land supply.

Housing allocations and flood risk

9. During the examination the Council confirmed that some housing allocations include land which falls within areas with a coastal flood hazard rating as set out on page 80 of the Core Strategy. Although the area mapped as green is described as being of low hazard, it is nevertheless an area which could be affected by shallow flowing or deep standing water. We have not been made aware of any evidence to indicate that a sequential test has been applied to justify the allocation of these sites. The Strategic Flood Risk Assessment indicates that the area of search for any sequential test is the rest of the district outside these hazard zones.

10. Some of the allocations which the Council has provisionally identified as being affected appear to lie outside any of the four hazard zones. However, some sites fall wholly or partly within the hazard zones.
11. Unless there is any strong evidence available now to indicate otherwise, the allocations that fall wholly or mainly within any of the four hazard zones do not appear to be justified in line with sequential test requirements, and so should be deleted from the plan. These appear to include:
    - Marshchapel - sites MAR 217, 226, 300 and 304
    - Grainthorpe – site GRA 211

12. The Council should now assess whether any of the sites which lie partially within any of the four hazard zones can feasibly be developed using only land outside of the zones and, if so, whether any changes need to be made to the housing capacity of these individual sites (as stated in the Settlement Proposals DPD). These appear to include:
    - Tetney – sites TN 311 and 308
    - Grainthorpe – site GRA 211
    - Hogsthorpe – sites HOG 306 and 309
    - Friskney – site FRI 321

13. Please see the comments above about quantifying the effects of this change on the housing land supply.

Jeremy Youle and Louise Phillips
Inspectors
11 October

ANNEX 11

Core Strategy Review and Site Allocations & Policies Examination

Inspector: Malcolm Rivett BA (Hons) MSc MRTPI

Programme Officer: Mrs Annette Feeney annette.feeney@ipswich.gov.uk

Tel: 01473 432006 Mobile: 07775 771026

Programme Officer: Mrs Annette Feeney

c/o Ipswich Borough Council, Grafton House, 15-17 Russell Road, Ipswich

Suffolk. IP1 2DE

Mr R Hobbs
Planning Policy Team Leader

SENT VIA EMAIL

xx April 2016

Dear Mr Hobbs

Ipswich Local Plan Examination (Core Strategy and Policies Development Plan Document Review and Site Allocations and Policies Development Plan Document incorporating the IP-ONE Area Action Plan) - **Inspector's Stage 1 Interim Findings**

1. *Introduction*

1.1 Following the completion of the recent hearing sessions, and based on all that I have now read and heard, I write to set out my interim findings on the matters discussed at Stage 1 of the Examination. However, I emphasise that these are not my final conclusions on the plans and that these findings may be subject to change dependent upon, amongst other things, the evidence put forward at Stage 2 of the Examination and the results of Sustainability Appraisal,

Habitats Regulations Assessment and consultation on any proposed modifications.

1.2 In summary I conclude that, subject to modifications in respect of a number of matters discussed at the hearings, there is sufficient prospect of the plans being found legally compliant and sound, in relation to the strategic matters so far discussed, to justify progressing to Stage 2 of the Examination. However, this is not a guarantee that the plans will ultimately be found sound.

2. *Duty to Co-operate*

2.1 The Council's *Statement of Compliance with the Duty to Co-operate* details the organisations with which it engaged in the preparation of the plans including, amongst others, Suffolk County Council, Babergh, Mid Suffolk and Suffolk Coastal district councils, Historic England, Natural England and the Environment Agency. Complementing the engagement with the other local authorities is the Council's membership of the Ipswich Policy Area Board, established in 2007, to provide a forum in which the authorities can work together on a range of issues and, in particular, to deliver housing and employment growth targets and to coordinate the delivery of necessary infrastructure.

2.2 The *Statement of Compliance* document also identifies nine strategic matters in relation to which the Council has engaged with others in the preparation of the plans: housing provision; gypsy and traveller accommodation; employment needs; transport infrastructure; flood risk; protection of heritage assets; Special Protection Area impacts; green infrastructure and co-operation with the Marine Management Organisation. For each matter the document details the management and working arrangements which have guided the engagement, the evidence base used and the outcome of the engagement and the ongoing co-operation. A notable aspect of the partnership working is the preparation/commissioning by the Council of studies jointly with its partners, including the *Strategic Housing Market Assessment* (2012), the *Ipswich Housing Market Area Population and Household Projections* (2013), the *Gypsy, Traveller and Travelling Showpeople Accommodation Assessment* (2013) and the *Employment Needs Assessment* (2016).

2.3 There is evidence of a high level of engagement with others by the Council in preparing the plans and I note that none of the bodies with which the Council is required to engage in pursuit of the Duty to Co-operate has suggested that Ipswich Borough has not adequately discharged the duty. Moreover, there are written statements from a number of these bodies confirming their belief that the Council has complied with the duty. Nonetheless, there are a significant

number of representors who contend that the Council has failed to adequately discharge the duty, particularly in relation to unmet housing needs and infrastructure provision.

2.4 Fundamentally it has been argued that Ipswich Council did not alert the neighbouring authorities about its likely inability to fully provide for its own housing needs early enough or with sufficient emphasis, and there is no

evidence of a specific communication from the Council on this particular point. However, at the hearings the neighbouring authorities confirmed that they had been aware of Ipswich's difficulties in this respect for a number of years, and certainly prior to the submission of the plans for examination. Moreover, whilst it is the case that the brief minutes of the Ipswich Policy Area (IPA) Board meetings do not provide explicit evidence that Ipswich's potential unmet needs have been discussed in detail, it is clear that the Board was addressing the broad issue of cross-boundary housing in its resolution of November 2013 that the objectively-assessed needs of the IPA should be met within the IPA. Furthermore, the context for this resolution is agreement, also, that the IPA should use the population and household forecasting scenarios employed by Ipswich Council (the Luton Report of September 2013) – ie that which forms the basis of the objectively-assessed need for housing set out in the submitted plans. To my mind this suggests that the IPA Board had been made aware of the housing supply situation in Ipswich shortly after the relevant evidence had been prepared/published.

2.5 It is also contended that through the Examination of the Babergh Core Strategy, Ipswich Council failed to seek to secure provision for the Borough's potential unmet housing needs. Whilst there is little detailed evidence before me on this issue, I note that Babergh Core Strategy was submitted for Examination in November 2012 and the main hearing sessions were held in March 2013, many months before the September 2013 publication of the objectively-assessed housing need for Ipswich on which basis unmet housing needs in the town have been identified. Whilst the timing is unfortunate I am, thus, not persuaded that this is evidence of Ipswich Council having failed to discharge the Duty to Co-operate.

2.6 There are strongly held objections to the plans in terms of the infrastructure which they identify to be necessary to the delivery of new development, in particular housing. This is a matter which will be discussed in detail at Stage 2 of the Examination. However, and whether or not there is disagreement between Ipswich and Suffolk County councils concerning infrastructure requirements, there is no convincing evidence to indicate that

Ipswich Council has not actively engaged with relevant bodies in connection with infrastructure requirements in the preparation of the plans.

2.7 As an outcome of the Council's co-operation with other bodies the five local authorities have prepared a Memorandum of Understanding which I gather is shortly to be formally considered for "signing" by each Council. The understanding commits the authorities to agree objectively-assessed housing needs for the Ipswich Housing Market Area and employment needs for the Ipswich Functional Economic Area; to identify broad locations to accommodate forecast growth; to ensure implementation of mitigation measures required as a result of Habitats Regulations Assessment and to prioritise infrastructure delivery. The understanding states that the joint work will take the form of a joint or aligned local plan(s) review and sets out a timetable for its preparation, starting in 2016 with adoption of the plan(s) envisaged in late 2019.

2.8 Given the enactment of the Duty to Co-operate several years ago, work on joint/aligned local plans would, ideally, be already well under-way or complete. However, there is no persuasive evidence to indicate that the time taken to reach the current point is primarily as a result of any action or inaction of Ipswich Borough Council.

2.9 It is almost always the case that a body could have done more than it did in discharging a legal duty. However, considered in the round, I am satisfied that the Council engaged constructively, actively and on an ongoing basis with all relevant organisations on strategic matters of relevance to the plans' preparation and that, thus, it has complied with the Duty to Co-operate.

3. *Unmet Housing Needs*

3.1 The Core Strategy Review, as submitted, indicates that due to the lack of undeveloped land within the Borough a maximum of 9772 additional dwellings could be accommodated within Ipswich itself during the plan period. I note representations contend that some sites not allocated in the plans could add to this figure and that there are other sites which have been inappropriately allocated for housing. These are matters to be discussed at Stage 2 of the Examination and it is therefore possible that the 9772 figure could change. However, I have seen no evidence to indicate that Ipswich could appropriately accommodate substantially more dwellings in the plan period than the 9772 figure.

3.2 I consider the objectively-assessed need (OAN) for housing in the Borough in detail in section 4 below but, based on the above, Ipswich is not able to accommodate entirely itself the 'starting point' figure of 10435 dwellings indicated by the 2012-based DCLG household projections or the 13550 dwellings

contended by the Council to be the OAN for the Borough. It is therefore likely that during the period to 2031 that there will be housing needs in Ipswich which cannot be met in the Borough.

3.3 With reference to the preparation of joint or aligned development plan documents (in line with the Memorandum of Understanding), the submitted plans (policies CS6 and CS7) indicate that the Council will work with neighbouring local authorities to address housing need later in the plan period (ie the unmet 3778 dwellings based on the contended OAN of 13550). Representations have suggested that the plans are insufficiently clear about where and when this housing need will be provided or the arrangements for determining this. Moreover, it has been argued that, to be sound, the current plans should resolve this matter rather than leave it for a plan review or subsequent DPDs.

3.4 However, the submitted plans (or any other plans for Ipswich alone) cannot make binding requirements on authorities other than Ipswich to allocate sites for housing in their areas. Ideally the aligned/joint plans which the authorities are working towards producing to address needs across the Ipswich Policy Area would be in place now, but they are not. Furthermore, aside from the issue of unmet housing need, and whilst I note some Examination participants suggested otherwise, I see there being considerable benefit in getting the submitted plans, subject to necessary modifications, adopted as soon as possible.

3.5 Amongst other things the Site Allocations plan allocates land for more than 1900 dwellings and for around 49ha of employment development within Ipswich. The Core Strategy allocates additional land for housing at Ipswich Garden Suburb, enabling around 3500 dwellings to come forward at this location during the plan period. Moreover, together the documents would provide up to date development management policies, to secure high quality development supported by the necessary infrastructure, in line with the *National Planning Policy Framework*. They would also allow for the adoption of (and thus full weight to be given to) the, currently draft, *Ipswich Garden Suburb Supplementary Planning* Document, which appears to have garnered broad support from developers and the local community. I note there are representations that some of the allocations and development management policies are inappropriate; these matters will be considered at Stage 2 of the Examination and the allocations and/or policies may need to be subject to modification. However the resulting plans, if adopted, would provide much more certainty for both developers and the local community than would exist in their absence. And, whilst it is not impossible that the envisaged development, appropriately designed and supported by the necessary infrastructure, would

come forward without the plans in place, it is more likely that it will do so if the plans are adopted.

3.6 Of course it would be inappropriate to plan for the housing (and other development) which can be provided in Ipswich itself at the expense of ensuring that arrangements are in place to provide for any unmet housing needs. I have therefore considered whether or not it is likely that agreed arrangements to provide for unmet needs are likely to be secured more quickly if the submitted plans were not to be adopted. As has been contended by some it is of course likely that the absence (in adopted form) of the submitted plans would give Ipswich Borough Council greater incentive to push for work on agreeing the extent of, and proposals to address, unmet housing needs across the Ipswich Policy Area to be finalised as soon as possible. However, Ipswich is only one of at least four authorities which need to agree the way forward and it appears to me that, however quickly Ipswich wishes to proceed, proposals for providing for unmet housing needs are unlikely to be resolved significantly more quickly than in the timescales set out for the production of joint/aligned development plans in the Memorandum of Understanding.

3.7 At the hearings it was suggested that the plans could be withdrawn, the cited shortcomings addressed and the plans resubmitted for Examination within a matter of months. However, there is little to suggest that this is a realistic proposition, particularly in terms of fully resolving the fundamental issue of unmet needs.

3.8 In essence, given the circumstances which the Ipswich Policy Area authorities currently find themselves in, there would be much to gain from the adoption of the submitted plans (subject to any necessary modifications) in terms of encouraging high quality development to come forward within Ipswich itself. At the same time there would be likely to be little to lose in terms of getting firm proposals in place to address potential unmet housing needs. Consequently, I conclude that the plans' broad approach to dealing with unmet housing needs is likely to be capable of being found sound. However, to be effective, the plans should include a policy which states in detail what Ipswich Council will do (and the timescales in which it will do it) to ensure that the extent of unmet housing needs are jointly assessed and that proposals for meeting the needs are put in place as quickly as possible.

4. *Objectively-Assessed Need for Housing*

4.1 The adopted Ipswich Core Strategy (2011-2027) sets out a housing requirement figure of 700 dwellings per year (dpa). The 'starting point' for the

consideration of the objectively-assessed need (OAN) for housing for the Review of the Core Strategy is the most recent (2012-based) DCLG Household Projections. The Council has stated that these indicate a requirement for 10,435 new dwellings across the 2011-2031 plan period, an average of 522 dpa.

4.2 I share the concern of the Council and others that the 2012-based forecasts reflect trends of unusually low levels of inward migration and household formation during the recession. Consequently, the migration trends of the 2006-2011 period and the household formation rates indicated in the DCLG 2008-based projections may, at the present time, more appropriately reflect likely demographic trends during the period to 2031. On this basis the Council contends that the OAN for the plan period is 13550, or 677 dpa, although I note that this forecast does not take account of the potential for a further increase in migration from London to Ipswich beyond that which occurred in the 2006-2011 period. Moreover, as discussed below, a housing requirement based on this figure would not necessarily appropriately align housing with employment in the Borough.

4.3 I also have a number of concerns with the Council's conclusion that the evidence included in the 2012 SHMA does not indicate the need for an adjustment to OAN to reflect market signals. Firstly, it is not clear that the SHMA, prepared before the publication of the Planning Practice Guidance (PPG), specifically considered whether or not an adjustment to OAN was necessary in

the light of the market signals evidence. Secondly, the SHMA's data is at least 5 years old and in terms of the important issue of overcrowding is based on the 2001 Census and there is no persuasive evidence to indicate that it remains relevant. Whilst the Council has submitted more recent evidence on the number of residential sales there is no up to date evidence on prices, rents or affordability to support the contention that an adjustment to OAN to reflect market signals is not necessary, notwithstanding that the OAN proposed by the Council is already uplifted from the 'starting point' of the 2012-based household projections.

4.4 Furthermore, based on the SHMA the Council indicates that there is a requirement for 584 affordable dwellings per year throughout the plan period. It is clear that the plans' 15% affordable housing requirement (35% for the Ipswich Garden Suburb) would not deliver this figure based on an overall housing requirement figure of 677 dpa. The PPG indicates that in such circumstances an increase in the total housing figures should be considered where it could help deliver the required number of affordable homes. At the hearing the Council stated that it had not formally given this matter consideration.

4.5 In line with guidance in the PPG the Council has considered its contended, past trends-based, OAN of 677 dpa against the plan period forecast/target for employment growth derived from the East of England Forecasting Model. It concludes that the plans would provide more than sufficient housing to accommodate the households necessary to occupy the forecast 12500 (625 per year on average) increase in jobs in the Borough to 2031. Having regard to the comments of some representors, the reported decline in the number of jobs in Ipswich in the 2009 – 2013 period and the average of only 151 additional jobs created in each of the first two years of the plan period, the 12500 new jobs forecast/target is, to my mind, a challenging one. There is also a striking difference between the decline in jobs in the 2009 – 2013 period in Ipswich and the growth in neighbouring Babergh (6.8% increase), Mid Suffolk (4.1% increase) and Suffolk Coastal (4.2% increase). However, the East of England Forecasting Model is a respected analysis and there is no convincing evidence to indicate that in the 15 years to 2031 the forecast 12500 increase in jobs in Ipswich will prove to be wholly unrealistic.

4.6 Moreover, it is clear that since 2001 (and potentially before that) an increasing proportion of Ipswich's rising population has been working outside the Borough. Consequently, even if the number of jobs in Ipswich does not increase as forecast by the plans, at the present time there is very little evidence to indicate that the plan period requirement for housing will be below the trend-based 'starting point' figure of 10435 dwellings, contrary to the contention of some representors. However, whilst it is entirely sensible to seek to align new housing and jobs, it would be a nonsense for an overly optimistic forecast of jobs growth in the Borough to result in an OAN for Ipswich which cannot, in any event, be provided for in the town. Consequently, there is a clear need for careful analysis of the alignment of realistic forecasts for employment and housing in the joint planning work about to commence for the Ipswich Policy Area and Ipswich Functional Economic Area.

4.7 In summary I conclude that in order to determine an up-to-date and rigorous objectively-assessed need for housing in Ipswich the Council would need to undertake more work, particularly in respect of likely trends in migration from London, the appropriateness of adjustments to reflect up to date evidence on market signals and to help deliver the identified need for affordable housing and to ensure that housing provision in Ipswich is appropriately aligned with likely changes in the number of jobs in the Borough. Nonetheless, for the reasons set out above, I conclude that at the present time the OAN is at least the 'starting point' figure of 10435 (522 dpa), implied by the most recent DCLG household projections and that it is potentially substantially more.

4.8 However, the plans which are the subject of this Examination can only provide for housing within Ipswich itself and, as detailed in section 3 above, the evidence shows that it is unlikely that even the 'starting point' OAN figure of 10435 dwellings can be provided for in Ipswich during the plan period. Moreover, fundamental to providing for the housing needs which Ipswich itself cannot meet is the work about to commence on preparing joint/aligned development plan(s) for the Ipswich Policy Area. Crucial to this will be the preparation of an up-to-date OAN figure for the Ipswich Housing Market Area and agreed arrangements for the distribution of housing needs which individual authorities cannot themselves meet. Consequently (and having regard to the discussions on this issue at the hearings), I conclude that there would be little point in Ipswich Council undertaking more work to better determine the OAN for Ipswich alone at this stage.

4.9 In the light of this I recommend that policy CS7 (and elsewhere in the plans as relevant) is modified to reflect the situation I have outlined above and to specifically state that the objectively-assessed need for housing **in Ipswich is "at least the 'starting point' of 10435 dwellings** indicated by the 2012-**based DCLG projections".**

5. *Provision for Gypsies and Travellers*

5.1 The *2013 Gypsy, Traveller and Travelling Showpeople Accommodation Assessment*, prepared jointly for the Council and its partner authorities, provides robust evidence of the need for additional pitches for gypsies and travellers identified in the supporting text of policy CS11. However, for the sake of clarity, to be effective and to ensure that accommodation for gypsies and travellers is planned for on the same basis as that for the settled community, a modification is necessary to include the need figure in policy CS11 itself.

5.2 The Council has indicated that it wishes to delete (by modification) policy SP4 in the light of an allocation now being deemed inappropriate. This particular matter will be discussed at Stage 2 of the Examination but, if the modification is to be made, it appears that a further modification is likely to be necessary to retain the element of policy SP4 which protects existing sites used by gypsies and travellers.

6. *Five Year Supply of Housing Land*

6.1 At the hearings the Council confirmed that it cannot demonstrate a five year supply of deliverable housing land against the submitted plans' housing needs figure of 13550 dwellings or even against the 9772 dwellings figure which the Council contends can be accommodated in Ipswich within the plan period as

a whole. As detailed in paragraph 3.1 there is, in effect, some challenge to the 9772 figure which will be considered at Stage 2 of the Examination. However, notwithstanding this, it is unlikely that a five year supply will be able to be demonstrated against an OAN of "at least 10435". The Council states that beyond the sites which have been the subject of representation in the Examination (to be considered at Stage 2) it is not aware of any others in the Borough which could feasibly contribute in any significant way to the supply of housing land.

6.2 The Council finds itself in difficult and relatively unusual circumstances in this respect, primarily due to the lack of undeveloped land within the Borough boundary. Given this I conclude that the Council's likely inability to be able to demonstrate a five year supply of housing, in the terms indicated above, is unlikely to render the plans unsound. However, in the interests of clarity and effectiveness, it is necessary for the plans to explicitly reference the matter of five year supply and its implications and to include a policy setting out the approach the Council will take, in the light of the housing supply situation, to determining any application for housing, not on an allocated site, which does happen to come forward. A modification to this effect is therefore required, although it will be necessary to discuss at the Stage 2 Hearings the appropriate basis for the calculation of five year supply.

7. *Employment Land Needs*

7.1 As explained in section 4 recent trends suggest that the target of creating 12500 new jobs in Ipswich during the plan period is a challenging, albeit not wholly unrealistic, one. However, given that the Framework identifies that it is one of the key roles of planning to contribute towards building a strong responsive and competitive economy, I consider the target to be a soundly based one, albeit that it may need to be subject to review as part of work on the joint/aligned development plan(s) and/or if progress towards achieving the target continues to be slow.

7.2 The recently produced *Ipswich and Waveney Economic Areas Employment Land Needs Assessment* identifies that 23.5 ha (net) of additional employment land is likely to be necessary to accommodate the 12500 new jobs in Ipswich, and there is nothing convincing to indicate otherwise. The report notes that a higher "gross" requirement is likely to be necessary for planning purposes, to allow a safety margin and for the replacement of any losses of employment land. However, I question whether this evidence supports the provision of policy CS13 that at least 30ha of land for B1, B2 and B8 will be allocated through the Site Allocations plan in addition to safeguarding of 10ha of land (for the same uses)

at Futura Park as a Strategic Employment Site – a total nearly double the identified 23.5 ha net requirement. I therefore request that the Council considers whether or not a modification to this policy is necessary in the light of the Employment Land Needs Assessment; the matter to be discussed again at the Stage 2 Hearings along with the soundness of the individual employment land allocations.

8. *Legal Compliance and Other Matters*

8.1 As detailed in section 2 I am satisfied that the Council has satisfactorily discharged the Duty to Co-operate in preparing the plans. Whilst other aspects of legal compliance were discussed at the Stage 1 hearings I cannot reach a conclusion on them until the relevant matters have been discussed in detail at Stage 2. However, at this point I am satisfied that there is not evidence of any fundamental legal compliance failing which could not be addressed by either modifications to the plans or further Sustainability Appraisal work being undertaken if necessary.

8.2 A number of other issues were raised by participants at the hearings which related primarily to matters to be considered in detail at Stage 2 of the Examination. I am therefore not commenting further on these points at this stage.

9. *Conclusions*

9.1 In the light of the above I conclude that, subject to the modifications detailed above, there is sufficient prospect of the plans being found legally compliant and sound, in relation to the strategic matters so far discussed, to justify progressing to Stage 2 of the Examination. However, I once again emphasise that this is not a guarantee that the plans will ultimately be found sound either in respect of the issues already discussed or those which will be considered at Stage 2.

9.2 Through Annette Feeney, the Programme Officer, I will now put in place arrangements for the Stage 2 hearing sessions to take place as soon as practicable and further details will be provided in due course. In the meantime I request the Council to consider and prepare the draft modifications to the plans I have so far indicated are likely to be necessary.

Yours sincerely

Malcolm Rivett

INSPECTOR

ANNEX 12

WORDING TO REPRESENTORS WHO MAY WISH TO APPEAR AT HEARINGS

The Inspector's *Matters, Issues and Questions (Stage 3)* will form the basis of the discussion at the hearing sessions. If you have any comments on these (for example, because you feel there may be a significant omission), you should contact the Programme Officer by the 5pm on Friday 28 October.

Only those who have made representations seeking to change the plan have a right to appear before, and be heard by, the Inspector.[1] However, it is important to stress that written representations carry the same weight as those made orally at a hearing session. Consequently, participation at a hearing session is only necessary if, in the light of the Inspector's *Matter, Issues and Questions*, you have specific points you wish to contribute.

If you have a right to be heard, and you wish to exercise that right, you should contact the Programme Officer by 5pm on Wednesday 2 November indicating the appropriate Matter and the session you wish to attend (see the draft Programme). You need to do this regardless of what you may have indicated on the representation form. Please note that if you do not contact the Programme Officer by that date it will be assumed that you do not wish to appear and be heard and you will not be listed as a participant. You should only request to be heard at a hearing session if you have made a relevant representation seeking a change to the plan. However, the hearing sessions are open for anyone to observe

It is not usual for those supporting the Local Plan to be heard at a hearing session, unless specifically invited by the Inspector. This is because S20 of the Act states that the Council must not submit the plan for examination unless they think it is ready for independent examination and para 182 of the Framework states that the authority should submit a plan which it considers is sound. It is therefore for those seeking changes to the Plan to demonstrate why they consider the Plan is unsound and what changes may be necessary to make it sound.

[1] S20(6) of the PCPA 2004

Version 1 – 24 June 2015

ANNEX 13

South Norfolk – Wymondham Area Action Plan, Site Specific Allocations & Policies Document and Development Management Policies Document **("the Plan")**

PROPOSED MAIN MODIFICATIONS AND SUSTAINABILITY APPRAISAL

Agenda for the hearing session with issues and questions

Please note: the hearing will not re-visit matters already discussed at previous hearing sessions, except where the proposed main modifications or sustainability appraisal documents have a bearing.

MORNING SESSION 9.30am-1pm

Proposed modification DM MM71

Policy DM 4.8

Strategic Gap

Participants: Barton Willmore[61]

Does the proposed modification to the strategic gap boundary to the east of Wymondham, as advanced through DM MM71, justify any further changes to the boundary? Is the boundary justified?

Does the recent planning permission relating to the Elm Farm Business Park have any bearing on the boundary to the gap?

Proposed modifications DM MM53 and DM 54

Proposed Policy DM3.18

[61] On behalf of Landstock Estates Ltd, Landowners Group Ltd, United Business and Leisure (Properties) Ltd and Wymondham Rugby Club

Secondary Education capacity in the catchment of Wymondham High School

Participants: Barton Willmore, Carter Jonas LLP[62], Mr Guy Mitchell, Wymondham Town Council, Jan Raynsford

Is the policy necessary to make the plan sound? Is the policy positively prepared and justified?

The Statement of Common Ground (Document E11) included school places modelling for years 7-11 based on pupil multipliers of 17.3/100 new dwellings, 24.5 and 30.5. However, the main modifications consultation response from Barton Wilmore[63] refers to a Norfolk County Council multiplier of 27.5. What status does this multiplier have and what bearing, if any, would using it have on school places planning in Wymondham and the distribution of the 'floating 1,800'? [see also item on SA Addendum]

Would the policy be effective?

Is it appropriate for the policy to refer to the catchment area of the Wymondham High School Academy?

If so, should the catchment be defined in the supporting text (for example, by reference to named settlements)?

The supporting text states that housing development likely to generate significant additional demand is defined as 20 houses or more. Is that figure justified?

The supporting text states that a reasonable travel distance will vary depending on the circumstances but that a site less than 3 miles away from a high school would normally be considered to be within a reasonable travel distance, particularly when accessible by walking and cycling. Is this justified?

Proposed modification WAAP MM4

Various changes to refer to 2,200 homes as a minimum requirement in Wymondham rather than a maximum, including para 5.4

Participants: Barton Willmore, Carter Jonas LLP, Mr Guy Mitchell, Jan Raynsford

[62] On behalf of Hallam Land Management

[63] Para 2.20 of representation

Is the reference to constraints which limit the overall amount of housing above this number (2,200) justified?

Proposed modification WAAP MM27, DM MM5 and SITES MM2

Commitment to an early review of the Plan

Participants: Carter Jonas LLP, Norfolk County Council

Is the commitment to an early review justified?

AFTERNOON SESSION 2pm-5pm

Sustainabilty Appraisal Addendum of the 'floating 1,800'[64]

Participants: Barton Willmore, Carter Jonas LLP, Mr Guy Mitchell, Mr Simon Mitchell

Has there been an appraisal of the sustainability of the proposals in each document? Has the SA Addendum considered reasonable alternatives for the spatial distribution of the 'floating 1,800'?

Does the distribution of the 1,800 dwellings accord with Joint Core Strategy Policy 9 ("in accordance with the settlement hierarchy and local environmental and servicing considerations") and JCS para 6.6?

Are the subdivisions of site options into individual 'reasonable site' parcels in Wymondham appropriate and is the assessment of each parcel robust?

Jeremy Youle

INSPECTOR

9/7/15 version 2

[64] Joint Core Strategy Policy 9 – South Norfolk smaller sites in Norwich Policy Area and possible additions to named growth locations: 1,800 dwellings

ANNEX 14
Data protection and local plans

The General Data Protection Regulations take effect from 25 May 2018. It aims to increase the control that individuals have over their personal data and the transparency and accountability of bodies in their use of personal data. Fines for non–compliance can be significant.

The main area that affects Inspectors examining a local plan is documentation (mainly representations) which includes contact and other personal details relating to individuals.

After the High Court challenge period has expired (6 weeks after the adoption of the local plan) or after the conclusion of any such challenge, any representations must be appropriately disposed of. The responsibility to do this lies with the examining Inspector.

It is not acceptable to dispose of these documents as domestic waste or at a local recycling centre, because this will not be secure.

You 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
- Post them to the LP team who will do the same

Details of how to arrange for parcels to be collected from your home may be found in the link below:-

https://intranet.planninginspectorate.gov.uk/task/book-a-courier/book-a-collection-from-home-and-cathays-park/

Electronic copies

- If you have stored any representations on your computer/laptop/tablet, these should be wiped following the expiry of the High Court challenge period with the memory stick or CD returned to the office for disposal.
- Likewise, any email exchanges with the Programme Officer or the office should be deleted following the expiry of the High Court challenge period for that particular plan (or after the conclusion of any such challenge).

More information on the subject can be found on the Intranet at the link below:-

https://intranet.planninginspectorate.gov.uk/task/data-protection-gdpr/

ANNEX 15

Local plans and the Revised (July 2018) Framework – Frequently Asked Questions

This note provides advice for Inspectors. It has been prepared in liaison with MHCLG.

Q. The plan has been submitted for examination under the transitional arrangements in para 214. Does this mean that policy in the new Framework cannot apply?

A. The NPPF para 214 states that the policies in the previous Framework will apply for the purpose of examining plans, where those plans are submitted on or before 24 January 2019. It does not state that LPAs can mix policies from the previous and current Frameworks. But equally it does not go as far as saying that the new Framework *cannot* apply in any circumstances.

It is possible that there could be some circumstances where the LPA seeks to 'future-proof' a policy to reduce the risk it might be regarded as out of date on adoption. This might also emerge as an issue when considering main modifications.

In such cases, you should consider whether, in the specific circumstances, it would be reasonable and pragmatic for the policy to be consistent with the new Framework rather than the previous one, taking into account the arguments which have been put to you. Overall, this is most likely to be achievable where the issue relates to a development management policy. However, any main modification must be necessary to help achieve a sound plan.

See also the question below about affordable housing.

Q. Notwithstanding the transitional arrangements would it be reasonable for a plan to be subject to a main modification to reflect the affordable housing threshold in the new Framework?

A. The new Framework (para 63) states that affordable housing provision should not be sought for residential developments that are not major developments.[65] Major developments are defined in NPPF Annex 2 as, for housing, 10 or more homes, or with a site area of greater than 0.5 hectares. Consequently, affordable housing should not be sought for developments of 9 units or fewer[66].

However, the Written Ministerial Statement of 28 November 2014 and the related PPG version both state that contributions should not be sought from developments of 10 units or fewer.

In this case it could plausibly be argued that it would be pragmatic and reasonable for a plan submitted under the transitional arrangements to be in line with the Revised Framework. This would lessen the prospect of it being argued in planning applications and appeals that the policy is out of date on adoption.

Q. Can LPAs use the standard method for assessing Local Housing Need (LHN) when the transitional arrangements in the Revised NPPF apply (para 214)?

A. GOV.UK states (emphasis applied):

Where plans are being prepared under the transitional arrangements set out in Annex 1 to the revised National Planning Policy Framework, the policies in the previous version of the framework published in 2012 will continue to apply, as will any previous guidance which has been superseded since the new framework was published in July 2018.

The previous (2012) NPPF requires the objectively assessed need (OAN) for housing to be assessed, and the relevant version of the PPG set out a method for doing this. It stated (emphasis applied):

There is no one methodological approach or use of a particular dataset(s) that will provide a definitive assessment of development need. But the use of this standard methodology set out in this guidance is strongly recommended because it will ensure that the assessment findings are transparently prepared. Local planning authorities may consider departing from the methodology, but they should explain why their particular local circumstances have led them to adopt a different approach where this is

[65] other than in designated rural areas where policies may set a threshold of 5 units or lower.

[66] Unless the site area exceeds 0.5 hectares.

the case. The assessment should be thorough but proportionate, building where possible on existing information sources outlined within the guidance.

In this context, LPAs could, in principle, use the LHN method. However, they would need to provide justification to demonstrate that it provides a reasonable objective assessment of housing needs in the circumstances.

You should also consider the following if you need to deal with this issue:

1. Revised Framework (2018) para 60 refers to a local housing need assessment, conducted using the standard method in national planning practice guidance, being used to determine the *minimum* number of homes needed. (emphasis applied)

2. The PPG on *Housing need assessment* was updated on 13 September 2018 and provides guidance on LHN.

3. The *Government response to the draft revised National Planning Policy Framework consultation* (question 14) states that it intends to consult on adjusting the method after the household projections are released in September 2018. Extract below (also now set out in the 13 Sept 2018 PPG):

   A number of responses to this question provided comment on the proposed local housing need method. The Government is aware that lower than previously forecast population projections have an impact on the outputs associated with the method. Specifically it is noted that the revised projections are likely to result in the minimum need numbers generated by the method being subject to a significant reduction, once the relevant household projection figures are released in September.

   In the housing White Paper the Government was clear that reforms set out (which included the introduction of a standard method for assessing housing need) should lead to more homes being built. In order to ensure that the outputs associated with the method are consistent with this, we will consider adjusting the method after the household projections are released in September. We will consult on the specific details of any change at that time.

   It should be noted that the intention is to consider adjusting the method to ensure that the starting point in the plan-making process is consistent in aggregate with the proposals in *Planning for the right homes in the right places* consultation and continues to be consistent with ensuring that 300,000 homes are built per year by the mid-2020s.

Q. Has there been a change in national planning policy for accessible housing and what implications might this have for examinations?

A. Yes there has been a change in policy and this is flagged in the Government response to the revised draft NPPF consultation:

…. we have strengthened the policy approach to accessible housing by setting out an expectation that planning policies for housing should make use of the Government's optional technical standards for accessible and adaptable housing (question 29)

The change can be seen by comparing the wording in the WMS of 2015 with that in the new Framework *(emphasis applied in the extracts below):*

Previously the WMS of March 2015 said that:

"The optional new national technical standards should only be required through any new Local Plan policies if they address a clearly evidenced need, and where their impact on viability has been considered …"

And the relevant PPG on Housing Technical Standards states:

"Local planning authorities have the option to set additional technical requirements exceeding the minimum standards required by Building Regulations."

So, LPAs had the *option* under the previous Framework of applying the higher standards, but could only do so if justified by need and viability tested.

The new NPPF (para 61) states that the size, type and tenure of housing needed for different groups in the community should be assessed and reflected in planning policies (including for people with disabilities). Footnote 46 then states:

"Planning policies for housing should make use of the Government's optional technical standards for accessible and adaptable housing, where this would address an identified need for such properties."

So, if there is a need, the new Framework states that use *should* be made of the optional standards. Therefore, there is a change in policy.

It follows from this that if the LPA has identified a need, but has not addressed this making use of the optional standards, that could be a soundness issue. The LPA would then need to consider how that could be resolved.

However, this change only applies to local plans submitted after the transitional arrangements have ended in January 2019.

Q. Are there any transitional arrangements for CIL examinations?

A. There are no transitional arrangements. Consequently, the new Framework and the July 2018 PPG on viability apply now.

The examiner may consider (if necessary having sought the views of the charging authority) whether any assessment prepared prior to publication of the current NPPF and viability guidance generally accords with that policy/guidance, applying reasonable judgement so as to not unnecessarily delay examinations.

The Planning Inspectorate

Local Plan Examinations

Role of the Inspector Training Manual Local Plans Chapter and Introduction

Not yet updated to reflect December 2023 Framework (NPPF)

What's new since the last version

Changes were made on 10 June 2021:

- A new section covering the purpose of the Local Plans Chapter, which is to provide reliable and up-to-date advice to Inspectors on the conduct of local plan casework but does not seek to interpret national policy.

This topic section of the Local Plan Examinations chapter of the Inspector Training Manual (ITM) applies to the examination of plans submitted on or after **25 January 2019**. It provides advice on the role of the Inspector in the examination process. There is a separate Local Plan Examinations chapter for plans submitted for examination prior to that date (though please note that chapter is no longer being updated).

Other recent updates

- None.

For earlier updates please see the Change Log in the Library.

Contents

1. To provide reliable and up-to-date advice to Inspectors on the conduct of local plan casework.

2. It is intended to be used both as the basis for training Inspectors in local plan casework, and as a source of advice for all local plan Inspectors to refer to while carrying out examinations.

3. It includes advice on the practical and procedural aspects of local plan casework (supplementing the advice in the Procedure Guide for Local Plan Examinations), and advice on how to deal with the main soundness and legal compliance issues that arise in local plan examinations.

4. It provides advice on the **application** of national planning policy and guidance in local plan casework, but **does not seek to interpret** national policy, in view of the legal principle that the interpretation of national policy is a matter for the courts. Nor does it seek to fill in any perceived gaps in national policy or guidance.

5. It does not tell Inspectors what conclusions they should reach on any issues they consider may be relevant to the soundness and legal compliance when examining a particular local plan. The conclusions Inspectors reach are based on their own professional judgment and the evidence before them in each examination, within the framework of national planning policy and guidance.

6. The advice it provides should be as detailed and practical as is possible, while recognising that the circumstances of each examination are different, and it is not feasible to provide advice on every situation or issue that might arise. In this way it should promote a reasonable degree of consistency in the approach Inspectors take, while not constraining their scope to respond creatively to circumstances, provided that the general principles of its advice are kept in mind.

7. It should be kept under regular review to ensure that it remains up-to-date. As well as incorporating changes in legislation and in national policy and guidance, the regular reviews should incorporate lessons learned from reviewing QA feedback, High Court judgments, inspector surveys and other relevant sources.

8. It sits alongside, and is intended to be consistent with, the Procedure Guide for Local Plan Examinations, which is published externally on the GOV.UK website.

Introduction

9. This version of the Local Plans chapter provides advice on the examination of plans submitted on or after **25 January 2019**. It has been revised and updated to accord with the current National Planning Policy Framework (published on 20 July 2021). It also accords with any revisions to the Planning Practice Guidance made after the new NPPF was published.

10. For advice on examining plans submitted before 25 January 2019, please refer to the other version of the Local Plan Examinations chapter[1].

11. All references to the NPPF in this version of the chapter are to the current (July 2021) NPPF, eg "NPPF 60" means paragraph 60 of the July 2021 NPPF.

[1] Local Plan Examinations (Submitted for Examination PRIOR TO 25 January 2019)

The Planning Inspectorate

Local Plan Examinations

Plan Preparation

Not yet updated to reflect December 2023 Framework (NPPF)

What's new since the last version

Changes highlighted in yellow were made on 11 October 2021:

- Additional information regarding NPPF 22 including PPG update and correspondence from Government.

This topic section of the Local Plan Examinations chapter of the Inspector Training Manual (ITM) applies to the examination of plans submitted on or after **25 January 2019**. It provides advice on the role of the Inspector in the examination process. There is a separate Local Plan Examinations chapter for plans submitted for examination prior to that date (though please note that chapter is no longer being updated).

Other recent updates

For earlier updates please see the Change Log in the Library.

Contents

Local Plan Preparation

Introduction

1. This section of the Inspector Training Manual (ITM) Local Plan Examinations chapter applies to the examination of plans submitted on or after **25 January 2019**. It provides information for Inspectors on the plan preparation process that occurs before local plans are submitted for examination. It covers:

    - Procedural requirements for local plan preparation
    - Content of local plan policies
    - Preparation of the policies map
    - The relationship between local plans, neighbourhood plans and supplementary planning documents

    Advice on the examination process and the Inspector's role in that process is given in a separate section of this ITM Local Plan Examinations chapter.

2. Inspectors should also ensure they are familiar with relevant advice in the revised NPPF, especially Chapter 3 Plan-making, and within the relevant PPG chapter, also entitled Plan-making.

Procedural requirements for local plan preparation

What is a local plan?

3. A local plan is a document which sets out the local planning authority's [LPA's] policies relating to the development and use of land in the LPA's area.[1] Once adopted by the LPA, it forms part of the development plan alongside any other extant local plans, any made neighbourhood plans and any published spatial development strategy or regional strategy covering all or part of the LPA's area. Paragraph 002 of the PPG chapter Plan-making[2] gives advice on what a local plan should contain.

4. In the primary legislation[3], local plans are referred to as "development plan documents" [DPDs]. The more common term "local plans" is used in the Regulations[4], in national planning policy and guidance, and in the Inspector Training Manual.

What is the legal definition of a local plan?

5. Regulations 2, 5 and 6, read together, define a local plan as any of the following:

    - any document prepared by a local planning authority individually or in cooperation with one or more other local planning authorities, which contains statements regarding one or more of the following—

[1] Planning and Compulsory Purchase Act 2004, as amended, s.17(3)
[2] PPG ID 61-002-20190315
[3] The Planning and Compulsory Purchase Act 2004, as amended ["the 2004 Act"; "the PCPA"].
[4] Of the Town and Country Planning (Local Planning) (England) Regulations 2012, as amended; any reference to a Regulation in this chapter is to these Regulations, unless otherwise stated.

- the development and use of land which the local planning authority wish to encourage during any specified period;
- the allocation of sites for a particular type of development or use;
- development management and site allocation policies, which are intended to guide the determination of applications for planning permission.

- any document which—

  - relates only to part of the area of the local planning authority;
  - identifies that area as an area of significant change or special conservation; and
  - contains the local planning authority's policies in relation to the area; and

- any other document which includes a site allocation policy.

Do local planning authorities have to prepare a local plan?

6. The specific legal requirement is that each LPA must identify the strategic priorities for the use of land in its area and set out policies to address those priorities in its DPDs (= local plans), taken as a whole.[5] Most LPAs also prepare policies to address non-strategic matters. See the sub-sections below headed 'What are strategic policies?' and 'What are non-strategic policies?'.

7. The LPA may choose to prepare a single local plan containing all its development plan policies, or to prepare a series of two or more local plans which together contain all its development plan policies (see the sub-section below headed 'Can strategic and non-strategic policies appear in the same plan?'). The 2012 NPPF's preference for a single local plan is no longer part of national policy.

8. NPPF 15 advises that the planning system should be genuinely plan-led and that succinct and up-to-date plans should provide a positive vision for the future of each area.

Can LPAs prepare joint local plans?

9. Yes. Two or more LPAs may choose to work together to prepare a joint local plan, or a series of joint local plans, to cover their areas. In addition, the Secretary of State has the power to direct LPAs to prepare joint local plans.[6] It is becoming more common for a group of LPAs to prepare a joint plan dealing with strategic matters across their combined areas, following which each LPA will then prepare a separate local plan dealing with issues specific to its own area.

What are local development documents?

10. Local development documents [LDDs] is a term used in the legislation to cover both local plans [= DPDs] and any other documents containing the LPA's policies or statements regarding the development and use of land in its area. Regulation 5 sets out a list of the documents which are to be prepared as LDDs, and Regulations 2 and 6 identify which of those are local plans.

[5] Sections 19(1B) & 19(1C) of the 2004 Act
[6] Sections 28 to 31 of the 2004 Act

11. LDDs which are not local plans (for example, supplementary planning documents or design codes) do not form part of the development plan. The requirements for preparing and adopting them are less stringent than for local plans. In particular, they are not subject to examination by an Inspector.

What is a local development scheme?

12. Each LPA is required to prepare and maintain a local development scheme [LDS], setting out the local plan(s) which they propose to prepare, and the geographical area and subject matter to which they relate. If the LPA proposes to prepare one or more joint plan(s) with other LPA(s), this must also be stated in the LDS.[7]

13. The Secretary of State (and, in London, the Mayor of London) has the power to prepare an LDS for the LPA, and to direct the LPA to make amendments to the LDS for the purpose of ensuring full and effective local plan coverage.[8]

What is a statement of community involvement?

14. Each LPA is also required to prepare a statement of community involvement [SCI], setting out their policy for involving persons with an interest in the development of the area when preparing and revising their local plan(s).[9] Among other things, the SCI will explain how the LPA intend to go about publicising the emerging plan and undertaking consultation on it. Regulation 10A requires the SCI to be reviewed at least once every five years.

What are the main legal requirements for preparing a local plan?

15. The local plan must be prepared in accordance with the LDS and the SCI, and the LPA's plans (taken as a whole) must include policies designed to ensure that development and use of land in the LPA's area contribute to the mitigation of, and adaptation to, climate change.[10] The LPA must identify the strategic priorities for the development and use of land in its area, and policies to address those priorities must be set out in its plans (taken as a whole).[11]

16. When preparing the plan, the LPA must have regard to:

- national planning policies and advice;
- any spatial development strategy or regional strategy covering or adjacent to the LPA's area;
- the Wales Spatial Plan, if the LPA's area is adjacent to Wales;
- any other local plan or LDD that the LPA has adopted;
- the resources likely to be available for implementing the proposals in the plan; and

[7] Section 15 of the 2004 Act
[8] Section 15(3A), (4) & (4A) of the 2004 Act
[9] Section 18(3) of the 2004 Act. The SCI is an LDD.
[10] Section 19(1), (1A) & (3) of the 2004 Act. See also the section of this Local Plan Examinations chapter dealing with SA, HRA and Climate Change.
[11] Section 19(1B) & (1C) of the 2004 Act.

- such other matters as may be prescribed.[12]

17. The LPA must carry out a sustainability appraisal [SA] of the proposals in the plan and prepare a report of its findings[13], and must comply with the relevant requirements of the Conservation of Habitats and Species Regulations 2017 (as amended).[14]

18. In preparing the plan, the LPA must also comply with the duty to co-operate contained in section 33A of the 2004 Act. This is covered in detail in the section of this ITM chapter on Duty to Co-operate.

What consultation is the LPA required to carry out before and during plan preparation?

19. **Regulation 18** requires the LPA to notify various bodies and persons of the subject of a local plan which they propose to prepare, and to invite representations from them on what a plan with that subject ought to contain. Those to be notified are such "specific consultation bodies", "general consultation bodies", and local residents and businesses as the LPA consider appropriate. "Specific consultation bodies" include organisations such as the Environment Agency, English Heritage and Natural England, and "general consultation bodies" include voluntary organisations and groups representing ethnic minority communities, religious groups, disabled persons and businesses.[15] In preparing the local plan the LPA must take account of any representations made.

20. **Regulation 19** requires the LPA, before submitting the local plan for examination, to make it available[16] on the LPA's website and at the LPA's offices for six weeks. During that six-week period anyone may make representations on the plan.

21. In practice many LPAs carry out considerably more consultation than is required by Regulation 18, before moving on to the Regulation 19 stage. For example, they may prepare an "issues and options" statement, a "preferred options" version of the plan and a "draft version" of the plan and consult on each of them in turn before preparing a "proposed submission" version to be published for representations under Regulation 19. This is perfectly acceptable, but there is no legal requirement for the Inspector who examines the plan to consider any representations that are made before the plan is published under Regulation 19.[17]

Is there a requirement to review a local plan?

22. Yes. Section 17(6A) of the 2004 Act, in combination with Regulation 10A, requires each local plan to be reviewed at least once every five years. Section 17(6B) of the 2004 Act makes it clear that when carrying out the review of the plan the LPA must consider whether or not to "revise" it, following that review. Similarly, NPPF 33 advises that the review should assess whether the plan's policies need "updating",

[12] Section 19(2) of the 2004 Act. The other prescribed matters are currently set out in Regulation 10.
[13] Section 19(5) of the 2004 Act.
[14] See the section of this Local Plan Examinations chapter dealing with SA, HRA and Climate Change.
[15] See Regulation 2, "Interpretation".
[16] Together with the sustainability appraisal and various other documents which the LPA is required to submit along with the plan when it is submitted for examination.
[17] See Regulation 23.

taking into account any changes to local circumstances or national policy, and that the plan should then be "updated" as necessary.

23. From the way in which these terms are used in the 2004 Act and the NPPF, it can be seen that "reviewing" a plan is different from "revising" or "updating" it:

- "Reviewing" a plan (or "a plan review") means the LPA assessing its existing adopted plan in order to decide **either** that is fully up-to-date, **or** that factors such as changes in local circumstances and/or to national policy mean that it needs revising or updating.

- "Revising" or "updating" a plan means making any changes to the plan that have been identified as necessary as a result of reviewing it. This may involve producing a new version of the plan.

24. Inspectors should use these terms in a way that is consistent with the Act and the NPPF, in order to avoid misunderstandings. In particular, please note that "reviewing" does **not** mean making changes to, or producing a new version of, a plan – even though it has commonly been used in that sense up to now.

25. It is for the LPA to carry out the review of the plan and decide if its policies need updating.[18] There are no formal arrangements for external scrutiny of the review process.

26. If the LPA decides that updating of policies is needed, they will have to prepare and adopt new and/or revised local plan policies following the procedural requirements outlined in the sub-sections above headed 'What are the main legal requirements for preparing a local plan?' and 'What consultation is the LPA required to carry out before and during plan preparation?'. All the usual legal and procedural requirements for plan preparation apply when policies are updated, and the updated policies will be subject to examination in the usual way.[19]

27. Paragraph 65 of the PPG on 'Plan-making' provides a list of specific information for the LPA to consider when deciding whether policies need updating.[20] Paragraph 62 advises that most plans are likely to require updating in whole or in part at least every five years.[21]

28. The PPG goes on to advise that significant changes in circumstances – for example, where new cross-boundary issues arise, or local housing need changes significantly – may mean that strategic policies will need updating sooner than five years from adoption.[22]

29. If, as a result of a review, the LPA decides that the plan's policies **do not** need updating, they must publish their reasons for this decision within five years of the adoption of the plan.[23] If they decide that one or more policies do need updating, the

[18] In the rest of this section of the ITM Local Plan Examinations chapter, to avoid repetition the term "updating" is used to mean both "updating" as per the NPPF and "revising" as per the 2004 Act.
[19] See para 69 of the PPG chapter Plan-making [PPG Ref ID 61-069-20190315].
[20] PPG Ref ID 61-065-20190315
[21] PPG Ref ID 61-062-20190315
[22] PPG Ref ID 61-062-20190315
[23] PPG Ref ID 61-061-20190315 & 070-20190315

LPA must update their LDS to set out the timescale for the update, which should then be carried out.[24]

Content of local plan policies

Strategic priorities and policies

30. Section 19 (1B) of the PCPA 2004 requires the LPA to identify its strategic priorities for the development and use of land in its area. While S19 relates to the preparation of the plan, the wording of the legislation makes it clear that it is for the LPA to identify their strategic priorities. S20(5a) does require the Inspector to determine whether the plan complies with S19. However, given the wording of the Act, it is unlikely to be for the Inspector to reach a judgement on whether an LPA has identified the correct strategic priorities. However, this specific point has not been considered by the Courts.

31. In contrast Section 19(1C) does require that *policies* to address the strategic priorities must be set out in the LPA's development plan documents (taken as a whole). This is a legal compliance issue, because S20(5a) states that the purpose of the examination is to determine whether the plan satisfies the requirements of section 19. This should be addressed (briefly, if this is uncontentious) in the final report, as prompted by the template.

What are strategic policies?

32. Strategic policies are policies to address the LPA's priorities for the development and use of land in its area, as required by sections 19(1B) & 19(1C) of the 2004 Act (see the sub-sections above headed 'Do local planning authorities have to prepare a local plan?' and 'Strategic priorities and policies'). They should look ahead over a minimum 15-year period[25] from adoption (NPPF 22). Where policies include larger-scale developments (eg new settlements or significant extensions to existing villages and towns) that form part of the strategy for the area, such policies should look further ahead to at least 30 years to take into account timescales for delivery (NPPF 22)[26].

33. On 2 August 2021, the Secretary of State wrote to the Planning Inspectorate regarding the application of NPPF 22, stating that guidance would be published and that Inspectors should reflect this policy in a "pragmatic and proportionate way". Subsequently, on 4 October 2021 the Minister of State for Housing wrote to the Planning Inspectorate's Chief Executive to confirm the new guidance was published.

34. This new guidance can be found in 'Plan-making' PPG at paragraphs 083 and 084. It states that where a local plan strategy incorporates larger scale developments such as significant extensions or new settlements, policies should be set within a vision

[24] PPG Ref ID 61-061-20190315
[25] Except policies for town-centre development, which should look ahead 10 years (NPPF 86 d)).
[26] The policy on larger-scale developments in NPPF 22 only applies to plans that have not reached Regulation 19 stage at the point of publication of the revised NPPF on 20 July 2021. For Spatial Development Strategies, this refers to consultation under section 335(2) of the Greater London Authority Act 1999. Transitional arrangements for the new policy at NPPF 22, as referenced at footnote 16, are set out at NPPF 221, in Annex 1, of the revised NPPF (July 2021).

that loots at least 30 years ahead. This policy requirement needs to be applied where most of the development arising from larger scale developments will be delivered "well beyond the plan period" and "where delivery of those developments extends 30 years or longer from the start of the plan period."[27]

35. Where NPPF 22 does apply, the authority should ensure their vision reflects the long-term nature of their strategy. It is not anticipated such long-term visions will require additional evidence. Where plan publication was imminent at the time of the revised NPPF [20 July 2021], authorities may consider whether their existing vision is sufficient to meet this policy requirement, or whether further explanation is needed using a short supplementary statement.[28]

36. NPPF 11 establishes on overarching policy for plan-making in achieving sustainable development. NPPF 11 a) sets out that all plans should meet the development needs of their area, align growth and infrastructure, improve the environment, mitigate climate change and adapt to its effects.

37. NPPF 20 advises that strategic policies should set out an overall strategy for the pattern, scale and design quality of places, and make sufficient provision[29] for various forms of development, infrastructure and community facilities, and for the conservation and enhancement of the natural, built and historic environment.

38. NPPF 21 goes on to say that strategic policies should be limited to those necessary to address the strategic priorities of the area (and any relevant cross-boundary issues), to provide a clear starting point for any non-strategic policies that may be needed. They should not extend to more detailed matters that are more appropriately dealt with through neighbourhood plans or other strategic policies.

39. NPPF 23 says that strategic policies should provide a clear strategy for bringing sufficient land forward, at a sufficient rate, to address objectively assessed needs over the plan period, in line with the presumption in favour of sustainable development. This should include planning for and allocating sufficient sites to deliver the strategic priorities of the area (except insofar as these needs can be demonstrated to be met more appropriately through other mechanisms, such as brownfield registers or non-strategic policies).[30]

What are non-strategic policies?

40. NPPF 28 advises that non-strategic policies should be used by LPAs and communities to set out more detailed policies for specific areas, neighbourhoods or types of development. This can include allocating sites, providing local infrastructure or community facilities, establishing design principles, conserving and enhancing the natural and historic environment, and other development management policies.

41. As well as appearing in local plans, non-strategic policies can appear in neighbourhood plans produced by local communities. NPPF 29 places emphasis on

[27] PPG ID: 61-083-20211004

[28] PPG ID: 61-084-20211004

[29] At this point the NPPF inserts footnote 13, which reads: "In line with the presumption in favour of sustainable development". This is a reference to NPPF 11, which requires strategic policies, as a minimum, to provide for objectively-assessed needs for development, unless certain circumstances apply.

[30] See the Housing section of this ITM Local Plans chapter for further advice on these requirements of the NPPF.

the role of neighbourhood plans as part of the statutory development plan and makes it clear that neighbourhood plans should not promote less development than is set out in, or undermine, strategic policies.

Do strategic and non-strategic policies need to be distinguished in the plan?

42. Yes. NPPF 21 advises that plans should make explicit which of their policies are strategic policies. Footnote 14 says that strategic policies should be clearly distinguished from non-strategic policies in single local plans (ie plans containing both strategic and non-strategic policies).

How should the LPA and the Inspector go about distinguishing between strategic and non-strategic policies?

43. Since there is, as yet, no track record of examinations under the revised NPPF, this is not an easy question to answer. However, it seems clear that national policy now expects strategic policies to do more than just set out broad statements of intent, as was the case in some plans produced previously.

44. The legal requirement for strategic policies to address the area's strategic priorities[31] means that they will need to deal with matters such as setting the requirements for housing and other forms of development, strategic infrastructure requirements, the spatial strategy, and cross-boundary issues including unmet need from neighbouring authorities. In areas where major constraints on development such as flood risk, Green Belt or AONB apply, there are also likely to be strategic policies on those matters.

45. The matters covered by non-strategic policies in local plans are likely to include, for example, policies setting out detailed development management requirements, or design policies specific to a certain part of the LPA's area.

46. The requirements of NPPF 23 (see the sub-section above headed 'What are strategic policies?') are likely to mean that many local plans will designate their site allocation policies as strategic policies. However, NPPF 28 makes it clear that non-strategic policies in local plans and neighbourhood plans may also allocate sites; logically this will include (but may not necessarily be confined to) situations in which it has been demonstrated, in accordance with NPPF 23, that some development needs can be met more effectively by non-strategic policies.

47. The PPG chapter Neighbourhood Planning contains the following set of "useful considerations" when reaching a view on whether a policy is a strategic policy, which Inspectors may find helpful:

- whether the policy sets out an overarching direction or objective;
- whether the policy seeks to shape the broad characteristics of development;
- the scale at which the policy is intended to operate;
- whether the policy sets a framework for decisions on how competing priorities should be balanced;
- whether the policy sets a standard or other requirement that is achieving the wider vision and aspirations in the LP;

[31] See sub-section above headed 'What is the legal definition of a local plan?'.

- in the case of site allocations, whether bringing the site forward is central to achieving the vision and aspirations of the LP;
- whether the Local Plan identifies the policy as being strategic.[32]

Note however that this PPG paragraph pre-dates the revised NPPF. Moreover, the final consideration – while no doubt helpful in a neighbourhood plan context – puts the ball back in the Inspector's court when examining a local plan.

48. When it is unclear whether a policy falls into the strategic or non-strategic category, it may be best for Inspectors to adopt a pragmatic approach, seeking to query the LPA's proposed designation only where it is obviously inappropriate, or where the issue has been raised by representors.

49. However, the distinction between the two types of policy has particular relevance for neighbourhood plans, which are legally required to be in general conformity with the strategic policies contained in the development plan.[33] Where a local plan policy is intended to provide direction for neighbourhood planning, therefore, it will need to be identified as a strategic policy (provided of course that it is, or can be made, sound).

Can strategic and non-strategic policies appear in the same plan?

50. Yes. It is up to the LPA how to present their local plan policies. They can prepare a single local plan containing all their strategic and non-strategic policies, separate plans for their strategic and non-strategic policies, or a series of plans each containing a mixture of strategic and non-strategic policies. However, the legal requirement to address their priorities for the development and use of land means that LPAs are likely to want to prepare (or update) their strategic policies at an early stage.

'Design' as strategic and non-strategic policies

51. The revised NPPF (July 2021) introduced new policy for achieving well-designed and beautiful places, as part of the overarching social objective of the planning system[34]. There are new requirements for all LPAs to provide "appropriate tools such as masterplans and design guides and codes", to set expectations and standards for achieving well-designed and quality homes in their areas, especially with regard to the supply of large scale residential developments (NPPF 73 c)). Design guides or codes should reflect 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 National Design Guide (October 2019) and the final version of the National Model Design Code (published on 20 July 2021 and forming part of the PPG)[35]. Development that is not "well designed" should be refused, especially where it fails to reflect local design policies and government guidance on design (NPPF 134). NPPF 131 and footnote 50 also set out new policies

[32] PPG Ref ID 41-076-20140306
[33] See NPPF footnote 18 and para 8(2) of Schedule 4B to the Town and Country Planning Act 1990, which is applied to neighbourhood plans by section 38A(3) of the 2004 Act.
[34] NPPF 8 b).
[35] NPPF 128 and 129. The National Model Design Code 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 National Design Guide, which reflects the government's priorities and provides a common overarching framework for design.

for ensuring new streets are tree-lined, incorporating trees elsewhere in developments, and retaining existing trees wherever possible. More information is given in the ITM Chapter on 'Design'.

52. In plan-making, design guides and codes can be prepared at an area-wide, neighbourhood and site-specific scale. To carry weight in decision-making, they should be "produced either as part of a plan or as supplementary planning documents" (NPPF 129). The PPG chapter Design: process and tools has not yet been updated to reflect the revised Framework (July 2021) but currently explains that LPAs should use strategic policies to set out their design expectations for areas at a broad level (eg "in relation to the character and role of town centres, areas requiring regeneration or suburban areas facing more incremental change") or to set key design requirements for strategic site allocations[36]. Non-strategic policies should be used to establish more local and/or detailed design principles for areas, which could also include design requirements for site specific allocations[37]. Such non-strategic policies on design can then link to Area Action Plans, neighbourhood plan-making and local design masterplans. Local design guides or design codes should be informed by the 10 important characteristics of good places set out in the National Design Guide and be adopted as SPDs or appended to a neighbourhood plan to be given weight in decision-making[38].

53. Consequently, LPAs should incorporate their design principles and vision as part of strategic policies in plans and design guides / codes as SPDs.

Can strategic policies appear in a joint local plan?

54. Yes. NPPF 17 explicitly says that strategic policies can be contained in joint or individual local plans produced by LPAs working together or independently. They may also appear in spatial development strategies [SDS] in areas for which powers to make SDS have been conferred.

Can strategic policies appear in London boroughs' plans, and in the plans of other councils in areas covered by a spatial development strategy [SDS]?

55. Yes. While the London Plan (which is the SDS for Greater London) comprises strategic policies, there is nothing in the NPPF or PPG to prevent strategic policies also appearing in individual London boroughs' plans. The same applies to plans prepared by individual LPAs in areas covered by other SDSs.

When preparing a plan, what evidence should the LPA gather to inform its policies?

56. NPPF 31 advises that the preparation and review of all policies should be underpinned by relevant and up-to-date evidence. It should be adequate and proportionate, focussed tightly on supporting and justifying the policies, and take into account relevant market signals. The PPG chapter Plan-making contains advice on

[36] PPG Ref ID: 26-003-20191001
[37] PPG Ref ID: 26-004-20191001
[38] PPG Ref ID: 26-005-20191001 and Ref ID: 26-008-20191001

evidence-gathering to support policies on a range of local plan topics.[39] Many of the other PPGs chapters dealing with specific topics also contain relevant advice.

Can Section 78 appeal decisions form part of the evidence base?

57. It is relatively common for LPAs to refer to Section 78 appeal decisions within their evidence base and to seek to use them to help justify policies. They are also often referred to by objectors in support of their particular case. Whilst they may have some relevance, it must be borne in mind that these decisions might have been made under different circumstances to that of the preparation and examination of a Local Plan. Therefore, Inspectors should not feel overly influenced or bound by the findings of a Section 78 appeal decision. However, you should consider any appeal decisions referred to you to assess their relevance and significance. If the decision appears to you to be significant and directly relevant, it will usually be best to refer to it (as briefly as possible) in your reasoning.

58. This issue was considered in Dylon 2 Ltd v London Borough of Bromley and SofS [2019] EWHC 2366 (Admin) and it is a helpful example of how the Courts may approach the issue. In this case the claimant contended that the Inspector had not complied with her duty to give reasons because she failed to deal expressly with an appeal decision submitted to her after the hearings were closed. It was argued that the conclusions in the local plans report and the appeal decision were inconsistent in relation to five-year housing land supply. The Court concluded in para 62:

> "I do not consider either that the local plan Inspector had to go through all the views expressed by the appeal Inspector about other sites. The local plan Inspector's task could be impossible otherwise; there could be no real limit to the number of different decisions, and arguments about decisions, which she had to work her way through and around. Her task is not to explain why she differs from such an array, but is to strike her own course dealing with the differently focussed issues she has to confront, on the basis of all the evidence and views which she hears. Her conclusion was the judgment of an Inspector at an examination with the range of participants, the nature of inquiry, the focus of the task, and what may be different evidence and views available; the other was the product of an appeal with whatever the Council and a single appellant were able to present. Otherwise a single appeal could stand for an examination of the soundness of the major housing policy. The degree of difference requires no explanation and the expression of the different view, itself supported by the reasons required by the 2004 Act, is sufficient in my view to explain the position".

The policies map

What is the role of the adopted policies map?

59. The role of the adopted policies map is to illustrate, geographically, the application of the policies in the adopted development plan. It is maintained by the LPA and must comprise or contain a map of the LPA's area reproduced from, or based on, an Ordnance Survey map.[40]

[39] PPG Ref ID 61-039 to 048-20190315
[40] Regulation 9

What is the role of the submission policies map?

60. The LPA is required, by Regulation 22, to submit a submission policies map along with the local plan when the plan is submitted for examination.[41] The role of the submission policies map is to show how the adopted policies map would be amended by the local plan if the plan were adopted in its submitted form.

61. The Examination process section of this chapter explains what the Inspector should do if changes are needed to what is shown on the submission policies map.

The relationship between local plans, neighbourhood plans and supplementary planning documents

What is the relationship between local plans and neighbourhood plans?

62. At paragraph 006 the PPG chapter Plan-making advises:

> "Neighbourhood plans, when brought into force, become part of the statutory development plan for the area that they cover.
>
> They can be developed before, after or in parallel with a Local Plan, but the law requires that they must be in general conformity with the strategic policies in the adopted Local Plan for the area (and any other strategic policies that form part of the statutory development plan where relevant, such as the London Plan)…"[42]
>
> "Where a neighbourhood plan has been brought into force, the local planning authority should take its policies and proposals into account when preparing the local plan. Local plan policies should not duplicate those in the neighbourhood plan, and do not need to supersede them unless changed circumstances justify this…"[43]

63. NPPF 30 makes it clear that once a neighbourhood plan has been brought into force, its policies take precedence over existing non-strategic policies in a local plan covering the neighbourhood area, where the two are in conflict. The neighbourhood plan policies may themselves be superseded by local plan policies that are adopted subsequently. NPPF 21 advises that strategic policies (in a local plan) should not extend to detailed matters that are more appropriately dealt with through neighbourhood plans.

64. See the section above headed 'Content of local plan policies' for further advice on strategic policies and their implications for local plans, and see the sub-section headed 'What is the relationship between the housing requirement in strategic policies and in neighbourhood plans?' in the Housing section of this ITM Local Plans chapter for advice on the stipulation in NPPF 66 that strategic policies should set out a housing requirement figure for designated neighbourhood planning areas.

[41] Unless the submitted local plan, when adopted, would not result in changes to the adopted policies map.
[42] See the sub-section above headed How should the LPA and the Inspector go about distinguishing between strategic and non-strategic policies?
[43] PPG Reference ID 61-006-20190723

What is the relationship between local plans and supplementary planning documents?

65. Supplementary planning documents [SPDs] are not local plans[44] and so do not have the statutory force given to local plans by section 38(6) of the 2004 Act. While there are Regulations governing the preparation of SPDs[45], they are not subject to examination.

66. The sub-section above headed 'What is the legal definition of a local plan?' sets out the types of policies that legislation specifies may appear only in local plans and may not appear in SPDs or other documents that are not local plans. They include development management and site allocation policies which are intended to guide the determination of applications for planning permission.

67. At paragraph 008 the PPG chapter Plan-making advises:

> "[SPDs] should build upon and provide more detailed advice or guidance on policies in an adopted local plan. As they do not form part of the development plan, they cannot introduce new planning policies into the development plan. They are, however, a material consideration in decision-making. They should not add unnecessarily to the financial burdens on development."[46]

68. Consequently, local plan policies should not treat SPDs as if they have local plan status or seek to devolve policy matters to SPDs. A policy which requires compliance with criteria or standards that are set out in an SPD (or any other document that is not a local plan) is unlikely to be lawful or consistent with national policy. The criteria or standards would need to appear in the plan itself (and thus be tested through examination) if the policy is to be considered sound. The same applies to site allocations. However, SPDs may legitimately provide guidance on the implementation of policies.

[44] See Regulation 2, 5 and 6 which together define which documents are local plans. The term "local plan" in the Regulations is equivalent to the term "DPD" in the 2004 Act – see the sub-section above headed 'What is the legal definition of a local plan?'
[45] Regulations 11 to 16
[46] PPG Reference ID 61-008-20190315

The Planning Inspectorate

Local Plan Examinations

The Role of the Inspector in the Examination Process

Updated to reflect Current Framework (NPPF)?	Yes

What's new since the last version

Changes highlighted in yellow were made on **17 February 2023**:

- Amendment to paragraph 145 of Section 3, to include references to the guidance 'PINS Process for arranging Virtual and Blended Local Plan Hearings' as well as the recently published online 'Guidance for Local Planning Authorities and Others Hosting virtual events for the Planning Inspectorate'
- Other related amendments about arranging 'virtual', 'in-person' and 'blended' events at paras 147, 149, 157, 158 and 205
- New Annex 17, providing links to the guidance on arranging and hosting events

This topic section of the Local Plan Examinations chapter of the Inspector Training Manual (ITM) applies to the examination of plans submitted on or after **25 January 2019**. It provides advice on the role of the Inspector in the examination process. There is a separate Local Plan Examinations chapter for plans submitted for examination prior to that date (though please note that chapter is no longer being updated).

Other recent updates

- New Q&A content on how to examine matters covered by other regulatory regimes and policies referring to supplementary planning documents (SPD)
- Additions to the existing Q&A at para 241 about main modifications [MMs]
- Additions to the existing content at paras 274 – 281 on post-hearings letters to LPAs

For earlier updates please see the Change Log in the Library.

Contents

Introduction

1. This section of the ITM Local Plan Examinations chapter applies to the examination of plans submitted on or after **25 January 2019**. It provides guidance on the role that Inspectors are expected to play in the examination process. It covers:

    - The Inspector's role and approach to the examination
    - Overview of the examination
    - Detailed advice on each stage of the examination

2. The guidance in this section applies to all types of plan. For specific guidance on additional considerations that apply when examining non-strategic ("Part 2") plans, please see the section below headed "How should the Inspector approach the examination of a non-strategic ('Part 2') plan?".

3. The PINS document Procedure Guide for Local Plan Examinations [Procedure Guide] is the principal source of guidance on the procedural aspects of local plan examinations. The Procedure Guide is aimed at all those involved in the process of examining a plan, including the appointed Inspector. Inspectors should ensure they are fully familiar with its contents, as the LPA and all participants will have a reasonable expectation that the guidance in it will be followed. There is also a short guide aimed at those who might be participating in an examination for the first time.

4. **This section of the ITM Local Plan Examinations chapter is intended to be read alongside the Procedure Guide: it is not a stand-alone document**. It cross-refers to but it does not duplicate the Procedure Guide's contents. Instead, it supplements the Procedure Guide, providing additional advice on the Inspector's role specifically aimed at Inspectors themselves. It follows the same structure as the Procedure Guide, to allow for easy read-across between the two.

5. Inspectors should also ensure they are familiar with relevant advice in the revised NPPF, especially Chapter 3 'Plan-making', and with the PPG section also entitled 'Plan-making'.

6. The legislation allows the Inspector wide scope to determine how an examination is carried out. One of the main purposes of the Procedure Guide is to promote a reasonable degree of consistency in the procedures that are followed. If for any reason you consider it is necessary to depart significantly from the procedures outlined in the Procedure Guide, you should first seek advice from your Inspector Manager [IM] or mentor.

The Inspector's role and approach to the examination

What is the legal basis for the Inspector's role in the examination?

7. Section 20(1) of the 2004 Act[1] requires an LPA to submit every local plan to the Secretary of State for independent examination. Section 20(4) requires that the examination is carried out by a person appointed by the Secretary of State. When the Plans Team appoint an Inspector to carry out a plan examination, the appointment is made on behalf of the Secretary of State [SoS]. But unlike in s78 appeals, when examining the plan the Inspector is conducting an independent examination, not

[1] The Planning and Compulsory Purchase Act 2004 (as amended)

acting on behalf of the SoS. However, sections 20(6A), 21 and 21A give the SoS various powers of intervention and direction which he or she may decide to invoke.

8. The purpose of the examination is defined in section 20(5). Essentially it is to determine whether the plan met all the procedural requirements set out in legislation[2], whether it is sound, and whether the LPA complied with the Duty to Co-operate[3] during its preparation.

9. Section 20(7), (7A), (7B) and (7C) set out the various possible outcomes of the examination and what the Inspector is required to do in each case. These are explained in Procedure Guide paragraph 8.

What does national planning policy and guidance say about the Inspector's role in and approach to examinations?

10. The PPG chapter Plan-making advises that:

> "The Inspector should work proactively with the local planning authority. Underpinning this is the expectation that:
>
> - issues not critical to the plan's soundness or other legal requirements do not cause unnecessary delay to the examination of the plan
> - Inspectors should identify any fundamental concerns at the earliest possible stage in the examination and will seek to work with the local planning authority to clarify and address these
> - where these issues cannot be resolved within the examination timetable, the potential of suspending the examination should be fully considered, with the local planning authority having an opportunity to assess the scope and feasibility of any work needed to remedy these issues during a period of suspension, so that this can be fully considered by the Inspector
> - consideration should be given to the option of the local planning authority making a commitment to review the plan or particular policies in the plan within an agreed period, where this would enable the Inspector to conclude that the plan is sound and meets the other legal requirements"[4].

11. The Franks principles of openness, fairness and impartiality apply to examinations as they do to all procedures over which Inspectors preside. Inspectors must never communicate directly with any party, including the LPA, outside the hearing sessions: all other communications with the Inspector must be through the Programme Officer [PO][5].

12. Please refer to Procedure Guide paragraphs 6 & 7 for further advice on the Inspector's approach. More detail on how the advice applies to each stage of the examination is provided in the remainder of this section.

[2] That is, the 2004 Act and the Town and Country Planning (Local Planning) (England) Regulations 2012, as amended. All references below to "the Regulations" or to a numbered Regulation are to the latter document, unless otherwise stated.
[3] Duty to Co-operate is covered in a separate section of the ITM Local Plan Examinations chapter.
[4] PPG Reference ID 61-050-20190315
[5] If the PO is unavailable for any reason the Plans Team can assist with communications.

Examining for soundness

13. NPPF 35 sets out the four tests of whether a local plan is sound. They apply to all local plans, but NPPF 36 advises that they should be applied to non-strategic policies in a proportionate way, taking into account the extent to which the non-strategic policies are consistent with relevant strategic policies for the area.

14. If any aspect of the plan clearly fails one or more of the soundness tests, it is the Inspector's role to put that right[6]. The major part of the Inspector's time during the examination is usually taken up with identifying, discussing and resolving soundness issues. Guidance on how to do this is set out in the rest of this section of the ITM Local Plan Examinations chapter. But Inspectors should not get drawn into discussing or suggesting "improvements" to the plan if they are not needed to make it sound. That is not the Inspector's role.

15. In the Grand Union Investments judgment[7] the High Court made it clear that the Inspector has substantial discretion in identifying and remedying soundness issues, as long as their approach is not irrational and that they take into account relevant guidance and other material considerations:

> "… the guidance as to "soundness" in the NPPF is policy, not law, and it should not be treated as law. As Carnwath L.J., as he then was, said in Barratt Developments Plc v The City of Wakefield Metropolitan District Council [2010] EWCA Civ 897 (in paragraph 11 of his judgment), so long as the inspector and the local planning authority reach a conclusion on soundness which is not "irrational (meaning perverse)", their decision cannot be questioned in the courts, and the mere fact that they have not followed relevant guidance in national policy in every respect does not make their conclusion unlawful. Soundness, he said (at paragraph 33) was "a matter to be judged by the inspector and the local planning authority, and raises no issue of law, unless their decision is shown to have been "irrational", or they are shown to have ignored the relevant guidance or other considerations which were necessarily material in law" [para 59].
>
> "The assessment of soundness was not an abstract exercise. It was essentially a practical one. If the core strategy as submitted was unsound, the inspector had to consider why and to what extent it was unsound, what the consequences of its unsoundness might be, and, in the light of that, whether its unsoundness could be satisfactorily remedied without the whole process having to be aborted and begun again, or at least suspended until further work had been done" [para 67].

16. Section 20(2)(b) of the 2004 Act requires that the LPA must not submit the plan for examination unless they think it is ready for examination. That is a matter for the LPA. The Act places no requirement on the Inspector to determine whether the LPA were reasonable to think that their plan was ready for examination.[8] This is because S20(5) states that the purpose of the examination is to determine whether the plan satisfies the requirements of S19, S24(1) and S33A. It does not refer to satisfying the requirements of S20(2).

[6] Usually by recommending a MM, if asked to do so by the LPA. See section 6 below.
[7] Grand Union Investments Ltd v Dacorum BC [2014] EWHC 1894 (Admin)
[8] See CK Properties (Theydon Bois) Ltd v Epping Forest DC [2018] EWHC 1649 (Admin)

Examining for legal compliance

17. Section 20(5)(a) & (c) of the 2004 Act define precisely the sections of the Act and the Regulations with which the Inspector must determine whether or not the plan complies. Section 20(5)(a) lists what are essentially procedural requirements for the preparation and submission of the plan, while section 20(5)(c) refer to the duty to co-operate under section 33A. (If the Inspector finds that the LPA have failed to comply with the duty to co-operate, the failure cannot be rectified during the examination and the plan will normally be withdrawn, since it cannot lawfully proceed to adoption. See the separate section of this ITM Local Plan Examinations chapter on Duty to Co-operate for further advice.)

18. It is quite common for representors to claim that the LPA have failed to meet one or more procedural requirements, sometimes with an explicit or implied indication that the adoption of the plan could be challenged as a result of that failure. It is important to bear in mind what section 113(6) & (7) of the 2004 Act say about challenges to the plan based on a failure to meet a procedural requirement under section 20(5)(a). If such a failure has occurred, the High Court has the power to quash or remit the plan only if it is satisfied that the interests of the applicant (= the person bringing the challenge) have been substantially prejudiced as a consequence of the failure.

19. If faced with a claim that a procedural requirement has not been met, the Inspector should first establish exactly what the relevant section of the Act or Regulation requires the LPA to do. The next step is to establish, through correspondence with the LPA and/or discussion at the hearing sessions as required, whether or not that requirement was in fact met, and if it was not, whether or not it is likely that anyone's interests would potentially be substantially prejudiced as a result.

20. But even if the Inspector concludes that there would potentially be substantial prejudice, that is not the end of the matter. In most cases it is possible to remedy a procedural failure in such a way that no person's interests are in fact substantially prejudiced. For example, if when preparing the plan, the LPA failed to have regard to national policies and guidance as required by section 19(2) of the 2004 Act, it is very likely that the failure is capable of remedy, if necessary, by means of main modifications to the plan. If there was a procedural failure in the way that the Sustainability Appraisal [SA] was carried out (section 19(5)), it may be possible for the LPA to re-do all or part of the SA correctly[9].

21. In the CK Properties case[10] a claim for judicial review was brought on the grounds that the LPA had failed to make a proposed submission document available as required by Regulations 19 and 35. This meant that it was not available to anyone intending to make representations on the plan at Regulation 19 stage. However, the LPA later wrote to interested persons, including the claimant, who had raised the issue of the lack of the appendices in their regulation 20 representations, offering them an opportunity to supplement those representations. The judge concluded:

> "It will be a matter for the Inspector to decide whether it is appropriate to take those additional representations into account, or allow interested persons the opportunity to make additional written representations during the examination process. **However the Inspector has wide powers to remedy any procedural shortcomings or unfairness [emphasis added]**. There is in my

[9] See the section of the ITM Local Plan Examinations chapter on Sustainability Appraisal, Habitats Regulations Assessment and Climate Change.
[10] CK Properties (Theydon Bois) Ltd v Epping Forest DC [2018] EWHC 1649 (Admin)

view no real likelihood of the Inspector refusing to take into account additional representations made by interested persons in relation to Appendix B after that appendix was made available by the Council (so long as they do so without undue delay). […] [para 86]

"… the Claimant has not suffered any prejudice as its concerns regarding the soundness and legal compliance of the draft plan will be addressed through the independent examination process. […] In my view an order quashing the decision would be unnecessary and disproportionate" [para 91].

22. Cases where there has been a procedural failure which could potentially result in substantial prejudice to one or more parties, and which it is not possible to remedy, are extremely rare. If you think you are faced with such a situation, you should discuss the matter with your Inspector Manager or mentor, and/or the Professional Lead (Plans).

The approach of the Inspector and communicating with the LPA

23. An Inspector's role in examining a plan differs significantly from the role of conducting appeals casework. Rather than reaching a decision to allow or dismiss based solely on the information before them, examining Inspectors are expected to work pro-actively with the LPA to resolve soundness and legal compliance issues wherever possible.[11] However, at the same time, the examination must remain rigorous and impartial, and the Inspector will sometimes reach conclusions that the LPA may not welcome.

24. The LPA will have invested substantial time and effort in preparing the plan, and once it is adopted it is the LPA who will be responsible for implementing it. Accordingly, it is important that good channels of communication between the Inspector and the LPA, via the PO, are maintained throughout the examination and that, wherever possible, the Inspector establishes a positive working relationship with the LPA. The important thing is that the Inspector should have communicated their concerns to the LPA as soon as possible so that the LPA has a reasonable opportunity to respond, and so that any unwelcome conclusions from the Inspector do not come as a surprise.

25. Similar principles apply to the examination process itself. For example, the LPA should normally be given the opportunity to comment before the Inspector makes any important procedural decisions. When asking the LPA to provide information or comments on any issue, the Inspector should take care to set reasonable deadlines.

How should an Inspector approach the examination of a non-strategic ('Part 2') plan?

26. Some LPAs are still bringing forward "Part 2" plans (such as site allocations or development management plans) which follow on from a previously-adopted Core Strategy or strategic plan. In addition, the revised NPPF envisages that plans containing only non-strategic policies may continue to come forward in future[12].

[11] For example, see S20(7C) of the Act, the Introduction to the Procedure Guide and this letter from the Secretary of State

[12] See the section of this ITM Local Plan Examinations chapter on Local Plan Preparation.

27. There is a requirement in Reg 8(4) for the policies contained in a local plan to be consistent with the adopted development plan. Consequently, a non-strategic (Part 2) plan must be **consistent** with the strategic (Part 1) plan, unless the intention is to supersede any policy in the strategic plan (under Reg 8(5)). In London under s24(4) of the 2004 Act local development documents must be **in general conformity** with the spatial development strategy which equates to The London Plan. Depending on what sort of plan you are dealing with, therefore, you must ensure that you use the correct terminology. Do not, for example, attempt to assess whether or not the Part 2 plan "complies" with the strategic plan: that is not the right legal test.

28. Therefore, as a starting point when examining non-strategic plans, Inspectors should be clear what the plan is purporting to do, its relationship with any other existing or emerging plans, and whether it will supersede any existing plan or policies in whole or part. If any of these points is unclear from the plan itself or from the LPA's Local Development Scheme [LDS], you should seek clarification from the LPA early on. You may need then to ask the LPA to amend its LDS, and/or recommend main modification(s) as necessary, to ensure that the position is clear (see also Does the plan identify any previously-adopted policies which its own policies are intended to supersede? below.)

29. Once the purpose of the plan has been established, you should stick closely to examining the plan in that context, draw up your Matters, Issues and Questions on that basis and do not allow the examination to be unnecessarily side-tracked. If necessary, the purpose can be clarified in your guidance note.

30. In most cases the purpose of a non-strategic plan will be to meet the aims of the strategic (Part 1) plan and to deliver development in accordance with it. You will need to take this into account when drawing up your MIQs. For example, if the non-strategic plan is allocating housing sites, the issues to be examined are likely to include whether the plan will meet the housing requirement established in the strategic plan, and whether the site allocations are consistent with the strategic plan's spatial strategy.

31. For more advice on the approach to examining non-strategic plans, see In what order should the issues be considered in the Assessment of Soundness? below. For more advice on dealing with housing site allocations in non-strategic plans, see the Housing section of this ITM Local Plan Examinations chapter.

Overview of the examination

32. See Procedure Guide, paragraphs 2.1-2.17, and paragraphs 051 to 058 of the PPG on Plan-making.[13]

[13] PPG reference ID 61-051 to 058-20190315

Is there any external advice (in addition to the NPPF & PPG) that may help Inspectors examining local plans?

33. The Planning Advisory Service (PAS) provide a range of useful material. This includes a toolkit for LPA's, which is based on questions commonly asked by Inspectors in their MIQs. This is likely to be particularly helpful for Inspectors who are undertaking their first examinations:

https://local.gov.uk/pas/plan-making/plan-preparation-project-management/local-plan-route-mapper-toolkit-reviewing-and

34. PAS also produce good guidance on Regulation 22 statements. This emphasises that this is "an opportunity to draw the Inspector's attention to the issues that are most pertinent to the LPA's Local Plan and, more importantly, the council's responses to these challenges":

https://local.gov.uk/pas/pas-topics/local-plans/local-plan-reg-22-consultation-statement

35. Other guidance is provided for preparing a proportionate evidence base in support of the local plan and on what a good local plan should look like:

https://local.gov.uk/pas/pas-topics/evidence-plan-making-focus-upon-proportionality-february-2020

https://www.local.gov.uk/pas/plan-making/case-studies/case-studies-what-good-local-plans-look

36. Guidance on SA, Duty to Co-operate, strategic planning, climate change and plan-making latest news can be found at:

https://www.local.gov.uk/pas/plan-making

What are the main stages of the examination?

37. Please refer to Procedure Guide paragraphs 10 & 11 and the tables which follow them. They set out the main stages of the examination process and outline what happens at each stage. The rest of the Procedure Guide, and of this section of the ITM chapter, provide more detail on each of the stages and key actions outlined.

The examination stages

Section 1: Before submission

38. For information and advice on the processes that take place before the plan is submitted for examination, please refer to Procedure Guide Section 1 and the Plan Preparation section of this ITM Local Plan Examinations chapter.

Section 2: Submission

What is the role and status of the Programme Officer?

39. Procedure Guide paragraph 2.2 outlines the role of the Programme Officer [PO]. Outside the examination hearing sessions, the Inspector has no direct contact with the LPA or any other party: all phone calls and correspondence are handled by the PO on the Inspector's behalf.

40. The PO is appointed by the LPA. Many POs are self-employed and highly experienced in the role. They may be working on more than one examination at the same time. On the other hand, some LPAs choose to second a member of their own staff to act as PO for the duration of the examination. Provided the PO has had no involvement in the preparation of the plan, that is perfectly acceptable.

41. PINS provides PO training sessions for LPA employees and other prospective POs. However, it is not obligatory for a prospective PO to attend them. Even for those that do, it is likely that a seconded member of staff will be less familiar with examination procedures and may need more support than an experienced, self-employed PO.

When should the Inspector first make contact with the Programme Officer?

42. As soon as possible after appointment: the PO's contact details will be in the appointment letter. Normally the PO will have been in post for some time before the Inspector is appointed. They will usually be expecting a phone call within a day or two of the Inspector's appointment. It is important to do this, in order to make contact and begin to establish a working relationship.

When should the Programme Officer first make contact with representors?

43. As soon as possible after the Inspector has been appointed. See Procedure Guide para 3.1. The PO's initial email to all those who have made representations should inform them of the Inspector's appointment and provide a link to the examination website. It should make it clear that additional written material is not invited at this stage and that the PO will contact them again to set out the arrangements for the hearing sessions.

How should the Inspector work with the Programme Officer?

44. Although the PO is appointed by the LPA they work under the Inspector's direction. A good PO is an immense help as they can be left to deal with most of the administrative aspects of the examination, including queries from the public and participants, leaving the Inspector to concentrate on the plan itself. Usually, the relationship is a collaborative one and often the PO and the Inspector get on very well. Even where that is not the case, a sound working relationship is almost always established. Serious conflicts or personality clashes are very rare, but if one occurs you should seek advice from your SGL or mentor.

45. The key to a good working relationship is for the Inspector and the PO to be open and clear about what they are doing and what they each expect the other to do, at each stage of the process. The Inspector should of course be reasonable when setting tasks and timescales for the PO.

46. Experienced POs may have their own established way of running examinations. That can often be a benefit, especially if the Inspector is less experienced. However, if the PO's preferred way appears to conflict with PINS guidance or with the Inspector's own preferences, the Inspector should not be afraid to explain how they would like things done differently.

47. An inexperienced PO, on the other hand, may need the Inspector to guide them through the examination procedures. If the PO has not attended a PINS training course, it would be advisable at least to ask them to read the training material, as well as the Procedure Guide, and if possible to observe a hearing session at another examination.

48. If the PO is a LPA employee, it is also particularly important to ensure that they are seen by all parties as independent of the LPA in the way they perform their role. You should seek advice from your SGL or mentor if you have any concerns on this point.

49. Emails between the Inspector and the PO are subject to Freedom of Information requests. Informality is fine within reason, but you must avoid saying anything that would be embarrassing or would appear to compromise your impartiality if it became public. It is also important to give the PO clear instructions about the exact content of any messages you ask them to send to other parties, including the LPA.

How should the Inspector use the examination website?

50. Procedure Guide paragraph 2.4 explains the role of the examination website. It is usually hosted on the LPA's website, but it should appear as a distinct webpage, or set of webpages, to make it clear that the examination is independent of the LPA. Early on in the examination process, the Inspector (through the PO) should agree with the LPA a suitable structure for the examination website, and a simple reference number system for documents placed on it.

51. The website is a source where the Inspector can find most of the documents needed for the initial assessment of the plan. As the examination progresses, various administrative documents, communications between the Inspector and the LPA, hearing statements, additional evidence and other material will be added to the website. The website is the main place to which all parties go for the documentation they need during the examination.

52. This means that if the examination is to run smoothly, it is vital to ensure that material can be placed on the website speedily[14] once the Inspector requests it. Ideally the PO should be able to place material directly on the website, but if the LPA is not able to give the PO access, the LPA will need to put a system in place to respond quickly to requests from the Inspector via the PO.

53. A link to the Procedure Guide for Local Plan Examinations and the short guide to taking part in local plan examinations (both available on gov.uk) should be displayed prominently on the home page of the examination website, together with a brief explanation of its purpose (eg, that it is a main source of guidance on the procedure for the examination, alongside the Inspector's guidance note). The PO may often be

[14] The Service Level Agreement between PINS and the LPA says: The LPA must ensure that the PO is able to ensure that examination documents and information are uploaded promptly to the examination website as directed by the Inspector (para 8(f)).

able to deal with procedural queries by referring the enquirer to the relevant section of the Procedure Guide and / or the short guide.

54. Local plan examinations tend to take a year or more passing through various stages. This can be difficult for participants to follow, particularly if they have not taken part in an examination before. It is therefore important that people can easily tell the stage that has been reached and what happens next from the examination website, for example without having to trawl through letters between the Inspector and the LPA and without having to contact the Programme Officer. This is particularly important where there are significant delays for any reason. This can be achieved by posting a brief note or news item explaining briefly where things are.

What is the Inspectorate's general approach to keeping local plan documents?

55. The Inspectorate's local plan team keeps:

- the final examination report for 5 years
- information relating to the invoicing of the LPA for the costs of the examination for 7 years
- any correspondence dealt with directly by the local plan team for 1 year.

Any other documents will only be kept exceptionally. All examination documents are held by the LPA on their website and retention is a matter for them.

56. However, it is possible that, as the Inspector, you may hold a duplicate copy of some examination documents, either because you wrote or downloaded them. You may also have notes prepared for your own use and which are not in the public domain, for example those made during the hearing sessions.

57. There are two key issues here:

- the possibility of requests for you to release documents which are not in the public domain
- your responsibilities in relation to data protection.

These are dealt with in the next two questions.

What is the Inspectorate's approach to the release of local plan documents that are not in the public domain?

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

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

The starting point is that documents should be released unless there are very good reasons not to, in line with exemptions set out in the legislation (which are different in each case). These exemptions mean that we do not need to release documents while the examination is still live, including draft reports.

59. To date we have also taken the line that there are good reasons to not release quality assurance comments about Inspector's reports, legal advice or advice offered by line managers and others, even after the examination has concluded. This is because the release of such documents could inhibit the free and frank provision of advice and exchange of views. However, there is no definitive position on whether any individual documents should be released and each case is considered on its own merits.

60. Generally, though, we have fewer good reasons to withhold an Inspector's hearing notes whether hand-written, digital or paper. Historically the Inspectorate has released these notes, on request, for all casework types.

61. Once the examination has closed you no longer need to keep any documents, unless you think it would help our case in a legal challenge or complaint. Our advice therefore is to:

- safely delete/destroy any documents once they are no longer required
- only retain what is likely to be essential to defend a legal challenge or complaint.

Any documents should therefore be disposed of after the period for making a legal challenge has passed (generally 6 weeks after the LPA has adopted the plan) or, if there is a challenge, at the point any retained documents are no longer required. You can destroy your notes before that, if you think they would be unlikely to be of assistance in a challenge.

62. However, please be aware that any documents you do hold could potentially be released at any time. You should, therefore, avoid writing anything that could be misleading or damaging to you or the Inspectorate, even in notes you consider to be personal.

63. The responsibility for disposing of documents lies with you. Information on how to safely dispose of documents is provided below.

What are the Inspector's responsibilities for data protection during and after the examination?

64. The General Data Protection Regulations came into effect on 25 May 2018. They aim to increase the control that individuals have over their personal data and the transparency and accountability of bodies in their use of personal data. Fines for non–compliance can be significant. The Procedure Guide (Section 2: Submission) provides a link to the PINS privacy statement.

65. The Procedure Guide (Section 1: Before Submission) explains that the Inspector will need to know the names of those who have made representations on the plan but not their addresses.

66. However, it is possible that the representations and other evidence provided could include personal information about individuals, in addition to their names. The main concern for Inspectors examining a local plan will usually be how to handle documentation which includes any personal information relating to individuals. If you are concerned about any issues regarding representations which contain personal information within them, please discuss this with your line manager. It may also be worth raising with the LPA via the Programme Officer. The Planning Inspectorate's

Senior Data Protection Manager (in Corporate Services) can also provide advice about any matter relating to personal data (especially where there is sensitive information or there could be an expectation of special handling by the individual).

67. During the examination itself, and until that data can be disposed of, the Inspector must make sure that all such documentation is kept secure.

68. When the examination has closed you no longer need to keep any documentation, unless you think it would help in a legal challenge or complaint. Our advice therefore is to:

- safely delete/destroy any documents that are not required for this purpose
- only retain what is likely to be essential to defend a legal challenge or complaint.

You must always ensure that any documents containing personal data are safely destroyed on the completion of the examination or at the point that data is no longer needed for the conduct of a legal challenge (which will usually be known around 6 weeks after the date the LPA adopted the plan).

69. The responsibility for safely destroying any personal data lies with the examining Inspector. Information on how to safely dispose of documents is provided below.

How can I safely dispose of any documents?

70. 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 Plans Team 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/booka-collection-from-home-and-cathays-park/

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 Plans Team for disposal
- Any email exchanges with the PO or the Plans Team should also be deleted.

Examination documents that do not contain any personal or sensitive information can be disposed of via kerbside waste collection or at a local recycling centre, if your local authority will accept them. More information on data protection can be found at: https://intranet.planninginspectorate.gov.uk/task/data-protection-gdpr/

How is the Inspector's time charted for the examination?

71. At the beginning of the examination, you should agree with the Plans Team how much time is to be charted in your programme for preparation, sitting and reporting, and when those stages are planned to occur. It is important that this time is charted promptly so that other work can be fitted in around it. PINS Local Plans Protocol 2, available on the Local Plans and CIL page of the PINS intranet, provides more detail of the time allocation process. If it appears subsequently that any significant delay in the examination timetable is likely to arise, you should discuss this with the Plans Team as soon as possible so that your chart can be adjusted.

72. The same applies if it appears that there will be a significant discrepancy between the charted time and the actual time you need for any stage of the examination. Significant discrepancies between anticipated and actual time taken can cause audit and finance problems.

How should the Inspector keep the Plans Team and the Professional Lead informed of progress?

73. The Plans Team and the Professional Lead (Plans) need to know about the progress of examinations and any major issues that are likely to arise, so that PINS is not taken by surprise at any particular turn of events. In some circumstances the Plans Team may also need to inform MHCLG of developments. The Inspector should therefore keep the Plans Team and the Professional Lead informed of progress throughout the examination. Significant issues – for example, fundamental soundness problems, or the need for a substantial pause in the examination – should be communicated as soon as they arise. General progress should be communicated by completing the monthly Plans Tracker form.

74. Often dates for the hearings are set only provisionally at the outset of the examination: if this is the case you should inform the Plans Team as soon as the dates are confirmed, and also confirm your charted preparation and reporting time. When the hearings have concluded, you should inform the Plans Team as soon as possible of when you expect to submit your report for QA.

Section 3: Initial assessment and organisation of the hearing sessions

What are the Inspector's main tasks during this stage of the examination?

75. The Inspector usually has two or three weeks allocated to make an initial assessment of the plan and to organise the hearing sessions. The main tasks that need to have been completed by the end of this period are:

- Check that the procedural requirements have been met and the evidence base is complete;
- Confirm the plan which is to be examined and the status of any proposed changes submitted by the LPA;
- Make an initial assessment of the plan and identify potential soundness and legal compliance issues;
- Write to the LPA with initial clarification questions (if necessary);

- Prepare matters, issues and questions [MIQs] to structure the examination and the hearing sessions;
- Set dates and an initial programme for the hearing sessions;
- Issue a guidance note on the examination process.

76. These tasks are considered in turn below. But in practice they overlap and the Inspector will need to be flexible in using the time available to ensure that they are all completed.

77. If the Inspector has concerns that there may be fundamental flaws in the plan or the evidence base, or that the duty to co-operate may not have been met, their concerns will need to be raised with the LPA and addressed before these initial tasks can be completed. See What should the Inspector do if they identify any fundamental concerns about soundness or legal compliance during their initial assessment? below.

Initial assessment of the plan

How should the Inspector establish that the relevant procedural requirements have been met?

78. See Procedure Guide paragraphs 3.2-3.5.

79. Procedure Guide paragraphs 1.17+ set out the documents that must be submitted with the plan for examination. As soon as the Inspector has been appointed, they should check that all those documents are available on the examination website. If any of the required documents are missing the PO should ask the LPA to provide them immediately.

80. If the LPA is unable to provide any of the required documents, this might well indicate that one or more procedural requirements have not been complied with. Such a situation is unusual, but if it should occur you should ask the LPA for clarification as soon as possible, seeking advice from your SLG or mentor as necessary. The next steps will depend on what specific procedural requirement has not been met. See What should the Inspector do if they identify any fundamental concerns about soundness or legal compliance during their initial assessment? below.

81. The LPA may submit a statement confirming that the relevant procedural and legal requirements have been complied with. This can be helpful, but the Inspector should check that it is accurate.

How should the Inspector establish that the evidence base is complete?

82. One of the procedural requirements is for the LPA to submit such supporting documents as are relevant to the preparation of the plan[15]. These will include the documents which form the evidence base for the plan. At the start of the examination the Inspector should check as far as is possible that the evidence base is complete. During your first read-through of the plan, make a note of all the key supporting evidence that is referred to and check that the corresponding documents have been submitted or are available on the examination website. It is not essential for all the

[15] Regulation 22(1)(e)

evidence base documents to have been formally submitted, as long as they are publicly available on the website.

83. Paragraphs 038-048 of the PPG on Plan-making[16] contain advice on evidence-gathering for different plan topics. They provide another useful check on what evidence is likely to be required, depending on the scope of the plan under examination.

84. The LPA should be asked about any obvious gaps in the evidence base as soon as possible. Sometimes they have simply overlooked the relevant document, but if important evidence is not available you may need to ask them to prepare it. This occurs only rarely, and you should ask your SGL or mentor for advice as necessary if should arise.

What format should the submitted documents, the evidence base documents and the Regulation 19 representations be in?

85. The Inspector should make sure that all the documents they need are available in a format which they can easily work with. The submission documents are usually provided on a memory stick to be downloaded. They, and any other evidence base documents, should also be available on the examination website. The Inspector has the option (within reason) of requesting hard copies where they would be more convenient[17].

86. Although not a legal requirement, it is vitally important that all the representations made at Regulation 19 stage are provided in a searchable database and that they can be easily accessed in both policy and paragraph order and representor order[18]. Otherwise much Inspector time will be wasted. If the representations have not been provided in the correct format, the LPA should be asked to rectify this. In some circumstances the PO may also be able to assist.

Can documents be added to the evidence base?

87. Yes – if evidence base documents are missing they can be added to the examination website during the course of the examination. In the interests of natural justice the Inspector will need to make sure that interested parties have the opportunity to read them. As long as any additional documents are placed on the website a reasonable time before any relevant hearing sessions take place, and the participants are alerted to them, it will not usually be necessary to invite written comments on them. For advice on dealing with documents submitted during or after the hearings, see section 5 below.

Is the Inspector required to have regard to all the representations made at Regulation 19 stage?

88. Yes. This is a specific legal requirement – Regulation 23. If there has been consultation on an addendum of proposed changes before submission of the plan

[16] PPG Reference ID 61-038 to 048-20190315
[17] Procedure Guide para 1.23
[18] Procedure Guide para 1.19

(see How should the Inspector confirm which version of the plan is being examined? below), the Inspector will also need to have regard to the responses to that consultation.

Is the Inspector required to have regard to representations made at Regulation 18 stage?

89. No. The LPA are required by Regulation 22 to submit a summary of the main issues raised in the Regulation 18 representations and a statement of how those representations have been taken into account. But there is no legal requirement for the Inspector to have regard to the Regulation 18 representations.

How should the Inspector confirm which version of the plan is being examined?

90. See Procedure Guide paragraphs 1.2-1.5. Normally the plan that is submitted to be examined must be the same as the plan which was published for representations at Regulation 19 stage. The only permissible exception to this is where an addendum of proposed changes has been prepared and consulted on **before submission**, following the procedure described in Procedure Guide paragraph 1.4. If this has happened the Inspector must verify that the correct procedure has been followed, seeking clarification from the LPA as necessary.

91. If the correct procedure has been followed, the Inspector must confirm that the plan that is being examined incorporates the addendum of proposed changes. This confirmation is usually best done as part of an Inspector's initial letter to the LPA, and it should be reiterated in the Inspector's guidance note.

92. Conversely, if the correct procedure has **not** been followed, the Inspector will usually need to confirm that the plan is being examined in the same form as was published for representations at Regulation 19 stage, **without** the addendum of proposed changes. This will also apply if consultation on the addendum took place **after** the plan was submitted. (In these situations, the addendum of proposed changes may be treated as a list or schedule of proposed changes as described under What should the Inspector do about other changes to the plan proposed by the LPA? below).

93. It is important to clarify these matters at the outset because the Inspector's recommended main modifications will apply specifically to the text of the plan that is being examined.

After the plan has been submitted for examination, can the LPA withdraw it and replace it with another version to be examined?

94. No. Once the plan has been submitted, the only way in which material changes may be made to its policies is by the Inspector recommending MMs to it: see Procedure Guide paragraph 1.5. If the LPA decide to withdraw the plan they have submitted, the examination will come to an end. They cannot replace it with another version during the examination. However, see the advice below on the potential scope and extent of main modifications.

What should the Inspector do about other changes to the plan proposed by the LPA?

95. LPAs often submit, along with the plan, a list or schedule of proposed changes which has not been the subject of consultation. Often the proposed changes are seeking to address issues raised in the representations made at Regulation 19 stage. Some changes may have been drafted by the LPA itself, some may have been drafted by representors, and in some cases they may arise from discussions between the LPA and other bodies – for example the statutory agencies.[19]

96. Such a list of proposed changes can be helpful in suggesting some potential main modifications to the plan. However, the Inspector will need to make its status clear, and clarify that any proposed changes that materially affect the plan's policies can only be included in the plan if the Inspector considers they are necessary for soundness or legal compliance and recommends them as main modifications. See What is a main modification? below.

97. It is quite common for such lists to contain a mixture of potential main modifications and additional modifications, and the Inspector may also need to help the LPA to distinguish between the two. All these matters may be dealt with in the Inspector's initial letter to the LPA and reiterated as necessary in the Inspector's guidance note and at the hearings.

What should happen if the LPA decides that it no longer supports the plan it submitted and wishes to make significant changes to it?

98. There have been cases where a LPA decides it no longer supports the plan it has submitted and wishes to make significant changes to it. For example, this might happen after a change in political control. As noted in the previous paragraph, there is no provision in the Act or Regulations which allows a submitted plan to be withdrawn and replaced by a different version during the examination. The only way a plan can be changed after submission is if the Inspector recommends MMs which are necessary to make the plan sound.

99. One option in these circumstances would be for the LPA to submit a list of proposed changes to the plan and to ask the Inspector to consider recommending them as MMs. But when the LPA's proposed changes represent a significant change to the strategy, this can be very difficult to deal with during the examination.

100. An example might be where a LPA wishes to move from a reliance on new settlements to an approach based on expanding existing ones. In order for this to happen, the LPA would need to persuade the Inspector that the strategy in the submitted plan was unsound. Consultation would need to take place on the proposed changes and the Inspector would be obliged to consider the representations made on both the submitted plan and the revised plan. This is likely to lead to a long and difficult examination. In addition, there is no certainty that the LPA would achieve the plan it wanted, because the Inspector might conclude that the strategy and approach in the submitted plan was, in fact, sound and that there was no need for the LPA's proposed changes.

[19] For example, the Environment Agency, Historic England, Natural England.

101. In essence, the examination system is not designed to allow an LPA to significantly change a plan during the examination. In circumstances where the LPA no longer supports its own plan, it would be reasonable for the Inspector to advise the LPA that the most appropriate course of action would be to withdraw it, citing the reasons set out above. And that if the examination goes ahead it is likely to be long and difficult. Please also see the advice in the section below which may be relevant on: 'What should an Inspector do if they have significant soundness or legal compliance concerns following the hearing session(s) that would be very difficult to overcome by MMs or additional work?'

How can the Inspector gain an initial overview of the plan and the likely soundness and legal compliance issues?

102. It is usually best to start by reading through the submitted plan, making notes as you go along. Note down any queries, anomalies and potential soundness and legal compliance issues, however minor, as you come across them. Cross-check with the NPPF and PPG if it seems that a policy may not be consistent with national policy.

103. Then read through the LPA's summary of the representations received at Regulation 19 stage. If this has been done well it should give a good indication of representors' views. In some cases, the LPA may also have provided a response to the main issues they have identified[20], or the Inspector may ask them to provide one if that would be helpful and would not cause an unreasonable delay. You will usually find that the representations identify many of the same soundness and legal compliance issues as you have identified in your initial read-through of the plan. But you may also have identified issues that no-one else has.

104. You will then need to turn to the representations themselves. It is usually best to start with the representations from bodies such as neighbouring LPAs, statutory agencies, development industry representatives, parish and town councils, and locally-based interest groups. Focus in on any potential soundness and legal compliance issues that are raised. The LPA may also have provided responses to the representations or to the main issues raised in them, although this is not a statutory requirement.

105. In some examinations there may be very large numbers of representations from individuals, but often most of these are about a relatively small number of controversial policies or site allocations. You must however ensure that you are aware of all significant issues raised.

106. At the end of this process you should have an initial list of potential soundness and legal compliance issues. You will probably also have a list of queries for the LPA about matters that are unclear. Straightforward factual queries (e.g. is there a viability assessment of the plan? where can a document be found in the list of the evidence base documents?) should be raised by e-mail via the PO. Queries that have a bearing on the soundness and legal compliance of the plan should be raised by letter. See Who should the Inspector's initial questions be directed towards and what information should be placed on the examination website? below.

[20] See Procedure Guide, para 1.7.

Does the plan make explicit which of its policies are strategic policies?

107. NPPF 21 requires plans to make explicit which policies are strategic policies. If the plan before you does not, you should raise the matter with the LPA, as a MM may be required to correct it. See paragraphs 30+ of the Plan Preparation section of the ITM Local Plan Examinations chapter for detailed advice on this point.

Does the plan identify any previously-adopted policies which its own policies are intended to supersede?

108. Regulation 8(5) requires that if the plan before you contains any policies that are intended to supersede any policies in the adopted development plan, it must state that fact and identify the superseded policies. Some LPAs overlook this requirement, so you should check that it has been done and raise the matter with the LPA if it has not. The plan will need to be altered accordingly by means of a MM, otherwise there is a risk that the previously-adopted policies will continue to apply even after the new plan has been adopted.

Should the Inspector write an initial letter to the LPA after completing an initial assessment of the plan?

109. Inspectors may find it helpful to write an initial letter to the LPA setting out any queries on aspects of the plan and the evidence base on which they require clarification. Throughout the examination, Inspectors should always seek to raise concerns with the LPA, through the PO, at the earliest possible stage and allow them sufficient time to consider such concerns. Inspectors should be pro-active and front-load the process as far as possible to ensure an efficient and effective examination. Possible examples of this are where a weakness in the evidence base has been identified and seems capable of being addressed early on, or to probe the justification for a policy that is not consistent with national policy, and where this approach may save hearing time or overall examination time. However, raising early questions is not obligatory, and if the plan is a straightforward one and you have no queries or other matters to raise, it may not be necessary.

110. Where you consider an initial letter is required, you should confine your questions to those that are necessary to inform your understanding of the plan. Asking too many questions can delay the examination and cause unnecessary work for the LPA. Questions should be specific rather than general, and neutrally phrased but inquisitorial. For example:

- Which parts of the evidence base is the LPA relying on to support policy X?
- Is there specific local justification for policy Y, which does not appear to follow national guidance in the following respects…?
- Where in the Sustainability Appraisal was the issue of air quality considered?

111. Seeking clarification at this stage can save time later in the examination. For example, there may be an opportunity for the LPA to address any weaknesses ahead of discussion at the hearing sessions, rather than additional work being required after the hearing sessions themselves, causing a delay. This will also ensure that best use can be made of the hearings. In some cases, it may also remove the need for any further discussion.

112. Often the queries can be easily resolved, and where they cannot this may highlight an issue that requires further investigation and/or discussion. Inspectors should be reasonable in the number of queries they make, but should not hesitate to ask about anything that they need to know in order to inform their assessment of the plan's soundness and legal compliance.

113. The initial letter to the LPA also provides the opportunity for the Inspector to confirm any procedural matters which require confirmation, such as whether or not the plan that is being examined incorporates the addendum of proposed changes, if one has been submitted. See How should the Inspector confirm which version of the plan is being examined? (**see above**).

114. In some cases you may have been able, during your initial assessment, to identify a number of potential main modifications [MMs] to the plan that you think are likely to be needed. If so, it is also helpful to raise them in the initial letter to the LPA and invite a response, while making it clear that this is your preliminary view at this stage. If the LPA confirm that they agree with your suggested MMs, there may be no need to discuss them at the hearings, unless other parties have made relevant representations or are otherwise affected by them. An example of an initial letter is provided as Annex 1.

Who should the Inspector's initial questions be directed towards and what information should be placed on the examination website?

115. The Inspector's initial questions should usually be directed to the LPA. However, in some cases, it may be appropriate to ask a question of another participant. For example, where a neighbouring authority has raised a concern relating to the duty to co-operate, it might be appropriate to seek further details from the outset.

116. The Inspector's initial letter, the LPA's reply, and any other documents or information the LPA provide in response to the Inspector's queries must all be published on the examination website.

117. Straight forward requests, such as, seeking missing documents can be undertaken via an email to the PO and does not need to be published on the examination website. Nor does day-to-day correspondence with the PO about the general running of the examination.

118. However, any substantive correspondence between the Inspector and the LPA or any other participant should be placed on the examination website.

Should participants in the examination be given the opportunity to comment on new evidence provided by the LPA in response to the Inspector's initial questions?

119. This depends on the circumstances including the nature of the evidence, its significance and whether it might lead to significant changes to the plan. As ever, the key is to ensure that what you do is fair and so aligns with the Franks Principles. There will usually be two options (and if you are uncertain, please discuss with your IM or Professional lead):

1. Allow participants the opportunity to take the additional evidence into account when preparing for the hearings – allowing them to comment in their written statements and at the hearing. It is sensible, therefore, for the Inspector to draw participants' attention to the new evidence in their guidance note and/or matters, issues and questions.

2. However, in some cases the new evidence may be of such significance that a wider consultation exercise might be sensible before the Inspector's MIQs are finalised and participation in the relevant hearing sessions is confirmed.[21] For example, this might apply if the new evidence could have significant implications for what is being proposed in the plan (eg in relation to the spatial strategy and/or substantially different site allocations).

Please also see the section below on 'How should new evidence be dealt with by the Inspector and when should additional consultation be undertaken?'

What should the Inspector do if they identify any fundamental concerns about soundness or legal compliance during their initial assessment?

120. See Procedure Guide paragraphs 3.2+ and paragraph 055 of the PPG chapter on Plan-making[22]. Sometimes the Inspector will identify fundamental concerns about soundness or legal compliance at the initial assessment stage. Such concerns are likely to be about important issues of legal compliance, issues where the plan appears to be strongly at odds with national policy, or important plan policies that appear not to be supported by evidence. **You should discuss any fundamental concerns you may have with your IM or mentor, and if necessary the Professional Lead (Plans), before taking any further steps.**

121. Important legal compliance issues might include, for example, concerns that the duty to co-operate had not been met[23], or that the Regulation 19 procedure had not been properly followed. Examples of fundamental concerns about soundness might be that the LPA had applied an incorrect approach resulting in an unjustifiably low assessment of housing need, or that the plan proposed the removal of land from the Green Belt with no substantial evidence of exceptional circumstances to support it, or that there were one or more substantial flaws (eg in respect of flood risk) in the site selection process[24].

122. Any fundamental concerns should be raised with the LPA, inviting the LPA to respond, as soon as they become apparent[25]. It is important that this is done early on because the LPA may then need to carry out further procedural steps or further work on the evidence base before the hearings can begin. In some circumstances the plan may even have to be withdrawn. Raising fundamental concerns at an early stage therefore helps to avoid wasted cost and effort. An example of an initial letter raising fundamental concerns is provided as Annex 2.

[21] For example, along the lines of that carried out at Regulation 19
[22] PPG ID Ref: 61-055-20190315
[23] See the section of the ITM Local Plan Examinations chapter on Duty to Co-operate.
[24] See the sections of section of the ITM Local Plan Examinations chapter on Housing and Green Belt.
[25] Seek advice from your SGL or mentor on this as necessary.

123. **Any letter from an Inspector which raising concerns about soundness or legal compliance issues must be sent in draft to the Professional Lead (Plans) for comment. (If you have any doubt about whether a letter falls into this category, please discuss it with the PL.) The Inspector must then ensure that the Plans Team sends the final version of the letter to MHCLG for information at least 48 hours before it is sent to the LPA.**[26]

124. What happens next will depend on the LPA's response. If that satisfies the Inspector's concerns it should be possible to move on to arrange the hearing sessions in the usual way. But if the Inspector still has fundamental concerns it is likely that one or more early hearing sessions will need to be arranged specifically to explore them.

How and when should any necessary early hearing sessions be arranged?

125. Procedure Guide paragraph 3.8 gives advice on when it is appropriate to deal with substantial issues in a separate early hearing, or block of hearings, before moving on to the rest of the hearing sessions. Early hearing sessions are arranged in essentially the same way, and follow the same procedure, as any other hearing session – see Arranging the hearing sessions below. What distinguishes them is that they take place before the main body of hearing sessions, so that the Inspector can explore any potentially fundamental concerns they may have about soundness or legal compliance.

126. Early hearing sessions should only be used when the issues to be discussed are likely to affect the progress and timing of the rest of the examination, and so need to be resolved before the later hearings take place. For example:

- There is significant uncertainty over whether or not the duty to co-operate has been met. This uncertainty needs to be resolved because if the duty has not been met, the plan may well have to be withdrawn.
- There is significant uncertainty over whether the plan's housing requirement is soundly based. This uncertainty needs to be resolved before the soundness of the housing land supply and restrictive designation policies can be tested.
- There is significant uncertainty as to whether the plan's spatial strategy is supported by the evidence base, including the Sustainability Appraisal. Since the spatial strategy underpins many of the plan's policies, this uncertainty needs to be resolved before the rest of the hearings can proceed.

All participants whose representations bear on the fundamental concerns identified should be invited to the relevant early hearing session(s).

127. This approach of holding early hearing sessions is often referred to as a "staged" approach, but it should **not** be regarded as the default position for examinations. Unless the circumstances described in the previous two paragraphs apply, the examination hearings should be programmed in the usual way as set out in Procedure Guide paragraph 3.7.

128. Where early hearing session(s) are held, provisional dates for the main body of hearing sessions may also be set, but their provisional status must be made clear in

[26] As required by the letter from the Secretary of State to the Planning Inspectorate's Chief Executive dated 18 June 2019, which may be found here: https://www.gov.uk/guidance/local-plans

case the examination needs to be paused to enable the LPA to carry out further work.

When early hearing sessions have been held, how should the Inspector communicate any conclusions they have reached?

129. The purpose of any early hearing session is to enable the Inspector to reach conclusions on the fundamental concerns about soundness or legal compliance that they have identified. Inspectors will therefore be expected to give an early indication of their conclusions: either that there is fundamental unsoundness or legal non-compliance, or that the examination can proceed.

130. If the Inspector concludes that there is a fundamental soundness or legal compliance problem, this must be communicated to the LPA as soon as possible. The usual means of doing this is by issuing an "interim findings" letter. The letter should set out the Inspector's conclusions and should set out what options the LPA has to address the identified problem.

131. For example, if there are fundamental weaknesses in the way that SA has been conducted or housing need has been calculated, the main options are likely to be for the examination to be paused[27] while the necessary remedial work is carried out, or for the plan to be withdrawn. Wherever possible the Inspector should seek to suggest ways in which the problems they identify can be overcome. If, however, the Inspector finds fundamental failings in compliance with the duty to co-operate, they will not be capable of being remedied and the Inspector will normally invite the LPA to withdraw the plan.[28]

132. In interim findings letters, Inspectors should go no further than is necessary to set out their conclusions on fundamental soundness or legal compliance problems and the options for the LPA to deal with them. Any reasoning that is needed to support those conclusions should be as brief as possible. An example of an interim findings letter is provided as Annex 3.

133. **All proposed interim findings letters must be submitted for QA before issue. A copy of the draft letter should be sent to the Professional Lead (Plans) and copied to the Inspector's IM and the Plans Team. After QA comments have been received and the final version of the letter has been prepared, the Inspector must then ensure that the Plans Team send the final version of the letter to MHCLG for information at least 48 hours before it is sent to the LPA.**[29]

134. If, after the early hearing session(s), the Inspector is satisfied that there are in fact no fundamental soundness or legal compliance problems affecting the plan, there is no need for an interim findings letter. It is sufficient to inform the LPA that the Inspector is satisfied that the examination can proceed, and to post a similar message on the examination website. The examination can then continue in the usual way.

[27] See Section 9 below.
[28] See the section of this ITM Local Plan Examinations chapter on Duty to Co-operate.
[29] As required by the letter from the Secretary of State to the Planning Inspectorate's Chief Executive dated 18 June 2019. The letter may be found here003A https://www.gov.uk/guidance/local-plans

Should Inspectors issue interim or partial examination reports following early hearing session(s)?

135. After early hearing sessions have been held, Inspectors are sometimes asked to indicate to participants their views on **all** controversial matters affecting the plan, by issuing what would in effect be an interim or partial version of their examination report. This is inappropriate, and any such requests should be politely refused. Inspectors should do no more at this stage than what is described in What should the Inspector do if they identify any fundamental concerns about soundness or legal compliance during their initial assessment? above. The place to deal with all the matters of soundness and legal compliance affecting the plan is in the examination report, after all the evidence has been heard and consultation on the MMs has taken place.

How should new evidence be dealt with by the Inspector and when should additional consultation be undertaken?

136. LPAs sometimes produce new evidence or suggest MMs early on in the examination, in some cases to address initial concerns or questions raised by the Inspector. Where such evidence or proposed MMs are relatively minor, it will not usually be necessary to undertake additional consultation, as participants will be able to fairly consider the evidence or MMs during the examination process (and address them in their hearing statements and/or in the hearings).

137. However, where the new evidence or proposed MMs are more significant it can lead to a difficult decision for Inspectors in terms of determining whether additional consultation is needed and, if so, when and with who. The first consideration should be whether the new evidence or proposed MMs are likely to affect anyone not already involved in the examination (ie those who did not comment at Regulation 19 stage). If this is unlikely, then there is no need to undertake additional consultation and the new evidence or proposed MMs can be suitably considered by participants during the examination, through written statements and/or the hearing sessions.

138. Where the Inspector is of the view that the new evidence or proposed MMs could result in stakeholders or members of the public being affected who did not comment at the Regulation 19 consultation, then additional full consultation might be needed, particularly where the new evidence has arisen relatively early on in the examination (before the hearing sessions). This could include new site allocations, alterations to the spatial strategy, revised needs assessments and significant changes to the SA or HRA.

139. Additional consultation at this stage of the examination will allow those who might now wish to participate in the examination the opportunity to play a full role. This can be important in identifying any significant issues with the new evidence or proposed MMs early on in the examination. This can be preferable to leaving consultation to the MM stage, because any significant issues which come to light during the MM consultation could lead to the need for further hearings and significant delays in the examination process.

140. However, there will be occasions where it might be appropriate to consult on new evidence *alongside* the consultation on MMs (ie even if the new evidence is unrelated to any of the MMs). It has the advantage of avoiding delay to the examination and is most likely to be appropriate where the new evidence is being prepared as a result of

discussion at the hearings stage **and** the initial view of the Inspector is that the new evidence is unlikely to require any further MMs or hearing sessions. However, the Inspector will need to review this position after consultation.

141. If it is decided at the hearing sessions that additional work by the LPA is needed, then the Inspector will need to examine the additional evidence once it is complete. This might require additional hearing sessions. Participants should be given the opportunity to comment upon the new evidence either through written statements and/or hearing sessions if needed.

142. As ever, the key in all of this is to ensure that what you do is fair and so aligns with the Franks Principles.

Programming the examination

How should Inspectors go about the realistic, efficient and effective programming of examinations?

143. The programming of an examination can be challenging given the scale, complexity and the timescales involved. There may also be times where the timetable is uncertain (for example, if the LPA is working on new evidence) and the Inspector has other casework to manage. Consequently, at an early stage, it can be useful to produce a draft programme for the entire examination, building in realistic timescales for each part of the process. It might also be helpful to share this with the PO and LPA to help assess whether they think it is realistic and if they will both have sufficient resource/time available at the key times of the examination. Although the programme will need to be reviewed regularly, this will provide some indication of when time will be needed in your chart for the examination. Establishing a positive and proactive approach to programming with the LPA and PO from the outset will help ensure that any changes in circumstances can be accommodated in an efficient and effective manner.

144. It can be common for Inspectors to have multiple examinations at the same time or other casework that can result in delays to the examination process. Having a broad programme set out early in the process will help the Inspector to manage competing casework demands and allow their chart to be kept clear of other casework during the main stages of the examination. Early notice to the Local Plans team of charting requirements by Inspectors is essential. Inspectors should speak to their line manager if competing casework demands are affecting the efficient and effective progress of an examination.

Arranging the hearing sessions

145. See Procedure Guide Section 3. You should also have regard to the PINS Process for arranging Virtual and Blended Local Plan Hearings and PINS Guidance for Local Planning Authorities and others hosting virtual events for the Planning Inspectorate when considering and arranging hearing sessions, including the potential for 'virtual' or 'blended' events.

Are hearing sessions always held?

146. If none of the representors who are seeking a change to the plan has asked to appear at a hearing session, there is no need to hold one (unless the Inspector considers it necessary in order to explore any soundness or legal compliance issues). In such cases the examination may be conducted through written representations. In practice this is very rare. Hearing sessions are held in the great majority of examinations.

When should the dates for the hearing sessions be set?

147. The Inspector should decide on **provisional** dates for the hearing sessions within the first few days after appointment, particularly in order that accommodation for 'in person' hearings can be reserved. The provisional dates should be set in consultation with the LPA and PO, taking account of their (and the Inspector's) availability and whether suitable accommodation is available (particularly if 'in-person' or 'blended' events are intended to form part of the hearings programme). However, the dates should not be confirmed or publicised until the Inspector has completed the initial assessment of the plan, in case any delays arise because clarification or further evidence needs to be sought from the LPA.

148. A minimum of six weeks' notice of the start of the hearing sessions needs to be given[30], so this should be borne in mind when setting the provisional dates. It is perfectly acceptable to give a longer period of notice and this may be advisable when it includes the Christmas, Easter or summer holidays. In some cases, the LPA's Statement of Community Involvement[31] may require a longer notice period.

What are the requirements for a 'physical' hearings venue?

149. In the event that 'in person' or 'blended' events form part of the hearings programme, see Procedure Guide paragraphs 4.5-4.7 for the requirements of the hearings venue. The Inspector should ask the PO to liaise with the LPA to ensure that these requirements are met.

How should the hearing sessions be structured?

150. The hearing sessions should be structured around the matters, issues and questions [MIQs] drawn up by the Inspector. See Procedure Guide paragraph 3.7 for advice on what MIQs are. An example MIQ document is provided as Annex 4.

How should the Inspector go about drawing up the matters, issues and questions?

151. There are various possible approaches to this task but the following suggestions should be helpful if you are doing it for the first time. Start by setting out the broad topics that will need to be discussed at the hearing sessions: these will form the basis

[30] Regulation 24
[31] See the Plan Preparation section of this ITM chapter on Local Plan Examinations.

for defining the **matters**. For example: the spatial strategy, housing need, the housing requirement, housing supply, flood risk, and so on.

152. Then list under each topic the potential soundness and legal compliance issues you have identified during your initial assessment of the plan. These will form the basis for defining the **issues**. The issues should be set out as a series of open questions which bear directly on the soundness or legal compliance of the plan, reflecting the NPPF's soundness criteria as appropriate. For example:

- Is the plan's spatial strategy justified by evidence? Does it provide an effective basis for meeting development needs?
- Has the plan's housing requirement been arrived at accordance with national policy and is it justified by the evidence?
- Will the plan be effective in providing a sufficient supply of housing to meet the housing requirement?
- Is the plan's approach to flood risk consistent with national policy? If not, is there evidence that there are local circumstances which justify it?

153. Each matter may cover just one or a number of issues, and it may take a few iterations to align the matters and issues satisfactorily. Once that has been done, move on to set out a series of more specific **questions** for each issue you have identified. Each question should be about a specific point on which **you**, as the Inspector, need to hear discussion or obtain information – do not include questions for the sake of it, or just because someone else has asked them. As with issues, the wording of the questions should bear directly on soundness or legal compliance and reflect national policy criteria where appropriate.

154. Avoid including open ended questions such as 'whether a policy complies with national policy'. These can sometimes be met with broad answers that are not particularly helpful. It is better to be specific and ask about the aspect of the policy that you are concerned about. This will help ensure that you get the evidence you need and that any written statements you invite are focused on helping you. It will also avoid placing an unnecessary burden on the LPA and other participants by asking questions that result in answers that add little value to the process or result in repetitious material being provided.

155. For example, the following types of questions might be appropriate for an issue about the plan's housing land supply:

- Were the allocated housing sites selected according to a process that was robust, consistent, and based on sound evidence?
- Is there evidence to show that allocated sites A, B, C etc, identified in the plan's housing land supply for the first five years, are deliverable according to the definition in the NPPF Glossary?
- Is there evidence to show that allocated sites D, E, F etc, identified as likely to come forward in years 6-10 of the plan period, are developable according to the definition in the NPPF Glossary?
- Is there compelling evidence to show that windfall sites will provide a reliable source of supply as anticipated in the plan?

How should the initial programme of hearing sessions be drawn up?

156. See Procedure Guide paragraph 3.8 for advice on how many days a week to sit for (three days, usually Tuesday to Thursday) and how often to arrange breaks between blocks of hearings in longer examinations. Experience has shown that sitting for longer or taking less frequent breaks should be avoided as it is too demanding, especially for the Inspector and the LPA. Moreover, the non-sitting days and the breaks give time for background work, site visits etc to be carried out, increasing the efficiency of the hearing sessions overall.

157. For 'in-person' hearings, each sitting day usually runs from 9.30 or 10.00am to around 5pm, with an hour's lunch break around 1.00pm, and short breaks in the mid-morning and mid-afternoon. However, the number of individual sessions on days of hearings that involve 'virtual' event components may need to be adapted if necessary, to provide more regular breaks in screen time.

158. The 'overview of the examination' section of the Procedure Guide provides an overall indication of the number of sitting days that are likely to be needed for each type of plan. Each of the Inspector's defined matters is usually allocated one day or half a day, depending on the number of issues and questions to be discussed. Occasionally major matters involving multiple, complex or contentious issues may require more than one day.

159. If in doubt about the length of time needed for a matter, it is sensible (within reason) to allow more rather than less time for it. It is better for a day to finish early than to over-run, as over-running can cause difficulties for all participants.

160. The initial programme for the hearing sessions, showing the matter(s) to be discussed at each session, should be drawn up on this basis. The LPA should be invited to comment on it. An example of an initial programme is provided as Annex 5.

Should omission sites be discussed at the hearing sessions?

161. Not usually. See Procedure Guide, para 5.15. It should be made clear in the Inspector's guidance note that omission sites will not be discussed at the hearings. Instead the focus will be on whether or not the process by which LPA selected the allocated sites was sound. It is normally good practice to have one or more specific hearing questions on this issue.

162. Discussion at the hearings is likely to cover both the process of site selection, including the underlying evidence base, and the soundness of individual allocated sites where they are challenged (or the Inspector has doubts about them). Promoters of omission sites will be allowed to put arguments on these issues but not to promote the merits of their omission site. If the Inspector finds that the site selection process was unsound the most likely remedy will be for the LPA to be invited to fix it and re-run the process.

163. An exception to this general approach might be required if the LPA argue that they cannot meet their full assessed need for housing because of constraints or lack of capacity, or if they are proposing to release Green Belt land because they consider that insufficient Green Belt sites are available. In these situations it might be necessary to examine whether – in principle – there are other, non-allocated sites that could contribute to the housing supply.

164. See Should potential MMs be discussed at the hearings if they are likely to involve the allocation of additional sites? below for advice on what to do in situations where the Inspector finds that additional sites need to be allocated in order to meet the housing requirement.

How should participants be allocated to the hearing sessions?

165. See Procedure Guide paragraphs 3.8+.

166. Anyone who made a representation at Regulation 19 stage seeking a change to the plan has a right to take part in the hearing sessions[32]. The representations form will usually include a tick-box for those who wish to take part in the hearings, and they should be identified on the representations database. After the hearings programme has been drawn up, representors will normally be asked by the PO to confirm their intention to participate (see How should the hearing sessions be publicised and participants invited? below).

167. Once the number of hearing sessions and the matters to be discussed at each session have been decided, it may be useful to ask the PO to make a draft allocation of those representors with a right to appear – if this can be done easily and without causing undue delay. Each such representor should be allocated to one or more hearing session(s), based on the relevance of their representations to the matters to be discussed. The draft allocation of representors to hearings provides a useful check on the way the hearing sessions and the matters and issues have been structured. However, the draft allocation should not be published at this stage.

168. But if very large numbers of people have indicated on the Regulation 19 representation form that they wish to take part in the hearings, it may not be practicable or a good use of time to prepare a draft allocation. In such cases it is usually best to wait until representors have confirmed their intention to participate to the PO (see How should the hearing sessions be publicised and participants invited? below). They can then be allocated to hearing sessions at that stage.

Can other people attend or be invited to the hearing sessions?

169. Representors who are not seeking changes to the plan and people who have not made representations may sometimes ask to appear at the hearing sessions. In most cases the PO should be asked to refuse any such request politely but firmly, explaining the qualifying criteria for participants.

170. However, other parties may be invited to participate if the Inspector considers it helpful to enable the soundness or legal compliance of the plan to be determined. For example: representatives of statutory bodies such as the Environment Agency, Historic England or Natural England, especially when these bodies are suggesting the plan is unsound; or representatives of adjacent LPAs where cross-boundary matters need to be discussed, or they have suggested that the duty to co-operate has not been met. But Inspectors should be aware of the resource pressures on those bodies and issue invitations only when genuinely needed. Any such invitations

[32] Section 20(6) of the 2004 Act. See Procedure Guide paragraph 3.10.

should be issued at an early stage even if the exact date of the hearing cannot be confirmed.

171. The landowner or promoter of a site that has been allocated in the plan may support that proposal and thus not have a right to be heard. However, the LPA may sometimes invite them to appear at the hearings as part of the LPA's team. If the LPA have not, but you have concerns about the deliverability of the site or the soundness of the allocation, it may be appropriate for you as the Inspector to invite the landowner to the relevant hearing session to assist in answering your questions.

172. Should you subsequently decide to recommend a main modification deleting the allocation, the fact that the landowner will already have had this opportunity to put their views to the Inspector may also mean that there will be no need to hold a further hearing session to discuss it, even if the landowner objects to its deletion.

Can barristers and solicitors take part in hearing sessions?

173. Yes, but they take part in the same way as any other participant. They are not normally permitted to present evidence formally and cross-examine as they would at an appeal inquiry. See Procedure Guide paras 5.15-5.16.

Can Members of Parliament take part in hearing sessions?

174. Yes. See Procedure Guide paras 5.5-5.6. Note in particular the advice in paragraph 5.5 that the Inspector will allow an MP, as a representative of their constituents, to take part in a hearing session, even if the MP did not make a representation on the plan.

175. If the Inspector considers it helpful, it is reasonable to ask an MP if they are willing to answer questions at the hearing session. Questions should be put with the same degree of tact and sensitivity as for any other participant, bearing in mind that MPs are unlikely to have the same depth of planning knowledge as planning professionals.

Should hearing participants be asked to prepare hearing statements or examination statements of common ground?

176. See Procedure Guide paragraphs 3.18+. There is no requirement on the Inspector to invite written hearing statements, and no right for participants to submit them. However, more often than not Inspectors find it helpful to ask for hearing statements specifically addressing the questions set out in their list of MIQs. Well-focussed hearing statements, especially from the LPA, can save time at the hearing sessions by reducing the need for oral submissions.

177. It is up to you as the Inspector to decide whether hearing statements are required or optional. They can be very helpful to your assessment of soundness and report writing because they provide direct answers to the specific questions you consider most relevant. However, you should only ask for them where you think they will be helpful and you must allow sufficient time for them to be prepared and for you to read and understand the volume of material that may come in. Overall, most examiners tend to ask the LPA to provide statements on all matters and to make it optional for

other participants, unless there are very specific questions you want answering directly. You should explain your position in your guidance note.

178. Similarly, you can invite the LPA and other parties to prepare examination statements of common ground if you think they would be helpful. For example, they can save time by reducing and clarifying the points on which the LPA and other parties disagree. They can also be helpful when writing the report.

Why does the Inspector need to produce a guidance note?

179. See Procedure Guide paragraphs 3.24+. Annex 6 provides a link to the model guidance note. The purpose of the Inspector's guidance note is to explain the procedural arrangements for the examination and to set the ground rules for the hearing sessions. In most cases it avoids the need for a pre-hearing meeting, which in the past used to be held for this purpose. The guidance note should be specifically tailored to the circumstances of the examination, covering all the relevant matters listed in Procedure Guide paragraph 3.25 and any other necessary points. It may also be helpful to refer to the Planning Inspectorate's Customer Charter in your guidance note and to the guide aimed at people participating in their first local plan examination. The Procedure Guide sets out our promises to customers and what we expect back. It specifically asks that customers treat our staff with courtesy and respect, and that we will not tolerate rude or abusive behaviour in any form of communication. A reference to the Charter in your guidance note may help discourage inappropriate behaviour, language or material being submitted (for instance in a hearing statement, in response to a consultation on main modifications or at the hearings) and will help make it clear that it will not be accepted.

How should the hearing sessions be publicised and participants invited?

180. The Inspector's guidance note, the Inspector's list of MIQs and the initial programme of hearing sessions should be posted on the examination website, usually all at the same time[33]. Participants are not normally listed on the draft hearings programme at this stage.

181. At the same time the PO should be asked to email[34] everyone who made a representation at Regulation 19 stage advising them that the documents have been published on the website. The LPA should also publish the name of the Inspector and the date, time and place of the first hearing session in accordance with Regulations 24 and 35. Provided all this is done at least six weeks before the hearing sessions open, the statutory notice requirements will have been met.

182. The PO's email and the Inspector's guidance note should also advise any representors who have the right to take part in the hearing sessions that they must indicate if they wish to take part and set a deadline of around two weeks for them to do this. The email and guidance note must make it clear that they need to indicate their wish to take part **irrespective** of whether they have already done so (for example, by ticking the box on the representation form). They should also indicate

[33] Some Inspectors prefer not to publish the full list of MIQs at this stage. As an alternative, the draft hearings programme may be published with just the matters, or just the matters and issues, listed. If the Inspector is inviting hearing statements, they will then need to draw up and publish the full list of MIQs in sufficient time to inform the preparation of statements.

[34] If any representors do not have access to email it will be necessary for the PO to write to them.

which of the hearing sessions they wish to take part in, based on the relevance of their representations to the matters and issues for each session. It should, however, be made clear that the Inspector will decide on the final list of participants for the hearings.

183. Experience has shown that asking representors about their wish to participate at this stage is a more effective way of identifying participants for hearing sessions than relying on the tick-box on the representation form. It is lawful because section 20(6) of the 2004 Act does not specify at what stage and in what form a request to appear at a hearing session must be made. However, if a representor who had indicated on the representation form that they wished to participate, but had failed to indicate their wish when asked by the PO, came forward later asking to take part, the Inspector would need to give careful consideration to their request in the light of section 20(6) and in the interests of fairness and natural justice.

184. The model guidance note (see Annex 6) includes a request for people to let the Programme Officer know as soon as possible if they have any specific needs or requirements to enable them to attend and / or participate in the hearing sessions(s). It is particularly important to ensure that reasonable adjustments are made for anyone with a disability. It should be possible for these to be put in place by the Programme Officer working with the LPA, but if there are any difficulties then raise these initially with your Inspector Manager.

185. If hearing statements are being invited, the PO's email and the Inspector's guidance note should also set out the arrangements and deadline(s) for submitting them. It is usual to set the deadline at least three weeks before the hearings open, so that the Inspector and the hearing participants have adequate time to read them. Staggered deadlines may be set if there is more than one block of hearings.

186. An example of a PO's email to representors is provided as Annex 7.

How should the programme for the hearing sessions be finalised?

187. Once the deadline for representors to indicate if they wish to take part in the hearing sessions has passed, the Inspector should ask the PO to revise the draft (unpublished) allocation of participants to the hearing sessions accordingly. The Inspector should review the revised allocation to ensure that they are satisfied with it.

188. Occasionally, some representors may have concerns that do not directly bear on any of the issues the Inspector has identified for discussion, but nonetheless wish to exercise their right to be heard. Options for dealing with this are to fit them into the hearing session that appears most closely related to their concerns, or to arrange a general matters session for them at the end.

189. Sometimes the Inspector wishes to discuss a matter on which no representations have been made. In such cases it is perfectly permissible to arrange a hearing session in which just the LPA and the Inspector participate. Like all the other sessions, it will be open to anyone to observe.

190. Hearing sessions should not normally involve more than 20 to 25 participants. See Procedure Guide paras 3.16+ for advice on how to manage attendance at sessions which are over-subscribed.

191. Once the revised hearings programme, including lists of the participants allocated to each session, is complete it should be published on the examination website with a note advising that it is subject to review and that it is participants' responsibility to check the website regularly for further updates. Examples of hearings programmes with participants are provided as Annex 8.

Section 4: Preparation for the hearing sessions

What happens in the period before the hearing sessions begin?

192. See Procedure Guide, paras 4.1-4.4.

193. After the tasks described in Section 3 above have been completed, there is usually a period of at least six weeks before the hearing sessions begin. In the first two or three weeks of this period Inspectors are often charted to do other work, as there may well be little that the Inspector needs to do on the examination. However, it is advisable to schedule at least one or two days in this period to deal with examination matters that arise. For example, finalising the programme for the hearing sessions (see How should the programme for the hearing sessions be finalised? above).

194. It is important that the Inspector has a good general understanding of the geography and character of the area before going into the hearing sessions. This will inform the Inspector's approach to the plan and help give participants confidence in the Inspector. It may therefore be helpful to make a familiarisation visit to the plan area and any key locations or sites before the hearings open. The visit may be combined with an inspection of the hearings venue and/or a meeting with the PO. But lengthy journeys should not normally be undertaken solely for this purpose, unless you consider it necessary. If the plan area is a long way away, an alternative is to make the familiarisation visit and meet the PO at the venue on the day before the hearings open.

195. In the two to three weeks immediately before the hearing sessions begin, the Inspector will need to be charted full-time to the examination in order to prepare.

What preparation does the Inspector need to do for the hearing sessions?

196. If hearing statements have been invited, the Inspector will need to read through them all carefully. The hearings proceed on the basis that all participants, including the Inspector, are familiar with all the previously-submitted written material, including participants' representations and statements.

197. In the light of the statements, the Inspector should review their list of MIQs for discussion at the hearings. The statements may have adequately answered some of the questions or even resolved one or more of the issues. If this is the case, there will be no need to discuss the issue or question at the hearing (unless there are other interested participants whose views need to be heard in the interests of fairness). On the other hand, the statements may raise new or supplementary questions on which the Inspector needs to hear discussion.

198. The Inspector may use the original list of MIQs, with or without revisions, to structure the discussion at the hearing sessions. Alternatively, the Inspector may find it useful to produce an agenda for each hearing session. The Inspector's thinking may have

moved on since the MIQs were issued, and in some cases participants may have made comments on them. Revised MIQs and agendas give the opportunity to redefine, remove or supplement MIQs as necessary. An example of a hearing agenda is provided as Annex 9.

199. Revised MIQs or agendas can also help to structure the discussion at the hearings by indicating the order in which issues and questions will be taken, and – if helpful – by indicating which participants' input is specifically invited on each issue or question.

200. However, it is not obligatory to produce revised MIQs or agendas. It may be equally possible to achieve the same objectives using the original list of MIQs for each hearing session, making any necessary revisions to it orally at the hearing. In some cases it may also be helpful for the Inspector to prepare and circulate a discussion note beforehand.

201. Any revised MIQs, agenda or discussion note should wherever possible be published on the examination website in advance of the relevant hearing session. The more notice that can be given, the better. To ensure that participants are aware, the PO should also be asked to email copies directly to them.

202. In some cases, after issuing the agenda or revised list of issues and questions, the Inspector may identify further questions that they need to put to the participants. The examination is a dynamic process and the Inspector should not hesitate to put any questions they need to during the hearings.

203. As part of your preparation you should also consider whether there are any other main modifications – apart from those you have already identified – which it would be appropriate to suggest and/or invite discussion on. In some cases the hearing statements may contain potentially appropriate MMs.

204. You should think about the way that each hearing session is likely to develop, the order in which to invite participants to contribute, and any steps the LPA is likely to be asked to take at the end. This will help to ensure that you are on top of the proceedings.

What administrative tasks need doing in the run-up to the hearings?

205. You will need to write a very brief opening announcement to set the scene for the examination. See Procedure Guide, para 5.11. An example opening announcement is provided as Annex 10. You should ask the PO to doublecheck that the accommodation arrangements for 'in person' hearings and/or technical arrangements for 'virtual' hearings are all confirmed. When necessary for hearings including 'virtual' components, it may be helpful to prepare an additional Inspector guidance note to assist virtual participants with the available functions of the software platform (usually MS Teams or Zoom) and also set out any specific procedures to be followed. The PO should also be asked to prepare "Toblerone"-style nameplates for participants at 'in person' hearings, to provide structure and formality to the proceedings.

What arrangements need to be made for site visits?

206. The guiding principle is that a site visit should only be carried out if the Inspector considers it necessary in order to determine whether or not a policy or a site

allocation is sound. In most cases this will also include sites which are the subject of substantial representations. It may also be helpful for the Inspector to visit a site to make a visual assessment, for example if the written and oral evidence about it is unclear or inconclusive. But there is no requirement for all allocated sites or all the boundaries of designated areas to be visited.

207. The Inspector should assess the need for site visits before the hearings on this basis and be ready to respond accordingly to any requests for visits that may arise at the hearing sessions. All site visits are made unaccompanied unless the Inspector needs to go onto private land in order to view the site effectively. The practical arrangements for accompanied visits may be made at the hearing sessions or through the PO.

208. On accompanied visits, the Inspector should be accompanied by a representative of the LPA and a representative of the landowner or site promoter. Others may attend at the Inspector's discretion. No discussion of the merits of the site is permitted but physical features may be pointed out to the Inspector.

Section 5: Conduct of the hearing sessions

209. See Procedure Guide Section 5.

What is the purpose of the hearing sessions?

210. The purpose of the hearing sessions is for the Inspector to gain the information they need to reach conclusions on the soundness and legal compliance of the plan, and to explore with the LPA and other parties how any soundness and legal compliance problems can be resolved.

211. As far as possible the Inspector should conduct the hearing sessions in such a way as to develop a sense of trust and rapport with the parties, and especially with the LPA. The LPA needs to understand that, although the Inspector is charged with assessing soundness and legal compliance, they will work with the LPA to overcome problems wherever possible – and that requires mutual trust and cooperation if it is to work.

212. The hearing sessions are an important part of the examination, but they are only part of it. As the previous sections make clear, many soundness and legal compliance issues may have been resolved, and potential main modifications drawn up, well before the hearing sessions begin.

What is the Inspector's role in the hearing sessions?

213. The Inspector plays a leading role and is much more active than in most appeal inquiries or even appeal hearings. Unlike in an appeal case, where the Inspector has to decide between two opposing arguments, the Inspector's role in the examination also includes working with the parties to find solutions to problems wherever possible.

214. The discussion at each hearing session should be focussed on the soundness and legal compliance issues that the Inspector has identified. The Inspector should be authoritative, firm and proactive - make it clear from your demeanour and approach

that you are in charge (but politely and without appearing arrogant or dismissive). The Inspector should direct every part of the discussion, identifying each question on which they wish to hear contributions and inviting specific participants, including the LPA, to contribute as appropriate.

215. The Inspector should take an inquisitorial approach. This will require the Inspector to ask follow-up questions where necessary, and to probe the evidence of the parties, to ensure they have all the necessary evidence to reach a conclusion on each soundness issue. Try to keep questions short and simple and only ask one question at a time. Good preparation and a full understanding of the views of each party before the hearing sessions commence will help to ensure a focused discussion.

216. The hearings are not an opportunity for participants to rehearse arguments that have already been made in their representations and hearing statements. In some cases, it may be appropriate to ask participants to highlight salient parts of their representation or hearing statement, but you should take care to ensure that they do not recite from it at length.

217. When putting questions, Inspector should bear in mind each participant's level of professional knowledge. For example, it may be appropriate to put searching questions to a member of the planning profession, but not to a local resident.

218. Normally the Inspector will only invite contributions from those whose representations directly bear upon the issue or question under discussion. But in the interests of natural justice, after the Inspector has obtained all the information they need on each issue or question, the participants should be asked if anyone else has a relevant point to make. The LPA should then be given the opportunity to respond to any points made.

219. Not all participants will be familiar with the procedure, so the Inspector should explain it briefly at the beginning of each hearing session. As the hearing continues, the Inspector may sometimes need to be firm in insisting that the procedure is followed. Participants should not be allowed to dictate proceedings.

220. For events with large numbers of participants (20+), focused discussion will be essential to ensure that hearings are completed in a reasonable timeframe. The Inspector may need to limit the time that participants have to answer each question and it should be emphasised that it is unhelpful for them to repeat matters raised by other participants that have spoken before them. Further guidance on managing large events effectively is provided at Annex 16.

221. Disruptive or inappropriate behaviour from participants and observers should not be permitted. If anyone displays such behaviour an initial request should be made for it to stop. If the behaviour continues, a more formal warning should be given. As a last resort, if the behaviour of the participant(s) or observer(s) has not improved then there is likely to be no other choice but to ask the person(s) to leave the hearing session and a short adjournment may be appropriate whilst this happens.

Can children attend hearing sessions?

222. Children can make representations under Regulation 20 (in response to consultation at Regulation 19 stage) and they may participate in hearing sessions. Any participant under the age of 16 will need to be accompanied by a parent/guardian/responsible

adult and it is their responsibility to ensure they have any permission to be out of their place of education, where this is applicable.

Should the Inspector set out their views about soundness or legal compliance at the hearing sessions?

223. The soundness or legal compliance issues about which the Inspector has concerns will be evident from the issues and questions they have identified for discussion. During the hearing sessions it is helpful for the Inspector to be open about the stage that their views on each issue have reached. On issues where you are certain that the plan is unsound or legally non-compliant, you should say so and focus discussion on how to put it right. Where you are less certain, you can pose a question conditionally: "If I were to conclude that the plan is unsound for XXX reason, how could that be addressed?"

224. Being open with the LPA will also ensure that they are not taken by surprise by any interim or post-hearing findings.

Should potential main modifications be discussed at hearing sessions?

225. Yes, they definitely should. See the guidance on MMs in Section 6 below, and in particular How should the need for MMs be discussed during the hearing sessions?. One of the main benefits of the hearing sessions is that they enable discussion of how potential MMs might resolve soundness or legal compliance issues. The Inspector should suggest, and invite discussion on, the principle of any main modification that appears to them to be necessary.

Can additional written material be requested or submitted at (or after) the hearing sessions?

226. It may not always be possible for all the Inspector's questions to be answered at a hearing session: the necessary information may not be readily available, or discussions between the LPA and other parties may need to take place outside the hearing. In such circumstances, if it is not possible for the information to be provided at a later hearing session, the Inspector should ask for it to be provided in writing and should set a timetable for its submission. Unless the information is purely factual, in the interests of fairness other participants should be given the opportunity to comment on it either at a later hearing session or in writing. A deadline for their comments should be set.

227. The submission of unsolicited written material at the hearings should be discouraged. The expectation is that any written material, such as hearing statements, is submitted in advance as specified by the Inspector. However, in the interests of natural justice, Inspectors should be wary about refusing to accept material that is clearly germane to the soundness or legal compliance of the plan. Establish why it is late and how it is relevant.

228. If unsolicited material is accepted and unless it is purely factual, other affected parties must be given the opportunity to respond to it. In many cases this can happen at the hearing itself, perhaps after a short adjournment if that is needed to enable

participants to read the new material. If that is not possible, the Inspector may need to make arrangements and set a deadline for written comments to be made.

229. The same advice applies to any material requested or submitted after the hearings have concluded.

Should the Inspector take notes during and after the hearing sessions?

230. The Inspector should take notes in a similar way as for a s78 hearing. Their notes are not a verbatim record of the proceedings but an aide-memoire to assist with subsequent reporting.

231. It is good practice to make brief notes after each hearing session setting out the key points you want to cover in your report and any conclusions – however tentative – you have reached. This will provide a helpful starting point for your report, especially when reporting may be delayed for a few weeks.

How should any necessary action points arising from the hearing sessions be captured and confirmed?

232. It is quite common for the Inspector to ask for actions to be taken which arise from the discussions at the hearing sessions. The provision of additional written information and/or written comments on it, as described in the preceding paragraphs, is one example. As another example, in some circumstances the Inspector might need to ask the LPA to hold discussions with other parties if the Inspector considers this is the best way to resolve a soundness or legal compliance point.

233. The Inspector should keep a note of all such action points as they arise and should ask the LPA to do the same. At the end of each day, or at the beginning of the following day, it is advisable to go through the action points that have arisen, to ensure that they have all been captured.

234. The Inspector should then confirm each action point and its associated deadline to the LPA and the other participants. There are various ways of doing this:

- orally at a final wrap-up session (see What should happen at the end of the hearing sessions? below)
- in a written note, either at the end of each week of the hearings, or after all the hearing sessions have ended
- as part of a post-hearing letter – see In what circumstances will the Inspector need to write a post-hearings letter to the LPA after the hearing sessions have concluded?, and the subsequent two questions, below.

235. Whichever method or combination of methods is used will depend on the circumstances. The essential point is that it must be clear to all parties what is required and when it must be provided.

What should happen at the end of the hearing sessions?

236. Before the hearings close, Inspectors usually find it useful to hold a short wrap-up session, normally immediately after the end of the final hearing session. Apart from the LPA, it is not usually necessary to invite participants to the wrap-up session since its purpose is primarily administrative. However, it should be publicised so that people can attend as observers if they wish[35].

237. The purpose of the wrap-up session is to tidy up any administrative loose ends and as far as possible to set out the timetable for the next stages of the examination. The Inspector should confirm any outstanding action points from the hearings and the deadlines for them to be completed, and confirm the process and timetable for drawing up the draft schedule of MMs (see What should the Inspector say at the end of the hearing sessions about how the MMs will be taken forward? and What should the Inspector say to the LPA about drawing up the schedule of proposed MMs? below). The arrangements for any necessary accompanied site visits should also be confirmed. In cases where the Inspector needs to ask the LPA to prepare additional evidence or identify additional sites, the scope and timescale for this work (and the length of any necessary pause in the examination) should be set out as far as possible. See Procedure Guide paragraph 5.19+.

238. Sometimes it may not be possible to confirm all these matters at the wrap-up session. For example, the Inspector may need to see an additional document before inviting comments on it or may need to reflect before coming to a view on whether a MM is needed for a particular soundness or legal compliance issue. Any such matters should be confirmed in writing as soon as possible after the hearing sessions, and the Inspector should indicate at the wrap-up session that they will do this. See What should the Inspector say at the end of the hearing sessions about how the MMs will be taken forward? and In what circumstances will the Inspector need to write a post-hearings letter to the LPA after the hearing sessions have concluded? below.

What is the position on filming/recording at hearing sessions?

239. See the guidance in the Procedure Guide (Section 5). The principles underlying that guidance are that filming or recording at 'real' events is now common practice and is permitted as long as it is not disruptive. In particular, it is now increasing common for LPAs to record or live-stream 'real' events. Where hearings are held virtually, the event will either be live-streamed and/or recorded and made available on the examination website (so that anyone could view the event in the same way they could attend a 'real' hearing. The Inspector should advise participants and observers that hearing sessions are public events and that they will be or may be recorded and that recording may be or will be published. If the event is 'virtual' people can choose to turn their camera off should they be concerned about being filmed.

Should attendance sheets be provided at the hearing sessions?

240. No. It used to be customary for the PO to ask participants and members of the public attending the hearing sessions to fill in an attendance sheet. There is no longer any administrative need for this and it can lead to data protection problems. Attendance

[35] If it is held directly after the end of the last hearing session, the Inspector can give the other participants for that session the option of leaving or staying on as observers.

sheets should therefore not be used unless the venue requires a record for security or building evacuation reasons.

Section 6: Main modifications to the plan and post-hearing matters

What are the main principles for Inspectors when dealing with main modifications [MMs]?

241. These may be stated as follows:

- Wherever possible seek to identify MMs to overcome issues of soundness and legal compliance
- Preparation of a MM schedule should be commenced as early as possible, and should include any arising from the Inspectors initial assessment of the Plan and/or the LPA response to initial questions
- Use the hearings to explore how issues of soundness and legal compliance can be overcome through MMs – unless an issue has been resolved through earlier correspondence with the LPA
- Work to build a positive relationship with the LPA and the other parties
- Seek to ensure the LPA understands why each MM is needed – this is particularly important if the change is a significant or potentially controversial one
- Remember that where there is a soundness problem, there may be more than one option for fixing it – where so, give the LPA options
- Ask the LPA to keep a running list of MMs that are agreed at the hearings so there is no need to send the LPA a long schedule of MMs
- Wherever possible reach conclusions on soundness and the way forward on MMs by the end of the hearings
- If there are issues for which this is not possible, write a focussed post-hearings letter which should:
    - give brief reasons for each conclusion and clear advice to the LPA on the gist of each additional MM that is likely to be needed
    - provide a fuller explanation of the reasons why any significant or potentially controversial changes are needed
    - convey any significant changes contained in the MMs very clearly (eg the potential deletion of a strategic site should not be conveyed in a one-line sentence in a table or list - ‘delete policy #’)
    - where there are options for resolving the soundness problem, set them out and ask the LPA to advise how they wish to proceed
- Agree the detailed wording of all the MMs with the LPA after the hearings and before consultation on them takes place.

What is a main modification?

242. Section 20(7C) of the 2004 Act requires the Inspector examining a DPD [= local plan] to recommend modifications to it that would make it sound and compliant with the legislative requirements[36], if asked to do so by the LPA. Section 23(2A)(b) refers to such modifications as “the main modifications”. Accordingly, a MM is a modification

[36] Apart from the Duty to Co-operate

that is required to make the plan sound or legally-compliant. MMs are recommended in the Inspector's report on the examination.

243. Section 23(3) & (4) of the Act goes on to advise that when a LPA adopts a DPD [= local plan] it must incorporate the MMs recommended by the Inspector. The LPA may also make additional modifications to the plan, but the additional modifications must not materially affect the plan's policies. Accordingly, any change which materially affects the plan's policies cannot lawfully be made unless it is a MM recommended by the Inspector.

244. Note also that in some cases a change to the **reasoned justification**[37] may affect the application of a policy, and thereby materially affect the policy. In these circumstances the change to the reasoned justification will also be a MM.

Who is responsible for MMs?

245. Responsibility for MMs lies squarely with the Inspector. This is clear from section 20(7C) of the 2004 Act and is reinforced by the judgment in the Performance Retail case[38]. That judgment found that the Inspector's duty is to do what (and only what) is necessary in order to modify the document into one that is in the Inspector's judgment sound (paragraph 17).

246. It is very important therefore that Inspectors take the utmost care to ensure that they recommend all the MMs that are necessary to make the plan sound or legally-compliant, and that the recommended MMs are clearly and accurately worded.

Is there any limit to the extent of changes to a plan which may be achieved through main modifications?

247. The LPA cannot withdraw a plan and replace it with a different one during the examination (see above – 'After the plan has been submitted for examination, can the LPA withdraw it and replace it with another version to be examined?'). However, the primary legislation (in S20 7B and 7C) places no limits on the extent or nature of main modifications that an Inspector can recommend, other than they must have the effect of making the plan sound and/or legally compliant (S20 5). Nor does the NPPF or PPG.

248. This conclusion is confirmed in para 57 of Mr Justice Cranston's judgment in **IM Properties Development Limited v Lichfield District Council & Anor [2015] EWHC 2077 (Admin)**, which states as follows (highlighting added):

> **"**57. **In my judgment section 20(7) – 20(7C) contemplates that changes of substance can be made to the local plan.** The legislative history is that subsections (7) – (7C) were introduced into section 20 by section 112 of the Localism Act 2011. … The amendments to section 20 increase the scope for planning inspectors to recommend changes so as to enable local plans to be found sound. Previously plans would have to be found to be unsound and therefore unable to proceed to adoption. The Localism Act 2011 has changed that. **There is no limitation in the statutory language preventing a**

[37] The reasoned justification may also be referred to as *the supporting text*.
[38] Performance Retail Ltd Partnership v Eastbourne BC & SSCLG [2014] EWHC 102 (Admin)

'rewrite' of the local plan (whatever that language might mean, when any change is a rewrite)."

Mr Justice Cranston went on to find that the nature and extent of the modifications proposed and the permissibility of the proposed modifications were a matter of planning judgment for the planning inspector, which the courts would not interfere with, applying **Tesco Stores Ltd v SoS for the Environment [1995] 1 WLR 759.** Essentially, provided an inspector exercises discretion rationally in recommending modifications which would achieve a sound and legally compliant plan, then arguably any modifications to a local plan, however extreme, should be at a low risk of successful legal challenge, on the basis that the Inspector has the vires in the legislation to approve such modifications.

249. However, there may be circumstances where, given the extent of changes required to achieve soundness, it would be reasonable to advise the LPA to withdraw the plan. See the sections below on 'What should an Inspector do if they have significant soundness or legal compliance concerns following the hearing sessions that would be very difficult to overcome by MMs or additional work?'.

What is an additional modification?

250. From section 23(3)(b) of the 2004 Act it can be seen that an additional modification [AM] is a modification that does not materially affect the plan's policies. LPAs and others often refer to them as "minor" modifications, but it is best for Inspectors to use the correct legal term.

251. There is no further explanation in national policy or guidance of what might reasonably be categorised as an AM. It is generally accepted that the correction of typos and the updating of document titles, dates and the like can be made as AMs. It is also possible that the addition of contextual material could fall into this category. However, any change that directly affects a plan policy or affects how it would be applied will almost certainly not be an AM.

252. AMs do not need to be recommended by an Inspector: it is for the LPA to make them if they wish.

Who is responsible for AMs?

253. Responsibility for AMs lies entirely with the LPA. Inspectors should avoid giving any indication, in discussion or correspondence, that they have responsibility for them. The Inspector's is only required to recommend MMs that are necessary to make the plan sound. It is the LPA's responsibility to decide what may legitimately be included in the plan as an AM.

Is there always a clear distinction between what is a MM and what is an AM?

254. Not always. In a few cases the Inspector may need to exercise professional judgment when determining whether a particular change is a MM or an AM. However, the Inspector must only recommend a change as a MM if they are sure that they will be able to justify it in their report by reference to one or more of the soundness tests.

When should the LPA make its request to the Inspector to make MMs to the plan?

255. The LPA may make the request at any time after the plan has been submitted. If the request has not been made by the time the hearing sessions close, the Inspector – via the PO – should prompt the LPA to make it. However, on the rare occasions where the Inspector concludes that the plan cannot be made sound or legally compliant, there is no purpose in asking the LPA to make this request.

To which version of the plan does the Inspector recommend MMs?

256. The Inspector recommends MMs to the submitted plan. Normally the submitted plan is the same version of the plan as was published for representations at the Regulation 19 stage [the Regulation 19 version].

257. The only exception to this is if **before submission** the LPA have published and invited representations, on the same basis as the Regulation 19 consultation, on an addendum of proposed changes to the Regulation 19 version of the plan. In that case the addendum of proposed changes will form part of the submitted plan for the purposes of the examination.[39]

Where do MMs come from?

258. Suggestions for MMs may arise in various ways and at various times:

- The Inspector may identify the need for MMs in a letter to the LPA during the initial assessment of the plan (see Should the Inspector write an initial letter to the LPA after completing an initial assessment of the plan? above)
- The LPA may submit a list of proposed changes, some or all of which would constitute MMs, along with the submitted plan (see above)
- Other parties may propose changes, some or all of which would constitute MMs, in their representations on the plan
- The Inspector, the LPA or other parties may propose MMs during the hearing sessions (see below).

259. The preparation of a MM schedule should be commenced as early as possible on a 'without prejudice' basis under the Inspector's guidance. For example, potential MMs offered by the LPA in response to early questions from the Inspector should be included in a draft schedule, and this may be added to (and amended) during the hearings, while making clear that it is a working document.

260. As responsibility for MMs lies with the Inspector, Inspectors should not accept any MMs proposed by the LPA or others at face value. While suggestions for MMs can often be helpful, it is for you to decide whether any proposed MMs are necessary for soundness or legal compliance, and if so, to ensure that they are clearly and accurately worded.

[39] See above for a fuller explanation of this process.

How should the need for MMs be discussed during the hearing sessions?

261. The guiding principle is that any soundness and legal compliance issues that are likely to require MMs, and the potential ways in which MMs could resolve them, should be discussed at the hearing sessions – unless the issue has already been resolved earlier in the examination[40]. This is important for two reasons:

- to ensure that none of the MMs the Inspector ultimately recommends comes as a surprise to the LPA and the other parties
- to build consensus as far as possible by involving the LPA (and other parties where relevant) in considering the need for, and options for, potential MMs.

262. The discussion of potential MMs should generally focus on the principle of the MMs, not their detailed wording[41]. It may happen in different ways depending on the context, and in many cases it need only be very brief. For example:

- The Inspector has identified the need for certain MMs in a letter to the LPA during the initial assessment of the plan, and the LPA has accepted the need for them. In these cases, it will only be necessary to hear discussion if there are other participants who disagree with the need for the MMs.

- The Inspector has identified issues of soundness and/or legal compliance for discussion at the hearing sessions. As well as inviting discussion on the issues themselves, the Inspector should also ask the LPA and other parties to discuss how MMs might resolve any problems of soundness or legal non-compliance. As part of that discussion the Inspector may also suggest potential MMs where this would help the examination progress – but should avoid making a commitment to any MM unless certain of the need for it. The Inspector's approach to the discussion will depend on the circumstances. For example:

    - If the Inspector is clear in their own mind that an aspect of the plan is unsound or legally non-compliant, they should say so at the hearing. The Inspector should then focus the discussion on how the unsoundness or legal non-compliance could be rectified through MM(s) – and/or by the LPA carrying out additional work on the evidence base if necessary. Many potential MMs can usually be dealt with in this way.

    - If the Inspector is inclined to think that an aspect of the plan is unsound or legally non-compliant, but is not quite certain, they should explore the issue by posing a question at the hearing along the lines: "If I were to conclude that the plan is unsound for XXX reason, what are your views on how that could be rectified through MMs?"

    - Even if the Inspector will be unable to reach a view on the soundness or legal compliance of an aspect of the plan until they have had time to go away and reflect after the hearing discussion, they should still explore provisionally at the hearing how any soundness or legal non-compliance they might ultimately find could be rectified through MMs.

[40] And provided it does not need to be discussed by any other parties. See para 87 above.
[41] See paras 211-213 below.

263. The Inspector should use any or all of the above approaches, as appropriate, in each hearing session.

Should the detailed wording for MMs be drawn up during the hearing sessions?

264. It is usually best at the hearing sessions to discuss the principles of any MMs that are likely to be necessary, but to avoid getting into discussion of the detailed wording if this would be time-consuming and ineffective. Unless it is clear that the detailed wording can be agreed quickly and easily, the Inspector will usually ask the LPA to draw up detailed wording for the MMs after the hearings (see What should the Inspector say at the end of the hearing sessions about how the MMs will be taken forward? below).

265. Exceptions to this may include:

- Cases where the LPA or another party has drafted proposed text for certain MMs before the hearings. This may have been done, for example, in response to a letter from the Inspector identifying the need for certain MMs; as part of a list of proposed changes drawn up by the LPA in response to representations made at Reg 19 stage; as part of another party's written representations; or as a result of discussions between the LPA and another party[42]. In such cases, it may be possible to agree the proposed wording, including any minor changes to it, at the hearing session. However, any more substantial changes the Inspector considers necessary would usually best be drawn up afterwards.

- Cases where the exact wording of a MM is critical to the soundness issue under discussion – for example, a key criterion in a development management policy. In such cases it may be appropriate for the Inspector to propose detailed wording and invite discussion on it during the hearing; to ask the LPA and interested other parties to draw up detailed wording during an adjournment; or to invite further written submissions on the detailed wording from the participants after the hearing session.

266. The Inspector should take great care not to appear to endorse the detailed wording of any proposed MM (even if it is agreed between relevant parties) unless certain that the MM is necessary for soundness or legal compliance, and is clearly and accurately worded. To avoid later difficulties, it is advisable in all cases to say that you will agree the final detailed wording of the proposed MMs with the LPA later, before consultation on the MMs takes place.

Should potential MMs be discussed at the hearings if they are likely to involve the allocation of additional sites?

267. Where the Inspector's concerns are about the soundness of particular site allocations, a somewhat different approach to potential MMs will usually be needed. The Inspector will need to consider whether, if they were to find any site allocations unsound and to recommend their deletion, the plan as a whole would be unsound if

[42] It is quite common for LPAs to hold discussions with statutory bodies such as the Environment Agency, Historic England or Natural England about those bodies' representations, and to agree proposed MMs with them before the hearing sessions. In some cases the agreed MMs may be set out in a Statement of Common Ground. The same process may occur with other parties.

replacement site(s) were not identified and allocated in the plan. The need to identify and allocate additional sites could also arise if the Inspector has concerns about whether sufficient sites have been allocated in the plan.

268. In such circumstances, the Inspector should not normally suggest, or invite discussion on, potential additional sites at the hearings, even if alternative sites have been proposed by other parties. This is because interested persons, including neighbouring residents, will not have had the opportunity to make representations on the additional sites. Moreover, there may be other potential additional sites not yet identified, the merits of which will also need to be considered if the process is to be fair and comprehensive. Since the plan is the LPA's, it is appropriate that the LPA should take the lead in identifying the necessary additional sites.

269. In such cases, the Inspector's post-hearing letter (see In what circumstances will the Inspector need to write a post-hearings letter to the LPA after the hearing sessions have concluded?, and the subsequent two questions, below) should ask the LPA to identify as many additional sites as the Inspector considers are necessary. Anyone opposed to the allocation of those additional sites will not have had a previous opportunity to comment on them or to ask to appear at a hearing session. Public consultation on the newly-identified sites should therefore normally be undertaken in advance of, and separately from, the schedule of proposed MMs. Experience indicates that it is almost inevitable that further hearings on the newly-identified sites will be required in the interests of natural justice. After going through that consultation process, and hearing discussion on the newly-identified sites at further hearing session(s), there should usually be no need to invite a second round of comments on those sites as part of consultation on the MMs.

How should a record of potential MMs be kept during the hearing sessions?

270. The LPA should be asked to keep a running list of all potential MMs discussed during each hearing session. The Inspector should also keep a record of them and may wish to ask the PO to email their list to the LPA each day as an additional check. At the end of each day (or at the start of the next day), it is useful to go over the LPA's list of potential MMs briefly, to ensure that they have all been captured.

What should the Inspector say at the end of the hearing sessions about how the MMs will be taken forward?

271. At the end of the hearing sessions the list of potential MMs kept by the LPA is likely to fall into a number of different categories. These include:

1. MMs which the Inspector has made clear are necessary, and for which the detailed wording has been agreed at (or before) the hearings

2. MMs which the Inspector has made clear are necessary, but for which the detailed wording remains to be drawn up

3. Issues on which the Inspector needs to go away and reflect before reaching a final view over whether a MM is necessary for soundness or legal compliance.

272. At the end of the hearing sessions, the Inspector should make it clear what the state of play is with the MMs. If all the potential MMs fall into categories (1) and (2) the

Inspector will only need to ask the LPA to draw up detailed wording for those in category (2). But in cases where there are also potential MMs in category (3), it will be necessary for the Inspector to write to the LPA after the hearings close, in order to set out their views on the need for those potential MMs. Where this is the case, the Inspector should announce that they will do so.

273. The Inspector should also seek to agree a timetable for the LPA to prepare detailed wording for all the MMs which the Inspector considers necessary.

In what circumstances will the Inspector need to write a post-hearings letter to the LPA after the hearing sessions have concluded?

274. In many examinations, where the need for all the necessary MMs has been established by the end of the hearing sessions, there will be no need for a post-hearings letter. The Inspector will usually only need to write a post-hearings letter for one of the following reasons:

- to express a final view on whether certain MMs are necessary for soundness or legal compliance and to explain why the changes are needed. These will relate to any issues which the Inspector needed to reflect on after the hearings (see paragraph 254 above); or
- to ask the LPA to carry out additional work on the evidence base in order to address issues of soundness or legal compliance – unless this had already been communicated during the hearings; or
- to raise significant concerns with regard to the soundness or legal compliance of the Plan that are unlikely to be overcome by additional work or by MMs, and therefore to suggest (or advise) the withdrawal of the Plan from examination.

275. Soundness or legal compliance issues, and the need for any associated MMs raised in interim findings or post hearing letters should not come as a surprise to the LPA and should have been discussed at the hearing sessions.

If the Inspector needs to write a post-hearing letter about MMs to the LPA, what should it contain?

276. Any post-hearing letter should be as short as possible, but as long as is necessary to do the job. It does not need to consider or explain the MMs for which the need was established at the hearings. Its main purpose is to set out the Inspector's views on the need for any further MMs to address the issues which the Inspector needed to reflect on after the hearings, and to provide a brief but proportionate explanation for them. The aim here is to adhere to the Franks Principle of openness to ensure that the LPA and participants have a clear understanding of how key decisions have been arrived at. We are vulnerable to external criticism if we fail to provide adequate reasons for key conclusions and this has the potential to damage our reputation. If you are in doubt about how much reasoning to provide at this stage, please discuss with your Inspector Manager and / or the Professional Lead.

277. For each of the further MMs, the letter should explain as concisely as possible why the plan is unsound or legally non-compliant, and set out the Inspector's view on how this could be rectified by a MM. If there is more than one option for resolving the issue, the options should be set out as alternatives.

278. The extent of the explanation required will vary depending on the significance of the change and the degree to which the Council and/or others will be receptive to the change. For example, changes that require changes to housing need/requirement or the deletion of new towns, site allocations or of policies which are seen by the LPA as ground-breaking/important (eg on climate change) will require a fuller explanation than a comparatively slight adjustment to bring a development management policy into consistency with the NPPF. An example of wording relating to the deletion of site allocations is provided below.

279. In many cases it will be possible to set out the reasons quite briefly, allowing the full explanation to be provided in your final report at the end of the examination. However, where a post-hearing letter sets out the full reasoning for a change, one option is for this to be attached as an annex to the final report. This then avoids the need to recast the detailed wording of a post-hearing letter into the final report format. Equally, it is reasonable to incorporate the reasoning from a post-hearing letter into your final report. If you are unsure about what would be best, please discuss with your Inspector Manager.

280. The Inspector should also make it clear that their expressed views are based on the evidence currently before the examination – to allow for reconsideration if further evidence comes forward. For the avoidance of doubt the letter should also include a sentence confirming that the further MMs are in addition to the MMs for which the need was established at the hearing sessions.

281. The letter should not usually deal with any issues on which the Inspector considers the submitted plan is sound and legally-compliant.

282. **Any letter from an Inspector to a LPA setting out the Inspector's views on the need for any MM(s) must be submitted for QA before issue. A copy of the draft letter should be sent to the Professional Lead (Plans) and copied to the Inspector's IM and the Plans Team. After QA comments have been received and the final version of the letter has been prepared, the Inspector must then ensure that the Plans Team send the final version of the letter to MHCLG for information at least 48 hours before it is sent to the LPA.**[43]

What does a good example of a post-hearing letter look like?

283. Two example post-hearing letters are provided as Annex 11. However, here is an extract from a post-hearing letter which illustrates the principles of the approach. It sets out a finding by the Inspectors (there were two jointly examining this plan) suggesting that several housing sites should be deleted from the plan.

The Inspectors' finding as set out in the letter:

> **During the examination the Council confirmed that some housing allocations include land which falls within areas with a coastal flood hazard zone. These**

[43] As required by the letter from the Secretary of State to the Planning Inspectorate's Chief Executive dated 18 June 2019. The letter may be found here: https://www.gov.uk/guidance/local-plans

could be affected by shallow flowing or deep standing water. We have not been made aware of any evidence to indicate that a sequential test has been applied to justify the allocation of these sites. The Strategic Flood Risk Assessment indicates that the area of search for any sequential test is the rest of the district outside these hazard zones. Unless there is any strong evidence available now to indicate otherwise, the allocations that fall wholly or mainly within the hazard zone do not appear to be justified in line with sequential test requirements, and so should be deleted from the plan. These appear to include housing site allocations A, B and C.

Looking at how this finding breaks down into its component parts:

Is it clear why the plan is unsound? - **the allocations that fall wholly or mainly within the hazard zone do not appear to be justified in line with sequential test requirements.**

Is it clear what led to this finding? - **During the examination the Council confirmed that some housing allocations include land which falls within areas with a coastal flood hazard zone. We have not been made aware of any evidence to indicate that a sequential test has been applied to justify the allocation of these sites.**

Is the extent of the problem clear? – **These could be affected by shallow flowing or deep standing water.**

Is it clear that the soundness issue affects site allocations? – **These appear to include housing site allocations A, B and C.**

Is it clear how the soundness issue could be rectified by MMs? – **The allocations that fall wholly or mainly within the hazard zone … should be deleted from the plan.**

Is there any scope for the LPA to suggest alternatives and for the Inspector to reconsider if necessary? - **Unless there is any strong evidence…** and **These appear to include …**

What should an Inspector do if they have significant soundness or legal compliance concerns following the hearing session(s) that would be very difficult to overcome by MMs or additional work?

284. Inspectors should always, wherever possible, seek to progress examinations in a pragmatic way in accordance with the letter from James Brokenshire on 18 June 2019. However, there may be some circumstances (fairly rarely) where despite the best efforts of the Inspector to seek to address soundness or legal compliance concerns through MMs or additional work, the problems are so significant that this would create very significant difficulties.

285. This could happen, for example, where there are very substantial problems with the housing requirement, spatial strategy (for example, where it is so flawed it undermines the distribution of allocated sites), the level of housing supply, the selection of sites (eg to the extent it undermines the spatial strategy) or some combination of these. In these circumstances, it could be that the LPA would need to bring forward changes that would be tantamount to the delivery of a new plan (in full or in part), backed by a new evidence base.

286. This would be likely to take a very long time as the LPA would need to prepare new evidence and changes to the plan - and then consult on them. The Inspector would then have to consider those changes and hold hearing sessions. All the changes would have to be considered as main modifications to the originally submitted plan and the process is likely to be complicated and potentially confusing for participants. In effect, the process of plan-preparation would be taking place during the examination. There would also be a risk that the evidence supporting other parts of the plan might become out-of-date and the possibility that after examining the revised plan, it might still be found unsound, requiring further changes.

287. In such circumstances, it would be reasonable for the examiner to advise the LPA to withdraw the plan, carefully explaining the difficulties (including that the examination could be long, complex and costly) and that withdrawing the plan and returning to the plan-preparation stage might be the more pragmatic and sensible solution. The PPG confirms this can be an option:

> "Where the changes recommended by the Inspector would be so extensive as to require a virtual re-writing of the local plan, the Inspector is likely to suggest that the local planning authority withdraws the plan" (Paragraph: 057 Reference ID: 61-057-20190315).

288. These can be very difficult decisions for Inspectors to make and striking the right balance is not easy. In these circumstances, please do discuss the possible approaches with your Inspector Manager.

What options does the Inspector have if the LPA declines to withdraw the plan in the circumstances outlined above?

289. There are 3 possible options – 1) allow the examination to continue, 2) find the plan unsound and end the examination or 3) request that the SoS directs the LPA to withdraw the plan.

1. This is the option that has been followed several times in recent years and it has led to some very long and complex examinations.

2. S20(7C) requires that, where a plan is unsound, the examiner must recommend main modifications to make it sound, if asked to do so by the LPA. 7C provides no caveats relating to how difficult this might be to achieve in practice and there is nothing in the Act that allows an examiner to require that a plan is withdrawn. However, it could be argued that S20(7C) should be subject to an element of reasonableness and it could, therefore be possible to argue that it does not apply in circumstances where the Inspector considers it is not possible or feasible to remedy the defects in the plan. However, there is no case law on this and ultimately only a court could reach a definitive conclusion on the interpretation of the Act. If you intend to pursue this option, your report/letter would need to be carefully and persuasively argued and it would be advisable to give the LPA advance warning. You should also discuss this option with your IM and Professional Lead. It is worth noting that this approach is unlikely to be seen as reasonable if you have already confirmed that the plan can be made sound/legally compliant through main modifications, unless there has been a significant change in circumstances since then or the LPA has since confirmed that it would not adopt a plan with the main modifications required to make it sound (it could be argued that

carrying out consultation on changes a LPA could not accept would not be worthwhile).

3. It would be possible for the Inspector (or Inspectorate) to request that the Secretary of State direct the LPA to withdraw the plan under S20(9A). However, this option is entirely at the discretion of the Secretary of State. In recent years no such requests have been made by an Inspector (or the Inspectorate) and there have been no directions requiring any LPA to withdraw a plan.[44] It is therefore an untested option in practice, although it is mentioned in the PPG, albeit as an exception:

> 'Exceptionally, under section 21(9)(a) of the Planning and Compulsory Purchase Act 2004, the Secretary of State has the power to direct a local planning authority to withdraw its submitted plan.'

In some cases, if the examination is to continue, it might also be possible to consider the deletion of the unsound parts of the plan, with those parts to be addressed in a separate later plan or plan update.

290. Finally, it is worth noting that our externally published Procedure Guide does state that it may not always be possible to make some plans sound or legally compliant:

> 'The Inspector finds the plan unsound and/or legally non-compliant as submitted, and that it is not possible to make it sound and legally compliant by making main modifications to it. In these circumstances the Inspector must recommend non-adoption of the plan. In practice, the LPA would be asked to consider withdrawing the plan before any such recommendation was made.'

291. Please also see the section above on 'What should happen if the LPA decides that it no longer supports the plan it submitted and wishes to make significant changes to it?' which deals with similar issues.

If the Inspector writes a post-hearings letter to the LPA, should it be published on the examination website?

292. Yes. It is important for the transparency of the examination that examination participants understand why the Inspector considers each of the proposed MMs is necessary.

How should procedural matters be dealt with after the hearings sessions have finished?

293. After the hearings have finished, a number of procedural tasks need to be carried out by the LPA and the Inspector. As the Inspector has overall responsibility for the examination, they will need to ensure that all the following tasks are properly carried out.

[44] As at February 2022

294. Each of these tasks is considered further below. In most cases these matters can be dealt with by email via the PO, with no need for any formal communication that is published on the website.

- Drawing up the schedule of proposed MMs;
- Agreeing and checking the detailed wording of the proposed MMs;
- Considering whether the MMs will require further SA and/or HRA;
- Carrying out consultation on the proposed MMs.

295. But if the Inspector is writing a post-hearing letter to deal with further MMs (see *If the Inspector needs to write a post-hearing letter about MMs to the LPA, what should it contain?* above), it may be efficient for that letter also to deal with some or all of these procedural matters.

What should the Inspector say to the LPA about drawing up the schedule of proposed MMs?

296. The Inspector should ask the LPA to draw up a draft schedule containing draft detailed wording for all the MMs that are needed and set a deadline for this to be done. The Inspector should also make the following requirements clear:

- For each MM, the schedule should show the text of the submitted plan[45] amended with ~~struck-through~~ text for deletions and **bold underlined text** for insertions. This is the format required for the final schedule that will be appended to the Inspector's report and it will save time to use it throughout the process. Track-change format and coloured text should be avoided as these do not always transfer well when the schedule is reproduced.

- The MMs should be set out, as far as possible, in plan order and each MM should be given a reference number: MM1, MM2, MM3 and so on. To keep the number of MMs manageable, it is usual for all the necessary changes to any individual policy (and/or section of the reasoned justification) to be combined into a single MM for that policy (or section).

- But MMs that are consequential upon a principal MM may be combined into a single MM that sweeps together all the policy or reasoned justification references that need to be changed to accord with the principal MM.

- The LPA may also include in the schedule a column briefly explaining the reasons for each MM, to help representors understand why the MM is being proposed.

- The schedule should be provided in Word format (not PDF) so it can be edited by the Inspector.

297. The Inspector should also make it clear that the LPA must send the draft schedule of MMs to the Inspector for comment, and that the Inspector will need to agree the final version of the schedule before it is published for consultation.

[45] Or the submitted plan as amended by an addendum of proposed changes, if the addendum was subject to public consultation before the plan was submitted.

How should the drafting and agreement of MMs be programmed with the LPA?

298. The Inspector needs to ensure that the work required to draft and finalise the schedule of proposed MMs is realistically programmed with the LPA. In addition, the Inspector will need to ensure that sufficient time is allocated in their chart to deal promptly and thoroughly with the task of scrutinising the schedule and any necessary supporting assessments, such as SA and HRA, before clearing it for consultation. The arrangements should be agreed with the LPA at the end of the hearing sessions.

299. The Inspector should request that matters such as Council meetings, pre-election periods and any other factors that may affect the programme for completion of the examination, following the end of the consultation period on the MMs, have been appropriately considered in the agreed timescales.

How is the detailed wording of the proposed MMs agreed?

300. Once the LPA has drawn up the draft schedule of proposed MMs as requested by the Inspector, it is sent to the Inspector for comment. The Inspector should then request any changes to the draft wording that they consider necessary for soundness or legal compliance. These may include changes to ensure that the MMs are clear and unambiguous. The draft wording may need to pass through several iterations before it is finalised. The final version must be approved by the Inspector.

301. The Inspector should pay due regard to the fact that the plan is the LPA's, and should not ask for changes to the draft MMs without good reason. At the same time, however, responsibility for the MMs lies with the Inspector, and so the Inspector must not hesitate to insist on wording changes which they consider necessary to make the plan sound and legally-compliant, even if the LPA are reluctant to make them. If faced with such reluctance, Inspectors may need to point out that unless the MM in question is altered there is a risk that the plan may be found unsound, and that they will consider all the consultation responses on the MM before deciding whether to recommend it.

302. The process of agreeing the detailed wording of the MMs does not take place in public. The various iterations of the draft schedule of MMs and the Inspector's comments on them are usually dealt with by email and are not published on the examination website. No-one's interests are prejudiced by this, since all parties have the opportunity to comment on the MMs when they are published for public consultation. However, please note that all correspondence on the draft schedule of MMs may be the subject of Freedom of Information requests.

Will the proposed MMs require Sustainability Appraisal and Habitats Regulations Assessment?

303. This will depend on the nature of the proposed MMs. The Inspector should ask the LPA to consider whether SA or HRA of the MMs is necessary, and if so, to carry it out.[46]

[46] See the section of this ITM chapter on SA, HRA and Climate Change.

What is the procedure for public consultation on the schedule of proposed MMs?

304. See Procedure Guide paragraph 6.9, which provides details of the consultation procedure for proposed MMs.

What should the Inspector say to the LPA about the MM consultation procedure?

305. The Inspector must make it clear that they will take account of the responses to consultation on the proposed MMs before reaching final conclusions on the MMs that are required to the plan; and that their conclusions and full reasons for recommending MMs will be set out later in their report on the examination.

306. The Inspector should draw attention to Procedure Guide paragraph 6.9 and highlight its main requirements, ie that the scope of consultation on the MMs should reflect that of the consultation held at Regulation 19 stage, and that it should last for a minimum of six weeks. The LPA may hold consultation over a longer period if they wish or if that is a requirement of their Statement of Community Involvement.

307. The Inspector must also make it clear that:

- Any necessary proposed changes to what is shown on the submission policies map must also be published for consultation alongside the schedule of proposed MMs[47].
- If SA and/or HRA was carried out on the proposed MMs, the relevant report(s) must be published for consultation alongside the schedule of proposed MMs.
- Any revised or additional evidence that has been prepared to support the MMs should also be published for consultation alongside the schedule of proposed MMs.
- The consultation is only on the proposed MMs, any proposed changes to the policies map and any SA, HRA and/or additional or revised evidence. Representations on any other aspect of the plan will not be considered.
- If the LPA wish to publicise or consult on AMs alongside the schedule of proposed MMs, the AMs must be set out in a separate table and it must be made clear that they are not before the Inspector for consideration.

What checks should the Inspector carry out before consultation on the MMs begins?

308. Before consultation on the MMs begins the Inspector must carefully check:

- the exact wording of all the proposed MMs, bearing in mind that the Inspector has legal responsibility for the MMs they recommend, and that even small mistakes can be difficult to rectify later;

[47] See the next section dealing with the policies map.

- that all the MMs are expressed in such a way that the nature and scale of the proposed change will be clearly understood;
- that all the necessary MMs are included in the schedule;
- that the schedule does not include any MMs that the Inspector has not endorsed;
- any proposed changes to the policies map (see next section on the Policies Map);
- that any new evidence being published for consultation alongside the MMs, such as SA or HRA, is complete, and has been carried out appropriately and in accordance with any relevant legal requirements;
- all aspects of the text the LPA proposes to publish alongside the MMs to explain the consultation process: in particular to ensure that it makes clear that representations are invited on the proposed MMs, on any changes to the policies map, and on any accompanying new evidence (such as SA or HRA), but not on any other aspect of the plan.

An example of a MM consultation schedule with LPA's explanatory text is provided as Annex 12.

Is it necessary to hold further hearing sessions after consultation on the proposed MMs?

309. The expectation is that further hearing sessions after the consultation on the MMs will be the exception rather than the norm. Representors should not expect that there will necessarily be another opportunity to appear before the Inspector. Moreover, the legal right to appear at a hearing applies only to those who made a representation at Regulation 19 stage. Unlike at Regulation 19 stage, therefore, the consultation response form should **not** invite representors to indicate whether or not they wish to appear at a hearing session.

310. However, the Inspector must always consider whether or not it is necessary to hold further hearing session(s). The need may arise because a substantial new piece of evidence or a new issue, not previously considered, is raised in representations on the MMs. Or a further hearing may be necessary to ensure that interested parties are not prejudiced: for example, if the proposed MMs include a new site allocation which had not previously been the subject of consultation[48]. In such circumstances it is likely to be appropriate for the Inspector to invite the parties making representations on the proposed MM to attend the hearing (regardless of whether or not they have a legal right to attend).

311. The decision on whether or not to hold further hearing session(s) rests with the Inspector, but it is advisable to seek the LPA's views before reaching a decision. An example agenda for a post-MM consultation hearing is provided as Annex 13.

[48] See paras 214-216 above which explain how this situation can be avoided.

Is it necessary to invite further written representations from the LPA or other parties after consultation on the MMs?

312. Normally no further written representations from any party are invited or accepted once consultation on the MMs has closed.

313. If the Inspector thinks it would be helpful, they may ask the LPA to make written comments on the consultation responses – provided this will not cause a long delay to the examination. As an alternative to a general request for comments on the responses, the Inspector may ask for the LPA's input on specific points arising from the consultation, for example to resolve a factual matter, or to respond to a point that has not previously been put to them.

314. In some cases, LPAs themselves decide to make comments on some or all of the consultation responses on the MMs, even though the Inspector has not asked them to. It will usually be appropriate for the Inspector to accept the LPA's comments, unless the time the LPA need to prepare them is likely to lead to a long delay to the examination. If that applies, the Inspector should ask the LPA to comment on specific responses only, as advised in the previous paragraph.

What if significant new evidence emerges or a change in Government policy occurs during or after consultation on the proposed MMs?

315. Sometimes significant new evidence emerges, or a change in Government policy that might affect the examination of the plan occurs, during or after the MM consultation. The approach to this will depend on the specific situation, but it is likely that the Inspector will, as a minimum, need to ask the LPA to comment or to set out its revised position. In the light of the LPA's response the Inspector will need to consider whether representations from other parties should be invited. Inspectors should seek advice from their SGL or mentor as necessary.

How does the Inspector deal with the responses to consultation on the schedule of proposed MMs?

316. The Inspector must consider all the consultation responses before finalising their recommendations on the MMs. In some cases the responses may not add materially to the evidence or arguments already before the Inspector. But where new evidence or arguments do arise, the Inspector must be alert to them and consider whether they require reconsideration of the principle or the detailed wording of any of the proposed MMs.

317. Note that the consultation is only about the proposed MMs and any proposed changes to the policies map (see next section on the Policies Map). The Inspector need not consider any responses about any other aspect of the plan.

What should the Inspector do if, in the light of the responses to consultation, they consider that change(s) are needed to the schedule of proposed MMs?

318. This will depend on the scale and nature of the change(s) required. Procedure Guide paragraph 6.12 explains the limited circumstances in which the Inspector may make changes to the proposed MMs without further consultation.

319. If the Inspector considers any change that falls outside those circumstances to be necessary, it is likely that further consultation will need to take place in order to avoid prejudice to any party's interests. Where the further change is very significant, it may even be necessary to hold a further hearing session. However, such situations are rare.

How should the schedule of MMs be finalised before it is appended to the Inspector's report?

320. If the Inspector considers that any changes are needed to the published schedule of proposed MMs, the LPA should be asked to make them. (Or if it is easier, the Inspector can make the changes and inform the LPA that they have done so.) The LPA should also remove the "reasons" column (if there is one) from the schedule together with any explanatory text and logos. The Inspector's reasons for recommending the MMs will be set out in their report.

321. The Inspector should make a final check of the schedule of MMs to ensure that it is accurate in every detail. This is vital because corrections cannot be made to the schedule once it has been issued to the LPA along with the Inspector's report.

Section 6a – The Policies Map

What is the policies map?

322. Each LPA is required to maintain an **adopted policies map** which illustrates geographically the application of the policies in the adopted development plan[49]. Each time the LPA submits a new local plan for examination, it must provide a map showing how the adopted policies map would be changed when the new plan is adopted[50]. This is the **submission policies map**[51]. Informally both types of policies map tend to be referred to as "the policies map".

323. The adopted policies map must be reproduced from, or be based on, an Ordnance Survey map[52]. But there is no prescribed format for the submission policies map. It may be a single map or a series of maps, and it may be separate from or bound into the submitted plan. Sometimes the plan contains inset maps which may – or may not – be part of the submission policies map. Early on in the examination, Inspectors should ensure that it is clear what constitutes the submission policies map, seeking clarification from the LPA if necessary. The key criterion is that the submission policies map must show all the proposed changes to the adopted policies map which arise from the submitted plan.

[49] Regulation 9
[50] Unless the new plan would not result in any changes to the adopted policies map.
[51] Regulation 22(1)(b)
[52] Regulation 9

324. Often LPAs submit a submission policies map which does not simply show those proposed changes to the adopted policies map. Instead, they submit a complete policies map for the whole of their area, with the proposed changes incorporated into it. In effect this is a "proposed adopted policies map", showing what the adopted policies map would look like if the plan were adopted as submitted. As long as all the proposed changes are included on the submission policies map, this approach is acceptable.

Can the Inspector recommend main modifications to the submission policies map?

325. No. The submission policies map is not defined in legislation as a development plan document[53]. This means that Inspectors do not have the power to recommend main modifications [MMs] to it. However, see also the next question and answer.

Should the Inspector nonetheless ensure that necessary changes to what is shown on the submission policies map are made?

326. Yes. Circumstances frequently arise where the plan can only be made sound by means of a change to what is shown on the submission policies map. For example:

- The Inspector finds that three additional site allocations are needed to ensure that the plan can meet its housing requirement, and recommends a MM to insert the sites into the relevant site allocation policy. The additional site allocations were, of course, not shown on the submission policies map. But when the plan is adopted, the adopted policies map will need to show them, otherwise the policy will be ineffective. Therefore there needs to be a change from what is shown on the submission policies map.

- The Inspector finds that a policy proposing to designate 20 areas of Local Green Space [LGS] can only be made sound if 15 of the areas are deleted, and recommends a MM accordingly. The designation of those 15 areas will also need to be changed from what is shown on the submission policies map. Otherwise the adopted policies map would show the designation applying to the 15 areas that had been deleted from the policy, rendering the policy unjustified and ineffective.

- The Inspector finds that a policy permitting certain forms of development within defined settlement boundaries is sound but finds that the alignment of one of the defined settlement boundaries is not justified. There is no need for a MM to the policy, but the proposed settlement boundary will need to be altered from what is shown on the submission policies map. Otherwise, the policy will not be justified because the policy will be applied to the wrong area of land. (The same principle will apply to any policy designation where the boundary of the designation is shown incorrectly on the submission policies map.)

[53] See below: What is the legal status of the policies map? for the legal background to this.

327. As the above examples illustrate, there are two types of situation where a change from what is shown on the submission policies map may be needed:

1. Where a MM is required to make the policy sound, and the change from what is shown on the submission policies map follows on from the change made by the MM (eg the first and second bullet points above);

2. Where the wording of the policy is sound, so no MM is needed, but the geographical expression of the policy is wrong and what is shown on the submission policies map needs to be changed accordingly (eg the third bullet point above).

Either situation could apply to anything shown on the policies map, including site allocations and protective designations.

328. The Inspector must ensure that any necessary change to what is shown on the submission policies map is made, whether or not it is associated with a MM. The following paragraphs explain how to achieve this.

How should any necessary changes to what is shown on the submission policies map be drawn up, and how should consultation take place on them?

329. The Inspector should ask the LPA to draw up any changes to what is shown on the submission policies map that are necessary. The LPA should do this at the same time as they draw up the schedule of proposed MMs to the plan. In accordance with the judgement Mark Jopling vs Richmond BC, SoS and Quantum Teddington LLP [2019] EWHC 190 (Admin) and to ensure fairness, any such proposed policies map changes must then be consulted upon, alongside the proposed MMs. They should be published for consultation alongside the MMs, but they must not be included in the MM schedule, nor referred to as MMs. The Inspector should check that the consultation documents make it clear that representations are invited on the proposed policies map changes as well as on the MMs.

330. The Inspector should take account of any comments made on the proposed policies map changes in the same way as comments on the proposed MMs.

How should any necessary changes to what is shown on the submission policies map be dealt with in the Inspector's report?

331. The examination report template contains standard text which is designed to ensure that, when the LPA update the adopted policies map, they include all the changes to what is shown on the submission policies map which the Inspector considers are necessary. In most cases these will be the proposed policies map changes which were published for consultation alongside the MMs. But in some cases, the Inspector may have considered it necessary to amend those proposed policies map changes in the light of the consultation responses.

332. The standard template text is self-explanatory and reads as follows (with commentary and references to the changes to what is shown on the submission policies map highlighted **in bold**:

The Council is required to maintain an adopted policies map which illustrates geographically the application of the policies in the adopted development plan. When submitting a local plan for examination, the Council is then required to provide a submission policies map showing the changes to the adopted policies map that would result from the proposals in the local plan. In this case, the submission policies map comprises the set of plans identified as [insert title] as set out in [insert document reference] [**NB this is the submission policies map as originally submitted for examination along with the plan**].

The policies map is not defined in statute as a development plan document and so I do not have the power to recommend main modifications to it. However, a number of the published MMs to the Plan's policies require **further corresponding changes to be made to the policies map**. [In addition, there are some instances where the geographic illustration of policies on the submission policies map is not justified and **changes should be made to the policies map** to ensure the relevant policies are effective.][delete as appropriate].

These **further changes to the policies map** were published for consultation alongside the MMs [insert document title or link to website]. [In this report I identify any amendments that are needed to those **further changes** in the light of the consultation responses][delete as appropriate].

When the Plan is adopted, in order to comply with the legislation and give effect to the Plan's policies, the Council will need to update the adopted policies map to include all the changes proposed in [insert document title – **NB this is the submission policies map as originally submitted**] and the **further changes published alongside the MMs** [incorporating any necessary amendments identified in this report][delete as appropriate].

Should the changes to the submission policies map be appended to the Inspector's report?

333. No – the changes to the submission policies map should not be included in the appendix of MMs, nor otherwise appended to the Inspector's report. To do so would suggest that the Inspector is recommending the changes as MMs without having the necessary legal powers. But the Inspector must be sure to use the standard template text reproduced above so that the necessary references to the published changes are provided in their report.

What should the Inspector do if there is no clear link between a policy and its geographical expression on the policies map?

334. In all cases where a policy has a geographical application, this must be illustrated on the policies map[54], and the policy must establish a clear link between the two. Otherwise the plan may not be effective. For example, a policy setting out what forms of development are permissible within settlement boundaries will not be effective unless it also states that the settlement boundaries are shown on the policies map.

[54] Regulation 9

335. If there is no clear link between a policy and its geographical expression on the policies map the Inspector will need to recommend a MM to rectify this.

Can the Inspector recommend MMs to diagrams or illustrations which are not part of the submission policies map?

336. Some plans contain diagrams or illustrations which form part of a policy or part of the reasoned justification. Provided it is clear that the diagrams or illustrations are not part of the submission policies map, the Inspector can recommend MMs to them where that is necessary to make the plan sound.

What is the legal status of the policies map?

337. Section 20(1) of the 2004 Act requires every development plan document [DPD] to be submitted to the Secretary of State for independent examination. Section 20(5) details the purpose of the examination in respect of the DPD. Consequently, only DPDs can be examined.

338. Section 17(7) of the Act enables Regulations to prescribe which documents are DPDs.

339. Regulation 2(1) states that any document of the description referred to in Regulation 5(1)(a)(i), (ii) or (iv) or 5(2)(a) or (b) is both a local plan and a DPD. (The term "local plan" is generally used in the Regulations in preference to "DPD", but the two terms mean the same thing.)

340. Regulation 5(1)(b) refers to a map accompanying a Regulation 5(1)(a) document showing how the adopted policies map would be amended if it were adopted. This map (referred to as the "submission policies map" in Regulation 2(1)) is not defined as a DPD or local plan under Regulation 2(1).

341. Regulation 6 "Local plans" describes which documents are included in the description of local plans. In doing so, like Regulation 2(1) it excludes the documents in Regulation 5(1)(a)(iii) and 5(1)(b). This confirms that the policies map is not a DPD or a local plan.

342. Regulation 9 sets out the form and content of the adopted policies map and explains that it must illustrate geographically the application of the policies in the adopted development plan. It also says that where the adopted policies map consists of text and maps, the text prevails if there is a conflict.

What does Planning Practice Guidance (PPG) advise?

343. At paragraph 002 the PPG on *Plan-making* states:

> The policies map should illustrate geographically the policies in the Local Plan and be reproduced from, or based on, an Ordnance Survey map. If the adoption of a Local Plan would result in changes to a previously adopted policies map, when the plan is submitted [to the Planning Inspectorate] for examination, an up to date submission policies map should also be submitted, showing how the adopted policies map would be changed as a result of the new plan.[55]

[55] PPG Ref ID 61-002-20190315

Section 6b – Examining policy wording

What are the principles for examining policy wording?

344. NPPF 16(d) advises that plans should contain policies that are clearly written and unambiguous, so it is evident how a decision-maker should react to development proposals.

345. Inspectors should therefore examine each policy critically, and also review the whole plan for internal consistency. The following questions may assist the Inspector in carrying out this task:

- Does the policy provide a clear indication of how a decision maker should react to a development proposal, or is it simply a statement of intent?
- Is the meaning of the policy clear about what type of development it applies to and what is required to comply with the policy?
- Are any policy criteria reasonable and are they capable of being assessed?
- Is the policy consistent with national planning policy and in particular with any development management expectations it contains?
- Are terms used consistently, both within each policy and throughout the plan as a whole?
- Does the plan as a whole have a reasonably consistent approach to the structure of policies and to any overlap between policies?

346. Where a policy includes words such as *major* or *strategic* it should be clear within the covers of the plan to what scale of development such wording applies and why that scale has been set. Where a policy introduces a specific criterion as a test of acceptability eg *no more than X*, *no closer than Y*, there should be clear evidence justifying the choice of that threshold. In some cases the evidence may support a range of possible alternatives and the question will be whether the Council's chosen threshold represents a reasonable planning judgment.

347. Sometimes the LPA may seek to justify a policy on the basis that it has been carried forward unaltered from an earlier adopted plan, and "the previous Inspector was satisfied with it". You must, however, examine it on the same basis as all the other policies, in the light of current evidence, current national policy and guidance, and any relevant local circumstances.

Can plan policies duplicate national policy?

348. NPPF 16(f) advises that plans should avoid unnecessary duplication of policies, including policies in the NPPF. Nonetheless, inclusion of policies in a development plan gives them statutory force, and so LPAs may seek to replicate national planning policy in their plan policies. Such duplication does not necessarily make the policy unsound, provided that the plan policy is consistent with the national policy, or if it is not, that there is a sound local justification for the difference(s).

Is there a general presumption against local plan policies which exercise control over matters which are covered by other regulatory regimes?

349. It is sometimes said that local plans should not duplicate other regulatory controls and that this is a core principle of the planning system. However, it has not been possible to identify anything in primary or secondary legislation or in national policy or guidance which clearly and definitively sets this out. However, the following references in the NPPF are relevant:

> 16 – "Plans should: […] (f) serve a clear purpose, avoiding unnecessary duplication of policies that apply to a particular area (including policies in this Framework, where relevant)". [This clearly means that local plans should avoid duplicating **planning** policies which are in the NPPF. However, it is not clear if the reference to 'duplication of policies' is intended to cover other regulatory regimes.]
>
> 188 – "The focus of planning policies and decisions should be on whether proposed development is an acceptable use of land, rather than the control of processes or emissions (where these are subject to separate pollution control regimes). Planning decisions should assume that these regimes will operate effectively". [This wording clearly does seek to avoid duplication, but only in relation to **pollution control** regimes.]

There is no clearly-stated general presumption against duplication in the NPPF section on plan-making, in the tests of soundness or in the PPG section on 'plan-making'. Conversely, the NPPF and PPG specifically allow local plans to set additional technical requirements which exceed the minimum standards required by Building Regulations in respect of access and water.[56] So, in this area at least, local plans can include policies which control matters which are covered by another regulatory regime.

350. Beyond the national policy framework set out above, it will be for the examiner to decide if any policies seeking to exercise control over matters which are covered by other regulatory regimes are justified and consistent with the principles set out in NPPF 16.

How should policies referring to supplementary planning documents (SPD) and other documents be examined?

351. The starting point is that "as they [ie SPD] do not form part of the development plan, they cannot introduce new planning policies into the development plan."[57] This is because Regulation 5(1)(a)[58] states that any document prepared by an LPA must be prepared as a local development document if it contains statements on (i) the development and use of land, (ii) the allocation of sites for a particular type of development or use or (iv) development management and site allocation policies intended to guide the determination of applications for planning permission. Regulation 2 confirms that any document of the description referred to in Regulation 5(1)(a)(i), (ii) or (iv) is prescribed as a 'development plan document' – ie it is a 'local plan'. It follows that any such policies should be prepared and examined as a 'local plan' under Sections 19 and 20 of the Act.

[56] NPPF 130f) footnote 49 and PPG on optional technical standards
[57] PPG Paragraph: 008 Reference ID: 61-008-20190315
[58] Town and Country Planning (Local Planning) (England) Regulations 2012

352. References to SPD in local plans should therefore reflect their legal status. However, we have seen plans submitted to us for examination which contain policies which require development proposals to comply with SPD (parking standards are a common example). Such policies are unlikely to be sound because they would have the effect of elevating SPD to the status of local plan policy without having been subject to the process of preparation and independent examination required by Sections 19 and 20. One solution to this is for there to be a main modification which deletes such policy requirements, replacing them instead with wording based on the PPG - which states that SPD 'provide more detailed advice or guidance on policies in an adopted local plan' (similar wording is also used in the Glossary to the NPPF). So, for example, replacement wording might say something like: 'More detailed advice and guidance about this policy is provided in a Supplementary Planning Document'. For clarity and to comply with NPPF 16d[59], such references are best set out in supporting text rather than in the policy itself (given that the policy cannot require compliance with an SPD). The same principles apply to masterplans and requirements set out in other documents (for example, Local Transport Plans).

353. The status of SPD has been considered by the Courts. For example, 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 by the LPA as an SPD rather than as a DPD. Accordingly, it was procedurally flawed because it had failed to follow the proper procedure for adopting a DPD and was therefore unlawful.

How should the test of consistency with national policy be approached with regard to policy wording?

354. On certain topics, the NPPF sets out very clear development management expectations. For example, the sequential tests for main town centre uses (NPPF 87-91) and for flood risk (NPPF 159-169), the definition of inappropriate development in the Green Belt and the exceptional circumstances test (NPPF 147-151), the approach to major development in National Parks and AONBs (NPPF 176, 177), and the advice on considering the potential impacts of proposals on heritage assets (NPPF 199-208).

355. Where such expectations apply, ensuring consistency with national policy requires careful consideration of what the NPPF says and how the plan policy in question relates to it. Unfortunately, experience indicates that policies are often poorly drafted in this respect. For example:

- important tests in national policy may be summarised or only partly replicated in the policy, thereby altering their meaning;
- key words may be used too loosely, widening their application inappropriately;
- long policies may have a poor structure making it unclear to which proposals various sub-categories apply; and

[59] 'Plans should contain policies that are clearly written and unambiguous'

- policies may overlap on some matters, but not on others, making it unclear whether such differences are intended to signal a difference in the significance of the included or excluded factor.

What should the Inspector do if they have concerns about policy wording?

356. The Inspector should raise any concerns about policy wording in writing with the LPA as early as possible, particularly where the matter has not been raised in representations and so may not require discussion at the examination hearings. In some cases the concerns can be resolved through correspondence with the LPA in advance of the hearings. Alternatively, the Inspector may need to schedule a discussion at a hearing session in order to explore the intention of the policy and any potential pitfalls it may contain.

357. Where the Inspector's concern is about possible inconsistency with national policy, it is important to establish at the outset whether the LPA **intends** to diverge from national policy or whether the apparent conflict arises simply from poor drafting. If the LPA intends the policy to be consistent with national policy, they can be asked to draw up changes to address the Inspector's concerns. If, on the other hand, any divergence from national policy is deliberate the LPA will need to provide justification for this based on local circumstances, and the matter may well need to be explored at a hearing.

358. Where the intention of the plan policy is to reflect national policy (rather than to deliberately diverge from it), a straightforward way of resolving inconsistency may be to recommend a MM which replaces the unsatisfactory policy with one simply stating, for example, that the LPA will deal with planning applications in the Green Belt in accordance with national planning policy.

359. In some cases there may be informed representations from bodies such as the Environment Agency, Natural England or Historic England highlighting what they regard as fundamental flaws in policy wording. Where the Inspector broadly shares those concerns, then the LPA can be asked to work with the relevant body or bodies to agree a revised policy wording. The Inspector should ensure that they are also satisfied with any revised wording agreed.

360. If other parties have made specific representations on the policy, the proposed revised wording should be discussed at the appropriate hearing session, and wherever possible it should be circulated in advance of the hearing. Where a party has decided not to appear at a hearing on the basis of a substantially revised policy wording agreed with the Council, Inspectors should be alert to potential unfairness if there is a possibility that the revised wording may not be taken forward. In such circumstances they may wish to invite that party to appear.

361. Whether or not it is discussed at a hearing session, any revised policy wording that is necessary for soundness must be included in the schedule of proposed MMs for consultation.

Section 6c - Examining 'partial updates' of local plans

What issues might be faced when examining 'partial updates'

362. We see a number of LPAs proposing 'partial updates' to existing local plans, sometimes because they have reviewed their existing plans and concluded that only some sections need updating or because they want to address a particular issue, such as climate change. **For the reasons set out below, examination of 'partial updates' (which may be referred to by the LPA as a review or partial review of the plan) can raise procedural difficulties. Consequently, at an early stage in the examination, Inspectors are urged to discuss the plan and potential difficulties which might arise with their Inspector Manager.**

363. There isn't much national guidance on this and nor is there much legislative underpinning. This may be why we have seen some plans where the public consultation and the published plan have been unclear about what is in scope and what isn't (ie which policies and parts of the plan are being reviewed and which are not). This has led to problems at examination where Inspectors have been obliged to decide what is in scope and what isn't. We have also seen cases where LPAs have accepted representations they consider to be out of scope and cases where allocations have been purportedly 'rolled-over' without review. Untangling these procedural problems can delay examinations and waste time, particularly if the LPA has to re-consult to rectify any significant risk of unfairness.

How might you solve any problems?

364. The key point is to try and arrive at a clear position about which parts of the plan are in scope and which are not, as early in the examination as possible. If this is not clear, try to resolve it through sending the LPA some early questions. If it is still not clear, you will probably need to cover it at the first hearing session.

365. If you consider the consultation was unclear and this has led to a real possibility that the consultation carried out by the LPA was unfair and potentially prejudicial, you could advise the LPA to re-do the consultation during the examination (clearly explaining what is in and out of scope for comment and examination) or to withdraw the plan to allow it to be correctly prepared. However, these are not steps to be taken lightly. In the event of a legal challenge the Courts are only likely to be concerned about a procedural breach if it is clear it has caused prejudice. Given any legal challenge is likely to be made to the Council, their approach to any risk will be an important consideration when deciding what to do.

366. If there is a disagreement about whether some representations are in scope, this will need to be resolved. Ideally, the LPA should explain its reasons for accepting or declining any representations, but if this doesn't achieve a definitive position, it is something you will have to conclude on.

367. You may face arguments that parts of the plan which the Council is not updating should be updated and so should fall within the scope of the examination. There is no specific national guidance on this. However, the government's Planning Practice Guidance does anticipate that LPAs can choose to update specific policies rather than only whole plans –

"A local planning authority can review specific policies on an individual basis. Updates to the plan or certain policies within it must follow the plan-making procedure; including preparation, publication, and examination by the Planning Inspectorate on behalf of the Secretary of State."[60]

It would therefore be reasonably to conclude that it is for the LPA to decide which policies it considers should be updated and that those which are not being updated are out of scope. However, you will need to consider any specific arguments on this.

368. It is important that the adopted plan clearly states which policies have been updated (rather than giving the impression that the whole plan has been updated). This can correctly be achieved through the plan you are examining stating which policies in the existing development plan are to be superseded (ie updated). This is required to satisfy Regulation 8(5) of the Town and Country Planning (Local Planning) (England) Regulations 2012. If the submitted plan does not achieve this, you should ask for it as a main modification.

Section 7: The Inspector's report

369. See Procedure Guide paragraphs 7.1-7.8. Hyperlinks to relevant example Inspectors' reports are provided in the text which follows.

What are the main principles of report-writing?

370. See Procedure Guide para 7.1 and PINS *Local Plans Quality Assurance of Local Plan and Community Infrastructure Levy Reports and Soundness and Legal Compliance letters*, available on the Local Plans and CIL page of the PINS intranet (in *Guides*).

371. In brief the Inspector's report should:

- **focus** on the issues of soundness and legal compliance identified by the Inspector and reach clear conclusions on each one;
- **explain** why each of the recommended MMs is necessary to make the plan sound or legally-compliant;
- **explain** the need for the LPA to make any changes to what is shown on the submitted policies map;
- **not** deal with additional modifications;
- **not** address every representation or every point raised by the parties;
- **not** summarise the cases of individual parties, recite national policy or include quotes from the evidence;
- **be** concise and readable;
- **be** accurately written and free of errors.

See Local Plans Protocol 1 for a more comprehensive statement of what a good report entails.

Why is a report required?

[60] Paragraph: 069 Reference ID: 61-069-20190723

372. Section 20 of the 2004 Act requires the person appointed to carry out the examination to make recommendations on the plan (see paragraph 3 above) and to give reasons for their recommendations. The Inspector's report, together with the MM appendix, fulfils both these requirements.

Should the PINS report template always be used?

373. Yes. The latest version of the Local Plan report template, available on the Local Plans and CIL page of the PINS intranet, should always be used to ensure consistency in the format of reports. Much of the standard wording given in the template reflects legislation and national policy. It should not be altered unless there is a clear reason to do so. However, where alternative sections of text are given in the template, please take care to delete the one(s) that are not needed.

How is the report structured?

374. The PINS report template provides the overall structure for the report. See Procedure Guide paragraph 7.4 for an explanation of the content and purpose of each section. Further guidance on writing each section is given below.

When should the Inspector start work on the report?

375. As soon as possible after the hearings finish – or after each block of hearings if there is more than one block. Starting as soon as possible will ensure that the issues and the discussion at the hearing sessions are still fresh in your mind. If time is limited, just set down as much as you can in note form and come back to it later.

376. It is also helpful early on to estimate how long it is likely to take you to write each section of the report, and in particular how long it will take you to deal with each of the soundness issues. It is good practice to draw up a reporting timetable with daily reporting targets. This will help to structure your reporting time and make the whole task more manageable.

What writing style should be used?

377. The emphasis should be on readability. Use plain English but without undue informality and avoid jargon as far as possible. Unless absolutely necessary, avoid the use of terms such as "on balance", "it appears that", "it is considered that", and so on. Just set your views out clearly and decisively, without hedging.

378. Keep paragraphs short (maximum eight lines or so) and vary the sentence lengths. Use sub-headings every page or so to break up long sections of text. Keep footnotes to a minimum: there is no need to reference sources. Set out any abbreviated term in full the first time it is used, followed by the abbreviation in square brackets. But avoid too many abbreviations, especially ones involving long strings of initials which are off-putting to the reader. As long as it is clear what is meant, it is better to use shorthand terms such as "the plan", "the Council", "the Viability Study" and so on.

379. Refer to the PINS Style Guide – check link for further advice.

How should the front page of the report, and the abbreviations section on page 2, be completed?

380. The report is made to the LPA so the LPA's official name should be filled in after "Report to …" at the top of the front page. Unless the LPA is not a Council, make sure the word "Council" is included somewhere in the name, eg *Shropshire Council, Stroud District Council*, *the Council of the London Borough of Lambeth*. For joint plans, put all the full names of each LPA in the order in which they appear on the title page of the plan, or – if the LPAs have created a joint committee to prepare the plan[61] – put the name of the joint committee.

381. Fill in the full name of the plan (including any dates) after "Report on the Examination of…" in the middle of the front page.

382. Ask the Plans Team for the submission date and reference number if you are not sure – they should be on your appointment letter. Fill in the first and last dates of any hearing sessions held as part of the examination.

383. The abbreviations page contains a list of "standard" abbreviations, but any that are not actually used in the report should be deleted, and any extra abbreviations that are used should be added.

How should the Non-Technical Summary be written?

384. Bear in mind that it is a summary and avoid excessive detail. In the section summarising the MMs, give a summary of each of the key MMs in a bullet point each, but wrap up groups of less significant, related MMs into a single bullet-point. For example: Amendments to the wording of various development management policies to ensure that they are justified, effective, and consistent with national policy.

How should the Introduction be written?

385. If the plan which forms the basis for the examination is **not** the same as the version that was published under Regulation 19, this needs to be explained (see paragraph 4 of the PINS report template). Usually this will be because an addendum of changes was consulted on and then submitted along with the plan – see paragraph 200 above.

386. For advice on dealing with the sections of the Introduction on MMs and the policies map, see sections 6 and 6a above.

How should the Assessment of Duty to Co-operate be dealt with?

387. See paragraphs 36-39 of the section of this ITM Local Plan Examinations chapter on Duty to Co-operate.

How should the Assessment of Legal Compliance be dealt with?

388. The PINS report template provides suggested text for dealing with each of the relevant legal tests in a summary format. In many cases there are no significant legal

[61] See section 29 of the 2004 Act.

issues and this summary, together with any brief additional explanation where necessary, is sufficient.

389. But if there are significant issues of legal compliance they should be dealt with in the same way as the soundness issues (see How should the Assessment of Soundness be dealt with? below)[62], and an appropriate cross-reference should be provided in the legal compliance summary section. The heading of the Assessment of Soundness section can be amended to "Assessment of Soundness and Legal Compliance" to cover the inclusion of legal compliance issues.

How should the Assessment of Soundness be dealt with?

390. The Assessment of Soundness is where you assess whether the plan meets the tests of soundness contained in the NPPF. It should be written as a series of subsections, each addressing a specific soundness issue identified by the Inspector. As the Assessment of Soundness is usually by some distance the longest section of the report, you will need to give particular attention to ensuring that it follows a clear and logical structure (see "*In what order should the issues be considered?*" below).

391. There is no requirement to deal with every representation, every point raised at the hearings, or every aspect of the plan. Nor does the assessment need to go into forensic detail: the emphasis should be on the exercise of planning judgment. The extent of your reasoning on any issue will always be a matter of judgement having regard to the issue's degree of importance and controversy.

What do I need to cover in my reasoning on soundness?

392. Inspectors should assume that they are writing for an informed audience. Nonetheless, there should be sufficient context provided to allow someone (including the QA panel) who may not have been involved in the detailed discussion to understand what the soundness issues were and the conclusions of the Inspector on them, including the need for any MMs or policies map changes. The same principle also applies to interim findings and letters raising soundness issues during examinations.

393. The issues addressed will usually be based on the issues identified in the Inspector's list of MIQs (see How should the Inspector go about drawing up the matters, issues and questions? above). But it is not necessary to stick rigidly to the original order or wording of the issues. Matters may also have moved on as a result of the hearing sessions and the issues addressed in the report should be amended accordingly. It may also be possible to combine some of the original issues and consider them together, and it may be that one or more issues no longer need to be considered in detail.

394. The general principle is that each of the issues you consider in your report should focus on whether or not a particular aspect of the plan is sound. In most cases each issue will involve an assessment of the soundness of a policy or a group of policies, based on a consideration of the relevant evidence, and an explanation of why any MMs you are recommending are necessary to make the plan sound. You should not

[62] Apart from the duty to co-operate, which is considered separately in the report. See para 304 above.

spend time unnecessarily considering issues that have no bearing on the soundness of the plan.

395. Inspectors should have regard to the following three scenarios when considering what issues to cover in their reports, and the appropriate level of reasoning on each issue.

1. **The policy you are considering is unsound**: The reasons for your conclusions need to be explained in the report, along with an explanation of the necessary MMs and any policies map changes.

2. **The policy you are considering is sound, but the issue has been one of significance in the examination (for example, housing need or supply)**: Your reasons for finding it sound need to be explained.

3. **The policy you are considering is sound, but you do not consider the issue to be one of particular significance**: If there have been representations on the topic, it was defined as an issue in the MIQs (which implies you potentially thought it might have been of significance) and you had a hearing discussion on the subject, it will usually be sensible to explain concisely why you consider the relevant policy or its geographic representation are sound and do not need to be changed.

396. The third scenario above can often be the most difficult to decide what level of reasoning to include in the report. A balance must be struck between ensuring a concise report, but one that also covers what it needs to. When considering the third scenario above, it may be useful for Inspectors to bear in mind: the nature of the examination; the level of interest on the particular matter, including that from well informed parties; and whether it is evident from the examination that anybody would be clearly disappointed (and so likely to complain) if you did not explain why you disagreed with them in finding the plan sound. This third scenario is one that has been subject to complaint from participants.

397. The above approach should not result in the length of reports significantly expanding, as in most cases, your reasoning can be very concise. For example, when considering the traffic concerns of local residents for a site allocation, it could be said:

> The roads surrounding the ### site allocation are congested at peak times. However, the evidence in the supporting Transport Assessment, and by the Council at the hearing, demonstrate that the development of the site would not have any adverse impacts on highway safety and the allocation is therefore sound.

How should the issues be defined in the Assessment of Soundness?

398. Each issue addressed in the Assessment of Soundness should be worded as a question, which forms the heading for the sub-section that answers it. For example:

- Will the plan meet the full range of housing needs in the district?

- Are the plan's policies on design justified and effective?

399. At the end of your reasoning on each issue, your conclusion should be expressed in the same terms as the question. For example, after your consideration of the soundness of that aspect of the plan, and your explanation of why you are recommending any necessary MMs, your conclusions on the issues above might be:

- For the above reasons I conclude that the plan will meet the full range of housing needs in the district.
- Subject to the recommended main modifications, the plan's policies on design are justified and effective.

How should the issues be dealt with in the Assessment of Soundness?

400. Unless it is obvious from the context, findings on soundness and on the need for MMs should refer explicitly to the NPPF tests: that the policy is (or is not) positively-prepared, justified, effective and/or consistent with national policy.

401. Unless it is absolutely necessary, do not summarise or refer directly to arguments put by the LPA or other parties, or identify representors by name. Quotations from representations, evidence or national policy should also be avoided. Set out your findings in clear and confident terms, using positive rather than negative phrases. Avoid over-use of phrases such as "I consider" or "In my view", but make it clear that the findings are your own. Don't rely on summarising the position of the LPA (for example) as a substitute for setting out your own findings

402. The following example may help to illustrate these points. Instead of saying:

> "I have considered the arguments of Boddington Parish Council [1] and local residents that the traffic generated by 60 dwellings on the proposed site off Worthington Lane would lead to unacceptable congestion on the B9876 [2]. However, the traffic count evidence presented by the Council and New Homes Ltd (the prospective developers) shows that the additional movements that would be generated would not significantly add to the existing congestion on the B9876 [2,3]. The Parish Council [1] also had concerns over the safety of pedestrians walking from the site to the village shop and school [2]. But the Highway Authority pointed out that there is a continuous footway along Worthington Road to The Cross, where the shop and school are located [2,3]. I therefore find that there is no reason to consider the proposed site allocation to be unjustified [4]".
>
> [1] Reference to party by name
> [2] Summary of argument put by party
> [3] Reliance on position put by party
> [4] Conclusion expressed in negative terms

It would be better to say:

> "While the development of 60 dwellings on land off Worthington Road, Boddington would generate some additional traffic movements along the B9876 towards Worthington, the evidence shows that there would not be a significant increase in congestion. The continuous footway along Worthington Road would allow future residents to access local facilities in Boddington. Consequently, the site allocation is justified".

In what order should the issues be considered in the Assessment of Soundness?

403. There is no one "right" answer to this question. Much depends on the specific circumstances of the plan and the examination. However, the following principles, drawn from QA reading of Inspectors' reports, provide a useful guide[63].

Full local plan reports
[*See the example reports on the* Ashford *and* Guildford *Local Plans*]

404. In full local plan reports there will usually be three categories of issue to deal with in the Assessment of Soundness – strategic issues (eg spatial strategy, development needs and provision for those needs, Green Belt alterations), soundness of site allocations, and soundness of development management policies. It is usually best to deal with strategic issues first, before moving on to the other two categories. As far as possible, closely-related issues should be dealt with in a logical sequence, so that the conclusions on one issue lead into the consideration of the next.

405. The trickiest issue to deal with is likely to be housing need and provision. It will usually work best to adopt the following sequence:

- Assess whether the objectively-assessed need for housing over the plan period has been arrived at in accordance with national policy and guidance.
- Assess whether the plan's overall housing requirement figure is sound. For example, if it is lower than the objectively-assessed need figure, what are the factors which justify this?
- If the plan proposes a stepped housing requirement, assess whether that approach is justified.
- Assess whether the plan provides an adequate supply of land to meet the housing requirement over the plan period.
- Assess whether the plan will provide a five-year supply of deliverable sites from its date of adoption.
- Assess whether the plan will make appropriate provision for affordable housing, accommodation for gypsies and travellers, accessible and adaptable housing, and housing to meet the needs of particular groups, such as (for example) disabled people, older people, and students. It usually works best to deal together with the need for and provision of each of these categories, before moving on to the next category.

406. If each of these matters is straightforward, you may be able to deal with them all as sub-sections of one single issue. In more complex cases, it may be better to consider some or all of them as separate issues.

407. You may sometimes find it more logical to alter the above sequence, or to insert other issue(s) into it. For example, the plan may make alterations to the Green Belt boundary in order to provide enough housing land to meet the objectively-assessed need. In such cases, it may be sensible to consider the issue of whether there are exceptional circumstances to justify Green Belt boundary alterations in principle, after

[63] Please be aware that these paragraphs only provide guidance on how to structure the Assessment of Soundness, not on how to deal with the issues within it. For detailed guidance on dealing with the issues covered by the Assessment of Soundness, please refer to the relevant sections of this ITM Local Plan Examinations chapter.

considering the objectively-assessed need for housing, but before dealing with the soundness of the housing requirement figure. As another example, if the delivery of some of the proposed housing land supply depends on the provision of strategic infrastructure, you may well need to deal with the strategic infrastructure issues before considering whether there is an adequate housing land supply.

408. It is not essential for your report to consider the soundness of the individual site allocations before concluding that the plan provides an adequate supply of housing land. The report is meant to be read as a whole, and as long as it is internally consistent there is no reason why you cannot conclude on housing land supply as part of your consideration of strategic housing issues, and leave your detailed consideration of the soundness of individual site allocations until later in the report. But it is good practice to "signpost" the fact that you will be returning to consider the soundness of individual site allocations later.

409. Depending on what issues are at play in your examination, you will often also need to deal in your report with strategic issues concerning the need for and provision of employment land, and/or retail floorspace. As with housing need and provision, is usually logical to consider whether or not the relevant requirement figure is sound, before moving on to consider whether or not the plan makes adequate provision to meet it.

410. After you have dealt with the strategic issues, it is often logical to consider the soundness of site allocations next, and then the soundness of development management [DM] policies. Unless there are particular complexities, both these topics can often be dealt with as single issues, split into sub-sections covering individual site allocations and individual DM policies or groups of policies. But these are not hard-and-fast rules.

411. If the plan is allocating Green Belt sites for development, when dealing with site allocations you will need to assess whether, in each case, there are exceptional circumstances to justify the release of each of the Green Belt sites. This assessment will usually be informed by a Green Belt review carried out by the LPA and will often involve consideration of, for example, the contribution that each site makes to the Green Belt purposes defined in the NPPF. This issue is distinct from the strategic issue of whether there is a need in principle to release Green Belt land in order to meet development needs.

Strategic ("Part 1") plan reports

[See the example report on the New Forest District Local Plan – Part 1: Planning Strategy]

412. If the plan you are examining contains only strategic policies, or strategic policies plus a limited number of strategic site allocations, you will not usually be able to assess whether or not the plan meets the housing requirement for the plan period, provides a five-year supply of sites, or makes appropriate provision for the different categories of housing need. When considering housing need and provision, therefore, it is likely that you will only need to deal with the matters in the first three bullet points in the section on **Full local plan reports** above, and any related matters such as whether exceptional circumstances exist in principle to justify alterations to the Green Belt boundary.

413. As with the strategic elements of full local plan reports, discussed above, you may also need to deal in your report with the plan's spatial strategy, and with strategic issues concerning the need for and provision of employment land and/or retail floorspace.

Site allocation & development management ("Part 2") reports

[See the example report on the Rushcliffe Part 2 plan.]

414. The purpose of a "Part 2" plan is usually to allocate sites to meet the development needs established in the adopted strategic ("Part 1") plan, and/or to set out detailed DM policies. The first issue, or series of issues, in your report will usually assess whether or not the plan meets those needs in a way which is consistent with the policies of the strategic plan[64].

415. The strategic plan's development requirements will usually provide the basis for your assessment of the adequacy of the provision made by the "Part 2" plan. But it may occasionally be necessary, in certain circumstances, to revisit the justification for the development requirements in the strategic plan.

416. In any case, in terms of housing land provision, in a "Part 2" report you will usually need to address the matters set out in the last three bullet points in the section on **Full local plan reports** above (relating to supply), and you may also need to assess whether the plan makes adequate provision for other development requirements that have been established in the strategic plan.

417. It will also be necessary to consider whether the "Part 2" plan's approach to the distribution of development land, and to the release of Green Belt land if that is proposed, are consistent with the strategic plan.

418. The remainder of your report will consider the soundness of individual site allocations and/or DM policies, in a similar fashion as for full local plans (see above).

419. If there are any other areas in which consistency between the Part 2 plan and the strategic plan needs to be examined, you should deal with them in your report. But it is not usually necessary to make consistency with the strategic plan an issue in its own right.

How should the need for MMs and policies map changes be explained?

420. The explanation of the need for any MMs should flow naturally from the Inspector's findings on soundness and legal compliance. All that is usually required is to say that the MM is necessary to overcome the shortcomings that the Inspector has identified. So that this is clear, it may sometimes also be necessary to give a brief summary of what the MM does. There is no need to say who originally proposed the MM.

[64] Or which is in general conformity with the London Plan, if you are dealing with a plan in London.

421. There is no need to refer to any MMs proposed by the LPA or other parties which you are not recommending. And do not refer to additional modifications in the report: they are a matter for the LPA alone.

422. Any necessary changes to what is shown on the submission policies map should also be explained in the relevant section of the report. See How should any necessary changes to what is shown on the submission policies map be drawn up, and how should consultation take place on them? above.

What form should the conclusion to each issue take?

423. There should be a specific conclusion to each sub-section of the Assessment of Soundness. Usually this should reflect the wording of the issue, and it should refer to any MMs necessary for soundness or legal compliance. For example, appropriate conclusions to the issues under How should the issues be defined in the Assessment of Soundness? above could be:

- For the reasons given above, I conclude that the plan will meet the full range of housing needs in the district – ie the Inspector considers the plan is sound on this matter and no MMs are needed.
- Subject to the MMs I have outlined above, the plan's policies on design are justified and effective – ie MMs are needed to make the policy sound.

Do all the recommended MMs need to be explained in the report?

424. Yes. You will need to go through the report when it is finished, and make sure that it gives an explanation for **each** of the MMs contained in the appended schedule of MMs (see below).

Does the report need to explain any changes which the Inspector has made to the MMs since consultation on them took place?

425. Yes. In certain circumstances the Inspector may make changes to the proposed MMs that were put out for consultation, before recommending them to the LPA. See What should the Inspector do if, in the light of the responses to consultation, they consider that change(s) are needed to the schedule of proposed MMs? above. As well as amendments to the wording of the MMs, the changes could include deciding not to recommend one or more of the MMs at all: in other words, deleting them from the schedule. Any such changes must be explained briefly in the report.

How should the Overall Conclusion and Recommendation section be dealt with?

426. Strictly in accordance with the PINS report template. Apart from deleting any paragraphs that are not required, Inspectors should not alter the wording of this section as it is based on the relevant sub-sections of the Act. It is designed to cover each of the possible outcomes of the examination, and the confirmation of a five-year housing land supply for plans that are seeking to demonstrate this (see the Housing section of the ITM Local Plan Examinations chapter).

How should the Schedule of Recommended MMs be laid out and checked?

427. The schedule of recommended MMs is provided as an appendix to the Inspector's report. It is up to the Inspector whether it forms part of the same Word document as the report itself, or a separate Word document. The schedule is usually based on the schedule of proposed MMs that was put out for consultation, but if any subsequent changes have been made by the Inspector, it will incorporate those changes. The reasons column (if there is one) and any other explanatory material, logos etc provided by the LPA should be removed, and an appropriate heading should be inserted (eg *XXXX Local Plan – Schedule of Main Modifications*).

428. You should check that every MM referred to in your report is included in the MM schedule. In accordance with the *Beechcroft Developments Limited* case[65] great care needs to be taken to ensure the wording and effect of the proposed modifications is consistent with the recommendations the Inspector will make in the final report.

429. However, any necessary changes to what is shown on the submission policies map should **not** be included in the schedule of recommended MMs. See Can the Inspector recommend main modifications to the submission policies map? above.

430. Together with the Inspector's recommendations, the schedule of recommended MMs effectively forms a legal document telling the LPA what needs to be done to the submitted plan to make it capable of being adopted. The schedule must therefore contain the exact text of all the necessary MMs – expressed as changes to the submitted plan[66] – and no extraneous material. There is no provision for corrections to be made to the schedule once the final report has been issued, so the Inspector must check it extremely thoroughly. Do not rely on the LPA to pick up errors at the fact-check stage. An example schedule of recommended MMs is provided as Annex 15.

What do the courts say about the approach to report-writing?

431. The approach advocated above is generally supported by the judgment in the *Cooper Estates* case[67], in which it was found that the Inspector

> "is not required to spell out why it [the plan] is not unsound in the light of every participant's/objector's argument. It was not necessary for [the Inspector] to go through the main arguments in contention between Cooper Estates and the Council, and state his conclusions on each as if it were an appeal against the refusal of planning permission … . That would be a misconception of the role of the examination with its particular role, notably the testing of soundness" (paragraph 61).

[65] Consent Order for Beechcroft Developments Limited v Richmond on Thames London Borough Council and SoS (CO/3783/2019). The problem here was that the recommendations in the Inspector's Report were not consistent with the main modifications leading to problems about the fairness of the consultation. This was accepted by the LPA and PINS leading to a consent order from the Court which required the relevant proposed main modification to be consulted on again and then re-examined.

[66] Or to the submitted plan as amended by an addendum of proposed changes, if the addendum was subject to public consultation before the plan was submitted. 0020

[67] Cooper Estates Strategic Land Ltd v Royal Tunbridge Wells Borough Council [2017] EWHC 224 (Admin)

432. Similar conclusions were reached in the judgment in the Waverley case[68]:

> "In respect of the reasons challenge, I think the Inspector's reasons were perfectly adequate, considering the factors set out by Lord Brown in South Bucks v Porter. The [Inspector's report] was primarily written to a knowledgeable audience, certainly in respect of the Claimants and their supporters. It is also relevant that it is a report written for a Local Plan examination, not an s.78, and that context necessarily means that the reasons will be less extensive than in a major s.78 inquiry, and not every participant's arguments will be dealt with in comprehensive terms. This is virtually always the case … . To place a requirement on a Local Plan inspector to set out the level of detail which is normally in a s.78 decision would be to impose an unreasonable, and ultimately unnecessary burden" (paragraph 59).

433. The fact that the standard of reasons required from a Local Plan Inspector's report is different from that required of an Inspector determining a planning appeal was also emphasised in the Compton Parish Council, Julian Cranwell, Ockham Parish Council vs Guildford Borough Council, and SoS [2019] EWHC 3242 (Admin) judgement.

How should I deal with any post-hearing soundness letters in my report?

434. In some cases it may be necessary to set out your detailed conclusions about some key aspects of soundness and legal compliance in a post-hearing letter. If you are satisfied that the reasoning and conclusions in a letter of this kind are still valid, you can rely on this reasoning in your report, either by repeating the content or by attaching the letter as an appendix and explaining that it forms an integral part of your report. If you follow this latter approach you will need to carefully explain what you have done. For example, in the report on the North Essex Garden Communities it was dealt with like this:

- Introductory explanation:

  'My three post-hearings letters, IED/011, IED/012 and IED/022 are attached to this report. They set out my detailed findings on many aspects of the Plan's soundness and legal compliance. To avoid unnecessary repetition, sections of those letters are to be read as integral parts of this report. In the sections below dealing with the duty to co-operate, other aspects of legal compliance, and the soundness of the Plan, I indicate which specific paragraphs of those letters form integral parts of this report.'

- Example of subsequent reference:

  'I consider this matter in IED/011, and conclude that each of the North Essex Authorities met the duty to co-operate in the preparation of the Section 1 Plan. Paragraphs 7 to 16 inclusive of IED/011 (attached below), which form an integral part of this report, set out my reasons for reaching that conclusion. There has been no subsequent evidence that leads me to alter the conclusion I reached in IED/011. Accordingly, I am satisfied that where necessary the NEAs engaged constructively, actively and on an on-going basis in the preparation of the Plan, and that the duty to co-operate has therefore been met.'

[68] *CPRE Surrey Ltd & another v Waverley BC and others* [2018] EWHC 2969 (Admin)

Section 8: Quality assurance [QA], fact-check procedure and delivery of final report to the LPA

435. See Procedure Guide paragraphs 8.1-8.7.

Are there guidelines for the QA process and how long does it take?

436. As you approach the end of the reporting period you should let the Plans Team know when you expect to submit the report for QA, and keep them updated if this changes. You should also tell the Plans Team about any specific timing requests the LPA may have made for receipt of the fact-check report.

437. PINS Local Plans Protocol 1: Quality Assurance of Local Plan and CIL Reports, available on the Local Plans and CIL page of the PINS intranet, provides internal guidelines for the QA process. Once you have sent a report to the Plans Team for QA, you should allow about two weeks for it to come back with comments. On the covering email to the Plans Team you can set out any necessary context or highlight any issues that you would like to draw the QA readers' attention to.

438. You should deal with any comments on the report as soon as you can so that the fact-check version can be sent to the LPA without delay.

What is the purpose of the fact-check process and how long does it take?

439. As the name indicates, the fact-check process gives the LPA the opportunity to draw attention to any factual inaccuracies, inconsistencies or lack of clarity in the report. You should correct any such points if they are drawn to your attention. But it is not appropriate for a LPA to use the fact-check process to persuade the Inspector to make changes to, for example, their findings on soundness, or their recommended MMs.

440. The LPA is allowed two weeks to carry out the fact-check but in practice most do it within a few days. Wherever possible you should be ready to make any necessary factual corrections quickly so that the final report can be sent to the LPA without delay.

441. **Every fact-check report must be sent to MHCLG by the Plans Team for information at least 48 hours before it is sent to the LPA.**[69]

Can the final report be altered once it has been issued to the LPA?

442. Unlike for appeal decisions, there is no legal basis or slip rule within the Planning and Compulsory Purchase Act (2004) that allows for a final local plan report that has been provided to the LPA to be altered. Issuing ad hoc reports with varied text could create uncertainty and set a precedent. This is why there is a fact check stage before the final report is published, to identify any factual errors.

[69] As required by the letter from the Secretary of State to the Planning Inspectorate's Chief Executive dated 18 June 2019. The letter may be found here: https://www.gov.uk/guidance/local-plans

443. However, if an error is found after the final report is issued, it is possible for the Inspector to write to the LPA to accept that there is an error and to advise that the Inspector's letter should be published on the examination website alongside the report when it is published by the LPA in line with S20(8). If the error is relatively minor, it is unlikely to have any significant bearing on the LPA's decision to adopt the plan. However, it is up to the LPA to decide how to exercise the discretionary power under s23 to adopt the plan.

Section 9: Other Procedures

444. See Procedure Guide Section 9

ANNEXES - Overview

These Annexes provide examples of the different types of examination documents that are referred to in the Role of the Inspector in the Examination Process section of the ITM Local Plan Examinations chapter.

Each examination is different, and so the example documents should not be seen as models to be followed exactly. Instead, please see them as helpful illustrations of the ways in which different Inspectors have produced material for each of the various stages of the examination process.

With one exception, the examples are documents that were produced for real-life local plan examinations. Please note that most of them were prepared for plans submitted and examined under the 2012 NPPF and related PPG.

Former Annexes 14A and 14B, which contained example Inspectors' reports, have been replaced by hyperlinks to a more recent examples. The hyperlinks will be found in Section 7 above, dealing with the Inspector's report.

Many other examples of examination documents are available online, on the websites of current and recent local plan examinations. You may wish to look at some of those as alternative examples to the ones provided here.

Annex 1 Inspector's initial letter to the LPA raising queries and pointing out policy wording issues

Inspector's Initial Comments / Questions to the Council

I have now made progress with my initial preparatory work. I set out below a number of procedural matters and initial questions for the Council.

Hearing sessions

It is expected that the Hearing Sessions will take place late September 2018 onwards for two weeks with an additional week reserved in mid-October 2018. Please note that the Council should ensure that the start date for the hearing sessions is notified at least 6 weeks in advance of the sessions commencing.

I will be circulating a Matters and Issues paper and a draft Hearings Programme in due course. The examination is based on the Matters and Issues and not driven by the representations.

A Guidance Note has been produced to outline the nature of the hearing sessions. Those who have sought modifications to the Local Plan (LP) and signalled a wish to be heard will be invited to the relevant hearing session(s). There is no formal presentation of evidence or cross-examination; the procedure is an inquisitorial process, with the Inspector asking questions based on the Matters and Issues identified for Examination. The Council and relevant representors will have the opportunity to provide responses to the identified Matters and Issues, to be submitted approximately 2-3 weeks before the hearings commence. There is no need for any legal representation, but lawyers are welcome as a member of a team.

Representations

Copies of the representations are displayed on the Council's website and summarised in documents LP006 and LP007. It is for the Council to decide whether the representations are duly made, and also to decide whether to accept late representations. Late representations which are not formally accepted by the Council are not forwarded to the Secretary of State and the Inspector does not consider them. I have been provided with a schedule of those representors who have already requested a wish to participate at the hearings. There will be a further opportunity for representors seeking a change to the plan to indicate a wish to participate

Initial Questions to the Council

Meeting with representors/Statements of Common Ground

Q1. Is it the Council's intention to have any further discussions with representors? If so, could the Council please provide details and confirm when any Statements of Common / uncommon Ground are likely to be completed?

Q2. It would be helpful if the Council could provide an update on the Memorandum of Understanding with South Oxfordshire District Council?

Core Evidence base

I have received the Submission Documents and Evidence-based Documents (and note that these have been provided on the Council's website).

Q. Is any other substantial work/reports likely to be undertaken for the examination, and if so what is the timetable for such work?

Dealing with Changes to the Local Plan

In considering any proposed modifications, I will need to take a view whether any are required for soundness/legal compliance reasons. As you will be aware, in order for me to make such 'main modifications', you would need to formally notify me as to whether you wish to request modifications under section 20(7C) of the Planning and Compulsory Purchase Act 2004 (as amended).

In the absence of a request under section 20(7C), my report would be confined to identifying any soundness or legal compliance failures in the Plan and, if there are such failures, recommending non-adoption of the Plan.

Q. Please give an indication of the Council's position on main modifications?

This would be advantageous to the efficiency of the examination process and the expectation of participants. Deferring a decision to request modifications until a late stage of the examination may risk both time delay and incur additional examination costs.

Minor changes that do not go to the question of soundness or legal compliance are made solely by the Council on adoption and not by the Inspector

Q. Notwithstanding the wording of the covering note to the schedule of modifications LP008, some of the wording proposed and incorporated into the LP appears to change policy wording or the interpretation of policy. Would the wording changes within the Submission Plan have been apparent to the reader? Could the Council please comment on this?

Neighbourhood Plans

Q. Are there any Neighbourhood Plans in preparation within the Borough? If so what stage have they reached?

Whole Plan Viability

Q. What evidence is there for assessing the effect of the policies on the viability of development where they set out infrastructure requirements or contributions? If this is not available what steps would be needed to rectify this?

Housing Supply

Q. Would the Council be able to demonstrate a five year housing land supply, including an appropriate buffer, at the point of adoption of the LP should it be found sound? Please provide evidence to demonstrate how.

Q. Tables on pages 162, 179, 194, 201 and 210 – what is the current position on sites with planning permission?

Q. Paragraph 10.2.2 – a number of sites in the table are referred to as being 'long term' or 'unknown' – for each site (with the exception of Grazeley) could the Council please explain what the reasons are for this?

Supplementary Planning Documents

There are a number of Supplementary Planning Documents and other Guidance Documents referred to in the text of the LP.

Q. For each of these listed below could the Council please confirm the date of production where this is not defined, and also it's planning status?

- Sustainable Design and Construction
- Station Area Framework
- Station Hill South Planning and Design Brief
- Kenavon Drive Urban Design Concept Statement
- Dee Park Planning Brief
- Whiteknights Development Plan Built and Natural Environment

Q. Policy EN12 – in the penultimate sentence what is meant by 'nationally or locally recognised metrics'?

Q. In paragraph 4.2.85 - What is meant by the Council reviewing its approach to air quality, and are there any implications for Policy EN15?

Employment

Q. Paragraph 4.3.8 - What is the likelihood of a freight consolidation centre coming forward and will is it clear to the decision maker how to react to such a proposal?

Housing

Q. Paragraph 4.4.13 – what is the latest position on the Register for Self-Build Homes?

Q. Policy H5 – what is the evidence for applying the optional technical standards as policy?

Q. Policy H6 - what is the status and age of the Housing Strategy referred to within this Policy?

Q. Paragraph 4.4.96 what is the evidence relating to student numbers produced by the University?

Gypsy and Traveller provision

The Gypsy and Traveller, Travelling Showpeople and Houseboat Dweller Accommodation Assessment 2017 identifies a need for gypsy and traveller accommodation in the Borough.

Q. Has the methodology of the Gypsy and Traveller Accommodation Assessment been tested at any other examinations to date?

Q. Could the Council please confirm what options were explored for both permanent and transit Gypsy and Traveller sites within the Borough, and the reasons for discounting any sites?

Transport

Q. Policy TR2 – the policy refers to safeguarding land for high quality bus routes what land would this be?

Retail

Q. Paragraph 4.6.6 – what is the previous national guidance referred to, and why is it relevant to Policy RL1?

Q. Policy RL6 – what is the latest position on applications for public houses within the Borough to become Assets of Community Value?

Other uses

Q. Paragraph 4.7.6 – what progress has been made on identifying a potential site for a new 6 form entry secondary school, and what are the potential implications for the LP if a site is not found?

Q. Policy OU2 Figure 4.9 is there any planned development in the Middle and Outer Zones? If so, what are the implications for the LP?

Central Reading

Q. What is meant by the '18 hour welcome' and is it defined anywhere?

Q. Paragraph 5.4.36 refers to regional policy – what is this?

Caversham and Emmer Green

Q. Policy CA1a the first sentence refers to national policy – what particular national policy is being referred to?

Wind Turbine Development

On 18 June 2015, the Secretary of State published a Written Ministerial Statement regarding onshore wind turbine development. The WMS sets out a consideration to be applied to proposed wind energy development so that local people have the final say on wind farm applications. When determining planning applications for wind energy development involving one or more wind turbines, local planning authorities should only grant planning permission if:

- The proposed development site is in an area identified as suitable for wind energy development in a Local or Neighbourhood Plan; and
- Following consultation, it can be demonstrated that the proposal reflects the planning concerns of affected local communities and therefore has their backing.

In applying these considerations, suitable areas for wind energy development will need to have been allocated clearly in a Local or Neighbourhood Plan. No such areas are identified.

Q. In light of this WMS, can the LP be regarded as being effective and consistent with national policy in so far as it relates to wind energy related developments? If not, what modifications would be necessary to the Local Plan?

Other Matters

Q. Are the policies worded to ensure that they will be effective and that they provide a clear indication of how a decision maker should react to a development proposal? For example phrases such as 'Take account of' (for example Policies ER1d and ER1c) and in Policy EM3 the criteria are questions, these are not requirements that must be satisfied. The Council may wish to consider if modifications are necessary.

A response to these questions by no later than midday on Monday 23 July 2018 would be appreciated. If this is not possible, could the Council please indicate when I can expect a response?

XXXX XXXX

Inspector appointed to examine the Reading Local Plan

Annex 2 Inspector's initial letter to the LPA raising concerns about soundness / legal compliance

ID/01

ROYAL BOROUGH OF WINDSOR AND MAIDENHEAD: Examination of the Borough Local Plan, 2013 – 2033.

Inspector: XXXX

Programme Officer: XXXX

Tel: XXXXX

Email: xxxx@xxxx

INITIAL QUESTIONS FOR THE COUNCIL

As a result of my initial appraisal of the Borough Local Plan (the Plan) and associated materials, I have identified a number of matters for the Council to address before I finalise my main issues and questions for the examination. The latter will be published separately and statements will be invited prior to any hearing sessions. The timetable for the examination will be set in due course.

My purpose in asking initial questions of the Council is to 'flag up' potentially significant issues of relevance to my examination of the legal compliance and soundness of the Plan and to assist the efficient progress of the examination. Therefore, please could the Council provide a succinct but complete answer to each of the questions below by **Friday 6 April 2018** via the Programme Officer. If further explanation is required, please contact me through the Programme

Officer allowing time for the deadline to be met.

1. <u>Habitats Regulations Assessment: SANG Capacity and Air Quality</u>

In its representation dated 8 August 2017, Natural England expresses concern about the scale of Suitable Alternative Natural Greenspace (SANG) provision in the Plan; and about the evidence in respect of how the development proposed might impact upon air quality and, consequently, upon the integrity of the relevant protected sites in and around the Royal Borough.

a. I understand that the Council has prepared document CD008: Habitats Regulations & Air Quality Update, January 2018, in response to Natural England's concerns. Is this correct? This document assesses the impact of the Plan on air quality in relation to protected Natura 2000 sites and the Council's obligations to manage local air quality. Do the conclusions of this study address the concerns raised by Natural England about the evidence base for air quality? In particular:

- The study concludes at para. 5.1.2 that mitigation is required in respect of the potential effect of nitrogen deposition upon a small part of Bisham Woods SSSI, which forms part of the Chiltern Beechwoods SAC. Is this addressed by the Plan? If not, should it be?

- The conclusion concerning the potential for significant effects “in-combination” with other plans and policies is a little unclear (para.5.1.3) in terms of whether they can or cannot be ruled out. However, it does suggest that RBWM should work with its Duty to Cooperate partners to carry out further investigations and plan for mitigation if necessary. Is the conclusion of the study that “in-combination” effects can or cannot be ruled out? If they cannot be ruled out, are the necessary joint working arrangements in place to address them? How does the Plan secure the necessary joint working and how will it ensure that any necessary mitigation is provided?

b. The update study of January 2018 (CD008) does not appear to address Natural England’s concern that the Plan does not identify adequate SANG for development expected to come forward within 5km of the Thames Basin Heaths SPA.

- Is this matter addressed elsewhere? If not, is it sufficient for Policy NR4 of the Plan to commit the Council to delivering appropriate mitigation in the future (Clause 5); and/or to encourage applicants to seek bespoke SANG solutions (Clause 7)? Natural England’s representation appears to suggest that this approach could threaten the delivery of the proposed housing allocations.
- Please could the Council set out which sites are likely to come forward within the 5km zone of influence of the SPA (or 7km zone if relevant), and indicate how much SANG is likely to be required above that already provided in the Plan.

The Programme Officer has made Natural England aware of the above questions. It would be helpful if the Council could liaise with Natural England in answering them, and ascertain whether or not its concerns have been/can be resolved.

2. **<u>Flood Risk</u>**

In its representations dated 26 September 2017, the Environment Agency (EA) expressed concern that the Plan includes several site allocations in flood risk areas, but no Level 2 Strategic Flood Risk Assessment (SFRA) has been produced. In relation to such sites, the EA suggests that it is not always possible to know which flood zone is relevant and whether the site is capable of being developed to take account of flood risk.

a. Having regard to the EAs representation and to the advice in the Planning Practice Guidance (PPG) concerning when a Level 2 SFRA might be required, is the plan sound in the absence of a Level 2 SFRA? In particular:

- Are the spatial strategy and consequent site allocations informed by a robust sequential test and, where necessary, exception test as required by para. 100 of the National Planning Policy Framework (NPPF)? Where is this evidence provided and what role did Sustainability Appraisal play in the process? (I note that para. 8.1.8 of the Level 1 SFRA, June 2017, indicates that the Council has prepared a Sequential Testing Report on the basis of the updated Level 1 SFRA of 2016 and allocated sites for future development accordingly. Where is this report?).

- Which of the sites to be allocated in the Plan fall wholly or partly within Flood Zones 2, 3a or 3b? Please provide the following information for each site:

  - A map showing the site in relation to the relevant flood zone(s);

- A summary of the use for which it is allocated;
- A summary of the evidence which demonstrates that the site passes the sequential test and, if necessary, the exception test;
- A summary of the evidence which demonstrates that there is a reasonable prospect of this site being deliverable with respect to the need to mitigate flood risk.

o In light of the responses to the questions above, is any additional evidence required to justify either the plan's overall strategy or any individual site allocation?

b. The EA is also concerned about whether the growth proposed by the plan can be achieved without degrading the water environment or having implications for the Water Framework Directive as required by para. 109 of the NPPF. What is the Council's evidence to demonstrate compliance in this matter? With reference to Sections 3.18 and 3.19 (Water Supply and Sewerage) of the Infrastructure Delivery Plan, January 2018, how can the Council be confident that the infrastructure needs identified will be in place in time to support planned growth?

The Programme Officer has made the EA aware of the above questions. It would be helpful if the Council could liaise with the EA in answering them and ascertain whether or not its concerns have been/can be resolved.

3. <u>Duty to Cooperate (DtC)</u>

a. Housing needs within the Housing Market Area (HMA)

I understand that South Bucks District Council disagrees with RBWM Council and Slough Borough Council that S. Bucks should form part of the Eastern Berkshire HMA for plan-making purposes. Leaving aside the technical validity of this grouping, please explain the cooperation that has taken place to seek to resolve this issue. In particular:

- o How did S. Bucks become involved with the Berkshire (including S. Bucks) Strategic Housing Market Assessment 2016 (SD002)? Who took the decision to include S. Bucks and why? Was it a willing participant? How did it contribute? I understand that it was not a commissioning authority.
- o When did S. Bucks first raise concerns about the HMA groupings emerging from the SHMA and why? Were alternatives proposed? Were genuine efforts made to explore and resolve the disagreements?
- o Once it became clear that the disagreement over the HMA geography would not be resolved, how did RBWM reach the decision to proceed with its Plan based on the SHMA? Were DtC partners, including S. Bucks, Slough BC and the Western Berkshire authorities involved in this decision? Were alternative options considered?
- o What are the main implications of proceeding on the basis of the SHMA without the engagement of S. Bucks? Do the implications go beyond the question of where to provide for the unmet housing need in Slough? It is my understanding that S. Bucks' unmet need is to be exported to Aylesbury Vale and that RBWM considers there is no unmet need arising from its own area.

- How did RBWM explore the possibility of providing for unmet needs in Slough before concluding that it could not do so (see letter of 17 July 2017)? I note that housing growth above the Royal Borough's own Objectively Assessed Need (OAN) was only tested through sustainability appraisal after the Plan was published. Why was this not tested earlier given the situation of unmet need in Slough was well known? Has the timing of the assessment skewed the result?
- Having concluded that it could not help to provide for housing needs in Slough, how far is it the responsibility of RBWM to seek an alternative solution? Has RBWM taken part in any cooperation to this effect?
- What is the current position in respect of reviewing housing market areas and seeking a collective approach to addressing housing needs arising within this plan period and beyond? What is the scope of the Wider Area Growth Study? Is the present Plan sufficiently flexible to address any changes arising from studies such as this by a process of review?

b. Some Other DtC Issues

Slough BC is concerned about the absence from the Plan of a spatial distribution for housing; and about the lack of a specific requirement in Policy HO3 for the provision of affordable housing for social rent. Slough states that these concerns were raised with RBWM on several occasions before the Plan was published. Are these issues which should have been addressed under the DtC and, if so, what cooperation took place?

4. **<u>Green Belt Review</u>**

Nature of Green Belt review; demonstrating that exceptional circumstances justify boundary alterations; and the Duty to Cooperate

a. Paragraph 14 of the NPPF generally requires that a Local Plan should meet the objectively assessed development needs of the area. However, it also confirms (via footnote 9) that Green Belt is one of the constraints which indicates that development should be restricted. How has the Council gone about resolving this tension and come to the conclusion that there are exceptional circumstances to justify the alteration of Green Belt boundaries in the Plan? In particular:

- How do the specific development needs of the Royal Borough weigh against the importance given to Green Belt protection?
- What would be the consequences of not releasing Green Belt land to help meet development needs?
- Have alternatives to Green Belt release been fully considered, including maximising the use of previously developed land? Could any other neighbouring authority have accommodated some of the Royal Borough's housing need which could not be met on non-Green Belt land?
    - The Edge of Settlement Analysis Parts 1 and 2 (SD018 & SD019), consider parcels of land on the edge of settlements which are themselves excluded from the Green Belt. Having determined that a Green Belt review was necessary to accommodate development needs, and having regard to paragraph 86 of the NPPF concerning villages in the Green Belt, should the Council have considered whether any of the villages presently washed over by the Green Belt should be excluded from it and/or potentially expanded? In the absence of

this analysis, has the Council done all it reasonably could to avoid altering Green Belt boundaries?

- When identifying parcels of Green Belt land for assessment in the Part 1 Study (SD018), land subject to “hard constraints” were excluded for reasons of efficiency. Are these exclusions justified, in particular those relating to heritage assets and land in National Trust ownership? I note that Crown Land was not excluded from the study.
- How has the Council satisfied itself that the revised Green Belt boundaries to be established by the Plan will be capable of enduring beyond the Plan period as required by paragraphs 83 and 85 of the NPPF? Is it necessary to identify areas of safeguarded land between the urban area and the Green Belt to meet longer term development needs?

b. Paragraph 2.17 of the Edge of Settlement Analysis Part 1 (SD018) acknowledges that national guidance identifies Green Belt as a strategic policy in terms of the Duty to Cooperate. It further recognises that the level of housing to be planned for is determined in part by whether there is an unmet requirement in a neighbouring authority area. Given that unmet housing need in the HMA is an issue with which the Council has had to grapple, and that neighbouring authorities are similarly constrained by Green Belt, should a Green Belt review have been undertaken on a joint basis with one or more neighbouring/near authorities? Why was this not done and what are the consequences for the robustness of the Council’s own review?

c. Paragraphs 4.4-4.5 of the Part 2 Edge of Settlement Analysis (SD019) rule out ten parcels of Green Belt land from further consideration. However, the study does not reach an overall conclusion about which of the remaining parcels would be most suitable for future development.

- How was it decided which of the remaining parcels would be allocated? Has all the land in the remaining parcels been allocated in the Plan?
- If any land/parcels were left unallocated, did the Council consider whether more could be used to help to meet the needs of neighbouring authorities?

End.

XXXX

INSPECTOR

Annex 3 Inspector's interim findings letter requiring further work following hearing session(s)

Inspector's letter to Yorkshire Dales

Yorkshire Dales National Park Local Plan

Inspector: XXXX

Dear XXXX

Examination of the Yorkshire Dales Local Plan 2015-2030
Subsequent to your submission of the Yorkshire Dales Local Plan (the LP/the plan) for examination, I have undertaken a preliminary review of the LP and the evidence produced. I am writing to you seeking clarification on a number of points and to raise some initial concerns.

Plan period
The plan period is 2015 to 2030. Please could you clarify the rationale for these start and end dates.

The objective assessment of housing need
It is not clear to me what the National Park Authority (NPA) considers to be the objective assessment of housing need (the OAN). Two documents are produced in evidence, the Housing Need, Land Supply and Housing Target (December 2015) paper and the Demographic Forecasts (November 2015) paper by Edge Analytics. Neither gives a definitive opinion about the level of need or the specific basis upon which it should be set. The Housing Need paper, from my reading, seems tentatively to indicate that 38 dwellings per annum should be regarded as the OAN. Is that the NPA's position? Whatever the case may be, I would be grateful for a clear and concise explanation of what the NPA considers the OAN to be and precisely what evidence is relied on in that regard.

The plan requirement/target
It is apparent that the requirement set by the LP is 55 dpa. The basis for this, however, is less explicitly stated. Does this figure represent a 'rounding-up' of the Dwelling Growth +52 scenario considered in the Demographic Forecasts paper?

Affordable housing
I would welcome your confirmation of what the NPA considers to be the objectively assessed need for affordable housing, and what the plan requirement/target is for affordable housing. Again, please clarify the evidence relied on to support the figures given. Is the need and plan requirement for affordable housing included within the figures for housing in general?

Policy C1 sets requirements for the provision of affordable housing on the basis of site size thresholds. Supporting this, paragraph 4.8 says "*these viability issues, together with the changes to national planning policy that prevent the*

Authority from requiring on-site delivery of affordable housing on sites of fewer than 11 dwellings, have led the Authority to adapt its policy …". I understand the reference here to be to the Written Ministerial Statement of 28 November 2014 and alterations to the Planning Practice Guidance (PPG), which altered national policy relating to affordable housing. Under these changes, for sites of 10 houses or less, and with a maximum floorspace of 1,000 square metres, affordable housing should not be sought.

However, you will be aware of the High Court's decision in *West Berkshire*[70] concerning the Written Ministerial Statement and the PPG changes. The Declaration Order issued on 4 August 2015 confirms that the policies in the Written Ministerial Statement must not be treated as a material consideration in development management and development plan procedures and decisions, or in the exercise of powers and duties under the Planning Acts more generally. The PPG has been updated accordingly. The Secretary of State has been granted leave to appeal the judgement.

In the light of this, I would welcome confirmation of the NPA's position in relation to the thresholds in Policy C1. Perhaps the main question is whether the thresholds are supported by the evidence. If they are not, what thresholds, if any, would be so justified?

Housing sites and land supply

As I understand it, all of the housing sites in the LP are presently allocated in the Housing Development Plan 2012 – many remain unchanged, some are proposed to be enlarged and some reduced. Moreover, from my reading of the NPA's Housing Land Assessment (December 2015), the current gross supply is from extant planning permissions and sites proposed to be allocated through the LP. Could you clarify whether my understanding is correct?

Unless I have missed something, I am not aware of any housing trajectory illustrating the expected rate of housing delivery for the plan period, nor of any housing implementation strategy of the kind demanded in paragraph 47 of the National Planning Policy Framework. I would be grateful if you could direct me to these. If they have not been produced, I would be grateful to know of your intentions to ensure that they are.

The housing implementation strategy should clearly and concisely indicate the sources of land supply, when it is expected to be delivered and how this will meet the plan target. A robust justification for the significant reliance on windfall should be included. Although I do note the arguments put in the papers already submitted, expansion of this drawing on specific monitoring data would be helpful.

In addition, I would be grateful for clarification of any shortfall or over-provision to be taken into account. At present, I am unclear as to the 'delivery against target' situation at the beginning of the LP period in 2015, and I also do not know the present situation – that is, the delivery performance since the start of

[70] West Berkshire DC & Reading BC v Secretary of State for Communities and Local Government [2015] EWHC 2222 (Admin)

the LP period until now. Where relevant, I will also need to know how the NPA proposes to deal with any shortfall – whether the 'Liverpool' or 'Sedgefield' method is to be used – and the justification for the chosen approach. I suggest that much, if not all, of this could helpfully be within the housing implementation strategy.

The settlement hierarchy and the spatial distribution of housing

Table 1 of the LP sets out the settlement hierarchy. From the evidence, I am not adequately clear about the methodology used to decide which settlements sit within each of the three tiers. Please could you explain this.

Policy SP3 seeks to direct new build housing to allocated sites and sites inside the Housing Development Boundaries of the Local Service Centres and Service Villages listed in Table 1. However, this involves over forty settlements. From my reading, there is no indication in the plan of how the NPA anticipates new housing should be distributed among them. Delivery of the plan's housing target relies rather heavily on windfall sites. But there is nothing in the LP, so far as I can see, to control or direct windfall delivery in spatial terms. As a consequence, the likely level of new homes to be built in each settlement, or in each of the three tiers of the hierarchy, is not clear to me, even in broad terms.

This raises a question of whether the spatial strategy should provide a firmer steer, for example by illustrating the expected apportionment of housing between the settlements or across the tiers of the hierarchy. I would be grateful to know the NPA's position in this regard, and particularly why the chosen approach is regarded by the NPA to be the most appropriate.

Housing Development Boundaries

Paragraph 2.16 of the plan says that "*Housing Development Boundaries have been saved from the Housing Development Plan 2012 and are identified on the Policies Map*". But both paragraph 1.1 and Appendix 1 of the LP say that the plan supersedes all policies within the 2012 Housing Development Plan. Please clarify the NPA's position on this.

I have concerns about the notion of 'saving' the Housing Development Boundaries from the Housing Development Plan 2012. You will appreciate that the Policies Map is not a discrete document in its own right. Rather, from Section 9 of the 2012 Regulations[71], its purpose is to illustrate geographically the application of the policies in the adopted development plan. The policies in the Housing Development Plan which rely on the illustration of the Housing Development Boundaries on the Policies Map will be replaced by new LP policies. The Housing Development Boundaries will expire with the Housing Development Plan policies they illustrate. Consequently, it seems to me that the LP will introduce new Housing Development Boundaries, even if they are no more than a re-drawing of the previous boundary lines.

[71] The Town and Country Planning (Local Planning) (England) Regulations 2012 (as amended)

This may seem an academic issue. But the point is that because the Housing Development Boundaries are not 'saved', they are squarely a matter for consideration through this examination.

This leads me to two matters. Firstly, I would be grateful if you could explain the justification for the delineation of the Housing Development Boundaries. What methodology or criteria have been used and what evidence does the NPA rely on in this respect? How has the Sustainability Appraisal process influenced matters?

Secondly, I am concerned that people may not have realised that the delineation of the boundaries was a matter on which they could comment. The wording used in paragraph 2.16 of the LP – that the "*Housing Development Boundaries have been saved*" – may have given people the impression that the boundaries were 'saved' and therefore not something their comments could influence.

Much will depend on how this has been presented through public consultation on the plan. I ask that you provide me with a full and open account in this regard. If there is any risk that the consultation process may have been compromised to any degree in relation to the Housing Development Boundaries, this must be remedied. In such circumstances, further public consultation will be necessary before the examination can progress to hearings.

Provision for Gypsies and Travellers

The national Planning Policy for Traveller Sites is clear that local planning authorities should use a robust evidence base to establish the accommodation needs of Gypsies and Travellers and, in short, to ensure that those needs are met. National Park authorities are not exempted from this.

I note that a number of Gypsy and Traveller Accommodation Assessments have been produced in evidence. However, there is not one among them that provides any meaningful up-to-date analysis of Gypsy and Traveller accommodation needs in the NP. Consequently, while it may be that "*levels of need are negligible*", as paragraph 4.45 of the LP puts it, so far as I can see there is no sufficiently robust or adequately recent evidence to justify that stance. Please could you explain what evidence the NPA relies on to show that there is no need to make provision for Gypsies and Travellers through the LP?

Policy L2 – conversion of traditional buildings

Policy L2 says:

"*Proposals for change of use to a dwellinghouse for continuous occupation will be subject to a local occupancy restriction unless the applicant agrees to pay a conservation levy to fund the conservation of other significant buildings within the National Park …*"

Through Appendix 7 of the plan, the levy is set at 50% of the uplift in value brought about by the conversion. Appendix 7 also sets out the reasons why the

NPA considers this approach to meet the tests in the Community Infrastructure Levy Regulations 2010 (as amended) (the CIL Regulations).

At present, I am not persuaded that the conservation levy would meet the CIL Regulations. It is neither necessary to make the development acceptable in planning terms nor is it directly related to the development.

In considering compliance with the CIL Regulations, Appendix 7 appears to regard the conversion of a traditional building to be the development involved. But it is quite clear that Policy L2 regards such a conversion to be acceptable, so long as it is subject to a local occupancy restriction. Indeed, it is only the waiver/absence of such an occupancy restriction that 'triggers' the levy.

It seems to me that the development in question, in effect, is the conversion of a traditional building without the imposition of a local occupancy restriction. However, imposing the levy and using the receipt to conserve another building elsewhere in the National Park has nothing to do with who occupies the building being converted into a dwelling. These are unrelated matters. Moreover, spending the levy on conserving another building would not overcome any problem caused by the absence of a local occupancy restriction. It is therefore difficult to see how it is necessary to make the development acceptable.

Furthermore, I am concerned that the policy in effect allows the option of paying a fee in order to avoid the NPA imposing an occupancy restriction. But restricting occupancy is either necessary to make the development acceptable in planning terms or it is not. If it is, a planning condition or obligation should be used. If not, then no such restriction should be imposed. Whether or not the applicant will pay a levy to the NPA is neither here nor there, and has no bearing on the need or otherwise for such a restriction to be imposed. Indeed, suggesting that such a payment can be made implies that the local occupancy restriction set out in Policy L2 is not necessary. That in itself raises further concerns.

I have set out here my initial thoughts and concerns on this issue. Has the NPA sought legal advice in relation to Policy L2? If so, it would help to produce it in evidence. If not, I suggest that a legal opinion may well be instructive and of assistance to the examination.

Moreover, following on from my point above, I would be grateful if you would clarify, for the avoidance of any doubt, the evidence relied on to justify the plan's intentions concerning the use of local occupancy restrictions, including in Policies C1 and C2. If you intend to continue pursuing the conservation levy, I would be grateful if you could explain the justification for waiving the local occupancy restriction in instances where the levy is to be paid.

Renewable and low carbon energy

You will be aware of the Written Ministerial Statement of 18 June 2015 entitled 'Local Planning'. This says that when determining planning applications for wind energy development involving one or more wind turbines, local planning authorities should only grant planning permission if:

the proposed development site is in an area identified as suitable for wind energy development in a Local or Neighbourhood Plan; and

following consultation, it can be demonstrated that the planning impacts identified by affected local communities have been fully addressed and therefore the proposal has their backing.

The PPG has been updated to reflect this and to add further detail.

Policy CC1 permits proposals for small scale renewable and low carbon technologies that met the energy needs of communities and businesses in the National Park, but does not identify any suitable areas for wind energy developments. The LP does not, therefore, meet the Government's expectations in this regard. Consequently, it seems to me that the LP as presently drafted is not sound in this respect.

To my mind, there are three options open to the NPA:

delete any criteria-based policy (or part thereof) that looks to approve wind turbines, leaving future planning decisions to rely on the WMS;

add to the criteria-based policy the additional WMS tests saying a wind turbine proposal must be in area identified as suitable for wind energy development / fully address the planning impacts identified by local communities. This would mean the plan would include the up-to-date policy, and support any future part of the development plan (including a neighbourhood plan) that identifies suitable areas. The rationale could be provided in the supporting text (otherwise it might appear that the plan was requiring wind turbines to be in identified areas but not identifying any area as suitable for wind energy); or

amend the plan to make it clear that any generic policy on renewable energy development does not relate to wind turbines, that the wind turbine issue will be dealt with in a subsequent review of the plan or single issue DPD, and that in the meantime wind turbine proposals will be considered against the WMS.

I would be grateful to know your thoughts on this matter, and for confirmation of the NPA's intentions.

The Yorkshire Dales Design Guide

Policy SP4 says that "*all development proposals should be consistent with the guidance set out in the Yorkshire Dales Design Guide …*". But the Design Guide has not been drawn up as a development plan document and has not undergone the scrutiny of examination. Demanding consistency with it as a matter of development plan policy, as Policy SP4 does, effectively gives it development plan status. In my view, that is not appropriate.

The NPA should give consideration to an alternative form of wording for Policy SP4. The application of the policy should not rely on the Design Guide. I suggest removing reference to it from the policy, and simply pointing out the Design Guide's existence in the supporting paragraphs.

Habitats Regulations Assessment

I note the letter from Natural England dated 18 January 2016, withdrawing the objections it had previously raised in relation to the Habitats Regulations Assessment (HRA). It appears that Natural England's concerns have been overcome as a result of further information provided in the updated HRA report dated November 2015 and in an email from the NPA dated 12 January. The HRA report I have in evidence is dated January 2016. For clarification, is this the same as the HRA report referred to in Natural England's letter?

Moreover, the email to which Natural England's letter refers appears to be not in evidence. I would be grateful if you could explain the situation to me, for the avoidance of doubt, and provide a copy of the email in question.

Overall and looking forward

Overall, I have identified a number of shortcomings that must be addressed, one way or another. That being said, it seems to me that all of the issues I have raised can be addressed – that is to say, they relate to soundness problems that are capable of remedy.

I recognise that some of the points I have raised may well take some time to fully address. I ask that you now consider the next steps and the timescales involved in progressing the matters I have raised. Please rest assured that I will do all I can to assist, and to give the NPA every opportunity to address these issues.

I trust that you find this letter helpful, and in the spirit of assistance I am happy to answer any questions you may have in relation to procedural issues. I will do all I can to help the NPA in relation to the way forward, although you will appreciate the restricted nature of my role in this regard and that any advice given is without prejudice.

I look forward to hearing from you at the earliest opportunity in relation to your view about the next steps and timescales involved.

Yours sincerely

XXXX

INSPECTOR

Inspector's letter to Windsor & Maidenhead BC

ROYAL BOROUGH OF WINDSOR & MAIDENHEAD: Examination of the Borough Local Plan, 2013- 2033

Inspector: XXXX

Programme Officer: XXXX Email: xxxx@xxxx

Dear XXXX,

INSPECTOR'S ADVICE AFTER STAGE 1 HEARINGS

1. Stage 1 hearing sessions were held from 26 – 28 June 2018 and I write with initial advice following those sessions. The advice concerns the matters we have already discussed while a number of other matters remain to be considered in the future. At present, I hope to consider these during a second stage of hearings later in the year once the Council has responded to the issues set out below.

2. I am yet to reach firm conclusions regarding the soundness and legal compliance of the aspects of the Plan considered at Stage 1. My advice is given now without prejudice to the conclusions that I might ultimately reach in my report. My report might also address the other main issues which arose during Stage 1 of the examination but which are not covered here.

Availability of Evidence/Fairness

3. Concerns regarding the availability of documents and the legality and fairness of the Council's consultation process arose primarily in relation to employment and flood risk evidence. The Judgement in the case of CK Properties (Theydon Bois) Limited v Epping Forest District Council [2018] EWHC 1649 (Admin) (Doc PS040) was issued after the hearings took place and I have now read it.

4. In its light, can the Council confirm that sufficient evidence was available to enable it to decide that the plan was ready for independent examination because it was "sound"? The Council should also confirm that any persons not already taking part in the examination process have not been prejudiced by the unavailability of certain documents at the point of publication. If the Council has any concerns in these respects, then I should be informed and the Council should outline any necessary corrective actions.

5. Finally, while I do not require this, I would like to offer the Council the opportunity to make comments and/or legal submissions covering any implications of the Judgement it considers relevant. The same invitation is extended to the following representors who made legal submissions concerning this matter at the hearings: XXXX on behalf of XXXX; XXXX on behalf of XXXX and XXXX on behalf of 13 local organisations. Responses should be sent to the

Programme Officer by Friday 24 August and I will consider them in advance of Stage 2 of the examination.

Habitats Regulations Assessment and Suitable Alternative Natural Greenspace (SANG)

6. During the hearings, the Council indicated that it would be reviewing the work it has already undertaken in this area in light of the Judgement in the People over Wind & Sweetman v Coillte Teoranta case. It also agreed that an Appropriate Assessment in respect of the likely effect of the Plan upon a small area of Chiltern Beechwoods SAC should be carried out. The Council should advise me of the timetable for this work.

7. Turning to SANG, while the Council is clearly pursuing a number of options to secure adequate land for the plan period, at the time of the hearings, provision remained uncertain. If certainty cannot be achieved within the course of the examination, then the Council should consider modifying Policy NR4 of the Plan to clarify that planning permission will not be granted for developments requiring SANG for which inadequate SANG is available. The Council might also consider splitting Clause 3 of Policy NR4 so that all of the relevant wording concerning development within the zone of influence of the SPA is read together. At present it is covered between Clauses 3 and 5-8.

Conflict with Hurley & The Walthams Neighbourhood Plan (NP)

8. Proposed Local Plan allocation HA22 directly conflicts with Policy GEN7 (WW Land off Breadcroft Lane) of the NP made recently, in June 2017, which designates approximately the same area as a Local Green Space.

9. The Planning Practice Guidance (PPG) deals with circumstances where NPs come forward before an up to date Local Plan is in place at paragraph 009 (ID: 41-009-20160211). It clearly contemplates a situation in which an emerging Local Plan could conflict with a made NP because it draws attention to section 38(5) of the Planning and Compulsory Purchase Act 2004. This requires that if a policy in a development plan conflicts with another policy in the development plan, the conflict must be resolved in favour of the most recent policy.

10. For this reason, the PPG advises that Local Planning Authorities should work with qualifying NP bodies to produce complementary Local Plans and NPs and to minimise conflicts. It advocates a proactive and positive approach. Whilst the Council provided support to the qualifying body during the preparation of the NP, and notwithstanding the complimentary remarks made about the support given in the NP itself, the evidence I heard indicates that the conflict between proposed allocation HA22 and Policy GEN7 was never raised. Consequently I cannot presently conclude that the Council worked proactively and positively with the qualifying body to produce complementary plans in relation to this particular issue.

11. The Council should therefore advise me about how it considers that this matter, including the fundamental issue of conflict, should be resolved through

the examination process. It would be helpful if the position could be agreed with the NP body.

Green Belt

12. The concerns raised about the robustness of the Council's Green Belt review work include that the conclusions reached about certain sites in its Edge of Settlement Analysis of 2016 (Doc SD018) differ significantly from the conclusions reached in its superseded Edge of Settlement Analysis of 2014 (Doc SD017).

13. Can the Council explain the relationship between the 2014 and 2016 studies; whether methodological differences are responsible for any change in findings; and, broadly, how and whether it is satisfied that the conclusions of the later study are robust?

Flood Risk

14. At the hearings, the Environment Agency (EA) continued to express concern about the robustness of the evidence provided by the Level 2 Strategic Flood Risk Assessment 2018 (L2 SFRA). In particular, the EA was not satisfied that the conclusions of the report were based upon a sufficiently precautionary approach to climate change. Working with the EA, the Council should clarify the approach taken, referring to the requirements of national policy and guidance where appropriate. If possible, I would request a Statement of Common Ground to confirm that the approach taken was satisfactory or, if it was not, what corrective measures are required.

15. Turning to the Plan itself, it is proposed to allocate 20 sites, for more than 2,900 dwellings, which would be required to pass the exception test. In this respect, I note the conclusion of the Sustainability Appraisal of June 2017 (Doc CD004) that "the issues of air pollution and flood risk, in particular fluvial flood risk, represent the most significant concerns" (para. 19.2.2). The conclusion continues at paragraph 20.1.3 that "the number of sites in areas of high flood risk puts additional emphasis on the need for the sequential test to provide a robust justification for development in these areas". At present, it has not been clearly demonstrated that the sequential test provides this robust justification.

16. The PPG explains at paragraph 022 (ID: 7-022-20140306) that a Local Planning Authority should demonstrate that it has considered a range of options in the site allocation process, using the SFRA to apply the sequential test and exception test where necessary. It advises that where other sustainability criteria outweigh flood risk issues, the decision-making process should be transparent, with reasoned justifications for any decision to allocate land in areas at high flood risk in the SA Report.

17. It is my understanding that the SA Report appraises only those sites which were identified as being reasonable alternatives through the Housing and Economic Land Availability Assessment (HELAA) 2016 (Doc SD003), because they were considered to be deliverable, developable or potentially developable. Similarly, the L2 SFRA explains that the first step in the sequential test

methodology was to screen out sites considered inappropriate for development for "other planning reasons".

18. However, Appendix A of the L2 SFRA indicates that more than 200 sites in Flood Zone 1 were screened out for other planning reasons and it is not clear to me how flood risk, and the need to apply the sequential test, were taken into account in this process. The "reasons" column in Appendix G of the HELAA provides only summarised information – often just a single word. Similarly, it is not clear to me how the sites which made it through the initial screening process (presumably those in Appendix B of the SFRA and appraised in the SA Report) were further narrowed down to form the final list of proposed allocations with the sequential test in mind.

19. Consequently, while I do not seek a site by site response, I would ask the Council to prepare a statement to clearly explain how it carried out the sequential test throughout its site selection process, including at the initial screening stage. The statement should include an explanation of the decision to screen out "small sites" and clarify whether these are accounted for elsewhere as part of the land supply in the Plan. In light of the advice in the PPG that reasoned justifications should be provided where other sustainability criteria are considered to outweigh flood risk, I need to understand how flood risk informed site selection and the strategy pursued in the Plan, and how it was treated alongside other planning matters.

20. I note that both the L1 and L2 SFRAs, at paragraphs 8.1.5 and 1.3.4 respectively, explain that the purpose of the evidence is to enable the Council to carry out the sequential test for all potential allocations. As stated above, the SA also indicates that the Council should justify development in areas of high flood risk and so the statement should focus upon the Council's decision-making process. It should provide the transparent explanatory evidence sought by the PPG.

21. If the Council is satisfied, and can demonstrate, that it has carried out the sequential test robustly, then I would ask it to also clearly demonstrate how each of the 20 relevant allocations pass part 1 and particularly part 2 of the exception test. Firstly and generally, I am not yet satisfied that sites without a safe access/egress are capable of passing the exception test at the allocation stage. Paragraphs 039 and 040 of the PPG do not appear to suggest that evacuation and flood response procedures should be used to substitute for safe access/egress. I also note the EA's concerns in this respect in its letter to the Council dated 20 March 2018 (paras. 2.8.3 – 2.8.4). Are these matters to be addressed by the proposed addendum to the L2 SFRA and, if so, is this document required before it can be concluded that the exception test is passed?

22. Secondly, it would be helpful to draw together the information presented in the various tables and appendices in the L2 SFRA and to link it directly to each proposed allocation. At present it is difficult to work out which sites considered in the L2 SFRA are proposed to be allocated and which have been rejected. Thirdly, it should be clarified whether the nature and degree of risk on each site has

informed the estimated developable area – particularly for those sites with a high proportion of land located in Flood Zone 3.

23. Fourthly, having regard to paragraph 025 of the PPG (ID: 7-025-20140306) it should be clear in the Plan how the L2 SFRA informs consideration of part 2 of the exception test. This should provide confidence that the exception test could be passed at the planning application stage. The Council should consider whether modifications to some of the site allocation proformas in Appendix D of the Plan are needed to make it apparent in all relevant cases that the exception test must be passed, and what should be done to achieve this. Moreover, it should be clear in the Plan (perhaps in Policy NR1) that permission would not be granted for developments on allocated sites which prove incapable of passing the exception test at the planning application stage.

24. The Council should share its explanatory statement covering the above matters with the EA and seek agreement as far as possible. Again, a Statement of Common Ground is desirable. However, if the Council concludes that either of the sequential or exception tests are not passed, then it should set out its position as to whether and how this could be addressed through the examination process.

Next Steps

25. The Council should aim to provide a complete response to the above matters by Friday 17 August 2018. Alternatively, if the nature of the work required indicates that more time is needed then I should be notified, with reasons, by the same date and with a timetable for the additional work.

26. With the exception of those invited to make specific comments and/or legal submissions (see paragraph 5 above), I am not seeking a response to this advice from any other parties. I will advise on Stage 2 of the examination once I have received the Council's response to this letter.

XXXX

INSPECTOR

20 July 2018.

Annex 4 Inspector's Matters, Issues and Questions

Inspector's MIQs from Sutton:

LONDON BOROUGH OF SUTTON

Examination of Sutton Local Plan 2016-2031

Inspector: XXXX

Programme Officer: XXXX

Tel: XXXX

Email: xxxx@xxxx

Address: XXXX

Webpage: Local Plan Examination in Public - Sutton 2031 - Sutton Council

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INSPECTOR'S ISSUES AND QUESTIONS

This note contains the main issues that I have identified in order to determine the soundness and legal compliance of the Local Plan. These will form the basis of the hearing sessions to be held. Furthermore, it poses both general and specific questions that I have in relation to the soundness of the Local Plan and which can be addressed in any hearing statement. Some of these questions have already been raised with the Council (ED3) and I have requested a reply by Friday 21 July 2017 so that this can be taken into account.

General advice about statements is contained in my guidance note but there is no need for every question to be covered.

In setting them I have had regard to paragraphs 154 and 157 of the National Planning Policy Framework which set out in broad terms what Local Plans should do. The Council should also consider this in addressing the questions below. Should, as a result of these questions and the other matters for the Council, changes be proposed to any of the policies or text then these should be added to the schedule of proposed changes (L.2.K). This should be kept up-to-date and the latest version published prior to the examination hearings.

Issue 1

Have the relevant procedural and legal requirements been met, including the duty to co-operate and those required by the Conservation of Habitats and Species Regulations 2010?

i) Is the Sustainability Appraisal (SA) (L.1.D) undertaken suitably comprehensive and satisfactory and has it sufficiently evaluated reasonable alternatives? In particular did it adequately assess the 3

options for sustainable growth, the spatial strategy and the London Cancer Hub? Are the findings of the SA of the Issues and Preferred Options (L.3.Q) properly reflected in the SA of the Local Plan?

ii) Has the Council engaged constructively, actively and on an on-going basis with neighbouring authorities?

iii) Does the Habitats (Appropriate Assessment) Screening Report of February 2016 at Appendix 4 of the Sustainability Appraisal of Issues and Options (L.3.R) comply with the Conservation of Habitats and Species Regulations 2010? Does it adequately address whether the Local Plan would have a likely significant effect on European conservation sites either alone or in combination with other plans or projects?

iv) In preparing the Local Plan has the Council complied with its Statement of Community Involvement having particular regard to the representations made by residents of Lenham Road (consultee 10)?

Issue 2

Are the spatial vision and objectives for Sutton sound having regard to the presumption in favour of sustainable development and the trends and challenges in the Borough?

Issue 3

Is the overall spatial development strategy for sustainable growth (Policy 1) sound having regard to the needs and demands of the Borough; the relationship with national policy and Government objectives; the provisions of The London Plan and the evidence base and preparatory processes? Has the Local Plan been positively prepared?

i) Will the strategy satisfactorily and sustainably deliver the new development and infrastructure needed over the plan period?

ii) The Planning Practice Guidance (PPG) on *Local Plans* (ID 12-010-20140306) indicates that policies should not reiterate the National Planning Policy Framework (NPPF). As criterion a) of Policy 1 largely repeats paragraph 14 of the NPPF should it be removed?

iii) In assessing the viability of the Local Plan and having regard to paragraph 173 of the NPPF has sufficient account been taken of all the relevant standards in the Plan and the implications of CIL?

Issue 4:

Are the policies for housing growth (Policy 1) and for affordable housing (Policy 8) justified, deliverable and consistent with national policy? Is the housing target and the distribution and location of new housing justified, will there be an on-going 5 year supply of deliverable housing sites and is the overall target for affordable housing and the type of tenure justified?

Housing growth

i) Is the multi-centred spatial strategy selected for the distribution of housing growth justified compared to the reasonable alternatives?

ii) Is the target of 6,405 homes over the plan period (427 homes per annum) justified having regard to the aim in The London Plan (Policy 3.3) to "close the gap" to objectively assessed need? Does the Local Plan do all it can to boost significantly the supply of housing as set out in paragraph 47 of the NPPF? In this respect should the Local Plan have released sites from the Green Belt or Metropolitan Open Land? Given that 439 and 406 net additional dwellings were completed in 2014-15 and 2015-16 respectively is the target sufficiently ambitious?

iii) Is the target of 6,405 homes over the plan period (427 homes per annum) justified having regard to the capacity identified in the Strategic Housing and Economic Land Availability Assessment (SHELAA) (L.10.B) for 6,802 net additional dwellings (page 17)? Why is there a disparity between the capacity figure and the overall yield of 6,410 in the housing trajectory table (Table 6.1 on page 19)?

iv) What are the likely implications for the labour market of the housing target which is below the figure of 751 homes per annum required to meet the forecast level of employment growth according to the SHMA (Figure 54 on page 73)? Does the housing target take sufficient account of the expected increase in the workforce at the London Cancer Hub?

v) Has the Council considered increasing the total housing figures in order to help deliver the required number of affordable homes in accordance with the PPG (ID 2a-029-20140306)?

vi) Will the Local Plan provide a 5 year supply of deliverable sites against the Local Plan target of 427 dwellings per annum with an appropriate buffer in accordance with paragraph 47 of the NPPF? Is this on track for Phase 1 of the Local Plan from 2016-2021? How is any shortfall in delivery since the start of that period to be addressed? The housing trajectory in Table 1 indicates that the policies in the Local Plan will not ensure the on-going availability of a 5 year supply in Phases 2 and 3. How is this to be addressed?

vii) Having regard to the SRQ matrix in The London Plan (Table 3.2) has the Council made reasonable assumptions about densities that can reasonably be achieved at allocated sites? Should higher densities be sought in Sutton Town Centre?

viii) Are the assumptions and analysis regarding site suitability, availability and achievability and development capacity in the SHELAA reasonable and realistic? Is this assessment sufficiently comprehensive and rigorous? Are the sites relied upon for the supply of housing deliverable and developable in accordance with paragraph 47 of the NPPF Planning Policy Framework?

ix) Is the approach to windfall sites in Chapter 5 of the SHELAA justified having regard to paragraph 48 of the NPPF? Should the 182 small sites with planning permission simply be treated as increasing supply by 289 dwellings rather than as 'windfall'?

x) Is the housing trajectory at Table 1 of the Local Plan and in Table 6.1 of the SHELAA (page 19) realistic? Is it reasonable to assume that all deliverable sites will be completed in Phase 1?

xi) Is there sufficient flexibility within the allocations to accommodate unexpected delays whilst maintaining an adequate supply?

xii) How would the supply of housing sites be monitored and managed? Does the Local Plan contain a housing implementation strategy?

xiii) Does the Local Plan adequately address the needs for all types of housing (excluding affordable housing) and the needs of different groups in the community as set out in paragraph 159 of the NPPF?

Affordable housing

i) On what basis is the 50% borough-wide target for affordable housing in Policy 8 a) justified having regard to the 40% recommendation in the Strategic Housing Market Assessment (SHMA) (L.10.C), the findings of the Viability Report (L.2.H) and the likely high preponderance of flatted development? Should a specific target be set for private developments as well as an overall target?

ii) Having regard to Policy 3.11 of The London Plan, the SHMA and the Viability Report are the percentages for social/affordable rent and intermediate housing justified? What are the key differences between Sutton and the remainder of London to justify the 75%/25% split?

iii) In criterion b)(i) how is it to be determined whether a site is capable of delivering 11 units or more?

iv) What is the justification for the inconsistency with national policy in the Written Ministerial Statement of 28 November 2014 and the PPG on *Planning Obligations* in expecting a financial contribution from sites below the threshold? What will the level of that contribution be? How will viability be affected? Are the assumptions made in the Viability Report about the implications of Starter Homes reasonable?

v) How will criterion c) regarding negotiating the maximum reasonable amount be implemented in practice? Will it be effective?

vi) Is criterion d) sufficiently clear about when off-site provision of payment in lieu will be accepted? Will the approach to phasing of large sites be effective?

Issue 5:

Are the policies for commercial growth (Policy 1) and for growing employment offer (Policies 14-16) justified, deliverable and consistent

with national policy? Will they be effective? Will the Local Plan ensure the future supply of land available for economic development and its sufficiency and suitability to meet identified needs?

i) Does Policy 1 take sufficient account of the implications of the London Cancer Hub?

ii) Will the proposed levels of additional land and floorspace in criterion e) provide a future supply that is sufficient and suitable to meet identified needs? Is it the most appropriate strategy to not release sites from the Green Belt or Metropolitan Open Land to meet those needs?

iii) Is the provision of 10 additional hectares of land for industrial uses justified having regard to the Town Centre and Economic Development Assessment (TCEDA) (L.11.A)? Paragraph P14.1 indicates that the most robust forecast is probably the Labour Supply Growth forecast but what is the explanation for this choice? Has the need for additional floorspace been properly translated into a land area?

iv) What is the justification for the requirement in criterion a) that proposals should provide at least one job per 60 sq m? How will this be ascertained?

v) Will the intensification of the Beddington Strategic Industrial Area in Policy 14 b) be effective in delivering additional industrial development? Is there any evidence that this has taken place previously? Is the expectation that around 50,000 sq m of additional floorspace (P14.2) can be achieved by means of intensification realistic?

vi) Why is the target for additional gross office floorspace 23,000 sq m when the TCEDA (L.11.A) refers to planning for between 29-36,000 sq m (paragraph 8.53)?

vii) Is the amount and distribution of retail and food and beverage development justified having regard to the TCEDA (L.11.A)?

viii) What is the justification for the 15% limit on total net floorspace for trade counters in Policy 15 b)?

ix) Should criterion c) of Policy 15 and paragraph P15.3 limit ancillary uses to those that meet only the needs of employees?

x) Is the distribution of office development envisaged by Policy 16 justified and will criterion a) be effective?

xi) Is Policy 16 c) justified in seeking to prevent the loss of office accommodation subject to certain conditions?

Issue 6:

Are the policies relating to Sutton's strategic projects (Policies 2*-6) justified and will they deliver the relevant strategic objectives?*

London Cancer Hub

i) Is the option selected for the development of the London Cancer Hub (LCH) justified compared to the reasonable alternatives?

ii) What certainty is there that the aspirations for LCH will be realised within the plan period? Is development deliverable with robust partnership arrangements in place? Will there be a sufficient critical mass of commercial floorspace? Should the amount of development envisaged be specified in the policy?

iii) How does the estimated increased employment and additional floorspace relate to the commercial growth envisaged in Policy 1?

iv) Does the evidence base (L.7.E & L.7.G) provide a sufficient basis for the consideration of transport impacts with particular regard to the representations made by Surrey County Council (consultee 53) and Reigate and Banstead Borough Council (consultee 81)?

v) Should Policy 2 include provisions regarding public transport improvements to increase the PTAL rating of the site? Should development be contingent on achieving sustainable transport options as outlined in the Issues and Options Report (L.7.G)? Will the sustainable transport options achieve the modal shift sought in the Transport Report (Table 4-2 of L.7.E)? Should the need for a comprehensive Travel Plan and individual Transport Assessments be included in the policy?

vi) Does criterion b) of Policy 2 provide sufficient certainty about the scope for residential development at LCH? Is such a provision necessary and justified and have the transport impacts been assessed? Is the density in the indicative housing capacity in LCH1 justified?

vii) Will criterion c) ensure that adequate transportation measures are in place when they are required? Can or should the required level of transport improvements required be defined more precisely than those in the table on page 25 to provide certainty? Will the proposed measures be effective in cost effectively limiting the significant impacts of development in accordance with paragraph 32 of the NPPF?

viii) Does criterion d) offer sufficient protection to the allotment function at Belmont? Is re-location to the eastern side of the site realistic?

ix) Are the capacities for development and the indicative phasing of 4 waves in LCH1 realistic?

Sutton Town Centre

i) Are the ambitions for growth in Sutton Town Centre justified? Will transport and other necessary infrastructure be in place to support the

delivery of a comprehensive redevelopment of the town centre in Policy 3? Will criterion g) be effective?

ii) Is adequate provision made for the delivery of community infrastructure such as health, social, cultural and sports and recreation facilities?

iii) Does Policy 3 enable the provision of the "hybrid" transport solution of Tramlink, some highway interventions and additional bus services set out at paragraph 7.0.0.15 of the Sutton Town Centre Transport Options Appraisal Study (iii) (L.16.D)?

iv) Is it reasonable and justified to expect family sized housing to be delivered in Sutton Town Centre under criterion b)? How will the proportion of family units be determined?

v) Is the level of retail floorspace sought in criterion c) supported by the evidence in the Town Centre and Economic Development Assessment (L.11.A)? Has it taken sufficient account of the impact on other centres outside the Borough? How effective will it be in delivering the amount and type of retail floorspace envisaged and in the locations expected?

vi) Does criterion d) take sufficient account of the findings of the Town Centre and Economic Development Assessment (paragraph 9.24 of L.11.A)? How effective will it be in delivering the amount of office floorspace expected around Sutton station?

vii) Will encouraging active frontages in criterion f) along St Nicholas Way and Throwley Way be effective in achieving that objective?

viii) Would the new road link between Brighton Road and Grove Road harm any heritage assets?

ix) If floorspace is not delivered in the quantity required for each land use as referred to in h) and in view of the large number of mixed use site allocations, what actions will be taken to correct or adjust any imbalance?

x) Should the transformation of the gyratory referred to in the Masterplan (L.8.A) be highlighted in Policy 3 as well as in Policy 35? What is the latest position regarding the options identified?

xi) Will Policy 3 be effective in bringing forward the 3 key sites (St Nicholas Centre, Civic Centre & Train Station) for the town centre identified in the Masterplan (L.8.A)?

Tramlink and Major Transport Proposals

i) Is there robust evidence to identify and protect the tramlink route as one which is critical in developing infrastructure to widen transport choice in accordance with paragraph 41 of the NPPF?

ii) How is the funding gap of around £140m identified by TfL to be addressed (page 15 of L.16.F)? Is Tramlink deliverable within the plan period?

iii) How realistic is the prospect of an extension of Tramlink to Belmont (page 17 of L.16.F)?

Wandle Valley Renewal

i) Will Policy 5 be effective in achieving sustainable place shaping in the Wandle Valley growth corridor?

ii) Are its detailed policy provisions justified?

Issue 7:

Are the policies for meeting housing needs (Policies 7 & 9-13) justified, deliverable and consistent with national policy?

i) Paragraph P7.3 explains that the density matrix in The London Plan has been modified for Sutton. What is the justification for this? Where is this modification set out in Policy 7 and should the densities sought be set out in the policy? How will whether density is appropriate to local character be judged and will this limit development within the Suburban Heartlands?

ii) Is the housing mix sought in Policy 9 justified and will criteria a) – c) be effective? Given the likely high preponderance of flatted development anticipated, especially in Sutton Town Centre, how is the need for family housing identified at Figure 123 of the SHMA to be achieved by Policy 9?

iii) Has the imposition of the internal space standards and accessibility in criteria d) and e) of Policy 9 considered whether there is a clearly evidenced need and the impact on viability in accordance with the Written Ministerial Statement of March 2015?

iv) In Policy 10 b) what is the justification for limiting residential conversions to Areas of Potential Intensification and the floorspace requirement of 125 sq m?

v) In Policy 10 c) what is the justification for limiting large houses in multiple occupation to Areas of Potential Intensification? How will a concentration of HMOs be assessed in (vii)? Should the provisions apply to extensions?

vi) Notwithstanding proposed changes 16 and 17 (L.2.K) why should new care homes be required by Policy 11 a) and b) to show that they are meeting a specific need or that proposals will result in improvements?

vii) Paragraph 53 of the NPPF and Policy 3.5 of The London Plan refer to policies to resist the inappropriate development of residential gardens. Is Policy 13 justified in Sutton? Will the policy be effective?

Gypsy and traveller accommodation

i) Why is the Council proposing to deal with the accommodation needs of gypsies and travellers in the manner set out in P12.2 of the Local Plan in the light of the revised definition in the Planning Policy for Traveller Sites (PPTS)?

ii) How is the Council proposing to address the needs of people residing in or resorting to their district with respect to the provision of sites on which caravans can be stationed in line with section 124 of the Housing and Planning Act? Are their needs to be differentiated from those within the definition of gypsies and travellers?

iii) Should the Local Plan identify a supply of specific, deliverable sites or broad locations for growth for years 6-15 of the Local Plan in accordance with paragraph 10 of the PPTS and to meet the need identified for 14 pitches between 2020 and 2029 in accordance with the Needs Assessment (L.10.E)? What support is there in national policy for the Council's plan, monitor and manage approach? Is it realistic to suppose that re-location will reduce future potential need as suggested at P12.6 of the Local Plan?

iv) As any future proposals for new pitches on the allocated extension to the existing site at The Pastures would be inappropriate development, should the existing sites and the allocated extension be removed from the Green Belt as an inset as indicated by PPTS paragraph 17? If not, would the allocation be effective? Are the exceptional circumstances to justify an alteration to the Green Belt those set out at P12.7 of the Local Plan? Is there anything to add?

v) Why were the two preferred site options identified at paragraph 6.2 of the Site Search (L.10.F) excluded from the Local Plan? Were there any reasons for this other than those given in paragraph 1.4 of the Post Consultation Update (L.10.H)? Why were the sites listed as POSSIBLE in Table 4 of the Update and referred to in paragraph 3.1 (L.10.H) excluded?

vi) Should details of site allocation S104 be included in Chapter 4? Is it realistic for this site to accommodate an additional 9 pitches?

vii) Paragraph 11 of the PPTS refers to the criteria-based policies to provide a basis for decisions on applications where there is no identified need. As a need for pitches does exist is this part of the policy justified?

viii) Are the detailed criteria a) – f) fair and reasonable and is the requirement to meet an identified need consistent with national policy?

Issue 8:

Are the policies for making centres destinations (Policies 17-19) justified, deliverable and consistent with national policy? Will they be effective?

i) Does the Local Plan adequately assess the function and role of town centres and their capacity to accommodate new town centre development? Is the expanded definition of town centres uses in the Glossary in Chapter 5 justified?

ii) Should Policy 17 make clear that all targets are for developments outside Sutton Town Centre?

iii) How will criteria a) – d) deliver the floorspace that the Council seeks to make provision for? Have these targets had sufficient regard to the findings of the Town Centre and Economic Development Assessment (L.11.A)?

iv) Having regard to paragraph 9.36 of the Town Centre and Economic Development Assessment (L.11.A) are the changes to the primary and secondary shopping frontages of the town and district centres justified (Appendix 3)?

v) What is the rationale for the restrictions imposed on non-A1 uses in shopping frontages by Policy 18 b) – d)?

vi) What is the justification for the limitations on A5 (hot food takeaway) uses and residential uses in Policy 18 e) – f)?

vii) Is the designation of additional local centres and the provisions in criteria b) and c) of Policy 19 justified?

Issue 9:

Are the policies for serving communities (Policies 20-23) justified, deliverable and consistent with national policy? Will they be effective?

i) Would Policy 21 make adequate provision for new health facilities consistent with anticipated growth in the Borough?

ii) Does Policy 21 give sufficient attention to other food growing spaces and healthy food as part of promoting healthy communities?

iii) Does criterion b) of Policy 22 provide sufficient flexibility for assessing proposals involving the loss of community facilities?

iv) Is the Appendix to Policy 22 accurate and complete?

Issue 10:

Are the policies for maintaining green spaces (Policies 24-27) justified, deliverable and consistent with national policy? Will they be effective?

Are there exceptional circumstances that warrant altering Green Belt and Metropolitan Open Land boundaries?

(i) Eight areas of potential change were identified in Table 8 of the Green Belt and MOL Review (L.13.A) but have not been progressed. Does the Green Belt and MOL Report Post Consultation Update (L.13.D) provide an adequate explanation of the reasons for this?

(ii) Should Green Belt and Metropolitan Open Land designations be treated in the same way for policy purposes having regard to the NPPF and Policy 7.17 of The London Plan? Against what criteria should the value of Green Belt and Metropolitan Open Land be assessed and was the original Review appropriate in this respect?

(iii) What are the exceptional circumstances that warrant altering the Green Belt and Metropolitan Open Land boundaries as indicated by criteria a) – b) of Policy 24?

(iv) Given that any future proposals for a school on Rosehill Recreation Ground would be inappropriate development and contrary to Policy 7.17 of The London Plan should the allocation (S98) be removed from Metropolitan Open Land? In that event, what are the exceptional circumstances to justify such an alteration?

(v) Is the Council satisfied that the Green Belt boundaries will not need to be altered at the end of the development plan period?

(vi) Have the proposed boundaries been defined clearly, using physical features that are readily recognisable and likely to be permanent?

(vii) Should specific provision be made for accommodation for the elderly within the Green Belt?

(viii) Are the provisions of criterion d) of Policy 24 consistent with national policy in respect of the definition of inappropriate development, the treatment of very special circumstances, replacement buildings and the effect on openness?

(ix) What is the justification for the use of an increase in external volume of 30% in defining disproportionate additions in Policy 24 e)?

(x) Are the provisions of Policy 24 f) regarding visual amenity justified?

(xi) Having regard to Policy 7.18 of The London Plan does Policy 25 take sufficient account of situations where existing open space might be

replaced by equivalent or better quality provision in the locality? Is the wording of criterion a) i) clear?

(xii) Will policy 25 b) be effective in protecting and delivering allotments and food growing spaces?

(xiii) Notwithstanding proposed change 26 (L.2.K) does Policy 27 provide sufficient support for agricultural and horticultural uses? Are its provisions consistent with Policy 24? What is the rationale for criterion d) relating to replacement dwellings and how does this relate to Policy 24?

Issue 11:

Are the policies for raising design standards (Policies 28-30) justified, deliverable and consistent with national policy? Will they be effective?

i) Are the Areas of Taller Building Potential properly defined and does the Taller Buildings Study (L.14.G) provide a robust evidence base?

ii) Does Policy 30 contain an adequate distinction between the policy provisions for conservation areas compared to areas of special local character?

Issue 12:

Are the policies for delivering one planet targets (Policies 31-34) justified, deliverable and consistent with national policy? Will they be effective?

(i) Do the policies in the Local Plan adequately address climate change issues having regard to section 19(1A) of the 2004 Act?

(ii) Having regard to the Government's announcement that it will not be proceeding with zero carbon homes is Policy 31 justified in seeking that target? Having regard to issues of viability is this deliverable?

(iii) Has the Local Plan been prepared in accordance with Diagrams 2 and 3 of the PPG on *Flood Risk and Coastal Change*?

(iv) Are the SFRA Level 2 Report (L.15.E), Consolidated Sequential Test (L.15.O) and other supporting evidence adequate and robust to demonstrate that the sequential and exception tests have been passed for site allocations?

(v) Has the imposition of the optional requirement for water efficiency in criterion c) of Policy 33 considered whether there is a clearly evidenced need and the impact on viability in accordance with the Written Ministerial Statement of March 2015?

Issue 13:

Are the policies for improving the sustainable transport network (Policies 35-37) justified, deliverable and consistent with national policy? Will they be effective?

iv) Are the policies balanced in favour of sustainable transport modes as indicated by paragraph 29 of the NPPF?

v) Is there robust evidence to identify the transport proposals in Policy 35 as critical in developing infrastructure to widen transport choice in accordance with paragraph 41 of the NPPF? Has sufficient account been taken of the cross-border impacts on areas in Surrey?

vi) What are the implications of the Potential Trip Generation Assessment (L.16.G) for the areas of the Borough outside Sutton Town Centre having regard to the Transport Data Report (L.16.C)? Is there sufficient capacity to cope with the extra trips generated? Are any mitigation measures required as a result?

vii) How are smaller developments referred to in criterion b) of Policy 36 to be defined? Notwithstanding the *Transport Assessments and Travel Plans* Supplementary Planning Document is this sufficiently clear and effective?

viii) How does Policy 37 on parking address the Written Ministerial Statement of March 2015 and The London Plan? Is the approach to parking for dwellings in PTALs 0-2 and in Rest of the Borough locations (Notes 3 and 4 of Appendix 11) justified?

Issue 14:

Are the site allocations in Chapter 4 (Policy 41) justified and deliverable within the plan period having regard to any constraints and consistent with national policy? Is there sufficient detail on form, scale, access and quantum?

The Council has responded to the individual representations made. Unless there has been a material change in circumstances there is no need for further statements to be made.

Issue 15:

Does the Local Plan have clear and effective mechanisms for delivery and monitoring (Policies 38-40)?

i) Should there be more detail about projects for which S106 contributions should be forthcoming in Policy 38?

ii) Does the Local Plan make clear, for at least the first five years, what infrastructure is required, who is going to fund and provide it, and how

it relates to the anticipated rate and phasing of development in line with the PPG on *Local Plans* (ID 12-018-20140306)? Does Table 2 and the provisions of Policy 38 provide sufficient certainty in this respect?

iii) Does the monitoring framework in Table 3 contain relevant and measurable indicators and will it and Policy 39 be effective?

iv) Paragraph 154 of the NPPF establishes that only policies that provide a clear indication of how a decision maker should react to a development proposal should be included. In the light of this should Policy 40 be omitted?

Other matters for the Council

I also have a few general, detailed points to make to the Council. Whilst some of these are may be outside the scope of soundness, I nevertheless pass them on to assist. I have not attempted to highlight all of the instances where the matters raised apply.

i) In a number of policies including, for example, Policy 17 there are numerous statements that "the Council will make provision for". Given that the Council will not be making that provision itself this wording is unclear and potentially misleading. I therefore invite the Council to review this terminology wherever it occurs.

ii) Some policies contain wording to the effect that something should be demonstrated "to the Council's satisfaction" (for example, Policy 37 b) or uses the phrase "considered necessary by the Council" (for example, Policy 36 c). Both of these expressions add a potential degree of uncertainty and I would therefore also invite the Council to review the use of this construction.

iii) The word "appropriate" in a policy does not always provide a clear meaning (for example, Policy 28 c) and its usage should therefore be reviewed.

XXXX

INSPECTOR

23 May 2017

Annex 5 Initial hearings programme, without participants

Initial hearings programme for Ashford Local Plan examination:

ASHFORD BOROUGH COUNCIL

Examination of Ashford Local Plan 2030

Inspectors: XXXX

XXXX

Programme Officer: XXXX

Tel: XXXX

Email: xxxx@xxxx

Address: XXXX

Webpage: Local Plan to 2030

HEARINGS PROGRAMME – version 1 – issued on 21 February 2018

Please bear in mind that the programme is subject to change although this will be minimised. Representors should nevertheless check the webpage and any adjustments will be highlighted in the Updates and Next Steps section. However, this is unlikely to occur until after the first deadline for the submission of hearing statements on 27 March 2018. Some spare dates have been identified should any of the sessions over-run. If that proves necessary the intention is to adhere to the programme rather than disrupt it. This means that any hearings that could not be completed on the allocated days will be resumed at a later date.

Day	Date	AM session (10am start unless indicated)	PM session (2pm start)
Week 1			
1	11 April	Issue 1 Procedural and legal requirements, evidence base, strategic objectives Policy SP1 * 9.30 start	Issues 8, 9 & 11 Retail and leisure/Ashford town centre/strategic transport Policies SP4, SP5 & TRA1

Week 2			
2	17 April	No session	<u>Issues 2 & 3</u> Spatial distribution of housing and economic development Policies SP2 & SP3
3	18 April	<u>Issue 4</u> Housing requirement – 1 Policy SP2 Housing market area; household projections; employment trends; market signals; London * 9.30 start	<u>Issue 4</u> Housing requirement – 2 Policy SP2 Housing market area; household projections; employment trends; market signals; London
4	19 April	<u>Issue 5</u> Housing supply – 1 Delivery; 5 year supply; housing trajectory; windfalls * 9.30 start	<u>Issue 5</u> Housing supply – 2 Delivery; 5 year supply; housing trajectory; windfalls
Week 3			
5	1 May	<u>Issue 6</u> Affordable and other specialist housing Policies HOU1 & HOU2	<u>Issue 10</u> High quality design, separation of settlements and housing policies Policies SP6, SP7, HOU3a, HOU5 & HOU6
6	2 May	<u>Issue 7</u> Housing policies – traveller accommodation and sites Policies HOU16 & HOU17 and sites S43 & S44	<u>Issue 10</u> Other housing policies Policies HOU7 – HOU15 & HOU18
Week 4			

7	9 May	Issue 12 Ashford sites – 1 Sites S1 & S2 * 9.30 start	Issue 12 Ashford sites – 2 Sites S3, S4 & S5
Week 5			
8	15 May	Issue 12 Ashford sites – 3 Sites S6 – S10	Issue 12 Ashford sites – 4 Sites S11 – S15
9	16 May	Issue 12 Ashford sites – 5 Sites S16 – S20	Issue 12 Ashford sites – 6 Sites S21 – S23, S45 & S46
10	17 May	Issue 12 A20 corridor Sites S47, S48 & S49	Issue 12 Rural sites – 1 Tenterden, Biddenden & High Halden Sites S24, S25, S27, S33, S42 S58 & S60
Week 6			
11	30 May	Issue 12 Rural sites – 2 Appledore, Hamstreet, Woodchurch & Wittersham Sites S26, S31, S32, S40, S57, S61 & S62	Issue 12 Rural sites – 3 Mersham, Shadoxhurst, Smeeth & Aldington Sites S35, S36, S38, S51, S52 & S59
12	31 May	Issue 12 Rural sites – 4 Charing, Egerton, Hothfield & Westwell Sites S28, S29, S30, S34, & S55	Issue 12 Rural sites – 5 Brook, Challock, Chilham & Smarden Sites S37, S41, S53, S54 & S56
Week 7			

13	12 June	Issues 13 &14 Employment Policies EMP1 – EMP11	Issue 15 Transport Policies TRA2 – TRA9
14	13 June	Issue 16 Natural and built environment Policies ENV1 – ENV15	Issues 17 & 18 Community facilities and implementation Policies COM1 – COM4 & IMP1 – IMP4

Spare dates – 23 May, 24 May, 7 June, 19 June, 20 June, 21 June

Annex 6 Model Guidance Note

The model guidance note can be found on the Local Plans and Community Infrastructure Levy part of the local plans page on the intranet.

Annex 7 Notification to representors enclosing MIQs, draft hearings programme and Inspector's guidance note

Notification letter from the North Essex Section 1 Plan examination:

IED002

NORTH ESSEX AUTHORITIES

Joint Strategic (Section 1) Plan

Inspector: XXXX

Programme Officer: XXXX

Tel: XXXX

Email: xxxx@xxxx

Address: XXXX

_____

To all representors

13 November 2017

Dear Sir / Madam

Examination of the North E**ssex Authorities' Section 1 Plan**

As you will know, I am the Inspector appointed to carry out the examination of the Joint Strategic (Section 1) Plan. I am writing to you because you have made a representation about the Section 1 Plan, to let you know about the arrangements for the examination hearings.

Please find enclosed with this letter a draft programme for the examination hearings, my list of Matters, Issues and Questions for the hearings and my Guidance Note. Please read the Guidance Note carefully, as it explains the process for the hearings in detail.

I will take your representations on the Section 1 Plan into account, whether or not you participate in the hearings.

If you wish to participate in any of the hearing sessions, you must contact the Programme Officer, whose details are set out above, by 5.00pm on Friday 24 November 2017, indicating the session(s) you wish to attend. You must this do even if you have previously stated that you wish to attend (for example, when you made your representations). Please note that if you do not contact the Programme Officer by that date, I will assume that you do not wish to participate.

You may only request to participate in a hearing session if you have made a relevant representation seeking a change to the Plan. But the hearing sessions are open to anyone to come along and observe.

After I have reviewed all the requests to participate, an updated hearing programme listing the participants for each session will be published in early December on the Examination webpages, details of which are given in the enclosed Guidance Note.

Please note that the hearing programme is subject to change. Updated versions will be published on the Examination webpages. You should check them regularly for the latest version, if you are intending to participate.

If you have any queries about the hearing arrangements, or any other aspect of the examination, please do not hesitate to contact the Programme Officer.

Yours faithfully

XXXX

Inspector

Annex 8 Hearings programme including participants

Hearings programme for Windsor & Maidenhead examination:

https://www.rbwm.gov.uk/home/planning/planning-policy/emerging-plans-and-policies/draft-borough-local-plan/examination-local-plan/inspectors-documents

Please select document ID16 v12

Hearings programme for North Essex Section 1 Plan examination:

https://www.braintree.gov.uk/directory-record/5318/ied005inspector-s-section-1-hearing-timetable-version-7

Annex 9 Hearing agenda

Hearing agenda for the Wandsworth Council Local Plan Review Examination

WANDSWORTH COUNCIL

Local Plan Review Examination

Inspector: XXXX Programme Officer: XXXX

Address

Email: xxxx@xxxx

HEARING AGENDA

Day 1 – Wednesday 8 July 2015 (Room 123)

10.00am start at Wandsworth Town Hall

Core Strategy and preliminary, procedural and legal matters

Issue 1
Have the relevant procedural and legal requirements been met, including the duty to co-operate and those required by the Conservation of Habitats and Species Regulations 2010?

Issue 2
Are the spatial vision and strategic objectives for Wandsworth sound having regard to the presumption in favour of sustainable development?

Issue 3
Is the overall spatial strategy sound having regard to the needs and demands of the Borough; the relationship with national policy and Government objectives; the provisions of The London Plan and the evidence base and preparatory processes? Has the Core Strategy been positively prepared?

Questions to be discussed:

Is the Core Strategy based on an up-to-date assessment of objectively assessed housing needs?

Does the publication of the 2012-based household projections make any material difference to the figures in the Core Strategy and are any amendments required to take this information into account?

Are the sites relied upon for the supply of housing deliverable in accordance with the housing trajectories? Are the expectations placed on the delivery of sites in Nine Elms Vauxhall realistic?

Is there sufficient flexibility within the allocations to accommodate unexpected delays whilst maintaining an adequate supply?

Is adequate provision made for housing for the elderly?

Does the Core Strategy strike the correct balance between residential and employment uses?

Specific policies to be discussed:

Policy PL2 – Flood risk
Should what is meant by "appropriate sites" be further explained in criterion a)? Are criteria a) and c) consistent in their treatment of the need for a Flood Risk Assessment?

Policy PL8 – Town and local centres
Should arts, culture and tourism uses including hotels be added to criterion c) to fully reflect the Main Town Centre uses defined in the Glossary to the NPPF?

Policy PL9 – River Thames and the riverside
What is the extent of the Thames Policy Area and would modification LP11 adequately protect safeguarded wharves including any waste transfer function?

Policy IS2 – Sustainable design, low carbon development and renewable energy
Is further modification LPFM40 regarding the national technical standards justified?

Policy IS5 – Achieving a mix of housing including affordable housing
Are policies for the supply of affordable housing justified having regard to viability, tenure split and the need for affordable housing in the Borough? What is the justification for setting an "expected maximum"?

Is further modification LPFM49 regarding accessible and adaptable dwellings and wheelchair user dwellings justified?

Policy IS7 – Planning obligations
Does criterion c) provide a clear indication of how a decision maker should react to a proposal in accordance with paragraph 154 of the NPPF?

Participants:

XXXX

XXXX

XXXX

Annex 10 Inspector's opening announcement for hearing sessions

Inspector's opening announcement for Ashford Local Plan examination:

This hearing session is now open. It forms part of the examination of the Ashford Local Plan. My name is XXXX and I am one of the Inspectors appointed by the Secretary of State to conduct this examination and to report to the Council in due course. The format of the hearing is a structured and focused discussion that I shall lead.

Preliminary matters

Introductions

LPA

Others round table

Audible?

Other Inspector – XXXX

Programme Officer – XXXX - responsible for organising hearing sessions and publication of documentation – first point of contact – any assistance required

Housekeeping

Mobile phones

Fire exits

Toilets

Filming or recording

Documents

Plan under examination is the submission plan of December 2017.

Prior to submission consultation took place under Regulation 19 and in respect of Main Changes. We have those representations as well as the Council's summaries and will take them into account.

Produced guidance note and also identified issues and related questions.

Received hearing statements from the Council and from others as listed on the webpage.

The Council has also published a schedule of proposed changes to the Plan as ABC/PS/11 which will be considered alongside the submitted plan.

An agenda setting out the matters to be discussed today based on our issues and questions has been issued and there are copies if anyone needs one. We will do our best to follow this.

Overview and Our Role

We are tasked with considering the soundness of the Plan in accordance with the criteria in the National Planning Policy Framework and also whether it is legally compliant. The hearings are intended to assist us in that regard. In submitting the Plan the Council consider that it is sound and this is the starting point for the examination. So if you are challenging the soundness of the Plan then you have to explain why and what changes would make it sound.

XXXX and I are examining the plan jointly. However, one or other of us will lead the particular hearing session although on occasion the other will be present in order to hear the discussion. I will be conducting the majority of hearing sessions in Weeks 1 – 4 and XXXX thereafter.

We have read and will take into account the hearing statements that have been prepared and also the original representations that were made. There is no need for these to be repeated. Instead my aim is that the discussion moves on from those documents and deals with specific questions that I have or areas where further clarification or explanation is required. At times, I may ask for a more general contribution or a summary of your position. It is also helpful to stick to the matter in hand and to refrain from commenting on unrelated matters.

As the hearings will take place over several weeks it may be that some matters will be best deferred to subsequent days in order that we keep on track. Also matters covered and things said on one day form part of the examination and do not need to be repeated subsequently.

In order to test the Plan for soundness and legal compliance I will need to ask questions. You will have seen that I have already been doing this and both the Council and other participants have responded to these. This is likely to continue today but anything that I ask should not be taken as demonstrating a particular pre-disposition. I will normally start a particular topic by asking for responses to questions I have before indicating that I wish others to comment.

If you wish to do so then please indicate this by turning your name plate on its side. In speaking during the hearing I would request that you are concise and specific. In particular, if you wish to highlight certain parts of your statement or other documents that form part of the examination then it will be helpful to me if you can provide the reference.

It is open to the Council to propose further changes to the Plan and I would ask that they keep a record of possible changes that arise during the hearings. Any Main Modifications should be subject of future consultation.

The examination remains open until my report is submitted to the Council. No further representations or evidence will be accepted after the hearing sessions have finished unless we specifically request otherwise. At the end of the hearing sessions we will indicate the likely timescales of the next phases of the examination.

Any questions?

Annex 11 Inspector's post-hearing advisory letter setting out need for MMs with brief reasons

(a) Letter from the Inspectors to East Lindsey District Council

Examination of East Lindsey Core Strategy and Settlement Proposals DPD

Post Hearing Advice – Main Modifications and Related Matters

Introduction

1. During the hearing sessions a number of potential main modifications were discussed. We understand that the Council has kept a running list of all of these and is currently working on a full draft. Consequently, this letter relates solely to potential main modifications that were discussed, but not confirmed, in those sessions and to the administrative arrangements relating to all potential main modifications. This is the position we outlined to the Council in the final hearing session on 4 October.

2. At this stage we are not inviting any comments about the contents of this letter or the Annex to it.

Main Modifications

3. Potential main modifications, in addition to those clearly signalled during the hearing sessions, are set out in the Annex to this letter.

Process

4. The Council should now prepare a consolidated schedule of all the potential main modifications identified during the hearing sessions and as set out in the Annex to this letter. The Council should also consider the need for any consequential changes that might be required in connection with any potential main modifications.

5. We will need to see the draft schedule and may have comments on it. We will also need to agree the final version of the schedule before it is made available for public consultation.

6. The schedule should take the form of a numbered list of main modifications with changes shown by means of strikethrough to show deleted text and new text shown in bold or underlined (or both). It should also include a column that briefly explains the reasons for the main modifications to assist consultees. For clarity and to avoid an excessive number of main modifications, it is best to group all the changes to a single policy together as one main modification.

7. The main modifications should be expressed as changes from the Publication Version of the plans and not from the Submission Modifications

Draft, the latter of which contains changes suggested by the Council (in blue and red font) which have not been consulted upon.

8. The Council should also satisfy itself that it has met the requirements for sustainability appraisal by producing an addendum to the Sustainability Appraisal of the submitted plan in relation to the potential main modifications, as appropriate. We will need to see a draft of the addendum and may have comments on it. The addendum should be published as part of the public consultation.

9. The Council has previously prepared lists of proposed *additional minor modifications.* Some of these were discussed as potential main modifications during the hearing. Any remaining *additional modifications* are a matter solely for the Council. If the Council intends to make any *additional modifications* these should be set out in a separate document from the main modifications. If the Council intends to publicise or consult on any additional modifications it should be made clear that such changes are not a matter for the Inspectors.

10. Advice on main modifications and sustainability appraisal, including on consultation is provided in *Examining Local Plans Procedural Practice*[72] (in particular, see paragraphs 5.24 to 5.28). Amongst other things this states that the scope and length of the consultation should reflect the consultation at the Regulation 19 stage (usually at least 6 weeks). It should be made clear that the consultation is only about the proposed main modifications and not about other aspects of the plan (except as outlined in para 12) and that the main modifications are put forward without prejudice to the Inspectors' final conclusions.

11. The *Procedural Practice* also states that the general expectation is that issues raised on the consultation of the draft Main Modifications will be considered through the written representations process and further hearing sessions will only be scheduled exceptionally.

Other related matters

12. The following should be made available as part of the consultation:

- Sustainability Appraisal of the proposed main modifications
- Sustainability Appraisal − the Gypsy & Traveller full site analysis table omitted from the original document (document ED044)
- Sustainability Appraisal − additional appraisal relating to allocations WAI407 and SYP310 (Document ED047)
- Habitats Regulation Assessment Addendum (Document ED024)

[72] The Planning Inspectorate − June 2016 (4th Edition v.1)

- Policies Map One and Two and a key to them (Documents ED027 & 028)
- All changes to the submission Policies Map relating to main modifications or where necessary for accuracy/clarity
- The tables listing inland commitments, coastal commitments, allocations and the five year supply trajectory (Documents ED033, 034, 035, 036, 037) – updated as outlined in the Annex
- Housing target table (Document ED050) – updated as outlined in the Annex.
- Any further Habitat Regulations Assessment (see para 14)

13. Updated versions of existing documents should be given suffix numbers – eg Document ED033a) and dated to clearly differentiate the updated versions.

14. The Council should consider whether the potential main modifications necessitate any further Habitat Regulations Assessment. For example, this might include the deletion of the protected open space between Chapel St Leonards and Ingoldmells (Policy SP19).

Consideration of potential main modifications

15. The views we have expressed in the hearing sessions and in this letter on potential main modifications and related policies map changes are based on the evidence before us, including the discussion that took place at the hearing sessions. However, our final conclusions on soundness and legal compliance will be provided in the report which we will produce after the consultation on the potential main modifications has been completed. In reaching our conclusions, we will take into account any representations made in response to the consultation. Consequently, the views we expressed during the hearing sessions and in this letter about soundness and the potential main modifications which may be necessary to achieve a sound plan could alter following the consultation process.

Timetable

16. We would be grateful if the Council could now:

- confirm a timetable through to the publication of the main modifications for consultation, including for the update to the various housing tables
- confirm the Council's position with regard to the housing sites where there are flood risk issues, as set out in the Annex

17. Thank you for your cooperation on this. If you need any clarification, please contact us through the Programme Officer.

XXXX and XXXX

Inspectors

13 October 2017

Annex to Inspectors' letter of 11 October 2017

Examination of East Lindsey Core Strategy and Settlement Proposals DPD

Post Hearing Advice – Main Modifications and Related Matters

The following are in addition to the potential main modifications signalled as being necessary at the hearing sessions. The Council should consider the need for any consequential changes as a result of these potential main modifications.

Housing land requirement

1. The plan should include a housing trajectory (preferably in the form of a graph) setting out:

- the annual target between 2011 and 2031 based on the objectively assessed need figure
- annual completions between 2011 and 2017
- cumulative completions between 2011 and 2017
- forecast annual delivery between 2017 and 2031
- the annual requirement between 2017 and 2031, including the recovery of the shortfall in delivery from 2011 to 2017
- the annual requirement between 2017 and 2031 plus a buffer as required by para 47/2nd bullet of the National Planning Policy Framework

2. The shortfall in housing delivery between 2011 and 2017 (identified as 1,085 dwellings) should be recovered over the remaining *lifetime* of the plan and not over an initial 5 year period, as is proposed in para 19 of the Core Strategy.

3. The additional buffer required by para 47 of the National Planning Policy Framework should be 5%, as things stand now. However, the Council should plan for the possibility that a buffer of 20% may be necessary at some time in the future.

4. During the examination, and in Document ED049, the Council accepted that changes should be made to the housing supply likely to be provided from some commitments (sites with planning permission) and allocations in the plan. The relevant evidence documents (as set out in para 12 of the letter) should now be updated and used to inform the detail of the main modifications (for example, in relation to the Core Strategy - Policy SP3, Table A on page 25, Table B on page 26 and the supporting text on pages 21-29 and in relation to the Settlements DPD – individual housing site capacities, tables A and B on pages 12-13 and the existing commitments in the Coastal Zone on page 163).

5. The documents, policy, table and supporting text referred to above will also need to be amended as a consequence of the changes to the housing allocation sites set out below. This relates to both the overall supply over the plan period and the five year supply.

6. The supply/delivery of affordable housing set out on page 36 of the Core Strategy will also need to be re-worked having regard to the proposed changes to the overall housing supply and as discussed in the hearing sessions.

7. It is important that all the numbers in these various documents and in the plans are correct and consistent with each other.

Housing allocation – Burgh le Marsh (Site BLM310)

8. The available evidence indicates that this site meets the criteria for the designation of a local wildlife site. Unless clear evidence to the contrary is available now, this site should be deleted as a housing allocation. See the comments above about quantifying the effects of this change on the housing land supply.

Housing allocations and flood risk

9. During the examination the Council confirmed that some housing allocations include land which falls within areas with a coastal flood hazard rating as set out on page 80 of the Core Strategy. Although the area mapped as green is described as being of low hazard, it is nevertheless an area which could be affected by shallow flowing or deep standing water. We have not been made aware of any evidence to indicate that a sequential test has been applied to justify the allocation of these sites. The Strategic Flood Risk Assessment indicates that the area of search for any sequential test is the rest of the district outside these hazard zones.

10. Some of the allocations which the Council has provisionally identified as being affected appear to lie outside any of the four hazard zones. However, some sites fall wholly or partly within the hazard zones.

11. Unless there is any strong evidence available now to indicate otherwise, the allocations that fall wholly or mainly within any of the four hazard zones do not appear to be justified in line with sequential test

requirements, and so should be deleted from the plan. These appear to include:

- Marshchapel - sites MAR 217, 226, 300 and 304
- Grainthorpe − site GRA 211

12. The Council should now assess whether any of the sites which lie partially within any of the four hazard zones can feasibly be developed using only land outside of the zones and, if so, whether any changes need to be made to the housing capacity of these individual sites (as stated in the Settlement Proposals DPD). These appear to include:
    - Tetney − sites TN 311 and 308
    - Grainthorpe − site GRA 211
    - Hogsthorpe − sites HOG 306 and 309
    - Friskney − site FRI 321
13. Please see the comments above about quantifying the effects of this change on the housing land supply.

XXXX and XXXX

Inspectors

(b) Inspector's letter to LB Sutton:

LONDON BOROUGH OF SUTTON

Examination of Sutton Local Plan 2016-2031

Inspector: XXXX

Programme Officer: XXXX

Tel: XXXX

Email: xxxx@xxxx

Address: XXXX

Webpage: Local Plan Examination in Public - Sutton 2031 - Sutton Council

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Dear XXXX

POST HEARINGS ADVICE

1. As indicated in my closing comments at the final hearing session on 28 September 2017 (ED38) this letter sets out some advice about further modifications needed and steps that should be taken to make the Sutton Local Plan 2016-2031 (SLP) sound.

2. I have given full consideration to all the representations made about the SLP including the verbal contributions at the hearings. My final conclusions regarding soundness and procedural compliance will be given in the report to be produced following consultation on the proposed main modifications. Nevertheless, having regard to the criteria for soundness and to assist for now, I shall give brief explanations for my preliminary advice.

3. Nevertheless further evidence may emerge and I will need to take account of any representations received via the consultation process. My views are therefore given here without prejudice to the conclusions that will appear in the report. This will also cover other main soundness issues that arose during the examination but which are not dealt with in this letter.

4. My advice below is in respect of individual policies, sites or specific topics and I deal with them in turn.

Policy 3

5. The provision of family housing in Sutton town centre would be subject to the 50% target in Policy 9. The evidence indicates that this is unrealistic and leaving it to be settled on a case-by-case basis would not be effective plan-making. Therefore, recognising the different make-up of the town centre to the rest of the Borough, a specific target for family housing should be set in Policy 3 although with caveats to take account of site specific circumstances. It will be for the Council to consider what this

proportion should be but from the information presented an expectation of 25% would be both aspirational and potentially realistic.

Policy 8

6. The policy sets a Borough-wide target of 50% affordable units from all sources. However, this relies on site-by-site assessment for individual sites which would not provide predictability. Furthermore, based on the evidence the overall target is unrealistic as it is unlikely to be met at many sites. Consequently the policy is unsound as it stands and a target for judging the acceptability of all schemes is required.

7. The onus is on the Council to come up with a justifiable percentage. However, based on the viability evidence, the recent 'track record' and the Mayor's recent Supplementary Planning Guidance consideration should be given to the figure of 35%. Criterion c) of Policy 8 should therefore be replaced although the other considerations referred to there should be retained.

8. Seeking a financial contribution to the Affordable Housing Fund on sites below the threshold of 11 or more gross units conflicts with the Written Ministerial Statement of 28 November 2014 and the Planning Practice Guidance. As this part of the policy is inconsistent with national policy it is likely to place a disproportionate burden on small developers. Furthermore, it is not justified by local circumstances and should be deleted.

Industrial Land

9. With particular reference to the London Industrial Land Demand Report (R1.B.C) I consider that the target of 10 ha of industrial land provision in Policy 1 is justified. However, the intention for supply to be based solely on the intensification of the Beddington Strategic Industrial Area (SIL) is not realistic even allowing for the planned investment in the area. The Council may wish to review the likely delivery from this source having regard to the sites identified (L.11.H & L.11.I) where re-development is unlikely to take place over the plan period. This includes those outside the SIL area or currently safeguarded for waste uses. In addition some sites will be affected by general parking requirements or have uses which rely on open areas or have an irregular configuration. My advice, based on the evidence presented, is it that it would not be reasonable to expect more than 20,000 sq m to be delivered within the Beddington SIL by means of intensification.

10. During the hearing the Council indicated that the only alternative option would involve the release of nearby Metropolitan Open Land (MOL). It may wish to re-consider this but in order for the Local Plan to be found sound my advice is that specific allocations are required to deal with the consequent shortfall of at least 5ha of industrial land. As part of this process it seems likely that the Council will need to re-visit the 3 sites included in the Issues and Preferred Options document. However, in

deciding how to proceed I draw attention to paragraph 83 of the NPPF which also applies to MOL and which provides that boundaries should be capable of enduring beyond the plan period.

11. Policy 14 a) expects that proposals within SILs or Established Industrial Areas should provide at least one full-time job per 60 sq m of floorspace. However, such a provision would be likely to preclude some developments from proceeding that would otherwise be acceptable in those areas and which would make an overall contribution to the economy. Moreover, its practical implementation would be difficult. Consequently this stipulation is neither justified nor effective and should be removed.

Gypsy and traveller accommodation

12. The proposed site extension to The Pastures (S104) would be within the Green Belt. As a consequence any future application for a gypsy and traveller site would amount to inappropriate development and require the demonstration of very special circumstances. Because of this the SLP would not be positively prepared and neither would it be effective in facilitating the traditional and nomadic way of life and travellers. Therefore this site should be removed from the Green Belt as an inset as indicated in paragraph 15 of the Planning Policy for Traveller Sites (PPTS). Exceptional circumstances are required to alter the Green Belt boundary but paragraph P12.7 of the SLP and other evidence in the Gypsy and Traveller Post Consultation Update (L.10.H) set out what these are.

13. The PPTS indicates that for years 6-10 of the plan period a supply of specific, developable sites or broad locations for growth should be identified and, where possible, for years 11-15. However, the Council's response to national policy is flawed in that it is unable to clearly identify any such locations and relies on a plan, monitor and manage approach. In order to achieve soundness my advice is that a commitment should be made in the supporting text to a review of the provision of sites for gypsies and travellers. It should specifically refer to the submission of a development plan document to address this issue within 5 years of the adoption of the SLP.

Policy 11

14. The requirements for care homes to demonstrate that they meet a specific need and will result in improvements in the level of care are unduly restrictive and the policy is not positively prepared in this respect. In criterion d)i) there is no reason to preclude housing with care being located where there is good public transport accessibility. There is also insufficient evidence that a concentration of this type of housing or of care facilities under section e) would be harmful and so should be resisted. Consequently to achieve soundness the policy should be modified accordingly.

Policy 40

15. Policy 40 is intended to "add teeth" to the Council's planning enforcement function. However, setting out how it will use its powers in this regard is outside the expectations for plan-making in paragraph 154 of the NPPF and these provisions are statutory in any event. There is no real evidence that omitting the policy would fetter the Council's actions in any way and to be consistent with national policy it should be deleted. Furthermore, paragraph 207 of the NPPF refers to the publication of a local enforcement plan to manage enforcement pro-actively.

S2 Land Adjoining Hackbridge Station

16. The indicative site capacity of 203 is based on pre-application discussions (ED40). However, to be consistent with the supporting text in the SLP the indicative capacity should be based on The London Plan density matrix and not a higher figure. Accordingly the indicative housing capacity should be reduced to 174 net additional dwellings.

S98 All Weather Pitch and Part of Tennis Centre, Rosehill

17. This site is allocated as a secondary school to be built in the first phase of the SLP. The Council is considering alterations to the site boundary to more closely reflect the land required including that for parking. It is intended that the land would remain as MOL. However, in any planning application the proposed school would then be inappropriate development and to be permitted would require the existence of very special circumstances. This would not be effective or positive plan-making.

18. The Council is concerned that the wider area would become vulnerable to development pressure in the event that the land was removed from its existing designation. However, if the extent of the site is tightly drawn then there is no reason to suppose that this would be the case. Exceptional circumstances are required to alter the MOL boundary and in this respect the critical need for further education provision and the lack of alternatives have been put forward, amongst other things. Therefore, to achieve soundness, my advice is that this site be removed from the MOL.

Finally

19. I am not inviting comments from the Council or from anyone else on the preliminary advice given in this letter. It is primarily directed to the Council for the purpose of identifying matters where consideration should be given to modifications in order to achieve soundness. These are in addition to the matters raised during the hearings themselves. However, could the Council let me know as soon as possible if there is anything in this letter that is unclear and requires further explanation.

20. Subject to addressing this advice I now invite the Council to progress the main modifications in the manner set out in my earlier note which I shall not repeat here. If there are any outstanding procedural questions then the Council should contact me via the Programme Officer. The Council should also keep me informed of progress and, as previously advised, give

me the opportunity to see the final schedule, including changes made in response to this letter, before it is published.

21. Any representations about any proposed main modifications that follow from this letter can be made as part of the consultation process and I will take them into account at that stage.

XXXX

INSPECTOR

19 October 2017

_____

Annex 12 Consultation schedule of MMs & policies map changes – including Council's reasons for MMs

Schedule of proposed MMs from the Birmingham Development Plan examination:

https://www.birmingham.gov.uk/downloads/file/2151/exam155_schedule_proposed_main_modspdf

Schedule of proposed MMs & policies map changes from the Rother Development and Site Allocations Plan examination:

https://www.rother.gov.uk/wp-content/uploads/2020/01/Schedule_of_Main_Modifications_and_changes_to_Policies_Maps_Jul_2019_CONSULT_FINAL.pdf

Annex 13 Agenda for post-MM consultation hearing

Agenda for the South Norfolk – Wymondham Area Action Plan hearing session on PROPOSED MAIN MODIFICATIONS AND SUSTAINABILITY APPRAISAL

South Norfolk – Wymondham Area Action Plan, Site Specific Allocations & Policies Document and Development Management Policies Document **("the Plan")**

PROPOSED MAIN MODIFICATIONS AND SUSTAINABILITY APPRAISAL

Agenda for the hearing session with issues and questions

Please note: the hearing will not re-visit matters already discussed at previous hearing sessions, except where the proposed main modifications or sustainability appraisal documents have a bearing.

MORNING SESSION 9.30am-1pm

Proposed modification DM MM71

Policy DM 4.8

Strategic Gap

Participants: XXXX[73]

Does the proposed modification to the strategic gap boundary to the east of Wymondham, as advanced through DM MM71, justify any further changes to the boundary? Is the boundary justified?

Does the recent planning permission relating to the Elm Farm Business Park have any bearing on the boundary to the gap?

Proposed modifications DM MM53 and DM 54

Proposed Policy DM3.18

Secondary Education capacity in the catchment of Wymondham High School

Participants: XXXX[74]*, XXXX, XXXX*

Is the policy necessary to make the plan sound? Is the policy positively prepared and justified?

The Statement of Common Ground (Document E11) included school places modelling for years 7-11 based on pupil multipliers of 17.3/100 new dwellings, 24.5 and 30.5. However, the main modifications consultation response from

[73] On behalf of XXXX, XXXX and XXXX
[74] On behalf of XXXX

XXXX[75] refers to a Norfolk County Council multiplier of 27.5. What status does this multiplier have and what bearing, if any, would using it have on school places planning in Wymondham and the distribution of the 'floating 1,800'? [see also item on SA Addendum]

Would the policy be effective?

Is it appropriate for the policy to refer to the catchment area of the Wymondham High School Academy?

If so, should the catchment be defined in the supporting text (for example, by reference to named settlements)?

The supporting text states that housing development likely to generate significant additional demand is defined as 20 houses or more. Is that figure justified?

The supporting text states that a reasonable travel distance will vary depending on the circumstances but that a site less than 3 miles away from a high school would normally be considered to be within a reasonable travel distance, particularly when accessible by walking and cycling. Is this justified?

Proposed modification WAAP MM4

Various changes to refer to 2,200 homes as a minimum requirement in Wymondham rather than a maximum, including para 5.4

Participants: XXXX, XXXX, XXXX

Is the reference to constraints which limit the overall amount of housing above this number (2,200) justified?

Proposed modification WAAP MM27, DM MM5 and SITES MM2

Commitment to an early review of the Plan

Participants: XXXX, XXXX

Is the commitment to an early review justified?

AFTERNOON SESSION 2pm-5pm

Sustainability Appraisal Addendum of the 'floating 1,800'[76]

Participants: XXXX, XXXX, XXXX

Has there been an appraisal of the sustainability of the proposals in each document? Has the SA Addendum considered reasonable alternatives for the spatial distribution of the 'floating 1,800'?

[75] Para 2.20 of representation

[76] Joint Core Strategy Policy 9 – South Norfolk smaller sites in Norwich Policy Area and possible additions to named growth locations: 1,800 dwellings

Does the distribution of the 1,800 dwellings accord with Joint Core Strategy Policy 9 ("in accordance with the settlement hierarchy and local environmental and servicing considerations") and JCS para 6.6?

Are the subdivisions of site options into individual 'reasonable site' parcels in Wymondham appropriate and is the assessment of each parcel robust?

XXXX

INSPECTOR

9/7/15 version 2

Annex 15 Schedule of recommended MMs

Appendix to the Inspector's report on the Birmingham Development Plan:

https://www.birmingham.gov.uk/downloads/file/2625/bdp_inspectors_report_main_modifications_annexepdf

Appendix to the Inspector's report on the Rother Development and Site Allocations Plan:

https://www.rother.gov.uk/wp-content/uploads/2020/03/Schedule_of_Main_Modifications_Rother_DaSA_Inspectors_Report_Appendix_Nov_2019.pdf

Annex 16 Planning and Running Large Events Effectively

Managing large events with 20+ participants can be particularly challenging. However, if large numbers of participants want to exercise their right to be heard they can be unavoidable. This provides a short guide to help Inspectors plan and run large events as effectively as possible.

Planning the hearing sessions

If the Inspector anticipates a large number of participants and/or observers, then the LPA should be contacted through the Programme Officer at an early stage to ensure that a suitable venue is secured to accommodate the numbers envisaged. If after all reasonable attempts, one large room is unavailable, it may be possible to have a live video link to a neighbouring room(s) as an overflow for observers. However, if the hearings are virtual this will not be an issue because the event can be live-streamed and/or recorded and made available on the examination website.

To reduce the number of active participants as far as possible, Inspectors should emphasise in their guidance notes that written material carries the same weight as oral submissions. It may also be possible to persuade representors with similar views to work together to reduce the number of people speaking, for example, Parish Councils and local opposition groups. This should be explored through the Programme Officer.

In terms of the seating arrangements at real events, it is likely to be necessary to limit each participant at the table to one seat. It is normally useful to have a row of chairs behind the tables so that other representatives for each participant can be close by and 'hotseat' if necessary.

If the numbers of active participants exceed around 30, then it may be necessary to have more than one hearing on the same subject. However, this is not ideal for the Inspector and LPA, and should be avoided where possible. Where this is unavoidable, participants at the later hearing(s) should be encouraged to observe earlier ones to ensure that subsequent discussions are focused and not repetitious.

Running the hearing sessions

Inspectors will need to be particularly focused on ensuring discussions solely relate to soundness and legal compliance matters and may need to be firmer than usual with all participants where discussion veers from the question posed, is repetitious or is not helping you reach a conclusion. Inspectors should actively stop participants repeating their written evidence.

In some cases, the Inspector may need to limit the time that participants have to answer each question. If this is necessary, the Inspector should set this out at the start of the session and be fair to all parties by ensuring that this is applied with a reasonable degree of consistency.

Inspectors are likely to need to ask some follow-up questions, but these should only be pursued if necessary, to reach a conclusion on something (for example, in relation to necessary main modifications). It can often be most efficient to allow all participants to answer each question in turn (where relevant to their representations) and then allow the LPA to address any points raised by others and to have the final say, rather than regularly seeking the views of the LPA.

Another helpful approach is for the Inspector to start off by asking the LPA a number of focussed questions before opening the floor to other participants. In this way the Inspector can cover a lot of the ground before opening the floor to other participants (who may, in some cases, find that the Inspector has already satisfactorily covered their point).

If there are multiple hearing sessions on the same issue, it is helpful at the start of each session for the Inspector to briefly summarise the discussions that have taken place at prior sessions, particularly for those who did not observe them. Inspectors should emphasise that you do not need to hear the same arguments again and that parties should only contribute to the discussion if they have something new to add.

Annex 17 Guidance on hosting events

Please see the links below to the guidance on arranging and hosting events:

- Process for arranging Virtual and Blended Local Plan Hearings
- Guidance for Local Planning Authorities and others hosting virtual events for the Planning Inspectorate

The Planning Inspectorate

Local Plan Examinations

DUTY TO COOPERATE

Not yet updated to reflect December 2023 Framework (NPPF)

What's new since the last version

Changes highlighted in yellow made 13 July 2021:

- highlighted amendments to the Introduction and the sub-section headed 'What does caselaw say about challenges to Inspectors' conclusions on the DtC?'. The amendments update references to the PPG and summarise the outcome of an additional relevant High Court challenge.

This topic section of the *Local Plan Examinations* chapter of the Inspector Training Manual (ITM) applies to the examination of plans submitted on or after **25 January 2019**. It provides advice on the approach to the Duty to Cooperate in local plan examinations. The existing Local Plan Examinations chapter will continue to apply for plans submitted for examination prior to that date.

Other recent updates

For earlier updates please see the Change Log in the Library.

Contents

Introduction

1. This topic section of the ITM Local Plans Examinations chapter applies to the examination of plans submitted on or after 25 January 2019. It provides advice on dealing with the Duty to Cooperate [DtC] in examinations.

2. Inspectors should also ensure they are familiar with relevant advice in the revised NPPF, especially Chapter 3 *Plan-making*, and within the PPG chapter (also entitled Plan-making), paragraphs 029-033 & 075 of which deal specifically with the DtC, and paragraphs 009-028 of which are also relevant to it.

What is the legal basis for the duty to co-operate and to which activities does it apply?

3. S33A of the Planning and Compulsory Purchase Act 2004 (as amended) defines the "duty to co-operate in relation to planning of sustainable development". The DtC applies to the preparation of local plans[1], and to activities that prepare the way for or support the preparation of local plans, so far as relating to a strategic matter. A "strategic matter" is defined in s33A(4) as:

    a) sustainable development or use of land that has or would have a significant impact on at least two planning areas, including (in particular) sustainable development or use of land for or in connection with infrastructure that is strategic and has or would have a significant impact on at least two planning areas, and

    b) sustainable development or use of land in a two-tier area if the development or use —

        (i) is a county matter, or

        (ii) has or would have a significant impact on a county matter.

4. NPPF 25 advises that strategic policy-making bodies should collaborate with one another, and engage with their local communities and relevant bodies, to identify the relevant strategic matters which they need to address in their plans.

5. The PPG chapter Plan-making provides extensive guidance on the DtC[2]. In answering the question 'What are the strategic matters on which cooperation is required?', it points out that NPPF 20 provides a non-exhaustive list of the matters that strategic local plan policies should make provision for, and says that "this [list] is linked to matters set out in s33A …".[3] However, it is important to note that a matter listed in NPPF 20 – or any other matter – is only subject to the DtC if it meets the definition of a "strategic matter" in

[1] Including the preparation of joint local plans. The DtC also applies to the preparation of other local development documents and marine plans. In the context of joint local plans, all references below to a LPA that is preparing a plan should be taken to refer also to a group of LPAs preparing a joint plan.
[2] PPG Reference ID 61-001-20190315 to 61-025-20190315
[3] PPG Reference ID 61-014-20190315

s33A(4), as set out above. It is a matter of planning judgment, in the particular circumstances of each local plan, whether or not that is the case.

Who is subject to the Duty to Co-operate?

6. S33A(1) says that the DtC applies to LPAs, county councils which are not LPAs, and bodies that are prescribed or of a prescribed description – these bodies are listed in Regulation (4) of the Town and Country Planning (Local Planning) (England) Regulations 2012 (as amended). The prescribed bodies include the Environment Agency, English Heritage, Natural England, the Mayor of London, Homes and Communities Agency (since renamed to Homes England), various transport and health authorities and providers, and the Marine Management Organisation.

7. Not all the prescribed bodies need to be engaged in the preparation of every local plan: for example, the Marine Management Organisation is unlikely to need to co-operate with an inland LPA.

What does the DtC require of the bodies which are subject to it?

8. S33A requires LPAs and other bodies subject to the DtC to engage constructively, actively, and on an on-going basis with one another in order to maximise the effectiveness of plan preparation. They are also required to have regard to the activities of each Local Enterprise Partnership (LEP) and each Local Nature Partnership so far as those activities are relevant to plan preparation.

9. NPPF 26 seeks effective and ongoing joint working between strategic policy-making authorities and relevant bodies. In particular, it says, such joint working should help to determine where additional infrastructure is necessary, and whether development needs that cannot be met wholly within a particular plan area should be met elsewhere. NPPF 11 b) and NPPF 35 a) also highlight the role of DtC in addressing the latter issue, which frequently arises with regard to unmet housing needs.

10. The DtC also applies to a group of two or more LPAs which is preparing a joint local plan. The LPAs preparing the joint plan are required to co-operate with one another, and as necessary with any neighbouring LPAs and other bodies subject to the DtC, on any relevant strategic matters.

Can a failure to comply with the DtC be rectified at examination?

11. No, because the DtC applies specifically to plan preparation, and plan preparation ends when the plan is submitted for examination.[4]

[4] See the judgment in *Samuel Smith Old Brewery (Tadcaster) v Selby DC* [2015] EWCA Civ 1107, para 40.

What are the consequences if the DtC has not been complied with?

12. S20(7A) requires that the examiner must recommend non-adoption of the local plan if they consider that the LPA has not complied with the DtC. In practice, the LPA would be invited to withdraw the plan before such a recommendation was made. See the sub-section below headed 'If the Inspector concludes that the DtC has not been met, how should that conclusion be communicated to the LPA?'.

13. Annex 1 to this section of the chapter gives examples of circumstances where this has occurred. Only a small number of plans – 14 in total at the time of writing[5] – have been found not to have met the DtC since its introduction in 2011.

What evidence of compliance with the DtC, including statement(s) of common ground, should the LPA provide?

14. NPPF 27 advises that:

> "In order to demonstrate effective and on-going joint working, strategic policy-making authorities should prepare and maintain one or more statements of common ground, documenting the cross-boundary matters being addressed and progress in cooperating to address these. These should be produced using the approach set out in national planning guidance, and be made publicly available throughout the plan-making process to provide transparency".

15. The PPG chapter Plan-making contains detailed guidance on preparing statements of common ground, which is not repeated here. It covers their scope, the geographical area they need to cover, and arrangements for preparing, publishing and updating them.[6] Inspectors should ensure that they are familiar with the guidance and should expect the LPA to have followed it.

16. The statement(s) of common ground will usually be a key part of the LPA's evidence on the DtC. The LPA may also provide a statement of compliance with the DtC, as recommended in the PINS Procedural Practice document.[7]

How is compliance with the DtC tested at examination?

17. S20(5)(c) of the 2004 Act makes it clear that one of the purposes of the examination is to determine whether or not **the LPA** complied with the DtC in preparing the plan. There is no requirement to determine whether any other body met the duty.

18. For each plan they deal with, Inspectors will need to begin by ascertaining whether the LPA identified all the strategic matters to which the DtC applies, especially where this is a matter of dispute. Most plans will involve one or more strategic matters as defined in s33A(4), but in some cases – for example, certain plans containing only non-strategic

[5] January 2019
[6] PPG Reference ID 61-009-20190315 to 61-075-20190723
[7] Procedural Practice in the Examination of Local Plans, June 2016 (4th Edition v.1), paras 1.18-1.19

policies – there might be no strategic matters and so the DtC would not be engaged. Where the Inspector finds that this is the case (that there are no strategic matters and the DtC is not engaged), it must be clearly stated in the report.[8]

19. Having ascertained the relevant strategic matters, the key legal test is whether the LPA has maximised the effectiveness of plan preparation by engaging constructively, actively, and on an ongoing basis with other bodies (including other LPAs) that are subject to the DtC. Note that this legal test is distinct from the question of whether the LPA's engagement with other bodies has resulted in a sound plan. Parties may confuse the two, but when assessing compliance with the DtC the Inspector's focus should be on whether LPA has met the specific requirements of s33A of the 2004 Act.

20. The extent of the co-operation with other bodies which the LPA is required to demonstrate will depend on the extent to which each body is concerned with each strategic matter. For example, if one strategic matter is flood risk affecting two or more adjacent authorities, those LPAs and the Environment Agency are likely to need to play a major role in co-operation on that matter, but it may well not be a relevant matter for English Heritage or the Civil Aviation Authority.

21. With regard to what the LPA is required to demonstrate, the PPG advises:

> "Strategic policymaking authorities should explore all available options for addressing strategic matters within their own planning area, unless they can demonstrate to do so would contradict policies set out in the National Planning Policy Framework. If they are unable to do so they should make every effort to secure the necessary cooperation on strategic cross boundary matters before they submit their plans for examination […]"
>
> "Inspectors will expect to see that strategic policy making authorities have addressed key strategic matters through effective joint working, and not deferred them to subsequent plan updates or are not relying on the inspector to direct them…"[9]

22. However, there may be circumstances in which, despite their best efforts, the LPA are unable to secure the necessary co-operation from neighbouring LPAs or other bodies. The PPG goes on to advise:

> "Where a strategic policymaking authority claims it has reasonably done all that it can to deal with [strategic] matters but has been unable to secure the cooperation necessary, for example if another authority will not cooperate, or agreements cannot be reached, this should not prevent the authority from submitting a plan for examination. However, the authority will need to submit comprehensive and robust evidence of the efforts it has made to cooperate and any outcomes achieved; this will be thoroughly tested at the plan examination."[10]

[8] See, for example, the Inspector's report on the Basement Revision of the Westminster City Plan – extract at Annex 2.
[9] PPG Reference ID 61-022-20190315
[10] PPG Reference ID 61-022-20190315

23. Thus a failure to secure agreement does not necessarily indicate that the LPA has failed to meet the DtC. But comprehensive and robust evidence of the efforts the LPA has made to co-operate, and the reasons why they were unsuccessful, will be required.

If the Inspector has concerns about the DtC, when and how should they be dealt with?

24. Any concerns about the DtC should be dealt with as early as possible. This will avoid wasting time and effort in examining other issues, given that the examination will come to an end if it is concluded that the LPA has not complied with the DtC. Therefore, if the Inspector has concerns that the LPA may not have met the legal DtC test, those concerns should be raised in correspondence with the LPA within the first few weeks of the examination.

25. If the concerns cannot be resolved in correspondence with the LPA, the appropriate course of action is usually to hold an early hearing session solely to discuss whether the legal DtC has been met. This will involve the LPA and other relevant parties, and will take place in advance of and separately from the main series of hearing sessions.

26. Early hearing(s) on other strategic issues, such as unmet housing need, may also be needed if the Inspector has substantial concerns about them. Depending on the circumstances, it may be possible to deal with all the issues, including DtC, together in one early hearing session, or it may be more effective to discuss them in separate early hearing sessions.

27. Examples of issues to be explored at an early hearing session on the DtC may include:

    - Is a legally-compliant process of co-operation by the LPA demonstrated with clear evidence, including statement(s) of common ground as required by the PPG?
    - Have the LPA done all they reasonably could to maximise the effectiveness of plan preparation by cooperating with all other relevant bodies?
    - Did the co-operation process deal with all the relevant strategic matters, and issues arising in relation to them?
    - Is it clear how each strategic matter was resolved? If any were not resolved, are there satisfactory reasons for this?
    - Is there evidence of any strategic matter(s) on which the LPA should have cooperated, but have failed to do so effectively?
    - Are there any bodies with which the LPA should have cooperated, but have failed to do so effectively?

What are early warning signs of a potential failure in the DtC?

28. 11 of the 14 plans that have been withdrawn[11] because of the LPA's failure to comply with the DtC involved unmet housing need.[12] This is by far the most common strategic matter on which a potential failure of the DtC is likely to occur. From the beginning of the examination Inspectors should be alert to the following warning signs, which might indicate a DtC problem:

    - The LPA is unable to meet its local housing need within its own boundaries and there are no agreed arrangements, through statement(s) of common ground, to distribute its unmet need to neighbouring authorities;

    - The LPA is able to meet its own local housing need, but one or more neighbouring authorities have identified unmet needs and the LPA has not entered into any arrangement, through statement(s) of common ground, on how those needs will be met;

    - Unmet need has been identified (either by the LPA itself or by neighbouring authorities), and there are agreed arrangements, through statement(s) of common ground, to deal with it – but the arrangements are to defer addressing the unmet need until future plan review(s)[13].

29. Other early warning signs could be representations from other bodies subject to the DtC that the LPA has failed to co-operate effectively with them. But of course these are not necessarily definitive and the Inspector will need to consider whether they raise genuine concerns about the legal DtC. Any failure of the LPA to comply with the DtC is likely to involve one or more shortcomings on the LPA's part in the **process** of co-operation required by s33A of the 2004 Act.

30. Look carefully at representations from other parties (not subject to the DtC) alleging that the DtC has not been met. The scope of the DtC is often misunderstood and it may be that the issue they are raising is really to do with soundness.

Does the DtC require LPAs to enter into agreements on joint approaches to plan preparation, or to produce joint plans?

31. S33A(6)(a) requires all bodies subject to the DtC to **consider** whether to consult on and prepare, and enter into and publish, agreements on joint approaches to plan preparation. And s33A(6)(b) requires the LPA to **consider** whether to agree under s28 to prepare joint plan(s) with other LPA(s).

32. The PPG on Plan-making advises that LPAs should demonstrate at examination that entering into agreement(s) on a joint approach to plan preparation has been considered. Inspectors should therefore expect to see some evidence on this point. However, compliance with s33A(6)(a) is unlikely to be a contentious issue purely in its

[11] As of the time of writing (January 2019)
[12] Annex 3 contains a series of extracts from Inspectors' reports on such plans.
[13] However, in some circumstances this approach might be justified: for example, if a neighbouring authority's unmet need was only identified at a late stage.

own right, as the LPA are only required to show that they have **considered** the point. It is more likely to arise as a subsidiary issue in cases where overall compliance with the DtC is in dispute. Where the Inspector finds that the LPA have complied with the DtC in all other respects, there can be no logical grounds for concluding that they should have entered into agreement(s) on a joint approach.

33. Similarly, the requirement in s33A(6)(b) is for the LPA to **consider** whether or not to prepare a plan jointly with other LPA(s). As long as the LPA can show they have considered the point, in most circumstances it is unlikely to be controversial. While not inconceivable, it would take a very rare set of circumstances for a decision not to prepare a joint plan to be a reason for concluding that the LPA have failed the DtC. The 'Zurich Assurance' judgment[14] found that LPAs have a substantial margin of appreciation or discretion in judging whether or not to prepare a joint plan.

If the Inspector concludes that the DtC has not been met, how should that conclusion be communicated to the LPA?

34. The Inspector should write to the LPA setting out their conclusion and the reasons for it. Particular thoroughness and care are required, in view of the serious consequences of such a conclusion. The Inspector's reasoning should be carefully framed in terms of the specific wording in the legislation, and in the NPPF and the PPG where relevant.[15]

To ensure a consistent approach, no finding of a failure to meet the DtC should be issued until the matter has been discussed with the Group Manager (Plans).

35. The Inspector's letter should then set out the options available to the LPA, which are to withdraw the plan from examination, or to receive the Inspector's report (which would have to recommend that the plan should not be adopted because of the LPA's failure to comply with the DtC[16]). In practice, most LPAs choose to withdraw the plan.

How should the DtC be dealt with in the Inspector's report?

36. S20(7)(b) and s20(7B)(b) of the 2004 Act make it clear that, in order for the plan to be capable of adoption, the Inspector must (among other things) "consider that, in all the circumstances, it is reasonable to conclude that the LPA complied with the [DtC]". In addressing this issue in the section of the report on the DtC, the Inspector's focus should be on the process of engagement and whether or not the legal DtC test has been met. Issues of soundness should be dealt with elsewhere in the report[17].

37. The Local Plan report template provides a form of words to be used for concluding on the DtC, in cases where the Inspector finds that the LPA has met the DtC. That form of words should be used unless there are clear reasons for taking a different approach.

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[14] Zurich Assurance v Winchester CC & South Downs NPA [2014] EWHC 758 (Admin), paragraph 111
[15] See Annex 1 for examples of Inspectors' letters and reports finding that the DtC has not been met.
[16] See the sub-section above headed **Can a failure to comply with the DtC be rectified at examination?**
[17] See the sub-section above headed **How is compliance with the DtC tested at examination?**

Inspectors should set out their findings in a positive fashion, rather than, for example, saying that in the absence of any evidence to the contrary the DtC can be said to have been met. This will ensure that the report does not appear to make an incorrect presumption in favour of finding compliance with the duty. See the discussion of the 'Zurich Assurance' case in the sub-section below headed **'What does caselaw say about challenges to Inspectors' conclusions on the DtC?'**

38. Where the Inspector has found that the DtC has not been met, and the plan has not been withdrawn, the Inspector's letter to the LPA (see the sub-section above headed '**If the Inspector concludes that the DtC has not been met, how should that conclusion be communicated to the LPA?'**) will provide the basis for the reasoning in the report. It will usually be unnecessary to deal with any other issues. The template provides model wording for the Inspector's conclusion on the DtC and the consequential recommendation that the plan should not be adopted.

39. In cases where the Inspector finds that the DtC is not engaged because there are no strategic matters, this must be clearly stated in the report – see the sub-section above headed '**How is compliance with the DtC tested at examination?'.** In such cases there is no need to consider whether or not the DtC has been met.

What does caselaw say about challenges to Inspectors' conclusions on the DtC?

40. Inspectors' conclusions on the DtC have been the subject of a High Court legal challenge either directly, or as part of a s113 challenge to an adopted plan, on various occasions, including in 'Central Bedfordshire'[18], 'St Albans'[19] and 'Sevenoaks'[20], where the Inspector had found that the LPA had failed to meet the DtC, and in 'Zurich Assurance'[21], 'Gallagher Homes'[22] and 'Trustees of Barker Mill Estates'[23], where the Inspector's finding was that the DtC had been met.

41. In all but one of these cases the challenge was dismissed. The exception is 'Gallagher Homes', where the High Court was unable to make any findings on the DtC issue, but upheld the challenge on other grounds. The Court of Appeal subsequently dismissed the LPA's appeal against that judgment.

42. A number of principles (from which none of the other judgments dissented) were helpfully summarised in the 'Trustees of Barker Mill Estates' judgment:

    i. The question posed by section 20(7B)(b) of PCPA 2004 is a matter for the judgement of the Inspector;

[18] The Queen (oao Central Bedfordshire Council) v SSCLG [2015] EWHC 2167 (Admin)
[19] St Albans City & District Council v SSCLG and others [2017] EWHC 1751 (Admin)
[20] Sevenoaks District Council v SSHCLG [2020] EWHC 3054 (Admin)
[21] Zurich Assurance v Winchester CC & South Downs NPA [2014] EWHC 758 (Admin)
[22] Gallagher Homes Ltd & Lioncourt Homes Ltd v Solihull MBC [2014] EWHC 1283 (Admin)
[23] Trustees of the Barker Mill Estates v Test Valley BC and SSCLG [2016] EWHC 3028 (Admin)

ii. The Court's role is limited to reviewing whether the Inspector could rationally make the assessment that it would be "reasonable to conclude" that the LPA had complied with section 33A;

iii. It would undermine the structure of PCPA 2004 and the procedure it provides for review by an independent Inspector if, on a challenge made under section 113, the Court sought to apply a more intrusive form of review in its assessment of the underlying lawfulness of the LPA's conduct or performance;

iv. The Inspector's conclusion cannot be impugned unless irrational or unlawful;[24]

v. Issues such as what would amount to sustainable development, what would have a significant impact on two or more planning areas, what should be done to "maximise effectiveness" with regard to the preparation of a development plan, what measures of constructive engagement should take place and the nature and extent of any co-operation are all matters of judgment for the LPA. The requirement in section 33A(6) to consider joint approaches to strategic planning matters is also a matter of judgment for the LPA. Each of these issues is highly sensitive to the facts and circumstances of the case. The nature of these functions is such that a substantial margin of appreciation or discretion should be allowed by the Court to the LPA.[25]

43. In 'Zurich Assurance' the judge indicated that it would have been erroneous if the Inspector had started from the presumption that there had been compliance with the DtC, but found that in fact he had not done so.[26]

44. In 'Central Bedfordshire' the judge observed that it was for the Inspector to consider whether the DtC had been discharged, irrespective of whether the LPA itself considered it had met the duty. To come to a planning judgment on the DtC involves not a mechanistic acceptance of all documents submitted by the [LPA] but a rigorous examination of those documents and the evidence received. The Inspector had set out in some detail the positive and negative factors as part of the discharge of his duty. His decision was an entirely rational one, and there was no evidence that in coming to his conclusion he did not afford the claimant a wide margin of appreciation.[27]

45. In 'Sevenoaks' the judge found that the DtC arises in relation to each and every strategic matter individually. The Inspector had, therefore, not erred in focussing on one of those strategic matters (unmet housing need) when reaching her conclusions on the DtC. Nor had the Inspector conflated the DtC with the requirement for soundness: it was clear from her reasoning that what she was scrutinising and assessing was not the

[24] Barker Mill Estates [paragraph 58]
[25] Barker Mill Estates [paragraph 56]. The term "margin of appreciation" is not specifically defined in any of the judgments cited here, but it (and the use of the alternative term "or discretion") indicate that the Courts expect the Inspector not to take an overly rigid approach when assessing whether or not the LPA has met the DtC. To date, no challenge has succeeded on this ground.
[26] Zurich Assurance [paragraph 121]
[27] Central Bedfordshire [paragraphs 51 & 55]

identification of a particular solution for the strategic issue of unmet housing need, but rather the quality of the manner in which the issue had been addressed.[28]

46. There was no justification for the suggestion that the Inspector failed to afford a margin of appreciation to the claimant in reaching her conclusions; the clear-cut nature of the conclusions which the Inspector reached were fully set out and ultimately the Inspector was required by section 20 of the 2004 Act to reach conclusions in relation to the statutory test, which she did.[29] The Court of Appeal subsequently refused the LPA permission to appeal against the High Court judgment.

[28] Sevenoaks [paragraphs 50 & 55]
[29] Sevenoaks [paragraph 57]

ANNEX 1 - Extracts from selected Inspectors' letters and reports in cases where it was found that the LPA had not met the Duty to Co-operate:

St Albans Strategic Local Plan

Withdrawn 2017 following High Court challenge

The evidence does not enable the Inspector to conclude that prior to the submission of the SLP, St Albans City and District Council gave satisfactory consideration to identifying, addressing and seeking co-operation with regard to strategic cross-boundary matters and priorities. The legal requirements, as expanded upon in paragraphs 178 to 181 of the National Planning Policy Framework and in the Planning Practice Guidance, have not been fulfilled and therefore the Duty to Co-operate has not been met. As the Plan has not been based on effective joint working on strategic matters and priorities and because currently there is insufficient evidence to demonstrate that the SLP has been positively prepared, there is also the significant risk that the Plan could be found to be not sound.

Castle Point New Local Plan

Inspector's report March 2017

Housing policies have failed to address how unmet need will be dealt with across the housing market area. This is exacerbated by the lack of consideration of this matter when reducing the housing target by 50%. Whether these policies are justified is a matter of soundness but they represent the consequences of DtC actions and are deficient in this respect. In addition, the Council has not made every effort to consider how it might deal with the significant unmet need for traveller sites in south Essex arising, in particular, from Basildon.

Central Bedfordshire Development Strategy

Withdrawn May 2015 following High Court challenge

I recognise that my conclusion with regard to the Duty is not one that the Council will welcome. However, I believe it to be the only conclusion that I could reasonably draw on the evidence that was presented both at submission and in response to both my initial letter (ED09) and my agendas for the Matters 1 and 2 hearing sessions. In simple terms there should be much clearer evidence of the co-operation required for the effective delivery of the homes and jobs needed in the Luton and Central Bedfordshire area.

I fully appreciate that the Duty is not a duty to agree. However, even in that context, I do not consider that there is sufficient evidence that the various authorities have taken the necessary steps through the Duty process to secure the delivery of the homes and jobs needed by authorities such as LBC that are constrained in their ability to meet their own needs. I do not underestimate the challenge that achieving the necessary co-operation presents in this particular area. However, all reasonable steps must be shown to have been taken to secure that co-operation before it would be reasonable to conclude that the Duty had been complied with. As I have explained, I consider the co-operation between the Council and LBC in particular has fallen short of the required level.

Having come to that conclusion, under s20(7)(A) of the 2004 Act I must recommend non-adoption of the Plan. There are two options now open to the Council. First, the Council could chose to receive my report. In substance, that would be the same as this letter and must reach the same conclusion. Second, the Council could chose to withdraw the Plan under s22 of the 2004 Act. That would seem to me to be the most appropriate course of action but that is clearly a matter that you will wish to consider.

Runnymede Local Plan

Withdrawn July 2014

Co-operation should produce effective and deliverable policies on strategic cross boundary matters, which in this instance includes housing and employment. Effective co-operation is likely to require sustained joint working and there should be clear outcomes, one way or another. However, there is insufficient comprehensive and robust evidence to enable me to conclude that every effort has been made by Runnymede Borough Council to seek co-operation with other nearby local planning authorities. Although there has been recent activity with regards to the duty, it is too late in the process for me to give it significant weight. It is an indication, however, that progress on the matter may be achieved in the near future.

Bolsover Local Plan Strategy

Withdrawn June 2014

The concerns about the Duty to Co-operate centre on the [cross-boundary] former Coalite Chemical Works site. Overall, there was no comprehensive or robust evidence of the efforts that the Council should have made to co-operate, or of any outcomes achieved, on the Coalite site strategic issue. In particular, there was no evidence of “a proactive, ongoing and focussed approach to strategic planning and partnership working” or that the Council’s councillors and officers have adequately engaged in “discussion, negotiation and action to ensure effective planning” on an ongoing, constructive basis for this important strategic matter in its plan-making processes.

Aylesbury Vale Plan Strategy

Withdrawn February 2014

As it stands there are significant issues in terms of potential unmet needs from other authorities and how they will be accommodated. There are particular issues concerning the relationship of Aylesbury Vale to Milton Keynes and its future growth. These issues have been left unresolved. The Council has been aware of these issues from early in the plan preparation process, if not before. There has been a substantial period of time since the duty to co-operate came into force and the NPPF was published. Whilst noting the lack of specific evidence on potential unmet needs from other authorities and accepting that collaboration and joint working is a two way process, it is the Council’s duty, as the authority submitting the Plan for examination, to have sought to address these issues through constructive, active and ongoing engagement.

On the basis of the above assessment I consider that the Council has not engaged constructively, actively and on an ongoing basis and that this has undermined the

effectiveness of plan preparation in dealing with key strategic issues. It is with regret therefore that I must conclude that the Council has not complied with the duty to co-operate.

North West Leicestershire Core Strategy

Withdrawn October 2013

The absence of a strategic policy approach towards meeting housing needs within the housing market area (HMA) as a whole & the substantial differences that remained between the Council and several other authorities within the HMA in respect of this matter were considered to not satisfy the duty to co-operate (DtC). The DtC topic paper contained no information on the strategic policy approach.

Hart Local Plan

Withdrawn June 2013

The Council had pursued a strategy that by its own admission would not meet full, objectively assessed needs for housing with no indication as to how, or even if, unmet needs could be met elsewhere. It had failed to co-operate with neighbouring authorities in considering the effect that any under-provision of housing in the District would have on the wider housing market area. Taking all of this into account the Inspector considered that the Council had failed the legal duty to co-operate and that the Core Strategy target for overall housing provision was unsound.

ANNEX 2 - Extract from the Inspector's report on the Basement Revision of the Westminster City Plan (adopted Nov 2016), concluding that the DtC was not engaged:

Basement development is likely to have some wider cross-boundary consequences including construction traffic. The effects of noise, vibration, dust and air pollution could also be directly experienced by those living in neighbouring Boroughs. However, these manifestations do not have a significant impact on any other planning area. As a result the duty to co-operate imposed by section 33A of the 2004 Act is not engaged. Nevertheless because of the increasing trend for basement development across London the Council has liaised with other Boroughs and agencies in a constructive way.

ANNEX 3 - Extracts from selected Inspectors' reports and findings in cases where it was found that the LPA had met the Duty to Co-operate:

Luton Local Plan

Adopted Nov 2017

The thorough consideration of the DtC in this report covers a number of strategic issues and includes this helpful survey of other examination findings:

1. I have been referred to several other examinations where Inspectors have concluded on the duty to cooperate. However, some caution must be applied because the circumstances in each case will inevitably be different to some degree. Consequently, I do not intend to provide an analysis against all the examples cited or to compare and contrast the various findings with Luton in detail. Nevertheless, there are some key threads which are of significance.

2. In some of the cases, the duty was failed principally due to problems relating to the objective assessment of housing need, including through the preparation of a SHMA.[30] This is not the case with Luton. Indeed, taken together, the various DtC examination findings emphasise the central importance of carrying out joint work on housing markets and OAN. Such work has been carried out in the preparation of Luton's Plan.

3. In some cases the duty was failed because the authority being examined failed to give satisfactory consideration to meeting the unmet housing needs of other authorities.[31] Again this does not apply to Luton, because Luton is the potential exporter of unmet housing needs.

4. In Hart, one of the Inspector's concerns was about engagement with neighbouring authorities on meeting Hart's housing needs. However, this was largely because the Council only raised the issue and initiated discussions very late in the process just before submission. In contrast, Luton raised the issue with its neighbours well in advance.

5. In Coventry, the Inspector did express concerns about the mechanism for dealing with any shortfall, should one arise. However, the main concern was about the absence of a joint SHMA for the HMA. As noted above the steps taken by Luton to establish the OAN and deal with its unmet needs are reasonable.

6. However, there are examples that are more directly relevant. In the case of Birmingham, neighbouring authorities agreed to produce a study to identify broad spatial options to accommodate Birmingham's unmet needs. The Birmingham plan was submitted before this study had been completed and similar criticisms were raised as with Luton. However, the Inspector concluded, as I have done, that the steps taken by the Council prior to submission were sufficient to comply with the duty. There are inevitably some differences, for example in terms of the scale and proportion of unmet

[30] Coventry, Hart, Aylesbury Vale
[31] Mid-Sussex, Aylesbury Vale, Central Bedfordshire

need and work on the spatial options study in Birmingham appears to have started earlier in the process than in Luton. There also appears to have been a greater commitment from Birmingham's neighbours than Luton's to review their plans if necessary to help accommodate unmet need. However, in overall terms, the situation is sufficiently similar to provide a positive parallel.

7. In addition, Crawley's plan was found to have met the duty despite failing to secure in full the future provision of its unmet needs. This was because there was no compelling evidence that this failure resulted from the Council not promoting its case with sufficient vigour. The same applies with Luton.

8. Overall, I can see nothing in these various findings that would lead me to a different overall conclusion on the duty.

Conclusions on the duty to cooperate

9. The Council has submitted a large amount of evidence that illustrates the extent and nature of engagement over the full range of strategic matters. Significantly, Central Bedfordshire and North Hertfordshire have both agreed that Luton has met the duty.

10. It may be the case that Luton could have done more to engage with its neighbours and that some questions might have been asked earlier and more explicitly. However, that will probably be true in the preparation of most plans. In this case, there were considerable difficulties to overcome in terms of cooperation, particularly with Central Bedfordshire, and it is reasonable to consider the duty with regard to what is realistic and achievable. In this context, significant progress has been now made on joint working, particularly in relation to the SHMA and the actions taken by Luton across the range of strategic matters have been acceptable, reasonable and sufficient. For the reasons outlined above, the legal duty to cooperate has been met.

Birmingham Development Plan

Adopted Jan 2017

1. In August 2012, the Council wrote to all the other LPAs in the GBSLEP area as well as the BCAs, Coventry City Council and North Warwickshire Council, making it clear that it was likely that Birmingham would need to look to adjoining areas to accommodate some of the city's housing requirement. The letter proposed a meeting to discuss the issues and resolve a way forward in addressing them. A number of meetings and discussions on these matters followed, and other LPAs, including South Staffordshire, Stratford-on-Avon and Telford & Wrekin were also involved in discussions.

2. One important outcome from these discussions was the commissioning by the GBSLEP of the Strategic Housing Needs Study [SHNS], Stage 2 of which has been discussed above. Following the completion of Stage 2 – an assessment of housing needs and existing capacity across the HMA – the intention is for Stage 3 to identify broad spatial options for accommodating housing growth, including housing needs arising in Birmingham that cannot be met within the city.

3. Furthermore, as a result – at least in part – of representations by the Council, so far seven LPAs within the HMA have included a commitment in their adopted or emerging Local Plans to review those plans, should there be evidence (including from the SHNS) of housing needs arising in Birmingham or the West Midlands conurbation that cannot be met within the areas in which they arise.

4. Stage 3 of the SHNS was originally programmed for completion by February 2014, well before the BDP was submitted for examination, but in the event it is likely to be about a year beyond that date before it is finalised. At the hearing session there was criticism of the Council for having submitted the BDP before either Stage 2 or Stage 3 of the SHNS had been completed. It was argued that the Council could not be found to have complied with the legal duty to co-operate in the preparation of the plan, in circumstances where the full extent of housing needs in Birmingham and across the HMA was not known, and specific proposals for meeting Birmingham's housing shortfall in other LPA areas had not been identified.

5. But the legal duty to co-operate is not a duty to agree, nor is it a duty to reach a particular policy outcome: instead the objective, in the present context, is to maximise the effectiveness of plan preparation in respect of the strategic matters of housing needs, provision and distribution.

6. I consider that the steps taken by the Council, prior to the submission of the BDP for examination, were consistent with that objective. They sought to identify the full scale of housing needs in Birmingham through the 2012 HMA, and across the HMA through their participation in the GBSLEP's commissioning of SHNS Stage 2. When it became clear that they could not accommodate provision to meet all Birmingham's housing needs within the city, they held meetings and discussions with other LPAs in the HMA in order to address the issue. Through the GBSLEP, they went on to prepare a brief for Stage 3 of the SHNS, and through their representations they helped to persuade other LPAs to include commitments in their Local Plans to review those plans if this becomes necessary to address the shortfall.

7. It is true that further work needs to be done (as I have made clear earlier in this paper) to establish the full, objectively-assessed need for housing in Birmingham over the plan period. But that is a matter of soundness and it does not alter the general position, on which the Council based their plan preparations, that there will be a substantial shortfall of housing provision in the city to meet the city's needs, and that the shortfall will need to be met by other LPAs in the HMA.

8. Drawing all these points together, I find that it would be reasonable to conclude that the Council have complied with the relevant legal requirements in respect of their duty to co-operate in the preparation of the BDP.

Brighton and Hove City Plan Part One

Adopted March 2016

1. The Council's Duty to Cooperate Compliance Statement outlines the steps the Council has undertaken to comply with the duty. The Statement provides details of meetings convened by the City Council. It confirms that the Council has worked with a number of neighbouring local authorities and other statutory providers, to address a number of

strategic issues, most notably housing, employment and the regeneration of Shoreham harbour.

2. The Council has actively engaged at both officer and member level in a range of cross-boundary partnerships, most notably the Coastal West Sussex and Greater Brighton Strategic Planning Board (CWSGBSPB). Formal requests were sent to other Councils in the Sussex Coast Housing Market Area and beyond for assistance in meeting the City's housing need. No positive responses were forthcoming, mainly because other authorities are finding it difficult to meet their own needs as set out in the Draft Statement of Common Ground, which forms an appendix to the Duty to Cooperate Compliance Statement. However, the Duty to Cooperate is not a requirement to agree

3. In all the circumstances, I consider that Brighton and Hove City Council has demonstrated that it has complied with the duty imposed by section 33A of the 2004 Act.

The Planning Inspectorate

Local Plan Examinations

Sustainability appraisal, Habitats Regulation Assessment, Climate Change, Air Quality and Flood Risk

Not yet updated to reflect December 2023 Framework (NPPF)

What's new since the last version

Changes highlighted in yellow made 13 May 2022:

- Footnote 28 discussing transitional arrangements relating to updated peak rainfall allowances published by the Environment Agency, which come into effect from 10th May 2022.

This topic section of the Local Plan Examinations chapter of the Inspector Training Manual (ITM) applies to the examination of plans submitted on or after 25 January 2019. The existing Local Plan Examinations chapter will continue to apply for plans submitted for examination prior to that date, but please note that that chapter is no longer being updated.

Other recent updates

Previous updates on 12/04/2022:

- Link to PINS Note 11/2020r2 in new paragraphs 62 and 63

For earlier updates please see the Change Log in the Library.

Contents

Sustainability Appraisal

Legislation

1. Sustainability appraisal incorporates strategic environmental assessment[1].

2. Relevant legislation is therefore set out in the Planning and Compulsory Purchase Act 2004 ("2004 Act") and The Town and Country Planning (Local Planning) (England) Regulations 2012 ("2012 Regulations"), but also the Environmental Assessment of Plans and Programmes Regulations 2004 ("SEA Regulations").

3. The SEA Regulations contain requirements, relating to both process and content, that are additional to those in the 2004 Act and 2012 Regulations.

4. The key parts of the legislation are as follows:

Planning and Compulsory Purchase Act 2004
Section 19(5) of the 2004 Act requires the local planning authority to carry out an appraisal of the sustainability of the local plan, and to prepare a report of the findings of the appraisal.

The Town and Country Planning (Local Planning) (England) Regulations 2012
Regulation 17 includes the sustainability appraisal report as a proposed submission document which means that it must be published for consultation (alongside the local plan) on the local planning authority's website and made available for inspection at their principal office and other appropriate places (regulations 19 and 35)[2].

[1] NPPF paragraph 32 and footnote 19, and PPG ID:11 paragraphs 001 and 007.
[2] The Town and Country Planning (Local Planning) (England) (Coronavirus) (Amendment) Regulations 2020 and The Town and Country Planning (Local Planning, Development Management Procedure, Listed Buildings etc.) (England) (Amendment) Regulations 2020 temporarily suspended the requirement to make documents available for inspection at the principal office and elsewhere until 31 December 2021.

The Environmental Assessment of Plans and Programmes Regulations 2004 **("the SEA Regulations")**

Regulation 5(1) requires the responsible authority to carry out, or secure the carrying out, of an environmental assessment during the preparation of a local plan and before its adoption. This is known as Strategic Environmental Assessment ("SEA").

Regulation 12(2) states that the report shall identify, describe and evaluate the likely significant effects on the environment of (a) implementing the plan; and (b) reasonable alternatives taking into account the objectives and the geographical scope of the plan.

Regulation 12(3) states that the report shall include such of the information referred to in schedule 2 [see Annex 1 attached] as may reasonably be required, taking account of (a) current knowledge and methods of assessment; (b) the contents and level of detail in the plan; (c) the stage of the plan in the decision-making process; and (d) the extent to which certain matters are more appropriately assessed at different levels in that process in order to avoid duplication of the assessment.

Regulation 13 sets out requirements for consultation on the strategic environmental assessment. This includes a requirement for consultation bodies and public consultees to be invited to express their opinion on the relevant documents (ie the sustainability appraisal report) as soon as reasonably practicable after they have been prepared.

The SEA Regulations have been amended by the Environmental Assessments and Miscellaneous Planning (Amendment) (EU Exit) Regulations 2018. The amendments alter the terminology used in the SEA Regulations in order to reflect the UK's departure from the EU. They do not materially affect the requirements of the Regulations as regards the SEA process itself.

National planning policy and guidance

5. In achieving sustainable development, NPP7 in the revised NPPF (July 2021) has incorporated the United Kingdom's commitment, along with other nations, to pursue the 17 Goals for Sustainable Development in the period to 2030. NPPF paragraph 32 states that local plans should be informed throughout their preparation by a sustainability appraisal that meets the relevant legal requirements (including the SEA Regulations). 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).

6. Planning practice guidance ID:11 deals specifically with sustainability appraisal (incorporating strategic environmental assessment) and includes a summary flow chart of the iterative process[3]. It states that the sustainability appraisal should help to promote sustainable development by assessing the extent to which the emerging plan, when

[3] PPG ID:11 paragraph 013.

judged against reasonable alternatives, will help to achieve relevant environmental, economic and social objective[4].

What is the role of the Inspector under the 2004 Act and 2012 Regulations with regard to the sustainability appraisal?

7. Under section 20(5) of the 2004 Act, the role of the Inspector includes determining whether a local plan (a) satisfies the requirements of section 19 and any regulations under sections 17 and 36; and (b) is sound[5]. Therefore, the Inspector should check that the local planning authority carried out a sustainability appraisal of the local plan, prepared a report of the findings of the appraisal, and published the report along with the plan and other submission documents under regulation 19. Provided that the local planning authority did this, the Inspector can be satisfied that they complied with the legal requirements of the 2004 Act and the 2012 Regulations.

8. The quality and nature of the sustainability appraisal carried out during the preparation of the plan will be relevant both in terms of compliance with the SEA Regulations and the assessment of whether it is robust evidence on which to determine if the plan being examined is sound – see below.

What is the role of the Inspector in considering whether the SEA Regulations were complied with by the local planning authority prior to submitting the plan for examination?

9. Neither the 2004 Act nor the SEA Regulations require the Inspector to determine if the local planning authority complied with the SEA Regulations during the preparation of the Plan. However, if the SEA Regulations have not been complied with by the time that the plan is adopted, there is the potential for successful legal challenge.

10. Furthermore, it may be possible to address any non-compliance with the SEA Regulations during the examination. The Inspector should, therefore, check early in the examination if the local planning authority complied with the SEA Regulations during the preparation of the plan so that any significant shortcomings can be rectified if necessary.

What is the role of the Inspector in ensuring that the SEA Regulations are complied with during the examination?

11. The SEA Regulations apply up until the plan is adopted. It is reasonable to expect the local planning authority to continue to take prime responsibility for any updates to the appraisal during the examination. However, the Inspector will need to be reasonably satisfied that this is carried out appropriately and be prepared to offer advice if necessary, including about scope and quality. To help ensure compliance with the SEA Regulations, the Inspector should take joint responsibility with the local planning authority[6]:

[4] PPG ID:11 paragraph 001.
[5] The role of the Inspector is also to determine whether the duty to cooperate was complied with and, if applicable, whether the plan is in general conformity with a regional strategy.
[6] Regulation 2 of the SEA Regulations states that a "responsible authority", in relation to a plan, means (a) the

- in deciding whether proposed main modifications should be subject to sustainability appraisal and what, if any, reasonable alternatives should be appraised at that stage of the plan-making process; and

- to ensure that consultation on sustainability appraisal of the main modifications is carried out, that the views of consultees on the sustainability appraisal report are invited, and that those representations are considered before the plan is adopted (including by the Inspector before finalising their report).

What is the role of the Inspector in terms of considering the sustainability appraisal to help assess whether the plan is sound?

12. It is not the role of the Inspector to decide if the sustainability appraisal report is sound. Rather, the sustainability appraisal report should be used, along with other evidence, to help decide if the plan is sound and, if not, how the plan could be modified to ensure that it is. In particular, it should help to assess whether the proposals in the plan are justified, taking into account reasonable alternatives, and based on proportionate evidence.

What does the sustainability appraisal report need to contain?

13. The sustainability appraisal should only focus on what is needed to assess the likely significant effects of the plan, and does not need to be done in any more detail than is appropriate for the content and level of detail in the plan[7].

14. However, for many plans, the sustainability appraisal report is likely to be a large document, often comprising more than one volume. Reflecting the requirements of the SEA Regulations (see Annex 1 below), and the fact that it also needs to address social and economic matters, the report should include sections covering:

    - a non-technical summary
    - the scope and purpose of the appraisal and an overview of the emerging plan and its evolution
    - the methodology used and any difficulties encountered
    - the baseline environmental, economic and social characteristics of the area
    - the key objectives of other plans and programmes and socio-economic and environmental issues relevant to the plan
    - the likely effects of the implementation of the plan and reasonable alternatives, including cumulative effects, mitigating measures, uncertainties and risks

authority by which or on whose behalf it is prepared; and (b) where, at any particular time, that authority ceases to be responsible, or solely responsible, for taking steps in relation to the plan or programme, the person who, at that time, is responsible (solely or jointly with the authority) for taking those steps. Case law has not established definitively whether or not the Inspector is "jointly responsible for taking steps in relation to the plan" during the examination, and is thereby a "responsible authority" for SEA while the examination is in progress. However, it is clear from the relevant judgments that the Courts accept that the Inspector plays an important role in the SA process.

[7] PPG ID:11 paragraph 009.

- the reasons for selecting the proposals in the plan and rejecting the alternative
- conclusions and recommendations
- implementation and monitoring measure.

15. Calverton PC v Nottingham CC [2015] EWHC 1078 (Admin) shows that it is permissible for the appraisal report to refer back to earlier documents, so long as the reasons in the earlier documents remain sound and that those documents are organised and presented in such a way that it may readily be ascertained, without any paper chase being required, what options were considered and why they had been rejected.

16. If the Inspector finds the sustainability report to be unintelligible, or lacking information required by the SEA Regulations, they should inform the local planning authority and ask for it to be amended.

Does the Inspector need to consider representations made about the sustainability appraisal?

17. The sustainability appraisal report will have been published for consultation alongside the plan under regulation 19. In accordance with regulation 23, the Inspector must consider all representations made about the plan under regulation 20. It is possible that representations include comments about the sustainability appraisal, and if so these may help identify any possible deficiencies with it and/or understand any potential soundness issues with the plan. Therefore, if the Inspector has not received copies of representations about the sustainability appraisal made in response to regulation 19 consultation they should ask for them to be provided or confirmation that none were received.

18. The Inspector will need to consider any representations made about any updates to the sustainability appraisal made during the examination, including of the main modifications published for consultation.

In what detail does the Inspector need to consider the sustainability appraisal report?

19. The non-technical summary should provide an overview of the approach adopted and key conclusions, and cover all of the information listed in schedule 2 to the SEA Regulations [Annex 1].

20. The extent to which the Inspector needs to consider the full report will depend on how complex the plan and the related examination issues are, and on the extent to which representors have criticised the appraisal or how it has or has not been used to inform the content of the plan. It may be necessary to look at particular parts of the full report, for example the appraisals of the spatial strategy, distribution of development, and strategic allocations along with reasonable alternatives to them and the reasons given for rejecting the alternatives. If the sustainability appraisal appears to have been carried out satisfactorily, and there are no significant representations suggesting that it has not, it may not be necessary to spend much time on it during the examination.

What are potential causes of non-compliance with the SEA Regulations?

21. The following checklist can be used to help to identify potential non-compliance with the SEA Regulations. Representations may raise other potential non-compliance issues.

    - Is there a non-technical summary?
    - Does the report (and summary) include all of the relevant information required by schedule 2 of the SEA Regulations (see Annex 1)?
    - Is the report intelligible and reasonably self-contained, without requiring extensive reference to other documents?
    - Were reasonable alternatives to policies and proposals in the plan identified and appraised?
    - Conversely, were there reasonable alternatives that could fulfil the plan's objectives that were not appraised?
    - Were the reasonable alternatives sufficiently distinct such that meaningful comparisons can be made of the different sustainability implications?
    - Have the policies and proposals in the plan and the reasonable alternatives been appraised on a like-for-like basis?
    - Have reasons been given for rejecting the alternatives that were appraised?
    - Were the consultation requirements of SEA Regulation 13 complied with, including inviting comments on the sustainability appraisal report when the plan and proposed submission documents were published under regulation 19 of the 2012 Regulations?

Can deficiencies in the sustainability appraisal process be corrected during the examination?

22. Yes. This has been confirmed in a number of court cases including Cogent Land v Rochford DC [2012] EWHC 2542 (Admin) and No Adastral New Town v Suffolk Coastal [2015] EWCA Civ 88.

23. However, care must be taken to ensure that updates to the sustainability appraisal are not used as an exercise to justify a predetermined strategy.

Should potential non-compliance with the SEA Regulations be addressed during the examination?

24. If the Inspector identifies apparent non-compliance with the SEA Regulations (for example against the above checklist), they should raise the concerns with the local planning authority and, depending on the response, potentially hold an early hearing session to discuss the matter. See the ITM section on the Examination Process and the Role of the Inspector.

25. If, after considering the local planning authority's response to the note and/or the

discussion at the hearings, it is clear that the SEA Regulations may not have been complied with, the Inspector should ask the local planning authority to carry out the necessary work to address the shortcomings.

Should the sustainability appraisal be updated during the examination to address any inconsistencies with national policy and guidance?

26. In assessing soundness, the Inspector should consider whether the appraisal was carried out in a manner that was consistent with NPPF paragraph 32 and PPG ID:11, having regard to any representations made about it. If not, it is possible that further sustainability appraisal will need to be carried out during the examination. However, this may not be necessary where there is other evidence available to enable a determination to be reached on the soundness of the plan, provided that the sustainability appraisal seems to meet the statutory requirements of the SEA regulations.

27. Representors may raise specific points, for example that the scoring given to a site in respect of certain sustainability objectives should have been different. However, the appraisal process is not a precise science, it will always encompass differences of professional opinion on individual points, and such differences of opinion do not usually mean that the appraisal is flawed.

28. IM Properties Development v Lichfield [2015] EWHC 2077 (Admin). In this case the Court dismissed the challenge and found that the Inspector was entitled to conclude that the appraisal was acceptable even though it contained some minor defects, as there was no evidence of major flaws and the main points were clearly drawn out in the non-technical summary.

What "reasonable alternatives" should be identified and appraised?

29. The sustainability appraisal should have identified reasonable alternatives to the strategy and policies in the plan, and assessed these against the baseline environmental, economic and social characteristics of the area and the likely situation if the plan were not to be adopted. Reasonable alternatives may need to be appraised for levels of growth; the spatial strategy and distribution of development across the district; allocations; other specific proposals (such as new roads); and in some cases policy wording (for example if a development management policy is departing from national policy). However, the alternatives must be sufficiently distinct to enable comparisons to be made of their different sustainability implications, and they must be realistic, deliverable and capable of achieving the plan's objectives.

30. The local planning authority has substantial discretion in deciding what alternatives are reasonable. However, a number of plans have been subject to legal challenge, some successfully, on the grounds that reasonable alternatives were not adequately identified and/or appraised by the local planning authority during their preparation. The key cases are summarised below.

31. Calverton PC v Nottingham CC [2015] EWHC 1078 (Admin). This case summarised a number of key findings from previous cases. It shows that it is necessary to consider reasonable alternatives, and to report on those alternatives and the reasons for their rejection. Alternatives must be subjected to the same level of analysis as the preferred option. Options may be rejected as the Plan moves through various stages, and do not necessarily need to be examined at each stage. The final report must include a description of what alternatives were examined and why, along with the reasons for

rejecting earlier options.

32. Heard v Broadland DC, South Norfolk DC and Norwich City Council [2012] EWHC 344 (Admin). The judgment found that the sustainability appraisal did not properly identify reasonable alternatives to a proposed growth location, which became the favoured option, and failed to examine alternatives in the same depth as that option. Reasons for rejecting alternatives and selecting the preferred option were not clear.

33. Chiltern DC [2014] EWCA Civ 1393 . In this case the Court of Appeal considered that the threshold is low for proposals which do not warrant even an outline reason for being disregarded. However, in the circumstances of the case, the Council was not under an obligation to consider a proposed land swap as a reasonable alternative and thus subject it to a sustainability appraisal.

34. Ashdown Forest Economic Development v Wealden DC [2014] EWHC 406 (Admin) found that the local planning authority is the primary decision–maker in identifying what is a reasonable alternative, and it has substantial discretion in that task. The alternatives chosen should be realistic, and the local planning authority need only provide an outline of the reasons for selecting them.

35. Ashdown Forest Economic Development v Wealden DC South Downs NPA [2015] EWCA Civ 681. Part of the High Court judgment referred to above was overturned on the grounds that no alternatives to a policy requiring mitigation measures for development within 7km of an SPA/SAC had been considered. This was despite the fact that nobody had suggested any alternatives.

36. R. (on the application of Friends of the Earth England, Wales and Northern Ireland Ltd) v Welsh Ministers [2015] EWHC 776 (Admin) found that reasonable alternatives are options which are considered by the decision-maker to be capable of meeting the plan's objectives to such an extent that that option is viable.

Does sustainability appraisal need to be carried out of proposed main modifications?

37. National guidance states that it is up to the local planning authority to decide if proposed main modifications need to be subject to sustainability appraisal before they are published for consultation[8]. However, the Inspector should provide advice and in most cases it is advisable that all of the main modifications (and potentially reasonable alternatives to them) are appraised.

38. If significant main modifications, such as additional allocations, are identified during the examination they (and potentially reasonable alternative sites) may need to be subject to sustainability appraisal and consultation prior to discussion at a hearing session. Otherwise, sustainability appraisal can be carried out when all of the main modifications are being drafted.

Do reasonable alternatives to proposed main modifications need to be identified and appraised?

39. It may be necessary to identify and appraise alternatives to potential main modifications, although at this relatively late stage in the plan-making process the scope for

[8] PPG ID:11 paragraph 023.

reasonable alternatives will have narrowed considerably. Indeed, a main modification may in itself be a reasonable alternative to an element of the plan as submitted. If main modifications involve allocating additional sites, or deleting allocations, it may be necessary to compare those with alternative sites (unless all reasonable alternatives had already been appraised earlier in the process).

40. R. (on the application of Driver) v SSHCLG [2018] EWHC 1132 (Admin). The judgment found that it was reasonable to compare sites with others only within a particular geographical area, rather than the borough as a whole, in light of the strategy for distribution which had been decided upon. This is because options discarded at earlier stages do not have to be revisited at every subsequent stage.

41. Compton Parish Council and others v Guildford BC and SSHCLG [2019] EWHC 3242 (Admin). In this case, the objectively assessed housing need figure was reduced (from 12,426 to 10,678) during the examination but the housing land supply remained unchanged. The judgment found that it was acceptable that the sustainability appraisal did not consider an alternative of reducing supply to match the reduced level of need because having a buffer was reasonable. Whether the increase in the buffer that the reduction in need resulted in would have significant effects was a matter of judgment for the Council.

42. Aireborough Neighbourhood Development Forum v Leeds City Council and others [2020] EWHC 1461 (Admin). The judgment found that a 25% reduction in a housing requirement identified during the examination was a "very significant amount" and therefore reasonable alternatives should have been considered through the sustainability appraisal to inform decisions about how the plan should be modified. Despite this finding, the Court refused to grant relief on this ground because the outcome of the challenge would have been no different. The appeal was successful on a reasons challenge relating to Green Belt release, and not because of any breach of the SEA regulations.

Do any updates to the sustainability appraisal during the examination need to be subject to public consultation?

43. Yes, consultation is required on the updated sustainability appraisal report, and consultees must be invited to comment on it before the plan is adopted[9]. In practice, this will need to be before the end of the examination. It will usually take place at the same time as consultation on the main modifications. But if the sustainability appraisal needs to be updated earlier in the examination before certain matters are discussed at hearing sessions, it is possible that specific consultation on the updated report will need to be held prior to those sessions.

44. The Inspector must consider any comments about the updated sustainability appraisal before finalising their report.

45. It is unusual for responses to consultation at main modifications stage to give rise to the need for additional sustainability appraisal work. Should that be the case, however, the Inspector must ensure that it is carried out and is subject to further consultation as necessary.

[9] SEA Regulation 13(2).

How should the sustainability appraisal be dealt with in the Inspector's report?

46. The legal compliance section in the report template includes reference to the sustainability appraisal. This will usually be appropriate in cases where the Inspector found no significant deficiencies in the submitted sustainability appraisal and no substantial issues were raised in representations.

47. If any additional sustainability appraisal work was on proposed main modifications only and was not controversial, the optional wording referring to sustainability appraisal contained in the "main modifications" section of the report template will usually be appropriate.

48. But if the Inspector identified significant deficiencies in the sustainability appraisal, there will need to be a section in the report explaining what was wrong and how it was corrected. Similarly, any substantial controversy over the adequacy of the sustainability appraisal should be discussed in the report, even if the Inspector concludes that it is satisfactory.

49. It may also be helpful to refer to the findings of the sustainability appraisal, where this is an important part of the evidence justifying the plan, when assessing a main soundness issue in the report. For example, whether the spatial strategy and distribution of development proposed in the plan is justified, having regard to reasonable alternatives.

HABITATS REGULATIONS ASSESSMENT

Legislative background

50. Regulation 105 of the Conservation of Habitats and Species Regulations 2017 (as amended) [the Habitats Regulations] requires that where a land use plan is likely to have a significant effect on a European site or a European offshore marine site (either alone or in combination with other plans or projects), the plan-making authority[10] for that plan must, before the plan is given effect, make an appropriate assessment of the implications for the site in view of that site's conservation objectives. The process by which this is done is known as Habitats Regulations Assessment [HRA]. There is national guidance on HRA in the PPG chapter on Appropriate Assessment.

51. The first stage of HRA is a screening process in order to identify whether or not the plan is likely to have a significant effect on any European site, either alone or in combination with other plans or projects. This stage of the HR assessment must be carried out on a precautionary basis. The question is whether there is a probability or a risk that the plan or project will have a significant effect on any European site. It is not necessary at this stage to identify that it would have such an effect, merely whether there is a risk that it might. If there are no likely significant effects, there is no need for the HRA process to go any further. But where there are likely significant effects, a more detailed appropriate assessment [AA] will be required.

52. For detailed advice on the HRA process, including on its implications for plan examinations, see Annex B to the ITM chapter on Biodiversity. That chapter should

[10] Reg 111 defines an LPA as a "plan-making authority" for the purposes of Reg 105. Note that the term "competent authority", which refers to the body that is responsible for HRA when considering whether or not to grant planning permission, does not apply in the plan-making context.

also be read alongside PINS notes 11/2020r1 (Increased nutrients and the implications for European sites), 05/2018r3 (Consideration of avoidance and reduction measures in HRA), and 02/2017r2 (Wealden District Council v SSCLG, Lewes District Council & South Downs National Park Authority).

53. Another useful source of information, particularly on details of the HRA process, is the DTA Handbook on HRA: https://intranet.planninginspectorate.gov.uk/task/habitats-regulation-assessment-hra/legislation-policy-and-guidance/

    Note however that the DTA Handbook is not Government guidance and should not be treated as a definitive source of advice.

Changes resulting from Brexit

54. Following Brexit, a new body of law has been created ("retained EU law") to preserve the effect of EU legislation as it applied to the UK immediately before 31 December 2020. From 1 January 2021, the UK is no longer bound by the EU nature Directives[11]. The Habitats Regulations provide the legislative basis for HRA in England (and Wales), and legislative references in Inspectors' reports and other documents should refer to the Regulations rather than the EU nature Directives.

55. The Habitats Regulations themselves have been amended[12] in order to reflect the transfer of functions from the European Commission to UK authorities. Defra has published updated guidance[13] to explain the effects of those amendments. The amendments do not affect the process of HRA, but they result in changes to some of the terminology previously used. In particular, they introduce the term "national site network". The national site network comprises both European sites and European offshore marine sites in the UK that had been designated under the EU Directives at 31 December 2020 and formed part of the EU's Natura 2000 network, plus any further sites that may be designated after 1 January 2021 under the Habitats Regulations.

56. As a result, the term "national site network" should now be used when referring to the network of European sites in the UK. The terms "European site" and "European offshore marine site" [14] are retained in the Habitats Regulations, including Regulation 105, and should continue to be used when referring to the requirements of those regulations.

[11] Council Directive 94/43/EEC 1992 on the conservation of natural habitats and of wild fauna and flora (the Habitats Directive); and Council Directive 2009/147/EC on the conservation of wild birds (the Birds Directive).
[12] By the Conservation of Habitats and Species (Amendment) (EU Exit) Regulations 2019.
[13] Defra policy paper: Changes to the Habitats Regulations 2017 (January 2021); and Defra guidance: Habitats Regulations Assessments – protecting a European site (February 2021).
[14] Regulation 8 of the Habitats Regulations 2017, as amended by the Conservation of Habitats and Species (Amendment) (EU Exit) Regulations 2019 (the '2019 Regulations'), defines European sites and European marine sites. European sites include: Special Areas of Conservation (SACs) and Special Protection Areas (SPAs) already existing at 31 December 2020; any Site of Community Interest (SCI) placed on the EU Commission's list or any site proposed to the EU prior to 31 December 2020; and any SAC or SPA designated in the UK after 31 December 2020. European marine sites are defined as European sites consisting of marine areas. As a matter of policy, the Government also applies the Habitats Regulations procedures to possible SACs (pSACs), potential SPAs (pSPAs), Ramsar sites and proposed Ramsar sites, and sites identified, or required, as compensatory measures for adverse effects on any of the above sites.

57. Judgments of the European Court given prior to 31 December 2020 must still be complied with in the UK[15], and EU guidance on HRA will continue to be relevant for as long as domestic legislation mirrors the requirements of the EU nature Directives.

Dealing with HRA in examinations

58. The HRA process is undertaken by the LPA as the plan-making authority. The HRA process is usually the subject of a separate HRA report, but it may cross-refer to information contained in the SA, if relevant.

59. The HRA report should identify any European sites that could potentially be affected by the plan, either alone or in combination with other plans and projects and should provide demonstrable evidence that a screening exercise has been carried out. The screening exercise will determine if the plan (alone or in combination) could have an impact on a European site and will determine if a likely significant effect [LSE] on the site could occur. If the screening exercise determines that a LSE could occur, the HRA Report should also include demonstrable evidence that Appropriate Assessment [AA] has been carried out, in accordance with the legislation and with regard to relevant caselaw.

60. Where AA is required, Natural England [NE] (as the appropriate nature conservation body) is a statutory consultee, and the LPA must have regard to any representations made by NE within such reasonable time as the LPA specifies[16]. Typically, the consultation will be undertaken on the basis of the findings in the HRA report, although this is not specified in the Habitats Regulations. The plan-making authority must also, if it considers it appropriate, take the opinion of the general public[17].

61. In many cases the HRA process is uncontroversial and does not take up much examination time. But if NE raise objections to, or have reservations about, the plan and/or the HRA report's findings, their views should be considered very carefully. There is no specific legal requirement for the Inspector to consider representations from other parties (if they have been sought by the LPA), but any representations that are provided to the Inspector should be considered on their merits. The Inspector should raise any issues and problems with the LPA as early as possible and explore them at the hearings as necessary.

62. In relation to 'nutrient neutrality', Inspectors need to be aware of the latest advice from NE to affected LPAs, under its letter 'Advice for development proposals with the potential to affect water quality resulting in adverse nutrient impacts on habitats sites'. It sets out NE's advice for development proposals that have the potential to affect water quality in such a way that adverse nutrient impacts on designated habitats sites cannot be ruled out. It also provides an update to those LPAs whose areas include catchments where NE has already advised on how to assess the nutrient impacts of new development and mitigate any adverse effects, including through application of the nutrient neutrality methodology. These matters are covered in **PINS Note 11/2020r2** along with a list of the affected LPAs.

63. **PINS Note 11/2020r2** should be read alongside this chapter regarding the requirements of the HRA and the making of an AA as well as the PINS Notes dealing with HRA: PINS Note 02/2017, and PINS Note 05/2018 (links to these Notes can be found in PINS Note 11/2020r2 in the 'Implications for Local Plans' section). Inspectors examining Local

[15] 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.
[16] Regulation 105(2)
[17] Regulation 105(3)

Plans in affected areas should seek the views of the parties regarding the implications of the NE advice.

64. If the Inspector reaches the view that the HRA process has not been carried out properly or has reached an irrational conclusion, the LPA should be asked to remedy it by obtaining further information and producing a new or revised HRA report. The new or revised HRA report should be subject to an equivalent level of consultation as the original report. NE should of course be included in the consultation. The LPA and the Inspector will need to consider and discuss at further hearing(s) if necessary, whether the findings of the new or revised HRA report mean that any modifications need to be made to the plan.

65. The HRA process is iterative and is often not concluded until the plan is close to submission, in which case the submitted plan may not have taken all its conclusions into account. This sometimes means that the conclusions of the HRA necessitate MMs to be made to the plan – for example to introduce mitigation measures to offset the impacts of certain allocated sites. The LPA and/or NE will normally be aware of this and will bring forward suggested changes post-submission, for the Inspector to consider recommending as MMs. In the unlikely event that they have not done so, the Inspector should raise the matter with the LPA in the first instance, and also seek the views of NE as necessary. Depending on the response, it may then be necessary to raise the matter in MIQs and discuss the potential need for MMs at the hearing sessions.

66. The full schedule of proposed MMs to the plan, and any changes to the plan (such as additional site allocations) which are the subject of consultation before the MMs[18], will need to be the subject of HRA screening, and AA as necessary, before public consultation on them takes place.

The Inspector's report

67. The Inspector's report will need to make it clear that the HRA process undertaken by the LPA has been carefully examined and found to be robust. If HRA is uncontroversial it can be dealt with briefly in the legal compliance section of the report, adapting the standard wording as necessary. But if it was necessary for a new or revised HRA report to be prepared, or for MMs to be brought forward as a result of the HRA, it is likely that the Inspector will need to give a fuller explanation, in the main body of the report, of what the issues were and how they were resolved.

Relevant caselaw

68. HRA is a process and has been shaped and influenced through a variety of caselaw. Among the most pertinent judgments are those in the 'Waddenzee'[19], 'Wealden'[20] and 'People over Wind'[21] cases.

69. The Waddenzee judgment established that at HRA screening stage it can only be concluded that a proposal would be unlikely to have a significant effect if such a risk can be excluded on the basis of objective information.

[18] As described in para 30 above.
[19] Landelijke Vereniging tot Behoud van de Waddenzee v Staatssecretaris van Landbouw [2004] EUECJ C-127/02
[20] Wealden DC v SSCLG, Lewes DC & South Downs NPA [2017] EWHC 351 (Admin)
[21] People over Wind, Peter Sweetman v Coillte Teoranta [2018] EUECJ C-323/17

70. In the light of the Wealden judgment, all plans where the effects of nitrogen deposition (alone or in combination with other plans or projects) may be an issue must be carefully reviewed by Inspectors. The impact of the judgment is not limited to the Ashdown Forest, which was the subject of the Wealden case. Particular care needs to be exercised where a plan or project may result in effects (alone or in combination), either there or at other sites where increased nitrogen deposition may affect a European site. Inspectors should refer to PINS Note 02/2017r2 for more detail and its annex contains guidelines on questions that the Inspector may need to pursue.

71. The People over Wind judgment established that measures intended to avoid or reduce the harmful effects of the plan or project on a European site should be assessed within the framework of an AA, and that it is not permissible to take such mitigation measures into account at the screening stage. See PINS Note 05/2018r3 for more detailed advice on how this judgment affects the approach to local plan examinations.

CLIMATE CHANGE

Statutory requirements

72. Section 19(1A) of the 2004 Act requires that development plan documents must (taken as a whole) include policies designed to secure that the development and use of land in the local planning authority's area contribute to the mitigation of, and adaptation to, climate change.

73. One of the Inspector's duties under section 20(5) of the 2004 Act is to determine whether or not the requirements of section 19 of the Act have been met. This will be a matter of judgement for the Inspector. It is important to note that the legislation requires consideration of the plan as a whole, rather than focusing on individual policies or lack of them. The fact that a plan does not have a specific policy dealing with climate change or a matter that could affect climate change, does not necessarily mean that the plan, when considered as a whole, does not meet the requirements of section 19 of the Act.

National policy and guidance

74. NPPF 152 advises that:

> "The planning system should support the transition to a low carbon future in a changing climate, taking full account of flood risk and coastal change. It should help to: shape places in ways that contribute to radical reductions in greenhouse gas emissions, minimise vulnerability and improve resilience; encourage the reuse of existing resources, including the conversion of existing buildings; and support renewable and low carbon energy and associated infrastructure".

75. NPPF 153 to 156 provide more specific guidance on how these objectives should be taken forward in local plans. When applying the soundness test of consistency with national policy, Inspectors should satisfy themselves that this guidance is reflected in development plan policies, taken as a whole, including by recommending main modifications where necessary.

76. There is also a PPG chapter entitled 'Climate Change'. It provides guidance on planning for renewable and low-carbon energy developments (wind turbines, solar farms etc)

rather than on the issue of climate change as a whole.

Dealing with climate change in examinations

77. The degree to which s19(1A) bears on plans will vary according to their scope and content. Inspectors should test compliance with the requirement and the need for any MMs in a proportionate way, having regard to national policy, the scope and purpose of the plan, and any evidence and representations that are relevant. It may be helpful to include an over-arching question in your MIQs that reflects the wording of s19(1A). Where there are policy-specific concerns, more detailed questions may be necessary to explore the matter.

78. In some examinations representors have sought to argue that the plan should take a more ambitious approach to combatting climate change than is required by the 2004 Act or the NPPF, drawing attention, for example, to the LPA's declaration of a climate emergency and/or the government's legally binding commitment to achieve net zero carbon emissions by 2050. Inspectors will of course consider all representations on their merits, but the test of a plan's soundness and legal compliance on this issue will be whether or not it meets the relevant requirements of the 2004 Act and the guidance in the NPPF. See also the sub-section below headed **Relevant caselaw**.

The Inspector's report

79. The part of the Inspector's report dealing with legal compliance must say whether or not the plan satisfies section 19(1A). The examination report template (available from this page) includes standard wording that can be amended to reflect the Inspector's findings.

80. It is for the Inspector to decide how best to reflect their conclusions in the report. An example is as follows:

> "Several policies will help ensure that the development and use of land will contribute to the mitigation of, and adaptation to, climate change. These include the various policies setting out the approach to coastal flood risk, and the policy on renewable and low-carbon energy. In addition, the overall spatial focus on large settlements is intended to reduce the need to travel. Accordingly, the plans, taken as a whole, achieve this statutory objective".

Relevant caselaw

81. In the 'Bioabundance' case[22] a local environmental campaign group applied for permission to apply for statutory review of the LPA's decision to adopt the 'South Oxfordshire Development Plan'. They argued, among other things, that the number of houses proposed by the plan breached the government's legally binding commitment to achieve net zero carbon by 2050. The High Court refused permission to apply for statutory review, and the Court of Appeal subsequently refused permission to appeal against the High Court's decision.

82. In the Order issued by the Court of Appeal, Stuart-Smith LJ observed that section

[22] Bioabundance Community Interest Company Ltd v South Oxfordshire DC and others, ref CO/250/2021 (High Court) & C1/2021/0810/PTA (Court of Appeal)

19(1A) of the 2004 Act does not require the development plan documents to explain how or when particular targets (eg net carbon emissions) will be met. He found that there was no call for the Inspector's report to consider the extent to which the main modifications, including provisions seeking carbon reductions, were outweighed by the inevitable increase in carbon emissions arising from the exceptional increase in housing provision above the standard methodology, and the subsequent effect of this on the legally binding net zero target. The relevant question was whether the development plan documents when taken as a whole included policies designed to secure that the development and use of land in the LPA's area contributed to the mitigation of and adaptation to climate change.

Technical standards for the sustainability of new homes and commercial buildings

What is the broad picture looking like?

83. The Government has acknowledged that the current position regarding energy efficiency standards could lead to confusion and uncertainty for local planning authorities and developers. In the response to the Future Homes Standard consultation (January 2021) the Government explains that 'while some local planning authorities are unclear about what powers they have to set their own energy efficiency standards and have not done so, others have continued to set their own energy performance standards which go beyond the Building Regulations minimum and in some cases beyond the Code for Sustainable Homes. Equally, for developers we have heard that this has resulted in disparate energy efficiency standards across local authority boundaries, the inconsistency of which can create inefficiencies in supply chains, labour and potentially quality of outcomes'.

84. The Future Homes and The Future Buildings Standards are to be put into place by the Government to address these issues by 2025 to improve the energy efficiency of new buildings and to reduce carbon emissions.

85. As a steppingstone to the new standards, the Building Regulations were amended in December 2021 to provide an interim uplift in energy efficiency standards. The approach to technical energy efficiency standards for new buildings is therefore in a state of transition.

86. Meanwhile, where viable and justified, Local Planning Authorities remain able through the Planning and Energy Act 2008, to set local requirements for the sustainability of buildings and low carbon energy which differ to those set out in the Building Regulations. National policy in this regard is set out in the Written Ministerial Statement on Plan Making dated 25 March 2015. This clarified the use of plan policies and conditions on energy performance standards for new housing developments. The statement sets out the government's expectation that such policies should not be used to set conditions on planning permissions with requirements above the equivalent of the energy requirement of Level 4 of the Code for Sustainable Homes (approximately 20% above the then Building Regulations across the build mix) (also see Local Plans Housing ITM 202-204).

How is the policy and regulatory context for technical building standards changing?

87. The Government has given a commitment that by 2025, it will introduce new building standards for energy efficiency. These are the Future Homes Standard for new build homes, and the Future Buildings Standard for non-domestic buildings. Consultation has been held on potential changes to the Building Regulations in respect of the new standards. It is intended that consultation on the technical specification of the new standards will be held in 2023. The new standards are to be implemented in 2025.

88. As an interim uplift, in December 2021 the Building Regulations were amended so that CO^2 emissions from new build homes must be around 30% lower than the previous standards, and emissions from other new buildings, including offices and shops, must be reduced by 27%. The amended Building Regulations come into force on 15 June 2022 following a transition period.

89. New Building Regulations have also been published regarding the overheating of buildings. The Written Ministerial Statement of 15 December 2021 sets out that the new overheating standard is a part of the Building Regulations and is therefore mandatory, so there will be no need for policies in development plans to duplicate this. There was no equivalent statement made regarding the changes to the Building Regulations in terms of the energy efficiency of buildings. Should a LPA propose energy efficiency policies which go beyond the scope of the Building Regulations, this is a matter to explore with representors through your MIQs.

90. The Government considers that given the changes to the Building Regulations and the implementation of the Future Homes Standard, it is less likely that local authorities will need to set local energy efficiency standards[23]. Additionally, it has also confirmed that the new planning reforms will clarify the longer-term role of LPAs in determining local energy efficiency standards. However, in the meanwhile, LPAs remain able to set local energy efficiency standards through their local plans.

Electric vehicle charging

91. Part S of the Building Regulations was updated in December 2021 setting out requirements for electric vehicle charging for residential and non-residential buildings. These take effect on 15 June 2022. The changes to the Building Regulations relate both to provision of charging points in buildings and does not apply to all associated parking spaces.

92. It is possible that plans in examination may include policies which include requirements for electric vehicle charging. There is no clear statement in legislation, policy or guidance that directly says that local plan policy should not duplicate other regulatory regimes. However, NPPF 16 says that policies should be clear and unambiguous as well as serving a clear purpose and the PPG on Use of Conditions states that conditions (attached to planning permissions) requiring compliance with other regulatory regimes will not meet the test of necessity and may not be relevant to planning. You will need to consider the soundness of such policies in this context.

[23] The Future Homes Standard: 2019 Consultation on changes to Part L (conservation of fuel and power) and part F (ventilation) of the Building Regulations for new dwellings Summary of responses received and Government response para 2.41

AIR QUALITY

Introduction

93. This section sets out advice relating to air quality. It focuses on local plan work and aims to assist Inspectors who are examining a Local Plan. Detailed background information and advice relating to air quality is set out in the ITM Air Quality chapter and is essential reading for local plans Inspectors.

What is the role of local plans?

94. National policy and guidance set out that local plans have a role in the management of air quality. Paragraph 186 of the NPPF states that '**planning policies and decisions 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 and Clean Air Zones, and the cumulative impacts from individual sites in local areas'**. This is further supported in the PPG on Air Quality which recognises that all development plans can influence air quality in a number of ways, for example through what development is proposed and where, and the provision made for sustainable transport.

95. The NPPF also states that '**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**' (NPPF 186). This is reinforced in the PPG.

When may air quality considerations be relevant?

96. The NPPF sets out that the presence of Air Quality Management Areas (AQMA) and Clean Air Zones should be taken into account in plan making. This is supported by the PPG which also says that it is important to take into account other areas including sensitive habitats or designated sites of importance for biodiversity where there could be specific requirements or limitations on new development because of air quality. Such situations may occur in urban or rural locations and are therefore matters which are likely to arise in many local plan examinations.

Initial assessment of a local plan for air quality matters

97. As part of your systematic reading of the plan, representations and evidence documents, you should consider whether the management of air quality in the plan is a matter for legal compliance or soundness. Legal compliance issues may occur for example with the Duty to Cooperate, sustainability appraisal or Habitats Regulations Assessment. Note down any queries, anomalies and potential soundness and legal compliance concerns. Questions to bear in mind may include: are there any identified AQMAs; are there Air Quality Action Plans (AQAPs) in place; are there Clean Air Zones; what are representors saying on air quality matters?

What is the role of the sustainability appraisal and Habitats Regulations Assessment in air quality matters?

98. The sustainability appraisal should address air quality matters in the baseline environmental assessment and include air quality within its objectives and environmental issues, in the assessment of likely effects, and in the reasons given for selecting the proposals in the plan and rejecting alternatives. Similarly, the Habitats Regulations Assessment should consider air quality issues such as within the environmental baseline, in the screening stage, any appropriate assessment, and proposed mitigation measures.

When should concerns about a local plan's approach to air quality be raised?

99. Where it is necessary for you in your understanding of a plan, it can be helpful to pose early focused questions to the LPA on its approach to air quality in the local plan. These should be specific, neutrally phrased but inquisitorial. To make for an efficient examination, there may be an opportunity for the LPA to address any weaknesses in this regard ahead of discussion at the hearing sessions, such as through the provision of further evidence or proposed main modifications.

How reliable is the technical evidence before you?

100. There are a number of cases detailed in the Air Quality ITM chapter relating to evidence reliability including where air quality data was found to have been deliberately manipulated (eg Cheshire East). In a local plan examination, relevant evidence should be considered in a proportionate way, taking into account any representations challenging the plan's findings on air quality. Alternative technical evidence may be provided by representors. Statements of Common Ground are useful in identifying the differences of position between the LPA and representors and to clarify any evidence gaps and can help to focus the discussion at hearing sessions. Early focused questions may be particularly helpful where evidence quality is challenged in representations. It is reasonable however to take the view that technical data provided by experts can be relied upon unless there is anything of significance that points to a potential problem.

Proposed development allocations

101. Development allocations may fall within, or may affect AQMAs or Clean Air Zones, either in their own right and cumulatively, or potentially give rise to new exceedances of air quality standards. The potential effects of proposed development on air quality ought to have been considered through the sustainability appraisal and Habitats Regulations Assessment where appropriate. Specific technical assessments may be provided, and mitigation measures may be identified. A question to bear in mind at the initial assessment or MIQ stages is whether any necessary mitigation measures are needed, and identified in the plan to address air quality implications of proposed allocations, either separately or in combination, and would the policies of the plan be effective to secure them?

Development management policies

102. A plan may contain specific air quality policies, relating to AQMAs and meeting the aims of any AQAPs and Clean Air Zones. There may also be forms of air quality mitigation sought through other policies. They may include provision for charging points for ULEVs, measures to drive modal shift, provision of cycleways, etc.

103. The NPPF in paragraphs 187 and 188 refers to the 'agent of change' principle. This is concerned with where the operation of an existing business or community facility could have a significant adverse effect on new development (including changes of use) in its vicinity, the applicant (or 'agent of change') should be required to provide suitable mitigation before the development has been completed. This is to ensure that new development should not result in unreasonable restrictions being placed on existing businesses and facilities. The NPPF also reminds us that the focus of planning policies should be on whether proposed development is an acceptable use of land, rather than the control of processes or emissions (where these are subject to separate pollution control regimes), and that planning decisions should assume that these regimes will operate effectively.

FLOOD RISK

National policy and guidance

104. The national policy approach to flood risk is summarised as follows in NPPF 159:

> "Inappropriate development in areas at risk of flooding should be avoided by directing development away from areas at highest risk (whether existing or future). Where development is necessary in such areas, the development should be made safe for its lifetime without increasing flood risk elsewhere".

105. NPPF 160 to 165 then set out a structured method to apply this approach in plan-making. More detailed guidance on the method is set out in the PPG chapter 'Flood risk and coastal change', first published in March 2014. A brief summary of the method is given below, but Inspectors should ensure that they are fully familiar with the whole of the PPG.

106. The method has two main elements. First a **sequential test** is carried out, the aim of which is to steer development to areas at lowest risk of flooding. The sequential test should be informed by a Strategic Flood Risk Assessment (SFRA)[24] which categorises land into four Flood Zones (1, 2, 3a & 3b) according to their probability of flooding.[25] Wherever possible, plans should accommodate all proposed development in Flood Zone 1. Where this is not possible, site allocations in Flood Zone 2 should be considered. Only where there are no reasonably available sites in Flood Zones 1 or 2 should the suitability of sites in Flood Zone 3 be considered.

107. Flood Zone 1 is suitable for all types of development. But if the LPA is considering allocating a site in Flood Zone 2 and/or 3, they must take into account the guidance on development vulnerability and flood zone compatibility set out in the PPG. Table 2

[24] There are two levels at which SFRA can be carried out – the level required depends on the extent to which necessary development can be accommodated outside flood risk areas. See PPG Ref ID 7-012-20140306.
[25] The definition of each Flood Zone is set out in Table 1 of the PPG: Ref ID 7-065-20140306.

within the PPG chapter classifies different land uses according to their vulnerability to flood risk[26], which has been integrated into the revised NPPF (July 2021) as a new Annex 3, with the classification of 'essential infrastructure' expanded to include all types of electricity generation, storage and distribution to capture changes in technology types. Table 3 indicates which land uses it is appropriate to allocate in Flood Zones 2, 3a and 3b, and which categories should not be allocated in those zones, based on their vulnerability classification[27]. For some categories of development Table 3 also prescribes that, before they are allocated in Flood Zone 2 or 3, the second element of the method – the **exception test** – should be applied.

108. NPPF 164-165 make it clear that for the exception test to be passed, it should be demonstrated that:

    a) the development would provide wider sustainability benefits to the community that outweigh the flood risk; and

    b) the development will be safe for its lifetime taking account of the vulnerability of its users, without increasing flood risk elsewhere, and, where possible, will reduce flood risk overall.

    Both elements of the exception test should be satisfied for development to be allocated or permitted.

109. It is important that the SFRA is undertaken at an appropriate point in the plan making process, and that it is not being retrofitted to meet a predetermined strategy or around proposed allocations. The SFRA should also consider flood risk from all sources and use up to date UK climate change projections (Environment Agency - Flood risk assessments: climate change allowances[28]).

What is the approach to development and coastal change set out in national policy?

110. National policy and advice are set out in the NPPF and PPG, which should be your starting point. Local plans in coastal areas may contain policies relating to land use and coastal change. The NPPF 153 sets out that policies should support appropriate measures to ensure the future resilience of communities and infrastructure to climate change impacts, such as providing space for physical protection measures. Local plan policies may seek to safeguard land for these purposes. There is a separate environmental permitting process for works within 16 metres of flood defences operated by the Environment Agency.

111. In coastal areas, local plans should take account of the UK Marine Policy Statement and marine plans. The Marine Maritime Organisation and the Environment Agency are relevant Duty to Cooperate bodies. The NPPF sets out that local plans should **reduce risk from coastal change by avoiding inappropriate development in vulnerable**

[26] PPG Ref ID 7-066-20140306
[27] PPG Ref ID 7-067-20140306
[28] This guidance was updated by the Environment Agency on 10th May 2022 to reflect updated peak rainfall allowances. The revised guidance comes into immediate effect (i.e. from 10th May), however to avoid delays to development plan documents and strategic flood risk assessments which are well advanced or were submitted for publication at the time the updated allowances were published, the Environment Agency has advised that it will base its advice on the previous guidance. LLFAs will be advised to take the same approach.

areas and not exacerbating the impacts of physical changes to the coast (171). The NPPF also says that **Integrated Coastal Zone Management should be pursued across local authority and land/sea boundaries, to ensure effective alignment of the terrestrial and marine planning regimes** (170). Whilst the risk of coastal flooding could be an issue in a local plan, this is not necessarily what the relevant Marine Plan may be concerned with.

112. Any area likely to be affected by physical changes to the coast should be identified in local plans as a Coastal Change Management Area (CCMA) and local plan policies should be clear as to what development will be appropriate in such areas and in what circumstances; and make provision for development and infrastructure that needs to be relocated away from CCMAs (NPPF 171). The NPPF and PPG detail what development may be appropriate in CCMAs. Coastal flooding may also occur however outside of designated CCMAs. Flood risk and coastal change management are included within the scope of strategic policies set out in the NPPF 20.

Dealing with flood risk in examinations

113. As part of the evidence base there should be a Strategic Flood Risk Assessment (SFRA) identifying each flood zone in the plan area, and evidence showing how flood risk vulnerability was taken into account in allocating all the proposed development sites. Where Table 3 of the PPG chapter indicates that the exception test needs to be applied, there should be evidence showing how it was passed.

114. If there are any shortcomings in the SFRA or in the LPA's approach to site allocations, it is likely that there will be representations from the Environment Agency and/or the lead local flood authority pointing them out. The Inspector will need to consider these representations carefully and raise any concerns with the LPA in the first instance. If the LPA are unable to resolve the Inspector's concerns it may then be necessary to hold an early hearing session to consider the matter[29].

115. Flood risk may be raised as an issue, often by local residents, when specific site allocations are considered at the examination. The Inspector will need to assess any evidence that is presented on its merits and consider whether it outweighs the SFRA and any site-specific evidence produced by the LPA. You should also bear in mind the guidance in NPPF 167 and footnote 55. This requires a site- specific flood-risk assessment to be carried out at planning application stage for all developments in Flood Zones 2 and 3, and for development on larger and more vulnerable sites in Flood Zone 1; and requires the provision of site-specific flood-risk mitigation and safety measures to be demonstrated before development is allowed in areas at risk of flooding.

The Inspector's report

116. Flood risk is a soundness matter. Any flood risk issues that are relevant to the soundness of the plan should be dealt with in the report in the same way another soundness issues. Flood risk may be a main issue in its own right, or it may be a matter to be considered when dealing with individual site allocations.

[29] See the section of this ITM Local Plan Examinations chapter on The Role of the Inspector in the Examination Process.

ANNEX 1 Environmental Assessment of Plans and Programmes Regulations 2004 ("SEA Regulations")

Schedule 2: Information for Environmental Reports

Regulation 12(3) requires the report to include such of the following information as may reasonably be required, taking account of (a) current knowledge and methods of assessment; (b) the contents and level of detail in the plan; (c) the stage of the plan in the decision-making process; and (d) the extent to which certain matters are more appropriately assessed at different levels in that process in order to avoid duplication of the assessment

1. An outline of the contents and main objectives of the plan, and of its relationship with other relevant plans and programmes.

2. The relevant aspects of the current state of the environment and the likely evolution thereof without implementation of the plan.

3. The environmental characteristics of areas likely to be significantly affected.

4. Any existing environmental problems which are relevant to the plan including, in particular, those relating to any areas of a particular environmental importance, such as areas designated pursuant to Council Directive 79/409/EEC on the conservation of wild birds and the Habitats Directive.

5. The environmental protection objectives, established at international, European Union or Member State level, which are relevant to the plan and the way those objectives and any environmental considerations have been taken into account during its preparation.

6. The likely significant effects on the environment, including short, medium and long-term effects, permanent and temporary effects, positive and negative effects, and secondary, cumulative and synergistic effects, on issues such as (a) biodiversity; (b) population; (c) human health; (d) fauna; (e) flora; (f) soil; (g) water; (h) air; (i) climatic factors; (j) material assets; (k) cultural heritage, including architectural and archaeological heritage; (l) landscape; and (m) the inter-relationship between the issues referred to in sub-paragraphs (a) to (l).

7. The measures envisaged to prevent, reduce and as fully as possible offset any significant adverse effects on the environment of implementing the plan.

8. An outline of the reasons for selecting the alternatives dealt with, and a description of how the assessment was undertaken including any difficulties (such as technical deficiencies or lack of know-how) encountered in compiling the required information.

9. A description of the measures envisaged concerning monitoring in accordance with regulation 17.

10. A non-technical summary of the information provided under paragraphs 1 to 9

The Planning Inspectorate

Local Plan Examinations

Public sector equality duty

Not yet updated to reflect December 2023 Framework (NPPF)

What's new since the last version

This topic section of the Local Plan Examinations chapter of the Inspector Training Manual (ITM) applies to the examination of plans submitted on or after **25 January 2019**. It provides advice on the approach to the Public Sector Equality Duty (PSED) in local plan examinations. The existing Local Plan Examinations chapter will continue to apply for plans submitted for examination prior to that date.

Other recent updates

For earlier updates please see the Change Log in the Library.

Contents

What is the PSED and what relevance does it have for Inspectors carrying out local plan examinations?

1. The Public Sector Equality Duty [PSED] flows from section 149 of the Equality Act 2010 ("the EA"). Section 149 requires 'public authorities' to have 'due regard' to what are known as the 'three aims' when exercising their functions.

2. PINS has accepted that an Inspector examining a local plan is carrying out a 'public function'[1] for the purposes of s149 and, in doing so, must personally comply with the PSED.

What is the Inspector's public function?

3. Your role is to consider whether the plan is sound as defined in legislation (s20 of the PCPA 2004[2]) and national policy. In this case, the 'public function' is the examination of the plan. It therefore follows that the PSED requires you to have 'due regard' when assessing whether or not the plan is sound and when considering any main modifications to make it so.

4. The requirement to have 'due regard' does not require you (or specifically empower you) to depart from s20 of the PCPA 2004, from national planning policy or the planning practice guidance which explains how the national planning policy should be implemented.

What are the 'three aims'?

5. The 'three aims'[3] are the need to:

   (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Act;

   (b) advance equality of opportunity between persons who share a 'relevant protected characteristic' and persons who do not share it;

   (c) foster good relations between persons who share a 'relevant protected characteristic' and persons who do not share it.

6. The 'relevant protected characteristics' are defined by s149(7):

   - Age

[1] 'Public functions' are functions which are functions of a public nature for the purposes of the Human Rights Act 1998 (s150(5) EA 2010).
[2] Planning and Compulsory Purchase Act 2004
[3] S149(1) EA 2010

- Disability
- Gender reassignment
- Pregnancy and maternity
- Race
- Religion or belief
- Sex
- Sexual orientation.

What does "to have due regard" mean?

7. This is set out in sections 149(3) - 149(5). Please make sure you are aware of this part of the Act. The equality duty is a duty "to have due regard to the need" to achieve the three aims. It is "not a duty to achieve a result".[4][5]

8. In R. (Brown) v. Secretary of State for Work and Pensions [2008] EWHC 3158 (Admin) the court considered what a relevant body has to do to fulfil its obligation to have due regard to the three aims. The 'Brown principles' have been accepted by courts in later cases. In summary they are:

    - The public authority must be aware of the duty under the Act
    - Due regard must be exercised before as well as at the time a decision is taken
    - It is not sufficient to justify it after the event
    - The duty is a continuing one
    - Due regard must be exercised consciously, with 'rigour' and an open mind, and not just as a tick box exercise
    - It is good practice to make specific reference to the duty, and
    - It is good practice to keep an adequate record showing that the duty was considered. If records are not kept, it may make it more difficult, evidentially, for a public authority to persuade a court that it has fulfilled the duty.

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[4] R (Baker) v Secretary of State for Communities and Local Government [2008] EWCA Civ 141

[5] In Hotak v London Borough of Southwark [2015] UKSC 30 - "…in the light of the word "due" in section 149(1), I do not think it is possible to be more precise or prescriptive, given that the weight and extent of the duty are highly fact-sensitive and dependant on individual judgment."

Due regard might also involve considering whether the LPA should be requested to provide more evidence/information[6].

What should the Inspector do to ensure that she or he has complied with the PSED?

9. To comply with the Brown Principles, it is important to have 'due regard' throughout the examination from the start until its completion. This can be achieved by taking the following steps:

(i) During your initial preparation consider whether the policies in the plan would have an effect on the three aims and anyone with a relevant protected characteristic. In addition, has the plan failed to address any relevant policy areas which it should reasonably have addressed, given the intended scope and purpose of the plan? Examples of relevant policy areas could include:

- age – need for, and supply of, housing for the elderly
- disability – need for, and supply of, accessible housing - and policies relating to accessible external spaces
- race – need for, and supply of, accommodation for gypsies and travellers.

(ii) If those with relevant protected characteristics are affected by the plan (or alternatively, if relevant policy areas have been omitted), ensure that appropriate questions are set out in the matters, issues and questions (MIQs) and then explored at the hearing sessions. Consider whether more evidence/information may be necessary.

(iii) Be alert to your PSED duties throughout the examination, and not only when reaching conclusions and in respect of main modifications.

(iv) Address the PSED as integral part of your reasoning in your final report, having regard to your role in assessing whether the plan is sound and legally compliant.

(v) Briefly summarise how you have complied with the PSED in the legal compliance section of your final report.

[6] "[T]he duty of due regard under the statute requires public authorities to be properly informed before taking a decision. If the relevant material is not available, there will be a duty to acquire it and this will frequently mean that some further consideration with appropriate groups is required" LDRA Ltd v Secretary of State [2016] EWHC 950 (Admin) – quoting an earlier judgment.

Does the PSED require that a particular outcome is achieved?

10. Having 'due regard' does not necessarily mean that a particular outcome or result must be achieved. Instead, the weight to be given to the equality implications, when reaching your conclusions about the soundness of the plan, is a matter of judgement for you.

11. The courts will not interfere with such judgements unless the decision was outside the limits of reasonableness. In Bracking, McCombe LJ approved the following extract from the judgment in R (Hurley & Moore) v Secretary of State for Business, Innovation and Skills [2012] EWHC 201 (Admin):

> "The concept of 'due regard' requires the court to ensure that there has been a proper and conscientious focus on the statutory criteria, but if that is done, the court cannot interfere with the decision simply because it would have given greater weight to the equality implications of the decision than did the decision maker. In short, the decision maker must be clear precisely what the equality implications are when he puts them in the balance, and he must recognise the desirability of achieving them, but ultimately it is for him to decide what weight they should be given in the light of all relevant factors".

However, your approach to the exercise of your PSED duties must be rigorous.[7]

How should questions be phrased in Matters, Issues, and Questions?

12. Questions should generally be phrased having regard to the tests of soundness. However, in some examinations Inspectors may find it helpful to ask a question to help bring PSED issues out into the open. This might be the case where the LPA has not produced an equality assessment. It could be asked as an initial question or in the MIQs. Two possible examples are set out below:

- In what way do the policies in the plan affect those with relevant protected characteristics as defined in s149 of the Equality Act 2010?

- In what way does the plan seek to ensure that due regard is had to the three aims expressed in s149 of the Equality Act 2010 in relation to those who have a relevant protected characteristic?

[7] Officials reporting to or advising Ministers/other public authority decision makers, on matters material to the discharge of the duty, must not merely tell the minister/decision maker what he/she wants to hear but they have to be "rigorous in both enquiring and reporting to them" Stuart Bracking & Ors v Secretary of State for Work and Pensions [2013] EWCA Civ 1345

How should the Inspector record that they have complied with the PSED in line with the 'Brown principles'?

13. Your compliance should be implicit from the approach you have taken from the start of the examination, including in the MIQs and at the hearing stage. In addition, you should briefly set out the issues you have considered against the PSED in your final report. Two illustrative examples of wording you might use are set out below:

    Example 1:

    Throughout the examination, I have had due regard to the aims expressed in S149(1) of the Equality Act 2010. This has included my consideration of several matters during the course of the examination including [eg - the provision of traveller sites to meet need and accessible and adaptable housing].

    Example 2:

    Throughout the examination, I have had due regard to the equality impacts of the [insert plan name] in accordance with the Public Sector Equality Duty, contained in Section 149 of the Equality Act 2010. This, amongst other matters, sets out the need to advance equality of opportunity and foster good relations between people who share a protected characteristic and people who do not share it.

    There are specific policies concerning specialist accommodation for the elderly, gypsies and travellers and accessible environments that should directly benefit those with protected characteristics. In this way the disadvantages that they suffer would be minimised and their needs met in so far as they are different to those without a relevant protected characteristic. There is, also, no compelling evidence that the RLP as a whole would bear disproportionately or negatively on them or others in this category.

How does an Inspector's PSED duty relate to the PSED duty of the LPA when preparing the plan?

14. As a public authority the LPA is required to comply with the PSED. It is not your role to assess whether or not the LPA has complied with the PSED. However, the LPA may have prepared an equality assessment or similar to help show their compliance. If so, this will form part of the evidence base and it could help inform the issues you wish to examine, the questions you ask and your assessment of soundness and legal compliance.

Does the PSED relate to the Inspector's consideration of whether the plan is legally compliant?

15. The PSED is most likely to apply when assessing soundness. However, there may be some circumstances where the PSED has relevance for legal compliance issues.

Is the PSED covered in any other chapters of the ITM?

16. The PSED is also covered in the chapters on Human Rights and Public Sector Equality Duty and on Gypsy and Traveller Casework.

Where can I find more advice on the PSED?

17. The Equality and Human Rights Commission publishes guidance about the PSED. Principal documents include:

    - The Essential Guide to the Public Sector Equality Duty
    - Meeting the Equality Duty in Policy and Decision-Making
    - Technical Guidance on the Public Sector Equality Duty: England

The Planning Inspectorate

Local Plan Examinations

Housing

Not yet updated to reflect December 2023 Framework (NPPF)

What's new since the last version

Changes highlighted in yellow made 10 January 2023:

- Addition at the end of para 161, advising that BCIS is a commonly cited source of data on development costs.

This topic section of the Local Plan Examinations chapter of the Inspector Training Manual (ITM) applies to the examination of plans submitted on or after **25 January 2019**. It provides advice on the role of the Inspector in the examination process. There is a separate Local Plan Examinations chapter for plans submitted for examination prior to that date (though please note that chapter is no longer being updated).

Other recent updates

- This chapter was previously updated on 24 February 2022 to provide reference to the guidance in the PPG on housing standards.

For earlier updates please see the Change Log in the Library.

Contents

Introduction

1. NPPF 60 states:

> "To support the Government's objective of significantly boosting the supply of homes, it is important that a sufficient amount and variety of land can come forward where it is needed, that the needs of groups with specific housing requirements are addressed and that land with permission is developed without unnecessary delay."

The NPPF's policies, taken as a whole, provide the means by which these objectives are to be met.

How does the presumption in favour of sustainable development affect planning for housing?

2. NPPF 11 b) states:

> "Strategic policies should, as a minimum, provide for objectively assessed needs for housing [and other uses], as well as any needs that cannot be met within neighbouring areas, unless:
>
> i. the application of policies in this Framework[1] that protect areas or assets of particular importance provides a strong reason for restricting the overall scale, type or distribution of development in the plan area; or
>
> ii. any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole."

3. Accordingly, when planning for housing, the LPA must first objectively assess the housing needs of their area. Their plan should then seek (as a minimum) to meet those needs in full, together with any unmet needs of neighbouring areas, unless any of the factors referred to in NPPF 11 b) i. or ii. prevent them from doing so.

4. Neither the phrase "as a minimum" in NPPF 11 b), nor the objective of "significantly boosting the supply of homes" in NPPF 60, places any obligation on LPAs to provide for more than their objectively-assessed need. Instead, NPPF 11 b) enables LPAs to provide for more than their objectively-assessed need, if they choose to do so.

[1] The policies referred to here are listed in NPPF footnote 7.

What is the difference between housing need, the housing requirement, and housing land supply?

5. **Housing need** is the amount of housing needed in an area over a given period, assessed separately from considering land availability or any other factors that might prevent need from being met.[2] It equates to the objectively-assessed need for housing referred to in NPPF 11 b).

6. **The housing requirement** is the amount of housing the plan actually seeks to provide during the plan period. It may be the same as, or higher or lower than, the housing need figure. Where it is lower than the housing need figure, this must be justified by evidence of factors which prevent the full housing need from being met within the plan area[3].

7. **Housing land supply** is the total amount of land identified in the plan for housing development during the plan period. It is usually made up of a number of components including completions since the start of the plan period, existing commitments, allocated sites, and (where justified) a windfall allowance. The housing land supply must meet the housing requirement for at least the first 10 years of the plan period[4]. In many cases the plan identifies a housing land supply that is greater than the housing requirement. This is usually desirable because it provides a "cushion", giving greater confidence that the requirement can be met.

8. Housing need, the housing requirement, and housing land supply are considered in more detail in the following sections of this chapter.

Assessing housing need

How should housing need be assessed?

9. NPPF 61 states:

> "To determine the minimum number of homes needed, strategic policies should be informed by a **local housing need assessment, conducted using the standard method in national planning guidance** – unless exceptional circumstances justify an alternative approach which also reflects current and future demographic trends and market signals. In addition to the local housing need figure, any needs that cannot be met within neighbouring areas should also be taken into account in establishing the amount of housing to be planned for."

[2] PPG Reference ID: 2a-001-20190220

[3] Unless the plan area is part of a wider area covered by a strategic development strategy or joint plan: for example, if it is a London borough. See the sub-section below headed 'Assessing housing need in London, and in other local authority areas covered by spatial development strategies or joint strategic policies'.

[4] See the sub-section below headed 'How should the plan identify an adequate housing land supply for the plan period?'

10. This approach to assessing housing need applies to all plans submitted for examination on or after 25 January 2019[5] (for advice on assessing housing need for plans submitted before that date, please refer to the ITM chapter entitled Local Plan Examinations (Submitted for Examination PRIOR TO 25 January 2019)).

11. For the great majority of LPAs, the standard method for assessing local housing need consists of three steps. An additional fourth step applies, to LPAs in the 20 most populous cities and urban centres only, after the expiry of the transition period arrangements applying to it. See the next two sub-sections below for detailed explanations of the three-step and four-step standard method respectively, and the transition period arrangements for the fourth step.

What is the standard method for assessing local housing need?

12. The standard local housing need assessment [LHN] method is set out and explained in full in the PPG on Housing and economic need assessment[6], and Inspectors should ensure they are fully familiar with it. In brief, for all LPAs apart from those in the 20 most populous cities and urban centres[7], it consists of three steps:

    1. From the 2014-based ONS national household projections[8], take the annual average household growth for the plan area over a 10-year period
    2. Multiply by an adjustment factor which reflects the relative affordability of housing in the area[9]
    3. Apply a "cap" if the result of steps 1 & 2 exceeds the existing plan's housing requirement[10] by more than 40%.

    These steps produce an annual average housing need figure, which must be multiplied by the number of years in the plan period to arrive at a housing need figure for the whole plan period[11].

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[5] By virtue of the transitional provisions at NPPF paragraph 220.
[6] PPG Reference ID: 2a-004-20201216 to 2a-009-20190220, which includes ID: 2a-033-20201216 to 2a-038-20201216 covering the circumstances where the cities and urban centre uplift applies.
[7] See the next sub-section for details of how the standard method applies to these.
[8] Paragraph 004 of the PPG chapter Housing and economic need assessment [PPG Reference ID:2a-004-20201216] specifically advises that the 2014-based household projections, rather than any more recent projections, should be used. The reasons for this are given in paragraph 005 of the PPG chapter.
[9] Using the annual affordability (median house price to median workplace-based earnings) ratios produced by ONS. See Tab 5c of this spreadsheet - 'Ratio of median house price to median gross annual (where available) workplace-based earnings by local authority district, England and Wales, 1997 to 2018' for the latest figures.
[10] Or the projected household growth figure, if (a) it is higher than the existing plan's requirement **and** (b) the existing plan's requirement was adopted more than five years ago and has not subsequently been reviewed with the review concluding that it does not need updating; or if (c) the existing plan does not set a housing requirement. See the explanation of Step 3 within the PPG at Reference ID: 2a-010-20201216.
[11] PPG Reference ID: 2a-012-20190220

13. The standard LHN assessment method identifies a minimum annual average housing need figure, not necessarily the full level of housing need for the plan area[12]. Paragraph 010 of the PPG indicates that in some circumstances it may then be appropriate to apply an uplift to the standard-method LHN figure to arrive at the full level of housing need. Circumstances in which such an uplift may be appropriate are considered in the section below headed 'Can an LPA's objectively-assessed housing need be lower or higher than the figure arrived at using the LHN standard method?'

How is the standard LHN assessment method applied in the 20 most populous cities and urban centres?

14. For local authorities in the 20 most populous cities and urban centres, the standard LHN assessment method consists of the three steps set out above, plus an additional fourth step, referred to in the PPG as a "cities and urban centres uplift". This fourth step consists of adding a 35% uplift to the figure generated by the previous three steps. However, the fourth step is subject to transition period arrangements, as follows[13]:

    - Authorities that have published their plan under Regulation 19 by 16 December 2020[14] may submit the plan to PINS up to six months from that date for examination under the existing three-step standard method, ie **without** the cities and urban centres uplift; and

    - Authorities that have published their plan under Regulation 19 after 16 December 2020 but no more than three months from that date may submit the plan to PINS up to six months from the Regulation 19 publication date, for examination under the existing three-step standard method, ie **without** the cities and urban centres uplift.

15. The method for working out which local authorities the cities and urban centres uplift applies to is set out in paragraphs 004 and 033 of the PPG[15]. Paragraph 033 makes it clear that LPAs may move in and out of the list as their populations change. Inspectors should therefore ensure that the evidence on an LPA's inclusion in, or exclusion from, the list is up to date.

16. As of December 2020, the local authorities to which the cities and urban centres uplift applies, subject to the transition period arrangements set out above, are:

    - Birmingham City Council
    - City of Bradford Metropolitan District Council
    - Brighton and Hove City Council
    - Bristol City Council

[12] PPG Reference ID: 2a-002-20190220
[13] See PPG Reference ID: 2a-036-20201216 for full details of the transition period arrangements.
[14] 16 December 2020 is the date on which the PPG was updated to include the cities and urban centres uplift.
[15] PPG Reference IDs: 2a-004-20201216 (under "Step 4 – cities and urban centres uplift") and 2a-033-20201216.

- Coventry City Council
- Derby City Council
- Hull City Council
- Leeds City Council
- Leicester City Council
- Liverpool City Council
- Manchester City Council
- Newcastle City Council
- Nottingham City Council
- Plymouth City Council
- Reading Borough Council
- Sheffield City Council
- Southampton City Council
- Stoke-on-Trent City Council
- City of Wolverhampton Council
- and all the LPAs in Greater London (ie the 32 London boroughs and the City of London).

17. In an area to which the cities and urban centres uplift applies, the PPG expects the full extent of housing need generated by the standard LHN assessment method, including the uplift, to be met within the area itself, rather than in surrounding areas, unless this would conflict with national policy and/or legal obligations[16].

18. Responsibility for the overall distribution of housing need across London lies with the Mayor, as opposed to individual LPAs. This means that, while the LHN for London (including the cities and urban centres uplift) is calculated on a borough-by-borough basis, there is no assumption that each borough's full level of need will be met within its own boundaries[17].

Is "local housing need" the same as "housing need" or "objectively-assessed housing need"?

19. While it is not entirely consistent in its use of terminology, the Housing and economic need assessment PPG chapter tends to use the term local housing need [LHN] to mean the figure derived from the standard method assessment[18], and to use "housing need" or "actual housing need" to refer to the full level of need, including any uplift to the standard-method figure arising, for example, as a result of PPG paragraph 010. This full need figure logically equates to the objectively-assessed need for housing referred to in NPPF 11 b).

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[16] PPG Reference ID: 2a-035-20201216
[17] PPG Reference ID: 2a-034-20201216
[18] This is consistent with the NPPF Glossary, which defines LHN as "the number of homes identified as being needed through the application of the standard method set out in national planning guidance, or a **justified** alternative approach". [**emphasis** added]

20. Terminology will no doubt evolve as the revised NPPF and the revised PPG are used in local plan examinations. To begin with, however, it may be best for Inspectors to use the term "housing need" as per the PPG, or "objectively-assessed need for housing" as used in NPPF paragraph 11 b), to refer to the full level of need for housing in the plan area (which will usually comprise either the standard-method LHN figure, or that figure plus any uplift which it may be appropriate to apply to it). In what follows, the terms "housing need" and "objectively-assessed need for housing" are used in that sense.

Is past under-delivery of housing factored into the standard-method LHN assessment?

21. Yes – in the standard method, the adjustment factor (at step 2) is intended, among other things, to take account of any past under-delivery of housing in the plan area[19]. The LPA will not need to take any further account of any under-delivery from **before** the base date of the standard method LHN assessment, when assessing housing need using the standard method. But that may be necessary if they are using an alternative to the standard method. For circumstances in which under-delivery **since** the base date of the assessment may need to be taken into account, see the sub-section below headed 'Should past shortfall in housing provision be taken into account when setting the housing requirement?'.

If their LHN assessment using the standard method involves the use of a cap, are LPAs required to plan for any housing need that exceeds the cap?

22. Where the LHN figure, assessed using the standard method, is capped, the PPG advises that:

> "The cap reduces the minimum number generated by the standard method, but does not reduce housing need itself. Therefore [plans] adopted with a cap applied may require an early review and updating to ensure that any housing need above the capped level is planned for as soon as reasonably possible."[20]

Where the minimum annual local housing need figure is subject to a cap, consideration can still be given to whether a higher level of need could realistically be delivered. This may help prevent authorities from having to undertake an early review of the relevant policies.

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[19] PPG Reference ID: 2a-011-20190220
[20] PPG Reference ID: 2a-007-20190220

23. Neither the NPPF nor the PPG contains any other mechanism for meeting housing need above the capped level. This indicates that, when preparing its current plan, an LPA is not required to provide for any need identified at steps 1 and/or 2 [the "pre-cap need"] which lies above the level of the step 3 cap, although it may choose to do so if a higher figure can realistically be delivered. The PPG clearly envisages that the way to deal with "pre-cap need" is through a plan review (unless the LPA itself chooses to provide for a level of need higher than the capped level).

Can an LPA's objectively-assessed housing need be lower or higher than the figure arrived at using the LHN standard method?

24. A LPA's objectively-assessed housing need cannot be lower than the figure arrived at using the LHN standard method because, as the PPG advises, the standard method determines the minimum number of homes needed in the plan area.[21]

25. But its objectively-assessed housing need can be higher than the standard-method LHN figure. This is made clear in paragraph 010 of the Housing and economic need assessment PPG chapter, which refers to the standard-method LHN figure as a "minimum starting-point" for determining housing need, and points out that the standard method does not attempt to predict the impact of future government policies, changing economic circumstances or other factors on demographic behaviour.

26. Accordingly, PPG paragraph 010 advises that there will be circumstances in which it is appropriate to consider whether actual housing need is higher than the standard method indicates. Examples of circumstances where this may be appropriate include:

- where growth strategies for the area that are likely to be deliverable are in place;
- where strategic infrastructure improvements are planned that would drive an increase in new homes;
- where an authority has agreed to take on unmet need from neighbouring authorities, as set out in a statement of common ground (see the sub-section below headed 'How should unmet need from neighbouring authorities be factored into the LPA's housing need assessment?').

27. The PPG also advises:

> "There may, occasionally, also be situations where previous levels of housing delivery in an area, or previous assessments of need (such as a recently-produced Strategic Housing Market Assessment) are significantly greater than the outcome from the standard method. Authorities will need to take this into account when considering whether it is appropriate to plan for a higher level of need than the standard model suggests."[22]

[21] PPG Reference ID: 2a-002-20190220
[22] PPG Reference ID: 2a-010-20201216

28. PPG paragraph 010 makes it clear that the Government supports "ambitious" LPAs who want to plan for growth. Provided there is evidence to support any uplift which the LPA has applied to the standard-method LHN figure, therefore, it should usually be regarded as sound unless there is clear evidence to the contrary. Paragraph 010 may also be used by other parties as a basis to argue that an uplift should be applied to the LPA's own assessment of housing need,[23] despite the LPA itself seeing no need for it. Where this occurs, Inspectors will need to consider whether the evidence before them indicates that such an uplift is necessary to make the plan sound.

29. The evidence supporting the need for an uplift is likely to be stronger if it reflects one or more of the factors set out in PPG paragraph 010. These include where a deliverable growth strategy or a Housing Deal is in place, or where major new infrastructure is planned. Clear evidence of other substantial future changes in economic circumstances, such as the arrival of a major new employer in the area, might also justify an uplift to the standard-method LHN figure. An uplift may also be justified where recent delivery levels, or a recent Strategic Housing Market Assessment (SHMA), indicate that need is significantly higher than the standard-method figure.

30. On the other hand, Inspectors will need to bear in mind that the standard LHN method is itself designed to address projected household growth and historic under-supply.[24] Accordingly, existing demographic and economic trends that are reflected in the ONS's population and household projections should not normally give rise to the need for an uplift to the standard-method figure. Similarly, evidence of higher-than-average house prices and rents, or suppressed household formation rates, is unlikely to justify an uplift because those factors will already have been addressed by step 2 of the standard method.

31. From the foregoing paragraphs it will be clear that in certain circumstances an uplift may need to be applied to an LHN figure that has previously been capped as part of the standard-method LHN assessment. While this may appear paradoxical, it does appear to be the intention of the revised NPPF and the PPG that any uplift to the standard-method LHN figure should be regarded as part of a LPA's objectively-assessed housing need.[25]

[23] Or a further uplift, if the LPA have already applied an uplift in their own housing need assessment.
[24] PPG Reference ID: 2a-002-20190220
[25] In this context it is relevant to note that paragraph 61 of the NPPF requires strategic policies to be **informed** by a local housing need assessment conducted using the standard method. It does not say that the standard method determines the total level of housing need that LPAs should plan for.

How should unmet need from neighbouring authorities be factored into the LPA's housing need assessment?

32. Paragraph 010 of the Housing and economic need assessment PPG chapter makes it clear that one of the circumstances in which it is appropriate to consider whether actual housing need is higher than the LPA's standard-method LHN figure, is where the LPA has agreed to take on unmet need from neighbouring authorities (see the sub-section above headed 'Can an LPA's objectively-assessed housing need be lower or higher than the figure arrived at using the LHN standard method?').

33. Where an LPA is proposing to accommodate unmet housing need from a neighbouring authority, the expectation is that this will have been agreed in a statement of common ground[26] (see the section of this ITM chapter on Duty to Co-operate).

When can authorities depart from the standard method for assessing housing need?

34. Authorities are not bound to use the standard LHN method to assess their housing need, but as NPPF paragraph 61 makes clear, exceptional circumstances are required to justify an alternative approach[27] and any such alternative approach must also reflect current and future demographic trends and market signals. In the light of this, Inspectors will need to consider very carefully whether any alternative approach is justified.[28]

35. The provisions of PPG paragraph 010 do not themselves constitute an alternative approach to the standard method, because they envisage that any uplift is applied to the LHN figure arrived at using the standard method.

When should the housing need assessment be carried out?

36. The housing need assessment should occur at the start of the plan-making process, but it should be kept under review and revised where appropriate.[29] One of the main inputs to the standard LHN method, workplace-based affordability ratios, are revised and published every year, usually in March.[30] This means that, in practice, the standard-method LHN figure may change significantly between the beginning of the plan-making process and the submission of the plan for examination. Inspectors should usually expect the submitted plan to be based on the latest available figures.

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[26] PPG Reference ID: 2a-014-20190220
[27] This does not apply to National Parks or the Broads Authority and in certain other circumstances (see the sub-section below headed Assessing housing need in areas where LPA and local authority boundaries do not align, or where data is unavailable).
[28] See PPG Reference ID: 2a-003-20190220
[29] PPG Reference ID: 2a-008-20190220
[30] PPG Reference ID: 2a-009-20190220

For how long can the housing need figure be relied upon?

37. An LPA's housing need figure calculated using the standard LHN method may be relied upon for two years from the date on which the plan is submitted for examination.[31] If the examination lasts for more than two years, the Inspector will need to consider if it is appropriate to ask the LPA to reassess the housing need figure. This may of course have implications for other aspects of the plan.

At examination, how should Inspectors test housing need assessments that depart from the standard method?

38. The PPG[32] advises that:

> "Where a strategic policymaking authority can demonstrate an alternative approach identifies a need higher than that identified using the standard method for assessing local housing need, the approach should be considered sound as it will have exceeded the minimum starting point."

39. This should not be taken to mean that an alternative approach is automatically sound if it produces a higher housing need figure than the standard LHN method. There is an onus on the LPA to "demonstrate" that the alternative approach identifies a higher figure. The Inspector will need to be satisfied that this has in fact been demonstrated, especially where there is evidence supporting the contrary view. Exceptional circumstances for taking the alternative approach must also be demonstrated in accordance with NPPF 61.

40. The PPG gives no examples of circumstances that might justify a housing need figure lower than that produced by the standard LHN method. Moreover, it says

> "Where an alternative approach results in a lower housing need figure than that identified using the standard method, the strategic policymaking authority will need to demonstrate, using robust evidence, that the figure is based on realistic assumptions of demographic growth and that there are exceptional local circumstances that justify deviating from the standard method. This will be tested at examination."[33]

41. This indicates that very robust evidence of exceptional local circumstances will be needed to justify a housing need figure that is lower than the figure arrived at through the standard LHN method.

[31] PPG Reference ID: 2a-008-20190220
[32] PPG Reference ID: 2a-015-20190220
[33] PPG Reference ID: 2a-015-20190220

Assessing housing need in areas where LPA and local authority boundaries do not align, or where data is unavailable

42. Some LPAs, including those whose boundaries do not align with local authority boundaries, cannot use the standard LHN method to calculate their housing need, because the necessary data is unavailable. These include the National Park Authorities and the Broads Authority, local authorities whose boundaries have changed in the last five years, and local authority areas where the samples are too small. The PPG advises that such authorities may continue to identify a housing need figure using a method determined locally, but in doing so will need to consider the best available information on anticipated changes in households as well as local affordability levels.[34]

Assessing housing need for re-organised local authorities

43. Where a local authority has been created by a recent re-organisation (for example, where two or more LPAs have been merged to form a single LPA), the data needed to calculate the LHN using the standard method may not be available on a consolidated basis for the whole of the new local authority area. In such circumstances, the PPG advises that, for plan-making, the new / re-organised LPA should use a LHN figure for its area which is at least the sum of the LHN figures for all the predecessor authorities it comprises[35].

Assessing housing need in London, and in other local authority areas covered by spatial development strategies or joint strategic policies

44. Greater London and a number of other areas are, or will be, covered by spatial development strategies [SDS]. Elsewhere, groups of LPAs may decide to prepare joint strategic policies. In either case, the housing need for the defined strategic area should at least be the sum of the LHN figures for each LPA within the area[36].

45. The SDS or the joint strategic policies will set the housing requirement for each LPA within the strategic area. Each LPA in the strategic area should use their housing requirement figure as set in the SDS or in the joint strategic policies. They should not seek to revisit their LHN or requirement figure when preparing their own strategic or non-strategic policies[37].

[34] PPG Reference ID: 2a-014-20190220
[35] PPG Reference ID: 2a-039-20201216
[36] PPG Reference ID: 2a-013-20201216
[37] PPG Reference ID: 2a-013-20201216

Assessing housing land availability

Why does housing land availability need to be assessed?

46. NPPF 68 advises that:

> "Strategic policy-making authorities should have a clear understanding of the [housing] land available in their area through the preparation of a strategic housing land availability assessment [SHLAA]. From this, planning policies should identify a sufficient supply and mix of sites, taking into account their availability, suitability and likely economic viability."

47. The SHLAA identifies how much land in the plan area is suitable, available and achievable for housing development during the plan period.[38] This in turn enables the LPA to assess whether it is able to meet its LHN in full. The SHLAA is therefore part of the evidence base which informs the housing supply that is provided by the plan.

How should the SHLAA be carried out?

48. The PPG chapter Housing and economic land availability assessment sets out a detailed method for assessing housing land availability.[39] Inspectors should ensure they are familiar with that guidance and should expect the LPA to have followed it, unless the LPA can show that they have followed an alternative and equally rigorous assessment procedure. There are four stages to the PPG method:

Stage 1: **identification of sites and broad locations**. This involves identifying all land that may have potential for development, including through a "call for sites". LPAs are urged to work with a wide range of interest groups and to identify a wide range of site sizes.

Stage 2: **site / broad location assessment**. This involves assessing each of the sites or broad locations identified at Stage 1 to gauge its suitability for housing development. The PPG sets out the factors and criteria that are likely to be relevant to that assessment. The likely timescale and rate of development for each site should also be assessed.

Stage 3: **windfall assessment (where justified)**. In accordance with NPPF 69 c) and 71, LPAs should also consider whether there is compelling evidence that windfall sites will provide a reliable source of housing land supply.

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[38] PPG Reference ID: 3-001-20190722
[39] PPG Reference ID: 3-006-20190722 to 3-025-20190722. The PPG method applies to both housing and economic land availability assessments.

Stage 4: **assessment review**. This involves preparing an indicative delivery trajectory based on the evidence gathered in stages 1 to 3. The trajectory should also be subject to an overall risk assessment. When complete, it will indicate whether or not there is sufficient suitable, available and achievable land available, at the right times, to meet the LPA's LHN figure. If it does not identify sufficient land, the LPA should consider whether the assumptions made at earlier stages of the assessment should be altered to enable more suitable, available and achievable land to be identified.

Setting the housing requirement

In what circumstances might the plan's housing requirement be higher than the objectively-assessed housing need figure?

49. In order to arrive at the housing requirement figure, an adjustment may need to be made to the objectively-assessed housing need figure to allow for any shortfall in housing provision since the plan was submitted for examination. It may also be appropriate to make an adjustment for vacant dwellings and second homes. In addition, it may be necessary to consider increasing the housing requirement to help deliver affordable housing. See the next three sub-sections for further guidance on each of these points.

Should past shortfall in housing provision be taken into account when setting the housing requirement?

50. Where the plan's housing requirement is derived from a housing need figure based on the standard LHN method, it is not necessary to consider any under-delivery of housing from **before** the base date of the standard-method LHN assessment when setting the housing requirement[40]. The base date of the plan should usually coincide with the base date of the standard-method LHN assessment.

51. However, if there is evidence during the examination (for example from annual monitoring) that there has been a shortfall in housing provision against the LHN-based housing requirement **since** the base date of the LHN assessment, but before the plan is adopted, the plan will need to specify how the shortfall will be made up over the rest of the plan period. The PPG expects it to be made up within the first five years after adoption unless a longer period can be justified.[41]

[40] See the sub-section above headed 'Is past under-delivery of housing factored into the standard-method LHN assessment?'.
[41] PPG Reference ID: 68-031-20190722

Why might adjustments need to be made for vacant dwellings and second homes?

52. When carrying out a SHMA it has become standard practice to make an allowance for the proportion of new dwellings that will be vacant at any given point in time due to normal market "churn" in the housing stock. This is to ensure that enough **dwellings** are provided to meet the growth in the number of **households** forecast by the SHMA. In some areas, it has also been found appropriate to make an allowance for the proportion of new dwellings that are likely to be sold as second or holiday homes and will therefore not be available to meet the assessed housing need.[42]

53. Neither the NPPF nor the PPG contains any advice on applying such adjustments to a housing need figure that has been assessed using the standard LHN method. Where the appropriateness of making such adjustments is a matter of dispute, Inspectors will need to consider the matter on the basis of the evidence before them. Where adjustment factor(s) are found to be appropriate, they should, wherever possible, reflect specific local evidence.

Why might an adjustment need to be made in order to help deliver affordable housing?

54. The Housing and economic need assessment PPG chapter requires an assessment of whether total affordable housing need is likely to be met by the plan (see the sub-section headed 'How should the plan ensure the provision of affordable housing?' below). If it is not, an increase in the plan's overall housing requirement may need to be considered, where this could help deliver the required amount of affordable housing.[43] The thinking behind this is that providing additional market housing would fund the provision of additional affordable housing.

55. If it is argued that the LPA should have made such an increase (and they have not), the Inspector will need to consider, firstly, if an increase is justified in principle by the evidence, and secondly, whether any such increase would actually be effective in delivering more affordable housing. The second point will require consideration of whether there would be any effective demand for additional market housing. In assessing this, it may be relevant to consider whether the LPA's housing need figure has been capped as part of the standard LHN method, as this might suggest that there is potential additional demand. Conversely, if the LPA's housing need figure has already been uplifted in accordance with PPG paragraph 010, there may be less scope for any further increase.

[42] See Annex 2 to this section of the ITM chapter for examples of reports where this matter has been considered.
[43] PPG Reference ID: 2a-024-20190220

In what circumstances might the plan's housing requirement be lower than the objectively-assessed housing need figure?

56. NPPF 11 b) makes it clear that plans should meet objectively-assessed needs for housing unless:

    i. the application of policies in the NPPF that protect areas or assets of particular importance [as listed in NPPF footnote 7] provides a strong reason for restricting the overall scale, type or distribution of development in the plan area; or

    ii. any adverse impact of meeting objectively-assessed needs for housing in full would significantly and demonstrably outweigh the benefits, when assessed against the policies in the NPPF taken as a whole.

57. The factors in criteria i. and ii. – often referred to as "constraints" – might therefore justify setting a housing requirement figure that is lower than the objectively-assessed housing need figure. Constraints might typically include large areas of Green Belt and AONB, extensive areas of land at risk of flooding or coastal erosion, or LPA boundaries drawn tightly around the built-up area which leave no or little capacity for new housing.

How should the Inspector decide if a housing requirement figure lower than the objectively-assessed housing need figure is justified?

58. If the housing requirement in a submitted plan is lower than the objectively-assessed housing need figure, the LPA will need to provide evidence that constraints, or other factors acknowledged by NPPF 11 b) i. & ii. mean that sufficient land cannot be identified to meet the housing need figure in full. The SHLAA (see the section above headed 'Why does housing land availability need to be assessed?' will usually be a central element in this evidence.

59. Inspectors should probe the evidence thoroughly to ensure that the LPA have investigated every possible source of housing land and assessed them using an effective and consistent procedure. If the Inspector finds that the LPA's assessment of housing land availability is inadequate, the LPA should be asked to rectify the deficiencies. This may result in more available land being identified, enabling a higher housing requirement figure to be set.

60. If, on the other hand, the Inspector is satisfied that no additional housing land is available and that the housing requirement figure is justified, the LPA will be expected to demonstrate that they have sought to ensure that their unmet housing need is met by neighbouring authorities, through the duty to co-operate process.[44]

[44] See the section of this ITM chapter on Duty to Co-operate

What is the difference between an annual average requirement and a stepped requirement?

61. The housing requirement may be set either as an annual average requirement, or as a "stepped" requirement. An **annual average requirement** means that the same number of dwellings is required to be provided in each year of the plan period. So, if the total requirement for the plan period is 3,000 dwellings and the plan period is 15 years, the annual average requirement will be 200dpa (= 3,000 divided by 15).

62. A **stepped requirement** means that the yearly requirement varies during the plan period: for example, the plan might require 100dpa to be provided in each of the first five years of the plan period (500 dwellings altogether), and 250dpa to be provided in each of the remaining 10 years (2,500 dwellings altogether).

63. The housing requirement should not be confused with the delivery trajectory (see the sub-section below headed 'How should Inspectors assess whether there is an adequate housing land supply for the plan period?'). The purpose of the delivery trajectory is to illustrate how the housing requirement will be delivered.

In what circumstances might a stepped housing requirement be justified?

64. The usual expectation is that the housing requirement is set as an annual average figure to be met in each year of the plan period. However, the PPG acknowledges that local plans may set stepped requirements where there is to be a significant change in the level of housing requirement between emerging and previous policies, and/or where strategic sites will have a phased delivery or are likely to be delivered later in the plan period.[45] Stepped requirements should be justified by evidence and should not be used to unnecessarily delay meeting identified development needs. They should also ensure that the planned housing requirements are met fully within the plan period.

How should the housing requirement figure be set out in the plan?

65. To provide clarity for future decision-makers[46], it is critical that the housing requirement is set out unambiguously in the plan's policies. This is especially important when the plan is setting a stepped requirement because it will be assumed that an annual average requirement figure will apply unless there is a policy statement to the contrary.

66. The plan's strategic policies should set out both the overall housing requirement for the plan period as a whole, and the requirement(s) that apply in each year of the plan period. For example:

[45] PPG Reference ID: 68-021-20190722

[46] For example, when assessing whether or not a five-year housing land supply exists. See the sub-section below headed 'Do plans need to identify a five-year supply of housing land?'.

> 15,000 dwellings are required to be provided between 1 April 2020 and 31 March 2035. The annual requirement is for 1,000 dwellings in each year of that period.

Or if a stepped requirement is being set:

> 15,000 dwellings are required to be provided between 1 April 2020 and 31 March 2035. The annual requirement is for 800 dwellings in each of the five years from 1 April 2020 to 31 March 2025, and for 1,100 dwellings in each of the ten years from 1 April 2025 to 31 March 2035.

67. The plan should also set out clearly (usually in the reasoned justification) the LPA's objectively-assessed housing need, and (a) in cases where the LPA's objectively-assessed need is not met in full by the plan's housing requirement, the level of that unmet need, or (b) in cases where the plan's housing requirement includes provision to help meet the unmet needs of neighbouring LPA(s), the level of that provision. Again, this is to provide clarity for future decision-makers.

Dealing with the housing requirement[47] when examining non-strategic ("Part 2") plans

Why is the housing requirement sometimes raised as an issue in non-strategic plan examinations?

68. A non-strategic or "Part 2" plan which makes site allocations and/or contains development management policies will not usually seek to set, or review, the housing requirement for the plan area. Inspectors may however find that representors ask them to reconsider the soundness of the housing requirement that has been set in an adopted strategic plan[48]. The representors will usually argue that there have been changes in circumstances which mean that the housing requirement should be higher (if they are promoting the allocation of additional sites) or lower (if they are opposing the allocation of one or more sites). The changes in circumstances they point to may include, for example, the introduction of a new method of calculating housing need, or the publication of new official household or population projections.

[47] This section deals with the issue of the housing requirement as it is that issue which is most commonly raised in non-strategic plan examinations. Similar principles will apply to employment and retail requirement issues, should they arise.

[48] In this section the term "adopted strategic plan" is used as shorthand for a Core Strategy or any other adopted plan which contains strategic policies which set the housing requirement.

What have the Courts said about the need for the Inspector to reconsider the housing requirement in non-strategic plan examinations?

69. The relevant judgments are Gladman Development Ltd v Wokingham BC [2014] EWHC 2320 (Admin), and Oxted Residential Ltd v Tandridge DC [2016] EWCA Civ 414.

70. In 'Wokingham', the High Court considered a challenge to the adoption, in 2014, of Wokingham Borough Council's site allocations plan. The plan allocated sites to meet a housing requirement that had been set in a Core Strategy adopted in 2010. In accordance with national planning guidance at the time of its adoption, the Core Strategy housing requirement was based on the figure in the Regional Strategy for the South East. But in 2012, the NPPF introduced a requirement for each LPA to make an objective assessment of its own full housing needs. The claimant, Gladman, argued that the Inspector who examined the site allocations plan could not lawfully determine whether it was sound without first ensuring that there had been an objective assessment of housing need, as required by the NPPF.

71. In the High Court Lewis J found that there was no such requirement in law or in the 2012 NPPF.

> "… the inspector … was not obliged to consider whether there was an objective assessment of need for housing before considering the examination of the [site allocations plan] to determine whether the allocation of sites was sound" (paragraph 71 of the judgment).

72. The Court of Appeal reached similar findings in 'Oxted Residential'. In that case, Tandridge District Council had, in 2014, adopted a Part 2 plan containing just development management policies. The Part 2 plan did not reconsider the housing requirement, which had been set in a Core Strategy adopted in 2008 and was, like Wokingham's, based on the figure in the South East Plan. A recent objective assessment of housing need carried out for the Council in 2013 showed a requirement figure far greater than that required by the Core Strategy. The claimant, Oxted Residential Ltd, argued that the Part 2 plan could not comply with the statutory requirements in the 2004 Act and with national policy in the 2012 NPPF (in particular the requirement to "boost significantly the supply of housing") unless it considered the district's objectively-assessed housing need.

73. The claimant's appeal was dismissed. Giving the Court of Appeal's judgment, Lindblom LJ quoted with approval (at paragraph 31) the High Court's finding in the 'Wokingham' case that:

> "There is nothing in the statutory scheme to prevent the adoption, for example, of a development plan document that is making allocations consistent with an adopted core strategy, simply because the core strategy may require revision or amendment to bring it into line with national policy".

74. While the 2012 NPPF was replaced by a new version in 2018 and revised again in 2019, there has been no subsequent caselaw which expressly contradicts the Courts' findings in 'Wokingham' and 'Oxted Residential'.

How should the Inspector deal with non-strategic plan examinations if the housing requirement is raised as an issue?

75. In 'Oxted Residential', Lindblom LJ said, at paragraph 38:

> … "the legislation contemplates a modular structure to the Development Plan whereby it can be constructed from a series of individual elements" … "[these] individual parts may be developed at different times against the backdrop of different national policies" … An inspector conducting an examination must establish the true scope of the development plan document he is dealing with, and what it is setting out to do. Only then will he be able properly to judge "whether or not, within that scope and within what it has set out to do", it is "sound" …[49]

76. When starting to examine a non-strategic or "Part 2" plan, therefore, you should ensure that you are clear about its intended purpose and its relationship with any other adopted or emerging plans. Refer first to the text of the plan itself and to the LPA's Local Development Scheme [LDS], which should make these points clear. But if the plan and the LDS are unclear about either or both points, you should raise them with the LPA as one of your initial questions. In some cases, it may subsequently be necessary to recommend a main modification to the plan to ensure that it sets out its purpose and its relationship with other plans clearly.

77. If you have established:

> (a) that there is an adopted strategic plan which sets the housing requirement for the area,
>
> (b) that the purpose of the plan before you is to set out non-strategic policies (such as site allocations and/or development management policies) in accordance with the adopted strategic plan,
>
> (c) that the plan does not involve the allocation for development of sites that are currently in the Green Belt, and
>
> (d) that a review of the housing requirement is not one of the explicit purposes of the plan before you

[49] Here Lindblom LJ is in part quoting from Dove J's findings on the 'Oxted Residential' case when it was first considered in the High Court: [2015] EWHC 793 (Admin).

then the starting assumption will be that the subsidiary plan will correctly be aiming to provide a supply of land to meet, or contribute towards meeting, the housing requirement in the adopted strategic plan. However, there may be circumstances in which it is justified for you to consider whether there is up to date and reliable evidence that the housing need/requirement will be reduced and that, consequently, the relevant strategic plan policy setting that requirement may be out of date[50].

78. Moreover, it is important to note that both 'Wokingham' and 'Oxted Residential' dealt with cases in which representors had contended that the evidence indicated that the housing requirement ought to be **higher** than had been established in the adopted strategic plan. Except in cases involving Green Belt allocations (see the section on these below), the Courts have not considered the question of whether non-strategic plans ought to reconsider the housing requirement when there is evidence that suggests that it ought to be **lower** than stated in the adopted strategic plan. In such circumstances it could be argued, for example, that some of the plan's site allocations are no longer justified.

79. If you are faced with these circumstances in a non-strategic plan examination, it may be advisable not to rely **solely** on the principle established in the 'Wokingham' and 'Oxted Residential' judgments. For example, as long as there are no reasons to find that any of the individual site allocations are unsound, a further consideration might be that allocating them all would provide greater certainty that housing need would be met, whether or not the evidence indicates that the housing requirement ought to be reviewed. Please discuss with your Inspector Manager, mentor and/or Professional Lead if you are in doubt about how to proceed and see the section below on the 'Aireborough' judgement.

80. Once you have established the scope of your examination, you should set it out clearly in your Guidance Note and bear it in mind when drawing up your Matters, Issues and Questions. You should politely prevent participants from drawing you into matters that are outside that scope, referring to the judgments in 'Wokingham' and 'Oxted Residential' if necessary. You may also need to deal with the matter briefly in your report. For example, the Inspector's report on the Tunbridge Wells Site Allocations Local Plan said:

[50] See the section on below about site allocations in the Green Belt if the plan before you includes any Green Belt allocations.

"… I have also considered whether the nature of the changes in evidence and policy that have taken place since 2010 mean that the SALP should allocate additional land that would have the effect of materially modifying the strategy in the adopted CS, or alternatively be withdrawn. However, having regard to the Wokingham judgment (and the recent finding in the Court of Appeal on the [Oxted Residential] case which confirms the correct approach) there is no basis in law[51] for me to consider this matter further. I have not considered any additional land for allocation (omissions sites) over and above that proposed to be allocated in the SALP, on the basis that the SALP meets the land requirements of the CS and there have been no circumstances in which my consideration of individual proposed site allocations in the remainder of this report have led to a shortfall of land against the requirement set out in the CS".

How should the Inspector ensure that a non-strategic plan which includes site allocations is consistent with the adopted development plan?

81. Regulation 8(4) of the 2012 Regulations requires that the policies contained in a local plan must be consistent with the adopted development plan, unless they are explicitly intended to supersede policies in the adopted plan. When examining a non-strategic plan, therefore, you will also need to satisfy yourself that the plan is consistent with the adopted strategic plan.

82. For example, a non-strategic site allocations plan will normally be expected to provide enough sites to ensure that the housing requirement in the strategic plan is met, and to distribute the allocated sites across the plan area in accordance with the strategic plan's spatial strategy. And the delivery trajectory of the allocated sites should enable the overall delivery trajectory in the adopted strategic plan to be met. If it does not, or if some of the allocated sites are unsound, it is likely that you will have to ask the LPA to identify additional sites for allocation, and recommend main modifications accordingly.

[51] Strictly speaking, this should have said "there is no **requirement** in law". As the inspectors in the Wokingham and Oxted Residential cases had not reconsidered the respective Core Strategy housing requirements, the judgments did not reach any finding on whether or not it would have been lawful for them to do so.

What does the Aireborough[52] judgment say about the justification for Green Belt site allocations in non-strategic plans?

83. The High Court judgment in the Aireborough case concerned a site allocations plan [SAP] submitted for examination in 2017, in which Leeds City Council sought to make allocations to meet the housing requirement established in their 2014 Core Strategy. The allocations included a large number of Green Belt sites. But in 2018 the Council submitted for examination a Core Strategy Selective Review [CSSR] which proposed a much lower housing requirement than the 2014 Core Strategy.

84. In response to the CSSR, the Council proposed a series of amendments to the SAP during the examination. The aim was to only allocate only sufficient sites, including only some of the Green Belt sites, to meet the 2014 Core Strategy housing requirement until 2023. The remaining Green Belt sites allocated in the SAP were to be deleted. The Inspectors broadly endorsed the Council's proposals and recommended main modifications to the SAP on that basis.

85. The Aireborough Neighbourhood Development Forum successfully challenged the adoption of the SAP. In paragraphs 98 to 107 of her judgment Lang J found that the Inspectors had failed to give adequate reasons why exceptional circumstances existed for the release of the allocated Green Belt [GB] sites, and that this failure was an error of law. The exceptional circumstances that the Inspectors were relying on to justify the GB release was the absolute level of housing need as set out in the Core Strategy. But the claimant and others had strongly submitted to the examination that GB land should not be released because, in the light of the emerging CSSR, there was no longer a need for GB release and thus no longer exceptional circumstances. This was probably the most controversial issue in the SAP process and there was a duty on the Inspectors to explain clearly their reasons on the issue. However, there was no clear explanation from the Inspectors as to why, in the light of the evidence which clearly showed there would be a drop in the requirement figure in the CSSR, they still decided there were exceptional circumstances justifying the level of GB release in the SAP.

What are the implications of the Aireborough judgment for the way in which Inspectors consider and justify Green Belt site allocations in non-strategic plans?

[52] Aireborough Neighbourhood Development Forum v Leeds City Council & Others [2020] EWHC 1461 (Admin)

86. It is important to be aware that the 'Aireborough' judgment does **not** imply that GB release in a site allocations plan cannot, as a matter of principle, be justified by exceptional circumstances, even in a situation where there is evidence that future housing need has fallen significantly since the housing requirement was set in the adopted strategic plan. The error of law was the failure by the Inspectors to explain their **reasons** for considering that exceptional circumstances existed in that particular case.

87. Nonetheless, the judgment means that you will need to take great care if you are examining a non-strategic plan which allocates Green Belt sites to meet the housing requirement established in an adopted strategic plan, and you are faced with evidence that future housing need is significantly lower than the adopted requirement. You cannot set aside that evidence by simply referring to the 'Wokingham' and 'Oxted Residential' judgments. Although Lang J did not consider those cases in her judgment[53], she did explicitly (in para 103 of the judgement):

> "reject [the Council's] argument that the job of the SAP was simply to allocate for the figures in the Core Strategy, and that the Inspectors therefore did not need to, and indeed should not, have looked at any other figures. The job for the Inspectors in deciding whether there should be GB release was to apply the [2012] NPPF, and in particular para 83. They therefore had to determine whether there were exceptional circumstances to justify GB release. If the level of need in the Core Strategy was undermined in emerging policy then that was a matter that they had to take into account and give reasons in respect of. The logical outcome of [the Council's] argument would be that any change of circumstance which undermined the Core Strategy requirement was irrelevant to the determination of exceptional circumstances in the SAP. In my view that cannot be right. The Inspectors had to take the up to date position in respect of all material considerations and that must include the actual level of housing requirement if the policy had become out of date".

88. In your report, therefore, you will need to explicitly consider the strength of the evidence indicating a reduction in future housing need, and weigh that evidence as one of the material considerations when you are deciding whether or not exceptional circumstances exist to justify the release of the allocated Green Belt sites. Other considerations may also be relevant to that decision and could in principle help to justify the release of Green Belt sites if the evidence indicates that their release is not needed in purely numerical terms. This is clear from paragraphs 98 and 99 of the 'Aireborough' judgment, where Lang J said:

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[53] The only mention of those cases in the 'Aireborough' judgment is in a quote from one of the Inspectors' documents at paragraph 22(g).

> "The matters advanced by the [Council's advocate] as to why a broad spread of housing would be desirable are, in my view, perfectly valid points which might as a matter of planning judgment justify the release of GB land even though there was no need for the release in terms of the crude housing supply figures. … However, it is quite clear that that is not … the justification in the Inspectors' report for the GB release. … [T]he Inspectors were justifying GB release on the basis of the "identified needs" and not issues of geographical spread and fair distribution".

89. Whether there are any other considerations which help to demonstrate that exceptional circumstances exist, and what those considerations are, will depend on the circumstances of each individual examination. For example, see the case of 'Compton Parish Council & Ors v Guildford Borough Council & Anor'[54] where the High Court considered a challenge to the adoption of the Guildford Local Plan.

90. This was a full local plan which set the housing requirement for the plan area and allocated sites, including Green Belt sites, to meet the requirement. A main modification to the plan significantly reduced the housing requirement from the requirement figure in the submitted plan, in the light of a revised SHMA which took into account the 2016-based household projections. But the Inspector did not recommend reducing the site allocations to match the new, lower requirement. As a result, there was a substantial surplus in the supply of housing land, including the Green Belt sites, over and above the revised requirement. The claimant argued that, in the situation of the reduced requirement, the Inspector had not shown that there were exceptional circumstances which justified the release of the Green Belt sites.

91. At paragraph 98 of his judgment, Sir Duncan Ouseley outlined the various considerations that the Inspector had taken into account in deciding whether exceptional circumstances existed:

> "The [Inspector]'s analysis of the need to release land from the Green Belt considered the need for housing, the need for land for business uses which could not be met other than by Green Belt releases, the lack of scope for increasing housing on land within the urban areas, the need for a sound and integrated approach to the proper planning of the area, and the need for flexibility, along with the local-level exceptional circumstances in relation to the major sites and issues. … The number of dwellings for which land supply was allocated, was determined in the first place by the OAN, but in addition a buffer had to be provided and a satisfactory delivery trajectory provided for; the selection of sites was affected by where the needs could best be met, with least impact on the Green Belt, catering for other needs, and making a coherent strategy …"

92. Paragraph 105 of the judgment concluded:

[54] [2019] EWHC 3242 (Admin)

> "… the prospect that a level of housing in excess of the OAN might be achieved can contribute to exceptional circumstances. … There would plainly be significant benefits, as the Inspector was well aware in this context, in terms of affordability, and affordable housing if more [housing] were provided. Taken as part of the whole group array of exceptional circumstances, there is nothing unlawful about that being seen as a useful even significant advantage, in line with NPPF housing policy, and as a contributor to exceptional circumstances."

93. The High Court's rejection of the challenge to the Guildford Local Plan demonstrates that Green Belt release may lawfully be justified on the basis of exceptional circumstances in a situation similar to that of the 'Aireborough' case, provided that the Inspector's report shows that all the relevant considerations have been taken into account.

94. On the other hand, it may be that you find that the reduction in housing need outweighs any potential benefits of continuing to allocate Green Belt sites, and consequently that exceptional circumstances to justify Green Belt release do not exist. That is also capable of being a lawful exercise of planning judgment, provided that all the relevant considerations are explicitly taken into account in your report.

Delivering the housing requirement

What are the roles of strategic and non-strategic policies in providing for housing?

95. NPPF 23 advises that strategic policies should

> "provide a clear strategy for bringing sufficient land forward, at a sufficient rate, to address objectively-assessed needs over the plan period […]. This should include planning for and allocating sufficient sites to deliver the strategic priorities of the area (except insofar as these needs can be demonstrated to be met more appropriately through other mechanisms, such as brownfield registers or non-strategic policies)".

Non-strategic policies in local plans and neighbourhood plans may also allocate sites [NPPF 28]. Further relevant guidance is at NPPF 60 and 68.

96. The "strategic priorities of the area" [NPPF 23] can reasonably be taken to include meeting the objectively-assessed needs for housing. Therefore:

- Inspectors examining full local plans should expect the strategic policies to identify the overall housing requirement and should expect the strategic and any non-strategic policies, in combination, to identify, and where appropriate allocate, a sufficient supply of land to meet that requirement.

- Inspectors examining local plans containing only strategic policies should expect those policies to identify the overall housing requirement and to identify and, where appropriate, allocate sufficient sites to meet that requirement, **unless** it has been demonstrated that all or some of those sites can be identified or allocated more appropriately through other mechanisms, such as brownfield registers or non-strategic policies in local plan(s) and/or neighbourhood plans.

- Inspectors examining local plans containing only non-strategic policies which allocate sites should refer to the LPA's Local Development Scheme (LDS)[55] and the strategic policies in any extant preceding plan, in order to understand the role of the plan they are examining. The strategic policies ought to set out the amount of housing which the non-strategic policies are expected to provide. The non-strategic policies should be examined on that basis.[56] If the relationship is unclear, the Inspector should seek clarification from the LPA at an early stage[57].

What is the relationship between the housing requirement in strategic policies and in neighbourhood plans?

97. NPPF 66 requires that, within the plan's overall housing requirement, strategic policies should set out a housing requirement figure for each designated neighbourhood planning area. Inspectors will need to ensure that this is done, and that the neighbourhood requirement figures reflect the plan's overall strategy for the pattern and scale of development and any relevant allocations, as NPPF 66 requires.

What are the requirements of national policy and guidance as regards identifying a supply of housing land for the plan period?

98. NPPF 68 requires that planning policies should identify a supply of:

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[55] As required by section 15 of the PCPA.

[56] See Gladman Developments Ltd v Wokingham BC [2014] EWHC 2320 (Admin) and Oxted Residential Ltd v Tandridge DC [2016] EWCA Civ 414. In 'Wokingham' it was found that a site allocation plan did not need to reconsider objectively assessed need provided that its scope was clearly limited to allocating sites to meet the need established in a Core Strategy. In the 'Oxted Residential' judgment Lindblom LJ stated [para 32]: "… the relevant policies in the [2012] NPPF, properly understood, do not require every development plan document within its broad definition of a "Local Plan" to fulfil all the requirements described in paragraph 47. Where one of the necessary purposes of a particular development plan document is to identify the level of housing need that requires to be met in the relevant area, "as far as is consistent with the policies set out in [the NPPF]", the provisions of the NPPF bearing on that purpose, including paragraphs 158 and 159 as well as paragraph 47, will be engaged. However, as Lewis J aptly put it [in Wokingham], "[properly] read, … [the NPPF] does not require a development plan document which is dealing with the allocation of sites for an amount of housing provision agreed to be necessary to address, also, the question of whether further housing provision will need to be made" (paragraphs 63 to 65 of Wokingham).
While those judgments were given in the context of the 2012 NPPF, similar principles continue to apply.

[57] See also the section below headed 'What are the key questions for Inspectors to examine in respect of housing land supply?'

a) specific, deliverable sites for years one to five of the plan period[58]; and

b) specific, developable sites, or broad locations for growth, for years 6-10 and, where possible, for years 11-15 of the plan.

99. Note that although NPPF 68 (a) requires policies to identify a supply of specific, deliverable sites for years one to five of the **plan period**, the PPG on Housing Supply and Delivery advises that:

> "In plan-making, strategic policies should identify a 5 year housing [land] supply from the **intended date of adoption of the plan**."[59]

The start of the plan period may be earlier than the intended date of adoption of the plan (in some cases by several years). Accordingly, national policy and guidance are not entirely clear in defining the period for which a five-year supply of specific, deliverable sites should be identified by planning policies. However, it is logical that the period should run from the intended date of adoption of the plan, as the PPG indicates. In the context of the "tilted balance" provisions of NPPF 11 (d) that apply to planning applications and appeals, there would be little benefit in identifying a five-year housing land supply from the beginning of the plan period if that lies one or more years in the past.

100. Inspectors should, therefore, follow the PPG advice and assess whether or not there is a five-year supply of specific deliverable sites from the intended date of adoption of the plan. For detailed advice on assessing the five-year housing land supply, see the section below headed "Five-year housing land supply".

101. NPPF 68 (b) then requires planning policies to identify a supply of specific, developable sites, or broad locations for growth, for years 6-10 and, where possible, for years 11-15 of the plan[60]. Taken literally, this means years 6-10 and 11-15 from the start of the plan period. But if the start of the plan period lies one or more years in the past, one or more of years 6-10 will fall within the five-year period for which specific, deliverable sites have to be identified, as that five-year period begins with the intended date of adoption of the plan. Accordingly, there is also some lack of clarity in national policy and guidance about what is meant by years 6-10 and 11-15.

102. However, this does not appear to have raised any significant problems in examinations, nor has it been the subject of any legal challenges. When dealing with the requirements of NPPF 68 (b), it is best for Inspectors to focus on whether the plan identifies a sufficient supply of housing land to meet the housing requirement for the remainder of the plan period (following on from the five-year supply of deliverable sites required by NPPF 68 (a)). Unless the plan period is very unusually short, the remainder of the plan period will almost certainly cover years 6-10, and will often cover years 11-15 as well, regardless of whether those years are counted from the start of the plan period or from the plan's intended date of adoption.

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[58] See the section below headed 'Five-year housing land supply'.
[59] PPG Ref ID: 68-004-20190722
[60] The same wording appears in the PPG: ID Ref 68-019-20190722.

What are the key questions for Inspectors to examine in respect of housing land supply?

103. In the light of the requirements of national policy and guidance as discussed above, the key questions for Inspectors to examine will usually be:

1) will there be a five-year supply of deliverable sites from the intended date of adoption? And
2) will the plan provide a supply of deliverable and/or developable sites and/or broad locations to meet the full housing requirement for the rest of the plan period?

If the answer to both these questions is 'yes', then the plan will comply with both NPPF 68 and the PPG advice on the five-year housing land supply [5YHLS].

104. In considering question (2) it should be noted that NPPF 68 only requires a supply of sites or broad locations for years 11-15 of the plan "where possible". Accordingly, if it is not possible to identify a supply for the whole of the plan period, the requirements of NPPF 68 will be met provided there is reasonable confidence that the requirement can be met up to the end of year 10 or later.

105. As part of the examination, Inspectors must examine these questions for any plan whose purpose includes the provision of a supply of housing land to meet its full housing requirement. For example, a full local plan will usually identify both the housing requirement and a supply of land to meet that requirement in full. And a site allocations plan will often identify a supply of land to meet the full housing requirement that has been established in an earlier strategic plan. In such cases, therefore, the Inspector must test whether the plan meets the requirements of NPPF 68.

106. If, on the other hand, the plan before you is a subsidiary plan (eg, a site allocations plan or an area action plan) which allocates **some** sites, but not **all** the sites required to meet the requirement, you will need to use your judgment in determining how far it is reasonable to expect the plan to meet the requirements of NPPF 68.

107. For example, the subsidiary plan might allocate only a small proportion of the housing land supply needed to meet the requirement, with most of the supply being allocated in other plan(s). You might consider that it would not be reasonable to expect that plan to provide a 5YHLS, or to meet the full housing requirement for the rest of the plan period. The same is likely to apply if you are dealing with a strategic plan which sets the housing requirement but allocates no sites, or only a few strategic sites, and relies on a subsequent allocations plan to provide all or most of the supply of land needed to meet the requirement. Another possibility could be that the plan provides a 5YHLS, but not enough sites to meet the full housing requirement for years 6-10 and 11-15.

108. In these and other similar cases where it appears that the plan may not be capable of meeting all the requirements of NPPF 68, your first step should be to clarify the intended purpose of the plan. It may be that the plan itself, and/or strategic policies in another plan (eg a Core Strategy), and/or the LDS, makes it clear what proportion of the overall housing requirement the plan is intended to provide, over what part of the plan period, and whether its purpose includes the provision of a 5YHLS. Otherwise, you will need to clarify these points with the LPA in your initial correspondence with them. You should then examine the plan on that basis, and make the basis on which you are examining it clear in your MIQs and in your report. This will enable future decision-makers to understand the extent to which the sites in the plan contribute towards meeting the requirements of NPPF 68, while not meeting them in full.

109. It is conceivable that a plan might be submitted for examination which sets the housing requirement but allocates no housing sites, or only a small number of strategic housing sites, and indicates that all or most of the housing supply will be brought forward in future non-strategic policies and/or through the LPA's brownfield sites register. In accordance with NPPF 23, the Inspector will need to test whether the LPA has demonstrated that it is more appropriate to bring forward all or part of the housing supply through those alternative means, rather than by identifying all the necessary land in the current plan. If satisfied on that point, the Inspector must make it clear in the examination report that the plan has been examined on that basis.

110. Spatial Development Strategies [SDS] set the housing requirement for their area, but the supply to meet the requirement will come forward through subsequent local plans. In areas covered by an SDS, the 5YHLS will therefore be tested when each local plan comes forward.

How should Inspectors assess whether there is an adequate housing land supply for the plan period?

111. The plan should identify all the components which make up its housing land supply. Typically, these will include:

- Dwellings completed since the start of the plan period[61] ("completions");
- Dwellings with planning permission, or with a resolution to grant permission subject to a planning obligation ("commitments");
- Sites proposed for allocation in the plan ("allocations");[62]
- Broad locations for growth, where appropriate (and only from year 6 onwards); and
- A windfall allowance, where justified.

112. Planning policies should identify a sufficient supply and mix of sites, taking into account their availability, suitability and likely economic viability [NPPF 68]. Strategic policies should include a trajectory illustrating the expected rate of delivery over the plan period [NPPF 74]: in other words, a graph or table setting out how many dwellings in total are expected to be delivered in each year of the plan period. NPPF 74 also advises that "plans should also consider whether it is appropriate to set out the anticipated rate of development of specific sites". This is most likely to be appropriate for large-scale or strategic sites.

113. As noted above, NPPF 68 requires planning policies to identify "specific, deliverable sites" to meet the five-year housing land supply [5YHLS] requirement (detailed guidance on this is provided in the next section), and "specific, developable sites or broad locations[63] for growth" to meet the requirement for years 6-10 and, where possible, for years 11-15 of the plan. For year 6 onwards, therefore, any specific, allocated sites or broad locations forming part of the supply must meet the definition of "developable" in the NPPF Glossary. The PPG on Housing Supply and Delivery provides guidance on how a developable site should be demonstrated[64], and the ITM chapter on Housing provides further advice on how to apply the definition.

114. Some plans identify a housing land supply greater than the housing requirement for the period in question, thereby providing a "cushion" or "headroom" over and above the requirement. For example, this may be with the aim of providing greater confidence that the requirement can be met, to allow for the possibility that some allocated sites may not be developed if there are problems with deliverability. There is nothing in national policy or guidance that specifically requires a "cushion". Whether or not one should be provided, and its size, are matters of planning judgement for the LPA – and then for the Inspector when assessing soundness.

115. Alongside the overall trajectory required by the NPPF, Inspectors will usually find it helpful to ask the authority to produce a detailed spreadsheet setting out how many dwellings each committed and allocated site is expected to deliver in each year of the plan period, and what any windfall allowance for each year is (guidance on what constitutes a realistic windfall allowance is at NPPF 71.) The spreadsheet should be accompanied by evidence to justify the delivery information it contains, which may include both generic assumptions and site-specific evidence, as appropriate.

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[61] The start of the plan period will usually coincide with the base date for the housing need assessment.
[62] Inspectors should ensure that allocated sites are not also included as commitments, so there is no double-counting.
[63] The PPG also makes it clear that broad locations may include a windfall allowance – see PPG ID Ref 3-023-20190722.
[64] PPG Reference ID: 68-020-20190722

116. Use of the spreadsheet will help focus discussion on the sites' availability, suitability and likely economic viability, and on whether the authority's expectations are reasonable. Any necessary adjustments should be made to the spreadsheet as the discussions proceed. The final version of the spreadsheet will then form the basis for the delivery trajectory in the adopted plan. Inspectors should also consider whether, in the interests of fairness, representors should be given the opportunity to make written comments on the spreadsheet. In particular, this may be appropriate if the spreadsheet was produced after the plan was submitted, or if it is substantially altered during the examination.

117. The Inspector should test the information in the spreadsheet and the accompanying evidence in a proportionate manner. For many of the sites listed, it may be possible to rely on the information and evidence provided by the LPA. But where those appear questionable, or there is evidence to contradict that of the LPA, it is likely to be necessary to explore these key points:[65]

- Is the expected date for the first completions on the site realistic, taking account of any relevant available evidence, such as on constraints, the status of any planning applications, and developer intentions?
- Is the expected rate of development (= number of dwellings completed each year) realistic, taking into account local market evidence and – for large sites – the likely number of developers and "outlets" (= distinctive parts of the development, each of which is usually built out by a separate developer)?
- Are any generic assumptions, such as on lead-times between allocation or planning permission and first completions, justified?

Do plans need to identify a specific proportion of smaller housing sites?

118. At least 10% of the plan's housing requirement should be accommodated on sites of one hectare or less, unless strong reasons can be shown why this target cannot be achieved [NPPF 69 a)].

119. NPPF 69 a) refers to the identification of 'land' and this can reasonably be argued to include completions and planning permissions, where their supply is relied upon in the plan, as well as allocated sites. If there is robust evidence to suggest that some are likely to be on sites of less than one hectare, it may be appropriate to also rely on future windfall developments. The NPPF also specifically states that sites on the brownfield register can also contribute.

[65] Annex 1 to this section of the chapter sets out some more detailed questions that could be asked when testing deliverability.

Five-year housing land supply

Do plans need to identify a five-year supply of housing land [5YHLS]?

120. One of the requirements of NPPF 68 is that planning policies should identify a sufficient supply of specific deliverable sites for years one to five of the plan period, with an appropriate buffer as set out in NPPF 74. This is referred to as a five-year housing land supply [5YHLS].

121. In all cases where the plan's purpose includes the provision of a supply of housing land to meet its housing requirement, Inspectors will need to test specifically whether or not the plan provides a 5YHLS in accordance with NPPF 68. This is likely to apply to most examinations[66].

From what point in time should the 5YHLS be assessed?

122. Although NPPF 68 refers to "years one to five of the plan period", the 5YHLS should be assessed **looking forward five years from the intended date of adoption of the plan**, as no practical purpose is served by assessing it from any earlier date. This is confirmed by the PPG on 'Housing Land Supply and Delivery'[67].

123. LPAs' housing delivery statistics are usually compiled on an annual basis from 1 April to 31 March the following year. For convenience, therefore, it is often sensible to define the 5YHLS assessment period as the five years beginning on 1 April nearest to the plan's intended adoption date.

124. The Inspector should set a cut-off date for evidence as close as possible to the intended adoption date. In practice this will usually be several months before the plan is adopted: in most examinations the cut-off date will coincide with the deadline for the submission of hearing statements. Nonetheless the evidence provided should be sufficient to provide confidence that there will be a 5YHLS from the intended date of adoption.

125. Testing the housing land supply for the first five years from the intended adoption date is especially important because the absence of a 5YHLS, in an application or appeal situation, triggers the provisions of NPPF 11 d) (see the ITM Housing chapter). As well as testing the evidence to ensure that the 5YHLS identified in strategic policies is sound, Inspectors will, when necessary and wherever possible, recommend main modifications to ensure that the plan identifies a 5YHLS from its date of adoption[68].

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[66] If it is unclear whether or not the plan's purpose includes the provision of a 5YHLS, the Inspector should seek to establish this at an early stage of the examination. See the sub-section above headed 'What are the key questions for Inspectors to examine in respect of housing land supply?' for further advice on this point.
[67] PPG Reference ID:68-004-20190722
[68] PPG Reference ID: 68-008-20190722

126. Detailed guidance on calculating the 5YHLS is provided in the PPG on Housing supply and delivery from paragraph 022 onwards. Inspectors should ensure they are familiar with this guidance.

What is the process for assessing whether or not there will be a 5YHLS from the intended date of adoption?

127. The process essentially consists of establishing on the one hand the r**equirement** for housing land over the first five years from the intended date of adoption of the plan ("the 5YHLS requirement"), and on the other hand the **supply** of deliverable sites to meet that requirement, in accordance with NPPF 68.

How is the 5YHLS requirement calculated?

128. NB: Worked examples of the advice in this sub-section and the following **three** sub-sections are provided in Annex 3 below.

129. The requirement which the 5YHLS must meet is: the sum of the plan's housing requirement[69] for each of the first five years from the intended date of adoption of the plan, plus an appropriate buffer in accordance with NPPF 74.

130. If the plan's housing requirement is expressed as a straightforward annual average, the sum of the plan's housing requirement for the first five years from the intended date of adoption will simply be five times the annual average. But if the plan sets a stepped requirement, the relevant sum will be the total of the specific requirements for each of the first five years from the intended date of adoption. In either case, if the plan's housing requirement is expressed as a range, the 5YHLS requirement is calculated using the bottom end of the range[70].

131. In calculating this sum, any shortfall in delivery since the base date of the plan period should also be taken into account. Similarly, any over-supply since the base date may also be taken into account. See the next two sub-sections for advice on these points.

132. The buffer is an additional 5% unless:

- there has been significant under-delivery of housing over the previous three years, in which case the buffer is an additional 20%; or
- the authority wishes to "confirm" its 5YHLS position for a set period after adoption, in which case the buffer is an additional 10%, or is 20% if the previous bullet point also applies. The process of "confirming" a 5YHLS, and its implications for the buffer, are covered in the sub-section below headed 'Demonstrating a confirmed five-year supply of housing land'.

[69] PPG Reference ID: 3-035-20180913.
[70] PPG Reference ID: 3-037-20180913

133. “Significant under-delivery of housing” is defined in NPPF footnote 41 as delivery below 85% of the housing requirement over the previous three years, as measured by the Housing Delivery Test [HDT]. The definition for the HDT in the Glossary of the revised NPPF (July 2021) has been updated to clarify that it measures “net homes delivered” in a local authority area against the homes required, using national statistics and local authority data. The HDT is carried out by Government and the results for each local planning authority in England are published annually in November. The requirements of the HDT in the NPPF also include that, where the HDT is below 95%, the authority should prepare an action plan to address the reasons for the shortfall and the actions to increase delivery (NPPF 76). NPPF 222 sets out that the HDT will apply the day following the publication of the results, at which point they supersede previously published results. Until new HDT results are published, the previously published results should be used.

134. From 2020, where the HDT is below 75% the presumption in favour of sustainable development must be applied (NPPF 222 b)). For the transitional years 2018 and 2019, this threshold was set at 25% and 45% respectively. However, the transitional arrangements for the introduction of the HDT from November 2018, which were set out in Annex 1 of the NPPF, have now ended: the 25% threshold for 2018 to 2019 has been deleted from NPPF 222, along with the deletion of references to the transitional arrangements in footnote 8 and footnote 41. NPPF 222 a) and b) set out the percentage of delivery that was below the housing required in 2019 and 2020 respectively.

135. The PPG chapter Housing supply and delivery covers the HDT and HDT Action Plans from paragraphs 036 to 054. The PPG should be read in conjunction with the Government’s Housing Delivery Test measurement rule book, which sets out the methodology for calculating the HDT results and the annual measurements are published on the Government’s website, Housing Delivery Test. Further guidance is also given in the ITM Housing chapter. Inspectors should check the current position as necessary.

How should any past shortfall in completions against the plan’s housing requirement be dealt with when calculating the 5YHLS requirement?

136. A plan’s base date (the date from which its housing requirement runs) may precede its date of adoption. If housing delivery fails to meet the housing requirement in the period between the base date and the date of adoption, there will be a shortfall in provision at the date of adoption. PPG paragraph 031 advises that any such shortfall should be added to the plan requirement for the next five years (that is, the 5YHLS assessment period), unless a case can be made to apply it over a longer period:

> "The level of deficit or shortfall will need to be calculated from the base date of the adopted plan and should be added to the plan requirements for the next 5 year period (the Sedgefield approach), then the appropriate buffer should be applied. If a strategic policy-making authority wishes to deal with past under delivery over a longer period, then a case may be made as part of the plan-making and examination process rather than on a case by case basis on appeal"[71].

137. Note that any shortfall should only be counted from the base date of the plan, and should be calculated using the plan's housing requirement for the years in question. Any shortfall that occurred before the plan's base date should not be included.

Can past over-supply be counted against planned requirements?

138. Under the heading:

'How can past over-supply of housing completions against planned requirements be addressed, including when calculating the 5YHLS requirement?'

paragraph 032 of the PPG on 'Housing supply and delivery' states:

> "Where areas deliver more completions than required, the additional supply can be used to offset any shortfalls against requirements from previous years."

This paragraph is silent on whether or not over-delivery since the base date of the plan / housing requirement can be used to proportionately reduce the subsequent housing requirement over the rest of the plan period. [72] However, that would be a logical and reasonable approach for Inspectors to take. Indeed, a common calculation in local plan examinations is to subtract the number of completions since the plan / housing requirement base date from the total requirement over the plan period to arrive at a residual requirement from the current date until the end of the plan period. There is no national policy or guidance on whether past over-delivery should be factored in over the full lifetime of the plan or over a shorter period (eg to reduce the 5-year requirement) and this will be a matter for you to judge based on a consideration of any arguments put to you.

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[71] PPG Reference ID: 68-031-20190722

[72] Tewkesbury BC v SSHCLG [2021] EWHC 2782 (Admin). See in particular para.47 of that judgement which states (in relation to a planning appeal), "The Framework does not say, nor does the PPG, that oversupply must be taken into account in all circumstances. For the reasons already given it is not for the court to supplement or add to the existing text of the policy. The question of whether or not to take into account past oversupply in the circumstances of the present case is, like the question of how it is to be taken into account, a question of planning judgment which is not addressed by the Framework or the PPG and for which therefore there is no policy. No doubt in at least most cases the question of oversupply will need to be considered in assessing housing needs and requirements. The fact this may be the case does not require the court to provide policy in relation to this issue which the policy maker has chosen not to include".

When should the relevant buffer be applied when calculating the 5YHLS requirement?

139. Paragraph 022 of the PPG on 'Housing supply and delivery' advises:

> "To ensure that there is a realistic prospect of achieving the planned level of housing supply, the local planning authority should always add an appropriate buffer, applied to the requirement in the first 5 years (including any shortfall)…"

140. Accordingly, any past shortfall which you have agreed should be taken into account in the 5YHLS requirement must be included in the requirement figure **before** the appropriate buffer is applied.

141. By extension it would also be logical/reasonable to apply the buffer **after** any previous over-supply which you have agreed should be taken into account has been included in the requirement figure.

142. See the worked examples at Annex 3 for further guidance on when and how to apply the buffer. For advice on what the appropriate buffer should be, see the sub-section 'How is the 5YHLS requirement calculated?' above.

How should the Inspector assess whether or not there will be sufficient supply to meet the 5YHLS requirement?

143. The advice in the sub-sections above entitled 'How should the plan identify an adequate housing land supply for the plan period?' and 'How should Inspectors assess whether there is an adequate housing land supply for the plan period?' is also relevant when considering whether there will be sufficient supply to meet the 5YHLS requirement.

144. Bear in mind that for a site to be included in the 5YHLS, the NPPF requires it to be "deliverable". There is guidance on what constitutes a deliverable site for plan-making in the PPG on Housing Supply and Delivery[73]. The ITM chapter on Housing (in the sub-section headed 'Which sites can be included in the five-year supply?') also provides relevant advice.

[73] PPG Reference ID: 68-007-20190722

145. There is no specific guidance in the NPPF or the PPG on whether or not a windfall allowance can be included in the 5YHLS. The requirement in NPPF 68(a) that plans should identify a supply of **specific**, deliverable sites for years one to five might be taken to suggest that they cannot. Similarly, the definition of "deliverable" sites in the NPPF Glossary includes a requirement that such sites should be available **now**, which would appear to exclude windfall sites. On the other hand, the PPG on 'Housing supply and delivery' appears to indicate that windfalls may be taken into account when LPAs are seeking to confirm their 5YHLS through an annual position statement [APS][74]. If the PPG allows windfalls to be included in the 5YHLS for the purposes of an APS, it is hard to see the logic of excluding them in the plan-making context.

146. Inspectors will need to exercise their planning judgment with caution if this question arises in an examination. If you accept that a windfall allowance may, in principle, be included in the 5YHLS, there will also need to be compelling evidence (including a track-record of previous windfall provision) to support the specific level of windfall allowance proposed by the LPA. See NPPF 71.

What should the Inspector do if the evidence indicates that there will not be a 5YHLS on adoption, or that the plan will not meet the full housing requirement for the rest of the plan period?

147. If the plan's purpose includes the provision of a supply of housing land to meet its full housing requirement (see the section above headed 'What are the key questions for Inspectors to examine in respect of housing land supply?'), the Inspector should, wherever possible, recommend main modifications to ensure that the plan provides a 5YHLS[75] and meets its full housing requirement for the rest of the plan period if possible, or at least up to the end of year 10. The first step is to ask the Council to consider how to address the situation. Possible responses may include:

- The LPA identify additional deliverable and/or developable housing sites or broad locations: this may require a pause in the examination while they carry out this work and then carry out public consultation and sustainability appraisal (if required);
- The LPA identify additional supply by relaxing their windfall policies, if the evidence supports this;
- If there has been a shortfall in housing provision since the base date of the plan, it could be spread over the remaining plan period ('Liverpool' method) rather than being made up within the 5YHLS assessment period;

[74] PPG Reference ID: 68-014-20190722
[75] See PPG Reference ID: 68-008-20190722

- The housing requirement could be “stepped” to match the five-year requirement to the available supply (see the sub-section above headed ‘In what circumstances might a stepped housing requirement be justified?’). This will only be possible if the plan before you is also setting the housing requirement;

- A review mechanism could be considered if the concerns relate to the later part of the plan period. NPPF 68 only requires a housing land supply for years 11-15 to be identified “where possible”, so its requirements will be met provided there is a 5YHLS and sufficient supply to meet the full housing requirement up to the end of year 10. But if there is only enough supply to meet the requirement for a shorter period, or if a 5YHLS is not provided, you will need to make a planning judgment as to whether the benefits of getting a plan in place outweigh that specific conflict with national policy, so that the plan overall is sound subject to an early review.

148. If the plan’s purpose is to provide a supply of land which contributes towards the 5YHLS and/or the housing requirement for the rest of the plan period, but not to meet the 5YHLS or the requirement in full, you will already have made it clear that you are examining the plan on that basis. If the plan will provide the intended level of supply (in accordance with any relevant adopted strategic policies), it is likely that it will be sound in terms of housing provision. But if the evidence indicates that the plan will not achieve its intended level of supply, you will need to decide whether or not it is necessary for soundness to recommend main modifications to address this. See the previous paragraph for possible responses if you consider that this is necessary.

Demonstrating a confirmed five-year supply of housing land

149. NPPF 75 says that a 5YHLS, with the appropriate buffer, can be demonstrated where it has been established in a recently-adopted plan or in a subsequent annual position statement. Detailed advice on this process is set out in the PPG chapter Housing supply and delivery, where it is described as “confirming” the 5YHLS.[76] The fact that a 5YHLS has been “confirmed” using this process will then be a material consideration in subsequent applications or appeals. The process is based on a recommendation of the Local Plans Expert Group, the aim of which is to reduce time-consuming disputes in appeals over the existence of a 5YHLS.

150. If the LPA wishes to confirm their 5YHLS through a recently adopted plan, they must make that clear as part of the plan-making process, and must engage at Regulation 19 stage with developers and others with an interest in housing delivery[77]. At the outset of the examination, the Inspector should check whether or not the LPA has done these things. If it has, the Inspector must make it clear to participants, when setting out the matters, issues and questions, that this matter will be considered as part of the examination.

[76] PPG Reference ID: 68-009-20190722 to 68-018-2090722
[77] See PPG Reference ID 68-010-20190722

151. Where a plan is intended to confirm the 5YHLS, the 5YHLS requirement must include a minimum **10%** buffer, or a 20% buffer if there has been significant under-delivery of housing over the previous three years[78]. Evidently, a plan that is seeking to confirm the 5YHLS will need to identify sufficient sites to ensure that a 5YHLS will be achieved. The Inspector will need to make a thorough assessment of their deliverability (see the sub-section above headed 'How should Inspectors assess whether there is an adequate housing land supply for the plan period?') in order to reach a conclusion on whether or not the plan can demonstrate a 5YHLS from the intended date of adoption. To provide certainty for future decision-makers, that conclusion will need to be set out in the Inspector's report using the form of words provided in the PINS examination report template.

152. NPPF footnote 40 sets out the period – which varies depending on the date of the plan's adoption – during which confirmation of the 5YHLS through a "recently-adopted plan" remains valid. If the LPA wish to confirm their 5YHLS for subsequent periods, they may do so each year through an annual position statement [APS] that is considered by PINS on behalf of the SoS, but this is outside the examination process.

Assessing and meeting specific housing needs

How should the needs of people with specific housing requirements be assessed?

153. The second of the objectives listed in NPPF 60 is that "the needs of groups with specific housing requirements are addressed". NPPF 62 advises that, within the context of the overall housing need assessment:

> "The size, type and tenure of housing needed for different groups in the community should be assessed and reflected in planning policies (including, but not limited to, those who require affordable housing, families with children, older people, students, people with disabilities, service families, travellers, people who rent their homes and people wishing to commission or build their own homes)".

[78] See the sub-section above headed 'How is the 5YHLS requirement calculated?'

154. The PPG on *Housing and economic need assessment* gives guidance on assessing affordable housing need and the housing needs of older people, people with disabilities, students, those renting in the private sector, and those wanting self-built and custom-built housing.[79] There is further guidance relating to different types of housing, affordable housing and rural housing in the PPG on Housing needs of different groups. Some of this duplicates the earlier PPG but in some areas supplements that advice. There is also a separate PPG on Housing for older and disabled people that covers identifying their requirements, accessible and adaptable housing and specialist housing as well as inclusive design. Inspectors should expect to find evidence that all this guidance has been followed, as appropriate to the circumstances of the area and the role of the plan.

155. The assessments should cover both the quantitative needs of each group and their needs for particular sizes, types and tenures of dwellings. For affordable housing, the PPG also requires an assessment of whether total affordable housing need is likely to be met by the plan (see the sub-section below headed 'How should the plan ensure the provision of affordable housing?'). If it is not, an increase in the plan's overall housing requirement should be considered, where this could help deliver the required amount of affordable housing[80].

156. See the section of this ITM chapter on Gypsy and Traveller issues for advice on assessing and meeting the accommodation needs of these groups.

What is the relationship between specific housing requirements and the Public Sector Equality Duty?

157. Policies dealing with the housing needs of older people, people with disabilities and ethnic gypsies and travellers are relevant to the Inspector's Public Sector Equality Duty (PSED), as those groups have protected characteristics under the Equality Act 2010. See the sections of this ITM chapter and other chapters of the ITM dealing with PSED and on Gypsy and Traveller casework.

What is the relationship between the housing needs of particular groups and the objectively-assessed housing need figure?

158. The overall process of assessing housing need described in the section above headed *Assessing housing need* above establishes the LPA's objectively-assessed need for new housing over the plan period. The PPG recognises that the needs of particular groups may exceed, or be proportionately high, in relation to the overall housing need figure. This is because particular groups' needs may be calculated on the basis of the whole population of an area, rather than just the projected new households captured by the standard LHN method.[81]

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[79] PPG Reference ID: 2a-017-20190220 to 2a-024-20190220
[80] PPG Reference ID: 2a-024-20190220
[81] PPG Reference ID: 2a-017-20190220

159. It is not necessary, therefore, to take specific account of the needs of particular groups when working out the objectively-assessed need for housing. However, the need for affordable housing may affect the housing **requirement** figure (see the sub-section above headed 'Why might an adjustment need to be made in order to help deliver affordable housing?').

How should the plan ensure the provision of affordable housing?

160. NPPF 63 says

> "Where a need for affordable housing is identified, planning policies should specify the type of affordable housing required, and expect it to be met on-site unless:
>
> a) off-site provision or an appropriate financial contribution in lieu can be robustly justified; and
> b) the agreed approach contributes to the objective or creating mixed and balanced communities".

161. The usual approach is for the plan to include one or more policies requiring a certain percentage share of any new housing development to be provided in the form of affordable housing, as defined in the NPPF glossary and in the WMS and PPG on First Homes (see below). Any such policy should meet the requirements of NPPF 63, including specifying how much of each type of affordable housing is required,[82] and should be supported by robust viability evidence. In some cases, the viability evidence may indicate that the different percentage shares of affordable housing should be sought in different parts of the LPA's area, or for different types of housing development. It is common for the viability evidence to be challenged during the examination. The Viability chapter of the PPG[83] provides detailed guidance that Inspectors should consider when reaching a view as to whether the viability evidence is robust and therefore if the plan's approach to affordable housing (and the other requirements of the plan that might affect viability) is justified. BCIS is a commonly cited source of data on development costs.

162. NPPF 64 makes it clear that affordable housing should not be sought from non-major developments – that is, from developments of fewer than 10 dwellings, or with a site area of less than 0.5ha – other than in designated rural areas. In designated rural areas (National Parks, AONBs and areas designated under s.157 of the Housing Act 1985) policies may set a lower threshold of 5 units or fewer, below which affordable housing contribution should not be sought.

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[82] See the NPPF Glossary definition and the WMS and PPG on First Homes for a list of the types of housing that can be regarded as "affordable housing". The LPA should provide evidence of how the overall need for affordable housing breaks down across the various types.
[83] PPG Reference ID: 10-001-20190509

163. A Written Ministerial Statement [WMS] entitled Affordable Homes Update was published on 24 May 2021. It sets out the Government's plans for the delivery of First Homes and its new model for shared ownership through the planning system. The WMS is to be read alongside the NPPF as a statement of Government policy. Also published on 24 May 2021 were a new PPG section entitled First Homes, and an update to the PPG section entitled Housing needs of different groups.

164. The WMS introduces First Homes as a new category of affordable housing and sets out the Government's policy that a minimum of 25% of all affordable housing units secured through developer contributions should be First Homes. This is a national threshold applicable throughout England.

165. The WMS requires local plans and neighbourhood plans to take the new First Homes requirements into account from 28 June 2021, subject to the following transitional arrangements. Plans that have been submitted for examination before 28 June 2021 and plans that have been published under Regulation 19 by 28 June 2021 and are then submitted for examination before 28 December 2021, are not required to reflect the First Homes policy requirements.

166. For these "transitional" local plans, however, the WMS, reflecting the Government's desire to introduce First Homes requirements at the earliest possible opportunity, advises that inspectors should consider through the examination whether a requirement for an early update might be appropriate. Inspectors should therefore consider whether such a requirement should be made and should raise the matter at an appropriate stage of the examination. The PPG does not provide any further advice on this matter and the decision is therefore for your judgment. Section 20 of the 2004 Act empowers Inspectors to recommend modifications to a local plan only if necessary, to make it sound and/or legally compliant.

167. The WMS and PPG contain detailed guidance on the First Homes policy, including among other things the definition of First Homes, eligibility and qualifying criteria, and First Homes exception sites. The PPG also contains advice on applying the policy in plan-making. Inspectors should make themselves familiar with all this guidance and take it into account when examining plans to which the First Homes policy applies. The definition of soundness in NPPF 35 includes being consistent with national policy. Since the WMS is national policy, it applies to any local plan submitted for examination which is not covered by the transitional arrangements and which is intended to provide affordable housing. Issues should be investigated in the usual way, eg through the Inspector's Matters, Issues and Questions.

168. NPPF 65 requires that, where major development involving the provision of housing is proposed, at least 10% of the total number of homes to be available for affordable home ownership (as defined in the NPPF Glossary), unless this would exceed the level of affordable housing required in the area, or significantly prejudice the ability to meet the affordable housing needs of specific groups. The PPG advises that the 25% expected First Homes contribution can make up or contribute to this overall 10% requirement, and the WMS makes it clear that where specific developments are exempt from delivering affordable housing under NPPF 65, they are also exempt from the requirement to deliver First Homes.

169. The WMS also introduces a new model for shared ownership housing, to be delivered through grant funding and the planning system. Shared ownership is one of the categories included in the NPPF Glossary definition of affordable housing. The transitional arrangements set out above for First Homes also apply to the requirement for the new shared ownership model.

170. The Inspector should establish how much affordable housing will be delivered as a result of the plan's policies. Ideally this should be sufficient to meet the full identified need for affordable housing, but often there is an anticipated shortfall in provision, even after other sources of affordable housing such as direct provision by local authorities and housing associations have been taken into account. This is usually because the amount of affordable housing that can be viably funded by new market housing is insufficient to meet the total level of affordable housing need.

171. Where this is the case, the LPA should have considered whether or not an increase in the plan's overall housing requirement would help meet the need for affordable homes (see the sub-section above headed 'Why might an adjustment need to be made in order to help deliver affordable housing?'). The Inspector should ensure that this has been considered, and also that the plan is seeking the highest percentage share of affordable housing provision that is consistent with maintaining viability. Provided all this has been done, it is usually appropriate to conclude that the objective of meeting affordable housing need through the plan's policies has been met as far as it is possible to do so.

How should the plan ensure provision for other groups with specific housing needs?

172. The approach to addressing the particular housing needs of other groups will vary, and subject to viability considerations Inspectors should generally take a positive attitude to policies aimed at meeting them.

173. For example, the plan should allocate sites to meet the needs of gypsies and travellers[84]. It may be appropriate for the plan similarly to allocate sites for student housing, housing for service families and sheltered housing for older or disabled people, and/or to include policies encouraging the provision of those types of housing and also private rented housing. The needs of older people and families with children could also be addressed by policies requiring appropriate proportions of different types and sizes of dwellings to be provided in larger developments. Policies could require plots in larger developments to be reserved for those wishing to build or commission their own homes.

[84] See the Gypsies and Travellers section of this chapter.

174. As with affordable housing, it may well be that the plan is unable meet the identified needs of other groups with specific housing requirements in full. This point is recognised by the PPG, which advises that LPAs should therefore consider how those needs can be addressed within the overall housing need that has been established.[85] The Inspector will need to be satisfied that all reasonable steps have been taken to meet them as far as is possible.

How should the plan address need for accessible and adaptable housing?[86]

175. Inspectors should be aware of a change in policy which was flagged in the Government response to the draft revised NPPF consultation (July 2018):

> "we have strengthened the policy approach to accessible housing by setting out an expectation that planning policies for housing should make use of the Government's optional technical standards for accessible and adaptable housing. [question 29 response]"

176. The change can be seen by comparing the wording in the Written Ministerial Statement [WMS] 'Planning Update March 2015' (25 March 2015) with that now in the NPPF (emphasis applied in the extracts below).

177. The WMS of March 2015 said:

> "The optional new national technical standards **should only** be required through any new Local Plan policies if they address a clearly evidenced need, and where their impact on viability has been considered …"

And the relevant PPG chapter on Housing Optional Technical Standards advises that:

> "Local planning authorities **have the option** to set additional technical requirements exceeding the minimum standards required by Building Regulations."[87]

178. Thus, LPAs previously had the *option* of applying the higher standards, but could only do so if justified by need and viability tested.

179. By contrast, NPPF footnote 49 now states:

> "Planning policies for housing **should** make use of the Government's optional technical standards for accessible and adaptable housing, where this would address an identified need for such properties."

[**emphasis** added]

[85] PPG ID 2a-017-20190220
[86] See also the section below headed 'Housing standards and plan-making'.
[87] PPG Reference ID: 56-002-20160519

180. If the LPA have not carried out an assessment of need for accessible and adaptable housing, Inspectors should ask them to do so as a first step. Where the LPA has identified a need but has not addressed that need by making use of the optional standards, it is clear from the NPPF that this could be a soundness issue. The Inspector would need to ask the LPA to consider how it could be resolved. This is confirmed by the PPG which confirms that where an identified need exists, plans are expected to make use of the optional technical housing standards.[88]

Housing in rural areas

What is the national policy approach to housing in rural areas?

181. NPPF 78 advises that, in rural areas, planning policies should support housing developments that meet local needs. It advises LPAs to support the provision of rural exception sites which provide affordable housing to meet local needs, and to consider whether allowing some market housing on such sites would help facilitate the provision of affordable housing. NPPF 79 advises that housing should be located where it will enhance or maintain the vitality of rural communities. Opportunities should be sought to allow villages to grow and thrive, especially where this will support local services. There is also advice on how planning policies can support sustainable rural communities in the PPG.[89]

Should isolated new homes be allowed in the countryside?

182. NPPF 80 advises that planning policies should avoid the development of isolated homes in the countryside unless one or more of a defined list of circumstances apply. Local plan policies should not depart from that approach without very strong local justification.

183. In the 'Braintree' judgment[90] it was held that:

> "[…] the word "isolated" in the phrase "isolated homes in the countryside" simply connotes a dwelling that is physically separate or remote from a settlement. Whether a proposed new dwelling is, or is not, "isolated" in this sense will be a matter of fact and planning judgment for the decision-maker in the particular circumstances of the case in hand".

184. The court was not persuaded by the LPA's argument that, when deciding whether or not a new home would be isolated, the decision-maker must also consider whether the site is **functionally** isolated relative to services and facilities. While the 'Braintree' judgment was reached in the context of the previous, March 2012, version of the NPPF, the wording of the corresponding paragraphs in each version is very similar.

[88] PPG Reference ID: 63-009-20190626
[89] PPG Reference ID: 67-009-20190722
[90] Braintree DC v SSCLG and others [2018] EWCA Civ 610

Settlement boundaries

Should a plan have settlement boundaries?

185. There is no requirement for a plan to identify settlement boundaries in national policy or guidance. However, they are commonly used by LPAs, can be a useful tool in steering new development as part of the spatial strategy **and have been found sound by Inspectors**. **However, some plans do not have settlement boundaries, relying instead on criteria-based policies to assess proposals for development around the edge of settlements – and this approach has also been found sound.**

Is it the Inspectors role to assess if the settlement boundaries are appropriate?

186. Settlement boundaries will likely be shown on the policies map. Whilst Inspectors cannot recommend MMs to the policies map, it may be necessary to ensure that the boundaries are justified, because if the geographical illustration of the relevant policy is wrong, then the relevant policy[91] will be unsound.

187. It may therefore be necessary for the Inspector to ensure that the LPA has employed a sensible approach in defining them. In some cases, the LPA will have amended existing settlement boundaries to include development that has been permitted since they were last drawn. If a consistent approach has been taken to updating the settlement boundaries with recently permitted development, then this is likely to be an acceptable approach. However, there is no hard or fast rule and Inspectors will need to consider the specific circumstances of each plan.

Do site allocations and sites with planning permission have to be inside the settlement boundary?

188. There is nothing specific in national policy or guidance that addresses this issue and it is, therefore, a matter for the judgement of the Inspector taking into account the circumstances of the examination and any arguments made on this issue. If the submitted plan includes site allocations outside the settlement boundary, a question to consider is whether it would be justified for the LPA to decide future applications for development on sites which have been positively identified for development in the plan against policies that will usually be restrictive because they regard the site as 'open countryside' or similar. For sites that have planning permission but are not being proposed as allocations, the circumstances may be different (ie are there reasons why the site is not being specifically allocated for development in the plan?).

[91] Policies may set different criteria for development proposed outside settlement boundaries (usually more restrictive) and within them (generally less restrictive).

Is it appropriate to identify new areas of land for development to meet the plan's needs through the use of settlement boundaries?

189. Although relatively uncommon, it has been known for some LPAs to seek to extend settlement boundaries to include new parcels of land for future development to meet identified needs. Whilst in theory this could be acceptable, the Inspector should explore with the LPA why this approach has been taken, rather than seeking to formally allocate the land for development within the plan. The Inspector will also need to consider whether it would be necessary to explore with the LPA whether the potential impacts of development on such parcels of land have been appropriately assessed to establish their suitability. The approach taken will depend on the circumstances and whether or not the land is intended to make a quantified contribution to housing land supply.

Article 4 Directions

190. The Government has introduced new policy on the application of Article 4 Directions, as set out in the WMS Revitalising high streets and town centres made on 1 July 2021 and NPPF 53 (July 2021). The new policy follows the introduction of new permitted development rights by the Government over recent years, which allow the change of use to residential without full planning permission as part of its measures to increase housing supply on brownfield land. In very specific circumstances, LPAs can make Article 4 directions to suspend individual permitted development rights, where justified. The WMS seeks to ensure that LPAs use Article 4 directions in a highly targeted way to protect historic high street areas, though ensuring that they do not unnecessarily restrict the ability to deliver housing through permitted development rights. Where they relate to a change from non-residential use to residential use, NPPF 53 sets out that the removal of national permitted development rights by Article 4 Directions should only be used where it is necessary to avoid wholly unacceptable adverse impacts (such as the loss of the essential core of a primary shopping area which would seriously undermine its vitality and viability). In other cases, Article 4 directions should only be used where they are necessary to protect local amenity or the well-being of the area (such as requiring planning permission for the demolition of local facilities). In all cases, they must be based on robust evidence, and apply to the smallest geographical area as possible. Further information is given in the GPDO chapter of the ITM.

191. The change to policy only applies to changes from non-residential to residential use. It does not apply to changes between different residential uses. The WMS emphasises that the geographical coverage of all Article 4 directions should be the smallest area possible to achieve the aim of the Article 4 direction. For historic high streets and town centres, this is likely to be the irreducible core of a primary shopping area and is very unlikely to apply to the whole Town or entire local authority area. LPAs are required to notify the Secretary of State about new Article 4 Directions, with MHCLG officials checking proposals for compliance against the policy in NPPF 53 (with the Secretary of State intervening where necessary). If a local plan includes a policy on or about Article 4 Directions, it will be necessary to consider whether it is consistent with NPPF 53. For plans in examination, at the time that NPPF 53 was introduced (July 2021), it may be necessary to seek views from the LPA.

Housing standards and plan-making

192. This part of the training manual should be read in conjunction with the section of the Housing chapter of the ITM headed 'Housing standards' and Annexes 5 and 6 to the Housing chapter, which are concerned with the application of the standards by decision-makers.

What is the policy basis for the use of housing standards in plan-making?

193. The Written Ministerial Statement (WMS) of March 2015 Planning update March 2015 - Written statements to Parliament – GOV.UK introduced a new approach to setting technical standards for new housing:

> "The new system will comprise new additional optional Building Regulations on water and access, and a new national space standard (hereafter referred to as "the new national technical standards"). This system complements the existing set of Building Regulations, which are mandatory."

194. As a result, the WMS says that LPAs should not set out in their plans any additional local technical standards or requirements relating to the construction, internal layout or performance of new dwellings. As part of the new system the Code for Sustainable Homes [CSH] has been withdrawn. However, plan policies may continue to require energy performance requirements to be set at a level equivalent to the outgoing CSH Level 4.[92] The PPG chapter on Climate Change sets out under the section, 'Can a local planning authority set higher energy performance standards than the building regulations in their local plan?'[93], the following:

[92] This was originally intended as a temporary measure until late 2016, at which point the WMS envisaged the introduction of a zero-carbon homes requirement in the Building Regulations and the commencement of section 43 of the Deregulation Act 2015. But the zero-carbon homes requirement was abandoned in the Treasury report Fixing the foundations: Creating a more prosperous nation (July 2015), and section 43 has not yet commenced. The Government has committed to a review of minimum energy performance requirements through provisions in the Housing and Planning Act 2016 (s.165) though there is no indication when that review will take place.
[93] PPG Paragraph: 012 Reference ID: 6-012-20190315

"Different rules apply to residential and non-residential premises. In their development plan policies, local planning authorities:

- Can set energy performance standards for new housing or the adaptation of buildings to provide dwellings, that are higher than the building regulations, but only up to the equivalent of Level 4 of the Code for Sustainable Homes.

- Are not restricted or limited in setting energy performance standards above the building regulations for non-housing developments.

The Planning and Energy Act 2008 allows local planning authorities to set energy efficiency standards in their development plan policies that exceed the energy efficiency requirements of the building regulations. Such policies must not be inconsistent with relevant national policies for England. Section 43 of the Deregulation Act 2015 would amend this provision, but is not yet in force".

The PPG goes on to state that the WMS "clarified the use of plan policies and conditions on energy performance standards for new housing developments", which set out "the government's expectation that such policies should not be used to set conditions on planning permissions with requirements above the equivalent of the energy requirement of Level 4 of the Code for Sustainable Homes (this is approximately 20% above current Building Regulations across the build mix)".

195. The WMS further advises that new plan policies should only require new housing to meet any of the optional national technical standards if they address a clearly evidenced need and where their impact on viability has been considered.

196. The PPG chapter Housing – Optional Technical Standards contains sections on the new optional technical standards for water efficiency, accessible and adaptable and wheelchair-user housing, and internal space.

197. In accordance with the WMS and the PPG:

- references to the CSH, Lifetime Homes Standards, and zero-carbon standards should **not** be included in plan policies;
- local technical standards or requirements should **not** be included in plan policies;
- policies that expect the optional higher national technical standard for water efficiency, or the nationally-described internal space standards, to be met must be supported by clear evidence of need and evidence that viability has been considered.

198. However, **a different policy approach applies in respect of the optional national technical standards for accessible and adaptable housing.** NPPF footnote 49 advises that:

> "Planning policies for housing **should** make use of the Government's optional technical standards for accessible and adaptable housing, where this would address an identified need for such properties."

See the sub-section above headed 'How should the plan address need for accessible and adaptable housing?' for further advice on this point.

How is the use of BREEAM affected by the national policy approach?

199. Some LPAs have proposed policies that expect residential conversions to meet BREEAM Excellent standard or similar. BREEAM sets sustainability standards for non-domestic buildings which are not affected by the WMS. However, it also includes standards for domestic refurbishment including domestic conversions and change of use projects.

200. The wording of the WMS on this point is quite clear:

> "… local planning authorities should not set in their emerging Local Plans … any additional local technical standards or requirement relating to the construction, internal layout or performance of **new dwellings**." [**emphasis** added]

201. The WMS therefore applies to new homes of all types and not just new-build homes or newly-erected homes. The intention of the WMS is to stop local authorities from setting additional technical standards on any new homes, other than the technical standards set out in the WMS on water efficiency, access and space. As BREEAM is a technical standard, it should not be applied to housing. A policy referring to it in relation to domestic conversions would not be consistent with national policy.

How should an energy efficiency standard equivalent to CSH Level 4 be expressed?

202. As noted above, the WMS allows policies to require energy efficiency performance that exceeds the current Building Regulations, but their requirements should not go above the equivalent of CSH Level 4. Given that the CSH has been withdrawn, some authorities have experienced difficulties in expressing this.

203. The Building Regulations[94] set energy requirements at the equivalent of Level 3 of the now withdrawn Code. Level 4 represents a 19% (or greater) improvement over this in terms of carbon dioxide emissions[95] (see, in particular, Code for Sustainable Homes Technical Guide Code Addendum (2014) England)[96].

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[94] Approved Document L (Conservation of fuel and power)

[95] The minimum energy performance requirements for a new dwelling are the 'Target [CO_2] Emission Rate' (TER) and the actual performance of the dwelling is the 'Dwelling [CO_2] Emission Rate' (DER)

[96] Figure also found at paragraph 2.3.56 of the Mayor of London's *Housing* Supplementary Planning Guidance of March 2016)

204. So, if a policy is justified in terms of need and viability then it could be worded along these lines:

> Housing development should achieve at least a 19% improvement in energy performance over the requirements of the Building Regulations (2013, as amended).

Table: Summary of the optional national technical standards and relevant national policy and guidance

	Energy	Water	Access	Space
WMS	Able to set and apply policies which exceed Building Regs Not above CSH Level 4 equivalent (19% above Part L of B Regs) Zero carbon homes abandoned in Productivity Plan			
PPG		Where a clear local need, policies can require tighter requirement of 110 litres/ person/ day – para 014 How to establish a clear need and sources of evidence – paras 015 & 016	For LPAs to show need for accessible dwellings having regard to published data – para 007 LPAS should clearly state what proportion of new accessible and adaptable or wheelchair-user dwellings must comply with the B Regs – para 008	Need for space standard established taking account of need, viability and timing – para 020 LPAs should only require an internal space standard by referring to the Nationally Described Space Standard – para 018

			Policies requiring wheelchair-accessible dwellings [M4(3)(b)] must only apply where LPA nominate or allocate the occupant – para 009
Building Regs	**Part L** Equivalent to CSH Level 3	**Part G** 125 litres/ person/ day is baseline standard – optional higher standard of 110 litres/ person/ day	**Part M** Baseline M4(1) = visitable dwellings (Category 1) Optional requirements M4(2) = accessible and adaptable (Category 2) and M4(3) = wheelchair user (Category 3) [M4(3)(a) = wheelchair-adaptable; M4(3)(b) = wheelchair-accessible]

ANNEX 1
Considerations in Assessing Deliverability

Account should also be taken of the advice on what constitutes a deliverable site in the PPG on Housing supply and delivery (ID: 68-007-20190722).

Sites with planning permission

Is the site still available for development?

Is there reliable evidence as to the intentions of the owners/developers?

When is development likely to commence and what are the build-out rates likely to be?

If planning permission is subject to the completion of a planning obligation, what progress has been made in negotiating the agreement?

If it is an outline permission, what progress has been made with discharging conditions?

Does development rely on the delivery of critical infrastructure (e.g. new roads, new water infrastructure, significant pre-commencement work)? Is the delivery of any such infrastructure likely to be delayed?

Sites allocated in the previous development plan

How long has the site been allocated?

Why has it not come forward for development?

What does the SHLAA say about the site constraints?

Windfall rates

Potential windfall sites should have been excluded from the SHLAA, to avoid double counting.

What are the historic windfall delivery rates and expected future trends?