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 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.

28. Advice on land availability assessments for economic development, including main town centre uses, is given in the section of the PPG chapter Housing and economic land availability assessment (see also the Employment development section of the ITM Local Plan Examinations chapter).

29. 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

30. 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

31. NPPF 86 b) advises that planning policies should make it clear which uses will be permitted in town centres and primary shopping areas. The permitted uses will usually reflect the definitions in the NPPF Glossary.

32. NPPF 87 advises that a sequential test should be applied to planning applications for main town centre uses that are neither in an existing centre nor in accordance with an up-to-date plan. The PPG advises that local plans should contain policies to apply the sequential test to such proposals[14]. 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 89).

33. The sequential test set out in NPPF 87 reads as follows:

> "Main town centre uses should be located in town centres, then in edge of centre locations; and only if suitable sites are not available (or expected to

[14] PPG Reference ID 2b-009-20190722

become available within a reasonable period) should out of centre sites should be considered".

34. In assessing the soundness of policies which are intended to apply the sequential test, it is important to note that the NPPF Glossary defines "edge of centre" differently for retail purposes, office development, and other main town centre uses. It may be necessary to recommend main modifications if the NPPF Glossary definitions have not been applied correctly:

    - For retail purposes, "edge of centre" means a location that is well connected to, and up to 300m from, the primary shopping area.
    - For all other main town centre uses (including office development), "edge of centre" means a location within 300m of a town centre boundary.
    - For office development only, "edge of centre" also includes locations outside the town centre but within 500m of a public transport interchange.
    - In determining whether a site falls within the definition of "edge of centre", account should be taken of local circumstances.

35. It is also important to be aware of the definition of a "town centre" in the NPPF Glossary. It advises that, unless they are identified as centres in the development plan, existing out-of-centre developments which comprise or include main town centre uses do **not** constitute town centres.

36. NPPF 90 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[15] and Inspectors should ensure that it has been taken into account.

37. 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 1,000sqm (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.

[15] PPG Reference ID 2b-016-20190722

Complementary strategies and parking provision

38. According to the PPG[16], 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.

[16] PPG Reference ID 2b-003-20190722

The Planning Inspectorate

Local Plan Examinations

Local Plans and Neighbourhood Plans

Updated to reflect Current Framework (NPPF)?	**Yes**

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 Neighbourhood Plans and the issues likely to arise in local plan examinations. 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

What are neighbourhood plans?

1. The National Planning Policy Framework ('NPPF') states that:

> Neighbourhood plans are "prepared by a parish council or neighbourhood forum for a designated neighbourhood area. In law this is described as a neighbourhood development plan in the Planning and Compulsory Purchase Act 2004." (Annex 2: Glossary)
>
> "Neighbourhood plans that have been approved at referendum are also part of the development plan (as defined in section 38 of the Planning and Compulsory Purchase Act 2004), unless the local planning authority decides that the neighbourhood plan should not be made." (Annex 2: Glossary)
>
> "Neighbourhood plans must meet certain 'basic conditions' and other legal requirements (as set out in paragraph 8 of Schedule 4B to the Town and Country Planning Act 1990 (as amended)) before they can come into force. These are tested through an independent examination before the neighbourhood plan may proceed to referendum." (para 37)

2. The Planning Practice Guidance ('PPG') (paras 55 and 65) explains that the independent examination is limited to testing whether a draft neighbourhood plan meets the 'basic conditions' and some other matters. One of the basic conditions is general conformity with the strategic policies in the development plan. The examination is not testing the 'soundness' of a neighbourhood plan as defined in the NPPF for local plans.

3. Neighbourhood plans are brought into force by the LPA if more than half those voting in a local referendum are in favour (see para 80 of the PPG).

What is the legal and policy basis for neighbourhood plans?

4. The legal basis for a neighbourhood plan is derived from the Town and Country Planning Act 1990 ('TCPA 1990'), the Planning and Compulsory Purchase Act 2004 ('PCPA 2004') and subsequent Acts and Regulations[1]. If you need more information:

Making of neighbourhood plans	• Part 3 and Schedule A2 PCPA 2004 • S61E and Schedule 4B TCPA 1990 • PPG para 065

[1] Neighbourhood Planning Act 2017; Localism Act 2011; Town and Country Planning Act 1990, as amended (TCPA 1990); Planning and Compulsory Purchase Act 2004 (PCPA 2004); Neighbourhood Planning (Referendums) Regulations 2012; Neighbourhood Planning (General) Regulations 2012; Town and Country Planning (Local Planning) (England) Regulations 2012.

Relationship between neighbourhood plans and local plans	• Paragraph 8(2)(e) of Schedule 4B TCPA 1990 • S38 PCPA 2004 • NPPF para 29 • PPG para 009
How a conflict between a neighbourhood plan and local plan should be resolved	• S38(5) Planning and Compulsory Purchase Act 2004 • PPG para 044 • NPPF para 30

What does national policy and guidance say about neighbourhood plans?

5. The NPPF and PPG set out national policy and guidance. The PPG should be looked at carefully because it is not repeated here. It includes a section on what neighbourhood plans can include.

6. The NPPF sets out the relationship between neighbourhood plans and local plans:

    - Neighbourhood plans should support the delivery of strategic policies contained in local plans or spatial development strategies (para 13)
    - Neighbourhood plans contain just non-strategic policies (para 18)
    - Neighbourhood planning gives communities the power to develop a shared vision for their area (para 29)
    - Neighbourhood plans can shape, direct and help to deliver sustainable development, by influencing local planning decisions as part of the statutory development plan (para 29)
    - Neighbourhood plans should not promote less development than set out in the strategic policies for the area, or undermine those strategic policies (para 29)
    - Once a neighbourhood plan has been brought into force, the policies it contains take precedence over existing non-strategic policies in a local plan covering the neighbourhood area, where they are in conflict; unless they are superseded by strategic or non-strategic policies that are adopted subsequently (para 30) [Note – this reflects PCPA 2004 s38(5) which requires

that the conflict must be resolved in favour of the policy which is contained in the last document to become part of the development plan]

- Neighbourhood plans must be in general conformity with the strategic policies contained in any development plan that covers their area. (para 29 footnote 18).

7. The NPPF then explains what local plans need to do to set a housing requirement for Neighbourhood Plans (and see also the PPG on this):

    - "Strategic policy-making authorities should establish a housing requirement figure for their whole area, which shows the extent to which their identified housing need (and any needs that cannot be met within neighbouring areas) can be met over the plan period. Within this overall requirement, strategic policies should also set out a housing requirement for designated neighbourhood areas which reflects the overall strategy for the pattern and scale of development and any relevant allocations" (para 66)

    - "Where it is not possible to provide a requirement figure for a neighbourhood area (because a neighbourhood area is designated at a late stage in the strategic policy-making process, or after strategic policies have been adopted; or in instances where strategic policies for housing are out of date), the local planning authority should provide an indicative figure, if requested to do so by the neighbourhood planning body. This figure should take into account factors such as the latest evidence of local housing need, the population of the neighbourhood area and the most recently available planning strategy of the local planning authority" (para 67)

8. The NPPF also advises that Neighbourhood Plans can be used to change Green Belt boundaries:

    - "Where a need for changes to Green Belt boundaries has been established through strategic policies, detailed amendments to those boundaries may be made through non-strategic policies, including neighbourhood plans." (para 140)

What if there is conflict between a made or emerging neighbourhood plan and the local plan being examined?

9. In theory a neighbourhood plan should follow on after strategic policies have been put in place through an adopted local plan. If so, the main issue when examining a local plan will be whether its strategic policies provide an appropriate direction for any neighbourhood plans that are to come (for example, by setting a housing requirement for a neighbourhood plan area – see below). However, a neighbourhood plan can also be prepared before or at the same time as the LPA is producing its local plan[2].

[2] Or, where applicable, a spatial development strategy is being prepared by an elected Mayor or combined authority.

10. The PPG advises that where a neighbourhood plan is brought forward before an up-to-date local plan is in place, the neighbourhood planning body and the LPA should discuss and aim to agree the relationship between policies in any made and emerging neighbourhood plans, the most up-to-date proposals for a new local plan, and any adopted development plan[3]. This should, in theory, minimise any conflicts.

11. However, we have seen submitted local plans that allocate development sites which are protected from development in neighbourhood plans and vice versa. In such circumstances, there are two possible outcomes:

    - The local plan is sound and would therefore appropriately supersede the neighbourhood plan

    - The local plan is unsound and should be changed to resolve the conflict with the neighbourhood plan.

12. Where a conflict exists, a good starting point is to ask the LPA to explain their reasons for seeking to supersede a neighbourhood plan policy. You might also ask how the conflict could be resolved (for example through a main modification and/or a change to the policies map). The views of the neighbourhood plan group are also likely to be relevant and you could ask for a statement of common ground between the LPA and neighbourhood plan group, if you think that would help.

13. If, after consideration of the relationship, you conclude that the local plan is sound (ie the conflict is in favour of the local plan not the neighbourhood plan) then, once it is adopted, decisions on planning applications would be decided in favour of the more recent plan – ie the local plan. However, the local plan should also state whether it is intended to supersede another policy in the adopted development plan – ie including any existing neighbourhood plan (see Regulations 8(4) and 8(5)[4]). If the plan does not already state this, this would need to be achieved by a main modification.

14. In reaching conclusions on these issues, it is important to take into account NPPF 29 which states that neighbourhood planning gives communities the power to develop a shared vision for their area and to influence local planning decisions. However, the PPG in 'When will it be necessary to review and update a neighbourhood plan' does accept that "policies in a neighbourhood plan may become out of date, for example if they conflict with policies in a local plan covering the neighbourhood area that is adopted after the making of the neighbourhood plan". The PPG goes on to say that: "Communities in areas where policies in a neighbourhood plan that is in force have become out of date may decide to update their plan, or part of it."

15. In the Darlington Local Plan examination, an unjustified conflict (where a housing allocation in a neighbourhood plan lay outside the development limits shown in the submitted local plan) was resolved in favour of the neighbourhood plan. This was achieved by making changes to the local plan development limits from those shown on

[3] See paragraph 009, Neighbourhood Planning PPG.
[4] Town and Country Planning (Local Planning England) Regulations 2012. These require that policies in a local plan must be consistent with the adopted development plan, unless a local plan policy is intended to supersede a policy in the adopted development plan, in which case this must be stated in the local plan.

the submitted policies map, so that the neighbourhood plan allocation would now fall within the limits, as explained in the report:

> "… I am satisfied that the development limits defined on the policies map are generally based on a reasonable and broadly consistent approach. During the examination, at my request, the Council used its methodology to review the development limits to take account of the existing and emerging neighbourhood plans as well as recently completed developments and planning permissions granted since the Plan was prepared. In light of that, the Council is proposing to make some amendments to the development limits shown on the submitted policies map, other than where to do so would be contrary to policies in the Plan."

What if there are issues setting a housing requirement for designated neighbourhood areas?

16. NPPF paragraph 66 says that within the overall requirement, strategic policies should also set out a housing requirement for designated neighbourhood planning areas which reflects the overall strategy for the pattern and scale of development and any relevant allocations.

17. However, experience shows that not all local plans provide a housing requirement for designated neighbourhood areas. If so, you will need to explore through the examination whether the plan should do this. In some areas a zero requirement might be valid, for example, having regard to the local plan's spatial strategy, constraints, land availability and the housing land supply position.

18. In some cases, the local plan might set a housing requirement for a neighbourhood plan area and then leave the neighbourhood plan to secure delivery of the site allocations required to achieve this. This can sometimes raise questions about whether the neighbourhood plan will be progressed quickly enough and if the housing will be delivered. Where this is an issue possibility, it would be appropriate to consider if the local plan should include a mechanism to address this risk.

19. In East Lindsey, the plan set a housing requirement for a particular settlement where a neighbourhood plan was being prepared, but progress and delivery was questioned by objectors. Recognising this issue, the plan included a policy mechanism to mitigate the risk. The examiners' report (2018) dealt with the issue like this:

> "Policy SP6 sets out the approach the Council will take where a neighbourhood plan has been proposed but subsequently fails to be delivered in a timely manner, potentially causing a shortfall in the housing supply. At this time the policy only potentially applies to Alford where the Town Council is preparing a neighbourhood plan which will include housing allocations. Elsewhere the housing supply is being provided primarily from commitments and specific allocations. Consequently, apart from Alford, the plan is not reliant on any Neighbourhood Plans to deliver a supply of housing. Given the Framework explains that neighbourhood planning gives communities direct power to deliver the sustainable development they need, it is reasonable for the plan to expect new housing in Alford to be delivered and shaped through this process.

Policy SP6 states that the Council will intervene to produce a development plan if a failure to deliver a neighbourhood plan would lead to a gap in delivery. This is a reasonable safeguard, as is the criteria that will strongly support housing proposals in any interim period. The policy does not specify any particular period for intervention and that will be something for the Council to judge based on the specific circumstances. However, in relation to Alford we understand that the Council has a memorandum of understanding with the Town Council that expects the Neighbourhood Plan to be completed within 6 months of the adoption of these Plans.

Some concerns have been expressed that the Alford Neighbourhood Plan has made slow progress in recent years. However, Policy SP6 provides an appropriate safeguard. Choosing when to intervene is a matter for the Council and there is no compelling reason to set out any specific timescales in the policy. Nor is there any need for the plan to be more specific about how or where the 161 dwellings should be provided in Alford, given that neighbourhood planning is intended to empower local people to shape and direct sustainable development in their area. However, a change is necessary to correctly set out the relationship between local and neighbourhood plans (MM7)."

20. The South Oxfordshire Core Strategy[5] followed a similar approach. Policy CSTHA2 states that the Neighbourhood Plan for Thame will allocate land for 775 new homes and Policy CSC1 sets out what steps would be taken if monitoring shows housing was not coming forward in a timely manner.

[5] https://www.southoxon.gov.uk/wp-content/uploads/sites/2/2019/01/2013-05-01-Core-Strategy-for-Website-final_0.pdf

The Planning Inspectorate

Major Hazard Installations

Updated to reflect Current Framework (NPPF)?	Yes

What's new since the last version

Changes highlighted in yellow made 1 September 2022.

- The addition of new paragraphs 26 and 27 and Annex D, to include an example of a non-s321 case involving a development near an upper tier COMAH establishment (an oil refinery), with HSE and the Oil company as Rule 6 parties.

This chapter was originally published on 22 July 2022, providing practical advice and references on dealing with issues arising from potential risk to public safety from major hazard installations.

Procedural guidance is included for planning appeals and called-in applications and for local plan examinations where there may be implications for national security, occasionally requiring the handling of 'official sensitive' material in 'closed session' by Direction under s321 of the 1990 Act (as amended).

Contents

Introduction

1. This chapter draws attention to the main provisions of law and national policy and guidance concerning land use planning in relation to the storage of hazardous substances. This subject is covered in general terms in the Hazardous substances chapter of the Planning Practice Guidance (PPG) (as of January 2022). This repays detailed study.

2. Otherwise, the main purpose of this chapter is to provide practical advice, with examples, to assist in dealing with and recommending or reporting on planning appeals, called-in applications and local plan examinations where public safety is a main issue due to the proximity of a major hazard installation (a Control of Major Accident Hazards ('COMAH') site – see below). Nationally, there are about 750 COMAH sites and 1,000 other hazardous substances storage sites.

3. In particular, advice is given for the rare occasions when, usually at the request of the Health and Safety Executive (HSE), the Secretary of State (SoS) issues a Direction under s321(3) of the Town and Country Planning Act 1990 (as amended) ('the 1990 Act') that specified evidence pertaining to a major hazard installation shall only be heard and open to inspection by persons listed in the Direction. Invariably this action may be taken where such evidence would be likely to result in the disclosure of information on matters of national security and its public disclosure would be contrary to the national interest. Such information is typically classified as 'official sensitive' (formerly 'restricted') and gives rise to a need for a separate report on the evidence subject to the s321 Direction.

4. In practice, as far as current Department and Planning Inspectorate records show, there have been only two occasions, in 2008 and in 2021, when a s321 Direction was issued in connection with called-in planning applications. The HSE has stated that it has requested the call in of an application only eight times in 35 years to 2021.

5. There has been one occasion, in connection with the Thames Tideway National Infrastructure (NI) examination, where evidence has been heard in closed session. If an Examining Inspector is made aware of a potential request for a closed hearing, they should inform their relevant PINS case team who can advise on how the request should be handled. There are separate NI Work Instructions – 'How to handle a request to the SoS for a closed hearing' under separate legislation.

Legislation and guidance

Acts

- The Town and Country Planning Act 1990 (as amended by s321)
- The Planning (Hazardous Substances) Act 1990

Regulations

6. The Seveso III Directive sets expectations on land-use planning. In particular, Article 13 requires planning controls to apply to all establishments within the scope of the directive and

developments in the vicinity of these establishments.

7. The main Regulations are:

- The Town and Country Planning (Development Management Procedure) (England) Order 2015 SI 2015/595 (see Reg 18 and Schedule 4)
- The Town and Country Planning (Local Planning) (England) Regulations 2012 SI 2012/767 (see Reg 10(1)(a) and (b))
- The Planning (Hazardous Substances) Regulations 2015 SI 2015/627
- The Control of Major Accident Hazards Regulations 2015 SI 2015/483
- The Planning (National Security Directions and Appointed Representatives) (England) Rules 2006 SI 2006/1284

National Planning Policy Framework

8. The July 2021 National Planning Policy Framework ('NPPF') at paragraph 45 states that local planning authorities should consult the appropriate bodies when considering applications for the siting of, or changes to, major hazard sites, installations or pipelines, or for development around them.

9. Major hazard sites are defined in the Glossary as sites or infrastructure, including licensed explosive sites and nuclear installations, around which Health and Safety Executive (and Office for Nuclear Regulation) consultation distances to mitigate the consequences to public safety of major accidents may apply.

10. Paragraph 97(a) states that planning policies and decisions should promote public safety and take into account wider security and defence requirements by anticipating and addressing possible malicious threats and natural hazards, especially in locations where large numbers of people are expected to congregate. Footnote 43 lists these as including transport hubs and leisure and sports venues but notably does not mention residential areas at that point (however, see paragraph 13(iv) below).

11. Paragraph 97(b) states that policies and decisions should also recognise and support development required for operational defence and security purposes and ensure that operational sites are not affected adversely by the impact of other development proposed in the area.

Planning Practice Guidance

12. The PPG (2022) includes the chapter on Hazardous substances (PPG Paragraph 003 Reference ID: 39-003-20161209). It explains planning controls relating to the storage of hazardous substances in England and how to handle development proposals around hazardous establishments. This guidance should be studied in detail in connection with any case involving major hazard installations including local plans under preparation and examination.

13. The essential points of the PPG guidance are as follows:

i. The lessons from explosions such as at the Flixborough chemical works in Humberside in 1974, Seveso in Italy in 1976 and Buncefield in 2005 underline the importance of controlling

sites where hazardous substances could be present and where development is proposed near them [001 Reference ID: 39-001-20140306]

ii. Hazardous substances consent is a key part of controls over the storage and use of hazardous substances in quantities posing an off-site risk.

iii. In the consideration of development proposals around hazardous installations, technical advice should be sought on the risks presented from the COMAH authority, which for most cases is the HSE. Due weight is then given to those risks, balanced against other relevant planning considerations [002 Reference ID: 39-002-20161209]

iv. Local planning authorities are required to consult the HSE or other expert bodies on certain development proposals where the presence of a COMAH site is relevant. Such proposals include **residential development and large retail, office or industrial developments** located in consultation zones and development likely to result in an increase in the number of people working in or visiting the relevant area. Particular regard should be had to children, older people and disabled people or a risk to the environment [*068 Reference ID: 39-068-20161209*]

v. HSE advice is based upon the following principles:

   a) The risk considered is the **residual risk** (that is the risk that unavoidably remains even after all legally required measures have been taken to prevent and mitigate the effects of a major accident) to people in the vicinity
   b) Where it is beneficial to do so, the advice takes account of risk as well as hazard (that is the likelihood of an accident as well as its consequences)
   c) The advice takes account of the size and nature of the proposed development and the inherent vulnerability of the population at risk
   d) The advice takes account of the risk of serious injury, including that of fatality, attaching particular weight to the risk where a proposed development might result in a large number of casualties in the event of a major accident [068 Reference ID: 39-068-20161209].

vi. The COMAH competent authority has no power of direction and the decision on whether to grant a planning permission rests with the local planning authority (or Inspector or Secretary of State). However, in view of the acknowledged expertise of the HSE or other COMAH competent authority in assessing the off-site risks presented by the use of hazardous substances, any advice from the HSE that planning permission should be refused for development for, at or near to a hazardous installation or pipeline should not be overridden without the **most careful consideration**.

vii. Where HSE advice is material to any subsequent appeal or called-in application, the HSE may provide expert evidence at any local inquiry. More information on the issues the COMAH competent authority takes into account when advising on applications can be found on the Health and Safety Executive Land Use Planning website, the Environment Agency's website and the Office for Nuclear Regulation's website [071 Reference ID: 39-071-20161209].

viii. If a local planning authority is minded to grant permission against COMAH competent authority advice, it should give 21 days' notice to that authority to enable it to consider whether to request the SoS to call in the application.

ix. The HSE will normally consider its role to be discharged when it is satisfied that the local authority is acting in full understanding of the advice received and the consequences that could follow and will only consider recommending call-in action in cases of exceptional concern or where important policy or safety issues are at stake [072 Reference ID: 39-072-20161209].

Public Safety Issues and Evidence

14. An issue of risk to public safety may be raised against a proposed development where there is claimed to be potential for harm to human health at the proposed development from a nearby COMAH site. Such harm might arise as a result of accidental or malicious damage to the installation resulting in such as explosion, fire or the release of noxious substances.

15. Invariably, such objections would be raised by the HSE, often appearing under Rule 6 at a public inquiry. The objection might be challenged by the appellant where the local planning authority has refused the application on HSE advice or by the applicant in conjunction with the planning authority, where the authority has resolved to approve the proposal contrary to HSE objections.

16. The public safety issue usually involves consideration of the potential source of harm, the likelihood a harmful incident and the likely effect on nearby populations after mitigation (residual risk). Ultimately a recommendation or decision needs to be reached as to whether the residual risk is acceptable on the balance of all other material planning considerations.

17. HSE uses long-established and accepted methodology dating from 1989 to undertake quantitative risk assessments to identify sources of risk, means for their control and mitigation. Accepting that zero risk is unattainable, mitigation to residual risk is achieved by way of emergency planning and the control of off-site population by land use planning.

18. This approach is used to establish risk contours to define inner, middle and outer consultation zones around COMAH sites. Consultation is required concerning risk to human health for any development within the outer contour. The risk contours are established upon the calculated level of individual risk of harm to a person present within the consultation zones.

19. Individual risk is measured in terms of the chances per million per year (cpm/yr) of an individual receiving a "dangerous dose" of a noxious or dangerous substance as a result of an incident that might potentially occur at the COMAH site. The defining individual risk levels are 10cpm/yr for the inner zone, 1cpm/yr for the middle zone and 0.3cpm/yr for the outer zone.

20. The HSE advises strongly against housing development where the risk of dangerous dose is above 10cpm/yr in the inner zone or between 1cpm/yr and 10cpm/yr in the middle zone. The HSE advises against large public facilities like sports stadia in the outer zone.

21. The HSE also assesses societal risk, which takes account of the number of people subject to the assessed individual risk. This is calculated by an empirical formula resulting in a Societal

Risk Index (SRI), the limit value of which is 2,500. Above this, HSE advises against proposed development of more than two houses. Control of societal risk is a primary aim of the Seveso Directive. The strength of HSE advice against a proposed development and whether to request call in of an application depends upon the calculated value of SRI. It is important to distinguish individual risk from societal risk.

22. Some authorities adopt different risk assessment criteria. For example, an adopted local plan might contain public safety policy citing cpm/yr of death. The HSE criteria related to dangerous dose cover both death and non-fatal injury but potentially life-changing harm. However, the cpm/yr of death sets a higher limit level.

23. Such differences of approach can result in conflicting evidence being adduced at inquiry, leading to submissions that the planning authority cannot have given the requisite most careful consideration to HSE advice against the development. The test of most careful consideration is supported in case law. In such a case, judgement is likely to be necessary as to whether compliance with a development plan should be overridden by a more stringent assessment by an objector as an other material consideration, in terms of the planning balance section required by s38(6) of the Planning and Compulsory Purchase Act 2004.

Practical Examples

24. Of the two called-in planning applications on record involving s321 Directions, the first involved a proposed hotel and grandstand at the Oval cricket ground, Kennington, Lambeth in 2008-9. The application was called in due to the development potentially placing some 1800 additional spectators within the consultation zone of the nearby Kennington gas holders, a COMAH site. There was no increase in individual risk compared with that to existing residents of nearby flats and cricket spectators but there would clearly be an increase in societal risk. The Inspector judged on the evidence that the risk was “worth taking” in the overall balance and the SoS agreed, granting permission. The open and restricted reports form Annex A (the restricted report was later derestricted due to changed circumstances).

25. The second called-in application subject to a s321 Direction related to a proposed 139-dwelling residential development close to a chemical works in Runcorn, Halton, Cheshire, which is a COMAH site storing hazardous chemicals including chlorine. This Inquiry was aborted when the planning authority withdrew its support for the application and the applicants adduced no evidence of their own. However, the case provides comparatively recent experience to inform future practice and related pre-Inquiry correspondence forms part of Annex C.

26. Additionally, Annex D provides an example of an Inspector’s decision on an upper tier COMAH case without a s321 Direction. The University of Chester had submitted linked s174 appeals regarding a breach of planning control at Land at Thornton Science Park. The enforcement notices (in summary) alleged a material change of use of the land, from research and development use (in connection with automotive / petrochemical / aviation / environmental and energy industries) to a mixed-use development comprising a University science and engineering faculty. The site was situated next to the Stanlow Oil Refinery, an upper tier COMAH establishment, with HSE and Essar Oil (UK) Limited given Rule 6 status. It was ruled that the submission of sensitive information from Essar Oil, HSE and the Council was not necessary for the determination of these appeals, and following a Screening Direction, an Environmental Impact Assessment was also not required.

27. The focus for determination in the Annex D example was whether a change to a sui generis mixed use on the site, which included elements of teaching and workplace training for up to 404 higher adult education students, involved development and a material change of use. The main issues for assessing the planning merits of each appeal included in particular an assessment of the effect of the development on public safety, having particular regard to the proximity to Stanlow Oil Refinery as an upper tier COMAH establishment and the Refinery's continuing operation within the Stanlow special policy area. Other planning considerations included the effect of the change of use on the heritage assets at the site, the effect of the development on the Mersey Estuary SPA / Ramsar site, and whether any identified harm could be addressed through conditions.

Section 321 Directions and secure handling of official sensitive documents

28. An example of a Direction under s321 of the 1990 Act (as amended) appears at Annex B.

29. Subject to specific legal advice in each case, it is incumbent upon the Department, the Inspectorate and all parties to the inquiry, including the Inspector and programme officer, to ensure compliance with the s321 Direction and to treat all the written and oral evidence cited in the Direction as official sensitive (formerly 'restricted').

30. When the inquiry into the Oval case took place in 2008-9, all the documentation was in hard copy and it was a relatively simple matter to keep the restricted written evidence securely in separate files limited to persons named in the s321 Direction.

31. By the time of the Runcorn case in 2021, two major changes had occurred to procedural practice. First, all documentation is now primarily in electronic form and, second, the Covid19 pandemic had led to the holding of virtual inquiries, by such electronic applications as Teams or Zoom, invariably hosted by the local authority.

32. Accordingly, as soon as there is mention of the possibility of a s321 Direction being sought, typically in association with a call-in request by the HSE, the Inspectorate case officer should be asked to liaise with the Department via the Planning Casework Unit (PCU) concerning any Direction to be issued. The case officer should also ensure that all appropriate participants are named in the Direction, including any programme officer or IT staff hosting any virtual event and notify all parties and the Inspector when the Direction is issued.

33. This is a matter for any case management conference and subsequent Directions by the Inspector. Examples of pre-Inquiry correspondence appear at Annex C.

34. Such Directions should include details of how the virtual or face-to face closed sessions of the inquiry are to be organised and conducted. In connection with the Halton case, it was concluded by the Inspector and the Inspectorate IT team, on Government advice, that a Teams meeting hosted by the local authority, with invitations restricted to individuals named in the s321 Direction, was sufficiently secure for official sensitive material to be discussed.

35. **However, it is important that to consider on a case by case basis whether closed virtual hearings would provide the necessary level of security. That is likely to depend upon any restrictions on face to face events at the time and legal views on such as the degree of sensitivity of the information involved and security considerations regarding hazardous substance processing and storage equipment**.

36. If a virtual hearing is considered appropriate, it is necessary for the Inspector to stress throughout the importance of all parties preventing any unauthorised person having sight of official sensitive material or overhearing oral evidence which is classed as official sensitive. This is particularly important where participants in a virtual closed session join from an office or their home where no unauthorised persons should be in the same room. For face to face events, the authorised programme officer or event administrator should be in attendance to control admission.

37. All official sensitive evidence must be encrypted for submission to the Inspectorate and placed not on Horizon (or its replacement data handling system) but on a SharePoint or similar website set up by the Inspectorate IT team, with access strictly limited to persons named in the s321 Direction.

38. At first sight, holding any part of a public inquiry in private is a classic oxymoron, likely to give rise to public objection. In both the Oval and Halton cases such concerns were raised, including on grounds that local people employed within the COMAH site were well aware of the risks, rendering the s321 Direction unnecessary and inappropriate. Be that as it may, it is for the SoS to determine whether issues of national security override the normal presumption of open public access to documentation. Such submissions are not therefore strictly for the inquiry but might beneficially be reported briefly for completeness, in case of any complaint to the SoS.

39. However, there is provision under s321(5) of the Act and **Planning (national Security Directions and Appointed** Representatives**) (England) Rules 2006** for persons not authorised by the s321 Direction to be represented by a special advocate in closed session. However, such an appointed representative still cannot disclose the official sensitive evidence to the client.

Annex A: Example Reports and Decision

Report to the Secretary of State for Communities and Local Government

by xxxxxxxxxxxxxxx

an Inspector appointed by the Secretary of State for Communities and Local Government

The Planning Inspectorate
Temple Quay House
2 The Square
Temple Quay
Bristol BS1 6PN
☎ GTN 1371 8000

Date 26 March 2009

APPLICATION by

SURREY COUNTY CRICKET CLUB

and

ARORA INTERNATIONAL HOTELS

to the COUNCIL of the LONDON BOROUGH of LAMBETH

for DEVELOPMENT at THE BRIT OVAL

Inquiry opened on 14 October 2008

File Ref: APP/N5660/V/08/1203001

File Ref: APP/N5660/V/08/1203001

The Brit Oval
Surrey County Cricket Club, Kennington Oval, London SE11 5SS

- The Application was called in for decision by the Secretary of State by a direction, made under section 77 of the Town and Country Planning Act 1990, on 2 May 2008.
- The Application is made by Surrey County Cricket Club and Arora International Hotels to the Council of the London Borough of Lambeth.
- The Application, Ref 07/04598/FUL, is dated 14 November 2007.
- The development proposed is:
  demolition of the Lock, Laker and Peter May Stands and the Surrey Tavern; construction of new spectator stand and hotel together with alteration to Pavilion stand elevation and formation of new plaza to front and turnstiles; construction of new ticket block (resubmission of application 07/02422/FUL).
  The reason given for making the direction was:
  the proposal may conflict with national and regional policies on important matters.
- On the information available at the time of making the s77 Direction, the following were the matters on which the Secretary of State particularly wished to be informed for the purpose of her consideration of the application:
  a) the representations submitted to the Secretary of State by the Health and Safety Executive [HSE] concerning the potential risks of the proposed development in proximity to the Kennington Gasholder Station;
  b) whether the proposed development is in accordance with national policy on hazardous installations as set out in Circular 4/2000 *Planning Controls for Hazardous Substances;*
  c) whether an agreement under section 106 of the Town and Country Planning Act 1990 is an appropriate method of meeting the safety concerns of HSE;
  d) whether the proposed development accords with the relevant provisions of the Lambeth Council's Unitary Development Plan adopted in August 2007;
  e) whether the proposed development accords with the relevant provisions of the London Plan 2004 – *Spatial development Strategy for Greater London* (as amended);
  f) whether any permission should be subject to conditions and, if so, the form they should take; and
  g) any other relevant material planning considerations.
- The Inquiry sat for a total of 15 days, on 14-17 and 29 October, 12-14, 17-21 and 24 November and 2 December 2008.
- Restricted evidence subject to Direction under s321 of the Act was heard in closed session.
- Accompanied Site Visits were undertaken on 22 October 2008.

Summary of Recommendation: The appeal be allowed, and planning permission granted subject to conditions.

NOTE

RESTRICTED EVIDENCE

This Report takes into account the conclusions set out in a separate Restricted Report made subject to established procedures for the handling of material Restricted to individuals specified in a Direction made under section 321 of the Act of 1990 as amended.

The Direction and three amendments were made by the Secretary of State for Communities and Local Government between 16 October and 17 November 2008 in response to a request by the Health and Safety Executive in the interests of national security.

This Main Report covers all matters considered at the Public Inquiry other than Restricted matters of public safety with respect to the Kennington Gasholder Station. These were heard in closed session in accordance with the s321 Direction.

CONTENTS

Abbreviations

ACMH	Advisory Committee on Major Hazards
ADF	Average Daylight Factor

[1] Section Numbers are hyperlinked to Section Titles

ALARP	As Low As Reasonably Practicable
mAOD	metres above ordnance datum
BER	Building Emissions Rate
BLEVE	Boiling Liquid Expanding Vapour Explosion
BMIIB	Buncefield Major Incident Investigation Board
BR02[06]	Building Regulations 2002 [2006]
BRE[EAM]	Building Research Establishment [Environmental Assessment Method]
CA	Competent Authority
CBE	Cautious Best Estimate
CCS	Community Consultation Statement
CD	Core Document or Consultation Distance *according to context*
CIMAH	Control of Industrial Major Accident Hazards
CMAHR	*Control of Major Accident Hazards* Regulations
COMAH	Control of Major Accident Hazards
CO2	carbon dioxide
cpm/yr	chances per million per year
CPNI	Centre for the Protection of National Infrastructure
CSR	Case Societal Risk
CZ	Consultation Zone
DS	Design Statement
DMP	Delivery Management Plan
EA	Environment Agency
ECB	England [and Wales] Cricket Board
FRA	Flood Risk Assessment
GH1	Gasholder No 1 of KGS
GLA	Greater London Authority
HIA	Hazardous Installations Assessment
HSE	The Health and Safety Executive
HSWA	Health and Safety at Work Act
ICC	International Cricket Council
IGE/SR	Institution of Gas Engineers/Safety Recommendations
KGS	Kennington Gasholder Station
kW/sqm	kilowatts per square metre
LBL	The Council of the London Borough of Lambeth [the Local Planning Authority]
LFEPA	London Fire and Emergency Planning Authority
LPA	Local Planning Authority
LPG	Liquid Petroleum Gas
LSR	Local Societal Risk
LUP	Land Use Planning
MDO	Major Development Opportunity
MHIDAS	Major Hazard Incident Data Acquisition Service
PA	public address [system]
PADHI	Planning Advice for Developments near Hazardous Installations
PIM	Pre-Inquiry Meeting
PTAL	Public Transport Access Level
PV	Photo Voltaics
RWCMA	Representative Worst Case Major Accident
SCCC	Surrey County Cricket Club [and Arora International Hotels – co-Applicants]
SEP	Surface Emissive Power
SL	Level of Sensitivity
SMG	Stadium Monitoring Group
SMP	Safety Management Plan
SOCG	Statement of Common Ground
SoS	Secretary of State
SPG	Supplementary Planning Guidance
SRAG	Safety Report Assessment Guide
tdu	thermal dose units
TER	Target Emissions Rate
UDP	Unitary Development Plan
UFO	United Friends of Oval
VSC	Vertical Sky Component

PROCEDURAL MATTERS

Pre-Inquiry Meeting

1.1 A Pre-Inquiry Meeting [PIM] was held on 31 July 2008, solely to discuss procedural matters, including details of the venue, the appointment of an Inquiry Assistant and a potential need for certain evidence to be taken in closed session [CD1]. At the PIM I undertook to give notice of any matters on which I wished to hear oral evidence.

1.2 I subsequently intimated to Surrey County Cricket Club and Arora International Hotels [SCCC] that matters of existing land uses around The Oval, the design concept of the proposed buildings, and various aspects of amenity and sustainability, all raised by local objectors United Friends of Oval [UFO], should be the subject of oral evidence. I also invited submissions as to whether there is any statutory basis for risk assessment, to provide a clear framework for the necessary judgements on public safety.

1.3 Accordingly SCCC provided oral evidence to rebut third party objections and, in response to the latter request, the Health and Safety Executive [HSE] submitted a paper on the acceptability of risk [HSE/AJW/02*Restricted*].

Venue

1.4 After the PIM, the Council of the London Borough of Lambeth [LBL] reported that the original venue at Stockwell Road YMCA was unsuitable and it was agreed that The Brit Oval itself be used.

1.5 UFO objected to this change on grounds that such an arrangement could influence the proceedings. UFO asked that a neutral venue be found and for any commercial contract between SCCC and LBL in this connection be made public.

1.6 There was no evidence that any party would be compromised by the use of The Brit Oval as the Inquiry venue and it was not accepted that the quality of the facilities might influence the outcome of the Application. Accordingly, the objection of UFO was overruled, taking into account also that, whilst The Brit Oval is the site of the disputed Application, it is itself established as a major public conference centre. It was left to LBL to deal with the request for disclosure of any contract with SCCC for provision of facilities [CD91]. The Inquiry proceeded without further dissent being expressed regarding the venue.

Inquiry Assistant

1.7 LBL appointed Miss Ruth Pilgrim, an officer unconnected with the disputed Application, as Inquiry Assistant to provide an independent central point of contact for all parties and to co-ordinate documentation and generally assist with the running of the Inquiry. Her work in this capacity was most helpful and much appreciated.

Closed Sessions – Restricted Information – Special Advocate

1.8 The Health and Safety Executive [HSE], as objector to the development and Rule 6(6) party to the Inquiry, requested the Secretary of State [SoS] to Direct, under s321 of the Act of 1990 as amended, that evidence relating to certain matters of public safety be heard or inspected only by specified persons in the interest of national security. These matters concern potential major incidents and local societal risk at the Kennington Gasholder Station [KGS], the role of the KGS in the local gas supply network and measures taken under the **Control of Major Accident Hazards** Regulations [CMAHR] to prevent major accidents and mitigate their effects. The SoS gave due notice of that request and subsequently made a Direction under section 321 of the Act on 16 October 2008, followed by three amendments on 3, 4 and 17 November 2008 [CD89]. The Directions named specific persons, excluding any interested persons or members of the public, who were authorised to inspect certain documents classified as Restricted. [The Inspector was not so named, being cleared to inspect Restricted material by virtue of his status as an established civil servant.]

1.9 In such circumstances persons excluded from the closed sessions are entitled to avail themselves of the services of a Special Advocate to represent their interests in the closed sessions. In practice only one group of objectors, United Friends of Oval [UFO] was minded to follow this procedure. After consideration, however, UFO submitted that:

> UFO appreciated the opportunity to consider their position on the matter of public safety and regretted that they were excluded from information critical to their lives as local residents. However, UFO noted that a Special Advocate if appointed, would still not be permitted to disclose the Restricted safety evidence of the main parties. UFO felt that they would thereby be at a clear disadvantage and unable to put forward safety evidence of their own. At the same time UFO were aware of the difficulty faced by the Inquiry in this respect and had decided overall not to request a Special Advocate.

1.10 In response it was submitted for SCCC that:

> Whilst the Health and Safety Executive [HSE] would also protect the interests of UFO as part of the general public, SCCC recognised the contradiction in holding a Public Inquiry in private and would ensure that all the points on every issue raised by UFO as unrepresented objectors would be covered in the presentation of the SCCC case.

1.11 The latter assurance was borne out throughout the conduct of the Inquiry, wherein the Restricted evidence was heard in closed sessions, held on each sitting day save for 14-17 October, from which all but the representatives of HSE, SCCC and LBL named in the s321 Directions were excluded.

1.12 As to the extent of the restriction; at the time of the PIM, HSE anticipated that only a small part of its own evidence would need to be Restricted whereas, in the event, the Restricted material comprised the bulk of the public safety evidence; not only that submitted by HSE but also that produced in response by SCCC and LBL.

1.13 During the course of the Inquiry, it was explained by HSE, and as far as possible made clear to members of the public by the Inspector in open session, that the

reason for the increased extent of the restriction was that the evidence is based around the statutory safety reports on the KGS made under the CMAHR. These COMAH Reports are excluded from public registers by Government Direction [HSE/JH/4/2/F-*Restricted*]. HSE had been obliged to notify the Home Office of the situation. The Home Office had responded with reference to guidance on disclosure of sensitive information by the Centre for Protection of National Infrastructure [CPNI]. Thereafter the Inquiry was bound by the nature and timescale of the response of the Home Office and the necessary procedures under s321 of the Act [HSE/GD/17-18-*Restricted*].

1.14 The evidence that was heard in closed session is reported in a separate Restricted Report which informs the Overall Conclusions reached below.

Inquiry Programme and the Non-Availability of Counsel for LBL

1.15 In correspondence dated 23-31 October 2008 [CD90] LBL submitted that its Counsel could not attend for some of the programmed sessions and requested postponement. This was overruled on grounds of the wider public interest and that LBL was in support of the Application in any event, and also on the clear understanding that an opportunity would be afforded to LBL, before the Inquiry closed, to address orally any points arising that affected its interests. In the circumstances LBL treated its expert evidence on gasholder safety as written representations and these are taken into account as such in this Report and in Restricted Report. In practice LBL was represented by junior Counsel holding a noting brief only and elected to take no further part in the oral proceedings, save for the provision of certain documents relating mainly to planning conditions and obligations.

Clarification

1.16 The Application was submitted and originally considered by LBL, HSE and the public, on the basis that the development would provide approximately an additional 1600 spectator seats but, at the Inquiry, it was confirmed that the correct number is 1830. It was established that this variation does not affect the consideration of the planning and safety issues that arise. LBL did not therefore re-advertise the Application. There was no dissent on this point.

1.17 Although there is space for 57 cars to be parked at basement level under the proposed hotel, LBL and SCCC agree that the number actually provided would be limited to 45 by planning condition. Again, this variation does not affect the consideration of the issues arising.

Statements of Common Ground

1.18 SCCC and LBL, in consultation with HSE, provided a SOCG [CD82]. UFO disagree with many aspects of the SOCG [UFO/1Appendix] and these are taken up in their case as reported below.

1.19 SCCC, LBL and HSE provided, in addition, a Restricted SOCG on Safety Matters which mainly summarises points of disagreement in the public safety evidence [CD83].

Planning Conditions and Obligations

1.20 SCCC and LBL have agreed a schedule of planning conditions they suggest should be imposed on the permission sought from the SoS. These are considered in detail in this Report and a schedule of recommended conditions is appended.

1.21 SCCC and LBL have completed a legal agreement, under section 106 of the Act, [CD81] providing for a range of obligations including: a financial contribution to the public realm; transport and highway works; traffic and parking management; travel and delivery management plans; a stadium monitoring group; local employment; and environmental sustainability measures.

1.22 SCCC have also completed a unilateral undertaking, under section 106 of the Act, to implement a Safety Management Plan [SMP] in conjunction with the proposed development [CD81A]. LBL submitted comments and proposals for a Rider to be added to that undertaking in order for it to become acceptable to LBL [LBL/1/App2].

1.23 Both HSE and UFO submitted comments upon both s106 obligations [HSE/GD/6 & UFO/1#7&9]. The s106 obligations are material considerations and their contents, and all comments upon them, are taken into account in this Report.

Accompanied Site Visits

1.24 On 22 October 2008, I undertook a series of accompanied site visits. The first was to view the operation of the Kennington Gasholder Station and was attended by representatives of HSE, SCCC and LBL. The second comprised a guided tour of the indoor and outdoor facilities of The Brit Oval itself, attended also by members of UFO. Finally, I toured the surrounding streets on a route suggested by UFO, culminating in visits inside Flats Nos 7, 41, 60 and 77 Lohmann House, from where I observed the Application site through the main living room windows.

2 DESCRIPTION and PLANNING BACKGROUND of the APPLICATION SITE and SURROUNDINGS

The Application Site and surrounding area and their planning background are described in the SOCG [CD82##2-3] and Document LBL1/1. The material points are:

Description

2.1 The Application site comprises those south eastern parts of The Brit Oval, at the "Pavilion End" of the Ground, currently occupied by the Lock, Laker and Peter May grandstands and the front of the main Pavilion, together with part of the grass playing area in front of them, as well as the site of the recently demolished Surrey Tavern [currently a temporary tented bar] and parking and circulation areas along the frontage to Kennington Oval. [CD82 Apps 1-3; CD/12/16-17]

2.2 The opposite, north western part of the Ground, the "Vauxhall End", is dominated by the OCS grandstand, which was completed with associated facilities in 2005. To the west of the Application site and Pavilion is the Bedser stand. The original Pavilion dates back to the 1890s and was raised in height in the 1990s.

2.3 The St Marks Conservation Area lies nearby to the south west and a number of listed buildings front Kennington Oval. Other surrounding uses are variously residential, educational, community, commercial and industrial in nature.

2.4 The closest residential properties to the Application site are the apartment blocks, Lohmann House and Lockwood House, both having many flats facing the site across Kennington Oval.

2.5 The Kennington Gasholder Station [KGS] lies north of The Oval and comprises four gasholders, the largest and nearest being the 131 tonne Gasholder No1 [GH1], situated about 53m from the boundary of the Application site. The other three holders contain a further 91 tonnes of gas, making a total inventory of 222t of natural gas.

2.6 The Oval underground station on the Northern Line is 130m south east along Harleyford Street from the Hobbs Gate entrance into the Application site, whilst the Vauxhall underground station on the Victoria Line and Vauxhall main line and bus stations are all 500m away to the northwest. With several bus routes passing The Oval, the Application site has an "exceptional" Public Transport Access Level [PTAL] of 6a.

Planning Background

2.7 The construction of the OCS stand followed the grant of planning permission by LBL subject to a s106 agreement. HSE was not consulted on that development.

2.8 A similar application to that now before the SoS was refused in October 2007, on the advice of HSE with respect to the proximity of the Kennington Gasholder Station, in the absence of a risk assessment by SCCC [CDs54-55].

2.9 The Application currently for determination following call-in by the SoS was accompanied by a specialist Hazardous Installation Assessment [HIA][CD18]. LBL commissioned its own specialist consultant to evaluate the submitted HIA. In January 2008 LBL resolved, on the basis of a favourable recommendation by officers, including with reference to late consultations and information, to grant planning permission for the proposal, subject to: a range of planning conditions; completion of a s106 agreement; the Mayor of London not directing refusal; and Application not being called in by the SoS [CDs57-59].

2.10 The Mayor advised LBL that the proposal is broadly acceptable in strategic planning terms, subject to further investigation of energy requirements, and that LBL should determine the Application subject to any action by the SoS. [CDs56&61]

2.11 However, the SoS called in the Application for determination following requests to do so by HSE and others [CDs45-46&69].

2.12 The Cricketers Public House, opposite the Ground on Kennington Oval, has been the subject of two planning applications for residential redevelopment in 2008. These have been refused by LBL for reasons of risk in proximity to the KGS, based on HSE advice and after consideration of specialist risk assessments in favour by both the applicants and the LBL consultant[2]. [LBL/1/1#6.9-15&7.1-8.1]

[2] Since the Inquiry into this Application an appeal has been lodged concerning the redevelopment of the Cricketers but that will be for separate determination.

3 POLICY, LEGISLATION, GUIDANCE and DEFINITIONS

Development Plan

Planning Policy relating to the Application is reviewed in the SOCG [CD82#5]. The material points are:

3.1 The proposals must comply with the statutory development plan unless material considerations indicate otherwise.[3] For that purpose, the development plan comprises the consolidated London Plan Spatial Development Strategy for Greater London adopted in 2008 [London Plan][CD31] and the adopted Lambeth Unitary Development Plan of 2007 [UDP][CD30].

3.2 The specific provisions that feature most prominently in the oral and written cases summarised below, and which are likely to be most germane to the decision of the SoS, are mainly contained within the UDP, albeit generally supported by the London Plan and also by national planning policy. In particular:

UDP Policy 7 requires new development in areas of mixed use to protect residential amenity.

UDP Policy 8 requires development attracting large crowds to be located on sites having very good access to public transport with adequate passenger capacity.

UDP Policy 9 requires an assessment of transport impact to demonstrate that a new development will not lead to an increase in congestion or reduce road safety, whilst UDP Policy 10 specifically safeguards the interests of pedestrians and cyclists.

UDP Policy 14, on parking and traffic restraint, at criterion (g), encourages car-free development in areas of high public transport accessibility.

UDP Policy 28 covers the location of large hotels, favouring non-residential areas with very good public transport access. London Plan Policy 3D.6 supports additional hotel rooms for the 2012 London Olympic Games.

UDP Policies 31 to 33, 45 and 47, consistent with London Plan Policy 4B, promote good design of appropriate scale, retaining urban character and grain. Buildings should address the street, and development should enhance views, promote public access and safety, and protect the settings of listed buildings and conservation areas. London Plan Policy 4B.1 seeks maximisation of site potential in redevelopment as a principle of a compact city.
UDP Policy 33 with text para 4.14.10, supported by London Plan Policy 4B.1, also requires acceptable standards of openness, privacy, daylight and sunlight at existing properties, the latter subject to the good practice guidance of the Building Research Establishment [BRE][4].

[3] Planning and Compulsory Purchase Act 2004 section 38(6)
[4] Site Layout Planning for Sunlight and Daylight – A Guide to Good Practice BRE 1991 Sections 2.2&3.2 BR 209 ISBN 0 85125 506 X

UDP Policies 34 and 35 respectively promote renewable energy and sustainable construction in new development. Major schemes are required to incorporate equipment for renewable power generation of at least 10% of their energy requirement and to demonstrate by sustainability assessment that they incorporate sustainable design and construction principles.

Under the heading of Climate Change, London Plan Policy 4A.1 sets a sequential hierarchy for considering applications in terms of: using less energy by sustainable design and construction measures; efficient supply by decentralised power generation; and use of renewable energy sources. This is commonly and aptly abbreviated to "be lean, be clean, be green"!

Adopted Supplementary Planning Guidance [SPG] to the UDP[5] sets Part L of the Building Regulations 2006 [BR06] as the minimum benchmark and starting point for sustainability assessment, to be undertaken in line with the foregoing sequence. Part L2A of the BR06 identifies a calculated Target [CO2] Emissions Rate [TER] as the performance minimum for an equivalent, notional, non-domestic building. This is set 28% below the level of compliance with the Building Regulations 2002 [BR02]. For compliance, the Building Emissions Rate [BER] must be less than the TER [BR02][UFO/3/C#4]. Overall assessments can be carried out using the Building Research Establishment Environmental Assessment Method [BREEAM].

UDP Policy 50, particularly criterion (g), resists the loss of open space and playing fields unless there is compensatory provision, including by enhanced public access.

UDP Policy 51 is specific to The Kennington Oval Cricket Ground. Through this policy LBL accepts the potential for increased capacity and usage and additional facilities at The Oval as a first class cricket ground, with the retention of the historic Pavilion regarded as a desirable feature of any redevelopment scheme, which should also seek to respect its setting and appearance. Rebuilding of other stands is acceptable. Redevelopment should enable a more efficient operation of the Ground to protect surrounding amenity as far as possible in terms of traffic, daylight, sunlight, privacy, pavement congestion, noise, including the public address [PA] system, and litter. Any proposal for increased capacity should demonstrate high quality design, of appropriate scale and mass in relation to neighbouring streets; and innovation is encouraged. The benefits of sport and regeneration should spread to the surrounding area. Para 4.17.28 of the supporting text confirms that LBL wishes to ensure that development at The Oval is achieved "without detriment" to the amenities of surrounding occupiers.

UDP Policy 54 concerns pollution, including noise, and public safety. At criterion (e) Policy 54 resists development that would increase noise above acceptable levels, especially at noise-sensitive buildings, including dwellings. At criterion (g), as supported by text para 4.20.10, Policy 54 states that development adjoining areas of hazardous use, including major development in the Oval Gasworks Potential Hazard Zone that encircles the whole of the Ground, will be

[5] Sustainable Design and Construction – LBL July 2008 paras 3.12-13; 5.7

controlled if this would create an unacceptable residual risk after all health and safety controls have been complied with.

National Planning Policy

3.3 Those parts of national planning advice that support the provisions of the UDP are:

Planning Considerations other than public safety

Planning Policy Statement 1 [PPS1] on delivering sustainable development and the Government publication By Design[6] together promote high quality inclusive design, without undue prescription or imposition of style or taste on developers. That is subject to a set of urban design objectives, and the consideration of a range of aspects of development form. Very briefly, these include promoting local distinctiveness, street frontage continuity, definition of private space and high quality public realm, legibility and accessibility, all with reference to urban grain and scale.

PPS1 and its Planning and Climate Change supplement, together with PPS22 on the use of renewable energy, also establish the broad aim that new development will fulfil the key planning objective to secure the highest viable resource and energy efficiency by providing decentralised energy supply and sustainable buildings.

PPS25 sets out the principles of managing and reducing the risk of flooding in the location of new development, with reference to zones of probability of flooding, and classification of development vulnerability.

Planning Policy Guidance 13 [PPG13] sets objectives for sustainable transport and accessibility, and PPG24 deals with noise as a material planning consideration.

Public Safety provisions

HSE was established by the Health and Safety at Work Act 1974 with the overall aims to control dangerous substances and protect the public, as well as work people.

Circular 04/2000 [C4/00], on planning controls for hazardous substances, guides the implementation of the land use planning [LUP] requirements in Article 12 of the European Seveso II Directive 96/82/EC, to limit the consequences of major accidents involving dangerous substances, including natural gas.

Annex A to C4/00 covers the interrelationship of the hazardous substance consent and planning permission regimes. This makes clear, at paras A3-4, that the LUP role of HSE is advisory, without power of direction, in relation to the residual risk of an accident and the likely hazard due to its consequences. Para A5 recognises

[6] DETR and Commission for Architecture and the Built Environment 2000

the acknowledged expertise of HSE in assessing risk, and states that HSE Advice Against development near a hazardous installation "should not be overridden without the most careful consideration".

In the event that the local planning authority [now SoS] is minded to go against HSE advice to refuse development, para A6 of Annex A to C4/00 indicates that HSE will normally consider its role to be discharged when it is satisfied that the local planning authority is acting in full understanding of its advice, and the consequences that could follow the grant of permission. HSE will recommend that an application be called in for determination by the SoS only in cases of exceptional concern, or where important policy or safety issues are at stake. HSE has published its policy and procedure for requesting the SoS to call in an application [CD40].

For this purpose, HSE gives notice of Consultation Distances [CD] and Consultation Zones [CZ] round major accident hazards. These incorporate an Inner Zone [IZ], where few people present would survive a representative worst case major accident [RWCMA], a Middle Zone [MZ] where at least a "Dangerous Dose"[7] of harm would be received with up to 50% killed, and an Outer Zone [OZ], where up to 50% of vulnerable members of the population [old and young] might be expected to be killed.

Under the Seveso II Directive, operators of top-tier establishments, including gasholder stations with consent to store more than 200t of natural gas as in the case of KGS, must compile a safety report to the Competent Authority [CA] under the Control of Major Accident Hazard [COMAH] Regulations [COMHR]. In England the CA comprises HSE and the Environment Agency [EA] acting jointly.

HSE Planning Advice for Developments near Hazardous Installations [PADHI] [CD47]

3.4 For the purposes of LUP advice, the historic experience of HSE, including risk criteria established since 1989 [CD38], is codified into a methodology, and computer software, known as PADHI, for direct access by local planning authorities.

3.5 PADHI begins with the Individual Risk [IR] to a person present at a proposed development 100% of the time and then ascribes a Level of Sensitivity [SL] to the development, graded from 1 to 4, that takes account in broad terms of its size, likely levels occupancy and the presence of vulnerable groups. Sensitivity Levels are tabulated according to development type.

3.6 The resulting PADHI Decision Matrix is set out as follows:

[7] 1000 to 1800 in thermal dose units [tdu] which are related to kW/sqm [HSE/AJW/4/2/11

Level of Sensitivity	Developments in the Inner Zone [IZ]	Developments in the Middle Zone [MZ]	Developments in the Outer Zone [OZ]
1	DAA*	DAA	DAA
2	AA**	DAA	DAA
3	AA	AA	DAA
4	AA	AA	AA

* DAA = Don't Advise Against ** AA = Advise Against [CD93#5]

3.7 If a development gives an AA result, this is put forward as the final, definitive advice from HSE in response to consultation, subject to the application of Rules to cover developments straddling CZ boundaries or involving multiple uses [Rules 1 and 3] and to take account of existing developments in the CZ [Rule 4].

3.8 In respect of existing uses, Rule 4c was simplified in March 2008 [HSE/GD/2/12-13] to provide simply that "When weighing up HSE advice, existing use is a factor for planning authorities to consider where appropriate." This replaced a former, more complex version of Rule 4c that was seen as potentially leading to erroneous DAA results. The 2008 version of Rule 4c is the current published advice of HSE, including via its website.

Definitions

3.9 Certain terms common to the cases of all parties on public safety are:

Types of Risk
[HSE/GD/1#7]

Individual Risk [IR]

3.10 Individual Risk is defined as the frequency at which an individual may be expected to sustain a given level of harm from the realisation of specified hazards, ie the likelihood that a particular person might be harmed.

Case Societal Risk [CSR]

3.11 Case Societal Risk [CSR] is the chance of a number of people being harmed in a single major accident to a new development, in terms of the relationship between frequency and the number of people suffering from a specified level of harm in a given population from the realisation of specific hazards. CSR is taken into account in the categorisation of development type in setting Sensitivity Levels within the PADHI methodology.

Local Societal Risk [LSR]

3.12 Local Societal Risk is also the risk to a large number of people but related to the likelihood and consequences of possible major accidents from a hazardous

installation to all the surrounding population. LSR is not [yet] formally taken into account in the PADHI methodology.

Residual Risk [RR]

3.13 Residual Risk is that remaining after risks at source have been reduced, by compliance with operational safety legislation, to a level that is "As Low as Reasonably Practicable" [ALARP]. RR is the risk assessed in the LUP advice of PADHI.

FN curve

3.14 A graph of cumulative frequency [F] of events against numbers [N] of people affected.

Types of Fire
[SCCC/DMD/1para3.5.3]

Fireball [FB]

3.15 If a large release of gas is ignited within a few seconds then a fireball lasting between around 10 and 20 seconds may be produced, with very high levels of thermal radiation in all directions.

Jet Fire

3.16 An ignition of gas burning back to the point of release may form a jet fire if the release is under pressure. Depending on the nature of the failure, the jet fire may be directed horizontally or vertically. Jet fires continue to burn for as long as the release of gas is not isolated, giving rise to prolonged thermal radiation but with relatively local effect.

Seal Fire

3.17 Any ignition of gas may form a localised seal fire without any jet effects if the release is not under significant pressure. This will be the case for low pressure gas holders, and will result in a vertical flame at the side of the gas holder, having relatively local effects.

Flash Fire

3.18 If a release of gas is not ignited within a few seconds of the release, then a cloud of gas will disperse downwind some distance from the point of release. If the flammable part of this cloud then finds a source of ignition, the area covered by the vapour cloud will burn rapidly as a flash fire, with significant risks to all those within the flash fire envelope. The flash fire would probably be followed by a jet fire or seal fire.

4 DETAILS of the PROPOSALS

4.1 *Details of the Application proposals are set out in the SOCG [CD82#4], the Supporting Statement that accompanied the Application [CD14] and the listed Application Plans [CD12]. The material points are:*

Clarification

4.2 The Application was submitted on the basis that the development would provide approximately an additional 1600 spectator seats but, at the Inquiry, it was confirmed that the correct number is 1830. It was also confirmed that this variation arose from matters of detailed configuration of seating and that the increase of some 200 seats does not affect the consideration of the planning and safety issues that arise.

4.3 There is space for 57 cars to be parked at basement level under the proposed buildings but it is agreed between LBL and SCCC that the number actually provided would be limited by planning condition to 45. Again this variation does not affect the consideration of the issues arising.

Main Elements

4.4 The Application includes demolition of the Surrey Tavern and this has been completed. The existing Lock, Laker and Peter May stands would also be demolished to make way for a combined six-level grandstand and 168-bedroom hotel of five storeys with a 45-space basement car park, also incorporating storage for 50 cycles. The basement would be served by a new access ramp off Kennington Oval. The grandstand and hotel would consist of two wings forming a Y-shape linked by a glazed atrium. The elevations would be in light-coloured materials, as compared with the darker red brick of the existing Pavilion. The hotel would have a developed street frontage, set back from the present edge of Kennington Oval for much of its length [CD12/7]. Hotel rooms overlooking the playing area would double as hospitality boxes on match days. There would also be a new ticket and security office in an open plaza behind new turnstiles on the site of the former Surrey Tavern, as well as associated landscaping. Some visual enhancement would be undertaken to the Pavilion elevations in association with new seating to its front terrace.

Seating and Dimensions

4.5 Overall, the number of seats for spectators within the defined Application site [red line boundary] would increase from 4377 to 6207, making a total of 24,830 for the whole Ground compared with its present capacity of 23,000. The new seating would be arranged to continue the circular geometry established by the OCS stand so as to orientate individual seats toward the central Test Match pitch. This would have the effect of bringing the built development forward over part of the present outfield [CD12/13&16-17].

4.6 The roof of the stand would rise to about 28m in height; that is about 1.35m below the top of the Pavilion. By comparison, the hotel would be about 23.7m high.

Energy

4.7 Roof-mounted photovoltaic [PV] panels would provide a claimed 5% of required energy and a Combined Heat and Power [CHP] unit would reduce CO2 emissions by a claimed 25% to achieve a "very good" BREEAM rating.

5 THE CASE FOR SURREY COUNTY CRICKET CLUB AND ARORA INTERNATIONAL HOTELS

The case of SCCC is set out broadly in Documents SCCC/PMG/1-4. Specialist Documents are indicated at each heading. The material points are:

General

Common Ground and Matters in Dispute

5.1 LBL is in agreement with SCCC on all land use planning issues, as demonstrated by the main SOCG [CD30], save in respect of the terms of the unilateral planning obligation [CD81A - below]. There is no dispute between SCCC and HSE apart from concern over public safety related to the KGS. The other planning considerations discussed under the following headings are all raised either by the SoS in calling in the Application, or by UFO and other local residents, or by the Inspector.

Development Plan Policies and the Principle of Development

Open Space

5.2 A small loss of open space due to the proposed development, including by necessary reconfiguration of seating to address a circular playing area, would be offset by the creation of the plaza with access and by open areas at the site frontage to Harleyford Street and Kennington Oval, in compliance with UDP Policy 50.

Hotel Location

5.3 The Brit Oval and the Application site are plainly in an area of mixed use, as illustrated by a submitted Land Use Map [SCCC/PMG/2/3], and as expressly agreed by LBL [below]. The Ground itself encompasses sports, leisure, community and commercial uses, and the Montgomery Hall and Oval Theatre lie adjacent, alongside residential development, educational and industrial premises, and there is the large open space of Kennington Park to the east.

5.4 Given its excellent public transport connections, the site is an appropriate and sustainable location for an hotel to complement the main sporting use of The Oval. Such a combination of uses is consistent with many other major sports venues, for example the Hampshire Rose Bowl in Southampton. The development is accordingly in no conflict with UDP Policy 28 on the location of hotels, and complies with London Plan Policy 3D.6, favouring hotel development in the lead up to the 2012 London Olympic Games.

5.5 Although UDP Policy 51 contemplates the provision of hospitality facilities at The Oval, without mention of hotel accommodation, there is nothing to say that an hotel would not be acceptable. In any event, 46 of the 168 rooms would double as hospitality boxes on match days, in compliance with Policy 51.

Public Safety
[SCCC/RSC/1-3; SCCC/DMD/1-3]

That part of the public safety case for SCCC that was not covered by s321 Direction and was heard in open session is set out in detail in the SCCC open closing submissions [SCCC/CLOS/O]. The material points are:

Introduction

5.6 At the heart of the determination of this Application is the way in which the planning system should have regard to safety considerations and the acceptability of risk by the individual and society.

5.7 The public safety case of SCCC is essentially a response and rebuttal to the concerns raised by HSE, first in putting forward the PADHI Advice Against the proposed development, and subsequently, seeking call-in of the Application. The role of HSE in LUP is supported but the output of the PADHI methodology is merely advice to be taken into account in planning decisions.

Roles of HSE and SoS in relation to PADHI and Planning Policy

5.8 At the outset SCCC make two fundamental submissions:

First, there is little transparency in the HSE formulation and application of policy matters relating to the assessment of risks from hazardous installations.

Secondly, it is for the planning authority, and now the SoS, to determine whether the amount of risk to the individual and society which may result from the grant of planning permission for the proposed development is acceptable. It is not for HSE to usurp the role of the planning authority or SoS as decision maker. HSE has appeared to seek to do this many times in relation to this Application.

5.9 C4/00 makes clear that:

decisions should be made by elected authorities;
in view of its acknowledged expertise in assessing the off-site risks presented by the use of hazardous substances, any advice from HSE that planning permission should be refused for development for, at or near to a hazardous installation or pipeline, "should not be overridden without the most careful consideration";

HSE will normally consider its role to be discharged when it is satisfied that the local planning authority is acting in full understanding of the advice received and the consequences that could follow;

The advice from HSE is only one of many material planning considerations that a planning authority has to consider.

5.10 It is noted that the fundamental principle is now accepted by HSE that ultimately, for any proposed development, it falls to the local planning authority or SoS to decide the level of residual risk that is acceptable, when balanced against other material planning considerations. In other words, HSE may advise

on what the level of risk is but it is for the planning authority and SoS to consider whether it is acceptable both in itself and when balanced against other material planning considerations.

5.11 LBL gave very careful consideration to the HSE Advice Against this Application and reached its decision on an informed basis. LBL had not only the expert evidence of SCCC but its own independent, technical evidence. It took into account all the material planning considerations and came to the conclusion, after a thorough consideration of the matter, that planning permission should be granted. HSE still sought to interfere with the planning decision-making process and paid scant regard to its own risk-criteria for land use planning. This emphasises that the responsibility lies with the land use planning authorities since safety is but one of many factors to be considered.

Overview

5.12 It is a hallmark of the HSE case that it has totally ignored many such material considerations, the latest of which is the existing use of the site. Even on the basis of the level of risk calculated by HSE in this case [which is disputed by both SCCC and LBL] this development would not result in an unacceptable degree of risk to individuals or society.

5.13 This is a case which should be decided on its own facts. It is not a situation where the SoS is required to make determinative scientific findings as to risk calculations. It is a question of exercising balanced judgement on the basis of all the material planning considerations and, most importantly of all, using common sense, in order to assess whether that risk is unacceptable in terms of UDP Policy 54(g). If that is done, it is obvious that there are no sound and compelling reasons why this Application should be refused.

Design
[SCCC/NR/1-6]

5.14 The approach to the design is indicated in the submitted Design [and access] Statement [DS][SCCC/NR/2 and CD13]. The Architects were the obvious choice, as world leaders in stadium design, whose work includes the award-winning OCS Stand, completed at the Vauxhall End of The Brit Oval in 2005.

5.15 There is a conceptual masterplan for the long term redevelopment of The Brit Oval. Although unpublished, this guides the progressive location and development of improved facilities, arranged around a circular playing area with its north-south axis set within, and at a slight angle to, the outer Oval. The OCS stand covers roughly the northern half of the circle. The proposed replacement to the outdated Lock, Laker and Peter May Stands, north east of the Pavilion, would bring the seating area closer to the circular boundary at that point and improve spectator view. Any future replacement of the Bedser Stand to the southwest is foreseen as completing the circle, and maintaining built symmetry about the Pavilion.

5.16 The chosen architectural style is intended to complement the traditional Pavilion and surrounding buildings, whilst making appropriate contrast with the modern OCS building opposite. The original Pavilion [raised by an additional storey to its present height in the early 1990s] would be improved, as part of the proposed

development. This would follow the demolition of the Surrey Tavern to make way for an open plaza. The plaza in turn would frame public views of the building and provide circulation space [SCCC/NR/2#3&4]. Notwithstanding that this space would lie behind the proposed turnstiles [at least until advances in ticketing technology permit other means of crowd control], it would still be an important feature of the visual character of the area.

5.17 The design of the hotel would create a proper street frontage along Kennington Oval, replacing the existing harsh red brick wall. The hotel frontage would be set back from Kennington Oval behind an open, paved and planted area, crossed by the service entrance. The hotel parapet level would be lower than the ridge lines of Lohmann House and Lockwood House opposite, and separation distances between the buildings would be in keeping with the prevailing urban grain. Thus, although the overall height of the grandstand would be greater, there would be no sense of cramming, contrary to the allegation of UFO. The light-coloured walls of the hotel and stand buildings would suitably complement and emphasise the traditional red brickwork of the original Pavilion [SCCC/NR/4].

5.18 The development would thus make a transition from the busy Harleyford Road to the quieter residential lane of Kennington Oval. The hotel façade would be typical of many of the better quality residential buildings in the area with their uniform fenestration.

5.19 Beyond the hotel, the end bays of the new stand would be exposed to view from the street. In contrast with the solid, lime rendered hotel facade, the grandstand would be a lighter, more diaphanous building. White glass would admit light whilst maintaining privacy. The end of the stand would be open and the rear would be clad with an open timber screen. In response to the subjective allegation of UFO that the design would not be of world class, the horn-beam leaf inspired roof to the stand would make a striking addition to the architecture of the area and a fitting counterpoint to the existing Pavilion.

5.20 Overall, the scheme has been sensitively designed to make efficient use of the space available. It would harmonise with the locality and meet the wishes of SCCC and the Duchy of Cornwall as freeholders. Whereas the present buildings represent an incomplete street scene along Kennington Oval, the proposal would create of an active frontage, compatible with its surroundings.

5.21 The proposed development thus offers a high quality design that is subservient to the main form of existing buildings, whilst respecting the context and setting of the Pavilion and surrounding development, including the nearby St Mark's Conservation Area and listed buildings. The scheme would thereby comply with all the relevant design provisions of London Plan Policy 4B.1 and UDP Policies 32, 33, 47 and 51.

5.22 In respect of safety concerns, the fire performance of construction materials and details of escape routes and times are documented [SCCC/NR/3&5-6].

Highways and Transportation
[SCCC/PC/1-3]

5.23 Transport assessments show modest increases in traffic flows in Kennington Oval and connecting streets due to the proposed development. It is also evident that the majority of the additional spectators would arrive on foot, most via the Underground or bus systems. These movements are summarised as follows:

Travel Mode	**Daily one-way trips Hotel**	**Max/Hour one-way Hotel**	**Major Match Day two-way trips**
Car	270	39	18
Walk	298	41	201
Cycle	2	1	0
Bus	11	2	92
Underground	115	17	1006
Train	31	5	275
Delivery	35	19	-

5.24 There would be about 18 deliveries [36 movements] a day and maximum hourly total flow of some 60 vehicle movements. The access would safely facilitate necessary manoeuvring by commercial vehicles and the overall effect of these movements on the road network would be minimal. This would be assured by agreed condition 26, routing vehicles away from side streets, and agreed condition 27, preventing vehicles from reversing onto the highway.

5.25 There would be over 1000 spectators arriving by Underground and about 90 by bus on major match days. Again, compared with existing spectator numbers and the overall capacity of the public transport network, these numbers would be absorbed with spare capacity.

5.26 It is accepted that there is already local congestion at Oval and Vauxhall Underground stations, and on buses, at peak hours and on major match days but that is already subject to special controls and would not noticeably increase as a result of the greater capacity of the proposed development. Cricket matches do no generally coincide with peak travel times. The transport operators and Transport for London concur with these findings and raise no objection to the Application. Moreover, public transport capacity is set to increase over time.

5.27 Car parking on the site would be curtailed to 45 spaces, compared with 60 existing, and adequate cycle parking would be included.

5.28 The development would therefore comply with all the transportation provisions of UDP Policies 8-10 and 51, subject to the controls imposed by the s106

agreement and planning conditions on parking, reversing and highway works to create the new entrance and modify on-street parking controls.

Daylight and Sunlight
[SCCC/MAN/1-2]

Daylight

5.29 Assessed with reference to BRE guidance[8], the nearest properties at Lohmann House and Lockwood House would suffer no noticeable loss of daylight in terms of the Vertical Sky Component [VSC] visible from their windows, save for the lower three floors of Lohmann House. Here, the VSC would fall below the recommended 27%, including a number of windows where the VSC would be less than 0.8 of its former value. This is generally regarded as a noticeable decrease. However, application of the more refined Average Daylight Factor [ADF] test, based on a weighted value of daylight in the rooms, shows that all windows of both blocks would continue to enjoy in excess of the requisite 2% ADF. In effect, they would still be well-lit. The frontage trees would mask the effects of the proposed new buildings on light in any event, especially in summer.

Sunlight

5.30 All windows in both blocks facing the proposed grandstand and hotel would continue to receive double the recommended 25% of annual summer, and 5% of annual winter sunlight hours, notwithstanding some noticeable degree of loss in winter. On the judgement permitted by para 4.14.10 of the UDP, such a reduction is not necessarily harmful in this urban context. Moreover, three-dimensional illustrations show that any increase in shadowing would be transient.

Policy

5.31 The nearest properties would not therefore be unacceptably overshadowed by the development and its effects on the amount of day-and sunlight reaching them would comply with the objectives of UDP Policies 33 and 51.

Noise and Disturbance
[SCCC/CFB/1-3]

5.32 An assessment was undertaken, using methodology agreed with the LBL Environmental Health Department, to consider noise at nearby sensitive locations. These were identified in front of Lohmann House and Lockwood House. Noise was considered from the following sources: the proposed hotel, including deliveries, refuse collection and general service yard activity; mechanical service plant at the hotel and proposed grandstand, including a refuse compactor; use of the public address [PA] system; and additional spectator numbers in the proposed stand [SCCC/CFB/2]. A further assessment specifically addresses traffic noise on surrounding roads [SCCC/CFB/3].

[8] Site Layout Planning for Sunlight and Daylight – A Guide to Good Practice BRE 1991 Sections 2. 2&3.2 BR 209 ISBN 0 85125 506 X

5.33 Results of site measurements [SCCC/CFB/2/A] indicate a high existing ambient noise level of around 57-63 dB(A)LA90, due mainly to road traffic.

5.34 Highest noise levels occur during deliveries via the hotel service yard in the early morning. These are predicted, by established methodology, to be 74-77dB(A)Lmax for isolated sounds, and 55dB(A)LAeq equivalent continuous values. With barrier attenuation by the boundary wall, these values would reduce to 65dB(A)Lmax and 48 dB(A)LAeq at the sensitive facades opposite. These figures are within stringent WHO guidelines and, moreover, fall below existing measured noise. Actual emitted noise levels can be kept within the predicted values by agreed planning condition 28, as well as by the Delivery Management Plan [DMP] within the s106 agreement, as supported by agreed condition 25. Notably, there are currently no controls over deliveries to the Ground.

5.35 Noise from mechanical plant and amplified sound [other than the PA system on match days] can also be controlled within the same limits by agreed conditions 9 and 10, consistent with the present controls on the OCS stand. Additional crowd and traffic noise would add only an imperceptible 1.5dB to present values.

5.36 UFO are unable to put forward results from comparable measuring equipment but, when their results are adjusted to enable broad comparison with the submitted noise assessment results, there is no evidence to indicate that SCCC values are not robust [CFB/3para12.2-6].

5.37 Accordingly, no part of the proposed development would give rise to any unacceptable additional noise impact and the proposal is compliant with UDP Policy 54 in this respect.

Privacy
[SCCC/NR/1]

5.38 The hotel would have a traditional urban relationship with the residential buildings opposite, comparable with the surrounding urban context. As a consequence, the hotel bedrooms would address Kennington Oval in a similar fashion to Lockwood House and Lohmann House. Balconies and occupied open spaces are avoided in the design and the principal portion of outward facing hotel windows would be obscure-glazed to prevent unacceptable overlooking. Separation distances between buildings would remain consistent with prevailing conditions. UFO objections on grounds of loss of privacy are thus unfounded.

5.39 The grandstand would follow a similar approach to ensure, through screening, that there are no backward views toward dwellings from the hotel corridors, or from the expanded tier at Level 3c, or from the restaurant or upper concourse at Level 5.

5.40 The proposal accordingly complies with UDP Policy 33 in terms of privacy.

Energy Strategy
[SCCC/MH/1-3]

5.41 The submitted Energy Statement [CD15] shows the base energy demand for the proposed hotel and the associated CO2 emissions. These are used to compare

different low and zero carbon technologies and select the most appropriate fit for the proposed development, taking into account matters of capital and operating costs, fuel delivery and the availability of space.

5.42 The energy strategy was developed according to the triple hierarchy of the London Plan – "be lean, be clean, be green", applying respectively passive design and efficient systems, using Combined Heat and Power [CHP][9] and Trigeneration[10], as well as renewable energy.

5.43 The effectiveness of the various measures proposed was reviewed with reference to the impact on the carbon footprint of the building, rather than the impact on its energy usage. This is the most thorough way to determine environmental impact as it takes account of the high carbon cost of electrical energy, in line with London Plan Policy 4A.1. These calculations use the total energy of the building and not just the elements subject to the Building Regulations [BR], thus providing as true a representation as possible of the energy performance.

5.44 At the first stage of assessment, the proposed buildings out-perform a notional, minimally compliant building under BR02. For instance, thermal performance is 40% better due to features including heat recovery on ventilation systems and high efficiency lighting, whilst sophisticated control systems reduce CO2 production. The base building in relation to the proposed development is therefore "lean".

5.45 At the second stage, both CHP and Trigeneration were reviewed and CHP was found to make significant carbon savings, lowering the carbon output of the building by a further 20%. This is achieved by matching the size of the CHP unit to the base load from the hotel for hot water, plus a small element of the space heating load.

5.46 At the third stage, the effectiveness of available technologies was reviewed in terms of their relative additional carbon savings, after installation of the CHP system. This limits some of the available technologies because they are less effective at reducing CO2 than a CHP plant. Solar electric power from PV panels would, however, be a suitable complementary technology, and these are included, making a further 4.5% carbon saving.

5.47 It is concluded that a 100kW CHP plant with PV panels would be the most effective, appropriate and viable option for the proposed buildings, delivering up to a 25% reduction in CO2 emissions over and above compliance with BR06 and providing 4.5% of this from a renewable source.

5.48 Thus the development would provide a significant carbon footprint reduction, in excess of the 10% requirement of UDP Policy 34. This approach is supported by both GLA and LBL.

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[9] Combined Heat and Power or Cogeneration: the use of a heat engine or a power station to generate both electricity and useful heat simultaneously.
[10] Trigeneration or Trigen: the simultaneous production of mechanical or electrical power, heat and cooling from a single heat source.

5.49 It is not appropriate to consider in detail, at this planning stage, matters that are properly subject to separate Building Control Legislation, as these are not germane to planning control.

Flood Risk
[SCCC/PMG/2/4]

5.50 Although the application site is within the highest flood risk zone 3a of PPS25, the submitted Flood Risk Assessment [FRA][CD21] confirms that the site benefits from Thames flood defences. Proposed floor levels of 5.23mAOD are above the undefended 1 in 1000 year flood level at Vauxhall Bridge, to the satisfaction of the Environment Agency [EA]. Construction methods, including water-tight basements with installed pump-out capacity, further address flood risk. The proposal thus conforms to all policy requirements on flood risk.

Need and Benefits
[SCCC/PMG/1#2; SCCC/PS/1#2; SCCC/PS/2]

Facilities

5.51 The Brit Oval is important from a cricketing perspective as an historic, prestigious, key venue for London, second only to Lords. The Oval is equally important for the significant benefits it brings to the local area as a major commercial facility, hosting other, non-cricket events on non-match days, including conferences, weddings, dinners and community functions.

5.52 The Oval is deeply involved with the local community, including by way of financial investment and via regular meetings of the Stadium Monitoring Group [SMG] involving residents groups, local organisations and elected Councillors. [SCCC/PS/2/1 – Community Brochure].

5.53 In the last 12 years financial turnover at SCCC has increased from £3million to £25million per annum and SCCC has enjoyed its most successful decade, with the key redevelopment of the Vauxhall End of the Ground with the new OCS stand, and the increased popularity of the short form game [Twenty20]. The Oval needs to continue to evolve in order to maintain its offer of first class facilities, contributing to the community in Lambeth and to the status of London as a World City.

5.54 Throughout the tenure of SCCC since it was founded in 1845, The Oval has been owned by the Duchy of Cornwall. The Ground soon became an international cricket venue, the first ever Test Match in England being held at The Oval 1880. Test Match and one-day cricket, at both international and national level, has continued at the Ground every season since, save for the two World Wars. The Oval has hosted other major sporting events, including the FA Cup Final and the very first soccer international.

5.55 The Brit Oval is now world famous and synonymous with England and Surrey cricket matches. All the world cricket nations when touring play at least one Test Match and one One-Day International at the Ground annually, making it one of the most important and historic cricket venues in the United Kingdom.

5.56 It cannot be assumed that the history and importance of The Brit Oval as a cricket venue will be enough to secure its longevity, either as an international host of cricket matches or as a cricket venue altogether. SCCC must continue to seek to increase the capacity of the Ground and modernise its facilities.

5.57 The ECB, as the governing body of cricket in the UK, sets down requirements for modern cricket venues to offer first class facilities in order to be considered for international and high prestige matches. Without maintaining these standards, the Ground would not be allocated any further international events. In this connection, it is notable that Old Trafford, Lancashire, for example has been replaced by Cardiff as a Test Match venue for this precise reason. So on-going improvement is essential to ensure that The Oval can compete with more modern and unconstrained grounds. Cardiff"s success follows a redevelopment proposal which increases the capacity of its Sophia Gardens ground from 5,500 to 16,000. The inclusion of a new pavilion, grandstand, media centre and other ancillary facilities have enabled the Ground to achieve category A status, which qualifies it for Test Match cricket.

5.58 Lords is presently seeking to increase its capacity from 32,000 to 40,000. Other Test Match venues are subject to redevelopment proposals, including Old Trafford, proposed to increase from 25,000 to 30,000 capacity, retaining an existing hotel on site, and the Rose Bowl, Hampshire, which is the subject of a £45 million redevelopment proposal comprising ground improvements and the construction of an hotel. The range of facilities and improvements is tabulated as follows:

County and Ground	Capacity	Current Facilities	Proposed Development	Test Status
Derbyshire County Ground	9,500	Media centre / conference facilities	Plans in the pipeline	No
Durham The Riverside	17,000	Council Sports Pavilion, the Indoor School and Bannatyne"s Health and Fitness Club, conference facilities	Unknown	Yes
Essex County Ground	6,500	Cricket centre and shop, corporate boxes	Unknown	No
Glamorgan SWALEC Stadium	16,000	Floodlights, conference facilities, museum, physio facilities	Unknown	Yes
Gloucestershire County Ground	15,000	Conference venue, gym, academy, corporate facilities	Unknown	No
Hampshire The Rose Bowl	20,000	Hotel / spa / leisure facilities / golf course / conference facilities	£45million development	Yes
Kent St Lawrence Ground	15,000	Conference facilities	Hotel / health centre / conference facilities	No

Lancashire Old Trafford	22,000	Hotel, cricket centre, academy, conference and banquet facilities,	750,000 sq ft mixed use with 30,000 stadium, conference facilities, hotel, housing and business	Yes
Leicestershire Grace Road	12,000	Conference and banqueting facilities, indoor cricket centre, fitness suite	No	No
Middlesex Lords	32,000	Museum, Media Centre	Proposals to increase capacity to 40,000	Yes
Northamptonshire County Ground	6,500	Indoor cricket centre, conference facilities	Unknown	No
Nottinghamshire Trent Bridge	17,500	Gym, Squash, Physio, Conference facilities	Unknown	Yes
Somerset County Cricket Ground	6,500	Conference and banqueting facilities	£60 million devt. 15,000 stadium, media facilities, housing and commercial development. Conference facilities and multi storey car park	No
Sussex County Ground	4,000	Museum, club shop, nets, conference and banqueting facilities	Waiting to appoint agency for master plan	No
Warwickshire Edgbaston	21,000	Indoor cricket centre, shop, conference and banquet facilities, museum, academy	£20 million proposal including new pavilion to take capacity to 25,000.	Yes
Worcestershire New Road	4,500	Cricket Shop, functions and events facilities	Unknown	No
Yorkshire Headingley	22,000	Conference facilities, Sports pavilion shared with LMU and the rugby teams	Proposed new pavilion	Yes

5.59 With such pace of development sought elsewhere, it is imperative that SCCC continues to increase the capacity of The Oval and improve its facilities. Refusal of the current Application would adversely affect the competitive position of The Brit Oval compared with the other potential Test cricket venues available in the country.

Contractual and Leasing Requirements

5.60 The ECB has extended the number of Category A grounds, considered capable of hosting international matches. Each of these grounds, including The Oval, now has a 15-year Staging Agreement with the ECB and, as a result, there is intense competition to host these fixtures, a situation which will only increase. The onus

is upon SCCC to provide facilities meeting ECB defined standards [CD86]. SCCC is expressly required, both in its ECB Staging Agreement and in its lease from The Duchy of Cornwall, to use its "best endeavours" to comply with a capital and refurbishment plan for the Ground and to ensure that international cricket is played at The Oval. In this context, the current Lock, Laker and Peter May stands are outmoded and need to be replaced, as now proposed.

5.61 The combination of Lords and the Oval makes London the most attractive destination to host cricket in this country, with 60% of the income from international fixtures resulting from matches at the two venues. The Oval is currently an attractive venue in many respects for the hosting of major cricket matches. The combined broadening and modernisation of the facilities offered at the Ground is vital to ensure that this standing is maintained with respect to the Staging Agreement and its leasing requirements.

The Growth of Twenty20 Cricket

5.62 The ever-changing face of cricket has seen the profile of the "short form" game [20 overs per innings played in a few hours, often in the evening - Twenty20] continually grow since its inception in 2003. This opens up cricket as a sport to a large part of the population who may never before have considered attending a cricket match. The major competitions such as the ICC Twenty20 World Cup, ICC Champions Trophy, World Cup, One Day Internationals, Test Matches and Domestic Twenty20 have all been added to the cricket calendar. The ECB considers that high-class venues are necessary for these events.

5.63 SCCC has responded to the growth of this game and has secured The Oval as one of the nominated grounds for Twenty20 cricket on the strength of its ability to provide the facilities required. It will also be the venue for five matches of the 2009 Twenty20 World Cup. The increased capacity and facilities provided by the redevelopment proposals will be a key factor in the ability of SCCC to attract such tournaments in future.

Enabling Development

5.64 The demand for international tickets exceeds the present supply by some 40% and SCCC is striving to bridge this gap. It is anticipated, with the advances in the game, that the popularity of cricket will continue, and that the demand for tickets will further increase, with more cricket proposed in people's leisure time.

5.65 Significantly, enabling development is required to fund these necessary advances. The OCS Stand was funded by a combination of Sports Lottery Grant and private donations but, more significantly, by bank loans taken out by SCCC. These funding streams are not available to progress the further development of the Ground. Accordingly, SCCC sought a development partner in Arora Hotels to assist in facilitating and enabling the next phase of the redevelopment of The Oval.

5.66 SCCC gave careful consideration to the nature of any enabling development, recognising that this needed to be both complementary to the ongoing use of the Ground and, at the same time, compatible with the surrounding mixed use nature of the area. Consideration was given to a range of potential uses,

including retail and residential development, but these were discounted for planning policy reasons of sequential location under the UDP.

5.67 Although residential uses would be compatible with the surrounding area, it was considered that the siting of any new residential development within the perimeter of The Oval would not be appropriate, given the challenges presented in separating the different user groups within the tight confines of the site. Residential uses would remove the combined and complimentary use of some of the facilities as both hotel rooms and spectator space.

5.68 Thus, it was concluded that an hotel would provide the ideal form of enabling development and, in 2006, SCCC entered into an agreement with Arora Hotels to take forward the redevelopment of the existing Surrey Tavern and the Lock, Laker and Peter May Stands, as now proposed.

5.69 A further consideration, as with many other major sports stadia, was the need to diversify, particularly as The Oval is not in use for much of the time. Identifying complementary uses that could operate when the Ground is not in cricket use is deemed to be both sustainable and financially prudent. This would build upon the success of the OCS Stand, which has the ability to host corporate events and conferences. These bring in additional income during non-event days. The current Application taps into this potential to offer not only vastly improved facilities in terms of spectator seating and access, but also better hospitality and catering. In addition, the hotel would provide a tourism focus and a new income stream for SCCC, as well as being supported by the Mayor of London, particularly as it is outside the Central London area. The location of the hotel adjacent to a major stadium such as this, with excellent transport links into Central London, represents a sustainable proposal to cater for the modern cricket goer and tourism as a whole.

5.70 The Bedser Stand gymnasium was, until recently, open to the public. However, SCCC needed to modernise and expand its offices. To retain them on site meant closing the gym and reconfiguring the space. The plan is to re-establish the gym within the new hotel for use by the players of SCCC and also providing an additional benefit to the community.

Community

5.71 Notwithstanding the submissions of UFO and others that The Oval, with the current development proposal, turns it back to the community, the Community Consultation Statement [CCS][CD84] indicates that this is a minority view. Extensive market research, including distribution of 5,500 leaflets followed by further detailed consultation, produced an unusually high, 85% response, mainly supporting the Application [CD84].

5.72 The submitted Economic Assessment [CD19] highlights that the development would bring tourism and some 200 jobs to the area, in line with the Lambeth Economic Development Strategy 2007-10 [CD63], enabling the further development of the Ground, as contemplated by UDP Policy 51 and supported in the GLA Stage 1 Report on the Application [CD56].

Overview of Need and Benefits

5.73 The clear need for the proposed development and the benefits it would provide are strong material considerations to be taken into account.

Law and Order

5.74 Points of public order put forward on behalf of 14-16 Kennington Oval and Rothesay Court relate mainly to the existing operation of The Oval and are police matters rather than planning considerations.

Planning Conditions

5.75 SCCC commend the agreed planning conditions as providing proper control over the proposed development [CD81B].

Planning Obligations

The Agreement

5.76 In response to the concerns of UFO regarding the s106 agreement [CD81; UFO/1Appendix]:

On-site car parking would be expressly restricted to 45 spaces by agreed planning condition 24.

Deliveries would be prohibited outside the hours of 0800 and 2000 except on match days when the hours of 0600 to 2200 would apply. These arrangements would be secured by agreed condition 5 and the Delivery Management Plan [DMP] at Schedule 4 of the s106 agreement. The extended hours on match days are essential to enable necessary supplies to be available for the operation of facilities such as catering concessions.

Further express controls over vehicle reversing and access to surrounding streets, such as by way provision of independent CCTV monitoring, would be unjustified.

Similarly, the noise limits imposed by agreed conditions 9-11 and 28 provide for sufficient monitoring and control of the local noise environment.

The agreed public realm contribution of £30,000 is reasonable in the light of wider public benefits of street improvements and increased visible open space in the immediate surroundings of the Application site. Contributions to the wider area would not be properly related to the development.

Adequate public consultation on all aspects of the operation of The Brit Oval is available via the established Stadium Monitoring Group.

External policing is a matter for law and order enforcement.

The Unilateral Undertaking

5.77 With regard to the unilateral s106 undertaking incorporating the proposed Safety Management Plan [SMP][CD81A]; notwithstanding the concerns of LBL and HSE, the obligation in its submitted form provides sufficient protection against public safety risks within the proposed development.

Overview

5.78 Both planning obligations are commended as ensuring proper control over the proposed development.

Overall Planning Balance

5.79 With respect to the objections put forward at the Inquiry mainly by UFO, it is unclear how many residents that organisation is formally authorised to represent and there is some impression that they might be motivated by personal, non-planning interests, such as loss of view from their homes. Their objections are fully rebutted in the detailed case of SCCC.

5.80 It would be a startling conclusion to reach that, even though cricket and the Kennington gasholders have co-existed in complete harmony for nearly 130 years, there could now be some intrinsic incompatibility between these two uses, such as to preclude a much-needed extension and enhancement of cricket and related facilities at The Oval.

5.81 SCCC submit that any such conclusion would be contrived and perverse, only reached by distorting statistical and historical information and by reliance on unproven theoretical research which has not been subject to independent peer review outside HSE. Such a conclusion would also result from a grossly over-cautious assessment, disregarding considerations which HSE admits it has not taken into account.

5.82 Indeed HSE states that they have no view on these other considerations but, at the same time, accept that the Inspector and the SoS should take them into account. On the latter basis, there can be absolutely no doubt that there are no sound and compelling reasons relating to safety, or any other of the several matters arising in this case, which would justify the refusal of this application.

5.83 Factoring in the very substantial economic and regenerative benefits of the proposal, it is perfectly clear that the Policy 54(g) balance should be struck in favour of the Application.

5.84 For all these reasons, the Inspector is invited to recommend, and the SoS to grant, planning permission, subject only to the planning conditions agreed between SCCC and LBL.

6 THE CASE FOR THE COUNCIL OF THE LONDON BOROUGH OF LAMBETH

The planning evidence of LBL is set out in Document LBL/1 which was examined orally. The material points are:

Development Plan Policies and the Principle of Development

6.1 UDP Policy 28 supports hotels in non-residential areas with good public transport. The Application site has exceptional public transport accessibility [PTAL 6a]. Although there are residential enclaves adjacent to the site, the residential development which includes Lohmann House and Lockwood House on the north east side of The Oval is in turn bounded to its north west by a Key

Industrial Business Area, whilst to its east is a Local Shopping Area. These are both identified on the UDP Proposals Map [CD30]. There are other commercial, educational and community uses all round The Oval. Accordingly, the site is situated not in a residential area but in an area of mixed use where an hotel is acceptable in principle.

6.2 UDP Policy 51 accepts increased capacity at The Oval, including ancillary hospitality facilities. Neither the proposed additional seating nor the hotel would be contrary to these provisions.

Public Safety

That part of the public safety case for LBL not covered by s321 Direction and heard in open session is set out in detail in proof of evidence LBL/1. The material points are:

Health and Safety Advice and Guidance

6.3 In a letter dated 19 December 2007, HSE Advised Against approval of the proposed development on the basis of its adopted PADHI methodology [CD44]. In accordance with C4/00 [CD29paraA4], LBL gave the most careful consideration to this advice before resolving to grant permission. This included hiring its own independent expert consultant to review the Hazardous Installation Assessment [HIA] submitted by SCCC with the Application [CD18], and to assist LBL to understand the risk posed by the Kennington Gasholders.

6.4 This action complied with UDP Policy 54(g), which controls development in the HSE Consultation Zone round the KGS in the face of any unacceptable risk. Policy 54(g) thus fully accords with Art 12.1 of the Seveso II Directive, as required by the Development Plan Regulations. LBL was entitled to judge that the risk is not unacceptable.

Planning Obligation

6.5 LBL considers that a s106 agreement could overcome the safety concerns of HSE. LBL therefore resolved to grant permission subject to a Safety Management Plan [SMP] being incorporated in the s106 agreement to ensure evacuation of the proposed additional spectator seats and their non-occupation when the gasholders are not empty. LBL was in negotiation with SCCC for such an agreement when the Application was called in.

6.6 The current position is that SCCC disagree that the evacuation provision is necessary and contend that the planning obligations as now executed afford sufficient control. The unilateral undertaking submitted by the Applicants therefore excludes any reference to the matter. LBL comments on the obligations as completed are set out under the relevant heading below.

Design

6.7 The design, as advised and requested by the Duchy of Cornwall as freeholder, is of classical style that would not detract from local character. The development would establish street frontages, in keeping with existing building heights, street widths and enclosure, so creating desirable spaces with continuous building lines and corner blocks. The plaza, in place of the demolished Surrey Tavern, would

enhance public vistas. In these respects, the proposal complies with UDP Policy 31(c).

6.8 The development would respond to the historic cricket ground and buildings in both the location and height of the new construction, creating a new visual separation from the Pavilion by use of acceptably contrasting materials still in keeping with the area.

6.9 The service access would be sensitively integrated into the appearance of the Kennington Oval frontage without detracting from the appearance of the locality. The design would thus be of high quality and would contribute positively to its surroundings, being compatible in context and form, and by improving sense and legibility of place. In these respects the design would conform to the requirements of UDP Policy 33(a)-(b).

6.10 The development would equally respect nearby listed buildings and conservation areas in line with UDP Policies 45 and 47[11].

Highways and Transportation

6.11 Any potential adverse impact on local amenity due to increased traffic can be acceptably mitigated by the Delivery Management Plan [DMP], secured by the s106 agreement, to restrict delivery hours and limit on-site parking to 45 of the 57 underground spaces available. The site is well located to enable additional traffic movements to be absorbed. The proposal would thus accord with UDP Policies 9, 14 and 33 in respect of transportation, parking and access.

Outlook, Daylight and Sunlight

6.12 The proposed development would have no adverse impact on outlook from any existing property. The submitted Daylight and Sunlight Report shows that loss of natural light from certain windows opposite the proposed hotel would be within the acceptable limits of BRE guidelines. All windows in Lockwood House would retain a Vertical Sky Component [VSC] in excess of the requisite 27%. Only in the lower three storeys of Lohmann House would the VSC fall below 27%, or less than 0.8 of their present value, and there the Average Daylight Factor [ADF] would still be 1.77%, compared with the requisite 1% or 1.5% for bedrooms and living rooms respectively. Both properties would continue to receive double the minimum sunlight recommended by BRE. Accordingly the development is regarded as compliant with UDP Policy 33 in this connection.

Noise and Disturbance

6.13 All additional noise from, and associated with, the proposed development could be acceptably mitigated in accordance with UDP Policy 7.

Privacy

[11] It was confirmed at the Inquiry that the Oval Pavilion is NOT itself listed [to the surprise of some present – including the Inspector!]

6.14 The proposed grandstand would face away from neighbouring residential properties whilst the outward-facing hotel windows would be in keeping with the general urban character of the area, as well as being obscure glazed to prevent overlooking. Intervening distances are sufficient to avoid undue loss of privacy in any event. The scheme is thus further compliant with UDP Policy 33(d).

Energy Strategy

6.15 The proposed development would not meet 10% of its energy requirement, in terms of carbon dioxide [CO2] emissions, from on-site renewable sources. Strictly, therefore, it would not comply with the terms of UDP Policy 34. However, the development would still make significant carbon savings by using a Combined Heat and Power [CHP] plant, as supported by the GLA. Taking into account that roof-mounted photovoltaic cells would provide some 4.5% of the energy requirement, the overall carbon saving would be 25%. This would give rise to a BREEAM rating of Very Good. The proposal is thus acceptable with respect to the aims of UDP Policies 34 and 35. This would be assured by the s106 agreement and planning conditions.

Flood Risk

6.16 There is no undue risk of flooding of the site, as indicated by the submitted Flood Risk Assessment [CD21].

Planning Conditions

6.17 LBL commends the schedule of planning conditions agreed with SCCC [CD81B].

Planning Obligations

The Agreement

6.18 The s106 agreement [CD81] stands as a material consideration that renders acceptable all the foregoing otherwise potentially adverse aspects of the proposed development.

The Unilateral Undertaking

6.19 However, with respect to the unilateral planning obligation [CD81A] and the proposed Safety Management Plan [SMP], it is submitted as follows [LBL/1/2]:

When resolving to grant permission for the proposed development subject to certain planning obligations, LBL also resolved that the SMP should: include a clause referring to safety management; cover issues relating to the height of the gas tanks; and deal with the need to vacate the new seats within the Inner [HSE consultation] Zone [IZ].

On the safety management clause; the Deed provides for a SMP but refers to a draft Contingency Plan at Schedule 2. This is not the approved SMP. LBL approval will therefore need to be sought in due course.

On the height of the gas tanks; Rider A [appended to LBL1/2] contains a proposed definition of when the level of the gasholder is "down", based on comments of the gas operator, providing a clear enforceable obligation which should have been incorporated in the s106 agreement.

On the need to vacate the new seats; the evacuation provisions in the Deed fail to deal with the need to vacate the new seats when the gasholder is not in its "down" position and it is unclear how these provisions relate to seats within the IZ. LBL propose definitions of "gasholder" and "additional spectator seats" with an accompanying plan to make clear that the obligation is to cover these requirements. A requirement for advance notification of the SMP to those purchasing tickets for the seats concerned should also be included [LBL1/2Rider Clauses 3.4-3.5; 4].

LBL does not support the unilateral Deed in the absence of Rider A as it fails to comply with its original resolution to approve the Application. Permission should be granted only on the basis of the Deed as amended in accordance with Rider A.

Overall Planning Balance

6.20 Subject to the foregoing submission regarding the unilateral planning obligation and the SMP, for all the foregoing reasons and taking into account the s106 agreement, the SoS is requested, on the balance of planning considerations in favour of the proposed development, to approve the Application and to grant planning permission subject to the agreed schedule of planning conditions.

7 THE CASE FOR THE HEALTH AND SAFETY EXECUTIVE

That part of the public safety case for HSE not covered by s321 Direction and heard in open session is set out in detail in proofs of evidence HSE/GD/1, 2, 5 and 6. The material points briefly are:

Public Safety

Planning Policy
[HSE/GD/1#9-10]

7.1 UDP Policy 54, consistent with Seveso II Directive Article 12 and C4/00 para 47, resists development adjoining areas of hazardous use where this would create unacceptable risk. However, UDP Policy 51 favours increased capacity at The Oval as now proposed, involving increased numbers of the public close to the Kennington Gasholder Station such as to increase the risk of the consequences of a major accident. These two policies are at odds with each other.

HSE Role, Reputation and Approach to Land Use Planning Advice [HSE/GD/1#3-6],

7.2 HSE is a statutory non-departmental public body of Crown status with an international reputation as a regulator and authority on risk.

7.3 Historically, after the well-known Flixborough explosion in 1974, the Advisory Committee on Major Hazards [ACMH] proposed a three-part strategy of identification, prevention and mitigation. This includes the control of development close to major hazard sites irrespective of the presence of existing development, with the overall aim to reduce the number of people at risk any greater than other everyday risks. Where possible harm from an incident is high, the risk occurrence should be very low indeed, due to public abhorrence of accidents that cause large numbers of casualties. These principles are carried into modern legislation and guidance, including development plan land use policy. [HSE/GD/1para8.1-6; HSE/CLOSPt1para81-87]

7.4 The law does not expect all risk to be eliminated but provides that the public should be protected as far as reasonably practicable by risk assessment and control measures. This is to reach a sensible balance between the unachievable aim of absolute safety as against poor risk management that damages lives and the economy.

7.5 There are three determinant factors as to whether the level of risk is acceptable or tolerable: likelihood of harm; severity of that harm; and the benefits, rewards or outcomes of the activity.

7.6 HSE advice is based on the residual risk that remains after all legally required preventive measures have been taken and is aimed at stabilising the numbers of people exposed. HSE generally Advises Against development near major hazards that would introduce a substantial number of people into an area where their risk levels would be significant compared with other risks to which individuals are exposed in everyday life.

7.7 There is no defined level of acceptable risk in law, policy or guidance. HSE regards risk as lying within a spectrum from broadly acceptable through tolerable to unacceptable, where tolerability refers to a willingness to live with a risk so as to secure certain benefits in confidence that the risk is worth taking and is being properly controlled. Risk prediction is uncertain and tolerability is a decision for individuals or society depending on circumstances. [HSE/GD/2/11]

PADHI Methodology and the Advice Against the Application [HSE/GD1#8]

7.8 A former consultation procedure based on HSE risk criteria of 1989 [CD38] gave three possible outcomes of "Advise Against" [AA], "Don't Advise Against" [DAA] and a middle option, "Consult", involving specific consideration of a development. Following Fundamental Review[12], PADHI does away with the "Consult" option and avoids delay and inconsistency in a pragmatic banded approach. As PADHI incorporates many years of experience and expertise it amounts to a development of the former system and not a replacement. It is emphasised that the PADHI methodology therefore provides the most carefully considered advice of HSE and is not a mere preliminary assessment, as SCCC allege.

7.9 The proposed grandstand would increase the number of spectators predominantly in the open within the notified Inner and Middle Zones. The Grandstand capacity within the Application sites would rise by 1830, from 4377 to 6207. Thus, not only the total but, importantly, the increase in number would far exceed the qualifying threshold of 1000 for Sensitivity Level 4 [SL4] of PADHI to apply. The hotel would have 168 bedrooms in the IZ and MZ, again far exceeding the 100-bed threshold for SL3 to apply. Accordingly, the application of the established PADHI methodology to the proposed development requires an overall SL4 and results in strong Advice Against the Application.

Request for Call-in of the Application
[HSE/GD/1#11&AnnexA]

7.10 There is a long history of HSE advising LBL against development of the kind now proposed near KGS. In connection with the present Application, HSE commented on the accompanying HIA report and on the independent review commissioned by LBL, as well as providing consolidated comments for the benefit of the LBL Committee considering the Application.

7.11 HSE contends that LBL failed to give its Advice Against the application the requisite most careful consideration and therefore, unusually and after due consideration, requested the call-in of the Application because it regards the risk due to the nearby KGS as very serious, not marginal or trivial.

Planning Obligations

7.12 Neither of the completed s106 obligations [CD81&81A] satisfactorily addresses the concerns of HSE [HSE/GD/6].

[12] [Implementation of the] Fundamental Review of Land Use Planning projects [HSE/AJW/4para5.2; HSE/AJW/4/1Exh6]

The Agreement

7.13 The agreement contains no reference to the Safety Management Plan [SMP], which is instead covered by a unilateral undertaking, and the gas operator is unwilling to sign up to the safety management provisions. These factors greatly concern HSE as they cast doubt on the enforceability of the safety measures.

The Unilateral Undertaking

7.14 The undertaking contains no absolute requirement to incorporate the expressed concerns of LBL and there is no mechanism for HSE to contribute to the SMP. The development could go ahead before LBL has approved the SMP.

7.15 The draft SMP [Contingency Plan] attached to the Undertaking does not cover potential major accidents at the KGS and fails to address any of the concerns expressed from the outset by HSE. The Undertaking, moreover, contains no specific reference to the events foreseen by LBL in its proposed Rider to the Deed, to require evacuation of designated seats when Gasholder 1 is full [LBL/1/2].

7.16 Omissions from the SMP in relation to major accidents include: any recognition of the potential suddenness of ignition events; details of communications during a major accident; details of evacuation routes; co-ordination with the LFEPA off-site emergency plan[13]; measures to control ignition sources; recognition that gas leaks could be detected by smell due to a variety of sources apart from KGS.

Planning Balance

7.17 It therefore now falls to the Inspector and SoS to grapple with the detail of the safety case and then to balance it against the claimed need for an improved cricket facility and an enabling hotel.

7.18 It is accepted that it is not for HSE to take a view as to where the planning balance lies, nor to comment on the strength of the perceived benefits of the development, save to say that HSE does not accept that any urgent or immediate need for improvements to The Oval has been made out.

7.19 The strength of the AA result is not materially weakened by taking only the increased population into account.

7.20 HSE would finally make the following three high level points:

the safety concern of HSE in the present case has from the outset been, and remains, a very serious one. With such strong PADHI Advice Against the development, unless the perceived benefits of the scheme are very significant indeed, the SoS should not allow this very serious concern to be overridden;

[13]London Fire and Emergency Planning Authority

there is no net safety benefit from this development, nor any other reason to override the PADHI conclusion; and

to refuse planning permission at this stage clearly does not mean that no further development can take place at The Oval. It is clear that the objections of HSE are based around the fact that additional development of high sensitivity level is proposed in the Inner and Middle Zones. It is not the case that all future development at The Oval is blighted by the presence of the Kennington Gasholders.

8 THE CASE FOR UNITED FRIENDS OF OVAL

See listed UFO Documents and Document WR3 - the material points are:

General

Statement of Common Ground

8.1 UFO disagree in a number of aspects with the SCCG. This follows from their fundamental disagreement with LBL over the several planning effects of the proposed development. The points raised [UFO/1/A] are covered in their case as set out below.

Representation

8.2 UFO comprise a group of residents from the local community representing the whole Kennington Park Estate, Rothesay Court in Harleyford Street and 14-16 Kennington Oval, comprising some 700 properties in all. UFO do not have the benefit of the technical qualifications, financial resources or professional advice available to SCCC and LBL and were obliged to prepare their evidence in their own time [UFO/N&O/ WR3&5].

Consultation

8.3 With reference to the public consultations that took place regarding the disputed Application; in mid 2007, SCCC merely produced a list of dates and events [UFO/M] and mounted a pubic exhibition on 17 July 2007, more than three weeks after the formal Application was submitted to LBL. This left no realistic opportunity for the resident community to influence any aspect of the development, even though it would very deeply affect its day-to-day life. UFO is concerned at the immense disparity between this approach and the detailed collaboration that, it must be assumed, took place between SCCC and LBL prior to the submission of the proposals.

8.4 The Design Statement [DS] for the current Application altered very little from that submitted with the proposal rejected previously and fails to address many outstanding important matters, enumerated elsewhere. SCCC should have been required to update supporting documents for such a major development. Instead, objectors were required to write in again for their representations to be taken into account. In accepting out-of-date supporting documentation from

SCCC but not accepting the 132 letters from objectors to the previous proposal, LBL has not been impartial.

8.5 Subsequently, UFO have taken steps to become involved in the Stadium Monitoring Group but it is important that the initial response of UFO to the Application be taken into account in the determination of the current Application by the SoS.

Development Plan Policies and the Principle of Development

Policies

8.6 In summary, the proposed development would directly contravene UDP Policies 28, 33, 34, 35 and 50 on hotel location, amenity, sustainability and open space. It would also conflict with provisions specific to the Brit Oval itself contained in UDP Policy 51.

Open Space

8.7 UDP Policy 50 prohibits any loss of open space due to the proposed development unless there is compensatory provision. The claim of SCCC and LBL that the area in front of the Pavilion would become a public plaza is erroneous, as the forecourt would not be open to the public, but behind the turnstiles. Far from providing a usable space in the public realm that could be a focal point for the local community, the proposed design would shut out the local community behind high walls. The hotel would provide no advantage for the spectating public in this respect, as the rooms dedicated as corporate boxes would be separated as part of the grandstand on match days. In the absence of compensation or exceptional circumstances, the Application is in conflict with Policy 50.

Hotel Location

8.8 UDP Policy 28 on Hotels and Tourism states that hotels should be located in non-residential areas. LBL conveniently describes the area surrounding the Application site as being in mixed use. This is challenged on grounds of the close proximity of high density housing directly adjacent to the site, comprising five-storey residential blocks. In any event, even mixed use may have a residential element. In this case, hundreds of residents would be affected by the proposed development which, at its closest point, would be only 16 metres away. These residents consider that they live in a residential area, with The Oval, the theatre and the gas holders as the exceptions. [UFO/A/Plan]

8.9 This is borne out in a planning report of the GLA Policy and Partnerships Directorate on a recent application by SCCC to install permanent floodlighting. The report states that the surrounding area is predominately residential in character [UFO/A#4]. The proposed large hotel would thus be in conflict with Policy 28, which contains no reference to an hotel in this area in its list of specific projects.

8.10 UDP Policy 51 on development at The Brit Oval makes specific reference to hospitality. In the context of The Oval, this means corporate boxes and entertainment, again without mention of an hotel. The Application is therefore in conflict with Policy 51 also.

Public Safety

8.11 No public safety evidence can be submitted because UFO, like all interested persons not connected with HSE, LBL and SCCC, are excluded from the bulk of the Restricted evidence.

Design

8.12 UDP Policy 51 on development at The Brit Oval states that the design should be of a high quality and encourages innovative proposals.

8.13 However, the siting of the proposed development would be inappropriate because the building would be crammed into an area which is already very compact, forcing the development to the limits of the site boundary wall. The hotel and its service entrance, in particular, would be extremely close to residential property.

8.14 The solid mass and bulk of the proposed built development would be out of scale with the Kennington Park Estate. The hotel and grandstand would tower over the surrounding buildings, rising above all neighbouring domestic windows to the height of the chimneys.

8.15 This would not be a world class development as envisaged by Policy 51 and its specifications would do no more than meet the legal minimum.

8.16 UDP Policy 33 requires major development to relate satisfactorily to the adjacent townscape. Contrary to this provision, the design does not relate to the recent OCS stand at the Vauxhall End. Moreover, the proposed hotel wing along Kennington Oval would be treated in a neo-Georgian manner with windows punched into a pale-coloured lime rendered façade. This does not match or complement the neo-classical Kennington Park Estate or the Pavilion.

8.17 Further, the surrounding buildings comprise five-storey, high density, housing against which the open space provided by The Oval opposite the end of the Bowling Green Street and Clayton Street provides a welcome feeling of space and light. In contrast, the existing situation in both these streets is described in the submitted Design Statement [DS][CD13] as canyon-like. If a solid building of equal height to the Kennington Park Estate blocks is built fronting Kennington Oval, this feeling of space and increased light will disappear, leaving a sense of enclosure to the residents, even for those having high level windows, as well as for passers-by at street level. The development would also create more a canyon-like experience along Kennington Oval.

8.18 The DS claims that the development would enclose and create a street scene along the north side of Kennington Oval, replacing the current harsh brick wall. On the contrary, the development would introduce a new 4.5m wall, higher than already exists and just as harsh, blocking sunlight and reflecting noise, detrimental to local living conditions.

8.19 The design also introduces a service delivery area, for both the hotel and the grandstand, right in front of living room and bedroom windows, detrimental to

the appearance and character of the area and with serious further noise and traffic implications [considered below].

8.20 Much of the DS is about the Pavilion, how it looks from different angles for those passing by or visiting the Ground, and how the area surrounding it can be improved. Comparatively, very little consideration has been given further along the Kennington Oval where people live and would view the proposed structure on a daily basis. For example, the LBL Planning Committee report states that the lime render of the proposed building would be a counter point to the rich red brick and terracotta and elaborative decoration of the Pavilion, emphasising its focal role. In fact, the Pavilion has no elaborate decoration on its public façade, and most residents of Lockwood and Lohmann Houses cannot see it from their windows anyway.

8.21 The DS fails to address either the turnstile solution or the materials to be used on the hotel façade. It does consider overshadowing by newly planted trees. This is farcical when the design advocates a five-storey building directly behind them.

8.22 In support of Policy 51, para 5.11.1 of the UDP states that the largest physical presence in The Oval area is the Cricket Ground, which needs to expand but currently relates poorly to the surrounding area. The development currently proposed would not improve the relationship of The Brit Oval to its surroundings, due to the overbearing nature of the buildings, the severance of the Cricket Ground from its neighbours by high walled barriers, a lack of public space, and the harm to the amenities of surrounding occupiers. By thus failing to contribute to the surrounding area, the project is out of accord with UDP Policy 33.

Highways and Transportation

8.23 There would be a noticeably detrimental change in the type of road traffic along Kennington Oval due to 18 commercial deliveries a day and some 29 extra peak hour vehicle movements. Currently, the SCCC transport assessment [CD20] itself admits, there is primarily low key, local traffic on Kennington Oval, Bowling Green Street and Clayton Street, where there are two primary schools and a children's centre. In addition there would be an increased danger to the predominantly pedestrian community, including a rise in air pollution by commercial exhaust fumes.

8.24 With reference to public transport, UDP Policy 51 requires any proposal to increase the crowd capacity of The Oval to demonstrate that it this within the capacity of the public transport serving it. Despite "site observations" of overall spare underground capacity in the SCCC transport assessment, local experience is that the available facilities are over-subscribed, for example the Northern Line at peak times. The assessment admits that stations are at capacity but dismisses this as normal. There is no information at all on the capacity of the main line train or bus systems, the latter being also notably oversubscribed [UFO/D Photos].

8.25 Nor is there any indication of the age of the data on which the assessment relies, but they appear to be outdated by up to ten years. Passenger usage has increased in that time, whilst improvements such as Cross River Tram are

deferred [UFO/E]. Moreover, evening floodlit Twenty20 games clearly coincide with the afternoon peak travel hours but the assessment works on the assumption that spectators will travel off-peak.

8.26 Furthermore, whereas the addendum transport assessment says that Transport for London accept that the proposed development would have no significant impact on Underground operations, that is not to say that the Victoria and Northern Lines can cope with increased peak usage due to evening matches at The Brit Oval [UFO/F,G,H].

8.27 For all these reasons the proposed development fails to meet UDP Policy 51 as supported by para 4.17.28 to achieve redevelopment of The Oval "without detriment" to amenities of surrounding occupiers.

Daylight, Sunlight and Overshadowing

8.28 Notwithstanding that LBL was advised that the proposed development would have no adverse effect on the surrounding residential dwellings, the submitted Daylight and Sunlight report admits that, for over 70% of the locations tested at Lohmann House, the Vertical Sky Component [VSC] would fall below the 27% BRE guideline, with a noticeable diminution to below 0.8 times the original value.

8.29 The results for Lohmann House and Lockwood House were shown together in the Planning Report Statement. This gave the impression that five out of twelve locations failed, whereas all the locations at Lockwood House were above the recommended level and 70% of the locations at Lohmann House were below the level.

8.30 Even if the reduced VSC values are better than the lowest level considered acceptable, this still represents a significant loss of daylight, detrimental to the majority of residents, surely amounting to an adverse effect, unacceptable in terms of UDP Policy 51 and para 4.17.28.

Noise and Disturbance

8.31 It is hard to accept the claim of SCCC that the proposed development would not have a significant detrimental effect on the amenity of nearby noise sensitive premises. Lohmann House presently fronts onto what is no more than a small back street, mostly open on one side. In contrast, the proposed development would leave Lohmann House facing onto an enclosed road containing the main service entrance to a large hotel and major cricket stadium.

8.32 In the submitted acoustic report [CD17], the measured background noise levels, ranging up to 89dB, were taken in exposed positions closer to the busy Harleyford Street than the residential properties of concern. In contrast, UFO measurements taken at the relevant façade show that the ambient sound level rarely rises above 50dB(A) with averages significantly lower than the SCCC data show [UFO/3Fig1].

8.33 UFO conclude that this is the result of the screening effect of the existing grandstand, such that the SCCC figures cannot therefore be indicative of the comparatively low level of noise currently experienced by residents of Lohmann House.

8.34 Therefore the difference between the current levels of noise experienced by residents of Lohmann House and what might be expected after the construction of the hotel would be much greater than predicted by SCCC in the original acoustic assessment.

8.35 The number of additional spectators using the streets, including many who could be drunk and rowdy, and also the activity of additional employees, would unacceptably increase noise levels.

8.36 Moreover, it is well-known that SCCC do not control activities at The Oval. There have been incidents of testing the evacuation alarm late at night, noise from the lift, overnight post-match cleaning operations, coaches running their engines, and even the outfield drainage works current during the Inquiry commencing outside their permitted hours. Minutes of the Stadium Monitoring Group bear this out [UFO/N&O].

8.37 The Architect to SCCC admitted that the proposed service entrance was located to suit the hotel, without consideration of residents living opposite. The increase in noise and disturbance consequent upon the development now proposed would amount to an unacceptable negative impact on the quality of life of residents, contrary to UDP Policy 51 and para 4.17.28.

Privacy

8.38 Currently there are no windows within The Brit Oval that overlook Lockwood and Lohmann Houses on Kennington Oval. The provision of a hotel with windows on the street boundary, opposite Lockwood House, would enable hotel guests to look directly into these flats. Hotel guests are passing strangers rather than neighbours who become part of the community. Those staying at the proposed hotel would be new to London, and possibly the United Kingdom, and so would be more curious about the lives of everyday Londoners and be likely to intrude more into the privacy of residents.

8.39 Despite this, LBL subjectively advocates flexibility in the application of privacy standards, precisely because the hotel would not be a permanent residential use, even though different people would occupy the hotel on many nights of the year.

8.40 Loss of privacy is still a concern over the intervening distance of 19m, as the degree of intrusion would increase over that currently experienced between Lohmann and Lockwood houses that stand 22m apart. There would also be more people high in the grandstand with a vantage point over the flats.

8.41 For these reasons the proposed development is at odds with the aim of UDP Policy 51 and para 4.17.28 to avoid detriment to amenity.

Energy Strategy and Sustainability

8.42 The expert evidence of UFO, supported by other qualified opinion, is that the proposed design fails to comply with the "be lean, be clean, be green" sequence of design and assessment of sustainable energy measures set down in statutory policy.

8.43 SCCC claim a 40% improvement in thermal performance [U-value] over a minimally compliant scheme. However that is misleading because it is based on the former requirement of the 2002 Building Regulations [BR02]. The current 2006 Regulations [BR06] are 28% more stringent in terms of Target Emissions Rate [TER]. The criterion of Part L2A of BR06 is for Building Emissions Rate [BER] to be as far below TER as possible. SCCC fail to show demand reduction measures as the required first stage of assessment, and do not explain why calculations of TER and BER have not yet been completed, despite asserting that the Building Research Establishment Environmental Assessment Method [BREEAM] would produce a Very Good result. As a consequence, it is not demonstrated that the proposal meets UDP Policy 34.

8.44 Further, the scheme does not achieve the requisite 10% reduction in CO2 emissions by use of renewable energy sources. In the absence of strong justification, this results in further non-compliance with UDP Policy 34. Moreover, contrary to the claim that no more photovoltaic [PV] panels could be included, there is no attempt in the scheme to make use of surfaces other than the roof, clearly indicating that the design falls short in sustainability terms. Furthermore, the claimed reduction in energy requirement due to the benefit from the Combined Heat and Power [CHP] system should have been taken into account in the second stage of the assessment sequence, before calculating the renewable contribution.

8.45 Permission cannot be justified in terms of UDP Policies 34 and 35 when SCCC has done so little to comply with sustainable energy requirements, albeit going to great lengths to convince the Inquiry that nothing more could be achieved [UFO/3/c/paras4.3.5-20].

8.46 The design omits a whole range of opportunities to improve sustainability, including: switches to the hotels tilt and turn windows to allow natural ventilation; ventilation to rooms and atrium; the possibility of using timber in the stand canopy; and rainwater harvesting.

8.47 Both SCCC and LBL show a lack of understanding of sustainable energy requirements. Finally, it is evident that performance cannot be relied upon to meet design predictions in practice [UFO/3/C/Appendix].

Planning Obligations

The Agreement

8.48 On the basis of previous adverse experience, UFO doubt the enforceability of planning obligations, but list without prejudice a number of "requirements" for any s106 agreement or undertaking, including comments on the draft Delivery Management Plan and Venue Charter [UFO/1#7&9; CD81Sch4Pt#2(a)&81A]. The main points, as discussed at the Inquiry, are:

on-site car parking should be expressly restricted to 45 spaces;

deliveries should be prohibited outside the hours of 0800 and 2000, including on match days;

there should be controls over: vehicle reversing, vehicle access to surrounding streets, and provision of independent CCTV monitoring of vehicle activity;

there should be regular independent noise monitoring of the development;

there should be much larger financial contributions to the surrounding public realm;

there should be public consultation by involvement in the Venue Charter, and by inclusion in the Stadium Monitoring Group;

there should be adequate levels of policing on match days.

Need and Community

8.49 Notwithstanding claims of widespread support, SCCC and its current proposal turn their backs on the local community. The SCCC commitment to providing local jobs among the 200 to be created is unsupported. The development would unacceptably harm amenity, contrary to planning policy, in the several respects set out above.

8.50 LBL inexplicably seems keen to brush aside their own UDP policies in favour of the proposed development, yet their own witness could not enumerate what benefits it would bring.

8.51 "Doomsday scenarios" put forward by SCCC that refusal of this application will cause The Brit Oval to lose its Test Match status or its lease from the Duchy Of Cornwall are not credible. The arguments on Test status are presented as hearsay and are hard to take seriously. The Oval is clearly the unchallenged No2 cricket venue in the UK, after Lords, and the SCCC Chief Executive admitted that the status of The Oval is not in fact in jeopardy. The Duchy of Cornwall lease merely requires "best endeavours" to secure international cricket. That is not an absolute requirement and it is inconceivable that SCCC would be turned out of The Oval if it lost international cricket.

Overview

8.52 For all the foregoing reasons the Application is in conflict with the UDP and should be refused in the absence of any overriding material considerations in its favour.

9 THE CASE FOR CLLR XXXXXX XXXXXX

See Documents IP/1 and WR3 - the material points are:

Development Plan Policies and the Principle of Development

9.1 It is incorrect to assume that existing built development at The Oval predates neighbouring residential uses as, within living memory, The Oval Cricket Ground was green open space, save for the red brick Pavilion, and even that has been raised in height in recent times.

Loss of Open Space

9.2 UDP Policy 50 does not permit the kind of progressive loss of open space that has occurred at The Oval over the years and which would continue with the currently proposed development. That would result from encroachment onto the existing playing area, reducing the total open space at The Oval to less than half the original area. The protection of Policy 50 applies equally to private as to public open space and is in no conflict with aims of Policy 51 to promote redevelopment of The Oval.

Hotel Location

9.3 UDP Policy 28 provides merely that hotels outside specified preferred areas should be in "non-residential areas". Notably it does not say "solely" residential areas. Nor does Policy 28 expressly state that hotels can be in "mixed use" areas. Yet LBL maintains that, as the area surrounding The Oval contains residential development, it is therefore in "mixed use" and thus "non-residential". So, by two easy jumps of sophistry, LBL redefines a substantially residential area as "non residential" for the purposes of Policy 28. In fact the proposed development conflicts in principle with Policy 28 on the location of hotels.

Transportation and Highways

Car-Free Development

9.4 The inclusion of even a reduced amount of underground parking is contrary to UDP Policy 14(g) which favours car-free parking in areas such as this, with excellent public transport accessibility on the edge of the central zone of London. That is apart from minimal facilities for car users with disabilities. Moreover, the design now inappropriately includes unused basement space originally proposed for parking.

Amenity – Light, Shadow, Dominance, Noise, Privacy

9.5 The amenity objections of UFO and other residents should be taken into account. In particular: the scale of the proposed building would be overbearing and oppressive; the slip road and access ramp would generate excessive traffic and noise along the residential part of Kennington Oval; the restaurant kitchens, rubbish compactor and service yard would be poorly sited along the flank frontage, detrimental to properties opposite.

Public Safety

Designing Out Crime

9.6 The proposed underground car park appears ill-advised in terms of terrorism resilience. HSE advice, circulated to LBL Members only at the eleventh hour, asked that terrorism resilience measures be considered. Despite the high profile of the site, the committee were given no such advice by officers.

9.7 It seems from a statement on terrorism by the Prime Minister reported in *The Times* on 15 November 2007 [IP/1/A] that no underground car park should be

placed under a high profile sports stadium, such as The Oval, whether or not it is next to a gasholder.[14]

Kennington Gasholders

9.8 The lay population cannot accept that there is no risk of ignition of gas leaking from the gasholders, particularly as a resident of Kennington Park Estate attested to the planning committee that he had seen a small piece of war-time ordnance leading to the release and ignition of gas sufficient to ignite window frames. Furthermore, the layman is aware of the sensitivity of major sports grounds where well-documented tragedies have taken place.

9.9 The dominant issue of gasholder safety has centred on the truthfulness of the HSE objection which was inappropriately questioned by SCCC and LBL. It is nevertheless the evidence of HSE that there have been incidents of escaped gas igniting, whether or not a fireball was involved. The brutal attack on HSE evidence has hitherto overshadowed other valid planning policy objections.

Overall Design Considerations

9.10 The appearance and layout of the proposal are both of concern. Linked to the amenity issues of the slip road, service yard, rubbish compactor and underground car park, is the unsatisfactory and unclear design of the long flank elevation, roughly perpendicular to the red brick pavilion block.

9.11 If a car free development were proposed in line with UDP Policy 14, the slip road and ramp would not be necessary and access could be achieved through the flank elevation, incorporating the service yard and rubbish compactor within the built development, out of sight of residents.

Planning Obligations

9.12 Without prejudice, suitable management plans should be extended to the whole Ground and off site to control development impacts, including adequate public realm contributions, compensation for loss of open space, and the provision of adequate policing.

Overview

9.13 LBL achieved the widely applauded Vauxhall End redevelopment by holding its nerve in considering up to five proposals before the right scheme evolved. In the present case, LBL lost its nerve and now supports a scheme which is flawed with respect to loss of open space, excessive on-site parking and inappropriate service provision and access. The gasholder safety matter should not preclude proper consideration of these other issues.

9.14 For all the foregoing reasons, the Application should be dismissed.

[14] *Inspector"s Note – see also CD88 - Hansard extracts and new guidance – indication of future design guidance; no specific reference to underground car parks.*

10 THE CASES FOR THE ROTHESAY COURT RESIDENTS COMMITTEE and MR XXXXX XXXX of XX-XX KENNINGTON OVAL

See Documents IP2, IP3 and WR3 - the material points are:

Rothesay Court

10.1 Rothesay Court is a block of 49 flats on the west side of Harleyford Street between Oval Underground Station and The Oval Cricket Ground. The proposed redevelopment would worsen already intolerable living conditions there.

10.2 On match days occupiers are increasingly overwhelmed by the influx of spectators, with groups, sometimes abusive and intimidating to elderly residents, congregating outside the block and trespassing on the gated front garden, creating obstruction, sitting on the wall consuming food and producing litter and human waste. The rear driveway also becomes blocked, causing dangerous obstruction to passing vehicles on a busy bus route. Congestion is exacerbated by traders and ticket touts. All this is detrimental to this period building.

10.3 Neither the police nor SCCC have shown any concern about this situation and it is socially unacceptable for neighbouring residents to be pushed aside in this way.

10.4 Residents support cricket but the changes to the character of game and its greater public attraction with the advent of floodlit Twenty20 matches, compounded by the projected further increase in spectator numbers due to the proposed development, is bound to worsen this unacceptable situation. This places the Application in conflict with UDP Policy 51 that requires redevelopment at The Oval to protect amenity.

Mr XXXXX XXXX – XX-XX Kennington Oval

10.5 Mr XXXX represents residents of the flats at XX-XX Kennington Oval and has spoken to the owner of neighbouring Oval Mansions, Mr XXXXX XXXXXX who shares the concerns of hundreds of local residents as put forward by UFO and others.

10.6 Residents have been adversely affected by the expanding operations at The Oval in recent years, including the larger OCS stand and the introduction of a greater number of noisier, floodlit Twenty20 games at night. Other adverse impacts include parking restrictions, rowdy drunkenness, deposition of vomit and urine and violent aggression.

10.7 Residents accept a degree of upheaval due to the neighbouring major sporting venue but over the last eight years the balance has shifted markedly with SCCC giving little weight to the legitimate concern of residents that they be allowed to enjoy their homes in peace and quiet.

10.8 The point of the objection is to highlight how much worse these effects have become, with LBL siding with SCCC at every turn. The current proposal would further exacerbate the situation, with extra spectators and year-round use of the

hotel and its commercial deliveries. It is time to draw the line and reject the Application.

10.9 As to the status of The Brit Oval, it is not accepted, as was claimed in connection with the recent floodlight application, that refusal would put The Brit Oval on the "B" list of national cricket venues. This disingenuously quotes an alleged threat by some shadowy figure from among the cricket authorities. The SoS cannot be held to ransom in this way as any such threat is not credible, especially given cricket grounds do not generally have hotels attached to them and that no ground, apart from Lords, comes near The Oval in terms of seating capacity.

11 WRITTEN REPRESENTATIONS OF SUPPORT

See Documents WR1, WR4 and SCCC/PS/2/2 - the material points are:

11.1 XXXXX XXXXXXXXX MP, Minister for Sport, whilst unable to comment directly on the application now before the SoS, generally supports innovation at the Brit Oval in line with Government ambition to culture a world class sporting landscape of excellence for the UK for participants and spectators alike. Exciting times lay ahead for UK cricket. The 2009 Ashes and the Twenty20 World Cup, including semi-finals of both men's and women's competitions on the same day, are scheduled at The Oval for 2009. The One-Day-International World Cup is scheduled for 2019. UK grounds and facilities have helped secure such prestigious events in the past and we must continue to ensure that they are an asset to the sport in the years ahead.

11.2 XXXX XXXXXXXX MP, Shadow Sports and Olympics Spokesman strongly supports the proposed development both personally and on a Party basis. The conservative Party wants to see The Oval redeveloped as one of the UK"s major international cricket grounds and world class sporting venues. HSE concerns are misguided and LBL has already given approval after having weighed up all material considerations and finding the HSE approach unnecessarily cautious on independent analysis. There are no recorded safety related incidents at The Oval during many years of cricket, nor apparently anywhere else in London. The development would deliver a much needed £35 million investment to Kennington, create jobs and attract more visitors and additional investment.

11.3 The Duchy of Cornwall, as freeholder of The Oval since 1377, supports the Application, as approved by the democratically elected Members of LBL who represent the local community. The proposed development would be part of a series of recent improvements to secure the long-term future of The Oval as an internationally renowned and historic sporting venue. It will also assist further the burgeoning connections of SCCC with the local community. The Prince of Wales and the Duchess of Cornwall visited The Oval to witness its information technology work with local children and its partnership with The Prince's Trust. The hotel in particular will create enduring local employment. LBL support is understandable in the circumstances and in light of the public consultation that has been undertaken. The Duchy feels that the proximity of the site to the Kennington Gasholder Station offers no threat to safety and any such concern should more usefully be directed toward the gas company. HSE objections, so

far as they are rational, logical and comprehensible, do not provide adequate reason to overturn the resolution of LBL to approve the Application. At its simplest, one can be pretty confident that the proposed new grandstand stand and hotel would not pose a safety risk. The SoS is requested to uphold the decision of LBL in favour of the grant of planning permission.

11.4 The International Cricket Council [ICC] points to The Brit Oval as a world-class venue crucial to the duty of the ICC to promote cricket as a leading global sport to inspire everyone and to connect countries and communities. As one of six major international cricket grounds in the UK, The Brit Oval attracts visitors and investment to the capital, aided by the recent enhancement due to the OCS stand and associated facilities. Benefits of the current proposal will include £35million investment, employment, energy conservation, relocation of noisy car parking, crowds and food concessions under cover as well as an overall strengthening of the international position of The Brit Oval. The blanket, risk-averse opposition from HSE has been given undue weight, whereas cricket has co-existed with the Kennington Gasholders for many years without incident and there is no evidence that this will not continue to be the case. This hugely important Application should be approved.

11.5 The England and Wales Cricket Board [ECB] as national governing body for cricket, is committed to building strong partnerships inside and outside the game, which must continue to attract investment. The development of key international stadiums is crucial to this, including the redevelopment of The Brit Oval now proposed. This would meet the changing nature of cricket, particularly the growth of the Twenty20 game, including under the concurrently proposed floodlights. The Application should be approved.

11.6 South London Business, representing the business community south of the Thames, sees the proposed development as building upon surrounding developments such as St George Wharf, Vauxhall, reversing historic decline. Research undertaken by the London Development Agency on the South London Tourism Strategy shows a shortage of high quality hotels and conference facilities in the Sub-Region. A 4-star hotel at The Oval is supported, especially given the provision of new jobs in an area of high unemployment. The development will secure the status of The Brit Oval and enhance the reputation of Lambeth in advance of the 2012 Olympics, as well bringing a £35million investment boost to the wider area. The Application should be approved.

11.7 XXXXXXX XXXXXXXX, Chief Cricket Correspondent of *The Times* supports the proposed development of The Oval as an iconic sporting institution of worldwide reputation. It has been able consistently to improve over recent years to currently the second highest capacity ground in England with one of the most highly regarded pitches. The continued development of The Brit Oval by way of the current proposal is vital to English cricket.

11.8 Other Interested Persons, including some 20 who made representations to the Inquiry, support the Application in terms comparable with the foregoing.

12 WRITTEN REPRESENTATIONS OF OBJECTION

See Documents WR2, WR4 and WR5 - the material points are:

12.1 XXXXXXX XXXXXXXXX AM supports the case of UFO and other local residents, having delivered a 200-signature petition against the proposed development to the London Assembly. Although there is no objection in principle to the development of The Oval, this poor design would undermine the appearance of the existing Ground as an important London landmark by introducing solid high walls to the road edge with no active frontage, creating a gloomy canyon-like experience for pedestrians and for residents of the lower floors of the flats opposite, exacerbating fear of crime. Instead, the building should be set back to create a lighter impression. The proposed service entrance would cause residents to face the "backside" of the proposed buildings and give rise to excessive disturbance. Local primary schools would be adversely affected by increased traffic including delivery lorries. There is no evidence of support for walking or cycling. The proposed ugly, blockish design fails to complement the light, open style of the new OCS stand with its successful green screen wall. Moreover, the energy and water efficiency of the scheme is questionable with respect to London Plan policies. The approach to the development is piecemeal and it should be rejected.

12.2 Cllr XXXXXX XXXXX and Cllr XXXX XXXX, Members of LBL for Oval Ward raise the same concerns as their Ward colleague, Cllr X XXXXXX [above], especially health and safety concerns at KGS, in light of ignition incidents during WWII and since. There is no objection to improving The Oval but the potential adverse impacts on surrounding permanent residents are important. The siting of the hotel in a residential area is contrary to UDP Policy 28 and all the adverse impacts on the area enumerated by Cllr XXXXXX, UFO and others make the scheme unacceptable. The provision of on-site parking is also contrary to UDP Policy 14 which favours car-free development, given the exceptionally good public transport links the site enjoys. There is also some concern over flood risk. Public realm improvements are required in accordance with UDP Policy 36. There is no co-ordinated action plan to ensure the requisite high quality street environment.

12.3 Other Interested Persons. Some 11 other interested persons who made representations to the Inquiry and over 120 who wrote to LBL object to the Application in terms that reflect the foregoing written objections and the cases of other objectors set out above.

13 INSPECTOR'S OVERALL CONCLUSIONS AND RECOMMENDATION

These Overall Conclusions and the Recommendation that follows take into account the content and conclusions of a separate Restricted Report on public safety matters.

Italic [square-bracketed] numbers are cross-references to other paragraphs in the report from which these conclusions are drawn and act as hyperlinks in electronic versions of the document.

The Application

13.1 The Application called in for determination by the Secretary of State [SoS] was made to the Council of the London Borough of Lambeth [LBL] by Surrey County Cricket Club and Arora International Hotels [SCCC]. The proposal includes the removal of the existing Lock, Laker and Peter May Stands and the Surrey Tavern and the erection of a six-storey spectator stand incorporating 1,830 additional seats, a new five-storey building containing a 168-bedroom hotel and basement parking for 45 cars, and a new ticket and security office and turnstile system, together with ancillary development. *[0-17, 4.1-6]*

The Inquiry

Restricted Evidence, Consultation and Representation

13.2 The Inquiry was unusual in that much of the evidence was subject to s321 Direction and heard in closed session. The process of consideration of the request by the Health and Safety Executive [HSE] for the s321 Direction and its subsequent issue resulted in the proceedings becoming protracted and fragmented. The situation was further complicated by the non-availability of Counsel for LBL for much of the Inquiry, as well as the decision to hold the Inquiry at The Brit Oval itself in the absence of a suitable neutral venue. *[0-6, 0, 0]*

13.3 Unsurprisingly, there was a degree of public disquiet expressed concerning the Inquiry arrangements and, in particular, the apparent tension between the principles of openness and fairness in respect of matters affecting the lives of local people and the need in the wider public interest to restrict access to certain information concerning the safety of the Kennington Gasholders near the Application site. That disquiet was duly acknowledged by Counsel for SCCC. *[1.8-10]*

13.4 With the co-operation of all parties, the Inquiry was completed with as much evidence as possible being heard in open session. Where reference was made in closed session to matters that were not strictly covered by the s321 direction, I have sought as far as possible to reflect these in this Main Report. LBL was afforded an opportunity to make closing submissions notwithstanding the limited noting brief of their substitute Counsel for much of the Inquiry proceedings but, in the event, did not do so. *[1.11-15]*

13.5 Throughout though, UFO and others drew attention to their perceived disadvantage in having no legal representation and being obliged to prepare and pursue their objections in their own time, as compared with the main parties and

the Inspector who were present on a professional basis. UFO complained that consultation between SCCC, LBL and the public had been inadequate. *[0-4]*

13.6 In practice, UFO were able to exercise their right of appearance and in doing so acquitted themselves well under the leadership of their three named witnesses. Despite the misgiving of SCCC that UFO are a small, personally motivated group, it is evident from the submissions of others that, in fact, they represent at least a substantial minority of local opinion who deserve to be taken seriously. The question of whether or not the earlier public consultation on the proposed development and the handling of the Application when it was before LBL may have had shortcomings is not a matter directly for this Report or for the SoS in deciding the Application. Far more important is the fact that all objections have now been heard or submitted in writing and are here reported for consideration in the overall balance of the decision that now falls to be made. *[0, 0, 0-3]*

13.7 Overall, I am satisfied that the proceedings were fair, and open to the extent that this was possible in the circumstances, and crucially that no party was placed at any undue disadvantage. Accordingly, it is my first conclusion that the SoS may safely proceed to determine the Application on the evidence now presented.

Planning Considerations

13.8 The main planning considerations for assessment, incorporating the matters nominated by the SoS in calling in the Application, are as follows:

The principle of the development, including compliance with the adopted London Plan as consolidated 2008 [London Plan] and the Lambeth Unitary Development Plan [UDP] adopted in August 2007 *[call-in matters d) and e)]*;

Public Safety with respect to the Kennington Gasholder Station [KGS] and compliance with national policy on hazardous installations as set out in Circular 04/2000 *[call-in matters a) and b)]*;

The design concept and spatial and visual relationship between the proposed and existing buildings within and surrounding The Oval;

Traffic generation and public transport capacity, particularly in connection with the proposed hotel along the unclassified part of Kennington Oval and connecting streets;

Compliance with guidance on daylight, sunlight and overshadowing;

Noise and Disturbance to local residents;

The potential for overlooking and reduction in privacy between the proposed building and existing properties;

Compliance with Energy Strategy requirements;

Degree of Flood Risk;

Degree of need and public support for the proposed development and any community and planning benefits it would provide; *[para13.8.3-10 all relate to call-in matter g]*

The form of Planning Conditions to be applied to any permission *[call-in matter f)]*; and

The terms of the submitted planning obligations, including whether an agreement or undertaking under section 106 of the Act can appropriately meet the safety concerns of HSE *[call-in matter c)]*.

Development Plan Policies and the Principle of Development

Open Space

13.9 There would be a small loss of open green space due to the realignment of the front edge of the proposed grandstand to follow the circular cricket field boundary, consistent with the form of the Vauxhall End of the Ground. This continues a progressive erosion of the original green Oval. However, it would result in no effective reduction in the cricket field and, at the same time, would assist in enhancing the experience of spectators and so benefit the established sporting use of The Oval.

13.10 Further, there would be new open spaces, first, in the form of the plaza, affording better public views of the Pavilion, and second, the setting back of the hotel frontage along Kennington Oval. It is true that the built form of the frontage would be taller, and that the plaza would be enclosed by turnstiles, at least until improved ticketing technology obviates them. Even so, these features would compensate for the small loss of open space within the playing area, including by affording better access to The Oval, and to the sport of cricket generally, for an increased number of spectators.

13.11 Accordingly any conflict between the development and UDP Policy 50 would be insignificant and would therefore set no unacceptable precedent for future loss of open space. *[0, 0, 0, 0, 0, 12.1]*

Hotel Location

13.12 The Brit Oval, with its own combination of sports and commercial functions, and the immediately surrounding area together exhibit a wide mixture of land uses. Residential use predominates in several parts of the locality, and the closest neighbouring properties to the Application site itself are the flats fronting Kennington Oval just a few metres across the street from the Application site boundary. Clearly the area is in mixed use, as claimed by SCCC and LBL but, equally, it cannot reasonably be described as non-residential. Therefore the location of the proposed 168-bedroom hotel would not strictly comply with the provision of UDP Policy 28 that large hotels should be located in non-residential areas. Neither does UDP Policy 51, specific to The Oval, mention the prospect of hotel development, referring only to hospitality facilities.

13.13 At the same, time UDP Policies 28 and 51 are neither exhaustive nor preclusive of hotel development in areas of very good public transport access, provided adverse impact on the amenity of adjacent occupiers can be avoided and a high quality design achieved. In those terms, the Application site is a sustainable and

appropriate location for an hotel to support the main sporting function of The Oval. This includes part-use as hospitality accommodation, an approach consistent with that taken at other major sporting venues. Thus, if the development now proposed is judged to be acceptable in terms of amenity and design, there would be no significant conflict with UDP Policies 28 or 51 in terms of hotel location. Furthermore, the proposal would align with London Plan Policy 3D.6 in support of hotel rooms for the coming Olympics. *[0-4, 0, 0, 0-5, 0-2, 0-10, 0, 12.1]*

Overview

13.14 There no evidence of any other objection in principle to the location of the proposed development in terms of established planning policy. Objections on grounds of public safety and a range of other planning effects form the bulk of the respective cases.

Public Safety
taking into account the Conclusions of the Restricted Report

Planning Policy

13.15 There is superficial tension between UDP Policy 51, which favours increased spectator capacity at The Oval, and UDP Policy 54(g), which resists development if it would be at unacceptable risk from an accident at the nearby Kennington Gasholder Station. However, the UDP is properly to be read as a whole. These two provisions are not at odds with each other in any event because Policy 54(g) provides for judgement as to whether any such risk would be unacceptable or not. That is the very essence of the judgement the SoS is now called upon to make with respect to the consideration of public safety in this case. *[0, 5.12, 6.3-5, 0]*

Public Safety Considerations

13.16 The considerations arising briefly are: the approach the SoS should take to the public safety issue in deciding the Application; the nature and potential effects of accidents at KGS as the basis for the HSE Advice Against the proposed development; the credibility of the risk from such an event occurring; and overall the degree to which the SoS may judge that risk to be acceptable in its own right, or as part of the overall planning balance of the decision to be made.

Approach to Decision

13.17 HSE Advice Against the proposal should be reviewed and tested in the light of the SCCC challenge to its credibility, then the level of Individual Risk to the occupants of the Application site with the proposed development in place should be re-assessed. The HSE advice will thus have been afforded the most careful consideration, as required by C4/00. Any increase in Case Societal Risk due to the larger number of people affected can then be judged under the test of acceptability set by UDP Policy 54(g) and finally weighed in the overall balance of planning considerations, including the presence of existing development. *[0, 5.6-11, 0-4, 0-7]*

13.18 It is a theme of third party representations in support of the Application, and also an aspect of the case of SCCC, that the absence of any harmful incident at

KGS in the history of The Oval to date is evidence that there is no unacceptable risk under current policy and practice. However, prior accident occurrence is already taken into account in the respective cases of HSE and SCCC. *[5.79-80, 11.1-5]*

Nature, Credibility and Acceptability of Risk

13.19 I have concluded from the Restricted evidence considered separately that the HSE PADHI Advice Against the Application is justified on a cautious best estimate and that if the proposed development were located where no development currently exists it should not be allowed.

13.20 However, there are certain factors that lessen the risk and provide reassurance that an accident is less likely than even the very low order of calculated risk would indicate.

13.21 In this case, moreover, it is now for the SoS, in weighing up the HSE advice, to take account, under PADHI Rule 4c, of the existing use of the site.

13.22 This very low Individual Risk to new spectators would remain at its present level but there would be some increase in Case Societal Risk by way of introducing 1830 additional people into the area. The judgement to be made is whether that risk is acceptable in terms of UDP Policy 54(g) or, in other words, "worth taking" in the overall balance of planning considerations. *[3.7-13, 0-13, 0-11, 0-9]*

Design

13.23 In relation to the current Application, the claimed existence of a conceptual masterplan for The Oval remains little more than an abstract assertion by SCCC. However, the Design Statement demonstrates a logical approach in the derivation of the design of the proposed grandstand, hotel and associated facilities in the chronological and physical framework of recent and future developments at the Ground.

13.24 The replacement of the older stands adjacent to the Pavilion is the next logical step toward ultimately completing a circle of redevelopment addressing the play area, with any future replacement of the less outdated Bedser stand to be arranged symmetrically on the other side of the Pavilion.

13.25 The strikingly modern OCS stand opposite the traditional Pavilion makes a bold and individual statement. Yet it is the wish of the Duchy of Cornwall, supported by adopted UDP Policy 51, that the traditional historic Pavilion be respected. In this context, it is appropriate that the design now proposed at once contrasts with the OCS stand and at the same time reflects the architecture of the Pavilion and neighbouring residential blocks just outside the Ground.

13.26 This is achieved by the choice of detailing that would effectively harmonise with the varied but generally traditional styles that contribute to the character of Kennington Oval, and by the choice of light-coloured elevations that would set off the red brick Pavilion to advantage. The heights of the respective parts of the built development would also pay heed to the proportions of adjacent buildings and streets, suitably reflecting the present urban grain. In the

circumstances a local loss of openness at the junction of Bowling Green Street and Clayton Street is not unacceptable in my view.

13.27 Even though the development would introduce a service entrance on Kennington Oval opposite existing dwellings, I consider that this would be accommodated in the frontage discretely, without undue visual impact. Moreover, the façade of the hotel would be set back from the road edge to provide an improved street frontage, and the plaza on the site of the former Surrey Tavern would offer improved vistas of the signature Pavilion front.

13.28 The design would be visually legible and inclusive with respect to maintaining the distinctiveness of the surrounding urban area, whilst making good use of the available space without a sense of cramming, and without detriment to the settings of any nearby listed building or conservation area. Suitably constructed and finished, the proposed buildings would be of a quality commensurate with the world status of The Oval.

13.29 Overall, the proposed design complies with the requirements of the development plan as supported by national policy and advice. In particular it meets UDP Policies 31-33 and 51 on design quality at The Brit Oval, as well as Policies 45 and 47 preserving the local built heritage. It would support the objective of London Plan Policy 4B.1 to maximise the use of the site, and would generally conform to the provisions of PPS1 as informed by the advice in By Design. *[0-3, 0, 0, 0-7, 0-22, 0-10, 0-22, 0-11]*

Highways and Transportation

13.30 There is no evidence that there would be any significant additional road traffic congestion along Kennington Oval or surrounding streets due to the modest increases in deliveries and car trips to and from the development. There is no reason that suitable entrance geometry could not be achieved, together with arrangements to ensure that the use of the service yard would not give rise to dangerous manoeuvres on the highway. There would be a net reduction in car parking on the Application site of 15 car spaces.

13.31 Neither is there evidence that there would be inadequate capacity on the public transport systems to cater overall for the increase in passenger numbers due to the proposed development of around 1000 each way per match day.

13.32 In these broad respects, subject to agreed controls imposed by planning conditions and obligations on access works, on-site parking space and street parking measures, the development would comply with the transportation and parking restraint provisions of UDP Policies 8, 9 and 14.

13.33 However, there would be some change in the character and frequency of traffic movements in Kennington Oval due to the use of the proposed service yard, involving extra activity. This could be noticeable on a daily basis to occupiers of dwellings opposite the Application site, with implications too for pedestrian safety close to schools.

13.34 Moreover, despite an overall adequacy in public transport capacity, there is evidently already a problem of over-crowding at peak travel times, causing

inconvenience to local residents. The start of evening Twenty20 matches, that attract large crowds, is more likely to clash with such peak periods than is the case with traditional whole-day or multi-day fixtures, and system improvements to alleviate this problem cannot be taken for granted, as exemplified by the deferment of the Cross River Tram project.

13.35 Even so, these effects must be viewed in the context of the highly urban surroundings of The Oval, where peak-time congestion is normal, and large crowds already attend major cricket matches. In the circumstances, subject to an agreed planning condition to prohibit very late or early deliveries, any apparent additional impact due to increased road traffic or public transport usage consequent upon the proposed development would be slight and, in this respect, there would be no significant conflict with the aim of UDP Polices 7 or 51 to protect amenity. *[0, 0-28, 0, 0-27, 0, 12.1]*

Daylight, Sunlight and Overshadowing

13.36 There would be some loss of daylight and sunlight at nearby flats in Lohmann House and Lockwood House due to overshadowing by the proposed buildings. However, when assessed in line with BRE guidance, these effects are shown to be comparatively slight. Moreover, every affected window and room would continue to enjoy levels of daylight and sunlight in excess of established requirements. Accordingly, the impact of the development on daylight and sunlight would be acceptable in terms of UDP Policy 33. *[0, 0-31, 0, 0-30, 0]*

Noise and Disturbance

Noise from the Proposed Development

13.37 Common sense and experience would indicate that the residential streets on the north side of The Oval can be relatively tranquil, especially at night, and that the introduction of a service yard opposite Lohmann House would bring the potential for increased disturbance, especially during early morning deliveries at the proposed hotel. This could just as likely result from individual noise events [Lmax] as from an increase in equivalent continuous sound levels [Leq].

13.38 UFO point to the increased enclosure by the proposed buildings as having the effect of magnifying noise impact, and support their concern with sound measurements that would seem to bear this out. On consideration though, the more sophisticated technical data of SCCC and LBL would appear more reliable, having been obtained using equipment of acknowledged suitability and quality which was not available to UFO. The SCCC data demonstrate that additional noise due to the proposed development would be well below the stringent limits set by WHO standards at the nearest facades and, indeed, would not rise to the present ambient levels that result largely from existing road traffic.

13.39 Provided working hours were limited to avoid noise incidents late in the night, and provided noise emissions from mechanical plant were controlled by planning condition, as in the case of the existing OCS stand, the development would not worsen noise impact on local amenity and would therefore be acceptable in terms of UDP Policies 7, 51 and 54(e). Noise from the PA system can of course only be controlled on non-match days, and the overall level of crowd noise and

noise from other existing sources, such as overnight cleaning operations, is unlikely to increase due to the development currently proposed. *[3.2, 0-13, 0-37, 0, 0-34, 0]*

Crowd Behaviour – Law and Order

13.40 Another aspect of disturbance was repeatedly raised by local residents, including disquieting accounts of uncontrolled rowdy, drunken and violent behaviour by groups of cricket fans, especially late at night after Twenty20 matches. It is not clear whether such an unacceptable situation could be better addressed by SCCC in terms of its own stewarding practices, or by the police under law and order legislation. From a planning point of view, it would appear that these matters would not be noticeably worsened by the 1830 increase in spectator numbers resulting from the proposed development, as compared with the 23,000 capacity of the Ground as it exists. In the circumstances, any justified complaints in this regard by local people do not amount to an amenity objection to the present Application. *[0, 8.34-37, 0-4, 0-9]*

Privacy

13.41 The misgivings of UFO regarding loss of privacy are not borne out on consideration of the substantial distances between hotel windows and existing dwellings, given also that the main part of the hotel windows would be obscure-glazed by requirement of a planning condition, and there would be no open balconies. Even though many properties facing the Application site currently have an outlook over the open Cricket Ground, the introduction of a fenestrated building opposite, consistent with the established urban context, would not of itself reduce their privacy and the grandstand would face away from private property. In respect of privacy the development would comply with UDP Polices 33 and 51. *[0, 0, 0-40, 0, 0-41, 0]*

Energy Strategy

13.42 The development plan, by London Plan Policy 4A, adopts the sequential approach to assessing the energy performance of the proposed building in terms of "be lean, be clean, be green"; that is, to reduce demand for energy in the first place, supply what is required efficiently by decentralised power generation, and then use renewable energy sources. UDP Policy 34 requires a minimum 10% energy from renewable sources, calculated with reference to CO2 emissions, and Policy 35 generally promotes sustainable construction.

13.43 The Energy Statement of SCCC, supported by LBL with the approval of GLA, claims to calculate base demand on the whole carbon footprint of the building as a more complete analysis of environmental impact of various sustainability measures considered, as this takes account of the high carbon cost of electricity.

13.44 Despite probing via written questions from a witness for UFO with expert background in the subject, SCCC do not appear to have demonstrated transparently how, at the first step, the base demand was calculated. This reduces the confidence with which the choice, at the second step, of decentralised Combined Heat and Power [CHP] is viewed, even though it is shown to contribute 20% of the demand. The use of roof-mounted photovoltaic [PV] panels, at the third step, to produce only 5% of the power supply from renewable sources is clearly not in strict accordance with UDP Policy 34.

However, LBL and GLA accept that the substantial CHP contribution overrides this consideration.

13.45 The Building Regulations 2006 [BR06] requirement for new buildings is substantially more stringent than the former BR02 in terms of Target Emissions Rate [TER]. SCCC do however show a potential Building Emissions Rate [BER] below the TER, as required, subject to calculation for future BR approval, and SCCC predict a BREEAM rating of "very good".

13.46 It is the contention of UFO nevertheless that planning permission cannot be justified in terms of Policies 34 and 35 without a clearer, quantitative demonstration of compliance, and UFO highlight areas of alleged missed opportunity, not least to provide a greater area of PV panels over available building surfaces. UFO doubt the technical understanding of SCCC and LBL in this connection.

13.47 Adopted planning policy is now reliant upon the BR legislation to ensure compliance with sustainable energy provisions in support of climate change. That is not to say that a precise sequential calculation of energy demand, supply and renewable contribution is essential at this application stage, provided there is reassurance that these technical matters can be properly resolved in connection with later Building Regulations approval, although compliance should also be secured by planning condition.

13.48 I understand the frustration of UFO but, in this case, SCCC and LBL have agreed to a very open planning condition [CD81B/20] affording LBL, in effect, a second opportunity to ensure that an energy efficient design is implemented in accordance with Policy 35. A further agreed condition [CD81B/21] requires a minimum renewable contribution of 5%. However, it is more appropriate in the circumstances to broaden that requirement to give LBL ultimate control over the acceptable degree of compliance with Policy 34 in the detailed energy scheme. I recommend accordingly. Moreover, the s106 agreement imposes a legal obligation upon SCCC to achieve the claimed BREEAM rating of "very good" and to provide, in advance of construction, an Energy Scheme to secure at least the claimed savings from a building compliant with the relevant Part L of the Building Regulations.

13.49 The important factor here is that the development cannot proceed until compliance is assured in practice. It is proper to secure this performance by these requirements for later submission of details where it is evident that they can be met in practice.

13.50 Despite a measure of confusion in the presentation of the cases on both sides of the argument, I am satisfied by the available evidence that substantial demand savings and sustainable contributions can be made in the practical energy performance of the buildings, sufficient to ensure compliance with UDP Policy 35 on sustainable construction.

13.51 As for the 10% renewable requirement of UDP Policy 34; there remains scope in the implementation of any permission for improvement above the 5% minimum now claimed, and I accept that any shortfall below the policy minimum could properly be judged to be outweighed by the benefits of an otherwise fully

compliant energy scheme incorporating the sustainability measures identified. *[0-10, 0, 0-9, 0, 0-47, 0]*

Flood Risk

13.52 There is nothing to dispute the results of the submitted flood risk assessment that, although in the highest flood risk Zone 3a, the site benefits from River Thames flood defences and the proposed floor levels of 5.23mAOD are above the undefended 1 in 1000 year flood level, to the satisfaction of the EA. Given water-tight basements with installed pump-out capacity to address any occurrence of higher level flooding, the proposal conforms to the national flood risk requirements of PPS25. It would be appropriate to secure these flood resistance measures by planning conditions. *[0, 0, 0, 12.1]*

Need and Benefits

13.53 The Brit Oval evidently makes major contributions to sport at international, national and local level as well as supporting and involving the Lambeth community in economic terms by associated conference, leisure and other activities, and by providing employment. Its historic presence lends prestige to the Borough, to London and to the UK as a whole. With the popularity of cricket increasing, especially the short form Twenty20 game, there is potential for SCCC to build on their expanding financial turnover of the last decade by investing in improved facilities.

13.54 There is wide and high level support for the Application, including from the Minister for Sport and the Shadow Sports and Olympic Spokesman, the Duchy of Cornwall and the international and national cricket authorities, as well and many local people consulted in market research. This enthusiastic response recognises that it is necessary for the Ground to keep pace with developments at cricket grounds elsewhere, in order to maintain the standards necessary to continue to be awarded top level fixtures in competition with other national venues.

13.55 SCCC has substantial contractual and leasing obligations to both the ECB and The Duchy of Cornwall to maintain Test cricket at The Oval. Even so, there does not appear to be a short-term danger that The Brit Oval, as second only to Lords and ahead of any other cricket ground in status and capacity, will lose its Test status if the present Application is refused.

13.56 At the same time, it is reasonable to accept that there is a material need for both the grandstand and hotel development, and the associated improvements to the Ground, to meet the aspirations of the game of cricket in its widest context, accepting also that the hotel is enabling development in support of the continued viability of SCCC as a business. The additional turnover and employment that would result from the development now proposed would also benefit both the Borough and wider London economies.

13.57 These factors and the wide public support enjoyed by the Application should be taken into account in the overall balance of planning considerations. *[0-70, 8.50, 0-8]*

Planning Conditions

13.58 The planning conditions set out in the appended schedule are recommended to be imposed on any permission the SoS decides to grant in response to the Application.

13.59 The recommended conditions are closely based on the conditions agreed between SCCC and LBL. All are appropriate in terms of the tests of relevance, necessity, precision reasonableness and enforceability of Circular 11/95.

13.60 Condition 1 is the standard commencement condition. Conditions 2-8 and 12-14, 18 and 22-23 would ensure compliance with the submitted plans and the satisfactory detailed design and visual appearance of the development, including ancillary buildings [22-23], landscaping [14] and flood defence measures [2g]. Conditions 9-11, 25-26 and 28 would ensure the availability of controls to keep noise impact to an acceptable level, whilst conditions 15-17, 24 and 27 would properly address bicycle storage, disabled access, parking and road safety. Finally, conditions 18-21 would ensure sustainable design, construction and operation of the buildings.

13.61 UFO and others are doubtful, on past performance, whether the conditions would be enforced, but that is a matter for LBL as local planning authority. *[0, 0, 0]*

Planning Obligations

The Agreement

13.62 The s106 agreement is material to any permission the SoS might grant in response to the Application, and its provisions comply with the requirements of Circular 05/2005 in terms of relevance to planning, necessity, relationship to the development and reasonableness.

13.63 On consideration of all the concerns of UFO about the s106 agreement and the responses of SCCC to them, I am satisfied that the financial contributions to the public realm and transport are appropriate in terms of planning policy. The highway works are necessary to protect road safety and provide satisfactory on-street parking near the site access. The Travel Plan and Parking Plan meet sustainability and road safety requirements off-site, whilst the Delivery Management Plan develops the requirement of the planning conditions to ensure orderly delivery practice without undue disturbance. The Stadium Monitoring Group properly perpetuates established community involvement in addressing the day-to-day running of The Oval in the public interest. The Local Labour Employment provision would help secure the local community benefit of the extra jobs generated by the development. The construction Management and Energy Plan supports sustainable construction in the face of climate change, developing the thrust of the planning conditions in this regard. The CCTV provisions are appropriate to the maintenance of security.

13.64 UFO and others are again doubtful on past performance that the planning obligations would be effective but again that is a matter for LBL as local planning authority. *[1.20-23, 0, 0, 0]*

The Unilateral Undertaking

13.65 Turning to the unilateral undertaking by SCCC that provides for the Safety Management Plan; HSE are right that this is merely an operational safety plan for the Ground without specific reference to the risks from the nearby KGS that led to their Advice Against the development and ultimately to the call-in of the Application. The late intervention by LBL, seeking the addition of a Rider to impose restrictions on the occupation of the proposed spectator seats at risk is understandable, given its long-held position that the additional societal risk at the development should be addressed by management measures at the KGS or within the Oval itself.

13.66 In practice, however, I do not consider that the measures put forward in the proposed Rider are realistic or practical from an operational point of view. The idea of keeping vacant, or even evacuating a portion only, of the seats in the new grandstand would be unlikely to be accepted seriously by the paying public, and would be hard to enforce. It would be for the SoS to consider whether to seek execution of the Rider as proposed but, on the evidence and documentation before the Inquiry, SCCC show no inclination to comply with the request to add the Rider to the undertaking. In the circumstances, the undertaking has to be taken into account in its present form, whereby it merely secures operational safety within The Oval and carries no weight in connection with the public safety issue at KGS. *[1.21-23, 0, 0]*

Call-in Matters

13.67 Before coming to my assessment of the final planning balance I briefly re-iterate the foregoing conclusions in the strict order of the matters on which the SoS particularly wished to be informed in calling in the Application:

a) the HSE representations concerning the risks from KGS are essentially upheld, subject to proper judgement that the predicted risk is acceptable in this case, taking account of existing development in accordance with PADHI Rule 4c;

b) on the foregoing basis, including most careful consideration of the HSE advice, the development would accord with national policy on hazardous installations in C4/00;

c) a section 106 agreement would not be necessary or appropriate in meeting HSE concerns in the foregoing circumstances;

d) the development would accord with the UDP in relation to public safety and a variety of other potential planning effects, save in certain minor respects that are overridden by evident planning need and benefits;

e) the development would similarly accord with the London Plan 2004;

f) any permission should be subject to conditions, set out in the appended schedule, recommended as necessary to limit the planning effects of the development;

g) all other material planning considerations are covered in the foregoing.

Final Planning Balance

13.68 The proposed development can properly be judged to be in compliance with the UDP with respect to the considerations of design, light, noise, privacy and flood risk.

13.69 There is arguably a degree of conflict with UDP Policy 50 on open space, Policy 28 on hotel location, Policies 7 and 51 on amenity, and Policy 34 on energy strategy. It is true that, with respect to local amenity, any degree of adverse impact would strictly be contrary to UDP Policies 7 and 51, read in the light of supporting para 4.17.28, oft-quoted by UFO, that development at The Oval should be "without detriment" to the amenities of surrounding occupiers.

13.70 Generally however, where policies require "no adverse effect", this is taken to mean "no significant adverse effect". It is understood that an effect such as some loss of light, privacy or peace, might be regarded as significant by residents individually or in represented groups like UFO. However, if there is compliance with accepted standards at any given location, it is fair to judge the effect as being insignificant to the public interest at large in broad planning terms. So even if strictly non-compliant with the letter of the policy as interpreted by UFO, it would require commensurately minor benefits to justify the proposed development.

13.71 That leaves the question of safety at KGS. Importantly, PADHI Rule 4c of March 2008 makes clear that the presence of existing development in the Consultation Zones [CZs] is a factor for the SoS to take into account in weighing up the HSE advice. The present grandstands exist alongside extensive neighbouring development whereby thousands of visiting spectators, as well as permanent residents, tolerate a very small residual risk from KGS. There is no suggestion in policy or evidence that this risk should be addressed by the removal of either the KGS or the development that currently lies within the CZs.

13.72 The development would place the hotel and, during Oval fixtures, up to 1830 additional spectators in the Inner and Middle CZs. The judgement for the SoS is whether that increase in societal risk is worth taking. The SoS is entitled simply to judge that risk as being of such a low order in its own right as to be acceptable in terms of Policy 54(g).

13.73 In the final planning balance overall, I take the view that the identified demand and need for the development, and the sporting and economic benefits it would bring, together outweigh any degree of non-compliance with the UDP, such that planning permission should be granted on the terms sought by SCCC.

Overall Recommendation

I RECOMMEND that the Application be allowed and permission granted for the development proposed, subject to the planning conditions set out in the Schedule appended to this Report.

xxxxxxxxxxxxx

~~**RESTRICTED**~~

Report to the Secretary of State for Communities and Local Government

by XXXXXXXXXX

an Inspector appointed by the Secretary of State for Communities and Local Government

The Planning Inspectorate
Temple Quay House
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Date 26 March 2009

This is a derestricted version of the previously submitted restricted version of the report.

APPLICATION by

SURREY COUNTY CRICKET CLUB
and
ARORA INTERNATIONAL HOTELS

To the COUNCIL of the LONDON BOROUGH of LAMBETH

for DEVELOPMENT at THE BRIT OVAL

CONSIDERATION OF MATTERS OF PUBLIC SAFETY SUBJECT TO DIRECTION UNDER SECTION 321 OF THE TOWN AND COUNTRY PLANNING ACT 1990 AS AMENDED

Inquiry opened on 14 October 2008

File Ref: APP/N5660/V/08/1203001

NOTES

~~RESTRICTED EVIDENCE~~

~~This Restricted Report is made subject to established procedures for the handling of material restricted to individuals specified in a Direction made under section 321 of the Act of 1990 as amended.~~

~~The Direction was made by the Secretary of State for Communities and Local Government on 16 October 2008 in response to a request by the Health and Safety Executive in the interests of national security.~~

~~This Restricted Report relates to matters of public safety heard in closed session in accordance with the s321 Direction.~~

OTHER MATTERS

Details of the Application, Inquiry, appearances, documentation, abbreviations and all factual matters of procedure, policy, definitions, description and other material planning considerations are set out in the Main Report together with the Overall Conclusions and Recommendation by the Inspector to the Secretary of State, which take into account the Conclusions on ~~Restricted~~ matters set out below.

This ~~Restricted~~ Report is intended to be read in conjunction with the Main Report.

CONTENTS

[15] Section Numbers are hyperlinked to Section Titles

Abbreviations

ACMH	Advisory Committee on Major Hazards
ALARP	As Low As Reasonably Practicable
BER	Building Emissions Rate
BLEVE	Boiling Liquid Expanding Vapour Explosion
BMIIB	Buncefield Major Incident Investigation Board
BR02[06]	Building Regulations 2002 [2006]
BRE[EAM]	Building Research Establishment [Environmental Assessment Method]
CA	Competent Authority
CBE	Cautious Best Estimate
CD	Core Document or Consultation Distance *according to context*
CIMAH	Control of Industrial Major Accident Hazards
CMAHR	*Control of Major Accident Hazards* Regulations
COMAH	Control of Major Accident Hazards
CO2	carbon dioxide
cpm/yr	chances per million per year
CPNI	Centre for the Protection of National Infrastructure
CSR	Case Societal Risk
CZ	Consultation Zone
EA	Environment Agency
GH1	Gasholder No 1 of KGS
GLA	Greater London Authority
HIA	Hazardous Installations Assessment
HSE	The Health and Safety Executive
HSWA	Health and Safety at Work Act
IGE/SR	Institution of Gas Engineers/Safety Recommendations
KGS	Kennington Gasholder Station
kW/sqm	kilowatts per square metre
LBL	The Council of the London Borough of Lambeth [the Local Planning Authority]
LFEPA	London Fire and Emergency Planning Authority

LPA	Local Planning Authority
LPG	Liquid Petroleum Gas
LSR	Local Societal Risk
LUP	Land Use Planning
MHIDAS	Major Hazard Incident Data Acquisition Service
PADHI	Planning Advice for Developments near Hazardous Installations
RWCMA	Representative Worst Case Major Accident
SCCC	Surrey County Cricket Club [and Arora International Hotels – co-Applicants]
SEP	Surface Emissive Power
SL	Level of Sensitivity
SMG	Stadium Monitoring Group
SMP	Safety Management Plan
SOCG	Statement of Common Ground
SoS	Secretary of State
SRAG	Safety Report Assessment Guide
tdu	thermal dose units
UDP	Unitary Development Plan

1. THE CASE ON PUBLIC SAFETY FOR THE HEALTH AND SAFETY EXECUTIVE

The detailed public safety case for HSE is contained in the proofs of evidence listed at appendix to the main Report and in closing submissions HSE/CLOS Parts I & II.

The material points are set out briefly below, supported by frequent references to listed documents and, for completeness, including matters also set out in the Main Report.

Note that Proof HSE/AJW/4 is bound with 18 Appendices [HSE/AJW/4App1-18] and accompanied by 86 Exhibits in three volumes [HSE/AJW/4/1Exh1-86].

Proof HSE/AJW/7 is a paper by HSE on The Acceptability of Risk, provided in response to a request for submissions by the Inspector.

GENERAL

Planning Policy
[HSE/GD/1#9-10]

1.1 Unitary Development Plan [UDP] Policy 54(g), consistent with Seveso II Directive Article 12 and para 47 of Circular 04/2000, resists development adjoining areas of hazardous use where this would create unacceptable risk. However, UDP Policy 51 favours increased capacity at The Oval as now proposed, involving greater numbers of the public close to the Kennington Gasholder Station [KGS] such as to increase the risk of the consequences of a major accident. These two policies are at odds with each other. The proposed development is contrary to UDP Policy 54(g) due to risk to public safety. This caused HSE to Advise Against approval of the Application.

HSE Role, Reputation and Approach to Land Use Planning Advice [LUP]
[HSE/GD/1##3-6, HSE/OPENpara15-18, 22-23, HSE/CLOSPt1para1-33, 43-46, 50-58],

1.1 HSE is a statutory non-departmental public body of Crown status with an international reputation as a regulator and authority on risk.

1.2 Historically, after the well-known Flixborough explosion in 1974, the Advisory Committee on Major Hazards [ACMH] proposed a three-part strategy of identification, prevention and mitigation. This includes the control of development close to major hazard sites irrespective of the presence of existing development, with the overall aim to reduce the number of people at risk any greater than other everyday risks. Where there is a high possibility of harm from an incident, the risk occurrence should be very low indeed, due to public abhorrence of accidents that cause large numbers of casualties. These principles are carried into modern legislation and guidance, including national policy for land use planning. [HSE/GD/1para8.1-6; HSE/CLOSPt1para81-87]

1.3 The law does not expect all risk to be eliminated but provides that the public should be protected as far as is reasonably practicable by risk assessment and control measures. This is to reach a sensible balance between the unachievable aim of absolute safety as against poor risk management that damages lives and the economy.

1.4 There are three determinant factors as to whether the level of risk is acceptable or tolerable: likelihood of harm; severity of that harm; and the benefits, rewards or outcomes of the activity concerned.

1.5 HSE advice is based on the residual risk that remains after all legally required preventive measures have been taken and is aimed at stabilising the numbers of people exposed. HSE generally advises against development near major hazards that would introduce a substantial number of people into an area where their risk levels would be significant compared with other risks to which individuals are exposed in everyday life.

1.6 There is no defined level of acceptable risk in law, policy or guidance. HSE regards risk as lying within a spectrum from broadly acceptable through tolerable to unacceptable, where tolerability refers to a willingness to live with a risk so as to secure certain benefits in confidence that the risk is worth taking and is being properly controlled. Risk prediction is uncertain and tolerability is a decision for individuals or society depending on circumstances. [HSE/GD/2/11]

Acceptability of Risk[16] [HSE/AJW/7, HSE/OPENparas24-32, HSE/CLOS/Addenda1&2, HSE/CLOSPt1para14-22]

1.7 In the absence of any statutory basis of risk acceptability, HSE uses a Tolerability of Risk [TOR] framework to determine compliance with operational safety legislation whereby risk to surrounding population is "reduced As Low As Reasonably Practicable" [ALARP].

1.8 The HSE guideline level for broadly acceptable individual risk from all hazards at work is less than one chance per million per year [1cpm/yr] of death from voluntary risks comparable with other risks in everyday life, provided all such work risks have been reduced ALARP.

1.9 Crucially, the 1cpm/yr value for a major hazard installation [MHI] operating ALARP is not a threshold below which a single hazard may be considered acceptable or incredible. That will necessarily be much lower than 1cpm/yr. By comparison, risks of 1000cpm/yr over a large part of the life of a worker and 100cpm/yr for a member of the public are established as "intolerable" or "unacceptable". In LUP Consultation Zones [CZs], the Inner Zone [IZ] represents a risk level of over 10cpm/yr of death, the Middle Zone [MZ] between 1 and 10cpm/yr of death and the Outer Zone [OZ] between 0.3 and 1cpm/yr of death.

1.10 The TOR framework is not directly relevant to the consideration of acceptability of Residual Risk [RR] in the LUP context. The PADHI[17] methodology for LUP advice uses a different approach in separately assessing RR after operational risks have been reduced ALARP. As Individual Risk [IR] and Level of Sensitivity

[16] See Main Report paras 3.10-18 for definitions of different Types of Risk and Different Types of Gasholder Fire

[17] Planning Advice for Developments near Hazardous Installations

[SL] or Case Societal Risk [CSR] rise, an Advise Against result becomes more likely.

1.11 The ALARP and RR formulations are therefore doing very different things and it is a fundamentally flawed approach, as adopted by SCCC, in effect to claim that it necessarily follows that RR is acceptable just because a MHI is operating ALARP. That would negate LUP advice regarding new development in the CZ and rob the provisions of Article 12 of the Seveso II Directive and the related C4/00 of any substance in this respect. Operating ALARP merely ensures that risks are limited within the lawful consent. That is as far as controls on an existing MHI can go and it has to be accepted that the RR to an existing development cannot be avoided.

1.12 In a LUP context, new development does not have to be exposed to risk from a MHI and the central question in this case becomes whether it is acceptable to increase the consequences of a potential major accident by exposing additional people to the RR. In the absence of statutory limits of acceptability, that is a matter of planning judgement now for the SoS and not for HSE.

1.13 However the significance of the RR must be understood. It is a misconception of the SCCC case that a risk is acceptable simply because hazardous events are unlikely in an ALARP setting. If that approach were adopted the plainly absurd situation would arise that, in LUP terms, any development would be acceptable close to a MHI.

Protection Concept and Cautious Best Estimate [CBE] versus Best Estimates, Quantified Risk Assessment [QRA] and Local Societal Risk [LSR]
[HSE/OPENpara19-21, 33-34, 101-103; HSE/CLOSAddendum3; HSE/CLOSPt1para47-49, 59-70; HSE/CLOSPt2para135-140]

1.14 The Protection Concept and the PADHI methodology is based on a Cautious Best Estimate [CBE] where every attempt is made to use realistic best estimate assumptions but where justification is difficult some overestimation is preferred. This helps to offset uncertainties of human behaviour such as "rubber-necking" at a developing fire rather than running away from it!

1.15 The CBE approach is long-established within HSE risk criteria and expressly supported by the SoS in the case of Mere Tank Farm, Portland [CD38para26-27; CD39para89-95; HSE/AJW/4/1Exh8para13]. Moreover, it is apparently common ground [and common sense] in this case that CBE is the appropriate precautionary approach to take as discussed in the HSE publication Reducing Risks Protecting People [aka R2P2][CD39].

1.16 Whilst the Buncefield Major Incident Investigation Board [BMIIB] report favours QRA among its wide recommendations for the future review, it recognises problems with its use where the frequency of events is very difficult to establish, as in the present case. The Government has also accepted that LSR should be added into LUP advice after public consultation [CD42]. However, there is no benchmark for assessing the significance of LSR. One reason for this is that LSR which would not increase markedly even if a large number of people were present but for short periods. Accordingly, it is too early to anticipate either of these substantial changes to the LUP advice system. Currently the Protection

Concept [aka Consequence Based Approach] and PADHI as updated in March 2008 [CD93] remain the proper basis of UK public safety advice by HSE and across Europe. [CD38para14; HSE/AJW/4/1Exh4para4.1]

1.17 The QRA submitted by SCCC is unhelpful in this case because it is written in terms of Best [not cautious best] Estimates, is admitted to be overwhelmingly dominated by a single fireball event and would have yielded the same CZs as PADHI if it had adopted the same frequencies and consequence modelling. It is nowhere suggested that the quantification of frequencies is less difficult in this case than it was in connection with Mere Tank Farm.

LAND USE PLANNING ADVICE

Judgement Criteria
[HSE/AJW/4#4]

Dangerous Dose and Thermal Dose Units [tdu]

1.18 HSE bases its LUP advice on the Residual Risk [after ALARP] of "serious injury including an element of fatality", attaching particular weight to major accidents which could result in large numbers of casualties. That is in line with C4/00paraA4 [CD38para52]. This is quantified in terms of a Dangerous Dose of harm, producing severe distress and injury to many, and death to sensitive groups, measured in thermal dose units [tdu] related to kW/sqm but taking account of exposure time.

1.19 Cautious best estimates by HSE of the effects of thermal radiation, confirmed by internal peer review, are that 1800tdu would cause 50% fatality, 1000tdu a low proportion of fatality in a normal population and 500tdu a low proportion of fatality even in a sensitive population eg children and the elderly [HSE/AJW/4/1Exh12-14]. Protection from closed buildings as well as the potential for ignition of construction material and blast effects are all considered.

Case Societal Risk [CSR] and Scaled Risk Integral [SRI]

1.21 HSE has devised a comparator of Case Societal Risk [CSR] called the Scaled Risk Integral [SRI], which empirically relates population, individual risk and time of occupation to site area. This is used in the consideration of whether to request the SoS to call in an application [below]. [HSE/AJW/4para4.11]

Siting Policy

1.22 The HSE Siting Policy is used to establish the Residual Risk Consultation Zones [CZs] round MHIs throughout the country. The process is subject to rigorous internal peer review commensurate with its importance. Where CZs are set on a Protection Concept basis the selection of the Representative Worst Case Major Accident [RWCMA] is informed by both predicted frequencies and consequences of candidate foreseeable events.

1.23 Below ALARP, frequency prediction of such rare events is difficult and uncertain, justifying a CBE approach based on available historic data, including that contained in COMAH statutory safety reports[18], subject to the Representative

[18] Under Control of Major Accident Hazards [COMAH] Regulations

Hazards method of frequency analysis. This is the most suitable of the three-tier analysis framework used by HSE, due to the uncertainty involved. [HSE/AJW/4para5.7-11&App5&2]

Incidents

1.24 Telescopic, water-sealed gasholders represent a mature technology for keeping town or natural gas at low pressure in cylindrical lifts, with many still in operation today that date originally from the mid 19th Century, including Gasholder No1 [GH1] at KGS [HSE/AJW/4/1Exh21].

1.25 Documented historic gasholder accidents show that in the last 40 years there have been about three non-ignited gas escapes a year and a total of at least five major water seal fires, following draining of the water from the seal tray. These produced tall, very hot flames with surface radiation levels shown to be in the order of 200kW/sqm, such that the sight has been described in the media as looking "like a massive Christmas pudding". [HSE/AJW/4para6.4-8&App2; HSE/AJW/4/1Exh22&24]

1.26 Catastrophic events have also occurred over the years, including due to WWII hostilities and terrorist incidents [HSE/AJW/4para6.9-18&App2; HSE/AJW/4/1Exh27-39&10B; HSE/AJW/4/1Exh39-48]. These include the Warrington attack of 1993, when 30% of the roof of a gasholder was removed giving rise to rapid gas escape and a phenomenon described as a fireball.

1.27 There is also a record of a non-ignited water seal decouplement of a small gasholder in 1979 due to failure of the antifreeze system. [HSE/AJW/4/1Exh49para6.2.6]

Evolution of Consultation Distances

1.28 From the 1980s CDs were set at 60m from the side of all large water-sealed gasholders but with new information, including COMAH reports on top-tier gasholder sites [those with consent for more than 200t of gas], a review was commenced in 2002 by Advantica [formerly British Gas Technology]. This work ultimately produced an estimated event frequency for a decoupled seal or worse with ignition of 10cpm/yr, and for total collapse with ignition of 1 to 5cpm/yr. Tested statistically by the Poisson formula and the "n+1" rule, good correlation was obtained with predictions in the COMAH safety reports. [HSE/AJW/4para7.3-14table&App5&2; HSE/AJW/4/1Exh53-66]

1.29 After further technical review, HSE established on a CBE basis that this amounted to sufficient evidence to base LUP advice on a RWCMA of a fireball consuming 50% of the consented maximum capacity of a gasholder following a seal decouplement with ignition. However, a relatively modest Specific Emissive Power [SEP] of 200kW/sqm was assumed, in order to compensate for the available fireball consequence model being relatively conservative. This results in Consultation Distances from the centre of a gasholder equal to the fireball radius for the IZ, 1000tdu contour for the MZ and 500tdu for the OZ. [HSE/AJW/4para7.15-19tables; HSE/AJW/4/1Exh67-73]

Kennington Gasholder Station - notified Consultation Zones

1.30 The notified revised CZ boundaries for the KGS were calculated on the maximum quantity of low pressure natural gas permitted in each of the four gasholders by current hazardous substances consent. From the centre of the largest, GH1, nearest the Application site, these are 120m for the IZ, 270m for the MZ and 360m for the OZ. [HSE/AJW/4App7plan]

PADHI Advice Against the Application – Sensitivity Levels

1.31 A former consultation procedure based on HSE risk criteria of 1989 [CD38] gave three possible outcomes of "Advise Against" [AA], "Don't Advise Against" [DAA] and a middle option, "Consult", involving specific consideration of a development proposal. Following Fundamental Review[19], PADHI does away with the "Consult" option and avoids delay and inconsistency in a pragmatic banded approach. As PADHI incorporates many years of experience and expertise it amounts to a development of the former system and not a replacement. It is emphasised that the PADHI methodology therefore provides the most carefully considered advice of HSE and is not a mere preliminary assessment, as SCCC allege.

1.32 The proposed grandstand would increase the number of spectators predominantly in the open within the notified Inner and Middle Zones. The Grandstand capacity within the Application sites would rise by 1830, from 4377 to 6207. Thus, not only the total but, importantly, the increase in number would far exceed the qualifying threshold of 1000 for Sensitivity Level 4 [SL4] of PADHI to apply. The hotel would have 168 bedrooms in the IZ and MZ, again far exceeding the 100-bed threshold for SL3 to apply. Accordingly, the application of the established PADHI methodology to the proposed development requires an overall SL4 and results in strong Advice Against the Application.

Request for Call-in of the Application Detailed Residual Risk Assessment and Scaled Risk Integral [SRI] [HSE/GD/1#11&AnnexA; HSE/AJW/4#10-11]

Introduction

1.33 There is a long history of HSE advising LBL against development of the kind now proposed near KGS. In connection with the present Application, HSE commented on the accompanying HIA report and on the independent review commissioned by LBL, as well as providing consolidated comments for the benefit of the LBL Committee considering the Application.

1.34 HSE considered that LBL failed to give its Advice Against the application the requisite most careful consideration before resolving to grant permission and therefore, unusually and after due consideration, requested the call-in of the Application because it regards the risk due to the nearby KGS as very serious, not marginal or trivial.

RWCMA Risk Assessment

1.35 The risk assessment supporting the request for call-in of the Application was based on the RWCMA of a decoupled seal 50% fireball at GH1. Such an event

[19] [Implementation of the] Fundamental Review of Land Use Planning projects [HSE/AJW/4para5.2; HSE/AJW/4/1Exh6]

would occur when near-instantaneous loss of half the gas inventory resulted in a large, fuel-rich, flammable cloud escaping and igniting. This would form a short-lived [10-20 sec] but very hot [1000degC] spherical mass of flame, rising before reducing in size and changing to a mushroom shape, and eventually extinguishing some distance above the ground. [HSE/AJW4App8]

1.36 In support of this fireball evolution, gasholder ignition incidents at Warrington due to crown failure following terrorist attack, at Pittsburgh and at Low Moor following explosion, are all detailed in the evidence and are demonstrably comparable. [HSE/AJW/4App4; HSE/AJW/4/1Exh35,37,47-48]

1.37 As a cautious best estimate, the fireball is modelled as initially grounded with its diameter calculated using the commonly accepted Roberts formula [HSE/AJW/4/1Exh51, 82p286]. This takes the fireball as a solid flame with thermal radiation derived from the assumed SEP of 200kW/sqm. The resultant effect distances are plotted and compared with the results of SCCC and the COMAH report. The calculated fireball radius is 125m, the 1800tdu contour 200m and the 1000tdu contour 270m. Thus the chosen IZ for KGS is conservatively set at approximately the fireball radius and not the 1800tdu contour. Both the gas operator and SCCC themselves separately calculate these effects to be comparable or worse, representing half the grandstand and hotel expected to catch fire spontaneously with many spectators in the open engulfed and almost all within the 50% fatality 1800tdu contour. [HSE/AJW/4App9plan; HSE/AJW/4para11.18; HSE/AJW/4//1Exh49,51]

Seal fire

1.38 It is also possible that a seal fire [analogous to a Christmas pudding] would pose a substantial risk to spectators, even though this type of event is unlike a fireball, being of lower intensity but much longer lived. A seal fire would produce a tall, very hot flame for 10 to 20 minutes. This is represented as a vertical cylinder of flame 30m high of SEP 210kW/sqm, resulting in evacuating spectators receiving a dangerous dose of 1800tdu before they could escape and get clear of the buildings. The effects of a seal fire are considered in terms of Scaled Risk Interval [SRI] as a measure of Case Societal Risk [CSR][below]. [HSE/AJW/4para11.33-35tables]

Other Incidents

1.39 A flash fire from ignition of a gas escape could affect the grandstand depending on wind conditions, but not to the extent of the calculated RWCMA or a Seal Fire.

1.40 An internal split crown explosion would also cause some damage to the fourth storey suite terraces.

Case Societal Risk

1.41 In the case of a seal fire at GH1 where, as in this case, QRA is inappropriate due to uncertainty of input data, a rough estimate of IR is calculated from historic data over the last forty years to be of the order of 100cpm/yr. Applying a time factor to allow for the proportion of time a capacity crowd is present, the SRI value is 15,000,000. That is significantly in excess of the 750,000 Comparison Value by which the exposed population is considered substantial according to the

published HSE policy and procedure for requesting the call-in of an application. This is further evidence of the severity of the risk and that the request for call-in of the present Application was justified. [CD40; HSE/AJW/4para4.11&11.36-41]

CREDIBILITY

Introduction

1.42 It follows from the foregoing that any rebuttal of the HSE case can only turn on the credibility and frequency of the 50% fireball event, in terms of whether it should be used as the RWCMA in the first place and if it gives rise to a risk of 10cpm or more of death in the IZ or 1cpm or more of death in the MZ.

1.43 On the public safety issue, the SoS has to consider two largely irreconcilable views on this point, wherein making the right choice on a CBE approach is of very significant importance.

Witness Expertise [HSE/CLOSPtIIpara4-23]

General

1.44 Broadly, questions arise as to the relevant expertise of the technical witnesses and how their differing views are reached and supported by hard fact and science rather than mere judgement - to what extent their evidence supports their professional judgement and whether their departures from the opposing view are justified and whether their judgement is objective and balanced and based on tried and tested methodology with assumptions explained.

1.45 In this case, SCCC necessarily have to challenge the very basis of the HSE Siting Policy in setting the CZs. SCCC therefore seek to undermine the corporate view of HSE on these matters, a view which has evolved over a number of years, and via the peer review process.

1.46 Given the seriousness of the subject matter and the importance of the underlying issue, not just for this case but across the whole of the UK, the SoS is entitled to have a fully cogent case put forward which reflects the foregoing considerations on the claimed expertise of witnesses.

SCCC Witnesses

1.47 The challenge to HSE is led by evidence on gasholder safety [SCCC/RSC/1-3[supported by evidence of a QRA [SCCC/DMD1-3].

1.48 The SCCC gasholder safety witness [RSC] formed an early opinion that HSE was grossly wrong in its views. That was without sight of the safety reports or full suite of peer review panel records [HSE/JH/4/2/A-B; HSE/AJW/4/1Exh65-73], and without any modelling information, and without full understand of the nature of historic incidents. This judgement was therefore based on little material of substance and relied heavily on assumptions that certain types of event would not occur even though instances are recorded. For example the Ilkeston decouplement occurred, even though RSC asserted that upper lifts would jam during descent, and crown failures have occurred recently, despite safety improvements.

1.49 RSC wrongly persisted in asserting that COMAH reports included prospective fireball incidents by direction of HSE, rather than by choice of the operator, and was also optimistic about relative low ignitability of natural gas over town gas. It was later accepted that the HSE approach shows only minor conservatism in the latter respect but it was incorrectly asserted that an 18m ignition-free safety zone was delivered in this case.

1.50 The only SCCC modelling evidence was withdrawn in cross examination as flawed, despite ample opportunity for checking beforehand. Wrong assumptions were made about both the degree of protection that would be afforded by the open-ended grandstand and the number of spectators in the IZ.

1.51 Any engineering judgement made on this basis should be disregarded and this evidence accorded no weight.

1.52 The SCCC QRA witness [DMD] is an expert in the field but made surprisingly optimistic assumptions rather than the requisite CBEs regarding ignition probability and spectator escape times. Moreover, DMD takes a minority view in the gas industry that an ignited 50% gas escape should not be modelled as a fireball but submits no alternative modelling to show that the operator and HSE are wrong in this.

LBL Witness

1.53 The LBL safety consultant never did more than assess the case of SCCC without forming a separate view. It is not accepted that LBL gave HSE advice the requisite most careful consideration.

HSE Witnesses

1.54 Behind the evidence of the HSE witnesses in this case lies the acknowledged combined expertise of HSE built up over many years of experience. The main witness [AJW] has directly relevant experience, has no agenda other than to provide robust and proportionate advice, and relies on additional expertise to justify conclusions reached. The key difference between HSE and SCCC is the credibility of a 50% fireball event and no other important aspects of the case were challenged at the Inquiry.

Overview

1.55 Based on the apparent expertise and credibility of its witnesses, SCCC put forward a weak case against HSE Siting Policy, whereas the SoS should require cogent, consistent, impartial and robust evidence to override it, given its gestation and support in C4/00.

The Fifty Percent Fireball Event

The SCCC challenge

1.56 The SCCC challenge to the RWCMA assumed by HSE makes three claims:

that the requisite gasholder failure mechanisms do not exist;

that the gas would not ignite even if it were released;

that even if the gas did ignite, a fireball would not result.

Broad Considerations [HSE/CLOSPtIIpara26-45]

1.57 The gas operator is obliged by Reg7 and Sched4para2 of the COMAH Regulations 1999 to prepare a safety report identifying major accident hazards and detailing major accident scenarios. This led to a country-wide, specialist exercise for all top-tier sites such as KGS, undertaken by the former operator of KGS in 1999. The study derived a range of possible gas release scenarios. [HSE/JH/4/2/Bpp30&161]

1.58 SCCC admitted at the Inquiry that this was a careful process that identified key credible hazards, independent of Safety Report Assessment Guidance [SRAG]. The three possibilities of significance here are crown failure, decouplement and water seal failure fires. Each of these mechanisms has a variety of initiating events that are unlikely but cannot be ruled out, even within the current safety regime. That is as defined as conditional probability 2 in a range of possibility from 0-3. This inability to rule out an occurrence is precisely basis of the HSE Advice Against this Application.

1.59 With the advice of Advantica, as the recognised technical adviser to the gas industry, the present operator of KGS used a rising fireball computer model [FYRBL] assuming initial grounding [HSE/JH/4/2/Bpp174&343]. Considerable weight should be placed on this independent, robust process, which is considered by gas safety experts to show that the appropriate model is an ignited fireball, as distinct from a flash fire or explosion, as a basis for statutory safety reports and ALARP demonstrations. Notably the draft COMAH report attaches a frequency of 16cpm/yr to such an event, higher than the HSE figure of 10cpm/yr [CD83 Table4]. These matters were considered and upheld in the HSE peer review, recognising that the basic engineering of gasholders has not changed since the early 20thC. [HSE/AJW/4/2Exh65para25-28; Exh66; Exh67para4]

1.60 The justified conclusion of HSE is, in short, that catastrophic failures remain possible, that ignition can result and that a fireball can occur.

Mechanism
[HSE/CLOSPtIIpara46-54; HSE/AJW/4App2]

1.61 Notwithstanding allegations by SCCC of excessive caution on the part of HSE, decouplements have occurred, including in 1979 after modern safety provisions were introduced. Full explanation of past events or clear prediction of future incidents impossible. But once decoupled, there is nothing to prevent collapse of the separate lifts of a gasholder and an almost instantaneous mass escape will occur.

1.62 Crown failures also continue to occur – four between 1969 and 1985. If this removes over 20-30% of the crown surface, as in the Warrington attack, or for whatever reason, the release is so fast that the gasholder collapses.

Ignition
[HSE/CLOS/PtIIpara55-59]

1.63 Whilst the present operator in the draft COMAH report assumes a 30% ignition probability on mass release, HSE take it to be 50%, based on historical records of three out of six events to 2005 and now five out of nine including Stratford, Keighley and the unignited 1979 decouplement. HSE review found no reason to adopt a different figure on the change to natural gas.
[HSE/AJW/4/1Exh67p1066-7]

1.64 The SCCC [DMD] stance in response is the exact opposite to the proper CBE approach. SCCC ignore the ignition sources inherent in such catastrophic failures, despite records of sparking at Ilkeston and Keighley for example. [HSE/AJW/4/1Exh25p797; Exh30p815] The QRA submitted by SCCC errs on the side of optimism in relying on four factors to reduce historic frequency of ignition [SCCC/DMD/1App5p67]. These are the greater availability of ignition sources in the past, potential under-reporting of non-ignition events, buoyancy of natural gas and a lower rate of ignition occurrence in all events recorded post 1970. None of these factors are verified.

1.65 On any view ignition sources are available to a potential fireball grounded for any portion of its life and there are dwellings containing such sources within the critical 18m of the KGS. Academic papers cited by DMD themselves pit forward ignition rates ranging up to 90%, whereby the assumed 10% is significantly optimistic.

1.66 Ignition frequency is the key difference in the two opposing cases as a move from 10% to 50% drives up the frequency of a fireball from 2cpm/yr to the critical 10cpm/yr in the IZ.

Modelling
[HSE/CLOSPtIIpara60-70]

1.67 There is no expert or scientific support for the SCCC assertion that a fireball cannot occur in a low pressure gas situation. Indeed SCCC accepted at the Inquiry that the Pittsburgh event was a fireball. Contemporaneous testimony and scientific validation supports the occurrence of fireball-like events, including at Warrington.
[HSEAJW/4/1Exh32p820; Exh35p836; Exh37p841; Exh38p852; Exh48p868]

1.68 Nothing in the SCCC evidence justifies departure from the HSE 50% grounded fireball model.

Gasholder Improvements [HSE/CLOSPtIIpara73-77]

1.69 There is no evidence that the rate of accidents has reduced faster than the reduction in the number of gasholders, which remain of the same basic engineering characteristics as historically. The 1979 decouplement and the recent Dartford incident demonstrate that major releases still occur despite an improved safety regime.

Frequency
[HSE/CLOSPtIIpara78-95]

1.70 The HSE frequency analysis [HSE/AJW/4App5Ann2p83] clearly shows, by three different approaches, that the event frequency for the RWCMA is 10cpm per gasholder per year. Historic data since 1950 is used, appropriately excluding WWII. It should be noted that adopted Poisson analysis takes into account improvements to safety, as reflected in the number of years without incident. Incidents that are irrelevant or are not supported by credible information are discounted but photographs and contemporaneous reports are sufficient to justify inclusion on a CBE basis. Inherent uncertainty in this respect militates against the use of QRA. There is no comparable work by SCCC or others to challenge the results. Thus the 10cpm/yr result is sufficient to drive Advice Against in all CZs.

1.71 Comparative Frequency estimates are set out in the SOCG Addendum Table 4 [CD83]. The present operator assumes a 50% ignition frequency and a 16cpm/yr frequency, comparable with HSE. The crucial difference between SCCC and HSE results from SCCC assuming the lower end of ignition probability 10% against the 50% taken by HSE. The SCCC figure is a best estimate and not a CBE as required. The lower figure claimed by SCCC is unsupported by any analysis beyond engineering judgement.

Consequences
[HSE/CLOSPtIIpara96-104]

1.72 The IZ is set by HSE as the calculated fireball radius, a less cautious approach than the 1800tdu. It is common ground that a fireball grounded for any part of its life would kill anyone in the IZ, including 340 of the additional spectators in the four tiers of the proposed grandstand. The dispute is the speed with which it would rise.

1.73 Beyond the fireball and IZ, the key difference between SCCC and HSE is the low SEP of 173kW/sqm erroneously taken by SCCC. The lower value is appropriate to flash fires and lies toward the bottom of the accepted range of 150-450kW/sqm for a fireball. HSE realistically assumes 200kW/sqm which still allows for some buoyancy within a range of 200-270kW/sqm. The draft COMAH report uses a higher figure. Further SCCC also assume a greater reduction of radiation with distance than HSE, based on a non-standard text without explanation. The overall effect is to reduce the effects of the RWCMA on the MZ without scientific justification.

1.74 In short, the consequences of the RWCMA would be catastrophic for occupants of the development, as set out in the evidence of HSE [HSE/AJW/4para11.20].

Other Events [HSE/CLOSPtIIpara105-134]

Water Seal Failure Fire

1.75 Whilst not affecting the output of the PADHI methodology, a water seal fire drives a very high SRI [HSE/AJW/4para11.37-41] and is a further weighty reason for Advice Against the development, as set out above. Despite improved preventive safety measures these still occur, including the recent Dartford

incident. Historic records indicate a frequency of about 100cpm/yr with no evidence of a reduction with the advent of automatic seal water top-up facilities. The much more optimistic figure of both the operator and SCCC is unsupported. [CD83 Table 4] The accepted ignition probability is 3%.

1.76 Historically these leaks can be sudden, not slowly propagated as wrongly assumed by SCCC, giving limited time for evacuation before a dangerous dose is sustained.

Flash Fire and Crown Explosion

1.77 These do not feature in the HSE case.

PLANNING OBLIGATIONS

1.78 Neither of the executed completed s106 obligations [CD81&81A] satisfactorily addresses the concerns of HSE [HSE/GD/6].

The Agreement

1.79 The agreement contains no reference to the Safety Management Plan [SMP], which is instead covered by a unilateral undertaking, and the gas operator is unwilling to sign up to the safety management provisions. These factors greatly concern HSE as they cast doubt on the enforceability of the safety measures.

The Unilateral Undertaking

1.80 The undertaking contains no absolute requirement to incorporate the expressed concerns of LBL and there is no mechanism for HSE to contribute to the SMP. The development could go ahead before LBL has approved the SMP.

1.81 The draft SMP [Contingency Plan] attached to the undertaking does not cover potential major accidents at the KGS and fails to address any of the concerns expressed from the outset by HSE. The undertaking, moreover, contains no specific reference to the events foreseen by LBL in its proposed Rider to the Deed, to require evacuation of designated seats when Gasholder 1 is full [LBL/1/2].

1.82 Omissions from the SMP in relation to major accidents include: any recognition of the potential suddenness of ignition events; details of communications during a major accident; details of evacuation routes; co-ordination with the LFEPA off-site emergency plan[20]; measures to control ignition sources; recognition that gas leaks could be detected by smell due to a variety of sources apart from KGS.

OVERVIEW

Claimed Reasons to Depart from PADHI Advice Against the Application
[HSE/CLOSPtIpara134-185]

1.83 SCCC claim three factors in support of a contention that the PADHI Advice Against should be accorded reduced weight: that only three of the four lifts of

[20]London Fire and Emergency Planning Authority

GH1 are used; that The Oval is unlikely to be in use when the GH1 is other than empty; and added protection by the structure of the proposed grandstand over the present situation.

1.84 In respect of the first two of these claims, C4/00 is clear at para A7 that HSE is given on the basis of the maximum quantity permitted by the hazardous substances consent and its conditions.

1.85 The operator is lawfully entitled to re-instate the disenabled flying lift and there is no evidence that this would be foregone. Indeed the COMAH report covers its use. The case of SCCC that without the top lift there would be no increase in population in the IZ is not made out.

1.86 With regard to the summertime use of the gasholders, although there is an informal agreement to avoid raising the gasholders during cricket matches, this has not always been achieved in the past and, again, nothing in the consent prevents their full use at any time. In any event, no commissioned gasholder is ever truly empty, even in its fully "down" position, because a minimum volume must be retained to maintain pressure in the distribution network. Moreover, attempts to reach a formal agreement on this matter with the operator have failed. The SoS cannot reasonably proceed on any assumption that the gasholders will be empty during cricket matches at The Oval. Furthermore, there is nothing on the submitted planning obligations to limit the use of the Ground to the summer months and, for example, Australian football has been played there in the month of October. The hotel is an all-year use in any event.

1.87 On the third claim, SCCC admit that neither the construction of the grandstand itself nor its evacuation measures have been designed to withstand the RWCMA event or a major seal fire. Any such benefit is thus purely incidental yet, at the Inquiry, the SCCC safety witness [RSC] erroneously held to an earlier view that the building would provide an improved barrier effect to an increased number of people with improved escape routes away from the KGS.

1.88 None of these points are borne out by the evidence. Indeed the open fourth tier of the proposed stand would be more exposed than the existing Peter May terraces with a long escape route to the rear, toward the source of danger. Thus an additional 340 more people would be exposed to the risk from credible major accidents. This latter aspect was never considered by SCCC.

1.89 Furthermore there would be direct lines of sight from the six storey element and probably the front terraces below the corporate boxes. It is not known how the concourse would accommodate evacuating spectators.

1.90 In the event that the need for the development considered by the SoS to override the concerns of HSE, the building should still be redesigned to incorporate all possible barrier protection.

1.91 There is no ground for departure from PADHI or C4/00 in respect of any of the reasons claimed by SCCC.

The Risk

[HSE/AJW/4#12; HSE/CLOSPtIIpara144-152]

1.92 At the outset the Inspector summarised the safety issue as: what is the risk?; how likely is it to happen?; and how acceptable is that risk?

1.93 The relevant hazards are: a 50% release of gas on a catastrophic failure leading to a fireball; and a major water seal failure fire. HSE submits that when all the matters set out above are considered, the only possible conclusion is that the 50% fireball scenario is credible. It can arise from a variety of events including decouplement and crown failure, as history shows. It has been recognised by the present and former operators, unprompted by HSE. Ignition occurs around 50% of the time and has actually happened with natural gas. Fireballs have resulted and are scientifically explained. Proper modelling shows massive impacts on the added population in the grandstand. The 50% ignited fireball is correctly chosen to drive the CZs and its consequences have been appropriately modelled to justify the location of those zones.

1.94 The fireball event has a frequency of 10cpm/yr – agreed to be the basis for drawing the IZ. The major water seal failure fire scenario has a frequency of around 100cpm/yr [to an order of magnitude]. Both events would be likely to have very serious consequences to the population in the proposed grandstand in both the IZ and the MZ. The fireball would also be likely to have serious consequences for the hotel.

1.95 The fireball event therefore drives very strong Advice Against in terms of PADHI. It triggers an obvious request for call in based on a significant vulnerable population in the open within the IZ: that is, within the radius of the fireball itself. It is difficult to see what sort of juxtaposition of hazard and population could be more unacceptable.

1.96 The water seal fire does not drive the CZs but on an SRI calculation, it demonstrates that this proposal is far above the level at which safety issues are considered to be of such exceptional concern as to justify a request for call-in [15 million versus 750,000].

1.97 The Inspector's questions can be short circuited however. There is no reason to depart here from the very strong Advice Against properly generated by PADHI. That advice is based on years of judgement and developing expertise. The development falls within the IZ and MZ. There is a significant increase in vulnerable population in the IZ. The risk inevitably unacceptable acceptable for both parts of the development. Yet the Council proceeded on flawed advice from the SCCC witness.

Planning Balance

1.98 It now falls to the Inspector and SoS to grapple with the detail of the safety case and then to balance it against the claimed need for an improved cricket facility and an enabling hotel.

1.99 It is accepted that it is not for HSE to take a view as to where the planning balance lies, nor to comment on the strength of the perceived benefits of the development, save to say that HSE does not accept that any urgent or immediate need for improvements to The Oval has been made out.

1.100 The strength of the Advice Against the Application is not materially weakened by taking only the increased population into account.

1.101 HSE would finally make the following three high level points:

the safety concern of HSE in the present case has from the outset been, and remains, a very serious one, with strong PADHI Advice Against the development. Unless the perceived benefits of the scheme are very significant indeed, the SoS should not override this very serious concern;

there is no net safety benefit from this development or any other reason to override the PADHI conclusion; and

to refuse planning permission at this stage clearly does not mean that no further development can take place at The Oval. It is clear that the objections of HSE are based around the fact that additional development of high sensitivity level is proposed in the Inner and Middle Zones. The Inspector should not conclude that that any future development at The Oval is blighted by the presence of the gas holders.

2. THE CASE ON PUBLIC SAFETY FOR SURREY COUNTY CRICKET CLUB AND ARORA INTERNATIONAL HOTELS

The public safety case for SCCC is set out in detail in the proofs of evidence and closing submissions listed at appendix to the main Report.

The material points are set out briefly below, supported by frequent references to listed documents and, for completeness, including matters also set out in the Main Report.

GENERAL

Introduction

2.1 The public safety case of SCCC is essentially a response and rebuttal to the concerns raised by HSE, first in putting forward the PADHI Advice Against the proposed development and subsequently seeking call-in of the Application. The role of HSE in LUP is supported but the output of the PADHI methodology is merely advice to be taken into account in planning decisions. However, the 50% grounded fireball scenario put forward by HSE is incredible and should be discounted. Moreover, even if such an event did occur its effects would not be as wide-ranging as HSE claims. Furthermore there would only be a modest increase in Case Societal Risk [CSR].

2.2 Despite the conviction of HSE that Quantified Risk Assessment [QRA] is inappropriate in this case, it is confirmed by an expert QRA commissioned by SCCC that a fireball is an unlikely outcome of a large scale gas release from KGS as modelled by HSE and that Individual Risk [IR] at the proposed development would be low. The QRA further demonstrates that current Local Societal Risk [LSR] is not intolerable according to HSE criteria and that the additional population due to the development would increase this only marginally and within the standard measure of tolerability.[21]

Roles of HSE and SoS in relation to PADHI and Planning Policy

2.3 At the outset SCCC make two fundamental submissions:

First, there is little transparency in the HSE formulation and application of policy matters relating to the assessment of risks from hazardous installations.

Secondly, it is for the planning authority, and now the SoS, to determine whether the amount of risk to the individual and society which may result from the grant of planning permission for the proposed development is acceptable. It is not for HSE to usurp the role of the planning authority or SoS as decision maker. Despite accepting these limitations to its role, HSE has appeared to seek to do this many times in relation to this Application.

2.4 C4/00 makes clear that:

decisions should be made by elected authorities;

[21] See Main Report paras 3.10-18 for definitions of different Types of Risk and Different Types of Gasholder Fire

in view of its acknowledged expertise in assessing the off-site risks presented by the use of hazardous substances, any advice from HSE that planning permission should be refused for development for, at or near to a hazardous installation or pipeline, should not be overridden without the most careful consideration;

HSE will normally consider its role to be discharged when it is satisfied that the local planning authority is acting in full understanding of the advice received and the consequences that could follow;

The advice from HSE is only one of many material planning considerations that a planning authority has to consider.

2.5 There is contradiction in the HSE evidence as to whether HSE was satisfied in this instance as to the understanding and consideration by LBL of its advice; but at the Inquiry HSE accepted that it was so satisfied [HSE/GD/2Exh14para15-16]

2.6 It is noted that the fundamental principle is now accepted by HSE that ultimately, for any proposed development, it falls to the local planning authority or SoS to decide the level of residual risk that is acceptable, when balanced against other material planning considerations [HSE/AJW/7]. In other words, it was never for HSE to tell the planning authority what level of risk was acceptable or unacceptable. HSE may advise on what the level of risk is but it is now for the SoS to consider whether it is acceptable both in itself and when balanced against other material planning considerations.

2.7 LBL gave very careful consideration to the HSE Advice Against this Application and reached its decision on an informed basis. LBL had not only the expert evidence of SCCC but its own independent, technical evidence. It took into account all the material planning considerations and came to the conclusion, after a thorough consideration of the matter, that planning permission should be granted. HSE still sought to interfere with the planning decision making process and paid scant regard to its own risk criteria for land use planning [HSE/AJW/4/1Exh2]. These emphasise that the responsibility lies with the land use authorities since safety is but one of many factors to be considered.

2.8 It is a hallmark of the HSE case that it has totally ignored many such material considerations, the latest of which is the existing use of the site. Even on the basis of the disputed level of risk calculated by HSE in this case, the proposed development would not result in an unacceptable degree of risk to individuals and or society.

2.9 This is a case which should be decided on its own facts. It is not a situation where the SoS is required to make determinative scientific findings as to risk calculations. It is a question of exercising balanced judgement on the basis of all the material planning considerations and, most importantly of all, using common sense. If that is done, it is obvious that there are no sound and compelling reasons why this Application should be refused.

The Proper Approach [SCCC/CLOS/Rpara29-48&109-121]

General Principles

2.10 The decision of the SoS should be made against the following general principles, which are based on the published advice of HSE itself:

HSE Risk Criteria and the Buncefield MIIB Report indicate that the Worst Case Major Accident approach must be used sensibly to avoid excessive, arbitrary restrictions on land use, especially in terms of comparative evaluations, and that Cautious Best Estimate [CBE] should not be interpreted as over-cautious [HSE/AJW/4/1Exh2para12-16].

EC guidance and HSE peer review maintain that the simplified, consequence-based, Protection Concept gives a quick, conservative estimate of the compatibility of land uses. It is best employed where there is low population density and low demand on land use. It is no substitute for good judgement. The Buncefield MIIB Report prefers site specific QRA as a developing technique to enable risks to be quantified and inform common sense in decision making. The Report envisages no major hazard sites where data is insufficient for this purpose. [HSE/AJW/4/1Exh4p106; Exh5para7.2.4; Exh6p173; Exh7pp292&320]

R2P2 says that historic data should only be used over a carefully selected time period to allow for technological changes, and that qualitative and numerical risk estimates should be combined with engineering and operational information in the overall decision. [HSE/AJW/4/1Exh3para93]

Risk from MHIs should be compared with other every day risks. [HSE/AJW/4/1Exh2para44a]

Individual and Case Societal risks must be distinguished and there are no clear criteria of Local Societal Risk.

Scaled Risk Integral [SRI] relates to a centre of population and is difficult to apply reliably across the area of a development.

Balance of Material Considerations

2.11 It is vital that the SoS identify the relevant question – to balance the clear and undisputed benefits of the development against the risk of harm, admitted even by HSE to be miniscule, in terms of the test of UDP Policy 54(g) as to whether that risk would be unacceptable. That balance is not for HSE to perform within its advisory role and there is no duty on the SoS as planning decision maker to adopt the HSE view, as stated at para A1-6 of C4/00. HSE admits that its advice is not followed by local planning authorities in sixty cases a year. [HSE/GD/1para5.7]

2.12 That balance must be informed by several considerations not factored into the HSE assessment which, on any sensible basis, reduce the risk from miniscule to something akin to incredible. These are:

The Oval is only full to capacity on a limited number – five to ten – of Test match days per year.

Historic accident records cited by HSE show half the rate of accident occurrence in the summer months, when cricket is actually played, compared with the winter. [SCCC/CLOSpara113] Moreover, the gasholders are likely to contain the minimum amount of gas [and be in their "down" position] during major summer fixtures.

RWCMA and the CZs derived by HSE clearly relate to a fireball from 50% of the contents of GH1 with all four of its lifts full to its consented capacity, including the fourth flying lift, so-called because it flies above supporting framework with less lateral support than the lower three lifts. However, the flying lift has been disenabled since the 1987 hurricane for operational safety reasons related to high wind loading. This has the effect of reducing the effective capacity of GH1 from some 130t to less than 100t, with commensurate reductions in the fireball radius and size of the CZs. [SCCC/CLOSpara121]

On such summer occasions potential causes of ignition are less.

The proposed new grandstand would provide a degree of additional protection by way of screening.

Existing Use [SCCC/CLOS/Rpara116-120]

2.13 HSE ignores the existing uses of the Application site by way of the Lock, Laker and May stands, as it no longer regards itself as required to do so under the 2008 version of PADHI Rule 4(c)[22]. Under the former Rule 4(c) there would have been no Advice Against and no request for call-in. In withdrawing the former Rule 4(c), HSE confirmed the new approach of providing its advice based on the current facts and circumstances affecting public safety, without influence from any permitted use already existing. This is consistent with para 1.9 of the HSE consultation document [CD42], which states that HSE advice to a local planning authority does not currently take account of how many people are already present in existing developments.

2.14 In the 2008 Rule 4(c), PADHI now provides that existing use is a factor for planning authorities to consider where appropriate. HSE has not yet devised or published any methodology to assist in sifting those cases to which Rule 4(c) would formerly have applied. Accordingly, HSE states that it is outside its area of expertise to express a view as to whether the SoS should take existing use into account in this case. This shows a lack of common sense and judgement. It is vital that the SoS appreciate this limitation of HSE advice.

2.15 At the Inquiry, there was no dispute that existing use is properly a factor for the SoS to take into account. It was also agreed by HSE that the planning authority should take into account that, where available land is limited as in London, then it is more difficult to argue for an alternative site. That is an especially self-evident proposition where the issue in this case is not a question of finding a

[22] "If the proposed redevelopment or change of use is at the same Sensitivity Level or less than this existing permitted use, then it should not be advised against."

location for something like a new housing allocation, but relates to the necessary expansion and redevelopment of an historic cricket ground.

Quantified Risk Assessment [QRA]

2.16 Nor should the HSE Protection Concept be the end of consideration of the safety matter, particularly given that the QRA witness of both HSE and SCCC to this Inquiry are currently engaged together in work to include Local Societal Risk in HSE assessments in line with the agreement of ministers.

2.17 The SCCC QRA should be accorded due weight. This shows a worst Individual Risk due to a grounded fireball of a little over 1cpm but that is without the mitigating factors set out above and ignores evidence that such an incident is scientifically impossible. Individual Risk would be virtually unaffected by the proposed development in any event. Societal Risk is currently at an acceptable level and would increase only marginally with the development, again neglecting the several factors of mitigation. The FN curve of the SCCC QRA is remarkably similar to that produced independently in the draft COMAH report and it is unchallenged as a useful tool in the field of risk assessment. [SCCC/DMD/2para3.12]

2.18 Indeed, the imperative of looking beyond the confines of the HSE approach is exemplified again in HSE review documentation, where it is accepted that certain features of the PADHI method cannot be accommodated without unnecessarily constraining acceptable development [HSE/AJW/4/1Exh71para8].

Other Factors

2.19 There are two further related mitigatory aspects of the control regime of which HSE forms a central part but which HSE witnesses had not considered:

First, HSE accepts that there are no further safety measures that could be put in place at KGS and that risk is therefore tolerable if ALARP. However, if that situation changes for the worse, HSE has power to disapprove the COMAH report so that the gasholders could not be used, ending any safety concern. Notably, the draft COMAH report properly covers the contingency of the development now proposed going ahead, so it is impossible for Residual Risk to justify refusal of this Application.

Second, it follows that HSE could require that GH1 be in the "down" position on match days, whether via the statutory report and COMAH Reg 18(1), by improvement or prohibition notice under s21-22 of the HSWA, or by seeking modification of the conditions of the hazardous substances consent under s14(1) of the Planning (Hazardous Substances) Act 1990; the latter is used in the London Olympics consent. There is no evidence to support the HSE assertion that this would not be reasonably practicable, despite the understandable preference of the operator to avoid such action. [SCCC/RSC/2para4.7]

Historical Points
[SCCC/RSC/1#4&App5&6]

2.20 From the detailed history set out in the evidence, the following points are of note:

Gasholders are simple engineering structures, of long-established design, comprising low pressure vessels of riveted or welded steel sheets, of which the weakest part is the crown.

Due to the low gas pressure, any hole in the casing will not propagate quickly and, if ignited, the gas tends to burn safely without explosion.
[SCCC/RSC/1para4.3.7-10]

2.21 In the case of the KGS, the operator informally seeks to reduce the volume of hazardous material stored on the site during key events at The Brit Oval, based on a written commitment to use best endeavours to do so. The success of this initiative is evident from press photographs taken during matches.
[SCCC/RSC/1App7&9]

Operational Improvements
[SCCC/RSC/1#5.1-3]

2.22 It is very unlikely that any gasholder would fail catastrophically when operated in accordance with strict modern safety legislation [CMAHR] and inspection and maintenance regimes.

2.23 Leaks can occur but natural gas is only 55% the density of air and disperses upward rapidly and safely without further incident.

2.24 Main causes of leaks are metal corrosion and seal water loss.
[SCCC/RSC/1App10]

2.25 Split crowns can occur due to over-extraction of gas but most gas would remain in vacuum inside the holder where there is no source of ignition.

2.26 Wind and snow loading can cause decouplement. Freezing of seal water can also lead to gas leakage but most gasholders, including at KGS, have automated seal water top-up and automatic electric antifreeze systems. In the present case, such causes of gas leaks are unlikely during the summer cricket season.

2.27 The worst credible incident is failure of the volumetric governor to regulate flow of gas into the holder, causing release of excess via the seals.
[SCCC/RSC/1App12]

2.28 The change to natural gas from town gas in the 1960s was significant to safety because the methane that comprises the bulk of natural gas is accepted as being less flammable than the hydrogen in town gas [SCCC/RSC/1App13]. Moreover methane resists ignition by spark, whereas HSE assumes that this is the main ignition source during gasholder collapse.

LAND USE PLANNING ADVICE

Incidents
[SCCC/RSC/1#5.4,5.6]

2.29 HSE relies on 129 incidents recorded since 1971 in re-defining Consultation Zones [SCCC/RSC/1App10; HSE/AJW/4App2]. It is noteworthy that none of these accidents resulted in injury or death. Only four involved ignition, three

due to electrical faults and one sparking from a machine tool, whereas Institution of Gas Engineers Safety Recommendations [IGE/SR/4] now require there to be no ignition sources within 18m of a gasholder. Many gas releases were due to corrosion and poor maintenance of water seals, again contrary to IGE/SR/4, and should be a point of awareness in modern COMAH reports. It is also common knowledge that anti-freeze systems are prone to problems and are also subject to improvements to Gas Industry Standard GIS/EL8:2006 [SCCC/RSC/1App17].

2.30 In addition to incidents over the last 40 years, HSE relies in part on accounts of accidents in the early 20thC that involved more serious collapses, in particular those at Ilkeston, Port Glasgow, Ashton-under-Lyne, Bradford Road Manchester and Mytholmroyd. These all occurred between about 1912 and 1929 [HSE/AJE/4para6.10]. There were other incidents at Low Moor and Keighley between 1916 and 1930. All these accidents pre-dated the safety improvements consequent upon the Factories Act of 1937 and ignition occurred in only five. All involved town gas and not the less flammable natural gas. The leading cause of failure was collapse of crown plates which now feature prominently in the modern inspection regime.

2.31 The overriding conclusion therefore must be that gasholders are very low risk installations in terms of significant leaks or serious incidents, especially as gas disperses rapidly and ignition is rare. There is no ground to make allowance for unreported incidents that would necessarily be minor.

HSE Consultation Zones [SCCC/RSC/1#5.5, 6.1]

2.32 The new, more extensive CZs rely on the protection-concept-based analysis of a small number of worst case scenarios without regard to risk of occurrence. These are extremely unlikely, at less than 1cpm/yr, and should not have been used as a basis for altering the CZs.

2.33 Moreover, in the chosen RWCMA, a 50% fireball will rise rapidly due to buoyancy; occurrence is less likely due to the propensity for gasholder lifts to jam when out of alignment rather than to collapse suddenly; any collapse is likely to disrupt the gas cloud; methane is unlikely to ignite due to sparks. In the circumstances, the possibility of conditions for a fireball due to the formation of a dense, fuel-rich mass is questionable.

2.34 There is no evidence of any such incident since 1979, but several before then implying a change for the better in safety standards. Although COMAH reports cited by HSE cover decoupled seal incidents, operators regard them as extremely unlikely. HSE peer review admits that its approach is conservative.

2.35 No recorded ignition incident was clearly a fireball and even the Warrington terrorist incident, with sudden release due to 30% crown failure, caused no fatality and little damage outside the site to suggest that a fireball had actually occurred.

2.36 Overall, the 50% grounded fireball RWCMA claimed by HSE as a basis for the new enlarged CZs is not credible.

CREDIBILITY

Witness Expertise

2.37 In response to the HSE attack on the SCCC safety witnesses in person; this is a great deal misconceived and misses the fundamental point that RSC never swayed in the judgements relied upon and supported by DMD.

2.38 By comparison, HSE witnesses were often unable to answer questions or unwilling to make concessions.

2.39 It was never claimed that the building was designed to protect spectators from an incident which is regarded as incredible. The risk of the KGS to safety is admitted by HSE to be miniscule.

Fireball, Leak and Seal Fire Modelling

Evidence of Computational Fluid Dynamic [CFD] modelling [SCCC/RSC/1#8&App18] was withdrawn during the Inquiry.

Decouplement [SCCC/CLOS/Rpara50-53]

2.40 CDs were formerly 60m, which would have been inconsequential to the present Application. They have been greatly enlarged due to the adoption by HSE of a RWCMA consisting of a decouplement of a gasholder water seal and a fireball due to ignition of 50% of its inventory. Such an occurrence is regarded by the SCCC expert witnesses as incredible.

2.41 Four aspects of HSE scenario require examination: the credibility of such an event resulting in a fireball even if ignition occurred; whether such a fireball would remain grounded; whether there would be any difference in residual risk to the present and proposed development; whether HSE is over-conservative in its assumptions of frequency of decouplement incidents with ignition; and whether there are other potential causes of a fireball.

Fireball
[SCCC/CLOS/Rpara54-67]

2.42 A fireball requires ignition of a fuel-rich, compact gas cloud with a substantial core and minimal admixture of air. Where decouplement occurs and upper lifts descend via lower ones, it is not credible that 50% of the gas inventory would remain stable long enough to create such conditions because it would have initial vertical momentum. The lighter escaping gas, only 55% of the density of air, would rise rapidly through the annular [doughnut-shaped] space between lifts with great turbulence. The gas cloud would quickly lose the requisite over-rich core and compact shape, dispersing before a fireball could occur. The practical result would be a jet or flash fire, having negligible impact [below].

2.43 There is nothing in the volume of paper evidence to support the occurrence of a fireball in the face of these considerations, let alone the instantaneous removal of the enclosing wall of the gasholder postulated orally by HSE. Even if the crown were to shatter, most of the gas would have escaped before the remains of the upper lifts fell into the water tank.

2.44 As to the historical incidents on which HSE relies; none clearly gave rise to a fireball save arguably Pittsburgh in 1927 where the use of oxyacetylene equipment was blamed and can safely be disregarded in this present-day case.

2.45 More recently at Warrington, crown failure was induced by terrorist attack and caused a fireball-like incident. At Low Moor in 1916 such an effect resulted from debris from an exploding munitions factory. These escalation incidents should also be disregarded in this present-day case.

2.46 Further, only one of the four seal decouplements in evidence, Ilkeston in 1912, involved ignition.

2.47 For these reasons the HSE case fails because its analysis cannot coherently connect a seal decouplement event with a fireball consequence. This is an important step omitted in the logic of the HSE argument.

2.48 Consideration of a fireball in COMAH reports could relate to other causes such as massive crown failure and HSE seems equally or more concerned about seal fires in any event [below].

Grounding [SCCC/CLOS/Rpara68-79]

2.49 The HSE fireball model is derived from ignition of liquid petroleum gas [LPG], but in contrast with natural gas, LPG is denser than air and stored under high pressure, whereas a natural gas holder is a low pressure vessel. In the case of LPG, therefore, an accidental release would expand rapidly to form the fuel-rich cloud at ground level with real potential for ignition as a grounded fireball. HSE takes no account of the buoyancy of natural gas or its upward velocity in escaping from a gasholder. HSE documents record their own reservations as to the realism of a grounded fireball model. Its use is not justified.

2.50 In the two examples of alleged fireballs at Warrington and Pittsburgh, there is no evidence of grounding, with the only ground level damage attributed to other causes. The ability to detect the smell of gas some distance from source is related to a heavier-than-air additive sensitisor and adds nothing to the HSE case for grounding of a gas cloud. Nor is the use of a grounded fireball model in the draft COMAH report of significance as its source is unexplained. It must be right that a fireball would rise rapidly such that the grandstand roof would screen many of the occupants of the proposed development.

Frequency [SCCC/CLOS/Rpara80-103]

2.51 Notwithstanding earlier dismissal of decouplements as a cause of major accident, the HSE review of LUP re-included them, based on historic records dating back to 1910. Whilst specific causes were discounted as irrelevant, it is a matter of fact that there is no record of a fireball caused by a decouplement.

2.52 Several of the historic incidents analysed were total collapses which HSE elsewhere accepts should be set aside and the erroneous assumption is made

that any ignition event equates to a fireball. This defies logic and is over-conservative.

2.53 Of the four seal decouplements that did occur, three occurred over 80 years ago and the fourth in 1979 was due to winter freezing of seal water. The latter has no bearing on summer time cricket at The Oval and the former predated many system improvements, such as automatic cup and seal monitoring. It again defies logic to treat the few catastrophic failures as occurring randomly over the last century. It is self evident that suspect gasholders will have been decommissioned in the intervening years. HSE documentation again regards reliance on pre-1950 incidents, before gas nationalisation, as overly cautious, and since then there have been no seal decouplements leading to ignition. [HSE/AJW/4/1Exh66p1064]

2.54 Turning to the probability of ignition; natural gas is less prone to ignition than coal gas and a buoyant, rising cloud would not be susceptible to ground-level ignition sources. Accordingly the HSE assumption of a 50% chance of ignition of escaping gas, at the top of the accepted range of likelihood, is again over conservative, and a figure of 10% is more realistic.

2.55 As to causes of decouplement the following further mitigatory factors must be considered:

HSE agrees [SOCG Addendum p9 – CD83] that seismic activity is not a major issue. Even so its frequency analysis includes national earthquake frequency with an unexplained multiplier of three and no account of the relatively low frequency of seismic activity in London.

Mechanical and wind load failure is relatively unlikely to occur to GH1 which is column guided [not spiral] and has its unsupported flying lift disenabled. Low temperature failure of antifreeze systems or crown failure under snow loading will not occur during the summer cricket season.

There is no adjacent source of potential explosion as at Low Moor.

2.56 The assumed decouplement frequency of 16cpm/yr in the draft COMAH report includes all the foregoing causes as well as subsidence and escalation from a seal fire and is thus conservative in respect of the present case.

2.57 Use by HSE of the "n+1" and Poisson formulae to verify frequency estimates is not strictly necessary as the post-1950 period includes an accident, allowing a calculation of 10cpm/yr as the frequency of a non-ignition event [and only 1cpm/yr taking a more realistic ignition probability of 10%]. Applied to only 10 major match days out of the 365 days in a year, the frequency of exposure of a capacity crowd is reduced far below the 10cpm/yr on which the HSE Advice Against is based.

Other Causes of Fireballs

2.58 During the Inquiry HSE shifted emphasis onto the following other alleged causes of fireballs:

Crown Collapse
[SCCC/CLOS/Rpara105]

2.59 Major crown collapse causing a fireball is unrecorded and such an event is unlikely under modern inspection and maintenance regimes. At least 20% of the roof would have to fail – equivalent to the area of nine cricket pitches in the case of GH1! Those incidents of crown failure that have occurred did not result in a fireball and would have led to improvements in the structure of other gasholders.

Seal Fire Escalation [SCCC/CLOS/Rpara106]

2.60 Again, there is no record of a seal fire [burning up the side of a gasholder] weakening the crown such as to cause collapse. Importantly, it would take time for the fire to progress and either weaken the crown or cause deformation and decouplement, allowing an estimated 10 minutes for evacuation.

Other Types of Incident

Split Crown Explosions, Gas Leaks and Flash Fires
[SCCC/CLOS/Rpara122-3]

2.61 Although there was one split crown incident due to over-extraction of gas in1987, there has never been a split crown explosion. Such events are incredible in the context of KGS, given it has two levels of automatic cut-off facilities installed specifically to obviate over-extraction.

2.62 Flash fires due to gas leaks also require a very unlikely combination of circumstances of wind speed and external ignition sources. It is common ground that these too can be discounted.

Seal Fires [SCCC/CLOS/Rpara124-135]

2.63 HSE roughly calculates that there are 100cpm/yr of a major seal fire, based on the five seal fires that have occurred over the last 40 years [HSE/AJW/4para6.7&App 12], apparently assuming that all such incidents would be large fires giving a dangerous dose to everyone at the Application site [CD83 SOCG Table 4]. This is a substantial and unjustified exaggeration of reality that perverts the SRI calculation for the following reasons:

There have been no seal fires for 23 years during which time there have been safety improvements.

The database is too small to allow statistical analysis.

One seal fire in May 1976 was caused by a hand grinder, an unlikely occurrence at Kennington on a Major Event Day at the Oval, and the other four were caused by a spark from a faulty electrical anti-freeze system. This latter cause is not relevant in the summer when the anti-freeze system will not be operational. Indeed, KGS is fitted with automatic cut-outs which turn the system off at certain temperatures. In any event, this type of failure has been addressed by the introduction of a number of safety features, including automatic water cup monitoring, cut-off and top-up, supplementing weekly visual inspections. These

new safety features almost certainly explain why there has not been a seal fire since 1985. [HSE/JH/4/2ExhBp221; SCCC/RSC/2para7.17]

The draft COMAH report predicts a much lower frequency of 3.9cpm/yr [HSE/JH/4/2/1ExhBpara16.3.3] taking into account the particular safety features at KGS. HSE questions this figure but fails to take into account the following points that the COMAH release frequency is based on a fault tree reliability analysis on a similar system. Subject to frequent testing and inspection, this predicts a probability of failure of around 0.5%. HSE has no reasoned basis for departing from this. [HSE/JH/4/2ExhCp354; ExhEpp358-9]

It is fair to judge that only about 10% of seal fires would be large, with a frequency of about 0.4 cpm/yr [SCCC/DMD/3para5.3]. HSE, by contrast, assumes that all seal fires are large. There is no basis for this view in the absence of evidence of major damage. Only a seal fire at the lower part of GH1 could potentially affect the development.

If there were early ignition, the fire would take about 10 minutes to build up [propagating at the rate of about 9m per minute] providing ample opportunity to escape into a building or across the pitch. HSE claims that a seal fire could be sudden and massive but there is no record of any such event. If there were late ignition, it is very likely that evacuation would have been largely completed on account of either the loud noise of the release, the smell of the gas, or alarms signalled to the operator's control room. [DMD/3para5.5; HSE/JH/4/2ExhBpp171-2]

There is evidence that the SEP would only build up to the HSE predicted level of 210kW/sqm over time, and that a value of 150kW/sqm is more realistic [SCCC/CLOSpara133].

The SCCC QRA shows that seal fires make only a miniscule contribution to the risk profile of the development site.

It should also be noted that the HSE exaggerated "rough estimate" of the likelihood of a seal fire has perverted its SRI calculations. These are (a) based on this wholly unrealistic 100cpm/yr of a large seal fire, (b) assume that all those in the new development would be adversely affected, which is manifestly not the case, and (c) fail to limit consideration to the new population introduced by the development.

QUANTIFED RISK ASSESSMENT [QRA]
[SCCC/DMD/1#1-3]

Choice of QRA over Simplified Risk Assessment [SRA]

2.64 A QRA is a rigorous technique compared with the SRA approach of HSE in setting CZs but uses best available information combined with the same conservative modelling and frequency used by HSE over a whole year of operation, ignoring the low conditional probability that GH1 would be used in summer when most fixtures take place at The Oval.

2.65 The Buncefield Major Incident Investigation Board [BMIIB] report [SCCC/DMD/1App4] criticises the SRA approach for being vague and restrictive with some arbitrariness in the selection of the RWCMA and difficulty in comparison of the protection achieved with everyday risks. The Siting Policy is

criticised, including for not taking account of the quality of MHI site management and not distinguishing those already at risk from those introduced by new development. It is a key point that the BMIIB favoured a more robust QRA of actual risk for setting CZs, also taking account of reliability of engineered systems to improve safety and mitigation measures in place.

2.66 With regard to the hazards at KGS, natural gas, being lighter than air and containing 95% methane, disperses quickly and is less likely to ignite that certain other denser materials such as Liquid Petroleum Gas [LPG] that disperses at ground level. In the unlikely event of a fire due to corrosion, structural failure, operator human error or third party activity, its type and severity would depend on the size of the breach. Catastrophic rupture is relatively even less likely in the low pressure regime of a gasholder.

2.67 The Protection Concept is valid but at its most robust where the RWCMA is predictable, such as a LPG site where a Boiling Liquid Expanding Vapour Explosion [BLEVE] due to rapid high pressure release is the greatest hazard and can be modelled by well established methods. In contrast there is no standard fireball model for low pressure situations such as a gasholder where any fireball would rise due to buoyancy. Nevertheless a standard ground-based model is conservatively retained.

2.68 It is recognised that the precautionary approach was necessary when HSE identified a 50% grounded fireball as the RWCMA and this is a useful screening calculation but it is likely to overestimate the real residual risk.

2.69 It is not disputed that HSE has correctly applied the PADHI methodology and its call-in criteria resulting in Advise Against and subsequent call-in of the Application. However, the PADHI system is mechanistic and, although proved effective in many applications, for the foregoing reasons it has limitations in complex or uncertain cases such as the present proposal.

Results of the QRA
[SCCC/DMD/1#4&App5]

2.70 Conclusions on frequency of major events based on historical data differ from those of HSE in two ways.

2.71 First, on the same historical data used by HSE, the frequency of a major accident is halved due to time elapsed since the worst incidents using the well-known Poisson distribution formula.

2.72 Second, a reduced ignition probability further reduces the risk. HSE assumes a 50% chance of ignition based on three out of six recorded major escapes having ignited since 1912. Over the past 40 years the ignition rate has been only 3% of 129 gas escape events of all types and sizes up to 50t, about one third of them over 20t, albeit none were catastrophic. As natural gas is less ignitable a value of 10% is realistic.

2.73 Combining the two aspects of this reconsideration, event frequencies are taken which are a factor of 10 lower than those derived by HSE. Although this alters the magnitude of the risks calculated, it does not significantly alter the main

thrust of the SCCC case concerning the relative percentage changes of societal risk due to the proposed development.
[SCCC/DMD/1App5 – QRA Report#5.4&AppC6]

2.74 Tabulated hazard ranges are calculated using a lower SEP of 173kW/sqm due to the conservative assumption of a fireball. Although lower than the 200kW/sqm assumed by HSE, this figure is still above known lower values recorded in British Gas Research. A fireball radius between 129m and 163m [99-133m from the side of GH1] is predicted, whilst the more likely seal fire would produce a 1000tdu dangerous dose only out to 84m radius [54m from the side of GH1]. Of these, only the very unlikely catastrophic or decouplement fireball would reach as far as the proposed development and pose a significant hazard.
[SCCC/DMD/1table4.1p31&App5 – QRA Report#5.3.1]

2.75 The foregoing demonstrates the sensitivity of the protection concept basis of zone setting to the particular event chosen. In the present case, not only is there some uncertainty in the frequency of such severe events but it is not certain that a fireball is possible.

2.76 The acceptability of individual and societal risks can only be judged by balancing calculated risk with socio-economic benefits, with societal risk key in the present Application. Although LSR is not part of current LUP advice by HSE, its own Risk Criteria [CD38para73] clearly imply a judgemental approach.

2.77 Tabulated Individual Risk levels are calculated without taking account of the low occupancy of The Oval and ignoring the reduced summer time use of the KGS. The highest value is 1.1cpm. Multiplied by a calculated occupancy factor no more than 0.164, this falls well below accepted tolerability of 1cpm for the existing KGS operation ALARP.
[SCCC/DMD/1#4.4&table4.2&App5 – QRA ReportAppAtablesA.3-4]

2.78 Notwithstanding the simplified HSE determination of CSR, the better approach is to estimate LSR before and after the proposed development and take the difference as CSR. FN curves demonstrate that any LSR increase would be marginal at 1.1% even without consideration of reduced gasholder use during summertime major sport events at The Oval. The FN curve is remarkably similar to that in the draft COMAH report [HSE/JH/4/2/B]. These results are a factor of ten below the HSE upper comparison of intolerability based on 50 deaths in a single event, set out in R2P2, which would still not be exceeded even if the HSE frequency were retained [SCCC/DMD/p36fig4.2].

PLANNING OBLIGATIONS

The Unilateral Undertaking

2.79 The unilateral undertaking incorporating the draft Safety Management Plan would be sufficient to cover all safety requirements, without the additional measures put forward as a Rider by LBL to restrict the sale and use of certain seats in the proposed grandstand [SCCC/RSC/1#7].

OVERVIEW

2.80 HSE draws selectively from conservative aspects of the documentation on which it relies. Recent massive increases in CZs are based on an incredible RWCMA of a 50% grounded fireball, reliant on pre-1930 accidents, since when many safety and regulatory improvements have taken place, including the creation of HSE itself. This is borne out by a lack of ignition incidents in the last 40 years. A seal fire is also unlikely, especially during the summer cricket season when gasholder inventory is likely to be low and winter causes of decouplement due to wind or snow loading or frozen seals are remote. Even if such an event did occur, its effects would not be as wide-ranging as HSE claims and the grandstand building would afford a measure of protection, especially from a rising fireball. There would only be a minimal increase in societal risk in any event.

2.81 The principles that should underlie the decision of the SoS are: QRA is preferred to Protection Concept; historical data must be used with care; risk estimates should be combined with other engineering and operational information; major hazard risk should be related to everyday risks; theoretical risk assessment should be tested by independent review; SRI may not be truly representative in complex cases as it requires a single risk value to be applied to a centre of population [SCCC/CLOS/Rpara30].

2.82 It is vital to balance the clear and undisputed benefits of the proposed development against the risk of harm, which even HSE admits is miniscule, in order to assess whether that risk is unacceptable in terms of UDP Policy 54(g). C4/00 at para A1-6 makes clear that the view of HSE is merely advisory and there is no duty on the SoS to adopt it. Nor is the SoS bound to examine risk in the precise manner of HSE, which rejects QRA as inappropriate despite the BMIIB recommendations which HSE is currently engaged in taking forward.

2.83 HSE accepts that the Rules of PADHI could be constraining. Moreover, KGS is fully modernised with all available safety features installed such that existing residual risk is tolerable if ALARP – the ALARP and residual risk concepts are not unrelated. Furthermore, HSE has power to require GH1 to be "down" during major summer events at The Oval.

2.84 HSE has not sought in its PADHI advice to take into account the limited occupancy of The Oval, the likelihood that the gasholders would be empty on major match days in summer when wintertime risks will not occur, or the increased protection of the new building, which together would reduce the risk from miniscule to something akin to incredible. Factoring in the very substantial economic and regenerative benefits of the proposal, it is perfectly clear that the Policy 54(g) balance should be struck in favour of the Application.

3. THE CASE ON PUBLIC SAFETY FOR THE COUNCIL OF THE LONDON BOROUGH OF LAMBETH

The public safety case for LBL is set out in detail in proofs of evidence as listed at appendix to the main Report. The material points briefly are:

Policy Compliance

3.1 In a letter dated 19 December 2007, HSE Advised Against approval of the proposed development on the basis of their adopted PADHI[23] methodology [CD44]. In accordance with C4/00 [CD29paraA4], LBL gave the most careful consideration to this advice before resolving to grant permission. This included hiring its own independent expert consultant to review the Hazardous Installation Assessment [HIA] submitted by SCCC with the Application [CD18], and to assist LBL to understand the risk posed by the Kennington gasholders.

3.2 This action complied with UDP Policy 54(g) which in turn fully accords with Art 12.1 of the Seveso II Directive as required by the Development Plan Regulations, by controlling development in the HSE Consultation Zone round the KGS in the face of any unacceptable risk. LBL was entitled to judge that the risk would not be unacceptable.

Assessment of HSE Advice

3.3 Research of incident reports indicates that there has never been a true gasholder fireball, even during WWII hostilities, nor any gasholder event in normal operation that should be modelled as such. Many causes have been eliminated by improved practice under the supervision of HSE itself [LBL3/para16] but the basic physics of combustion means that decoupled seals cannot lead to the formation of the fuel rich core necessary for a fireball and sudden release by catastrophic crown failure is highly unlikely.

3.4 Remaining causes of gasholder collapse and decoupling, such as high winds, water seal freezing and snow loading, are also highly unlikely to occur during the cricket season. Some 10% of incidents of known cause [13 out of 126 – LBL/3paras4-5] are attributable to such winter-time causes. The Kennington Gasholders are well established and maintained and not near the end of their working life when risk might rise. A number of historic ignition events on which HSE rely were caused by bad practice not allowed today. Further, the most common ignition source is the electrical antifreeze system which would probably not be switched on in summer [LBL/3para11]. Failure frequency is therefore far lower now than in the early 20thC.

3.5 Based on the entire history of gasholders from around 1850, the most likely annual frequency of a fireball incident at KGS on the methodology of HSE reduces to 1.4cpm, and below a trivial 1cpm during the cricket season disregarding external causes. This is still a CBE whereas for HSE to ignore incidents pre-1910 installations results in a 16% over-estimate of occurrence [LBL/3para13-15]. The risk level would be unaffected by the proposed development, such that individual and societal risk would be unchanged for the

[23] Planning Advice for Developments near Hazardous Installations

existing population. All the additional spectators would be outside the Lower Flammability Limit [LFL] distance of 18m where potential ignition sources are manageable, eg catering facilities [LBL/3para7-8].

3.6 Fireball-like events due to crown failure, eg the Warrington bombing [LBL2/9] have not caused extensive injuries, suggesting that either the event was a less damaging diffusion fire or that HSE modelling of an initially grounded fireball, despite gas buoyancy, is over-conservative, even using the modest 200Kw/sqm SEP specified. The reported Hong Kong incident [LBL3/para23-25; LBL/3/1] evidently resulted from a vapour cloud followed by a diffusion fire and not a fireball.

3.7 To ensure risk at KGS would remain ALARP, the inventory of the gasholders could be kept low in the summer cricket season, especially as local demand is largely domestic [LBL/3para6]. Electrical installations such as lighting and phone masts could also be removed in line with Home Office Guidance [LBL/3para20-21], whilst the built development itself should afford shelter and mitigation of societal risk to the increased population. With such measures there is no risk-based reason to refuse the Application.

Planning Obligations

The Agreement

3.8 LBL considers that a s106 agreement could overcome the safety concerns of HSE and therefore resolved to grant permission subject to the preparation of a Safety Management Plan [SMP] for evacuation of the proposed additional spectator seats and their non-occupation when the gasholders were not empty. LBL was in negotiation with SCCC for such an agreement when the Application was called in.

The Unilateral Undertaking

3.8 The current position, however, is that SCCC disagree that the latter provision is necessary, and contend that planning conditions could afford sufficient control. For this reason the unilateral undertaking submitted by SCCC excludes any reference to the matter and LBL comments as follows:

When resolving to grant permission for the proposed development subject to certain planning obligations, LBL also resolved that the SMP should: include a clause referring to safety management; cover issues relating to the height of the gas tanks; and deal with the need to vacate the new seats within the IZ.
On the safety management clause; the Deed provides for a SMP but refers to a draft Contingency Plan at Schedule 2. This is not the approved SMP. LBL approval would therefore need to be sought in due course.

On the height of the gas tanks; Rider A [appended to LBL1/2] contains a proposed definition of when the level of the gasholder is "down", based on comments of the gas operator, providing a clear enforceable obligation which should have been incorporated in the s106 agreement.

On the need to vacate the new seats; the evacuation provisions in the Deed fail to deal with the need to vacate the new seats when the gasholder is not in its "down" position and it is unclear how these provisions relate to seats within the

IZ. LBL propose Definitions of "gasholder" and "additional spectator seats" with an accompanying plan. These make clear that the obligation is to cover these requirements. Advance notification of the SMP to those purchasing tickets for the seats concerned should also be included [LBL1/2Rider Clauses 3.4-3.5; 4].

LBL does not support the unilateral Deed as it fails to comply with their resolution in the absence of Rider A. Permission should be granted only based on the Deed as amended in accordance with Rider A.

4. INSPECTOR'S CONCLUSIONS ON RESTRICTED PUBLIC SAFETY MATTERS

The Application called in for determination by the Secretary of State [SoS] is fully reviewed in the Main Report where these conclusions are taken into account.

Italic [square-bracketed] numbers are cross-references to other paragraphs in this Restricted Report from which these conclusions are drawn, and (round-bracketed) numbers refer to paragraphs in Section 3 of the Main Report.

PUBLIC SAFETY CONSIDERATIONS

4.1 The public safety considerations arising in connection with the proposed development at The Oval are essentially:

The approach the SoS should take in deciding the Application with reference to the risk of major accidents at Kennington Gasholder Station [KGS] as a material planning consideration, having regard to local and national policy, and to Health and Safety Executive [HSE] guidance and practice;

The nature and potential effects of such accidents as the basis for the HSE Advice Against and request for call-in of the Application, including with reference to the HSE land use planning [LUP] advice methodology, "Planning Advice for Developments near Hazardous Installations" [PADHI];

The level of risk that such an event might actually occur, on consideration of the evidence as to the credibility of that advice;

The material effectiveness of the completed Planning Obligations; and

Overall, the degree to which the SoS may judge that risk to be acceptable in its own right, or as part of the overall planning balance of the decision to be made.

APPROACH TO THE DECISION

Policy

4.2 There is superficial tension between UDP Policy 51, which favours increased spectator capacity at The Oval, and UDP Policy 54(g), which resists development if it would be at unacceptable risk from an accident at the nearby Kennington Gasholder Station [KGS]. However, the UDP is properly to be read as a whole. These two provisions are not at odds with each other in any event because Policy 54(g) provides for judgement as to whether or not any such risk would be unacceptable in practice. That is the very essence of the decision that the SoS is now called upon to make with respect to the consideration of public safety in this case. *[0, 0, 2.81, 3.1]*

Role of HSE - Estimation and Acceptability of Risk[24]

4.3 Before the Inquiry opened, I invited the three Rule 6 parties to make submissions on the appropriate legal or policy formula for deciding whether any

[24] See Main Report paras 3.10-13 for definitions of different Types of Risk and Different Types of Gasholder Fire.

given risk would be acceptable. It was confirmed by HSE, without dissent, that there is no statutory basis for determining the acceptability of risk, and no level of acceptable risk defined in policy or guidance [HSE/AJW/7]. It is a matter of planning judgement for the SoS whether the level of risk to occupants of the proposed development would be acceptable, having regard to the likelihood and severity of potential harm, balanced against any countervailing benefits. Risk is estimated in terms of chances per million per year [cpm/yr] of death. *[1.3, 1.5-8, 0, 0]*

4.4 The current framework of guidance for making that judgement has evolved over many years of experience and practice related to recorded hazardous events. Some of these are extremely well known, including the Flixborough and Buncefield accidents which gave rise to major inquiries and reviews of safety and risk assessment procedures. *[1.1, 1.15]*

4.5 Legislation relevant to the present case is contained in the European Seveso II Directive and in UK Government Circular 04/2000 [C4/00]. The Directive seeks to limit the consequences of potential accidents at major hazard installations [MHIs] such as KGS, including by the control of new development close to them, "irrespective of the presence of existing development". The aim is to reduce the number of people subject to risk greater than they would expect to encounter in everyday life. This aim is carried forward in C4/00 and implemented by HSE. The role of HSE is not only as a statutory body of Crown status and statutory planning consultee, but also as a source of expertise in risk assessment and management, acknowledged across Europe and beyond. *(3.3.6)[0-3, 1.10, 0]*

4.6 Recognising this expertise and status, para A5 of C4/00 provides that, in the determination of planning applications for sites near a MHI, Advice Against the development by HSE "should not be overridden without the most careful consideration". At the same time, paraA3-4 of C4/00 make clear that the role of HSE in relation to residual risk of an accident and hazard due to its consequences is merely advisory. *(3.3.7)[0, 0, 2.5]*

4.7 It is established that this role of HSE is discharged once it is satisfied that the local planning authority has acted in full understanding of its advice. Where this is in doubt, HSE reconsiders the proposal to decide whether to request the SoS to call in the Application, as in this case. At the Inquiry the call-in request by HSE was itself controversial. However, it now falls to the SoS to decide the Application in any event, based on the evidence as now presented. The reasons the Application was called in are not directly a matter for this Report. *(3.3.8)[0, 0-9]*

4.8 In general, HSE regards a risk as "tolerable", or "worth taking", where people are willing to live with it in order to secure certain benefits, in the confidence that the risk is being properly controlled. A Residual Risk [RR] of 1 chance per million [1cpm/yr] of death per year is regarded as tolerable provided the risk is reduced "As Low As Reasonably Practicable" [ALARP]. It has to be accepted that "operating ALARP" merely ensures that risk is limited within the scope of the lawful consent to operate the MHI, and that the RR to an existing population cannot be avoided. *[1.2-7, 0-10, 1.10]*

4.9 Consistent with the principle of the Seveso II Directive, HSE assesses the risk to a potential increased population due to a proposed development differently from its consideration of RR with operation with all risks ALARP. The central question becomes whether it is acceptable to increase the consequences of a major hazard by exposing additional people to the RR, in terms of Case Societal Risk [CSR]. HSE consultation distances [CDs] are set to represent a risk of over 10cpm/yr of death in the Inner Zone [IZ], 1 to 10cpm/yr of death in the Middle Zone [MZ] and 0.3 to 1cpm/yr of death in the Outer Zone [OZ]. *(3.3.9)[1.81.8-14]*

4.10 Under the Protection Concept, HSE derives a Cautious Best Estimate [CBE] of the risk from a Representative Worst Case Major Accident [RWCMA] and its consequences as a basis for LUP advice. This is applied through its PADHI methodology, erring on the side of overestimation of frequency of occurrence of RWCMA where justification is difficult. Frequency is estimated in terms of chances per million per year [cpm/yr] of occurrence. This approach is well established and widely accepted, including in the case of Mere Tank Farm, decided by the SoS. *[0-16]*

4.11 Whilst HSE advice is given irrespective of the presence of existing development, PADHI makes clear, in its Rule 4(c), that this is a factor, now for the SoS, to take into account. SCCC submit that under a former version of Rule (c) the PADHI methodology would not have resulted in Advice Against the Application because of the existence of the present grandstands. However, it is the present Rule 4(c), as modified in 2008, which applies to this case and to which these conclusions hereafter refer.

4.12 It is noted that the Buncefield Major Incident Investigation Board [BMIIB], in its report, favoured a range of potential changes to the LUP advice system, including the consideration of Local Societal Risk [LSR] and a preference for site specific Quantitative Risk Assessment [QRA]. However, despite an indication of Government acceptance of these recommendations, the currently established system of risk assessment and LUP advice remains the Protection-based PADHI methodology, albeit it is recognised as being constraining in some respects. *[1.15, 0, 0, 10-69, 2.75, 2.82]*

Conclusion on Approach

4.13 The proceedings of HSE in relation to the emergence of risk assessment and LUP guidance are subject only to internal peer review and it is a fair criticism by SCCC that this process lacks the full transparency of an independent audit. Furthermore, it is clear that potential improvements to the system are already envisaged, particularly in response to the Buncefield MIIB recommendations. *[2.3]*

4.14 Therefore, notwithstanding the acknowledged high status of HSE as a source of expertise, the HSE Advice Against the proposal should be reviewed and tested in the light of the SCCC challenge to its credibility. That should include reference to the QRA submitted by SCCC as part of the Inquiry evidence [SCCC/DMD/1App5] as well as any other material factors. The level of individual risk [IR] to the occupants of the Application site, with the proposed development in place, can then be re-assessed.

4.15 Finally, the HSE advice having thus been afforded the requisite most careful consideration, any increase in Case Societal Risk [CSR] due to the larger number of people affected can be judged under the test of acceptability set by UDP Policy 54(g), and weighed in the overall balance of planning considerations, including the presence of existing development.

4.16 That is the approach I take in these conclusions, and in the Main Report, and it is the approach I commend to the SoS. *[1.16, 2.10, 2.74-76]*

REVIEW OF THE HSE ADVICE

Introduction

4.17 The background and details of the HSE Advice Against the Application are set out above in the case of HSE and in its listed documentation. There is no challenge to HSE on the calculation of Consultation Distances [CDs] or siting of the Consultation Zones [CZs] as based on the assumed RWCMA, or to the application of the PADHI methodology, including the selection of Sensitivity Levels [SLs], provided an appropriate RWCMA has been assumed. The HSE Advice is therefore only reviewed here in brief summary, as a starting point for the crucial assessment that follows under the heading of Credibility.

4.18 In short, it is appropriate to conclude that, if HSE is right about the RWCMA and its frequency and effects, then its Advice Against the Application is not to be questioned. The challenge to the credibility of the HSE advice is made in terms of whether the RWCMA was properly identified in the first place, and whether its frequency and effects have been appropriately estimated. It is also necessary to consider the effects of other potential hazards, and in particular a water seal failure fire.

Consultation Zones and PADHI Result

4.19 On the HSE assumption, an initially grounded fireball due to ignition of 50% of the inventory of Gasholder No 1 at KGS [GH1] could follow decouplement of a lift or catastrophic failure of the crown. This is the basis of the Consultation Distances [CDs], as calculated from the centre of GH1. These are 120m for the IZ, equivalent to a dangerous dose of 1800 thermal dose units [tdu] or the fireball radius; 270m or 1000tdu for the MZ; and 360m or 500tdu for the OZ. The IZ and MZ encompass a substantial proportion of the Application site, such that some 340 of the 1830 additional spectators would be at serious risk of death in the event of the RWCMA. Based on these CZs, the 1830 additional spectators alone justify PADHI Level of Sensitivity 4 [SL4], quite apart from the existing capacity of the grandstands to be replaced. The PADHI result is therefore clear Advice Against the Application – in the words of the HSE advocate – "as bad as it gets".

4.20 HSE estimates the frequency of such an event as 10cpm/yr, whereby it justifies its use as the RWCMA, even though the resultant risk of 10cpm/yr of death to people in the related IZ is accepted by HSE to be of a very low order.

4.21 Turning to the alternative consideration of a water seal failure fire; according to HSE, such an event could also subject a substantial number of spectators to a dangerous dose of harm, and the frequency of this occurrence is estimated in the order of 100cpm/yr, reinforcing the Advice Against result. This result is

further borne out by the calculated Scaled Risk Integral [SRI] of 15,000,000 compared with the 750,000 by which the exposed population is considered substantial. *[1.8, 0-41, 0]*

CREDIBILITY OF THE HSE ADVICE

50% Fireball – Mechanism – Ignition – Modelling - Consequences

4.22 There is robust evidence that gasholder failures by lift decouplement, crown failure and seal fire cannot be ruled out, with potential for ignition. *[1.57-62]*

4.23 Such occurrences are recorded, including as recently as 1979, after modern safety features were introduced. Accepting that past events cannot be fully explained on available information, and therefore that future events cannot be predicted with any certainty, on a CBE basis major escape of 50% of the gas inventory with potential for ignition exists *[0-64]*.

4.24 Taking into account the 1979 incident and the 2008 Dartford escape, there is no clear evidence that improvements to gasholders and their safety regime have led to any reduction in accident rate. That is despite a manifold reduction in the number of commissioned gasholders and given that the basically simple gasholder engineering has not fundamentally altered in a century. These factors also have implications for the claim of SCCC in its QRA that a lower event frequency is statistically probable due to the occurrence of a greater number of accidents in the more distant past. *[1.58, 0, 0, 2.20, 2.71]*

4.25 Predictions of the crucial ignition probability vary widely from 10% to 50% with the current KGS operator favouring 30%. HSE takes 50% as represented by 3 ignition events out of 6 events in total recorded in gasholder history to 2005, since when further events would indicate an increase to about 5 out of 9, or 55%. These are hardly statistically significant numbers but they are the only data available. In the circumstances the pragmatic position of HSE, to retain the 50% value at the upper end of the range, appears to be a reasonable CBE compared with the value assumed in the QRA submitted by SCCC, taking both inherent and external potential ignition sources into account. This consideration casts further doubt over the frequency claims in the QRA on which SCCC rely. *[0-66, 2.53, 2.71]*

4.26 The question of whether the most dangerous fireball outcome would occur, and how its effects should be modelled, is the single most controversial question that goes to the heart of the matter because it relates to the initial siting policy for CZs. Historic records are few and vague as to whether a true fireball has ever really occurred; but in all the volume of evidence now before the SoS there is nothing to rule it out. On a CBE, it is therefore necessary to model this occurrence as a credible RWCMA and only then to consider its likely frequency. *[0-68, 0-48, 0]*

4.27 Available predictive models are regarded as conservative and do not relate directly to flammable gas but to heavier material such as LPG where the assumption is made that the fireball will be grounded for the initial part of its brief life. However to compensate, HSE adopts a reduced Surface Emissive Power [SEP] value in calculating the fireball radius and then take that as the Inner CD instead of the higher 1800tdu contour normally assumed. Again on a

CBE basis, this seems reasonable on balance, given the catastrophic consequences to anyone caught in the fireball on the tiny chance that an accident equivalent to the RWCMA might actually happen. *[1.8, 0-37, 0-74, 0-50, 2.73]*

Frequency

4.28 With the foregoing doubts cast over the results of the QRA regarding fireball ignition and accident distribution over time, there is no reliable evidence to question the HSE calculation of event frequency of the 50% fireball. That assumes that the small number of historic events that underlie the prediction were indeed fireballs with causes that could be replicated in the present day conditions. This inherent uncertainty means that the SCCC, or any, QRA prediction must be viewed with extreme caution, if not suspicion. There is no evidence of other work as rigorous as that of HSE to disprove its results of 10cpm/yr likelihood of the RWCMA, notably lower than the 16cpm/yr that was independently calculated for the draft COMAH report. *[1.15-18, 0-53, 0-73]*

4.29 On any perception though, notwithstanding the careful research behind both these figures, the historic occurrence of a true fireball must be in doubt, especially given that contemporary accounts are not without contradiction and sensationalism. LBL notes that little loss of life is recorded, although that would always depend on the number of people actually present at the time. It is reasonable to conclude that HSE is justified in keeping to their adopted RWCMA of a 50% fireball, but that the actual event frequency is very likely to be substantially lower than 10cpm/yr. Thus, while there is no ground to dismiss the CZs or the PADHI advice based upon them, this is a factor to be borne in mind, albeit as part of a most careful consideration of that advice. *[0-71, 3.5]*

Other Events

4.30 There is evidence of a higher chance of around 100cpm/yr that a less dangerous, but still serious, water seal failure fire could occur and this lends some weight to the case for the Advice Against the Application. *[0-56, 0-77, 0-63]*

Additional Factors of Credibility

4.30 Certain factors are claimed in mitigation of the safety risk:

Flying Lift

The fourth flying lift of GH1 has been disenabled for some twenty years as a precaution against high winds. While this situation continues, the gas inventory and thus the potential extent of a fireball incident are reduced and the likelihood of decouplement is less, due to the full lateral restraint of the upper lift. HSE advice must be based on the full permitted gas inventory of the site, however, and the operator is entitled to reinstate the operation of the top lift. There is no indication that this latter right would be foregone. The SoS cannot therefore safely proceed on the basis that the flying lift will never be used and so no quantitative downward adjustment of the calculated risk is justified. At best this factor provides a degree of current reassurance. *[1.83-85, 0]*

Occupancy

The Oval is subject to a relatively low level of occupancy, being full to capacity on only 10-15 Test or other major match days a year. This would have no effect on the Individual Risk on any given day but would reduce the potential harm overall and again provide a degree of reassurance. *[2.12, 2.56]*

Seasonal Use

The use of The Oval is largely seasonal, with cricket in the summer and currently only limited other uses at other times of the year, although the proposed hotel would be an all-year-round use. During summer the gasholders tend to be operated below full capacity and remain in their deflated or "down" position, reducing the likelihood and extent of a major accident. There is an informal agreement that the operator avoids filling GH1 during Oval fixtures. Again, however, HSE advice must be based on the full inventory of GH1 and attempts to formalise this agreement have failed. There is no evidence that HSE could practically implement any statutory power to force limitation in the use of the gasholders for this purpose. Again therefore, no assumption can be made. This factor provides a further degree of reassurance but no adjustment of calculated risk level to exposed spectators is justified.

During summer, there is an historically lower accident rate at gasholders. Accidents due to excessive wind-loading or snow-loading are unlikely, as are incidents of gas escapes due to frozen water seals. Ignition sources are likely to be fewer. Any effect on summer risk level for these reasons cannot readily be quantified but this is a material factor that stands to be taken into account. *[1.85-88, 0-4, 0]*

The proposed grandstand might afford a degree of incidental screening protection from a fire at KGS but the building is not designed to withstand that risk as SCCC considered it incredible. Moreover, there would be extensive upper areas of the building exposed to a direct line of sight toward the gasholders, such that many new occupants would be in danger from an ignition event. On balance the screening effect of the building should be regarded as negligible on the available evidence. *[1.31, 1.86-99, 0]*

HSE Powers

Finally, SCCC point to the statutory power of HSE to force the closure of KGS if it were not operated with all risks ALARP. That situation is also related to current Residual Risk and there is no evidence that it is a realistic way to approach the mitigation of risk to the proposed development. *[2.19]*

4.32 In summary, the lower likelihood of summer accidents is a material consideration and there is a degree of current reassurance that the risk from KGS is reduced in relation to the unused, uppermost lift of GH1, the low occupancy of the Oval and the seasonal use of the exposed areas of the grandstand.

Witness Expertise

4.33 The SCCC safety witness never swayed in the conviction that the HSE case is excessively cautious, claiming support from the separately produced QRA. However, certain inaccurate assumptions were made and much of the technical

evidence supporting that conviction was withdrawn at the Inquiry. This left a case comprised largely of questioning aspects of HSE documentation and practice with little offered in the way of a justified alternative. In many ways the SCCC case erred on the side of best estimate or even optimism in some areas, rather than the requisite cautious best estimate. The written evidence of the LBL safety witness never claimed to go further than a review of SCCC evidence. The HSE witnesses also showed some reluctance or inability to answer openly and consistently apparently straightforward questions on their mass of submitted documentation.

4.34 In deciding this Application, with its wider implications for the public safety regime nationally, the SoS has to consider two irreconcilable views on technical matters that are difficult to assess. In the circumstances, the quality of expert evidence and the degree to which judgements are supported by scientific fact assumes particular importance.

4.35 Overall, it has to be borne in mind that the combined expertise of HSE, evolved over many years via internal peer review, is widely acclaimed and afforded particular national status by C4/00. This expertise underlay the evidence given by the HSE witnesses in this case, all of whom claim personal experience in the relevant field of safety. Where challenge to this evidence is not well supported by technical evidence or proven superior expertise, the HSE evidence should continue to be accorded due weight. *[0-55, 0-39]*

Conclusion on Credibility of HSE Advice

4.36 Taking into account the expertise of HSE, the RWCMA is credible and the PADHI advice based upon it justified. That is subject to the reservation that the risk of death derived from the frequency of the RWCMA of a 50% fireball is likely to be less in practice than the calculated 10cpm/yr and bearing in mind that the likelihood of accidents during the summer cricket season is lower. There is a degree of current reassurance that the risk from KGS is reduced in relation to the unused, uppermost lift of GH1 and the low occupancy and seasonal use of the exposed areas of the proposed grandstand.

PLANNING OBLIGATIONS

The Agreement

4.37 The submitted s106 agreement does not relate to the matters considered here and is discussed in the Main Report.

The Unilateral Undertaking

4.38 Turning to the unilateral undertaking by SCCC that provides for the Safety Management Plan; HSE is right that this is merely an operational safety plan for the Ground without specific reference to the risks from the nearby KGS that led to its Advice Against the development and ultimately to the call-in of the Application. The late intervention of LBL, seeking the addition of a Rider to impose restrictions on the occupation of the proposed spectator seats at risk, is understandable, given its long-held position that the additional societal risk at the development should be addressed by management measures at the KGS or within the Oval itself.

4.39 In practice, I do not consider that the measures put forward in the proposed Rider are realistic or practical from an operational point of view. The idea of keeping vacant or even evacuating only a portion of the seats in the new grandstand would be unlikely to be accepted seriously by the paying public and would be hard to enforce. It would be for the SoS to consider whether to seek execution of the Rider as proposed. On the evidence and documentation before the Inquiry, SCCC show no inclination to comply with the request to add the Rider to the undertaking. In the circumstances, the undertaking has to be considered in its present form and therefore carries no material weight in relation to safety at KGS. *[0-82, 0, 0]*

OVERALL ACCEPTABILITY OF THE RISK

4.40 It is evident that PADHI Advice Against the Application is justified on a cautious best estimate and that if the proposed development were set in a location where no development currently exists it should not be allowed.

4.41 In this case however, it is now for the SoS, in weighing up the HSE advice, to consider, under PADHI Rule 4c, the existing use of the site.

4.42 The Individual Risk to new spectators would remain at its present level. However, there would be an increase in Case Societal Risk by way of introducing 1830 additional people into the area. Some 340 of them, including in the exposed parts of the proposed grandstand, would almost certainly be killed if the RWCMA of a 50% fireball actually occurred with the grandstand fully occupied. The judgement to be made is whether that risk is worth taking on balance, or acceptable in terms of UDP Policy 54(g).

4.43 The risk due to such an event occurring is miniscule and it is already tolerated by a dense local population, accepting that KGS is operated with all risks ALARP. The increase of 1830 in the number of people affected is to be compared with the number of over 4300 already accommodated in the existing stands on the Application site.

4.44 Moreover, the justification for the PADHI Advice Against result is subject to the reservation that the frequency of the RWCMA of a 50% fireball is likely to be less in practice than the calculated 10cpm/yr.

4.45 Furthermore the lower likelihood of accidents during the summer cricket season is to be taken into account as a material factor, and there is a degree of current reassurance that the risk from KGS is reduced in relation to the unused, uppermost lift of GH1 and the low occupancy and seasonal use of the proposed grandstand.

4.46 On the other hand, there is potential to re-site the proposed development within The Oval but further from KGS or to re-design the buildings better to resist any risk from KGS. No such proposal is currently before the SoS for consideration.

4.47 Finally the unilateral planning obligation, as submitted, and proposed Safety Management Plan carry no weight with respect to the safety of the KGS.

4.48 These conclusions on the Restricted part of the evidence are carried forward to be taken into account as part of the Overall Planning Balance of the Application as a whole, in the Main Report.

Annex B: Example Section 321 Direction

Department for Levelling Up,
Housing & Communities

Section 321 (3) Direction in respect of an Inquiry into planning application 17/00468/FUL (Demolition of Pavilions clubhouse followed by development comprising 139 dwellings with associated ancillary development at The Pavilions, Sandy Lane, Runcorn, WA7 4EX)

1. The Secretary of State for Levelling Up, Housing and Communities has considered the request by the Health and Safety Executive for a direction under section 321 (3) Town and Country Planning Act 1990 relating to certain evidence relevant to the above application.
2. The Secretary of State has considered the information submitted by the Health and Safety Executive and the representations made in response to the publication of the notice in the Widnes and Runcorn Weekly Gazette on 12 August 2021 and communicated to relevant parties.
3. The Secretary of State is satisfied that, in the case of the inquiry to be held into this application under section 320 (1) of the 1990 Act, the giving of evidence of a particular description or making it available for inspection would be likely to result in the disclosure of information as to matters of national security or the measures taken or to be taken to ensure the security of premises or property; and that the public disclosure of that information would be contrary to the national interest.
4. Accordingly, in the exercise of the powers conferred on him by section 321 (3) of the 1990 Act, the Secretary of State hereby directs certain proofs of evidence, summaries and appendices of the persons listed in Schedule 1, where they deal with the matters set out in paragraph 3 above, shall only be heard and open to inspection by the persons listed in Schedule 2.

27 October 2021

Schedule 1

The proofs of evidence, summaries, appendices and written submissions of the following shall only be heard and open to inspection by the persons listed in Schedule 2:

HSE

names	Head of Land Use Planning Advice Team, HSE
	Principal Specialist Inspector Risk Assessment, HSE
	Principal Specialist Inspector, Risk Assessment, HSE

XXX Chambers

Halton Borough Council

names Director of Operation, Policy, Planning and Transport

Area Planning Officer

XXX Consulting

XXXXX Chambers

Schedule 2

Planning Inspectorate (PINS)

names Inspector
Inquiries Team

PINS

Professional Lead, Planning Appeals

HSE

names Head of Land Use Planning Advice Team, HSE

Principal Specialist Inspector Risk Assessment, HSE

Principal Specialist Inspector, Risk Assessment, HSE

Head of Major Hazards Risk Assessment Unit, HSE

Deputy Director, Head of Enforcement and Legal HSE

No,5 Chambers

Government Legal Department

Government Legal Department

Government Legal Department

Government Legal Department

Government Legal Department

Government Legal Department

Government Legal Department

Applicant n/a

Halton Borough Council

names

Director of Operation, Policy, Planning and Transport
Area Planning Officer

XXXX Consulting

XXX Chambers

Halton BC – technical team

Planning Manager
Senior Engineer

DLUHC

Secretary of State

Minister of State for Housing

Minister for Rough Sleeping and Housing

Minister for Building Safety and Fire

names

Chief Planner
Head of Planning Casework Unit

Planning Casework Unit

Planning Casework Unit

Planning Casework Unit

DLUHC Legal

DLUHC Legal

Policy advisor - EIA, SEA & Hazardous Substances

Annex C: Example Pre-Inquiry Correspondence

The Planning Inspectorate

CALLED IN APPLICATION REF:
APP/D0650/V/21/3274427
Sandy Lane Runcorn, Halton

FURTHER AMENDED SUMMARY AND DIRECTIONS
FOLLOWING RETURN TO VIRTUAL EVENTS
Amendments in blue text are for particular attention

Notes

This further update follows the decision to conduct all events virtually in response to current Government precautions regarding the Omicron variant of the Covid19 virus.

It has now been established that the Inquiry may proceed virtually including the required closed sessions. This update aims to cover all procedural matters raised to date and any delay in response is regretted.

All parties are respectfully asked and encouraged, in the spirit of the Rosewell recommendations for the efficient conduct of Inquiries, to co-operate with the Inspectorate, the Inspector and with each other to achieve an efficient and fair hearing of all points of view by way of open and closed virtual sessions, which are now accepted practice.

Introduction

1. The Virtual Inquiry is set down to open at 10.00 am on Tuesday 11 January 2022 and is expected to run for up to eight sitting days.

2. The appointed Inspector is xxxxxxxxxxx.

3. The Council will provide a person to act as Inquiry Administrator to co-ordinate appearances and documentation for the Inquiry.

Issues

4. The anticipated main issues in this case are:

    a. Principle – whether the proposed development is consistent with the development plan for the area (*SoS call-in matter*),
    b. Whether the proposed development is consistent with Government policies for Promoting Healthy and Safe Communities (NPPF Chapter No 8); in particular relating to paragraph 97 (previously 95*)* (*SoS call-in matter*),
    c. Sandy Lane Access, Traffic Management and Highway Safety,
    d. Amenity - Flood Risk, Noise, Air Quality,
    e. Loss of Playing Fields and Open Space, and
    f. Biodiversity including bats

Section 321 Direction and Virtual Open and Closed Sessions

5. Evidence relating to the nearby Chemicals Complex under Issue b above is classed '**official sensitive**' and is the subject of a Direction under Section 321 of the Act to be heard in private.

6. Official Sensitive (OS) Written Evidence is confined to a restricted Sharepoint site to which all parties scheduled in the s321 Direction have an electronic link.

7. It is a legal requirement for those individuals to ensure that no OS documents or oral evidence are seen or shared with any person not on the s321 schedule. This applies at all times and in particular during closed virtual sessions of the Inquiry when only such authorised persons may be in the same room.

8. The normal default assumption is that the Council will host the Inquiry, whether conventional or virtual. In this unusual case requiring closed sessions the Inspectorate IT team are at the disposal of the Council to advise on the effective and safe provision of virtual facilities if required. Contact is encouraged and can be made via the Case Officer regarding all aspects of hosting the virtual event. Arrangements and Joining Instructions for the Virtual Inquiry sessions will be provided separately.

9. The Council is asked if possible to notify the identity of any interested persons known to require participation in the Virtual Inquiry, especially any who may request representation by a special advocate for the closed sessions.

Dealing with the Evidence

10. The **Council** proposes to call witnesses on:
    Risk and Safety (Issue b)
    Planning
    Highways
    Noise (or by written statement as appropriate)

11. The **HSE (Rule 6)** proposes to call witnesses on:
    Risk and Safety (Issue b)
    Only

11a. **Viridor (Rule 6)** propose to call witnesses on:
    Noise
    Air Quality
    Planning

12. The **Applicant Company, X X XXXXXXX**, proposes to call no witnesses, save in relation to discussion regarding planning obligations and conditions.

13. The Inquiry will open as usual with brief opening statements and any necessary legal submissions.

14. **Issues c-f** will be addressed in topic-based **open sessions**, supported by the submitted proofs and statements of common ground (SoCG) where appropriate. These sessions will be in round table discussion format but cross-examination of specific proofs on noise and air quality will be allowed where requested and appropriate.

15. **Issues a-b** will be addressed by way of cross-examination, in **closed session** for risk and safety matters relating to the Chemicals Complex.

Conditions

16. A final schedule of suggested planning conditions, agreed as far as possible between the main parties, with the reasons for them, including references to any policy support, must be submitted at the same time as any rebuttals. The conditions must be properly justified having regard to the tests for conditions, in particular the test of necessity. Any pre-commencement conditions will need the written agreement of the Applicants. Any difference in view on the suggested conditions, including suggested wording, should be highlighted in the schedule with a brief explanation given.

Planning Obligation

17. The planning obligation should be submitted in executed form before the Inquiry and in any event a latest draft must be available in conjunction with proofs and if further updated at opening and the deed must be finalised before the close, together with a Community Infrastructure Levy (CIL) Compliance Statement from the Council.

Documents including Official Sensitive material

18. The Council will maintain a document library via its website.

19. All documents have or will be submitted to the Inspectorate electronically.

20. '**Official sensitive**' proofs and documents relating to Risk and Safety of the Chemical Complex are held in a dedicated Sharepoint file with access provided only to persons named in the s321 Direction.

21. **Any further 'official sensitive' documents submitted must be encrypted and marked 'official sensitive' in the file name and in the heading of any covering email and on each page of the documents themselves, either within the header or by 'watermark'.**

22. **Any further proofs and rebuttal proofs must be submitted before 19 December 2021**.

Inquiry Programme

23. Virtual sessions will generally run from 10.00am to about 4.00pm but with some flexibility to suit the evidence and prevailing circumstances.

24. A programme is provided alongside these Directions and more detailed round table discussion Agendas will follow no later than 5 January 2022. The delay from the original issue date for the Programme and Agendas is regretted but it stems from the recent decision to conduct all events virtually and to accept certain further documents.

25. Following the formal opening of the Inquiry, brief opening statements will be invited from the main parties in the order: Council, HSE, Viridor, Applicants. (***with transcripts provided via the Case Officer***)

26. The Inquiry will then hear from any interested persons who do not wish to join later open topic discussions but the arrangements for this are necessarily flexible.

27. This will be followed by topic-based sessions on issues c-f as well as planning obligations and conditions as appropriate.

28. Next, there will be closed sessions by cross-examination on risk and safety matters and finally cross-examination as necessary on planning issues in closed or open session according to content.

29. In conclusion, closed and then open final submissions will be heard in the reverse order: Viridor, HSE, Applicants, Council (***with transcripts provided***).

30. It was initially anticipated that evidence could be complete in the first week 11-14 January with any outstanding matters and closing submissions on Tuesday 18 January 2022. Virtual sessions tend to be shorter than the usual 6 hours to avoid fatigue and to allow for delays relating to such as interruptions to connectivity – a fair hearing is the overriding concern. More time may be spent on Noise and Air Quality than originally thought, including by cross examination. Therefore, the Programme has been extended to Thursday 20 January 2022 with a reserve day on Friday 20 January.

Costs

31. There is no current indication of any claims for costs.

Site Visits

32. Accompanied site visits to the Chemicals Complex and the Viridor recycling facility are subject to separate arrangements.

33. **Any questions or concerns regarding these amended directions must be raised with Case Officer immediately**.

XXXXXXX
Inspector

15 December 2021

The Planning Inspectorate

CALLED IN APPLICATION REF:
APP/D0650/V/21/3274427
Sandy Lane Runcorn, Halton

INQUIRY PROGRAMME

Notes

1. Please read this document in conjunction with the Further Update of the CMC Directions of even date.

2. The Programme below is necessarily flexible and may be adjusted – extended or compressed - according to circumstances as the Inquiry proceeds.

3. It is anticipated that active participation in the individual topic sessions will be primarily by the respective witnesses for the topics concerned together with their advocates, including the Rule 6 Parties and any unrepresented persons who have a particular related concern. Otherwise, interested persons will be heard separately, taking account of the efficient use of time, convenience and personal circumstances.

4. It is now agreed that the entire Proceedings will take place virtually. This will involve shorter sitting days than a conventional Inquiry.

5. Broadly, for each topic, the Council witness will be invited to speak first on each item, then the Appellant witness and then Rule 6 Parties witnesses and any interested persons.

6. In round table discussions there will be opportunity to emphasize main points of dispute and importance and to ask questions of opposing witnesses but no formal cross-examination. However, advocates may join the discussion as appropriate. It will not be necessary to read out or repeat substantial passages of the submitted proofs, as all written evidence will be taken into account.

PROGRAMME

Day 1 **Tuesday 11 January 2022**
10am – Open Session
1
General Opening Submissions *(unrestricted matters)*
2
Principle
3
Access and Highways
4
Loss of Playing Fields
5
Biodiversity
6
Planning Obligation and Conditions

Day 2 **Wednesday 12 January 2022**
10.00am – Open Session
1
Amenity
1a
Flood Risk
1b
Noise – including cross examination as appropriate
1c
Air Quality – including cross examination as appropriate

Day 3 **Thursday 13 January 2022**
10.00am – CLOSED SESSION - Cross Examination
Participants: Council and HSE persons named in s321 Direction only
1
Opening submissions on Official Sensitive Evidence
2
Safety of Chemicals Complex

Day 4 **Friday 14 January 2022**
10.00am – CLOSED SESSION - Cross Examination
Participants: Council and HSE persons named in s321 Direction only
1
Safety of Chemicals Complex *- continued*

Day 5 **Tuesday 18 January 2022**
10.00am – CLOSED SESSION - Cross Examination
Participants: Council and HSE persons named in s321 Direction only
1
Safety of Chemicals Complex *– continued as required*
2
Closing Submissions on Official Sensitive Evidence

Day 6 **Wednesday 19 January 2022**
10.00am - Open Session
1
Planning
by cross examination
2
Any other matters

Day 7 **Thursday 20 January 2022**
10.00am - Open Session
1
Closing Submissions from Open Sessions
In order: Viridor, HSE, Council, Appellants

Day 8 **Friday 21 January 2022**
Reserved for overrun

XXXXXX
Inspector

15 December 2021

Annex D: Example of a decision involving an upper tier COMAH case without a s321 direction

The Planning Inspectorate

Appeal Decisions

Inquiry Opened on 26 November 2019

Site visit made on 26 November 2019

by XXXXX XXXXX BA(Hons) MCD MA LLM MRTPI

an Inspector appointed by the Secretary of State

Decision date: 12 March 2020

Appeal Ref: APP/A0665/C/18/3206873 (the EN1 appeal)
Land at Thornton Science Park (Building Numbers 38, 48, 58, 62, 304 and 305), Pool Lane, Ince, Chester CH2 4NU

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
- The appeal is made by University of Chester against an enforcement notice issued by Cheshire West & Chester Council.
- The enforcement notice, numbered 18/00459/EMCOU, was issued on 13 June 2018 (EN1).
- The breach of planning control as alleged in the notice is: Without planning permission change of use of the Land to a university faculty within Use Class D1 of the Town and Country Planning (Use Classes) Order, 1987 (as amended) ["the Unauthorised Development"].
- The requirements of the notice are: Cease the use of the Land as a university faculty for further education teaching, research and related activities within use class D1 of the Town and Country Planning (Use Classes) Order, 1987 (as amended).
- The time for compliance with the requirements is by 30 September 2018.
- The appeal was made on the grounds set out in section 174(2) (a), (b), (c), (f) and (g) of the Town and Country Planning Act 1990 as amended. Since an appeal has been brought on ground (a) an application for planning permission is deemed to have been made under section 177(5) of the Act as amended.

Summary of Decision: **The enforcement notice is quashed and no further action is taken on the appeal**.

Appeal Ref: APP/A0665/C/19/3232583 (the EN2 appeal)
Land at Thornton Science Park, Pool Lane, Ince, Chester CH2 4NU

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
- The appeal is made by University of Chester against an enforcement notice issued by Cheshire West & Chester Council.
- The breach of planning control as alleged in the notice is:
  Without planning permission the material change of the use of the Land **from** a mixed use for research and development (in connection with automotive/petrochemical/aviation/environmental and energy industries), laboratories, office use, and industrial use (engineering workshops and blending plant) **to** a mixed use comprising a University science and engineering faculty providing undergraduate and postgraduate education, together with use for research and development (in

connection with automotive/petrochemical/aviation/environmental and energy industries), laboratories, office use and industrial use (engineering workshops and blending plant) ("the Unauthorised Development").

- The requirements of the notice are: Cease that element of the use of the Land as a University science and engineering faculty providing undergraduate and postgraduate education.
- The period for compliance with the requirements is within 6 calendar months from the date the notice takes effect.
- The appeal was made on the grounds set out in section 174(2) (a), (b), (c), (d), (f) and (g) of the Town and Country Planning Act 1990 as amended. Since an appeal has been brought on ground (a) an application for planning permission is deemed to have been made under section 177(5) of the Act as amended.

Summary of Decision: The appeal is dismissed and the enforcement notice is upheld with corrections and variations.

Appeal Ref: APP/A0665/X/19/3227520 (the LDC appeal) Land at Thornton Science Park, Pool Lane, Ince, Chester CH2 4NU

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 against a refusal in part to grant a certificate of lawful use or development (LDC).
- The appeal is made by University of Chester against the decision of Cheshire West & Chester Council.
- The application (Ref. 18/04182/LDC), dated 15 October 2018, was refused in part by the Council by notice dated 28 February 2019.
- The application was made under section 191(1)(a) of the Town and Country Planning Act 1990 as amended.
- The use for which a certificate of lawful use or development was sought is a sui generis mixed use, including elements of research and development, laboratory, teaching, workplace training, and including ancillary facilities such as offices and restaurant.

Summary of Decision: The appeal is allowed only in so far as the certificate granted by the Council is modified.

Appeal Ref: APP/A0665/W/18/3206746 (the section 78 appeal) Buildings 38, 40, 58, 62, 304 and 305, Thornton Science Park, Pool Lane, Ince, Chester CH2 4NU

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission.
- The appeal is made by University of Chester against the decision of Cheshire West & Chester Council.
- The application Ref 17/05138/FUL, dated 30 November 2017, was refused by notice dated 6 June 2018.
- The development proposed, as described on the planning application form, is Application for the change of use of buildings 38, 40, 58, 62, 304 and 305 at Thornton Science Park to continue to accommodate the University of Chester Faculty of Science and Engineering as an integral part of the Science Park.

Summary of Decision: The appeal is dismissed.

PRELIMINARY MATTERS

The Inquiry

1. The inquiry into all four appeals sat for ten days on 26 to 29 November, 3 to 5 and 10 and 11 December 2019 and 8 January 2020. The Health and Safety Executive (HSE) and Essar Oil (UK) Limited (Essar) were granted Rule 6 status.

2. An accompanied site visit took place on the afternoon of 26 November to Stanlow Oil Refinery and Thornton Science Park.

3. In week one of the inquiry the cases of the appellant, the Council and Essar were presented on the legal grounds of appeal against the two enforcement notices and the LDC appeal. In weeks two and three all parties, including the HSE, presented their respective cases on the ground (a) appeals/deemed planning applications, the ground (g) appeals and the section 78 appeal. The final sitting day was primarily taken up with closing submissions on behalf of all four parties. The only round table discussion was in relation to planning conditions.

Application for costs

4. An application for costs was made by the Council against the appellant and by the HSE against the appellant. These applications will be the subject of separate Decisions. The costs application by the Appellant was withdrawn.

The Appeals

5. Shell used to own Stanlow Oil Refinery and the land now known as Thornton Science Park (TSP). In 2011 the oil refinery was sold to Essar Oil (UK) Limited. The University of Chester acquired TSP on 31 March 2014.

6. The TSP is a roughly triangular shaped area of land of some 26 hectares (ha)[1], with a number of buildings in a fairly formal layout around a central open space and a network of access roads.

7. Over the period leading up to and during the inquiry, I sought clarification on the descriptions of the alleged breaches of planning control, the grounds of appeal against the enforcement notices, the use considered lawful, the description of the proposal in the section 78 appeal and the related plans. Additional information was requested in respect of heritage assets and the Mersey Estuary Special Protection Area (SPA) / Ramsar site.

The Enforcement Notices

Grounds of appeal

8. The appellant withdrew grounds (b) and (f) in the EN1 appeal and grounds (b), (d) and (f) in the EN2 appeal[2]. Confirmation of the position on the ground (d) appeal was made in the appellant's opening submissions to the inquiry. The ground (f) appeals were withdrawn by letter dated 17 December 2019. Consequently, it was understood that the appeals against the enforcement notices are proceeding on grounds (c), (a) and (g). However, at the end of the inquiry the appellant submitted that EN1 is invalid, because it does not

[1] CD15.1 paragraph 2.7
[2] CD6.16 confirmed ground (b) was withdrawn in the EN2 appeal

9. relate to the single planning unit at the TSP, serves no useful purpose and

should be quashed. In addition, the ground (b) appeal was maintained

because the appellant submitted that there has not and never has been any independent principal office use at TSP and therefore the Council's conclusion on the matter was disputed[3].

Proposed corrections EN1

10. The notice is clearly directed at the buildings outlined in red on the plan attached to the notice. I agreed with all parties that the description of the Land in the notice should be corrected to read "Building numbers 38, 40, 58, 62, 304 and 305 Thornton Science Park, Pool Lane, Ince, Chester CH2 4U, as shown in red on the attached plan ["the Land"].

11. The Council requested that the alleged breach of planning control be corrected to "Without planning permission, a material change of use of building numbers 38, 40, 58, 62, 304 and 305 to accommodate the University of Chester Faculty of Science and Engineering for the purposes of teaching, training and research as an integral part of the Science Park." This wording was considered to better reflect the description of the development subject to the section 78 appeal.

12. In my view it is not necessarily a good reason to correct the description of an alleged breach of planning control to accord with a description of a development in a planning application. The two developments need not necessarily be the same. In this case the notice was authorised and then issued shortly after the refusal of planning permission in June 2018. The references throughout the authorisation report are to a Class D1 use. In addition, Essar has consistently expressed the view that the phrase "as an integral part of Thornton Science Park" is vague and meaningless. I agree that the phrase is not sufficiently clear for describing an alleged breach of planning control.

13. I consider the corrections to the wording of the alleged breach should be limited to tidying up the wording of the description when read together with the corrected definition of the Land. The alleged breach would become "Without planning permission, a material change in the use of the Land to a university faculty for the provision of higher education within Use Class D1 of the Town and Country Planning (Use Classes) Order, 1987 (as amended) ["the Unauthorised Development"]. I am satisfied such a change is able to be made without prejudice to the Council and the Appellant.

Proposed corrections EN2

14. The Council requested that the description of the alleged breach of planning control be corrected to omit the words "and industrial use (engineering workshops and blending plant)" because after further consideration they were no longer identified as primary uses.

15. The appropriateness of such a correction is dependent on the outcome of the legal grounds of appeal and therefore I will return to the matter later in this decision.

[3] Inquiry Document A.16 paragraphs 4 and 6

The LDC appeal and the Section 78 appeal

16. The Council did not refuse to issue a certificate of lawfulness but exercised its powers under s191(4) of the 1990 Act and issued a certificate for a use that was described differently to the use applied for. The use that was certified to be lawful on 26 October 2018 was described in the First Schedule as: Use of the site (outlined in red on the plan appended) for research and development (in connection with automotive/petrochemical/aviation/environmental and energy industries), laboratories, office use (within Class B1 of the Town and Country Planning Use Classes Order 1987) and engineering workshops. The site was identified as the whole of TSP.

17. The Council accepted that the description in the First Schedule was meant to have stated: Use of the site (outlined in red on the plan appended) for research and development (in connection with automotive/petrochemical/ aviation/environmental and energy industries), laboratories, office use (within Class B1 of the Town and Country Planning Use Classes Order 1987) (as amended)) and industrial use (engineering workshops and blending plant) (within Class B2 of the Town and Country Planning Use Classes Order 1987 (as amended)). This description was in fact set out on page 1 of the certificate.

18. The common factor to both descriptions is that the Council did not consider teaching and workplace training to be a lawful component in the mix of uses. On further consideration, as more information became available during the course of appeal, the Council formed the view that the industrial use was not a primary but an ancillary use. The Council indicated a modified description would be acceptable: Use of the site (outlined in red on the plan appended) for research and development (in connection with automotive/petrochemical/ aviation/environmental and energy industries), laboratories, and office use (within Class B1 of the Town and Country Planning Use Classes Order 1987 (as amended)).[4]

19. Section 195 provides for appeals against refusals of LDCs and refusals in part[5]. The appellant put forward amended descriptions of the development subject to the LDC appeal.

20. The appellant is now seeking a certificate of lawful use or development under section 191(1)(a) of the 1990 Act for an existing use described as: "Use of the site (Thornton Science Park) for sui generis mixed use, comprising elements of research and development, laboratory, teaching and workplace training (for up to 404 higher adult education students on site at any one time) and ancillary uses". The site is identified as the whole of the TSP, as shown on Plan TSX_P00_002 rev A[6]. The main amendment is that the number of students is reduced from up to 600 higher education students, as set out originally in the description detailed in October 2018[7]. The modification relates

[4] Council's proof 6.25
[5] By virtue of section 195(4) of the 1990 Act, references in the section to a refusal of an application in part include a modification or substitution of the description in the application of the use, operations or other matter in question.
[6] CD1.23.2 and Inquiry Document A.6. This was further to the amendment proposed on 23 October 2019 CD11.17
[7] CD1.22.1 Letter dated 25 October 2018: Use of the site (Thornton Science Park) for sui generis mixed use, comprising elements of research and development, laboratory, teaching and workplace training including accommodating up to 600 higher education students and ancillary uses.

more to a level of educational use rather than a significant change in the land use described.

21. In the section 78 appeal the appellant also has proposed amending the description of the development for which planning permission is sought to: "A

material change in the use of buildings 38, 40, 58, 62, 304 and 305 to use by the University of Chester Faculty of Science and Engineering for the purposes of teaching, training and research as an integral part of the Science Park".[8] The amendment takes on board two matters. The application was seeking planning permission retrospectively under section 73A of the 1990 Act. Any permission would be for the actual development of a material change of use, rather than a continuation of the use. Secondly, the purpose and use carried out by the Faculty is confirmed.

22. To proceed on the basis of the proposed amendments to both the LDC appeal and the section 78 appeal would not cause injustice to any party bearing in mind they were subject to discussion and comment through Pre-Inquiry Notes and at the inquiry.

Development plan

23. The Cheshire West and Chester Council Local Plan (Part Two) Land Allocations and Detailed Policies was adopted in July 2019 as part of the development plan for the area. The Local Plan (Part Two) replaces the Ellesmere Port and Neston Borough Local Plan 2002. The saved policies cited in the reasons for issuing the enforcement notices and in the reasons for the refusal of planning permission are no longer relevant or require consideration.

Ruling

24. On 6 September 2019 the appellant requested sensitive information from Essar related to documentation prepared under the Control of Major Accident Hazards Regulations 2015 (the COMAH Regulations). Subsequently requests were made to the Council and the HSE for the same information. All three parties declined to provide the documents requested. I concluded that it was not necessary to require the Council, the HSE or Essar to provide the information for the reasons set out in a ruling dated 1 November 2019.

Screening Directions for EN1, EN2 and section 78 appeals

25. The use(s) of land at issue in the deemed planning applications in the EN1 and EN2 appeals and the development in the section 78 appeal fall within the description at 10(b) of Schedule 2 to the Town and Country Planning (Environmental Impact Assessment) Regulations 2017.

26. The Secretary of State issued a Screening Direction dated 22 October 2019 concluding that while there may be some impact on the surrounding area as a result of the development, it would not be of a scale and nature likely to result in significant environmental impact. Environmental Impact Assessment was not required. Accordingly of the Secretary of State directed that the alleged development would not be Environmental Impact Assessment development.

[8] Inspector's Inquiry Note 1 and confirmed in Inquiry Document A.3 page 2 paragraph 2

LEGAL GROUNDS OF APPEAL

LDC Appeal and EN1 and EN2 Appeals on Ground (c)

27. EN1 is specific to six buildings on TSP whereas the Land in EN2 extends over the whole Science Park. The EN2 notice was issued in the alternative after the Council concluded, in light of evidence submitted with the application for the LDC, that TSP was a single planning unit. Essentially the Council has maintained throughout that as a result of the acquisition and establishment of the University's Faculty of Science and Engineering (FSE) at TSP a new higher education use was added to the mix of uses traditionally and lawfully taking place on the land. According to the Council, the FSE's occupation of buildings for higher education purposes resulted in a material change of use for which planning permission was required but not obtained. Therefore the new sui generis mixed use is not lawful.

28. The appellant's case on the LDC appeal is that the certificate issued was not well-founded because it omitted teaching and workplace training from the mix of lawful uses of the TSP. The appellant's case on the ground (c) appeals evolved over the period leading up to the inquiry. In brief, initially it was argued that the present use was the same character as the use that had taken place at TSP since the 1940's. The increase, or intensification, in the level of teaching that had occurred when the FSE was established at TSP in 2014 did not amount to a material change of use.

29. Subsequently the appellant accepted that the introduction of the FSE onto the site amounted to a change of use (by virtue of the previously existing ancillary teaching and training elements becoming primary elements of the composite use) but that the change was not material in planning terms. In closing, the argument was expressed in a more subtle way, which I will return to in due course. Essentially, the common thread is that no material change of use took place as a result of the establishment of the FSE at the TSP.

30. Much of the appellant's evidence focussed on the encouragement given by the Council to the University's proposals to acquire TSP and to establish the FSE on the site. The appellant believed the Council gave assurances that because of the sui generis use of the site planning permission would not be required. The Council's position at the time was put forward as a compelling indication that no material change of use was proposed or took place. A case based on legitimate expectation was not advanced.

31. The case presented specifically in respect of building 58, based on section 75(3) of the 1990 Act, is that this building has explicit approval for use by the FSE by reason of a planning permission granted in February 2014.

32. A lawful development certificate was issued by the Council dated 24 May 2016 in respect of internal re-planning and replacement / remodelling works to the elevations of Building 95[9]. No party placed any reliance on this LDC in their respective cases and I have no need to refer to this matter again.

[9] CD12.2

LDC Appeal

33. Having regard to s195(3) of the 1990 Act, the main issue is whether the Council's decision to issue a certificate for a use other than that sought through the application was well-founded.

34. For the purposes of the 1990 Act, uses are lawful at any time if no enforcement action may then be taken in respect of them, whether because they did not involve development or require planning permission or because the time for enforcement action has expired or for any other reason (s191(2)). In this appeal the focus is on whether a change to a sui generis mixed use on the site that includes elements of teaching and workplace training for up to 404 higher adult education students involved development.

EN1 and EN2 Appeals

35. In so far as a ground (b) appeal has been maintained in the EN2 appeal, the issue regarding the status of the office use will be considered as part of the ground (c) appeal.

36. In an appeal on ground (c) the onus is on the appellant to show on the balance of probability that the matters alleged in the notice do not constitute a breach of planning control. Having regard to the context outlined above the main issues are:

    - In relation to EN1, whether the use of buildings 38, 40, 58, 62, 304 and 305 by the University of Chester's Faculty of Science and Engineering for higher education purposes resulted in a material change of use of the planning unit.
    - In relation to EN2, whether the new use resulting from the addition of an educational use (teaching, training and research) to the mix of uses on the Land, is materially different in character and effects to the previous use of TSP.
    - In respect of both the EN1 and EN2 appeals whether the planning permission granted in February 2014 authorised the use of building 58 for the purposes of teaching, training and research as a primary use.

Planning Unit

37. The first step is to define the relevant planning unit(s). Based on the principles established in *Burdle*[10], the planning unit is an accepted tool for determining the most appropriate area against which to assess the materiality of change. The planning unit is usually the unit of occupation, unless a smaller area can be identified which is physically separate and distinct, and/or occupied for different and unrelated purposes. A mixed or composite use is where the occupier carries on a variety of activities and it is not possible to say one is incidental to the other. The component activities fluctuate in their intensity from time to time but the different activities are not confined within separate and physically distinct areas of land.

[10] *Burdle v Secretary of State for the Environment* [1972] 1 WLR 12007

38. The appellant, the Council and Essar agreed that the 26 ha TSP site is and always has been a single planning unit. An initial review of the core documents and proofs of evidence indicated to me that probably was the

position and therefore I did not consider the matter needed to be explored in detail at the inquiry. The parties were agreeable to proceeding on that basis. Further consideration has confirmed that initial conclusion for the following reasons.

39. The physical extent of the land at the Thornton site has shown little variation over the years, essentially being roughly triangular in shape. Pool Lane to the east and the railway to the north provide firm physical boundaries. The long narrow block of land to the north of the railway line, mainly used for car parking, was occupied in conjunction with the Research Centre (within the ownership of Shell) by 1994[11] and is connected to the main site by an access road. It is bounded by Oil Sites Road to the north. The position of the long south west/north west boundary shows some minor variation over time, where additional land for car parking (beyond the perimeter road) appears to have been included at some time post 1994. In this area the adjacent Stanlow Oil Refinery has a secure boundary that contains the extent of TSP.

40. Shell, as land owner, developed and occupied the triangular area of land at Thornton for its Research Centre over the period from around 1940 to the late 1990s. Shell was the sole occupier until about 1998, after which accommodation was made available for other third party commercial tenants. It appears that take up was limited. All the contemporary reports describe the Research Centre functioning as one, with the research and development supported by ancillary services and facilities and infrastructure. The work undertaken would have complemented the production, processing and related storage operations at the Oil Refinery, also owned by Shell but the evidence indicates that the Research Centre functioned as an entity in its own right. The Council and the appellant confirmed that in their view both sites were separate planning units. As a matter of fact and degree the land occupied by the Research Centre was a single planning unit throughout the period of Shell's ownership.

41. Ownership of the entire site transferred from Shell to the University on 31 March 2014. The freehold title to the land is held by the Chester Diocesan Board of Finance (CDBF), as custodian trustee for the University. In addition, a 125 year lease has been granted in respect of the site by the CDBF to Thornton Research Properties Limited, a wholly owned subsidiary of the University, in order to facilitate the grant of leases and licences to commercial tenants located there. The University's Facilities Department deals with management across the site. Therefore, in effect ownership, long lease and management are consolidated in and controlled by a single body.

42. There has been no significant change in the boundaries, extent, physical features or circulation of the land within TSP as a result in the change of ownership and occupation. Access to the site for both vehicles and pedestrians is controlled and secured.

43. The TSP is occupied by the FSE for the purpose of delivering higher education to students and by a number of commercial tenants. There are instances

[11] CD12.4.3

where a firm is the sole occupant of a single building but more typically buildings are occupied by more than one tenant. As seen on the site visit, there is flexible space and close links between accommodation occupied by the FSE and commercial tenants. Students do not have day to day access to the non-educational buildings but tenant businesses have direct access to the

FSE buildings (dependent on research projects) and access to the professional training offered to the students. Ancillary facilities are available to all (students and commercial users), the main examples being the coffee shop, sports facilities and conference space. It is not possible to identify individual buildings or areas of land which are physically separate and distinct, and/or occupied for different and unrelated purposes.

44. The University advised that commercial tenants have leases (the larger tenants) or occupy their premises pursuant to a short term licence (the majority). This factor would be likely to increase the degree of control exercised by the site owner, flexibility and the ease with which tenants may switch sites or expand or contract their areas of occupation.

45. A continual theme throughout the appellant's evidence is the integration and interaction between the learning and skills being developed by the students and the project work and research being undertaken by businesses on the TSP. Representations from businesses located at TSP support that theme by illustrating with specific examples of their direct experience of collaboration with the academics and students and use of research facilities to test and develop products, technology and ideas. In addition, businesses have benefitted from the general support services and advice on site and from synergies with other firms located there. Reference is made to the culture at TSP associated with communication, combined expertise and knowledge pool and access to the technical resource.

46. In conclusion, the TSP is a single well defined and secure complex having a common access and circulation. The University is the sole owner and although there is not a single occupier, primary uses and activities are carried out with varying degrees of integration. As a matter of fact and degree the TSP is a single planning unit on account of the physical and functional characteristics.

Planning unit and EN1

47. The Council has explained why at the time it identified the Land as a smaller area focused on the six buildings. The notice was issued in response to the refusal of planning permission for a material change of use of the six buildings on TSP (the s78 appeal). Business tenants were known to occupy separate units. The notice was issued before receipt and consideration of the application for a lawful development certificate. Subsequently, with the benefit of additional information, the Council concluded that the entire TSP was a single planning unit and issued EN2 in the alternative.

48. The Council expressed no strong view on whether or not EN1 should be quashed if I decided there is a single planning unit but was not clear what the grounds for doing so would be, because the notice is not defective. The appellant considered in the circumstances EN1 should be quashed, as did Essar.

49. The conclusion on the planning unit does not mean that EN1 is invalid. There is nothing in the provisions of sections 172 and 173 of the 1990 Act that requires the enforcement procedure to be limited to a site or sites that do not overlap one another. Similarly, sections 174 and 175 have no indication of a requirement of exclusivity.

50. However, in respect of TSP, it is not a case where individual buildings are

owned and/or occupied by different businesses or people. There has been a single breach of planning control, as opposed to multiple breaches of planning control involving several buildings within a single complex that would be subject to separate notices. The mixed use at issue is carried on over the whole planning unit rather than the enforcement action seeking to attack a single activity which is carried on exclusively on the smaller site. The conclusion on whether the relevant planning unit is the smaller or larger area is not finely balanced. There is a single appellant and only one notice is necessary to address the alleged breach of planning control. Furthermore, each notice gives rise to a separate deemed planning application that has to be considered individually on its own merits. The Council fully accepted that the notices were issued in the alternative. The only reason EN1 was not withdrawn was in case the decision maker formed a different view on the planning unit.

51. I consider that EN1 no longer serves a useful purpose. The notice is not necessary to consider a ground (c) as to whether or not there has been a breach of planning control as the evidence is duplicated and has been addressed under the ground (c) appeal against EN2. Similarly, the planning merits evidence presented by all parties has been common to the two ground (a) appeals and little distinction has been made between the deemed planning applications. Potentially it would lead to two planning permissions with different descriptions of development and different sets of conditions or, if upheld along with EN2, to two different sets of requirements. Such outcomes could cause injustice to the appellant. There is no practical justification to uphold the two notices. The notice as corrected will be quashed and to do so would not cause injustice either to the appellant or the Council.

52. Consequently, the appeal under grounds (c), (a) and (g) as set out in section 174(2) of the 1990 Act as amended and the application for planning permission deemed to have been made under section 177(5) of the 1990 Act as amended do not fall to be considered. I will take no further action in respect of the EN1 appeal.

Lawful use

Period 1940 to 2014

53. The main sources of available information on the history, use and development of the Land are the contemporary reports and articles on Thornton Research Centre[12], planning application documents and the personal statements of people who trained and worked on the site in the period before 2014[13]. In the planning history, the first records of planning applications and permissions date from around the mid-1970s, many covering small scale

[12] CD14.43-CD14.49
[13] CD1.26

developments. There is no original planning permission authorising a use/uses for the site.

Documentary evidence

54. The land was developed by Shell next to its largest refinery in Great Britain at Stanlow. An Aero Engine Research Laboratory was constructed in 1940 to study problems in the development of aviation fuels and lubricants and was engaged on Government work during the Second World War. During the early

1940's the laboratory was expanded to carry out chemical and metallurgical work and for engine test units. Additional laboratories were built for research on general lubricating oil problems, for investigations on the production of chemicals from petroleum and to study diesel oils.

55. In 1947 the laboratories were co-ordinated and Thornton Research Centre was established, with two main spheres of operation known as the Engine and Chemical Divisions. In 1948 floor space amounted to some 730,00 sq. ft. and staff numbered 895, of which 323 people were qualified technical staff engaged in research work and 572 were in workshops, technical services and administration. In 1955 a similar number of staff (about 870) was reported, comprising chemists, engineers, physicists, metallurgists and statisticians employed directly on research projects together with workshop staff, glass blowers, librarians, photographers and administrative staff who served the Research Centre and maintained its equipment. A range of specialist equipment and facilities, including rigs, were designed, developed and installed at the Centre.
56. In 1962 an article on research establishments noted nearly 1,000 people were employed at Thornton, including 240 graduates, mainly chemists and engineers. The recruitment of university graduates was regarded as a means of keeping up to date in marketing, development and research alongside external contacts with universities, learned societies, research organisations, manufacturers and industrial concerns. Thornton staff also worked temporarily in establishments outside the Shell Group. A Shell publication dated to 1962 made reference to the replacement of many of the original buildings and the use of the most advanced research tools available. The Applied Physics Division was responsible for the development and maintenance of the specialised instruments used throughout Thornton. Where the exact type of instrument or apparatus could not be supplied by instrument manufacturers, the Division designed and constructed it in the engineering workshops.
57. A visitor handout dated September 1976 identified the Thornton Research Centre as being one of Shell's two principal centres of research in the United Kingdom, where 'the effort' was principally concerned with oil products (fuels, lubricants and bitumen), natural gas, marine, transportation and storage and general research[14]. The Centre employed some 950 people, about half of whom were directly engaged in research and development. Of these some 260 were graduates, predominantly chemists and engineers.
58. Reference is made to a continuous need for use of computer facilities and the use and application of this associated expertise to wider research and development programmes. The role of a fully equipped blending unit was to provide special blends used in the development, evaluation and field trials of fuels and lubricants and specified reference fuels for use in engine tests. Support services and facilities included a photographic and film unit, a patents unit, a film and lecture hall, workshops, catering and medical facilities, an employees' shop. The recruitment, career development and training of employees was overseen by personnel services. There were some 5,000 visitors each year and regular presentations by staff and visiting speakers on a range of subjects of scientific interest.

[14] The second was Sittingbourne Research Centre associated with agricultural chemicals, toxicology, enzymology and the chemistry of natural products.

59. A 50 year review described the 1970s as a period of expansion. The 1980s saw staff numbers reduced to 715 but Thornton was established as a world laboratory. The review noted that great emphasis had always been placed on helping schools and colleges through secondment of staff to schools, help with projects, provision of equipment and visits by teachers and students to Thornton.

60. The uses described in the reports and articles are reflected on a plan of the site and the buildings submitted with a planning application in 1974. Over the eight areas, the various laboratories were generally in the larger buildings, together with the central workshop, main building and restaurant. The lecture hall, offices, stores, trades units and workshops generally were buildings with a smaller footprint along with plant rooms, garages, sub stations, pump houses and so on. Photographs of the site in the 1970's showed generally low rise flat roofed brick buildings in a regular layout fronting incidental open space and access roads. The main administrative building was significant for its greater presence.

61. An application in 1976 for a proposed blending plant described the development as storage tanks, blending tanks and pumping equipment for the formulation of automotive gasolines for research processes. A new oil blending plant was granted planning permission in February 1990. The related site location plan included a small training centre building that had not been shown on earlier site plans[15].

62. In 1994 proposals were submitted for the first stage of a redesign of the site with a view to including the environmental research and additives synthesis work previously carried out at Sittingbourne[16]. The first phase was for a new building comprising five laboratory wings linked by communal facilities and support services. A new product and testing centre, and a new amenity and visitor centre were included. The aim of the project was to improve the functioning of the site and reduce running costs through the development of a smaller number of larger buildings grouped by activities – laboratories, engine and rig testing equipment and amenities.

63. The emphasis was on the expansion of research at Thornton, described then as 'one of the world's leading industrial laboratories'. Employment at that time was around 600 people and activities were concentrated in fuels and lubricants technology, combustion science/hazard analysis and environmental science. Close links were maintained with academic, government and independent scientific bodies, and manufacturing industry but no indication was given that education was regarded as a mainstream activity.

64. In 1998, the site was partially occupied by the commercial tenant Shell Global Solutions (a subsidiary of Shell UK) and the site was renamed Cheshire Innovation Park. Additional rented accommodation was available for other third party commercial tenants. Marketing literature referred to 'quality laboratory space' and state of the art laboratory space, supporting office accommodation and on site services directed at scientific and technical organisations[17]. Seemingly the venture was not a success and a very limited number of businesses were attracted to the site. In 2006 the site was

[15] CD12.5.5
[16] CD12.4.1-CD12.4.3

renamed Shell Technology Centre Thornton. New staff facilities (including a sports pitch and restaurant) were provided in 2009.

65. There is limited documentary evidence about the uses and activities at Thornton between the late 1990's /2000 and Shell's exit in 2014. A Shell information release to its staff in February 2013[18] noted that approximately 400 Shell employees and around 150 contractors worked at the site, although significantly the centre was described as being involved with research and development for Shell since 1940. The business case for consolidation of laboratory activity away from Thornton was made as part of a global strategic review.

Conclusions from documentary evidence

66. The articles and other contemporary documents were to some degree promotional literature but the probability is that they presented a good picture and reliable factual information of the development of the site and the specialist work and activities undertaken at Thornton.

67. A strong theme is the concentration of expertise and the pre-eminence of Thornton for research and development, much in laboratories with highly specialised and custom built equipment and apparatus. An appreciation is able to be gained of the type, range and specialist nature of the research carried out in the various technical divisions and in the laboratories, primarily related to aviation, vehicles, oil products, petrochemicals and energy. The expansion in environmental research was particularly related to the relocation of the Sittingbourne research centre to Thornton in the 1990s. The detail on the type, range and specialist nature of the research carried out in the various technical divisions strongly supports the view that research and development was a primary use, together with use of the laboratories.

68. The limited information on the offices indicates that at least to the 1990s this use was an important component in terms of the numbers of staff and their administrative and support functions in relation to research operations on the site. Subsequently there was the addition of commercial office tenants. The engineering workshops were associated with development and maintenance of the specialist equipment and therefore were ancillary to the primary research use. The purpose of the blending unit also was to service the research work and hence the industrial type use was ancillary.

[17] CD14.50
[18] CD14.18

69. After the early years of development and subsequent consolidation and expansion, Thornton functioned as a self-contained site with all necessary support services and facilities. Peak employment occurred during the 1970s (around 1,000 people). There is no evidence at all that it reached nearly 4,000, a figure suggested by the appellant. The staff engaged directly in research and development were supported by those who worked in technical, administration and personal services.

70. The Research Centre's role in education focused on the professional development of staff, the promotion of its expertise, and the sharing and expanding of specialist knowledge and its research work. The links to schools, colleges and universities were a passing reference in nearly all the various documents, in contrast to the detail on the research carried out in the various

technical divisions. The graduates that were employed had completed their education and the aim was to draw on their newly acquired knowledge, not to teach and educate them. The appellant maintained that based on conversations with former employees the site was known as 'Shell's University' but I have found no such mention of the term in the contemporary documents. The help to schools and colleges noted in the 50 year review was primarily in the form of outreach work, visits and assistance, not through teaching on-site as the main place of learning.

Statements in appellant's evidence[19]

71. The statements are generally consistent and indicate the type and scale of training and education that took place across the site in the 1970s, 1980's 1990's and through to 2012 and the end of Shell's occupation. The appellant identified 17 buildings where teaching and workplace training took place during Shell's occupation.

72. Highlighting the main points, in the 1960s and 1970s, approximately 25 apprenticeships were available for 16 year old students at Ellesmere Port Grammar School and other schools. In the 1980s schoolchildren from the Ellesmere Port schools would visit the site for extended periods of work experience.

73. A trainee technician programme was operating in 1992 when three trainees were recruited to work towards attaining National Vocational Qualifications. A new trainee was taken on every year over the following three years. Trainees were partnered with on-site technicians and training involved practical tasks to build up technical competence. Classroom sessions were predominantly run by Shell employees. Subsequently trainees and apprentices were recruited through TTE Training a local training provider. Shell participated in the Government sponsored Youth Training Scheme (YTS) in the 1980s and 1990s taking on 15 to 30 school leavers per year.

74. Students undertaking a sandwich year in industry and students undertaking PhDs spent part of their course at Thornton carrying out industrial research. Reference is also made to a programme for undergraduate students reading science at a variety of universities to visit Thornton for 8 weeks during their summer vacations to work in the laboratories. In the 1990s external learners on site numbered between 20 to 40 per year for work experience, as part of a

[19] CD1.26

sandwich degree course or for general training purposes. An initiative also established a scheme that extended over 8 years involving students from universities across Europe who worked two years full time at Thornton followed by a third year back in their host institution.

75. As part of the company's investment in their workforce, training sessions were held most weeks in a purpose built lecture/conference facility that were open to staff members, apprentices, trainees and outside visitors. Shell also encouraged employees into higher education by sponsoring degree courses. In the 1970s and 1980s technicians taken on at 18 continued their education to degree level by day-release and evening studies augmenting their learning at work. Outreach events and activities were arranged as part of Shell's Social Investment Programme to generate interest young people in Science, Technology, Engineering and Mathematics (STEM) subjects.

76. Official demonstration days, open days or family days attracted large numbers of visitors and families to the site.

Council's evidence

77. Direct knowledge of the site in the later period of Shell ownership comes from the statutory declarations of three people who worked there[20]. Mrs Brown, who also gave oral evidence at the inquiry, had a contract position with Shell Global Solutions for some 18 months in 2010/2011. Her work was office based on the ground floor of building 62, where 25-30 people worked within teams dealing with data and regulatory compliance across the world. Team meetings and training activities were held in meeting rooms on the top floor of buildings 49 and 62 or the ground floor of buildings 90 or 102. The training that took place at Thornton was concerned with on-site safety, departmental training on specific topics, personal development and one to one or small group training with trainees from the TTE Technical Institute, year out placements and summer/work experience students. Presentations, usually related to Shell initiatives and projects, were optional. She confirmed her training was solely for tasks forming part of her job or for personal safety and the safety of those she worked with.

78. During her time at Thornton, the site accommodated conferencing facilities for in-house and visiting Shell personnel, laboratory facilities for the Shell Stanlow Refinery and Lubricants plant, testing facilities for emissions and high octane fuels, teams from Shell Global Solutions and HR and IT personnel. Buildings 303, 304 and 305 operated as laboratories and had small meeting rooms. Building 301 was described as offices, building 38 housed the IT department and occupational health facilities, building 49 had a conference centre and was occupied by the HR department. Building 62 was used for offices and meeting rooms. Approximately 200 to 300 people worked on site.

79. XX XXXXX, whose role was with Shell Global Solutions, was at Thornton from 2005-2008. She was based primarily in offices in building 62 once it had undergone renovation works. Building 49 was then renovated to form conferencing space and offices. She recalled most buildings on the site were vacant, and that buildings 303, 304 and 305 were well occupied. She was aware of graduates and work placement students but they were relatively few in number. She was not aware of large numbers of students being present or student lectures taking place on site.

80. XX XXXXXX was employed at Thornton with Shell Downsteam from late 2005 to February 2008. His role involved working with refineries and chemical plants throughout Europe advising on future investment plans and asset integrity. His office was in building 62, he used conference facilities in building 49 although he was away from TSP about 50% of his working time. His recollection of a student presence was similar to that of XX XXXXX.

Other evidence

81. A representation from Essar in February 2018 included information based on interviews with employees who had previously worked on the Thornton and Stanlow sites during various periods from 2005 to 2011[21]. The Research and Technology Centre served the needs of any part of Shell's global organisation and technologies associated with fuels, lubricants, additives, engineering and

[20] Appendix B to the Council's proof

the environment. Laboratory testing, fuels development research, technical consultancy and management of global assets were carried out at the Centre. The Thornton site was a research centre but not a Shell designated training and / or education centre. Such training was provided at Wythenshawe and a location in the Netherlands. Local training for TTEs/apprenticeships and Stanlow Refinery staff was often carried out at the Excel centre, which was the Refinery site dedicated training facility. Prior to 2011, students, TTEs/apprentices were engaged in work experience related to the company's activities, the majority of who were located on the Refinery site.

Conclusions

82. Over the period between the 1960s and the late 1990s 'in house' education and training was directed primarily towards trainee technicians and apprenticeships and extended work experience. There were opportunities for students on external courses of study to carry out research at Thornton as part of their course, to gain work experience or carry out summer vacation work. Such activities were small scale and involved relatively small numbers of students or school children in comparison to the permanent staff numbers. Continual staff training and development was seen as an investment in maintaining a skilled workforce and a centre of excellence. There is nothing in the statements to lead me to alter my conclusions derived from the documentary evidence.

83. The evidence forming part of the Council's case covers relatively short periods of time post 2005 but is valuable because of the lack of other evidence on this period in the site's history. In particular XXX XXXXX was the only person appearing at the inquiry who had first hand knowledge and experience of working at Thornton. She was clear and consistent in her evidence and recollection and her evidence has a lot of weight.

84. The appellant did not adequately explain or support in any detail why it considered there never was any independent principal office use. I consider that the descriptions of the offices and individual roles of employment demonstrate that in all probability the office use was a primary rather than an

[21] CD3.1

ancillary use. The office function not only focused on serving and supporting the primary operations on the site but also had a much broader function related to operations, management and investment worldwide. This primary role was facilitated by the accommodation review, redevelopment of premises and the encouragement of commercial tenants during the mid 1990s. Even if the offices were an ancillary use in the earlier years of site development the primary office use formed part of the mix of uses on TSP for a period of over 10 years, sufficient to become lawful before the ownership changed in 2014.

85. Secondly, education and the presence of students was limited in scope and numbers. Staff training was more important but it was purely ancillary, directed at continuing professional development.

Overall conclusion

86. On the balance of probability research and development was a primary use. The highly equipped nature and concentration of work within laboratories on site supports a conclusion that laboratories should be in the mix of primary

uses. Office use is the other primary component.

87. The engineering workshops were associated with development and maintenance of the specialist equipment and therefore were ancillary to the primary research use. The purpose of the blending unit also was subsidiary to the research work. The Centre's role in education focused on the professional development of staff, the promotion of its expertise, and the sharing and expanding of specialist knowledge and its research work. Training and education of technicians, apprentices and students undertaking external courses were very much subsidiary. There is not the evidence to demonstrate that teaching and workplace training should be included as components in the mix of primary uses.

88. At the beginning of 2014 the lawful use of the planning unit was a sui generis mixed use comprising research and development, laboratories and office use. The main focus of the research was in connection with automotive, petrochemical, aviation, environmental and energy industries.

Post March 2014

89. The main triangular block of land and the adjacent car parking and circulation areas (as shown outlined in red on the plan attached to EN2 and the LDC plan) passed into the ownership of the University of Chester on 31 March 2014.

90. Thornton Science Park was established with the core objective of creating a unique higher education, research and commercial environment to deliver significant economic, education and environmental benefits[22]. TSP covers around 25 ha or so and 39 buildings are described as 'active' providing some 46,071 m^2 of floor space[23]. The establishment of TSP to date has been achieved primarily through building refurbishment rather than major building development.

[22] CD1.5 paragraph 5
[23] Inquiry Document A.1

91. As of 31 October 2019 this space is split between commercial tenants (45.71%), the FSE (13,359 m^2 or 29%), support services 5.78% and 19.5% is vacant. The commercial tenants total 41, with a total of 540 employees, comprising a mix of start-ups, Small Medium Enterprises (SMEs) and multinationals in the energy, environment, advanced manufacturing and automotive sectors. All the businesses, except for Essar SGS, have moved onto the site since March 2014.

92. The first intake of students to the University's newly formed Faculty of Science and Engineering was in September 2014. The FSE offers degrees in a range of disciplines including chemical engineering, electronic and electrical engineering, mechanical engineering, mathematics, computer science and natural sciences. Degrees take three years, or four years for masters degrees, to complete. Research was described as a fundamental aspect of the education. The University Prospectus identifies facilities as modern purpose-built labs including computer labs and a games zone, professional engineering software and a specialist science and engineering library.

93. More specifically, the FSE has occupied 6 buildings at TSP – numbers 38, 40, 58, 62, 304 and 305.

- Building 38 Sutton used to accommodate offices, a foyer and library on the ground floor, offices and meeting rooms on the first floor and administrative space above. The building now houses a library, teaching pods, an IT zone and information; IT seminar rooms, larger teaching rooms with small pods and group workspace on the 1st floor and on the 2nd floor a design suite, small modules and practical space and 3D printers.

- Building 40 Backford, originally constructed in the 1960s and subsequently refurbished, was used always as a restaurant with ancillary offices and meeting space. There continues to be a refectory and coffee shop open to all, with a conference room at the rear and access to buildings 90 and 102.

- Building 58 Kingsley was originally built as a workshop in the 1960s. The building was substantially refurbished for use by the FSE as a workshop with ancillary laboratory and office accommodation. It is now used as welding, casting, engineering, machinery workshops plus pilot plant for chemical engineering.

- Building 62 Dunham, constructed in the 1950s to provide offices and store room. It was later refurbished. An engine systems laboratory, with ancillary offices, was granted planning permission in November 1978. There are now teaching labs, seminar rooms and post graduate accommodation.

- Building 304 Hartford and Building 305 Sandfield were built in 1996, alongside building 303, to provide workshop and laboratory space, including a conference room and visitor reception. Building 304 now has various forms of laboratories, research facilities and post graduate accommodation, housing physical science and engineering, biotechnology and bio-engineering, automation and robotics, electronic and electrical engineering. Building 305 has on the ground floor fuel cell laboratories, post graduate laboratories and hybrid space. On the 1st floor are rooms for theory, with rooms for practical work either side, chemical and practical laboratories.

94. The density of occupation of buildings by students was shown to be about two times that by employees of commercial tenants.

95. In November 2019 there were 90 FTE teaching staff and 50 University support staff based at TSP. For the academic year 2019-2020 there are 549 undergraduates and 111 postgraduates at the FSE. Over 760 students have graduated since the FSE was established in 2014. The representations from lecturers, programme leads and heads of department explain how the structure and content of courses have been designed to take advantage of the accommodation, facilities and co-location with businesses.

96. Throughout the year the University raises awareness of the importance of science, technology engineering and mathematics (STEM) through outreach work. The programme includes a number of workshops, public lectures and open days at TSP and working closely with a number of local schools. Open days are also used to recruit and engage with students.

97. The Informatics Centre moved from the Parkgate Campus to TSP around October 2014. The web design and application development business is based

within the FSE and works on a range of projects for academic and commercial clients. The web site describes the space occupied as office accommodation comprising office and meeting spaces[24].

98. In 2015 the High Growth Centre was established in buildings 90, 101 and 102, co-funded by the University and the European Regional Development Fund (ERDF). The Centre offers advice and support (including technical advice and research by the FSE) to SMEs and start-up businesses and is designed specifically for companies operating within the advanced manufacturing, automotive, engineering and environmental sectors.

99. A facility known as the Energy Centre at Thornton was set up in 2017 in a refurbished building 95 to provide flexible space where industry and academia are able to come together to innovate, develop and demonstrate new energy technologies.

100. The representations confirm that some of the commercial tenants are primarily office uses occupying office space. These include a professional services company and a company involved in managing and developing real estate and infrastructure.

Conclusion on use

101. The establishment of a University Faculty offering degree courses in a range of disciplines brought a substantial change to the educational activity on the site. Student numbers on site increased to around 400 during term time (at any one time). Teaching and learning have occurred through a variety of mediums (workshops, seminars, lectures, practical work, individual study and so on) and in a range of spaces. There are instances where buildings such as 40 and 58 have similar uses as before but now as part of a broader mixed use. Buildings have been adapted to provide suitable accommodation as demonstrated by the before and after comparisons for buildings 38, 58, 62, 304 and 305 in particular. The educational use expanded in 2014 to a position where it was no longer subsidiary but became a primary use within the mix of uses within the planning unit on the TSP site. The continuing intake of students and delivery of education has ensured the continuation of the use over nearly a six year period.

[24] CD13.2.3

102. Research and development continues as a primary use in part linked to the FSE but also through the businesses that have occupied the commercial space on the site and more recently in the Energy Centre. Similarly, the laboratory work has retained its importance as a primary function for education and commercial occupiers. Whilst there is ancillary office use associated with the FSE and research and development use, office activity is identifiable as a primary use through the businesses offering professional services and advice as their main role and activity.

103. In 2014 the previous ancillary teaching and training expanded to become a primary educational use and the planning unit took on a new mixed use. The use of the TSP changed to a mixed use comprising research and development, laboratories, office use and a University science and engineering faculty for the provision of undergraduate and postgraduate education.

Materiality of the change of use

104. Planning permission is not always required for a change of use from one mixed use to another. The issue is whether the change of use is material in planning terms by comparing the former with the new use[25]. As set out in Planning Practice Guidance there is no statutory definition of 'material change of use'; however, it is linked to the significance of a change and the resulting impact on the use of land and buildings. Whether a material change of use has taken place is a matter of fact and degree and this will be determined on the individual merits of a case[26].

105. Case law[27] has established that an essential consideration is whether there has been a material change in the definable character of the use of the land, as opposed to a change in the particular purpose of a particular occupier. Off- site impacts are relevant, as well as planning purposes, the policy context and the planning consequence(s) of the loss of an existing use. Intensification does not amount to a material change unless and until the fundamental character of the use changes. It applies when the only way to distinguish between the former and present uses is in terms of scale.

106. A sui generis use is a use of its own kind. TSP has changed from one sui generis mixed use to a different sui generis mixed use. It is not a question of an intensification of the same use (such as more caravans on a caravan site). Whilst attention has focused on comparing the teaching / education uses the final comparison is between the former and existing mixed uses, as set out in Beach.

[25] CD10.11 *Beach v Secretary of State for the Environment, Transport and the Regions* [2001] EWHC Admin 381; CD10.12 *Belmont Riding Centre v First Secretary of State* [2003] EWHC 1985 (Admin)

[26] Planning Practice Guidance: When is permission required? Paragraph: 011 Reference ID: 13-011-20140306

[27] Including *Hertfordshire County Council v Secretary of State for Communities and Local Government* [2012] EWHC 277 Admin; [2012] EWCA Civ 1473; *East Barnet UDC v B T Commission* [1962] 2 QB 484; *London Borough of Richmond v Secretary of State for the Environment Transport and the Regions and Richmond upon Thames Churches Housing Trust* [2000] QBD; and *R (oao) the Royal Borough of Kensington and Chelsea v Secretary of State for Communities and Local Government, David and Rees and Gianna Tong* [2016] EWHC 1785 (Admin)

107. The appellant summarised the vision for the site under the University's ownership as 'to create a unique environment in which the presence of the new Faculty would play a crucial role in attracting business occupiers in the energy, environment, automotive and advanced manufacturing sectors'. A vital component would be the opportunities to access cutting-edge research equipment and facilities within the Faculty and to collaborate with academics, researchers and students, helping to commercialise new research and take new products to market with associated economic benefits[28].

108. The 'unique environment' characterising the TSP is a common theme throughout the appellant's evidence. The model operated by the FSE is said to be 'unique' in terms of university facilities but is simply a continuation and development of what was being undertaken by Shell. Instead of one large multinational company with different departments undertaking laboratory work, research and allied teaching and training, there are now up to 40 smaller companies and a university undertaking very similar activities. The cases of the other parties were regarded as allegations about changes in identity of the occupier and increases in personnel rather than any change in the character of what is undertaken on the site.

109. The case presented finally by the appellant was that teaching and training were ancillary elements of the previous mixed use. The continuation of these uses by the University do not constitute new additions, merely a change in their intensity and status. There has been no discernible change in the

character of the use of the land and no change from one use class to another. Instead there has been an incremental change in the composition of a sui generis mixed use across a large planning unit. The overall nature of the uses is the same, being related to research and development in the automotive, petrochemical, aviation, environmental and energy industries. The identity and purpose of the particular occupier has changed resulting in the teaching and training uses no longer having an ancillary function serving Shell's use of the site but instead becoming principal components of the mixed use by occupiers which now include the University. In short, the change in occupier from Shell to the University and its tenants has amounted to a change in the purpose of the occupier and it has not affected the character of the use of the land[29].

110. The evidence indicates to me that essentially the Thornton Research Centre was a purpose specific technology centre where testing and research was specific to the products and business of Shell. It was an employment site where employees were primarily engaged in research and development, specialist laboratory work and office work that latterly comprised administration, personnel and IT services and broader professional services operated through Shell Global Solutions and other companies. The 'allied teaching and training' was very much a subsidiary function limited in scope and scale directed at either (i) employees' personal professional development and safety and enhanced contribution to the parent business or company, or (ii) programme(s) of training of technicians and apprentices on a very limited

[28] Professor Wheeler's proof paragraph 18
[29] Inquiry document A.16 paragraphs 37 and 38

scale towards gaining first qualifications and a job within the company, or school and student work placements and holiday experience.

111. The University's witnesses described the Vision and Triple Helix model where academia, industry and government closely interact. The academic dimension comes across as essential and is directly derived from the FSE. Such an educational academic institution was not present during Shell's ownership and occupation before March 2014 and nor was the breadth of educational resources and learning that it provides. As Essar highlighted, Shell did not occupy a University campus, academia and industry was not co- located and was not fundamentally co-dependent[30].

112. The FSE may well be 'unique' when its research and laboratory facilities and its co-location alongside businesses are compared to other universities. However, it has come across strongly in the University's evidence that they have worked hard to create and ensure TSP is unique. The FSE's location on a site alongside small businesses and larger companies has been emphasised in the literature and prospectus information for students. The 'unique environment' has been an important element in the marketing of the site to attract new businesses to locate there. The FSE's presence has been regarded as vital to distinguish TSP from other science parks and to ensure its success. Shell was not an education institution. The documents related to Thornton Research Centre do not reference an academic environment at all and do not support the proposition now being advanced by the appellant. A representation on behalf of the University during consultation on the draft Local Plan (Part Two) referred to TSP's distinct land use role and economic development objectives since its establishment in 2014. As Essar submitted creating something unique can only be sensibly understood as

meaning that the current use is materially different from the previous use[31].

113. The establishment of the FSE, an educational institution, has resulted in the provision of education becoming a primary use. Courses of study are followed by a large number of students with a view to obtaining a qualification and skills for future employment, not necessarily linked to research and businesses at TSP. The evidence shows the number of students continuing at TSP after their formal education has been very small in comparison to the total number of students graduating. Many staff are employed to design and run the courses, give tuition and support. The fact that the Use Classes Order distinguishes business uses (Class B1) from non-residential institutions (Class D1), which includes any use for the provision of education, indicates the likelihood of different planning characteristics and consequences associated with the creation of an institution of learning.

114. The scope of the educational use is indicated by the range of disciplines and courses available. The educational use is clearly able to be distinguished from the former ancillary teaching and training apprenticeships, work experience placements and continuing professional development at Thornton Research Centre. During that period of time the learning was provided by an employer to an employee or in association with a course of learning at a school or college elsewhere. The purpose was different. The description of teaching and workplace training used by the appellant is not an adequate description of the

[30] Inquiry document E.5 paragraph 54
[31] Document E.5 paragraph 55

use and does not sufficiently indicate or capture the features of a university education.

115. Previously the apprentices and trainees were working across a range of research activities housed in buildings across the site[32]. Now six buildings and around 30% of the floorspace is devoted to the FSE educational use, including use of legacy laboratory and specialist equipment. Through refurbishment and adaptation of buildings there are now facilities and spaces for varying types of tuition and learning, and interaction between students both in study and 'free' time. The external site layout in terms of building and spaces may not have significantly changed. However, the evidence points to a layout and utilisation of space within buildings that has undergone significant alteration to provide the necessary accommodation for undergraduates, postgraduates and staff. This is consistent with a change in character of the mixed use.

116. The evidence shows that the site has a new identity, in part associated with the change in the occupiers and people frequenting the site, interaction through new activities and patterns of movement. In the 10 year period pre 2014 the presence of students was not noticeable on the site according to XXX XXXXX and other witness statements. Post March 2014, in term time the hundreds of students, predominantly of younger age than a settled workforce, would reasonably be expected to give the campus an identity and vibrancy that was not recognisable before. The Council's planning witness, when visiting the site in January 2016 in connection with an unrelated planning matter, noted that the range and scale of student activity and teaching was significant. The educational use fluctuates in its intensity as between terms and vacation leading to changes in character of the use of the site during the course of the year.

117. Furthermore students, who now form a substantial proportion of people on the site, are not employees but have a different contractual arrangement with the education institution, paying for their course of study and pastoral support. Being a student is different to being an employee, which is indicated by the importance attached by the University to workplace training for students.

118. The Council emphasised the controls now placed on patterns of movement within the site through the introduction of a card control access system applicable to all occupiers. When taken in isolation the CARDAX system does not contribute greatly to the change in character but it is relevant in so far as it is a further indication of the different nature of the use as expressed through the occupation and relationship between the FSE and its students, commercial tenants and the University as owner.

119. The Council and Essar submitted, with reference to a principle established in the *Richmond* case[33] that if a change of use gives rise to planning considerations that is a relevant factor to be taken into account. The appellant disputed this approach, submitting that planning policy can only bite where it has been established that there has been a change to the character of the use

[32] CD1.23.3

[33] Documents C.7 paragraphs 33, 34; Document E.5 paragraph 52; CD10.15 *London Borough of Richmond v Secretary of State for the Environment Transport and the Regions and Richmond upon Thames Churches Housing Trust* [2000] QBD

of the land – it cannot dictate or influence what amounts to such a change[34]. Reliance is placed on a very recent Supreme Court decision in *R (oao Wright) v Resilient Energy Severndale Ltd*[35].

120. In *Wright*, the development involved was a change of use of land from agriculture to the erection of a single community scale 500kW wind turbine for the generation of electricity. The issue in that case was whether the promise to provide a community fund donation qualified as 'a material consideration' and as a subsidiary issue whether the Council was entitled to include condition 28, regarding a community benefit society, in the planning permission. The judgement reaffirms the statement that when considering if there has been a change of use of land what really has to be considered is the character of the use of the land, not the particular purpose of a particular occupier.[36] However the decision focuses on the two stated issues and it does not consider in any detail, and hence does not overturn, the principle established in *Richmond*. On this point I agree with the Council.

121. Before the University acquired the land and the FSE moved to TSP the mixed use was research and business related, involving provision of employment and accommodated in purpose-built premises. This type of use dated back to 1940, when the subsequent development of the Research Centre was associated with Shell's operations and wider industrial use at the adjacent refinery site. This type of employment use was compatible with the major hazardous installation adjacent and was a type of land use that fulfilled a planning purpose in terms of public safety.

122. The development plan policies for the Stanlow special policy area and TSP seek to ensure that use of land is these places is consistent with the location within a hazard consultation zone and identify TSP for research and enterprise development. The loss of the existing lawful use would have a significant planning consequence.

123. No significant negative off-site impacts have been identified, related to typical planning matters such as noise, traffic generation, pressure on community facilities, services, infrastructure. No significant effect is likely on the Mersey Estuary SPA/Ramsar site. There may have been positive off-site impacts for which there is little evidence – the most likely being increased use of public transport to access the site by the shuttle bus service provided by the University. All in all off-site impacts add little to the overall assessment of materiality. However, the findings on all the other considerations strongly support a conclusion that a material change of use took place.

Other consideration

124. The appellant believed that the Council was fully aware of the proposals for the site and yet did not advise that a material change of use requiring planning permission would be involved. Much encouragement and full support was given to the proposals and the establishment of the FSE on the site. The appellant's key point is that the evidence of the Council's position at the time is a clear, objective and compelling indication that no material change of use was proposed, nor in fact took place.

[34] Document A.16 paragraph 36
[35] *R (oao Wright) v Resilient Energy Severndale Ltd and Forest of Dean District Council* [2019] UKSC 53
[36] See *East Barnet* op cit

125. The Council submitted, in short, that the appellant's argument is legally irrelevant and secondly that there is no secure evidential basis for the contention that the Council ever gave the appellant an unequivocal assurance that planning permission was not needed. To the contrary, the evidence shows that the University was aware that a material change of use (as opposed to a change in ownership) would need planning permission.

126. Sections 191 and 192 of the 1990 Act provide a comprehensive code for defining what is or would be lawful for the purposes of planning legislation. In my view the fatal omission on the part of the University was that, for whatever reason, at the outset no application was made for a formal determination by the Council as local planning authority as to whether or not the proposed use would be lawful. An application would have provided the mechanism to compare in detail the former use of the site with the proposed use within the statutory planning framework. The fact that there is a procedure in the 1990 Act to do so means that what may or may not have been said as part of the discussions has very little weight. Applications for lawful development certificates were made in October 2018, over four years after occupation and a change of use took place. The evidence submitted at that time was limited and it has only been during the course of the appeal that more informative documentation on the former use has been produced.

127. Notwithstanding, I have examined the information and evidence on the discussions between the University of Chester and the Council over the period up to the acquisition of TSP in 2014. In December 2012 the then Chief Executive of the Council and the then Leader of the Council expressed full support in writing (in the form of letters) for the University's proposed acquisition of the Thornton Research Centre and its intention to establish an academic faculty of engineering on the site. The correspondence was addressed to the Vice Chancellor, who sought such support to begin negotiations with Shell, to seek approval and funding from the Higher Education Funding Council for England and engage with other parties. The

support was no more than expressions of general encouragement for the project in principle within the context of the Council encouraging economic regeneration and growth in the area.

128. The position regarding the planning use of the site was discussed at a meeting on 13 March 2013 attended by the Vice Chancellor, the Chief Executive and the Deputy Chief Executive/Director of Regeneration of the Council and the Leader of the Council. No minutes of the meeting have been produced, although the University rely on an assurance on behalf of the Council that the University's plans to establish its new Faculty at the site and to recruit and teach students there did not require a planning application to change the site's use.

129. Even if such an assurance was given (and the Council does not accept that it was) there is nothing to show that the people giving such an assurance applied the relevant planning principles on material changes of use and were aware of appropriate detailed information and evidence. The letter of 5 September 2019 from the then Leader of the Council states that "we knew that the planning use did not need to be changed because we knew that Shell had used it for research and education for many years…. ". However, there is nothing to show whether this assertion was made on the basis of detailed information of the previous and proposed uses. The only indication is that the author was familiar with the TTE apprenticeship training. It is not credible to equate this small-scale programme with the education provided by a university faculty. Such an assurance, if made, was meaningless for current purposes and on which I place no reliance.

130. The documentation shows that the University was in direct contact with the Council's planning officers at the beginning of January 2013 at a time the University were bidding for capital support to develop the Thornton site. The University requested a general statement saying that "a like for like use will not require change under the sui generis but any alterations will be subject to change of use permissions". There is no evidence that such a statement was forthcoming from the local planning authority. What the request does indicate is a possible lack of understanding of the meaning of 'development' for planning purposes. Also, of note is the use of the phrase 'like for like'. The appellant confirmed that the advice of a planning consultant was not sought at this early stage.

131. More specifically in November 2013, on the basis of information on the proposed refurbishment of Building 38 (in the form of an outline description or works and a set of plans), a planning officer confirmed in writing that a planning application for the proposed works would not be necessary. A planning application was submitted for works to Building 58 in December 2013. The supporting documentation shows that in all probability planning officers knew of the University's proposals to create a new faculty of Engineering at Thornton and that the proposals for the two buildings were part of the proposal. However, there is no evidence that the planning authority was directly asked if the University's overall proposal for the site would require planning permission. There is nothing to show whether any more details were provided over and above the outline information in relation to the proposals for the two buildings. As a matter of fact no application was made at that time. It is not possible to conclude whether or not the planning authority specifically considered informally or applied its mind to whether a material change of use would be involved.

132. To conclude, the probability is that any opinion expressed in 2012 on the planning status of the site and proposal was not on a fully informed basis. Subsequently the evidence does not demonstrate how aware the Council's members and officers were of the previous use of the TSP site and particularly the extent and nature of any teaching and training, or how much information they were given of the University's plans for the TSP site. The evidence on the early discussions does not assist me in comparing the previous and the current use. The fact is no formal determination was made by the Council as local planning authority on the lawfulness of the existing or proposed uses through the procedure in sections 191 and 192 of the 1990 Act. The Council's position at the time the use by the Faculty was being proposed is of no assistance to deciding on the materiality of the change of use.

Conclusion on material change of use

133. As a matter of fact and degree post 31 March 2014 there was a material change in the definable character of the use of the land as a result of (i) the scale of the change that has taken place, (ii) the new identity developed on site, based on the University's Vision and the Triple Helix model, (iii) the way in which the buildings are used, (iv) the new patterns of movement, (v) the different characteristics of the new mixed use, (vi) the land use planning consequences of the change. Even discounting the land use planning consequences, the other factors would together be sufficient to result in a material change. The change was not confined to a change in the particular purpose of a particular occupier.

134. The use materially changed to a new sui generis mixed use comprising a University science and engineering faculty providing undergraduate and postgraduate education, research and development (in connection with automotive/petrochemical/aviation/environmental and energy industries), laboratories and office use. Development, within the meaning of section 55(1) of the 1990 Act, occurred.

Building 58[37]

135. Planning permission was granted in February 2014 to replace external curtain walling on the building and to provide a new entrance lobby and 2 canopies, circulation and ancillary accommodation.

136. The nub of the appellant's case, relying on section 75 of the 1990 Act, is that as a result of the 2014 permission use for a higher education faculty, including for teaching, became a lawful use of building 58 and a lawful principal component of the mixed use of the planning unit as a whole[38]. The result was considered entirely consistent with judgements in *Stevenage* and *Peel*[39].

137. If the appellant is correct the planning permission would have had the effect of authorising a material change of the TSP planning unit. Whether a subsequent material change would amount to a breach of planning control would rest on an intensification argument.

1990 Act

138. The relevant provisions are in section 75, regarding the effect of planning permission and section 336 on Interpretation.

139. Section 75(2) states "Where planning permission is granted for the erection of a building, the grant of planning permission may specify the purposes for

which the building may be used."

140. Section 75(3) states "If no purpose is so specified, the permission shall be construed as including permission to use the building for the purpose for which it is designed." With reference to the case of *Wilson*[40], 'designed' means the purpose for which the building was intended.

141. With reference to section 336, 'building' includes any structure or erection, and any part of a building, as so defined; and 'erection' in relation to buildings as so defined includes extension, alteration and re-erection.

[37] CD12.3.1 – CD12.3.8 provides copies of the planning application, planning permission and associated documents
[38] The first time the full particulars of the case were presented was in the closing submissions.
[39] CD10.4 *Stevenage BC v Secretary of State for the Environment, Transport and the Regions* [2011] EWHC 381 Admin; Inquiry Document E.2 *Peel Land and Property Investments plc v Hyndburn Borough Council and others* [2013] EWCA Civ 1680
[40] *Wilson v West Sussex County Council* [1963] 2 QBD 764

The planning application

142. On 12 December 2013 a planning application was made by the University for a development described on the application form as "Internal remodelling of an existing workshop, Building 58, on the Shell Thornton Site, to provide a new entrance, circulation and ancillary accommodation. The development includes the replacement of the old aluminium curtain walling, the provision of a new entrance lobby and 2 canopies". The application fee was based on the proposed physical alterations, not a larger fee for a change of use application.

143. In response to various questions on the application form, the existing use was stated to be 'workshop'. Further on[41], the building was described as an existing light engineering workshop and would remain so, where metal, electronic engineering experiments and constructions would be carried out. The materials proposed for the walls and roof were listed and the increase in floor space stated[42].

144. A full set of plans was submitted, including plans of the existing and proposed floor layouts and elevations.

145. The design and access statement (DAS) outlined the proposed creation of a new Faculty of Engineering[43] at the Shell Technology Centre. The document provided details of the proposed building layout, treatment of the elevations and proposed landscaping and, under the heading Access, the internal circulation, means of escape and so on. The stated aim of the project was not only to adapt the building to enable it to accommodate a higher education Engineering Faculty but also to improve the appearance, presence and performance of the building. Building 58 was identified as the home of the engineering workshops and the primary home of the Mechanical and Civil Engineering Department, housing workshop, technician and administration accommodation with the potential for small teaching /study areas.

146. The officer delegated report under the heading 'Proposal' outlined the proposed building works and confirmed that the building would be used as a faculty of engineering. The section 'issues and assessment' focussed on the proposed changes to the external facades and the effect on the appearance of the building and site.

Decision notice

147. Planning permission was granted by a decision notice dated 7 February 2014 for a development described as "Replace old aluminium curtain walling and the provision of a new entrance lobby and 2 canopies, circulation and ancillary accommodation" (ref 13/05373/FUL). Condition 2 required the development to be carried out in accordance with the approved plans, as listed and in accordance with the supporting documents, namely the design and access statement.

[41] Question 22 on the application form
[42] In answering the question on the application form, the existing floor space of 786 sq m and the additional floor space were categorised as non-residential institution.
[43] The document did not refer to Faculty of Science and Engineering

Assessment

148. On a plain and common sense reading of the decision notice the planning permission is for the external alterations only, as stated in the description of the proposed development. The permission did not authorise a material change of use to use by a University Higher Education Engineering Faculty for higher education purposes (Class D1). The description of the development for which permission was granted was consistent with the details of the planning application that was for alterations to building 58 and did not explicitly propose or request permission for a material change of use. The planning conditions do not have the effect of changing the description of the development granted permission.

149. Planning permission can only be granted for 'development' as defined in section 55 of the 1990 Act. Notwithstanding the appellant's submissions, it was not at all clear from the application, plans and DAS that the proposals for building 58 involved a change of use, let alone a material change of use. In order for a change of use to be development it has to be material. The local planning authority was alerted to the proposed faculty use at TSP only by way of background explanatory and supporting information to the application for building 58. The external physical works were directed at enhancing the external elevations and identity of the building. The internal works were directed at providing a new corridor leading off the main entrance to assist circulation and containment of the main workshops. In addition, new toilet facilities were to be provided towards the back of the building. The internal alterations did not amount to development requiring planning permission. The use of the internal space, as detailed on the application form, was to remain as workshops.

150. The proposed floor layout plans confirmed that information. The four largest rooms were annotated as workshops (not teaching spaces). The smaller rooms included a test bay, labs and technician rooms (plus one marked technician + staff).[44] The one indication on the plans of an educational use was the space identified as study/break out, comprising 54 m^2 of a total floorspace of around 786 m^2.

151. The DAS described the scheme as a light touch refurbishment. In the section on proposed building layout reference was made to the 'potential for small teaching /study areas' but the large open plan workshops were described as suitable for continued use as Engineering workshops. The accommodation within the new building 58 would not vary significantly from the existing layout. The focus was on the addition of the entrance and new corridor 'to facilitate access around the building without disturbing teaching spaces'. In

the schedule of proposed ground floor accommodation the four workshops were not identified as teaching spaces but as "heavy workshop spaces". The space readily identifiable as associated with teaching was limited to break out study space and 1 seminar lab.

152. The DAS section on Access referred to "the new function, although being a workshop, will be to accommodate students and staff" by creating a new means and direction of access. Nothing was said in the document about numbers of staff, students, the type of teaching activities or how, if at all, the

[44] The room marked Technician + staff need not be teaching staff

workshops would be used for teaching as opposed to research. All in all the brief descriptions in the DAS lacked detail to support a proposed material change of use of the building to a primary higher education/teaching use. It is not for a local planning authority to change the description of a development without the agreement of an applicant. In all probability the case officer was aware that the building would be used as a Faculty of Engineering but there was nothing in the officer report to indicate that a material change of use was proposed that required assessment. There is a distinction between the intention of the development, namely to accommodate use by the Faculty and whether that intention involved a material change of use on the evidence within the planning application.

153. Looked at in the round from a development management planning perspective, the building was to continue in use primarily as workshops, facilitated by relatively small alterations to the entrance and internal circulation. The new external walling systems were directed at updating the appearance and efficiency of the building. Importantly the application related to a single building, not the six buildings in the EN1 appeal and the section 78 appeal or the site as whole in the EN2 appeal. That being so, I disagree with the appellant that reliance can be placed on the fact the Council and Essar presented cases that a material change of use was involved[45]. The case for a material change of use of a single building is not directly comparable to the ground (c) appeals and, on the information for building 58, much harder to make out. Clearly there is also a tension in the appellant's case on building 58 and that on the ground (c) appeals and LDC appeal.

154. I conclude that the planning permission was not for a material change of use of building 58 but related only to physical works of alteration to the building. The permission did not explicitly or implicitly involve a material change of use such that there was a new purpose for the building – the use was to remain principally as workshops. The information indicated that the primary activity within the building would remain the same and in that context a change merely in the identity of the occupier carrying on the use does not amount to a material change of use. It follows from this conclusion, with reference to the *Peel* Court of Appeal judgement, that section 75(3) is not engaged.

155. It also seems to me that *Stevenage* does not assist the appellant. Reading section 75(2) and section 75(3) together, no purpose was stated in the planning permission. Notwithstanding the extended definition of "erection" in section 336, in so far as the works the subject of the application were for "the erection of a building", the building in question was only the parts of building 58 to which the application related. The application was not for the erection of the building as a whole. Having regard to *Stevenage*[46], it makes no sense to ascribe a higher education use to the altered exterior and associated

accommodation. In this case, section 75(3) cannot operate to enable planning permission to be construed as granting permission for a change of use of the whole of building 58.

156. To conclude, use of building 58 for a higher education faculty for the primary purpose of teaching did not become lawful by reason of the planning

[45] Document A.16 paragraph 56
[46] *Stevenage* op cit paragraph 69

permission dated 7 February 2014. The permission authorised operational development only. Therefore higher education teaching did not become a lawful principal component of the mixed use of the planning unit as a whole. The legal submissions of the Council and Essar are preferred to those of the appellant.

Conclusions on LDC Appeal

157. I have concluded that at the beginning of 2014 the lawful use of the TSP site was a sui generis mixed use comprising research and development (in connection with automotive/petrochemical/aviation/environmental and energy industries), laboratories and office use.

158. The establishment of the FSE, after the acquisition of the TSP site by the University of Chester resulted in a material change of use. The new mixed use has not become lawful through the passage of time because the requisite period of 10 years continuous use to gain immunity from enforcement action cannot be demonstrated. The use has not become lawful through the grant of a planning permission. Consequently the appellant is not successful in securing through the appeal an educational component as part of the lawful mixed use.

159. The description of the lawful use I have identified is not the same as stated in the certificate issued by the Council. The Secretary of State, or an Inspector, can exercise the same power under s191(4) on an appeal as local planning authority. Furthermore, the *Panton* judgment[47] indicated that an Inspector is obliged to issue a LDC for any use of the planning unit which the evidence shows is lawful, and to modify or substitute the descriptions of the use and the land if necessary.

160. Within that context I will substitute a more appropriate description of the use found to be lawful. In accordance with s195(2) I shall modify the LDC granted by the Council, rather than issue a new LDC. This approach will avoid any doubt which could result from having two LDCs in different terms being in force in response to the same application. In this respect s191(6) states that the lawfulness of any use for which a certificate is in force shall be conclusively presumed. The modified description will be for the same mix of uses as described by the Council during the course of the appeal. No reference to a use class is necessary or appropriate when describing a sui generis mixed use. The content of the modified certificate will adopt the form set out in Schedule 8 to the Town and County Planning (Development Management Procedure) (England) Order 2015.

161. Therefore, following s195(2), the Council's refusal in part was not well-founded in so far as the lawful use was not accurately described. I have, however, agreed with the Council that higher education should not be included as a component of the mixed use found to be lawful.

Conclusions on grounds (b) and (c) EN2 appeal

162. Office use has taken place on the Land as a matter of fact since the late 1940's. The office use became a primary or principal use, as a component of the mixed use, as the Research Centre developed over time. The appeal on ground (b) fails.

163. After the acquisition of the Land by the University of Chester in March 2014 the lawful use, described in paragraph 157 above, changed to a mixed use comprising research and development, laboratories, office use and a University science and engineering faculty for the provision of undergraduate and postgraduate education.

164. I have concluded that the new use resulting from the addition of an educational use (teaching, training and research) to the mix of uses on the Land, is materially different in character and effects to the previous use of TSP. A material change of use of the planning unit has occurred.

165. The material change of use amounted to development requiring planning permission. The planning permission granted in February 2014 did not authorise a material change of use of Building 58 to use by a Faculty of Engineering for a higher education use including teaching and hence that use has not become a lawful principal component of the mixed use of the planning unit as a whole. The material change of use has not been authorised by any other planning permission. I have not found the new sui generis mixed use to be lawful.

166. It follows that a breach of planning control occurred. The appeal does not succeed on ground (c).

167. The Council's request for a correction to the wording of the development described in the breach of planning control is justified. To retain consistency with the original wording, the enforcement notice in paragraph 3 should be corrected to state 'Without planning permission a material change in the use of the Land **from** a mixed use for research and development (in connection with automotive/petrochemical/aviation/environmental and energy industries), laboratories and office use **to** a mixed use comprising a University science and engineering faculty providing undergraduate and postgraduate education, research and development (in connection with automotive/petrochemical/aviation/environmental and energy industries), laboratories and office use.

EN2 APPEAL GROUND A / DEEMED PLANNING APPLICATION AND SECTION 78 APPEAL

Main Issues

168. The development for assessment in the deemed planning application is derived directly from the corrected description of the breach of planning control, as set out fully above, and is a mixed use. The application site is equivalent to the Land outlined in red on the plan attached to the notice and therefore covers all TSP.

[47] *Panton and Farmer v Secretary of State for the Environment Transport and the Regions and Vale of White Horse District Council* [1999] JPL 461

169. The section 78 development is not exactly the same. To recap the amended description is: "A material change in the use of buildings 38, 40, 58, 62, 304 and 305 to use by the University of Chester Faculty of Science and Engineering for the purposes of teaching, training and research as an integral part of the Science Park". The site outlined in red on the plan is confined to the footprints of the six buildings.

170. However, the main issues for assessing the planning merits of each appeal are the same:

- The effect of the development on public safety, having particular regard to the proximity of TSP to Stanlow Oil Refinery, an upper tier COMAH establishment;
- The effect of the development on the continuing operation of Stanlow Oil Refinery within the Stanlow special policy area;
- The effect of the introduction of the FSE education use on research and enterprise at TSP and in the wider area, taking into account the business and educational environment created at TSP.

171. Other planning considerations include:

- The effect of the change of use on the heritage assets at the TSP site;
- The effect of the development on the Mersey Estuary SPA/Ramsar site.
- Whether any identified harm may be addressed by the use of planning conditions.

172. No planning obligations were proposed by the appellant or sought by the Council.

Planning Policy

173. The development plan comprises the Cheshire West and Chester Council Local Plan (Part One) Strategic Policies (adopted January 2015) and the Cheshire West and Chester Council Local Plan (Part Two) Land Allocations and Detailed Policies (adopted July 2019).

174. For the purposes of these appeals, the most important policies in the Local Plan (Part One) are STRAT 1 sustainable development, STRAT 4 Ellesmere Port and ECON 1 economic growth, employment and enterprise. In addition, Policy SOC 5 is concerned with health and well-being and Policy ENV 6 promotes sustainable high quality design that promotes safe, secure environments and access routes where appropriate.

175. In the Local Plan (Part Two) the most important policies are EP 3 Stanlow special policy area, EP 5 Thornton Science Park, and DM 34 development in the vicinity of hazardous installations. Policy EP 1 is also relevant and is aimed at delivering Policy STRAT 4. I will refer to additional relevant development plan policies when addressing the other planning considerations outside of the main issues. I note that Policy CH 4 University of Chester focuses on development at the campus sites in Chester. The reasoned justification (para 2.30) refers to Policy EP 5 for the University's campus and activities at TSP.

176. All the development plan policies are up-to-date and have full weight.

177. The National Planning Policy Framework (the Framework) sets out the Government's planning policies for England. Planning Practice Guidance (PPG) advises on how these policies are expected to be applied.

178. The Framework requires consideration of whether unacceptable development could be made acceptable through the use of planning conditions or planning obligations. Planning conditions should be kept to a minimum and only be imposed where they are necessary, relevant to planning and to the development to be permitted, enforceable, precise and reasonable in all other respects (known as the six tests).

Effect on Public Safety

179. The public safety issue arises from the location of TSP adjacent to Stanlow Oil Refinery. Public safety is reflected in the social objective of sustainable development that supports strong, vibrant and healthy communities. Ensuring a safe built environment contributes to this objective. The Secretary of State considered public safety to be "such an important area" in the Silvertown Tunnel decision dated 10 May 2018[48].

Stanlow Oil Refinery

180. The Stanlow Oil Refinery complex is located to the west, north west and south west of, and has common boundaries with, TSP. Aerial photographs[49] illustrate well the very close proximity, the difference in scale and the contrast in layout, buildings and infrastructure on the two sites. A local railway line has an east/west alignment through the refinery complex and runs to the north of the main TSP site.

181. Stanlow Oil Refinery is one of the six major oil refineries in the United Kingdom. The site covers an area of approximately 769 ha and has been in operation since about 1924. The refinery is a source of fuels and refined products including gasoline, diesel, kerosene, naptha, fuel oil, propane and other chemicals. The Oil Refinery Major Accident Hazards establishment is designated as an upper tier COMAH site. This status arises from the exceedance of hazardous inventory thresholds as prescribed in the Control of Major Accident Hazards (COMAH) Regulations in respect of flammable and toxic substances[50].

182. Essar has outlined the existing operation, drawing attention to the range of refinery processes, including distillation, catalytic cracking and removal of contaminants such as sulphur. The refinery operates as a single chain as a highly integrated system and as a result it is not possible to isolate individual units[51].

183. On the part of the site located towards the boundary with the appeal site historically there have been solvent units (highly flammable liquids plus methanol), a sulpholane unit (butadiene and sulphur dioxide) together with additives plants (flammable liquids) and a resin plant. Existing plant and equipment include a loading gantry (flammable liquids) and alcohols production areas (toxic and flammable gas, flammable gas and flammable liquids). In addition, there is fully operational plant integral to the ability of the refinery to operate and produce on grade petroleum products such as gasoline and diesel and which gives rise the presence of toxic and flammable gas and highly flammable gases[52].

[48] HSE/REBUTTAL/1 Appendix 1 paragraph 66
[49] Appendices 1 and 2 to Mr Lyle's proof
[50] HSE/HPT/1 paragraph 5.3
[51] EOL/IL/04 paragraphs 3.32 to 3.35
[52] CD5.11 paragraphs 7.9 to 7.13

184. In a statement of common ground between Essar and the Council (the Hazardous Substances Authority) information is included on the original Hazardous Substances Consent (HSC) and a continuation consent dated 3 October 2011. A spreadsheet identifies the various vessel areas across the site, the relevant categories of substance permitted for each vessel area (or moveable storage area) together with any known restriction on quantity plus the relevant consent for each area[53].

185. The HSE has provided a summary table of the amounts of substances permitted to be held at the refinery site, including up to 4.59 million tonnes of highly flammable liquid [54]. In addition, the HSE has divided the site into 4 sections and provided a short summary description for each section[55].

186. The North East area is located to the north of TSP and the railway. Within this area the highly flammable liquid may be stored in large capacity liquid tanks, each with a capacity up to 99,168 m^3.[56]

187. The South East area is located to the south of the railway line, adjacent to TSP. This area has consent for substances classified as (i) very toxic and toxic in fixed tanks (with the largest tank having a 503 m^3 capacity) and moveable containers; (ii) hydrogen fluoride, sulphur dioxide and highly flammable liquids in both fixed (with the largest tank having a capacity of up to 10,700 m^3 capacity) and moveable containers; (iii) flammable liquids/gases stored at elevated pressure in vessels (with the largest tank having a 98 m^3 capacity), and (iv) methanol, very toxic and toxic to aquatic organisms.

188. The North West and South West areas are located further away from TSP. The North West area has consent for (i) very toxic and toxic substances andii) highly flammable liquids, in fixed tanks and moveable containers, and (iii) very toxic and toxic to aquatic organisms. The South West area has consent for (i) highly flammable liquids in fixed tanks (the largest tank having a capacity of 23,163 m^3) and moveable containers, (ii) LPG, tetra ethyl lead, tetra methyl lead, toxic to aquatic organisms.

189. This information indicates the highly complex nature of the refinery site, the broad range of hazardous substances and the large and very large quantities of substances/class of substances that are able to be stored there. It is important to bear in mind that the HSC was a deemed consent based on the inventory present during the establishment period and as such it was not granted after a merits-based assessment.

190. An effect of the HSC is that Essar has very considerable flexibility on how it may lawfully operate on its site without recourse to any further consents. As agreed between the appellant and the HSE the deemed consent allows substances to be kept anywhere in the specified vessel area. The maximum vessel size that can be located within the vessel area is identified. However, there is no specification of the location, size or operating conditions of smaller

[53] CD15.2 Appendix 1
[54] HSE/JR/1 page 7 paragraph 4.2
[55] HSE/JR/1 page 8 paragraphs 4.5 – 4.9
[56] HSE/JR/1 paragraph 4.6 has been subject to a correction and is clarified at HSE/REBUTTAL/1 at paragraph 2.6(b). The 4.59 million tonnes of highly flammable substances allowed to be stored across the refinery would equate to more than 40 of the largest vessels theoretically in situ, several of which could be physically accommodated in Area 17.

inventories or a maximum number of vessels, all of which have the potential to contribute to major accident hazards beyond the vessel area or off-site[57].

The consent does not limit the location of hazardous substances within the site at quantities below 10% of the controlled quantity. In addition, there is a complex of pipes, valves, pumps and loading gantries that are not covered by the hazardous substances consent.

191. The COMAH Regulations requires Essar as operator to take all measures necessary to prevent major accidents and to limit their consequences for human health and the environment. Therefore it must be accepted that the risks arising from the installation are as low as reasonably practicable (ALARP). The risk that unavoidably remains is the residual risk.

Legislative and policy framework and guidance

192. Major accidents and their serious consequences, such as at Bhopal, Seveso and Flixborough, have resulted in the development of controls on major accident hazards involving hazardous substances. Details of the relevant legislative and policy framework have been provided in the core documents, evidence and submissions and so do not need to be repeated at length. The Seveso III Directive[58] emphasises the need to ensure a high level of protection of human health and the environment. Article 13 sets out expectations on land use planning, which includes taking account of the need in the long term to maintain appropriate safety distances between hazardous installations and residential areas, buildings and areas of public use, recreation areas and, as far as possible, major transport routes. The Directive was implemented in this country principally through the Control of Major Accident Hazards Regulations in 2015.

193. Planning Practice Guidance on Hazardous Substances, last updated very recently in November 2019, deals with the land use planning aspects of the Seveso III Directive under planning legislation. The PPG provides up to date national advice on the planning controls relating to the storage of hazardous substances and, of particular relevance to the current appeals, on how to handle development proposals around hazardous establishments. In this respect the PPG confirms the requirement to consult the HSE as the expert body and COMAH competent authority.

194. The PPG also confirms the general principles on which the HSE will base its advice[59]. With reference to the matters that have been in dispute, significantly the principles state that where it is beneficial to do so the advice takes account of risk as well as hazard. Also, that advice should take account of (i) the size and nature of the proposed development and the inherent vulnerability of the population at risk, and (ii) the risk of serious injury, including that of fatality.

195. The HSE's role is advisory but the PPG confirms that in view of its acknowledged expertise in assessing the off-site risks presented by the use of hazardous substances any advice from the HSE against the grant of planning permission should not be overridden without the most careful consideration.

[57] CD15.3 paragraph 2.1.3 and HSE/JR/1 paragraph 5.3.9
[58] Directive 2012/18/EU of 4 July 2012 on the control of major-accident hazards involving dangerous substances, amending and subsequently appealing Council Directive 96/82/EC
[59] Paragraph 068 Reference ID: 39-068-20161209 PPG Hazardous Substances

The courts have expressed support for this approach, recognising that the HSE is the expert body that has statutory responsibility for providing decision makers with advice on such technical issues. The Secretary of State in the

Silvertown Tunnel decision placed great weight on HSE's advice given their expertise with respect to the effective regulation of major hazard industries.

196. The HSE has strongly advised against the FSE development. The HSE's assessment of overall residual risk for the development was determined through application of a codified decision matrix described in its Land Use Planning Methodology document[60].

Appellant's Case

197. The appellant's case on the public safety issue for the inquiry was primarily set out in the evidence of their principal consultant. The evidence included consideration of the risks of fire or explosion resulting from the loss of containment of oil or gasoline from a storage tank in Area 17 (the oil spill modelling) leading to a pool fire. As a result of his analysis TSP was placed in the Outer Consultation Zone or beyond and therefore threshold levels of risk are not reached. This evidence and conclusion were relied on by other witnesses appearing for the University.

198. The public safety technical evidence was subject to detailed expert scrutiny through the cross examination by the HSE. The witness accepted that the thermal modelling should be withdrawn and on that basis I will make no further reference to the withdrawn report. He also agreed that there was no possible rational basis for any decision maker to override the HSE on the basis of any of the technical material he presented. Subsequently in the following week, the Executive Dean, when pressed, placed no dependence on the technical evidence and understood that it had been withdrawn. The appellant's planning witness accepted he had to revise his position as he was no longer able to rely on the technical evidence.

199. Nonetheless, the final stated position of the University[61] is that the development does not result in a significant increase in numbers of people subject to thresholds of risk, when the numbers are examined and because HSE's assessment is a theoretical exercise as compared to the actual degree of risk in the real world. The appellant's technical evidence, in line with Seveso, sought to address the real likelihood of harm rather than focussing on just hazard consequences. The modelling work on tank failure was not withdrawn. Account must be taken of the presence of the existing population and development at Ince and the fact Policy EP 5 allows for further development at TSP. The HSE sensitivity levels are considered an exercise in unreality. The level of risk in the real world is the test to be applied, as illustrated by the Oval decision and in the Local Plan (Part Two) through the 2nd part of Policy DM 34. None of these considerations rely on the points conceded in cross examination.

Location

200. In terms of the development plan the compatibility and identification of a higher education use at TSP was considered through the consultation and

[60] CD7.5
[61] Inquiry Document A.16 paragraphs 61-97

examination stages of the Local Plan (Part Two). Representations included those made by the University and the HSE. The Publication Draft was specifically amended to delete reference in Policy EP 5 to teaching and a Class D1 use at TSP in response to HSE development advice in respect of hazard consultation zones and potential risks. This amendment was accepted through

the examination, even though a further representation was made by the University[62] and was carried through into the adopted plan.

201. Development at TSP has to satisfy both Policy EP 3 and Policy EP 5. In considering the application of these polices I have taken full account of the submissions of the appellant, the Council and Essar and the case law referred to[63]. The Council neatly summarised the conclusion to be drawn from *Cherkely* – that supporting text explains, but cannot add to, take away from or amend policy. *Canterbury* concerned the interpretation of policies worded permissively.

202. Policies EP 3 and EP 5 are part of a comprehensive spatial strategy for Ellesmere Port that embraces Stanlow and TSP. Policy STRAT 4 specifically identifies Stanlow as being important for petrochemical and related industries with suitable employment land for development being taken forward through the Local Plan (Part Two). Policy ECON 1 identifies the Stanlow area as a key employment location.

203. Policy EP 3 states that within the Stanlow special policy area Stanlow Oil Refinery is of national importance and safeguarded for continued use for petrochemical and related industries. Encouragement is given to the redevelopment of any vacant, under-used or derelict land that is surplus to the primary operational use of the site for employment use (use classes B1, B2 and B8), subject to any security restrictions and the policy criteria. New employment development (use classes B1, B2, B8 and suitable sui generis uses) will be supported where all the relevant stated policy criteria are met. Development proposals at TSP must take into account the Policy EP 3 criteria, as well as the additional criteria of Policy EP 5.

204. The emphasis is on employment development that is compatible with Stanlow Oil Refinery and in general the special policy area is regarded as the most suitable location within the plan area to accommodate hazardous and potentially polluting industry. With further reference to the reasoned justification (para. 3.37) it is clear that the intention of the policy is to allow for sui generis uses that are complementary to the operations of the oil refinery and small scale developments such as waste management facilities.

205. The development in the section 78 appeal does not fall within the category of new employment development. The sui generis mixed use development in the EN2 Appeal includes employment use components but also a primary education use. This type of mixed use is not identified by the policy as being 'suitable'.

206. Policy EP 5 identifies TSP for research and enterprise development. Employment development (use classes B1 and B2) will be supported where all the relevant stated policy criteria are met. The reasoned justification (para.

[62] CD7.17.2 The university requested provision for appropriate and defined higher education uses on the TSP site.
[63] *R (Cherkley Valley Campaign Limited) v Mole Valley District Council and another* [2014] EWCA Civ 567 and *Gladman Developments Limited v Canterbury City Council* [2019] EWCA Civ 669.

3.48) recognises that TSP is a site for the University's FSE. However, the text gives no positive indication that a major teaching role would be supported, which is consistent with the history of the formulation of the policy. Emphasis is placed on providing space for new business start-ups [and] for the expansion of businesses operating in the sectors of energy, environment, engineering, advanced manufacturing chemicals and automotive.

207. The policy does not identify or include support for a sui generis mixed use including higher education as a primary component. The scope of acceptable uses is more narrowly defined than in Policy EP 3.

208. Policies EP 3 and EP 5 do not explicitly preclude or rule out an educational use at TSP. However, these polices have to be considered as part of the spatial strategy for the area and the approach to the uses that will be permitted at the TSP site within the special policy area. The educational FSE even as part of a mixed use is not identified as an acceptable use in this location. My initial view is that there is not only a lack of support for but also policy objection to the appeal developments in respect of land use.

209. I will return to the criteria set out in Polices EP 3 and EP 5 later in the decision, following detailed consideration of the public safety issue.

210. Policy DM 34 gives effect to Policies SOC 5, ENV 6 and ECON 1 of Local Plan (Part One). The policy supports development in the vicinity of hazardous installations "providing it would not result in a significant increase in the number of people being subjected to threshold levels of risk." A second limb to the policy provides for exceptions in defined circumstances. The reasoned justification demonstrates that the policy relies on the HSE's Land Use Planning Methodology. It explains that "threshold levels of risk" are those which are sufficient for the HSE to advise against the development concerned being granted planning permission (para. 13.51). Hence there is support and endorsement by the development plan for the application of the Land Use Planning Methodology.

People at risk

211. The appellant disputed that the development has resulted in a significant increase in the number of people at TSP for two main reasons. First, during the occupation by Shell and by the University the overall numbers of people present are broadly comparable – the maximum total number of people currently on site at any one time now is 1,084 compared to around 1,000 in the Shell days. Secondly, the number of people could significantly increase in any event, without the need for planning permission (the fallback).

212. The documentary evidence suggests that during Shell's ownership the peak employment on the site was in the 1960s and 1970s when around nearly 1,000 people worked there[64]. Thereafter staff numbers declined and by the 1990's employment was around 600 people, even though there had been a period of expansion of research and improvements to the functioning of the site. The probability is that following the review and refurbishment of accommodation the numbers of employees in the early years would not be repeated.

[64] CD14.45 page 1630. CD14.47 page 4: In 1976 the Centre employed 'some 950 people'.

213. The information on existing occupation (November 2019) shows University staff totals 140 people, with 660 students and 540 employees in the commercial units, giving an overall total of some 1,340 people. Whilst not all students and staff may be on site at one time, I do not consider an adjustment should be made because there is not the information to make a similar adjustment for employees being away from the site in the pre-2014 period. The evidence of a former employee at Thornton shows his time working elsewhere was considerable (approximately 50%)[65]. In 1962 it was

reported "It is not unusual to find members of Thornton staff working temporarily in some other research establishment outside the Group."[66]

214. Comparing nearly 1,000 with 1,340, the number of people at TSP has significantly increased following the material change of use. Furthermore, buildings are used more intensively when in a primary higher educational use, as indicated by the data on floorspace and occupation. The FSE is not at full capacity, a second LDC application indicating that up to 1,000 students were envisaged[67]. The appellant stated in oral evidence that the plan is to grow student numbers, a reason being the income that is generated.

215. Even if the comparison was between nearly 1,000 and 1,084 the increase would be just less than 100 people, which given the percentage increase and policy context would be significant.

216. As to the fallback, it is the case that there is no existing planning condition or planning obligation restricting the number of people on the site. However, to support the point on numbers no evidence has been presented that examines such factors as range of authorised uses, likely intensity of use of the buildings, characteristics and any alterations to accommodation. In the absence of such detailed reasoning I am not persuaded that an increase in people necessarily would be a possible outcome in the future. In particular I have in mind the historic decline in numbers employed at the Research Centre even during periods of expansion and when it was one of the world's leading laboratories.

217. Furthermore, the inconsistency in the appellant's case does not assist the argument. When considering the future of the TSP, the appellant indicated that the TSP would no longer be viable without the FSE. If that was correct, the scenario of increased occupation would not be a real prospect. On both grounds I attach very little weight to this consideration. The policy test is directed at the development requiring planning permission giving rise to the significant increase in the number of people subjected to threshold levels of risk. There has been a change from one mixed use to a new mixed use, where the appellant emphasised the integral nature of the educational use. In those terms the relevance of the fallback is very questionable.

218. As a third and very important consideration the Council drew attention to the fact the Local Plan relies on the definition of the consultation zone by the HSE to confirm that an increase is significant [68]. As a matter of course the definition of the zone takes account of the size and nature of the proposed development. To consider the matter further would open up the possibility of a second definition of acceptable risk, which would negate the intention of the policy.

219. I conclude that the teaching and training use introduced by the University has resulted in a significant increase in the number of people at TSP, who are being subjected to threshold levels of risk within the meaning of Policy DM 34. The following sections consider whether the HSE's 'Advise Against' is justified.

[65] Council's Appendices, Appendix B iii paragraph 2.4
[66] CD14.45 page 1636
[67] An application was made in October 2018 for a certificate of lawfulness of proposed use or development for use of the TSP for a sui generis mixed use, comprising elements of research and development, laboratory, teaching and workplace training, including accommodating up to 1,000 higher education students and ancillary uses (ref 18/0405/LDC). The Council refused to issue a certificate by a decision dated 28 February 2019.

HSE's advice

220. By way of background, it appears that the University first became aware of the location of TSP within the Inner Zone in November 2015, when the HSE indicated that if planning permission was needed, it would advise against the development because of the introduction of a large student population into the Inner Zone[69]. In the latter part of 2016 the HSE confirmed its objection to the University's activities at TSP when consultation was undertaken on a draft Local Development Order.

221. The HSE has explained its advice is based on the residual risk to people which remains after all reasonably practicable measures, as required by the Health and Safety at Work etc Act 1974 and its relevant statutory provisions, have been taken at the establishment which has the benefit, and entitlement, of hazardous substances consent. There are two key elements to the HSE's assessment of residual risk for a proposed development when providing advice to a local planning authority (i) the setting of Consultation Zones, and (ii) establishing whether the proposed development falls within any of the zones in conjunction with the development type and risk.

Consultation Zones

222. In this case, the zones have been set using the protection concept. This concept is based on the principle of protecting populations potentially exposed to a hazard. The aim is to maintain a separation distance between the development and the hazard to provide a high degree of protection against more likely smaller major accidents and also very worthwhile protection against unlikely but foreseeable larger ones. A representative worst case scenario is chosen and used as a proxy to represent the range of events that could occur, those foreseeable and those whose causality is less certain.

223. At TSP the HSE considered the main risk to the development comes from the range of highly flammable substances that are permitted to be stored in the area to the north. The assessment is based upon the independent catastrophic failure of a 99,168 m^3 storage tank in Area 17 of the Oil Refinery, leading to surge overtopping of a bund, the spreading and formation of a pool of highly flammable liquid, vapour forming above the pool due to evaporation, ignition of the vapour above the pool and a large scale pool fire (the RWCMA). This fire would produce a risk by potentially exposing people to high levels of thermal radiation. The reasons for the choice of this type of representative

[68] CD7.2.1 paragraph 13.48
[69] Inquiry document H.2

scenario are detailed in the HSE's evidence and supported by reference to extensive research.

<u>Protection Concept</u>

224. I consider that use of the protection concept is justified in this case for the following main reasons. First and foremost, and as outlined above, Stanlow Oil Refinery is a highly complex and large site with the capacity to store and process an extensive range of chemicals, toxic substances and flammable liquids. The hazardous substances consent, essentially a deemed consent based on the historic inventory, is very broad and flexible with major multiple hazards elements. There is the ability for site conditions to change in future without further control, in part because the site operator is able to make use of the full entitlement at any time without requiring further permission.

Identifying and predicting the exact nature of all potential hazards is near impossible, bearing in mind scope for escalation and unknown or poorly understood mechanisms.

225. Therefore the use of a proxy is highly appropriate to provide public safety advice for the long term because of the inherent unknowns concerning the range of hazards that can or could occur from failures involving the large scale storage of highly flammable substances together with the freedoms inherent in the hazardous substances consent. The importance of this representative approach was illustrated in 2005 by the Buncefield incident involving a vapour cloud explosion, which highlighted the uncertainties in anticipating all types of incidents.

226. The protection-based approach has been subject to reviews dating back to the 1980s. It was endorsed by the Government's Advisory Committee on Major Hazards in 1989. In 2004 the ERM report found HSE's risk analysis methodology, such as those used to set zones arising from toxic hazards, generally fit for purpose and recognised the protection concept had an important continuing role in certain situations[70]. The Buncefield Major Incident Investigation Board (MIIB) in 2008 considered the concept and made recommendations in the context of a wider review of control of land use planning around major hazard sites. The recommendations regarding HSE's role and formal risk assessment were not taken forward by the Government. Prevailing national policy and regulations governing planning and hazardous substances are summarised in the relevant PPG.

227. The use of the protection concept to derive a cautious best estimate of risk from a representative worst case major accident is a well established and widely accepted approach that has been endorsed by the Secretary of State and Planning Inspectors as a means of assessing the compatibility of land use adjacent to a major hazard site. Notable appeals concern development at the Brit Oval (2009), Ram Brewery Wandsworth (2010) and Land at Brewery Tap Ipswich (2006). As a general principle the PPG supports the use of the protection concept, while allowing for the use of a quantified risk assessment (QRA) where beneficial.

228. The alternative approach based on QRA is not suitable to be applied to the complex Stanlow Oil Refinery site. This method requires the identification of

[70] CD9.8 (see paragraphs 12-16) and CD9.15 (see Executive Summary)

all the significant risks, the range of events that could occur, their scale and their frequency. The assessments of the impacts of each event are summated to give a quantified assessment of the total risks from the major hazardous installation to a person at the identified premises or site from all the relevant hazards. The task of applying this analysis to the Refinery site would be particularly daunting as it would have to model and assess all foreseeable events including escalation events. The quantification of the risk would be extremely difficult and probably impossible, the outcomes highly uncertain or potentially very misleading. The purported QRA put forward by the appellant highlights the inherent difficulties of this type of assessment for the Refinery site. The chosen event, even if correctly modelled, understood and assessed, would only indicate the risk to students from that single event.

229. The RWCMA, as a proxy, does not necessarily have to exactly reproduce existing storage and processes at the Oil Refinery. The aim of the proxy is to

cover a range of real events and effects that could present an equivalent or greater level of harm. When considered in that way, the description of the approach as 'theoretical' is inappropriate and misunderstands the basis for and reasoning behind the choice of the RWCMA. The refinery site has the benefit of a HSC that authorises the presence of very large volumes of a range of highly flammable liquids. The HSE advise that a large number of different release events could occur within or associated with the vessel area. These could include releases from high volume transfer operations that are not defined or controlled by the HSC. The events could lead to the generation and spread of flammable vapour over hundreds of metres from the release point.

The RWCMA

230. The representative event[71] is described as 54,000 m^3 of flammable liquid overtopping the bund and travelling at very high speed in the form of a tsunami. The predicted calculated diameter of the resultant pool is 744 m, which is then used to set the extent of the Consultation Zones by predicting the thermal consequences of a pool fire on the surrounding population. The thermal hazard represented by the Inner Zone is assessed to be in excess of a dose that would lead to 50% fatalities of an average population. The extent of the Inner Zone covers all six buildings in educational use[72]. Assuming a population of 600 students within the Inner Zone, the expectation is that at least 300 students would be killed and a further percentage would suffer serious harms because of the low protection provided by the buildings. This indicates the potentially devastating impact on TSP.

231. A number of elements were agreed between the appellant and the HSE, which are set out in the statement of common ground[73]. In summary, there was no dispute that the Inner Zone is defined by the distance to which a dose of 1800 thermal dose units (tdu) would be received and that in order to qualify as the Inner Zone this has to occur at a frequency of no less than 10 chances per million (cpm) per year. Tank failure rate data and the use of a pool fire to represent a range of potential hazards/risks associated with inventories of highly flammable liquids were agreed. In terms of pool fire modelling, agreed matters include the use of specified computer models and the volume overtopping a bund (based on 54% overtopping).

[71] HSE/JR/1 paragraphs 7.1 to 8.10 provide further details and references
[72] HSE/JR/1 Appendix N
[73] CD15.3

232. In relation to the assessment of risk or likelihood of an event happening, the appellant maintained that worldwide there has never been a catastrophic failure of a tank containing crude oil causing fatalities or injuries to off-site populations during the last 100 years or so. Even if this is factually correct, the relevance is minimal because of the proxy nature of the catastrophic tank failure as a component of the RWCMA. It is HSE practice to adopt a catastrophic tank failure as a representative event for all flammable liquid vessels because it is reasonably foreseeable and relatively straight forward and reliable to model. There is the documentary evidence to show numerous catastrophic tank failures have occurred. More generally, storage of flammable substances/liquids has led to serious incidents, where vapour cloud explosions resulted in injuries and fatalities (for example at Flixborough, Jaipur (2009) and at Amuay Refinery, Venezuela (2012)[74]).

233. In view of the reasoning behind the use of the protection concept, the fact that the RWCMA is based on the storage of gasoline in the tanks and not crude is acceptable. Furthermore, the HSC allows the tanks in Area 17 to hold any substances that are classified as B8 – Highly Inflammable. This category includes gasoline. The HSE's witness confirmed in cross examination that gasoline is the exemplar substance for highly inflammables. Significantly, Essar confirmed that not only crude oil is stored in Area 17 currently and outlined how future operational changes could occur realistically in that area. The appellant's witness was unable to demonstrate and explain how crude would spread differently.

234. The appellant made much of the fact that the RWCMA ignored topography, notably the gradient of Oil Sites Road away from the FSE and the railway cutting that physically separates the FSE from Area 17. However, the representative event, as a proxy, covers scenarios which may not be restricted in any way by terrain features. To illustrate the point the HSE refers to the potential for a spreading vapour cloud and the potential hazards from an ignited vapour cloud such as a flash fire or vapour cloud explosion that would not be impeded by topographical features such as a railway cutting. HSE deliberately did not take topography into account and in my view has suitably supported that approach by expert reasoned argument.

235. The HSE explained[75] that the failure rate for the representative tank failure has to take into account the number of tanks that may be present in the consented area. Due to the maximum size of tanks allowed and the consented quantities it was reasonably assumed there could be more than 3 large tanks in Area 17. Based on research and analysis, the combined failure rate for one tank is 5 cpm. The failure rate for 3 tanks (15cpm) was considered to be a sufficiently high rate for the scenario to be used to set the Inner Zone. I take no issue with this reasoning, having regard to the scope of the HSC. No allowance was made for escalation events between tanks.

[74] CD9.16
[75] HSE/JR/1 paragraphs 6.2.1 to 6.2.3

236. The appellant sought to demonstrate that the event frequency of the RWCMA is significantly lower than 10 cpm[76]. Related to this, a scenario was outlined, based on the location of the 3 nearest tanks to TSP, that reduced the event frequency to 5cpm. The outcome was considered to be cautious because it did not take into account a directional probability between the tank and the sensitive population, topography and a lower calculated rate for tank failure.

237. This exercise has a number of failings, which have been comprehensively set out by the HSE[77]. In particular I am troubled by the fact the methodology was not transparent and a number of variables were not supported by modelling or technical analysis. Too much reliance was placed on the existing tank layout and the position of the 3 chosen tanks, which fails to take account of the scope and flexibility of the HSC. The focus was on the frequency of a single tank failure alone, rather than the representative event as a whole. All matters considered, the exercise does not lead me to doubt the appropriateness, relevance and results of the representative event analysed by the HSE.

238. In conclusion, based on the representative event the HSE's evidence

explains the consequences of a catastrophic failure of a tank, with reference to the appropriate specialist modelling undertaken and the relevant expert research, technical documents and review underpinning the analysis. In my view none of this analysis was successfully challenged. A number of elements were agreed by the appellant. Given the scientific study and expertise involved and underlying the methodology I attach very substantial weight to the HSE's conclusions.

Appellant's assessment

239. The appellant's assessment of the likely consequences from loss of containment of oil or gasoline from a storage tank in Area 17 was shown to be seriously misleading. The ERM modelling took account of topography and the report concluded that (i) none of the crude oil or gasoline released would flow into the TSP site, and (ii) if the pool of crude oil were to be ignited the teaching buildings would be outside the 1,800 thermal dose unit. It emerged through cross examination that the ERM modelling was based on a release over the bund equivalent to that from a small pipe at 2m^3 per second over 8 hours 20 minutes. Therefore the modelled event was very different to and does not address the proxy event. It provides no appropriate or credible alternative to the catastrophic tank failure considered by the HSE.

240. The appellant, in closing, maintained that the results were reliable for a significant failure involving a 350mm leak, an incident considered significantly more representative than a total catastrophic tank failure[78]. However, the author of the ERM technical report on tank failure did not appear at the inquiry and the questioning of the appellant's witness raised a number of unanswered matters about the appropriateness of the chosen model and the robustness of the study. He accepted however that the cautious best estimate approach was not used, which is contrary to generally accepted practice. The ERM report did not stand up to scrutiny and I attach no weight to the results.

241. The approach adopted was to consider just a single possible event, whereas the distinguishing feature of the Oil Refinery site is the large number and types of potential incidents. A QRA was not carried out because the study failed to address the all hazards/risks from the multiple sources and mechanisms across the site. Overall the study is of no assistance to understanding the consequences of potential incidents and the risk to people at TSP.

242. Very significantly, the PPG advice was not applied in that no account was taken of the maximum quantities of substances permitted by the HSC and the assessment also failed to address all general principles identified by the PPG.

243. Overall I consider the analysis is very limited and narrow in scope and which in any event suffers from serious deficiencies. Contrary to the submission of the appellant, the technical evidence does not adequately or reliably consider actual risk in line with the requirements of the Seveso Directive[79]. The pool modelling was withdrawn.

Conclusions

[76] This argument is set out primarily in Inquiry Document A.16 paragraphs 73 to 78.
[77] Inquiry Document H.13 paragraph 81
[78] The appellant notes that this example would fall within the definition of a catastrophic tank failure cited in an Energy Institute Research Report (CD14.2 para 3.2.1). However, that report makes clear that the definition is for the purposes of the research report.

244. The complexity and the scale of Stanlow Oil Refinery is such that the likelihood of every specific effect occurring within a specified period or in specified circumstances is not able to be quantified. The HSE's representative event and subsequent analysis is the appropriate methodology and approach to address the circumstances in this case.

245. The choice of the RWCMA has been satisfactorily justified, the modelling is robust and the RWCMA is appropriate to define the Inner Zone in all respects.

246. Where Stanlow Oil Refinery is the major hazardous installation, the consultation zones defined by the HSE are reasonably set and provide the only basis for applying the decision matrix in the Land Use Planning Methodology. No factors or anything of substance have been identified that cause me to have any reservations and the consultation zones have full weight.

Sensitivity levels

247. The HSE's Land Use Planning Methodology defines sensitivity level (SL) as the scale used to define the vulnerability of a development population to major accident hazards. It is based on pragmatic criteria; the type of development, likely numbers present and whether any vulnerable people will be present. The scale ascends from Level 1 to Level 4 – the more vulnerable the population, the higher the sensitivity level.

248. In this case the HSE concluded the use is within the development type DT2.4 Indoor Use by Public, a category which includes adult education. Because of the large scale of the proposal and hence the numbers of people at risk, the sensitivity level is Level 3 (SL3). The HSE submitted that the SL3 is not remotely marginal because the floor space is well over 2 times the threshold of SL3; the intensity of use is about double per square foot of employment use; and being in the same category as a 5,000 m retail park or shopping centre is no surprise.

249. In justifying the application of 'Indoor Use by Public' in the Land Use Planning Methodology to the FSE development, the HSE considers the population is non-workplace and students are not employees. This distinction reflects important societal risk consequences which is integral to HSE's public safety advice. Such development results in a substantial increase in the numbers of people at risk, with those individuals gaining no direct benefit from their exposure to the risk, as opposed to employees who voluntarily accept exposure to risk as part of their employment[80]. HSE's position on the SL was fully supported by the Council and Essar.

250. The appellant submitted that, based on the facts of the case, the application of HSE's sensitivity levels is 'an exercise in unreality'. HSE's approach and SL3 equated the student population at the FSE with frail, elderly and vulnerable populations whereas students are fit young adults who are admitted to a secure site, who are fully inducted into emergency procedures and who are expected to work with potentially dangerous equipment. The reality of the situation is such that the FSE falls more appropriately into HSE SL1 workplaces, where the justification is "places where occupants will be fit

[79] The appellant referred to recital (18) and Article 3 part 3 of the Seveso Directive

and healthy and could be easily organised for emergency action. Members of the public will not be present or will be present in very small numbers and for a very short time". As a consequence the Advise Against would be reversed to Don't Advise Against.

251. Having fully considered the contrasting cases I find that the sensitivity levels are an element of the consistent and systematic approach followed by the HSE in providing health and safety advice relating to land use planning. This approach and the underlying philosophy have been informed by discussion documents to encourage public debate, been subject to review and have withstood the test of time. More specifically the rationale behind the SLs reflects one of the general principles in the up to date PPG that advice should take account of the size and nature of the proposed development and the inherent vulnerability of the population at risk.

252. On a key matter of dispute, I consider that university students are not employees but are rightly in the 'public' category. Employees are within the working population, earning a living at a chosen place of work. Employees tend to have a workplace within a building and are constrained by the employer's practices, management and their own job responsibilities. Employees cover a wide spectrum of ages and any apprentices would probably be assigned to an experienced individual or team to acquire skills and work experience. By comparison students attend a place of learning, paying for their education and with an expectation of a good level of pastoral care. The probability is that students will be of a younger, narrower age range. Because of the length of course of study, a turnover of the student population occurs every year. On a daily basis students are likely to have less regular hours of attendance and more flexibility in movement depending on

[80] HSE/HPT/1 paragraph 10.8

timetables, the different locations for formal courses of study, tuition, personal study and recreation time.

253. More particularly and additionally in respect of the FSE, the evidence has shown that the induction training on emergency procedures is not of the scope or frequency that employees of Shell Global Solutions received. Of particular note the Council's witness confirmed that it was made very clear to staff that there were risks associated with being located close to the refinery that involved toxic releases in addition to explosions and pool fires. The appellant's evidence did not demonstrate such clear advice was issued to prospective students. Reliance on attendance for an interview at TSP would be unlikely to be sufficient. The Green Square buildings to which staff and students are directed in the case of an incident were confirmed not to be blast proof or airtight. Students at the FSE undertake a range of courses including computer sciences and mathematics and consequently not all will be working with 'potentially dangerous equipment.' As the HSE observed, laboratory health and safety procedures would not prepare students to respond to the wider safety procedures in relation to a major event such as a vapour cloud explosion.

254. Whilst the TSP is a secure site, there also are occasions when the FSE has open days and other similar events where members of the public are invited to attend. They attract parents and school children of younger age than undergraduate students. The appellant drew attention to the open days during

Shell's ownership and occupation but time and opinions have moved on since that time and there is now a very different legislative and planning policy framework.

255. However, a compelling distinction is the societal view of risk, a consideration that somewhat surprisingly was not identified explicitly at the outset by the appellant's planning witness dealing with SLs. The HSE's document 'Reducing risks and protecting people' explores this issue[81], acknowledging that developing criteria on tolerability of risks for hazards giving rise to societal concerns is difficult. It highlights the opportunity for avoiding risk through land use planning and the increased level of intolerance by society if fatalities were to occur as a result of a deliberate choice to accept the risk. Members of the public who have a risk imposed on them in the wider interest of society are considered to have a sensitivity ten times that of employees. I agree with the HSE and the Council that the societal view of an incident involving students, young adults with their futures before them, would be materially different and greater in comparison to an incident involving employees.

256. A second and very important element in deriving the SL is the size of the development. For DT2.4 the SL increases from SL2 to SL3 where the development involves more than 5,000 m^2 of floor space because of the substantial increase in the numbers at risk. The appellant has confirmed that the six buildings in FSE use extend to approximately 12,622 m^2 net floorspace. Even in the workplace development type, the SL is increased to Level 2 for development providing for 100 or more occupants in any building

[81] CD14.2 see particularly section on Tolerability limits page 44

or 3 or more occupied storeys in height. Applying this to TSP, size results in an Advise Against even for workplaces.

257. In conclusion, the FSE higher education use is appropriately identified as Development Type 2.4 Indoor use by public, with a SL of 3 because of the numbers of people at risk. Given these two factors and the location within the Inner Zone, the decision matrix confirms an 'Advise Against'.

Area 45

258. Under the 1999 deemed consent B2 toxic substances are able to be stored in vessel area 45. The HSE calculated the associated hazard area using recognised modelling techniques and demonstrated that TSP lies within the Middle Zone (where the chance of hypothetical house resident receiving a dangerous dose for a toxic hazard is 1cpm per year). The appellant drew attention to the fact that equipment had been removed and the area grassed over some 14 years ago. In my view the current position is irrelevant because of the PPG confirmation that account must be taken of the maximum quantity of a substance permitted by a HSC. Therefore, although not the principal consideration, the risk from Area 45 is an additional reason for the Advise Against.

Site context: Ince

259. The village of Ince lies to the north of the railway line to the east of the Oil Refinery and within the Inner Zone. The proximity of the village to Area 17

and the large oil tanks was clearly seen on the site visit. No precise information was given on the development of the small linear village but there is no doubt that it has existed for many years. The population of the Parish of Ince is 210 people. The probability is that within the population there are vulnerable residents.

260. The physical relationship that exits between Ince and Stanlow Oil Refinery hazardous installation was established well before the current regulatory regime was in place. The development was not the result of a positive decision by the local planning authority. The HSE had no say in the original deemed consent and HSE's land use planning advice is not retrospective. By comparison, the current planning circumstances involving the development of the FSE are very different.

261. The appellant's submission that the Council could use its powers to revoke planning permissions has very little relevance and fails to acknowledge that the power may be exercised only up until the time any permitted operational development or change of use is completed. Revocation has no effect against any operations already carried out. No planning permissions are identified that could be subject to revocation. A hazardous substances authority can revoke or modify a HSC. Such a course of action would be extremely unlikely here in view of the national importance of Stanlow Oil Refinery and the liability to pay compensation. The Council gave no indication that it would consider such courses of action[82].

[82] The Council's planning witness confirmed that revocation of a hazardous substances consent tended to be where a site was redeveloped and that the Council did not undertake proactive reviews.

262. The protection to Ince is derived from the Oil Refinery operating at ALARP, as it is required to do. Ince is still exposed to a residual risk, a situation that has to be tolerated. Planning policy, based on the Seveso III Directive, is directed at avoiding additional population being placed at risk through new development. When weighing up the HSE's advice the existence of Ince has little significance.

Policy context

263. The appellant relied on Policy EP 5 specifically supporting further development at SSP, including use class B1 which may potentially involve significant increases in the on-site population.

264. Policy EP 5 has been considered in the Location section above. The essential point is that the policy supports employment development subject to satisfying all the stated criteria, including meeting the requirements of Policies DM 33 and 34 and Policy EP 3. Therefore in any decision a conclusion would be required as to whether there would be a significant increase in the number of people being subjected to threshold levels of risk. No inconsistency of policy approach is demonstrated.

Conclusion

265. The HSE's Advise Against is a very strong consideration when assessing the risk to public safety as a result of the development.

Other considerations: Appeal decisions

266. This section is prefaced by the usual observations that each appeal must be considered on its own merits in light of the evidence presented and that

circumstances are highly unlikely to be directly comparable, especially where different sites are involved. Nevertheless, appeal decisions involving hazardous installations and public safety are informative and have relevance on such matters as the conclusions on the HSE's approach, methodology and advice, levels of risk and the weight attached by the decision maker to public safety in the overall planning balance.

267. Oval decision[83]. In June 2009 the Secretary of State granted planning permission for the construction of a new spectator stand and hotel and related development at the Brit Oval, Surrey County Cricket Ground in Kennington, London. Evidence on public safety considerations was heard in closed session at the inquiry. The Kennington Gasholder Station (KGS) was the hazardous installation in question, comprising four gasholders with a total inventory of 222 tonnes of natural gas.

268. The Secretary of State agreed with the Inspector's conclusion that the PADHI Advice Against the application was justified on a cautious best estimate basis and that if the development were to be located where no development currently exists it should not be allowed. However, in weighing up the HSE's advice account was taken of the presence of the existing development in the Consultation Zones. There were also certain factors which were considered to lessen the risk and provide reassurance that an accident was less likely than even the very low order of calculated risk would indicate.

[83] CD9.23.1-CD9.23.4

269. Reassurance was taken from the lower likelihood of accidents during the summer cricket season when the gasholders tended to be operated below full capacity. Risk from the KGS also was reduced in relation to the unused uppermost lift of one of the gasholders. The relatively low level of occupancy of the Oval (being full to capacity on 10-15 match days a year) and the seasonal use of the proposed grandstand were additional factors found to mitigate the safety risk. The Secretary of State concluded that the increase in societal risk was acceptable in terms of UDP Policy 54(g).[84]

270. The Oval decision is relevant in so far as it illustrates an acceptable approach to decision making and highlights potential considerations, including the testing of HSE advice, and the exercise of judgement both in respect of the acceptability of the risk in own right and as part of the overall planning balance. Significantly the Secretary of State concluded that where a challenge to HSE evidence is not well supported by technical evidence or proven superior expertise, the HSE evidence should continue to be accorded due weight[85].

271. The decision-making balance is distinguished from the circumstances at TSP in several ways. In terms of policy context, the relevant development plan policies favoured increased spectator capacity at The Oval, allowing for judgement as to whether any risk from an accident at the KGS would be unacceptable or not. In the current appeals, as I have already shown, Local Plan policy is not supportive of educational use at TSP or in the Stanlow special policy area. Policies EP 3 and EP 5 specifically identify these locations for employment uses compatible with the Oil Refinery.

272. The new mixed use does not fall within a B1 or B2 use class, even though it includes research and development, laboratories and offices as primary

components alongside the educational use. It is a sui generis use. Policy EP 5 allows for new employment development at TSP but the criteria make very clear that the use has to be consistent with the location in a hazard consultation zone and is compatible with the existing employment uses in the Stanlow area. In other words, the starting point for assessing the acceptability of development is very different in respect of the fundamental of land use. The position at TSP involves the introduction and development of a student campus, not extending and developing an existing use (plus a new hotel), as at the Oval. The very limited relevance of Ince has been shown above.

273. I also consider that the nature and scale of the hazardous installations and scope of the HSCs are very relevant factors. Compared to KGS, Stanlow Oil Refinery is a far more complex and larger installation with a much greater range of hazardous substances on site, with the potential to give rise to a greater range of incidents. If anything, there is the scope for the intensity of use to increase at the refinery site bearing in mind the broad nature and flexibility of the HSC. Moreover, the FSE use does not have the same degree of seasonality or low level of occupancy that characterised the Oval project. There are no such factors that would act to reduce the risk.

[84] CD9.23.4 IR paragraph 13.15: Policy 54(g) resists development if it would be at an unacceptable risk from an accident at the nearby KGS.
[85] CD9.23.1 paragraph 15

274. Factors related to the representative event also display significant differences[86]. In the Oval decision the Secretary of State agreed that on a cautious best estimate it was necessary to model the most dangerous fireball outcome as a credible RWCMA and only then to consider its likely frequency. The Secretary of State agreed with the Inspector that the historic occurrence of a true fireball 'must be in doubt' and that the actual event frequency was very likely to be substantially lower than 10 cpm per year. That factor was borne in mind in the determination of the case and in the overall conclusion the risk of such an event was described as miniscule and already tolerated by a dense population. The detail of the reasoning is distinguished from my conclusion on the appropriateness of the representative event HSE adopted here.

275. In conclusion, I consider that the 'real world' risk at TSP is not similar to but greater than that judged to be the case in the Oval decision.

276. The Brewery Tap decision in 2006[87] is notable because Buncefield was considered by the Inspector to have brought a new level of uncertainty. The Inspector took a precautionary approach to risk and was persuaded by the benefits of the generic approach by the HSE, even though the appellant presented a credible alternative form of modelling the risk from a fire at the tank depot in question. The Inspector concluded there would be an unacceptable risk to the health and well-being of a future residential population.

277. The Ram Brewery appeal[88] concerned a mixed use development, including a large residential content, in proximity to Wandsworth Gas Holder. None of the proposed development would lie within HSE's Inner Zone, the majority of the scheme being in the Middle Zone. The Inspector's report indicates that much of the technical evidence centred on the representative fireball, ignition probability and event frequency. However, a conclusion of particular note is

that the always very low likelihood of hazardous events occurring cannot be compared with an individual's daily risk, such as crossing the road[89]. This was because very low residual risk levels when combined with the consequences of a hazardous event can result in a significant impact. The Inspector related this to the particular weight given by the Government to large populations in vulnerable settings together with events resulting in many casualties. In my view this conclusion is equally true today and is very similar to a point made in oral evidence by the HSE about the importance of factoring in the size of population. I attach little weight to the appellant's comparison of the 10 cpm risk threshold for a RWCMA to daily risks of road accidents and accidents in the home.

278. Having very carefully considered the risks associated with the gasholder the Secretary of State concluded in 2010 that introducing significant new levels of population, in towers, was not justified. The subsequent planning permission granted by the Council of the London Borough of Wandsworth was for a differently designed scheme. The permission was also subject to a planning

[86] CD9.23.1 paragraphs 8 and 9
[87] CD10.9
[88] CD10.7, Inquiry document H.4
[89] Inquiry document H.4 paragraph 18.96

condition that prevented occupation of certain blocks until the HSC for Wandsworth Gasholder Station had been revoked for the storage and distribution of natural gas in its entirety[90].

279. In conclusion, these appeals provide support for the HSE's application of the Land Use Planning Methodology in the current appeals and show the substantial weight attached by the decision-maker to public safety.

Exception to Policy DM 34

280. In view of my conclusions on the HSE's advice, the unauthorised development results in a significant increase in the number of people being subjected to threshold levels of risk and the first limb of Policy DM 34 is not met.

281. Helpful insight into the background to and application of the second limb of Policy DM 34[91] has been provided through the evidence and submissions. In my view the specific policy test is distinct, although with some parallels to the 'Oval type factors'. The test only applies where it has been concluded that a development would result in a significant increase in the number of people being subjected to threshold levels of risk. Compliance with the test may only be achieved by satisfying the exceptional circumstances set out in the policy and which are explained further in the reasoned justification.

282. TSP is in an existing built-up area where an exception may be considered in order to achieve a balance between the need for investment and regeneration within the existing urban area and the degree of risk involved.

283. A purpose of the policy is to provide a degree of flexibility within the vicinity of hazardous installations, recognising that persistent refusals of planning permission may lead to blight, a consequent lack of investment and a downward spiral of decay. The Council explained Policy DM 34 is a policy that not only applies to the Stanlow special policy area but more widely within the Borough. The policy covers areas showing indices of multiple deprivation

and where there is potential for development to be proposed in the middle and outer consultation zones. The balance between the need for investment and the degree of risk is a matter of judgement in all cases.

284. The likelihood is that the establishment of the FSE at the TSP has encouraged the reuse of buildings, helped to secure investment and funding of projects and supported the growth of businesses at TSP. The Faculty's presence has provided a competitive edge to the TSP by offering a business environment with a distinctive character. However, it is not evident that lack of success in these appeals would lead to blight and a lack of investment or in fact how the strategy for TSP may develop in future without a primary educational component. The viability argument of the appellant was not founded on substantive evidence.

285. In this case the HSE has issued very strong Advice Against the development. The position is not marginal, having regard to the location of the buildings in the Inner Zone, the scale and intensity of the use. The public

[90] Inquiry document H.9
[91] Policy DM 34 states in the second paragraph "Exceptions to this policy may be considered in existing built-up areas or where there is an existing commitment to development in order to achieve a balance between the need for investment and regeneration within the existing urban areas and the degree of risk involved."

safety case is of high importance and a consideration of substantial weight. By contrast the initial assessment by the appellant's planning consultant that the exception test is met was based on the understanding that TSP was within the Outer Consultation Zone and the advice that the individual risk resulting from an event is well below what the HSE considers to be broadly acceptable. At the inquiry this position was conceded to be unarguable. The witness's revised position on the test in oral evidence lacked clarity and consistency.

286. Provision is made and support given through Policies EP 3 and EP 5 for new employment development. As I have highlighted, the land uses that are supported do not include a Class D1 use (section 78 appeal) or a sui generis mixed use that includes a primary education component (EN2 appeal). Viewed from a different perspective, allowing a non-compatible use may restrict investment at Stanlow Oil Refinery. Land at TSP is not part of the employment land supply in Ellesmere Port identified in Policy EP 2 of the Local Plan (Part Two) to meet the strategic requirement for new employment development.

287. In conclusion, the degree of risk to public safety is such that when balanced against investment and regeneration the safety considerations are paramount and compelling. There are not the exceptional circumstances to justify departing from the direction in the first limb of Policy DM 34. Consequently, the higher education development and material change of use involved in the section 78 appeal and the EN2 appeal are not acceptable when considered under the second limb of Policy DM 34.

Conclusions

288. The HSE's Advise Against is firmly based on the principles set out in the PPG. The definition of the Inner Zone has been demonstrated to be sound and I have no reason to conclude that the Inner Zone is incorrectly defined.

289. There is no reasonable justification to adopt a bespoke approach and to depart from the sensitivity level tables in the HSE's Land Use Planning Methodology, even taking account of the components of the mixed use.

290. The challenge to HSE's evidence is not well supported by technical evidence or proven superior expertise. The technical evidence was shown to be lacking in scientific rigour and to be misleading. The written and oral evidence was not able to stand up to the comprehensive and detailed scrutiny of cross examination by the HSE. The Council and Essar have made their respective positions on the matter very clear in their closing submissions and fully support to the HSE's case. In sum, I regard the appellant's technical evidence as completely unreliable, lacking credibility and having very little weight.

291. Based on the location of TSP within the Inner Zone the decision matrix outcome for the appeals is confirmed as Advise Against. The application of a test as applied by the Secretary of State in the Oval decision and through the second part of Policy DM34, (the level of risk in the real world described by the appellant) do not indicate a different conclusion.

292. The changes of use would result in a significant increase in the number of people being subjected to threshold levels of risk and there are not the circumstances to justify an exception to this policy direction. There is no support from Policy DM 34.

293. The FSE use and the mixed use have been shown to be inconsistent with the location in a hazard consultation zone. It follows that failure to comply with Policy DM 34 results in a failure to comply with criterion 1 of Policy EP 5 and criterion 4 of Policy EP 3. All policy criteria have to be met. Accordingly the change of use developments are not supported by and conflict with Policies EP 3 and EP 5.

Mitigation and planning conditions

294. With reference to the Seveso Directive, maintaining an appropriate safety distance between the Stanlow Oil Refinery as the hazardous installation and new development is the land use planning solution to ensure the prevention of major accidents and limiting the consequences of such accidents on human health. In respect of the Local Plan, development is required to comply with all relevant policies. When that is the case, the expectation is that all practicable measures shall be taken to mitigate risks by careful building design and the preparation of emergency procedures, as set out in criterion 1 of Policy EP 5.

295. Planning Practice Guidance explains that when used properly, conditions can enhance the quality of development and enable development to proceed where it would otherwise have been necessary to refuse planning permission, by mitigating the adverse effects.

296. The development is not supported by Policy DM 34 and is contrary to that policy. Nevertheless, in light of PPG advice and to fully assess risk, the planning conditions put forward by the Council and the appellant will be addressed.

297. The appellant has proposed two planning conditions – to maintain Buildings 38, 40, 62, 304 and 305 as Green Square buildings in accordance with Chemical Industry Association guidelines (or other relevant guidance), and the submission of a Health and Safety and Incident Management Scheme within 3 months of the grant of permission. I agree with the Council that the requirements set out in the proposed conditions would be more appropriately dealt with through the provisions of the Health and Safety at Work etc Act 1974 and the local planning authority would not be the relevant regulatory

authority on such matters. Furthermore, the PPG advises that conditions that require compliance with other regulatory regimes will not meet the test of necessity and may not be relevant to planning. I consider that the proposed conditions would not be necessary.

298. Information was submitted by the appellant on the existing health and safety practices at TSP, including the access control systems and the induction required to be followed by students. The procedures are subject to regular review and adjustment and improvement. However, I agree with the Council that whatever training the students receive, it is an inadequate response. Mitigation is achieved more appropriately by following the policies controlling land use in the consultation zones of an upper tier COMAH site.

299. There was discussion on a condition that would restrict the number of students on site at any one time to 400 or 600. The appellant, in the event such a condition was thought necessary, preferred a limit of 600 students but acknowledged that it could work with a 400 limit. I consider even with the monitoring available through the CARDAX system the local planning authority would have considerable difficulty verifying any information submitted by the University. It has not been explained how the University would ensure the number was not exceeded. Such a condition would not be enforceable and a restriction on student numbers would be an unreasonable constraint on the functioning of the use granted planning permission. Reliance would have to be placed on the physical capacity of the six buildings to control numbers of students in the section 78 appeal. In the EN2 appeal as part of the mixed use the higher education could expand into other buildings on the site unless controlled by condition. In any event, introducing 400 students has been shown to significantly increase the number of people that would be subjected to threshold levels of risk.

300. It would be possible to preclude persons under the age of 16 years from accessing the site at any time and to restrict the number of days prospective students under the age of 18 years would be admitted to the site. However, this would not affect the sensitivity level used in the decision matrix and hence the strength of the HSE's advice against.

301. In conclusion, the fundamental reason for the unacceptability of the development on public safety grounds is the location of TSP adjacent to an upper tier COMAH site and within the Inner Consultation Zone. The use of planning conditions is not able to overcome this objection.

Conclusion on Public Safety

302. The establishment of the FSE at TSP and the material change of use involved have had a detrimental effect on public safety by placing a substantial number of people, especially students at unacceptable risk.

303. In terms of the Local Plan (Part One) Strategic Policies, by reason of the location of the development adjacent to the upper tier COMAH site the development does not promote a safe environment for its student population and is not supported by Policy SOC 5. For the same reason, the development does not secure a high quality environment sought by Policy ENV 6. When assessed against the Detailed Policies in the Local Plan (Part Two) the development is contrary to Policies EP 3, EP 5 and DM 34.

304. Public safety is not promoted, leading to a conflict with national planning policy as expressed in the Framework.

Effect on operation of Stanlow Oil Refinery

Policy

305. Local Plan (Part One) Policy ECON 1 identifies the Stanlow area as a key employment location which is safeguarded to meet future economic growth in the borough. Within the Stanlow special policy area (defined on the Local Plan Policies Map) Stanlow Oil Refinery is a major land user. The Council, the appellant and Essar all agreed that for the purposes of these appeals the focus is on the potential effect of the University developments on Stanlow Oil Refinery and not any other existing businesses. There are no representations or other evidence that indicate I should take a different approach and therefore I will concentrate on the Oil Refinery complex.

306. As set out earlier in this decision Policy EP 3 recognises the national importance of the Oil Refinery and requires that any new development must not prejudice the continuing operation of the refinery. New employment development (use classes B1, B2 and B8 and suitable sui generis uses) must not conflict with the continuing operation of existing businesses in the special policy area and be consistent with a location within a hazard consultation area (policy criteria 3 and 4).

307. The thrust of the policy is on securing the continued operation of existing businesses and encouraging employment development complementary to Stanlow Oil Refinery and the established petrochemical and related industries. On the basis of the generally understood meaning of the word prejudice, I consider that to comply with the 'no prejudice' policy test new development should not cause disadvantage, harm or detriment to the operation of the refinery. This is consistent with the approach and interpretation of the Council and Essar.

Economic impact

308. The economic contribution made by Stanlow Oil Refinery to the national, regional and local economy based on data for the financial year 2018 was quantified as part of Essar's evidence. There was no challenge to this evidence, or the methodology and data behind it. I consider the evidence provides a reasonable indication and overview of the importance of the Stanlow complex.

309. Referring to some of the main findings, at national level the report concludes that the refinery's direct contribution to UK GDP was £335.6 million[92]. When account is also taken of indirect and induced economic impacts, the contribution increased to £751 million, together with about £140 million in taxes. Total employment, including indirect and induced jobs, was in the order of 7,800 jobs.

310. Relatively capital-intensive activity takes place at the refinery. Even so, around 950 people were employed at the site (and in addition some 800 to 900 contractor staff) and labour productivity was shown to be very high. In a local context the refinery is a source of well-paid employment in a relatively deprived area of the Borough. The refinery's presence benefits a number of firms located in the locality and the wider area, notably the cluster of businesses specialising in the manufacture of chemicals and chemical products that provide 6,400 jobs.

311. The refinery is the main supplier of jet fuel to Manchester Airport via the Manchester jet line. The efficiency in fuel supply helps to reduce the airport's

operating costs. The production of diesel and gasoline at Stanlow was equivalent to 13% of the UK's total demand for road fuels during the 2018 calendar year, with most fuels being sold into the North West regional market. The report acknowledges that not all this industrial activity in the North West is dependent on the Stanlow Oil Refinery and that it would not cease if the refinery were not operating. The key aspect is that because Stanlow is the only refinery in the North West it supports the competitiveness of industries across the region. The broad range of refined oil products provides a diverse

[92] All figures relate to the financial year 2018 unless otherwise stated

set of industries with required inputs of fuels, lubricants and feedstocks with minimal transportation costs.

312. The report explains the role of Stanlow, along with a small number of active refineries in the UK, to the security and resilience of the UK's fuel supplies. It is demonstrated that each refinery is a nationally important asset and a crucial contributor to consistent and affordable fuel supplies to the domestic market. By way of illustration, a three day disruption to a refinery could result in nationwide economic costs of £100 million to £500 million.

313. Essar has invested over $1 billion in Stanlow since 2011. Demand for the refined products currently produced at Stanlow is expected to persist over the medium term. The site also has the flexibility to adapt its activities and to diversify its uses beyond the production of refined oil products in order to respond to future economic and technological developments.

314. The Refinery's economic contributions are facilitated by location specific factors such as its access to seaports and oil terminals, nationwide oil pipelines, extensive road and rail infrastructure and the proximity to a complex cluster of high value industries that have evolved within the region over decades. Essar's view is that these conditions would be extremely costly, if not impossible, to replicate at another site.

315. The evidence confirms the importance of Stanlow Oil Refinery to the local, regional and national economies and the associated social importance in terms of employment and transport.

Effect on operation

316. Essar has stated that it has a relatively longstanding good working relationship with the University[93]. More particularly Essar's laboratory and testing facility for the refinery is based at TSP and Essar is currently working with the University on potential new projects at the refinery site including the HyNet project. Therefore there appears to be some advantage to Essar in the University's investment at the TSP. The new mixed use would not detract from the accessibility of the location or have any effect on the infrastructure, factors that Essar identified as being benefits of the operation being based at Stanlow.

317. On site, a safety review would inform Essar whether additional measures, mitigation, or controls or other actions would have to be introduced or carried out as a result of having a student campus adjacent. In fact Regulation 10(2) of the COMAH Regulations 2015 requires an existing safety report to be reviewed and where necessary revised by the operator where (i) justified by new facts (Reg 10(2)(b)), and/or (ii) where justified by developments in knowledge concerning the assessment of hazards (Reg 10(2)(c)). A review

may be comprehensive or focused[94]. Essar confirmed that because of the complexity of the refinery a safety report review would cost in the order of £1 million and take a year to complete.

318. The carrying out of a statutory requirement would not amount to 'prejudice' but an element of uncertainty for the operator is introduced as a result of the

[93] CD5.11 paragraph 5.1
[94] Guidance on Control of Major Accidents Hazards Regulations 2015 paragraphs 185-190, 193-194

unauthorised development. In the absence of a detailed safety report review and assessment the precise scope, cost and implications of any measures in response to the changed circumstances cannot be known. The appellant accepted that a safety report could not be reasonably expected to be carried out to inform whether the University's development complies with Policy EP 3. A judgement on the policy test has to be made on the information that is available.

319. The Oil Refinery site is currently operating to ensure risk is reduced to ALARP. The appellant maintains that because all necessary measures are in place to protect the residents of Ince it is inconceivable that additional measures would be required for the purposes of protecting the adult student population at TSP, some further distance away. I disagree. For a start, the number of students on site at any one time has been shown to be double the population of Ince. Also, I have concluded that following the material change of use there has been a significant increase in the number of people at TSP and the development type has changed to one that is of greater sensitivity. It is more likely than not that the prevention and control measures required, and/or the mitigation measures considered necessary, would require adjustment to a greater or lesser extent. There would be potential financial and operational consequences for Essar.

320. As an example at the lower end of the scale, additional integrated gas detection and remote isolation has an estimated cost of £40 million. The installation of such equipment would require the closure of the refinery process for about 4 weeks at a cost on $1 million a day. This type of upgrade would result in disadvantage or prejudice to Essar directly and probably indirectly through damage to customer confidence.

321. Essar has demonstrated how the material change in the land use may be a constraint on future proposals at the refinery and reduce the flexibility offered by the HSC. Reference has been made to specific projects including a proposal to re-purpose the alcohol unit in Area 6 (close to TSP) to facilitate the storage and distribution of finished products, the location of additional sulphur units in Area 45 and housing hydrogen production and equipment as part of the HyNet project. More generally the eastern part of the refinery site, adjacent to TSP, is sequentially preferable for development in respect of flood risk. This area also contains key infrastructure to facilitate additional development. A reasonable expectation is that achieving ALARP in conjunction with new projects would be significantly more onerous if a non-compatible land use is taking place at TSP.

322. Policy ECON 1 identifies Stanlow as one of the key employment locations in the Borough, which are safeguarded as essential to meeting the future economic growth in the area. I conclude that the material change of use at

issue in the EN2 Appeal and in the section 78 appeal would prejudice the continuing operation of the refinery and fail to comply with Policy EP 3. Criterion 4 of Policy EP 5 is not satisfied because of the incompatibility of the use with existing employment uses in the Stanlow area and this policy conflict is an additional reason for non compliance with Policy EP 3. This policy conflict has substantial weight in view of the national importance of Stanlow Oil Refinery.

Effect of the FSE

323. Two aspects were addressed in the evidence: (i) the contribution made by the FSE to learning and skills, research initiatives and enterprise and to the role of TSP in the local and regional economy, and (ii) the implications in the event the appeals are unsuccessful.

Contribution to date

324. The FSE was the first such faculty to be created in the UK in the last 25 years or so. The release of the research centre site by Shell and the legacy of the premises and specialist equipment offered an opportunity to establish a faculty with close associations with the business community. The triple helix model of collaboration between University research and teaching, industry and government enabled funding to be secured to establish the faculty, as well as the High Growth Centre and the Energy Centre. Additional projects are in the early stages such as the Road Test Laboratory and housing the UK Geoenergy Observatory. The strategy followed has been selective of the companies allowed to locate on site, so that only technology businesses in the key energy, environment, advanced manufacture and automotive sectors are accepted. The ability to integrate learning with industry and research, the combination of industrial park and academic campus and the high level of integration and synergy between the two elements are described as unique.

325. The development of the FSE and the growth of TSP as a whole has been outlined above when considering the use of the site post acquisition and the materiality of change. Therefore the information on such matters as numbers of students and range of courses, the number and types of commercial tenants and companies and the development of business space and accommodation is not repeated here.

326. The Regeneris report[95] identified a number of important benefits of the close links between academia and industry: students are able to access work-based experience in science and engineering; the University is able to develop its curricula to improve the employment prospects of the students and to better meet the skills needed by business; tailored training is provided for industry partners; and research activity is increased and better shared. None of these are disputed. Similarly, there is recognition of the valuable research and innovation being undertaken in important areas such as climate change.

327. The Regeneris report attempts to quantify the economic effects of the University and business activities in Cheshire and Warrington (in 2015 basic prices), as set out in the table below[96].

	University activity	Business activity	Total economic impact

GVA per annum (£m)	£8	£52	£60
FTE jobs	175	690	865

[95] CD1.12: the report was commissioned by the University to support the planning application for the change of use of the six buildings.
[96] CD1.12 Table 3.2 page 22

328. Additional quantitative assessments were made of the impacts in the North West and the UK. Whilst undoubtedly positive, these figures in isolation and without meaningful comparators give limited insight into economic impact. However, it is possible to conclude that the contribution is not on the same scale as the Stanlow Oil Refinery. A better understanding of the benefits identified in the report, particularly those on site, is gained from the evidence of the witnesses for the appellant, including the supporting descriptive material in the representations of businesses, students and staff.

329. The appellant has explained how the University has worked hard to create a dynamic workplace environment where University staff, students, researchers and businesses are encouraged to connect, combine, collaborate and share ideas in ways that are economically and socially positive. At the heart of the University's mission is the commitment to ensure an outstanding learning experience and developing work ready graduates, especially important in the STEM related subjects. Business support services and projects funded by the ERDF have provided one to one business support to around 250 businesses, supported the creation of 86 new jobs, helped companies develop over 70 new products, processes or services and assisted companies get over 30 new products to market. The nationally and internationally significant research project involving the Faculty include projects with on-site businesses, regional stakeholders and local industry.

330. The letters of support from students[97] talk of the attraction of the co-existence of industry and education and the state-of-the-art teaching facilities and laboratories. The compact campus and bespoke faculty for STEM students were regarded as strong advantages over other universities. The practical experience interlinked with lecture content made the campus unique. The students emphasised the immense value of their work placements on site to developing a range of skills and to their study and career prospects.

331. The letters of support from heads of department and lecturers at the FSE[98] reinforce the themes in the evidence of witnesses and students, particularly from the perspectives of developing curricula, attracting and retaining staff, delivery and practicalities of coursework and achieving the best outcomes for the student. The strong focus is on research being fundamental to their education and the employability of undergraduates. To this end, all first and second year students are placed with companies on site or in the immediate area for a four or five week project. The third year students undertake a design project often based at local plants. Good employment rates have been achieved for graduates, including appointments by companies on site. A number of examples are provided of ongoing research projects and benefits of interaction and collaboration between students, staff and businesses. Attention is drawn to the advantages of the FSE being on a science park next to an industrial cluster.

332. The 23 representations of support from businesses located on the TSP also

provide a good indication of why they consider the model operating at

[97] Appendix 1 to Professor's Southall's proof
[98] Appendix 2 to Professor's Southall's proof

Thornton make it a special and successful place[99]. In summary, the prospect and opportunity of interaction with students and academic specialists, and the business support services were among the reasons given for choosing to locate at TSP. The close working relationship and collaboration with the FSE and the academic resource, and other companies on site, are generally highly valued. There are a number of examples of research and innovation being undertaken in partnership and with the benefit of university expertise that have helped in the expansion of the companies and the ability to attract investment. Use of the laboratories and specialist equipment has enabled and been critical to business development and innovation in their specialist work. Certain companies have employed graduates, sponsored PhD students and provided work placements for students at the FSE, with the indication that this practice will increase in the future. Overall the business outlook comes across as being very optimistic.

333. It appears that the establishment of the FSE has been a catalyst for the rejuvenation of the site, sustaining in beneficial use the physical resource (primarily buildings, equipment and infrastructure) post the Shell era. This growth has been welcomed in an area that is a Council priority for regeneration and development to assist in relieving deprivation and improving the skills and opportunities of the young, employees and residents. For example, the Ellesmere Port Development Board has confirmed its strong support for the development and regards TSP as having a fundamental role in the Cheshire Science Corridor Enterprise Zone, led by the Cheshire and Warrington Local Enterprise Partnership. The benefit to local students, workers and companies is emphasised. Firms located near to TSP have also used the facilities there to develop their products and services. The FSE is involved in various collaborations promoted in the area such as the Cheshire Energy Innovation District and the NW Hydrogen Alliance.

334. There are longer term ambitious plans to develop new commercial space at TSP. The location of TSP within the Cheshire Science Corridor and Enterprise Zone is also relevant. Looking forward, should the current uncertainty be lifted, a reasonable expectation is that the role of FSE and TSP within the social and economic framework would be consolidated and expanded.

335. In conclusion, the high quality education provided by the FSE has not been disputed. The educational and business environment created has been praised by students, employers and businesses. The FSE is of benefit to research and enterprise at TSP and in the wider area. A positive and valuable contribution (directly, indirectly and induced) has been made to the local and regional economy from the development at TSP.

Impact if unsuccessful

336. The requirement of the EN2 is 'to cease that element of the use of the Land as a University science and engineering faculty providing undergraduate and postgraduate education'. The appellant did not question this requirement or put forward a lesser requirement through a ground (f) appeal. Essentially the primary higher education use would have to cease. There is no requirement to remove any equipment, facilities or development facilitating the use. The

appellant envisaged that the FSE would have to relocate, an outcome

[99] Appendix 1 to proof of Mr Vernon

described as do-able. No firm plans for an alternative site or the future operation of TSP have been prepared or progressed in advance of a decision on these appeals.

337. Major concerns of the University are that the unique offer, the integration between learning, research and industry and the access to the high tech equipment would all be lost. Staff would leave, recruitment would be very difficult, the University's high reputation as a research location would diminish and important research projects would not be able to continue. The financial consequences for the University may extend to loss of grants and repayment of grant funding. TSP would become just another science park and its viability would be threatened. The consequences of withdrawal of the FSE from the site are described as catastrophic for all parties.

338. In the Regeneris report the modelling of the impact of the loss of business activity was based on two assumptions – 50% of student activity currently based at TSP would be lost within 3 years and one third of business activity would leave the Cheshire and Warrington economy either through business relocation or business closure. The appellant accepted that there was no analysis to support such assumptions. Consequently, the stated impacts on jobs and value generated are of no assistance. Reliance will be placed on other evidence, recognising that any assessment of the impact is constrained by the outline nature and current uncertainty of future plans.

339. The consistent strong theme of the University is that the co-location of the FSE alongside business tenants makes TSP distinct. This association would no longer be able to continue in its present form. The alternative options indicated for relocation suggest students would receive their education in a different environment. The vision and aspirations underlying the Thornton project would not be able to be progressed, which would be a huge setback for those driving its development. The specific short and long term consequences are harder to identify.

340. The representations from University staff provide insight into the potential consequences, including the practicalities of teaching elsewhere and the adverse effects this would have on the student learning experience. In their view if the faculty were to be relocated the value of student placements and projects would be much diminished through the loss of ease of communication and interaction with the industrialists both in the setting up of such collaborations and the delivery of them. Opportunities to interact with partners on site, use of the high class facilities and the conduct of industry related research projects would be lost. This would seriously hamper the ability to train graduates that are ready for the work place and seriously inhibit the University's ability to attract the best academic talent. All the benefits of co-location would be lost.

341. The Council submitted the appellant's claim that the educational and commercial uses need to be co-located is seriously overstated and not well supported by the factual evidence such as it is[100]. Reference is made to the relatively small number of student work placements at TSP[101], the sparse

[100] Inquiry document C.7 paragraphs 120 to 128

[101] Attention is drawn to (a) the Regeneris report paragraph 2.19: of the 37 businesses on site, 7 tenants had

provided places for 16 students in the year 2017-18; and (b) Appendix 1 to Mr Vernon's proof which shows that of the 23 representations 4 state they have accepted work placements and 1 may do so in the future.

evidence of postgraduate workplace study and the limited numbers of students recruited to full time employment work with businesses on site. Only one company mentioned using the University's laboratories at TSP and little detail is provided of businesses connections with teaching activities.

342. I treat the Council's review of the matter with some caution. The representations do not provide a comprehensive picture or necessarily capture all of the placements, as shown by cross referencing with the representations from University staff[102]. In oral evidence the High Growth Centre was identified as a rich source of placements. I do not read much into the fact not all tenants have written in support of the appeals – from experience this can be down to various reasons. I consider they are a good source of evidence to indicate effects from a specific point of view or at an individual level. The Regeneris report should be a more reliable systematic study of factual information. However, the information has not been comprehensively updated and the no-permission scenario has been shown to be based on unsupported assumptions.

343. Against this evidential background, it would be for the University to decide where and whether the current range of courses would continue to be offered, the form they would take and the nature of the links with TSP. Experience from other higher education institutions suggests that to run highly successful science and engineering courses does not depend on the FSE model where students are 'immersed into a working industrial environment. There should be no reason why in a new location the practical teaching in laboratories should not be maintained alongside lectures in lecture rooms and the other types of formal and informal spaces. The obstacles to such placements continuing in the event the FSE relocated elsewhere have not been explained. The appellant accepted that it was very difficult to put an accurate figure on how many staff would leave and that none of the academic staff have said they would leave if the FSE had to vacate the site.

344. More than half the students were said to do mathematics or computer science based courses. The appellant explained how these subjects benefit from being located at Thornton, closely integrated with the engineering courses and contributing to a range of projects. However, the probability is they would be less affected than students on engineering and similar courses. Various research projects are ongoing but only one was highlighted to be in jeopardy and that was if the specialist equipment was no longer available at TSP. Open days and similar events would be possible albeit at a different venue(s). More generally, I acknowledge the appellant's concerns that funding may be withdrawn and the potential embarrassment to the University.

345. A particular capital asset at TSP, as described in the appellant's evidence, is the refurbished, updated, and equipped laboratories and workshops with state-of-the-art and industry grade facilities and high-tech equipment, incorporating wherever possible the legacy equipment from the Shell days. The appellant acknowledges that due to the size and weight of equipment there would be problems in its relocation.

[102] PMW Research and PMW Technology Limited email dated 29.08.19 and the letter dated 16.10.19 from Dr Carolina Font Palma.

346. It appears that the equipment is an integral part of the refurbished accommodation at the site. At this point in time it is just not known whether the equipment would be retained in situ or relocated and therefore no firm conclusions may be made on the likely effect on students or business tenants. No analysis has been provided by the University of the research projects that may or may not be affected. The enforcement notice does not require the business and research use of the Energy Centre or the High Growth Centre to cease. In the event the decision was taken to move the specialist equipment to a new site to support a relocated FSE, tenants would not have the same convenient and ready access to this resource.

347. In the representations there is some indication that businesses would review either their expansion plans or continued presence at TSP were the FSE to relocate. Two companies stated a high likelihood of leaving the site to move elsewhere. However, the probability is that these types of decision would be much influenced by the plans of the University on such matters as the form of retained presence at the TSP (if any), accommodation and equipment.

348. An attempt was made to argue that the loss of the FSE would make the TSP unviable. This matter was formed no part of the appellant's initial case, was raised very late in the day at the inquiry and evidence was scant. There is little evidence to suggest existing businesses would relocate away from the site and even if they did it does not follow that they would be lost to the local area. I also note that new businesses have been attracted to the site after the enforcement notices were issued, indicating that the location was considered suitable despite the possibility of the cessation of the education use.

349. In the event the appeals are not successful, the probability is that the existing close integration between learning, research and business would not be maintained to the same level and the advantages of co-location would be considerably reduced. Relocating the FSE was accepted to be possible. Such a course of action would present major challenges to the University, although in the absence of a confirmed strategy the effects on the future of the FSE and the development of TSP are uncertain.

Conclusions

350. The University has been successful to date in taking forward its Vision for TSP. The development has encouraged refurbishment and re-use of an existing site, with premises for continued employment use in the Stanlow area alongside the use of the site for educational purposes. There are strengths of co-location for students, business and for promoting valuable research. Building on the Shell legacy, conditions have been created where businesses can invest, expand and adapt and where innovation addresses the challenges of the future. TSP also is within a cluster and part of a larger area being promoted for the development of creative and high technology industries. The improvement of skills and links to main employers is consistent with the Council's support for initiatives and accessibility to higher education in the Borough. All these factors are in accordance with strategic Policy ECON 1 and consistent with the Framework's policy for building a strong, competitive economy.

351. However, Policy ECON 1 provides general support, not an endorsement of achieving such aims at TSP. Having regard to Essar's submissions on the weight that should be attached to the Vision[103], the establishment of the FSE

and pursuit of the Vision at TSP has no support from development plan policy.

352. Turning to Policy STRAT 4, the appellant relies on the reference in the reasoned justification to the policy supporting the ambitions of the Ellesmere Port Vision and Strategic Regeneration Framework. However, the adopted policy focuses on delivering substantial economic growth and ensuring housing to complement the role as a key employment location. The Stanlow area is identified as being important for the petrochemical and related industries. In my view there is nothing in the policy to support the location of the FSE as a major higher educational facility at Thornton.

353. The development has been shown to contribute to meeting certain social, economic and environmental objectives but Policy STRAT 1 is concerned to do so in a sustainable way. Compliance is required with other relevant policies in the Plan. The conflict with Policies EP 3, EP 5 and DM 34 leads to a conclusion that the new mixed use does not have the support of Policy STRAT 1.

Heritage assets

354. Building 50 is a grade II listed building, built in 1940-1 as an aviation fuel research laboratory and offices, to a design by the internationally significant aviation expert XXX XXXX XXXXXX and renowned architects Burnet, Tait and Lorne. The imposing and elegant building has architectural detailing that reflected the importance of the work carried out within the building. It has special historic and technological interest for its pioneering and crucial work in the development of modern aviation fuel and its contributions to the success of British aircraft during World War Two[104].

355. Building 38 and Building 27 are locally listed buildings that were built in the early 1940s and designed by the same architects as Building 50. Building 38 is the more imposing and was originally used for research into diesels, oils and greases.

356. Building 50 is currently mothballed and the interior requires significant refurbishment. Building 27 is also currently mothballed. As a positive contribution, Building 38 has been fully refurbished to provide learning space and facilities. The building now houses the Faculty library, engineering and ITC labs, seminar space and office accommodation.

357. The deemed application and section 78 appeal concern a change of use and do not include any building works, whether new build, improvements or alterations. Therefore the developments would not directly affect the fabric or setting of the heritage assets and no harm or loss would result.

358. The developments and commitment of the University to TSP would increase the likelihood of securing viable new uses and refurbishment of Building 50 and Building 27. There is however no indication of any specific proposals or timescales and so very limited positive weight is attached to this consideration.

[103] Inquiry document E.5 paragraph 149
[104] CD11.10

359. In so far as the developments safeguard the designated and non-designated heritage assets there is compliance with Policy ENV 5 of the Local Plan (Part One). Referring to the Local Plan (Part Two) there is no conflict with Policy DM 47 (listed buildings) or DM 48 and accordingly compliance with

criterion 3 of Policy EP 5.

Mersey Estuary SPA/Ramsar

360. The Mersey Estuary SPA encompasses all or parts of the Mersey Estuary SSSI and New Ferry SSSI. It is a large sheltered estuary which comprises large areas of saltmarsh and extensive intertidal sand and mudflats with limited areas of brackish marsh, rocky shoreline and boulder clay cliffs within a rural and industrial environment. The intertidal flats and saltmarshes provide feeding and roosting sites for large and internationally important populations of wildfowl. During the winter the site is of major importance for ducks and waders. The site is also important during spring and autumn migration periods, particularly for wader populations moving along the west coast of Britain. The Ramsar designation is based on the numbers of wintering waterfowl of international importance and the presence of species at levels of international and national importance.

361. The designated site is vulnerable to physical loss through land claim, damage caused by dredging, agricultural requirements, non-physical loss, toxic and non-toxic contamination and disturbance by wildfowling.

362. The TSP is some 1.4 km from the Mersey Estuary SSSI, SPA and Ramsar site and is separated from the estuary by the Stanlow Oil refinery, the Manchester Ship Canal and industrial development. The potential hazards from the change of use would be from air and water quality impacts, which could directly impact on the habitats within the designated site and therefore on the qualifier/criterion species.

363. However, no new drainage infrastructure is proposed. The existing foul and surface water drainage systems will be used and no extra processes will require higher or different waste water outputs. No significant increase in traffic is forecast and there is no reason to consider air quality would be adversely affected. Therefore, the new use would operate within the existing parameters of the site and no significant impact is predicted. Impact from disturbance is not considered a potential source of harm because of general considerations related to poor accessibility of the European site from TSP and the fact the new population introduced by the change of use would be primarily students. For all these reasons I conclude the proposal is unlikely to have a significant effect on the designated sites.

364. Following consideration of other plans or projects within the surrounding area, the material change of use at TSP is not likely to have an 'in combination' significant effect on the European site.

365. In conclusion the change of use developments, whether for the six buildings or the TSP site as a whole, are not likely to have a significant effect on the internationally important interest features of the Mersey Estuary SPA/Ramsar site alone or in combination with other plans or projects. There is no conflict with Policy ENV 4 of the Local Plan (Part One) and compliance with criterion 1 of Policy EP 3 of the Local Plan (Part Two).

Traffic and travel mode

366. The Transport Statement[105] confirms that TSP is served by a single vehicular and pedestrian access via a roundabout junction on Pool Lane. The site access is overseen by security staff and no general public access is allowed. The majority of students use the free shuttle bus provided by the

University that operates a half hourly service Monday to Friday between the site and the Parkgate campus. No on-site parking is provided for students but car parking is available to University staff.

367. Experience to date has not highlighted any traffic or highway safety issues. A planning condition is proposed to secure a travel plan in accordance with the University's Travel Plan Strategy 2015-2020[106]. As worded the condition lacks a means of enforcement in the event a travel plan is not approved. There are no mechanisms proposed that would ensure the provision of the free shuttle bus service, which is an essential service to make the site accessible to all by a sustainable means of transport. There is little certainty about what targets and outcomes would be put in place.

368. Planning conditions are proposed to secure the provision of electric charging infrastructure and cycle parking to accord with provisions of Policy T5 of the Local Plan (Part Two).

Other potential effects

369. The development raises no concerns in terms of the effect on residential amenity, potential for pollution, noise generation or visual impact. Linked to the conclusions on the Mersey Estuary SPA/Ramsar site and heritage assets criterion 1 of Policy EP 3 is met.

Interested party representation

370. I am satisfied that I have covered all the matters raised, including those in relation to the planning history of the site, the advice provided by the Council regarding planning permission, the advice of the HSE, the safety of students, the success of the academic environment and the value of the development to the local economy.

Overall Planning Balance

Development plan

371. The planning balance is similar for the deemed planning application/ground - (a) in the EN2 appeal and the section 78 appeal. This approach is reflected in the closing submissions of the appellant, the Council and Essar.

372. For the reasons detailed above, the location of a University Faculty providing higher education, even as a primary component of a mixed use, is not in accordance with the strategy for Stanlow within the Ellesmere Port area set out in Policy STRAT 4. There is a policy objection to the use by reason of the provisions of Policies EP 3 and EP 5.

[105] CD1.10
[106] CD1.11

373. Furthermore, a higher number of people, especially students, are being placed at threshold levels of risk resulting in substantial harm to public safety. There is prejudice to the continuing operation of the nationally important Stanlow Oil Refinery. The very serious harms, a result of the location of the TSP site adjacent to an upper tier COMAH establishment, are not able to be overcome by planning conditions. The development is not supported by Strategic Policies SOC 5 and Policy ENV 6 and in the Local Plan (Part Two) by Policies EP 3, EP 5 and DM 34. In total, these conclusions weigh very heavily against the development.

374. The University has demonstrated a high commitment to developing a centre of excellence in learning and skills, research and enterprise, for which there is general strategic support from Policy ECON 1. In this context the valuable contribution by TSP to the local and regional economy has very significant weight.

375. In so far as the developments safeguard heritage assets there is compliance with Policy ENV 5 and no conflict with Policies DM 47 or DM 48. No conflict with Policy ENV 4 has been found in respect of the Mersey Estuary SPA/Ramsar. No traffic or highway concerns are raised. Continued future public transport provision to the site is not adequately secured.

376. Safety, health and well-being are important components of sustainable development. Having regard to the above conclusions, the sustainability principles outlined in Policy STRAT 1 are not sufficiently met.

377. Weighing all these conclusions together, my overall conclusion is that in each appeal the material change of use is contrary to the development plan when considered as a whole and is unacceptable.

Other considerations

378. The University has helped to create conditions at TSP where businesses can invest, expand and adapt and where students are able to acquire and develop skills, particularly in the STEM subjects. These factors are consistent with the Framework's policy for building a strong, competitive economy. The Vision promoted at TSP would not be able to continue in its current form if planning permission is not secured, which potentially could have very serious consequences for the University. However, the development works against the economic interests of Stanlow Oil Refinery, an installation of national importance. This consideration is of greater weight and tips the balance against the development on economic grounds. Public safety is not promoted, which given the circumstances is a serious conflict with the Framework.

379. TSP features in a various economic strategy, policy and promotional investment documents, including the Cheshire and Warrington Local Enterprise Partnership Strategic Economic Plan. However, these documents pre-date the latter stages of the preparation and the adoption of the Local Plan (Part Two) and they have no detailed consideration of the public safety aspects. They have limited weight for the purposes of these appeals.

380. When balanced overall, these national planning policy considerations support the direction provided by the development plan.

Conclusions

381. History has shown that even the best risk control measures occasionally fail

and that major accidents occur[107]. The Council and the HSE make a very simple but effective and persuasive submission. In accordance with the Seveso III Directive an appropriate safety distance should be maintained between the upper tier COMAH establishment and development for public use. Public safety is a priority and is a compelling and overriding consideration against the FSE educational development at Thornton.

382. For the reasons given above I conclude that:

- The material change of use, whether in the form of the section 78 appeal proposal or the mixed use in the EN2 appeal, is not in accordance with the development plan and is unacceptable. There are no considerations of sufficient weight to indicate otherwise.
- The EN2 ground (a) appeal should not succeed. I shall uphold the enforcement notice and refuse to grant planning permission on the deemed application.
- The section 78 appeal should be dismissed.

EN2 Appeal: Ground (g)

383. The purpose of the notice is to remedy of the breach of planning control by requiring the education element of the mixed use to cease. Essentially the provision of undergraduate and postgraduate education by the FSE would have to cease. There is no requirement to carry out any alterations or building works or to remove equipment, plant or machinery. The issue is whether the period for compliance of 6 months is reasonable.

384. The appellant is seeking a period to the end of the academic year in June 2022 in order that the University could meet its contractual obligations to its students. In effect a compliance period of over two years is being requested. The appellant has outlined the type of decisions that would have to be taken with a view to meeting the contractual obligations to deliver each student's programme of study with reasonable care and skill and to make available learning support facilities and other services as the University considers appropriate. The decision-making would fall to a new Vice-Chancellor.

385. The appellant stated through the Vice-Chancellor's evidence that decisions would need to be made on which parts of the operation at the site would remain viable if transferred to an alternative location, whether any should close and whether obligations to students should be sought to be transferred to other higher education institutions. On the assumption that academic provision would continue, relocation would be necessary either to newly built premises on the University's Parkgate Road campus, or acquisition and refurbishment of suitable premises in or close to the centre of Chester. Commercial agents were instructed around Spring 2019 to search for a suitable existing alternative site. Existing University premises are highly constrained and are said to be fully utilised in delivering academic provision

[107] HSE/HPT/1 paragraph 5.8

and supporting services to students. The aim would be to work responsibly with parties on a withdrawal strategy.

386. By all accounts future plans have been considered, at least at a preliminary level. Even so, a high degree of uncertainty remains about contingency or longer term future plans and options. The indication is that a period of time would be required for key decisions and financial planning. However, the planning issues came to the fore two years or more before the first enforcement notice was issued. The University chose to continue as normal in its student intake and did not attempt to review its Prospectus and marketing information.

387. Nevertheless, even though the enforcement notices were issued some time ago in June 2018 and May 2019, the appellant is entitled to assume success and to a reasonable period for compliance after the notice takes effect. I recognise that the academic, contractual and financial implications for the University would be substantial. The Council has also revised its position and confirmed that it considered a year would be ample time to make the necessary arrangements whilst removing the students from the inner zone as promptly as possible.

388. As regards policy, the Framework and Planning Practice Guidance explain that effective enforcement is important to maintain public confidence in the planning system by maintaining the integrity of the decision making process. In this case public safety is of paramount importance and the HSE could not be clearer in its advice. Such circumstances indicate that the period for compliance should be as short as reasonably possible.

389. Having balanced all the competing considerations I conclude that to extend the compliance period to one year is reasonable. The appeal on ground (g) succeeds to this extent and the enforcement notice will be varied accordingly.

DECISIONS

Appeal Ref: APP/A0665/C/18/3206873

390. It is directed that the enforcement notice be corrected:

- In paragraph 2 by the deletion of the description of the Land and the substitution of the words: Building numbers 38, 40, 58, 62, 304 and 305, Thornton Science Park, Pool Lane, Ince Chester CH2 4NU, as shown in red on the attached plan ["the Land"].
- In paragraph 3 by the deletion of the words of the alleged breach of planning control and the substitution of: Without planning permission, a material change in the use of the Land to a university faculty for the provision of higher education within Use Class D1 of the Town and Country Planning (Use Classes) Order 1987 (as amended) ["the Unauthorised Development"].

391. Subject to these corrections, the enforcement notice is quashed.

Appeal Ref: APP/A0665/C/19/3232583

392. It is directed that the enforcement notice be corrected in paragraph 3 by the deletion of the wording of the description of the matters which appear to constitute the breach of planning control and the substitution of the wording:

Without planning permission a material change in the use of the Land

from a mixed use for research and development (in connection with automotive/petrochemical/aviation/environmental and energy industries), laboratories and office use

to a mixed use comprising a University science and engineering faculty providing undergraduate and postgraduate education, together with use for research and development (in connection with automotive/petrochemical/ aviation/environmental and energy industries), laboratories and office use ("the Unauthorised Development").

393. It is directed that the enforcement notice be varied in paragraph 6 by the deletion of "Within 6 calendar months" and the substitution of "Within 12 months".

394. Subject to these corrections and variations, the appeal is dismissed and the enforcement notice is upheld, and planning permission is refused on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Appeal Ref: APP/A0665/X/19/3227520

395. The appeal is allowed, only in part. It is directed that the certificate of lawful use or development granted by Cheshire West and Chester Council and dated 28 February 2019 under reference 18/04182/LDC be modified by:

- At the end of the heading describing the statutory provisions, the addition of ": Article 39".
- Beneath the heading describing the statutory provisions the deletion of the two sections comprising the Description, Location and all associated wording.
- In the immediately following text, starting "In pursuance", the deletion of the wording "26 October 2018, the use/operation(s)" and the substitution of the "15 October 2018, the use", and the insertion of "of section 191(2)" after the word "meaning".
- The deletion of reasons (1) and (2), substituting the following reasons:

On the balance of probability, the sui generis mixed use described in the First Schedule was carried out continuously without significant interruption on the land for a period in excess of ten years prior to 31 March 2014 and became immune from enforcement action by reason of the passage of time. During that period the industrial use that was undertaken, mainly associated with engineering workshops and a blending plant, was ancillary to the research and development and laboratory uses. The teaching and workplace training that took place, including apprenticeships, work placements and youth training schemes, was an ancillary not a primary use and therefore cannot be included as a component of the mixed use found to be lawful.

After the acquisition of the site by the University of Chester on 31 March 2014 a Faculty of Science and Engineering was established on the site to provide undergraduate and postgraduate education.
Subsequently up to 404 adult higher education students attended on site at any one time. The teaching and workplace training in association with the Faculty of Science and Engineering became a primary use. All the previous

primary uses continued. A material change of use occurred to a new mixed use, comprising a University Faculty of Science and Engineering providing undergraduate and postgraduate education, together with use for research and development (in connection with automotive/petrochemical/aviation /environmental and energy industries), laboratories and office use. This material change of use took place less than ten years prior to the date of the application. No planning permission has been granted for this development. The use applied for is not immune from enforcement action and has not acquired lawfulness.

- The deletion of the content of the First Schedule and the substitution of: "Use of the site (outlined in red on the plan appended) for a mixed use comprising research and development (in connection with automotive/petrochemical/aviation/environmental and energy industries), laboratories and office use."
- In the Second Schedule the addition, after the postcode, of the phrase: (outlined in red on the plan appended).
- Under the heading Notes, the deletion of the description of development in the application (as amended) and the substitution of the description: "*Use of the site (Thornton Science Park) for sui generis mixed use, comprising elements of research and development, laboratory, teaching and workplace training (for up to 404 higher adult education students on site at any one time) and ancillary uses*".

Appeal Ref: APP/A0665/W/18/3206746

396. The appeal is dismissed.

XXXXX XXXXX

Inspector

APPEARANCES

FOR THE APPELLANT:

XXXXXXXXXX XXXXXXXX-XXXXXXX QC and XXXXX XXXXXX of Counsel They called	Instructed by Addleshaw Goddard solicitors
Professor XXXXXXXX XXXXXXX	Vice Chancellor, Principal and Chief Executive of the University of Chester
Professor XXXXXXXX XXXXXXXX	Executive Dean of the University of Chester's Faculty of Science and Engineering and Provost of Thornton Science Park
XX XXXX XXXXXX	Senior Executive Director of Commercial Operations and Chief Executive of Thornton Research Properties Limited
XX XXXXX XXXXXX BA(Hons) BPI MRTPI	Executive Director of Nexus Planning
XX XXXXX XXXX BSc CEng FIET	Principal Consultant with Engineering Safety Consultants Limited

FOR THE LOCAL PLANNING AUTHORITY:

XXXXXX XXXXXX, Barrister	Instructed by XXXXXX XXXXXXXX Legal Manager (Environment), Cheshire West and Chester Council
He called	
XX XXXXXXXX XXXXX	Product Steward of Essar Oil (UK) Limited
XXXX XXXXXXX BA(Hons) BPI MRTPI	Principal Planning Officer, Cheshire West and Chester Council

FOR THE HEALTH & SAFTEY EXECUTIVE (Rule 6 Party):

XXXXX XXXXXXXX QC (XXXXXXX *XXXXX, barrister attended in week 1*) He called	Instructed by XXXX XXXXX, Government Legal Department
XXXXXX XXXXXX BSc AMIChemE	HM Principal Specialist Inspector of health and safety (*XX XXXXXX adopted and presented the evidence of his colleague XX XXXXX XXXXXXXXXX who was unable to attend the inquiry*)

FOR ESSAR OIL (UK) LIMITED (Rule 6 Party):

XXXXX XXXXXXX QC	Instructed by XXXXX XXXXXX, Partner, Eversheds Sutherland (International) LLP
He called	
XXX XXXX BSc(Hons) MPhil MRTPI	Director ELG Planning

DOCUMENTS submitted at the inquiry

By the Appellant

A.1 Data on Thornton Science Park 31 October 2019
A.2 Plan of Thornton Science Park ref TSX_P000_012
A.3 Outline opening submissions on behalf of the Appellant
A.4 Erratum to Proof of Evidence of XX XXXXX
A.5 Core Documents for cross examination of HSE
A.6 Proposed amendment to description of the CLEUD application
A.7 Plan of Thornton Science Park with distances to tanks at Stanlow Oil Refinery
A.8 Costs on running Thornton Science Park by XX XXXXXX
A.9 *Mansell v Tonbridge and Malling Borough Council and Others* [2017] EWCA Civ 1314
A.10 *R (on the application of Wright) v Resilient Energy Severndale Ltd and Forest of Dean District Council* [2019] UKSC 53
A.11 *New World Payphones Limited v Westminster City Council and the Secretary of State for Housing, Communities and Local Government* [2019] EWCA Civ 2250
A.12 *R (on the application of Peel Land and Property Investments PLC) v Hyndburn Borough Council and Others* [2012] EWHC 2959 (Admin)
A.13 *Samuel Smith Old Brewery (Tadcaster) v the Secretary of State for Communities and Local Government and Others* [2009] EWCA Civ 333
A.14 *East Barnet Urban District Council v British Transport Commission and Another* [1962] 2 QB 484
A.15 *Wilson v West Sussex County Council* [1963] 2 QB 764
A.16 Closing Submissions on behalf of the Appellant

By the Council

C.1 Opening statement of the Local Planning Authority
C.2 Population information
C.3 Revised draft planning conditions
C.4 *Gladman Developments Ltd v Canterbury City Council* [2019] EWCA Civ 669
C.5 *The Queen on the application of Cherkley Campaign Limited v Mole Valley District Council and Another* [2014] EWCA Civ 567
C.6 Closing submissions on behalf of the Council

By the HSE

H.1 Opening remarks on behalf of HSE
H.2 Note on the HSE and the Health and Safety Laboratory early
H.2 engagement on Thornton Science Park 2015 to 2016 (*original*
v2 *document and replacement document*)
H.3 List of corrections and updates to the proof of XX XXXXXXXXXX
H.4 Report to Secretary of State for Communities and Local Government 26 March 2010 Site at Ram Brewery, Wandsworth ref APP/H5960/V/09/2099671, 2099695, 2099698, 2099572
H.5 *Wipperman and Another v Barking London Borough Council* [1965] 17 P&CR 225

H.6 Corrections to proof of evidence of XX XXXXXX
H.7 Copy of correspondence between Government Legal Department and Addleshaw Goddard 22 November 2019
H.8 Copy of correspondence between Addleshaw Goddard and Government Legal Department 25 November 2019
H.9 Consultation with HSE re Ram Brewery 12 August 2013 ref 2012/5286
H.10 Thornton Science Park – The Facts posted 7 June 2018
H.11 Email correspondence 12 June 2018
H.12 Email correspondence 2 August 2019
H.13 Closing submissions on behalf of HSE

By Essar Oil (UK) Limited

E.1 Opening submission of Essar Oil (UK) Ltd
E.2 *Peel Land and Property Investments plc v Hyndburn Borough Council and others* [2013] EWCA Civ 1680
E.3 Clarification note
E.4 Response to matters raised by the Inspector
E.5 Closing submissions on behalf of Essar Oil (UK) Ltd

General

R.1 Representation and supporting documents submitted by X XXXXXX

The Planning Inspectorate

Mobile Telecommunications

Updated to reflect 2023 Framework (NPPF)

What's new since the last version

Changes highlighted in yellow made 24 January 2023:

- Alternative Sites section expanded following *Murtagh v SSLUHC and IPs Hutchinson 3G (UK) Ltd & RB of Kingston upon Thames* [2022] EWHC 2991 (Admin)
- Para 16 amended following new guidance from Department for Culture, Media and Sport

Contents

Introduction

1. Inspectors make their decisions on the basis of the evidence before them. Consequently, they may, where justified by the evidence, depart from the advice given in this training material, although the National Planning Policy Framework and the Government's Planning Practice Guidance will still be relevant in all cases.

2. Most proposals for mobile communications installations relate to the mobile phone network and take the form of lattice towers, poles or antennas fixed to buildings. There can, however, also be fixed line broadband cabinets, telegraph poles and underground cables and cabinets.

3. This training material applies to casework in England only.

Policy, legislation and guidance

4. Paragraphs 114 to 118 of the National Planning Policy Framework deal with 'Supporting high quality communications', and these should be referred to when you deal with this type of casework.

5. National guidance on telecommunications, permitted development rights and prior approval is mainly provided in the 'When is Permission required' section of the Government's Planning Practice Guidance.

How the mobile network works

6. Mobile communications systems consist of a network of overlapping cells at the centre of which is a base station. The main cells are called micro-cells. However, to deal with specific capacity or topographical issues, these might contain pico-cells.

7. The base station usually consists of antennas attached to a supporting lattice, pole or building and equipment cabinets. The antenna transmits and receives radio waves. Each base station needs to be connected to the wider network by one or more microwave dishes or a landline.

8. A mobile device converts data (or the human voice) into radio waves. These signals are transmitted from the device to the nearest base station and from there to the wider network. They are then transferred to the receiving mobile device from the nearest base station.

9. Masts generally take the form of lattice towers or slimline monopoles. In some cases, these might be disguised as a telegraph pole, tree or flagpole. Antennas can also be sited on buildings where they are sometimes disguised so that they appear as part of the building (for example, as a false chimney). Alternatively, they can be hidden within a building (for example, church towers).

10. The number of base stations required can be affected by several factors including call and data volumes and topography. Antennas need 'line of sight' to the area they serve and consequently, coverage can be affected by topographical features such as hills, trees or buildings. Coverage inside a building will generally be less good than outside.

11. Antennas for different systems and operators need to be spaced apart to avoid interference. Cells may cover only a small area. This might be a few hundred metres in urban areas or 2-3 km in rural areas.

Development of mobile networks and operators

12. The Second Generation (2G) network provided for mobile telephone calls and text messages. 3G provided access to the internet and 4G provided mobile broadband at speeds which are similar to those from a fixed broadband connection. The roll-out of 5G started around 2020. This will provide improved device connectivity, ultra-low latency (delay), better capacity and ultra-high speeds. The Government's ambition is for the majority of the population to have access to a 5G signal by 2027.

13. In order to deliver 5G, replacement and additional installations will be required. This is because 5G uses a higher radio frequency which creates different technical constraints and this determines the siting and design of any infrastructure. In particular, whilst more data can be transmitted via 5G the signal cannot propagate as far or through obstructions. This means that the target service area is likely to be smaller and that base stations will need to be taller to achieve a 'line of sight'. Heavier antennas are also needed for 5G so that any supporting structures will need to be more robust. Operating at a higher frequency also means that a wider public exclusion zone is required for health reasons.

14. These considerations also affect rooftop deployments. These need to be sited to avoid 'clipping' the edge of the host building and also sited so as to create an adequate exclusion zone. This means that the antennas may need to be positioned centrally and elevated above roof level or on the edge of the rooftop.

15. As of November 2021 the network operators are Vodafone, Telephonica, Three and EE/BT. Each operator's network is separate although some base stations are shared. For all telecommunications work, the operators are required to give notice to LPAs under the Electronic Communications Code (Conditions and Restrictions) Regulations 2003 when installing, altering or replacing electronic communications apparatus.

16. The Code of practice for wireless network development in England was published by Department for Culture, Media and Sport in 2022. The role of the Code is to support the government's objective of delivering high quality wireless infrastructure whilst balancing these needs with environmental considerations.

Permitted development and prior approval

17. The below will answer many of the issues for Prior Approval and Permitted Development; however, the ITM chapter on The GPDO and prior approval appeals will go into further detail.

18. Many proposals will be permitted development under the Town and Country Planning (General Permitted Development) (England) Order 2015 (GPDO). By virtue of Article 3(1) electronic communications code operators can carry out the development permitted by Class A of Part 16 in Schedule 2 of the Order subject to the exclusions set out in paragraph A.1 and the conditions in paragraph A.2. Paragraph A.3 contains procedural requirements relating to prior approval applications.

19. The considerations in prior approval appeals are different to those in planning appeals. It is important that they are dealt with accordingly and not in the same way as an appeal against the refusal or non-determination of an application for planning permission.

20. Under paragraph A.3(4) certain development prescribed in paragraph A.2 (3) can only begin if the developer has applied to the LPA for a determination as to whether prior

approval will be required as to the siting and appearance of the development. Paragraph A.3(8) contains further pre-commencement conditions. In summary, the LPA is expected to confirm whether prior approval is or is not required. If it is, they have 56 days to determine whether such approval is given or refused. The development can go ahead if the LPA has not made a decision within that period (provided that it is permitted development).

21. These procedural paragraphs indicate that refusal of prior approval should follow notification by the LPA that prior approval is required. However, refusals of prior approval may be issued without that notification having occurred. In this circumstance it can be taken that prior approval was required, and the failure to notify accordingly does not invalidate the refusal or the subsequent appeal.

22. The interpretation of Class A is covered in paragraph A.4. Permitted development rights are also granted in accordance with the definitions set out in Article 2(1) of GPDO. Where a term is defined for the specific purposes of one Part or Class of the Order, it should not be taken as applying to other Parts or Classes.

23. Definitions set out in the Order relate only to the Order and not to primary legislation. However, where a term is defined in s336(1) of the TCPA 1990, and is not subsequently qualified or adapted in the Order, the definition in s336(1) would apply (unless the context requires otherwise). If neither the Order nor the TCPA defines a term, it would be appropriate that the 'ordinary' meaning (*Clive Evans v SSCLG* [2014] EWHC 4111 (Admin), paragraph 17), of language should be used when interpreting the GPDO, in a broad or common sense manner, unless there was something which clearly indicated to the contrary (*Waltham Forest London Borough Council v SSCLG* [2013] EWHC 2816 (Admin), paragraph 16).

24. General advice about prior approval appeals is provided in the Permitted development and prior approval appeals chapter.

25. Some cases might raise the issue of whether the proposed development is permitted development. In relation to whether the proposal is a "mast" the definition given in paragraph A.4 is that this: *means a radio mast or radio tower.* In *Mawbey & Lewisham LBC, SSCLG v Cornerstone Communications* [2019] EWCA Civ 1016 the Court of Appeal agreed with the High Court judge that a 'mast' in this legislative context is an upright pole or lattice work structure whose functions is to support an antenna or aerial. It need not be "ground based" or of any particular "scale" or "design" to meet the definition.

26. The alteration or replacement of a mast is excluded from the definition of permitted development if it exceeds the parameters set out in paragraph A.1(1)(d). Prior approval is required in the circumstances outlined in paragraph A.2(3)(c)(ii). It may be argued that the proposal for a mast is not a replacement because it would be built alongside an existing mast which would remain in place until all the services can be transferred across. On the other hand, it may be claimed that the proposal is a replacement because it will ultimately supplant the existing mast. This may affect whether the proposal is permitted development or not. Deciding this question will be a matter of judgment based on the facts of the case. However, there is no reason to assume that a replacement must be something that immediately takes the place of what is already there.

27. Paragraph A.2(2) provides that development permitted under Class A should be removed as soon as practical after it is no longer required for electronic communications purposes. This may be relevant when considering any visual implications of a second or replacement mast.

Dealing with prior approval appeals

28. Following a refusal of prior approval the correct template to use is 'DEV order appln – refusal'. However, the wording should be adjusted to reflect the precise circumstances of the appeal by referring to Part 16. The recommended wording is in the decision template at Annex A.

Defining the main issues in prior approval appeals

29. Because of the provisions of the Order the only issues that can be considered are **siting** and **appearance**. These terms are not defined but any matter that directly relates to either siting or appearance can be taken into account. These might include:

    - **Visual** – for example, the effect the siting would have on the character and appearance of the area including cumulative impacts or any effect on a conservation area or the setting of a listed building
    - **Highway safety** – for example, the effect that the siting might have on visibility splays or safe pedestrian movement along a pavement
    - **Living conditions** – for example, the effect of the siting on the outlook of neighbours
    - **Alternatives** – the availability of other potentially less harmful siting options

30. In setting the main issues it is advisable to refer to the matters of siting and appearance and the specific matters that are the focus of the appeal. Furthermore, if harm would arise, then reference should be made to the need for the proposal to be sited as proposed in the light of possible alternatives. In a case where the character and appearance of the area was central to the outcome of the appeal then the main issue could be worded as follows:

    The effect of the siting and appearance of the proposed installation on the character and appearance of the area and, if any harm would occur, whether this is outweighed by the need for the installation to be sited as proposed taking into account any suitable alternatives.

The development plan and the National Planning Policy Framework in prior approval appeals

31. Section 38(6) of the Planning and Compulsory Purchase Act 2004 does not apply to Class A of Part 16 of the GPDO and does not require regard to be had to the development plan. Therefore, a prior approval appeal should not be determined, expressly or otherwise, on the basis of S38(6) or as though the development plan must be applied.

32. Nevertheless, development plan policies may be relevant in prior approval cases, but only insofar as they relate to the matters of siting and appearance. So if the development plan contains material that is relevant to the planning judgement to be made, it may be taken into account as a material consideration.

33. However, it is important to ensure that no impression is given that development plan policies have been applied and that the appeal has been dealt with as a planning appeal. To this end, it is advisable to refer, if necessary, to any relevant policies at the outset and not to conclude against them when setting out findings against the main issues.

34. Part 16 does not require regard to be had to the National Planning Policy Framework. However, the policies in the Framework are capable of being a material consideration and should be treated as such. As well as the chapter on supporting high quality

communications, the chapters on achieving well-designed places and conserving and enhancing the historic environment may also be relevant.

35. Suggested wording to cover these points is in the example decision template at Annex A.

Heritage issues in prior approval appeals

36. Section 66 of the Planning (Listed Buildings and Conservation Areas) Act 1990 **does not** apply in prior approval applications. This is because a prior approval application is not an application for planning permission or permission in principle to which S66(1) does apply. Neither does it come within the ambit of S66(2). This statutory duty should therefore not be referred to when considering development affecting a listed building or its setting.

37. However, if the appeal site is within a conservation area then the duty in S72 of the Planning (Listed Buildings and Conservation Areas) Act 1990 **does** apply. Therefore, "… *special attention shall be paid to the desirability of preserving or enhancing the character or appearance of that area.*" That duty does not apply to any development affecting the setting of a conservation area.

38. The relevant paragraphs of the Framework regarding conserving and enhancing the historic environment are nevertheless applicable to any development that would affect the significance of any heritage asset including its setting. These policies should therefore be applied in prior approval appeals where a listed building or conservation area or their settings would be affected by the siting and appearance of the development.

39. If the siting and/or appearance of the proposal would affect a listed building or a conservation area then the 3-step approach in the chapter on the Historic Environment should be followed. This involves assessing the significance of the heritage asset, assessing the effect of the development on that heritage asset and, if necessary, undertaken a balancing exercise of any harm against public benefits.

Need and benefits in prior approval appeals

40. Paragraph 118 of the Framework establishes that local planning authorities should not question the need for an electronic communications system. The judgment in Westminster CC v SSHCLG & New World Payphones Ltd [2019] EWHC 176 (Admin) which concerned prior approval appeals involving telephone kiosks confirmed that arguments about whether electronic communications networks and the facilities required for their use are needed in the public interest are precluded (paragraph 49).

41. However, the need for the proposal to be sited in the proposed location is a different matter which is considered later in relation to alternative sites.

42. The social and economic benefits that would arise from a proposed mast or antenna installation may also be referred to. These might, for example, be expressed in terms of the benefits to the wider economy, improved connectivity for businesses, industry and other sectors, use by the emergency services, ensuring continuous coverage or facilitating the delivery of 5G. However, the Order is clear that the only considerations should be the siting and appearance of the proposal. Those benefits have effectively been recognised by the grant of permission under Article 3(1). Therefore, in cases not involving heritage assets, the potential wider benefits of the proposed development should not be taken into account. It may be necessary to explain this in the decision whilst acknowledging that these wider benefits exist. A suggested form of wording for use in **non-heritage appeals** is included in the example decision template at Annex A.

43. In appeals where harm would occur to the significance of a designated heritage asset there is a need to balance that harm against the public benefits that would occur. In that scenario the benefits associated with the proposal and referred to by the appellant should be addressed in the context of the policies in the Framework. In so doing, it should be borne in mind that a proposal to ensure coverage in a small geographical area is part of a wider whole and that the network would be undermined by gaps in coverage. Similarly, whilst only users of that particular network would be using the service, these aspects should ordinarily be regarded as "public" benefits.

Whether conditions can be imposed in prior approval appeals

44. Proposals which are permitted development under Class A, Part 16 are subject to standard conditions (see paragraphs A.2 and A.3). These include implementation within 5 years, development being carried out in accordance with the details submitted with the application and the removal of the structure/apparatus when it is no longer required for electronic telecommunications purposes.

45. These 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 allow the conditions to that effect by stating that '… prior approval is granted under the provisions of Article 3(1) and Schedule 2, Part 16, Class A…'.

46. However, to assist, the parties, particularly the appellant, any relevant conditions imposed by the Order should be described. A suggested word of forms is included in the example decision template at Annex A.

47. The Order does not provide any specific authority for imposing additional conditions beyond the deemed conditions for development by electronic communications code operators. Consequently, such conditions should not be imposed. If any conditions are suggested you should explain your approach.

48. It follows from this that, if control is necessary over some matter (for example, the coloured finish of a telecommunications pole), then this cannot be secured by condition. In such circumstances, unless the parties agree an amendment to the details of a proposal and subject to the *Bernard Wheatcroft Ltd v SSE & Harborough D.C. [1982] JPL 37* principles, then the appeal would need to be dismissed.

Formal decisions in prior approval appeals

49. If a prior approval appeal is allowed it is essential that the decision refers not only to the relevant Part and Class, but also to Article 3(1) of the Order, because it is that which grants planning permission for the development.

50. Consistent with decisions on planning 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 numbers.

51. If the appeal is dismissed, irrespective of whether the LPA refused or failed to determine the application, then it is sufficient to state that the appeal is dismissed.

Considerations in prior approval and planning appeals

Character and appearance

52. Considering the effect on the character and appearance of an area arising from proposed poles or masts, antennas proposed on buildings and equipment cabinets is no different to other appeal casework. Therefore consideration should be given to:

- What is the surrounding context? What are the defining characteristics of the locality?
- Are vertical features such as street lights and signs common in the immediate area?
- How would the proposal fit in? Would it be similar in height, thickness and shape to existing vertical features or noticeably different? If it is taller and wider would this have an adverse impact?
- Would it respect the spacing and siting of existing features?
- Would any disguise be effective?
- Would the proposal be seen against the skyline or a backdrop of buildings or trees or would it be screened by them? Would it be seen alongside a row of street trees? Are any trees likely to endure? Is any planting proposed realistic and capable of being implemented?
- Would it stand out as an unusual and incongruous feature or add to visual clutter or would it be seen as an unobtrusive piece of street furniture. How prominent would it be?
- Given the operational constraints that apply, have less intrusive options been considered? (for example, a slimmer or lower pole)

Need for the proposed siting

53. The proposal may be designed to fill a gap in coverage or to improve signal strength (for example to provide coverage within buildings or to increase the capacity of the network).

54. The appellant will often seek to demonstrate the need for increased coverage through the use of colour-coded signal maps. These usually show existing coverage (usually showing a gap), coverage from the proposal and the combined effect (usually showing the gap filled in). The maps may distinguish between reception within and outside buildings. Such information is helpful in establishing the 'area of search' for the proposed installation. Without it, the ability to meaningfully assess alternative locations may also be difficult and therefore the acceptability of the siting.

55. Local residents may argue that a mobile signal can be received in the area. However, this is unlikely to amount to a complete assessment of need. It may relate to a different network and does not necessarily reflect issues relating to capacity, in building coverage or signal strength.

Alternative sites

56. Paragraph 117 c) of the Framework expects evidence to be submitted to justify all applications. For a new mast or base station this includes evidence that the applicant has explored the possibility of erecting antennas on an existing building, mast or other structure.

57. If no harm would occur as a result of the proposal then there is no need to go on and consider the other sites that have been assessed. There is no requirement in the Framework or the Order for developers to select the best feasible siting. However, if harm would ensue then the other options that might be available are likely to be an

important consideration. This was emphasised by the findings in *Murtagh v SSLUHC and IPs Hutchinson 3G (UK) Ltd & RB of Kingston upon Thames* where an Inspector did not expressly consider the option of siting the equipment on an existing mast.

58. If the proposed development would cause harm and there are available other sitings to provide coverage then this would weigh against the proposal.

59. In **planning appeals** if there are shown to be no suitable alternative sites then this would be part of the S38 balance.

60. In **prior approval appeals** if there are shown to be no suitable alternative sites then the siting and appearance of the proposed development should be assessed bearing in mind that such proposals have been accepted in principle. In *Murrell v SSCLG* [2010] EWCA Civ 1367 it was confirmed that the assessment of such matters has to be made in a context where the principle of development is not itself at issue (paragraph 46). The installation therefore has to be sited somewhere within the target area. A lack of suitable alternatives could indicate that the proposal is the 'least worst' option. Given the acceptance of telecommunications equipment by the Order this could be a strong factor in favour of allowing the prior approval appeal.

61. In line with paragraph 117 c) the appellant should provide evidence to explain which alternative sites were considered and why they were rejected in favour of the appeal proposal. Reasons could include:

    - The site is not within the target area
    - The alternative site would have a worse effect in terms of appearance (perhaps because a taller/bulkier mast might be required to secure coverage depending on topography and neighbouring buildings)
    - The location of the site would have an adverse impact on residential amenity
    - The landowner is unwilling to allow their site to be used
    - Mast sharing is not technically feasible or would require a taller/bulkier mast (for example, would two slimline poles have a lesser effect than a single bulkier/taller mast?)
    - Access and/or servicing would not be feasible

62. In assessing the sites that have been discounted is there clear and persuasive evidence for this? Is that evidence comprehensive and reliable? The approach taken by the LPA may inform you in this respect and third parties may also provide evidence. In *Murtagh* a local resident referred to an existing mast and the Inspector failed to grapple with that issue. However, in order to conclude that a location has been discarded too hastily then some good reason will be required to counter the appellant's conclusions. This might be the case if there are ambiguities or omissions in the evidence provided about alternative sites What you are assessing is the likelihood that more suitable sites may reasonably be available.

63. If there is no dispute between the parties that all possible realistic alternatives have been assessed and properly rejected then there may be no need to delve into this further. On the other hand, if you conclude that whilst alternatives may exist the appeal proposal is preferable even though it would cause some harm, then cogent reasons should be given for that finding.

64. There is no specific requirement to seek out or consider alternative sites which have not been raised by any of the parties. However, in considering whether alternatives exist you will want to be satisfied that a thorough review of possible options within the search area, or possibly just outside it, has been conducted. Your approach to this should be realistic

and not expect that every single part of the search area has been accounted for. If the LPA and others have been unable to suggest any then you might reasonably conclude that there are none. Furthermore, it is more convincing to point to potential alternative locations rather than to conclude that you are not persuaded that there are not better locations. However, such findings should be of a general nature as you should not reach firm conclusions about the acceptability of alternative sites as this would fetter future decision makers.

65. If any significant changes to the appellant's case occur during the appeal proceedings interested parties may need to be given an opportunity to comment. This was considered in *Phillips v FSS, Havant BC and Hutchison 3G (UK) Limited* [2003] EWHC 2415 (Admin). In that case the potential availability of alternative sites was material to the decision. The relevant area of search was expanded from 200 metres in diameter, at the time of the application, to 400m in the appellant's appeal statement. The interested party was unaware of this and so was denied the opportunity to make representations about the larger search area. The Court concluded that this procedural unfairness had substantially prejudiced her interests.

Green Belts

66. In **planning appeals** Green Belt issues should be dealt with in the same way as any other appeal. The advice in the ITM chapter on Green Belts and paragraphs 137 to 151 of the Framework will be relevant.

67. Telecommunications equipment is likely to be regarded as a building for the purposes of Green Belt policy having regard to the definition of 'building' in section 336(1) of the TCPA 1990. Therefore, unless the proposed development would fall within one of the exceptions set out in paragraph 149 of the Framework, it would be inappropriate development. Other considerations that might weigh in favour of a proposal may include its benefits, the need for additional coverage or capacity and the lack of realistic alternatives outside the Green Belt.

68. Permitted development rights for Part 16 development apply in the Green Belt. Therefore, in **prior approval appeals** the principle of development is not for consideration and the question of whether or not the proposal represents inappropriate development in the Green Belt does not arise. This should therefore not be addressed. In considering the matters of siting and appearance it is advisable to limit references to the Green Belt as far as possible. It is preferable to consider the effect on the countryside rather than the effect on the character and appearance of the Green Belt.

Health

69. It is a requirement that the network operators confirm that the proposals are International Commission on Non-Ionizing Radiation Protection (ICNIRP) compliant. This is referred to at paragraph 117 of the Framework. Most applications are accompanied by a certificate stating that the proposal complies with the requirements of the ICNIRP radio frequency public exposure guidelines. A template certificate is provided in Appendix D to the Code of Best Practice on Mobile Network Development in England.

70. Evidence may be presented about the implications for health but paragraph 118 of the Framework makes clear that LPAs should not set health safeguards that are different from the International Commission guidelines for public exposure. If you intend to depart from the Framework regarding health, you will need to demonstrate that there are exceptional circumstances that justify doing so.

71. Health and public fears about health are capable of being a material consideration, and, if raised by the parties it should be made clear that they have been taken into account in the context of the Framework. If no evidence has been provided to show that the ICNIRP guidelines would not be complied with then the matter could be covered by the paragraph in the example template decision at Annex A.

Balancing

72. If there is no harm you will be allowing the appeal.

73. In **planning appeals** if there is harm, you should quantify it and then balance the harm against any social and economic benefits as well as the need for the proposal, having regard to the potential availability of alternative sites. Pay particular attention to the requirements of paragraph 116 of the Framework in doing so.

74. In **prior approval appeals** where harm would occur to the significance of a designated heritage asset there will be a need to balance that harm against the public benefits that would occur. In cases not involving heritage assets, the potential wider benefits of the proposed development should not normally be taken into account as the only relevant matters are siting and appearance. However, a balance may need to be struck between the need for the development to be located as proposed and the availability of realistic alternatives.

75. The final balancing is most convincing when it is clear that importance has been attached to both the positive and negative aspects of the proposal and that it is obvious why one is given greater importance to the other. Conclusions should be consistent with the findings made previously as part of the reasoning. It is also good practice for the conclusion to refer back to the originally defined issue.

Kiosk developments

76. The Town and Country Planning (Permitted Development, Advertisement and Compensation Amendments) (England) Regulations 2019 came into force on 25 May 2019 and amended Class A of Part 16 of Schedule 2 by removing permission for the installation, alteration or replacement of a public call box by, or on behalf of an electronic communications code operator. Prior to then a considerable number of appeals were made against the refusal or non-determination of prior approval. Such appeals often included arguments about whether the proposal was for a dual purpose including advertising and therefore outside the scope of the Order. This was settled by the Court of Appeal judgment in *New World Payphones Ltd v Westminster City Council* [2019] EWCA Civ 2250. The changes to the Order mean that proposed kiosks will now require planning permission.

ANNEX A - Decision Template Example

(GPDO 2015 Schedule 2, Part 16, Class A)

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 16, Class A 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 approval is granted under the provisions of Article 3(1) and Schedule 2, Part 16, Class A of the Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended) for the siting and appearance of [*development*] at land at [*address*] in accordance with the terms of the application Ref […], dated [*date*], and the plans submitted with it including [*plan nos…*]

OR

2. The appeal is dismissed.

Procedural Matter

Either:

3. The provisions of the Town and Country Planning (General Permitted Development) (England) Order 2015 as amended (GPDO 2015), under Article 3(1) and Schedule 2, Part 16, Class A, Paragraph A.3(4) require the local planning authority to assess the proposed development solely on the basis of its siting and appearance, taking into account any representations received. My determination of this appeal has been made on the same basis.

Or:

4. Because this is an application for prior approval the provisions of the 2015 Order require the local planning authority to assess the proposed development solely on the basis of its siting and appearance, taking into account any representations received. This appeal will be determined on the same basis.

Planning Policy

Either:

5. Tthe provisions of Schedule 2, Part 16, Class A of the GPDO 2015 do not require regard be had to the development plan. I have had regard to the policies of the development plan [*and any related guidance*] [*and the National Planning Policy Framework (Framework)*] only in so far as they are a material consideration relevant to matters of siting and appearance.

Or:

6. There is no requirement to have regard to the development plan as there would be for any development requiring planning permission.

7. Nevertheless, Policies ….. of the ….. Local Plan are material considerations as they relate to issues of siting and appearance. In particular, they seek to …….. Similarly, the National Planning Policy Framework is also a material consideration and this includes a section on supporting high quality communications.

Main Issue(s)

Option 1

8. The main issue(s) is/are the effect of the siting and appearance of the proposed installation on [*e.g. the character and appearance of the area or the significance of designated heritage assets or ….*].

Option 2

9. The main issues are the effect of the siting and appearance of the proposed installation on the ……. and, if any harm would occur, whether this is outweighed by the need for the installation to be sited as proposed taking into account any suitable alternatives.

Reasons

10. [*add reasons*]

Other Matters

Benefits [IN CASES NOT INVOLVING HERITAGE ASSETS – in those cases a balance against public benefits WILL be required as per paragraphs 201 or 202 of the National Planning Policy Framework]

11. Reference has been made to various social and economic benefits but these have not been taken into account in considering the matters of siting and appearance.

Health

12. Concerns have been raised about potential effects on health. However, the appellant has provided a certificate to confirm that the proposal has been designed to comply with the guidelines published by the International Commission on Non-Ionizing Radiation Protection (ICNIRP). In these circumstances, the Framework advises that health safeguards are not something which a decision-maker should determine. No sufficiently authoritative evidence has been provided to indicate that the ICNIRP guidelines would not be complied with or that a departure from national policy would be justified.

Conditions [*if allowing*]

Either:

13. Any planning permission granted for the [*development*] under Article 3(1) and Schedule 2, Part 16, Class A is subject to conditions set out in Paragraphs A.3(9), A.3(11) and A.2(2), which specify that the development must, except to the extent that the local planning authority otherwise agree in writing, be carried out in accordance with the details submitted with the application, must begin not later than the expiration of 5 years beginning with the date on which the local planning authority received the application, and must be removed as soon as reasonably practicable after it is no longer required for electronic communications purposes and the land restored to its condition before the development took place.

Or:

14. The Order does not provide any specific authority for imposing additional conditions beyond the deemed conditions for development by electronic communications code operators contained within it. These specify that the development must be carried out in accordance with the details submitted with the application, begin within 5 years of the date of the approval and be removed as soon as reasonably practicable after it is no longer required for electronic communications purposes and the land restored to its condition before the development took place.

Conclusion

15. For the reasons given above, I conclude that the appeal should be allowed and prior approval should be granted.

OR

16. For the reasons given above, I conclude that the appeal should be dismissed.

The Planning Inspectorate

Necessary Wayleaves

Updated to reflect Current Framework (NPPF)?	Yes
What's new since the last version This is a new ITM Chapter published on 13 August 2021	
Other recent updates	

Contents

Legislation

Electricity Act 1989 (C. 29)

Human Rights Act 1998 (C. 42)

The Utilities Act 2000 (C. 27)

Secondary Legislation

The Electricity (Necessary Wayleaves and Felling and Lopping of Trees) (Hearing Procedures) (England and Wales) Rules 2013 (SI 2013/1987)

The Electricity (Necessary Wayleaves and Felling and Lopping of Trees) (Charges) (England and Wales) Regulations 2013 (SI 2013/1986)

The Electricity Safety, Quality and Continuity Regulations 2002 (SI 2002/2665)

Guidance

Guidance for Applicants and Landowners and/or Occupiers – Application to the Secretary of State for Energy and Climate Change from 1 October 2013, for the Grant of a Necessary (Compulsory) Electricity Wayleave or Felling and Lopping of Trees Order in England and Wales (January 2014)

Abbreviations

1989 Act	Electricity Act 1989
BEIS	Department for Business, Energy and Industrial Strategy
CEGB	Central Electricity Generating Board
Charges Regulations	The Electricity (Necessary Wayleaves and Felling and Lopping of Trees) (Charges) (England and Wales) Regulations 2013 (SI 2013/1986)
DNO	Distribution Network Operator
ECHR	European Convention on Human Rights
EREC P2/7	Engineering Recommendation P2/7 Security of Supply (Issue 7, 2019)
ESQCRs	Electricity Safety, Quality and Continuity Regulations 2002 (SI 2002/2665)
Guidance	Guidance for Applicants and Landowners and/or Occupiers – Application to the Secretary of State for Energy and Climate Change from 1 October 2013, for the Grant of a

	Necessary (Compulsory) Electricity Wayleave or Felling and Lopping of Trees Order in England and Wales (January 2014)
ITM	Inspector Training Manual
Landholder	The person with a relevant interest in the land
National Grid ET	National Grid Electricity Transmission Plc
NETS SQSS	National Electricity Transmission System Security and Quality of Supply Standards (v 2.5, 1 April 2021)
Rules	The Electricity (Necessary Wayleaves and Felling and Lopping of Trees) (Hearing Procedures) (England and Wales) Rules 2013 (SI 2013/1987)
Secretary of State	Secretary of State for Business, Energy and Industrial Strategy

Introduction

1. This chapter gives an insight into casework involving necessary wayleaves and tree lopping or felling orders. Applications involving more significant schemes are handled by National Infrastructure Planning. This chapter does not cover compulsory purchase orders.

2. Inspectors should be familiar with the relevant provisions in the **1989 Act**, the **Guidance** and the **Rules**. The **Guidance** contains a flow chart showing the necessary wayleave and tree lopping or felling processes and a section on frequently asked questions.

Background to Electricity Transmission and Distribution Networks

3. Following the First World War, consideration was given to how to address the fragmented electricity supply industry. The 1926 Weir Report recommended to the government that a "*national gridiron*" supply system be created. As a result, the Electricity (Supply) Act 1926 was introduced to give powers to a new body (the Central Electricity Board) to set up the first synchronised nationwide 132 kV three-phrase grid. This grid began operating as nine networks in 1935 covering seven discrete areas of England and Wales and two in Scotland. By the end of 1938 these were coupled to run as one integrated 132 kV system, known as the National Grid. It allowed electricity to be transmitted from power stations to Bulk Supply Points (typically 132/33 kV substations) at the load centres.

4. The National Grid and the lower voltage public supply networks were nationalised by the Electricity Act 1947. This Act created the British Electricity Authority to co-ordinate the generation and transmission of electricity. It also created area electricity boards which were to be responsible for the retail distribution of electricity to consumers. The post-war years saw a rapid increase in demand for electricity and the British Electricity Authority decided in 1949 to upgrade the National Grid by the addition of 275 kV circuits. In 1954 the British Electricity Authority was renamed as the Central Electricity Authority and this in turn became the CEGB[1] under the Electricity Act 1957.

5. A further increase in demand for electricity in the 1960s led to the construction of large (2000 MW) power stations and a 275/400 kV Supergrid. This was followed in the early 1970s by the transfer of 132 kV assets from the CEGB to the area electricity boards. These 132 kV assets now form the 132 kV distribution networks. The substations that marshal circuits on the Supergrid and provide 132kV supplies to the local areas are known as Supergrid points.

6. The 1989 Act provided for the privatisation of the electricity supply industry. Four companies. (National Power, PowerGen, Nuclear Electric and National Grid) were formed out of the CEGB to take over the generation and transmission of electricity in England and Wales. The ownership of the lower voltage (132kV and below) distribution networks in England and Wales was transferred to twelve regional electricity companies.

7. There have since been mergers of companies that own and operate gas and electricity supply networks and also other companies taking over the retail sales of energy. One

[1] Responsible for England and Wales

of the most significant provisions of the Utilities Act 2000 is the requirement for energy companies to have separate licences for the distribution of gas and electricity.

8. There are currently fourteen DNO's in Britain and each is responsible for a regional distribution services area. The DNO's are owned by six different companies. All have been granted a licence under section 6(1) of the **1989 Act**. National Grid ET owns the Supergrid in England and Wales and it has also been granted a licence for the purpose of transmitting electricity in England and Wales.

9. Therefore, the present situation is that in England and Wales the transmission of electricity falls under National Grid ET and the distribution of electricity is the responsibility of the various DNO's.

Duties of Licence Holders

10. National Grid ET and the DNO's are regulated by the Office of the Gas and Electricity Markets (known as 'Ofgem'). It is Ofgem that grants the transmission and distribution licences.

11. National Grid ET's licence is granted on the condition that this company plans and develops its Supergrid in accordance with **NETS SQSS**.

12. The DNO's electricity distribution licences are granted on the condition that they plan and develop their electricity distribution networks in accordance with **EREC P2/7**.

13. These two standards play an important role in assessing the need for a particular electricity development or assessing the need to retain an electric line that a landowner may wish to remove from their land. The security of electricity supply that must be provided at each level in the electricity supply chain is given in these standards.

14. Licence holders who transmit or distribute electricity have duties under Section 9 of the **1989 Act** to develop and maintain an efficient, co-ordinated and economical system of electricity transmission and distribution. They also have a duty under Section 16 of the **1989 Act** to supply electricity on request.

Statutory Provisions for Licence Holders

15. Licence holders need a landholder's permission to install their electric lines and associated equipment (such as pylons, poles and transformers) on, over or under private land and to have access to the land when needed in connection with the line or equipment.

16. Licence holders generally obtain this permission by negotiating with the landowner and/or the occupier of the land. This negotiation may result in a voluntary easement (a right in perpetuity over the land) or an agreement for a voluntary wayleave (a terminable right that can only be enforced against the grantor).

17. The vast majority of permissions are agreed through negotiation with agreement being reached to keep equipment on the land in return for payment to the landholder (grantor). If agreement cannot be reached, paragraphs 6 and 8 of schedule 4 to the **1989 Act** permit the licence holder to apply to the Secretary of State for a necessary wayleave. Necessary wayleaves are usually granted for a period of 15 years. They remain in force for the period granted irrespective of whether the ownership or occupancy of the land changes during that period.

18. A necessary wayleave is defined in paragraph 6(1) of schedule 4 to the **1989 Act** as consent for the licence holder to install and keep installed an electric line on, under, or over the land and to have access to the land for the purpose of inspecting, maintaining, adjusting, repairing, altering, replacing, or removing the electricity line.

19. An electric line is defined in section 64 of the **1989 Act** as a line used for carrying electricity for any purpose and includes supports for the line and apparatus connected to the line. A line is defined in section 64 as any wire, cable, tube, pipe or other similar thing which is designed or adapted to carry electricity. It therefore includes an overhead line, or an underground cable used to carry electricity.

Necessary Wayleaves for a New Electric Line

20. A necessary wayleave for a new electric line may be granted under schedule 4 to the **1989 Act** providing that:

    a) it is to enable the licence holder to carry out its statutory duties and it is necessary or expedient for the wayleave to be granted (paragraph 6(1)(a) of schedule 4 to the 1989 Act); and

    b) notice has been given to the landholder requiring them to give the wayleave within a certain period (not being less than 21 days) and the landholder has either failed to give the wayleave before the end of that period or has given the wayleave subject to terms and conditions to which the licence holder objects (paragraph 6(1)(b) of schedule 4 to the 1989 Act).

21. In considering whether to grant a wayleave for a new electric line the Secretary of State will also have regard to the impact of the line on the use and enjoyment of the land.

22. A necessary wayleave for a new line will not be granted if the land is covered by a dwelling, or will be so covered on the assumption that any planning permission which is in force is acted on and the electric line is to be installed on or over the land (paragraph 6(4) of schedule 4 to the **1989 Act**). A necessary wayleave may however be granted for a cable buried underground.

23. A dwelling is defined as a building or part of a building occupied, or (if not occupied) last occupied or intended to be occupied as a private dwelling and includes any garden, yard or outhouse and appurtenances belonging to or usually enjoyed with that building or part of it (paragraph 6(8) of schedule 4 to the **1989 Act**). It does not refer to the curtilage of a building in the manner found in other types of casework.

24. Paragraph 2.24 of the **Guidance** outlines that the Secretary of State can only grant or refuse any necessary wayleave applied for in the application by the licence holder. Where an application for a necessary wayleave contains more than one electric line, each line in the application will be considered separately by the Secretary of State in accordance with the provisions in paragraph 6 of schedule 4 to the **1989 Act**. Accordingly, the Secretary of State has the discretion to grant a necessary wayleave for an electric line in an application relating to multiple lines, whilst refusing others within the same application.

25. It is generally the case that the Secretary of State cannot grant a necessary wayleave over an alternative route. However, there may be circumstances where an error in the application necessitates a wayleave being granted for a line over a route that varies

slightly from the application route. Before making such a recommendation, the inspector should seek the views of the parties.

Necessary Wayleaves for an Existing Electric Line

26. A licence holder may be granted a necessary wayleave under paragraphs 6 and 8 of schedule 4 to the **1989 Act** to keep installed an existing electric line on, under or over any land provided it is to enable the licence holder to carry out its statutory duties and it is necessary or expedient for the wayleave to be granted (paragraph 6(2)(a)) of schedule 4 to the **1989 Act**).

27. In considering whether to grant a wayleave for an existing electric line the Secretary of State will also have regard to the impact of the line on the use and enjoyment of the land.

28. Some wayleaves are determined by the expiration of a period specified in the wayleave agreement. In those cases, the grantor may, either 3 months before the end of the specified period, or at any time afterwards, give the licence holder a Notice to Remove the electric line (See paragraphs 8(1)(a) and 8(2)(a) of schedule 4 to the **1989 Act**). This is commonly called a one-step procedure.

29. Where there is a wayleave agreement in existence and the grantor requires the electric line to be removed, they must first give a Notice to Terminate the agreement in accordance with the terms contained in it (wayleaves normally contain a clause requiring either 6 or 12 months' notice of termination). Following the completion of the required period, the grantor must give a subsequent Notice to Remove to the licence holder to remove the electric line. Accordingly, in such cases two notices are required before the licence holder can apply to the Secretary of State for a necessary wayleave (See Paragraphs 8(1)(b) and 8(2)(b) of schedule 4 to the **1989 Act**). Commonly called the two-step procedure.

30. A voluntary wayleave ceases to be binding following a change in ownership or occupancy of the land. In such cases, a Notice to Remove the electric line may be given at any time after the change in ownership or occupancy has occurred (see paragraphs 8(1)(c) and 8(2)(c) of schedule 4 to the **1989 Act**). However, these cases are not always clear-cut. For example, a new landowner may have received payments from the licence holder before serving the Notice to Remove and this may have created a contract between the parties. Such an arrangement is known as an implied wayleave. The existence of an implied wayleave means that the two-step procedure described above must be followed before the licence holder can apply to the Secretary of State for a necessary wayleave.

31. If the licence holder does not intend to comply with the Notice to Remove, they must make an application for a necessary wayleave within three months of the date of the Notice to Remove or remove the electric line or alternatively seek a compulsory purchase order.

32. Paragraph 8 of schedule 4 to the **1989 Act** provides that if the licence holder makes an application for a necessary wayleave or a compulsory purchase order within three months of the Notice to Remove, then the existing wayleave is temporarily continued until the application is determined by the Secretary of State.

33. The restriction involving land covered by a dwelling (see paragraphs 22 and 23 above) does not apply where the application for the grant of a necessary wayleave relates to an existing electric line.

Tree Lopping and Felling Casework

34. Paragraph 9 of schedule 4 to the **1989 Act** permits the licence holder to apply to the Secretary of State for tree lopping orders or tree felling orders where any tree is or will be in close proximity to an electric line or electric plant which is kept installed or is being or is to be installed by a licence holder as:

    - it obstructs or interferes with the installation, maintenance or working of the line or plant; or
    - constitutes an unacceptable source of danger (whether to children or to other persons).

35. The licence holder may give notice to the owner and/or occupier of the land requiring them to fell or lop the tree or cut back its roots subject to the payment of reasonable expenses incurred in doing so.

36. If within 21 days of the notice these requirements are not undertaken, or no counter notice is served by the owner or occupier, the licence holder may fell or lop the tree. Should the owner or occupier give a counter notice objecting to the requirements of the notice then the matter is referred to the Secretary of State for determination.

37. Paragraph 9(6) of schedule 4 to the **1989 Act** allows the owner and/or the occupier of the land the opportunity to be heard.

Determination of Applications

38. Applications for wayleaves and tree lopping or felling orders are initially processed and managed by BEIS with applicants expected to make use of the BEIS on-line portal system.

39. On receipt of a valid application there is an obligation to offer the landholder the opportunity to be heard by an appointed person in accordance with paragraph 6(5) of schedule 4 to the **1989 Act** before a decision is reached regarding whether or not to grant a necessary wayleave.

40. Cases are determined either by way of an oral hearing or following an exchange of written representations between the parties. The holding of hearings and site visits are subject to the **Rules**. In all circumstances, the inspector will write a report to the Secretary of State and make a recommendation on the application. Inspectors may find it useful to refer to the general principles of reporting in the ITM chapter on Secretary of State Casework.

41. When BEIS send an application to the Planning Inspectorate for determination by an inspector a decision will already have been reached on what procedure should be adopted. In essence, either an oral hearing has been requested, or the parties are agreeable to the case being determined from the written representations. However, this should not prevent the inspector from recommending that an oral hearing is held should they consider this to be more appropriate.

42. Inspectors should be familiar with the ITM chapters on **Inquiries** and **Site Visits**. Inspectors should remember that the 'Franks' Principles', natural justice, human rights and the **Code of Conduct** also apply to this casework.

Oral Hearings

43. The **Rules** allow for a pre-hearing meeting to take place. There is no obligation to hold a pre-hearing meeting even if one is requested and the decision will rest with the inspector. It is open to the inspector to request a pre-hearing meeting should the case suggest that such a meeting is warranted to enable the hearing to run more efficiently and expeditiously (**Rule 10**). However, it will usually be sufficient for a pre-hearing note to be issued to the parties.

44. A pre-hearing meeting may be undertaken by telephone or video as long as none of the parties would be prejudiced. Any pre-hearing meeting must take place at least 30 working days prior to the date of the hearing (**Rule 10(7)**).

45. A pre-hearing note would normally be drafted by the case officer within the Planning Inspectorate and forwarded to the inspector to agree before it is issued. It is particularly important that all of the dates in the note, or any instructions issued following a pre-hearing meeting, comply with the **Rules**.

46. The date and time of the hearing will be placed in the appointed inspector's chart. The responsibility for supplying a suitable venue for the hearing rests with the applicant and an annex to the pre-hearing note will set out the requirements for the venue. **Rule 9(3)** specifies that the Secretary of State shall notify the parties of the date, time and venue for the hearing not later than 15 working days prior to the event. With this in mind the applicant should be asked to provide details of the venue to the case officer by a date that allows sufficient time for the required notification to be issued.

47. The parties are encouraged to reach a negotiated settlement even after the licence holder has applied to the Secretary of State for a necessary wayleave. It is common for parties to request that cases are held in abeyance to try and reach a settlement. In the circumstances, it may take several years for a case to come to an inspector. It is also the case that scheduled hearings are often cancelled due to the parties agreeing terms for a voluntary wayleave.

48. Any party who wishes to submit a statement of evidence should do so no later than 10 working days before the date of the oral hearing otherwise the statement may be disregarded (**Rule 11(2)(b)**). In any event, the failure of a party to adhere to this deadline will potentially lead to a need to take an adjournment. However, as outlined in paragraph 72 below, there is no provision for an award of costs to be made**. Rule 11(4)** specifies particular information that must be provided by the applicant in their statement of evidence.

49. Although referred to as a hearing, it should be noted that these oral events do not comprise of a round table discussion led by the inspector. Wayleave hearings are more closely aligned to what would be expected at an inquiry with witnesses called to give evidence for the respective parties and this evidence being subjected to cross-examination and re-examination. Nonetheless, wayleave hearings are more limited than a public inquiry for instance into an application for planning permission. Wayleave hearings are directed at private land rights rather than the general public interest. This limits the scope of the parties permitted to appear. The hearing will consider almost anything that bears upon the landholder's use and enjoyment of the land. Hearings will ordinarily be held in public, but a party may request that the public are excluded.

50. The inspector may undertake a site visit at any time before, during or after the hearing. It is recommended that inspectors undertake a pre-hearing visit to familiarise

themselves with the site and the surrounding area. A further accompanied visit is likely to be required at the end of the hearing. **Rule 13** sets out the requirements for site visits. It specifies that the inspector must visit the site if requested to do so by one of the parties or if it is necessary for the determination of the application.

51. The inspector can request the applicant to provide a transcript of the hearing for lengthy or complex cases.

Written Representations

52. Site visits for written representations cases are usually unaccompanied. In some cases, it will be possible to view the electric line and any apparatus from public land and in other cases the inspector will need to go onto private land. This matter should be determined in advance of the visit to ensure that the case officer can make any necessary arrangements for access to be obtained.

53. There are a number of cases to be determined where a Notice to Remove has been served with the intention of retaining supply to a particular property but have any line that serves other properties removed. BEIS have advised that in such circumstances, where the DNO wishes to retain all of the lines and equipment over the land, it needs to serve a 21-day notice in accordance with paragraph 6(1)(b) of schedule 4 to the **1989 Act** before an application is made to the Secretary of State for all of the equipment to be retained. Where this has not occurred, it is deemed that consideration can only be given to the equipment covered in the Notice to Remove. In such a case, the Inspector's recommendation might be as follows: *"that the wayleave be granted in part in accordance with the application made by [Applicant's name] on [insert date of application], subject to the exclusion of the lines and equipment needed to serve the property itself".*

54. It has been found in some cases that the information contained in applications by DNOs for wayleaves does not accurately reflect the position on site. There have been cases where lines recorded as running overhead in the application were actually located underground and vice versa. If there is something that is not clear from the written representations the inspector may request further information from any of the parties (**Rule 7**). This should be employed to clarify any discrepancies between the application and what is evident on site.

55. In light of the above matters, the inspector should be careful to note the location of all the electric lines and apparatus present on site. Inspectors may find it useful to take photographs of the position of the electric lines and apparatus. This will be particularly useful where there may be a discrepancy between the application and the equipment on site. The Secretary of State will need to be confident that any wayleave granted by reference to a plan correctly reflects the position of an electric line. It may be useful for photographs to be appended to the report to aid with an understanding on the description of the apparatus on site.

56. Multiple site visits will often be undertaken in a given locality in relation to separate applications. Although the respective cases of the parties may be the same or similar in nature, BEIS has advised in such circumstances they require separate reports to be produced for each case.

Relevant Considerations (Wayleaves)

57. The role of the inspector is to consider evidence regarding whether it is necessary or expedient for the electric line to cross the land in question, and the effects of the line on the use and enjoyment of the land.

58. Sometimes landholders object to the application on the grounds that the compensation offered by the licence holder is inadequate. Issues which relate to the impact on the use or enjoyment of the land and may subsequently be the subject of a claim for compensation can be raised in evidence. However, the Secretary of State does not have power under Schedule 4 to the **1989 Act** to prescribe financial conditions in a necessary wayleave case or to resolve disputes regarding the level of compensation. Compensation will fall to be settled by agreement between the parties or, failing agreement, by the Upper Tribunal (Lands Chamber) at the request of either party.

59. Whilst it may be appropriate to note those issues that do not fall within the relevant tests in the report, they should not influence the recommendation to the Secretary of State.

Necessary and Expediency Tests

60. It only needs to be established that it is necessary or expedient for the electric line to be installed or remain over the land in question. The '*necessary test*' is more exacting than the '*expediency test*' and relates to cases where there is absolutely no alternative to the route included in the application.

61. The basic requirement of these tests is to determine why a proposed or an existing electric line is needed. This will invariably relate to the licence holder's licence conditions to transmit or distribute electricity in accordance with either **NETS SQSS** or **EREC P2/7**.

62. Once the need for the electric line has been established consideration should be given to whether the land in question can be reasonably avoided. Landholders may seek to argue that the application should be refused on the ground that there is a suitable route elsewhere or an alternative option is available, such as placing the line underground.

63. In the case of a proposed electric line, the licence holder would normally carry out a routing study which takes into account the uses of the land along the proposed and alternative routes. The licence holder would have been involved in negotiations with the owners and occupiers of the various landholdings affected by the proposed electric line, and some may have entered into voluntary wayleave agreements. If the land in question cannot be avoided without reopening negotiations with the grantors' then this is material to the issue of expediency. Other factors that would normally be considered material to the issue of expediency include timescales, costs and the licence holders' statutory duties under section 9 of the **1989 Act** to develop and maintain an efficient, co-ordinated and economical system of electricity distribution/transmission.

64. In the case of an existing electric line, the licence holder would normally submit options for complying with a Notice to Remove. These options could impact on other land (such as overhead line diversion or cable sealing-end towers), involve new rights from other landholders, disruption to the local area and expense. Such factors are material to the issue of expediency.

Use and Enjoyment Tests

65. Account must be taken of the effect of the electric line and apparatus on the use and enjoyment of the land. The focus is on private land interests and the evidence must be site specific.

66. Reasons for landholders objecting to an application may include matters such as:

- The impact of the construction requirements on the land in question (new electricity lines).
- Site access requirements during construction and for future maintenance of the electric line.
- The effect of the siting of the line supports on the land (overhead lines).
- Drainage requirements and effects on existing land drainage.
- The effects of the line on views from principal buildings (overhead lines).

Relevant considerations (Tree Lopping and Felling Casework)

67. Applications are determined in accordance with the **Rules** and the general principles outlined above in relation to the handling of wayleaves casework are also applicable to tree lopping cases.

68. The role of the inspector in tree lopping casework is to consider site specific evidence relating to the effect of the close proximity of any tree on an existing or proposed electric line or electric plant, rather than more general issues. The site-specific issues that are likely to be relevant to the Secretary of State in considering an application are:

- the reasons why any tree obstructs or interferes with the installation, maintenance or working of an electric line or electrical plant;
- the reasons why the close proximity of any tree to the line or plant constitutes an unacceptable source of danger to people; and
- the use and enjoyment of the trees in question and the reasons why the owner or occupier refuses to have them cut.

The Regulations

69. All licence holders are also duty holders under the **ESQCRs**. Duty holders are required to ensure that:

- their equipment is used and maintained so as to prevent danger, interference with or interruption of electricity supply (Regulation 3(1)(b) of the **ESQCRs**);
- none of their overhead lines come so close to a tree as to cause a danger (Regulation 18(5) of the **ESQCRs**); and
- none of their overhead lines come so close to any tree as to interfere with or interrupt electricity supply (Regulation 20A of the **ESQCRs**).

The Standards

70. Duty holders may demonstrate compliance with Regulations 18(5) and 20A of the **ESQCRs** by complying with the Energy Networks Association's Technical Standard 43-8 Overhead Line Clearances. This specifies the minimum clearances required between trees and overhead lines operated at various voltages. These clearances take into account the relevant British Standard and represent current best practice throughout the United Kingdom.

Charging

71. The **Charges Regulations**[2] set out the rates applicants have to pay for applications to be processed. Inspectors should be careful to accurately record the time spent on each case as this time will be included in the invoice sent to BEIS. A CIR Form will be forwarded to the inspector to complete and sign once the report has been sent to the case officer for onwards transmission to the Secretary of State.

Costs

72. It should be noted that there is no provision for an award of costs to be made in relation to wayleave or tree lopping and felling cases as section 250 of the Local Government Act 1972 is not applicable to this casework.

Human Rights

73. Inspectors should be aware of the **Human Rights and the Public Sector Equality Duty** chapter of the ITM. Paragraph 3.1 of the **Guidance** acknowledges that it may be appropriate to consider the impact on the landholder's property rights under Article 1 of Protocol 1 to the **ECHR**. Article 8 of the **ECHR** may also be argued by parties opposing the grant of a wayleave.

74. The compensation scheme available for the grant of a wayleave may be a mitigating factor in balancing the conflicting arguments. However, the amount of compensation is not a matter for the Secretary of State. It follows that any argument that the **ECHR** is engaged due to the amount of compensation offered should also fail. The landholder has the opportunity to have the amount of compensation determined by the Upper Tribunal (Lands Chamber).

75. The main issue to be considered when making a recommendation to the Secretary of State, where human rights arguments are pursued, is whether any interference is justifiable and proportionate. Wayleaves applications require the decision maker to have regard to and balance the interests of the parties.

[2] The application fees were amended by The Electricity (Necessary Wayleaves and Felling and Lopping of Trees) (Charges) (England and Wales) (Amendments) Regulations 2017 (SI 2017 No. 195).

The Planning Inspectorate

Noise

Updated to reflect Current Framework (NPPF)?	Yes

What's new since the last version

Changes highlighted in yellow made 22 October 2022:

- Reference to the 'Agent of change principle' in NPPF and PPG at paragraphs 2.17 and 2.21;
- Paragraph 2.62 - Updated to reflect the end of the Brexit transition period from 1 Jan 2021;
- Additional casework example at paragraph 8.2, which dealt with the 'agent of change' principle;
- Updated to reflect changes arising from the revised NPPF, published in July 2021;
- Minor updates throughout

Other recent updates

Contents

Introduction

1. Inspectors make their decisions on the basis of the evidence before them. Consequently, they may, where justified by the evidence, depart from the advice given in this training material, although the National Planning Policy Framework (NPPF) Government's Planning Practice Guidance (PPG) and National Policy Statements (NPS) will still be relevant in all cases.

2. This training material applies to casework in England only[1].

3. Noise can have significant effects on the environment and on quality of life. Exposure to noise can have effects on sleep and general annoyance and can lead to chronic health effects (e.g. heart disease and hypertension)[2]. In view of this noise is a material consideration in the determination of planning, transport and environmental casework and a key indicator of sustainable development and therefore needs to be given appropriate 'weight' in the decision-making process.

4. Noise as a form of pollution has a primarily local impact. A single noise source (point sources) rarely has an impact beyond a neighbourhood. Exceptions may include transportation sources (linear sources) such as a major road, rail or other installation such as an airport.

Fundamentals of Noise

5. Sound can be considered a form of energy conversion when any form of 'work' is carried out, where the 'work' is not converted into heat or other energy forms. Noise is a term meaning any *unwanted* sound. Noise associated with environmental sources i.e. transport or industrial plant are unwanted as they can impose a burden of annoyance, distraction, interference or intrusion on people who may receive no immediate or direct benefit from the noise-producing system.

6. The aural sensation of sound is caused by the interaction between small pressure variations (oscillations) in the air around us and our hearing mechanism. Sound is transmitted through the air from molecule to molecule. Similar to water waves, the molecules are not carried along with the air disturbance, but oscillate to and fro as the sound wave passes. The way in which this disturbance moves is the *propagation of a sound wave*. Sound waves spread out from a source in three dimensions. The speed of the sound wave is not linked to the loudness of the sound, but the medium through

[1] In Wales, policy and guidance on noise can be found in – Planning Policy Wales: Edition 11 (WG, Feb 2021) and TAN 11: Noise (Welsh Office, October 1997)

[2] It is estimated that in Europe in 2020 road traffic noise was the most dominant source of noise with approx.113 million people affected by noise levels >55dB L_{den}; environmental noise is estimated to cause at least 12,000 premature deaths per year; about 22 million adults are annoyed and a further 6.5 million suffer chronic sleep disturbance due to environmental noise; contributes to 48,000 cases of ischaemic heart disease – Environmental Noise in Europe - 2020, EEA Report No 22/2019, EEA, March 2020.

which the sound is travelling[3]. These sound waves vary in amplitude and frequency over time.

7. Consider a piston, which can be driven backwards and forwards in regular cycles. As the piston is driven forwards there will be a region of *compression*; as the piston moves backwards there will be a region of *rarefaction*. This will form a pressure wave in the tube. If near enough, you would hear this pressure wave as sound. If the piston is driven through 100 to and fro cycles per second, this will produce a sound at 100 cycles per second; i.e. 100 Hertz(Hz). The maximum difference in pressure in one cycle is the amplitude of the sound pressure wave. The sound pressure is the pressure deviation from the local ambient pressure caused by a sound wave. The *sound pressure level* is a logarithmic measure of the root mean square sound pressure relative to a reference sound pressure. *Sound power level* is the total amount of sound energy per unit of time generated by a sound source measured in Watts (W). *Sound intensity* is the power transmitted per unit area at right angles to the direction in which the sound is propagating. These sound levels can be expressed as Decibels (dB) – a logarithmic (log) unit e.g. 30dB + 30dB = 33dB, not 60dB. The dB is the standard unit of noise measurement that you will come across in casework. See part 4 of this chapter for more information on noise concepts and terminology.

Policy, legislation and guidance

International/European:

8. **Environmental Noise Directive (END)[4]** – concerns the assessment and management of environmental noise and is the main EU instrument to identify noise pollution levels and to trigger action at both Member State and EU level. The END compelled EU Member States to produce noise maps every five years, the drafting of local noise action plans and collection of noise data to inform future Community policy and to consult on and make this information publicly available – see below. The Environmental Noise (England) Regulations 2006[5] transposed the END into UK Law.

9. **ISO 9613-2: 1996 Attenuation of sound during propagation outdoors** - describes a method for calculating the attenuation of sound during propagation outdoors in order to predict the levels of environmental noise at a distance from a variety of sources. The method predicts the equivalent continuous A-weighted sound pressure level (as described in ISO 1996) under meteorological conditions.

10. **WHO Guidelines for Community Noise 1999 (CNG)** – gives guidance on suitable internal and external noise levels, for steady sound in and around residential properties, which recommends:

    - 30 dB LAeq in bedrooms, with <45 dB LAmax, over 8 hrs at night;

[3] The speed of sound in air (at 1 atmosphere and 20^0C) is 344 metres/second - In water the speed of sound is 1,200 metres/second.

[4] EU retained law - Directive 2002/49/EC on the assessment and management of environmental noise.

[5] SI 2006/2238, which came into force on 1/10/2006.

- 35 dB L_{Aeq} in living rooms over 16 hrs in the day;
- 50 to 55 dB L_{Aeq} in gardens/outdoor living areas over 16 hrs in the day; and
- 45 dB L_{Aeq} outside bedrooms with an open window over 8 hrs at night

11. It is important to note the time periods over which these levels apply.

12. **WHO Night-time Noise Guidelines for Europe 2009 (NNG)** – provides additional guidance on night-time noise and recommends noise levels based on effects on health.

13. **Environmental Noise Guidelines for the European Region 2018**, updates and supersedes the CNG (apart from the indoor guideline values and any other values not covered by the new guidance e.g. industrial noise and shopping areas, which remain valid) and complements the NNG. The revised guidelines cover two new noise sources: wind turbines and leisure noise. The guidelines apply a 1 dB increment scheme, whereas prior guidelines (CNG and NNG) formulated or presented recommendations in 5 dB steps. The guidelines are source specific. They recommend values for outdoor exposure to road traffic, railway, aircraft and wind turbine noise, and indoor as well as outdoor exposure levels for leisure noise.

National and Planning:

Noise Policy Statement for England

14. The 'Noise Policy Statement for England (NPSE) March 2010', which sets out the long-term vision for Government noise policy, within the context of the guiding principles set out in Chapter 1, part 4 of the Government's Sustainable Development Strategy – 'Securing the future: delivering UK sustainable development strategy' (March 2005).

15. The NPSE overall policy vision is to 'Promote good health and a good quality of life through the effective management of noise within the context of Government Policy on sustainable development'. Its stated aim is to: "provide clarity regarding current policies and practices to enable noise management decisions to be made within the wider context". This statement represents an important step forward in noise policy, as its application should help to ensure that 'noise' is properly accounted for at the right time during noise related policy development and decision-making, as well as ensuring that noise is not considered in isolation.

16. It describes a Noise Policy Vision and three Noise Policy Aims and states that the vision and aims provide "the necessary clarity and direction to enable decisions to be made regarding what is an acceptable noise burden to place on society".

17. The NPSE seeks to provide a clear description of desired outcomes from noise management of a particular situation. It's three aims, within the context of Government policy on sustainable development, are:

- to avoid significant adverse impacts on health and quality of life from environmental, neighbour and neighbourhood noise;

- to mitigate and minimise adverse impacts on health and quality of life[6] from environmental, neighbour and neighbourhood noise;

- **where possible, to contribute to the improvement of quality of life** through the effective management and control of environmental, neighbour and neighbourhood noise.

18. The NPSE applies to:

    - Environmental Noise (ambient noise7);

    - Neighbour Noise (noise from inside and outside residential homes);

    - Neighbourhood Noise (noise arising from within the community, i.e. industrial and entertainment premises, trade and business premises, construction sites and noise in the street).

19. The NPSE does not apply to:

    - Occupational Noise (noise in the workplace).

20. Sound becomes 'noise' (often referred to as 'unwanted sound') when it occurs in the wrong place at the wrong time, e.g. when it causes sleep disturbance. Unlike air quality, there are currently no EU or national noise limits which have to be met (but there can be specific local limits for certain developments[8]).

21. It is important that when considering cases where noise is an issue, Inspectors should balance up the evidence, including any technical assessment, guidelines and any written & oral representations, to come to a reasoned conclusion on whether the noise constitutes a 'significant' effect on the 'quality of life' of those potentially affected by the proposed development - See 7.3 for NPSE effects levels.

National Planning Policy Framework[9]

22. Paragraph 102: the Local Green Space designation should only be used where the green area is:

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[6] This aim refers to situations where the noise impacts lie somewhere between the 'Lowest observed adverse effect level (LOAEL) and Significant observed adverse affect level (SOAEL)

[7] *Ambient (total) noise* includes all sounds occurring at a particular location, irrespective of the source. It is the sound that is measured by a sound level meter in the absence of a dominant specific noise source (IEMA 2014)

[8] Under Directions which came into force on 28 February 2008, issued under S5 of the Noise Act 1996, which set out certain permitted noise levels from 'offending dwelling or premises' (i.e. must not be >10dB above the background level).

[9] Revised NPPF [MHCLG, July 2021]

- demonstrably special to a local community and holds a particular local significance, for example because of its beauty, historic significance, recreational value (including as a playing field), tranquillity or richness of its wildlife.

23. Paragraph 174: Planning policies and decisions should contribute to and enhance the natural and local environment by:

    - preventing new and existing development from contributing to, being put at unacceptable risk from, or being adversely affected by unacceptable levels of soil, air, water or noise pollution or land instability.

24. Paragraph 185: Planning policies and decisions should also ensure that new development is appropriate for its location taking into account the likely effects (including cumulative effects) of pollution on health, living conditions and the natural environment, as well as the potential sensitivity of the site or the wider area to impacts that could arise from the development. In doing so they should:

    - mitigate and reduce to a minimum other adverse impacts on health and quality of life arising from noise from new development – and avoid noise giving rise to significant adverse impacts on health and the quality of life;

    - identify and protect tranquil areas which have remained relatively undisturbed by noise and are prized for their recreational and amenity value for this reason.

25. Paragraph 187: 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.

26. Paragraph 210: Planning policies should:

    - when developing noise limits, recognise that some noisy short-term activities, which may otherwise be regarded as unacceptable, are unavoidable to facilitate minerals extraction;

2.18 Paragraph 211: When determining planning applications, great weight should be given to the benefits of mineral extraction, including to the economy. In considering proposals for mineral extraction, minerals planning authorities should:

    - ensure that there are no unacceptable adverse impacts on the natural and historic environment, human health or aviation safety, and take into account the cumulative effect of multiple impacts from individual sites and/or from a number of sites in a locality;

    - ensure that any unavoidable noise, dust and particle emissions and any blasting vibrations are controlled, mitigated or removed at source, and establish appropriate noise limits for extraction in proximity to noise sensitive properties

Planning Practice Guidance (PPG)

27. On 6 March 2014 the previous planning guidance documents in England were replaced by the new Planning Practice Guidance. The guidance supports the National Planning Policy Framework and provides useful clarity on the practical application of policy and was updated in July 2019.

28. Noise PPG - paragraphs 001 - 012 sets out the circumstances where noise is relevant to planning, and emphasises that while noise can override other planning concerns, the NPSE and NPPF do not expect noise to be considered in isolation and separately from the economic, social and other environmental dimensions of proposed development. The PPG refers to the aims of the NPSE in respect of the 'Observed Effect Levels' at paragraph 003-004. The PPG states at paragraph 006 that "…the subjective nature of noise means that there is not a simple relationship between noise levels and the impact on those affected…". Paragraph 006 also cites various factors which might combine in any particular situation to affect the impact of noise. Paragraph 009 sets out the 'agent of change' principle and how the potential conflict can be addressed. Paragraphs 010-011 sets out mitigation measures to minimise noise impact.

29. Minerals PPG – Paragraphs 019 – 022 sets out the assessment process for noise emissions from minerals extraction processes. Paragraph 021 sets out appropriate noise standards for mineral operators for 'normal' operations by the use of noise thresholds at certain times established through planning conditions. Annex C (paragraph 0141) sets out a suggested planning condition for noise control and monitoring. Note: this guidance will be updated to reflect the revised NPPF and should be treated with caution.

30. Design: Process and Tools PPG – Paragraph 001 states that "*permission should be refused for development of poor design….*" The PPG refers to the National Design Guide (NDG)[10], which should be read alongside the PPG The NDG identifies 10 characteristics of well-designed places, one of which is 'Identity', within which at paragraph 55 states "*Well-designed places appeal to all our senses. The way a place…sounds…affects its enduring distinctiveness, attractiveness and beauty."*

Factors that can contribute to optimal acoustic outcomes can include:

- Layout;
- Form;
- Scale;
- Detailing; and
- Materials.

[10] National Design Guide [MHCLG, October 2019]

31. **Tranquillity Mapping -** PPG on Noise section paragraph 012 explains that for an area to be protected for its tranquillity it is likely to be relatively undisturbed by noise from human caused sources that undermine the intrinsic character of the area. Such areas are likely to be already valued for their tranquillity, including the ability to perceive and enjoy the natural soundscape, and are quite likely to be seen as special for other reasons including their landscape.

32. **Noise Mapping**[11] **and Noise Action Plans** – Under the requirements of the END, EU Member States must produce noise maps (and noise management action plans) every five years for the following areas:

- Agglomerations (> 250,000 people - first round), (> 100,000 people – second and future rounds);
- Major roads (> 6 million vehicles per year – first round), (> 3 million vehicles per year – second and future rounds);
- Major railways (> 30,000 trains per year);
- Major airports (> 50,000 movements per year, incl. small aircraft and helicopters)12

33. The **Noise Action Plans**[13] **-** based on the noise mapping results, are designed to manage environmental noise and its effects, including noise reduction if necessary. In line with Government noise policy and legislation, the Action Plans aim to promote good health and wellbeing through the effective management of noise. They also aim to protect quiet areas in agglomerations, where the noise quality is good. The associated maps detail the exposure level of noise from industry and transport sources, together with the number of people exposed to it.

Environmental:

Noise Act 1996

34. The Noise Act 1996[14] created the 'night noise offence' which can occur between 2300 and 0700 hours, which is in addition to the Statutory Nuisance provisions already in force under the EPA 1990 – see below.

[11] Defra Strategic Noise Mapping (2017) microsite

[12] Airport Noise Action Plans can be found at the airport's own website: e.g. Heathrow Noise Action Plan 2019-2023 [Heathrow Airport Ltd, adopted Feb 2019]; Bristol Airport Noise Action Plan 2019-2024 [Bristol Airport, adopted Feb 2019].

[13] Current Defra Noise Action Plans – published on 2 July 2019, which replace the 2014 Action Plans. There are three noise action plans covering roads, railways and agglomerations.

[14] Noise Act 1996 (C.37)

Environmental Protection Act 1990

35. Sections 79-82 in Part III of the EPA1990[15] imposes duties on local authorities to deal with 'statutory nuisances'. These include noise emitted from premises so as to be prejudicial to health or a nuisance under section 79(1)(g), and noise that is prejudicial to health or a nuisance and is emitted from or caused by a vehicle, machinery or equipment in a street [or in Scotland, road] under section 79(1)(ga). Section 79(1)(h) also imposes duties on local authorities to deal with any other matter declared by any enactment to be a statutory nuisance.

The Clean Neighbourhoods and Environment Act 2005

36. The CNEA[16] Provides local authorities in England and Wales with powers to deal with noise from intruder alarms and extends the powers for dealing with night time noise, referred to in the Noise Act 1996, to cover licensed premises.

Control of Pollution Act 1974 (COPA)

37. The COPA[17] introduced the concept of noise abatement zones[18], where criminal sanctions are imposed if levels are exceeded. Section 60 relates to 'Control of Noise at Construction Sites'; section 61 relates to 'Prior Consent for Work on Construction Sites'. This is often used in conjunction with BS5228, Notices served under the Act can specify noise levels and hours of operation and mitigation measures. These controls are normally used for major infrastructure projects e.g. Crossrail, Thames Tideway Tunnel, but can apply to Transport and Works Act (TWA) casework.

Industrial Emissions Directive (IED) and Environmental Permitting Regime

38. The IED[19] requires that all industrial operations in sectors covered by this EU Directive carry out noise assessments and make provisions to minimise noise emissions. The IED also requires that Best Available Techniques (BAT)[20] is be used to control noise emissions, taking into account the cost, which should be reasonable for the changes to be implemented. The IED (and other related environmental EU Directives) are implemented in England and Wales under the Environmental Permitting Regulations

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[15] Environmental Protection Act 1990 (C.43)

[16] Clean Neighbourhoods and Environment Act 2005 (C.16)

[17] Control of Pollution Act 1974 (C.40)

[18] Under COPA s63-67. NAZs were repealed on 1/10/2015 by Schedule 13, Part 5 of the Deregulation Act 2015 as the powers were not being widely used – there were only 81 NAZs, of which only 2 were being managed.

[19] EU retained law - Directive 2010/75/EU.

[20] BAT – the available techniques which are best for preventing or minimising emissions and impacts on the environment. This includes both the technology used and the way in which the installation is designed, built and operated. In deciding the level of control that constitutes BAT for an installation, a number of factors should be considered: i) costs and benefits, ii) the technical characteristics of the installation, iii) geographical location and iv) local environmental conditions. BAT for each sector is set out in process or sector-specific guidance, derived from the EC BAT Reference Documents (BREF).

2016[21] (EPR) – see the Environmental Permitting ITM Chapter for further details. Noise impact for activities subject to EPR should be measured using the BS4142 rating levels. Noise and Vibration considerations for environmental permits is contained within Environment Agency Guidance[22].

Nationally Significant Infrastructure Projects (NSIPs) -National Policy Statements

39. The NPPF does not contain specific policies for nationally significant infrastructure projects for which particular considerations apply. These are determined in England (and Wales) in accordance with the decision-making framework set out in the Planning Act 2008 and relevant national policy statements for major infrastructure, as well as any other matters that are considered both important and relevant (which may include the National Planning Policy Framework). National policy statements form part of the overall framework of national planning policy, and are a material consideration in decisions on planning applications.

Energy[23]:

40. Overarching Energy (EN-1)[24] – Section 5.11 deals with noise and vibration and sets out general considerations for assessment of noise impact from Infrastructure proposals and refers to the NPSE and relevant British Standards mentioned above.

41. Fossil Fuel Electricity Generating Infrastructure (EN-2)[25] – Section 2.7 sets out specific noise and vibration considerations for fossil fuel generating stations and refers to the generic information on noise assessment in EN-1 mentioned above.

42. Renewable Energy (EN-3)[26] – Paragraphs 2.5.53 – 2.5.58 set out specific noise considerations for Biomass and Waste Combustion Plants and refers to the generic information on noise assessment in EN-1 mentioned above; Paragraph 2.6.90 mentions noise from offshore piling from construction of offshore wind turbine construction; Paragraphs 2.7.52 – 2.7.62 sets out noise considerations for onshore wind turbines and refers to ETSU-R-97 (see Appendix B) as well as the generic information on noise assessment set out in EN-1 mentioned above.

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[21] SI 2016/1154

[22] Noise and vibration management: environmental permits (EA, July 2021), which replaced the Horizontal Guidance for Noise (H3) parts 1 and 2. Information requirements regarding noise impact assessments for permit applications are set out in the 'risk assessments for your environmental permit' (EA, revised March 2021).

[23] The Energy NPS are currently subject to review as part of the Operational review of the NSIP regime: to ensure they reflect the policies and broader strategic approach set out in the Energy White Paper; and to ensure they provide a suitable framework to support the infrastructure required for the transition to net zero.

[24] EN-1 [DECC, July 2011]

[25] EN-2 [DECC, July 2011]

[26] EN-3 [DECC, July 2011]

43. Gas Supply Infrastructure and Gas and Oil Pipelines (EN-4)[27] – Section 2.9 covers specific noise and vibration considerations for underground natural gas storage projects and refers to the generic information on noise assessment in EN-1 mentioned above.

44. Electricity Networks (EN-5)[28] - Section 2.9 covers specific noise and vibration considerations applying to electricity networks infrastructure projects and refers to the generic information on noise assessment in EN-1 mentioned above.

45. Nuclear Power Generation (EN-6) – Paragraph 3.12.3 of Volume I[29] points out that a new nuclear power station is unlikely to be associated with significant noise during operation, but the impact may be greater during the construction phase. Volume II[30] briefly mentions potential site specific noise effects at the eight sites chosen for new nuclear generation throughout Annex C.

Transport:

46. Ports[31] – Section 5.10 covers noise and vibration considerations and assessment of noise and vibration impact from ports infrastructure proposals and refers to the NPSE and relevant British Standards mentioned above.

47. National Networks[32] – Paragraphs 5.186 – 5.200 covers noise and vibration impacts arising from roads and rail infrastructure proposals and refers to the CRTN and CRN, the NPSE and NPPF mentioned above.

48. Airports: new runway capacity and infrastructure in the South East of England[33] - The Airports NPS provides the primary basis for decision making on development consent for a North-West runway at Heathrow Airport and is an important consideration with regard to other applications for runways and airport infrastructure in London and the South East. Noise impacts of airport expansion are assessed in general at paragraph 5.44-5.46. The requirements for air quality assessment are set out in paragraphs 5.52-5.53 and mitigation measures are detailed at paragraphs 5.54-5.66. Decision making considerations are set out in paragraphs 5.67-5.68.

[27] EN-4 [DECC, July 2011]

[28] EN-5 [DECC, July 2011]

[29] EN-6 Vol I [DECC, July 2011]

[30] EN-6 Vol II [DECC, July 2011]

[31] Ports NPS [DfT, January 2012]

[32] National Networks NPS [DfT, December 2014]

[33] Airports NPS [DfT, June 2018]

Waste:

49. Hazardous Waste[34] – Section 5.11 sets out noise and vibration considerations in infrastructure projects concerning recovery and/or disposal of hazardous waste. The NPS refers to the NPSE, relevant British Standards and the NPPF mentioned above.

50. Geological Disposal of Radioactive Waste[35] – Section 5.3 sets out noise considerations for infrastructure projects concerning the geological disposal of higher activity radioactive waste[36]. The NPS refers to the NPSE, relevant British Standards and the NPPF as mentioned above.

Water:

51. Waste Water[37] – Section 4.9 sets out noise and vibration considerations in infrastructure projects concerning waste water treatment plants. The NPS refers to the NPSE and the relevant British Standards as mentioned above.

52. Water Resources (Draft)[38] - A draft NPS subject to consultation, which seeks to provide guidance in order to determine applications for water resources infrastructure. Section 4.11 sets out noise and vibration considerations, particularly where proposals are within or adjacent to AQMAs or Natura 2000 sites. Section 4.11 also covers the requirements for assessment of noise impacts and mitigation measures for water resources proposals e.g. reservoirs, pipelines (for water transfer) and desalination plants.

British Standards/Building Regulations:

53. BS4142:2014+A1:2019[39] – Methods for rating and assessing Industrial and Commercial Sound – describes methods for the determination of the following levels at outdoor locations:

    - rating levels for sources of an industrial and/or commercial nature; and
    - ambient, background and residual sound levels,

    for the purposes of:

[34] Hazardous Waste NPS [Defra, June 2013]

[35] NPS for Geological Disposal Infrastructure [BEIS, July 2019]

[36] Including high-level waste, intermediate level waste and low-level waste not suitable for near–surface disposal in current facilities.

[37] Waste Water NPS [Defra, March 2012]

[38] Draft NPS for Water Resources Infrastructure [Defra, November 2018]

[39] This edition published in June 2019 clarifies the application of the standard; introduces 'uncertainty' including good practice for reducing uncertainty; the examples in Annex A have also been greatly expanded. BS 4142:2014+A1:2019 supersedes BS 4142:2014, which is withdrawn.

- investigating complaints;
- assessing sound from proposed new, modified or additional source(s) of sound of an industrial and/or commercial nature; and
- assessing sound at proposed new dwellings or premises used for residential purposes.

54. **BS5228:2009+A1:2014 Code of Practice for Noise and Vibration control on Construction and Open Sites -** gives data and methods for calculating noise from construction and other open sites (e.g. quarries, landfill sites); Part 1 relates to noise, Part 2 deals with vibration.

55. **BS8233:2014 Guidance on sound insulation and noise reduction for buildings -** provides guidance for the control of noise in and around buildings based on the WHO guidelines. It applies to the design of new buildings and refurbished buildings undergoing a change of use, but does not provide guidance on assessing the effect of changes in the external noise levels to occupants of an existing building.

56. **BS6472:2008 Guidance to evaluation of human exposure to vibration in buildings** – provides guidance on the application of methods measuring and evaluating vibration to assess the likelihood of complaints. Part 1 (*Vibration sources other than blasting*) provides guidance on prediction of human response to vibration in buildings from sources other than blasting (in the frequency range of 0.5Hz-80Hz) and describes how to determine the vibration dose value (VDV) from frequency-weighted vibration measurements. Part 2 (*Blast-induced vibration*) provides guidance on prediction of human response to vibration in buildings from blast-induced sources (in the frequency range of 4.5Hz-250Hz), primarily from mineral extraction activities, and can also be used for assessing other forms of vibration caused by blasting. However, this guidance is not suitable for one-off explosive events, e.g. bridge or building demolitions. See paragraph 4.25-4.26 for further information on VDV.

57. **Building Regulations (Approved Document E – Resistance to the passage of sound)**[40] **–** Regulations 20A and 12A introduced pre-completion testing for sound insulation as a means of demonstrating compliance for 'rooms for residential purposes' i.e. new houses and flats and those formed by conversion of other buildings. Alternatively, the use of robust details will be accepted i.e. use of high performance materials separating wall and floor construction.

Transport:

58. **Calculation of Road Traffic Noise (CRTN) –** Published by the Department for Transport (DfT) in 1998, the CRTN is the standard UK procedure for calculating noise from road traffic. Divided into three sections - Section I provides a general method for calculation of predicted noise levels at a distance from a highway (taking parameters into account); Section II provides additional procedures that may need to be taken into account when applying the method in Section I. Finally, Section III sets out procedures

[40] Approved Document E, DCLG, March 2015

and requirements for when traffic conditions fall outside the scope of 'standard' prediction methods. Examples are given in Annexes 1-18.

59. **Calculation of Railway Noise (CRN) –** Published by the Department for Transport in 1995, the CRN sets out the methods and procedures for calculating noise from moving railway vehicles[41]. Divided into three sections – Section I provides a general method for calculation of predicted noise levels at a distance from a railway (taking parameters into account); Section II provides additional procedures that may need to be taken into account when applying the method in Section I. Finally, Section III sets out procedures and requirements for when railway traffic and/or the site layout conditions fall outside the scope of 'standard' prediction methods in Section I.

60. **Design Manual for Roads and Bridges (DMRB) –** Document LA 111 – Noise and vibration[42] of the DMRB provides guidance on the assessment of impacts that road projects may have on levels of noise and vibration. The DMRB uses noise levels calculated by the CRTN methodology.

61. **Transport Analysis Guidance (WebTAG) –** TAG Unit A3[43] sets out a five step methodology for environmental appraisal of transport projects – i) Scoping, ii) Quantification of noise impacts; iii) Estimation of the affected population, iv) Monetary valuation of changes in noise impact, and v) Consideration of the distributional impacts of changes in noise based on the DETR Guidance[44]. The guidance makes reference to the WHO Health and Noise report[45], Defra Guidance[46], the CRTN/CRN and the DMRB.

62. **Noise Insulation (Railways and Other Guided Transport Systems) Regulations 1996** – legislation, by virtue of the 1973 Act[47], used to determine which properties should be provided with or pay a grant for sound insulation against noise from a new or significantly altered rail scheme. To qualify, properties have to fulfil criteria set out in regulation 4 and 7.

63. **The Noise Insulation Regulations 1975** and the **Noise Insulation (Amendment) Regulations 1998** – provides by virtue of the 1973 Act[47], equivalent legislation to the 1996 Regulations, used to determine which properties should be provided with or pay

[41] As defined in r3 of the Noise Insulation (Railways and Other Guided Transport Systems) Regulations 1996, SI 1996/428 and the Transport and Works Act 1992.

[42] LA 111 – Noise and vibration, Revision 2, May 2020, which replaced HD 213/11

[43] TAG unit A3 - Environmental impact appraisal, [DfT, July 2021].

[44] Guidance on the Methodology for Multi-Modal Studies Volume 2 (DETR, 2000)

[45] Burden of disease from environmental noise: Quantification of healthy life years lost in Europe (WHO/EC (JRC) 2011)

[46] Environmental Noise: Valuing impacts on: sleep disturbance, annoyance, hypertension, productivity and quiet (Defra, 2014)

[47] S20 of the Land Compensation Act 1973 (c.26)

a grant for sound insulation against noise from a new or significantly altered road scheme. To qualify, properties have to fulfil certain criteria set out in the regulations.

64. **Aviation Policy Framework** – Published in 2013 by DfT, sets out the Government's policy on aviation and sets out the parameters within which the Airports Commission would work. Section 3.1 deals with noise predominantly. Paragraph 3.12 states the Government's overall policy on aviation noise – to limit and where possible, reduce the number of people in the UK significantly affected by aircraft noise. Section 9.5 of the **Airports Commission Final Report**[48] sets out the environmental impacts and assessment of noise from the shortlisted schemes[49], which informed the commission's recommendations.

Other Guidance

65. **Professional Practice Guidance on Planning and Noise – New Residential Development (ProPG) -** The Professional Practice Guidance on Planning and Noise (ProPG)[50] has been produced by the Institute of Acoustics (IoA), Chartered Institute of Environmental Health (CIEH) and the Association of Noise Consultants (ANC). The ProPG, aimed at new residential developments, was published in June 2017, following consultation in 2016. It is published in 3 parts - the Main Guidance and 2 supplementary documents. *Supplementary Document 1: Planning and noise policy and guidance* gives an overview of noise policy related to planning. *Supplementary Document 2: Good Acoustic Design* relates to the use of good acoustic design in dwellings.

66. The ProPG has been produced to provide practitioners with guidance on a recommended approach to the management of noise within the planning system in England. It seeks to assist in the delivery of sustainable development by promoting good health and well-being. The guide promotes the use of a good acoustic design process in and around proposed new residential development. The ProPG follows a two-stage, risk-based approach:

- Stage 1 – initial assessment where external noise is rated against four Noise Risk Categories (NRCs)[51];
- Stage 2 – a systematic consideration of four key elements[52]

[48] Airports Commission: Final Report, July 2015

[49] GAL – new second runway at Gatwick (south and parallel to existing runway); HAL – new third runway at Heathrow (NW of current northern runway); HHL – extension of the existing northern runway at Heathrow.

[50] Professional Practice Guidance on Planning & Noise – New Residential Development (May 2017).

[51] Can be considered as an updated replacement for the Noise Exposure Categories (NECs) set out in PPG24, cancelled in March 2012.

[52] 1 – demonstrate a 'Good Acoustic Design Process'; 2 – observe 'Internal Noise Level Guidelines'; 3 – undertake an 'External Amenity Area Noise Assessment'; and 4 – consider 'Other Relevant Issues'.

67. Having followed the approach to its conclusion, noise practitioners will have a choice of four possible recommendations for the decision-maker to – grant without conditions; grant with conditions; avoid (refuse unless…) and prevent (refuse regardless).

68. It should be noted that the ProPG does not constitute government guidance and neither replaces nor provides an authoritative interpretation of the law or government policy, so should be given the appropriate weight by the decision-maker.

Implications of Exiting the EU

69. The UK left the EU on 31 January 2020 and the transitional arrangements that were put in place ended on 31 December 2020. From 1 January 2021, Defra needs to ensure that the EU environmental law that applied at 31 December 2020[53] can continue to operate appropriately in UK law by ensuring domestic legislation implements retained EU law and any international obligations. The Environment Bill[54] will enshrine environmental principles into UK law and makes provision for a framework of environmental governance. The following will continue from 1 Jan 2021:

- the UKs legal framework for enforcing domestic environmental legislation by UK regulatory bodies or court systems
- environmental targets currently covered by EU legislation - they are already covered in UK legislation
- permits and licences issued by UK regulatory bodies

Current legislation is changed from 1 Jan 2021 to:

- remove references to EU legislation (which should be referred to in decisions / reports as 'Retained EU Law Directive / Regulation xx/xxxx/xx')
- transfer powers from EU institutions to UK institutions
- make sure the UK meets international agreement obligations

Case Law

General Noise Issues

a) *Coventry and others v Lawrence and another*

Date: 26 February 2014; Ref: [2014] UKSC 13

70. There have been very few rulings on private nuisance at Supreme Court level. Conflicting Court of Appeal judgments over recent years have created uncertainty for

[53] EU Exit Web Archive – The National Archives

[54] Environment Bill 2019-2021.

land owners, developers and planners. A particular issue has been how the grant of statutory authority, for example a planning permission or environmental permit, to undertake the activity complained of affects the decision as to whether a nuisance exists.

71. This is therefore highly significant. In the Judgment the Supreme Court examines a number of key issues. These include whether a right to commit a noise nuisance can arise by way of prescription, the extent to which the grant of planning permission can affect whether a nuisance exists and is relevant to the determination of the character of the locality, and also the approach to be followed by the lower courts in deciding whether to grant damages instead of an injunction.

b) *Pauline Forster v Secretary of State for Communities and Local Government & Tower Hamlets London Borough Council, Swan Housing Association Limited*

Date: 29 June 2016; Ref: [2016] EWCA Civ 609

72. This Court of Appeal judgment about allowing dwellings near to a live music venue raises issues about developing near to an existing noise source, nuisance/licensing and closing windows to achieve reasonable noise levels. It is a useful reminder that the effects of the appeal proposal on an existing use that is a source of noise can be a material consideration that will need to be adequately addressed in the decision. It is no defence under nuisance proceedings that the complainant came to be used to the nuisance, for example, by moving into a property near to an existing noisy source. However, if a claimant builds on or changes the use of land so as to make the defendant's previously innocent activity a nuisance, this may be a defence. NPPF paragraph 182 (paragraph 187 in the revised NPPF) states that *"Planning policies and decisions should ensure that new development can be integrated effectively with existing businesses and community facilities. Existing businesses and facilities should not have unreasonable restrictions put on them as a result of development permitted after they were established."* – See 'Agent of Change' principle, covered in paragraphs 2.17 & 2.21.

73. The Court of Appeal found the High Court judge to have erred in holding that if residents of the flats were not going to be subjected to unreasonable noise levels it would follow that those residents would not be likely to complain about the noise. It was held that humanity being what it is, people are liable to complain about anything, and the question is whether there is any objective possibility of quantifying the likely prospects of success of such complaints [it is relevant to note that the PPG Noise para 6 states that LPAs should not presume that licence conditions will provide for noise management in all instances].

74. Lord McFarlane LJ raised the possible significance of the fact that the Inspector's conclusion on noise proceeded on the implicit basis that the windows of the flats would be closed. He commented that residents would be likely to open their windows in fine weather (or would wish to do so), and if they did, increased levels of noise from the music venue might fuel complaints. The Court of Appeal found that any point about noise and open windows was a matter to be taken into account in deciding whether noise levels would be acceptable.

c) *Stoke Poges Parish Council v SSCLG and Secretary of State for Education, South Buckinghamshire DC and Slough Sikh Education Trust Limited*

Date: 15 July 2016; Ref: [2016] EWHC 1772 (Admin)

75. This High Court judgment offers a reminder that British Standards and WHO Guidelines were not drafted with the same objectives as planning policy nor intended to have the same formal role and effect as development plan policies. In the context of national policy they do not set any specific standards and are clearly a matter of judgement for the decision maker, but they need to be understood sufficiently to enable them to be taken into account correctly.

76. It is also a reminder that a condition which secured noise levels at the boundary of the appeal site to 40 dBA between 0700 and 2200 and 30 dBA between 2200 and 0700 is unenforceable because it does not specify whether it applies to $L_{max,}$ $L_{90,}$ L_{eq} or something else!

National Infrastructure

NSIPs and Nuisance

77. Section 158 of the Planning Act 2008 confers statutory authority for carrying out development or doing anything else authorised by a development consent order (DCO). The statutory authority is conferred for the purpose of providing a defence in civil or criminal proceedings for nuisance. The statutory authority is subject to any contrary provision made in any particular case by a DCO.

78. DCOs have often included an article which makes such a contrary provision, by amending the terms of the defence in the case of noise nuisance (whilst leaving other types of nuisance to continue to have the general defence afforded by section 158). Under that article, the defence is available if the noise (a) relates to the construction or maintenance of the authorised development and is in accordance with controls imposed by the local authority under the Control of Pollution Act 1974, or cannot reasonably be avoided, or (b) relates to the use of the authorised development and cannot reasonably be avoided.

79. Here is an example of such a DCO article, but bear in mind that, going forward, references in it (and any footnote to it) to section 65 of the Control of Pollution Act 1974 should be removed (as that section was repealed on 1st October 2015 under the Deregulation Act 2015):

Defence to proceedings in respect of statutory nuisance

> **16**.—(1) Where proceedings are brought under section 82(1) of the Environmental Protection Act 1990([55]) (summary proceedings by person aggrieved by statutory nuisance) in relation to a nuisance falling within paragraph (g) of section 79(1) of that Act (noise emitted from premises so as to be prejudicial to health or a nuisance) no order is to be made, and no fine may be imposed, under section 82(2) of that Act if—
>
> (a) the defendant shows that the nuisance—
>
> (i) relates to premises used by the undertaker for the purposes of or in connection with the construction or maintenance of the authorised development and that the nuisance is

[55] 1990 c. 43. There are amendments to this Act which are not relevant to this Order.

attributable to the carrying out of the authorised development in accordance with a notice served under section 60 (control of noise on construction site), or a consent given under section 61 (prior consent for work on construction site) or section 65 (noise exceeding registered level), of the Control of Pollution Act 1974([56]); or

(ii) is a consequence of the construction or maintenance of the authorised development and that it cannot reasonably be avoided; or

(b) the defendant shows that the nuisance is a consequence of the use of the authorised development and that it cannot be reasonably avoided.

(2) Section 61(9) (consent for work on construction site to include statement that it does not of itself constitute a defence to proceedings under section 82 of the Environmental Protection Act 1990) and section 65(8) (corresponding provision in relation to consent for registered noise level to be exceeded) of the Control of Pollution Act 1974, shall not apply where the consent relates to the use of premises by the undertaker for the purposes of or in connection with the construction or maintenance of the authorised development.

80. Where, by virtue of section 158 or a provision in a DCO, a defence of statutory authority exists in proceedings for nuisance, section 152 of the Planning Act 2008 provides a right to compensation in certain circumstances. Under section 152(7), where the value of an interest in land is depreciated by physical factors (including noise) caused by the use of authorised works then, subject to certain conditions, compensation is payable for that depreciation.

Noise Concepts/Terminology

81. This part of the chapter builds on the concepts outlined in the introduction and refers to terminology that Inspectors are most likely to encounter in casework where noise is an issue.

Basic Concepts:

Sound Pressure Level (SPL)

82. Sound pressure level (SPL), sometimes referred to as acoustic pressure level, is a logarithmic measure of the effective pressure of a sound relative to a reference value. The commonly used reference for sound pressure in air is the threshold of human hearing.

Sound Power Level (SWL)

83. Sound power level (SWL), sometimes referred to as acoustic power level, is a logarithmic measure of the power of a sound relative to a reference value. Again, the commonly used reference for sound power is the threshold of human hearing.

[56] 1974 c. 40. Sections 61(9) and 65(8) were amended by section 162 of, and paragraph 15 of Schedule 15 to, the Environmental Protection Act 1990 (c. 43). There are other amendments to this Act which are not relevant to this Order.

Sound energy

84. Sound energy is a form of energy associated with the vibration of matter. The standard unit of sound energy is the joule (J).

Noise units (decibels/dB)

85. The decibel (dB), i.e. a tenth of a Bel is a unit of measurement of the magnitude of sound, changes in sound level, and a measure of sound insulation, which is an expression of the ratio between two quantities expressed (more conveniently) in logarithmic (log) form. One of these values is often a standard reference value, in which case the decibel is used to express the level of the other value relative to this reference.

86. The unit is most readily recognised as a unit of sound pressure level (dB_{SPL}) in the realm of acoustics. In this context, dB_{SPL} reference sound pressure as a field quantity, using the reference pressure in air (at standard atmospheric pressure) at the typical threshold of perception of an average human. The *number* of dB is ten times the logarithm to base 10 of the ratio of the squares of two field amplitude quantities. The lower limit of audibility is defined as SPL of 0 dB, the guide for the upper limit often used is 140 dB for threshold of pain – see table below. A 1 dB change in level is very small and would not be noticed; a 3 dB change would generally just be noticeable and a 10 dB change is a 10 fold change in the energy level of the sound which can be perceived as a doubling or halving in loudness.

87. Decibel Range (SPL):

0 dB	threshold of hearing
20 dB	Night-time quiet bedroom
40 dB	Daytime living room
60 dB	Speech level
80 dB	levels near busy road
100 dB	Nightclub
120 dB	threshold of feeling
140 dB	threshold of pain

Period

88. In the context of acoustics, a signal that repeats the same pattern over time is called periodic, and the period is defined as the length of time encompassed by one cycle, or repetition.

Frequency/Frequency Band

89. A frequency represents the number of times that a periodic function or vibration occurs or repeats itself in a specified time, often 1 second - cycles per second. It is usually measured in Hertz (Hz). A frequency band is a continuous range of frequencies between two limiting frequencies. Low frequency sound is considered in the range 10-150Hz[57], propagated by travelling through materials, even low levels can travel large distances and at the lower end of the frequency range are felt as low resonances akin to vibration. Sources of low frequency sound are typically industrial, e.g. pumps, boilers, amplified music, transport or can be natural, e.g. wind, thunder, ground movements. High Frequency sound is considered in the range 5kHz–20kHz[58], propagated by travelling through air, heard as high pitched sounds, from which exposure to high levels for prolonged periods can cause tinnitus or even hearing loss. Sources of high frequency sound can be industrial e.g. pneumatic tools, grinders, drills, machines or other sources such as alarms, aircraft engines and increasingly at the higher end of the frequency range electronic equipment.

Octave bands

90. The whole frequency range is divided into a set of frequencies called bands. Each band covers a specific range of frequencies. A frequency is said to be an octave in width when the upper band frequency is twice the lower band frequency.

91. Sound Pressure Level is often measured in octave bands. A one-third octave band is defined as a frequency band whose upper band-edge frequency (f2) is the lower band frequency (f1) times the cube root of two, is employed by arithmetically adding a table of values, listed by octave or third-octave bands, to the measured sound pressure levels in decibels (dB).

Wavelength

92. Wavelength is defined as the distance between repeating units of a sound wave.

Noise Rating Curves

93. Noise rating curves (NR) were developed by the International Standards Organization (ISO) to determine acceptable levels for the indoor environment. The NR Curves range from 0 to 130 – the NR level for different uses should not exceed the recommended Noise Ratings e.g. NR30 for private dwellings, hospitals, theatres, cinemas, conference rooms, through to NR70 for heavy engineering works or foundries. These

[57] Frequencies below 20Hz are also referred to as infrasound.

[58] Frequencies above 20kHz are also referred to as ultrasound.

are often used in the measurement of noise from mechanical sources such as air conditioning units in hotels, schools of other buildings. The SPL readings (in dB) taken at various frequencies (in Hz) can be plotted on to an NR curve – the overall NR value is the highest of the individual NR values over all the frequency bands, which corresponds to the value of that particular space/room.

94. Noise rating (NR) curves ensure that the sound is within a known level for each frequency band. Each curve is named after its respective value at 1kHz. As NR curves define limits at different frequencies, this enables the noise character to be defined or controlled. For example, a SPL of 30 dB L_{AEQ} may have the majority of its sound energy at 63Hz, or 125Hz or any other frequency. NR curves are usually applied to 1/3 octave band levels but can be applied to other parameters such as L_{eq}, L_{90}, L_{10} & L_{max}. It should be noted that there is no direct relationship between dB(A) and NR curves. However, Annex B to BS8233:2014 states that there is an approximate relationship (in the absence of strong low frequency noise) of NR = dB(A) -6.

95. To determine the NR level, the sound level in each frequency band is compared to the values in the NR tables[59] for the corresponding frequency. The NR curve number which applies to each frequency band is the highest numerical value not exceeded in that band. The NR provides a weighted indication of measured noise which can then be used to determine acceptable noise levels in various environments e.g. NR 30-35 is a target level for dwellings.

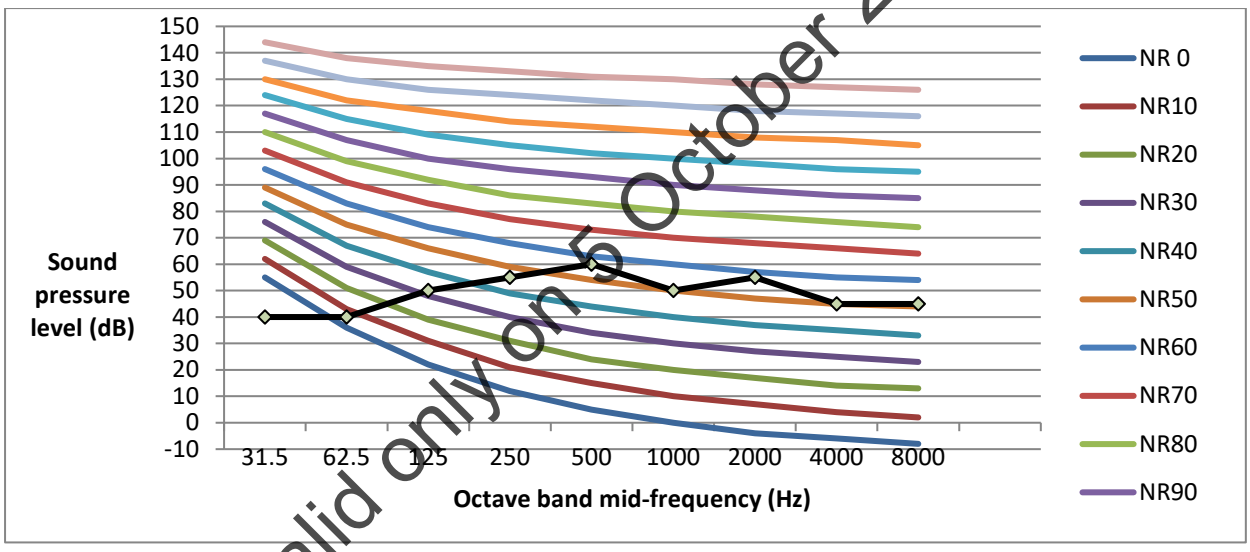
96. In the chart below, a noise source is represented by a number of sample sound pressure level (SPL) for each frequency band. These are then plotted are plotted against a series of noise rating curves (the sample measurements are illustrated with a black line and diamond points):

Octave mid-band frequency (Hz)	SPL = Sound pressure level (dB)
31.5	40
62.5	40
125	50
250	55

[59] See pp71-73 of The Little Red Book of Acoustics – A Practical Guide, [R Watson/O Downey, 3rd Edition 2013, Blue Tree Acoustics].

500	60
1000	50
2000	55
4000	45
8000	45

97. When plotted against the noise rating curves, these give a NR value of approximately 58[60]. The NR value is the highest of the individual SPL measurements in relation to the values of the NR curves:



	Octave band Mid Frequency (Hz)							
NR	63.0	125.0	250.0	500.0	1000.0	2000.0	4000.0	8000.0

[60] Derived from the 7th plotted point as the highest individual NR value corresponding to the NR in the table below (from ISO/R 1996:1971, replaced by ISO 1996-2:2017).

NR70	90.80	82.90	77.10	73.00	70.00	67.50	65.70	64.10
NR69	90.00	82.00	76.20	72.00	69.00	66.50	64.70	63.10
NR68	89.20	81.10	75.20	71.00	68.00	65.50	63.60	62.00
NR67	88.40	80.30	74.30	70.10	67.00	64.50	62.60	61.00
NR66	87.60	79.40	73.30	69.10	66.00	63.50	61.50	59.90
NR65	86.80	78.50	72.40	68.10	65.00	62.50	60.50	58.90
NR64	86.00	77.60	71.50	67.10	64.00	61.50	59.50	57.90
NR63	85.20	76.80	70.60	66.10	63.00	60.50	58.50	56.90
NR62	84.50	75.90	69.60	65.20	62.00	59.40	57.40	55.80
NR61	83.70	75.10	68.70	64.20	61.00	58.40	56.40	54.80
NR60	82.90	74.20	67.80	63.20	60.00	57.40	55.40	53.80
NR59	82.10	73.30	66.90	62.20	59.00	56.40	54.40	52.80
NR58	81.30	72.40	65.90	61.30	58.00	55.40	53.40	51.70
NR57	80.50	71.60	65.00	60.30	57.00	54.30	52.30	50.70
NR56	79.70	70.70	64.00	59.40	56.00	53.30	51.30	49.60
NR55	78.90	69.80	63.10	58.40	55.00	52.30	50.30	48.60
NR54	78.10	68.90	62.20	57.40	54.00	51.30	49.30	47.60

NR53	77.30	68.10	61.30	56.40	53.00	50.30	48.30	46.60
NR52	76.60	67.20	60.30	55.50	52.00	49.20	47.20	45.50
NR51	75.80	66.40	59.40	54.50	51.00	48.20	46.20	44.50
NR50	75.00	65.50	58.50	53.50	50.00	47.20	45.20	43.50

Background Noise/Sound Level

98. Defined as any sound other than the sound being monitored (primary sound). Also known as ambient noise level; residual noise or reference sound level. The background sound level is the underlying level of sound over a given period, T, and may be used as an indication of relative quietness at a given location. These sound levels are characterized by continuous or semi-continuous sounds, e.g. waves, traffic, mechanical noise from power supplies, A/C units, white goods; talking and other bioacoustic noise from animals and birds. The background noise level is the threshold below which, the time varying community noise level seldom drops. Studies have shown that the background noise level in areas not directly exposed to a major noise source seems to be proportional to the population density and linked to distribution of road traffic[61]. Rural areas have a relatively low level of background noise, and therefore may be subject to more disturbance from intrusive noise. Methodology for the determination of background sound level, $L_{A90,\ T}$ can be found in Chapter 8 of BS4142:2014+A1:2019, where it is defined as the '*A-weighted sound pressure level that is exceeded by the residual sound at the assessment location for 90% of the given time interval, T, measured using time weighting F and quoted to the nearest whole number of decibels'*. In general, background sound levels exceeded by more than 5dB may cause disturbance at noise sensitive receptors. Definitions for ambient sound/ambient sound level; background sound level; residual sound/residual sound level can be found in Chapter 3 of BS4142:2014+A1:2019.

Vibration

99. Defined as the oscillation of an object about a reference point, the number of these oscillations per second gives the frequency of vibration in Hertz (Hz). Sound can be detected by hearing, whereas vibration can be felt as it is transmitted through solid structures directly to the human body. Similar to sound, vibration is usually characterized by a number of different frequencies occurring simultaneously, e.g. different parts of a machine will vibrate at different frequencies[62]. Vibration may be

[61] Background noise levels in Europe, SINTEF Report No A6631, June 2008.

[62] The human perception range for vibration (1-80Hz) is far less than for sound (20-20,00Hz).

continuous or intermittent. Sources of vibration include steel presses or other machinery, road and rail traffic and blasting (for mineral extraction or demolition).

100. An object can vibrate in two ways: free vibration and forced vibration. Free vibration occurs when an object or structure is displaced or impacted and then allowed to oscillate naturally. For example, when you strike a tuning fork, it rings and eventually dies down. Forced vibration occurs when a structure vibrates because an altering force (or power) is applied. Rotating or alternating motion can force an object to vibrate at unnatural frequencies. Forced vibration at or near an object's natural frequency causes energy inside the structure to build, i.e. the structure will start to 'resonate'. Over time the vibration can become quite large even though the input forced vibration is very small.

101. A particle may vibrate along one of three axes (vertical, longitudinal and transverse), but will often vibrate in all three axes simultaneously. When measuring peak vibration levels, the highest level in any of the axes may be used and sometimes the resultant is used. But, the resultant level can be difficult to measure as the three axes may not vibrate in phase with each other.

102. Vibration can be expressed in metric units (m/s^2) or units of gravitational constant "g," where 1 g = 9.81 m/s^2. The vibration in each axis can be quantified using three parameters:

    - Acceleration – the rate change of velocity over time (in ms-2 or mms-2);
    - Velocity – the rate at which displacement varies with time (in ms-1 or mms-1); and
    - Displacement (or amplitude) – the distance (in m or mm) moved from the fixed reference point.

103. Vibration is often caused by airborne sound waves in both audible and subsonic ranges. For example, complaints from blasting at quarries are often not related to ground-borne vibration, but are from shaking windows or ornaments, induced by the air pressure wave from the blast. For blasting in quarries maximum peak particle velocity is often set as a limit in planning conditions. For example, a maximum peak particle velocity of 6 mms^{-1} for inhabited buildings and 18 mms^{-1} for uninhabited buildings. Humans can feel blast that result in vibrations down to 1.5 mms^{-1}.

104. Part 2 of BS5228: 2009+A1:2014 gives recommendations for basic methods of vibration control in relation to construction and open sites. The Standard also describes the legislative background to control of vibration and provides guidance on methods for measuring vibration and assessment of its environmental effects.

Vibration dose value (VDV)

105. Vibration dose value (VDV) is a cumulative measurement of the vibration level received (as in the measured magnitude of vibration and the length of time for which it occurs) over an 8-hour or 16-hour period. VDV can be considered to be the magnitude of a one-second duration of vibration which will be equally severe to the measured vibration. Calculation of VDV includes duration weighting, giving greater weight to occasional peaks in the level. After a vibration has been weighted for frequency, direction, duration, and magnitude, a value for the overall VDV is obtained. Vibration may vary and in many cases be intermittent. If the vibration level is 'steady' then shorter measurements of the acceleration may be used in the calculating formulae.

106. VDV is the standard methodology for determination of vibration levels, and will usually be encountered in the context of measurements from buildings adjacent to proposed developments. VDV limits are derived from BS 6472 (see paragraph 2.49 above) which sets out detailed guidance on human response to vibration in buildings.

Acoustic parameters and descriptors:

A-weighting

107. A-weighting is the most commonly used of a family of curves defined in the international standard sound level meter performance IEC 61672:2003 and various national standards relating to the measurement of Sound Pressure Level. A-weighted values are obtained by arithmetically adding a table of values, listed by octave or third-octave bands, to the measured Sound Pressure Levels in decibels (dB).

108. A-weighting is applied to instrument-measured sound levels in an effort to account for the relative loudness perceived by the human ear, as the ear is less sensitive to low audio frequencies. However, although A-weighting was originally intended for the measurement of such low-level sounds, it is now commonly used for the measurement of environmental noise and industrial noise.

Acoustic Indicators

109. Many units and indicators have been developed for the purposes of characterising one or more attributes of environmental sound. Some indicators in common use include:

$L_{Amax,F}$ / $L_{Amax,S}$	The A weighted maximum sound pressure level during the event or measurement period. F for fast and S for slow, which varies the length of time the sound meter captures the noise energy.
$L_{A10,T}$	The A weighted sound pressure level exceeded for 10% of the measurement period, T. This indicator provides a measure of the higher sound pressure levels that occur during the measurement period. In particular, it is used when assessing certain aspects of road traffic noise. In describing this level, it is good practice to include the measurement period e.g. $L_{A10\ 24\ hour}$.
$L_{Aeq,T}$	The equivalent continuous A weighted sound pressure level which contains the same sound energy in the period, T, as the actual (usually varying) sound over the same time period. L_{eq} is the Sound Pressure Level in decibels (dB), equivalent to the total Sound Energy over a given period of time. This indicator describes the average sound energy

	but with a bias towards the noisier events that occur during the measurement period. For sources that comprise identical specific events, the $L_{Aeq,T}$ will increase by 3 dB(A) if the source level increases by 3 dB(A); or the number of events double; or if the duration of each event doubles in length. $L_{Aeq,T}$ is often used in many areas of environmental noise assessment.
$L_{A90,T}$	The A weighted sound pressure level exceeded for 90% of the measurement period, T. This indicator provides a measure of the lower sound pressure levels that occur during the measurement period. It is sometimes defined as the background noise level. It is again good practice to include the measurement period when describing this level. This descriptor excludes noise events of short duration such as a passing vehicle.
L_{An}	L_{An} is the noise level exceeded for n% of the measurement period, A-weighted, and calculated by statistical analysis - where n is between 0.01% and 99.99%.

Sound Exposure Level (SEL)

110. SEL is the logarithmic measure of the A-weighted, Sound Pressure Level squared and integrated over a stated period of time or event, relative to a reference sound pressure value. The measurement units are decibels (dB).

Sound Behaviour:

Diffraction

111. Diffraction occurs when a sound wave encounters interference, in the form of an obstacle or an opening comparable in size to its wavelength. Depending on the size of the object and the wavelength of the sound, the sound wave bends or diffuses around the object and the diffraction or interference is significant. Similarly, when sound waves pass through a gap it spreads out depending on the gap size and the wavelength. Low frequency noise is diffracted more than high frequency noise.

Reflection

112. Reflection represents the change in direction of a sound wave upon contact with a surface or medium so that the sound wave returns into the medium from which it

originated. An echo is a reflection of sound returning with sufficient magnitude and delay so as to be perceived by its originator.

Diffusion

113. Sound diffusion occurs where a sound wave reflects or scatters from a surface. Diffusion may change the sound so that perception of its location or source becomes more difficult, or make it appear to originate from a number of directions simultaneously.

Absorption

114. Sound absorption occurs where a sound wave affects the boundary of a material which has the propensity to convert sound energy to another medium (generally heat).

Refraction

115. Refraction represents the bending of a sound wave from its original path, either because it is passing from one medium to another with different velocities or by changes in the physical properties of the medium, for example, a rise in temperature or a change in wind speed in the air.

Environmental Noise Control

116. Once noise levels have been measured or predicted and found to be a problem or potential problem, there are three strategies that need to be considered to enable the noise to be controlled in order to meet any required limits. These are control at source; between the source and receiver and at the receiver. These are considered in turn below:

Control at source

117. Noise reduction at source may be achieved by various methods including – control of noise by design or choice of process, e.g. choice of quieter machines or processes in industrial premises. Specific noise control measures can be applied after machine installation e.g. vibration isolation or enclosures (full or partial). It should be noted that in a situation where there are multiple noise sources, each source needs to be identified and the most dominant located in order to ascertain priorities for noise reduction. However, it may not be the loudest noise source that should be the priority – see cumulative effects section. It may be that reducing levels of other sources will have the same effect as reducing the level of the single dominant noise source.

Between the Source and Receiver

118. Control of noise between the source and receiver can be split into two groups – active noise control and passive noise control. Active noise control is where the noise can in effect be cancelled out when another noise source is placed nearby, which is ‘out of phase’ with the offending noise. This interference between two sound waves is technically complex and can only be used in certain situations e.g. enclosed spaces such ventilation ducts, or in the cab of a tractor. Passive noise control techniques involve interfering with the path of the sound by use of indirect sound paths (airborne flanking paths to direct sound away); sound absorbing materials; sound barriers, e.g. walls, earth mound, acoustic fence or building to deflect or diffract the sound.

Control of Noise at the Receiver

119. This is most commonly achieved by sound insulation of buildings as windows, air bricks and doors are 'weak links' in the sound insulation of the façade of a building. Sound insulation of buildings can be achieved by various means including – use of non-porous materials, ensuring there are no flanking paths directing the sound to the receiver; use of acoustic double glazing, ventilators with sound attenuating inlet ducts, and use of secondary doors.

Noise prediction and correction factors

120. Although noise prediction is useful, it should be noted that a predicted noise level can never be as accurate as a measured one. Correction factors may need to be applied in certain situations, but care should be taken to apply the most appropriate correction factors to the noise source involved. Using the BS4142 methodology:

- background noise levels (BNL) LA90 are measured at noise sensitive receptors;
- noise levels from the new source(s) are predicted for the receptor location as LAeq;
- noise levels are corrected (if appropriate) for duration and character63. The corrected noise levels are termed the rating levels and expressed in LAeq;
- The rating levels are then compared with the BNLs for the area.

121. Other correction factors may need to be considered, such as those for weather and ground effects as sound levels are affected by wind, temperature gradients, the nature of the ground surface, by turbulence and air absorption (depending on temperature, frequency and humidity). These may be taken into account in the method used for the propagation of sound from the source to the receiver.

122. Other factors may be needed to be considered when assessing whether noise disturbance is likely:

Nature of noise - Is the noise bland and easy to ignore? or is the noise tonal and/or information rich drawing attention to itself? e.g. traffic noise is easier to ignore than a crying baby;

Time of day or night it occurs - One hour of disturbance is easier to tolerate at 3 pm than at 3 am;

Day of the week on which it occurs - Generally people are more tolerant of noise generated during the working week, than at weekends;

[63] Methodology for determination of corrections for tonal, impulsive or any other distinctive character is set out in Chapter 9 of BS4142:2014+A1:2019.

How long it occurs for - one minute of noise causes less disturbance than one day or one week of noise;

How often it occurs - Once per year is less disturbing than once per week;

The character of the area in which it occurs - city centre residents are more likely to be tolerant of 'entertainment' noise than rural residents;

The attitude of the observer to the noise - People are less tolerant of noise generated by sources which they consider as undesirable in other ways.

Noise character

123. The overall character of noise can be presented in terms of sound pressure level and frequency. This can be further divided in terms of the '**spectral character of noise**' into three different types:

    i) Discrete frequency noise (pure tones – generated mainly from rotating machinery);

    ii) Broadband noise (random – *rumble*, *roar* or *hiss* from e.g. high-velocity nozzles from industrial sources); and

    iii) Impulsive noise (impact – transient acoustical event of short duration, usually >0.5 seconds) e.g. gunshot, hand clap, stamping machine.

124. Most noise sources will take on one or more of these sub-characteristics and will therefore possess a unique acoustical signature. **Loudness** is another characteristic of sound, but is highly subjective, from person to person. Assessments and decisions should refer to noise levels not loudness.

Casework Types where Noise arises

Planning Appeals (including Minerals):

125. Wind turbines/Windfarms – onshore: noise sources in rural areas with low background levels, the characteristics of machinery and aerodynamic noise – see Annex B; offshore: noise from piling of turbine foundations, underwater noise.

126. Superstores and other retail developments - traffic noise; servicing yards; ventilation plant; hours of opening. Particular problems such as hot food takeaways and amusement centres where the effects on amenity are those of disturbance from infrequent noise events or noise in public places.

127. Warehousing/industry - noise from industrial processes; goods & material handling and transport operations. Noise levels, hours of working, layout of development, intervening uses, subsequent changes of use or intensification. Note that the emission of noise may be a factor in enforcement or lawful development cases where the effect is to cross the boundary between B1 and B2 uses.

128. Catering and leisure/entertainment - public houses, restaurants, wine bars and clubs - control over hours of operation, duplication with licensing control, car parks and the behaviour of patrons.

129. Noisy sports – e.g. motorsports, model aircraft. Some guidance from The Sports Council. Issues include - control over duration and frequency of events, traffic and parking.

130. Petrol filling stations - hours of operation, ancillary developments such as shops and car washes - siting considerations.

131. Dogs and cats - location of catteries and kennels, character of surroundings, limited scope of planning conditions - other means of control through the law of nuisance.

132. Flat conversions - overlap with Building Regulations but residential amenity a legitimate planning concern - look at internal room arrangements critically; the location of parking provision in relation to living and bedrooms. Problem of insulation between homes created from conversion into flats may arise. Conversions could therefore exacerbate noise problems in urban areas.

133. Residential development in noisy areas but where land supply is limited - Good practice in housing layouts and mitigating measures. New residential development as an inhibition on other land uses because of prospective complaints/action over noise. Given the promotion of mixed developments as a desirable form of urban development how are resulting noise problems to be addressed?

134. Minerals - guidance in Minerals PPG on assessment and control of noise at mineral workings but there are off-site impacts such as lorry traffic. Coal stocking areas at mines and dockyards - noise from handling and transport operations.

135. Prior Approvals – the General Permitted Development Order was amended in April 2016 to allow noise issues to be considered for office to residential prior approval applications/appeals. Further advice can be found in paragraphs 85 – 89 of Annex B of the Inspector Training Manual chapter on The General Permitted Development Order and Prior Approval Appeals.

Transport:

136. Airport/aviation development – note the limitations of planning control in dealing with aircraft noise; siting of facilities; routing of landings/departures; problems of assessment of effects from small scale developments such as flying and gliding clubs, helicopter landing pads.

137. Highways – new or substantially altered roads resulting in increase in traffic; problems associated with additional traffic noise. Assessment via CRTN.

138. Railways - new or substantially altered rail schemes[64] resulting in increase in rail traffic; problems associated with additional traffic noise and vibration. Assessment via CRN.

[64] Including casework involving Trolley Buses and Trams under TWA 1992.

Environmental (IPPC/IED):

139. Industrial facilities – manufacturing, energy, chemicals/refining operations. May feature noise emitting activities within and beyond the site boundary e.g. machinery, heavy plant movements and site traffic entering/leaving facility. May require the use of acoustic barriers and activities within enclosed buildings.

140. Waste management operations – Amenity sites, Waste Transfer Stations, waste treatment and landfill operations may all feature noise emitting activities within and beyond the site boundary e.g. machinery, heavy plant movements and site traffic entering/leaving facility. May require use of acoustic barriers and activities within enclosed buildings.

141. Assessment for industrial sites under the Environmental Permitting Regime (EPR) is usually via BS4142. Guidance on Best Available Techniques (BAT), suitable noise conditions and noise assessment via BS4142 can be found in Environment Agency guidance on Noise and vibration management[65].

Casework Considerations

142. **Health & quality of life** – The World Health Organisation (WHO) defines health as a 'as state of complete physical, mental and social well-being and not merely the absence of disease or infirmity', and recognises that the enjoyment of the highest attainable standard of health as one of the fundamental rights of every human being. In the NPSE, there is a distinction between 'quality of life' defined as 'the subjective measure that refers to people's emotional, social and physical well-being' and 'health', which refers to physical and mental well-being. It is important to note this distinction in the NPSE.

143. Exposure to noise can cause annoyance and sleep disturbance, which affects quality of life and can cause impacts on health. The distinction made between 'quality of life' and 'health' recognises that evidence suggests that long term exposure to some types of transport noise may cause an increased risk of direct health effects. Research on the long term health effects of noise exposure is ongoing.

144. **NPSE Effects Levels** – Two established toxicology concepts applied to noise impacts are:

- No observed effect level (NOEL): this is the level of noise exposure below which no effect at all on health or quality of life can be detected.

- Lowest observed adverse effect level (LOEL): this is the level of noise exposure above which adverse effects on health and quality of life can be detected.

145. These concepts have been extended in the NPSE to:

[65] Noise and vibration management: environmental permits [EA, July 2021].

- Significant observed adverse effect level (SOAEL): This is the level of noise exposure above which significant adverse effects on health and quality of life occur.

146. SOAEL is likely to be different for different noise sources, for different receptors and at differing times. Further research will be required to increase understanding of what may constitute significant impact on health and quality of life from noise.

147. **Noise effects on wildlife/habitats/countryside** – the PPG on noise advises[66] that the effect of noise on wildlife and ecosystems is a factor that may need to be taken into account in certain proposals, particularly when potentially noisy development may affect 'designated sites'[67]. A Defra commissioned report[68] concluded that a strong evidence base does not exist regarding the potential impact of anthropogenic noise on non-marine UK protected species (PS) and species of principal importance (SPI). However, the study showed that it is likely that birds, bats and amphibian behaviour are affected by road traffic noise, but there is more work to be done in this area to confirm these effects.

148. Consideration must be given where potentially noisy development is proposed in or near SSSIs or any other 'protected areas' – National Parks, the Broads, AONBs and Heritage Coasts, where noise would affect the quiet and tranquil enjoyment of these areas. Noisy development may also have a serious effect on the welfare of livestock on nearby farms. When considering proposals which could affect livestock, Inspectors should be satisfied that appropriate consultation with Defra has been carried out.

149. **Road Traffic** – road traffic noise predictions usually depend on the accuracy/precision of the underlying transport assessment. The use of suitable topographic data is also important. Planning techniques can be employed to mitigate road traffic noise (assessed using the CRTN methodology incorporated into modelling software, which can also assist in mitigation design), such as separation, traffic management, the use of barriers and design/insulation of buildings. The effectiveness of noise barriers or earth bunds depends on many factors including the precise geometry such as barrier height, source and receiver height, distance between the source and receiver, the distance between the source and the barrier and between the receiver and the barrier[69]. Reductions of up to 12-15 dB(A) can be achieved if the barriers are sufficiently high and in the optimum position. Resurfacing the road with low noise surfaces can also achieve reductions. Other techniques include separation of vehicles from noise receptors by the use of ring roads, pedestrian only streets, limiting HGVs to designated routes; establishing minimum distances from new residential development to traffic flows of prescribed volumes. Speed and volume restrictions, encouragement

[66] Noise PPG paragraph 006.

[67] See ODPM Circular 06/2005 for categories of 'designated sites'. Further information can also be found in the Inspector Training Manual Chapter – Biodiversity.

[68] The effects on noise on biodiversity (NO0235) – final report for Defra, 2012.

[69] Mitigation techniques are covered in LA 111 - Noise and Vibration of the DMRB. Design for Environmental Barriers is covered in LD 119 – Roadside environmental mitigation and enhancement of the DMRB.

of traffic restraint and the use of public transport can also bring about improvements in the urban noise environment. Some of these techniques could be implemented by the use of conditions.

150. **Air Conditioning Units & Kitchen Exhausts** – control of noise from A/C[70] and exhaust[71] equipment will be needed in particular for densely populated areas where there are large numbers of business, commercial and entertainment premises and assessed by using the methodology in BS4142:2014+A1:2019. Air conditioners should ideally not be located adjacent to residential windows, bedrooms or living areas and should not be located near multiple reflective surfaces (e.g. walls and eaves) as noise will be reflected onto nearby properties. Acoustic barriers and enclosures can be used to mitigate noise from A/C units. With regard to kitchen exhausts, noise mitigation can be achieved by use of good design practice, e.g. have low turbulence ducts and fittings or locate high velocity ducts in non-critical areas; use quieter fans; use of sound absorbing lagging around ducts, duct silencers or sound plenums in supply and return air ducts; location of equipment rooms in non-critical areas[72]. Additionally, opening times of commercial and business premises could be restricted so that that it is not operational late at night. Some of these techniques can be implemented by the use of conditions.

151. **Entertainment/Leisure venues** – could include premises such as public houses, night clubs, leisure centres, town or village halls, club pavilions, outdoor festival sites, outdoor concert arenas. Noise problems may result from use of amplified music, crowd noise (both inside and outside the venue), A/C units or other mechanical equipment and traffic noise. Noise may be mitigated by use of restricted opening hours, altering the orientation of the building and therefore the relationship with receptors, use of good design e.g. internal layout:

    - buffering of hall with ancillary rooms,
    - sound insulation of premises including roof structure,
    - acoustic lobbies – internal or external,
    - use of windows and doors,
    - ventilation/air conditioning,
    - positioning and mounting of amplification equipment,
    - partial containment of external areas (in particular smoking areas),

[70] Originating from the hum of the fan, rattling/vibration of the case or internal parts, shaking/rattling of the glass/frame where the unit is installed.

[71] Originating from high air velocities through the extraction hood/grille/supply ductwork, fan motor noise and high extract/intake air velocities from the extraction/supply discharge point.

[72] Further information can be found in 'Nuisance smells: how councils deal with complaints' Defra, April 2015.

- use of noise limits/noise limiter (this may not be practical).

152. The Good Practice Guide on the Control of Noise from Pubs and Clubs[73] contains useful advice in the absence of robust noise limits for entertainment, often referred to by practitioners:

    - The LAeq 5minute level measured 1m outside a window to a habitable room, with entertainment taking place, shall show no increase when compared with the representative LAeq 5minute measured from the same position, under the same conditions and during a comparable period with no entertainment taking place and;

    - The LAeq 5minute level in the 63Hz and 125Hz octave bands measured 1m outside a window to a habitable room, with entertainment taking place, shall show no increase when compared with the representative LAeq 5minute level in the 63Hz and 125Hz octave bands measured from the same position…

153. It should be noted that some noise controls may be imposed by the local Council post planning permission via the licensing regime under the Licensing Act 2003.

154. **Motor sports/Model Aircraft** – includes any vehicular racing (cars, motorbikes, trucks), which can cause high noise levels and disturbance to nearby residents not only from the activity itself, but from crowd noise and traffic. Also included is model aircraft, which creates noise and can often be located near to residential areas. Statutory nuisance controls under the Environmental Protection Act 1990 and Control of Pollution Act 1974 can be applied to these activities. Noise from these events can be controlled by the use of the following mitigation techniques – siting of the venue away from noise sensitive areas, use of noise barriers around the site, use of existing topographical features between site and noise sensitive receptors when choosing site, restriction of hours when activity is allowed, use of mufflers on engines to reduce noise emission from vehicles. Additionally, for model aircraft[74] a restriction in amount of aircraft flown simultaneously can help reduce noise emissions. Some of these measures can be implemented by the use of conditions.

155. **Human Rights/PSED** – Under the ECHR, certain protocols can be applied in relation to noise disturbance. Article 8 – the right to respect for private and family life in *Hatton vs. UK (2003); 37 EHHR 28*, paragraph 96 of the judgment stated "There is no explicit right in the convention to a … quiet environment, but where an individual is directly and seriously effected by noise … an issue may arise under Article 8…". Article 1 of Protocol 1 – the protection of property has also been the subject of a judgment in *Thomas & Ors v Bridgend County BC [2011] EWCA Civ 862*, where the claimant argued that noise from a road was a breach of Article 1 by interfering with the peaceful enjoyment of possessions (i.e. the claimant's house) and they should be entitled to

[73] Good Practice Guide on the Control of Noise from Pubs and Clubs, IoA, March 2003. The Noise Council produced a Code of Practice on Environmental Noise Control at Concerts in 1995, which sets out suggested limits and restrictions for events.

[74] Further guidance can be found in the Code of Practice on Noise from Model Aircraft, DoE 1982.

compensation, the Judge concluded that as there was no compensation offered, that was a breach of Article 1.

156. With regard to the general requirement under the Public Service Equality Duty, decision makers need to take into account the potential effect of noise from a proposed development or activity and if any discrimination may arise from the effect on noise receptors. Further guidance on Human Rights and PSED can be found in the corresponding ITM Chapter.

157. **Underwater noise** – From piling (for construction of offshore wind turbines/windfarms[75], other offshore development); harbour works/operations, other coastal works where noise may be an issue. The National Physical Laboratory published a guide[76] for underwater noise measurement, which provides guidance on in-situ measurement of underwater sound, processing the data and for reporting the measurements using the appropriate metrics.

158. **Underground noise** – from underground road/rail development, e.g. Crossrail, mining and drilling operations, basement conversions and additions (in London particularly). Methodology outlined in BS5228 should be used for noise prediction and the assessment of effects applied using that set out in the NPSE. This should be set out in more detail in the Local Authorities 'Construction and Demolition Code of Practice'. Where rail is concerned methodology set out in the appropriate WebTAG and where road proposals arise the DMRB guidance should be used.

159. **Environmental Impact Assessment (EIA)** – provides a process where the interaction of environmental effects resulting from a proposed development can be predicted where there is likely to be significant effects (positive or negative) on the environment. These effects can then be reduced or avoided, where appropriate, through mitigation measures. The main purpose of an EIA is to provide the decision maker and the public with a clear description of what the likely significant effect of a project would be and how the effects have been assessed, provided through the Environmental Statement (ES). EIA is applied through the EIA Directive[77] transposed into English law through the EIA Regulations 2017[78] and Infrastructure Planning EIA Regulations 2017[79]. Schedule 4 of the regulations establishes the minimum information necessary for inclusion within an ES in order for it to be considered as such.

[75] The Offshore Renewables Joint Industry Programme (ORJIP) have commissioned a project to investigate acoustic disturbance of the marine environment from underwater noise and mitigation technologies for piled foundations. Vattenfall (a Swedish Energy Company) is taking forward the research project on underwater noise effects. The EC published the final report MaRVEN – Environmental Impacts of Noise, Vibrations and Electromagnetic Emissions from Marine Renewables in Sept 2015, which concluded that there are likely to be some effects on marine wildlife, in particular those that use sound as primary mode of communication, but there are many questions that remain.

[76] NPL Good Practice Guide No. 133 – Underwater Noise Measurement, NPL, 2014

[77] EU retained law - Directive 2011/92/EU

[78] The Town and Country Planning (Environmental Impact Assessment) Regulations 2017, SI 2011/571.

[79] The Infrastructure Planning (Environmental Impact Assessment) Regulations 2017, SI 2017/572.

160. The effects of noise on humans are usually the main consideration when assessing noise impacts. However, noise can also have significant direct or indirect effects on the environment, for example:

- Disturbance of wildlife – the effects on sensitive bird species or populations;

Table - Generic Scale of Noise Impacts on Fauna[80]

Effect	Description of magnitude of Impact	Significance of Effect (if required, particularly if the noise impact assessment is part of a formal EIA)
No reaction	No Impact	Not significant
Noise causes a reaction, either physiological or behavioural, but fauna returns to pre-exposure conditions relatively quickly and without continuing effects	Slight	Not Significant
Noise causes a reaction, either physiological or behavioural but cause more permanent changes that do not readily allow individuals or communities to return to pre-exposure conditions. Can include temporary nest abandonment.	Moderate	Significant
Noise causes demonstrable harm, either injury or death or causes situations such as permanent nest abandonment.	Severe	Significant

- The level and type of noise can have an effect on the character of a landscape or the setting of historic buildings/monuments; and

- Air overpressure from blasting activities can cause structural damage

161. The EIA process requires the following steps to be taken:

1) Scoping of issues to be addressed in the noise impact assessment;

[80] Guidelines for noise environmental impact assessment Version 1.2, IEMA, November 2014

Scoping is the process of identifying the content and extent of the Environmental Information to be submitted to the Competent Authority under the EIA process. Before undertaking a noise impact assessment, it is important that the assessor has a thorough understanding of the project and its context. This would involve:

- understanding the nature of the development and identifying the potential sources of noise;
- understanding the nature and character of the prevailing noise environment;
- identifying all the potential new noise sources that will arise from the proposals, during the construction, operation and, if appropriate, de-commissioning;
- understanding the nature of the new noise sources that will arise from the proposal, including such features as tonal characteristics, intermittency, duration and timing (diurnally and seasonally);
- identifying potential noise sensitive receptors; and
- understanding the policy context of the proposal, including central and local government policy, relevant international and national guidelines, British Standards etc.

Having considered these issues in the scoping process together with the outcome of consultation with relevant stakeholders, the noise assessor is then able to define the detailed scope of the assessment, or even, determine whether a noise study is necessary.

2) Understanding and description of the existing noise environment, including identification of sensitive receptors (baseline condition);

Baseline noise refers to the noise environment in an area prior to the construction and/or operation of a proposed (or new) development that may affect it.

Baseline noise levels may be required for different years. In many cases the year in which the study is carried out will be relevant and these baseline noise levels may be referred to as existing (or current). However, there may be occasions when baseline data are required for other years.

Baseline noise levels can serve several purposes in the assessment process:

- They provide a context for the noise levels predicted to arise from the proposed development.
- They may be required as a formal part of the noise assessment process.
- They may demonstrate that the noise environment is already unsatisfactory.

In order for baseline noise levels to fulfil any of these functions, they must be the values expected at the relevant time for the phase of the proposed development being considered. This may be at some future date either because the development will not be operational for several years or because its noise emissions will not be constant throughout its operating life.

For example, an industrial development may take several years to be planned, a year or more to be constructed and may be designed to have further production lines coming on stream in the years after it is first operating. In such circumstances different baseline years may be relevant for the construction and operating phases and neither of them will be the same as the situation at the time the assessment is conducted. Although it is possible to measure noise levels at the time an assessment is conducted, this may not be the relevant time for which the baseline noise levels are required. Baseline noise levels may therefore be determined by direct measurement, by prediction, or by a combination of these methods.

Sensitive receptors may include uses other than dwellings, and animals other than human beings. Normally, the objective is to identify those locations most sensitive to or likely to be adversely affected by the proposed development. (It should be noted that not all of these receptors would necessarily have the same degree of sensitivity). This variation would need to be taken into account during the assessment process. Possible receptors that may need to be considered when determining the baseline noise levels include:

- Dwellings;
- Schools / Colleges;
- Hospitals;
- Especially sensitive commercial / industrial installations;
- Commercial premises;
- Community facilities (including libraries, surgeries, health centres);
- Places of Worship;
- Retail premises;
- Open Air Amenities;
- Cemeteries;
- Light Industrial sites;
- Farms, kennels;
- Wildlife sites; and
- Vacant Land (Classify according to potential future use where possible. Consult planning consents, relevant planning strategies and similar local development documents, etc.)

"Open air amenities" covers a wide range of receptors and sensitivities. Sites such as those of special historic interest, nationally recognised footpaths and areas of landscape value should be considered as particularly sensitive[81].

3) Prediction of the noise expected to be generated by the proposed development;

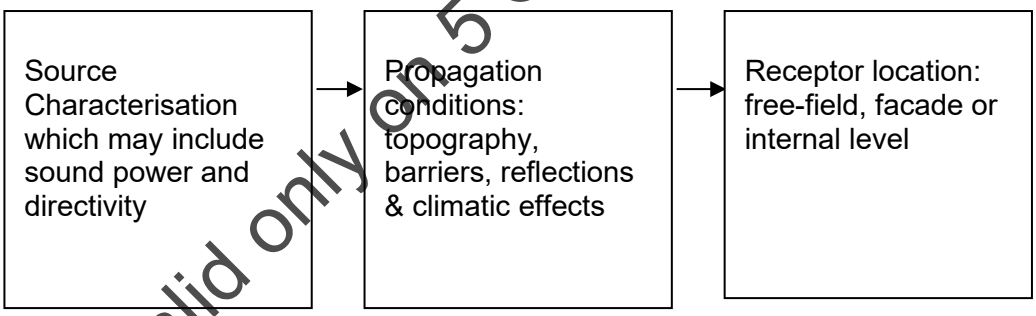
Prediction is a very important part of noise impact assessment. When a development is in the planning stage, it is the only way of quantifying the likely noise impact.

The prediction of noise for impact assessment requires consideration of both the way sound travels from source to receptor and analysis of the changing character of the noise during the various phases of the scheme to be assessed. Different predictions and prediction methods may be necessary during site preparation, construction, operation and decommissioning. For example, when planning for surface mineral working or waste disposal sites, consideration needs to be given to site preparation, fixed plant noise, mobile plant noise, site restoration and vehicle movements (both within the site and on the local road network).

Prediction Procedure

The basic prediction procedure involves consideration of the nature and noise level of the sources, the propagation along the paths between sources and receptors and the location of the receptors, as shown in the Figure below.

Figure - Source, Pathway, Receptor



Any noise prediction requires information about the sound power of the source or the sound pressure due to the source at a reference distance. The level of noise received from any source depends not only on the sound power frequency spectrum of the source but on the type and size of the source, the distance between source and receptor, the intervening topography and the climatic conditions, and on the location of the receptor. Consideration should also be given to whether the predictions are intended to give internal or external levels. If external levels are to be predicted, it should be decided whether they are to be the levels at a building facade or those free

[81] This category includes both nationally and locally designated sites, but might also include locations that are valued locally even though they have no formal designation.

from the influence of vertical reflecting surfaces near to the receptor (free-field). This will often be determined by the requirements of any formal modelling methods which may apply to the situation being assessed, relevant British Standards, other codes of practice and planning guidance which may exist. Reference should be made also to the discussion of receptors in, Baseline, for suggestions about the locations that should be included.

4) Assessment of the significance of the expected noise impact at the sensitive receptors that may be affected;

The ultimate aim of any noise assessment is to determine the effect of the expected change in the acoustic environment arising from the proposed development. Previous sections of this manual have described how information regarding the expected noise change can be acquired. The baseline and future noise levels at residential properties, schools, hospitals or in amenity areas will have been found, and it is from this and any other relevant information, that an overall conclusion regarding the significance or otherwise of the change in the acoustic environment must be drawn.

Table - Assessment Factors[82]

Factor	Issue
Averaging Period	Is the averaging time so long that it might mask a greater impact at certain times, or does the noise change occur for such a small proportion of the time that it can therefore be considered of little consequence?
Time of Day / Night / Week	Is the change occurring at a time that might increase or reduce its impact from that implied by the basic noise change?
Nature of the Noise Source	Is there a change in the nature of the noise source which might alter the impact?
Frequency of Occurrence	How does the frequency of the occurrence of the noise source affect the impact?
Spectral	Is there a change in the spectral characteristics

[82] Guidelines for noise environmental impact assessment Version 1.2, IEMA, November 2014

Factor	Issue
Characteristics	which might affect the impact?
Noise Indicator	Has the change which would be heard been correctly identified? (i.e. Does the change in level as described by the indicator used adequately detect the change that would be experienced by those exposed to it?)
Absolute Level (Benchmark)	How does the change relate to any applicable published guidance?

Table - Sensitivity of Receptor to Noise Level Exposure

	Large	Medium	Small	Negligible
Relative change	Greater than 10 dB(A) change in sound level	5 to 9.9 dB(A) change in sound level	3 to 4.9 dB(A) change in sound level	2.9 dB(A) or less change in sound level

To determine the overall noise impact the magnitude and sensitivity criteria are combined into a Degree of Effect matrix as shown in the Table below, with the corresponding effect descriptors in the Additional Table below.

Table - Degree of Effect Matrix

		Importance/sensitivity of receptor			
		High	Medium	Low	Negligible
Magnitude/scale of change	Large	Very Substantial	Substantial	Moderate	None
	Medium	Substantial	Substantial	Moderate	None
	Small	Moderate	Moderate	Slight	None
	Negligible	None	None	None	None

Table - Effect Descriptors

Very Substantial	Greater than 10 dB L_{Aeq} change in sound level perceived at a receptor of great sensitivity to noise
Substantial	Greater than 5 dB L_{Aeq} change in sound level at a noise sensitive receptor, or a 5 to 9.9 dB L_{Aeq} change in sound level at a receptor of great sensitivity to noise
Moderate	A 3 to 4.9 dB L_{Aeq} change in sound level at a sensitive or highly sensitive noise receptor, or a greater than 5 dB L_{Aeq} change in sound level at a receptor of some sensitivity
Slight	A 3 to 4.9 dB L_{Aeq} change in sound level at a receptor of some sensitivity
None/Not Significant	Less than 2.9 dB L_{Aeq} change in sound level and/or all receptors are of negligible sensitivity to noise or marginal to the zone of influence of the proposals

Cumulative and In-Combination Effects

Cumulative effects can be defined as:

”those that result from additive impacts caused by other past, present or reasonably foreseeable actions together with the plan, programme or project itself and synergistic effects (in- combination) which arise from the reaction between impacts of a development plan, programme or project on different aspects of the environment ”. [83]

There can be situations when separate, independent proposals are put forward at about the same time and which are going to impact on the same receptors. The various proposals need to be assessed independently, but, at some point, there should be liaison between the projects to consider the cumulative impact on the sensitive receptors of all the proposals. The cumulative impact is likely to be of concern for the local planning authority and, of course, those affected by the proposals are unlikely to differentiate between the noise from the different developments. They are simply going to perceive the total change to their noise environment should all the developments be implemented.

5) Identification of noise mitigation measures to reduce the noise impact;

[83] Guiding Principles for Cumulative Impact Assessment in Offshore Wind Farms, RenewableUK, June 2013.

The outcome of this step may mean that steps 3) and 4) will need repeating. The types of mitigation which might be employed may be classified, in order of importance and preference, as:

- Avoidance;
- Reduction; and
- Compensation.

For an industrial development, the first category includes the initial choice of plant or technology, which should be consistent with BAT[84] principles (Best Available Techniques). The site layout, building design and the operational management can also significantly affect potential noise impacts. Consequently, the initial avoidance of potential noise impacts and effects by plant selection, mode of operation and layout should be sought wherever possible.

Similar avoidance principles can be applied to transport developments, by careful selection of road or rail alignments to minimise the sensitive areas affected, or by careful location and route design for aviation developments. In addition for railways and airports, constraints could be placed on the noise generated by individual train units or aircraft either through the use of specific criteria or by making use of national or international noise emission standards.

Avoidance can also be achieved by:

- controlling the hours of operation,
- limiting the duration of operation,
- limiting the number of events, or
- limiting the number of different sources operating concurrently.

Reduction for industrial developments means adopting noise reducing methods such as enclosures, screening or fitting silencers to noisy plant. Such detailed acoustic/engineering design would normally be undertaken by a noise consultant or specialist engineer to achieve a given noise criterion or to minimise the noise impact.

The same principles can be applied to transport developments, with the use of landscaping or noise barriers for road and rail links or along airport taxi-ways, and the use of noise reducing surfaces on roads or resiliently mounted rails, rail dampers etc.

Compensation may include measures applied outside of the development area such as the fitting of double/secondary glazing to affected premises. In certain cases, legislation provides for financial compensation for the loss of value of properties affected by noise. It may also be possible to offer compensation in the form of the

[84] EU retained law - Directive 2010/75/EC.

provision of alternative or additional community facilities. Liaison with the relevant local authority or affected community groups might assist in identifying a suitable form of alternative compensation.

Residual Impact

This term effectively describes the resulting noise impact of the proposal that would remain once any mitigation has been implemented. The term 'residual impact' tends to focus on the adverse impacts that remain (rather than any beneficial effects) and its function is to ensure that the remaining adverse effects are not overlooked even if the overall conclusion is that the proposal produces a net noise benefit, or the scheme is permitted because of other economic or social benefits.

6) Monitoring of noise effects after development has been granted consent.

The need for on-going monitoring in addition to inspection both during and after project commissioning should be considered. The nature and extent of such monitoring will be dependent on the project scale, and the economic and practical limitations. However, such on-going monitoring is important to enable the detection of any degradation of the mitigation schemes occurring over time.

Noise prediction and assessment should be carried out using the established principles and guidance set out in Guidelines for noise environmental impact assessment Version 1.2, IEMA, November 2014.

162. Further general information on noise environmental impact assessment is set out in guidance[85] published by the Institute of Environmental Management & Assessment. Further information on EIA can be found in the ITM Chapter - EIA.

163. **Noise Assessment/Report -** The manner in which the noise impact assessment of a proposed development is reported is likely to depend on the nature of the project. For smaller projects the assessment is likely to be reported in a self-contained document. If, however, the assessment is part of a larger scheme that requires a formal EIA, the results are likely to form part of both the non-technical summary and the Environmental Statement (ES). It may also be necessary to present the results of the noise assessment in a form suitable for public consultation, possibly by way of displays or other easily accessible information.

164. The noise assessment report needs to provide a sufficient quantity and detail of information to satisfy the needs of those who will be making a decision regarding the overall merits and disbenefits of the proposal. For a small proposal it may be appropriate to include all relevant information in one document. However, for a large project or where noise is considered as part of an ES, a Technical Appendix may also be required. This would contain all the technical information that would not necessarily be required by the decision maker or stakeholders/members of the public but would assist people with a technical background to evaluate the noise assessment in more detail.

[85] Guidelines for noise environmental impact assessment Version 1.2, IEMA, November 2014.

165. The information that should be contained in the noise assessment report is set out below, together with a brief description of the scope of each topic:

Description of Project - This should consist of a description of the project but recognising that it is likely to have been described in detail elsewhere or by others. When that is the case, the project description in the noise report or Chapter should refer to those other documents for the general description and focus on the potential sources of noise.

Scope of the Noise Assessment - This should cover the potential noise impacts associated with the proposed development. It should include all potential noise sources, including those from any construction or de-commissioning element of the proposed development, on and off-site activities, and the area over which a possible impact could be experienced.

Standards and Other Guidance - This should describe the relevant standard(s) and other guidance document(s) that have been used in considering the noise impact of the proposed development. Full technical references to the documents should be included (e.g., title, author, publisher, and date).

Assessment Procedure - The method of assessment and relevance to the standard(s) or other guidance covered above, should be clearly stated, together with the noise indicators used. Where a criterion has been specially developed for a particular impact assessment then this should be described as required.

Description of Baseline - Qualitative descriptions of the existing area including noise sources should be included together with information about any relevant features that may affect the noise aspects of the potential development.

Noise Levels from Proposed Development - The results of the noise predictions will need to be presented in a form appropriate to the particular development. Predicted noise levels at specific locations where assessment is to be carried out will need to be included. Separate predictions will normally be required for different phases of any construction or de-commissioning elements of the proposed development.

Impact Assessment - The noise impact should be described by considering the baseline noise levels, the predicted noise levels and the method of assessment and criteria that were described in the preceding Chapters, including any mitigation that has been incorporated in the proposals. A summary of the severity of impact should be included here for all receptor locations defined within the Scope Chapter. When the scale or complexity of the proposals merit it, noise impacts should also be shown on a plan, and would probably take the form of coloured bands showing the impact descriptor, or noise contours, depending on the assessment methodology adopted.

Mitigation - This Chapter should describe the mitigation measures that will be incorporated in the development together with their likely effectiveness. An indication should be given of the scope for further mitigation which could have been included to reduce further the potential impact, and why it has been rejected. The practical, economic and other implications associated with such mitigation should be described.

Conclusions - The conclusions should summarise the results of the impact assessment, their relevance to existing standards, criteria or other guidance, together with proposed measures to ensure that the described impacts are not exceeded. The conclusion should include commentary about the overall severity or otherwise of the noise impacts once all these factors have been taken into account.

Technical Appendix - if it is appropriate to produce a Technical Appendix, it should contain any relevant additional information that would aid a more detailed evaluation of the noise assessment report by a technically competent person.

Public Consultation - Although the noise impact assessment report or environmental statement would usually be made available to interested members of the public, it may also be necessary to provide information for a public meeting or to be displayed at council offices or other public buildings. The results of the noise assessment should be presented in this case in an easily accessible form.

166. **Defining main issues** – noise is likely to be a main issue in the planning, transport and environmental casework types outlined in section 6 and needs to be treated as such when assessing the case and drafting the decision letter or report due to the very often contentious (though highly subjective) nature of many noise issues arising. Advice on defining the main issues can be found in 'The approach to decision-making' ITM Chapter.

Example decisions

Planning casework:

167. **APP/A3010/W/15/3131556** – S78 Appeal against refusal to grant planning consent for proposed new dog kennels and associated change of use to operate dog boarding kennels. The main issue in this case was the effect on living conditions of neighbouring occupiers with regard to noise and odour, in particular noise from dogs barking, vehicles and pedestrians visiting the site, which is within a rural village. The appellant submitted a noise assessment, to take account of background noise (but only for 2hrs) in the daytime on one day only, not in the evenings or weekend, when disturbance is more likely. Noise emission levels were based on the Councils SPD (which had not been adopted by the Council and is not part of any national guidance); there was no assessment under BS 4142:2014, enabling effects on people to be fully assessed. The appellant intended to erect acoustic fencing and insulation, but without adequate noise assessment, their effectiveness could not be assessed. Inspector concluded that the evidence fails to demonstrate that the proposal would not cause harm to living conditions of the neighbours; the appeal was dismissed.

168. **APP/P4605/W/18/3217413** – S78 Appeal against refusal to grant planning consent for change of use of a building from office use (class B1(a)) to 21 no. residential apartments (class C3). The main issue in this case related to the effect of noise from nearby commercial premises (live and recorded music premises) on the future occupiers of the proposed development and the compliance with paragraph 182 of the NPPF (paragraph 187 of the revised NPPF). The Inspector concluded that regardless of whether the mitigation for future occupiers addressed the internal noise climate, the mitigation proposed is compromised by the actions (opening of windows) of a third party (the future occupiers), which is beyond the control of either the appellant of the LPA and would therefore not adequately address the effect of noise from the nearby commercial premises. The development would therefore conflict with the requirements of the NPPF to ensure that new development can be effectively integrated with existing businesses and community facilities; that where the operation of an existing business would have a significant effect on new development nearby, suitable noise mitigation is provided as part of the development; and that new development provides a high standard of amenity for future occupiers.

Enforcement casework:

169. **APP/H5390/C/15/3124727** – S174 Appeal against breach of planning control [non-compliance with conditions on previous permission – in accordance with approved drawings (cond. 2) and audibility of amplified sound emitted from commercial part of the building (cond. 6)] – development was COU to fitness studio with ancillary retail use. One of the main issues related to noise and vibration disturbance on the neighbouring occupiers, following complaints made to the Council. Remedial measures were undertaken by the appellant, including additional insulation, noise management plan and use of a sound limiter during certain classes, set to 81 dB(A) which appeared to resolve the issues. As the Council refused to withdraw the Notice in case of future problems, it was agreed that condition 2 be withdrawn and condition 6 be altered to include maintenance of the remedial measures on the proviso that if these were not adhered to the use of the premises as fitness studio (for certain activities) should stop. The appeal was allowed, the notice quashed, and planning permission to include new condition 6.

Transport casework:

170. **DPI/H5960/13/21 – TWA Application for Line Extension Order by London Underground**, (LPA - LB Wandsworth). Application for the construction and operation of 3.2km extension to Charing Cross Branch of the Northern Line (NLE) from Kennington to a new station at the site of the disused Battersea Power Station. Noise and vibration impacts of the NLE during construction and operation were a major issue in this case. The Inspector recommended and the SoS agreed that the noise levels experienced from the operation of trains on the NLE would be below the NOEL and therefore acceptable; there should be no effect in terms of vibration (IR 8.79, 9.15). During construction the effects would be intrusive (even with BPM), but taking into account the controls that would be in place e.g. Code of Construction Practice (CoCP) and proposed planning conditions, the residual impacts would be acceptable (IR 8.94, 9.13-14).

171. **DPI/W2275/10/05** – **Multiple Trunk Road Orders & Detrunking Order, Side Road Order, Slip Road Order and Compulsory Purchase Order** for A21 Improvements Scheme (Tonbridge to Pembury) under the Highways Act 1980 and Acquisition of Land Act 1981. Various objections were raised in relation to increase in noise levels – Inspector concluded that most objections were unfounded. The scheme includes various acoustic barriers and use of low noise road surfacing to mitigate noise at sensitive receptors.

172. **DPI/U3100/10/12** – **TWA Rail Improvement Order and Exchange Land Certificate**, Chiltern Railways (Bicester – Oxford Improvements). Application under TWA 1992 for Chiltern Railways (Bicester to Oxford Improvements) Order made under s1 & 5 of the Act; a direction for deemed planning permission for development in the Order issued under s90(2A) of the 1990 Act. Issues concerning noise and vibration were raised – Inspector concluded (SoS agreed) that the scheme would have acceptable effect on local residents, providing the Code of Construction Practice was followed and appropriate Noise and Vibration mitigation used – this was secured by condition.

Minerals casework:

173. APP/H090/A/13/2201261 & 2201262 – s78 appeals by Tarmac Ltd against refusal of planning permission for extraction of sand and gravel without complying with condition on previous permission; additional soil storage bund without complying with previous condition. Noise and vibration from filling of trucks, revving of vehicles and use of

heavy plant (for screening/crushing) affecting residents was a major issue. An ES noted that the topography and vegetation in the area provides acoustic screening and noise mitigation. The Minerals PPG seeks to ensure that noise from minerals sites at sensitive sites does not exceed 55dB(A) or +10dB(A) more than background during 07.00-19.00hrs, but allows up to 70dB(A) for eight weeks a year (for particularly noisy short-term activities such as soil stripping or removal of soil storage mounds). The Inspector imposed noise conditions and restricted hours of operation as agreed at the inquiry.

National Infrastructure casework:

174. **TR010002** – **DCO application under s37 of the Planning Act 2008** for proposed A556 (Knutsford to Bowden Improvement) DCO. Order granting construction of 7.5km improvement of the A556 trunk road between M6 Junction 19 nr Knutsford and the M56 Junction 7 nr Bowden, Greater Manchester. The examining Inspector recommended the order be granted, SoS for Transport agreed – Development Consent Order granted. Main issues - Noise and vibration impacts, air quality and emissions, alternative schemes, biodiversity impacts, flood risk, water quality and resources, dust, pollutants and lighting and other impacts. Noise impacts were assessed as in the short and longer term there will be a perceptible increase in noise for a number of nearby dwellings, but with the substantial mitigation measures proposed the project would see a net benefit in terms of operational noise.

Annex A - Noise Conditions

Introduction

As with any other conditions, noise conditions need to adhere to the tests referred to in paragraph 56 of the NPPF and the Use of Conditions PPG paragraphs 003[86]. In particular noise conditions need to be **precise** and **enforceable**. Considerations when drafting or assessing suggested noise conditions include:

i) General Considerations:

- If a noise limit is proposed, is it achievable or would it effectively negate the permission?
- Does a single measured exceedance of a limit constitute a breach?
- What happens in the event of non-compliance?
- If works are required, are they proportionate to the development?
- If restrictions to operations are necessitated would the operation become unprofitable?
- If conditions necessary to protect amenity are such as to warrant the continued operation untenable, should permission for the proposal have been granted?
- Conditions in general, but particularly noise limits should not conflict with those imposed on a development by other regulatory regimes, e.g. conditions on an Environmental Permit under the Environmental Permitting regime[87].

ii) Particular Considerations:

- Is a noise limit condition essential or can practical measures avoid this need?
- Who is responsible for assessment – can they access the compliance point(s)?
- Can the measurement be made – is the required level too low? what are the potential interferences?
- Does treatment of interferences need to be included e.g. weather, birdsong? Or does the methodology incorporate standard procedures to deal with such matter as in BS 4142?

[86] Paragraphs 30-49 of the Conditions ITM Chapter provides more detail on the 'six tests'.

[87] see Environmental Permitting ITM Chapter for further guidance.

- How onerous are the monitoring requirements – will they be prohibitive?
- Is the methodology clear? Uncertain interpretation may affect expedience.
- Is the methodology contained in a BS, ISO or other standard? If so, specify the year and do not allow inclusion of 'successors'.
- word conditions clearly to explicitly distinguish between external noise sources and transmission of sound/vibration from sources within the building.

The PINS Suite of Suggested Planning Conditions contains various conditions related to noise issues and can be used as a starting point to consider and amend, if appropriate, to the particular circumstances of the case. Conditions should not of course come as a surprise to the parties. Special care is necessary to ensure that the appropriate noise indices/descriptors are properly used. The suggested noise planning conditions are reproduced below for convenience:

Noise – music restriction (20) –

Amplified or other music may only be played in the premises between the following hours: <listnonumbernospacebefore>[1100 - Midnight] Mondays - Fridays <listnonumbernospacebefore>[1100] Saturdays - [0100] Sunday mornings <listnonumbernospacebefore

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Noise – location restriction (89) –

[**] shall not take place anywhere on the site except within building(s).

The condition should describe precisely the activities to be controlled as well as the particular building(s) in which they are to take place.

Noise – insulation of building (90) –

The building shall be [constructed/adapted] so as to provide sound insulation against internally generated noise of not less than [**] dB(A), with windows shut and other means of ventilation provided. The sound insulation works shall be completed before the use of the building begins and retained thereafter.

Noise – level of noise on the boundary (91) –

The level of noise emitted from the site shall not exceed [A] dB LAeq [X], between [1100 and 2300 Monday to Friday] and [A] dB LAeq [X], at any other time, as measured on the [specified boundary/boundaries] of the site at [location(s) of monitoring point(s)].

Specify: A = noise level expressed as LAeq, T over a time period X (e.g. 1 hour). T = time of day.

Noise – hours of operation (92) –

No [specified machinery] shall be operated on the premises before [time in the morning] on Mondays to Fridays and [time in the morning] on Saturdays nor after [time in the evening] on Mondays to Fridays and [time in the evening] on Saturdays, or at any time on Sundays or on Bank or Public Holidays

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Noise – insulation of plant/machinery (93) –

Before [any] [specified plant and/or machinery] is used on the premises, it shall be [enclosed with sound-insulating material] [and] [mounted in a way which will minimise transmission of structure-borne sound] in accordance with a scheme that shall first have been submitted to and approved in writing by the local planning authority. The measures implemented as approved shall be retained thereafter.

Advice should be included in the reasoning to justify the sound insulation required, or the maximum permitted noise level at a specified monitoring point

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Noise – submission of scheme & implementation (94) –

Construction work shall not take place until a scheme for protecting the proposed [noise-sensitive development] from noise from the [**] shall have been submitted to and approved in writing by the local planning authority. All works which form part of the scheme shall be completed before [any part of] the [noise-sensitive development(s)] is occupied and retained thereafter.

Reasoning should justify any guidance on the maximum noise levels to be permitted within or around the noise-sensitive development so as to provide precise guidelines for the scheme to be permitted.

Noise – hours of operation (95) –

[specified machinery] shall be operated on the premises only between the following hours: <listnonumbernospacebefore>[** - **] Mondays - Fridays <listnonumbernospacebefore>[** - **] Saturdays <listnonumbernospacebefore>and shall not be operated at any time on Sundays or on Bank or Public Holidays.

Noise – protection of individual dwellings (96) –

The building envelope of plot no[s]. [**] shall be constructed so as to provide sound attenuation against external noise, not less than [**]dB(A), with windows shut and other means of ventilation provided. The sound attenuation works shall be completed before the dwelling[s] are occupied and be retained thereafter.

Noise – removal of industrial PD rights (97) –

Notwithstanding the provisions of Article 3 of the Town and Country Planning (General Permitted Development) (England) Order 2015 (or any order revoking and re-enacting that Order with or without modification), no further plant or machinery shall be erected on the site under or in accordance with part 7 of Schedule 2 to that Order.

Annex B - Noise Considerations for Wind Turbines

Introduction

With the number of onshore wind turbines and the increase in size of each turbine, an increasingly common issue arising in wind turbine proposals is noise, the main types being from either the 'swish' of the blades through the air (Amplitude Modulation) or low frequency hum/vibration from the drive train or the generator in the nacelle, which is located behind the rotor hub. These two types of noise can be categorised as aerodynamic and mechanical respectively and can have potentially detrimental effects on nearby properties if poorly located, by e.g. sleep disturbance and are therefore a material consideration in the decision-making process regarding applications and appeals.

Noise emissions from turbines are generally low i.e. between 35-45 dB(A) at about 300-400m from the turbine[88], so generally not significantly above background noise levels. This Annex aims to describe the types of noise that can occur from wind turbines where complaints may arise, how assessment of noise is presented using ETSU-R-97; circumstances that can affect noise issues, together with mitigation techniques and use of appropriate planning conditions.

Types of Wind Turbine Noise

Aerodynamic Noise

A study from 2005[89], which looked into localising and quantifying noise sources from wind turbines concluded that: These results clearly show that, besides a minor source at the rotor hub, practically all noise (radiated to the ground) is produced during the downward movement of the blades. The noise is produced by the outer part of the blades (but not by the very tip)…. Aerodynamic noise, generally the major noise source from modern wind turbines originates from the flow of air around the turbine blades. The 3 main mechanisms of aerodynamic noise production are outlined in a Defra commissioned report from April 2011[90] and are listed as Low Frequency Noise; Inflow Turbulence Noise and Airfoil Self Noise. The frequency of the noise generated depends on the size of the turbulent eddies – large producing low frequency noise; small eddies producing higher frequencies, which do not contain a distinguishable tone and is of a random character as in e.g. white noise. The dominant character is the 'swish' as the sound level fluctuates in a cycle of increased and reduced sound level, occurring at a rate of 1-2 times every second. This blade 'swish' is known as Amplitude Modulation of aerodynamic noise or AM and potentially could alter the noise level by up to 3-5 dB(A) in each blade rotation. AM noise generation is affected by primarily the rotor tip speed, but also the wind speed and wind shear.

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[88] Dependant on the size of blades (can range from 1 – 80 metres), wind speed/direction, atmospheric factors & model of turbine. Most modern proposals are three-bladed, horizontal-axis turbines.

[89] Localisation and quantification of noise sources on a wind turbine, Wind Turbine Noise: Perspectives for Control, Oerlemans S, Lopez BM, Oct 2015.

[90] Wind Farm Noise Statutory Nuisance Complaint Methodology, prepared for Defra by AECOM, April 2011.

In the past few years research into AM has shown that there are other types of AM, so blade swish is now also known as Normal AM (NAM). AM that exhibits behaviours outside of NAM is known as Other AM (OAM), some of this research has shown that the cause of OAM is most likely from partial blade stall, where 'thumping' or 'whoomphing' is heard. There is also Enhanced AM (EAM), where periods of increased swish or thumping have been reported, which may increase the noise level by up to 10 dB(A). There is currently ongoing research into all forms of AM by e.g. Institute of Acoustics (IoA), Defra and Renewable UK, therefore any evidence presented will need to be treated with caution. It seems that OAM is heard at nearer the turbine(s) and OAM/EAM is heard at large distances from turbine(s).

Mechanical Noise

Arising from the movement of mechanical parts in the nacelle; sources of mechanical noise are: the gearbox; generator; yaw drives; cooling fans and auxiliary equipment, e.g. hydraulics. Noise generated is similar to that from other rotating machinery and occurs through the transmission of vibration into the structure of the turbine, which radiates out as airborne noise. It should be noted that in modern turbines mechanical noise has been dramatically reduced to the extent that it has been more or less eliminated as a problem. However, increases in mechanical noise can occur through faults and wear & tear of e.g. bearings within the gear box/generator, worn gear teeth or misalignment of the generator drive shaft.

Noise Assessment

Introduction

The rise of wind turbine proposals, primarily in order to help meet the Renewable Energy targets, together with the reported complaints regarding noise emissions from turbines led to the formation of a standardised methodology for the assessment of noise from wind turbines/wind farms in order to provide indicative noise levels which would offer reasonable protection to residences near wind turbines and encourage best practice in turbine design and layout.

ETSU-R-97

A working group[91], facilitated by DTI produced a report in September 1996, which described a framework for measurement of noise from primarily wind farms and gave indicative noise levels, which would offer a level of protection to nearby residents without placing unreasonable restrictions on development. Although the report[92] is not a Government report, but the common views of noise experts, it was and still is the view of Government that this methodology should be used when assessing and rating noise from wind turbine proposals[93]. Paragraph 015 of the current PPG on Renewable and Low Carbon Energy endorses the use of ETSU-R-97 and any supplementary guidance to it in assessment of

[91] Energy Technical Support Unit (ETSU)

[92] The Assessment & Rating of Noise from Wind Farms [ETSU-R-97], DTI, 1997

[93] Paragraph 015 - Renewable and Low Carbon Energy PPG, DCLG, March 2014

impacts of wind energy development. Both ETSU-R97 and supplementary guidance can be considered a material consideration when determining wind turbine casework.

The method of assessment is broadly based on principles in the then existing standards and guidance for noise emissions; in particular BS4142 and in relation to night-time noise limits the WHO Environmental Health Criteria 12: Noise (i.e. between 2300–0700hrs) from 1980, where a level of 35 dB(A) is recommended to preserve the restorative process of sleep – it should be noted that these have been revised and updated since 1996. In summary the ETSU noise assessment procedure is as follows:

- Predict noise levels from all turbines (existing and proposed) at the nearest receptors;
- Determine a study area;
- Identify potentially affected properties;
- (If required) Undertake a measurement survey consisting of simultaneous measurement of background noise levels at representative properties with wind speed and direction at the proposed turbine site;
- Analyse the data to remove rain affected and atypical data, and derive the noise limits for the scheme;
- Update noise predictions & assess compliance with the noise limits for a candidate turbine, and provide design advice if compliance with the limits is considered unlikely.

The purpose of the procedure above is to set out the noise data required and the analysis needed to allow a decision-maker to assess the proposals compliance with the guidance for noise limits set out in ETSU-R-97. Limits are based on background noise, measured as L_{A90}, which can be very low in rural areas. However, but both background and turbine noise varies with wind speed, so limits need to reflect this. Noise limits apply to the *total* wind turbine noise as a receptor and are specified as follows:

Daytime amenity hours:

- Evenings (1800-2300);
- Saturday afternoons (1300-1800);
- Sundays (0700-1800)

- 5 dB(A) above background
- Lower cut off of 35-40 dB(A)

Night-time (2300-0700)

- 5 dB(A) above background
- Lower cut off of 43 dB(A)

In addition, the guidance recommends that where the occupier of a property has some **financial involvement** in the proposed wind turbine/farm the limits shall be:

Financial involvement

- 5 dB(A) above background
- Lower cut off of 45 dB(A)

but there is no guidance about what would constitute such involvement or how it should be specified in a planning condition with the necessary precision

For **single turbines and wind farms with very large separation distances** between the turbines and nearest residences the limits shall be subject to a simplified assessment[94]:

Simplified assessment

- Flat 35 dB(A) limit
- No need for monitoring

The Actual value chosen within the 35-40 dB range depends upon three factors which require judgment:

- The number of dwellings in the neighbourhood of the wind farm;
- The effect of noise limits on the number of kWh generated; and
- The level of exposure

For wind farms the Appellant will usually have carried out an assessment based on predicted noise levels for a candidate turbine and the recording of background noise levels at the nearest dwellings at different wind speeds to ensure that ETSU limits can be complied with.

Paragraph 2.7.58 of EN-3 provides that where the correct methodology has been followed and a wind farm shown to comply with ETSU-R-97 recommended noise limits, the decision maker may conclude that it will give little or no weight to adverse noise impacts from the operation of the wind turbines.

Notwithstanding the advice in ETSU-R-97, there may be a case in some circumstances for imposing the same lower fixed limit at night as in the day. Such a restriction might accord with paragraph 180 a) of the Framework and the NPSE, which aims to minimise adverse impacts on the quality of life arising from noise. This could also accord with the PPG in relation to the impact of noise on those affected, which includes as a relevant factor, that some types of noise will cause a greater adverse effect at night than if they occurred during the day because people tend to be more sensitive to noise at night as they are trying to sleep.

[94] Where wind speed is up to 10 m/s at 10m height or above 10 m/s in sheltered areas.

Supplementary Guidance

The Government commissioned the Institute of Acoustics (IoA) to take forward the recommendations of the Hayes McKenzie report[95], which set out potential problems in how LPAs dealt with noise assessments from wind turbine proposals. Problems highlighted included – the structure and presentation of noise assessment reports; the variations in ways some factors are taken into account in noise assessment and interpretation of ETSU-R-97 e.g. from differing approaches to background noise measurement to suggesting that background noise measurement is not required until planning consent is granted. Some variation was also found in the prediction methodology[96]. Wind shear and modulation correction/penalties were also not included in many cases, however it should be noted that ETSU-R-97 does not address these issues[97]. There is currently no agreed methodology to address modulation issues, although Renewable UK have published advice and suggested condition for AM[98] – further research is being carried out by the IoA and others to formulate an appropriate threshold for AM.

The IoA Good Practice Guide[99] was published in May 2013, following extensive consultation. The aim of the guide is to set out what is currently considered good practice in the application of ETSU-R-97 assessment methodology for all wind turbine developments above 50kW. The guide covers technical matters of acoustics which the IoA believe represent current good practice in the assessment of noise from wind turbines, to enable a decision maker to make an informed decision when assessing compliance with ETSU-R-97 guidelines. The guide does not endorse the noise limits set as this is a matter of Government policy. The good practice guide and the six accompanying supplementary guidance notes (SGNs), which provide additional issue specific information e.g. data collection; wind shear and sound power level data, for undertaking wind turbine noise assessments will be referred to in wind turbine appeal submissions and at events and as mentioned above should be considered a material consideration. Throughout the guide there are useful Summary Boxes, which highlight the main points in the text, there is also a glossary of terms used and an example planning condition aimed at large-scale onshore wind farm proposals – see below.

The IoA has also published its preferred methodology for measuring and rating amplitude modification in wind turbine noise in the final report from their Amplitude Modification Working Group (AMWG). Their Reference Method involves the following stages:

[95] Analysis of how noise impacts are considered in the determination of wind farm planning applications (HM: 2293/R1), Hayes McKenzie, April 2011.

[96] A method for noise prediction at the nearest properties is not described in ETSU-R-97. This is covered in chapter 4 of the IoA Good Practice Guide.

[97] Wind shear factors were addressed in the IoA Acoustics Bulletin article and the Good Practice Guide SGN 4.

[98] Template Planning Condition on Amplitude Modulation: Noise Guidance Notes, Renewable UK, December 2013.

[99] A Good Practice Guide to the application of ETSU-R-97 for the assessment and rating of wind turbine noise, IoA, May 2013.

Noise is measured in short1term, 1001millisecond LAeq values in 1/3-octave bands. Three frequency ranges or bands are evaluated: 50 - 200 Hz; 100 - 400 Hz and 200 - 800 Hz, and the results which exhibit the highest resulting levels of AM are used;

The fundamental length of input sample to be assessed (the minor time interval) is 10 seconds;

The hybrid reconstruction method is used to determine the AM value for each 10 second value;

The values of AM measured by the metric in each 101second interval are aggregated over a 101minute period (the major time interval) to provide a single value which is the AM rating for the 10 minute period.

Cumulative issues – ETSU-R-97 and the good practice guide deals with cumulative issues. Page 58 of ETSU-R-97 states 'that absolute noise limits …above background should relate to the cumulative effect of all turbines in the area that contribute to the noise received at the affected properties'. A HMP report stated that 'if an existing wind farm has permission to generate noise up to the ETSU-R-97 limits, noise limits set at any future nearby wind farm would have to be at least 10dB lower than that set for the existing wind farm to prevent breaching the ETSU-R-97 limits'. The IoA guide suggests a more detailed analysis on a case by case basis and recommends a cumulative noise impact assessment be carried out if a proposed wind farm is likely to produce noise levels within 10dB of any existing wind farm in the locality at a given receptor location. If it is predicted to be greater than 10 dB (but compliant with ETSU-R-97 in its own right) then an impact assessment is not necessary. The guide suggests additional means of resolving cumulative noise issues, such as strategic approach to planning to allow for 'headroom' i.e. using lower limits than ETSU-R-97 or apportioned limits for each wind farm, negotiation between wind farm developers on reviewing original limits and apply to alter relevant conditions. Cumulative conditions could be applied, whereby if noise limits increase from an existing wind farm, any noise levels from a second nearby wind farm will have to reduce.

Buffer Zones and Separation Distances – The PPG states that LPAs should not rule out otherwise acceptable RE developments through inflexible rules on buffer zones or separation distances. Noise varies with local topography, size and make of turbine. An acceptable separation distance for noise purposes is addressed in ETSU-R-97 at page 46, where it states that separation distances of 350-400 metres cannot be relied upon to give adequate protection to properties near wind farms.

Noise Policy Statement for England (NPSE) - Principles set out in The Noise Policy Statement for England (NPSE)[100] should also be taken into account and needs to be considered on a case by case basis because its aims are within the context of Government policy on sustainable development. The application of the NPSE should enable noise to be considered alongside other relevant issues and not in isolation e.g. the positive benefits of

[100] Noise Policy Statement for England (NPSE), Defra, March 2010

wind turbines need to be considered alongside the environmental (and health) impacts of noise.

Mitigation Measures – for modern turbines as mentioned above the predominant noise source is from the trailing edge of the blades. This can be reduced by adopting various design options e.g. blade add-ons to improve blade performance e.g. vortex generators or trailing edge serrations, which also reduce noise, 'smart' blade control strategies and alterations to blade shape – planform, airfoils etc. Another option is to run the turbine in Low Noise Mode (i.e. running at reduced rotational speed, resulting in lower power output and consequently lower noise output – this will obviously affect the economic performance of the site.).

Planning Conditions

As always conditions need to be justified and adapted to particular circumstances. Noise conditions for wind farms are complex and much will depend on the evidence adduced and form of suggested conditions, which should be informed by the approach set out in ETSU-R-97. Suggesting model conditions is problematic as the Hayes McKenzie report highlighted a number of different interpretations of ETSU and variations in prediction methodology. It suggested that guidance on best practice could usefully be more prescriptive on the approach to background noise measurements and interpretation of data, since this not only forms the basis of any assessment but is likely to determine the noise limits used in any eventual planning conditions.

The use of ETSU-R-97 'simplified' approach - The ETSU 'simplified approach' provides that if the developer can demonstrate that noise conditions [presumably the lower absolute limits suggested in ETSU which are $L_{A90,10min}$ 35-40 dB day-time and 43 dB night-time] would be met even if there was no increase in background noise until quite high wind speeds, then a simplified approach can be adopted that if the noise is limited to an $L_{A90,10min}$ of 35 dB(A) up to wind speeds of 10 m/s at 10 m high then this condition alone would offer sufficient protection of amenity, and background noise surveys would be unnecessary. This might be suitable for small wind turbines where full noise assessments are not submitted. A condition to achieve this might be along the lines of the following [condition 115 – PINS suite of suggested conditions, October 2015]:

The level of noise emissions from the turbine(s) hereby permitted when measured in free field conditions at the boundary of the nearest noise sensitive receptor which lawfully exists or has planning permission for construction at the date of this planning permission, or measured closer to the turbine(s) and calculated out to the receptor in accordance with a methodology previously approved in writing by the local planning authority, shall not exceed 35 dB $L_{A90,10min}$ up to wind speeds of 10 m/s measured at a height of 10 m above ground level at a location near to the turbine(s). All instrumentation and methodology, along with specified positions, for all measurements of noise and wind speed, shall have been previously approved in writing by the local planning authority.

IoA Good Practice Guide condition for larger-scale wind development – Annex B of the IoA Guidance on ETSU-R-97 sets out an example condition with attached guidance notes, the form of which has been the basis for noise control at several larger-scale UK wind farm developments at recent planning appeals. Conditions which are more concise may be acceptable, for smaller proposals in particular.

Renewable UK Template Planning Condition on Amplitude Modulation – published in December 2013, this alternative template condition is intended to be read in conjunction with the 'Example Planning condition' set out in Annex B of the IoA Good Practice Guide,

contains some alterations, with specific reference to application of penalty components for Amplitude Modulation.

Example Wind Turbine decisions involving noise

APP/F2605/A/12/2185306 – s78 T&CPA 1990 recovered appeal by Ecotricity (Next Generation) Ltd for two wind turbines [max. height of 100m] at Wood Farm, Church Lane, Shipdham. Inspector recommended dismissal, SoS agreed – appeal dismissed. Main issues – acoustic effects: findings of the noise assessment (tranquillity, amenity and noise, effects on health and elderly people, weight given to noise impacts); visual amenity, effect on listed buildings.

DPI/A0655/11/13 – S36 Electricity Act 1989 application by Peel Wind Farm (Frodsham) to SoS for nineteen wind turbines [max. height 125m] at Frodsham Canal Deposit Grounds, Cheshire, Inspector recommended consent be granted, SoS DECC agreed – application approved. Main issues – impact of the noise from the development on local amenity, govt's policy on energy mix; impact on the Green Belt, visual impact, impact on wildlife, impact on scheduled ancient monument, COMAH regulated sites, impact on radar. Conditions attached contain requirements similar to model conditions in Annex b of the IoA Good Practice Guidance.

Case Law involving wind turbine noise

Greaves v Boston Borough Council;

Date: 25 November 2014; Ref: [2014] EWHC 3590 (Admin)

In dismissing a claim by the owners of a property in Lincolnshire that Boston Borough Council had imposed an unenforceable condition which sought to limit noise emissions from a wind turbine, the High Court also held that they no longer had any legal standing to bring the challenge.

The condition stated that noise arising from the turbine should not exceed a specified level above background noise. However, the claimant asserted that it was not enforceable because in practice it was impossible to accurately measure individual noise levels over a specified five-minute period as required by the condition. In response the council stated that by the time of the court hearing the claimant had sold their house and had no legal standing to bring the challenge.

Mr Justice Dove stated that the approach to interpreting planning conditions should be benevolent and not overly narrow and strict. The fact that the condition was technical in nature was not fatal to its interpretation and enforceability since it was common for experts in the field of noise to be involved. Although the condition did not stipulate at what height noise measurements should be taken, their absence left the matter to good sense and professional judgement. It did not mean that the condition was hopelessly vague as to be incapable of being interpreted. In any event the judge also concluded that after the sale of the house the claimant had no legal basis for pursuing the challenge because he had no vested interest in the operation of the turbine.

Joicey v Northumberland County Council

Date: 7 November 2014; Ref: [2014] EWHC 3657 (Admin)

The High Court has considered a claim for judicial review of a planning permission for a wind turbine. A farmer applied for planning permission for a wind turbine on his farm. He

commissioned a noise assessment to support his application. The council only uploaded the noise assessment to their website the day before the planning committee meeting, which was in breach of their statutory duties under the "right to know" legislation.

The noise assessment assumed that the farmer's tenants had a financial involvement in the wind turbine, as the properties they occupied were owned and controlled by the farmer. As a result of this perceived financial involvement, the noise assessment based its calculations on higher permitted noise levels. This was an incorrect interpretation of "financial involvement".

This judgment has ramifications for the application of ETSU-R-97's guidance on financial involvement of 'wind-farm neighbours' and the application of noise limits at the 'nearest noise-sensitive properties'. In particular, the judge made a distinction between 'occupiers' and 'residents' at the nearest noise-sensitive properties, finding 'occupiers' to be the crucial term here and, further, that 'owners and tenants would be occupiers. Ordinarily, someone in a holiday let would be the occupier of premises, even if only for a few days'.

The judge found that a modest sum reducing rent or electricity costs did not make an occupier financially involved, particularly if the sum was compensatory rather than profitable for the occupier. However, the judge found that as a matter of planning judgment, the developer, and in turn the Council, had been entitled to conclude that the ETSU-R-97 financial involvement limits were applicable to a property owned and occupied by a party/parties with a clear financial return from the wind farm and to other properties owned by that party/those parties for letting out for short periods as holiday lets.

However, a further property owned by the applicant for the scheme had been incorrectly assessed for these purposes. Stressing that ETSU-R-97 referred to occupiers having the financial involvement, the judge noted that the applicant's tenants would not have a financial involvement by virtue of the applicant's own financial involvement.

Hulme v SoS for Communities and Local Government

Date: 26 May 2011; Ref: [2011] EWCA Civ 638

The Court of Appeal considered the meaning of two planning conditions relating to the levels of turbine noise from a proposed wind farm. The planning conditions set out what noise levels would be regarded as greater than expected and required the developer to submit a scheme designed to measure the levels. However, there was no express prohibition against the noise exceeding these levels.

The court held that it was plainly the intention that the noise levels could be enforced in some way and that the conditions should be construed as imposing an obligation on the developer to comply with them. The Court of Appeal saw this as a matter of construction, rather than an implied condition.

This case demonstrates the need for planning conditions to be unambiguous and clear on the face of the permission to avoid the uncertainty and possible challenges that arose in this case.

The Planning Inspectorate

Permission in Principle

Updated to reflect 2023 Framework (NPPF)?	Yes

What's new since the last version

Changes highlighted in yellow made May 2022:

- Update to Paragraph 22 to clarify the stages at which statutory provisions relating to certain heritage assets apply

Contents

Contents

Introduction

1. National Planning Practice Guidance (PPG) has comprehensive information covering *Permission in Principle* and *Brownfield Land Registers*. This Inspector Training Manual (ITM) chapter provides a concise overview of the relevant legislation and guidance, and advice on how to deal with permission in principle appeal casework. Inspectors should make themselves familiar with the relevant legislation and guidance before determining any appeals.

2. It should be noted that neither 'PiP', nor 'PIP' are recognised as accepted abbreviations, and Inspectors should refer to 'permission in principle' in their decisions. It is not necessary to capitalise the term.

3. 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

Information Sources

Legislation

Housing and Planning Act 2016[1]

Town and Country Planning (Permission in Principle) Order 2017

The Town and Country Planning (Permission in Principle) (Amendment) Order 2017

The Town and Country Planning (Brownfield Land Register) Regulations 2017

Guidance

Planning Practice Guidance: Permission in Principle

Planning Practice Guidance: Brownfield Land Registers

Background

4. Permission in principle is part of a 2-stage planning consent process which provides an alternative way of obtaining planning permission for **housing-led development**. It separates the consideration of matters of principle for proposed development on a site (location, land use, and amount of development) (Stage 1) from the technical detail of that development (Stage 2). A full planning permission is only secured when both Stages 1 and 2 have been passed. Permission in principle may include elements of non-residential development where this is compatible with a residential use and where the residential element would be the main use.

[1] Sections 150-151.

Stage 1		Stage 2		
	+		=	Planning permission
Permission in principle		Technical details consent		

5. Whilst it is easy to draw comparisons between permission in principle and an outline permission with all matters reserved, there is an important distinction. For permission in principle, a planning permission is only created once the related technical details consent (TDC) is subsequently granted, whereas an outline permission is *the* planning permission. As such, development that benefits from both permission in principle and technical details consent should simply be said to have 'planning permission'.

Permission in principle and technical details consent in appeals casework

6. You may encounter permission in principle or TDC in the following ways:

    - Appeal against refusal or non-determination of a direct application for permission in principle; or
    - Appeal against refusal or non-determination of an application for TDC or against any condition imposed. This type of appeal can be made regardless of whether the permission in principle has been granted via a direct application or a brownfield register.

7. In all of these cases the right of appeal stems from s78 of the Town and Country Planning Act 1990.

Why have Permission in Principle?

8. Permission in principle was introduced to assist with the Government's aim of boosting the supply of homes. The aim of permission in principle is to give up-front certainty on the core matters underpinning the basic suitability of a site but based on the minimum technical detail. Section 150 of the Housing and Planning Act 2016 inserted s58A and s59A into the Town and Country Planning Act 1990 and also amended s70.

9. There are currently 2 routes[2] by which permission in principle may be granted – by putting a site on Part 2 of a Brownfield Land Register prepared by the Local Planning Authority (LPA) or following a direct application to the LPA.

Brownfield Land Registers

10. The Town and Country Planning (Brownfield Land Register) Regulations 2017 place a duty on local planning authorities to prepare, maintain and publish a Brownfield Land Register. The definition of 'brownfield land' is the same as the definition of 'previously developed land' in Annex 2 of the National Planning Policy Framework (the Framework).

[2] A third route enabling the grant of permission in principle through local and neighbourhood plans is still awaiting enacting legislation.

11. The aim of the Brownfield Land Register is to provide up-to-date information on sites considered to be appropriate for residential development, having regard to certain criteria set out in the Regulations. The Register must be updated annually and must include all sites which meet the relevant criteria regardless of their planning status.

12. The Register has 2 parts. Part 1 comprises all brownfield sites appropriate for residential development which have met the necessary criteria[3]. Part 2 contains sites granted permission in principle. For sites to be entered into Part 2, the LPA must decide to allocate the land for residential development through the granting of permission in principle. Public consultation is required prior to this.

13. Sites must not be entered into Part 2 of the Register where residential development of that land could be:

    - Schedule 1 development.
    - Schedule 2 development, unless negatively screened.
    - habitats development, unless the LPA has specified the maximum net number of dwellings which in their opinion the land is capable of supporting; and they are satisfied that development up to and including that number would not be habitats development.

14. There are no appeal procedures associated with inclusion of a site within Part 2 of the Brownfield Land Register, although subsequent TDC applications may be appealed.

Direct application for permission in principle

15. A developer may apply directly to an LPA for permission in principle for the residential development of land. The LPA (or Inspector on appeal) may grant permission in principle, providing the development is NOT:

    - major development (10 houses or more)[4];
    - habitats development;
    - householder development; or
    - EIA development (A development could fall under Schedule 2, but the screening opinion may have found it to be not EIA development)[5]

What can be considered at the permission in principle stage

16. The scope of permission in principle (Stage 1) is limited to 3 considerations according to the PPG[6]:

    - Location
    - Land use

[3] Section 4 of The Town and Country Planning (Brownfield Land Register) Regulations 2017
[4] Major development may means development involving the provision of a building or buildings where the floorspace to be created is 1,000 square metres or more, or development is carried out on a site having an area of 1 hectare or more
[5] Article 5B(1) and (2) of the Town and Country Planning (Permission in Principle) Order 2017 as amended by Article 4 of the Town and Country Planning (Permission in Principle) (Amendment) Order 2017
[6] Paragraph: 012 Reference ID: 58-012-20180615

- Amount of development

17. The Regulations do not restrict consideration to these matters. However, s59A (12) of the 1990 Act requires that regard is had to any guidance issued by the Secretary of State. As the PPG is clear on what should be considered it is advised that this approach should be closely followed. Therefore, only issues relevant to these 'in principle' matters should be assessed at this stage.

18. When considering permission in principle appeals, you must have regard to the provisions of the development plan and any other material considerations, such as the Framework[7]. Therefore, in that sense, permission in principle appeals are no different to other Section 78 appeals.

19. Nevertheless, you should only deal with the 3 matters of location, land use and amount. In considering them, the main focus should be on the 'in principle' aspects of residential development at a site. In doing this, you should bear in mind that development cannot proceed until TDC has been given and that there is no requirement for this to be given automatically.

20. It is perhaps useful to think of the permission in principle process as being high level and it does not require the decision-maker to be satisfied about all aspects of the amount of development permitted. That is because there will be no planning permission until TDC has been granted. It would therefore not normally be appropriate to dismiss an appeal on the basis of the absence of certain detailed information. The approach to be taken will nevertheless depend largely on the evidence provided.

21. For example, the issue of safe access to the highway could reasonably fall within the ambit of "location" – especially if the options in this respect are limited. However, the detailed provision of sight lines would very much be a matter for TDC. Equally if there were limited evidence about the principle of access this is not a matter that you are required to deal with – even if you have misgivings about suitability. The absence of legislative provision provides some flexibility as to the scope of what is considered. Therefore, it is advisable to stick to the matters covered in evidence before you.

22. The PPG indicates that other statutory requirements may apply at the TDC stage such as those relating to listed buildings[8]. However, the duty in Section 66(1) of the Listed Buildings and Conservation Areas Act 1990 including the effect on the setting of listed buildings, does apply, as a reference to permission in principle was introduced by the Housing and Planning Act 2016. Furthermore, the general duty in conservation areas under Section 72(1) applies to the exercise of any functions under the Planning Acts which includes permission in principle. These duties **should** therefore be exercised when considering permission in principle cases.

23. In setting out main issues it is recommended that these adhere to the 3 principal matters identified in the PPG. This means that, for example, issues of character and appearance should be assessed under those headings and in so far as it relates to the principle of

[7] Section 70(2)(a) of the Town and Country Planning Act 1990 which engages Section 38(6) of the Planning and Compulsory Purchase Act of 2004
[8] Paragraph: 003 Reference ID: 58-003-20180615

development and its implications. Be careful not to stray into too much detail and as far as possible keep your assessment related only to the principle only.

24. The PPG indicates that it is not possible to impose conditions as the terms of any permission in principle must only include site location, type of development and amount.[9] It also says that the amount of development must be expressed as a range[10].

25. When granting a permission in principle the LPA must set out the minimum and maximum range of dwellings that are, in principle, permitted[11]. This range will usually reflect what the applicant applied for. As such, it is this range that should be the extent of your considerations when deciding an appeal against a refusal to grant permission in principle.

26. If you are being invited to consider an alternative range then you should consider carefully whether the evidence allows you to make such a judgement and whether, in doing so, this raises any procedural unfairness issues for other parties who might wish to have expressed a view on the alternative range.

27. The default duration of permission in principle is 3 years where granted on direct application, with the TDC to be determined during this period. If it is not, then the permission in principle would lapse

Habitats development

28. The background to this is set out at para 005 of the PPG[12].

29. Article 5B(1) of the Order (as amended) provides that permission in principle cannot be given for habitats development. This is defined in Article 5B(5) as development which 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) and is not directly connected with or necessary to the management of the site; and for which the competent authority has not given consent, permission, or other authorisation in accordance with Regulation 63 of the Conservation of Habitats and Species Regulations 2017.

30. Therefore, if a proposed permission in principle development is likely to have a significant effect on a qualifying European site or a European offshore marine site without any mitigating measures in place, an Appropriate Assessment (AA) must be carried out. Further detail about this process is in the ITM chapter on Biodiversity.

31. The LPA should have carried out an AA at application stage, but if this has not been done, it is advisable to revert to the LPA, and Natural England as the statutory advisor to gain their views if you are otherwise minded to grant permission in principle. The appellant should be offered the opportunity to comment.

32. After carrying out the AA, if you are confident the development will not adversely affect the integrity of the protected site, then (subject to you being satisfied with all other matters) permission in principle can be granted as the proposal would not fall within the

[9] Paragraph: 020 Reference ID: 58-020-20180615
[10] Paragraph: 052 Reference ID: 58-052-20180615
[11] Article 5A(3)(a) of the Town and Country Planning (Permission in Principle) Order 2017 as amended by Article 4 of the Town and Country Planning (Permission in Principle) (Amendment) Order 2017
[12] Paragraph 005 Reference ID: 58-005-20190315

definition of habitats development. However, if you find the proposal would adversely affect the integrity of the protected site, you must dismiss the appeal on the basis that it does not comply with Article 5B(1) of the Regulations.

33. To reach a conclusion that there would be no adverse effects on integrity, there should be no reasonable scientific doubt as to the absence of such effects. In undertaking the AA you can take into account mitigation measures, however, if the mitigation is not secured it may not be possible to reach the conclusion that there would be no adverse effects on integrity.

34. In that respect para 022 of the PPG indicates that there is no scope to secure obligations at the permission in principle stage although this could be done at TDC stage. However, this would not provide the necessary certainty that an adverse effect on integrity would be avoided as you could not be sure that this would occur. Nevertheless, there is no legal reason why an obligation cannot be entered into at any time. One way of dealing with this would be for an appellant to provide an obligation alongside the permission in principle application or appeal that includes the relevant mitigation provisions with the 'trigger' for its delivery linked to the associated TDC. That way you would have certainty about what the mitigation entailed but would also know that it would be secured if planning permission is actually forthcoming.

Technical Details Consent

35. Following the grant of permission in principle, Technical Details Consent must also be granted before development can proceed. A right of appeal exists. The TDC application/appeal must be in accordance with the specified permission in principle for the site. The LPA is required to determine a TDC application that is in accordance with the permission in principle unless the prescribed period of 3 years has been exceeded or if there has been a material change of circumstances since the permission in principle came into force[13].

36. Any decision must be made in accordance with relevant policies in the development plan unless there are material considerations, such as the Framework, that indicate otherwise. At this stage, you should only consider the details before you, not the principle of the development, in a similar manner to a reserved matters application/appeal.

37. The PPG[14] explains that separate TDC applications for different phases of development cannot be made. Therefore, the TDC must include all matters necessary to enable full planning permission to be granted for the permission in principle site[15], and the details presented should be the same as that required for a full planning application.

38. It is possible to attach conditions to the TDC, and these can also be the subject of an appeal. Planning obligations can also be secured, providing they meet the tests and Community Infrastructure Levy (CIL) may apply.

39. Refusal of TDC does not affect the permission in principle.

[13] Section 70 (2)(2ZZC) of the Town and Country Planning Act 1990
[14] Paragraph: 019 Reference ID: 58-019-20180615
[15] Section 70 (2)(2ZZB)(c) of the Town and Country Planning Act 1990

40. There may be a situation where the proposal was not EIA development at permission in principle stage, but at the TDC stage it is now considered to be EIA development. If this happens, the permission in principle remains valid, but the procedures set out that the EIA regulations must be satisfied before TDC can be granted.

Writing a permission in principle or technical details consent decision

41. The equivalent s78 decision template should be used with the words 'permission in principle' or 'technical details consent' substituted where appropriate.

42. It is advisable to set out the permission in principle or technical details consent procedure and what you are considering in a Procedural Matters paragraph.

43. Permission in principle decision

- An example decision is at Annex 1.
- You might want to confirm that any detailed drawings provided are indicative only as a procedural matter.
- Your Main Issues should relate to the 3 matters (location, use, amount of development).
- Anything else referred to by the LPA, appellant or interested parties is likely to be best covered under Other Matters.
- If you are allowing you must specify the minimum and maximum net number of dwellings. If there is any non-housing development proposed with the appeal, you must also specify the scale of any such development and the use to which it may be put.
- You must not apply any conditions.

44. Technical details consent decision

- An example decision is at Annex 2.
- You should set out the scope of the permission in principle as a procedural matter and explicitly say that the matters agreed at the permission in principle stage are not open to question.
- The rest of the decision will resemble any other S78 decision. The Main and Other Issues could be drawn from the usual full range of matters. Conditions can be imposed if you are allowing, and obligations can be considered.

45. Remember, the effect of granting TDC is to grant planning permission. Separate technical details consent applications cannot be submitted for different phases of development. As such, there should only be one TDC application that specifies all matters necessary to enable full planning permission to be granted.

Annex 1 – Example Permission in Principle Decision

Appeal Decision

Site visit made on XXXX

by An Inspector

an Inspector appointed by the Secretary of State

Decision date:

Appeal Ref: APP/XXXXX/0000000
Field 2, Long Lane, Foxtown FX4 9JD

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant permission in principle.
- The appeal is made by Mr and Mrs XYZ against the decision of A Local Planning Authority.
- The application Ref 1234/PiP, dated XXXX, was refused by notice dated XXXX.
- The development proposed is xxxx.

Decision

1. The appeal is allowed and permission in principle is granted for residential development comprising a minimum of X and a maximum of X dwellings at SITE ADDRESS in accordance with the terms of the application, Ref [ ], dated [ ].

OR

2. The appeal is dismissed.

Procedural Matters

3. The proposal is for permission in principle. Planning Practice Guidance (PPG) advises that this is an alternative way of obtaining planning permission for housing-led development. The permission in principle consent route has 2 stages: the first stage (or permission in principle stage) establishes whether a site is suitable in-principle and the second ('technical details consent') stage is when the detailed development proposals are assessed. This appeal relates to the first of these 2 stages.

4. The scope of the considerations for permission in principle is limited to location, land use and the amount of development permitted[16]. All other matters are considered as part of a subsequent Technical Details Consent application if permission in principle is granted. I have determined the appeal accordingly.

Main Issue

5. This main issue is whether the site is suitable for residential development, having regard to its location, the proposed land use and the amount of development.

Reasons

6.

[16] PPG Paragraph: 012 Reference ID: 58-012-20180615

Conclusion

7. For the reasons set out above, I conclude that the appeal should be allowed/dismissed.

An Inspector

INSPECTOR

Annex 2 – Example Technical Details Consent Decision

Appeal Decision

Site visit made on XXXX

by An Inspector

an Inspector appointed by the Secretary of State

Decision date:

Appeal Ref: APP/XXXXX/0000000

Field 2, Long Lane, Foxtown FX4 9JD

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant technical details consent.
- The appeal is made by Mr and Mrs XYZ against the decision of A Local Planning Authority.
- The application Ref 1234/TDC, dated XXXX, sought consent pursuant to permission in principle Ref 1234/PiP, granted on XXXX.
- The application was refused by notice dated XXX.
- The development proposed is xxxx.

Decision

1. The appeal is allowed and technical details consent is granted for (INSERT DESCRIPTION OF DEVELOPMENT) at SITE ADDRESS in accordance with the terms of the application, Ref [ ], dated [ ] and subject to the conditions set out in the attached schedule.

   OR

2. The appeal is dismissed.

Procedural Matters

3. The proposal is for Technical Details Consent following the grant of Permission in Principle. The Planning Practice Guidance (PPG) advises that this is an alternative way of obtaining planning permission for housing-led development. The permission in principle has established that the location, land use, and amount of development is suitable in principle. The Technical Details Consent that is the subject of this appeal can consider the remaining detailed matters but cannot reopen what has been agreed at the Permission in Principle stage. I have determined this appeal on that basis.

Main Issue/s

4. As per other s78 decisions.

Reasons

5.

Conclusion

6. For the reasons set out above, I conclude that the appeal should be allowed/dismissed.

An Inspector

INSPECTOR

The Planning Inspectorate

Planning Obligations

Updated to reflect 2023 Framework (NPPF)?	Yes
What's new since the last version: Changes highlighted in **yellow** made **7th July 2023**: • Clarification, and renumbering, at para 102-103 regarding Legal and Monitoring costs in an Obligation	
Other recent updates • 24 Feb - Paragraph 69 has had a very minor update to the wording regarding obligations on `car-free housing'.	

Contents

Introduction

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

2 This training material is aimed at appeal casework where planning obligations are involved. The term 'planning obligation' is sometimes used interchangeably to describe the legal instrument (or deed) itself and sometimes to describe the planning obligations for payment or performance contained within the deed. The content of this training material should be read with this in mind.

3 This is an interesting part of an Inspector's work, where careful attention to detail is rewarded. Separate advice is also available on examining Community Infrastructure Levy Charging Schedules.

4 This training material applies to casework in England only.

What are planning obligations used for?

5 You will find that Planning obligations are most commonly used to:

- ensure a payment is made to help fund local infrastructure (for example road improvements or extra school accommodation)
- ensure affordable housing is provided and to control its type, tenure, phasing, and continued availability as affordable housing.
- ensure land away from the appeal site is used for a particular purpose (for example, as open space or as a compensatory habitat) and/or that specific off-site works are carried out.
- transfer land or a building to the LPA – for example, as public open space or for a community facility
- promise not to do something - for example, so that permitted development rights are not exercised, or an existing planning permission is not implemented.

Agreements and unilateral undertakings

6 Be aware that planning obligations in connection with planning appeals, called-in planning applications and enforcement appeals can take the form of a:

Planning agreement – where the appellant/landowner (and any other relevant parties) and the LPA jointly enter into an obligation by agreement. This may also be referred to as a bilateral agreement.

Unilateral undertaking – where the appellant/landowner (and any other relevant parties) enter into an obligation unilaterally, without the LPA. It is important to be aware that a unilateral undertaking can only bind the parties who make it and their successors in title. It cannot bind the LPA (because they are not a party to it).

7 Our experience has shown that unilateral undertakings are sometimes advanced by appellants in preference to agreements because they can be concluded more quickly and they allow the appellant to offer something which might be less than that sought by the LPA (for example, a lower financial contribution).

8 Both have equal legal status. However, undertakings cannot bind an LPA since they are not a party to it unlike bilateral planning obligation agreements which can be used to extract covenants (promises) from the LPA such as to spend the money offered by way of a contribution to infrastructure in a certain way. As such, planning agreements are generally preferable. Whether unilateral or bilateral, the LPA will be the enforcing authority. Therefore, they should always be given an opportunity to comment regardless of whether or not they are a party.

Legislation

9 Planning obligations are made under section 106 of the Town and Country Planning Act. As noted above they may be made in the form of a bilateral agreement or a unilateral undertaking.

10 Section 106(1) sets out what a planning obligation may be used for:

(a) restricting the development or use of the land in any specified way
(b) requiring specified operations or activities to be carried out in, on, under or over the land
(c) requiring the land to be used in any specified way
(d) requiring a sum or sums to be paid to the authority[1] on a specified date or dates or periodically

National policy and guidance

11 You will see that the National Planning Policy Framework (NPPF) states that LPAs should consider whether otherwise unacceptable development could be made acceptable through the use of conditions or planning obligations. However, planning obligations should only be used where it is not possible to address unacceptable impacts through a planning condition (NPPF 55). See the ITM chapter Conditions for more advice on this.

12 Paragraph 57 of the NPPF then states that planning obligations should only be sought where they meet all of the following 3 tests:

- necessary to make the development acceptable in planning terms.
- directly related to the development; and
- fairly and reasonably related in scale and kind to the development.

13 Further useful guidance is provided in the government's Planning Practice Guidance chapter Planning Obligations[2], which you should study carefully.

14 The Procedural Guide – Planning appeals – England[3] also provides detailed advice.

[1] And in some cases the Greater London Authority
[2] Planning Practice Guidance Paragraph 001: ID 23b-001–20190315 to Paragraph: 031 Reference ID: 23b-038-20190901
[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. The Procedural Guide –Called-in planning applications – England applies to all applications which are 'called-in'.

Legal principles – planning obligations

15 As you gain in knowledge and understanding of these types of case, you will see that any person 'interested in land' may enter into a planning obligation. Section 106(3) provides that a planning obligation is enforceable by the LPA against a) the person entering into the obligation and b) any person deriving title from that person. In other words a planning obligation should **'run' with the land**. Upon sale of the whole or part of the land the obligation will automatically be binding on successors in title of the original parties to it.

16 It follows that an obligation will not be enforceable against successors in title of those who were not a party to it. This is why it is that all those with current interests such as freehold, leasehold and mortgagee interests will usually need to be a party to the deed. For example, if a mortgagee who was not party to the obligation repossessed the property or site, they could implement any extant planning permission without being bound by the planning obligation. However, there may be some cases where the risk of this happening would be low. It would be for you to judge whether the risk is reasonable. Where there is doubt about whether a party should be joined into the deed, seek the views of the main parties – and, if necessary, take legal advice, usually via Knowledge Centre.

17 A developer applicant with a contract to purchase the land will usually be the successor in title to the current landowner (if planning permission is granted). Consequently, although they will usually be party to the obligation, it is not essential that they are. If someone has no interest in the land they cannot lawfully enter into an obligation.[4]

18 A planning obligation must be entered into by deed. This is a legal instrument and, in effect, a promise to do (or not do) what is in the obligation. Section 106(9) sets out the 4 requirements (or formalities) that must be met. In summary the instrument must:

(a) state that the obligation is a planning obligation for the purposes of this section;
(b) identify the land in which the person entering into the obligation is interested;
(c) identify the person entering into the obligation and state what his interest in the land is; and
(d) identify the local planning authority[5] by whom the obligation is enforceable

19 Challenges to errors in the formalities are rare. However, in the case of *Southampton City Council v Hallyard Ltd* [2008] EWHC 916 (Ch), the failure of a s106 deed to state what interest the contracting party had in the land, invalidated it.

20 The liability of a party usually ceases when they have disposed of their interest in the land. Section 106(4) allows this to be stated in the obligation.

21 Section 106(5) provides for a restriction or requirement imposed under a planning obligation to be enforceable by injunction.

22 There is no standard format for an obligation but many LPA's provide template for use on their websites.

[4] However, in some cases other legislation may facilitate a developer joining in with the deed, for example under a combination of s278 and s106 powers to facilitate highway works. This is more likely in larger more complex casework.
[5] And in some cases the Mayor of London.

Community Infrastructure Levy (CIL) - overview

23 The Community Infrastructure Levy was introduced by the Planning Act 2008.[6] It states that:

> The overall purpose of CIL is to ensure that costs incurred in supporting the development of an area can be funded (wholly or partly) by owners or developers of land in a way that does not make development of the area economically unviable. (section 205)

24 The Community Infrastructure Levy Regulations came into force on 6 April 2010. Together with the Act, they allow an LPA to introduce a charge in the form of a local levy on development to fund infrastructure (such as transport schemes, flood defences, schools, hospitals, leisure centres and open space). However, it cannot be used to fund affordable housing[7] which will continue to be secured on a site-specific basis (by obligation or condition). The 2010 Regulations were amended in 2011, 2012, 2013, 2014, 2015 and 2019. Make sure you look at the up-to-date consolidated version in the PINS Library.

25 Detailed guidance on the use and operation of CIL, which you are strongly advised to familiarise yourself with, is provided in the Planning Practice Guidance. The intention of CIL is to allow authorities to apply a tariff-based approach to secure financial contributions for community infrastructure. Its purpose is not to make individual planning applications acceptable in planning terms, but rather to operate alongside planning obligations in the delivery of necessary infrastructure. Amendments to the CIL Regulations which came into force on 1 September 2019 now allow both CIL and planning obligations to be used to fund the same item of infrastructure, giving authorities greater flexibility in the use of funding secured from CIL and S106 obligations to deliver infrastructure. The Planning Practice Guidance explains that:

> *The levy is not intended to make individual planning applications acceptable in planning terms. As a result, some site-specific impact mitigation may still be necessary for a development to be granted planning permission. Some of these needs may be provided for through the levy but others may not, particularly if they are very local in their impact. There is still a legitimate role for development specific planning obligations, even where the levy is charged, to enable a local planning authority to be confident that the specific consequences of a particular development can be mitigated*.[8]

26 Before a charge can be introduced the LPA must produce a charging schedule setting out the levy and which types of development it will apply to. This is the subject of an independent examination. The charging schedule must be formally approved by a resolution of the full council of the charging authority. (Regulations 11-30)

27 You will appreciate that the rate set must not threaten the ability to develop viably the sites and scale of development identified in the development plan. This means that, when deciding the levy rates, an appropriate balance must be struck between additional investment (in infrastructure) to support development and the potential effect on the viability of developments.[9]

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[6] The regulations and guidance apply to England and Wales.
[7] Regulation 63(4) amended s216(2) of the Planning Act 2008 by deleting affordable housing from the list of infrastructure.
[8] Planning Practice Guidance Paragraph 167 Reference ID: 25-167-20190901.
[9] PPG Paragraph: 010 Reference ID: 25-010-20190901.

28 CIL only applies to 'chargeable development' as defined in s209 of the Planning Act 2008. However, under Regulation 6 certain works are not to be treated as development for the purposes of s208 (for example, buildings into which people do not normally go). Accordingly, they are not liable for CIL and cannot be chargeable development.

29 In addition, some further types of development are exempted from paying the levy. These exemptions are summarised in the Planning Practice Guidance[10].

30 The CIL charge is expressed in £s per square metre of floorspace. When planning permission is granted in relation to chargeable development, the charging authority will serve a notice setting out the amount of CIL payable by the developer. This takes place after planning permission has been granted and there is no need for a s106 obligation. The Regulations include various exemptions, reliefs, appeals and enforcement mechanisms.

Community Infrastructure Levy - the 3 tests become law.

31 Regulation 122(2) of the Community Infrastructure Levy Regulations 2010 states that a planning obligation may only constitute a reason for granting planning permission for a development if the obligation is:

(a) necessary to make the development acceptable in planning terms;
(b) directly related to the development; and
(c) fairly and reasonably related in scale and kind to the development.

32 These are the same as the 3 tests as those set out in paragraph 57 of the NPPF. However, the NPPF is policy, whereas the Regulations are law.

33 Regulation 122 only applies to chargeable development. Consequently, when you are considering a planning obligation:

For chargeable development – you must conclude against the Regulation 122 tests (and it is good practice to also conclude against the NPPF paragraph 57 tests).

For non-chargeable development – you should only conclude against the NPPF paragraph 57 tests.

34 The following paragraphs explain the types of development which are, and are not, chargeable.

35 Section 209 of the Planning Act 2008 and Regulation 6 define 'development' for the purposes of CIL. Anything which falls within the definition of 'development' is potentially chargeable development (ie it becomes chargeable if granted planning permission – Regulation 9).

36 Section 209(1) defines 'development' as: (a) anything done by way of or for the purpose of the creation of a new building and (b) anything done to or in respect of an existing building. Consequently, something which falls outside this definition cannot be chargeable development and so is not subject to Regulation 122. Examples

[10] Planning Practice Guidance Paragraph 005 ID: 25-005-20190901

might include mineral extraction or a pure change of use of land. Obligations offered in such casework should only be considered against the policy tests in the NPPF.

37 In addition, under Regulation 6 certain works are not to be treated as development for the purposes of s209 and so are not liable for CIL. These works cannot be chargeable development and so are not subject to Regulation 122. Obligations offered in such casework should only be considered against the policy tests in the NPPF:

- a building into which people do not normally go - Regulation 6(1)(a) & 2(a)
- a building into which people go only intermittently for the purpose of inspecting or maintaining fixed plant or machinery - Regulation 6(1)(a) & 2(b)
- the carrying out of any work to, or in respect of, an existing building for which planning permission is required only because of provision made under section 55(2A) of 1990 Act.[11] – Regulation 6(1)(c)
- the change of use of any building previously used as a single dwellinghouse to use as two or more separate dwellinghouses – Regulation 6(1)(d)

38 Certain works are defined as development under s209 but are then classed as being exempt from CIL under the Regulations. These are capable of being chargeable development and consequently Regulation 122 applies. Obligations offered in such casework should be considered against the policy tests in the NPPF and the legal tests in Regulation 122. This includes:

- Minor development (new build of less than 100 square metres as long as it does not comprise one or more dwellings) – Regulation 42
- Development used by a charity – Regulation 43
- Residential annexes or extensions – Regulation 42A
- Certain social housing – Regulation 49
- Self-build housing – Regulation 54A
- Affordable housing - Regulation 63(4) amended s216(2) of the Planning Act 2008 by deleting affordable housing from the list of infrastructure.

39 The statutory tests in Regulation 122 do not apply to enforcement appeals - for example, where a deemed planning application has been made through s174(2) and under ground (a).[12] Consequently, a planning obligation offered in connection with an enforcement appeal on ground (a) should only be assessed against the policy tests in the NPPF.

The effect of CIL on planning obligations and casework

40 Formerly Regulation 123 of the CIL Regulations restricted the use of planning obligations in two ways:

a) It prevented the use of a planning obligation for the provision or funding of infrastructure which was to be funded, wholly or partly, by CIL, to ensure that a developer did not pay twice for the same infrastructure in connection with a particular development; and

[11] These are works that affect the interior of buildings which exceed a prescribed percentage – for example the creation of a mezzanine floor

[12] This is because the definition of 'relevant determination' in Regulation 122(3) does not refer to enforcement provisions.

b) No more than 5 planning obligations could be pooled towards the funding of a single piece of infrastructure.

However, Regulation 123 was removed by the 2019 CIL Amendment Regulations on 1 September 2019.

41 So it is no longer unlawful when considering the grant of planning permission at appeal to take account of mitigation in the form of funding for an infrastructure project, which is also included in an authority's infrastructure list to be part funded by CIL or is being funded from pooled contributions from more than 5 other S106 obligations. However, Inspectors will still need to assess whether an obligation is necessary to make the development acceptable in planning terms under statutory tests in Regulation 122. Relevant guidance on this can be found in the Planning Obligations and CIL chapters of the PPG at following paragraphs: Reference ID: 23b-003-20190901, 23b-004-20190901 and 23b-006-20190901 and Reference ID: 25-166-20190901 to 25-170-20190901.

42 You may find it helpful to check the spreadsheet of CIL charging schedules maintained by the Plans team and the list of DPDs that have been submitted to PINS, which are now on the PINS pages on the Gov.uk website.

Casework options – planning obligations

43 If the need for a planning obligation is contested, then this is likely to form one of your main issues.

44 If you are presented with a planning obligation – you might reach one of the following possible conclusions:

1. The planning obligation meets all 3 tests and so is necessary – (you have sufficient evidence to conclude that this is so).

2. The planning obligation does not meet all 3 tests – (you have sufficient evidence to reach this conclusion).

3. It has not been demonstrated that the planning obligation is necessary or meets all 3 tests. This will usually be because you do not have sufficient evidence to show the obligation is justified. If the evidence is not sufficient it is best to avoid saying that the obligation '*is not necessary*' – it would be more accurate to say that '*it has not been demonstrated that it is necessary*'.

4. It is not necessary to make a finding.

45 Following from this, when dealing with casework, you will need to consider the following questions:

- Do I need to reach a finding about the planning obligation (or about the absence of one)?
- Can I lawfully take the planning obligation into account as a reason for granting permission?
- Does the planning obligation satisfy all 3 tests? (or is an obligation necessary if one has not been provided?)
- Will the planning obligation be effective? Will it achieve what is intended?

46 Further advice on these questions is provided below.

Do I need to reach a finding on the planning obligation?

47 You will generally need to reach a finding on an obligation (or the absence of one) in the following circumstances:

1. The lack of an obligation is a reason for refusal or has clearly been raised by the LPA as a concern, for example, in its appeal statement or, matters concerning an obligation are directly related to a contested issue.

2. The lack of an obligation is a reason for refusal, the need for contributions is contested by the appellant but an obligation has been provided. This is because, despite the provision of an obligation, this remains a significant contested issue.

3. You intend to allow the appeal and an obligation has been provided. This is because Regulation 122 states that an obligation may only constitute a reason for granting planning permission if it meets the 3 tests. So, you must reach a finding on the obligation even if the need for it is not contested.

4. You are dismissing the appeal for other reasons – but an obligation would provide a legitimate benefit. An example of this might be where an obligation seeks to make a contribution towards the provision of affordable housing off-site. This would be a potential benefit, even if required by a development plan policy, and so would need to be weighed against any harm.

5. It is argued that you are precluded from taking a site-specific obligation into account because the content of the obligation (or part of it) comprises relevant infrastructure for which a charging schedule is in place or exceeds the pooling restrictions. Or (in reverse), you must take a site-specific obligation into account because the content does not comprise relevant infrastructure for which a charging schedule is in place.

48 You will usually not need to reach a finding on an obligation (or the absence of one) in circumstances where:

An obligation has been provided and the issue of contributions is not contested and is not a reason for refusal – but the appeal is being dismissed for other reasons. This is because it is not a significant contested issue and a conclusion either way could not affect your overall conclusion to dismiss. Regulation 122 states that an obligation may only constitute a reason for granting permission if it meets the tests and, in this case, you would not be granting permission.

49 Advice on these and other casework scenarios are set out in more detail in Annex A.

Does the planning obligation satisfy all 3 tests?

50 The Procedural Guide – Planning Appeals – England ('The Guide') advises that:

The parties should ensure that they provide the necessary evidence to enable this assessment to be made. Inspectors will not take into account any obligations, including standard charges or formulae, which do not meet all the statutory tests.

51 The Guide lists the evidence which is likely to be needed to enable you to assess the obligation against the tests. This is often provided by the main parties in the form of a CIL compliance statement.

52 In cases being dealt with by hearing or inquiry, if you feel the evidence is insufficient, it can be helpful to write to the parties beforehand (through the case officer) to explain that you intend to ask questions about the justification for the obligation (such as the 3 tests and the policy background) and to request that the evidence is provided in an agreed CIL compliance statement in advance of the hearing. This can help avoid adjournments and protracted discussion at the event of whether the obligations meet the tests.

53 If the issue relates to the provision of financial contributions to pay for infrastructure or facilities – matters to consider might include:

1. Without a contribution, would there be a harmful effect in terms of the provision or availability of infrastructure or facilities? Are existing facilities at full capacity or failing to serve local needs? For example, is there a shortage of school places? What would be the additional demand on these facilities from the appeal proposal? Would they be able to cope with additional demand or would they be over-loaded? What evidence do you have? Is it up to date?

2. Would the development materially exacerbate any problems arising from an existing shortage in terms of existing infrastructure? Or would it, in itself, cause problems? A contribution cannot be expected to resolve an existing problem, but it could be used to help stop it becoming worse.

3. Where would the contribution be spent and on what and when? Would this be directly related to the proposed development? For example, would extra school places serve the needs of those living in the proposed development? Would it resolve the specific problem resulting from the proposed development?

4. How has the size of the contribution been established? Is it the right amount to resolve the problem specifically resulting from the proposed development? Does the contribution significantly exceed what is required? If so, make it clear that the additional sum has not been a reason for granting planning permission.

5. Is the requirement for a contribution backed up, or justified, by development plan policy and/or a supplementary planning document (SPD)/guidance?[13]

54 Some LPAs use a tariff-based system to calculate the size of contributions. This will often be set out in an SPD. These sometimes focus on the methodology and calculations used to establish the size of contribution required. However, does the SPD provide evidence that the contribution is necessary – for example is it clear that there would be an adverse effect that needs to be mitigated? Does it explain how the contribution would be used – for example would it be directly related to the development? Even if an SPD sets out a requirement for contributions (and the obligation cites that requirement) you are still obliged to consider the 3 tests.

55 In other cases, such as those that do not involve financial contributions, the key questions to ask will be:

[13] See Planning Practice Guidance Paragraph 004: ID 23b-004-20190901

- Would the obligation resolve a problem that would otherwise lead to the appeal being dismissed?
- Without the obligation would there be material planning harm?

56 You may conclude that some obligations meet the tests but that others do not. If so, you should make this clear in your decision. Where relevant, it should be made clear in your decision that, if an obligation does not meet all the tests, you cannot take it into account.

57 An obligation, relating to chargeable development, that fails one or more of the tests is not necessarily '*unlawful*'. This is because a properly executed deed would still have legal effect. It would be more accurate to state that *it does not pass the tests and therefore cannot be taken into account.*

58 In addition to concluding on the main issue, relevant development plan policy and any SPD – as noted in paragraph 33 above:

For chargeable development – you must conclude against the Regulation 122 tests (and it is good practice to also conclude against the NPPF paragraph 57 tests)

For non-chargeable development – you should only conclude against the NPPF paragraph 57 tests.

59 When reaching your conclusions bear in mind:

Acceptable development should not be refused because an appellant is unwilling to provide unnecessary or unrelated benefits.

Unacceptable development should not be accepted because unnecessary or unrelated benefits have been offered by the appellant.

60 Until recently there have been no judicial decisions on the operation of the 3 statutory tests. However the case of *R (on the application of) Hampton Bishop v Herefordshire Council [2013] EWHC 3947* confirms that the Regulation 122 tests are a codification of the principles developed in previous case law. This means that the House of Lords case of Tesco Stores Ltd v SSE 1995 is still good law on the subject. In that case Lord Hoffman said: "The reluctance of the English courts to enter into questions of planning judgement means that they cannot intervene in cases in which there is sufficient connection between the development and a planning obligation to make it a material consideration but the obligation appears disproportionate to the external costs of the development.".

61 Nor would the court interfere in the case of *R v Plymouth City Council, ex parte Plymouth and South Devon Cooperative Society* [1993] 67 P&CR where substantial off-site benefits were found by the decision maker to be fairly and reasonably related to the development. Similarly, in the Hampton Bishop case (reference above) an obligation to transfer an off-site rugby pitch to the Council for £1 was found by the court to have a connection with the development (because its current use became redundant) and hence there were no grounds for the Court to interfere, since weight is a matter for the decision maker (citing Lord Hoffman as above).

Will the planning obligation be effective?

62 If an obligation is to be taken into account it must be effective. The main questions to consider are:

1. Is the 'obligation' actually an obligation?

2. Will it do what it is supposed to do? (Is the drafting effective?)

3. Is it legally sound? (Has it been correctly executed and is it capable of being enforced?)

1. Is the 'obligation' actually an obligation?

63 Does the 'obligation' fall within the scope of s106(1)(a)-(d)? If it does not, it will not be a planning obligation and it will simply amount to a personal undertaking by the appellant.

64 Whether an 'obligation' presented in the course of an appeal amounts to a binding obligation rather that a personal undertaking is best illustrated by challenges relating to car free development.

65 In the case of *Westminster City Council v SSCLG & Mrs Marilyn Acons [2013] EWHC 690 (Admin)*, the decision to grant planning permission was quashed in the High Court. The 'obligation' was concerned with achieving car free development and prevented the owner from applying for a street parking permit in the following terms: '*The owner… undertakes … not to apply to the Council for a parking permit in respect of the land*….'. This obligation did not comply with the strict terms of s106(1) because it did not relate to the use of land. Instead it simply sought to prevent the owner from applying for a permit to park on the highway. Consequently, it was not enforceable as provided by s106(3) and s106(5) because it was not a planning obligation. It was merely a personal undertaking which was not capable of being registered as a local land charge and did not run with the land.

66 This case has now been followed in the Court of Appeal case of *R (oao Khodari) v Royal Borough of Kensington and Chelsea & Cedarpark Holdings Inc* [2017] EWCA Civ 333. The *Khodari* case confirms that prevention of parking on the highway is not a restriction on the appeal property being the "land" for the purposes of s106. It would therefore not come within 106(1) powers.

67 This illustrates the need for careful attention to drafting. For example, an obligation which had similar wording to the following: *the owner undertakes not to occupy the development until an amendment to the TRO has been implemented removing 'said property' [14]from the list of dwellings for which Residents Parking Permits can be issued'* would be directly linked to the land. Similarly, wording such as '*the owner undertakes not to occupy the development until a car club is in operation*' is a restriction on the land which complies with S106(1), whereas, wording such as '*The owner must promote car club use to occupiers of the development*' would not comply because it seeks to control the actions of a person rather than the use of land.

[14] This would need to be precisely defined in respect of the individual proposal

68 If there is any doubt you should seek comments from the parties about whether the 'obligation' falls within the scope of s106(1)(a)-(d)

1.1 Use of other powers

69 In Greater London the provisions of s16 of the Greater London Council (General Powers) Act 1974 are frequently included in the drafting of deeds and the *Khodari* case confirms that s16 is effective to secure car-free development. This is because the wider wording of s16 does not require a restriction on land, but only that an undertaking or agreement has a 'connection' with the land/property. If a presented deed includes s16 powers then it will be a secure way of achieving 'car-free' development in London[15].

70 Elsewhere in England and Wales securing car free housing may be more difficult. General guidance about car-free housing can be found at paragraphs 43-48 of the Highways and Transport chapter of the Inspector Training Manual. Paragraphs 241-251 of the Inspector Training Manual chapter on Conditions explore the possibility of a suitably worded condition which may be appropriate in the case of a small scale development. It will be a matter of judgement whether any negatively worded conditions put to you meet the test set out in Planning Practice Guidance paragraph 010 Reference ID: 21a-010-20190723.

2. Will the obligation do what it is supposed to do?

71 Look closely at the deed and obligation. Is it drafted in a way that it would achieve its intended effect? Is it sufficiently clear and detailed? Is the wording logical? Does it contain any obvious errors or anomalies? Are defined terms used consistently? Is there a lack of clarity that would create uncertainty about the obligation?

72 The following example illustrates the kind of drafting problems that can occur:

A proposal required off site highway works to make it acceptable. This required that land would be transferred to the Council. The unilateral undertaking sought to ensure the land was transferred before development started. However, the undertaking also stated that it would only come into effect once the development had commenced. The undertaking therefore contained contradictory elements and so its effect and enforceability was uncertain.

3. Is the obligation legally sound?

73 The Procedural Guide – Planning appeals – England provides detailed advice on the format and content of a planning obligation.

74 Does the obligation comply with the following checklist? If there is a problem it may mean that the obligation is incomplete and could not take effect (or that its effect would be uncertain). If so, it should be afforded little or no weight.

[15] See paragraph 38 of judgment in *R (oao Khodari) v Royal Borough of Kensington and Chelsea & Cedarpark Holdings Inc* [2017] EWCA Civ 333: "In my judgment if the obligations about parking permits fall within section 16 they will be legally valid".

a. Have all the relevant parties entered into it? Does it include details of each person's title to the land?[16]
b. Has it been correctly executed by all the parties as a deed?[17]
c. Is it dated?
d. Has it been signed and witnessed?
e. Does it state that it is a planning obligation?
f. Does it bind successors in title?
g. Is the site clearly identified?
h. Does it clearly refer to the relevant planning application?
i. Does it refer to the relevant local planning authority?
j. When would the individual obligations take effect? (for example when planning permission is granted?) When would each requirement be triggered?

What if the planning obligation is incomplete, flawed or missing?

75 An incomplete, flawed or missing obligation will not carry any weight.

76 The *Procedural Guide – Planning appeals – England*[18] indicates at what stage in the appeal process planning obligations should be provided. In summary:

Written representations:

An executed and certified copy of the executed planning obligation – for cases being determined under the Part 1 written representations process, appellants must provide this at the time of making their appeal(s). For appeals being determined under the Part 2 written representations process, this should be received by PINS no later than 7 weeks from the start date.

Hearings and inquiries:

Final draft, *agreed by all parties to it* – should be received by PINS no later than 10 working days before the hearing or inquiry opens.

A certified copy of the executed planning obligation – should normally be received before the hearing or inquiry closes, without the need for an adjournment.

If that is not practicable the Inspector will agree the details for the receipt of a certified copy of the executed planning obligation with the appellant/applicant and the local planning authority at the hearing or inquiry.

77 If an obligation has been provided but is incomplete or flawed or if there is a firm indication that one of the parties intends to provide an obligation but it is missing, consider taking the following action:

Written representations:

[16] The Procedural Guide – Planning appeals – England states this should be checked by the local planning authority and, in hearing and inquiry cases, the Inspector will ask for its assurance. In written representations cases, and in cases where the local planning authority is unable to give an assurance, the applicant or appellant will need to provide evidence of title to the Inspector. Normally this is in the form of an up to date copy entry or entries from the Land Registry.
[17] The Procedural Guide – Planning appeals – England which explains the correct format options where execution is by an individual or a company.
[18] The Procedural Guide – Called-in planning applications – England applies to all applications which are 'called-in'.

You are not obliged to delay your decision to wait for a completed obligation. However, before the site visit takes place, you could ask the parties (through the case officer) if they intend to provide a completed version of the planning obligation.

If you do this, it is best to set a deadline and to indicate that, after that you will not delay issuing the decision to wait for a completed one.

Hearing and inquiries:

If you realise before opening the event that, although no planning obligation has been provided, it is reasonably likely that one will be submitted, ask the case officer to write to the parties stating that any draft should be provided no later than 10 working days before the event opens (or whatever date is now feasible) and that it should be completed by the end of the event.

During your opening – check what progress has been made and for any key changes from previous drafts. Remind the parties that it should be finalised by the end of the event.

If there is a procedural problem – for example, the obligation has not been signed or dated or it contains obvious inconsistencies – it is reasonable to point this out to the parties. However, you should avoid commenting on the planning merits of an obligation.

If the obligation has not been completed by the end of the event – establish why. There may be good reasons. For example, if the wording of a draft is only finalised during the event, it can sometimes be difficult to secure the signatures of all relevant parties. If so, you might allow a short period for the document to be completed (for example, one week). However, you should stress that if it has not been provided by this time you will proceed to make your decision. You should confirm the timetable in writing through the case officer. Avoid leaving the deadline open-ended. It is prudent to seek the views of the parties at the event about what bearing the absence of a completed obligation would have on the outcome of the appeal.

78 You will need to decide if, in the interests of natural justice, whether any of the parties need to be given an opportunity to comment on an obligation, or a final version of it, which they have not previously seen. This is particularly likely to be the case where the LPA has not seen a unilateral undertaking. Always check to see if there are any material differences between a draft obligation and the final version.

79 If the deadline has passed and a completed obligation has not been provided, you can proceed to make your decision. If you consider an obligation was necessary, it is likely that you would dismiss the appeal, unless exceptionally the matter could be dealt with by means of a negatively worded condition (see the following section for advice). If this option has not been considered by the parties you may need to give them the chance to comment.

Requiring a planning obligation or financial contribution by condition

80 In summary, the Planning Practice Guidance[19] states that:

- no payment of money or other consideration can be positively required when granting planning permission;

[19] Planning Practice Guidance Paragraph 005: ID 21a-005-20190723 and Paragraph 010: ID 21a-010-20190723

- planning permission should not be granted subject to a positively worded condition that requires the applicant to enter into a planning obligation;
- 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 (it also explains why it is better to finalise a planning obligation before planning permission is granted)

81 However, the Guidance[20] also states that:

… in exceptional circumstances a negatively worded condition requiring a planning obligation or other agreement to be entered into before certain development can commence may be appropriate, where there is clear evidence that the delivery of the development would otherwise be at serious risk (this may apply in the case of particularly complex development schemes). In such cases the six tests must also be met (it goes on to state that, in these circumstances, LPAs should first discuss the need for an obligation and the appropriateness of using a condition with the applicant and that the heads of terms or principal terms needs to be agreed in advance).

Always accept a completed planning obligation

82 Regardless of any deadlines that you or PINS have set – you must accept and consider a completed obligation if it is received before your decision is issued. A completed and correctly executed obligation will have legal effect, even if you have not seen it. It will, therefore, bind the parties to do, or not do, whatever they have promised. Consequently, an existing planning obligation must be assessed by you.

Removing or modifying planning obligations

83 A completed planning obligation is a binding legal document. It cannot be unilaterally revoked by one of the parties. Nor can it be revoked by a condition attached to a subsequent permission. An appellant could submit a new application for the same or similar development with a different obligation, but they would still be bound by the 'original' obligation.

84 Procedures for the modification and discharge of planning obligations are set out in The Town and Country Planning (Modification and Discharge of Planning Obligations) Regulations 1992.

85 The Planning Practice Guidance[21] sets out the circumstances in which an obligation can be modified or discharged:

1. Through the agreement of the parties – such as a voluntary renegotiation.

2. On application to the LPA if the obligation predates 6th April 2010[22] or is over 5 years old (s106A). The test is whether it "no longer serves a useful purpose"[23] or

[20] Planning Practice Guidance Paragraph 010: ID 21a-010-20190723
[21] Paragraph 020: ID 23b-020-20190315 and 022-20190315
[22] Only applies to England – see Town and Country (Modification and Discharge of Planning Obligations)(Amendment)(England) Regulations 2013.
[23] Following *R (oao) Mansfield DC v SSHCLG & Mr J A Clark* [2018] EWHC 1794 (Admin), it has been clarified that for s106B appeals, in s106A(6) of the Town and Country Planning Act 1990, 'a useful purpose', does not mean 'a useful *planning* purpose'.

would continue to serve a useful purpose if modified as proposed (s106A(6)). There is a right of appeal (s106B). On appeal you will need to decide whether:

k. The obligation should continue to have effect without modification.
l. The obligation no longer serves a useful purpose and so should be discharged.
m. The obligation serves a useful purpose that would be equally well served if it was modified as proposed.

86 Section 106(A)(3) provides that an application to modify or discharge a planning obligation must be made by a person against whom a planning obligation is enforceable. Consequently, if there are no outstanding obligations (for example, because the relevant infrastructure payments have been made) there would be nothing left to enforce against (this might happen for example, if the applicant is seeking a repayment of monies already paid under the obligation). In these circumstances the application and appeal are unlikely to be valid. If necessary, seek legal advice.

87 Note that for the purposes of s106, s106A or s106B, reference to a "planning obligation" should be construed as a single obligation within a deed and meeting all the s106 tests, not as the deed itself in its entirety. Also, that the restriction on a 'split' decision under s106A, following *R (The Garden and Leisure Group Limited) v North Somerset Council* [2003] EWHC 1605 (Admin), relates to an individual obligation within a deed (and meeting all the s106 tests).

88 If, therefore, a relevant s106A application requests modifications to more than one such obligation contained in the same deed, it should be possible (if you consider the s106A tests to be met on some, but not others) to approve some but not others. As s106B states that "Subsections (6) to (9) of section 106A apply in relation to appeals….under this section", it is considered that the above point equally applies to decisions under s106B. It is important to remember though that if the application, under either s106A or s106B, proposed multiple modifications to any single obligation, then you cannot issue a 'split' decision on that particular obligation.

89 Following the judgment of the Court of Appeal in *R (oao Khodari) v Royal Borough of Kensington and Chelsea and Cedarpark Holdings Inc* [2017] EWCA Civ 333, Inspectors need to be aware that an appeal under s106B to discharge or modify an existing planning obligation will only be a valid appeal if upon scrutiny of the wording in the deed, it falls within s106(1). If it does not comply and is not therefore a planning obligation, there will be no power to modify or discharge it.

90 This is a matter arising particularly in Greater London in connection with car-free development (see also paragraphs 85-87). In circumstances where a deed is stated to be made under s106 but the wording is found not to comply with s106(1) then it will not be a planning obligation. Any proposal to modify what amounts to a personal contract (between the Council and the original signatories to the deed) will be a private matter between those parties.

91 Where there is found to be no planning obligation it follows that an Inspector will have no power to discharge or modify a deed made under other legal powers. As an example s16 of the Greater London Council (General Powers) Act 1974 is a legally valid and enforceable power to achieve car-free development in Greater London as endorsed in the *Khodari* judgment, nevertheless a deed made under s16 powers does not have the status of a planning obligation. Additional advice on this subject can be found in paragraphs 85-87 of this chapter.

92 Further general information can be found in the DCLG publication: Section 106 affordable housing requirements: Review and appeal and in the Procedural Guide – Planning appeals – England.[24]

Other casework matters which may arise

Differences between conditions and obligations

93 You can redraft a suggested condition because it is part of your decision. However, you cannot alter the terms of a planning obligation because it is a standalone document. Your role is to apply the statutory and policy tests and consider what weight should be attached to it.

94 Planning permissions are granted 'subject to conditions'. However, a planning permission cannot be granted 'subject to a planning obligation'. This is because the obligation is a separate legal document. The decision maker must decide whether the obligation satisfactorily addresses a matter which might otherwise have led to permission being refused.

Viability of planning obligations

95 In cases where the viability of planning obligations sought by the local planning authority is a main issue in the appeal, the NPPF and PPG chapters on Viability and Planning Obligations set out a plan-led approach to development contributions and viability. Inspectors should familiarise themselves with this approach, in particular the guidance on Viability in chapter 10 of the PPG. In summary, the approach is:

a. The role for viability assessment (of development) is primarily at the plan making stage (PPG Paragraph: 002 Ref ID 10-002-20190509);

b. Plans should set out the contributions expected from development, including the levels and types of affordable housing (NPPF 34);

c. Policy requirements (in plans) should be clear so that they can be accurately accounted for (by the developer) in the price paid for the land. They should be informed by evidence of infrastructure and affordable housing need and a proportionate assessment of viability to ensure that policies are realistic. (PPG Paragraphs: 001 Ref ID 10-001-20190509 and 005 ID: 23b-005-20190315);

d. The cumulative cost of such policies and the combined total impact of requests for infrastructure contributions should not undermine the deliverability of the plan (NPPF paragraph 34 and PPG Paragraphs 002 Ref ID 10-002-20190509 and 003: ID 23b-003-20190901);

e. They should be set at a level that allows development to be deliverable, without the need for further viability assessment at the decision making stage (PPG Paragraph 002 Ref ID 10-002-20190509);

f. 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 (NPPF 58) (PPG Ref ID: 23b-101-20190315);

g. Where planning obligations are negotiated on the grounds of viability it is for applicants to demonstrate whether any changes in circumstances since the plan

[24] The Procedural Guide – Called-in planning applications – *England* applies to all applications which are 'called-in'.

was brought into force justify the need for further viability assessment at the application stage (NPPF 58) (Paragraph: 010 Ref ID: 23b-010-20190315) (Paragraph 007 Ref ID 10-007-20190509 of the PPG provides examples of such circumstances);

h. Where a viability assessment is submitted at the application (or appeal) stage it should refer back to the viability assessment which informed the plan and reflect the government's recommended approach to viability assessments in paragraphs 010 to 019 of section 10 of the PPG, which define the standardised inputs for development costs and values, including land value (PPG Paragraph: 011 Ref ID: 23b-011-20190315);

i. The weight to be given to the viability assessment is a matter for the decision maker, having regard to all of the circumstances in the case, including whether the plan and the viability evidence on which it was based are up to date and any change in site circumstances (NPPF 58);

j. Under no circumstances will the price paid for the land be a relevant justification for failing to accord with relevant policies in the plan (this is repeated 5 times in the PPG at paragraphs ID 10-002, 10-006, 10-011, 10-014 and 10-018-20190509).

Affordable Housing and Tariff Style Contributions on Small Sites

96 With regard to small sites, the Written Ministerial Statement issued on 28 November 2014 stated that contributions for affordable housing and tariff-style contributions should not be sought on developments of 10 units or less and with a maximum combined gross floorspace of no more than 1,000 square metres, other than on Rural Exception sites (where policies may set out a lower threshold of units or fewer). The restriction on affordable housing contributions from small sites has been incorporated into the NPPF (NPPF 64) and subsequently retained in the PPG chapter on Planning Obligations when it was updated in March 2019 (Paragraph: 023 Ref ID: 23b-023-20190901).

97 The threshold is now defined as residential developments which are not a major development, which the PPG and the Glossary of the NPPF define as, for housing, development where 10 or more homes will be provided, or the site has an area of 0.5 hectares or more. NPPF 64 and paragraphs 026 to 028 of the PPG chapter on planning obligations also now define the circumstances where the vacant building credit should be offered to developers in relation to affordable housing contributions.

98 The legal background to this small site restriction is the Secretary of State's successful appeal to the Court of Appeal on 11 May 2016[25], overturning the previous High Court judgment on 31 July 2015 on applications by West Berkshire District Council and Reading Borough Council for judicial review of the Written Ministerial Statement policy changes[26]. Further advice is in PINS Note 05/2016r3: Secretary of State for Communities and Local Government v West Berkshire District Council and Reading Borough Council (Planning obligations and affordable housing & tariff-style contributions).

99 The Written Ministerial Statement of 28 November 2014 and NPPF 64 also outline that LPAs may choose to apply a lower threshold of 5-units or fewer to development

[25] *Secretary of State for Communities and Local Government v West Berkshire District Council and Reading Borough Council* C1/2015/2559; [2016] EWCA Civ 441.
[26] *West Berkshire District Council and Reading Borough Council v Secretary of State for Communities and Local Government* [2015] EWHC 2222 (Admin)

in designated rural areas being areas as described under section 157 of the Housing Act 1985, which includes National Parks and Areas of Outstanding Natural Beauty. Following the Written Ministerial Statement, a list of areas designated by the Secretary of State obtained from DCLG was published in the forums of the website of the Planning Advisory Service. Additionally, The Housing (Right to Buy) (Designated Rural Areas and designated regions) (England) Order 2016 (SI 2016/587) has designated a number of regions (Chichester, Malvern Hills, Shropshire and Wychavon) under s157(3) of the 1985 Act and parishes therein as rural areas.

100 The provisions of the WMS exempting small sites from tariff-style contributions have not been incorporated into the NPPF and were removed from the PPG chapter on Planning Obligations when it was updated in March 2019. However, the WMS remains extant and the updated PPG states that CIL is the most appropriate mechanism for capturing developer contributions from small developments (Paragraph: 023 Ref ID: 23b-023-20190901). It is not possible to be definitive as to whether policy contained within the WMS remains relevant and Inspectors should have regard to any evidence put forward in this respect. Further advice on the relationship between WMS and the NPPF is given in PINS Note 02/2019.

Pay back clauses

101 Agreements will often include a clause which requires that the LPA pay back any financial contributions if they have not been spent for the required purpose within a stated period of time. The presence or otherwise of such a clause is unlikely to affect the validity of the obligation or your consideration of it, unless you conclude that the pay back period is unreasonably short and so might be likely to result in necessary contributions being unspent and therefore lost. See also the guidance in the Planning Practice Guidance at Paragraph 021: ID 23b-021-20190315.

102 Pay back clauses in unilateral undertakings will not be binding on the LPA.

Contributions to Legal and Monitoring costs

103 **Legal costs:** while LPAs have powers to secure compliance with planning controls, there is no specific statutory requirement that they do so – the powers are discretionary. The provision to charge for them is not explicitly included in the changes to the CIL Regulations so, as a result, any requirement for funding to meet the legal costs of LPAs in securing compliance with a planning obligation would still need to satisfy the three tests. You will, therefore, need to consider whether such costs would be justified or whether they would fall within the scope of the reasonable everyday functions of the LPA. Whilst it is accepted practice for applicants/developers to pay the reasonable legal costs of the LPA in dealing with an obligation, this will seldom be a relevant consideration in casework.to the legal costs, while LPAs have powers to secure compliance with

104 **Monitoring Costs**: LPAs sometimes seek to recover their costs for monitoring an obligation and then securing compliance with it. *Oxfordshire County Council v SSCLG [2015] EWHC 186* upheld the Inspector's view that the administrative/monitoring fee was not necessary to make the development acceptable (a relatively modest proposal requiring one-off payments as contributions). For the most part, monitoring was part of the LPA function and the Inspector's reasoning on the matter was in line with regulation 122. However, this approach has been superseded as, from 1 September 2019, authorities can charge

a monitoring fee as part of a s106 agreement to cover the cost of monitoring and reporting on the implementation of a s106. Further detailed guidance is provided in paragraph 036 of the Planning Obligations chapter of the PPG. Regulation 122 of the CIL regulations was amended to make provision for local planning authorities to charge monitoring fees in planning obligations. However, the sum to be paid must:

- fairly and reasonably relate to the scale and kind to the development; and
- not exceed the authority's estimate of the cost of monitoring the development over the lifetime of the planning obligations which relate to that development.

Direct payments with no obligation

105 In some cases, the appellant may have provided a financial contribution requested by the LPA by means of a direct payment (for instance by cheque or cash) without any legal agreement or unilateral undertaking.

106 If you conclude the contribution is not necessary then you should clearly indicate that the payment has not had any bearing on your decision.

107 If you decide that a contribution is necessary you will need to consider whether there is sufficient legal guarantee that the contribution would be used for its intended purpose. Given that there may be no official record and no legal commitment, it may well be that the means of payment has not been properly secured. If so, you will not be able to give it any weight. You may first need to seek the views of the parties.

Transfer of land, contributions and unilateral undertakings

108 In *Hertfordshire CC v SSCLG & Others* [2011] EWHC 1572 Admin it was held that, in principle, an obligation may be used to transfer land to an LPA, for example to build education or other facilities on. The facilities might be provided in kind by the developer or via a sum of money to be paid to the Council to cover construction costs.

109 This will usually be achieved by means of an agreement in which the developer promises to provide the land and the buildings (or to make a contribution to pay for the buildings) and the LPA agrees to accept the land and buildings and to use the contributions, land and buildings for the intended purpose.

110 However, if the promise is by means of a unilateral undertaking it will not be binding on the LPA as they would not be party to it. Consequently, they are not legally required to accept it. You will, therefore, need to decide what weight can be given to such undertakings. For example, has the LPA given an assurance that it will accept the land/buildings and use the contributions for the required purpose? However, the obligation might still attract considerable weight even if the LPA has not given such an assurance. In 'Hertfordshire' the Judge concluded that this was a matter of planning judgement and the decision maker in that case had been entitled to conclude that the offer of land was reasonable and necessary to achieve relevant infrastructure and that the terms of the obligation would be effective.

111 In cases where a unilateral undertaking is offered you may need to consider whether there any safeguards in the obligation such as indexation of payments, arrangements for a bond or dispute mechanisms.

112 In order to fall within the scope of s106(1)(a)-(d), a valid planning obligation (whether an agreement or unilateral undertaking) should usually be in the 'negative' form in order to restrict the use of the land. For example: *'not to commence development until [] land has been transferred …'* or *'not to occupy until …'.*[27] For further advice in relation to the scope of s106 and the wording of obligations see above.

Off-site work covered by other legislation

113 Where off site works to an existing highway[28] are required to mitigate the effects of new development, the developer will usually enter into an agreement with the Council under s278 of the Highways Act 1980. This might typically cover matters relating to the agreed design, timings, payments, land provision and dedication.

114 However, if these works are necessary, they will need to be tied to the planning permission in some way so that it is certain that they will be carried out when appropriate (for example, before the development commences or before occupation). This can be achieved by means of a planning obligation executed under a combination of s278 and s106 powers. Grampian conditions can also be used to ensure off-site highway works are in place. A s278 agreement is usually entered into to satisfy the Grampian condition. But because highways Grampian conditions usually require the works to be completed before occupation, they do not need to mention the method to secure the works and so are less likely to fall foul of the test referred to in paragraph 54 above.

115 The same principles apply with off-site water and sewerage infrastructure.

Multiple/alternative obligations

116 You may be presented with a number of alternative obligations. For example, a developer may offer obligations with varying levels of financial contributions to infrastructure and suggest that you should choose the most appropriate depending on your findings. The obligations may each contain a clause which seeks to ensure that the others would not come into effect in the event that planning permission is granted on the basis of the one preferred obligation.

117 Such clauses are unlikely to affect the validity of the obligation. In your decision you will need to explain which obligation is the minimum sufficient to make the development acceptable (if any are) and that this is the obligation on which your decision is based.

Obligations conditional on an Inspector's conclusions

118 A s106 deed (whether in the form of a bilateral agreement or unilateral undertaking) submitted as an executed document will have legal effect. Some deeds may contain a mechanism (sometimes known as a 'blue pencil' clause) which provides that for any obligation(s) which an Inspector finds does not pass the statutory tests such obligation(s) shall have no effect and consequently the owner and/or other covenanters shall not have liability for payment or performance of that obligation.

[27] In *Hertfordshire CC v SSCLG & Others* [2011] EWHC 1572 Admin the Judge said that "the combination of positive and negative covenants and the provisions for the transfer of land were clearly all part of the restrictions on the development and use of land within s106"

[28] Typically this might include access/junction alterations, traffic calming and improved provision for cyclists and pedestrians

119 It is important that an Inspector considers each and every obligation in the deed, making clear in the decision which obligations pass the tests and whether those obligations amount to a material consideration to which weight can be attached. If an Inspector expressly states that the obligation is unnecessary and grants permission, matters relating to the effect of the mechanism for any future payment or performance of that obligation would be for the LPA and the parties to the obligation to resolve. However, to help avoid disputes after the grant of planning permission, it should be clear from your decision as to whether or not the obligation passes the three tests, including in relation to necessity.

Counterpart obligations

120 Occasionally, multiple obligations are provided which are identical in all respects except that each is signed by a different party. These are sometimes known as 'counterpart' obligations. They are generally provided where it has been difficult to arrange for all parties to sign the same document.

121 An obligation made under s106 is a public law document which must be entered on the planning and local land charges register and may be copied to interested parties. It, therefore, needs to be clear that all relevant parties have entered into it. Consequently, counterpart obligations are best avoided wherever possible and it is reasonable to suggest this to the parties.

122 However, there may be circumstances where it is agreed in advance by the parties that counterparts are the only practical option. In these cases, both the Inspector and the local planning authority should be satisfied that certified copies of all the individually signed documents have been provided (by a solicitor or other suitably legally qualified person). It is preferable in such circumstances that each counterpart document includes a clause confirming that while the deed may be executed in counterparts, or in any number of counterparts, each of these shall be deemed to be an original (or a duplicate original), but all of them, taken together, shall constitute one and the same agreement. While such a clause is recommended in order to improve clarity, its absence will not make the counterparts invalid.

123 Correctly executed counterpart obligations are legally valid and so should not be turned away. You should make sure you have copies of all of the separately signed agreements each certified by a solicitor as a true copy of the original. Also make sure that all relevant parties have signed an obligation.

Copies of planning obligations

124 The original copy of the obligation should be kept by the enforcing LPA. It should not be kept by PINS or by you because we normally destroy appeal files after one year. PINS should receive a copy of the original which has been certified by a solicitor as a true copy (generally from the party entrusted with custody of the original). The certified copy should be kept on the appeal file. You may need to remind the parties of this.

Variation of planning obligations

125 Note that once a planning obligation has been correctly executed (signed by all the parties and dated), it can only be varied by following the procedures set out in s106A

TCPA. In particular, the variation document must be a deed (s106A(2)), and must be made "by agreement between the appropriate authority … and the person or persons against whom the obligation is enforceable" (s106A(1)).

126 This means, for example, that handwritten amendments cannot be made to an obligation which has already been executed, even if those amendments are agreed between all the parties, so any such amendments would not be effective. Instead, a new deed should be used to state that the original document has effect subject to the proposed amendments.

127 Similarly, since the agreement of the LPA is required, it also means that a unilateral undertaking cannot be used to modify an earlier planning obligation, as the LPA must be a party to the variation document.

Secretary of State cases

128 In cases determined by the Secretary of State you should:

a. address any obligation in a discrete section of the report,
b. describe its content and purpose,
c. set out in your conclusions whether the obligation fulfils the 3 tests.

It is then for the Secretary of State to identify in the decision letter whether (s)he agrees, whether to take the obligation into account and, if so, the weight to be attached to it.

129 In Secretary of State cases Rule 17[29] provides that after the close of the inquiry you will make a report with your conclusions and recommendations. If a completed obligation is received after that date it will be forwarded to the Planning Casework Division (PCD) or the relevant department of the Welsh Government. However, in circumstances where a draft of an obligation has not been completed you can avoid this occurring by allowing a short adjournment of up to a month[30] to enable the obligation to be finalised. The inquiry would then be closed in writing. However, you should only do this if:

d. you are satisfied that the draft is robust and that few (if any) changes will be required before it is signed; and
e. you have taken all reasonable steps to ensure you have sight of the final obligation before the inquiry is formally closed.

130 If the obligation is not completed within one month, the inquiry should still be closed in writing. You should then submit your report to the Secretary of State as soon as possible after the inquiry has been formally closed.

131 It is essential in all cases where an obligation is offered, but not received, that this is mentioned in the report. Without information on what it was supposed to cover and how important it might have been, it will be difficult for the Planning Casework Division (PCD) to deal with a late submitted obligation without going back to the parties and occasioning further delay.

132 In some cases a completed obligation (especially a unilateral undertaking) may be received at the last moment. If the Inspector considers it necessary to seek the

[29] The Town and Country Planning (Inquiries Procedure) (England) Rules 2000 (SI 2000/1624)
[30] Note: this period is longer than might normally be allowed on a transferred appeal

views of the LPA outside the event, but while holding the inquiry/hearing open, then this must be done through the Case Officer.

Annex A

A Casework scenarios

The following table provides general guidance on the approach that might be appropriate in various different scenarios. However, it is not possible to be prescriptive and you must use your own judgement based on the particular circumstances of each case, the information available and the arguments put by the parties. It is mainly directed at casework where the LPA has sought financial contributions towards services and infrastructure.

	Scenario	Approach	Reason
1	The lack of an obligation is a reason for refusal, the need for contributions is contested by the appellant and no obligation is provided.	Assess whether, on the basis of the evidence provided, harm would arise in respect of any of the matters that the LPA believe an obligation should cover. Any harm should be factored into the overall planning balance.	It is a significant contested issue.
2	The lack of an obligation is a reason for refusal, the need for contributions is contested by the appellant but an obligation has been provided.	Assess and reach a finding on each element of the obligation. Where there are multiple contributions you should conclude separately on each one. This would usually be a main issue.	Despite the provision of an obligation – it remains a significant contested issue (unless the appellant has conceded it is now necessary). The appellant might have provided an obligation on a 'safety first' basis to avoid delay in the event that you conclude an obligation is necessary.
3	An obligation is provided and the absence of contributions is not a reason for refusal – **but** the appeal is being dismissed for other reasons.	It is not generally necessary to consider the obligation in any detail or to reach a finding on it. In such circumstances it will be sufficient for you to state that the appeal is to be dismissed on other substantive issues and whilst an obligation has been submitted, it is not necessary to look at it in detail, given that the proposal is unacceptable for other reasons. This can usually be dealt with in an 'other matters' section. The exception to this is where the obligation would provide, for example, affordable housing (whether to meet a policy	It is not a significant contested issue and a conclusion either way (with the exception of affordable housing) would not affect the overall decision. This is because Regulation 122 states than an obligation may only constitute a reason for granting planning permission if it meets the tests – and in such cases you would not be granting planning permission.

		requirement or not) which would have to be considered in the Inspector's overall balancing exercise.	An alleged benefit needs to be weighed against any harm.
4	An obligation is provided and the absence of contributions is not a reason for refusal/is not contested – and the appeal is being allowed	It **is** necessary to consider the obligation in detail and to reach a finding on it. If the obligation meets the 3 tests the appeal would be allowed. If you find that the obligation is not necessary or that the LPA has provided insufficient evidence to allow you to conclude that it is necessary – you should explain that you have not accorded the obligation any weight and so it has not been a reason for granting planning permission. This can usually be dealt with as an 'other matter'. If you find that the obligation is necessary but is incomplete or flawed so that it would not take effect – it is likely that you would need to consider dismissing the appeal after weighing the harm caused by lack of an obligation in the overall planning balance. If so, this would be a main issue.	This is because Regulation 122 states than an obligation may only constitute a reason for granting planning permission if it meets the tests – and in this scenario you would be granting permission
5	The lack of an obligation is not a reason for refusal. However, the LPA has commented in its appeal statement that contributions are necessary. No obligation has been provided.	If you are minded to allow on the basis of the main issues then you would need to deal with the lack of an obligation and reach a finding. If you conclude that an obligation is necessary then it could constitute a reason for dismissing the appeal. If you intend to dismiss on this basis, it should be a main issue. If you were minded to dismiss for other reasons – you could deal with this more briefly in an 'other matter' especially if the issue was only raised in passing by the LPA. You would not need to reach a finding. However, if the LPA's statement deals with the lack of an obligation in some detail (perhaps because there have been changed circumstances since it made its decision) it would be prudent to deal with it as a main issue and to reach a finding.	This is a 'losing' party argument against the proposal (even if not mentioned in a reason for refusal) and so needs to be addressed. If you are dismissing for other reasons, this 'other matter' could not lead you to a different decision on the appeal. Because it would be a significant contested issue.

6	Lack of obligation is a reason for refusal – but an obligation is provided during the appeal process	If allowing – assess and reach a finding on the submitted obligation. If dismissing for other reasons – there is no need to assess the submitted obligation or reach a finding (however, it should be referred to). You might explain that this was a reason for refusal, but that an obligation has now been provided, explain that the LPA has confirmed that this resolves their concerns (if it does), but that given you are dismissing for other reasons it has not been necessary for you to consider this matter in any further detail. However, an exception to this is if the obligation would provide a benefit such as affordable housing which could weigh in favour of the development (and so might need to be balanced against any harm). In all 3 cases you should explain the circumstances briefly (i.e. that the obligation was provided during the appeal process). In most cases this can be an 'other matter'.	It is necessary to reach a finding as to whether the contributions/provisions in the obligation meet the relevant tests (because of Regulation 122). It is no longer a significant contested issue – and the outcome of any assessment you carry out could make no difference to your decision to dismiss the appeal. An alleged benefit needs to be weighed against any harm.
7	The LPA considers an obligation is required. The appellant agrees that a contribution is reasonable but has not provided a completed obligation (and any deadlines you have set for it to be provided have passed).	If you are dismissing on the basis of other main issues – the absence of a contribution can be covered briefly in 'other matters' – generally you would not need not reach a finding. However, explain the circumstances. However, if the obligation relates to affordable housing (or some other potential *benefit*) this would be a potential positive factor that might need to be weighed against the harm If you are otherwise minded to allow on the main issues you will need to assess whether a contribution is necessary. If the issue is of 'substance' it might warrant being a 'main issue'. It would need to be a main issue if you conclude a	If you are dismissing for other reasons, this 'other matter' could not lead you to a different decision. A potential benefit should be weighed against any harm. If allowing, the LPA would have reasonable grounds to complain if you had not addressed this issue (given that they consider a contribution to be necessary and none has been provided).

		contribution is necessary and so would be dismissing on that basis.	
8	The LPA and the appellant agree that an obligation is necessary. An obligation has been provided but it is not complete (and any deadlines you have set for it to be provided have passed).	An obligation must be complete before it can take effect. If you conclude the obligation is necessary but could not take effect – then you should weigh the harm in the overall planning balance and the lack of an obligation may prove fatal to the appellant's case (unless the matter could be dealt with by condition) – and this would need to be a 'main issue'.	The *Procedural Guide – Planning Appeals – England* gives advice in Annexe N on when a completed obligation should be provided.
9	The LPA considers a contribution is necessary and the appellant has provided this by means of a direct payment to the LPA (for instance by cheque) without any legal agreement or unilateral undertaking.	If you conclude the contribution is not necessary then you should clearly indicate that the payment has not had any bearing on your decision. If you decide that a contribution is necessary you will need to consider whether there is sufficient legal commitment to guarantee that the contribution would be used for its intended purpose.	Given there will be no official record and no legal guarantee it may well be that the means of payment has not been properly secured. If so, you will not be able to give it any weight.
10	The lack of an obligation is a reason for refusal but since then a CIL charging schedule has been adopted.	If the parties are agreed on this the position can be explained briefly in an 'other matter' or procedural paragraph – i.e. that an LPA cannot charge twice for the same infrastructure. *But note affordable housing is not part of the CIL regime. Such provision will therefore continue to be secured via the s106 mechanism as will contributions which are site specific, i.e. that are needed to make the appeal proposal acceptable.*	An LPA can seek contributions via a s106 agreement for infrastructure which is also to be funded by CIL. Permission should not be refused for failure to pay a contribution due under CIL, since that will be dealt with separately under the CIL procedures. If part of a LPA's case at appeal relates to the absence of a mechanism for it to collect the CIL, you will need to set out the correct procedure briefly – e.g.: *The collection of the CIL contribution is undertaken by the relevant charging authority on service of a notice that planning permission has been granted in relation to chargeable development. As such, the requirement for, and enforcement of, the payment of a contribution in relation to ……. is not a matter for consideration in this appeal.*

Annex B

B Extracts from appeal decisions

The following are examples from reasoning in decisions made after the CIL Regulations were introduced (but before the 2014 amendments).

1. Contributions towards infrastructure not shown to be necessary and no obligation provided

The Council refers to the need for an obligation under Section 106 of the Planning Act to secure green space, education and transport contributions. The appellant suggests that a unilateral undertaking will be prepared. No planning obligation is before me. I have not been provided with evidence to indicate whether such an obligation is necessary having regard to the statutory tests in Regulation 122 of the Community Infrastructure Regulations 2010.

2. Contributions towards infrastructure not shown to be necessary and no obligation provided

The Council has advised that financial contributions are required towards the provision of public open space, community and educational facilities. Although the appellant has confirmed a willingness to provide these contributions, I have not been provided with a planning obligation.

Local Plan Policy 20 indicates that contributions will be sought to mitigate the adverse effects that new development may have on the local community and infrastructure and Policy 21 states that new developments which lead to an increased demand for community facilities will be expected to provide or contribute to the provision of appropriate facilities.

The Council's Delegated Report indicates that the contributions sought have been calculated using standard formulae based on the number of units, bedrooms and persons. However, I have not been provided with any detailed evidence to define the extent of any local deficiencies in open space, community and education facilities or the effect that the appeal proposal might have on them. Nor has any detailed information been provided to show how and where the contributions would be spent. Accordingly, I cannot be certain that the contributions sought would be necessary to make the development acceptable or that they would be directly related to the development and fairly and reasonably related in scale and kind.

Consequently, and notwithstanding the aims of development plan policy, I am unable to conclude that a planning obligation seeking to provide these contributions would comply with Regulation 122 of the Community Infrastructure Levy Regulations 2010. In these circumstances, the absence of a planning obligation does not weigh against the development.

3. Provision for affordable housing necessary but not provided

The Council's Strategic Housing Market Assessment undertaken as part of the preparation of the Local Development Framework identified a significant

shortfall in affordable housing in the district, in response to which Policy # of the Core Strategy requires new residential development in # to provide 50% of its dwellings as affordable homes, with financial contributions in lieu of on-site provision where fewer than 4 homes are proposed [this example pre-dates the changes made to the government's Planning Practice Guidance in December 2014]. On the evidence before me, it appears that the need for the contribution sought by the Council arises from the development and satisfies the 3 tests in Regulation 122(2) of the CIL Regulations 2010. The proposal would fail to secure appropriate financial contributions towards the provision of affordable housing and so would be in conflict with Core Strategy Policy #.

4. Contributions necessary but execution of obligation flawed

The submitted Unilateral Undertaking aims to secure financial contributions towards meeting the need for additional facilities and services arising from the development. The contributions towards education, libraries, play space and playing pitches, community facilities, recycling, environmental improvements and transport are in accordance with the standard charges sheet in the Council's adopted SPD. The Council has justified the various sums sought with updated information. I consider that the measures in the Undertaking are necessary, related directly to the development and fairly related in scale and kind. As such they would accord with the provisions of Regulation 122 of the Community Infrastructure Levy Regulations 2010 and the tests for planning obligations set out in the NPPF.

However, I have some concerns about the document itself, its execution and thus whether the Council could rely on it to secure the contributions. For example it is not signed by the appellant and there is no accompanying documentation to show that the agent has the power to sign such a deed on the appellant's behalf. Also, the plans referred to in Schedules 1and 2 are not included.

As I intend to dismiss the appeal for other reasons, I have not pursued this matter further with the main parties. Nonetheless, as it stands, and for the reason given in the previous paragraph, I am not satisfied that the submitted Unilateral Undertaking would make adequate provision for additional infrastructure to meet the additional needs arising from the development in accordance with Local Plan policy #, Core Strategy policy # and the SPD.

5. Obligations provided but not necessary/directly related

There are 2 executed planning obligations, dated 6 November 2009 and 8 July 2010.

The former makes provision for the payment of sums to Stoke City Council and Newcastle-under-Lyme Borough Council. In the case of Stoke this would be sums of £100000 towards the provision of environmental enhancements in Stoke town centre, and £25000 towards environmental enhancements for Bridgetts' Pond, which lies to the south of the proposed development. In the case of Newcastle the obligation would provide £100000 towards environmental enhancements in Newcastle town centre.

Having regard to the recently introduced CIL Regulations it seems to me that this obligation is not necessary in order to make the development acceptable. It relates to the payment for off site works which are not directly related to the development. The obligation therefore fails the tests set out and I do not therefore consider that it would be lawful to take it into account as a reason for granting planning permission.

The second obligation relates to employment matters. It would require Tesco to make reasonable efforts to enter into a Local Employment Partnership in order to bring a number of benefits, or if that is not possible, to set up alternative mechanisms for recruitment. In either case these would be intended to assist, for example, in recruitment and training of candidates from employment priority groups.

It seems to me that this obligation is directly related to the development, and is fairly and reasonably related in scale and kind to the development. However, I am not persuaded that it is necessary to make the development acceptable in planning terms. That was accepted at the inquiry. Hence this obligation too would fail to meet the tests in the Regulations and in my view it would not be lawful to take it into account as a reason for granting planning permission.

6. Some contributions pass the tests, others do not

The parties have completed a Section 106 Agreement in conjunction with East Sussex County Council which includes a number of obligations to come into effect if planning permission is granted. I have considered these in light of the statutory tests contained in Regulation 122 of The Community Infrastructure Levy (CIL) Regulations 2010. They relate to the following matters.

Affordable Housing: LP policy H6 seeks a minimum of 25 per cent of the units to be social rented housing. The Agreement provides for 18 such units and for a financial contribution to be made in respect of the shortfall of 4 units. The amount due would be calculated on the land value and the total build cost of the units being provided on site at the time development commences. In these circumstances I consider that this obligation would be fairly and reasonably related to the development proposed and that it passes the statutory tests.

Local Sustainable Accessibility Improvement Contribution (LSAIC): this is a sum of £50,730 negotiated on the basis of interim Supplementary Planning Guidance (SPG) entitled “A New Approach to Development Contributions”, published in 2003. New housing allocations have led in part to revised LSAIC costs for residential development in 2010/2011. However, no indication has been given of how the money would be spent, save that it is required “to offset the impact of the additional traffic”. On the basis of the evidence before me I am therefore unable to be sure that this obligation meets the statutory tests.

Road Traffic Regulation Order (RTRO) Contribution: in commenting on the planning application the Highway Authority noted that, as a result of the development, alterations would be required to the parking bays in Braybrooke Road, and that this would require a RTRO which would need advertising and a legal process. The Authority considered that the applicants should contribute £1500 towards this work. I am not aware of the policy basis for this requirement or the reason why the amount was increased to £2000 in the Agreement. I am therefore unable to conclude with any confidence that this obligation would pass tests (a) and (c) in CIL Regulation 122.

Play Area Contribution: a sum of £70,000 has been agreed for the upgrading of specified playgrounds in the vicinity of the appeal site. LP policy DG13 requires the provision of children’s playspace in residential schemes that include 25 or more family dwellings. This includes the appeal proposal. Where this cannot be provided on site a payment may be made for the improvement of a nearby playspace. SPG note 5 “The Provision of Children’s Playspace in Housing Developments”, adopted as interim guidance in 2004, sets out the playspace standards required. I understand from the SPG that the contribution would be based on the actual costs incurred by the Council in undertaking the

work and a commuted sum towards future maintenance. Given the size of the proposed development, the number of units involved and the lack of space on-site for this type of amenity, I consider that this obligation would pass the statutory tests.

Public Art Contribution: LP policy DG20 seeks the provision of "public art" in major development schemes, stating that the Council would have regard to the contribution that would be made by any such works or effects on the appearance of the scheme and the character of the area. A sum of £25,000 has been negotiated for this purpose, but with no commitment to any specific course of action. Whilst I sympathise with the objective of this obligation, including the possible future involvement of the local community in any project, on the evidence before me I cannot conclude that this obligation would pass the statutory tests.

In light of these findings, since the obligations relating to the LSAIC, RTRO and public art contributions fail to meet 1 or more of the tests set out in CIL Regulation 122, I am unable to take them into account in determining the appeal. I give significant weight to the obligations for affordable housing and for the improvement of local playgrounds to compensate for a low level of on-site playspace.

7. Contribution does not pass the tests

The appeal proposal is accompanied by a signed and dated unilateral undertaking submitted at the application stage, in a form acceptable to the Council. It sets out a series of payments for infrastructure and services contributions to accord with the Council's Supplementary Planning Document (SPD): Planning Obligations and Infrastructure Provision, adopted in 2008.

From the information submitted with the appeal and the subsequent representations, I am not content that, in this particular case, all the monies requested has been proven to be either directly related to the proposed development or necessary to make the development acceptable in planning terms. Therefore, without further refinement of the information to back up this case, I consider that there is a tension with [the then] Circular 5/2005 and the tests in Regulation 122 of the Communities Infrastructure Levy Regulations 2010. I am therefore unable to take the undertaking into account in determining this appeal.

8. Contribution does not pass the tests

The planning obligation provides for a payment of £27,000 to be made as a commuted sum for children's play space in lieu of provision on-site. This approach is in line with saved Policy OS2 of the Local Plan. The sum would be directly related to the development. It is calculated on the basis of the expenditure required for constructing a Local Area for Play on site. The Council's standard scale of charges is not disputed.

The proposal includes houses suitable for family housing. Some of those occupying the development would already live in the village but the obligation also allows for those with family connections to return and newcomers may occupy the dwellings that they leave. I therefore anticipate that the demand for such facilities would increase and that the contribution would be fairly and reasonably related in scale and kind.

There are two existing play areas in St Margaret's. It is not unreasonable to imagine that future occupiers could walk to the area at Reach Road. There is no suggestion that facilities there are inadequate but rather that upgrading of the equipment is said to be required every so often. The Parish Council indicated that they already have plans to improve. So whilst the proposal could be expected to increase the number of children

using the facility there is no tangible evidence of a quantitative shortfall in provision. Qualitative enhancements appear to be in hand.

I therefore consider, on the basis of the information presented, that the contribution is not necessary to make the development acceptable in planning terms. Having regard to Regulation 122 I am therefore unable to take account of this obligation. Policy OS2 accepts that children's play areas can be located elsewhere. That provision is nearby and well related to the new housing. There is no indication that it is deficient. As such, I consider that living conditions for future occupiers in this respect would be satisfactory and that there would be no conflict with the aims of the development plan.

9. Some contributions pass the tests, others do not

Having regard to the development plan and the Supplementary Planning Document (SPD) on Planning Obligations and Infrastructure, I consider that the provisions of the undertaking in respect of affordable housing and outdoor play space are necessary to make the development acceptable in planning terms. My understanding is that the sum for highway improvements is in addition to the expenditure required to improve the access, including the removal of the footbridge and the provision of an at-grade crossing. There is no indication of where this money would be spent or how it relates to the development. I am not persuaded that the voucher payment to first occupiers is necessary.

The infrastructure contribution covers a range of matters. There is anecdotal evidence of a shortage of school places nearby. The spending programme for the tariff refers to Borough wide recycling facilities and environmental improvements in Hinchley Wood. However, the functional and geographical link between the development and these items is not clear. I have no information to indicate any deficiencies in library provision. Other than education none of these contributions are directly related to the development. I also consider that a payment towards the cost of a monitoring officer is not justified as this is part of the general statutory duty of planning control.

The sum in respect of education is undisputed and based on the SPD. The terms relating to affordable housing and play space are also fairly and reasonably related in scale and kind. However, as they simply fulfil policy expectations, they attract no positive weight in support of the scheme. In accord with the Community Infrastructure Regulations I have not taken account of the other parts of the undertaking.

The Planning Inspectorate

Public Rights of Way

Updated to reflect Current Framework (NPPF)?	Yes

What's new since the last version

Changes highlighted in yellow made 28 une 2023:

- Numerous updates throughout this chapter

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The Rail Crossing Extinguishment and Diversion Orders Regulations 1993 (SI 1993 No. 9)

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The Local Authorities (Recovery of Costs for Public Path Orders) Regulations 1993 (SI 1993 No. 407)

The Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993 (SI 1993 No. 12)

The Highways, Crime Prevention etc (Special Extinguishment and Special Diversion Orders) Regulations 2003 (SI 2003 No. 1479)

The Public Rights of Way (Combined Orders) (England) Regulations 2008 (SI 2008 No. 442)

The Public Rights of Way (Combined Orders) (England) (Amendment) Regulations 2010 (SI 2010 No. 2127)

The Town and Country Planning (Public Path Orders) (Amendment) (England) Regulations 2013 (SI 2013 No. 2201)

Guidance

DEFRA Circular 1/09

Welsh Government Guidance for Local Authorities on Public Rights of Way, October 2016

Authorising structures (gaps, gates & stiles) on rights of way: Good practice guidance for local authorities on compliance with the Equality Act 2010 (Defra, 2010)

Guidance for English Surveying Authorities

Advice

Knowledge Library: Rights of Way page

- including ROW Notes
- including Advice Notes

Definitive Map Orders: Consistency Guidelines (PLEASE NOTE THAT THESE HAVE NOT BEEN UPDATED RECENTLY AND SHOULD BE TREATED WITH CAUTION)

Knowledge Matters

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Knowledge Library

Bailii

Alsatia

Acronyms and Abbreviations

ACU	Auto Cycle Union
All ER	All England Law Reports
AONB	Area of Outstanding Natural Beauty
ASV	Accompanied Site Visit
BBT	Byways and Bridleways Trust
BC	Borough Council
BDS	British Driving Society
BE	Blended Event
BHS	British Horse Society
BOAT	Byway Open to all Traffic
BOTO	Bridge or Tunnel Order
BR	Bridleway or Bridle Road
BW	Bridleway
CA or CoA (Also EWCA)	Court of Appeal
CA06	Commons Act 2006
CA68	Countryside Act 1968
CC	County Council
CLA	Country Land & Business Association
CRA	Commons Registration Act 1965
CROW or CROWA00	Countryside and Rights of Way Act 2000
CTC	Cyclists' Touring Club
DA15	Deregulation Act 2015
DC	District Council
DEFRA	Department for Environment, Food and Rural Affairs
DETR	Department for the Environment, Transport and the Regions
DfT	Department for Transport
DLW	Discovering Lost Ways
DMMO	Definitive Map Modification Order
DMO	Definitive Map Order
DMS	Definitive Map and Statement
DoE	Department of the Environment
EA	Environment Agency
EA10	Equality Act 2010
ECHR	European Convention of Human Rights
ELM	Environmental Land Management (agricultural payment scheme)

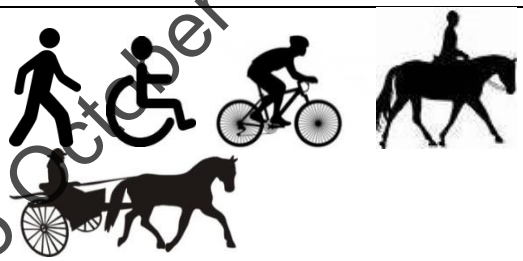
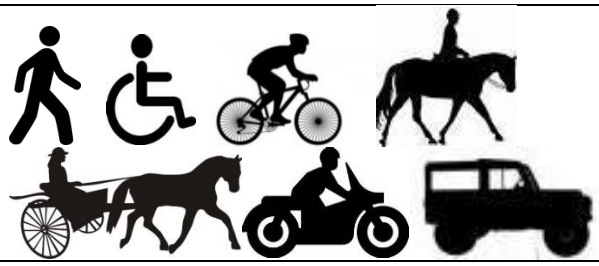
EWCA (also CA or CoA)	England and Wales Court of Appeal
EWHC	England and Wales High Court
FP	Footpath
GLASS	Green Lanes Association
GLEAM	Green Lanes Environmental Action Group
HA	Highway Authority
HA80	Highways Act 1980
HRA98	Human Rights Act 1998
HL	House of Lords
ILEMO	Integrated Legal Event Modification Order
IPROW	Institute of Public Rights of Way and Access Management
JPL/JPEL	Journal of Planning and Environment Law
LAF	Local Access Forum
LARA	Land Access & Recreation Association
LEMO	Legal Event Modification Order
LGA72	Local Government Act 1972
LNR	Local Nature Reserve
LPA	Local Planning Authority
LPA25	Law of Property Act 1925
MCAA09	Marine and Coastal Access Act 2009
MPV	Mechanically Propelled Vehicle
NAW	National Assembly for Wales
NE	Natural England
NERC or NERCA06	Natural Environment and Rural Communities Act 2006
NFU	National Farmers' Union
NNR	National Nature Reserve
NP	National Park
NPACA49	National Parks and Access to the Countryside Act 1949
NR	Network Rail
NRW	Natural Resources Wales
NT	National Trust
OMA	Order Making Authority
ORPA	Other route with public access
OS	Ordnance Survey
OSS	Open Spaces Society
PC	Parish Council

P&CR	Property, Planning and Compensation Report
PDGLA	Peak District Green Lanes Alliance
PNFPS	Peak and Northern Footpaths Preservation Society
PPO	Public Path Order
PROW	Public Right of Way
PSED	Public Sector Equality Duty
QBD/QB	Queen's Bench Division
QC	Queen's Counsel
RA	Ramblers' Association (or Ramblers)
RB	Restricted Byway
RCDO	Rail Crossing Diversion Order
RCEO	Rail Crossing Extinguishment Order
RDC	Rural District Council
ROW	Right of Way
ROWIP	Rights of Way Improvement Plan
RT	Ratione tenurae (roads)
RTA88	Road Traffic Act 1988
RTRA84	Road Traffic Regulation Act 1984
RUPP	Road Used as a Public Path
RWA32	Rights of Way Act 1932
RWA90	Rights of Way Act 1990
RWLR	Rights of Way Law Review
s.	Section of an Act of Parliament
SAM	Scheduled Ancient Monument
SI	Statutory Instrument
SSE	Secretary of State for the Environment
SRO	Side Road Order
SSEFRA	Secretary of State for Environment, Food and Rural Affairs
SSSI	Site of Special Scientific Interest
SST	Secretary of State for Transport
TCPA90	Town and Country Planning Act 1990
TRO	Traffic Regulation Order
TRF	Trail Riders' Fellowship
TWA92	Transport and Works Act 1992
UCR	Unclassified County Road or Unclassified Road
UDC	Urban District Council
UEF	User Evidence Form

UKHL	United Kingdom House of Lords
UKSC	United Kingdom Supreme Court
USV	Unaccompanied Site Visit
VE	Virtual Event
WCA81	Wildlife and Countryside Act 1981
1WLR	Vol. 1, Weekly Law Report
WO	Welsh Office

Types of Public Rights of Way

1. There are four types of public right of way:

Footpath – a way allowing people to pass and re-pass on foot with "normal accompaniments" which can include dogs, pushchairs, prams and wheelchairs but not bicycles, pushed or ridden.	
Bridleway – includes the rights of a footpath as well as the right to ride or lead a horse. A bicycle[1] can be ridden on a bridleway, subject to any order or byelaw restricting this right, provided that cyclists give way to walkers and horse riders[2].	
Restricted byway – includes the rights above and a right to use non-mechanically propelled vehicles, eg, a horse and carriage. NB: Roads used as public paths (RUPPs) are now recorded as restricted byways or have otherwise been reclassified[3]	
Byway open to all traffic (BOAT) – a right for all traffic, including vehicles, but mainly used by the public as a footpath or bridleway	

The Definitive Map and Statement

2. The Definitive Map and Statement (DMS) are the legal record of public rights of way. They were introduced by the National Parks and Access to the Countryside Act 1949 (NPACA49) and are held by the surveying authority, which is generally a County Council or Unitary Authority.

[1] In highway terms a bicycle is classed as a vehicle
[2] Countryside Act 1968
[3] S47(2) of the CROWA00

3. There is a duty on surveying authorities to keep the DMS under continuous review; s53 of the Wildlife and Countryside Act 1981 (WCA81). The inclusion of a public right of way on the DMS provides conclusive evidence as to its existence, but does not prevent there being additional unrecorded rights over the route in question; s56 of the WCA81.

4. People often refer to the 'definitive map' meaning both the map and the statement. The map is conclusive evidence of the status of the highway shown, whilst the statement provides evidence of the position, width, limitations or conditions affecting the public right of way at the 'relevant date'. The records are without prejudice to any question whether there were other rights, limitations or conditions at the relevant date.

5. The relevant date, recorded somewhere on the DMS, provides the date at which the evidence showed that the public right of way subsisted. The DMS can be consolidated to include changes arising from legal events[4] and modification orders. Where not consolidated, modification orders with a later relevant date form part of the DMS. Most if not all authorities will have a 'working copy' of the DMS showing all the changes made by orders.

An Overview of Rights of Way Casework

6. Alterations can be made to rights of way by two different types of legal order. Public Path Orders (PPOs) made under the Highways Act 1980 (HA80) or Town and Country Planning Act 1990 (TCPA90) alter the alignment and existence of rights of way on the basis of merit, making changes to the network through diversion, extinguishment and creation.

7. Definitive Map Modification Orders (DMMOs) made under the WCA81 record changes in the alignment, existence and status of footpaths, bridleways, restricted byways and byways open to all traffic through addition, deletion, upgrading and downgrading, on the basis of evidence to show that the changes have already taken place and so should be recorded.

8. When an order making authority (OMA) makes a rights of way order they are required to publicise it to allow an opportunity for objections to be made. If no objections are received or objections made are subsequently withdrawn, the order may be confirmed by the OMA.

9. If there are objections outstanding, the order must be submitted to the Secretary of State for Environment, Food and Rural Affairs (SSEFRA) or Welsh Ministers (WM) for confirmation. *R (Hargrave & Hargrave) v Stroud DC* [2002] EWCA Civ 1281 confirms the fact that there is discretion whether to make and/or confirm PPOs means that an authority need not submit it to the SSEFRA/WM for confirmation. This may lead to authorities submitting orders but taking a neutral stance with regard to confirmation, and then the case in support will often be led by the applicant for the order. Although *Hargrave* related to an order made under s119 of the HA80, it may arise in other situations. Unopposed orders may also be submitted where the authority requests modifications. OMAs can choose to withdraw PPOs but must submit DMMOs.

[4] see section 53(3)(a) of WCA81, for example a public path order is a legal event

10. When an order is received by PINS, it is validated by the English or Welsh Rights of Way casework team to ensure that it has been drafted in accordance with the appropriate regulations. These are set out for each type of order under each relevant section below.

11. The file will be sent to the Inspector 3-4 weeks prior to the charted event so that he or she can read up on the case and request any missing documentation. A checklist of the documents required for each order will be attached to the left-hand side of the case file. The original orders and copies will also be included on this side of the file – it is VITAL that you do not mark the original order in any way as it is a legal document.

Approach to Decision-Making

12. Orders should always be determined in accordance with the relevant criteria set out in the respective part of the HA80, TCPA90 or WCA81, as the case may be, and any other relevant Acts of Parliament. These should be the starting point for and provide the framework for your decision, unless the particular circumstances of the case dictate otherwise.

13. Some of the tests in PPO casework are quite narrow and relate to specific aspects of the route in question, for example the relative convenience of an alternative route. Others require much wider issues to be considered when deciding the expediency of the proposal.

14. Having started with the relevant statutory tests, you will need to consider the facts and submissions put to you by the parties, which include, for example, representations on matters of merit in PPO casework or legal submissions, and/or user, landowner and/or documentary evidence in DMMO casework. There may be matters which Inspectors consider relevant to their determination of the order, even if the parties do not raise them.

15. If such issues are to be referred to in the decision, they must be raised with the parties, either directly at the inquiry or hearing, or in correspondence if the case is being dealt with by written representations. The case of *Todd & Bradley v SSEFRA* [2004] EWHC 1450 made clear that there will be procedural unfairness, in breach of natural justice, if the decision turns on grounds that are not canvassed with the parties.

16. In each case it is for the Inspector to decide on the weight to be given to the various arguments for or against a proposed modification, having established the facts and considered the submissions of those concerned. The particular combination of evidence in any case may have similarities to that in other cases but nonetheless create a unique situation. However, Inspectors are reminded of the need to be as consistent as possible in their interpretation of the statutory tests, case law, policies and legal advice. As with all other casework write with the losing party in mind.

Modifying Orders

17. In coming to a decision it may be necessary to modify the order, for example, if no width is included you may need to add one; see Advice Note 16 and associated guidance. See also Advice Note 20 in relation to DMMOs. It may be that in the course of determination you are asked to make or find that other modifications are required, perhaps to the alignment, status or recording of limitations. You cannot replace the

Order map, but you can add a map for limited purposes in clarifying the existing order map. Examples of such circumstances include an instance where it is not possible to clearly show the width on the existing map, or if there is an obvious error with the Order map. OMAs should be asked to provide a separate map that clarifies the modification and attach this to the original Order map. However, it would not be appropriate to propose modifications that could not be shown completely on the order map, for example to add an additional section.

18. If the 'relevant date' on a section 53 order is earlier than 6 months before the date it is made, the order is invalid and will need to be returned to the authority. The 6 months provision is there to prevent landowners being prosecuted for obstructing a public right of way which they may not have known existed. Where the 'relevant date' is later than the date of the order, the order should be rejected and returned to the authority.

19. If an invalid 'relevant date' has arisen as a result of a clear typographical error e.g. 124th January or 30th February, it may be open to an Inspector to modify the order to correct the date. However, Inspectors should be wary of modifying an order where it is unclear whether the error has arisen as the result of a typographical error. If the case is not clear-cut, the correct approach would be for the order to be rejected.

20. The modifications may or may not require further advertisement, depending upon their effect and the matters set out in the relevant Act (see para 24 below). Where modifications are proposed which would require further advertisement, the initial decision should be headed 'Interim Order Decision' to clarify that the process has yet to be finally concluded. With the exception of s247 of the TCPA1990, no order can be confirmed with modification affecting land not affected by the order as made without giving notice of the proposed modification(s). Such matters would be where the alignment was altered, or the width increased. Where the evidence demonstrates that the width specified in a DMMO order should be reduced, modifications to the order must be made. This is distinct from PPO orders, as there is no legislative mechanism by which modifications can be advertised.

21. Minor modifications, where no new land is affected, would not need advertisement, for example, correcting typographical errors or adding grid references. However, the power of modification is not intended to make good orders which would otherwise be incapable of confirmation; see Welsh Government Guidance for Local Authorities on Public Rights of Way, October 2016, DEFRA Circular 1/09 and Advice Note 20.

22. To make such modifications a copy of the order, including the order map as appropriate, should be marked up with red ink and 'red ink modifications' written on the front of the file to alert the office team. Ensure you are using the correct notation as set out in Advice Note 22. Note that despite any changes you may consider to be required there is no need to modify the citation "…it appears to the authority…" even if they disagree with you. Again, **DO NOT** mark up the legal order as further alterations may arise as a result of advertised modifications. The office team will make such changes as are required to the legal order once the final decision is made, whether following advertisement or from unadvertised modifications.

23. Note that you will be making a final order decision at some stage, whether or not there are objections or representations to your proposed modifications. If there are objections or representations you need to take into account you may find you need to

propose, or make, further modifications; confirm the Order as you have already proposed; or, confirm the Order as originally made.

24. Be careful that you are not making amendments that should be separately advertised. For example, it may be appropriate to record a different number for a route joining onto the one you are dealing with in a DMMO but it would not be appropriate to record a width on that joining route that was not already shown in the relevant Definitive Statement. Even if all parties agree to the proposed modification you may still need to advertise depending on the relevant schedule:

    - Highways Act 1980 – Schedule 6, paragraph 2(3)
        - if it affects land not affected by the order as submitted;
    - Wildlife and Countryside Act 1981 – Schedule 15, paragraph 8(1)
        - if it affects land not affected by the order as submitted;
        - if it does not show any way shown in the order or shows any way not so shown;
        - if it shows as a highway of one description a way which is shown in the order as a highway of another description;
    - Town and Country Planning Act 1990 – Schedule 14, paragraph 3(6)
        - if it affects land not affected by the order as submitted.

Public Path Orders

General Principles

25. PPOs can alter the alignment and existence of footpaths, bridleways and restricted byways – introduced by the Natural Environment and Rural Communities Act 2006 (NERCA06). Changes cannot be made to BOATs by PPOs with the exception of s118B, 119B and 119D.

26. The HA80 allows changes under the following sections:

    Section 26: Creation

    Section 118: Stopping up (extinguishment)

    Section 118A: Stopping up of public paths crossing railway lines

    Section 118B: Stopping up of certain highways for purposes of crime prevention etc

    Section 119: Diversion

    Section 119A: Diversion of public paths crossing railway lines

    Section 119B: Diversion of certain highways for purposes of crime prevention etc

Section 119D: Diversion of certain highways for protection of sites of special scientific interest (SSSI)

27. The TCPA90 allows changes under the following sections:

Section 247: Public paths affected by development: orders by Secretary of State

Section 257: Public paths affected by development

Section 258: Extinguishment of public rights of way over land held for planning purposes

Section 261: Temporary stopping up of highways for minerals working

Technical Matters

Order Route not Shown on the DMS or Claimed to Exist on the Proposed Line

28. A route does not have to be recorded on the DMS before a PPO can be made. A Highway Authority (HA) is entitled to treat a route as a highway and, when dealing with a PPO in respect of an unrecorded right of way, an Inspector should not unreasonably dismiss this claim. Bear in mind that the HA may not be the OMA; ensure appropriate evidence is taken into account.

29. If the status of the route is the main issue in dispute, a DMMO would be the appropriate mechanism to determine this. Even if there is very strong evidence that the route should be recorded with a different status, such arguments should be set aside; a PPO cannot change the recorded status of the public right of way.

30. An assertion that the route onto which it is proposed to divert another route is already subject to public rights cannot be dismissed, as otherwise the effect of the diversion order would be to extinguish a public right of way. However, sufficient evidence of the existence of the rights will be required. In such circumstances you may be referred to *Bernstein* but it is important to read this case carefully as it is often misquoted and misunderstood.

Form of Order

31. Under the various sections of the Acts and relevant Regulations, PPOs should be “in the form” or “a form substantially to the like effect” to that set out in the relevant Regulations.

32. If a PPO differs from the prescribed form, Inspectors will need to decide whether or not it is substantially the same and whether anyone may have been misled or prejudiced as a result. If an order is so badly drafted that a reasonable person would be likely to misunderstand its intention or effect, it should not be confirmed.

33. A PPO must specify a width for a new highway. If it does not the Inspector should invite comments from the parties on the appropriate width and, in the decision, propose that the order be modified to record a width. This will require further advertisement.

34. If the width is given as a minimum or approximate width, the Inspector should modify the Order. This may or may not require further advertisement; see Advice Note No. 16.

PPOS Under the Highways Act 1980

General Principles

35. In determining orders made under s26, 118 and 119 of the HA80, there is an issue of 'expediency'. A definition provided by the Oxford English Dictionary is: "*convenient and practical although possibly improper or immoral*", "*suitable or appropriate*". In practice, expediency means wide discretion of the matters to be taken into consideration when deciding whether or not to confirm an order made under these sections.

36. *R (oao Manchester CC) v SSEFRA* [2007] EWHC 3167 (Admin) related to an Inspector's decision not to confirm a special extinguishment order for the reasons of crime prevention; s118B. The decision turned on the issue of expediency. Sullivan J said the weight to be given to the evidence was entirely a matter for the Inspector.

37. The Inspector had been satisfied that the ss(1) and (3) conditions had been met, and it was expedient to make the order from the point of view of crime prevention, but they could still decide it was not expedient to confirm the order, having regard to wider considerations. Subsection (7) requires the decision maker to have regard to all of the circumstances. With regard to resolving detailed issues, for example, graffiti or rubbish, the issue for the Inspector was one of balance. It was held that:

    "The weight to be given to the various factors in issue in a planning or highway inquiry, provided those factors are legally relevant, is entirely a matter for the Inspector's expert judgment. The use of the words "in particular" in the context of a subsection which is expressly conferring a very broad discretion on the decision-taker to decide whether confirmation of the order is "expedient", and is expressly enjoining him when doing so to have regard to all material circumstances, was not intended to displace that underlying principle."

38. It is reasonable to assume that this judgment relates to other HA80 orders, where expediency is a relevant consideration.

39. Arguments that the landowner bought the property in full knowledge of the existence of a right of way, and so should not then be able to alter it, have been considered in *Ramblers' Association v SSEFRA, Oxfordshire CC & Weston* [2012] EWHC 3333 (Admin). It was set out that there was no statutory bar to a person making an application in such circumstances.

40. The case also referred to the concern of confirmation of a PPO setting a precedent for other such orders. Every order must be dealt with on its own merits, subject to the evidence presented and *Weston* indicated that this argument would need to be backed by evidence to show that an accumulation of such decisions could be seen to be harmful.

Landscape, Conservation and Biodiversity

41. Regard should be had to landscape, conservation and biodiversity matters where relevant, in all casework relating to PPOs made under the HA80. Note that section 29

of HA80 refers to duties of the council, not Inspectors. For general biodiversity advice please refer to the relevant chapter of the ITM and make use of the Environmental Services Team where appropriate.

42. S11 of the Countryside Act 1968 (CA68) requires: “In the exercise of their functions relating to land under any enactment every Minister, government department and public body shall have regard to the desirability of conserving the natural beauty and amenity of the countryside”.

43. The s11 duty must be interpreted on the basis of s49(4) of the CA68, which states that “references in this Act to the conservation of the natural beauty of an area shall be construed as including references to the conservation of its flora, fauna and geological and physiographical features”.

44. S40(1) of the NERCA06 sets out that: “*The 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.” S40(2) provides that, in complying with subsection (1), a Minister of the Crown must in particular have regard to the United Nations Environmental Programme Convention on Biological Diversity of 1992.

45. Regulation 9(3) of The Conservation of Habitats and Species Regulations 2017 imposes a duty to have regard to the requirements of the Habitats Directive in the exercise of functions.

46. If the route is within a National Park, s5, 11a and 114(2) of the NPACA49 apply. S11a incorporates the ‘Sandford Principle’, which was updated by the Environment Act 1995 to say that:

"In exercising or performing any functions in relation to, or so as to affect, land in a National Park, any relevant authority shall have regard to the purposes specified in [s5(1) of the NPACA49] and, if it appears that there is a conflict between those purposes, shall attach greater weight to the purpose of conserving and enhancing the natural beauty, wildlife and cultural heritage of the area comprised in the National Park."

47. If within a National Nature Reserve (NNR) or Site of Special Scientific Interest (SSSI), s28(G) of the WCA81 applies. This imposes a duty on s28(G) authorities, which includes inspectors carrying out their duties:

“to take reasonable steps, consistent with the proper exercise of the authority’s functions, to further the conservation and enhancement of the flora, fauna or geological or physiographical features by reason of which the site is of Special Scientific Interest”.

48. If the route is within an Area of Outstanding Natural Beauty (AONB), s85 of the Countryside and Rights of Way Act 2000 (CROWA00) imposes a duty on the relevant body, which again will include Inspectors carrying out functions in relation to an AONB to: “have regard to the purpose of conserving and enhancing the natural beauty of the area of outstanding natural beauty”. This includes, by s92, the conservation of its flora, fauna or geological or physiographical features.

49. If the proposed route crosses a Scheduled Ancient Monument (SAM), consideration should be given to whether Historic England or Cadw have given consent to the carrying out of any works to bring a path into a suitable condition for use.

50. Depending on circumstances you may wish to ask for information available, for example from surveys, and what mitigation measures might be proposed. As with anything what are the relevant qualifications of those providing information to you. Don't forget to look at other relevant chapters in the ITM.

51. An Order cannot be made conditional upon the outcome of investigatory or other measures to protect biodiversity.

Rights of Way Improvement Plan (ROWIP)

52. The CROWA00 introduced ROWIPs[5]. In determining orders made under s26, 118 and 119 of the HA80, it is necessary to have regard to any ROWIP relevant to that area.

53. ROWIPs are being, or will already have been, integrated into Local Transport Plans. They are intended to be the prime means by which local HAs identify the changes to be made, in respect of management and improvement, to their local rights of way network. ROWIPs should support the Government's aim of better provision for cyclists, equestrians, walkers and people with mobility impairments.

54. When considering whether to confirm PPOs made under the HA80, the Secretary of State and the Welsh Ministers must give consideration to any material provision of a ROWIP prepared by any local HA whose area includes land affected by the order.

55. The CROWA00 also introduced Local Access Forums, which advise local authorities about improvements for public access.

Schedule 6 to the Highways Act 1980

56. The procedures relating to the making, confirmation, validity and date of operation of PPOs under the HA80 are set out in Schedule 6 to the Act. These matters are often raised by objectors in the belief that this will mean that an order is fatally flawed and will be thrown out.

57. If a failure to comply with the procedural requirements comes to light at any point before the determination of the order, Inspectors should seek to remedy this. The question must be whether anyone has, or is likely to have, suffered prejudice as a result of the failure to follow procedures and, if so, whether such prejudice can be avoided by requiring further work to meet the requirements of the procedures.

58. Such matters may include failure to serve notice on a party; to publicise the order on site; to publicise the order in the local newspaper; or giving less than 28 days' notice of the order for objections or representations to be made. In such cases, it would be possible for the determination of the order to be delayed whilst the appropriate notices are served, if necessary by an adjournment of any hearing or inquiry being held into the order.

[5] See also the Welsh Government's Guidance for Local Authorities on Rights of Way Improvement Plans.

59. Where prejudice cannot be avoided, the order should be considered as flawed and incapable of confirmation; Advice Note 21.

60. The notice should:

- state the general effect of the order;
- name a place in the area in which the land to which the order relates is situated where a copy of the order and map may be inspected and;
- specify the time (not be less than 28 days from the date of the first publication of the notice) within which, and the manner in which, representations or objections with respect to the order may be made.

61. The people on whom notice must be served are set out in paragraph (3) of Schedule 6, and the paragraph (3)(b) "prescribed" organisations are set out in the relevant Regulations. These are shown below, but note that some organisations have nominated local representatives who may lead on objections and representations:

Auto Cycle Union – all PPOs

British Horse Society – all PPOs

Byways and Bridleways Trust – all PPOs

Cyclists Touring Club – all PPOs

The Open Spaces Society – all PPOs

The Ramblers – all PPOs

The Chiltern Society – orders within the areas of Luton BC, Mid Bedfordshire DC, South Bedfordshire DC, Chiltern DC, Wycombe DC, South Buckinghamshire DC, Aylesbury Vale DC, Dacorum BC, Three Rivers DC, North Hertfordshire DC and South Oxfordshire DC.

Peak & Northern Footpaths Society – orders affecting land in Cheshire, Derbyshire, Greater Manchester, Lancashire, Merseyside, South Yorkshire, Staffordshire and West Yorkshire

Welsh Trail Riders Fellowship – orders in Wales

Network Rail – orders creating footpaths, bridleways and restricted byways on land adjacent to operational railway lines

62. A copy of the notice – not the order as people sometimes believe to be the case – is to be displayed in a prominent position at the ends of so much of any right of way that is to be created, stopped up or diverted by the order; at council offices in the locality of the land to which the order relates; and at such other places as the authority may consider appropriate.

63. On making a decision, a confirmed order cannot affect land not affected by the order as submitted except after giving notice.

Creation Orders

64. S26 of the HA80 enables the HA to compulsorily create a public right of way; it can also be used in situations where a landowner supports a proposal. S58 of the CROWA00 provides for Natural England (NE) or Natural Resources Wales (NRW) to apply to the SSEFRA or WM respectively for a public path creation order to create access to designated access land.

65. S26(1) sets out the criteria to be satisfied if an order is to be confirmed. The Inspector must consider:

    26(1) "whether there is a need for a footpath, bridleway or restricted byway" along the line indicated on the plan attached to the order and whether "it is expedient" to create it having regard to:

    a) the extent to which the path or way would add to the convenience or enjoyment of a substantial section of the public, or to the convenience of persons resident in the area; and

    b) the effect which the creation of the path or way would have on the rights of persons with an interest in the land, account being taken of the provisions as to compensation.

66. S28 provides that compensation will be payable if the order is confirmed. The amount is not a matter for the Inspector; it remains between the OMA and the relevant parties and may be defrayed to the applicant.

67. In deciding whether it is expedient to create a right of way, the factors to be considered are how much it would add to the convenience or enjoyment of a substantial section of the public or the convenience of persons resident in the area. This does not preclude the consideration of other matters.

68. *R (oao MJI (Farming) Ltd) v SSEFRA* [2009] EWHC 677 (Admin) concerned an order for a bridleway link on the South Downs Way. Objections resulted in modifications to record the disputed part as a 4m wide footpath. It was held that such width was not necessary or expedient to the creation of the footpath, as opposed to a bridleway, having regard to the public amenity and impact on the landowner affected. S26(1) requires the tests to be applied both in respect of the principle of the creation and also to the detail of its alignment, length and width.

Extinguishment Orders

69. When making an order under s118 of the HA80 to extinguish a public right of way, a HA must be satisfied that "it is expedient that the path or way should be stopped up on the ground that it is not needed for public use".

70. It is not for an Inspector to delve too deeply into the issue of 'need' for a path when dealing with an extinguishment order. The case of *R v SSE ex parte Cheshire CC* [1990] deals with this point, and reference is made in this to the earlier case of *R v*

SSE ex parte Stewart [1979]. When deciding whether or not an extinguishment order should be confirmed, the OMA or SSEFRA/WM must apply a different test, with s118(2) stating the criteria on which to be satisfied as being:

"they are satisfied that it is expedient [to confirm a public path extinguishment order] having regard to the extent (if any) to which it appears…that the path or way would, apart from the order, be likely to be used by the public, and having regard to the effect which the extinguishment of the right of way would have as respects land served by the path or way, account being taken of the provisions as to compensation contained in s28 above as applied by section 121(2) below."

71. S118(6) of the HA80 requires any temporary circumstances preventing use of the paths in question to be disregarded when determining the likely use that might be made of them. The type of conditions that constitute temporary circumstances was also addressed in the *Stewart* case.

72. It appears that the Courts will, for example, regard trees or hedges or even an electricity sub-station as temporary, but not a path that has ceased to exist because it has been eroded or fallen down a cliff. The principle which appears to have been endorsed is that to accept the deliberate obstruction of a path as grounds for its closure would encourage those who improperly obstruct public rights of way and, as a matter of policy, should not be condoned. Where the order route is impassable, an Inspector will need to consider the likely use if the obstruction is removed.

73. *R v SSETR ex parte Gloucestershire CC* [2001] ACD 34 concerns an extinguishment order regarding a footpath which had in part fallen into the River Severn. The main issues were whether there was a right to deviate where a footpath had been destroyed by erosion; whether the path moved inland as the river bank eroded; liability in respect of bank erosion and whether the Inspector's decision could be upheld because a new path had been dedicated following public use.

74. It was held that there was no general right to deviate other than in the usual case where a landowner had obstructed the way; there was no known law which provided for moving the footpath inland as a consequence of bank-side erosion. Dedication of a route was always possible, but there was in this case no evidence of a defined line that could have been dedicated.

Diversion Orders

75. S119 of the HA80 enables the HA to divert a public right of way. The criteria to be satisfied before an order is confirmed are set out in a number of subsections. S119(6) requires that, before confirming the order, the SSEFRA/WM must first be satisfied that:

(a) it is *expedient*, in the interests of the owner, lessee or occupier of land crossed by the path or way or of the public[6], that the right(s) of way in question should be diverted; what arrangements have been made for

[6] Whichever is specified in the order; note however that the Secretary of State submitted to judgment in the *Pearson* case (see consent order) on the grounds that where an order had been made in the interests of both the landowner and the public, an Inspector could consider confirmation of the Order even if it had been concluded that the interests of only one party were served by it.

ensuring that, if the order is confirmed, any appropriate barriers and signs are erected and maintained.

(b) the new route to be provided will not be substantially less convenient to the public; and

(c) it is expedient to confirm the order having regard to:

(d) the effect of the diversion on public enjoyment of the path as a whole;

(e) the effect the coming into operation of the order would have as respects other land served by the existing path; and

(f) the effect which any new public right of way created by the order would have as respects the land over which the right is so created and any land held with it;

(g) the provisions as to compensation.

76. S118(6) of the HA80 states that "…any temporary circumstances preventing or diminishing the use of a path or way by the public shall be disregarded." S119 does not contain such wording.

77. However, as outlined in Rights of Way Advice Note 9, when considering matters in relation to s119(6), whether the right of way will or will not be substantially less convenient to the public in consequence of the diversion, an equitable comparison between the existing and proposed routes can only be made by similarly disregarding any temporary circumstances preventing or diminishing the use of the existing route by the public.

78. In considering the potential effect of the proposed diversion upon use of the order route by the public, the existing route should be assessed as if it was open and maintained to a standard suitable for those users who have the right to use it. That is not to say that the circumstances on the ground are irrelevant under other sections, for example in relation to 'expediency'.

79. *Doherty v SSEFRA & Bedfordshire CC* [2005] EWHC 3271 confirms that s119(1) refers to the interests of the owners, lessees or occupiers across whose land the existing route passes, and the diverted route will run. Where the path or way crosses land where no diversion is proposed, those landowners or occupiers will have an interest as members of the public under s119(1) and, where relevant, under the tests in s119(6)(a) to (c).

80. S119(2) requires that a diversion order shall not alter a point of termination of the way if (a) that point is not on a highway or (b) where it is on a highway, otherwise than to another point which is on the same highway or another one connected with it, and which is substantially as convenient to the public. The case of *R v West Dorset DC, ex parte Connaughton* [2002] EWHC 794, All ER (D) 392 is helpful on this issue. There, the purpose of s119(2) was interpreted as ensuring "that a walker between two points is not left unable to reach his destination".

81. It is an established principle that a diversion cannot wholly follow an existing right of way; see *R v Lake District Special Planning Board, ex parte Bernstein* [1982] The Times, February 3.

82. S119(5) permits the OMA to reach agreement with the applicant – owner, lessee or occupier of the land – to defray any claims for compensation or expenses that may follow or to cover the cost of bringing the new route into a fit condition for public use. The details are not a matter for the Inspector, but you may need to be satisfied that it is physically possible to create a suitable path or way on the line shown in the order. It would be appropriate for an Inspector to take into account any effects on the land that cannot be remedied through financial compensation.

83. It should be noted that the new s119(3), as inserted by paragraph 9(3) of Schedule 6 to the CROWA00, has a requirement that the extinguishment date should be tied to the date on which the authority certifies that any works required to make good the new path have been carried out.

84. The current form of order under the PPO Regulations 1993 (SI 1993/11) makes no provision for the certification on which the extinguishment now hinges. In the absence of a prescribed form of order, it is acceptable for PINS to continue processing such orders.

85. The case of *Young v SSEFRA* [2002] EWHC 844 clarified that the relative convenience of the new route is a different issue to be addressed separately from the question of expediency and public enjoyment of the route. In deciding whether to confirm an order, Inspectors are required to consider the criteria in s119(6) as three separate tests, two of which may be the subject of a balancing exercise.

86. Where the proposed diversion is considered expedient in terms of test (i), is not substantially less convenient in terms of (ii), but would not be as enjoyable to the public, the Inspector is required to balance the interests raised in the two expediency tests – the interests of the applicant (i), and the criteria set out in s119(6)(a) (b) and (c) under (iii) to determine whether it would be expedient to confirm the order.

87. The balancing exercise was approved by Ouseley J in *Ramblers Association v SSEFRA, Weston and others* [2012] EWHC 3333 (Admin) where a decrease in the enjoyment of the path by the public had been weighed against the benefit to the interests of the owner. The broad nature of the 'expediency' test has also been considered in R v SSE ex parte Stewart [1980] 39 P & CR 934, in R v Cheshire CC [1991] JPL 537 and in *R (oao Manchester CC) v SSEFRA* [2007] EWHC 3167 (Admin).

88. The balancing of the two expediency tests was challenged in *The Open Spaces Society v SSEFRA* [2021] EWCA Civ 241. It was argued that, at the last stage of the confirmation process, the Inspector could only have regard to the specific matters in s119(6)(a) to (c) and could not balance those considerations against the interests of the landowner.

89. In rejecting those arguments, the Court of Appeal held that Appeal held that it is mandatory to have regard to the matters specified in subparagraphs (a) to (c) of s119(6) and any material provision in a rights of way improvement plan (s119(6A)), but the second expediency test is not limited to those matters. The decision-maker has a

broad discretion to have regard to any other relevant matter including, if appropriate, the interests of the owner or occupier of the land over which the path currently passes, or the wider public interest. The Court upheld the judgment of The High Court in which it was held that other factors raised could be an important element of the decision whether or not to confirm the order. The scale of benefits of the diversion to landowners and the public would also be relevant considerations under the balancing exercise. The updated S119 Order Decision template reflects this judgment.

90. Where the proposed diversion is seen as expedient in terms of (i) and (iii) but would be substantially less convenient to the public, the order should not be confirmed. Whether the diverted route will be substantially less convenient or not is for the Inspector's judgment.

91. The Court, in *Young*, considered "substantially less convenient to the public" referred to such matters as length, difficulty of walking and purpose of the path – features that fall within the natural and ordinary meaning of the word "convenient". Issues such as gradient, accessibility, numbers of stiles or gates, and width may be relevant depending on the context. The Oxford English Dictionary defines "substantially" as meaning 'to a great or significant extent'; 'for the most part; essentially'.

Rail Crossing Extinguishment and Diversion Orders

92. S118A and 119A of the HA80 provide for the stopping up or diversion of rights of way that cross a railway[7], other than by a bridge or tunnel. The provisions apply where it appears expedient to an authority in the interests of the safety of members of the public using it or likely to use it that the right of way should be stopped up or diverted.

93. The form of request for an order, set out under Schedule 1 of the 1993 Regulations, requires information to be provided to the authority at the application stage. This information may assist in informing the decision:

    (i) the use currently made of the existing path, including numbers and types of users, and whether there are significant seasonal variations, giving the source for this information…

    (ii) the risk to the public of continuing to use the present crossing and the circumstances that have given rise to the need to make the proposed order.

    (iii) for 118A – extinguishment: the effect of the loss of the crossing on users, in particular whether there are alternative rights of way, the safety of these relative to the existing rail crossing, and the effect on any connecting rights of way and on the network as a whole.

    (iii) for 119A – diversion: the effect of the extinguishment of the crossing and the creation of the proposed new path(s) or way(s) having regard to the convenience

[7] This includes a tramway but does not include any part of a system where rails are laid along a carriageway.

to users and the effect on any connecting rights of way and on the network as a whole.

(iv) the opportunity for taking alternative action to remedy the problem, such as a diversion (in the case of 118A), bridge or tunnel, or the carrying out of safety improvements to the existing crossing.

(v) the estimated cost of any practicable measures identified under (iv) above.

(vi) the barriers and/or signs that would need to be erected on the crossing or the point from which any path or way is to be extinguished, assuming an order is confirmed.

94. The SSEFRA/WM shall not confirm a s118A or s119A order unless satisfied that it is expedient to do so having regard to all the circumstances, and in particular to—

(a) whether it is reasonably practicable to make the crossing safe for use by the public, and

(b) what arrangements have been made for ensuring that, if the order is confirmed, any appropriate barriers and signs are erected and maintained.

95. S119A(5) sets out that a rail crossing diversion order shall not alter a point of termination of a path or way diverted under the order—

(a) if that point is not on a highway over which there subsists a like right of way (whether or not other rights of way also subsist over it), or

(b) (where it is on such a highway) otherwise than to another point which is on the same highway, or another such highway connected with it.

96. The authority may enter into an agreement to defray costs, for example, on works to bring the new site of the right of way into a fit condition for use by the public, or compensation which may become payable under s28 of the HA80. In general it is not for the Inspector to be concerned as to these matters, which are to be agreed between the authority and the operator[8].

97. There are currently initiatives by Network Rail to divert or extinguish level crossings, although it appears many of these may now be dealt with under the provisions of the Transport and Works Act 1992 (TWA92) on a region by region basis rather than the HA80 which may still be used for individual crossings. Three TWAO Orders have been considered in relation to crossings in the Greater Anglia Region (Cambridgeshire, Suffolk and Essex). If Network Rail pursues further crossings by means of TWAO, such orders may well still be referred to PINS.

98. If an Inspector concludes that it is expedient that the route in question be diverted but not expedient that the order be confirmed, for example, if the alternative route is unsuitable for some reason, a procedure exists under s48(4) of the TWA92 for the

[8] "operator", in relation to a railway, means any person carrying on an undertaking which includes maintaining the permanent way;

Secretary of State for Transport (SST) to consider making a 'bridge or tunnel order' (BOTO).

99. The guidance on this procedure is contained in the Department of Transport Circular 1/94. There is a time limit of two years between the application for the Rail Crossing Diversion Order and the making of any bridge or tunnel order. If an Inspector concludes that the current route is unsafe but the alternative route is not suitable, they will need to prepare a report addressed to SSEFRA. This will be the case even if the 2-year period for a BOTO has elapsed and so it cannot be made. It is not appropriate to simply 'not confirm' the order in these circumstances. Defra will forward the report to the DfT who will make a decision on the BOTO and Defra will issue a decision on the order.

100. In spring 2019 a Memorandum of Understanding between Network Rail, ADEPT, LGA & IPROW was produced. The aim is to improve working practices between Network Rail and Local Highway Authorities where ROW use level crossings on the rail network in England and Wales. You may find information is presented to you regarding an MOU primarily in relation to PPOs but information may also be presented with regard to DMMOs.

Extinguishment and Diversion Orders for the Purposes of Crime Prevention (including School Security)

101. S118B and 119B of the HA80 provide for the stopping up or diversion of rights of way[9] for the purposes of crime prevention either in an area designated for the purpose by the SSEFRA/WM or for the purposes of school security. These are referred to as "special extinguishment/diversion orders", "crime prevention orders" or "school security orders".

Crime Prevention Orders

102. There have historically been few crime prevention orders, which require the relevant highway to be within an area designated by the SSEFRA/WM by order. Due to the difficulties arising from the designation of areas for this purpose, it is unlikely there will be significant numbers in the future.

103. The extinguishment or diversion must be expedient for the purpose of preventing or reducing crime which would otherwise disrupt the life of the community. It must be shown that (a) the premises adjoining or adjacent to the highway are affected by high levels of crime, and (b) the existence of the highway is facilitating the persistent commission of criminal offences. The local policing body for the area needs to be consulted by the authority.

104. In considering confirmation under s118B, the Inspector needs to be satisfied that it is expedient to confirm the order having regard to all the circumstances, and in particular to—

[9] Which in this instance includes byways open to all traffic (BOATs)

105. whether and, if so, to what extent the order is consistent with any strategy for the reduction of crime and disorder prepared under section 6 of the *Crime and Disorder Act 1998*,

106. the availability of a reasonably convenient alternative route or, if no reasonably convenient alternative route is available, whether it would be reasonably practicable to divert the highway under section 119B rather than stopping it up, and

107. the effect which the extinguishment of the right of way would have as respects land served by the highway, account being taken of the provisions as to compensation contained in section 28 above as applied by s121(2).

108. Note that there is an expectation that any order map identifies the 'reasonably convenient alternative route'.

109. In relation to s119B, the matters relate to

    (a) whether and, if so, to what extent the order is consistent with any strategy for the reduction of crime and disorder prepared under s6 of the *Crime and Disorder Act 1998*,

    (b) the effect which the coming into operation of the order would have as respects land served by the existing public right of way, and

    (c) the effect which any new public right of way created by the order would have as respects the land over which the right is so created and any land held with it, so, however, that for the purposes of paragraphs (b) and (c) above the Secretary of State shall take into account the provisions as to compensation contained in s28…

School Security Orders

110. S118B and 119B(1)(b) of the HA80 relate to school security, where the right of way crosses land occupied for the purposes of a school. Advice has been given that the definition of a school for the purpose of s329 of the HA80 is the same as that in section 4(1) of the Education Act 1996:

    "an educational institution which is outside the further education sector and the higher education sector and is an institution for providing primary or secondary education or both whether or not the institution also provides further education".

111. A primary school includes a nursery school if used wholly or mainly for the purposes of providing education for children between the ages of 2 and 5. Where a path crosses school playing fields but is fenced on both sides it can still be described as crossing land occupied for the purposes of a school.

112. It must be expedient that the highway be stopped up for the purpose of protecting the pupils or staff from—

    (i) violence or the threat of violence,

    (ii) harassment,

(iii) alarm or distress arising from unlawful activity, or

(iv) any other risk to their health or safety arising from such activity

113. Confirmation of a school security order requires an Inspector to be satisfied that it is expedient to confirm the order having regard to all the circumstances, and in particular to—

(a) any other measures that have been or could be taken for improving or maintaining the security of the school,

(b) whether it is likely that the coming into operation of the order will result in a substantial improvement in that security,

(c) the availability of a reasonably convenient alternative route or, if no reasonably convenient alternative route is available, whether it would be reasonably practicable to divert the highway under s119B below rather than stopping it up, and

(d) the effect which the extinguishment of the right of way would have as respects land served by the highway, account being taken of the provisions as to compensation contained in s28…

114. As with s119 generally, a special diversion order shall not alter a point of termination of the highway –

(a) if that point is not on a highway, or

(b) (where it is on a highway) otherwise than to another point which is on the same highway, or a highway connected with it.

115. Additionally a right of way created by a special diversion order may be unconditional or (whether or not the right of way extinguished by the order was subject to limitations or conditions of any description) subject to such limitations or conditions as may be specified in the order.

SSSI Diversion Orders

116. S119D provides for the diversion of a highway which is in, or forms part of, or is adjacent to or contiguous with a Site of Special Scientific Interest (SSSI)[10]. These are referred to as “SSSI diversion orders”. It is rare for such orders to be made, but the tests as set out in paragraph 120 below) apply to all forms of public path.

117. An application must be made by NE and the authority must be satisfied that the public use of the highway is causing or likely to cause significant damage to the flora, fauna or geological or physiographical features, such that it is expedient that the line of the highway, or part of it, should be diverted for the purpose of preventing such damage. The damage must be connected to the actual reason that the site is designated as a SSSI. You should ensure that the citation is provided to you.

[10] See also s28 of the Wildlife and Countryside Act 1981.

118. As with s119 diversion orders, a SSSI diversion order shall not alter a point of termination of the highway if that point is not on a highway or – where it is on a highway – otherwise than to another point which is on the same highway, or a highway connected with it.

119. Where work is needed to bring the new site of the highway into a fit condition for use by the public, the authority shall specify a date and provide that the extinguishment does not come into force until the local HA for the new highway certify that the work has been carried out. This ensures that a public right of way remains available. The order may be unconditional or subject to limitations or conditions.

120. The SSEFRA/WM shall not confirm an SSSI diversion order unless satisfied that it is expedient to confirm the order having regard to the effect which

    (a) the diversion would have on public enjoyment of the right of way as a whole;

    (b) the coming into operation of the order would have as respects other land served by the existing public right of way; and

    (c) any new public right of way created by the order would have as respects the land over which the right is so created and any land held with it, so, however, that for the purposes of paragraphs (b) and (c) above the Secretary of State shall take into account the provisions as to compensation under s28…

Concurrent Orders

121. Where several orders are being considered together, care must be taken to deal with each order individually and on its own merits, even where these are put forward as a package by the council and/or the applicant.

122. The exception to this is provided by s118(5) of the HA80. This sets out that the extent to which a concurrent creation or diversion order would provide an alternative route can be taken into account when determining an extinguishment order.

123. Where a s118 or 118A extinguishment order is concurrent with a s26(1) creation, or a s119 or s119B diversion order, it is necessary to consider the creation and/or diversion order first[11]. Having considered that order on its own merits and come to a conclusion, the extinguishment order can be addressed. You should consider the extent to which the creation, diversion or rail crossing diversion order would provide an alternative path or way; s118(5)(b). Then go on to consider the s118 or s118A criteria.

124. Where an authority makes a number of creation orders – each providing a different alternative solution – and the authority only wishes the Inspector to confirm one, the authority's reasons for making the order in the first place can be a material consideration to balance against any other considerations in coming to the decision.

125. Therefore an Inspector may confirm one of the orders and decide not to confirm the others remaining. This appears to be supported in *R (oao) Hargrave & Hargrave v*

[11] Although the Act does not expressly provide for orders made under section 118B and 119B to be considered concurrently with other orders, Defra does not believe there is anything in legislation to prevent them from being so. The same consideration may also apply to S119D but advice should be sought on this point.

Stroud DC [2001] EWCA Civ 1281. In referring to paragraph 2(2) of Schedule 6 to HA80, he Judge commented:

"…there is no duty imposed upon the Secretary of State to confirm the order….I would hold that as a matter of construction of the Statute it is open to the Secretary of State on receiving the order …to decide that he will not confirm the order".

126. It is the word 'may' in paragraph 2(2) which seems to give the SSEFRA/WM (or Inspector on their behalf) the discretion whether to confirm the order.

127. These schemes may be referred to as 'rationalisation' and can lead to unhappiness about what may be seen as large scale changes to the network. Ensure that each order can stand on its own merits but it is not unreasonable, when considering expediency matters, to take account of the overall intention and outcome.

Creation Agreements

128. S25 of the HA80 allows HAs to enter into agreements with landowners to create new public footpaths, bridleways and restricted byways.

129. These agreements are essentially a matter for the parties concerned and do not necessarily involve public consultation in any form. They do not require confirmation and do not come to the SSEFRA/WM for determination. Although they are sometimes linked to diversion or extinguishment orders, there was no express provision, until recently, for such agreements to be taken into consideration when determining orders.

130. In a Court of Appeal (CoA) judgment, *Hertfordshire CC v SSEFRA* [2006] EWCA Civ 1718, it was held that creation agreements which are conditional and rely on the confirmation of another order cannot be taken into account when determining orders. However, a sealed unconditional creation agreement already in force can be considered.

PPOs under the Town and Country Planning Act 1990

131. Note that paragraph 100 pf the National Planning Policy Framework (NPPF 2021) sets out that "Planning policies and decisions should protect and enhance public rights of way and access, including taking opportunities to provide better facilities for users, for example by adding links to existing rights of way networks including National Trails." This may become relevant to your consideration.

Section 257

132. S257 of the TCPA90 empowers an LPA to authorise the stopping up or diversion of any footpath, bridleway or restricted byway, if satisfied that it is necessary to do so in order to enable development to be carried out in accordance with a planning permission granted under Part III of the Act, which includes works classed as

"permitted development"[12], or to enable development to be carried out by a government department.

133. The grant of planning permission does not of itself authorise any obstruction of a right of way.

134. In relation to s257(1) orders, you need to be satisfied that there is a valid planning permission; that it is not, for example, expired by the passage of time or invalid on some other ground. Although the existence of the permission may not be in issue, its merits may still be a matter of dispute.

135. In England, the Growth and Infrastructure Act 2013 introduced s257(1A)[13] allowing orders to be made where there is an application for planning permission and, if that permission were granted, it would be necessary to authorise the stopping up or diversion.

136. You must be satisfied that the stopping up or diversion is necessary in order to enable the development to be carried out. It is not enough that it is desirable, for example, because it would make the implementation of the planning permission more convenient. Objectors may put forward alternative proposals which, in their view, would make the stopping up or diversion unnecessary. The SSEFRA/WM, in whose shoes you stand, has no power to amend a planning permission. Note that there is no reason why any PPO has to refer to the entire width of a route. This is more commonly seen in relation to seeking extinguishment of a strip of land forming one side of a public right of way to allow development.

137. If you are minded to propose a modification to an order you must be sure that it is wholly consistent with the planning permission as proposed or granted, including any conditions attached to it. The conditions are part of the permission and if a condition cannot be met by the alternative proposal then the development could not be carried out "in accordance with the planning permission" as required.

138. The assessment of whether the stopping up or diversion is necessary can sometimes involve striking a fine balance. The need to stop up or divert rights of way through industrial developments, for example, will depend on the nature of the activities proposed and the relationship between the way and the proposed industrial facilities. Health and safety should have been in the mind of the LPA at the time of considering the planning application and, again, the position may well have been regulated by conditions.

139. If the planning permission is in "outline" only, it may be premature to confirm the order. For example, if the access to or layout or landscaping of a new housing estate are matters reserved for later approval, it would be difficult to establish on the basis of the information available that it is necessary to stop up or divert the right of way.

140. Another important question is whether works have already been carried out such that an order under s257 cannot be made or confirmed "*to enable development to be*

[12] Development that is granted planning permission by development order, normally the Town and Country Planning (General Permitted Development) (England) Order 2015 or a local development order
[13] The Town and Country Planning (Public Path Orders) (Amendment) (England) Regulations 2013 (SI 2013 No. 2201)

carried out". In *Ashby & Dalby v SSE & Kirklees MBC* [1978] 40 P & CR 362, (CA) [1980] 1 WLR 673, [1980] 1 All ER 508, a builder obstructed a path and started development before seeking a TCPA diversion order. The issue was whether it could be made where much of the development had been completed but some work remained to be done.

141. It was held in *Hall v SSE* [1998] EWHC 330 (Admin) that the matter must be considered according to the context; where a discrete and substantial part of a planning permission is completed in accordance with that permission, then that part of the permission has been completed and achieved. At the time of the inquiry, the planning permission was spent in so far as the highway was concerned.

142. *Sage v SSETR* [2003] UKHL 22 related to a planning enforcement notice but is considered relevant to TCPA public path orders. The Court of Appeal had sought to define *"substantially completed*" by reference to other provisions of the TCPA but the House of Lords restored the previously-held view that the issue is to be approached holistically. The question of whether a development is substantially complete is a matter of fact and degree to be determined in each case on the evidence.

143. If development undertaken is such to preclude the making or confirmation of the order, s257 cannot be engaged by demolishing part of the works already carried out. An order will need to be obtained under the HA80.

144. *Vasiliou v SST* [1991] 2 All ER 77 means that the above criteria are not the only matters to be considered. Where the order may impact on access to premises then this must be taken into account. The disadvantages or loss likely to arise as a result of the stopping up or diversion, either to members of the public generally, or to persons whose properties adjoin, or are near to the existing highway, should be weighed against the advantages to be conferred by the proposed order.

145. *KC Holdings (Rhyl) Ltd v SSW & Colwyn BC (QBD)* [1990] sets out that an order will not automatically be confirmed even where it is established that it is necessary to stop up a path for development to take place:

    "That part of the Act was concerned to give protection to the interests of persons who might be affected by the extinguishment of public rights, in which circumstances it was hardly surprising that under s209 [this was TCPA 1971] there was a discretion to consider the demerits and merits of the particular closure in relation to the particular facts that obtain."

146. If the proposal would cause disadvantage or loss to the public or owners of nearby property, you may decide not to confirm the order, even when the statutory criteria are met. It is necessary to strike a balance between the public and private benefit intrinsic in the development for which permission is granted, and any detriment arising from the stopping up or diversion.

147. You would need to weigh any disadvantage or loss against the identified benefits before deciding not to confirm the order, and carefully justify any such decision – possibly with reference to the Human Rights Act 1998 (HRA98), Article 8 and/or Article 1 of the First Protocol, as discussed below.

148. There is no provision for compensation. Diversion across land owned by a third party requires the latter's express agreement; it is common sense to insist on this agreement being evidenced in writing.

149. Objectors to such orders may be opposed to the planning permission. You will need to make it clear in your opening that the inquiry or hearing is not an opportunity to revisit the planning permission. You may also need to intervene later in the proceedings to remind parties that the merits of the planning permission are not before you.

Section 258

150. Orders under s258 are rare. They seek to extinguish a public path where land has been acquired or appropriated for planning purposes by a local authority. You need to be satisfied that this is the case and an alternative right of way has been or will be provided, or that no alternative is required.

Section 261

151. Orders under s261 are more frequent and relate to the temporary stopping up or diversion of highways for mineral working. The criteria to be met are that the stopping up or diversion is required for the purpose of enabling minerals to be worked by surface working, and that the public right of way can be restored, after the minerals have been worked, to a condition not substantially less convenient to the public.

152. While it is essential to refer to and apply the "required" test under s261, and "necessary" test in s257, the approach is fundamentally the same.

153. Note that "temporary" does not necessarily imply "short-term". A stopping up or diversion planned to last for 30 years may be temporary if 30 years is the period during which the extraction of the minerals is to continue, and the stopping up or diversion is to be reversed at the end of that period.

Section 247

154. Orders may also be made under s247 in relation to "highways", including both vehicular highways and rights of way. They are not that common and the matters to consider are as with s257, other than such Orders are not subject to the provisions of Schedule 6 regarding the advertisement of modifications which would affect land not affected by the Order as drafted.

Variation & Revocation Orders

155. Made and confirmed PPOs can be varied or revoked under HA80 s326 and TCPA90 s333(7). These are used rarely and would be likely to arise where an error was subsequently noted, e.g., a route shown on the original order was found to be incorrect, or if the proposed change was not required, for example the planning permission was no longer extant. The same rights to object apply as to any other order made under the relevant Act.

Combined Orders

156. As noted previously PPOs and DMMOS have different purposes. Whilst a confirmed PPO legally alters a public right of way, it does not automatically alter the DMS. To achieve this, a separate Legal Event Modification Order (LEMO) will be required.

157. The Public Rights of Way Combined Orders (England) Regulations introduced an Integrated Legal Event Modification Order (ILEMO) to PPOs such that a single order may be made under the HA80 or the TCPA90 and s53A of the WCA81 in England. When dealing with PPOs, you may need to take account of an ILEMO. There is no opportunity for objection to the ILEMO part of the order alone. If an error is found within the LEMO part of the Order an Inspector cannot correct the error by modification. However, you can remove the ILEMO from the order, leaving the authority to remake a separate LEMO addressing the matters. Removal of the ILEMO is achieved by noting the errors which necessitates its removal in the Decision on the Order and striking through the ILEMO part of the Order with red ink modifications.

158. In the unlikely event of a combined order being in the form specified by the 2008 regulations[14], rather than the amended regulations of 2010, Inspectors should ask the OMA to provide the information required to populate the additional schedule required by the 2010 Regulations to enable the Inspector to modify the order and confirm it. The Schedule should contain a part describing the PROW to be extinguished/created and a separate part for modification of the Definitive Statement which sets out the intended amendment varying the particulars of the path or way.

159. If you make or propose a modification to the PPO, then you can and should also make or propose changes to the ILEMO. It may be appropriate to consider modification of an ILEMO to clarify a matter that would not in normal course of events require further advertisement, for example to add a grid reference.

Definitive Map Modification Orders

Provisions of the WCA81

160. S53(2) of the WCA81 states:

> As regards every definitive map and statement, the surveying authority shall—(a) as soon as reasonably practicable after the commencement date, by order make such modifications to the map and statement as appear to them to be requisite in consequence of the occurrence, before that date, of any of the events specified in subsection (3)…

161. The key events set out in s53(3) in relation to DMMOs are:

> *(b)* the expiration, in relation to any way in the area to which the map relates, of any period such that the enjoyment by the public of the way during that period raises

[14] The Public Rights of Way (Combined Orders)(England) Regulations 2008

a presumption that the way has been dedicated as a public path or restricted byway **– addition to the DMS**

(c) the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows—

(i) that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates, being a right of way such that the land over which the right subsists is a public path, a restricted byway or, subject to section 54A, a byway open to all traffic **– addition**

(ii) that a highway shown in the map and statement as a highway of a particular description ought to be there shown as a highway of a different description – **upgrading and downgrading**

(iii) that there is no public right of way over land shown in the map and statement as a highway of any description, or any of any other particulars contained in the map and statement require modification – **deletion and alterations to particulars.**

Approach to DMMO Casework

162. The general approach to DMMO casework is set out above. In each case it is for the Inspector to decide on the weight to be given to the various arguments for or against a proposed modification, having established the facts and considered the submissions of those concerned.

163. When confirming an order to add a PROW to the DMS you must be satisfied that the right of way subsists. Once all the evidence has been individually assessed, the standard of proof to be applied in all DMMO cases is the 'balance of probability'. This demands a comparative assessment of the evidence on both sides, often a complex balancing act involving careful assessment of the relative values of the individual pieces of evidence and the evidence taken together.

164. The Consistency Guidelines seek to support a consistent approach to the common types of evidence referred to in DMMO cases, but this document has not been recently updated and its future is under review.

Form of the Order

165. The DMMO should be in the form or *"a form substantially to the like effect*" to that set out in the Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993.

166. If a DMMO differs from the prescribed form, Inspectors will need to decide whether or not it is substantially the same and whether anyone may have been misled or prejudiced as a result. If an order is so badly drafted that a reasonable person would be likely to misunderstand its intention or effect, it should not be confirmed.

167. A DMMO must specify a width for a new highway. If it does not, the Inspector should invite comments from the parties on the appropriate width and, in the decision,

propose that the order be modified to record a width. This will require further advertisement. If the width is given as a minimum or approximate width then the Inspector should modify the Order. This may or may not require further advertisement; see Advice Note No. 16.

Schedule 14

Directions

168. S53(5) of the WCA81 allows applications to be made for DMMOs, to add, upgrade, downgrade or delete routes. Schedule 14 of the WCA81 makes provision for and sets out the procedures to be followed in making applications for orders under s53, with paragraph 3 relating to the determination by the (surveying) authority:

3(1) As soon as reasonably practicable after receiving a certificate under paragraph 2(3), the authority shall:

169. investigate the matters stated in the application; and

170. …decide whether to make or not to make the order to which the application relates.

(2) If the authority have not determined the application within twelve months of their receiving a certificate under paragraph 2(3), then, on the applicant making representations to the Secretary of State, the Secretary of State may, after consulting with the authority, direct the authority to determine the application before the expiration of such period as may be specified in the direction.

171. Applications to direct the authority to determine the application are normally dealt with by way of written representation. The main issue that arises is as set out in paragraph 3(1): have the authority done what they should "as soon as reasonably practicable…" The decision may be to direct the authority to determine the application within a specified timescale or to not direct the authority, if there is no case for prescribing the timescale. If matters are raised in relation to HRA please refer to the information below.

172. The WCA81 provides that applications for directions can only be made once an authority has exceeded a 12 month period to determine a modification application. Inspectors might thus direct that determination is made within 6-12 months of the direction. There may be exceptional circumstances, where an authority is inundated with claims or where there is an emergency such as coronavirus, making it appropriate to extend the time, perhaps to 12 – 18 months.

173. Paragraph 4.9 of Circular 1/09[15] states that:

"…The Secretary of State in considering whether, in response to such a request, to direct an authority to determine an application for an order within a specified period, will take into account any statement made by the authority setting out its priorities for bringing and keeping the definitive map up to date, the reasonableness of such priorities, any actions already taken by the authority or expressed intentions of further

[15] Version 2, October 2009

action on the application in question, the circumstances of the case and any views expressed by the applicant."

174. A similar statement is set out at paragraph 5.26 of the Welsh Government Guidance for Local Authorities on Public Rights of Way.[16]

175. Decision templates for Schedule 14 directions do not currently feature in the Decision & Report Document System.

RoW Appeals

176. These arise where an authority has decided not to make an order in relation to an application under Schedule 14. The Inspector needs to decide whether the evidence is sufficient for an order to be made and, if so, direct the authority to make an order.

177. The determination of the evidence under Schedule 14 relies on the same rules as set out in relation to DMMOs under Schedule 15. There may be user, landowner and/or documentary evidence, and consideration must be given to any evidence submitted in addition to that taken into account by the authority in their determination of the application. The weight to be given to the evidence for or against an application is for the Inspector.

S53(3)(c)(i) - Tests A and B

178. There is an important difference between determining a DMMO and a Schedule 14 appeal where the application is made under s53(3)(c)(i); it sets out two tests:

    i. that a right of way which is not shown in the map and statement subsists **or** is reasonably alleged to subsist over land in the area to which the map relates, being a right of way to which this Part applies.

179. The tests were described as "A" and "B" in *R v SSE ex parte Norton & Bagshaw* [1994] 68 P&CR 402:

180. does a right of way subsist on the balance of probabilities?

181. is it reasonable to allege that a right of way subsists? For this possibility to exist, it will be necessary to show that a reasonable person, having considered all the relevant evidence available, could reasonably allege that a right of way subsists.

182. It was also held in *Norton & Bagshaw* that an Order should be **made** where **either** of the tests is met. The evidence to establish Test B will be less than that necessary to establish Test A.

183. Where Test A is not satisfied in a Schedule 14 appeal, perhaps because you find that the balance between the evidence for and against the claim is a fine one, with a conflict of credible evidence, you can still conclude that it is reasonable to allege that a right of way subsists and Test B is met. You would thus go on to direct the surveying authority to make an order.

[16] October 2016, WG28059, Digital ISBN: 978-1-4734-5963-2

184. For DMMO casework, it was held in *Todd & Bradley v SSEFRA* [2004] EWHC 1450 (Admin) that, in **confirmation** of an order, you will **only** consider Test A and make a finding as to whether a right of way subsists on the balance of probabilities.

185. It was noted by the CoA in the leading judgment of *R v SSW ex parte Emery (1997) QBCOF 96/0872/D*: "…The problem arises where there is conflicting evidence…In approaching such cases, the authority and the Secretary of State must bear in mind that an order…made following a Schedule 14 procedure still leaves both the applicant and objectors with the ability to object to the order under Schedule 15 when conflicting evidence can be heard and those issues determined following a public inquiry."

186. In a Schedule 14 appeal, you should decline to direct that an order is made if you are satisfied that it is not reasonable to allege that a right of way subsists – Tests A and B are not met – having considered all the evidence available to you, and without seeing the need for that evidence to be tested by cross examination.

187. Where, for instance, a way cannot reasonably be alleged to subsist because there is incontrovertible evidence to the contrary, it would not be appropriate to direct that an order be made. Such an example may be where a landowner has made statutory declarations under s31(6) of the Highways Act 1980 such that there is no uninterrupted period of use. Note that s31(6) refers to declaration by the owner or by his successors in title; a change in land ownership does not interrupt protection unless the new owner (the successor) fails to lodge a declaration at the appropriate time. A deposit made under s31(6) could be taken as a date that the public use was called into question and it remains possible that there is sufficient evidence of public use prior to that date for deemed dedication to have occurred. Similarly, public rights could be acquired if the owner fails to make subsequent statutory declarations and the protection under s31(6) has expired. The periods of protection have been subject to change. The period was increased from 6 to 10 years with effect from 13 February 2004. It was extended to 20 years on 1 October 2013 in England but remains 10 years in Wales[17].

188. All applications under s53(3)(c)(ii) and 53(3)(c)(iii) are simply determined on the balance of probabilities, as there is no 'reasonable allegation' test.

Technical Matters

189. Following *R (oao Warden and Fellows of Winchester College & Humphrey Feeds Ltd) v Hampshire CC & SSEFRA* [2007] EWHC 2786 (Admin), [2008] EWCA Civ 431, an application for a route to be shown as a BOAT, which is made before 20 January 2005 in England or 19 May 2005 in Wales[18], must be made strictly in accordance with paragraph 1 of Schedule 14.

190. To be compliant and engage the exemption under s67(3) for public vehicular rights to be preserved from extinguishment under section 67 (1), the application must be accompanied by copies of all the documents relied on together with a map of the correct scale. *Maroudas v SSEFRA* [2009] EWHC 628 (Admin), [2010] EWCA Civ 280

17 Section 36 (6A) and Section 36(6B) of the 1980 Act as amended by Section 13 of the Growth and Infrastructure Act 2013. The prescribed forms for statutory declarations under s31(6) of the Highways Act 1980 are in Schedule 1 of The Commons (Registration of Town or Village Greens) and Dedicated Highways (Landowner Statements and Declarations) (England) Regulations 2013

18 The relevant date for s67(3) of the NERCA06

sets out the requirements for validity of an application and the limited circumstances of providing additional information.

191. The matter of the map scale was considered in *Trail Riders Fellowship & Tilbury v Dorset CC & SSEFRA* [2013] EWCA Civ 553 and *R (oao Trail Riders Fellowship & Another) v Dorset CC* [2015] UKSC 18. A map which accompanies an application and is presented at a scale of no less than 1:25,000 satisfies the requirement in paragraph 1(a) of Schedule 14 of being "drawn to the prescribed scale" where it has been "digitally derived from an original map with a scale of 1:50,000" – provided that the application map identifies the way or ways to which the application relates. Importantly, the requirement for strict compliance need not apply to applications that do not involve s67(6) of the NERCA06.

192. The right of appeal under Schedule 14 does not exist if the authority issues a refusal notice to make an order for the status applied for, but resolves to make an order for a different status or an order which differs from the application in some other way. There is no right of appeal against an authority's failure to determine an application deemed to be invalid.

193. An appeal may only be made against determination to not make an order at all. These matters should normally be dealt with in the office before reaching you but if you are in doubt, ask.

194. Following an Ombudsman decision 18-010-841 Schedule 14 Appeals should include a direction with regard to the timescale within which an Order should be made if you are determining that should be the outcome. In England for appeals submitted from 1 October 2019 the authority should be directed to make the Order within 3 months. In Wales for appeals submitted from 14 November 2019 the authority should be directed to make an Order within 6 months. As with Schedule 14 directions the matter of exceptional circumstances may need to be taken into account, with timescales extended up to 18 months depending on circumstances. As the authority is required to make the Order only, the time afforded need not be as long as that potentially required to determine a modification application where, for instance, research is required.

195. When more than one route is included in a DMMO order, this may in some situations lead to the order being severed. Paragraph 5(1) of Schedule 15 of the WCA81 states that in circumstances where there are unwithdrawn objections that "relate to some but not all of the modifications made by the order", then the OMA may elect to sever the order. This causes the order to "have effect as two separate orders", the first "comprising the modifications to which the objections or representations relate" and a second "comprising the remaining modifications". The OMA should submit a notice confirming their decision to sever the order. This notice will indicate those sections of the original order that have been confirmed as unopposed. Although all routes will remain within one physical document, such documents will be approached as two separate orders. Inspectors should make clear in their decisions that the order has been severed under paragraph 5(1) of Schedule 15 and that their decision relates only to those routes that have not been confirmed.

Schedule 15

196. Schedule 15 to the WCA81 sets out the procedures relating to the making, confirmation, validity and date of operation of DMMOs. These matters may be raised by objectors in the belief that this will mean that an order is fatally flawed and will be thrown out.

197. If a failure to comply with the procedural requirements comes to light at any point before the determination of the order, Inspectors should seek to remedy this. The question is whether anyone has, or is likely to have, suffered prejudice as a result of the failure to follow procedures and, if so, whether such prejudice can be avoided by requiring further work to meet the requirements of the procedures. An Inspector appointed under schedule 15 to WCA81 is not appointed to determine whether all or any of the statutory requirements set out in Schedule 14 have been complied with. He or she is appointed to determine only the merits the order itself. Any failure by the OMA to meet any requirement under schedule 14 is subject to judicial review at the time that the order is made.

198. Such matters may include failure to serve notice on a party; to publicise the order on site; to publicise the order in the local newspaper; or giving less than 42 days' notice of the order for objections or representations to be made. In such cases, it would be possible for the determination of the order to be delayed whilst the appropriate notices are served, if necessary by an adjournment of any hearing or inquiry being held into the order.

199. Where prejudice cannot be avoided, the order should be considered as flawed and incapable of confirmation; see Advice Note 21.

200. The notice should state the general effect of the order, name a place in the area in which the land to which the order relates is situated where a copy of the order and map may be inspected and specifying the time (which shall not be less than 42 days from the date of the first publication of the notice) within which, and the manner in which, representations or objections with respect to the order may be made.

201. The people on whom notice must be served are set out in paragraph (3) of Schedule 15, with the paragraph 3(2)(b)(iv) "prescribed" organisations being set out in the relevant regulations. These are listed below but note that some organisations have nominated local representatives who may lead on objections and representations.

    Auto Cycle Union

    British Driving Society

    British Horse Society

    Byways and Bridleways Trust

    Cyclists Touring Club

    The Open Spaces Society

    The Ramblers

The Chiltern Society – within the areas of Luton BC, Mid Bedfordshire DC, South Bedfordshire DC, Chiltern DC, Wycombe DC, South Buckinghamshire DC, Aylesbury Vale DC, Dacorum BC, Three Rivers DC, North Hertfordshire DC and South Oxfordshire DC.

Peak and Northern Footpath Society – within the counties of Cheshire, Derbyshire, Greater Manchester, Lancashire, Merseyside, South Yorkshire, Staffordshire and West Yorkshire.

Welsh Trail Riders Fellowship – in Wales

202. A copy of the notice is to be displayed in a prominent position at the ends of so much of any way as is affected by the order; at council offices in the locality of the land to which the order relates; and at such other places as the authority may consider appropriate.

203. A confirmed order cannot affect land not affected by the order; not show any way shown in the order or show any way not so shown; or, show as a highway of one description a way which is shown in the order as a highway of another description, except after giving notice of such proposals.

204. OMAs have the power to sever an order where there have been objections to only part of the order. They can confirm as unopposed one part of the order and submit the other to PINS.

Making Changes to the Definitive Map and Statement

205. Changes to the recording of a route may arise under the statute by reference to s31 of the HA80 or common (or judge-made) law[19]. The evidence relied on may be from individuals, e.g., users or landowners, documents, or a mixture of both. The new evidence required to trigger a change should be that discovered since the relevant date of the DMS.

206. In relation to evidence of dedication of a way as a highway, s32 of the HA80 sets out that:

"A court or other tribunal, before determining whether a way has or has not been dedicated as a highway, or the date on which such dedication, if any, took place, shall take into consideration any map, plan or history of the locality or other relevant document which is tendered in evidence, and shall give such weight thereto as the court or tribunal considers justified by the circumstances, including the antiquity of the tendered document, the status of the person by whom and the purpose for which it was made or compiled, and the custody in which it has been kept and from which it is produced."

207. There is a great deal of case law associated with various elements of DMMOs and a summary of cases is attached at Appendix C. Remember that it is important to read the entire judgment and not rely simply on the summary; there may be differences which distinguish the case from the evidence you are dealing with in relation to a

19 See paragraph 5.45 of the Consistency Guidelines

particular DMMO. At Appendix D, an Index of reference material will help identify relevant judgments and information sources relating to the matters under consideration.

208. In relation to claims involving land forming part of a churchyard the General Synod Legal Advisory Commission opinion may be of assistance. You will need to check the circumstances in which the rights are alleged to subsist, including evidence of consecration or as the case may be "removal of legal effects of consecration". A right of way cannot be dedicated over churchyard at common law. It may be that statutory deemed dedication would arise under s31 HA80 but this will depend on the facts, including compatibility with public or statutory purposes as set out in s31(8). You may need to separately assess evidence for part of a claimed way on land alleged to be consecrated land, from that which is not. There is no reason why entry to a churchyard should not be an appropriate terminus for a right of way.

209. The 'presumption of regularity' can sometimes arise in casework as discussed in *Calder Gravel Ltd v Kirklees Metropolitan Borough Council.* The presumption operates where the validity of an act done by a public authority depends on the existence of a state of facts which cannot, with the passage of time, be proved. It presumes the authority acted lawfully and in accordance with its duty.

Addition of a Route

210. Addition may arise under s53(3)(b) of WCA81 which sets out that "the expiration, in relation to any way in the area to which the map relates, of any period such that the enjoyment by the public of the way during that period raises a presumption that the way has been dedicated as a public path or restricted byway." This may overlap with reference to s53(3)(c)(i).

Statute (Highways Act 1980)

211. Under statute, a way is deemed to have been dedicated as a highway "where a way over any land… has been actually enjoyed by the public as of right and without interruption for a full period of 20 years…The period of 20 years…is to be calculated retrospectively from the date when the right of the public to use the way is brought into question…"

212. The evidence for this is most likely to be supplied initially in User Evidence Forms (UEFs). An Inspector needs to be satisfied, on the balance of probabilities, that there is sufficient evidence of use 'as of right' and 'without interruption' to raise the presumption of dedication. As of right means without force, without secrecy and without permission[20]; these matters may be clear, or not, from the evidence as a whole. Whilst there may be a right of deviation in relation to a recorded public right of way, you are seeking evidence that the claimed right of way has been used. A change of route would not support the use of a single alignment.

213. The period of 20 years is to be calculated retrospectively from the date when the right of the public to use the way is brought into question, whether by a notice or otherwise.

[20] Nec vi, nec clam, nec precario

The Inspector may need to consider several events to identify the relevant twenty-year period or periods and take account of several matters in reaching a conclusion on that.

214. Questions would include whether the notice was sufficient to have called use into question; whether people were being physically stopped from using the claimed route by someone turning them off or by physical barriers, such as a locked gate; or whether it was simply the application to record the route which brought the 20-year period of use to an end (s31(7A) and 31(7B) of the HA80 as introduced by s69 of the NERCA06).

215. Once satisfied that the way is deemed to have been dedicated as a highway, consideration needs to be given to the 'proviso' set out in s31(1) of the HA80 as to whether "…*there is sufficient evidence that there was no intention during that* [20 year] *period to dedicate* [a public right of way]."

216. Following *Godmanchester & Drain v SSEFRA* [2007] UKHL 28, there will ordinarily be symmetry between the concepts of calling into question and a lack of intention to dedicate. The actions of the landowners, demonstrating a lack of intention to dedicate, may well demonstrate an earlier twenty-year period for consideration.

Common Law

217. If a claim fails under statute, consideration should be given to the evidence at common law – or the case may be made under common law anyway. The period of time over which dedication of a public right of way can be shown may be longer or shorter than 20 years, depending upon the evidence as a whole. However, it is necessary to show dedication by the landowner and acceptance by the public of that dedication; this is a more onerous task than deemed dedication under statute.

218. Sometimes the evidence arises only or mainly from documents. In analysing that evidence account should be taken of the relevant case law and advice contained in the Consistency Guidelines, taking account of current status of that document which has not been kept up-to-date. The case law summary, Appendix D, provides summaries of the main cases you are likely to be referred to and, unlike the Consistency Guidelines, is regularly updated. The summaries only provide a guide, please ensure you always read the full judgment relevant to your decision.

Deletion of a Route

219. This arises under s53(3)(c)(iii) of the WCA81 and will need to be considered at common law, by reference to the evidence as a whole and the relevant case law. Arguments are often made that the route could not possibly have been used by the public due to its physical condition. Bear in mind how quickly your garden gets overgrown and how instantaneously pot-holes seem to appear before giving great weight to a presumption that current conditions reflect those of one hundred years ago, or even ten.

Deletion and Addition

220. Sometimes an order seeks to alter the location of a route by, for example, moving it from one side of a boundary to another. In such situations both events, s53(3)(c)(i) and s53(3)(c)(iii), should be considered to see whether the evidence, as a whole, supports

both addition and deletion; R (oao Leicestershire CC) v SSEFRA [2003] EWHC 171 (Admin). It remains open, on the evidence, to confirm one part of the order but not the other.

Alteration of the Status of a Route

221. Evidence may be presented to say that a route has higher or lesser rights than are recorded on the DMS, for example that a footpath should be recorded as a restricted byway or a bridleway as a footpath. Such orders arise under s53(3)(c)(ii). The evidence presented may include user, landowner and/or documentary evidence.

Reclassification of Roads used as public paths (RUPPs)

222. Section 54 of WCA81 placed a duty on surveying authorities to review the DMS and reclassify all RUPPs as footpaths, bridleways or BOATs by way of reclassification orders. S54 ceased to have general effect after the commencement (on 11 May 2006) of s47 of CROWA00 but any undetermined reclassification orders made prior to that must proceed to a conclusion. It is believed there are a significant number of such cases still outstanding in Wales.

223. The Wildlife and Countryside (Definitive Maps and Statement) Regulations 1983 did not require a width to be recorded by a reclassification order. Revised 1993 Regulations specified that widths should be shown. An Inspector determining a pre-1993 reclassification order is not obliged to add a width but may consider it requisite to do so subject to the usual requirements of evidence and advertisement.

224. Where the width of a RUPP is recorded in a definitive statement, there is no need to re-state it in the schedule of a pre-1993 reclassification order, although it is open to an Inspector to do so. Since this is already conclusive evidence by virtue of its inclusion in the definitive statement, there would be no need to advertise its addition to the order.

Deregulation Act 2015

225. The relevant sections of the Deregulation Act 2015 (DA15) are not yet in force. These are sections 20–26 inclusive and Schedule 7 of DA15. The ITM will be updated appropriately once the relevant law is in force.

The Human Rights Act 1998 and Equality Act 2010

226. Where relevant, regard must be had to the provisions of the HRA98 and the Equality Act 2010 (EA10). The primary source of advice is the ITM chapter on Human Rights and the Public Sector Equality Duty, although that is primarily written with planning casework in mind.

227. Article 6(1) states that “in the determination of his 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.” Paragraphs 21-24 of the ITM chapter explain the application of Article 6(1) to the choice of procedure and conduct of hearings and inquiries.

228. In Schedule 14 direction decisions, the Secretary of State is required to consider what period of time would be "as soon as reasonably practicable" for the authority to investigate and determine the application. However, the decision does not amount to a determination of the applicant's civil rights and obligations, so Article 6(1) is not applicable to Schedule 14 directions.

229. Inspectors should make decisions in Schedule 14 direction cases on the meaning of "reasonably practicable" as set out in the WCA81 and ROW Circular 1/09, and avoid making any reference to Article 6(1) or the concept of "within a reasonable time". If the applicant has raised the question of Article 6(1) rights, such that the matter has to be addressed, the following text should be set out at the end of the decision – following your conclusion on the WCA81:

    Representations were made to the effect that Mr/Ms # rights under Article 6(1) of the Human Rights Act 1998 would be violated if the authority is not directed to determine the application.

    Article 6(1) provides that in the determination of his 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. However, my decision as to whether the authority has investigated and determined the application as soon as reasonably practicable in accordance with paragraph 3(1) of Schedule 14 of the WCA81 does not amount to a determination of the applicant's civil rights and obligations. Article 6(1) is not applicable to this decision.

230. Article 8(1) confers the right to respect for private and family life, home and correspondence. Article 1 of the First Protocol confers rights for the peaceful enjoyment of possessions, non-deprivation of possessions and control of the use of property in the general interest. The ITM chapter gives further guidance on Article 1 of the First Protocol and Article 8(1) and, in particular, how the rights thus conferred are 'qualified' such that in certain circumstances they may be interfered with provided the interference is proportionate having balanced competing interests.

231. PPO decisions are made on their merits and the decision-maker has some discretion. Accordingly, you will need to address any claim by the parties – particularly losing parties – in PPO casework that a right under Article 8 and/or Article 1 of the First Protocol would be violated or interfered with, perhaps because a route that is proposed to be created or diverted would cross or adjoin their property. Account should also be taken of the provisions for compensation under section 28 HA80, which sets out under ss.4 that where a person does not have an interest in the land over which the path was created, or in land held therewith, the right to compensation is available for those where the effect of the Order would have been "actionable at his suit". This is a matter for the authority to determine.

232. You will also need to address human rights issues in PPO cases, even if the parties have not done so, where you consider that there is a reasonable prospect that a right could be violated or interfered with.

233. Considerations relating to Article 8 and/or Article 1 of the First Protocol may be raised, but will not be engaged in DMMO casework where the only matter to be determined is whether public rights exist in law. The criteria which may be taken into account in DMMOs under WCA81 are strictly limited, such that personal considerations are not

relevant. It is not possible to interpret the legislation in such a way that it is compatible with the Convention rights.

234. A DMMO seeks to record a public right of way which already exists under the law; there is no consideration of the effect of the public right of way on individuals and their human rights, and no determination of any private, human or civil rights. A decision to confirm or not confirm a DMMO is lawful under s6(2) of the HRA98. It remains an option for the HA to take account of such issues by, for example, diverting a newly recorded route but these are not matters for the Inspector.

235. Similarly, the rights under Article 8 and/or Article 1 of the First Protocol will not be engaged in Schedule 14 direction decisions, even if the DMMO applied for would have personal or property implications for the applicant. The effect on the applicant of any delay in determining the application may be relevant to a Schedule 14 direction decision, but there would be no consideration of any effects of the public right of way subject to the application itself on the personal or property rights of the applicant.

Public Sector Equality Duty

236. Similarly, and again in accordance with the above ITM chapter, regard must be had to the PSED in procedural decisions and PPO casework, but not in DMMO determinations of public rights in law, or in Schedule 14 direction decisions which relate to the time for determination of DMMO applications.

237. The most commonly raised equality matter in PPO casework relates to the protected characteristics of disability and/or age in relation to furniture, e.g., stiles or gates, on a public right of way, particularly in relation to a diversion order and whether the proposed route is substantially as convenient as the existing route. This could relate to gradients or whether the proposed route means that there are no stiles.

238. The accessibility of a proposed route is one factor to be taken into account when considering whether the PSED will be discharged.

239. The British Standard 5709:2018 sets out the least restrictive option should be sought and the increasing scales of restriction are:

- Gap
- Gate
- Kissing gate
- Stile

240. Good Practice Guidance for Local Authorities on the Authorising of Structures is a useful reference as is 'Understanding the British Standard for Gaps Gates and Stiles BS5709:2018 explained', published by the Pittecroft Trust

241. It is considered that, by virtue of s.328(2) of HA80 a bridge is part of the highway, rather than a limitation upon it. Where the bridge is of different width to the right of way at either end this should be seen as a variation in the width, rather than a limitation, and shown as such on the DMS. A narrow gap in a fence, wall or comparable physical structure across a right of way may constitute a limitation. However, a narrowing of the

way is not, of itself, a limitation, but should be regarded as a variation in the width of the right of way. Clearly this is a matter of fact and degree.

The Well-being of Future Generations (Wales) Act 2015

242. The Well-being of Future Generations (Wales) Act 2015 may be relevant to PPO cases in Wales, which are likely to cover some of the Act's objectives. Welsh PPO decisions should thus contain the following standard text:

    I have considered the duty to improve the economic, social, environmental and cultural well-being of Wales, in accordance with the sustainable development principle, under s3 of the Well-Being of Future Generations (Wales) Act 2015 ("the WBFG Act").

    In reaching this decision, I have taken into account the ways of working set out at s5 of the WBFG Act and I consider that this decision is in accordance with the sustainable development principle through its contribution towards one or more of the Welsh Ministers well-being objectives set out as required by s8 of the WBFG Act.

243. The location of this paragraph in decisions should be properly added to and integrated with the "Conclusions". For orders which are solely based on legal matters, such as the majority of DMMOs, it is unlikely that reference to the 2015 Act will be required.

National Planning Policy Framework (NPPF)

244. In relation to open spaces, recreation and public rights of way and access, paragraph 100 of the NPPF states that "Planning policies and decisions should protect and enhance public rights of way and access, including taking opportunities to provide better facilities for users, for example by adding links to existing rights of way networks including National Trails.

245. This picks up two requirements applicable in all planning policy decision making: (1) to *protect* the existing network of public rights of way and public community spaces and (2) to *enhance* it.

Rights of Way Inquiries and Hearings

Rights of Way (Hearings and Inquiries Procedure) (England) Rules 2007

246. In general the procedures relating to rights of way events are run in a similar manner to other events and you should be familiar with the following ITM chapters:

    - Site visits
    - Hearings
    - Inquiries

247. However, you need to bear in mind that a separate set of procedure rules apply for rights of way hearings and inquiries. Ensure that you are familiar with the relevant rules!

248. The procedure rules are only in force in England. However, Wales works to the spirit of the rules and so there is a reasonable expectation that parties will provide statements of case and proofs of evidence within the stated timescales. Bear in mind that the Franks' Principles (See 'Role of the Inspectorv') still apply. The 2007 Rules do not make provision for a pre-hearing meeting to be held, whereas Rule 15 makes specific provision for those cases in which the SoS causes a pre-inquiry meeting to be held. However, there is no reason why a pre-hearing or pre-inquiry note, telephone call or meeting could not be used where appropriate.

249. There are some ways in which rights of way events can vary from events an Inspector may be familiar with in other areas of work, as set out below. An example of opening announcements is attached in Appendix A.

Position of the Order-making Authority

Advice Note 1 - Conduct of Inquiries and Hearings into Rights of Way Orders where Order Making Authorities do not actively support an Order

250. Generally the OMA supports the Order but there are circumstances in which they may take a neutral stance, for example:

- where they have been directed to make a DMMO following a Schedule 14 appeal;
- where a PPO has been made in the interests of the landowner.

251. In general, the authority will identify someone to take the matter forward, often the applicant for the Order. It is helpful to have someone from the authority to assist with technical queries and this usually happens. Note that the authority can also object to the Order.

Position of Parties in relation to the Order

252. It is possible that there may be more than one strand of objection arising in relation to DMMOs. For example, an Order is made to record a footpath and the landowner objects to it on the basis that there are no public rights over the route, whilst the British Horse Society object on the basis that it should instead be recorded as a bridleway. Another possibility is where there is agreement between some that there is a right of way on the land but disagreement as to alignment, along with objection to any route being recorded at all.

253. These 'three-way' events require particularly careful management, for example, to ensure at inquiry that cross-examination between parties in support of a right of way is limited to matters of disagreement, such as status or alignment. It may be appropriate for questions to be directed through the Inspector.

254. In addition to objections, there may be statutory representations in support of an Order. These parties may be called by the OMA or other supporting party, or may give evidence and cross-examine opposing parties separately.

255. Where there is a request for a modification to the Order, ask for a marked up copy of the Order to be provided to the Inquiry. Take an adjournment to allow this to happen if required.

One-sided events

256. As a statutory party has the right to be heard, it is possible that they may be the only party to an event, if no-one else wishes to speak. In such cases the Inspector may need to take a more active role in questioning evidence, making it clear that the questions do not reflect a personal view, simply an exploration of relevant matters.

Inquiries and Hearings into Modified Orders

257. When making decisions on Orders a modification may be proposed, which leads to further objections. In such cases Advice Note 10 provides the appropriate information on procedures to be followed.

Inquiries and Hearings for Local Authorities

258. In relation to HA80 Orders, an objection from a Parish, Town or Community Council is an objection by a 'local authority' with regard to paragraph 3(3) of Schedule 6 to the HA80 as amended. This takes precedence over s329 and, therefore, an inquiry should be held under paragraph 2(2) of Schedule 6 to the HA80.

Working in Wales

259. The England procedure rules are applied in spirit to casework in Wales. It is important to remember the advice given in Welsh Language Wales Inspector Guidance. See also information in Appendix A.

Costs Awards

260. The general principles in the Costs Awards section of the ITM apply to rights of way casework, including the ability for Inspectors to initiate awards of costs. Section 9 of Circular 1/09 gives advice which should assist in reading across the regimes (but note that it is not up to date with regard to its external referencing). Costs apply to hearings and inquiries across the regimes under CROWA00.

261. Note that creation orders under s26 HA80 are considered to be analogous to compulsory purchase orders, i.e., they would give a right to compensation. Extinguishment and diversion orders made under HA80 MAY be analogous depending on the circumstances of the case. The costs team would write to the relevant parties, having checked the file after issue of the Order decision. It is unlikely that the Inspector would have further involvement in the matter following the issue of the decision.

262. Where an interim decision is to be issued, Inspectors should prepare a draft costs decision. This information can be used to write the final costs decision at the same time as the final order decision.

APPENDIX A: Opening and Other Announcements for Public Rights Of Way Inquiry

Whilst there are specific points which must be covered in opening a rights of way inquiry, how they are phrased and delivered, and even the order in which they are dealt with, are matters of personal style and expression – as is the case in other inquiries. The example given here relates to a DMMO inquiry; appropriate alterations or additions would need to be made to suit PPO or other types of inquiry, and the opening may also be adapted to suit your own style and the circumstances of the case.

INTRODUCTION

Good morning ladies and gentlemen. It is 10 am and the inquiry is now open. [I have taken the time by the clock in the room (which appears to be X minutes fast / slow]/my watch.

I hope that everyone can hear me clearly. However, if at any time anyone has a difficulty with hearing the proceedings please let me know. If you have a mobile phone please ensure it is turned off or onto silent mode throughout the course of the Inquiry.

NAME AND STATUS OF INSPECTOR/PURPOSE OF INQUIRY

My name is ----------. I am the Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs to conduct this inquiry and to decide whether or not the Order should be confirmed.

The Order was made under (*section and Act*) ----------by (*Order Making Authority*) ----------on (*date of Order*) ----------

The Order relates to is named [route]. Full details of the route are given in the Order and map

HOUSEKEEPING

The toilets are…

Fire alarm test?

Fire alarm procedure…

APPEARANCES

I will now take the names and addresses of those people who wish to speak.

a) Firstly, who is representing the Order Making Authority?

Will you be calling any witnesses? [*Ask for names]*

b) Is there anyone [else] who wishes to speak in support of the Order?

c) Who wishes to speak on behalf of the Objector(s)?

Do you intend to call any witnesses? [*Names*]

d) Are there any other interested persons who would like to speak at the inquiry? Are you speaking for or against the Order or taking a neutral stance?

Before the end of the inquiry I will ask again if there is anyone else who wishes to speak – it is important that I hear everything that is relevant to my decision before the close of the inquiry.

Does anyone intend to film or record the Inquiry or make use of social media?

Is everyone comfortable with this (for example, they may not wish to have their faces shown or voice recorded). If there are concerns, you can ask that filming/recording is restricted to certain angles. If filming/recording does take place ask that it is carried out responsibly.

Observer

[Before moving on I should point out that seated in the body of the hall is an observer from the Planning Inspectorate. You may see us in conversation, but that would not be about the case and he/she will take no part in the proceedings].

STATUTORY FORMALITIES

Can the Order Making Authority confirm that all of the relevant statutory requirements have been complied with?

SUBJECT OF INQUIRY

If confirmed without modification the effect of the Order would be to…..

Following advertisement of the Order (*number of*) -------- [objections and/or representations] were received that have not been withdrawn.

The purpose of this inquiry is to determine whether the criteria set out in (the appropriate section and Act) have been met. The Order Making Authority has relied upon (relevant criteria in Act relied upon), in which case the matters before me for consideration are:

What is not before me are matters such as:- (Give appropriate examples as necessary or relevant e.g.: the desirability of the proposals in the Order or environmental concerns).

This may be a disappointment to some people but the law is quite clear on that point. My determination must be based upon the evidence relating to a claim for a public right of way.

In due course, I shall make my decision on the basis of those matters before me.

The decision will be one of the following options:

- to confirm the Order
- to propose that the Order be confirmed subject to modifications;
- or not to confirm the Order.

SITE VISIT

I have walked the route/s OR As far as is possible from public vantage points, I made an unaccompanied inspection of the claimed rights of way (say when), and have I have familiarised myself with the area.

If requested to do so I can make a further visit in the company of representatives of the Order Making Authority, other supporters of the Order and the objector(s), either during, or following the close of the inquiry.

During that final inspection, however, I will not be able to hear any further evidence. However, people should make sure I have seen features or locations that they have mentioned in their evidence. I must stress that I will be strict about this rule and I will not be prepared to entertain attempts to present further evidence or engage in discussion over the merits or otherwise of the Order during the site visit.

I will make the arrangements for this final inspection at an appropriate time; probably just before I close the inquiry.

PROCEDURE

For the benefit of those who may not be familiar with them I will now give a brief outline of the procedure to be adopted at this type of local inquiry.

Shortly I will give my understanding of the main issues which I need to explore at the Inquiry, indicating those that seem to be of particular relevance from my reading of the evidence already submitted.

1) Case for the Order Making Authority[21]

I will start by hearing the case for the Order Making Authority. This usually takes the form of a short opening address and then the evidence of the witnesses.

2) Case for the Supporters

[21] If the OMA are taking a neutral stance you need to confirm this, ask if they wish to make an opening statement and, if not, move straight on to the supporters case

I will then take evidence from anyone else who wishes to speak in support of the Order.

3) Case for Objectors(s)

That will be followed by the cases for the principal or statutory objector(s).

Following which there will be an opportunity for anyone else who wishes to do so to speak in opposition to the Order.

4) Interested Persons may then put their points

So that everybody has an opportunity to put relevant points to the inquiry as a final stage in the giving of evidence any interested parties may have the opportunity to speak.

In each case once a witness has given their evidence, they will be available for:

- cross examination from the opposing party.
- questions from any interested persons that I have noted who hold an opposing view.
- (if represented by an advocate) Re-examination (questions of clarification) from his/her own side.
- It is possible that I may have questions of my own for the witness.

So that everyone can see and hear the witnesses clearly I would like the witnesses to sit at this table ----------.

I would like to stress that witnesses should be asked questions. People should not use an opportunity to question a witness as a pretext to make statements that should rightly be given as their own evidence.

When interested people address the inquiry please will they come forward and speak from the witness table. It is also helpful if interested parties would stand when addressing me from the body of the room. This makes it clear who is speaking and what is being said.

I would expect the main parties to remain seated throughout.

There might be some occasions where the layout of an inquiry room might make this impractical and you may need people to stand to be heard.

5) Closing submissions from Objectors and Supporters

(This should only really be necessary if they have called witnesses)

6) Closing submissions from Order Making Authority

The OMA is entitled to the last word, even if taking a neutral stance.

It is helpful to me to have a written version of closing submissions if possible. Where this is not possible, you may have to adjust your delivery speed to match my note taking.

It is usual in rights of way cases for all parties to bear their own costs and whilst I am not inviting any applications I draw your attention to the provisions of the Department for Communities and Local Government's Planning Practice Guidance, often referred to as the PPG, and Defra Circular 1/09. I remind you that if you wish to apply for an award of costs you must do so before the close of the Inquiry. I remind you that I have a power to initiate an award of costs, whether or not any applications have been made. If I were to do this, it would follow a written process with the relevant party after the decision is issued.

PROOFS OF EVIDENCE, LETTERS AND OTHER DOCUMENTATION

I have received the following:

- Statement of case from the Council & proof of evidence of…
- Statement of case from…representing…including proofs of evidence for himself, Mr … and Mr ….

Have the parties got copies of the relevant documents[22]?

Has anyone any other letters or documents to hand to me[23]?

I will take all the letters and other written representations that I have received into account when coming to my decision.

If there are spare copies of documents it would be helpful if they could be circulated so that interested persons may follow what is being said.

[Alternatively, spare copies of proofs, maps and other documents could be placed on a table at the back of the inquiry room for interested persons to borrow **and return** documents.]

Document table and "the huddle"[24]

Because some of the points raised at the inquiry may involve detailed examination of historical evidence, it may be that I and a limited number of participants from the main parties may have to engage in close scrutiny of maps or other documents. Sometimes it is only possible to fully appreciate points that are being put forward by examining the original of a document as opposed to any copy that may be contained in the Planning Inspectorate's file.

[22] Bear in mind that only statements of case & proofs of evidence are sent out (with summaries where appropriate); the documents will have been on deposit at a venue set out by the Council.
[23] If there are new documents make arrangements for copies to be made at the first opportunity
[24] You may not wish to refer to this in opening but simply make the point at the time such a huddle becomes necessary

Please would everyone be aware that this is an important part of the inquiry process, but it does not mean that I will be discussing the merits of the evidence at such times. I have to be fully satisfied that I have seen and noted the content of relevant documents – any discussion of matters arising will only take place in open inquiry sessions.

I would be grateful if those people who are not actively involved would refrain from noisy or distracting conversation in the body of the room.

INQUIRY PROGRAMME

The inquiry is scheduled to sit for -------- day(s). However, I would like to check at this stage if this is a realistic estimate. Can each of the main parties tell me how long they think it will take to give their evidence and to explore relevant matters through cross-examination?

- OMA
- Supporters
- Objectors

Note how long they say and sketch out a timetable for the inquiry.

In view of the anticipated duration of the OMA's and other cases of which I am already aware it will probably not be until just before mid-day before we would reach the stage of hearing evidence from members of the public.

I appreciate that some people may have other engagements and may not be able to stay for the entire duration of the inquiry. If there is anyone who must leave early please let me know now and I will attempt to hear you if at all possible by perhaps slightly altering the running order of the proceedings.

Before the close of the inquiry I will ask again if there is anyone else who wishes to speak.

NOTIFICATION OF DECISION

Everyone who made an objection or representation in the time period specified in the OMA's Statutory Notice of the Order, and who did not subsequently withdraw it, will automatically receive a copy of my decision, whether they speak at the inquiry or not.

A copy of the decision will be published on gov.uk and therefore available for all those attending and any other interested person(s).

OTHER PRELIMINARY MATTERS

Before we get into the formal proceedings of the inquiry, there are a few other matters to deal with.

Domestic Arrangements

It is not my usual practice to sit later than 5 pm. Depending on the progress of the inquiry I would propose to adjourn for lunch for a maximum of one hour at about 1 pm.

I will take a short "comfort break" mid-morning, and during the afternoon, at an appropriate natural break in the proceedings.

In the interests of openness and fairness to all parties I would appreciate it if people would not attempt to engage me in any form of conversation during adjournments. It is not that I am being unfriendly or stand-offish, but I must not be seen to engaged in private conversations with one party only.

Toilets are available ……

MAIN ISSUES

I will now clarify the main issues as I understand them from the evidence submitted.

ANYTHING ELSE?

That concludes my opening announcements. Are there any questions or queries about the procedural aspects of the inquiry or any other matters which any one wishes to raise at this stage?

I now call upon Mr / Mrs …… for the Order Making Authority to open their case.

CLOSING STAGES OF THE INQUIRY

Is there anyone else who wishes to be heard?

I will now hear the final submissions from the main parties. I will hear the Objectors first, followed by (the supporters* and then) the OMA, who will have the final say.

*It would not be usual for me to hear a final submission from the supporters of the Order because they have not called any witnesses

Having now heard the final submissions from the main parties there are a number of matters that I need to attend to before formally closing the inquiry:

- have I any outstanding questions?
- have I got all of the documents that I need?
- have I got a copy of each of the proofs of evidence / photographs / plans?
- Are there any other matters to be attended to before I close the inquiry?

ARRANGING THE SITE VISIT

As there are no further matters, I will now make the arrangements for the accompanied site inspection.

Once again I must stress that this site visit is not an opportunity for people to attempt to bring forward new evidence or submissions or to enter into a discussion about the case.

COSTS APPLICATIONS?

Are there any other submissions I am required to hear before closing the inquiry? or

[if there are no applications for costs] I would like to thank everybody for their help at this inquiry, and I wish you all a safe journey home.

The Inquiry is now closed.

Working in Wales

At the opening of an event in Wales the Inspector must make the introduction as follows:

“Yn ystod y digwyddiad yma, mae croeso i chi gymryd rhan trwy gyfrwng y Gymraeg. (Mae offer cyfieithu ar gael yma i chi wneud hyn)” [then translated to] “During this event, we welcome participation through the medium of Welsh. (There are translation facilities here in order for you to do this)”

If translator is available, introduce the translator. If translation has not been arranged, don’t say the second sentence (in brackets). Replace with:

“Nid oes offer cyfieithu ar gael ar hyn o bryd, ond mae’n bosib trefnu hyn” [translated to] “There are no translation facilities here currently, but this can be arranged”. If anyone does request where translation has not been arranged, you’ll need to go on to explain (in English, and also in Welsh if you are able), what the next steps would be i.e. adjournment.

Some guidance on pronunciation:

Yn ystod | y digwyddiad | yma, | mae croeso i chi | gymryd rhan | trwy gyfrwng | y Gymraeg.

ugh Nuh-stod | ugh-dig-Withy-ad | Um-ma, | mye Kroy-soy chee | Gum-rid Rhan | trooy Guv-roong | ugh-gum-Rye-gg.

(Mae offer | cyfieithu | ar gael | yma i chi | wneud hyn)

(mye Off-err | kuv-Yaith-ee | arr Gyle | Um-mye chee | Nayd hin)

Nid oes offer | cyfieithu | ar gael ar | hyn o bryd, | ond mae’n bosib | trefnu hyn

nid oyce Off-err | kuv-Yaith-ee | arr Guy-larr | hin oh Breed, | ond myne Boss-sib | Trev-knee hin

Although it is only necessary to say this once in opening, for multi day events you may wish to repeat it.

There is a recording of Welsh Language event introductions for you to listen to, which should assist with pronunciation. If you require any further assistance, for example with place names, please contact the Welsh team, who will help – they have for example prepared a number of audio files to assist with pronunciation, which are also available through the Welsh Language Yammer Group (you will need to sign up to the group to access the files). If you are unsure about what to expect during simultaneous translation, again please contact the Welsh team for further assistance.

APPENDIX B: User & Landowner Evidence

Introduction

1. Information on User Evidence Forms (UEFs) can be found in section 5 of the Consistency Guidelines. Unfortunately there is no standard form and some local authorities have much better forms than others. The example used here is better than most and covers just about everything that is necessary, but there are others that you will come across that simply fail to ask the right questions.

2. Please note that details set out in UEFs may need to be handled with regard to PINS Note 05/2017 (sensitive personal information) and the UK GDPR. The Rights of Way Privacy Statement provides public information as to how we treat personal information.

The Value of UEFs

3. A selection of UEFs may well form the backbone of an applicant's case for a modification order. They may have been gathered over the years, some may even be 10 or more years old and they will usually be in support of a claim of 20 years uninterrupted use, though they may alternatively seek to support a Common Law claim.

4. The evidence contained in such forms will usually be most important, certainly to the applicant. Frequently the bulk of the forms will not be supported by witnesses who can be questioned; therefore the Inspector may accept them at face value. However, this should not be the case without analyses of the UEFs. The verbal evidence arising from cross-examination may allow weight to be placed on the untested UEFs or show such discrepancies that the untested evidence must be disregarded.

5. Usually UEFs will be on the file that is sent to the Inspector; in many cases they will bulk out the file. Sometimes UEFs are assumed to be valid evidence in support of usage when they have not been properly analysed by interested parties, thus you may have a case where it is claimed that there are 50 people who say that they have used the path over a period of 20 years or more. On analysis you might well find that a large number of these are invalid for one reason or another, for example, due to not being signed.

Analysis of UEFs

6. Upon receiving a file containing UEFs you need to analyse them and decide which are valid, which are questionable and which are invalid. Prepare questions for whoever is relying upon the forms to substantiate a case.

7. Analysis of UEFs can be done quite effectively in Excel. In the first numbered column insert the year in which the right to use the path was first called in question and then

number backwards for each of the 20 years. Against each name draw a line through each year of claimed use.

8. When completed, any gaps or weak areas in the 20 year period will stand out. A weak area is one where perhaps only one or two users claim to have walked the path – you then have to decide whether or not you think that there has been sufficient use by the public, uninterrupted, over a period of 20 years or more.

9. Bear in mind that it is not necessary for everyone to have used the route for the full period of 20 years. People naturally move into and out of areas, use a route when they have a dog to walk and not when they don't etc. Also bear in mind that frequency or use, or number of users, may be a reflection of the locality. For example, few but very regular in an urban cut through; large numbers irregularly in a suburban link path; or, few regularly or irregularly in a rural area.

Landowner Evidence Forms

10. In addition to UEFs, many authorities have a landowner version. Inspectors should be as rigorous in analysis of this evidence as with UEFs. The information may assist in confirming evidence given in UEFs, for example the date of notices, which may then clarify the date that use was brought into question. Alternatively, they may provide entirely different information such that there is a conflict of evidence which you need to explore at the Inquiry. If dealing with this by written representations, you will need to come to a view as to the reliability of each set of evidence.

Scrutinising the Contents of UEFS

11. If all the questions in a UEF were clearly answered, the Inspector's job would be an easy one – but they seldom are and it is essential to scrutinise every form in detail to ensure that the vital questions have been clearly and accurately answered.

12. This does not matter so much if the author of the form appears as a witness at a hearing or inquiry where they can be questioned. Where there is no opportunity for questioning, the form must be clear and unequivocal if you are going to attach great weight to what it purports to say.

13. Frequently UEFs are completed by an applicant for an order, not by the actual user, so many may be in the same handwriting but signed by different individuals. Occasionally it occurs that a form is completed and signed, but the alleged signatory denies all knowledge of it! Whilst this is rare, it is less rare for opponents of an applicant to question the validity of forms because they are all in the same handwriting and it might be alleged that the details are not authentic. It will be for the Inspector to make a judgment based on the circumstances.

14. Sometimes two UEFS will be filled in by the same person several years apart and it is not uncommon to find a difference in the evidence. If you can question this at Inquiry that may clarify matters. If not, then, bearing in mind the reliability of memory, see *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm) you may

decide either to take the information from the earliest UEF, which will be closest to the event that has led to the Order, or the lowest level of use, as that should reflect the minimum. It may be necessary to explain your reasoning in your decision.

15. In response to the question "How many user evidence forms were required to warrant confirming an Order?" PINS answer has been: "It was not the number of forms but the quality of the evidence contained in the form that would be taken into account by the Inspector. PINS cannot advise on the number of forms to be submitted."

16. Specific comments on the UEF questions:

Age: often left blank, but can be useful in confirming periods of a claim.

Occupation: Again, often left blank, but might be useful in ascertaining private rights, for example, where a farm worker may have had such rights. Be prepared for the argument where a farm worker used the path at weekends when he was off duty, and was therefore exercising public rights as opposed to the private rights he enjoyed as a worker when working!

Description: Often very sketchy, but it needs to be sufficient for you to be satisfied that it refers to the path in question.

Status: Frequently left blank when the forms are filled in individually, because the average person does not understand the difference. Believing the way to be public is not evidence of use, but if the belief is based on something concrete it helps to build confidence in the validity of the form.

Have you used the above way? You are looking for, but often do not get unequivocal answers. It is common for age to be omitted at the top of the form, and "*all my life"* to be inserted here. This is of little assistance unless you then have the opportunity of hearing the evidence at Inquiry.

The number of times during the year assists in determining overall frequency of use. Ten people using the route once a year is unlikely to be as visible to a landowner as six people who use it once a week.

The start and finish points, if completed, should tie up with the description. You need to be satisfied that the same path is being referred to.

The purpose of use is important insofar as it can be consistent with occupation and belief of the status, or can demonstrate private right, albeit unintentionally. It is more of a verifying factor.

The means of use needs careful scrutiny; if the claim is for a BOAT and the witness has merely claimed use on foot, the form is of little value on its own. However, don't forget that the lower rights are included within the higher status and it is the evidence as a whole that needs to be considered.

Obstructions

Stiles – The presence of stiles would suggest that only a footpath exists.

Gates – If there is evidence that a gate or gates have been kept locked, this would suggest that no right of way exists or else there is an obstruction which has not been removed. It can be important with regard to proving the lack of intention to dedicate.

Notices – can be very important, particularly what they say. It has been argued at inquiry that a notice which stated Private No Through Road –Access to Frontages Only – No Parking or Turning – Beware of Ramps with a number 15 in the middle indicating a speed limit, applied only to vehicles and did not show a lack of intention by the residents to dedicate the said road. Whatever the signs say, there will always be scope for argument.

Other Obstructions – usually fallen trees but sometimes a deliberate obstruction placed across a track by a landowner calling into question the right of the public to use it.

If there is a natural obstruction, it can be important if it has made the way impossible for use by the method claimed in the order. If, for example, a tree prevented possibility of use by a vehicle for a number of years, but the way could still be used by foot or on horseback, this might be inconsistent with a claim for a BOAT. Such evidence can be innocently slipped in and unnoticed until the Inspector scrutinises the form and asks the question.

Did the signatory work for the landowner? If the answer is yes, then almost certainly he would have a permissive right and the UEF could not count towards the 20 year period.

Have you been a tenant or owned any of the land? Usually simple, but often the question remains unanswered or the answer is no. The person gathering UEFs is unlikely to obtain one from the landowner or tenant!

Are you related to the landowner? Again, normally left blank but important; unless there are very unusual circumstances, which would have to be justified, it must be assumed that 'family' have permissive rights.

Permission: Often answered by "*Didn't think I needed it"*. If the signatory has obtained permission, the UEF will not support 20 years of use.

Stopped or turned back: This is often blank, but it is important if filled in as it would be evidence of no intention to dedicate and might be used to establish the later date of the 20 year period.

Did you enjoy a private right? Usually there are mixed answers to this question, often because the signatory does not understand the differences between a public and private right.

Route and additional information: This question can be important in ensuring that the correct path has been properly described, but more often than not this question and the last are not completed.

Signature and Date: These are both important. If the form is not signed, it is not valid. If the form is not dated it could still be valid, depending on how accurately the rest of the form had been completed. If no date throws doubt on the accuracy of the other information, particularly dates, then you should be careful as to the amount of weight you place on the form.

APPENDIX C – Index of Reference Material, Guidance and Advice

In electronic form, the Index can be used by alphabetical order (click on the relevant letter below to move through the alphabet) or by using the "find" facility i.e. *edit>find>"query"*.

Updates will be sent at intervals. Number crossed through equals withdrawn notes or advice.

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Accuracy of description *Mr A and Mrs P Perkins v SSEFRA and Hertfordshire CC (QBD)[2009] EWHC 658 (Admin)* *The Queen on the application of Roxlena Limited v Cumbria County Council and Peter Lamb* [2017] EWHC 2651 (Admin)	05/09	
Acquiescence *R v East Mark* [1848] 11 QB 877 *Thornhill v Weekes* [1914] 78 JP 154 *Nicholson v SSE* [1996] COD 296	19/02	

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R v Oxfordshire County Council and others ex parte Sunningwell Parish Council (HL)[1999] UKHL 28, [2000] 1 AC 335,[1999] 3 WLR 160, [1999] 3 All ER 385 Hywel James Rowley and Cannock Gates Ltd. v SSTLR (QBD)[2002] EWHC 1040 (Admin), [2003] P & CR 27 *R(oao) Cheltenham Builders Ltd v South Gloucestershire District Council* (QBD) [2003] EWHC 2803 (Admin)		
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ad medium filium- see Ownership		
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entering agricultural premises – as @ September 2016 the relevant link is https://www.gov.uk/guidance/keeping-livestock-healthy-disease-controls-an-prevention		
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Belief *R v SSE ex parte North Yorkshire County Council* (QBD) [1998] EWHC 962 (Admin), [1999] COD 83, [1999] JPL B101 *R v Oxfordshire County Council and others ex parte Sunningwell Parish Council* (HL)[1999] UKHL 28, [2000] 1 AC 335,[1999] 3 WLR 160, [1999] 3 All ER 385		
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Bicycle use *Whitworth and others v SSEFRA* (QBD) [2010] EWHC 738 (Admin), [2010] EWCA Civ 1468 *Slough Borough Council v SSEFRA* [2018] EWHC 1963 (Admin)	04/10 01/11	
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Deletion *Rubinstein and another v SSE* (QBD)[1989] 57 P & CR 111, [1988] JPL 485 *R v SSE ex parte Simms & Burrows* [1990] 3 All ER 490, (CA)[1990] 60 P & CR 105, [1990] WLR 1070, [1990] 89 LGR 398, [1990] JPL 746, [1991] 2 QB 354 *R v SSE ex parte Kent County Council* [1990] JPL 124, (QB)[1994] CO/2605/93, [1994] 93 LGR 322 *J Trevelyan v SSETR* [2000] NPC 6, (CA)[2001] EWCA Civ 266, [2001] 1 WLR 1264 *Thould v SSEFRA* (QBD)[2006] EWHC 1685	14/06 11/07	
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Development substantially complete *Ashby and Dalby v SSE and Kirklees Metropolitan District Council* [1978] 40 P & CR 362, (CA) [1980] 1 WLR 673, [1980] 1 All ER 508 *Hall v SSE* (QBD)[1998] JPL 1055, [1998] EWHC 330 (Admin)		

	RoW Note	Advice Note
Sage v SSETR and Maidstone Borough Council [2003] UKHL 22, [2003] 1 WLR 983, [2003] All ER 689		
Deviation – see also Wandering *Fernlee Estates Ltd v City & County of Swansea and the National Assembly for Wales* (QBD)[2001] CO/3844/2000, [2001] EWHC Admin 360, [2001] 82 P & CR DG19, [2001] 24 EG 161 (CS) *R v SSETR ex parte Gloucestershire County Council* (QBD)[2001] ACD 34, [2001] JPL 1307		
Disability		
• Discrimination Act (Draft Guidance)	10/08	
• discrimination, access to the countryside	4/00	
• access for all, using tribunals, site visits	36/04 05/10	
• illegible evidence	36/04	
Disclaimers attached to e-mail evidence	17/03	
Discovery of evidence *R v SSE ex parte Simms & Burrows* [1990] 3 All ER 490, (CA)[1990] 60 P & CR 105, [1990] WLR 1070, [1990] 89 LGR 398, [1990] JPL 746, [1991] 2 QB 354 *Robert Fowler v SSE and Devon County Council* (CA) [1991] 64 P & CR 16, [1992] JPL 742 *Mayhew v SSE* [1992] 65 P & CR 344, (QBD) [1993] 65 P & CR 344, [1993] JPL 831, [1993] COD 45 *Burrows v SSEFRA* (QBD) [2004] EWHC 132 (Admin) *Kotarski v SSEFRA & Devon CC* (QBD)[2010] Draft judgment, [2010] EWHC 1036 (Admin)	04/04 20/05 07/10	
Discretionary re-opening inquiry/hearing	22/03	

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Diversion *R v Lake District Special Planning Board ex parte Bernstein* (QBD)[1983] The Times 3 February *R (oao) Pierce v SSEFRA* [2006] (& Counsel advice) *R (oao) Young v SSEFRA* (QBD)[2002] EWHC 844 (Admin) *Doherty v SSEFRA and Bedfordshire County Council* (QBD) [2005] EWHC 3271 *Hertfordshire County Council v SSEFRA* (QBD) [2005] EWHC 2363 (Admin), (CA)[2006] EWCA Civ 1718 (Tyttenhanger) *Ramblers' Association v SSEFRA and Oxfordshire County Council, Weston and others* [2012] EWHC 3333 (Admin) *The **Open Spaces Society** v Secretary of State for Environment, Food and Rural Affairs [2020] EWHC 1085 (Admin), [2021] EWCA Civ 241*	07/02 07/05 08/05 06/06 09/06 14/06 17/06 12/09	9
• & extinguishments – special, crime prevention – HA80 118B & 119B statutory instrument	15/03	
• date new route comes into effect	01/18	
• expedient in whose interests, DEFRA advice	08/08	
• may follow an existing ROW for some, but not all or most of its length	20/05	9
• need to have regard to ROWIP	27/04	
• new form of order, extinguishment to be tied to date of works	15/03	
• path not shown on DMS	12/02 17/04	
• SSSI non statutory guidance	14/07	
• temporary circumstances	27/04	

	RoW Note	Advice Note
• Wales CROWA00 statutory instrument Schools special extinguishment/diversion orders	10/06	
Document copying issues (for Inquiries/Hearings)	01/10	
Documentary evidence *Moser v Ambleside Urban District Council* (CA)[1925] 89 JP 118, 23 LGR 533 *Hollins v Oldham* (Ch)[1995] C94/0206 unreported *Maltbridge Island Management Company v SSE and Hertfordshire County Council* [1998] EWHC Admin 820, [1998] EGCS 134 *Commission for New Towns & Worcestershire County Council v JJ Gallagher Ltd* [2002] EWHC 2668 (Ch), [2003] 2 P & CR 3 *Fortune and others v Wiltshire Council and Taylor Wimpey* [2010] EWHC B33 (Ch) [2012] EWCA Civ334 *Network Rail Infrastructure Ltd v Welsh Ministers [2020]* EWHC 1993 (Admin) (30 July 2020)	03/04 15/11	
Drafting errors *Kotarski v SSEFRA & Devon CC* (QBD)[2010] Draft judgment, [2010] EWHC 1036 (Admin)	07/10	
Duly made – see Objections		
Duty to modify Definitive Map & Statement *Powell and Irani v SSEFRA and Doncaster Borough Council* [2014] EWHC 4009 (Admin)		
E		back
Electronic submission of decisions	9/07	
Environment Stubbs (on behalf of GLEAM) v Lake District National Park Authority and others *[2020] EWHC 2293 (Admin)*		

	RoW Note	Advice Note
Erosion *R v SSETR ex parte Gloucestershire County Council* (QBD)[2001] ACD 34, [2001] JPL 1307		
European Convention for the Protection of Human Rights – see also Human Rights Act & RoW casework *R v SSETR ex parte Alconbury Developments Ltd and others* [2001] UKHL 23 *R (oao) Laing Homes Ltd v SSEFRA ex parte Buckinghamshire CC* [2003] EWHC 1578 (Admin), [2003] 3 PLR 6		
Event – omission of, wrong, more than one – DMMO	13/03	20
Evidence • disclaimers attached to e-mail evidence	17/03	
• handwritten, legibility and people with disabilities	36/04	
• interpretation by inspector – see also Natural justice	16/04	
Evidence as a whole *Eyre v New Forest Highway Board* [1892] 56 JP 517 Somerset County Council v Scriven (1985) *R(oao) Mr and Mrs Ridley v SSEFRA and Mr and Mrs Ridley & Mrs M Masters v SSEFRA* [2009] EWHC 171 (Admin)	10/07	
Expediency *R v SSE ex parte Stewart* [1979] 37 P & CR 279, [1980] JPL 175 *R (oao) Manchester City Council v SSEFRA* [2007] EWHC 3167 (Admin) *Pearson v SSEFRA and others* (Pearson Consent Order) (QBD)[2008] C0/1085/2008 *Ramblers' Association v SSEFRA and Oxfordshire County Council, Weston and others* [2012] EWHC 3333 (Admin)	08/08 11/08	9

	RoW Note	Advice Note
The Open Spaces Society v Secretary of State for Environment, Food and Rural Affairs [2020] EWHC 1085 (Admin), [2021] EWCA Civ 241		
Extinguishment *R v SSE ex parte Cheshire County Council* (QBD)[1991] JPL 537, [1990] COD 426, 179, 180 *R v SSETR ex parte Gloucestershire County Council* (QBD)[2001] ACD 34, [2001] JPL 1307 *R(oao Governors of Hockerill College) v Hertfordshire County Council* [2008] EWHC 2060 (Admin)	15/03	
• & diversions - special, crime prevention – HA80 118B & 119B statutory instrument		
• need to have regard to ROWIP	27/04	
• orders, whether creation agreements are material	21/05	9
• path not shown on DMS	12/02 17/04	
• special, relevant highway	27/04	
• special, crossing land occupied by a school	27/04	
• Wales CROWA00 statutory instrument Schools special extinguishment/ diversion orders	10/06	
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Failure to consult – see Consultation on orders		
Farm Survey Records	10/08	
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Maltbridge Island Management Company v SSE and Hertfordshire County Council [1998] EWHC Admin 820, [1998] EGCS 134 *Robinson Webster (Holdings) Ltd v Agombar and another* [2001] unreported (QBD)[2001] EWHC 510 (Ch), [2002] 1 P & CR 20 *R(oao) Mr and Mrs Ridley v SSEFRA and Mr and Mrs Ridley & Mrs M Masters v SSEFRA* [2009] EWHC 171 (Admin)		
Foot & mouth disease, breaks in user change to Advice Note 15 *The Queen on the application of Roxlena Limited v Cumbria County Council and Peter Lamb* [2017] EWHC 2651 (Admin)	20/02, 05/10	15
Foreshore *Attorney General & Newton Abbot RDC v Dyer* [1945] 1 Ch 67 *R (on the application of Newhaven Port and Properties Limited) v East Sussex County Council and another* [2015] UKSC 7 Supreme Court		
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Gates *Davies v Stephens* [1836] *Lewis v Thomas* [1950] 1 KB 438 *R v SSE ex parte Blake* [1984] JPL 101 Somerset County Council v Scriven (1985) • sections 147 and 147ZA of the Highways Act 1980, Wales only, need to have regard to those with mobility problems when authorising stiles or gates	09/07 10/07	
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GLEAM guidance (website)	10/09	
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	RoW Note	Advice Note
Mark Horvarth v SSEFRA [2009] European Court Case C-428/07		
Grampian conditions *Grampian Regional Council v City of Aberdeen District Council* [1984] 47 P&CR 633 *R (on the application of Network Rail Infrastructure Ltd) v S/S for Environment, Food and Rural Affairs* [2018] EWCA Civ 2069		
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Health & safety – questionnaires to OMAs	02/09	
- reporting incidents at Inquiries, Hearings and SVs	15/11	
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• legal submissions can be accepted	11/11	
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• summary of case (Inspector's discretion)	10/10	
Hedge to hedge presumption – see Widths		
Highway - definition of, in Halsbury's Law of England, CG section 2	28/04	
Historic value *Mark Horvarth v SSEFRA* [2009] European Court Case C-428/07		
Human Rights Act & RoW case*work* *Vasiliou v SST and another* (CA)[1991] 2 All ER 77, [1991] JPL 858		19

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Illegal use *Hayling v Harper* [2003] EWCA Civ 1147		
Implied permission – see As of right		
Improvement plans, rights of way – CROWA00 (commencement No.3) Order 2003	14/03	
Inclosure Acts & Awards *Logan v Burton* [1826] *Cubitt v Maxse* [1873] LR 8 CP 704 *R v SSE ex parte Andrews* (QBD)[1993] COD 477, [1993] JPL 52 *Dunlop v SSE and Cambridgeshire County Council* (QBD) [1995] CO/1560/94, [1995] 70 P & CR 307, [1995] 94 LGR 427, [1995] COD 413 *Jenkinson v SSE* [1998] QBCOF 98/0210/4? *Buckland and Capel v SSETR* (QBD)[2000] EWHC Admin 279, [2000] 1 WLR 1949, [2000] 3 All ER 205 *Commission for New Towns & Worcestershire County Council v JJ Gallagher Ltd* [2002] EWHC 2668 (Ch), [2003] 2 P & CR 3 *Parker v Nottinghamshire CC and SSEFRA* [2009] EWHC 229 (Admin) *R (on the application of John David Andrews) and SSEFRA* [2015] EWCA Civ 669 Court of Appeal *Craggs v Secretary of State for the Environment* [2020] EWHC 3346 (Admin) • RWLR course summary	5/89 10/97 3/00 20/06 03/09	11

	RoW Note	Advice Note
Incompatibility (for dedication) *British Transport Commission v Westmorland County Council* (HL)[1957] 2 All ER 353, [1958] AC 126 *The Ramblers Association v SSEFRA* [2017] EWHC 716 (Admin)		
Inquiries • into modifications *Marriott v SSETR* (QBD)[2000] [2001] JPL 559 *Perkins v SSETR* (Consent Order) (QBD)[2002]	15/02	10
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• powers to modify orders		20
Intention to dedicate *Poole v Huskinson* [1843] 11 M & W 827		
Interests in land (diversion) *Doherty v SSEFRA and Bedfordshire County Council* (QBD) [2005] EWHC 3271	06/06	
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Interruption *Poole v Huskinson* [1843] 11 M & W 827 *Moser v Ambleside Urban District Council* (CA), 23 LGR 533		

	RoW Note	Advice Note
Merstham Manor v Coulsdon and Purley Urban District Council [1937] 2 KB 77 *Jones v Bates* (CA)[1938] 2 All ER 237 *Lewis v Thomas* [1950] 1 KB 438 *R v SSE ex parte Blake* [1984] JPL 101 *Betterment Properties (Weymouth) Ltd v Dorset County Council* [2012] EWCA Civ 250 Court of Appeal *The Queen on the application of Roxlena Limited v Cumbria County Council and Peter Lamb* [2017] EWHC 2651 (Admin) • Foot & mouth disease – AN 9 queried *R (Pereira) v Environment and Traffic Adjudicators and London Borough of Southwark* [2020] EWHC 811 Admin		9
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Irrelevant/Relevant objections – see Objections		
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	RoW Note	Advice Note
Lack of intention to dedicate a right of way (the proviso) *Lewis v Thomas* [1950] 1 KB 438 *Fairey v Southampton County Council* (QBD)[1956] 1 All ER 419, (CA) [1956] 2 QB 439 *R v SSE ex parte Cowell* [1992] JPL 370, (CA)[1993] JPL 851 *Jaques v SSE* (QBD)[1995] JPL 1031 *The National Trust v SSE* (QBD) [1998] EWHC 1142 (Admin), [1999] COD 235, [1999] JPL 697 R v SSE ex parte Billson (QBD)[1998] 2 All ER 587, [1998] EWHC 189 (Admin), [1998] 3 WLR 1240, [1999] QB 374 Applegarth v SSETR (QBD)[2001] EWHC Admin 487, [2002] 1P & CR 9, [2002] JPL 245, [2001] 27 EG 134 (CS) AMG Darby v First Secretary of State and Worcestershire County Council (QBD) [2003] EWHC 299 (Admin) Burrows v SSEFRA (QBD) [2004] EWHC 132 (Admin) Norman & Bird v SSEFRA (QBD) [2006] EWHC 1881 (Admin), [2007] EWCA Civ 334 R (oao) Godmanchester Town Council and Drain v SSEFRA and Cambridgeshire County Council [2005] EWCA Civ 1597, [2006] 2 All ER 960, [2006] 2 P & CR 1) [2007] UKHL 28, [2007] 3 WLR 85, [2007] 4 All ER 273 Paterson v SSEFRA [2010] EWHC 394 Newhaven Port and Properties v East Sussex CC [2012] EWHC 647 [2013] EWCA Civ 276 Asghar Ali v SSEFRA, Essex County Council and Frinton and Walton Town Council [2015] EWHC 893 (Admin)	03/03 16/06 7/07 06/15	
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	RoW Note	Advice Note
Mark Horvarth v SSEFRA [2009] European Court Case C-428/07		
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Law of Property Act 1925 *R v SSE ex parte Billson* (QBD)[1998] 2 All ER 587, [1998] EWHC 189 (Admin), [1998] 3 WLR 1240, [1999] QB 374		
Legal Event Modification Order (LEMO) and combined orders	06/12	
Legal memory *Rubinstein and another v SSE* (QBD)[1989] 57 P & CR 111, [1988] JPL 485 *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm)		14
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• added to order by inspector	27/04	
• bridges & pinch points – DEFRA advice (now see October 2010 guidance)	04/09	
Limited dedication *Poole v Huskinson* [1843] 11 M & W 827		
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	RoW Note	Advice Note
Fortune and others v Wiltshire Council and Taylor Wimpey [2010] EWHC B33 (Ch) [2012] EWCA Civ334 *Trail Riders Fellowship v SSEFRA* [2017] EWHC 1866 (Admin) *Slough Borough Council v SSEFRA* [2018] EWHC 1963 (Admin)		
Local Access Forums Regulations in effect, DEFRA guidance issued, need to have regard to advice from forum – http://webarchive.nationalarchives.gov.uk/20130402151656/http://archive.defra.gov.uk/rural/documents/countryside/crow/laf-guidance.pdf • Natural England advice	7/07	
'Local authority' – definition in TCPA 1990	16/09	9
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Maisemore – see erosion		
Map scales (Schedule 14 applications) *Trail Riders Fellowship & Tilbury v Dorset CC & SSEFRA* [2013] EWCA Civ 553 *R (on the application of Trail Riders Fellowship and another)* v Dorset County Council [2015] UKSC 18 Supreme Court	13/12 08/13 05/15	
Material provision in ROWIP • need to have regard to, for diversions, creations, extinguishments	27/04	
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Mineral workings – surface – TCPA s261 temporary stopping up/diversion orders under s247 & s257		9
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• on L drive - L:\Wales & Major Casework\Defra, FSS, Major Casework, DFT\RoW\ROW Management Meetings\Section Meeting Minutes and Agendas		
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• powers re limitations & conditions	17/04	
• proposed modifications to be added to order and map	02/12 13/16	
• to limitations	27/04	
• modification to reduce width, no need to advertise	27/04	
• objections to – clarification of matters to be considered	12/11	
• order maps		20
• consideration of 'old' and 'new' evidence	07/11	
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	RoW Note	Advice Note
(The) National Park Authorities' Traffic Orders (Procedure)(England) Regulations 2007 Stubbs (on behalf of GLEAM) v Lake District National Park Authority and others *[2020] EWHC 2293 (Admin)*		
Natural Environment and Rural Communities Act 2006 (NERC) – see also Bringing into question, Byway open to all traffic, Map scales, Schedule 14 applications, Vehicles *Du Boulay v SSEFRA* (Du Boulay Consent Order) QBD[2008] Claim No. CO/8352/2007 *R (oao Warden and fellows of Winchester College and Humphrey Feeds Ltd) v Hampshire County Council and SSEFRA* (QBD)[2007] EWHC 2786 (Admin), CA [2008] EWCA Civ 431 *Wathes, Pearson, Young, Roberts and Lowe v SSEFRA* (T34x Protection Group Consent Order) QBD [2009] CO/9252/2008 *Maroudas v SSEFRA* (QBD) [2009] EWHC 628 (Admin), (CA) [2010] EWCA Civ 280 *Fortune and others v Wiltshire Council and Taylor Wimpey* [2010] EWHC B33 (Ch) [2012] EWCA Civ334 *Trail Riders Fellowship v SSEFRA* [2017]EWHC 1866 (Admin) *Slough Borough Council v SSEFRA* [2018] EWHC 1963 (Admin)	04/08 05/08 06/08 09/08 01/09 03/10 11/12	
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• GLEAM guidance (website)	10/09	
• 16/11/06 in force in Wales	23/06	
• section 66, 72 DEFRA guidance	06/12	
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• vehicular use (*Plumbe* paper)	02/09	
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	RoW Note	Advice Note
R v SSE ex parte Slot [1997] EWCA Civ 2845, [1998] 4 PLR 1, [1998] JPL 692 *Todd and Bradley v SSEFRA* (QBD)[2004] EWHC 1450 (Admin), [2004] 1 WLR 2471, [2004] 4 All ER 497, [2005] 1 P & CR 16 *Ford v Nottingham CC* (2007) (Consent order) *Powell and Irani v SSEFRA and Doncaster Metropolitan Borough Council* (QBD) [2009] EWHC 643 (Admin) *R. (on the application of Ortona Ltd) v Secretary of State for Communities and Local Government* [2009] EWCA Civ 863 Graham Plumbe v Secretary of State for Environment, Food and Rural Affairs (2010)(Consent order)	07/07 05/09 11/10 13/10	
Navigation Act *Parker v Nottinghamshire CC and SSEFRA* [2009] EWHC 229 (Admin)	03/09	
Necessary for development *Calder v SSE* (CA)[1996] EGCS 78		
NERC – see Natural Environment and Rural Communities Act 2006		
Neutral stance by OMA	04/11	1
New argument – must be canvassed with parties	10/11	
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Not connected to another highway Skrentry v Harrogate Borough Council and others [1999] EGCS 127 *Kotegaonkar v SSEFRA and Bury Metropolitan Borough Council* [2012] EWHC 1976 (Admin)	09/12	
Notice of orders *The Ramblers' Association v Kent County Council* (QBD)[1990] 154 JP 716, [1990] COD 327,[1990] 60 P & CR 464, [1991] JPL 530	02/10	

	RoW Note	Advice Note
Notices *R v SSE ex parte Blake* [1984] JPL 101 *Burrows v SSEFRA* (QBD) [2004] EWHC 132 (Admin) *R (Oxfordshire and Buckinghamshire Mental Health NHS Foundation Trust v Oxfordshire County Council* [2010] EWHC 530 (Admin) *Paterson v SSEFRA* [2010] EWHC 394 *Betterment Properties (Weymouth) Ltd v Dorset County Council* [2012] EWCA Civ 250 Court of Appeal	04/04	
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Objections – to orders *Lasham Parish Meeting v Hampshire County Council and SSE* [1992] 65 P & CR 3, 91 LGR 209, (QBD) [1993] 65 P & CR 331, [1993] JPL 841, [1993] 91 LGR 209 *Mayhew v SSE* [1992] 65 P & CR 344, (QBD) [1993] 65 P & CR 344, [1993] JPL 831, [1993] COD 45 *R v SSE ex parte Slot* [1997] EWCA Civ 2845, [1998] 4 PLR 1, [1998] JPL 692 *R (oao Lea) v SSETR [2013] EWHC 1401 (Admin)* *Ford v Nottingham CC* (2007) (Consent order) • relevant/irrelevant WCA – statutory instrument CROWA00	07/04 07/07 10/14	23
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• to be considered in full in decisions	34/04	
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	RoW Note	Advice Note
Wild v SSEFRA (QBD) [2008] EWHC 3641 (Admin) (CA) [2009] EWCA Civ 1406		
Obstructions (PPOs) – see Temporary circumstances		
Omission of an event in DMMO	13/03	
Once a highway, always a highway *Dawes v Hawkins* [1860] 8 CB (NS) 848, 141 ER 1399 *Harvey v Truro Rural District Council* [1903] 2 Ch 638	20/05	9
Open Access – see Countryside and Rights of Way Act 2000		
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Order map, addition of a further map to clarify a width	12/12	
Order title, modification of	27/04	
Owner/occupier - definition	02/10	
Ownership *R v Edmonton* [1831] 1 Mood & Rob 24 *Attorney General v Beynon* (CA) [1970] Ch 1, [1969] 2 All ER 273 *Commission for New Towns & Worcestershire County Council v JJ Gallagher Ltd* [2002] EWHC 2668 (Ch), [2003] 2 P & CR 3	03/04	
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Particulars *Masters v SSETR* [2000] 2 All ER 788, (CA) [2000] EWCA Civ 249, (CA)[2000] 4 All ER 458, (CA)[2001] QB 151	04/04	

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Burrows v SSEFRA (QBD) [2004] EWHC 132 (Admin)		
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Permission *R v SSE ex parte Billson* (QBD)[1998] 2 All ER 587, [1998] EWHC 189 (Admin), [1998] 3 WLR 1240, [1999] QB 374 *R v City of Sunderland ex parte Beresford* [2003] UKHL 60, [2004] 1 AC 889, [2004] 1 All ER 160 *Kotegaonkar v SSEFRA and Bury Metropolitan Borough Council* [2012] EWHC 1976 (Admin) *Re St Martin le Grand, York; Westminster Press Ltd v St Martin with St Helen, York (incumbent and parochial church council) and others* [1989] 2 All ER 711 *Hywel James Rowley and Cannock Gates Ltd. v SSTLR* (QBD) [2002] EWHC 1040 (Admin), [2003] P & CR 27 *R (on the application of Barkas) v North Yorkshire County Council and another* [2014] UKSC 31 Supreme Court *R (on the application of Newhaven Port and Properties Limited) v East Sussex County Council and another* [2015] UKSC 7 Supreme Court *R on the application of Goodman v Secretary of State for Environment Food and Rural Affairs* (Eastern Fields) [2015] EWHC 2576 (Admin)	19/02 24/03 09/12	
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R (oao) Norfolk County Council v SSEFRA (QBD) [2005] EWHC 119 (Admin), [2006] 1 WLR 1103, [2005] 4 All ER 994	16/05	
Preliminary matters *R (on the application of Network Rail Infrastructure Ltd) v S/S for Environment, Food and Rural Affairs* [2018] EWCA Civ 2069		
Prescription *R v Oxfordshire County Council and others ex parte Sunningwell Parish Council (HL)[1999] UKHL 28*, [2000] 1 AC 335,[1999] 3 WLR 160, [1999] 3 All ER 385		
Presumption against change *R v SSE ex parte Kent County Council* [1990] JPL 124, (QB)[1994] CO/2605/93, [1994] 93 LGR 322 *R (oao) Leicestershire County Council v SSEFRA* (QBD)[2003] EWHC 171 (Admin)	03/03	
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Private rights *Paterson v SSEFRA* [2010] EWHC 394		
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the Public R (on the prosecution of the National Liberal Land Co Ltd) v The inhabitants of the County of Southampton (QBD)[1887] LR 19 QBD 590 *Jennings v Stephens* [1936] 1 Ch 469 *Comber* (2010) (Consent Order)	11/10	

	RoW Note	Advice Note
Public interest *Morley Borough Council v St Mary the Virgin, Woodkirk (Vicar and Churchwardens)* [1969] 3 All ER 952 *K. C. Holdings (Rhyl) Ltd v SSW and Colwyn Borough Council* (QBD)[1990] JPL 353 *The Open Spaces Society v Secretary of State for Environment, Food and Rural Affairs [2020] EWHC 1085 (Admin), [2021] EWCA Civ 241*		
Public nuisance *Hereford & Worcester v Pick* [1996] 71 P&CR 231 *Garland and Salaman v Secretary of State for Environment, Food and Rural Affairs and Surrey County Council* [2020] EWHC 1814 (Admin) *& CA [2021] EWCA Civ 1098*		
Public Path Orders • DEFRA advice on whose interests order made in	8/08	
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Quashing orders June Jones v Welsh Assembly Government (QBD)[2009] EWHC 3515 (Admin)	09/09	
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	RoW Note	Advice Note
Ramblers Association v Secretary of State for Environment, Food and Rural Affairs [2017] EWHC 716 (Admin)		
Railway plans Vyner v Wirral Rural District Council [1909] 73 JP 242		
Reasonable landowner (protecting his rights) *Powell and Irani v SSEFRA and Doncaster Borough Council* [2014] EWHC 4009 (Admin)		
Reasonably alleged – see Schedule 14		
Reclassification of RUPPs, restricted byways, Wales, CROWA00 stat inst & commencement order	10/06	
Recording (tape) at inquiries	21/06	
Recreational use *Hue v Whiteley* [1929] 1 Ch 440 *Dyfed County Council v SSW* [1989] 58 P & CR 68, (CA) [1990] 59 P & CR 275, [1990] COD 149		
Registers, public rights of way, CROWA00 Wales stat inst & regs	10/06	
Regulations 'The Public Rights of Way (Combined Orders) (England) Regulations 2008'	5/08	
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	RoW Note	Advice Note
Representations – to orders *Lasham Parish Meeting v Hampshire County Council and SSE* [1992] 65 P & CR 3, 91 LGR 209, (QBD) [1993] 65 P & CR 331, [1993] JPL 841, [1993] 91 LGR 209 *Mayhew v SSE* [1992] 65 P & CR 344, (QBD) [1993] 65 P & CR 344, [1993] JPL 831, [1993] COD 45		23
Reputation *Fortune and others v Wiltshire Council and Taylor Wimpey* [2010] EWHC B33 (Ch) [2012] EWCA Civ334	15/11	
Restricted byways – see also Natural Environment and Rural Communities Act • RUPPs to become, CROWA00 stat inst & commencement order	07/06 10/06	
Rights of Way Hearings and Inquiries Rules, adopted in spirit in Wales	08/12	
Rights of way improvement plans (ROWIP) • CROWA00 commencement No.3 Order 2003	14/03	
• CROWA00 Sch 6, regard to material provisions re diversions, creations, extinguishments	27/04	
Rights of Way Law Review: copyright issues at Inquiries	10/12	
Rights of Way Review Committee: Practice Guidance Notes – issue of revised editions 1-4 and 5. (and 6 in PINS note only)	8/02	
• Practice Guidance Notes – status of	10/02	
Road Traffic Act 1930 *Stevens v SSE* [1998] 76 P & CR 503		
Road Traffic Regulation Act 1984 Stubbs (on behalf of GLEAM) v Lake District National Park Authority and others *[2020] EWHC 2293 (Admin)*		

	RoW Note	Advice Note
Bowen & Ors v Isle of Wight Council [2021] EWHC 3254 (Ch)		
Road Traffic Act 1988 *Hayling v Harper* [2003] EWCA Civ 1147 *Massey & Drew v Boulden & Boulden* [2002] EWCA Civ 1634, [2003] 1 WLR 1792, [2003] 1 P & CR 22, [2003] 2 All ER 87		
Roads used as public paths (RUPPS): *Lasham Parish Meeting v Hampshire County Council and SSE* [1992] 65 P & CR 3, 91 LGR 209, (QBD) [1993] 65 P & CR 331, [1993] JPL 841, [1993] 91 LGR 209 *Stevens v SSE* [1998] 76 P & CR 503 *R v SSETR ex parte Masters* (1998) R v SSE & Somerset County Council ex parte David H Masters & M P Masters [1999] CO 3453/97 *R (oao) Kind v SSEFRA* (QBD)[2005] EWHC 1324 (Admin), [2006] QB 113	16/05	23
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• applications (for BOAT – NERC Act) *R (oao Warden and fellows of Winchester College and Humphrey Feeds Ltd) v Hampshire County Council and SSEFRA* (QBD)[2007] EWHC 2786 (Admin), CA [2008] EWCA Civ 431 *Wathes, Pearson, Young, Roberts and Lowe v SSEFRA* (T34x Protection Group Consent Order) QBD [2009] CO/9252/2008 *Trail Riders Fellowship & Tilbury v Dorset CC & SSEFRA* [2013] EWCA Civ 553 *R (on the application of Trail Riders Fellowship and another) v Dorset County Council* [2015] UKSC 18 Supreme Court *Trail Riders Fellowship v SSEFRA and Dorset County Council* [2016] EWHC 2083 (Admin)	08/07 04/08 05/08 06/08 09/08 11/12	
• New evidence can be considered in an appeal, including that from third parties	03/14	
• Hearing or inquiry	03/14	
• include description of route at third bullet point	12/11	
• Procedure in Wales	06/15	
• Non-statutory inquiry (costs)	02/15	
• Reasonably alleged to subsist *R v SSE ex parte Bagshaw and Norton* (QBD)[1994] 68 P & CR 402, [1995] JPL 1019 *R v SSW ex parte Emery* (QBD) [1996] 4 All ER 1, (CA)[1998] 4 All ER 367, [1998] 96 LGR 83 *Todd and Bradley v SSEFRA* (QBD)[2004] EWHC 1450 (Admin), [2004] 1 WLR 2471, [2004] 4 All ER 497, [2005] 1 P & CR 16	16/04	
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• Wales - jurisdiction	08/09	
• withdrawal of application *The Queen on the application of Roxlena Limited v Cumbria County Council and Peter Lamb* [2017] EWHC 2651 (Admin)		
Schedule 14 Directions *(R oao John Andrews v SSEFRA)* (2012) (Consent Order & Counsel opinion)	04/12	
Schools, Wales CROWA00 statutory instrument special extinguishment/diversion orders	10/06	
Seals on orders	06/17	
Secretary of State cases - post inquiry/hearing correspondence	22/03	
Section 31 Highways Act 1980 *Kotegaonkar v SSEFRA and Bury Metropolitan Borough Council* [2012] EWHC 1976 (Admin) *Wright and Anor v SSEFRA* [2016] EWHC 1053 (Admin)		
Section 31(6) deposits *R (oao The Ramblers' Association) v SSEFRA* (Ramblers' Association Consent Order) QBD[2008] CO/2325/2008	01/09	
• successors in title	15/16	

	RoW Note	Advice Note
Settlements (strict) *Moser v Ambleside Urban District Council* (CA)[1925] 89 JP 118, 23 LGR 533		
SGM Minutes & Agendas • L Drive for SGL minutes & agendas - as @ September 2016 the relevant link is: L:\Enforcement, Specialist Casework & Costs/Administration/Rights of Way Team/MEETINGS/Sub Group Meetings/Minutes	19/06	
Signatures on decisions, typeface Monotype Corsiva 18	3/07	
Signs – see Notices		
Site visits, people with disabilities	36/04	
Special extinguishment orders *R (oao) Manchester City Council v SSEFRA* [2007] EWHC 3167 (Admin) • relevant highway & schools	27/04 2/08	
Squatters – see Adverse possession		
SSSI Diversions, non-statutory guidance	14/07	
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• recording other information apart from position, width, limitations & conditions		5
Statutory declarations, weight to be given to	02/14	
Statutory incompatibility *R (on the application of Newhaven Port and Properties Limited) v East Sussex County Council and another* [2015] UKSC 7 Supreme Court		

	RoW Note	Advice Note
The Ramblers Association v Secretary of State for Environment, Food and Rural Affairs [2017] EWHC 716 (Admin) *R (on the application of Lancashire County Council) (Appellant) v Secretary of State for the Environment, Food and Rural Affairs and another (Respondents) R (on the application of NHS Property Services Ltd) (Appellant) v Surrey County Council and another (Respondents) [2019] UKSC 58* *Garland and Salaman v Secretary of State for Environment, Food and Rural Affairs and Surrey County Council* [2020] EWHC 1814 (Admin) *& CA [2021] EWCA Civ 1098* *Network Rail Infrastructure Ltd v Welsh Ministers [2020]* EWHC 1993 (Admin) (30 July 2020)		
Stopping up *Logan v Burton* [1826] *R (on the application of Network Rail Infrastructure Ltd) v S/S for Environment, Food and Rural Affairs* [2018] EWCA Civ 2069		
Structures on rights of way, Guidance	14/10 15/10	
Submissions, post inquiry • Legal, at inquiries and hearings	2/02 03/12	3
Substantially complete – see Development substantially complete		
Substantially less convenient *R (oao) Young v SSEFRA* (QBD)[2002] EWHC 844 (Admin)	7/02 9/06	
Sufficiency of user *Hollins v Verney* [1884] 13 QB 304 *Mann v Brodie* [1885] HL 378, 10 App Cas 378 *Comber* (2010) (Consent Order)	04/10 11/10 01/11	

	RoW Note	Advice Note
Whitworth and others v SSEFRA (QBD) [2010] EWHC 738 (Admin), [2010] EWCA Civ 1468 *Wright and Anor v SSEFRA* [2016] EWHC 1053 (Admin)		
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Temporary circumstances/obstructions, Highways Act 1980 *R v SSE ex parte Stewart* [1979] 37 P & CR 279, [1980] JPL 175	27/04	
Tenants and dedication *Davies v Stephens* [1836] *Moser v Ambleside Urban District Council* (CA)[1925] 89 JP 118, 23 LGR 533 *Jaques v SSE* (QBD) [1995] JPL 1031 *Hywel James Rowley and Cannock Gates Ltd. v SSTLR* (QBD)[2002] EWHC 1040 (Admin), [2003] P & CR 27	19/02	
Termination points (diversion) *R(oao) Connaughton v West Dorset District Council* (QBD)[2002] EWHC 794 (Admin), [2002] All ER (D) 392		
Tithe Maps – see also Documentary evidence *Merstham Manor v Coulsdon and Purley Urban District Council* [1937] 2 KB 77 *Kent County Council v Loughlin and others* [1975] JPL 348, 235 EG 681	10/97	

	RoW Note	Advice Note
Maltbridge Island Management Company v SSE and Hertfordshire County Council [1998] EWHC Admin 820, [1998] EGCS 134 *R(oao) Mr and Mrs Ridley v SSEFRA and Mr and Mrs Ridley & Mrs M Masters v SSEFRA* [2009] EWHC 171 (Admin)		
Tolls *Austerberry v Oldham Corporation* [1885] LR 29 Ch D 750 *Midland Railway Corporation v Watton* [1886] 17 QBD 30 *R v SSE ex parte Cowell* [1992] JPL 370, (CA)[1993] JPL 851		
Town and Country Planning Act 1990 (TCPA) *Ashby and Dalby v SSE and Kirklees Metropolitan District Council* [1978] 40 P & CR 362, (CA) [1980] 1 WLR 673, [1980] 1 All ER 508 K. C. Holdings (Rhyl) Ltd v SSW and Colwyn Borough Council (QBD)[1990] JPL 353 *Vasiliou v SST and another* (CA) [1991] 2 All ER 77, [1991] JPL 858 *Calder v SSE* (CA) [1996] EGCS 78 *Hall v SSE* (QBD)[1998] JPL 1055, [1998] EWHC 330 (Admin) *Sage v SSETR and Maidstone Borough Council* [2003] UKHL 22, [2003] 1 WLR 983, [2003] All ER 689 *R (on the application of Network Rail Infrastructure Ltd) v S/S for Environment, Food and Rural Affairs* [2018] EWCA Civ 2069	15/04 8/05	
Trustees – see Settlement		
Tunnel or bridge orders – see Rail crossing extinguishment/diversion orders		9
Turnpikes *Midland Railway Corporation v Watton* [1886] 17 QBD 30		
Twenty year period *Turner v Walsh* [1881] 6 AC 636		

	RoW Note	Advice Note
Davis v Whitby [1974] 1 Ch 186, [1974] 1 All ER 806 *Berry v SSEFRA and Devon County Council* (QBD)[2006] EWHC 2498 (Admin) *Wright and Anor v SSEFRA* [2016] EWHC 1053 (Admin)		
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Unrecorded route or alignment (diversion) *Doherty v SSEFRA and Bedfordshire County Council* (QBD) [2005] EWHC 3271	06/06	
Units of measurement directive	1/95	
Upgrading *Robert Fowler v SSE and Devon County Council* (CA) [1991] 64 P & CR 16, [1992] JPL 742		
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Vehicles *R v SSE ex parte Riley* (QBD)[1989] 59 P & CR 1, [1989] JPL 921 *Hanning v Top Deck Travel Group Limited* (1993) 68 P & CR 14 *Robinson v Adair* (QBD)[1995] NPC 30, [1995] The Times 2 March *Stevens v SSE* [1998] 76 P & CR 503	3/02 14/04 16/05	12

	RoW Note	Advice Note
R v Planning Inspectorate Cardiff ex parte Howell (QBD)[2000] EWHC Admin 355, [2000] NPC 68 *Robinson Webster (Holdings) Ltd v Agombar and another* [2001] unreported (QBD)[2001] EWHC 510 (Ch), [2002] 1 P & CR 20 *Hayling v Harper* [2003] EWCA Civ 1147 *Massey & Drew v Boulden & Boulden* [2002] EWCA Civ 1634, [2003] 1 WLR 1792, [2003] 1 P & CR 22, [2003] 2 All ER 87 *Bakewell Management Ltd v Brandwood and others* [2003] EWCA Civ 23, [2003] 1 WLR 1429, (HL)[2004] UKHL 14, [2004] 2 AC 519, [2004] All ER 305, [2004] 2 WLR 955,[2005] 1 P & CR 1 *R (oao) Kind v SSEFRA* (QBD)[2005] EWHC 1324 (Admin), [2006] QB 113		
Venue, suitability of	14/11	
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• casework, electronic submission of	11/12	
• CROWA00 Commencement Orders	19/05 10/06 02/07	
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• CROWA00 sections 147 and 147ZA of the Highways Act 1980; need to have regard to those with mobility problems when authorising stiles or gates http://gov.wales/legislation/subordinate/nonsi/countrysidewales/2007/CROWGuidance2007e?lang=en	9/07	
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	RoW Note	Advice Note
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• Registers, public rights of way, CROWA00 stat inst & regs	10/06	
• RoW Hearings & Inquiry Rules, adopted in spirit	08/12	
Wandering – see also Deviation *Attorney-General v Antrobus* [1905] 2 Ch 188 *The National Trust v SSE* (QBD) [1998] EWHC 1142 (Admin), [1999] COD 235, [1999] JPL 697		
Wartime requisitioning and War Powers Orders *Jaques v SSE* (QBD)[1995] JPL 1031	4/08	
Waterways *Attorney General ex rel. Yorkshire Derwent Trust Ltd v Brotherton* HL [1991] 3 WLR 1126		
Weight to be attached to evidence *Maltbridge Island Management Company v SSE and Hertfordshire County Council* [1998] EWHC Admin 820, [1998] EGCS 134 *R (oao) Manchester City Council v SSEFRA* [2007] EWHC 3167 (Admin)		
Well-being of Future Generations (Wales) Act 2015	05/17	
Width – see also Accuracy of description	3/07	16
Turner v Ringwood Highway Board [1870] LR 9 Eq 418 *Attorney General v Beynon* (CA) [1970] Ch 1, [1969] 2 All ER 273 *Jenkinson v SSE* [1998] QBCOF 98/0210/4? *Hale v Norfolk County Council* [2000] EWCA Civ 290, [2001] Ch 717, [2001] RTR 397	04/04 03/09	

	RoW Note	Advice Note
R(oao) MJI (Farming) Ltd v SSEFRA (QBD) [2009] EWHC 677 (Admin) *Parker v Nottinghamshire CC and SSEFRA* [2009] EWHC 229 (Admin) *Sinclair v Kearsley & Salford City Council* [2010] EWCA Civ 112 *Sweet v Sommer (Ch)*[2004] EWHC 1504, (CA) [2005] EWCA Civ 227		
• clarification of by addition of a map to an order	12/12 06/16	
• footpaths & bridleways to be specified in all orders		16
• minimum & approximate not to be used in orders	9/06	16
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• Wales	W Note 8	
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APPENDIX D – DEFRA Related Case Law Summaries (February 2022)

(Commons & Rights of way)

Consent orders at end of section

The provision of case summaries below does **not** mean that there is no need to read the judgment in full where a case is relevant to an Order Decision!

A B C D E F G H I J K L M N O P Q R S T U V W X Y Z

A

*Robinson v **Adair***

(QBD)[1995] NPC 30, [1995] The Times 2 March

Summary: Concerns illegal vehicular use post 1 December 1930 when it became an offence to drive a mechanically propelled vehicle without lawful authority on a footpath or bridleway; vehicular use on a footpath or bridleway unable to provide user evidence under s31 HA 1980 to upgrade to byway - no public rights can be acquired by actions prohibited by statute. Overruled by Bakewell judgment.

*Robinson Webster (Holdings) Ltd v **Agombar** and another*

[2001] unreported (QBD)[2001] EWHC 510 (Ch), [2002] 1 P & CR 20

Summary: Concerns the sufficiency of historical evidence to show dedication of public vehicular rights. The lane in question was numbered on the Tithe Map, reference in the Tithe Apportionment showed its occupation by 'parish officers'. Judgment: "very strong indication that it was regarded as a publicly maintainable highway at the time". The lane was uncoloured on the Finance Act Map (excluded from the taxable land of a hereditament). Judgment: "most material evidence in relation to the status of [the lane] at the time".

Also, Etherton J said "It is clear…that public rights may be established over a cul-de-sac by actual use as of right by members of the public".

*R v SSETR ex parte **Alconbury** Developments Ltd and others*

[2001] UKHL 23

Summary: dealt with the question whether certain decision making processes of the SSETR were compatible with article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) as incorporated in the Human Rights Act 1998. Held that the existing procedure of inquiry before an Inspector, decision by the SofS, and right of appeal on a point of law to the High Court accorded with Article 6.

***Asghar Ali** v SSEFRA, Essex County Council and Frinton and Walton Town Council*

[2015] EWHC 893 (Admin)

Key Words: Adequacy of reasoning; use of "infelicitous" language

Summary: An Inspector's decision was challenged as irrational. Although stating that the evidence as to locking a door was "sound and reliable" and that she "had no reason to doubt " the evidence that the door had been locked, she found on the balance of probabilities that the door had not been locked. The judge stated that the Inspector's wording "may have been clearer" and that there were "infelicities in her language". Nevertheless he concluded that on a reasonable reading of the decision, the Inspector meant that whilst she had no reason to doubt the evidence *in itself*, the evidence was not sufficient when looked at together with the rest of the evidence, including extensive evidence from users of the path, to satisfy her on the balance of probabilities that the door was locked.

The Inspector accepted that the door was locked at Christmas 2011. However, it was perfectly rational to conclude that, as the purpose of the path was for getting to local shops and businesses, the locking of a door at Christmas when those shops and businesses were closed, was not effective to provide sufficient evidence that there was no intention to dedicate. The acts on the part of the landowner were not sufficiently overt to bring to the attention of the public who used the way that the landowner had no such intention.

***Allen v Bagshot** Rural District Council*

[1970]

Summary: (see ROW Advice Note No. 19 for application to Human Rights legislation)

It is doubtful an adjoining landowner or occupier constitutes a class of person whose interests would be considered by a local authority or the SS when making or confirming a diversion order. (This case was decided under s111 of the HA 1959, which equates with s119(6) of the HA 1980, however, the expediency test in s119(1) differs to that in s111(1))

*R v SSE ex parte **Andrews***

(QBD)[1993] COD 477, [1993] JPL 52

Summary: concerns the interpretation of sections 8, 10 and 11 of the 1801 General Inclosure Act; *'ultra vires'* awards. It questioned whether the commissioners had the power to set out a 4ft wide public footpath under the General Act, in the absence of specific provision in the local act. Judgment: s8 of the 1801 Act empowered commissioners to set out new public carriage roads of 30+ ft. wide, and to reorganise roads and tracts (which may be less than 30 ft. wide) across land to be inclosed directly affected by the setting out of new carriage roads. s11 of the Act

only extinguishes pre-existing carriage roads if they are not set out. It does not touch pre-existing footpaths and bridleways. This was overturned by [2015] EWCA Civ 669 *R (on the application of John David **Andrews**) and SSEFRA*.

*R (on the application of John David **Andrews**) and SSEFRA*

[2015] EWCA Civ 669 Court of Appeal

Key Words: S10 Inclosure Consolidation Act 1801

Summary: The Court of Appeal held that section 10 of the Inclosure Consolidation Act 1801 (the 1801 Act) does empower enclosure commissioners to create *public* bridleways, as opposed to only *private* bridleways. The Court found that there were many examples of inconsistency of language in the 1801 Act and that a "purposive interpretation" should be adopted, ie one which reflects the intention of Parliament.

The purpose of the Act was to consolidate in one statute the clauses "usually contained "in earlier private enclosure Acts. A large number of pre-1801 Acts authorised commissioners to appoint public as well as private bridleways and footpaths and the Court found that it seemed unlikely that Parliament would not have intended to give commissioners a power which they had previously repeatedly exercised. Furthermore, in 1801, public rights of way on foot and horseback were as important for the public in getting around as were the public carriageways for vehicular traffic and would have had far greater importance that private ones. The Court stated that it was difficult to identify any strong public interest in a commissioner setting out private rights on private enclosed land. The Court concluded that S10 should be interpreted as giving commissioners power to create new public bridleways and footpaths unless the language of the section could not bear that meaning.

Looked at in isolation of the rest of the statute and without regard to its underlying purpose the most natural interpretation of the first few lines of S10 is that the word "private" governs all the items in the list. However it is not impossible to read the word "private" as governing only the first item, namely roads, and to read the remaining items as unqualified by the word private. There are other indications in the Act which suggest that Section 10 was intended to cover both public and private bridleways and footpaths and there are many linguistic imperfections in the Act.

*Attorney-General v **Antrobus***

[1905] 2 Ch 188

Summary: concerns a cul-de-sac path leading to Stonehenge, closed off by the landowner. Judgment: "…the want of a *terminus ad quem* is not essential for the existence of a public road", and "a landowner may by express words, or by conduct…be shown to have dedicated even a cul-de-sac to the public". On Tithe maps has been effectively superseded by *Maltbridge* and *Agombar*. Confirms that there is no such thing as a right to wander freely.

***Applegarth** v SSETR*

(QBD)[2001] EWHC Admin 487, [2002] 1P & CR 9, [2002] JPL 245, [2001] 27 EG 134 (CS)

Summary: concerns interpretation of s31(1) and s31(2) of HA 1980 – the proviso and 'bringing into question'. Mr Applegarth had extensive rights over the road in question, but did not own the freehold of the soil or surface. Judgment: no impediment to the (unknown) freeholder dedicating public rights.

Even though the owner was unknown, that did not mean that someone in Mr Applegarth's position was relieved of the need to show sufficient evidence of a lack of intention to dedicate on the part of the landowner. s31(2) places no limit at all on the circumstances in which the public's right may 'otherwise', ie, otherwise than by an owner's notice under s31(3) be brought into question. In particular it does not limit it to actions of the landowner.

Munby J stated: "Whether someone or something has "brought into question" the "right of the public to use the way" is, as it seems to me, a question of fact and degree in every case."

Also, public rights may be acquired over a private right of way.

*R (oao) **Ashbrook** v East Sussex County Council*

[2002] EWCA Civ 1701, [2003] 1 P & CR 191

Summary: concerns obstructions and duty of highway authority. This case is not relevant to Inspectors making decisions on diversion orders.

***Ashby & Dalby** v SSE & Kirklees Metropolitan District Council*

[1978] 40 P & CR 362, (CA) [1980] 1 WLR 673, [1980] 1 All ER 508

Summary: a builder obstructed a path and started development before seeking a TCPA diversion order. The issue was whether such an order could be made where much of the development had been completed, but some work remained to be done. Judgment: TCPA orders can still be made as long some of the authorised development remains to be completed, but if it had been completed the powers in TCPA (now s247 and s257) cannot be used. Development is regarded as complete if the work remaining is minimal (see paragraph 7.9, RoW Circular 1/08)

***Austerberry** v Oldham Corporation*

[1885] LR 29 Ch D 750

Summary: in the absence of statutory authority, the reservation by a private individual of a right to level a toll in respect of highway user was not recognised by the courts if it was alleged to have occurred after 1189.

Concerned maintenance of what had been a private road. In 1837 several landowners agreed to build a road for agricultural use to bypass an inconvenient road. The Trustees of the Company set up built and maintained it and established tollgates to charge tolls, including to the landowners for non-agricultural use. By 1880 the area had become part of the town of Oldham. Oldham Corporation acquired the site of the road from the trustees and stopped collecting tolls, allowing it to become highway, though not maintainable at public expense. They decided to charge frontagers with improvement costs. One objected, arguing the Corporation were successors in title of the trustees who has covenanted to maintain the road from the proceeds of tolls. The Corporation argued successfully the maintenance covenant was not binding on them as successors to the original covenantor (see RWLR 14.2 p85).

B **Back**

Barkas *v North Yorkshire CC*

[2012] EWCA Civ 1373

Towns and Village Greens

Summary: Where members of the public use land for recreation 'of right' or 'by right' then that land cannot be registered as a town or village green in the basis of use by the inhabitants of a locality or neighbourhood within a locality as such use is not 'as of right'.

R (on the application of ***Barkas****) v North Yorkshire County Council & another*

[2014] UKSC 31 Supreme Court

Key Words: Registration of a town or village green; "as of right", Beresford judgment

Summary: In this case the land claimed as a town or village green was held and maintained by the Council for public recreation pursuant to s12(1) of the Housing Act 1985. Lord Neuberger found that "so long as land is held under a provision such as S12(1) of the 1985 Act, it appears to me that members of the public have a statutory right to use the land for recreational purposes, and therefore they use the land "by right" and not as trespassers, so that no question of user "as of right" can arise."

Beresford was found to be wrongly decided by the House of Lords. In that case the city council and its predecessors had lawfully allocated the land for the purpose of public recreation for an indefinite period and therefore there was no basis upon which it could be said that the public use of the land was "as of right"; it was "by right". It was made clear by Lord Carnwath that this does not mean that land in public ownership can never be subject to the acquisition of village green rights. It depends on the facts and whether the land is held or laid out for public recreational use.

R v SSE ex parte ***Bagshaw & Norton***

(QBD)[1994] 68 P & CR 402, [1995] JPL 1019

Summary: Concerns Sch 14 appeals and reasonable allegation. s53(3)(c)(i) involves consideration of two tests, on the balance of probabilities – test A does a right of way subsist, or test B is it reasonably alleged to subsist. Test A requires clear evidence in favour of the applicant and no credible evidence to the contrary. If there is a conflict of credible evidence and no incontrovertible evidence that a way cannot be reasonably alleged to subsist then the SS should find that a right of way is reasonably alleged to subsist and make a direction accordingly. It is for the SS to decide whether "a reasonable person, having considered all the relevant evidence, could reasonably allege a right of way to subsist". Owen J said "Whether an allegation is reasonable or not will depend on a number of circumstances…However, if the evidence from witnesses as to user is conflicting, but, reasonably accepting one side and reasonably rejecting the other, the right would be shown to exist, then it would seem reasonable to allege such a right ". (Approved in the *Emery* judgment which provides further clarification on 'reasonably alleged to exist' at the Sch 14 stage).

Also, by inference, appears to accept that an order based on presumed dedication may be made under either s53(3)(b) or s53(3)(c)(i).

Further, there was no rule of law that you cannot have a right of way to a cul-de-sac in the countryside.

Bakewell *Management Ltd v Brandwood & others*

[2003] EWCA Civ 23, [2003] 1 WLR 1429, (HL)[2004] UKHL 14, [2004] 2 AC 519, [2004] All ER 305, [2004] 2 WLR 955,[2005] 1 P & CR 1

Summary: (see ROW Advice Note 12) illegal user cannot be user as of right. Concerned a challenge to the charging of exorbitant sums by owners of common land for vehicular access over that land to private houses. It is an offence to drive without lawful authority on common land (see particularly s34(1) RTA 1988). Judgment: this offence was not a bar to the acquisition of a vehicular right of way by long use. If it was open to a landowner to dedicate a highway to the public, then that dedication could constitute 'lawful authority' for the purposes of s34(1). *Robinson v Adair* (1995) overruled and *Hanning v Top Deck Travel Group Limited* (1993) 68 P & CR 14 overturned. May not be lawful authority if it leads to a public nuisance.

Note: s66 of the NERCA 2006 reverses the effect of the *Bakewell* decision: After the commencement date, no public right of way for mechanically propelled vehicles is created unless by an enactment or instrument or otherwise on terms that expressly provide for it to be a way for such vehicles; or by construction in exercise of powers conferred by any enactment, of a road intended to be used by such vehicles.

Barlow v Wigan Metropolitan Borough Council [2020] EWCA Civ 696

The claimant contended that the defendant Council was liable for injuries sustained in tripping over an exposed tree root on a path in Abram Park, Wigan. The path had been laid out as part of a public park by Abram UDC in the mid-1930s and had been in use by the public since that time.

The question was whether the path was a "*highway constructed by the highway authority"* within the meaning of s36 (2) (a) of the 1980 Act or whether thew path was a highway which before commencement of the 1980 Act had been a "*highway maintainable at public expense*" within the meaning of s36 (1) of the 1980 Act.

Consideration was given to the provisions of s38 of the Highways Act 1959 (the 1959 Act) which described two kinds of highway maintainable at public expense: (i) those repairable by the inhabitants at large (repairable by virtue of s47 of the National Parks and Access to the Countryside Act 1949 (the 1949 Act)) where dedication or deemed dedication would have occurred before 16 December 1949 and (ii) those which in 1959 were 'maintainable by the highway authority'.

The Court held that the terms of s36 (2) (a) of the 1980 Act were not satisfied because Abram UDC had not constructed the path as the highway authority. However, the terms of s36 (1) of the 1980 Act were satisfied as dedication of the path at common law through long use could be deemed to have occurred in the 1930s and that the path was of a type deemed to be "repairable by the inhabitants at large" prior to 16 December 1949 (the commencement of the 1949 Act) and thereafter until 1 January 1960 (the commencement of the 1959 Act) and was deemed to be 'maintainable at public expense' since that date.

R v City of Sunderland ex parte ***Beresford***

[2003] UKHL 60, [2004] 1 AC 889, [2004] 1 All ER 160

Summary: Although the case concerned an application to register land as a village green, it has application in the rights of way context. Held: to establish that use was *precario* there needed to be a positive act of granting permission that went beyond tolerance or acquiescence. Encouragement to use did not establish that use was *precario*. Permission had to be temporary and revocable. Lord Bingham, "a licence to use land could not be implied from mere inaction of a landowner with knowledge of the use to which his land was being put". Lord Rogers, "I see no reason in principle why, in an appropriate case, the implied grant of a revocable licence or permission could not be established by inference from the relevant circumstances."

R v Lake District Special Planning Board ex parte ***Bernstein***

(QBD)[1983] The Times 3 February

Summary: a diversion made under s119 HA 1980 must provide a new path for at least some of its length. A path created on an already existing one would effectively mean an extinguishment. Hodgson J said "It seems to me clear that what section

119 is concerned with is moving the line of an existing path and, therefore, providing a new path in which event the old one can be stopped."

Secretary of State for the Environment v The ***Beresford Trustees***

1996 Unreported Court of Appeal (FC3 96/5806/D)

Key Words: Irrationality; disputed questions of fact; adequacy of reasons

Summary: The case concerned an inspector's decision relating to s31 Highways Act 1980. At first instance the judge quashed the decision on the basis that the inspector's finding that there was insufficient evidence to show that there was no intention to dedicate during the relevant period was not rational, "*since no rational body, considering all the relevant evidence, could have come to this conclusion*".

The evidence related to a notice which had been put up and the fact that children had been turned away as trespassers by a gardener. These matters were dealt with in detail in the Inspector's decision and reasons given why they did not demonstrate a lack of intention to dedicate.

The Court of Appeal set aside the judgment and allowed the appeal. It made clear that the on the question of absence of intention to dedicate, the burden of proof was on the objectors and that they had to show that, notwithstanding the disputed evidence, the only rational conclusion was that their case was proved. In this case it was not and indeed the evidence "*simply demonstrated to me how understandable was the decision of the Inspector*".

The judgment highlights that it is for the Inspector to make the findings of fact. "The points which have been raised by the landowners and which persuaded the Judge to accede to their motion do not in my judgment amount to more than an attempt to reopen the factual issues which it was the function of the Inspector to decide……He is not obliged to rehearse all the evidence that he heard but simply to give an adequate explanation of the grounds of his decision and show that it was rational and properly arrived at"

Berridge v Ward (1861) 30 LJCP 218 A case concerning conveyance of land. The court set out the presumption of ownership to the centre of the road (ad midium filum) in these terms: "where a piece of land which adjoins a highway is conveyed by general words, the presumption of law, is that the soil of the highway *usque ad medium filum* passes by the conveyance, even though reference is made to a plan annexed, the measurement and colouring of which would exclude it". See also *Commission for New Towns v J J Gallagher Ltd*.

Berry *v SSEFRA and Devon County Council*

(QBD)[2006] EWHC 2498 (Admin)

Summary: concerns *de-minimus* - whether events in the last year of the 20 year period satisfied the proviso in s31 HA 1980. The landowner submitted a landowner

evidence form to the OMA in December 1998 stating his lack of intention to dedicate the way. He made a statutory declaration under s31(6) that he had no intention to dedicate, in January 1999. Later that year he erected a sign denying the existence of any public right of way.

The date of bringing into question was taken as the date of the sign. The Inspector determined the s31(6) declaration and the erection of the sign were indistinguishable, and that as the landowner evidence form had been submitted within the last month or so of the 20 year period, that it was *de-minimus*. The judge concluded the weight of evidence showed the sign had been erected in July or August 1999. A period of 6 or 7 months between a clear intention not to dedicate and the later date of bringing into question could not be *de-minimus.*

***Betterment** Properties (Weymouth) Ltd v Dorset County Council*

[2012]EWCA Civ 250 Court of Appeal

Key Words: Registration of a town or village green; as of right; effect of signs and vandalism of signs; interruption of 20 year period by third party works; rectification of the register; delay.

Summary: Was user "as of right" when the reason witnesses had failed to see signs appeared to be because they were vandalised and removed on a regular basis shortly after they were erected. The Court of Appeal referred to the judge's finding at first instance that if left in place, the signs were sufficient in number and location and were clearly enough worded so as to bring to the actual knowledge of any reasonable user of the land that their use of it was contentious. The appeal judges concluded that there was a "world of difference" between the case where the landowner simply fails to put up enough signs or puts them in the wrong place and a case where perfectly reasonable attempts to advertise his opposition to the use of his land is met with acts of criminal damage and theft. It was not necessary to take legal action, put notices in local papers or distribute leaflets.

Where part of a site is fenced off by a third party (in this case to carry out drainage works) it is sufficient to disrupt the 20 years user of land where the fencing results in a physical ouster of local inhabitants from the land. However, the disruption must be inconsistent with the continued use of the land as a village green. If the 2 competing uses can accommodate each other, then time does not cease to run.

Delay is not a barrier to rectification of the register under s14 unless it is shown that other public and private decisions have been taken on the basis of the existing register which has operated to the significant prejudice of the respondents or other relevant interests. Sullivan LJ added that a delay of a decade would be capable of being a delay that was so long that prejudice could be inferred. See ***Paddico*** for further discussion of delay.

*Attorney General v **Beynon***

(CA) [1970] Ch 1, [1969] 2 All ER 273

Summary: concerns the width of a way. The Judge said "It is clear that the mere fact that a road runs between fences, which of course includes hedges, does not *per se* give rise to any presumption. It is necessary to decide the preliminary question whether those fences were put up by reference to the highway or for some other reason. When that has been decided then a rebuttable presumption of law arises, supplying any lack of evidence of dedication in fact, or inferred from user, that the public right of passage, and therefore the highway, extends to the whole space between the fences and is not confined to such part as may have been made up. One has to decide the preliminary question in the sense that the fences do mark the limit of the highway unless there is something in the condition of the road or circumstances to the contrary."

R v SSE ex parte ***Billson***

(QBD)[1998] 2 All ER 587, [1998] EWHC 189 (Admin), [1998] 3 WLR 1240, [1999] QB 374

Summary: concerns duration of no intention to dedicate; a revocable deed; rights over common land and the effect of s193 of the Law of Property Act 1925 which created public rights of air and exercise. In this case, users of the tracks in question were permitted to use them by way of a revocable deed, conferring rights of access, executed by the landowner but which had not been publicised. Use by the public was held to be by licence not as of right, even though they believed it was as of right. A lack of intention to dedicate need not be shown for the whole 20 year period under s31 HA 1980 – the words 'during that period' do not mean throughout that period.

Blackbushe Airport *Limited v Hampshire County Council and Secretary of State for Environment, Food and Rural Affairs*

[2021] EWCA Civ 398

Background

Yateley Common was registered as common land under the Commons Registration Act 1965. Blackbushe Airport is a general civil airport operated by Blackbushe Airport Ltd ("BAL"). Almost all of the operational area of the airport lies within the area of the common. BAL applied to the Council under paragraph 6 of schedule 2 to the Commons Act 2006 to de-register part of the airport as common land. The application land comprised approximately 115 acres of operational land, including the runway, taxiways, fuel storage depot, car parking, the terminal building (including control tower) and a café. The two-storey terminal building has a footprint of about 360m2 in one corner of the site.

Despite already being in operational use as part of an airport, the application land was provisionally registered as common land in 1965. The registration became final in 1975.

In order for the application land to be deregistered depended upon whether it was "within the curtilage of a building" to fulfil paragraph 6(2).

BAL contended that the entire operational area of the airport formed part of the curtilage of the terminal building. The Inspector allowed the application. That decision was quashed by the High Court upon challenge by the Council. BAL appealed to the Court of Appeal.

Ground of Challenge

The issue turned on what is meant by the phrase "within the curtilage of a building."

Judgment

The High Court was right to hold that for the airport's operational land to fall within the "curtilage of a building", for the purposes of the Commons Act 2006, the land must form part and parcel of the building to which it is related.

The focus of the language of the statute is on the building which is deemed to have been wrongly registered as common land, and not the land.

The test is not whether the land and building together formed part of the same unit. The correct test is whether the land should be treated as if it were "part and parcel of the building". The difference is critical. It led to the Inspector addressing the wrong question, namely, whether the land and building together fell within the curtilage of the airport rather than whether the land fell within the curtilage of the building.

Although land does not have to be ancillary to the building in order to fall within its curtilage, the answer to the question whether it is ancillary to the building was highly relevant. The correct question was whether the application land is ancillary to the terminal building, which it is not. It is ancillary to the functioning of the airport.

The ambit (or physical extent) of the curtilage of a building in any given case will be a question of fact and degree. In this instance, the extensive area of operational airfield could not properly be described as falling within the curtilage of the relatively small terminal building.

Implications

The judgment provides clarification of the meaning of the phrase "*the curtilage of a building*" in the Commons Act 2006.

Whether the test is satisfied in any given case will depend on the facts and circumstances of that case.

R v SSE ex parte ***Blake***

[1984] JPL 101

Summary: concerns interruption to use by a locked gate. Judgment: “It would be impossible ever for a landowner to prevent the acquisition of a right of way over land…by the erection of a gate across any part, because given the nature of the terrain it would always be possible for persons wishing to use the path to find a way round and then …claim that they were using the way; whereas what had happened in fact was that they were acknowledging the existence of the obstruction…by their very actions to avoid it”. Also, an intention not to dedicate must be demonstrated by an overt action likely to come to the attention of users. A notice does not have to be in place for the whole period; it is evidence for the time displayed.

Bowen & Ors v Isle of Wight Council [2021] EWHC 3254 (Ch)

The defendant Council refused planning permission for development of a site accessed from a private way known as Guilford Road. The development was considered unacceptable on road safety grounds unless a TRO was made. The Council contended that a TRO could not be made as the road at issue was not a “road” for the purposes of section 142 of the Road Traffic Regulation act 1984.

The Court found that a road will be a "*road to which the public has access*", and thus within the definition of "road" in section 142 of the 1984 Act, provided that the general public do, as a matter of fact, exercise access to it and provided that those members of the public "*have not obtained access either by overcoming a physical obstruction or in defiance of prohibition express or implied*".

The question as to whether a way is a road for the purposes of section 142 of the 1984 Act is therefore essentially a factual one. If the conditions are satisfied it is irrelevant to enquire further whether the presence of the public on the road was merely by the tolerance of the owners or whether the tolerance is to be taken to have given implicit permission. The Court was not persuaded by the *obiter dicta* of the Judge regarding tolerated trespass in *R (Pereira) v Enforcement and Traffic Adjudicators* [2020] EWHC 811 (Admin)

The simplicity of the resulting test is welcome, for at least two reasons: first, it avoids the need for courts, when considering such matters as motoring offences, to become embroiled in, or confused by, subtle distinctions regarding when an owner's inaction does and does not imply permission; second, it avoids importing into the statutory definition a distinction that is wholly irrelevant to the statutory purpose of providing for the safety of those who may reasonably be expected to be on roads and affected by what happens on them.

Where members of the general public park their cars along such a privately owned and maintained way, or who walk up and down it, they are, strictly speaking, trespassers on it, because they have no permission to be there and are merely tolerated by those entitled to possession. But where they do not gain access by overcoming any physical obstruction, or have never been prohibited from entering,

their access is sufficient for the purposes of the statutory definition of a road under s142.

***Box** Parish Council v Lacey*

[1979] 1 All ER 113

Box Hill Common was formerly land of the manor of Box. A local authority provisionally registered the land under the Commons Registration Act 1965, to which the owner objected. The Commons Commissioner found that the land was severed in 1878, was "open, uncultivated and unoccupied" and refused to confirm the registration.

On the owner's appeal it was held allowing the appeal, that on a true construction of ss.1(1)(a) and 22(1) "waste land of a manor" could not be include land which had ceased to be connected with the manor before the date of registration.

NB This case has received mixed judicial comment and was not followed in *Hants CC v Milburn*, below.

***British Transport Commission** v Westmorland County Council*

(HL)[1957] 2 All ER 353, [1958] AC 126

Summary: dedication must be compatible with the purpose of land held. A public right of way can be dedicated over a railway line provided that public use of the footpath was not incompatible with the statutory purposes of the railway authority. Judgment of Parke J in *R v Inhabitants of Leake* (1833):

"If the land were vested by the Act of Parliament in Commissioners, so that they were thereby bound to use it for a special purpose, incompatible with its public use as a highway, I should have thought that such trustees would have been incapable in point of law to make a dedication of it; but if such use by the public be not incompatible with the objects prescribed by the Act, then I think it clear that the commissioners have that power."

Incompatibility is a matter of fact. "Whether at the date when the question is considered by the tribunal of fact, there is any likelihood that the existence of the alleged right of way would interfere with the adequate and efficient discharge of the undertaker's statutory duties."

*Attorney General ex rel. Yorkshire Derwent Trust Ltd v **Brotherton***

HL [1991] 3 WLR 1126

Summary: concerns public right of navigation, whether waterway equivalent to public right of way that could be acquired by long user; Rights of Way Act 1932.

Held, the expression ‘a way…upon or over any land’ in s1(1) of the RWA 1932 (see now s31(1) HA 1980) referred to the physical site upon which the feature described as ‘the way’ ran and where the way had been enjoyed by the public in a certain manner and for a period of time it was deemed to be dedicated, as land itself which was capable of ownership, to the public use as a highway; that the extension of the meaning of ‘land’ made by s1(8) was intended to cover situations where the relevant land was permanently or temporarily covered by water, such as a ford or causeway and nothing turned on the words ‘upon or over’; and that, accordingly, on its proper construction s1 did not apply to navigable rivers.

***Buckland and Capel** v SSETR*

(QBD)[2000] EWHC Admin 279, [2000] 1 WLR 1949, [2000] 3 All ER 205

Summary: The definitive map showed as a bridleway a route that had previously appeared on maps only as a footpath. The inspector confirmed that decision and B appealed.
Held, allowing the appeal, that for a route to fall within the definition of a byway open to all traffic, it was important to consider current use. The Wildlife and Countryside Act 1981 s.66(1) referred to a byway as a route over which there is a right of vehicular traffic but which was mainly used by the public as footpath and bridleway. For a route to fall within that definition, the combined current use by pedestrians and equestrians had to exceed vehicular use.
Note: no longer relevant to the definition of BOAT.

Burford v Secretary of State for Communities and Local Government & Test **Valley BC**

[2017] EWHC 1493

Summary: The court had to consider the definition of “curtilage” in the context of Part 1, Class E of the Second Schedule to the Town and Country Planning (General Permitted Development) (England) Order (GPDO). This arose from a decision on an enforcement notice appeal, which was challenged.

Held: A building subject to an enforcement notice did not fall within the curtilage of a dwelling house, so as to amount to permitted development within the GPDO, where it was in an area unattached to the land surrounding the house and not forming one enclosure with it.

Three factors had to be taken into account in determining whether a structure or object was within the curtilage of another building: (a) the physical layout of the building and the other structure; (b) their ownership, past and present; (c) their use or function, past and present.

Land could not be described as a curtilage unless forming part and parcel of the house or building which it contained or to which it was attached. It was the relationship between the main dwelling and the land in question which was relevant

in considering function and/or use. It was a question of fact and degree: "curtilage" connoted a building or piece of land attached to a dwelling house and forming one enclosure with it: it was not restricted in size, but had to be fairly described as part of the enclosure of the house to which it referred.

***Burrows** v SSEFRA*

(QBD) [2004] EWHC 132 (Admin)

Summary: (see ROW Note 4/04) concerns the interpretation of a 'Private Road – access only' notice near an official 'Public Footpath' notice, and the meaning of erect and maintain; whether an Order decision should cover points relevant to an OMA's jurisdiction to make an order, that are not raised at the inquiry. A Nicol QC concluded the "adequacy or otherwise of the notice in its context as an expression of the landowner's intention was a question of fact for the Inspector". The intention of the person erecting the notice may be inferred from how it was likely to be interpreted by those who saw it. In this case, the sign was held to be insufficient to demonstrate a lack of intention to dedicate the way for walkers and horse riders. A notice is only effective for the purposes of s31(3) of the HA 1980 if erected by the owner of the land over which the way runs, or a person acting on their behalf. It does not have to be maintained throughout the whole 20 year period, only for some substantial time during that period.

Also, modification/correction of the DM requires the discovery of evidence – an inquiry cannot simply re-examine the same evidence considered when the DM was first drawn up. There must be some new evidence, which when considered together with all the other evidence available, justifies the modification/correction.

C **Back**

***Calder** v SSE*

(CA)[1996] EGCS 78

Summary: s247 of TCPA 1990 empowered the SS to make a diversion order if he thought it was necessary to enable the development to be carried out in accordance with the grant of planning permission. It was not for the SS acting under s247 to postulate other developments if he was satisfied that diversion was necessary to allow the permitted development to be carried out.

*R(oao) **Cheltenham** Builders Ltd v South Gloucestershire District Council*

(QBD) [2003] EWHC 2803 (Admin)

Summary: concerns the registering of land as a village green, as of right. Held, having regard to *Sunningwell*, the question must be not whether those using the land knew that their use was being objected to or had become contentious, but how

the matter would have appeared to the landowner, since in cases of prescription the presumption arises from the latter's acquiescence.

R v SSE ex parte ***Cheshire County Council***

(QBD)[1991] JPL 537, [1990] COD 426, 179, 180

Summary: concerns the tests in s118(1) and s118(2) of the HA 1980. Auld J considered an Inspector is not required to delve too deeply into the issue of 'need' for a path when dealing with an extinguishment order under s118. The issue at the confirmation stage is the question of expediency, having regard to the extent the path would be likely to be used by the public and the consequential effect on the land if it is extinguished.

Challenge Fencing v Secretary of State for Housing, Communities and Local Government

[2019] EWHC 553 (Admin)

Summary: A lawful development certificate was refused on appeal by an Inspector on the basis that the area of land for which the certificate was sought - hardstanding and concrete access strips, did not fall within the curtilage of a building intended to be used for a fencing business.

Held: the Court upheld the decision and summarised the applicable principles when determining the extent of the curtilage of a building.

(a) the extent of the curtilage was a question of fact and degree;

(b) the physical layout and the past and present ownership and use of the land or buildings had to be taken into account;

(c) the relative sizes of the building and its claimed curtilage were relevant;

(d) whether, in terms of ownership and use, the building or land within the claimed curtilage was ancillary to the main building was relevant, Skerritts followed;

(e) the degree to which the building and the claimed curtilage fell within one enclosure was relevant; and

(f) the relevant date on which to determine the extent of the curtilage was the date of the application, having regard to the past history of the site and its use at the time of the application.

Church Commissioners for England v Hampshire County Council *[2014] 1 WLR 4555 (CA)*

C erected a fence on land in July 2003 and G applied in June 2008 to register the land as a village green under CA2006 but failed to comply with the regulations. C objected that the corrected version was filed out of time, but the High Court held that an application for a village green could, as a matter of law, be corrected, and if done within a reasonable period the corrected application would take effect from the filing

date. Since C knew of the application and had assisted G by providing the map, C could not complain that the long period before the application was corrected was unreasonable.

C appealed to the Court of Appeal, that any corrected application should take effect from its filing date; and the judge had been wrong to find G had complied with all the requirements for applications within a reasonable opportunity. His appeal was dismissed, it being:

Held: (1) Regulation 5(4) suspended a registration authority's right to reject a non-compliant application until a reasonable opportunity had been given to put an application in order. If, within that reasonable opportunity, the errors were corrected, the original application had full force and effect; the Regulation had, therefore, to be retrospective.

(2) (by a majority) The question whether an applicant had had a reasonable opportunity to correct errors was a question of law for the court to be conducted on the concrete facts of the case. The vital point was that C was not aware that G had been given adequate extensions which had not been complied with for no good reason so a reasonable opportunity had been exceeded in the instant case.

R(oao) ***Connaughton*** *v West Dorset District Council*

(QBD)[2002] EWHC 794 (Admin), [2002] All ER (D) 392

Summary: concerns termination points of footpaths; whether this is where a footpath crosses another highway; whether a diverted route can follow the line of an existing path. Under s119(2) of the HA 1980 the termination points of a public footpath are matters of fact to be determined in the circumstances of each case. The purpose of s119(2) being to enable a walker to reach their destination when walking between two points. Thus a termination point need not be where a footpath crosses another highway, although the numbering of paths on the DM whilst not conclusive of termination points is a relevant factor. Other factors include the general geography of the path and the destination that a path user might be expected to wish to reach.

s119(7)(b) expressly contemplates a situation where at least part of a diverted route can run along the line of an existing path (see ***Bernstein***).

R v ***Cornwall County Council*** *ex parte MJ & RF Huntington*

(QBD)[1992] 3 All ER 566, (CA)[1994] 1 All ER 694, [1994] JPL 816

Summary: a person "has no right to question the validity of an order in the courts between the time it is made and the time, if any, when it takes effect". On the proper construction of paragraph 12(3) to Sch15 of WCA 1981, challenges before as well as after the 42 day appeal period were precluded. But also "insofar as the applicants also desire to raise matters of legal complaint regarding the process whereby the [OMA's] came to make their decisions to make modification orders in

the first place… the applicants will be able to do so under the express provisions of paragraph 12(1)."

R (on the application of Cotham School) v Bristol City Council [2018] EWHC 1022

Summary to follow

R v SSE ex parte ***Cowell***

[1992] JPL 370, (CA)[1993] JPL 851

Summary: concerns tolls. This is a difficult case concerning s31 HA 1980 and the proviso – George Laurence (RWLR 8.2 p47) appears to have had difficulty understanding what was decided. For example, despite s31, Rose LJ held that there must be an intention to dedicate on the part of the landowner of which user by the public is evidence. The issue of the landowner's intention does not arise if the case fails on the preceding conditions. Nothing in s31(1) suggests that 'sufficient evidence', if intention not to dedicate, is limited either to or by matters identified in subsections (3)-(6).

Craggs *v Secretary of State for the Environment*

[2020] EWHC 3346 (Admin)

Summary: Dismissal of an appeal against a decision not to make a DMMO, raised the question whether the Shipham and Winscombe Inclosure Award of 1799 ("the Award") created a "public bridle road" (bridleway) over the route in question. At issue was whether the purported creation was "intra vires", ie within the powers of Shipham and Winscombe Inclosure Act 1797 ("the Enabling Act") and if so, whether that part of the Award could be "severed" from other parts which in a previous case were declared unlawful.

The Enabling Act required "public carriage roads" to be at least 40 feet wide, but set no width for private roads, or bridle roads. However in a section of the Award headed "Private Roads or Ways", provision was made for other roads for the benefit of: *all and every other person and persons whomsoever having any occasion whatsoever to go travel pass and repass through upon and over the same roads and ways and every or any or either of them on foot or on horseback with horses cattle carts and other carriages loaded or unloaded at their and every of their free wills and pleasure. These provisions were considered in Buckland Buckland v Secretary of State for the Environment Transport and the Regions [2000] 1 WLR 1949*, to be ultra vires as they purported to create a private way but then make it open to the public at large.

Held the clear intent of the Award was to give the public unfettered rights to use the roads described as "private" but there was a tension with creating such rights under the heading "private roads and ways". To see if a legal instrument (such as the Award) can be severed to preserve the lawful part, the court will decide what are the ultra vires elements, and whether the part sought to be retained is within the powers

of the enabling Act. It then applies the test of "textual severability" (can the offending words be disregarded and the text remain grammatical and coherent?); and if so it also applies a test of "substantial severability" (is what remains essentially unchanged in its legislative purpose?). Even if textual severance is not possible, part only of the impugned provision can still be upheld, if the court is satisfied there is no change in its "substantial purpose and effect". Applying this analysis the court noted that:

"*The public carriage roads were subject to the 40 feet requirement and the maintenance provisions in respect of the surveyor. However, the public bridle roads power was not subject to any such provisos. It is therefore in my view clear that the Commissioners had the power to create public bridle roads, separate from public carriage roads, and without any requirement for a specified width or maintenance…It is also clear that the Commissioner intended that the various routes under the heading of "private roads and ways" should be open to the public*."

The Commissioners probably wished to avoid the width and maintenance requirements for public carriage roads, in order to minimise disruption and reduce the Parish liability for the public carriage roads. In Buckland this led to any purported creation of public carriage roads being ultra vires, however in the present case "a purposive approach would seek to retain the vires for the creation of the public bridle roads." Therefore the creation of a public bridle road along the Route was intra vires.

Textual severance was not possible: if wording related to "carts and carriages" were removed, private rights would be extinguished as well as public rights, altering the purpose of the provision. However, the substantial severability test could be met: "*The Commissioners having made in effect two inconsistent statements in the Award, in my view the correct approach must be to look at the clear words in the user clause, and the broader purpose of the Award, which is highly likely to have been to create routes open to the public. The substantial purpose and effect, namely not to create public carriage roads of 40 foot with maintenance falling on the Parish but to allow the public to use the route on horseback, is maintained*."

Therefore, the Award lawfully created a "public bridle road" (bridleway) over the route in question."

***Cubitt** v Maxse*

[1873] LR 8 CP 704

Summary: concerns 'setting out' and public acceptance. If an Inclosure Act and Award provided for a new highway to come into existence following various statutory processes such as certification, then if, for example, there was no certification, no highway came into existence. It was possible, however, even if there was no certification, for a highway to come into existence following inclosure by the normal common law rules of dedication and acceptance, if there was acquiescence by the

owner and use by the public (but see discussion in RWLR 9.3 p163 and consider whether the presumption of regularity may apply if no evidence of certification).

D **Back**

*AMG **Darby** v First Secretary of State and Worcestershire County Council* (QBD) [2003] EWHC 299 (Admin)

Summary: The appellant thought a diversion order had been confirmed. He encouraged people to use the 'new' path. The order had not been confirmed. A DMMO was made to add the path to the DM. The appellant's actions in encouraging use of the path during the 20 year period did not show lack of intention to dedicate.

***Davies** v Stephens*

[1836]

Summary: this case was about a footpath in the Parish of St Ishmaels, leading from a road to the sea at Monk Haven on Milford Haven. For 30 or 40 years, while the land was occupied by tenants, the path was used by fishermen, bathers, and people getting seaweed, wreck etc from the beach. A gate was sometimes locked across the way, which had never been repaired by the Parish.

Held: "all the acts of user seem to have taken place during the occupation of tenants, and their submitting to them cannot bind the owner of the land without proof of his also being aware of it; but still, if you think that such acts of user went on for a great length of time, you may presume that the owner had been made aware of them. A gate being kept across it is also a circumstance tending to show that it is no public road, but not a conclusive one; for a road may originally have been granted to the public, reserving the right of keeping a gate across it to prevent cattle straying." (see also *Rowley* and *Lewis v Thomas*)

***Davis** v Whitby*

[1974] 1 Ch 186, [1974] 1 All ER 806

Summary: use of a way by different individuals, each for periods of less than 20 years, is sufficient if, taken together use covers a continuous period of 20 years or more. (This case dealt with a private right of way)

***Dawes** v Hawkins*

[1860] 8 CB (NS) 848, 141 ER 1399

Summary: dedication of a way to the public cannot be for a limited time, but in perpetuity. An ancient highway over a common was diverted by an adjoining landowner and a new road provided which the public used for over 20 years, after which the original road was re-opened to the public.

However, public rights over the original road were retained. "It is an established maxim – once a highway, always a highway; for the public cannot release their rights, and there is no extinctive prescription." It was also held that public user on land adjoining a right of way, if it is referable to the way having been illegally obstructed or allowed to become foundrous, affords no reasonable evidence of a dedication over that adjoining land.

R v SSE ex parte Smith (on behalf of the Seasalter Chalet Owners' Association) and C ***Deller***

[1993] unreported

Summary: a decision had been made not to award costs to the appellants following a DMMO inquiry. The Inspector's decision to confirm the order had been quashed by a Consent Order. Held: the Council's decision to make the DMMO was 'badly flawed'. The Inspector, in stating that the Council had acted reasonably, was Wednesbury unreasonable.

Note: Basic flaws in the process of making a decision to make a DMMO may thus lead to an award of costs to the successful party at the subsequent inquiry on the grounds of 'unreasonable behaviour'.

De Rothschild v Buckinghamshire CC (1957) 55 LGR 595

The 20-year period of use envisaged by s31 of the 1980 Act must be a period which ends with the public right being brought into question. It is insufficient to show that at some time in the past there had been 20 years use if the way then fell into disuse with that use not being questioned prior to disuse. In De Rothschild, use had been enjoyed without interruption from 1914 to 1940 with use being called into question in 1948. The way had not been used between 1940 and 1947 due to wartime requisitioning, but this even did not bring use into question.

Doherty *v SSEFRA and Bedfordshire County Council*

(QBD) [2005] EWHC 3271

Summary: concerns a diversion order, confirms that s119(1) HA 1980 refers to the interests of the owners, lessees or occupiers across whose land the path or way currently passes and across whose land the diverted path will run. Where the path or way crosses land where no diversion is proposed, those landowners etc will have an interest as members of the public under s119(1) and where relevant under the tests in s 119(6)(a) to (c). Judgment confirms a diversion order can be made other than on the application of the owner, lessee or occupier.

Where the path's alignment is challenged, this must be dealt with under the provisions of s53 of the WCA 1981. Confirms that s56 of that Act provides conclusive evidence of the existence/alignment of a way and this must be the starting point for consideration of a PP diversion order.

R v SSETR ex parte ***Dorset County Council***

(QBD)[1999] EWHC 582 (Admin), [1999] NPC.72, [2000] JPL 396

Summary: Concerns the 'proviso' in s31 of HA 1980. Held: all it requires is sufficient evidence of a lack of intention to dedicate: overt and contemporaneous evidence was usually required, but there was no rule that it had to be directed at users of the way. On the issue of 'bringing into question', Denning LJ's judgment in *Fairey* was approved. "Whatever means are employed, they must be sufficient at least to make it likely that some of the users are made aware that the owner has challenged their right to use the way as a highway." NB: in this case it was the owner who challenged users. That might not always be the case.

See also *Godmanchester and Drain* concerning lack of intention to dedicate.

Dunlop *v SSE and Cambridgeshire County Council*

(QBD) [1995] CO/1560/94, [1995] 70 P & CR 307, [1995] 94 LGR 427, [1995] COD 413

Summary: (see ROW Advice Note 11) concerns definition of 'private carriage road'. A road was set out as a 'Private Carriage Road' in an inclosure award made under an act which incorporated the provisions of the 1801 General Inclosure Act. Held: there was nothing in the 1801 Act which suggested that inclosure acts or highway law generally differentiated between carriage roads according to whether private or public vehicles were permitted to go along them. The meaning of 'private carriage road' had therefore to be determined in the context of the 1820 Award.

Note: the judgment contains a useful and fascinating disquisition on the historical development of public and private ways and the distinction, which lasted until the 19th century, of 'common ways'.

Also, use of the terms 'CRF' and 'CRB' have no legal significance.

Dyfed *County Council v SSW*

[1989] 58 P & CR 68, (CA)[1990] 59 P & CR 275, [1990] COD 149

Summary: concerns use for recreational activities. There is no rule that use of a highway for mere recreational purposes is incapable of creating a public right of way. In this case, however, concerning recreational use of a path round a lake, the area of which was set out in an enclosure award 'for the use of all persons interested in this enclosure', it was found that the presence of the public could be accounted for by this wording – which implied that the right to use the lake must have implied a right to walk along its perimeter – and no public right of way arose.

"If …the route was only used as an incident of the fishing, swimming, sunbathing, picnicking etc, then …the use for sunbathing and matters of that kind is not capable of giving rise to a presumption of dedication as a highway", but "…use by the public

for pure walking …was capable of founding a case of deemed dedication of the footpath whether or not such walking was itself purely recreational."(see article in RWLR 6.3 p1 where the author considers this wrongly decided.)

Also, concerning the Inspector's decision, the reasons given must be sufficient to enable a court to determine whether or not the decision is right in law.

Attorney General & Newton Abbot RDC v ***Dyer***

[1945] 1 Ch 67

Summary: on cul-de-sacs, it is "clearly settled not to be a requisite of a public right of way that it must lead from one public highway to another. Thus there may be a public right of way to a view point or beauty spot,…even to the sea's margin and thence returning."

In this case the foreshore was privately owned, "…evidence of the user…on their way to a walk over, or picnic upon the foreshore, cannot be regarded as evidence of user as of right, since in regard to their activities on the shore, such persons can at best have been licensees of the owner or exercising some customary privilege confined to the inhabitants…"

But "…where…there is a body of evidence of user of the way strictly as a public way, it is legitimate to add and to rely upon evidence of user in connection with the privilege mentioned…on the ground that the privileged class of licensees or local inhabitants are also members of the public and pass along the way in their latter character."

E **Back**

R v ***East Mark***

[1848] 11 QB 877

Summary: dedication might be presumed against the Crown from long acquiescence in public user. The jury were rightly directed to consider whether the owner, whoever they might be, had consented to the public use in such a manner as to satisfy the jury that a dedication to the public was intended.

R v ***Edmonton***

[1831] 1 Mood & Rob 24

Summary: there is a rebuttable presumption that the soil over which a highways runs is owned by the owners of the adjoining land, to the middle of the highway (*ad medium filum*).(see also *Beynon*)

Edwards v Jenkins

[1896] 1 Ch 308

Summary: Application was made to register a customary right over land by the inhabitants of several adjoining or contiguous parishes, to exercise the right of recreation over land situate in one of the parishes.

Held: The 'locality rule' applied. The inhabitants of the contiguous Surrey parishes of Beddington, Carshalton and Mitcham could not have a customary right of recreation over land in Beddington: the rule is 'One parish, one custom.'

This case was mentioned in the House of Lords decision of Oxfordshire CC v Oxford City Council as the "strictest application of the locality rule".

In para 11 of *Oxfordshire* the court noted that "In *New Windsor Corpn v Mellor [1975] Ch 380, 387* Lord Denning MR thought that Kekewich J had gone too far. "So long as the locality is certain, that is enough". But there is no doubt that the locality rule was the pinch-point through which many claims to customary rights of recreation failed to pass."

*The Queen on the application of **Elveden Farms Limited** v SSEFRA*

[2013] EWHC 644 (Admin)

Key Words: adequacy of reasons; interim decisions

Summary: The reasoning in decisions must be read with appropriate generosity and against the background of the knowledge known to the parties to the decision making process. The case concerned the width of part of the Icknield Way. The judge found that the Inspector's preliminary decision contained insufficient reasoning to enable the claimant to know why it had won or lost and that the second report wouldn't permit an informed reader to know with a sufficient degree of certainty why the inspector maintained his earlier conclusion.

The judge appeared confused as to the nature of interim decisions and the modification process and with regard to what action he should take eg. "I propose to quash the order or proposed order, whichever is the correct description of it".

*R v SSW ex parte **Emery***

(QBD) [1996] 4 All ER 1, (CA)[1998] 4 All ER 367, [1998] 96 LGR 83

Summary: approves Bagshaw and Norton. Provides further clarification of the reasonably alleged to subsist test at the Sch14 stage. This was a case about conflicting evidence of use. Held in relation to WCA 1981 s53: where there is a conflict of apparently credible evidence, a right of way is 'reasonably alleged to subsist' if, reasonably accepting the evidence of one side, and reasonably rejecting that of the other, the right would be shown to exist.

Also, an order made under s53(2) following a Sch14 procedure still allows the applicant and objectors the right to appeal under Sch15 when conflicting evidence can be heard at a public inquiry and the matter subsequently determined.

*Glynn **Evans** v Waverley Borough Council Court of Appeal (Civil Division)*

[1995] 7 WLUK 139 - 12 July 1995

At issue was the power of the council to confirm an emergency tree preservation order under TCPA s199(1) including such modifications as it considered expedient. "Modification" was considered in light of several cases including *Stevens* (see above). Those cases were not authority for the proposition that any provision in a statute giving powers of modification is to be construed narrowly and strictly. What they showed was (i) that a power to modify confers a right to enlarge as well as to restrict the ambit of that which is modified; and (ii) that a power to modify a statute should be narrowly and strictly construed.

However in this case, it was held that the power of the council to confirm an emergency order under TCPA included such modifications as it considered expedient and this power should not be construed narrowly.

***Eyre** v New Forest Highway Board*

[1892] 56 JP 517

Summary: concerns the meaning of 'highway' at common law; cul-de-sacs; dedication; and maintenance. The summing up to the jury by Wills J is often quoted as a masterpiece of its kind. It deals with the concept of dedication of highway rights, the relevance of evidence of lack of repairs by the parish, the changes introduced by the 1835 HA, the implications of unsuccessful attempts to prevent public use where there is some earlier evidence pointing to a dedication, the right to deviate over foundrous land, rural cul-de-sacs, and the need to look at the evidence relating to the whole of a route even when only a part is in dispute. The CA held that this summing up was a "complete exposition of the law on the subject.

Where a short section of uncertain status exists it can be presumed that its status is that of the two highways linked by it. "What would be the meaning in a country place like that, of a highway which ends in a cul-de-sac and ends at a gate…whoever found such a thing in a country district like this, where one of the public, if there were any public who wanted to use it at all, would drive up to that gate for the purpose of driving back again?". (see also *Moser v Ambleside* and *Roberts v Webster*)

F **Back**

***Fairey** v Southampton County Council*

(QBD)[1956] 1 All ER 419, (CA) [1956] 2 QB 439

Summary: concerns whether ROWA 1932 is retrospective; intention to dedicate; differentiation between common law/statute law dedication; burden of proof. A landowner objected to the inclusion of a footpath on the DM. He had objected to public use of the way in 1931, but there was evidence of public use for the 20 years prior to 1931 and the path was held to be public by virtue of the 1932 Act.

The fundamental judgment by Lord Denning on 'bringing into question' (HA 1980 s31). "In order for the rights of the public to have been "brought into question" the landowner must challenge it by some means sufficient to bring it home to the public that he is challenging their right to use the way, so that they might be apprised of the challenge and have a reasonable opportunity of meeting it." "…a landowner cannot escape the effect of twenty years' prescribing by saying that, locked in his own mind, he had no intention to dedicate; or by telling a stranger to the locality…In order for there to be 'sufficient evidence that there was no intention' to dedicate the way, there must be evidence of some overt acts on the part of the landowner such as to show the public at large – the public who used the path...that he had no intention to dedicate."

See also *Godmanchester and Drain*.

***Fernlee Estates** Ltd v City & County of Swansea and the National Assembly for Wales*

(QBD)[2001] CO/3844/2000, [2001] EWHC Admin 360, [2001] 82 P & CR DG19, [2001] 24 EG 161 (CS)

Summary: a DMMO was confirmed adding a bridleway to the DM over the claimant's land. Dedication was presumed under s31 HA 1980 on 20 years' uninterrupted use. The line of use altered somewhat when the claimant was carrying out building works. The evidence was that the line moved laterally by no more than 20 metres. Held: "I am un-persuaded that the Claimants have any case on the ground of inadequate precision. The route is sufficiently defined albeit it may have varied slightly from time to time."

***Fortune** and others v Wiltshire Council and Taylor Wimpey*

[2010] EWHC B33 (Ch) [2012] EWCA Civ334

Summary: (RWLR 7.1 p91-95) concerns the status of Rowden Lane –documentary evidence and what constitutes a List of Streets (here a computer database of highways) – effect of NERC Act. Evidence of reputation is considered. In relation to documentary evidence, a mass of documents provided a broad picture which emerged largely consistently over time.

McCahill J on the purpose of NERCA, "This analysis of the role and purpose of ss66 and 67 NERCA leads me to conclude that s67(2) NERCA should not be given a restrictive interpretation. On the contrary, Parliament having extinguished certain

public vehicular rights of way merely because they were not shown on a definitive map, on which many of them simply could not be recorded, a purposive interpretation should be given to the exceptions, especially when the burden of proof is cast upon the person seeking to establish that a particular unrecorded right of way has not been extinguished. Moreover, it seems to me appropriate that, if NERCA starts from the premise of abolishing such a wide category of vehicular highways …the exceptions to this extinguishment should not, in the absence of clear and compelling language to the contrary, be construed narrowly."

It was held that a list under s36(6) should include minor highways that were maintainable at public expense, but the omission of minor highways is not fatal. Held, that a s36(6) List must be in writing-but this encompasses many different forms- including for the purposes of the HA 1980 and s67 of NERCA 2006 records held on a computer database of ways maintained at public expense which can be made available to the public by printing off a copy or displaying it on a computer screen.

Considering Wiltshire Council's books of maps of maintainable highways, it was held that a list under s36(6) did not have to be in any particular format or to contain a statement as to what it was. Although Wiltshire's list also contained unadopted roads, this was irrelevant when it contained several thousand roads that were maintainable. Held, an authority can only have one list under s36(6) at any one time.

*Robert **Fowler** v SSE and Devon County Council*

(CA) [1991] 64 P & CR 16, [1992] JPL 742

Summary: concerns status of DM through discovery of evidence. An Inspector confirmed a DMMO upgrading a footpath to a bridleway. The appellant challenged the validity of the Order. Held: the definition of footpath as a highway over which the public had a right of way on foot only did not mean that no higher rights could exist – the recording of a way as a footpath did not extinguish higher rights that had existed at the date of the DM.

The following claims of the appellant were also rejected: that s31(10) of HA 1980, read in conjunction with s56(1) of WCA 1981 prevented reliance being placed on s31(1) of HA 1980 as a means of establishing any higher right; that the Order was invalid because the Inspector had no legal qualifications (the judge suggested surveying qualifications might be more suitable – George Laurence disagrees, see RWLR 81.1 p2)

G **Back**

*Commission for New Towns & Worcestershire County Council v JJ **Gallagher** Ltd*

[2002] EWHC 2668 (Ch), [2003] 2 P & CR 3

Summary: (see ROW Note 3/04, Beoley Lane) concerns weighing documentary evidence; definition of a private carriage road in an inclosure award (incorporating the 1801 Act provisions) in relation to evidence of a pre-existing public carriageway. The status of a lane claimed to be a public vehicular highway but which was shown in an inclosure award of 1824 as a "private carriage road" was in question.

Neuberger J accepted other evidence was sufficient to show that the route was a public carriageway prior to (and since) the date of the enclosure award, saying "the mere fact that there are a fair number of other pieces of evidence all of which tend to point the other way does not of itself mean that the enclosure documentation is outweighed…One piece of high quality or convincing, evidence will frequently outweigh a large number of pieces of low, or weak quality evidence…While the inclosure documentation does represent powerful evidence, it is not unequivocal…" and "in the light of the provisions of the Inclosure Act 1801, that, if (the) lane was a public carriageway at that time, the Inclosure Award cannot have deprived it of that status." He did not disagree with the interpretation of "private carriage road" adopted by Sedley J in the *Dunlop* case that it meant "a private road (as opposed to a public highway) for carriages."

Thus although the highway presumption is "Where a piece of land which adjoins a highway is conveyed by general words, the presumption is, that the soil of the highway, *usque ad medium filum* passes by the conveyance, even though reference is made to a plan annexed, the measurement and colouring of which would exclude it" (*Berridge v Ward* 1861), in this case, the lane, owned by two people, farmed as pastureland with tithe rent-charge apportioned to it was not inconsistent with it being a public carriageway.

Regarding the transfer of private rights, it was held that there must be evidence of private use before it was conveyed. Grant of a private right to use the lane was unnecessary since a public right already existed.

***Garland** and Salaman v SSEFRA and Surrey County Council*

[2020] EWHC 1814 (Admin) & CA [2021] EWCA Civ 1098

Summary: A modification order altered a footpath's status to a bridleway, known as "Muddy Lane", a track which in part passes under the M25, via an underpass built in the early 1980s. The order was challenged by two landholders following a joint application involving cycling groups. They claimed there were several legal impediments to dedication at common law of bridleway rights, including:

(1) Use of the underpass on horseback was severely limited eg by the low headroom and as such was a nuisance, so could not be the basis of dedication at common law. (2) Incompatibility with Highways England's statutory functions given the alleged unsafe underpass. (3) Violation of Article 2 (right to life), European Convention on Human Rights.

It was also alleged that (4) the objective approach in *Godmanchester* was not followed in assessing whether the owner had taken steps to disabuse users of the belief it had been dedicated as a bridleway, and (5) locked barriers showed the land owner's lack of intention to dedicate the way as a bridleway.

As to 1) *Sheringham UDC v Holsey (1904) LGR 744* was relied on, where a claim was rejected, based on carts being driven on a narrow lane, that the lane was dedicated a carriageway at common law: "*Upon the evidence I do not see my way to hold that there has been any such user as to convert the footway into a public highway for all purposes. The user for wheeled traffic was in its inception and has all along been a public nuisance and no length of time can legalise it*."

Held:

(1) The Inspector correctly identified the relevant issue, ie whether the use of the route by horse riders and cyclists would make it unsafe for passage by pedestrians. The facts were not comparable to *Sheringham* as the potential for conflict between horse riders and pedestrians in the underpass was not such as to render the route so unsafe for pedestrians as to give rise to a public nuisance.

Horse riders could with care dismount and lead their horses along the short section of the underpass, and the Council could maintain the route to accommodate the different types of lawful user.

The Inspector correctly distinguished the position whereby granting higher public rights over an existing footpath would be unlawful if it gave rise to a public nuisance to pedestrians using it, from alleging that recording the route as a bridleway would be unsafe for cyclists or horse riders, which is not relevant to the decision. That the shared use may intensify and require regulation, did not affect the finding that designation as a bridleway would not be a public nuisance.

(2) The question of statutory incompatibility is to be determined in light of the facts as they were and could reasonably be foreseen, as at the date of the public inquiry into the Order. The underpass did not comply with highway design standards, was unsafe for passage by horse riders, and there was a statutory duty to maintain highway safety (s5(2) Infrastructure Act 2015), however there was no evidence that its use by horse riders and cyclists materially impacted on the safe and efficient operation of the M25.

(3) If safety issues were to engage Article 2, ECHR, the common law enables such consideration to be given via the application of the principle in *Bakewell Management Limited v Brandwood*.

(4) The inspector had not simply accepted at face value individual users' subjective interpretations of the significance of those barriers. *Godmanchester* does not require the decision maker to ignore evidence from individual users as to what they understood barriers or signs erected along the route to signify. Such evidence will often provide the decision maker with a useful source of information on which to found an objective assessment of what the reasonable user would have taken the

land owner's intention to have been, taking that user evidence into consideration along with other factors.

(5) In *R v Secretary of State for the Environment ex parte Blake [1995] JPL 101* the Court upheld a decision that footpath users would have understood locked barriers as a clear demonstration of the owner's lack of intention to dedicate the way as a bridleway. However in the present case the Inspector had reasonably concluded that pedestrians would have understood the locked barriers to indicate a quite different intention, ie to prohibit and prevent the use of the Order route by motor vehicles.

In the appeal Court, the grounds for the Appeal were that the Inspector had applied the wrong test; had failed to take into account material factors; that too much weight had been given to one witness' evidence; that the reasoning given was inadequate and that the conclusion was perverse. All grounds of Appeal were rejected.

Gestmin *SGPS SA v Credit Suisse (UK) Ltd*

[2013] EWHC 3560 (Comm)

Key Words: Reliability of oral evidence based on recollection

Summary: This is a commercial case concerning investment risks and has nothing to do with ROW. However, it contains an interesting assessment of the value of oral evidence and the unreliability of human memory. Only paras 15 to 23 of the judgment are of interest.

The judge states that memory is particularly vulnerable to interference and alteration when a person is presented with new information or suggestions about an event in circumstances when memory is already weak due to the passage of the time. The process of civil litigation itself subjects the memories of witnesses to powerful biases, eg a desire to assist the party who has called the witness, the procedure of preparing a statement a long time after the relevant events, which statement may go through a number of iterations which cause a witness's memory of events to be based increasingly on the statement and later interpretations of it rather than the original experience of events.

The judge's conclusion was that "the best approach for a judge to adopt in the trial of a commercial case is to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts….it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth".

R **(Gloucester)** v SSETR (Maisemore)

[2010] 82 P&CR 15

Keywords: Extinguishment; Footpaths; Local authorities' powers and duties; Planning authorities

Summary: A local authority, GCC, challenged a decision of a planning inspector that a riverside footpath, which had been eroded so badly as to cause it to disappear in parts, should not be extinguished on the ground that it would continue to be used by the public. GCC argued that (1) the evidence did not support a finding that the path was likely to be used; (2) it was not under any duty to prevent erosion; (3) members of the public were not entitled to deviate along the riverbank as shaped after the erosion, there being no such thing as a moving right of way, and (4) immaterial considerations had led to the decision. The Ramblers' Association contended that the authority had a duty to maintain the path and that as it had disappeared, it was not possible to order its extinguishment. Holding that there was no right to deviate from a

route in cases involving the destruction of a right of way and that moving paths did not exist in law, the court found that there was no evidence that a footpath likely to be used by the public existed.

Held, granting the application for judicial review, that (1) the public right over part of a highway had a defined route which could not be lost by lack of use, but could be by physical destruction; (2) there was no authority to support the proposition that a right to deviate arose upon the destruction, rather than obstruction, of a right of way, therefore the public had no right to deviate onto the nearest path; (3) there was no evidence that a moving right of way existed in law, and for one to arise there would have to be some new factor of usage or dedication, and the inspector had been wrong to find that the path

still existed on a different alignment and was likely to be used by the public.

***Gloucestershire** County Council v Farrow & others*

[1985] 1 WLR 741

Summary: a letter directed to a Highway Authority was accepted as 'bringing into question' for the purposes of s31 HA 1980 (but see *Fairey*). The market place at Stow on the Wold had originally been dedicated as a highway subject to a right to hold a weekly market. The market was discontinued about 1900, and subsequently the land was used as a highway. When an attempt was made to revive the market it was held that because of 20 years' uninterrupted use as a highway, the land had been re-dedicated without any restriction.

*R v SSETR ex parte **Gloucestershire County Council***

(QBD)[2001] ACD 34, [2001] JPL 1307

Summary: concerns s118 HA 1980 extinguishment order in respect of a footpath which had in part fallen into the River Severn. The main issues in relation to waterside paths were whether there was a right to deviate where a footpath had been destroyed by erosion; whether the path moved inland as the river bank eroded; liability in respect of bank erosion and whether the Inspector's decision could be upheld because a new path had been dedicated following public use.

Held: there was no general right to deviate other than the usual case where a landowner had obstructed a way; there was no known law which provided for the moving of the footpath inland as a consequence of bank-side erosion; whilst dedication of a route was always possible, there was in this case, no evidence of a defined line that could have been dedicated (in any event this issue was not argued before the Inspector).

R (oao) ***Godmanchester Town Council and Drain*** *v SSEFRA and Cambridgeshire County Council*

[2005] EWCA Civ 1597, [2006] 2 All ER 960, [2006] 2 P & CR 1) [2007] UKHL 28, [2007] 3 WLR 85, [2007] 4 All ER 273

Summary: (see ROW Notes 10 and 11/2007)(RWLR 6.3 p109-116) concerns lack of intention to dedicate; overt acts by the landowner to be directed at users of the way; duration of no intention to dedicate. The HL reversed the earlier judgment of the CA and rejected the judgments of Sullivan J in *R v SSE ex parte* Billson (1999) and Dyson J in *R v SSETR ex parte* Dorset CC (1999) which held that a landowner did not need to publicise to users of the way his lack of intention to dedicate.

Hoffmann LJ approved the *obiter dicta* of Denning LJ in *Fairey* (1956) who held "in order for there to be 'sufficient evidence there was no intention' to dedicate the way, there must be evidence of some overt acts on the part of the landowner such as to show the public at large – the people who use the path…that he had no intention to dedicate".

Hoffmann LJ held that "upon the true construction of s31(1), 'intention' means what the relevant audience, namely the users of the way, would reasonably have understood the owner's intention to be. The test is … objective: not what the owner subjectively intended nor what particular users of the way subjectively assumed, but whether a reasonable user would have understood that the owner was intending, as Lord Blackburn put it in *Mann v Brodie* (1885), to 'disabuse' [him]' of the notion that the way was a public highway". Evidence in the form of letters between the landowner and the planning authority, and the terms of a tenancy agreement were held by the HL to be insufficient evidence of a lack of intention to dedicate. They had not been brought to the attention of the public so the users could not have known what the owner's intention was.

It also upheld the earlier decision of Sullivan J in *Billson* that "during that period" in s31(1) did not mean that a lack of intention had to be demonstrated "during the whole of that period". The HL did not specify the period of time that the lack of

intention had to be demonstrated for it to be considered sufficient; this would depend upon the facts of a particular case.

***Goodes** v East Sussex County Council*

(CA) [1999] RTR 210, (HL)[2000] UKHL 34, [2000] 1 WLR 1356, [2000] 3 All ER 603

Summary: the duty of a highway authority under s41(1) of HA 1980 to maintain the highway did not require the authority to keep it free of ice.

R on the application of ***Goodman** v Secretary of State for Environment Food and Rural Affairs (Eastern Fields)*[2015] EWHC 2576 (Admin)

Key Words: Registration of a town or village green; "as of right" and "by right"; implied appropriation; implied permission.

Summary: The court held that, for there to have been an implied appropriation, there must be evidence that the local authority met the statutory test for appropriation set out in s122 of the Local Government Act 1972. ***Barkas*** is not authority for the proposition that land can be appropriated without any evidence of the council having considered whether the land was no longer required for the use for which it was held and that appropriation can be deduced from the management of the land.

The inspector found that visits of a circus and funfair would have alerted a reasonable person to the fact that they were using the land by permission and therefore by virtue of an implied licence. However, the judge found that the situation was different to that in ***Mann*** by reason of the land being in public rather than private ownership. Also the nature and character of the events, although charged for, were at least arguably not inconsistent with a public entitlement to use the land.

For there to be an implied permission there must be evidence that the landowner intended to grant permission. In the case of land owned by a local authority the fact that the intervening acts of the landowner were of themselves for the purposes of public recreation is also relevant. Eastern Fields was publicly owned and the types of events that the public were charged for were not inconsistent with a public entitlement to use the land.

H **Back**

***Hale** v Norfolk County Council*

[2000] EWCA Civ 290, [2001] Ch 717, [2001] RTR 397

Summary: this case sums up the previous judgments on the 'hedge to hedge' presumption (see *Beynon*). If the preliminary question of whether a fence adjoining a highway was put up in order to separate it from the neighbouring land is answered in the affirmative, there is a rebuttable presumption that the public's right of passage extends as far as the fence. But "it seems to me much less clear that there is any

foundation for a presumption of law that a fence or hedge which does, in fact, separate land over part of which there is an undoubted public highway from land enjoyed by the landowner has been erected or established for that purpose. It must, in my view, be a question of fact in each case." "It must depend… on the nature of the district through which the road passes, the width of the margins, the regularity of the line of hedges, and the levels of the land adjoining the road; and (I would add) anything else known about the circumstances in which the fence was erected." (Lord Chadwick)

Hall v Howlett

[1976] EGD 247

Summary: concerns whether an overgrown lane was an obstructed highway. Deeds of a property adjoining a lane from 1879 and 1905 referred to the lane as public. An inclosure award (no date given in the judgment but presumably before 1879) laid out a 20 ft. wide 'Private carriage road and driftway'. It was held that this setting out was "almost conclusive that the [inclosure] commissioners did not think that there was already a public highway there, because there is no basis to establish and lay out a new private road over existing public highway".

***Hall** v SSE*

(QBD)[1998] JPL 1055, [1998] EWHC 330 (Admin)

Summary: concerns building across line of footpath; building completed and then part demolished; whether development substantially completed. Held: in relation to TCPA 1990 diversion and extinguishment, 'substantial completion' must be considered according to the context, where a discrete and substantial part of a planning permission is completed in accordance with that permission, then that part of the permission has been completed and achieved.

Permission was for construction of 2 houses and 2 garages. The path in question cut across the corners of one proposed house and one proposed garage. A s257 order was made; the house and garage built, but before the inquiry part of the new garage was demolished, the objector claiming that therefore the development was not substantially complete. But at the time of the inquiry the planning permission was spent in so far as the highway was concerned.

***Hampshire County Council** v Secretary of State for Environment, Food and Rural Affairs & Ors*

[2020] EWHC 959 (Admin)

Yateley Common was registered as common land under the Commons Registration Act 1965. It was requisitioned in WWII and derequisitioned in 1960. Blackbushe Airport is mostly in the area of the common. Its owner (BAL) applied to remove part of the airport as common land from the register.

The application land was c46.5 ha of operational land including runway, taxiways, fuel storage depot and terminal building (including control tower), the Bushe Café and car parking.

On appeal against the Inspector's decision to allow its de-registration, the issue was whether the whole of the airport's operational land (which included the application land) fell within "the curtilage of a building". The Secretary of State and BAL's case that under the 2006 Act the test was: is the land and building associated in such a way that *they* comprise part and parcel of the same entity, a single unit, or an integral whole, was rejected.

Held: "The curtilage of a building" as found in this legislation requires the land in question to form part and parcel of the building to which it is related. The correct question is whether the land falls within the curtilage of the building and not whether the land together with the building fall within, or comprise, a unit devoted to the same or equivalent function or purpose."

Analysing the case law on curtilage, the correct principle was that for property to qualify as falling within the curtilage of a building, it must form part and parcel *of that building* (not whether the building forms part and parcel of some unit which includes that land, or whether those two items taken together form part and parcel of an entity or an integral unit (which would be akin to the approach used to identify a different concept, the 'planning unit').

The question posed by the statute is whether land forms part of the relevant building, and thus falls within its curtilage. The 'curtilage' question is not correctly addressed by asking what is the curtilage of an institution or use which occupies some larger area than the building itself (*Dyer* and *Barwick*).

On the material available to the court, it was likely that the application to de-register anything other than the terminal building and the Bushe Café would have been rejected.

Attorney General v ***Hanmer***

(1858) 2 LJ Ch 887

Summary: Waste land of the manor was defined as "the open, uncultivated and unoccupied lands parcel of the manor…other than the demesne lands of the manor".

('Of the manor' was held by the court in the *Hazeley Heath* case to mean land which is or was formerly connected to the manor). Demesne land is that owned and occupied by the lord of the manor for his own purposes.

Harvey *v Truro Rural District Council*

[1903] 2 Ch 638

Summary: Joyce J said “Mere disuse of a highway cannot deprive the public of their rights. Where there has once been a highway no length of time during which it may not have been used will preclude the public from resuming the exercise of the right to use it if and when they think proper.” and, “The possession of a squatter on the highway since 1886 cannot bar the public right.”

Hayling v Harper

[2003] EWCA Civ 1147

Summary: illegal user cannot be user as of right. Concerns vehicular access to dwelling house over public footpath, long user, Road Traffic Act 1988, whether criminal offence to drive over public footpath without lawful excuse. Held, driving a vehicle on a footpath without lawful authority is unlawful and an easement cannot be acquired by conduct which at the time is prohibited by statute (s34 RTA 1988).

***Hereford** & Worcester v Pick*

[1996] 71 P&CR 231

Summary: Dedication by user may be prevented if the user amounts to a public nuisance.

***Hertfordshire County Council** v SSEFRA*

(QBD) [2005] EWHC 2363 (Admin), (CA)[2006] EWCA Civ 1718

Summary: (see ROW Note 24/06, **Tyttenhanger**) concerns the powers to create, divert and extinguish footpaths and the proper interpretation of the wording of s118 of the HA 1980 with regard to creation agreements; whether the Inspector was correct in not taking a creation agreement into account when considering whether or not to confirm three extinguishment orders.

The Council had made public path extinguishment orders and entered into related creation agreements for the creation of replacement paths. The agreements stated the creations were to become effective immediately before the extinguishments of the related lengths of paths. The appeal against the Inspector’s decision was dismissed, and the decision of Sullivan J was upheld: the correct interpretation of s118 precluded taking creation agreements into account, while allowing concurrent creation or diversion orders to be considered.

Whilst creation agreements that are conditional and rely on the confirmation of the order cannot be taken into account when determining orders, a sealed unconditional creation agreement already in force may be considered.

R(oao Governors of Hockerill College) v Hertfordshire County Council

[2008] EWHC 2060 (Admin)

Keywords: Footpaths; Schools; Security precautions; Stopping up

Summary: A local authority's refusal to make a special extinguishment order under the Highways Act 1980 s.118B was rendered unlawful by its prematurely considering matters relating to whether it would be expedient to confirm the order, when it should have first considered matters relating to whether it would be expedient to stop up the footpath.

The claimant school (H) applied for judicial review of a decision of the defendant local authority not to make a special extinguishment order under the Highways Act 1980 s.118B in respect of a public footpath that crossed H's grounds. H applied to the local authority for an order extinguishing the footpath. The local authority initially deferred making an order to give H time to make various security initiatives suggested by the local authority's officers. Consultation with the local community also took place. After the deferral period the officers recommended that the order should be made. The local authority refused to make the order, noting that the footpath was well used; that, although security at the school needed to be improved, the order would not by itself provide a total solution to the crime problem; and that the footpath was used to gain access to other schools and the local hospital, meaning that people would be more likely to drive to those places if the order was made.

H submitted that the local authority ought to have decided the question of expediency set out in s.118B(1)(b) and only then considered matters specified in s.118B(8). While there could be an overlap between those matters, there would usually be no overlap between s.118B(1)(b) and s.118B(8)(c) and (d). The local authority unlawfully considered matters within s.118B(8)(c) in deciding the question of expediency.

Held: Application granted.

Section 118B could be analysed in stages. First, the local authority had to determine whether it was expedient to stop up the highway for the reasons given in s.118B(1)(b); if that test was satisfied, it had the discretion to make an order. If it made an order, it would have to give public notice of it. After that the local authority would have to determine whether it was expedient to confirm the order having particular regard to the matters specified in s.118B(8). There was overlap between the two stages. The local authority was entitled to have regard to s.118B(8) at the first stage for a variety of reasons.

However, it was clear from the papers that the local authority's task was to decide the first stage, and two of the reasons it gave were from s.118B(8). The local authority was free to look at a wide range of factors to decide the first question, but it looked at those matters and decided the broader second question instead. That was unlawful. The decision was quashed and the matter remitted to the local authority to reconsider, *R. (on the application of Hargrave) v Stroud DC [2002] EWCA Civ 1281, [2003] 1 P. & C.R. 1, [2002] 7 WLUK 555* considered.

Hollins v Oldham

(Ch)[1995] C94/0206 unreported

Summary: (see Advice Note 4 paragraph 2.42, s12 of the Consistency Guidelines) concerns the interpretation of map evidence relating to Pingot Lane, and the meaning of the phrase 'cross road'. The judge acknowledged 2 categories of road shown on Burdett's 1777 map and in respect of a cross road said "This latter category, it seems to me, must mean a public road in respect of which no toll is payable. This map was probably produced for the benefit of wealthy people who wished to travel either on horseback or by means of horse and carriage…There is no point, it seems to me, in showing a road to such a purchaser which he did not have the right to use" and "Pingot Lane must have been considered, rightly or wrongly, by Burdett as being either a bridleway or a highway for vehicles".

Finance Act, Tithe, OS and sale and conveyance documents were also considered. "The whole of the documents have to be examined to assess their reliability…This applies just as much to official documents such as the definitive map or ordnance survey sheets or tithe surveys as it does to other records such as commercially produced maps."

***Hollins** v Verney*

[1884] 13 QB 304

Summary: concerns sufficiency of user. A (private) right of way was claimed, but use had been only intermittent, for the purpose of carting wood. The judgment of Lindley L J contains a full discussion of the idea of interruption and how it interacts with the idea of a full period of 20 years, comparing, for example 'without interruption' to 'without cessation' and looking at a situation where there is no use in the first year of 20, but evidence of previous use.

"No user can be sufficient which does not raise a reasonable inference of such continuous enjoyment. Moreover, as the enjoyment which is pointed out by the statute (Prescription Act 1832) is an enjoyment which is open as well as of right, it seems to follow that no actual user can be sufficient to satisfy the statute, unless during the whole of the statutory term (whether acts of user be proved in each year or not) the user is enough at any rate to carry to the mind of a reasonable person who is in possession of the servient tenement, the fact that a continuous right to enjoyment is being asserted, and ought to be resisted if such right is not recognized, and if resistance to it is intended."

*R v SSE ex parte **Hood***

[1975] 1 QB 891, [1975] 3 All ER 243

Summary: this case deals with RUPP reclassification and is now redundant.

*Mark **Horvath** v SSEFRA*

[2009] European Court Case C-428/07

Summary: includes reference to significance of prows in the landscape and may be of relevance to arguments made about the historic value of paths in PP cases. Questioned, whether a Member State is permitted to include requirements relating to the maintenance of visible public rights of way in the standards of good agricultural and environmental condition of land. Considers the importance of row to the landscape and the preservation of 'human habitats' in rural areas. Confirmed prows are to be regarded as landscape features within the relevant Regulation; and a statutory obligation guarantees a minimum level of maintenance and avoids the deterioration of habitats.

*R v Planning Inspectorate Cardiff ex parte **Howell***

(QBD)[2000] EWHC Admin 355, [2000] NPC 68

Summary: (see ROW Advice Note 12) concerns post 1930 vehicular use on a RUPP subject to a reclassification order. Roch LJ adopted the approach taken in the *Stevens* case regarding post 1930 vehicular use saying "the Inspector started from the premise that any post-1930 vehicular use must be automatically disregarded: that is to say that the Inspector assumed the very fact that could only be established after a review of all the evidence had been concluded, that prior to December 1930 there was no vehicular right of way…" In *Stevens* Sullivan J considered evidence of vehicular use post 1930 was admissible in lending credibility to pre-1930 use for claims made under common law. (see also *Robinson v Adair* and *Stevens* v SSETR)

***Hue** v Whiteley*

[1929] 1 Ch 440

Summary: concerns use 'as of right'. A route to Box Hill had been used by the public for recreation. It was held that motive for user was irrelevant in considering whether dedication could be implied. "Does it make any difference that it is desired [NB: this is one of the series of judgments, now overruled, where it was assumed that 'as of right' implied a subjective belief in a right to use a route] to use the way for business or social purposes, or for walking to benefit health, or for a stroll through a beauty spot?"

I **Back**

R v Devon County Council ex parte MJ & GJ **Isaac** and another

[1992] unreported

Summary: whether the statutory scheme (for applying to the courts in rights of way cases) meant that judicial review could not be applied for.

J **Back**

Jaques *v SSE*

(QBD)[1995] JPL 1031

Summary: concerns common law dedication; true construction of s31 HA 1980; no intention to dedicate; burden of proof; effect of wartime requisitioning. This case is largely of historical interest, in the development of understanding of the 'proviso' in s31 of the HA 1980. But there is a subsidiary point about capacity to dedicate.

It was held that "the bare fact that there was not a person in possession of the land capable of dedicating the way could not of itself defeat a claim under section 31(1)… However, a right of way could not arise under section 31 if at some time during the relevant period there was *no person at all* having the legal right to create a right of way. Where the only person in possession is a tenant, he together with his landlord can create a right; but where land is requisitioned …no person having an interest in the land had the power to dedicate."

R (**Jenkins**) v The Welsh Ministers

[2016] EWCA Civ 1422

A footpath having been created through a public path creation order running along the cliff-tops it was discovered that parts of the route of the path, as shown on the order map, had disappeared as the cliffs had been eroded. An order was, therefore, made under s.119 to divert parts of the path further inland. The Order was confirmed after a public inquiry but the Claimant challenged the confirmation, inter alia, on the grounds that the path had ceased to exist because of the erosion and that there was nothing to divert. The court considered authorities such as R. v Inhabitants of Greenhow [1876] 1 QBD 703 and R v (Gloucester) v SSETR [2010] 82 P. & C.R. 15. Per Elias LJ at para 32:

"I would accept that since the right of way attaches to land it will be lost if the land itself is destroyed. It does not, in my view, follow that a right of way would be lost whenever the smallest part of the route has disappeared as a result of erosion. In general the courts have taken a very pragmatic view to the question whether a right of way has been destroyed."

Taking that pragmatic approach, the purpose of the s.119 order was to address the issue that the path was potentially dangerous along its present line.

"In my judgment, that is best achieved by recognising that in the context of section 119 the path may be said to remain in existence even if it could not be followed in its entirety. It is still a sensible use of language, it seems to me, to say the same path

remains in existence even though a small part of it cannot be walked because it is no longer on firm ground"

The Court, therefore, recognised that the destruction (by erosion) of parts of a path could be addressed by the diversion of the path; cf. R v (Gloucester) v SSETR [2010] 82 P. & C.R. 15

Jenkinson v SSE

[1998] QBCOF 98/0210/4?

Summary: concerns width. Edge Road, formerly a RUPP reclassified to bridleway, for which an application was made to modify to footpath. It had been set out at inclosure as an occupation road 18-24 ft. wide. The OMA made an order to specify the full width. Walker LJ considered whether the Inspector had evidence of public use as a bridleway and whether such use extended over the full width, and found there was no dedication effected by the inclosure award and it was subsequent public use which was essential.

He also found that the physical boundaries were not set out by reference to the highway (a requirement if presumption is based on boundaries alone without evidence of user – ***Beynon***), but that the Inspector had a good deal of evidence before him of public use "and there was adequate evidence from which it could be inferred that that user was over the whole irregular width of the track".

***Jennings** v Stephens*

[1936] 1 Ch 469

Summary: "…use as of right by the inhabitants of the locality is sufficient."

***Jones** v Bates*

(CA)[1938] 2 All ER 237

Summary: concerns dedication at common law; meaning of 'as of right' (ROWA 1932); burden of proof; bringing into question. Provided use is of a kind capable of being challenged, it is immaterial that the reason why the user was not challenged was that the owner believed the way to be public.

This is another case where subjective 'as of right' (in implied or presumed dedication of a right of way) was argued, i.e. it was assumed that 'as of right' implied a belief in the user that he/she had a right to use the path in question. However it contains, in the judgment of Scott L J, what is called in ***Jaques*** a 'full and convenient description of the common law' and is worth reading for that. It also contains discussion of the idea of 'interruption' – there must be interference with the enjoyment of a right of passage.

On use as of right, it is for those denying that the rights exist to prove that there was compulsion, secrecy or licence, if that is claimed. On continuity of use, "A mere

absence of continuity in the de facto user will not prevent the statute from running…No interruption comes within the statute unless it is shown to have been an interference with the enjoyment of the right of passage."

***June Jones** v Welsh Assembly Government*

(QBD)[2009] EWHC 3515 (Admin)

Summary: (see ROW Note 9/09) concerns a DMMO made by Ceredigion CC. Further to an inquiry an Inspector proposed to modify the order in relation to the route of the footpath. The final decision confirmed the order as made. Ms Jones claimed the Inspector had failed to sufficiently deal with an interruption to the order route (the construction of a building). Judgment was made that the decision could not stand and an order be made to quash the decision. Ms Jones claimed there was no power to quash only the Inspector's decision, and that the DMMO must also be quashed. Held that the DMMO itself should be quashed.

K **Back**

***Kotarski** v SSEFRA & Devon CC*

(QBD)[2010] Draft judgment, [2010] EWHC 1036 (Admin)

Summary: (see ROW Note 07/2010) (RWLR 8.2 p189-191) this was a Part 8 challenge against the Inspector's decision to confirm the order thus modifying the DM to resolve an anomaly between the map and statement. The decision was challenged on the basis that there was no evidence or insufficient evidence of subsistence of a public right of way on the relevant date. Also concerned the discovery of evidence and whether it should be 'new' evidence.

The judgment confirms that a drafting error can be 'discovered evidence' to add a missing route to the map and effect a positional correction of a route already on the DM. The judge noted that the decision was "...both clear and comprehensive". The appeal was dismissed. (see also *Norfolk CC*, *Trevelyan*, *Simms and Burrows* & *Mayhew*) (see Defra Circular 1/09 for the evidential tests for confirming an order to downgrade or delete a prow)

K. C. Holdings (Rhyl) Ltd v SSW & Colwyn Borough Council

(QBD)[1990] JPL 353

Summary: it does not follow that once it has been established that it is necessary to stop up a path to allow development to take place (considering an order under s257 TCPA 90) then confirmation of an order will automatically follow. This was not a rubber-stamp provision. "That part of the Act was concerned to give protection to

the interests of persons who might be affected by the extinguishment of public rights, in which circumstances it was hardly surprising that under s209 [this was TCPA 1971] there was a discretion to consider the demerits and merits of the particular closure in relation to the particular facts that obtain."

***Kent County Council** v Loughlin and others*

[1975] JPL 348, 235 EG 681

Summary: Lord Denning held that the fact that a particular road is not shown at all on a Tithe map is evidence that there was no road at the location in question at the date of the tithe survey, but it could have existed as a footpath. Otherwise the judgment merely emphasises the importance and reliability of tithe map evidence in general.

*R v SSE ex parte **Kent County Council***

[1990] JPL 124, (QB)[1994] CO/2605/93, [1994] 93 LGR 322

Summary: concerns proposed deletion of a whole footpath where only part incorrectly shown, the existence of which was not disputed but its precise route unknown. Held: "it seems inherently improbable that what was contemplated by s53 was the deletion in its entirety of a footpath or other public right of way of a kind mentioned in s56 of the 1981 Act, the existence but not the route, of which was never in doubt."

*R (oao) **Kind** v SSEFRA*

(QBD)[2005] EWHC 1324 (Admin), [2006] QB 113

Summary: (see ROW Notes14/05, 16/05) held that the reclassification of a RUPP as a bridleway had not the effect of extinguishing any vehicular rights that might have existed over the RUPP.

***Kotegaonkar** v SSEFRA and Bury Metropolitan Borough Council*

[2012] EWHC 1976 (Admin)

Key Words: S31 Highways Act 1980; definition of highway; connection to other public land.

Summary: A way to which the public has no right of entry at either end or at any point along its length cannot be a highway at common law. The claimed path was across a plot of land on which there was a line of paving stones connecting at one end to land occupied by a health centre and at the other to the forecourt of some shops. The health centre land and the shops land were both in private ownership with no public right of way over. Members of the public entered both pieces of land as licensees.

Under S31 the relevant way must not be “a way of such character that use of it by the public could not give rise at common law to any presumption of dedication”. The judge found that as a matter of principle the concept of an “isolated highway” is incongruous because such a way does not have all the requisite essential characteristics of a highway, as the public do not have a right “freely and at their will” to pass and repass. They can only do so by virtue of a licence to enter and cross other land, which could be withdrawn at any time.

Where access to the way might lawfully be blocked at any time by adjacent landowners, the public’s ability to pass along the way is not as of right and is of such fragility that it simply does not and cannot have the necessary characteristics of a highway. Case law in *Bailey v Jamieson (1875-76) LR 1 CPD 329* supports this view. The situation is quite different to a cul-de-sac which it is clear can, in law, be a highway.

L **Back**

*R (oao) **Laing Homes** Ltd v SSEFRA ex parte Buckinghamshire CC*

[2003] EWHC 1578 (Admin), [2003] 3 PLR 6

Summary: concerns registering land as village green and whether s13(3) and s22 of the Commons Registration Act 1965 are compatible with Article 1 of Protocol 1 to the European Convention on Human Rights (see also *Oxfordshire*, RWLR s.15.3 pg135).

***Lancashire County Council** v Secretary of State for the Environment, Food and Rural Affairs and Janine Bebbington*

2016 EWHC 1238 (Admin)

Summary: An application to register five areas of land adjacent to Moorside Primary School in Lancaster as a TVG, was granted for four of the areas. The local education authority applied for judicial review of a decision by a planning inspector that the majority of the site near a school should be registered as a TVG.

Held: Application refused. When considering an application to register land as a town or village green pursuant to the Commons Act 2006, there was no requirement for the "locality" to have existed in the same form for the required period of 20 years' user. It was sufficient to define the area in relation to which a "significant number of the inhabitants" of the locality or neighbourhood could be judged. There was no express or implied requirement for a geographical spread of users from throughout the locality.

This decision was appealed to the Court of Appeal and allowed, but on appeal to the Supreme Court was confirmed as correct (see below)

*R (on the application of **Lancashire County Council**) (Appellant) v Secretary of State for the Environment, Food and Rural Affairs and another (Respondents) R (on*

the application of NHS Property Services Ltd) (Appellant) v Surrey County Council and another (Respondents)

[2019] UKSC 58

Summary: The Supreme Court confirmed the High Court decision (above) and dealt with another appeal concerning Leach Grove Wood in Leatherhead, sought to be registered as a green, relying on 20+ years use. The inspector recommended refusal but Surrey County Council registered the land. The owners sought JR and the registration was quashed on the basis that SCC failed to consider statutory incompatibility.

The central issue in both cases was the interpretation and application of the statutory incompatibility ground of decision identified in the majority judgment in the Supreme Court in *R (Newhaven Port & Properties Ltd) v East Sussex County Council [2015] UKSC 7.*

Held (by majority): *Newhaven* authoritatively interpreted the Act to mean that where land is acquired and held for defined statutory purposes by a public authority, the Act does not enable the public to acquire rights over that land by registering it as a green, where such registration would be incompatible with those statutory purposes. Here there is an incompatibility between the statutory purposes for which the land is held and use of that land as a green and therefore the Act is not applicable.

So, in the Lancaster case, the rights claimed pursuant to the registration of the land as a green are incompatible with their use for education purposes, including as playing fields or for constructing new school buildings. LCC did not need to show they are currently being used for such purposes, only that they are held for such statutory purposes.

Similarly, in the Surrey case the issue of incompatibility has to be decided by reference to the statutory purposes for which the land is held, not by reference to how the land happens to be used at a particular point in time.

Lasham Parish Meeting v Hampshire County Council and SSE

[1992] 65 P & CR 3, 91 LGR 209, (QBD) [1993] 65 P & CR 331, [1993] JPL 841, [1993] 91 LGR 209

Summary: (ROW Advice Note 7)(RWLR 8.2 p41) concerns duly made objection and relevance, amenity considerations cannot be taken into account. A council is not entitled to disregard an objection to an order (reclassification in that case) and confirm it as an unopposed order just because the objection is irrelevant. Potts said an objection is duly made "if it is made within the time and the manner specified in the Notice of Order" and "I am unable to find anything in the legislation requiring an objector to set out legally relevant grounds before an objection could be said to be "duly made"."

But Potts J suggested that the SofS (PINS) could have an active role in, for example, writing to those making irrelevant objections reminding them of the costs regime. Confirms that the only issue in dealing with s53 and s54 cases is what public rights of way exist: suitability and amenity must be disregarded in deciding whether to confirm an order.

R (oao Lea) v Secretary of State for Environment, Transport and the Regions [2013] EWHC 1401 (Admin)

Summary: A planning inspector had not erred by declining to take into account safety considerations in determining whether a footpath should be reclassified as a bridleway pursuant to a presumed dedication by virtue of the Highways Act 1980 s.31.

The appellants appealed against a declaration by a planning inspector appointed by the respondent secretary of state that a right of way was a bridleway. Until the decision of the planning inspector, the relevant way had been classified as a footpath. The inspector had been called upon to determine whether it should be reclassified as a bridleway pursuant to a presumed dedication by virtue of the Highways Act 1980 s.31. Under that section, the relevant test was one of usage. Before the inspector could reclassify the way, she had to find that it had been used as of right for the preceding 20 years or more for the riding or leading of horses. In determining that question, the inspector saw the written evidence of 25 riders.

While the appellants did not dispute that the claimed use had taken place, they alleged that they had put barriers across the way so as to obstruct the progress of horses. Their central claim was, however, that the way was too narrow for it to be safely used by both horses and pedestrians. The inspector found that the only matter for her to decide was that of usage, and that the safety question was not something she could take into account. She found that the horses had easily negotiated L's barriers and that the required usage had taken place.

Held: Appeal dismissed. The inspector's findings of fact could only be challenged on public law grounds and, on the evidence available to her, she was plainly entitled to reach the conclusions she did. It was impossible to say that she had acted irrationally or made some error of law. She had applied the correct test and had neither taken into account irrelevant maters nor failed to take account of relevant ones. The safety issue was not something that she could have taken into account.

***Leeds** Group plc v Leeds City Council*

[2010] EWHC 810 (Ch) [2011] EWCA Civ 1447

Summary: In the High Court, the case concerned an application to register land as a town or village green (TVG). After an inquiry conducted by a barrister (the Inspector) it was recommended that the land should be registered as a TVG and this was done. The Inspector had concluded that the land had been used in accordance with section 22(1A) of the 1965 Commons Act (the Act), as amended by the 2000

CROW Act by inhabitants of a ‘neighbourhood’ within a ‘locality’. The use was not contested but the definitions of ‘locality’ and ‘neighbourhood’ were.

The ‘locality’ accepted by the Inspector in this case had ceased to be a recognised administrative unit in 1937. Nevertheless, it was found that it was still reasonable to regard Yeadon as a ‘locality’ when considering the definition of a ‘neighbourhood within a locality’, particularly as the intention of parliament in adding this limb to the legislation in 2000 was to make it easier to register TVGs. It was also found in this case that, even if Yeadon was not the appropriate ‘locality’, the parish of the local church could be considered as the relevant ‘locality’.

With regard to use by the inhabitants of a ‘neighbourhood’, it was contended that this should be a single ‘neighbourhood’ whereas in this case inhabitants of two ‘neighbourhoods’ had used the area. However, it was held that the Act now only requires a significant number of the inhabitants of any neighbourhood within a locality to have used the area and there is no reason why the existence of two or more qualifying ‘neighbourhoods’ is fatal to an application to register a TVG. It was further argued that the ‘neighbourhoods’ referred to in this case could not reasonably be so regarded as they lacked cohesiveness as they contain a mixture of properties and lack community facilities. However, it was held that the use of the term ‘neighbourhood’ in the legislation was deliberately imprecise and the ‘neighbourhoods’ identified had linking streets with similar names and a preponderance of post-war semi-detached housing and could be regarded as relevant ‘neighbourhoods’.

It was also contended that, as the criteria accepted in this case relied on use of the land by the inhabitants of a ‘neighbourhood’ within a ‘locality’ which was only added to the Act in 2000 and came into operation in 2001, use before this date should not count as being ‘as of right’. Prior to this a landowner would have had no reason to resist recreational use of the land as he would have known it could not lead to a successful claim for it to be registered as a TVG. This was dealt with quite briefly and held with reference to the case of *Oxfordshire v Oxford City Council [2006]* that there was no indication in the legislation that parliament intended the operation of the amendment to be postponed.

The application for judicial review was dismissed.

In the Court of Appeal the question of retrospectivity regarding whether the amendment to the definition of TVG introduced by the Countryside and Rights of Way Act 2000 (the 2000 Act) should be construed so as to postpone its operation until 2020 was pursued further. The wording of the 2000 Act states that the relevant section (98) should come into operation two months after the passage of the 2000 Act, that is on 30 January 2001. As the amendment also required use of land to have continued up to the date of an application it was not entirely retrospective – a landowner had a minimum period of 2 months in which to prevent public use continuing.

It was again held that there is nothing in the legislation to suggest that parliament intended operation of the new provision to be postponed as was being claimed.

Consideration was also given to whether the relatively short 2 month period between passage of the 2000 Act and it coming into operation in this respect was enough to be fair to landowners. It was decided that on balance it was, particularly as recreational use would have had to have taken place for nearly 20 years at least previously and a landowner would have had little realistic means of knowing whether users were inhabitants of a 'locality' or a 'neighbourhood within a locality' during this period and therefore might have been expected to be aware that there was a possibility that an application for his land to be registered as a TVG might be made.

The appeal was dismissed.

(see also *R (Oxfordshire and Buckinghamshire Mental Health NHS Foundation Trust v Oxfordshire County Council)*

***Legg** & others v Inner London Education Authority*

[1972] 3 All ER 177

Summary: applies to the modification of orders. Megarry J stated "But throughout there must, I think be the continued existence of what is in substance the original entity. Once it reaches the wholesale rejection and replacement, the process must cease to be one of modification…For one proposal to be fairly regarded as a modification of another proposal one must be able to perceive enough in it of that other, to recognise it as still being the proposal, even though changed…The line may well be hard to draw, but there comes a point where the modifications have swamped or eaten away so much of the original that it is impossible to regard what there is as still being the original in a modified form".

*R (oao) **Leicestershire County Council** v SSEFRA*

(QBD)[2003] EWHC 171 (Admin)

Summary: (see ROW Note 3/03) concerns the arguments in *Bagshaw* and the test to be applied at the confirmation stage; presumption against change. Consideration of an order modifying the map to show a route shown running through one property to run through another (Manor Cottage and Glebe Cottage).

Collins J held "the only issue which the Inspector had to determine was essentially which was the correct route to be shown on the map" requiring him to consider "both whether, in accordance with section 53(3)(c)(i), a right of way not shown subsisted, and also, in accordance with section 53(3)(c)(iii), whether there was no public right of way over land shown on the map". "The presumption is against change rather than the other way around".

If there is insufficient evidence to show the correct route is other than that shown on the map, then what is shown on the map must stay because it is in everyone's interest that the map is to be treated as definitive. The starting point is s53(3)(c)(iii),

and only if there is sufficient evidence to show that that was wrong (ie on the balance of probabilities the alternative was right) should a change take place.

***Lewis** v Thomas*

[1950] 1 KB 438

Summary: concerns interruption; intention to dedicate. "Although such an act as locking a gate across a way which is used as of right by the public prima facie constitutes an interruption of the enjoyment of the way within the meaning of s1 of the Rights of Way Act 1932, and none the less so because during the time while the gate is kept locked no-one had happened to try to use the way, the absence of any intention to challenge the right of the public to use the way is material to the question whether there has in fact been any interruption within the meaning of the section."

The gate in question was locked only at night, and for the purpose of preventing cattle straying into a field where corn was stacked. The interruption must be with intent to prevent public use of the way. "…the question of the intention of the interrupter is primarily relevant if, and only if, the owner, against whom the right of way was asserted, seeks to prove no intention to dedicate."

Littlejohns and another v Devon County Council and another [2016] EWCA Civ 446

Summary: the Littlejohn family had grazed sheep and cattle on common land adjacent to their farms in Devon for decades. The common land was registered under the scheme introduced by the Commons Registration Act 1965 (CRA1965). The family failed to register their rights of common by the July 1970 deadline under CRA1965 but continued to use the land and in 2010 applied to register rights of common by prescription based on usage since 1970.

Held: It is not possible to register new rights of common over land already registered as common land. The CA confirmed Devon CC's refusal of the application on the basis that a right of common could not be created by prescription over land that had been registered as common land under the CRA 1965. By sections 6(1) and (2) of Commons Act 2006, a right of common can no longer be created by prescription (save in the three areas of land excluded from the operation of Part I of the Act by section 5, namely the New Forest, Epping Forest and the Forest of Dean); only by express grant or enactment.

***Logan** v Burton*

[1826]

Summary: Under an Inclosure Act, the commissioners were empowered to stop up footways as well as carriageways running over land to be inclosed and over old inclosures. The failure of the commissioners to obtain a justice's order for the

stopping up of a footpath meant that the footpath had not been effectively stopped up and continued post-inclosure.

M **Back**

Maltbridge *Island Management Company v SSE & Hertfordshire County Council*

[1998] EWHC Admin 820, [1998] EGCS 134

Summary: the relevant sections of the judgment concern the weight to be given to Tithe map and Finance Act evidence. "The tithe map and apportionment evidence is undoubtedly relevant as to both the existence, and physical extent, of a way at the relevant time. Because both public and private roads were not tithable, the mere fact that a road is shown on, or mentioned in, a tithe map or apportionment, is no indication as to whether it is public or private. But if detailed analysis shows that even if he was not required to do so, the cartographer, or the compiler of this particular map and apportionment, did in fact treat public and private roads differently, whether by the use of different colours, the use or non-use of plot numbers, or other symbols, or in schedules or listings, I do not see why evidence based upon such analysis should not be admissible as to the existence, or non-existence of public rights of way." The weight to be attached is a matter for the Inspector. It cannot be conclusive.

R (oao) ***Manchester City Council*** *v SSEFRA*

[2007] EWHC 3167 (Admin)

Summary: Concerns an Inspector's decision not to confirm a special extinguishment order for the reasons of crime prevention (s118B of HA 1980). The decision turned on the issue of expediency. Sullivan J said the weight to be given to oral or written evidence or a petition is entirely a matter for the Inspector; having referred to an issue once in an OD, an Inspector is not required to repeat the point over and over.

On the issue of expediency and ss 7, he said even though an Inspector has been satisfied that the conditions for making the order (ss1(a) and (3)) have been satisfied and it is expedient to make the order looking at the matter from the point of view of crime prevention, he may decide it is not expedient to confirm the order, having regard to wider considerations.

ss(7) requires the decision maker to have regard to all of the circumstances. The words "and in particular" require regard to the factors listed in subparagraphs (a) to (c) but do not require those factors to be given most or any enhanced weight. With regard to resolving detailed issues (eg graffiti, rubbish etc) the issue for the Inspector was one of balance.

The RA appealed (see Footpath Worker Vol.25 No.4, p9-11). The principal matter to be determined by the court was the operational effect of the words 'in particular' within s118B(7) before the three criteria (a-c). Held "The weight to be given to the

various factors in issue in a planning or highway inquiry, provided those factors are legally relevant, is entirely a matter for the Inspector's expert judgment. The use of the words "in particular" in the context of a subsection which is expressly conferring a very broad discretion on the decision-taker to decide whether confirmation of the order is "expedient", and is expressly enjoining him when doing so to have regard to all material circumstances, was not intended to displace that underlying principle." The Inspector's decision was upheld.

***Mann** v Brodie*

[1885] HL 378, 10 App Cas 378

Summary: concerns common law dedication; sufficiency of user; presumption; Scottish law (Lord Blackburn compares with English law). A public right of way depends on use by the public as of right, continuously and without interruption. The number of users must be such as might reasonably have been expected if the way had been unquestionably a highway. User must be from one terminus to another, not private use, or use by licence.

On common law dedication, held "Where there has been evidence of a user by the public so long and in such a manner that the owner of the fee, whoever he was, must have been aware the public was acting under the belief that the way had been dedicated, and has taken no steps to disabuse them of that belief, it is not conclusive evidence, but evidence on which those who have to find the fact may find that there was a dedication by the owner, whoever he was." On interruption, the landowner must "take steps to disabuse those persons (the users) of any belief that there was a public right."

***Maroudas** v SSEFRA*

(QBD) [2009] EWHC 628 (Admin), (CA) [2010] EWCA Civ 280

Summary: (RWLR 7.1 p65-67) the main issue in this case was whether vehicular rights had been extinguished by the NERCA or whether the application for a modification order constituted a valid application under s53(5) of the WCA 1981, triggering an exception set out in the Act. The application was not signed, dated, did not apply to the whole route and was not accompanied by a map. The claimant contended that it was not a valid application and consequently the exception s67(3) of NERCA did not apply and the order should not have been confirmed.

The appeal against the decision of the HC to uphold the decision was allowed and the earlier judgment reversed. Some minor departures may be acceptable - for the purposes of section 67(3), a valid application may be made where supplementary information is provided to make good an error or omission in the application, at any rate if the information is provided within a very short time of the submission of the application form. (see also *Winchester*)

***Marriott** v SSETR*

(QBD)[2000] [2001] JPL 559

Summary: (see ROW Advice Note 10) concerns the correct approach under Sch15 to the WCA 1981 and the procedure to be adopted in relation to the confirmation of orders made under s53(2) of the 1981 Act; and by analogy to inquiries and hearings held under paragraph 2(3) of Sch 6 to the HA 1980 and paragraph 3(6) of Sch 14 to the TACPA 1990. Sullivan J said "an inquiry or hearing will be required under paragraph 8(2)(b) only if an objection has been "duly made". Whilst an objection need not detail the grounds on which it is based in order to be duly made (see *Lasham*) it must be an objection "with respect to the proposal" [of the Inspector to modify the Order]".

Thus at a second inquiry into proposed modifications, only objections to the proposed modification should be heard. Procedure to be followed after a proposed modification has been advertised (i) where objections or representations are made that only relate to the proposed modification; (ii) where evidence is submitted or submissions are made at a second inquiry or hearing that do not relate to the proposed modification; (iii) where there is a mixture of objections and representations some of which relate and others which do not relate to the proposed modification; and (iv) where there are objections or representations that do not relate to the proposed modification.

***Massey** & Drew v Boulden & Boulden*

[2002] EWCA Civ 1634, [2003] 1 WLR 1792, [2003] 1 P & CR 22, [2003] 2 All ER 87

Summary: concerns vehicular access to a property over a track across a village green. Held: on the true construction of s34(1) of the RTA 1988, the phrase 'land of any other description' meant what it said and was not to be construed *ejusdem generis* with the words 'common land' and 'moorland'. The wording of s34(1)(a) was unambiguous. Prescriptive rights for vehicular access can only be acquired over 'land forming part of a road ie a highway or a road over which the public already has access in accordance with the definition in s192 – that is access to a track in the sense of using it as a road.

Seemingly vehicular rights can be acquired through post-1930 long user, provided that certain conditions are met.

R v SSETR ex parte **Masters** (1998)

*R v SSE & Somerset County Council ex parte David H Masters & M P **Masters***

[1999] CO 3453/97

Summary: WCA 1981; modification of Map to indicate route as a byway instead of a RUPP; challenge to confirmation of order.

***Masters** v SSETR*

[2000] 2 All ER 788, (CA) [2000] EWCA Civ 249, (CA)[2000] 4 All ER 458, (CA)[2001] QB 151

Summary: (see ROW Advice Note No.8) Definition of BOAT; balance of predominant user; evidential status of 1929 handover map; OS maps. The word 'byway' in s66 of the WCA 1981 was to be given a purposive construction, and not be limited to those byways that were currently and actually used by the public for predominantly pedestrian or equestrian purposes.

Roch LJ held: It is in my judgment clear that Parliament did not contemplate that ways shown in definitive maps and statements as RUPPs should disappear altogether from the maps and statements simply because no current use could be shown, or that such current use of the way as could be established by evidence did not meet the literal meaning of s66(1) and that Parliament did not intend that highways, over which the public have rights for vehicular and other types of traffic, should be omitted from definitive maps and statements because they had fallen into disuse if their character made them more likely to be used by walkers and horse riders than vehicular traffic.

The CA's judgment means that for a carriageway to be a BOAT equestrian or pedestrian use is not a precondition, or that such use is greater than vehicular use. The test relates to its character or type and in particular whether it is more suitable for use by walkers and horse riders than vehicles.

Roch LJ read the word 'particulars' as "referring to the details such as the position, width of the public path or BOAT and any limitations or conditions affecting the public right of way thereover". He did not consider that the deletion of a BOAT from the DMS was a modification of particulars contained in the map and statement.

***Mayhew** v SSE*

[1992] 65 P & CR 344, (QBD) [1993] 65 P & CR 344, [1993] JPL 831, [1993] COD 45

Summary: (see ROW Note 20/05, Advice Note No.7) concerns status of DM and its modification through 'discovery' of evidence; suitability; traffic regulation orders. Evidence to support an order under s53(3)(c) need not be new or fresh evidence. It may already have been in the surveying authority's possession, but becoming aware of it or a new evaluation of the significance of it can amount to the discovery of new evidence.

Potts J adopted parts of the judgment in *Simms and Burrows*. The word 'discovery' suggests the finding of some information which was previously unknown (when the DM was prepared), and which may result in a previously mistaken decision being corrected; i.e. the discoverer applying their mind to something previously unknown to them. Also, the power under s53(2) of the 1981 Act is not to make such modifications as appear desirable, but requisite in consequence of the events in ss(3).

***Merstham Manor** v Coulsdon and Purley Urban District Council*

[1937] 2 KB 77

Summary: concerns the ROWA 1932, 'as of right' and without interruption. "Actually enjoyed by the public as of right" means that the exercise of such right has been actually suffered by the owner. "As of right" means in the exercise of a right vested in the public and not by permission of the owner from time to time given. On interruption, " …public user is essentially to some extent intermittent, occurring as it does only when individual members of the public make use of the way…It is "actual enjoyment" which must be without interruption… the word interruption is properly construed as meaning actual and physical stopping of the enjoyment…" Also, tithe maps make no distinction between a public and a private road, their object is to show what is titheable and the roadways are marked on them as untitheable pieces of land whether they are public or private.

***Midland Railway Corporation** v Watton*

[1886] 17 QBD 30

Summary: it would be incorrect to describe a road as a turnpike merely because the proprietors take tolls for the use of it, without being subject to any statutory liabilities in respect of it, such as are imposed on the trustees of turnpike roads. A turnpike can only be dedicated under statute.

Hampshire County Council and others v Milburn

[1990] 2 All ER 257

Summary: Land is 'of the manor' if it can be shown to be land which is, or was, formerly connected to a manor.

Mattingley Green and Hazeley Heath in Hampshire had been registered as common land not subject to rights of common. Both parcels formed part of the waste land of their respective manors. In 1981 the defendant, lord of both manors, conveyed the two manors and all manorial rights, reserving to himself the ownership of the two parcels. He then applied for deregistration of both parcels as common land since they were no longer waste land of the manor. The judge ordered the council to accede to the application.

Held, allowing the appeal, that "waste land of a manor" meant "land now or formerly waste land of a manor" or "waste land of manorial origin." The Royal Commission on Common Land (1958 Cmnd.462) had recommended that land which was common land at the date of the passing of the Commons Registration Act should remain so. Parliament could not have intended that "waste land" should cease to be affected by the 1965 Act by reason of a voluntary act of the owner for the time being.

Box Parish Council v Lacey [1980] Ch. 109, [1978] 5 WLUK 170 disapproved).

R(oao) ***MJI (Farming) Ltd*** *v SSEFRA*

(QBD) [2009] EWHC 677 (Admin)

Summary: Concerns a s26 HA 1980 order for a BR link on the South Downs Way. Objections to the order and interim decisions made by the Inspector resulted in modifications to record the disputed length of route as a 4 metre wide FP. Held, such width was not necessary or expedient to the creation of the FP (as opposed to a BR), having regard to the public amenity and impact on the landowner affected, s26(1) requires the tests to be applied both in respect of the principle of the FP and also to the detail of its alignment, length and width.

With regard to the adequacy of the order map, the judge remarked that when dealing with the creation and maintenance of public rights, at the time they are created it is vital they are precisely and accurately defined, not just in the interests of the affected landowner but also in the interests of the public, who wish to exercise the benefit of those rights.

Morley Borough Council *v St Mary the Virgin, Woodkirk (Vicar and Churchwardens)*

[1969] 3 All ER 952

Summary: ecclesiastical law, faculty, jurisdiction, consecrated ground, use for secular purposes, burial ground, road improvement scheme. Held, the court had jurisdiction to allow consecrated ground which was still in use for sacred purposes to be used for a secular purpose as public convenience could justify the grant of a faculty for such purposes as a footpath or a part of a highway.

The faculty would be granted in this case because the public interest outweighed the interest of the respondents; the cost of alternative routing of the road, the danger which would be created if there were no improvement and the fact that all exhumed remains could be re-interred in the same graveyard made the grant desirable. See also ***Re St John's, Chelsea***.

Moser v Ambleside *Urban District Council*

(CA)[1925] 89 JP 118, 23 LGR 533

Summary: concerns the effects of ancient maps; highway dedication; strict settlement; interruptions; notices; use for pleasure – a cul-de-sac leading to a waterfall. Between 1834 and 1842 a tenant was capable of dedicating a way over the land in question. He conveyed it in 1842 to trustees upon a settlement which was assumed to be strict. He died in 1875 leaving the land to be sold by the trustees. They sold it in 1879. The purchaser mortgaged it to the trustees of the will of another testator. In 1899 the trustees of a third testator bought the land which was then in strict settlement. Two small scale maps showed a road on the line of the alleged highway, and it was shown on OS in 1913 as a footpath.

This was considered sufficient evidence with public user that a way was presumed to have been dedicated between 1834 and 1842. Evidence of a locked gate, people having been turned back, notices which could have referred to trespass on adjacent land and use predominantly to reach a waterfall were insufficient to rebut dedication.

On interruption, Mackinnon J said "…a single act is very much greater weight than a quantity of evidence of user by one or other members of the public who may use the path when the owner is not there and without his knowledge" but "an ineffective interruption, either by the owner or a tenant, so far from being proof that there is no dedication, rather works the other way as showing that there has been an effective dedication."

N **Back**

*The **National Trust** v SSE*

(QBD) [1998] EWHC 1142 (Admin), [1999] COD 235, [1999] JPL 697

Summary: concerns intention not to dedicate. By permitting the public to wander at will over NT land, user as of right is precluded. Held: it is necessary to decide whether there was user as of right and not permissive user before the presumption of dedication in s31 can operate.

R v Wiltshire County Council ex parte **Nettlecombe** Ltd & Paul Nicholas David Pelham

(QBD)[1997] EWHC 1040 (Admin), [1998] JPL 707

Summary: (see ROW Advice Note 8) concerns definition of BOAT. Dyson J said "…the language of the definition is clear and unambiguous. It is expressed in the present tense, and refers to current use, not past or potential use." The judgment did not clarify whether present use should include vehicular use, or whether use by pedestrians and horse riders was needed to satisfy the definition for a BOAT. (See *Masters* for BOAT definition)

*R (on the application of **Network Rail Infrastructure Ltd**) v S/S for Environment, Food and Rural Affairs*

[2017] EWHC 2259 (Admin); [2018] EWCA Civ 2069

Key Words: Section 257 TCPA; whether stopping-up "necessary"; Grampian conditions; subsequent planning permissions; determining preliminary issues.

Summary: A planning permission for residential development was conditioned, for highway safety reasons, to limit the number of units to 64 unless either of two events occurred: (1) a footpath diversion order was made and confirmed or (2) such an order was made but on considering it, the Secretary of State did not confirm it. The

inspector found as a preliminary issue that the condition would have permitted the whole development to be built without an order necessarily being confirmed, therefore the order was not "necessary" for the purposes of section 257.

The High Court held that “necessary” in s257(1) does not mean “essential” or “indispensable”, but “required in the circumstances of the case”. The condition required the necessity test and the merits test to be carried out alongside each other and the order would only cease to be necessary at the point where the merits test is not satisfied. The Court of Appeal agreed, noting that necessity could relate to a legal as well as a physical obstacle, such as a condition preventing further development unless a diversion order was confirmed.

Lindblom LJ said that in construing a condition on a planning permission "one should avoid, if one can, a construction that defeats the obvious purpose of the condition, and seek to give it the effect it was plainly meant to have". The condition clearly intended to restrict further development until there was a decision to confirm the order or not. Whether the order under consideration was necessary to enable the development to be carried out in accordance with the planning permission depended on the outcome of a substantive consideration of the stopping-up order itself on its merits, such as any public safety implications.

Consideration of an order was an exercise of statutory discretion separate from the decision on a planning application. The scope of that discretion was explained in Vasiliou and it was unnecessary to add to that. It was for the decision maker to decide if both tests are met or not.

The court also held that s119A may have been a more appropriate order to contemplate, but it was not wrong for the condition to require sections 257/259 to be used.

See also *Redrow Homes Ltd v Secretary of State for Levelling Up, Housing and Communities & Anor* [2023] EWHC 879 (Admin) (19 April 2023) as a further example of a TCPA 1990 s. 73 and 106 dispute. If the local authority grants a s.73 permission, it may not alter the description of development which was authorised in the earlier permission, nor may it impose a condition on a s.73 permission which purports to have the effect of altering the earlier permission.

Network Rail Infrastructure Ltd v Welsh Ministers

[2020] EWHC 1993 (Admin)

Summary: A confirmed modification order showed a public footpath over the claimant’s land, from a wooden stile across dual railway tracks, ending at a stone stile giving access to the foreshore of the River Conwy estuary. On the other side of the stone stile a cycle path ran along sloping masonry built to support the lines and which encroached over the high water mark. Fishing and mining had been staple industries in the area. The 1819 OS map showed a route from the estuary foreshore close to store houses, historically used in conjunction with a ferry operating from a point close to 'Ferryhouse' over the Conwy. The Inspector decided that the

evidence, “in particular” tithe and OS maps, and statutory railway plans, showed the route was dedicated to the public at large at common law in the pre-railway age.

It was claimed the railway was built on land reclaimed from the sea, so any public use before 1853 could not have been on the order route, but if anywhere, on a pre-reclamation route. Further, the reference to the Tithe map and the early OS mapping "in particular" showed impermissible weight was put on these documents as showing public as opposed to private use.

Held:

It was the road leading to the foreshore shown on the OS mapping, and not the slipway on the foreshore, which the inspector found was suggestive but not determinative of a public road. Although the footpath led to the foreshore between the high and low water marks, it would not be under water for substantial times of the day, and although frequency of user may be affected by the high tide, that was unlikely to have been significant. The precise point of disembarkation, which was dependent on water depth, was not as important as the fact that access to the foreshore was gained at the store houses over a route very similar to the order route, as a destination or for onward travel.

The inspector correctly highlighted the disclaimer on OS maps that a way shown is not evidence of a public right of way, and similarly with tithe maps, whose purpose was to show the productiveness of land for tithe assessment, and that a private, as well as a public, right of way can diminish such productiveness. The maps were suggestive only of a public road. There was no evidence the ferry was only used by fishermen or miners. The inspector rightly viewed the Store houses and the Ferryhouse next to the foreshore and the link between the ferry and Tywyn, as justifying an inference that the public extensively used this route to access the foreshore and walk along it.

No witness could give direct evidence of the particular use so the inspector could draw proper inferences from the documents, taking into account the absence of evidence, but also of matters such as the provision of a stile and unlocked gate in countering the claim that the occupation crossing was provided for fishermen, and in observing that given the historical access to the foreshore at this location, there was no reason for the public to doubt that it was to continue after construction of the railway.

Railway plans, normally specifically surveyed for the scheme, usually recorded topographical detail faithfully. The 1822 watercolour by Samuel Austin showing a track to the foreshore, and other prints, were creative works not demonstrating public use, and little weight was rightly accorded to them. However it was rational to have regard to what was on the ground after the construction of the railway, as some evidence of pre-existing use and the weight to be attached to that was a matter for the Inspector.

Comment:

In *Ramblers Association v Secretary of State for Environment, Food and Rural Affairs* [2017] EWHC 716 (Admin), it was held that dedication of a public right of way over an operational railway was incompatible with the statutory objectives of Network Rail to provide a safe and efficient railway and its duty to ensure public and passenger safety. The *Welsh Minsters* case illustrates that the statutory incompatibility principle can be defeated if evidence demonstrated dedication to have occurred prior to the construction of the railway.

That proper inferences can be drawn from the available evidence even where there are no direct witnesses, reflects the statement of Lewison LJ in *Fortune and others v Wiltshire Council and Another (2012)*: '*In the nature of things where an inquiry goes back over many years (or, in the case of disputed highways, centuries) direct evidence will often be impossible to find. The fact finding tribunal must draw inferences from circumstantial evidence. The nature of the evidence that the fact finding tribunal may consider in deciding whether or not to draw an inference is almost limitless*.'

Permission to appeal not granted, 11 December 2020 (C1/2020/1377)

New Windsor Corp v Mellor

[1975] Ch. 380

Summary: Bachelor's Acre had been used as of right for "lawful sports and pastimes" for over 300 years.

Lord Denning described how the right arose and the challenge came about: "Bachelors' Acre….was not the preserve of unmarried men and was over two acres in area. From time immemorial it had belonged to the Mayor, Bailiffs and Burgesses. In mediaeval times it was the meadow where young men practised with their bows and arrows. A pair of butts was set up there. When the long bow went out of use, the young men practised with their muskets….in 1967 M., a lady living in the borough, applied to register the land as a town green…"

Held: A customary right had thereby been established which could not be lost by disuse or abandonment. The registration of Bachelor's Acre as a village green was confirmed, the customary right having once been acquired, the green was registrable under the Commons Registration Act 1965.

***Newhaven** Port and Properties v East Sussex CC*

[2012] EWHC 647 [2013] EWCA Civ 276

Town and Village Greens

Summary: Land which is a tidal beach and inundated by water for periods of the day can still be registrable as a town or village green if use by the inhabitants of a locality or neighbourhood within a locality satisfies the remaining tests under s15 of the 2006 Act or its predecessors. Use of the land may be regulated by byelaws, but

for those byelaws to render use precarious, the landowner has to take some overt action to communicate the existence of those byelaws to the public – in the same way that *Godmanchester* requires overt acts on the part of the landowner to communicate a lack of intention to dedicate.

*R (on the application of **Newhaven** Port and Properties Limited) v East Sussex County Council and another*

[2015] UKSC 7 Supreme Court

Key Words: registration of a beach as a town or village green; rights over the foreshore; byelaws; implied licence; statutory incompatibility.

Summary: The case concerned the decision of East Sussex County Council to register an area of beach at Newhaven as a village green. The Supreme Court judgment covers 3 issues.

1. Whether the public have an implied licence to use the foreshore for sports and pastimes and therefore user could not have been "as of right". The Court concluded that the issue was of wide-ranging importance but declined to determine it as it was not necessary to do so for the purpose of determining the appeal. The lower courts had found that members of the public used the beach for bathing "as of right" and not "by right" and the Supreme Court proceeded on the assumption that that was correct.

2. Whether byelaws gave the public am implied licence to use the beach. The relevant byelaws were not displayed and the majority of the Court of Appeal considered that it was essential that any licence be communicated to the inhabitants before it could be said that their usage of the land was "by right". However, the Supreme Court referred to the judgment in ***Barkas*** and found that it is not always necessary for a landowner to draw attention to the fact that use of the land is permitted for use to be treated as "by right". They concluded in this case that there was a public law right, derived from statute, for the public to go on the land and use it for recreational purposes and that this amounted to an implied licence. Accordingly, use was "by right" rather than "as of right".

3. Statutory incompatibility. The Supreme Court held that where Parliament has conferred on a statutory undertaker (in this case the harbour authority) powers to acquire land compulsorily and to hold and use that land for defined statutory purposes (in this case a working harbour), the 2006 Act does not enable the public to acquire by user rights which are incompatible with the continuing use of the land for those statutory purposes. However, the ownership of land by a public body, such as a local authority, which has statutory powers that it can apply in future to develop land, is not of itself sufficient to create a statutory incompatibility.

***Nicholson** v SSE*

[1996] COD 296

Summary: concerns ROWA 1932; HA 1980 s31; WCA 1981 s54 reclassification as a BOAT; statutory dedication; common law dedication; owner's grant of a right of passage to public. In the case of a claim based on less than 20 years, inference of dedication will depend on the facts of the case, "*Prima facie* the more intensive and open the user and the more compelling the evidence of knowledge and acquiescence, the shorter the period that will be necessary to raise the inference of dedication…"

***Norfolk** County Council v Mason*

[2004] EWHC B1 (Ch)

*R (oao) **Norfolk County Council** v SSEFRA*

(QBD)[2005] EWHC 119 (Admin), [2006] 1 WLR 1103, [2005] 4 All ER 994

Summary: (see ROW Notes 3/05, 16/05, 20/05, ROW Advice Note 5) The judgment confirmed that where there is a discrepancy between the DM and the DS, from the relevant date of the map and until such time as the map was modified following a review, the map takes precedence.

Pitchford J said "…the correct approach to the interpretation of the definitive map and statement must be a practical one. They should be examined together with a view to resolving the question whether they are truly in conflict or the statement can properly be read as describing the position of the right of way", and where there is a conflict the map takes precedence because "…the discretionary particulars depend for their existence upon the conclusiveness of the obligatory map".

Held: "For the purpose of s56 of the WCA 1981, the definitive map is the primary and source document. If the accompanying statement cannot be read as supplying particulars of the position of the footpath on the map then the position as shown on the map prevails over the position described in the statement. It is conclusive evidence unless and until review under s53(2)…". "…the number of occasions when the statement cannot be regarded as compatible with the map will be rare. The question whether they are in irreconcilable conflict is a matter of fact and degree. In reaching a conclusion whether the statement can be reconciled with the map, a degree of tolerance is permissible, depending upon the relative particularity and apparent accuracy with which each document is drawn. Extrinsic evidence is not relevant to this exercise save for a comparison between the documents and the situation on the ground at or about the 'relevant date'."

"At review, neither the map nor its accompanying statement is conclusive evidence of its contents. In the case of irreconcilable conflict between the map and the statement, there is no evidential presumption that the map is correct and the statement not correct. The conflict is evidence of error in the preparation of the map and statement which displaces the *Trevelyan* presumption. Each should be accorded the weight analysis of the documents themselves and the extrinsic

evidence, including the situation on the ground at the relevant date, demonstrates is appropriate."

***Norman** & Bird v SSEFRA*

(QBD) [2006] EWHC 1881 (Admin), [2007] EWCA Civ 334

Summary: (see ROW Notes 16/06, 7/07) concerns lack of intention to dedicate.

Laws LJ said "In my judgment it is helpful to distinguish between two possible states of affairs. One is where a landowner merely asserts that he never had an intention to dedicate the relevant way to the public, but gives no evidence, nor is there any other evidence, of any overt act which tends to corroborate that state of mind on his part. The second is where the landowner gives evidence of overt acts barring the public, putting up notices and so forth, although there may not be any independent evidence of such acts, and the landowner's own evidence is again given after the event, perhaps some considerable time after the event."

"The Inspector was required to find facts relevant to the proviso" and "appears to have proceeded on the basis that in order to satisfy the proviso contemporary evidence verified in some way had to be produced". This was held to be a flawed approach, suggesting the Inspector was looking, perhaps exclusively, for evidence that was contemporaneous with the events in question or evidence which actually arose during the 20 year period.

*R v SSE ex parte **North Yorkshire County Council***

(QBD) [1998] EWHC 962 (Admin), [1999] COD 83, [1999] JPL B101

Summary: concerns the 'belief virus' that for the presumption of dedication to arise, user must have been as of right and in the belief that the user had a legal right to use the way. This view was overturned in *Sunningwell*.

Northam Bridge and Road Co. v London and Southampton Railway Co. [1840]

O **Back**

*R v Isle of Wight County Council ex parte **O'Keefe***

[1989] JPL 934, [1989] 59 P & CR 283

Summary: concerns the interpretation of s53 and s54 of WCA 1981 and the OMA's pre-order making responsibilities, including advice from officers as to the correct application of the law to evidence. Held, a decision would be quashed if it could be shown that the decision-making process was flawed. This could arise either because there was a wrong or inadequate appreciation of the law or, because the evidence was presented without proper explanation or emphasis.

Council officials failed to present the evidence fully as they did not qualify the strength of the user evidence or a proper assessment of the submissions by Mr

O'Keefe on the strength of the evidence. They failed to properly consider the legal problems arising with regard to dedication to the public as they had not considered the effect that the land was held on trust and was subject to a mortgage would have on that dedication.

O'Keefe *v SSE and Isle of Wight County Council*

[1996] JPL 42, (CA)[1997] EWCA Civ 2219, [1998] 76 P & CR 31, [1998] JPL 468

Summary: resulted from a challenge to the legality of the DM process in general and s53 and s54 of the WCA 1981. Concerns evidence of intention, meaning of 'as of right'. It was argued that an order made under s53(3)(c)(i) of the WCA 1981 for the addition of a footpath should have been made under s53(3)(b). Held: s53(3)(c)(i) is drafted widely enough to encompass user evidence.

Pill J said there is "no impediment to the way being made by reference to section 53(3)(c)(i). It meets the case. Parliament thought it right to specify a particular statutory presumption which arises from the Highways Act [1980 s31] in a specific paragraph [s53(3)(b)], but that does not remove jurisdiction to make an order to which the presumption is relevant under the general powers in paragraph (c)(i)". OMAs are reminded to make their own assessment of the evidence rather than accept their officers' view without question. (Comment on 'as of right' has been superseded by *Sunningwell*)

Oxfordshire *County Council v Oxford City Council & Robinson*

[2004] EWHC 12 (Ch), [2004] Ch 253, [2005] EWCA Civ 175

(HL)[2006] UKHL 25, [2006] 2 AC 674, [2006] 4 All ER 817

Summary: (Trap Grounds) the HL held that in the case of an application to have land registered as a village green under the Commons Registration Act 1965, the 20 year period of user required must precede the date of application, not (as held in the CA) the date of registration (see also *Laing Homes* and *Redcar*, RWLR s15.3 pg 135).

The ***Open Spaces Society*** *v Secretary of State for Environment, Food and Rural Affairs [2020] EWHC 1085 (Admin), [2021] EWCA Civ 241*

Summary: the OSS sought judicial review of the Inspector's decision, ROW/3217703 to confirm the Oxfordshire County Council Rollright Footpath No. 7 (Part) Public Path Diversion and Definitive Map and Statement Modification Order 2015. She considered the test of expediency in s119(6) Highways Act 1980, was an overarching balancing exercise and there was a "relatively minor loss of public enjoyment of the path as a whole which must be weighed against the interests of the owners/occupiers". On balance she found the benefits to the owners/occupiers outweighed the loss of public enjoyment and it was expedient to confirm the order.

Held (upholding the lower court): When deciding whether it is expedient to divert a public right of way the decision maker must have regard to the matters specified in paragraphs (a) to (c) of 119(6) and any material provision in a rights of way improvement plan (119(6A)). They may also have regard to any other relevant matter including, if appropriate, the interests of the owner or occupier of the land over which the path currently passes, or the wider public interest.

The Inspector was correct in that a broad balance or merit judgement is to be made by the decision-maker pursuant to the overarching test of expediency. The expressly stated negative factors must be taken into account, they were not an exclusionary list. Benefits of the diversion to landowners and the public were also relevant considerations under the balancing exercise. This could include for example other wider possible benefits such as the interests of agriculture, forestry or biodiversity.

The judgment confirms the approach to be taken when the decision maker is determining whether it is expedient to divert a public right of way. It will be for the inspector to weigh the different considerations, including those specifically set out in section 119(6) and (6A) and any others that are relevant. It is usually the case that the party or parties in whose interests the order was made would be taken into account in deciding expediency. It must not be assumed though that those interests will prevail in all circumstances, no matter how strong other competing interests.

*R (**Oxfordshire and Buckinghamshire Mental Health NHS Foundation Trust** v Oxfordshire County Council*

[2010] EWHC 530 (Admin)

Summary: (RWLR 15.3 p167-174) concerns town and village greens and the erection of prohibitory notices and meaning of neighbourhood and locality.

On notices, the fundamental question is what the notice conveyed to the user; evidence of actual response to the notice by actual users is relevant; the nature, context and effect of the notice must be examined; it should be read in a common sense not legalistic way; would more actions/notices by the landowner have been proportionate to the user; subjective intent of what a notice is to achieve is irrelevant unless communicated to the users or a representative of them. (see also *Leeds Group plc v Leeds City Council*)

P **Back**

***Paddico** (267) Limited v Kirklees Metropolitan Council & others*

[2011] EWHC 1606 Ch [2012] EWCA Civ 262

Town and Village Greens – on the meaning of locality

*Jonathan Adamson v **Paddico** (267) Limited (1), Kirklees Metropolitan Borough Council (2), William John Magee (3), Thomas Michael Courtney Hardy (4)*

[2012] EWCA Civ 262 (Court of Appeal)

Key Words: Registration of a town or village green; rectification of the register; effect of delay; meaning of "locality".

Summary: The appeal related to an Order that the register of town and village greens be amended by the deletion of the entry relating to Clayton Fields. The case confirmed Lord Hoffman's observations in the *Oxfordshire* case and Vos J at first instance that a "locality" within s22 (1) of The Commons Registration Act 1965 and s98 of the Countryside and Rights of Way Act 2000 is singular and must have legally significant boundaries.

The Edgerton Conservation Area although having legally significant boundaries, could not be a "locality" as the boundaries were legally significant for a particular statutory purpose and defined by characteristics relating to special architectural or historic interest rather than by reference to any community of interest on the part of its inhabitants. Furthermore, the Conservation Area was not in existence for the full 20 year period.

The CoA also found the Vos J conclusion relating to the "predominance" test to be correct and confirmed that it is necessary to show that the land is used predominantly by the inhabitants of a defined locality.

The longer the delay in seeking rectification the less likely it is that it will be just to order rectification of the register. In this case the delay of over 12 years was "by the standards of any reasonable legal process, so excessive as to make it not just to rectify the register". Carnwath LJ would regard "a delay beyond the normal limitation period of 6 years as requiring very clear justification".

However, the CoA was not unanimous on the issue with Patten LJ dissenting on the basis that the registration had been found to be unlawful and there was no injustice in the Appellant being deprived of rights to which he was never entitled. See ***Betterment*** for further discussion of delay.

***Parker** v Nottinghamshire CC and SSEFRA*

[2009] EWHC 229 (Admin)

Summary: Concerns whether or not the order made under s53 WCA 1981 adequately described the width of the way to be added to the DMS; and whether the Inspector had proper regard to the Trent Navigation Act 1783 by which private rights of way were created alongside the river (and over the claimed route) thus, it was argued, negating the evidence of the 1771 Inclosure Act and 1773 Award, which it was further argued had not been carried out in accordance with the legal

requirements. The Inspector's approach and conclusions reached on the Inclosure Act and Award, and on the Navigation Act, were upheld.

The judge held that a description of the width of a row can be provided by giving a numerical description, by reference to physical features, or, as in this case, by reference to a plan with a width marked on it (as referred to in Defra's non-statutory guidance of 12/02/07). He also remarked that the Council would no doubt assist the landowner in determining how much of their land was affected by the row (i.e. it's not up to the Inspector, precise detail cannot always be achieved!).

Parkinson v SSE and Lancashire CC

[1992]

Parry v SSE and Shropshire CC

[1998]

***Paterson** v SSEFRA & Oxfordshire CC & The Ramblers' Association*

[2010] EWHC 394

Summary: (RWLR 6.3 p139-144) concerns the relevant 20yr period for s31 HA and interaction of public and private rights over the same land. Held, the proper interpretation to be placed on notices, taking into account their context was a matter for the Inspector. In order for the presumption in s31(1) to operate it is only necessary to identify some period of 20yrs back from the date of bringing into question – ss31(2) does not identify the 20yr period as when the way was first brought into question, but enables reliance to be placed on any 20yr period ending with such an event.

The meaning of the wording of notices displayed on the way was a matter for the Inspector and how users understood signs in a particular context may indicate how a reasonable person would interpret them in that context. Notice under s31(5) would count as sufficient evidence of a lack of intention to dedicate provided it is given in the relevant period. Sales J concluded the evidence of actions in 1934 should be assessed by reference to the terms of the current rather than previous legislation. The existence of private rights whilst making it difficult for a landowner to make clear their intention could be resolved by clearly worded notices. It was a matter for the Inspector to conclude whether or not the landowners had made their position clear.

R (Pereira) v Environment and Traffic Adjudicators and London Borough of Southwark

[2020] EWHC 811 Admin

This case concerned parking on a privately owned piece of land for which the owner had received a parking ticket. It raised the issue of whether such a piece of land could be regarded as a 'road to which the public has access' so as to preclude even

the owner from parking on it. It had been held by the Traffic Adjudicators that the land had been demonstrated to be an Adopted Public Highway (APH). After a challenge by P a review adjudicator determined that it had not been demonstrated that the land was an APH but that it had been dedicated as a highway under Section 31 of the Highways Act 1980 as a result of 20 years of public use, even though this had never been claimed by Southwark. Accordingly, the Pereiras had not had a fair opportunity to rebut it and this was sufficient reason to dispose of the case. However, the judge also held that the review adjudicator had erred in law in interpreting Section 31. It had been decided that even when the strip of land in question was obstructed by parked cars, which it often was, pedestrians could proceed by way of another strip, also owned by the Pereiras, on which cars were not normally parked. This was held to be incorrect as it would suggest that however a landowner sought to obstruct a way so as to prevent public access, a public right could still be presumed if people found a way of circumventing the obstruction. The judge then held that there was no legitimate basis for remitting the question of Section 31 dedication for reconsideration as the adjudicator's conclusion was erroneous and unsustainable and therefore fatal.

Nevertheless, the review adjudicator had not addressed the question of whether the land was an APH and this should have been remitted for reconsideration unless it could be demonstrated that rejection of this was the only lawful conclusion the adjudicator could have come to. For the land to have become an APH it was necessary for the public to have had both factual and legal access to it. In this case it was held that by parking cars on the land for significant periods on 200 days of the year the Pereiras had prevented factual public access to it. This conclusion was sufficient for an order substituting the success of the Pereiras to be made without remittal for further review.

The judge also made some *obiter* comments with regard to the question of legal public access in which he determined that it would have been possible to find that public access had only been allowed on the basis of tolerated trespass but on the facts in this case he would not have done so. However, he would have been minded to find that public access was available as a result of an implied licence at such times as the land was not required for private parking.

The application for judicial review was upheld, the traffic adjudicator's decision quashed and substituted with an order to cancel the penalty charge.

*Mr A and Mrs P **Perkins** v SSEFRA and Hertfordshire CC*

(QBD)[2009] EWHC 658 (Admin)

Summary: (see ROW Note 5/09)(RWLR 8.2, p175-177) whether the order (confirmed with modifications) adequately and accurately identified the route of the FP. Challenged on 2 grounds – accuracy and breach of a previous Consent Order (1997, see *Perkins* Consent Order) in respect of the order plan. The issue came down to a question as to what degree of detail is possible and required as a matter of law.

Judge remarked "I accept that if it is possible, it will generally be desirable to show an order route to a high level of precision, but that will be the position if there is evidence to support such precise delineation actually relating to the right of way in question. Where, as is often the case, the existence of the right of way is shown by historical maps of varying quality, vintage and produced for varying purposes…there is certainly no requirement in law to show the route with a greater degree of particularity than can be justified on the basis of the available evidence"

"The Inspector dealt with various issues relating to the precision with which the footpath could/should be displayed, the location of the route and the description in the statement. Her conclusions on those various points were a matter of judgment for her on the evidence available and, to a degree, were for her discretion as to how things should be shown within the order. That said…the principal issue is whether the Inspector erred in concluding that the "Definitive Statement" could provide "…the necessary detail" absent from the plan".

The Judge concluded it was a matter for the Inspector, and held the Consent Order quashing the 1997 order had no bearing on the present order. See also *R v SSE ex parte Simms and Burrows*.

R (oao) **Pierce** v SSEFRA

[2006]

Summary: (see ROW Note 14/06) concerns a s119 order under HA 1980 and whether or not the Inspector was right not to go on to consider the tests in s119(6)(a) to (c) having concluded the second test, that the way will not be substantially less convenient to the public had failed.

***Poole** v Huskinson*

[1843] 11 M & W 827

Summary: concerns common law dedication; intention to dedicate; interruption; and limited dedication. The case concerned a private carriage road set out by an Inclosure Act. Local parishioners claimed it had become a churchway but not a highway.

Lord Parke "A single act of interruption by the landowner is of much more weight, upon a question of intention, than many acts of enjoyment." "There may be a dedication to the public for a limited purpose, as for a footway, horseway or driftway; but there cannot be a dedication to a limited part of the public, as to a parish." For dedication of a way to the public by the owner of the soil, "there must be an intention to dedicate…of which the user by the public is evidence, and no more" subject to rebuttal by contrary evidence of interruption by the owner.

***Powell & Irani** v SSEFRA & Doncaster Metropolitan Borough Council*

(QBD) [2009] EWHC 643 (Admin)

Summary: (see ROW Note 5/09) claimed breach of natural justice in refusal to grant an adjournment at the Inquiry held; no evidence before the Inspector concerning the width of the way. The Judge concluded on the basis of the evidence before the Inspector the objector was not at fault in leaving others to pursue the objection, an agreement to that effect having been reached through solicitors; there was nothing to suggest he should have appreciated they were not pursuing the objection, and notice of an application for adjournment was made at the start of the inquiry; written submissions summarised what needed to be done for the objector to properly prepare his case.

"Whilst the impact of the Order on the Claimants may not be relevant to the substantive issues before the Inspector, it is, in my view, relevant to matters of procedural fairness arising during the proceedings, and in particular to the determination of the application for an adjournment". Held, the refusal of the application for an adjournment amounted to a breach of natural justice. In view of this, no judgment was made on the issue of width.

Powell & Irani *v SSEFRA & Doncaster Borough Council*

[2014] EWHC 4009 (Admin)

Key Words: S31 HA 1980; as of right; reasonable landowner; S53(2)(a) duty to modify definitive map and statement.

Summary: can presumed dedication arise under S31 Highways Act 1980 if use of the way by the public as of right is proved for a 20 year period, but the particular circumstances of the use are such that a landowner who is reasonably vigilant in protecting his rights cannot have been expected to prevent the use?

The case concerned a decision to confirm a 2012 DMMO to add a route to the DMS which had been used for 20 years despite having been diverted by a public path order in 1967. The definitive map had never been updated to record the alteration and therefore the original line of the footpath remained on the definitive map.

Held that it is "absolutely clear" from the authorities that there is no additional test over and beyond the tripartite test of *nec vi*, *nec clam*, *nec precario*. Posing the tripartite test is the law's way of assessing whether or not it is reasonable to expect that the use would be resisted by the landowner. The structure of the inquiry should be as follows: first, an examination of the quality and quantity of the use which is relied upon; then consideration of whether any of the vitiating elements from the tripartite test apply, judging the question objectively from how the use would have appeared to the owner of the land. There is no additional test of a reasonable landowner.

In addition it was argued that the 2012 order must be quashed as otherwise the OMA would not be able to fulfil its duty to modify the DMS to give effect to the 1967 order. It was held that the duty is to modify the map in a way which ensures that it

reflects the up to date position and the 2012 order effectively superseded the 1967 order.

Conflict with para 4.35 of Circular 1/09 – “rights that cannot be prevented cannot be acquired”.

Q **Back**

R **Back**

*The **Ramblers' Association** v Kent County Council*

(QBD)[1990] 154 JP 716, [1990] COD 327,[1990] 60 P & CR 464, [1991] JPL 530

Summary: concerns s116 of HA 1980 and powers of magistrates to stop up highways, mandatory nature of notices that were necessary in order to give the magistrates jurisdiction to hear an application to stop up a way. Wolf LJ said “In a sense, they could be described as technical. However, the importance of failing to give the required notices should not, for this reason, be underestimated because the notices were intended to bring to the attention of the public the proposals to stop up the public rights of way and, if the public were not aware of a proposal, they might be deprived of an opportunity of protecting the public rights to which they were entitled”.

The Ramblers Association v SSEFRA

[2017] EWHC 716 (Admin)

Key Words: S31(8) Highways Act 1980, incompatibility exception; S55 British Transport Commission Act 1949, trespass as criminal offence; Network Rail Licence; dedication of cul-de-sacs.

Summary: The case concerns a claimed footpath over a railway crossing. Network Rail (NR) claimed that they had no capacity to dedicate a new public right of way on the basis that dedication would be inconsistent with its obligations to operate a safe and efficient network. S31(8) Highways Act 1980 provides that nothing in S31 “*affects any incapacity of a corporation of other body or person in possession of land for public or statutory purposes to dedicate a way over that land as a highway if the existence of a highway would be incompatible with those purposes”.*

It was held that although the Inspector failed to explicitly mention S31(8) he had applied the correct test. The main question before the court was the date at which the assessment of statutory incompatibility should take place. Dove J found that there were sound practical reasons why the facts should be assessed at the point in time when the question arises as *“consideration of whether or not the recognition of a right of way would be incompatible with the statutory undertaker’s statutory duties is in large part going to be a forward-looking exercise”.* He also stated that

considering the safe and efficient operation of the railway in, for example, 1970 would have to be on the basis of technical standards and engineering knowledge at that point in time which would be an artificial exercise. He concluded that *"The question of fact under section 31(8) is to be examined at the point in time when the order is being examined".*

The Inspector's conclusion that the Order should not be confirmed on the basis that the use of the level crossing by pedestrians amounted to a trespass which was rendered criminal by S55 of the British Transport Commission Act 1949 was also upheld. All parties accepted that the doctrine of illegality operated as a free-standing principle upon which the Order could be defeated, as opposed to being a factor which was part and parcel of the considerations under s31. Dove J found a clear public interest in excluding trespassers from the railway lines who may not only come to harm themselves , but also may give rise to health and safety risks for those working on the railway, and that this public safety objective was of particular weight in striking the balance between this and the public interest underpinning S31.

NR also claimed that the licence pursuant to which NR operates the rail network would not permit the creation of new rights over railway land without the consent of the Office of Rail and Road. Written submissions were made concerning whether or not the licence had the effect of preventing NR through statutory incompatibility from dedicating a footpath, but as the Inspector had not founded his conclusions on this aspect, the point was not pursued at the hearing. All parties reserved their position in relation to it.

A final point in this lengthy and complex judgment concerns the dedication of cul-de-sacs. The Ramblers stated that there was no reason why the Inspector could not have confirmed the order as, in effect, 2 cul-de-sacs each running up to the railway lines and terminating at the point where the level crossing commenced. Dove J stated that there was *"no prima facie right for the public to pass from the public highway (where they have a right to be) to a location where they have no right to be (such as a location which does not join up with other parts of the rights of way network)"* and that the question is one of evidence in each case. In this case there was no evidence to suggest that people were using the two cul-de-sacs to gain access to the railway as a point of popular resort. Rather the claimed cul-de-sacs were used as parts of a single journey crossing the railway.

Ramblers' Association v SSEFRA and Oxfordshire County Council

[2012] EWHC 333 (Admin)

Key Words: Diversion order; structure of test in S119 Highways Act 1980; expediency; relevant issues

Summary: In concluding that it was expedient to confirm a diversion order the Inspector stated that 2 arguments which were raised were not relevant to the tests for confirmation set out in s119. These were that the applicants had bought the mill knowing of the existence of the footpath and that therefore it was not legitimate for

them to expect to divert it and the question of precedence in relation to other paths close to mills.

The Secretary of State conceded that the Inspector erred in law in treating the 2 matters as irrelevant. However, Ouseley J stated that he had "very real doubts" as to whether the concession relating to the applicants knowledge was correct and pointed out that "it is plain that there is no statutory bar to a person making an application in circumstances where they have acquired the property with knowledge".

Most of the judgment concerns an argument put by George Laurence QC regarding the structure of s119 and how the tests in it should be applied. Ouseley J found Mr Laurence's analysis "untenable. It is unnecessarily complicated, repetitious and not borne out by the statutory provisions".

He found that when considering the s119(1) expediency question under s119(6) the Inspector must do so by confining himself to what is in the interests of the landowner. "He is not at that stage concerned with the exercise of the discretionary powers which arises once a conclusion has been reached about what is expedient in the interests of the landowner. That wider class falls to be dealt with under the second expediency question in s119(6)".

The expediency issue in s119(6) is not confined to the specific powers in sub-paragraphs (a) to (c), nor to the effect of compensation. It covers all considerations that are material. "The fact that there is a focus given by statute to specifying factors does not narrow down the scope of expediency in its application at that stage".

Furthermore there is no residual discretion to come to a view other than that to which the answer to the questions of s119(6) would otherwise point. "I cannot conceive of circumstances in which, having properly answered the section 119(6) questions and concluded that it was expedient in relation to both questions that the diversion order be made, an Inspector rationally could say that nonetheless the order should not be confirmed".

*R (Lewis) v **Redcar** and Cleveland Borough Council*

(QBD)[2008] EWHC 1813 (Admin), (CA)[2009] EWCA Civ 3, (SC)[2010] UKSC 11

Summary: (see RWLR 15.3 p139-146 for CA and p161-165 for SC comments) concerned whether a piece of open land which formed part of a golf course ought to have been registered as a town green under s15 of the Commons Act 2006. The Inspector found local residents when using the land for recreation deferred to golf players.

Held, allowing the appeal: (1) the critical question is what are the respective rights of the local inhabitants and the owner of the land once it has been registered. The statutes give no guidance on this. The 1965 Act was intended to be a two stage process: the registers would establish the facts and provide a definitive record of what land was/not common land or town or village green, and Parliament would deal

with the consequences of registration by defining what rights the public had over the land that had been registered.

(2) The origin of deference lies in the idea that once registration takes place, the landowner cannot prevent use of the land in the exercise of the public right which interferes with his use of it (see *Laing Homes Ltd*). It would be reasonable to expect him to resist use of his land by the local inhabitants if there was reason to believe that his continued use of the land would be interfered with when the right was established. Deference to his use of it during the 20yr period would indicate to the reasonable landowner that there was no reason to resist or object to what was taking place.

But accepting the rights on either side can co-exist after registration subject to give and take on both sides, the part that deference has to play in determining whether the local inhabitants indulged in lawful sports or pastimes as of right takes on a different aspect. The question is whether the user by the public was of such amount and in such manner as would reasonably be regarded as being the assertion of a public right. Deference by the public to what the owner does on his land may be taken as indication that the two uses can in practice co-exist.

(3) The position may be that the two uses cannot sensibly co-exist at all. But it would be wrong to assume, as the inspector did in this case, that deference to the owner's activities, even if it is as he put it overwhelming, is inconsistent with the assertion by the public to use the land as of right for lawful sports and pastimes. It is simply attributable to an acceptance that where two or more rights co-exist over the same land there may be occasions when they cannot practically be enjoyed simultaneously.

If any of the local inhabitants were to exercise their rights by way of all take and no give in a way to which legitimate objection could be taken by the landowner they could, no doubt, be restrained by an injunction. The inspector misdirected himself on this point. The question then is whether the council's decision which was based on his recommendation can be allowed to stand if the facts are approached in the right way.

(4) The facts of this case, as described by the Inspector, show that the local inhabitants were behaving when they were using the land for sports and pastimes in the way people normally behave when they are exercising public rights over land that is also used as a golf course. They recognise that golfers have as much right to use the land for playing golf as they do for their sports and pastimes.

Courtesy and common sense dictates that they interfere with the golfer's progress over the course as little as possible. There will be periods of the day, such as early in the morning or late in the evening, when the golfers are not yet out or have all gone home. During such periods the locals can go where they like without causing inconvenience to golfers. When golf is being played gaps between one group of players and another provide ample opportunities for crossing the fairway while

jogging or dog-walking. Periods of waiting for the opportunity are usually short and rarely inconvenience the casual walker, rambler or bird-watcher.

(5) The court cannot find anything in the inspector's description of what happened in this case that was out of the ordinary. Nor does the court find anything that was inconsistent with the use of the land as of right for lawful sports and pastimes.

Judgment can be accessed via PINS website in link to JPL issue 9,2010)

***Reid** v the Secretary of State for Scotland*
[1999] 2 AC 512

Summary: Lord Clyde in his speech notes as follows: "Judicial review involves a challenge to the legal validity of the decision. It does not allow the court of review to examine the evidence with a view to forming its own view about the substantial merits of the case. It may be that the tribunal whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from the procedures which either by statute or at common law as matter of fairness it ought to have observed.

As regards the decision itself it may be found to be perverse, or irrational, or grossly disproportionate to what was required. Or the decision may be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, or of sufficient evidence, to support it, or through account being taken of [an] irrelevant matter, or through a failure for any reason to take account of a relevant matter, or through some misconstruction of the terms of the statutory provision which the decision-maker is required to apply. But while the evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies it is perfectly clear that in a case of review, as distinct from an ordinary appeal, the court may not set about forming its own preferred view of the evidence. These principles are quite clear."

*R(oao) **Mr and Mrs Ridley** v SSEFRA and Mr and Mrs Ridley & Mrs M Masters v SSEFRA*

[2009] EWHC 171 (Admin)

Summary: (see ROW Note 5/09)(RWLR 9.3, p175-177) concerns order upgrading a FP to BR at common law, confirmed following 2 inquiries and 2 costs decisions. Challenged on grounds Inspector misunderstood relevant evidence and had regard to immaterial consideration; that the decision was perverse being based on insufficient evidence. Held that, "As a matter of logic and common sense, it is perfectly plausible that an accumulation of material pieces of evidence may lead to a conclusion that while none of them, of itself, actually points to a particular result, taken as a whole they do"; that there had been a failure to consider relevant evidence – all 3 grounds were dismissed.

Costs decision challenged on grounds it was unarguable and should be refused as the decision mischaracterised guidance as procedural requirement, and failed to

have regard to the fact a skeleton argument had been provided in advance of the second inquiry – both grounds dismissed. The Judge commented "The nub of the Inspector's reasoning for concluding that Mrs Masters' conduct was unreasonable was that Mrs Masters was undoubtedly aware that substantial material, which was going to be relied upon at the Inquiry, needed to be made available well before the Inquiry began" and with regard to the skeleton argument, "The Inspector concluded that that document was inadequate to allow anyone to prepare in relation to the information later brought forward at the Inquiry. This was pre-eminently a matter for the Inspector".

On documentary evidence, the absence of any deduction for prow in a valuation carried out under the 1910 Act does not necessarily signify that there was no recognised highway over the hereditament in question. Failure to claim such a deduction was unlikely to prejudice the landowner unless the land attracted the annual charge, known as "undeveloped land duty", which was imposed by reference to the "assessable site value" of undeveloped land (the value of the land as a building site after deducting the actual or estimated cost of clearing the site). While a way may be uncoloured on the FA map, it does not necessarily point to it being a public carriage road. On Tithe, the different treatment of sections of the route reflected those parts enclosed and that part enclosed on one side, for apportionment purposes the value of the whole of the land inclusive of the track being assessed.

R v SSE ex parte **Riley**

(QBD)[1989] 59 P & CR 1, [1989] JPL 921

Summary: concerning the Countryside Act 1968 and whether reclassification as a bridleway or footpath extinguished vehicular rights. The judge took the view that it did not.

Note: Defra letter to OMAs March 2004 which considered such rights had been extinguished, and *R (Kind) v SSEFRA* which held they had not.

***Re St John's**, Chelsea*

[1962] 2 All ER 850

Summary: ecclesiastical law, consecrated ground, church site, proposed use of site as car park. Held, a faculty for the secular use of consecrated ground cannot be granted unless the proposed user falls within the restricted category of wayleaves, or the purpose for which the ground was originally consecrated can no longer lawfully be carried out.

***Re St Martin le Grand**, York; Westminster Press Ltd v St Martin with St Helen, York (incumbent and parochial church council) and others*

[1989] 2 All ER 711

Summary: concerns right of way over ecclesiastical property, prescription, user as of right, presumption of grant of faculty. Held, a right given to a person to pass over consecrated land cannot, without the grant of a faculty, amount to more than a licence granted by the incumbent for the duration only of his incumbency, and cannot be binding on his successors in title to the freehold. The principle that consecrated land should be protected from secular use is not an absolute one. See also *Morley BC v St Mary the Virgin, Woodkirk*.

***Roberts** v Webster*

[1967] 66 LGR 298, 205 EG 103

Summary: concerns evidential weight of inclosure documents. An appeal against a decision of the justices at quarter sessions where they had to decide whether a highway existed before 1835 and whether it was publicly maintainable. Their decision was based on inclosure evidence that the way existed in 1859.

Widgery J stated: "It seems to me that the inclosure award of 1859 is very powerful evidence indeed to support the view that Pipers Lane at that time was reputed to be a public highway....If they (the justices) concluded, as they did, that the inclosure award was such a powerful piece of evidence that they should infer from it that a highway existed over this road in 1859, I can see no fault in their doing so. Indeed, speaking for myself, I am prepared to say that had I been sitting with the justices at quarter sessions, I feel sure that I should have adopted the same view."

Also held: notwithstanding *Eyre v New Forest Board*, there was no rule of law that a cul-de-sac in a district could never be a highway, and if there was some attraction at the end which might cause the public to wish to use it that could be sufficient to justify the conclusion that a highway had been created.

*Hywel James **Rowley** and Cannock Gates Ltd. v SSTLR*

(QBD)[2002] EWHC 1040 (Admin), [2003] P & CR 27

Summary: (see ROW Note 19/02) concerns s31 of HA 1980 (statutory presumption of dedication) – whether a tenant's positive actions could be attributed to the landowner.

Elias J "seemed acquiescence of the tenant was the basis of the case for the assertion that there was user as of right… it would surely be implied that the tenant would have the right to decide who should be entitled to go onto his land and whom he may forbid. I find it difficult to see why the tenant's acquiescence should bind the landlord, but not positive acts taken by the tenant in accordance with the exercise of his rights over the property, to exclude strangers." And "if it is alleged that the freeholder has a different intention to the tenant, there should at least be evidence establishing that."

"In the context of whether or not permission has been granted, therefore, the question is simply whether objectively viewed the evidence justifies the inference

that there is implied permission, not whether the public are made aware of the acts relied upon as giving rise to that implication".

*The Queen on the application of **Roxlena Limited** v Cumbria County Council and Peter Lamb*

[2017] EWHC 2651 (Admin)

Key Words: Accuracy of route alignment. Foot and Mouth as interruption. Discovery of evidence.

Summary: The case concerns a decision by the authority to make an Order under Schedule 14. The first ground of challenge was that the evidence relied upon was insufficient to plot the exact route and widths of the paths in question so that they could be unambiguously identified. It was held that the obligation on the surveying authority is to make a judgment on the basis of the best evidence it has. It would be unjust to require a standard that would be impossible to meet for example "*where, as in this case, a determined and hostile landowner exercises the right not to cooperate in the process by permitting access to the land*".

The court also considered the question of interruptions to use caused by the foot and mouth outbreak. Kerr J stated that he did not agree with the Advice Note of November 2012 or the Marble Quarry decision (inspector's decision). He stated (obiter) that he saw no basis for the proposition that "*an interruption which is more than de minimis but caused by measures taken against foot and mouth disease, is incapable in law of amounting to an interruption in use of a footpath or other way… Use or non-use is a question of fact: the cause of any non-use is not the issue*". In this case he found that the simple point was that 40 persons gave evidence of uninterrupted use over the requisite 20 year period. Whether those users may have forgotten a time when they didn't use them due to foot and mouth were points for the inspector at an inquiry if one were held. There was no need for the council to ask specific questions about foot and mouth disease at the preliminary stage.

The case concerned an application which relied on evidence (user evidence forms) presented with a similar, earlier, application which was not determined because of a supposed procedural defect. It was submitted that the council was wrong to take into account those UEFs as that evidence had already been "discovered" and could not be discovered again. Kerr J accepted that the UEFs were the subject of "discovery" when the earlier application was submitted and that they were not discovered a second time when the second application was made. However, he made it clear that it was preferable to interpret the statutory provisions in a way that promotes justice and found that the duty of the council to make modifications to the map and statement as appeared to it to be requisite in consequence of that discovery, remained in place. The duty did not cease to apply once an application had been made. "*There is nothing in the statutory language which prevents an applicant from relying upon evidence discovered years earlier but not yet acted upon by the authority concerned*".

The judge also made an interesting obiter comment. The applicant withdrew her application prior to determination due to threats of legal action against her. The claimants suggested that the Council could not then continue to deal with it. Kerr J stated that the authority was right to deal with the application as the obligation to investigate the matters stated in it, and to decide whether or not to make an order, survived any purported withdrawal.

NB: Given that the comments regarding F&M were obiter, DEFRA does not intend to revise AN15.

Roxlena Ltd, R (On the Application Of) v Cumbria County Council

[2019] EWCA Civ 1639

Summary: H applied for an order to modify the DMS by adding footpaths over land owned by R. Evidence of 20 years' continuous use was produced. A further application in 2013 added a claimed bridleway. CCC considered there was enough evidence to show a reasonable allegation that there had been uninterrupted use of the paths for over 20 years. It rejected R's case that restrictions in the foot and mouth outbreak in 2011 had interrupted the claimed user period.

Hayton Woods had not been surveyed by CCC as successive owners refused to allow this, nor did any aerial photographs show any paths beneath the trees. Evidence of the routes and their use, which was contentious, was contained in various maps, records, statements and questionnaire replies. The court was asked: (1) whether there was sufficient evidence to justify making the order for the footpaths; (2) whether the Council failed to discharge its duty to investigate alleged interruption of the use; (3) whether the Council had made a discovery of evidence within section 53(3)(c) of the Act; and (4) whether there was sufficient evidence to justify making the order for the bridleway.

***Rubinstein** and another v SSE*

(QBD)[1989] 57 P & CR 111, [1988] JPL 485

Summary: Held that once a right of way was shown on the DM it could not be deleted – overturned by Simms and Burrows.

S **Back**

***Sage** v SSETR & Maidstone Borough Council*

[2003] UKHL 22, [2003] 1 WLR 983, [2003] All ER 689

Summary: concerns a planning enforcement judgment. Held: the exception to development in s55(2)(a) TCPA 1990 applied only to a completed building on which work was carried out for its maintenance, improvement or other alteration. It did not apply to work required to complete a building which was subject to planning control. Even if the remaining work on an incomplete dwelling was to be carried out inside

the building and did not materially affect its external appearance, it did not fall within the exception, and the building could not be regarded as substantially completed for the purposes of s171B(1).

An application made for permission for a single operation was made for the whole of the building operation because final permission required a complete structure. If a building operation was not carried out, both internally and externally, fully in accordance with the permission, the whole operation was unlawful. That differed from where a building has been completed but was altered or improved.

Somerset County Council v **Scriven** (1985)

Summary: SCC as highway authority, claimed a section of Woolhayes Lane between points B and C (where there were gates), was a highway for all purposes. It ran through farmland once owned by SCC but they sold it to Mr Scriven (S). In 1975 S put locks on the gates and said they were locked once a year, on Christmas Day. Based on the enclosure award documents it was found that Woolhayes Lane was highway over the whole of its length, at least since 1814, despite there being no evidence in the Quarter Sessions records that the enclosure award was ever complied with, and no indication on the 1839 tithe map of any road between B and C. The tithe map would cast serious doubt on the status of the length B-C but "*was not capable of destroying the cogency of antecedent evidence*". As to the specific points argued by S and his family:

Held:

1) the gates prevented cattle straying from common land, it making sense to leave the land in between unfenced, but their existence "did not rebut the overwhelming evidence of public user".
2) the evidence that the gates were locked was not objective, and it was likely that the inhabitants of the area would attend church on Christmas Day when any locking of the gates would be noticed.
3) the evidence that acts of maintenance by SCC were other than under an obligation, were unconvincing and other repairs they did were solely as a result of flooding.
4) "*The dedication of a highway is a matter of inference to be drawn from all relevant circumstances*". S's family were happy for villagers to use the lane, and later, with the advent of social mobility, strangers began to use it. The attitude of S and his family was powerfully in favour of a dedication.
5) Although S's family had been tenants of SCC and as such the dedication as found by the court would not be binding as against SCC as landlord, as highway authority SCC was the successor of the inhabitants of the district and *"to suggest that use of a road by the inhabitants should not bind the County Council, if it also happens to own the land through which the road passes, is wholly unreal and untenable*."

***Sheringham Urban District Council** v Halsey*

[1904] ChD 68 JP 395

Key words: Highway, public footway, award under an Inclosure Award, Right of user for barrows and carts, post, obstruction, removal, injunction

Summary: By an award made under an Inclosure Act a strip of land, about six feet wide, was awarded as a footway. Some years after this award had been made certain persons used this lane for the passage of barrows and handcarts,

some few of which were pulled by donkeys or ponies. This user continued for forty or fifty years, when the plaintiffs placed a post at the entrance to this lane to prevent its further user by barrows and carts. The defendant removed this post, claiming a right to use the lane for carts and barrows. The plaintiffs thereupon claimed an injunction to restrain him from interfering with the post.

Held, that the user by wheeled traffic was in its inception and had been all along a public nuisance; that it was illegal, and that no length of time could legalise it; and that after the award no one could have had the power to dedicate the lane as a highway for all purposes.

R v SSE ex parte ***Simms & Burrows***

[1990] 3 All ER 490, (CA)[1990] 60 P & CR 105, [1990] WLR 1070, [1990] 89 LGR 398, [1990] JPL 746, [1991] 2 QB 354

Summary: concerns status of DM and its modification through 'discovery' of evidence, information "which may or may not have existed at the time of the definitive map". Read in conjunction with Circular 19/90 (WO Circular 45/90). The purpose of s53 and s54 of the WCA 1981 is to achieve a DM which shows accurately which rights of way exist. The DM is conclusive evidence of the existence of a public right of way unless and until it is modified.

The judgment confirms that s53(3)(c)(ii) permits both upgrading and downgrading of highways and that s53(3)(c)(iii) permits deletions from the DM. Purchas LJ said he could "see no provision in the 1981 Act specifically empowering the local authority to create a right of way by continuing to show it on the map, after proof had become available that it had never existed" and there was a duty to "produce the most reliable map and statement that could be achieved", by taking account of "changes in the original status of highways or even their existence resulting from recent research or discovery of evidence". The 1981 Act recognises "the importance of maintaining, as an up-to-date document, an authoritative map and statement of the highest attainable accuracy".

Held that s53 and s56 could be reconciled once the purpose of the legislation as a whole was understood. Under s56, the map was conclusive evidence of the

existence of a public right of way, unless and until there was a modification of the map under the provisions of s53.

Sinclair *v Kearsley & Salford City Council*

[2010] EWCA Civ 112

Summary: (reported in B&B 2011/1/3, attached to ROW Note 1/2011) concerns obstruction of an unadopted road along which an old footpath ran. "If a landowner is taken to have fenced against a highway, there is a rebuttable presumption that the land between the fence and the made up or metalled surface of the highway has been dedicated to public use as a highway and accepted by the public as such."

Skerritts of Nottingham Ltd v SoS Environment Transport and the Regions

[2000] All ER (D) 245; [2000] EWCA Civ 60

Summary: The question of whether land is considered to be within the curtilage of a building is a question of fact and degree (following *Dyer v Dorset County Council [1989] 1 QB 346*).

(NB Do not confuse this case with the Skerritts case decided in the same year on the planning issue of when a structure can be a building under TCPA)

A listed building enforcement notice was issued for a stable block and the appeal turned on whether it was within the curtilage of the Grade II* listed Grimsdyke Hotel, Old Redding, Harrow Weald. In this context, the curtilage of a substantial listed building was held to be likely to extend to what are or have been, in terms of ownership and function, ancillary buildings:

"Whether land was in the curtilage of a building was a matter of fact and degree. The curtilage need not be small, nor was the idea of smallness inherent in the term. The curtilage of a principal manor house, for example, was likely to include stables and other outbuildings".

Where large areas of land are concerned the landscape character of the land may be considered to see whether it supports operations associated with the principal building, for example, accommodating domestic functions associated with a country house.

Skrentry v Harrogate Borough Council & others

[1999] EGCS 127

Summary: as a general rule, a route has to lead "to a destination to which the public was entitled to go".

R v SSE ex parte ***Slot***

[1997] EWCA Civ 2845, [1998] 4 PLR 1, [1998] JPL 692

Summary: in the CA (1998) it was held that a property owner was denied natural justice when an Inspector and the OMA refused her permission to make independent representations when a diversion that she supported was objected to, and refused to give her a copy of the objection letter.

***Slough** Borough Council v SSEFRA*

[2018] EWHC 1963 (Admin)

Key Words: Common law dedication. Use by cyclists. S67 NERCA - list of streets exemption.

Summary: The case concerns an Order which added a bridleway to the definitive map and statement and an Inspector's decision to modify the Order to add a BOAT, primarily on the basis of use by cyclists.

A post was installed at the end of the route in about 1961 together with staggered railings which prevented the passage of mechanically propelled vehicles. No action, physical or legal, was taken to have the obstruction removed. The Inspector found that dedication had occurred at common law some time before 1959 and therefore that the blockage in 1961 could not defeat that pre-existing dedication.

The evidence showed limited motor vehicle use between 1956 and 1959, but not earlier. It also showed some cycle use by 2 people from the 1930s with other evidence of cycle use since 1956 when new housing etc was built. Cycle use continued after the blocking of the route as its configuration permitted cyclists to pass through it.

Ouseley J held that it was not sufficient to say that dedication had already occurred and so the blockage was irrelevant without considering the converse position. The existence of the blockage was relevant to whether the dedication for vehicular use should be inferred particularly given that there was no evidence of vehicular use before 1956 and the fact that the blockage came only 5-6 years later. "*In considering the significance of the blockage and whether a right had in fact been created and was being interfered with, the absence of any endeavours to remove the blockage is very relevant*"

He goes on to say that although the inspector would have also had to consider the fact that "the landowner had not sought to prevent vehicular use by bicycles… an explanation which he might have accepted, had he approached the matter in the way I judge was required, was that bicycle use was tolerated over a footpath and bridleway, rather than being a dedication for vehicular use, including motor vehicles". He held that in failing to consider the role of the blockage and the response to it, the inspector ignored a material consideration or gave no legally adequate reasons for his conclusions.

A second ground of challenge concerned s67 NERCA 2006 and the s36 Highways Act list of streets. The route was included in the Council's list of streets with the words "private street" after it. The inspector found that as it was included in the s36 list, the s67 exemption applied.

Ouseley J held that one document could include not only the s36 list but other highways as well. "If the document is clear that it includes the s36 list but other matters as well, and the distinction between the s36 highways and the other is clear from the form of that document, I see no reason why the inclusion in the one document of the s36 list, and another form of record, should mean that the attributes of the s36 list should be accorded to all the ways in the one document, including those that expressly disavow their role as highways maintainable at public expense…..Part of the document is a list under s36 and part is not". He found that the inspector was wrong to interpret the Council's list as showing that the route was a highway maintainable at public expense when the very entry for the route said that it was not – it was a private street.

R(oao) ***Smith*** *v Land Registry (Peterborough Office) & Cambridge County Council*

[2009] EWHC 328 (Admin)

Summary: concerns claim for adverse possession of land recorded on DM as a BOAT, whether a highway could be extinguished by adverse possession. The judge reviewed case law back to the C19th, including *Bakewell*, *Harvey v Truro District Council* ("The possession of a squatter on the highway since 1886 cannot bar the public right") and *Turner v Ringwood Highway Board*. As a matter of law, an adverse possession or squatter's title cannot be acquired on land over which a public right of way exists. (CA decision in *London Borough of Bromley v Morritt* [1999] unreported re: adverse possession).

R (on the prosecution of the National Liberal Land Co Ltd) v The inhabitants of the County of ***Southampton***

(QBD)[1887] LR 19 QBD 590

Summary: concerns liability for repair of a bridge not built in a highway. Held, the fact that such a bridge is of public utility and is used by the public is not necessarily conclusive against the county on the question of liability, user and utility being only elements for consideration in determining that question; but there need not, in addition to evidence of public user and public utility, be proof of an overt act amounting to a formal adoption by a body capable of representing and binding the county.

On interpretation of 'the public' Coleridge LJ said "User by the public has in all cases been treated as an element in determining the liability of the county to repair a bridge; but the word "public" in this connection must not be taken in its widest sense; it cannot mean that it is a user by all the subjects of the Queen, for it is common knowledge that in many cases it is only the residents in the neighbourhood who ever use a particular road or bridge. In the present case, however, there is no doubt

abundant proof of the user of the bridge by, and of its utility to, the public, confining the meaning of that word to that portion of the public which used it."

***South Buckinghamshire District Council** v Porter*

[2001] EWCA Civ 1549, [2002] 1 WLR 1359, (CA)[2002] 1 All ER 425, [2003] UKHL, [2003] AC 558, [2003] 3 All ER 1, [2004]

Summary: passage from this planning case quoted in *R oao Manchester City Council* v SSEFRA concerns reasoning in Inspectors' decisions which can be read across to other decisions.

Lord Brown stated "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 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."

***Stevens** v SSE*

[1998] 76 P & CR 503

Summary: (see ROW Advice Note No.12) concerns rights along RUPPs and the effect of the RTA 1930 on vehicular user, the issue being whether the Inspector was correct in deciding that no carriageway had been created, either at common law or by virtue of s31 of the HA 1980, by vehicular use post 1930. Sullivan J held that the mere fact of classification as a RUPP was not in itself evidence of the existence of any vehicular way.

Evidence of vehicular use prior to and post December 1930 should be taken into account since evidence post 1930 may give credibility to user evidence before 1930 thus establishing dedication of vehicular rights at common law. "If, having looked at the evidence overall, including both evidence of user and the documentary evidence, the Inspector is satisfied that there was no dedication of the way for vehicular use at common law or by 20 years user prior to 1930, then and only then

will it be possible to say that evidence of post 1930 use should be excluded because such use would have been unlawful". (see also *R v PINS ex parte Howell*)

Stevens v The General Steam Navigation Company Ltd

[1903] 1 K.B. 890

While employed by the company S met with an accident by which he sustained injuries for which he claimed compensation under the Workmen's Compensation Act, 1897, which provided for compensation for certain events in a factory. The original definition of a factory was laid down in the Factory Act 1895 but the Factory and Workshop Act 1901 repealed and re-enacted this original definition but with additions.

Held: the modifications mentioned in the Interpretation Act, 1889, includes additions (hence in the definition of " factory " in the 1897 Act the reference to the 1895 Act must be taken to refer to the provisions of s104 Factory and Workshop Act, 1901, which added to the definition to include machinery used in the process of unloading a ship in a navigable river). Collins MR stated:

"*Modification implies an alteration, and it seems to me to be as much a modification of that which previously existed that the word harbour should be added as if a limitation had been imposed by the removal of a word from the definition… in my opinion there is no reason to limit the word "modification", which is equally applicable whether the effect of the alteration is to narrow or to enlarge the provisions of the former Act*".

Later cases have considered this case when deciding the scope of "modifications" in its context.

R v SSE ex parte ***Stewart***

[1979] 37 P & CR 279, [1980] JPL 175

Summary: concerned the tests in s118(1) and s118(2) of HA 1980 and the situation where a footpath could not be used because it was obstructed. The court found that a pine tree with a girth of 2'6", a hedge 4' wide and 12' high and an electricity sub-station were capable of being temporary obstructions and could be disregarded under ss(6).

On obstruction, Phillips J "the prime question was, in the case of an obstruction, whether it was likely to endure." "…the difficulties of allowing obstructions, or any doubt as to the line of path, to count to any substantial extent as reasons for making a stopping up order. Were that to be so it would mean that the easiest way to get a footpath stopped up would be unlawfully to obstruct it and that could not be the policy." On expedient, "…the word 'expedient' must mean that, to some extent at all events, other considerations could be brought into play, if that were not so, there would be no room for a judgment, which was bound to be of a broad character, whether or not it was 'expedient'."

Stubbs (on behalf of GLEAM) v Lake District National Park Authority and others

[2020] EWHC 2293 (Admin)

Summary: This case concerned the decision of the LDNPA not to impose Traffic Regulation Orders (TROs) on 2 routes. Judicial review of this decision was pursued on 3 grounds:

1) That the LDNPA failed to properly interpret Section 11A(2) of the National Parks and Access to the Countryside Act 1949 (the Act) because officers advised members that they should prioritise the statutory purpose of "conserving and enhancing the natural beauty, wildlife and cultural heritage" of the National Park over that of "promoting opportunities for the understanding and enjoyment of the special qualities" of the National Park if there was an "irreconcilable conflict" whereas the Act referred only to "conflict".

2) That the LDNPA failed to discharge a duty upon it under Section 122 of the Road Traffic Regulation Act 1984 (the 1984 Act) and failed to make a decision based upon the relevant mandatory considerations. It was also in error when contending that it was not exercising a function under the 1984 Act. It therefore committed an error of law in reaching its decision.

3) There was a misdirection in relation to the test for consultation under Regulation 4 of the National Park Authorities Traffic Orders (Procedure) (England) Regulations 2007. Officers advised members that consultees would ned to be provided with details of a specific TRO proposal whereas consultation could have taken place on an in principle decision.

With regard to Ground 1, the report made to members was a detailed Assessment Report (AR). The judge accepted the submission on behalf of the defendant that, as the LDNPA generally had to treat the two statutory purposes of National Parks equally and only prioritise one in cases of 'conflict', it was appropriate that this should be interpreted as circumstances in which 'conflict' cannot be resolved by management or stewardship. Whether such circumstances are described as 'irreconcilable' or in some other way was considered to be a question of semantics and in this case members of the LDNPA had been properly advised as to when the provision of Section 11A(2) was relevant to the decision making process. The decision of the members that the current 'conflict' could be satisfactorily dealt with by management measures was not wrongly arrived at.

On Ground 2 it was held that the LDNPA was not in fact making a decision requiring the duty under Section 122 of the 1984 Act to be engaged at this stage, that would only be the case after a detailed consultation had been undertaken. In any event, the judge was satisfied that matters required to be addressed by Section 122 had been addressed in the AR.

On Ground 3 it was accepted that there could be a range of types of consultation that might be undertaken under Regulation 4. In this case members had been advised of the form of process that would need to be followed if a TRO was

identified as an appropriate management option and was consistent with DEFRA guidance in relation to the process. It was not considered necessary for officers to provide details of all possible alternative options.

The application for judicial review was dismissed on all 3 grounds.

***Suffolk County Council** v Mason*

(CA)[1978] 1 WLR 716, (HL)[1979] AC 705, [1979] 2 All ER 369

Summary: an entry on the DM does not necessarily remain conclusive evidence forever.

*R v Oxfordshire County Council & others ex parte **Sunningwell** Parish Council*

(HL)[1999] UKHL 28, [2000] 1 AC 335,[1999] 3 WLR 160, [1999] 3 All ER 385

Summary: (see ROW Advice Note No.6) concerns town or village greens, customary right, land used predominantly by villagers for informal recreation, whether belief in existence of right exclusive to villagers necessary, use for sport and pastimes, whether landowner's toleration prevents the claim. Held: "as of right" that is without force, secrecy or licence, did not require a subjective belief in the existence of that right; and toleration by the landowner was not fatal to a finding that user had been as of right.

Hoffman LJ said: To require an enquiry into the subjective state of mind of the users would be contrary to the whole English theory of prescription, which depends upon acquiescence by the landowner giving rise to an inference or presumption of a prior grant or dedication. For this purpose the actual state of mind of the road user is plainly irrelevant ... in my opinion the casual and, in its context, perfectly understandable aside of Tomlin J in *Hue and Whiteley* (1929) has led the courts into imposing upon the time-honored expression 'as of right' a new and additional requirement of subjective belief for which there is no previous authority and which I consider to be contrary to the principles of English prescription ... user which is apparently as of right cannot be discounted merely because, as will often be the case, many of the users over a long period were subjectively indifferent as to whether a right existed, or even had private knowledge that it did not.

***Sweet** v Sommer*

(Ch)[2004] EWHC 1504, (CA) [2005] EWCA Civ 227

Summary: concerns a private right of way/easement of necessity (in this case vehicular) to a parcel of landlocked land which otherwise could not be used (other than if part of a building was demolished to create access); obstructing access to the land by reducing width, and locking a gate without having consulted the owner of the landlocked land or providing them with a key.

***Taylor** v Betterment Properties (Weymouth) Ltd*

[2012] EWCA Civ 250

Towns and Village Greens

***Thornhill** v Weeks*

[1914] 78 JP 154

Summary: concerns the physical character of a way. On acquiescence and non-resident owners, "…the extent of the owner's acquiescence must in each case be a material question as to user, but much less cogent if such user is intermittent or small or if the owner is non-resident, especially if there is no bailiff or servants living there…".

On permission, "…the user may be referable to licence where it is by people in the hamlet and it is necessary in each case to examine the surrounding circumstances in order to arrive at a conclusion". (see also *Poole v Huskinson*)

***Thould** v SSEFRA*

(QBD)[2006] EWHC 1685

Summary: (see ROW Note 14/06) concerns deletion from DM of a bridleway following a Sch14 direction to the OMA to make the order and a Sch15 inquiry, adequacy of reasoning and whether an Inspector's decision was perverse. It was found that having considered the evidence including the cogent evidence presented by the claimants the Inspector concluded their evidence had not on the balance of probabilities displaced the presumption that the original DMS had been correctly made. Whilst he could lawfully have decided the other way, it was open to him to come to this conclusion and it was not perverse. Furthermore, his reasons for coming to the conclusion he did were sufficient to enable the claimants to know why he reached those conclusions.

***Todd** and Bradley v SSEFRA*

(QBD)[2004] EWHC 1450 (Admin), [2004] 1 WLR 2471, [2004] 4 All ER 497, [2005] 1 P & CR 16

Summary: (see ROW Note 16/04) concerns orders made under s53(3)(c)(i) of the WCA 1981, confirmed the burden of proof is 'on the balance of probabilities'. At the Sch15 stage a more stringent test is to be applied than at the Sch14 stage (see *Norton and Bagshaw*). An Inspector at the Sch15 stage should only consider whether the right of way subsists on the balance of probabilities.

Also, an Inspector should not take a significantly different view on the interpretation of the evidence to that presented by the parties, or refer to new material not before

the inquiry, without giving the parties the opportunity to comment, before reaching a decision.

*R (on the application of **Trail Riders Fellowship & another**) v Dorset County Council*

[2013] EWCA Civ 553; [2015] UKSC 18 Supreme Court

Key Words: map to prescribed scale; S67 NERCA; *Winchester* case; *Maroudas* case

Summary: A map which accompanies an application and is presented at a scale of no less than 1:25,000 satisfies the requirement in paragraph 1(a) of Schedule 14 to the Wildlife and Countryside Act 1981of being "drawn to the prescribed scale" in circumstances where it has been "digitally derived from an original map with a scale of 1:50,000". This is provided that the application map identifies the way or ways to which the application relates. Two of the five judges dissented.

A second issue regarding the effect of s67(6) NERCA 2006 did not arise for decision but the judgments contain interesting obiter dicta. Three of the five judges expressed the opinion that the saving provided by S67(3) does not include applications purportedly made before the cut-off date which were substantially defective, whether or not the defects might otherwise have been cured in one way or another.

Lord Carnwath advocated a more flexible approach and questioned the correctness of *Maroudas* and Lord Clarke stated that he was sympathetic to Lord Carnwath's approach, albeit that he preferred to express no view on the matter. Also see TRF v SSEFR & Dorset County Council [2016] EWHC 2083 (admin)

Trail Riders Fellowship & Green Lane Association Ltd v Secretary of State for the Environment Food and Rural Affairs

(QBD) [2022] EWHC 1804 (Admin) [2022] 6 WLUK 508

Summary: concerns the exceptions in NERC 2006 s.67(2). When considering whether one of the exceptions applies, the character of the right of way is not a mandatory consideration. It falls within the category of potentially relevant considerations which the decision-maker might take into account, but they are not required to do so unless it is so obviously material on the facts that it would be an error of law to ignore it.

Furthermore, s67(2)(a) should not be read consistently with the definition which the court in *Masters v SSETR* gave to the definition of BOAT in s66(1) WCA 1981 due to: (a) important differences in the statutory tests and (b) the fact that the purposes of the legislation is different.

Trail Riders Fellowship *v SSEFRA & Dorset County Council*

[2016] EWHC 2083 (Admin)

Key Words: application in accordance with para 1 of Schedule 14 of WCA 1981; S61 NERCA 2006; *Winchester* case; *Maroudas* case

Summary: The judge was bound to follow clear CoA authority in *Winchester* and *Maroudas* that applications must be made in full accordance with paragraph 1 of Schedule 14. The argument in the Supreme Court in the *TRF* case between the different Justices was not about the interpretation and application of *Winchester* and *Maroudas* but whether those cases were rightly decided. The Supreme Court's obiter dicta (from both sides of the argument) make it plain that the approach in *Winchester* and *Maroudas* is a strict one, from which any departure in the making of the application from the statutory requirements will render it defective unless it is de minimis.

In this case the failure to provide documents listed in the application was not unimportant. The purpose of the requirement is to enable those affected by an application to know the strength of the case they have to meet. No reader of the application and its enclosures would have been able to test the supportive material for him or herself.

Trail Riders Fellowship v SSEFRA

[2017]EWHC 1866 (Admin)

Key Words: S67 NERCA. List of streets and maps

Summary: It was common ground that immediately before the commencement of NERCA there was an existing public right of way for mechanically propelled vehicles over the whole of Oakridge Lane. Oakridge Lane was not shown on the relevant DMS but was described in Hertfordshire County Council's List of Streets. The List of Streets (LoS) also contained a map. The Inspector found that the true historic right of way followed a straight line whereas the route shown on the LoS map had a slightly bowed alignment.

The challenge was to the inspector's finding that the difference in alignment on the map meant that the exception in NERCA could not apply. The judge found that the reasoning contained a non sequitur. *"Although she correctly recognised differences between a LoS and a DMS she treated the map within the LoS as if it was required to contain, and did contain, the cartographic accuracy and precision of a DMS; and treated it as "conclusive", although a LoS is not required to include any map at all".* The purpose of a LoS is "*essentially to identify and record which streets are maintainable at public expense, but not, in contrast to a DMS, precisely to delineate them".*

George **Trenchard** v SSE & Devon CC

[1996]

*J **Trevelyan** v SSETR*

[2000] NPC 6, (CA)[2001] EWCA Civ 266, [2001] 1 WLR 1264

Key Words: Test for Deletion from Definitive Map. Power to make modifications which result in a fundamentally different order.

Summary: (see ROW Advice Note No.20). The case concerns an order for the deletion of a bridleway from the definitive map. The bridleway was not shown on any maps prior to the coming into force of the 1949 Act and the survey form delineating the route did not include any explanation as to the nature of the evidence supporting the claim. At the inquiry to determine whether or not the order should be confirmed the Council contended that while no bridleway existed the evidence demonstrated that there was a right of way in the form of a footpath.

The first point considered by the Court of Appeal was the Inspector's doubt over whether he had the power to modify the order by substituting a footpath as the order quoted S53(3)(c)(iii) and stated "that there is no public right of way over land shown in the map and statement as a highway of any description". It was submitted that to depict a footpath in place of a bridleway could not be described as confirming the order subject to modification as it would result in a fundamentally different order. The Court of Appeal held that if this submission was correct and the inspector found that there was a right of way on foot he would be bound to decide that the original order could not be confirmed, thereby leaving on the definitive map a bridleway that should not be there and that this would be a "*manifestly unsatisfactory state of affairs*". Accordingly it found that "*if, in the course of an inquiry, facts come to light which persuade the inspector that the definitive map should depart from the proposed order, he should modify it accordingly, subject to any consequent representations and objections leading to a further inquiry. To fetter his power to do this by a test which requires evaluation of the modification to see whether the inspector can truly be said to be confirming the original order would be undesirable in principle and difficult in practice".*

The Court of Appeal then considered the correct approach to be adopted when considering whether a right of way should be deleted from the definitive map and the weight to be given to the definitive map. The Court of Appeal held "*where the Secretary of State or an inspector appointed by him has to consider whether a right of way that is marked on a definitive map in fact exists, he must start with an initial presumption that it does. If there were no evidence that made it reasonably arguable that such a right of way existed, it should not have been marked on the map. In the absence of evidence to the contrary, it should be assumed that the proper procedures were followed and thus that such evidence existed. At the end of the day, when all the evidence has been considered, the standard of proof required to justify a finding that no right of way exists is no more than the balance of probabilities. But evidence of some substance must be put in the balance, if it is to outweigh the initial presumption that the right of way exists. Proof of a negative is seldom easy, and the more time that elapses, the more difficult will be the task of*

adducing the positive evidence that is necessary to establish that a right of way that has been marked on a definitive map has been marked there by mistake".

Turner v Ringwood Highway Board

[1870] LR 9 Eq 418

Summary: when a highway exists the public has a right to use the whole of the width of the highway and not just that part of it currently used to pass or re-pass.

Turner v Walsh

[1881] 6 AC 636

Summary: dedication of the way in question to the public as a highway is presumed (or deemed) to have taken place, and the highway to have been created, at the beginning of the relevant 20 years. Dedication may be presumed against the Crown at common law.

TW Logistics Ltd v Essex County Council and another

[2021] UKSC 4

This case concerns land registered as a Town or Village Green (TVG). The land in question is a 200m^2 area of concrete close to the water's edge in a working port. It was registered on the grounds that it had been used by local inhabitants for lawful pastimes for at least 20 years. The landowners, TW Logistics Ltd (TWL) challenged the registration in the High Court and the Court of Appeal and lost, having failed to establish, among other things that use had not been 'as of right' or did not constitute lawful pastimes.

The main issues before the Supreme Court were the contention by TWL that registration would criminalise the continued use of the land for commercial purposes and that the quality of use by local inhabitants was not such as to justify registration. It was accepted as a matter of fact that the land had been used during the relevant 20 year period for the passage of commercial vehicles, their loading and unloading and the occasional storage of materials as well as for walking and informal recreation by local inhabitants. However, commercial activity was not intense and did not discourage people from using the land for recreation nor did their activity adversely affect commercial use.

The issue of criminalisation was said to arise as a result of Victorian statutes which restricted various activities on TVGs and/or more recent legislation such as the Road Traffic Act (RTA) and Health and Safety legislation. These matters were dealt with at some length but, very briefly, it was found that it would not be unlawful for TWL to continue to use the land in the same manner as they had during the relevant 20 year period as the Victorian statutes and the RTA referred to activities carried out

without lawful authority and would not apply. Health and Safety legislation was said to apply irrespective of the registration of the land as TVG and was unaffected by it.

With regard to the quality of use, it was claimed that TWL could not be regarded as having accepting that the public were asserting a right to use the land for recreation because they continued to use the land for commercial purposes inconsistent with such a right nor could they be thought to acquiesce to public use if it was likely to render their own use unlawful. It was held that in fact public use had taken place 'as of right' that is without force, secrecy or permission and had been perfectly obvious to the landowner. The fact that members of the public were said to have moved out of the way of commercial activities on occasion did not change this.

The appeal was dismissed.

(NB: The situation in this case differs from that in *R(Newhaven Port and Properties Ltd) v East Sussex County Council and another [2015] UKSC 7* in that TWL was not subject to any statutory obligations to operate as a port which were inconsistent with registration as a TVG)

U **Back**

V **Back**

***Vasiliou** v SST and another*

(CA)[1991] 2 All ER 77, [1991] JPL 858

Summary: (see ROW Advice Note No.20 for application to Human Rights legislation) concerns TCPA orders and closure of a road causing loss of trade. The CA held that when exercising his discretion, the SS was not only entitled, but required to take into account the adverse effect the Order would have on all those entitled to the rights which would be extinguished by it, especially as there is no provision for compensation.

"I can see nothing to suggest that, when considering the loss and inconvenience which will be suffered by members of the public…the minister is not at liberty to take into account all such loss, including the loss, if any, which some…such occupiers of property adjoining the highway, will sustain."

Vyner v Wirral Rural District Council

[1909] 73 JP 242

Summary: concerns deposited railway plans and books of reference accepted as evidence of a public right of way.

Ramblers Association v SSEFRA, **Weston** and others [2012] EWHC 3333 (Admin)

Summary: The case concerned a Public Path Diversion Order under S119 of HA80. The Inspector treated objections concerning the fact that the landowner knew of the existence of a path when he bought his property and the possibility that allowing the diversion might set a precedent regarding paths close to similar properties as not relevant. It was conceded on behalf of the SofS that the inspector had erred in this respect but contended that this had made no difference to his decision. The judge stated that he had serious doubt as to whether the issue of prior knowledge of the path when the property was purchased was in fact relevant. He commented that it would be similar to arguing that someone who applied for planning permission should not have bought a property as they knew that the development they wished to take place did not exist on it. It was ruled that the question of precedence had not been supported by any evidence to which the Inspector could have given weight and that, even if the issue of prior knowledge was relevant, it could not have been given any weight by the Inspector in the simple and general way in which it was expressed. He referred to the judgement in *Simplex GE (Holdings) Ltd v SSEFRA [1989]* in which the Court of Appeal had pointed out that, even when a decision had been found to be unlawful, a court had discretionary power not to quash it if it was satisfied that the decision could not have been different if no error had been made.

It was further contended that the word *'may'* as it appears in S119(1) and Paragraph 2 of Schedule 6 suggests a discretion of the OMA or the SofS to not confirm an order even if the evidence indicates it is expedient. This argument was deemed to be untenable. The purpose of the discretion for the OMA in S119(1) is to allow consideration to proceed to other aspects of expediency after it has been determined that an order is expedient in the interests of the landowner or the public and that for the SofS in Schedule 6 to allow him to not accept the recommendation of an inspector in cases for which he is the decision maker.

An additional point raised was that the Inspector had not considered the fact of the historical integrity of the path even though he had considered the extent to which it affected public enjoyment of it. No evidence on this ground had been put forward but it was suggested that the Inspector could have picked it up from the material before him. The judge said this was a marginal matter and if anyone wished to benefit from consideration of it, they were required to have raised it in their submission.

The order was not quashed.

R (oao) **Whitmey** v The Commons Commissioners

[2004] 3 WLR; [2004] EWCA Civ 951

Held: The Commons Commissioners had no jurisdiction to hear disputed applications for the registration of land as a town or village green under the

Commons Registration Act 1965 s.13. The resolution of such disputes by registration authorities did not infringe the Human Rights Act 1998, as the courts had a wide power to review registration decisions under s.14(b) of the Act.

Disputes as to whether land should be registered as a green under s.13 could be determined: (1) by an application to court at any time for a declaration that a property was or was not a village green for the purposes of the Act; (2) the registration authority could itself determine the matter, and (3) following registration, a dissatisfied party could apply to court for rectification of the register under s.14(b).

If a dispute was serious and the registration authority had itself to make a decision on the application, it should firstly receive the report of an independent legal expert who had at their request held a non-statutory public inquiry. The registration authority had power to amend a register under s.13 even if there was a dispute as to the factual basis for an application.

***Whitworth** and others v SSEFRA*

(QBD) [2010] EWHC 738 (Admin), [2010] EWCA Civ 1468

Summary: (see ROW Note 04/2010 for HC judgment) (see ROW Note 01/2011 for CA judgment) – concerns whether bicycle use can give rise to rights higher than a bridleway. The ground that there was no documentary evidence to justify the Inspector's conclusion the way was an ancient bridleway was dismissed.

The appeal succeeded on the ground that the Inspector erred in law in finding that use of a bicycle would be consistent with a finding that (route BCD) was anything more than a bridleway, since members of the public have had a right to use bridleways for cycling since the coming into force of section 30(1) of the 1968 Act:

"In the present case, the Inspector had found that by 1968, and before the relevant 20-year period the way had the status of a bridleway. After that time, use of the bridleway by cyclists would have been permitted by the 1968 Act. The owner would have had no power to stop it. There would be no justification therefore for inferring acquiescence by him in anything other than bridleway use…It follows that in considering the extent of deemed dedication, the use by cyclists should be disregarded."

Carnwath LJ saw force in the submissions that use by two cyclists "was on any view insufficient to support a finding of use as enjoyment as of right "by the public"."

***Wild** v SSEFRA & Dorset County Council*

(QBD) [2008] EWHC 3641 (Admin) (CA) [2009] EWCA Civ 1406

Summary: (RWLR, 6.2 p27-31) concerns inference of dedication at common law, issue of objections to public use having been made, but the landowner of the way is not known. It was common ground that Keith J who heard the application in the HC was entitled to interfere with the inspector's decision but only on ordinary judicial

review principles. Inspector's decision made on implied dedication at common law having determined insufficient user to satisfy a 20 year period from 1978-1998 under s31 HA1980.

"Mr Upton, for the appellant, does not seek to go behind the inspector's finding that ownership of the footpath had not been established, but the critical point seems to me to be that there was a possibility that he [the lord of the manor] and his predecessors owned it. Indeed, I would go so far as to say that on the evidence there were no other candidates. The fact that there was a possibility that he and his predecessors owned the land in my judgment makes the challenge to the Definitive Map and Statement in 1978 of great importance. As concluded by the Inspector, from the moment of the 1978 inquiry there was public knowledge that it was challenged that the Order route was a public footpath. It must be inferred that the users knew they were using the path against that challenge, but the inspector does not deal with this. The state of mind of the users seems to me to be relevant to the status of the track. It was common knowledge that an objection had been made to the public use of the track by someone who might be the owner."

"…what the inspector overlooks, is the impact of the 1975 objections at the 1978 inquiry and how they might be relevant to the nature of the use of the Order route thereafter. The objections at the 1978 inquiry seem to me to be no different in principle from those same objectors, had they chosen to do so, putting up a notice on the Order route saying there was no a right of way."

"As the authorities make clear, it does not follow as night follows day that because there has been use there has been dedication by the owner; it is necessary to look at all the circumstances. There are various questions to be asked. Public user is the first question, then comes acquiescence and finally dedication."

"In my judgment the inspector made an error of law in failing to have regard to the fact that objection had been raised publicly at the 1978 inquiry by a person or persons who might have been the owner or owners of the Order route." "…objection followed by inactivity hardly seems…to give rise to acquiescence from which dedication is to be inferred."

R (oao Warden and fellows of ***Winchester*** *College & Humphrey Feeds Ltd) v Hampshire County Council & SSEFRA* (QBD)[2007] EWHC 2786 (Admin), CA [2008] EWCA Civ 431

Summary: (see ROW Notes 5/08, 6/08, 9/08 (Defra letters 02/06/08, 13/08/08 and 18/08/08)) concerns whether an application for a route to be shown as a BOAT made before 20 January 2005 (the relevant date for s67(3) of the NERCA 2006) was a section 53(5) of the WCA 1981 application for the purposes of s67(3)(a). It overturns the HC judgment on what constitutes an application in terms of s67(7) of the NERCA and paragraph 1 of Sch14 of the WCA 1981.

An application must be accompanied by copies of all the documents relied on together with a map of the correct scale. Dyson LJ "In my judgment, as a matter of ordinary language an application is not made in accordance with paragraph 1 [of

Sch14] unless it satisfies all three requirements of the paragraph…It must be made in a certain form (or a form substantially to the like effect with such insertions or omissions as are necessary in any particular case). It must be accompanied by certain documents. The requirement to accompany is one of the rules as to how an application is to be made."

And, "In my judgment, section 67(6) [of the NERC Act 2006] requires that, for the purposes of section 67(3), the application must be made strictly in accordance with paragraph 1. That is not to say that there is no scope for the application of the principle that the law is not concerned with very small things *(de minimus non curat lex)*…Thus minor departures from paragraph 1 will not invalidate an application. But neither the Tilbury application nor the Fosberry application was accompanied by any copy documents at all, although it was clear from the face of the applications that both wished to adduce a substantial quantity of documentary evidence in support of their applications. In these circumstances I consider that neither application was made in accordance with paragraph 1."

And, further on paragraph 1 applications in the context of s67(3)(*a*), "The applicant is required to identify and provide copies of all the documentary evidence on which he relies in support of his application. There is nothing in the language of the paragraph which supports the construction that the applicant's obligation is limited to identifying and providing copies of those documents on which he relies to which the authority does not have access."

However, this need not apply to applications that do not come under s67(6) of the NERCA, "I wish to emphasise that I am not saying that ,in a case which does not turn on the application of section 67(6), it is not open to authorities in any particular case to decide to waive a failure to comply with paragraph 1(b) of Schedule 14 and proceed to make a determination under paragraph 3; or to treat a non-compliant application as the "trigger" for a decision under section 53(2) to make such modifications to the DMS as appear requisite in consequence of any of the events specified in subsection (3)."

Winterburn v Bennett [2016] EWCA Civ 482

A car park was owned by a club until 2010. W ran a fish and chip shop next to the car park entrance, which was used by customers. B purchased the land in 2010 and let the building to a tenant who obstructed access to the car park. Until 2007 a sign on the wall of the car park stated "Private car park. For the use of club patrons only" and a similar sign was in the club's window.

The issue was whether the signs were sufficient to prevent W acquiring a right to use the land as a car park or whether the owners had acquiesced in the use so as to entitle W to such a right, despite the presence of signs.

Held: Appeal dismissed. The presence of signs stating that a car park was private, clearly indicated the landowner's continuing objection to unauthorised parking. The adjacent shop owners had not, as a result of use over a number of years, acquired by prescription the right to park there. The servient owner did not have to back his

objection by physical obstruction or legal action. The signs were a proportionate protest and anyone reading them would understand their meaning and effect; that persons other than club patrons were not allowed to park there. Where a landowner made his position entirely clear through the erection of clearly visible signs, the unauthorised use of the land could not be said to be "as of right". Those who chose to ignore such signs should not thereby be entitled to obtain legal rights over the land.

Wright and Anor v SSEFRA [2016] EWHC 1053 (Admin)

Key Words: S31 HA 1980; 20 year period; user evidence.

Summary: The Claimants case was that the Inspector's decision was unlawful as there was very little evidence of use during the "early years" of the 20 year period relied upon. At the Inquiry the evidence focussed on interruptions to use and absence of intention to dedicate rather than on sufficiency of use. Ouseley J accepted that the Inspector had to be persuaded on the evidence that the user endured through the whole of the 20 year period and that mere silence or lack of evidence on the part of the landowner was not the equivalent of positive evidence satisfying S31.

Ouseley J found that the Inspector had not given any significant weight to the user evidence forms, given "the problems with UEFs in general and with these in particular: the absence of plans for many, the lapse of time between the making of the statement and the marking on the plans of the routes in question, the "invitation" to mark all the routes on the maps, the contradictions between the map and form…" . However he found that it was likely that the inspector was satisfied with the oral evidence alone "which had not been challenged or explored in cross-examination".

Ouseley J also made an interesting obiter comment about the service of claim papers. CPR Part 8 does not oblige Claimants to serve the applicants which leads to a risk that the applicants might find that the order which they obtained, although benefiting the public generally, had been quashed. He stated that the parties who are served should consider whether notice needs to be given to the applicants and serve them with papers if thought necessary in the interest of justice. If in doubt the direction of the court could be sought well in advance of the hearing.

X **Back**

Y **Back**

R (oao) ***Young*** *v SSEFRA*

(QBD)[2002] EWHC 844 (Admin)

Summary: (see ROW Notes 7/02, 9/06 (revised May 2006) and ROW Advice Note No.9) clarifies the approach to be taken when considering the criteria for confirmation of a diversion order made under s119 of HA80. In deciding whether to confirm an order, Inspectors are required to consider the criteria in s119(6) as 3 separate tests, 2 of which may be the subject of a balancing exercise.

Where the proposed diversion is considered expedient in terms of test (i), is not substantially less convenient in terms of (ii), but would not be as enjoyable to the public, the Inspector is required to balance the interests raised in the 2 expediency tests – the interests of the applicant (i), and the criteria set out in s119(6)(a) (b) and (c) under (iii) to determine whether it would be expedient to confirm the order. Conversely, where the proposed diversion is seen as expedient in terms of (i) and (ii) but would be substantially less convenient the order should not be confirmed.

Turner J considered "substantially less convenient to the public" referred to such matters as length, difficulty of walking and purpose of the path – features that readily fall within the natural and ordinary meaning of the word "convenient".

Z **Back**

CONSENT ORDERS

A

Andrews v SSEFRA and others (Andrews Consent Order)

(QBD)[2012] C0/619/2012

Summary: Relevant to S14 direction decisions. Followed applications under S14 to record BOATs and requests to direct the Council to determine after 9 and 14 years respectively. The Inspector failed to address the argument that the Council policy in relation to determination of BOAT applications was unlawful.

B

C

D

Du Boulay *v SSEFRA* (Du Boulay Consent Order)

QBD[2008] Claim No. CO/8352/2007

Summary: Concerns exception under s67(3) of NERCA 2006 regarding applications – they must be made in strict accordance with para 1 of Sch14 to the WCA 1981. See also *Winchester*.

E

F

G

H

I

J

K

L

M

N

Northumberland County Council v Secretary of State for Environment Food and Rural Affairs (CO4352/2010)

Summary: Consented on the basis that the Inspector misapplied the law as set out in *R (oao Warden & Fellows of Winchester College) v Hampshire County Council [2008]*.

O

P

Pearson *v SSEFRA and others* (Pearson Consent Order)

(QBD)[2008] C0/1085/2008

Summary: Conceded the Inspector applied the wrong test in considering s119(1) of the HA 1980. Under s119(1) the order can be made either in the interests of the landowner or of the public. The test does not require the expediency to be in the interests of both the landowner and the public. See also ROW Circular 1/09 and Defra letter 27/02/09.

Perkins *v SSETR* (Perkins Consent Order)

(QBD)[2002]

Summary: the cost of holding a second inquiry in respect of a modification subsequently requiring advertising is not a relevant consideration. "The consideration of expense was not material to the exercise of the discretion to propose modifications to an order given by paragraph 7(3) of Schedule 15 to the Wildlife and Countryside Act 1981".

Q

R

R (oao The Ramblers' Association) v SSEFRA **(Ramblers' Association Consent Order)**

QBD[2008] CO/2325/2008

Summary: (see ROW Note 1/09, and internal note drafted by B Grimshaw dated 10/02/09 seeking clarification from Defra on a number of points) concerns *Godmanchester and Drain* and the effect in law of a landowner depositing with the appropriate council s31(6) HA 1980 documents.

Inspector's decision challenged on 3 grounds- that the deposit of a map and statement under s31(6) must be followed up by the lodging of a statutory declaration; if the deposit of a map and statement under s31(6) is sufficient to satisfy a lack of intention on behalf of the landowner to dedicate a prow, then it must also act as a bringing into question; that there is no reason in law why sections of a route over which no lack of intention to dedicate has been shown cannot function as highways albeit cul-de-sacs where one end connects with a highway. The Consent Order was granted on the basis of ground 3.

S

T

Wathes, Pearson, Young, Roberts and Lowe v SSEFRA **(T34x Protection Group Consent Order)**

QBD [2009] CO/9252/2008

Summary: Concerns upgrading a bridleway to BOAT and application of the *Winchester College* judgment in CA. The Inspector was correct in concluding that no other subsection of ss67(2) or (3) of NERCA06 engaged to prevent extinguishment of mpv rights.

However, the Inspector erred in interpreting *Winchester* to mean that 'the decision to make an order by a relevant authority is not rendered invalid if the application falls short of the strict terms of Schedule 14'. At para. 59 of the judgment, Dyson LJ recognised the reference to "such an application" in s67(3)(b) is to an application made under s53(5) for the purposed of s67(3)(a), ie. one that was fully compliant with Sch14 para 1 and the 1993 Regulations. At para 62 he also emphasised that full compliance with Sch14 para 1 was necessary to engage s67(3)(b).

U

V

W
X
Y
Z

Abbreviations	
AC	Appeal Court
All ER	All England Law Reports
CA/CoA	Court of Appeal
CB (NS)	Common Bench, New Series 1857-1866
Ch / ChD	Chancery reports (Chancery division, High Court)
COD	Crown Office Digest
EG/EGCS	Estates Gazette / Estates Gazette Case Summaries
EWCA Civ	England and Wales Court of Appeal (Civil Division)
EWHC	England and Wales High Court (Administrative Court)
HC	High Court
HL	House of Lords
JP	Justice of the Peace

JPL	Journal of Planning and Environment Law
KB	King's Bench Division (High Court)
LGR	Local Government Reports
oao	on the application of
OD	Order decision
OMA	Order Making Authority
P & CR	Property and Compensation Reports (published by Butterworths)
PP	Public Path
QBD	Queen's Bench Division (High Court)
ROWA	Rights of Way Act
RTA	Road Traffic Act
RTR	Road Traffic Reports
RUPP	Road Used as a Public Path
RWLR	Rights of Way Law Review
SC	Supreme Court
UKHL	UK House of Lords
WLR	The Weekly Law Reports

Latin terms	
de minimus [non curat lex]	the law does not concern itself with small things
ejusdem generis	of the same kind
ex parte	by a party
nec vi, nec clam, nec precario	without force, without secrecy, without permission
obiter dicta	judicial opinion incidental to but not part of the principle[s] upon which a case is decided

per se	by itself
precario	by permission
prima facie	at first sight
terminus ad quem	the finishing point
ultra vires	beyond the authority confirmed by law
usque ad medium filum	up to the centre line

The Planning Inspectorate

Purchase Notices

Updated to reflect Current Framework (NPPF)?	**Yes**
What's new since the last version • First published 8 January 2016	
Other recent updates	

Contents

Relevant Legislation and Guidance

Sections 137 - 144 of the Town and Country Planning Act 1990

Pages 116 to 126 of DCLG Guidance (referred to below as "DCLG Guidance") on Compulsory Purchase process and the Crichel Down Rules (see also PINS NOTE 34/2015r1) (applicable to England only)

The commentary to section 137 in the Encyclopaedia of Planning Law (pages 2-3503 to 2-3514 provides useful background detail and reference to relevant judgments)

Welsh Office Circular 22/83: Purchase Notices (applicable to Wales only)

Administrative Process for Purchase Notices

Introduction

1. A purchase notice may be made under section 137 of the Town and Country Planning Act 1990. A purchase notice is a form of compulsory purchase order in reverse. It may be served on the District council, Welsh county, county borough or London Borough in whose area the land lies by owners of land if, following a planning refusal or a conditional grant of planning permission, they consider that their land has become *incapable of reasonably beneficial use*.

2. Adverse planning decisions are the main reasons for the service of purchase notices but such a notice may also be served following the making of revocation, modification, discontinuance or tree preservation orders. There are also listed building purchase notices, which arise from the refusal of listed building consent or its conditional grant and conservation area purchase notices. Essentially, the listed building purchase notice process is the same as for purchase notices served under section 137 of the Town and Country Planning Act 1990 but the relevant legislation is section 32 to 36 of the Planning (Listed Buildings and Conservation Areas) Act 1990. All written correspondence, reports and decisions will have to correctly reflect the relevant sections of the Planning (Listed Buildings and Conservation Areas) Act. The guidance which follows below has, in the interest of brevity, been expressed in terms of a purchase notice served under section 137 of the Town and Country Planning Act 1990.

The Procedure

3. If the council do not accept the purchase notice and can find no other local authority or statutory undertaker willing to acquire the land they must, within 3 months of service, send a copy of the notice to the Secretary of State with a statement of their reasons for not complying with it. The server of the notice can then comment on the council's reasons. The Secretary of State, on the information before him at that stage, then makes a preliminary decision as to whether or not he intends to confirm the notice on the council or some other authority, or to take certain other courses of action in lieu of confirmation.

   These are:

   - to grant planning permission for the development originally sought;

   - to direct that some other planning permission be granted if applied for;

- to revoke or amend any conditions attached to the permission originally granted;

- to grant or direct the grant of planning permission for part of the site and confirm the notice for the remainder of the site on the appropriate authority.

4. Before reaching his final decision the Secretary of State is required to indicate his initial intention and afford the parties an opportunity to be heard before a person appointed by him if requested. In that event a local inquiry, or in suitable cases a hearing will be held and the Inspector will, after hearing the case, report to the Secretary of State. In practice the initial indication of intention is typically drafted by a decision officer within the Inspectorate, though it could also be drafted by an Inspector.

Time Limits

5. In those cases where the Secretary of State, at proposal stage, proposes to confirm a notice, the provisions of Section 143(2) of the 1990 Act have the effect of imposing time limits for the determination of the notice. In such circumstances failure to issue the decision within 6 months of the date on which the notice was sent to the Secretary of State, or within 9 months of the date on which the notice was served on the authority, whichever is the earlier, results in the notice being deemed to be confirmed on the authority.

6. Reports on purchase notice cases where the time limits apply must therefore, be submitted at least two weeks before the final date for decision shown on the file cover.

7. Where the Secretary of State proposes not to confirm the notice, the time limits do not operate at the post-proposal stage and the normal requirements for the submission of reports apply. Under Section 143(4) of the Act, the application of the time limits is suspended where there is a concurrent enforcement or other planning appeal affecting the same land until the appeal is determined. When this provision applies, a formal letter to this effect is sent to the parties and placed on the file. It is also customary to take no further action on the purchase notice whilst the appeal is being determined, in case it results in planning permission for the development which, if carried out, would render the land capable of reasonably beneficial use.

Hearing/Local Inquiry

8. The hearing/inquiry should be conducted in accordance with the general advice given in the Inspector Training Manual - Inquiries. In the event of a hearing/inquiry the related Procedure Rules do not apply but the parties are normally requested to observe them. At the hearing/inquiry it is usual for the party who asked to be heard to put their case first. The Inspector should obtain all the information necessary for the proper consideration of the case. This should include the existing state, that is the present planning status, and present use of the land, land uses in the area, any suitable alternative development put forward, including that originally sought, and any proposed substitution of a different acquiring authority. Interested persons should be heard if:

    - they consider that they might be affected by any alternative development under consideration;

    - they have proposals or relevant information on beneficial uses; or,

- have some other legitimate interest.

9. Interested persons may include prospective owners who have information relevant to marketing the land or development issues.

Main Issues

8. In purchase notice cases there may be three main issues:

    a. whether the land is capable of reasonably beneficial use in its existing state or could be rendered capable of such use by the carrying out of development for which planning permission has been granted or undertaken to be granted.

    b. if, and only if, it is not so capable whether, in lieu of confirmation, planning permission should be granted (or conditions revoked or amended) to make the land capable of reasonably beneficial use.

    c. The third issue which may arise is whether an alternative acquiring authority should be substituted.

The Decision Process

Reporting

10. The standard template for Secretary of State reports should be used as a guide (available on DRDS). Facts should not be found. This is because if the Secretary of State's decision were subject to a time limit and if he wished to disagree with any finding of fact he would have to go back to the parties and there would be insufficient time for him to do so. The report should therefore end solely with the inspector's conclusions and recommendation.

11. In the conclusions the Inspector should first deal with the issue of whether or not the site is capable of reasonably beneficial use in its existing state, or could be rendered capable of reasonably beneficial use. Whether or not the site is considered capable of beneficial use the Inspector should deal with the merits of suggested alternative uses, in case the Secretary of State takes a different view on the issue. In the final conclusion on the merits the Inspector should state clearly that "*I have considered all possible alternative uses and conclude that …*". Where appropriate the Inspector should then go on to deal finally with the matter of whether another authority should be substituted for the council on whom the notice has been served.

12. In all cases reasons must be given in the conclusions for the recommendation which follows, including the reasons for any conditions imposed.

The Recommendation

13. The recommendation should be on the following lines, as appropriate:
that the purchase notice be confirmed (on a different authority if appropriate); or

    - that the purchase notice be rejected; or

    - that in lieu of confirmation planning permission be granted for the development originally sought; or

- that in lieu of confirmation a direction be given that some other planning permission be granted if applied for; or

- that in lieu of confirmation the conditions attached to the grant of the permission be revoked or amended; or

- that in lieu of confirmation of the notice in relation to the whole site planning permission be granted or directed for part and for the remainder of the notice to be confirmed on the appropriate authority.

14. Following the consideration of alternative uses, the Secretary of State cannot grant permission for an alternative use for which no application has been made. The Secretary of State may however direct that planning permission be granted if applied for.

15. The Secretary of State has no power to confirm a notice for part of the land and reject it for the remainder; any recommendation should deal with the land as one unit, with two exceptions. First, permission can be directed for one part of the land and the notice confirmed for the remainder. Secondly, a substitute acquiring authority can be named in relation to one part of the land only (for example where an English County council as highway authority could make use of it). The notice can then either be confirmed on the remainder of the land or a direction made that permission be granted.

Costs

16. Should there be any application for costs this will be dealt with in accordance with the information given in the Inspector Training Manual – Costs Awards chapter by the making of a separate report to the Secretary of State.

Section 137 of the Town and Country Planning Act

17. Guidance on the concept of Reasonably Beneficial Use, as referred to at section 137 of the Town and Country Planning Act 1990, is given in paragraphs 250 & 251 of DCLG Guidance. Section 137(3)(a) refers to " … *land that has become incapable of reasonably beneficial use in its existing state*". The words 'has become incapable' have been taken in practice to mean 'is incapable'. The reason for the existing state of the land is immaterial to the assessment of whether it is incapable of reasonably beneficial use unless that state is the result of some unauthorised development which could be the subject of an enforcement notice requiring it to be returned to its original state.

18. 'Existing state' means the land as it is now. It precludes any use involving development for which express planning permission is required unless already granted or promised. It does not, however, preclude development that can be carried out by virtue of the UCO or GPDO.

19. Although a purchase notice usually follows an adverse decision on a planning application (a refusal or a conditional permission) the purchase notice is not a claim that the decision has made the land incapable of reasonably beneficial use, but that without the benefit of the unfettered permission sought it cannot be used reasonably beneficially. The onus is on the server to demonstrate that there is no reasonably beneficial use. The notice must relate to the whole of the land the subject of the planning decision giving rise to it and all that land must be shown to be incapable of reasonably beneficial use. In certain limited circumstances, however, a 'split decision' is possible.

Reasonably Beneficial Use

20. What is a 'reasonably beneficial use' in one set of circumstances may not be so in another. Because of this, there is no statutory definition of the term. It is a question of fact and degree on which the Inspector must advise the Secretary of State. From various judgements a number of principles have emerged;

- It is not a comparison of the land in its existing state with its potential value had the permission sought been granted. The test is not whether the land is less valuable to the owner than if developed in accordance with the owner's wishes. Instead, it is whether the use is reasonably beneficial to the owner (or a prospective owner) in all the relevant circumstances of the particular site. [*R -v- Minister of Housing and Local Government, ex parte Chichester Rural District Council* (1960) WLR 587].

- The Secretary of State would normally expect to see some evidence that the server has attempted to dispose of the relevant interest. However, in considering that evidence, the decision maker must have reasonable grounds to conclude both that a prospective owner exists and that the prospective purchaser is prepared to pay a price commensurate with what would be a reasonably beneficial use. The owner should not be expected to sell at an artificially low (possibly peppercorn) price. [Court of Appeal judgment in *Gavaghan & Gavaghan -v- SoS for the Environment and South Hams District Council* [1990] JPL 273].

- A use which is only beneficial to the public at large must normally be disregarded. [*Adams and Wade -v- Minister of Housing and Local Government and Another* [1965] 18 P&CR 60.] However, there is an exception to this principle, where land has a restricted use as undeveloped or amenity land, by virtue of the terms of an existing planning permission. Typically this would be a housing estate with landscaped or other amenity areas. See paragraph 24.

- The history of how the land came to be in its existing state is not relevant, even if the owner has contributed to the situation, for example by neglect. The only exception to this principle is where the existing state results from a breach of planning control that is still susceptible to enforcement action.

21. In assessing whether or not land has a reasonably beneficial use in its existing state the existing use of the land, or any possible uses which do not require planning permission, should be compared with the uses prevailing in the area and the general pattern of development. For example a small enclosure suitable for grazing might have a reasonably beneficial use for that purpose in a rural area, but the same use in an urban area might not be considered beneficial. If the council suggest any alternative use (not requiring permission) they should produce evidence of a demand for that use; but where a server argues to the contrary he/she should also produce supporting evidence. If they do not the Inspector should ascertain whether there is any real demand. There have been occasions where councils have introduced an alternative use without supplying any supporting evidence or where that use needs planning permission which they have neither granted nor undertaken to grant.

22. It may sometimes be possible for an area of land to be rendered capable of reasonably beneficial use by being used in conjunction with neighbouring or adjoining land provided that a sufficient interest in that land is held by the server of the notice, or by a prospective

owner of the purchase notice land. Use by a prospective owner cannot be taken into account unless there is reasonably firm indication of intention to acquire the notice site.

23. The concept of reasonably beneficial use is not synonymous with profit. Profit may be a useful comparison in certain circumstances but the absence of profit, however calculated, is not necessarily a material consideration (for example in the case of a purchase notice involving the garden of a dwellinghouse). Nor is 'reasonably beneficial use' a comparison with the value of the land after any Schedule 3 development, as is sometimes argued (that is development not constituting new development). Schedule 3 rights may be of importance in assessing the value of the land if a purchase notice is confirmed, but cannot affect the issue of whether or not the land has reasonably beneficial use in its existing state.

24. Where the land is incapable of reasonably beneficial use, under s142 the Secretary of State may refuse to confirm the notice if part or the whole of the land has a restricted use under the express or implied terms of an existing planning permission, in the context of the development already permitted and it remains appropriate to restrict the use of the land in the way originally intended. Examples of this would be land earmarked by condition or the approved plans for amenity land in a housing estate, or landscaped areas in business parks.

25. Further guidance on the concept of reasonably beneficial use and related matters is given in paragraphs 250 & 251 of DCLG Guidance.

Alternative Uses

26. If it is decided that the land has no reasonably beneficial use in its existing state, or that it cannot be rendered capable of reasonably beneficial use by the carrying out of any development for which planning permission has been granted or undertaken to be granted, it has then to be considered whether planning permission should be granted for either the development originally sought or some other form of development. These matters should be considered against the background of the development plan and any other material considerations, as in the case of Section 78 appeals.

Substitute Authority

27. In considering a request by the council that some other authority should be substituted, the overriding consideration will be whether that authority are likely to have a functional use for the land. An example would be where a County council needs all or part of the land for highway purposes. The suggested substitute authority's views should be sought. The Secretary of State has, however, no powers to confirm a purchase notice on a Government Department.

The Planning Inspectorate

Retail and Town Centre Developments

Updated to reflect the 2023 Framework (NPPF)?	Yes

What's new since the last version

- This chapter was updated on 8 August 2022 to include a section on 'retail development and community facilities outside town centres', providing an overview of policy and case law related to a need to assess any risks to the loss of local services and community facilities from new retail development.

Other recent updates

- This new ITM chapter was published on 16 June 2022 and contains practical advice on related policy and guidance, the sequential test and impact assessments.

Contents

Introduction

1. Inspectors make their decisions on the basis of the evidence before them. Consequently, they may, where justified by the evidence, depart from the advice given in this training material, although the National Planning Policy Framework and the Government's Planning Practice Guidance will be relevant in all cases.

2. The casework covered by this chapter includes retail development and other town centre development. Issues such as highways, visual impact and living conditions may also arise but this chapter focuses on those that are unique to these types of development.

Policy and guidance

3. Chapter 7 (paragraphs 86 – 91) of the National Planning Policy Framework is entitled 'Ensuring the vitality of town centres'. It should be referred to when dealing with this type of casework. It is noteworthy that this section has been carried forward, largely unaltered, from the original Framework of 2012 (paragraphs 23 – 27).

4. The Framework indicates that decisions should support the role that town centres play at the heart of local communities, by taking a positive approach to their growth, management and adaptation. It also refers to the application of a sequential test, flexibility on issues such as format and scale and an impact assessment. These will be dealt with in this chapter.

5. The Glossary contains definitions that are relevant including:

   - Main town centre uses;
   - Edge of centre;
   - Out of centre;
   - Out of town; and
   - Town centre.

6. These terms should be used precisely and accurately having regard to the definitions. In particular, the range of uses covered by "main town centres uses" is broad. The term "town centre uses" is imprecise and therefore should not be used.

7. Guidance is provided in the Planning Practice Guidance (PPG) on Town centres and retail. Its main contents are concerned with planning for town centre vitality and viability; permitted development and change of use in town centres and assessing proposals for out of centre development.

Other training manual chapters

8. The ITM chapter on ‘Local Plan Examinations’ includes a topic chapter on retail and main town centre uses which may provide useful background when considering an appeal. It gives advice about the national policy context,

    - evidence base, retail needs assessments, town centre hierarchy, defining town centres and primary shopping areas and development management policies.

9. A wide range of uses benefit from permitted development rights set out in the Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended), based on the Use Classes Order. The extent of these is covered in the PPG and also in the ITM chapter on ‘The General Permitted Development Order and Prior Approval Appeals’. This chapter and the legislation may need to be referred when dealing with town centre proposals, particularly if ‘fallback’ arguments are presented or if permitted development rights have changed since relevant development plan policies were adopted.

Sequential test

10. Paragraph 87 of the Framework confirms when the sequential test should be applied. It is important to recognise that this applies to all “main town centre uses” and not just retail development although subject to the exceptions in rural areas identified in paragraph 89. For example, the sequential test is required for offices and hotels that are not proposed in an existing centre or in accordance with an up-to-date development plan. An “existing centre” includes an area defined on a local authority’s policies map and includes city centres, town centres, district centres and local centres as per the Glossary definition.

11. The PPG contains a section on how the sequential test should be used in decision-making[1]. In contains a checklist covering the considerations that should be taken into account, which include matters relating to location and flexibility. Deciding whether the sequential test has been passed or not will depend on the detailed evidence provided (or not provided) about how individual sites have been assessed.

12. Paragraph 91 of the Framework indicates that an application should be refused if it fails to satisfy the sequential test. Furthermore, the failure to undertake a sequential test, especially for smaller scale urban developments including main town centre uses, may be a significant consideration and may lead to a decision to dismiss an appeal.

[1] Ref: ID: 2b-011-20190722

Suitable and available sites

13. The sequence for the location of main town centres uses is town centre sites first, edge of centre sites second and out of centre sites third. According to the Framework, out of centre sites should be considered only if suitable sites in the town centre or on the edge of a centre are not available. In *CBRE Lionbrook (General Partners) Ltd v Rugby Borough Council and another* [2014] EWHC 646 the court confirmed that suitability and availability are matters of planning judgement.

14. Deciding whether sites are “suitable” and “available” should be taken to mean suitable and available for the broad type of development which is proposed in the application by approximate size, type and range of goods. It should generally exclude the identity and personal or corporate attitudes of an individual retailer[2]. In *Aldersgate* it was held that the necessary sequential test had not been carried out and considered. This was because town centre sites were excluded from the sequential test undertaken as the intended operator of the proposed out of centre site already had existing stores in the town centre.

15. Suitability and availability as part of the sequential test should therefore be judged on the basis of planning for land uses and against the backdrop of national policy, rather than from the retailer or developer’s perspective. For example, arguments that the site search should be limited to a narrow catchment area in order to adhere to an operator’s business model would not accord with the expectations of the Framework. As the Court of Appeal observed in *Warners Retails (Moreton) Ltd v Cotswold District Council and others* [2016] EWCA Civ 606, sites should not be rejected on the strength of the self-imposed requirements or preferences of a single operator. Otherwise, the sequential approach would likely become a merely self-fulfilling activity, divorced from the public interest.

16. *Sainsburys Supermarkets Limited v London Borough of Hillingdon and others* [2015] EWHC 2571 (Admin) confirms that "available" is a simple English word whose meaning does not require any further qualification or explanation, and its application will require fact-sensitive judgment in each case[3].

17. More specifically, *Aldersgate* clarifies that “available” cannot mean available to a particular retailer but must mean available for the type of retail use for which permission is sought. However, the judgment also highlights that there may be instances where identity may matter, notably where the town needs representation by

[2] Aldersgate Properties Ltd. v. Mansfield District Council and another [2016] EWHC 1610 (Admin)

[3] The judge also commented in *Sainsburys* that “The debate which occurred during the course of argument about the meaning of "available" generated, in my view, far more heat than light.”

different retailers, or where town centre sites are being hoarded by developers/retailers who refuse to develop them, but also refuse to sell them. But a town centre site already owned by a retailer who is intending to use it for retailing, but who is not going to make it available to others is plainly available for retailing, though only to one retailer. In turn, that does not mean that another retailer can thus satisfy the sequential test and so go straight to sites outside the town centre. In such circumstances the detailed evidence about the intentions and actions of the parties involved is likely to be critical in deciding whether a site is available.

18. The PPG stipulates that the local authority is expected to support the applicant in undertaking the sequential test, including the sharing of relevant information. Therefore the sequential sites to be covered may have been agreed. However, there may be alternative sites which are being promoted as sequentially preferably by third parties and these should not be excluded.

19. The sequential sites may include former department stores which generally comprise large format retail units. These premises often formed the anchor tenant for main town centre shopping schemes and may benefit from dedicated car parking. It will be for the appellant to provide a robust case as to why these units cannot accommodate the appeal proposal. You may therefore be presented with arguments concerning the internal layout of the store, visibility of the unit and ease of access to car parking.

20. The Framework refers to sites that are expected to become available within a reasonable period. Deciding what is a “reasonable” timeframe will be a matter of judgement depending on the circumstances of the case.

21. To address this, detailed timelines may be provided and individual retailers may also present evidence as to what constitutes a reasonable timeframe from the operator’s perspective. Where other town centres sites comprise elements of larger town centre regeneration schemes, it is likely that the Council or the developer of the scheme may provide more detailed evidence on delivery timeframes relating to market demand, construction and store fit out and other issues.

Flexibility of format and scale

22. Paragraph 88 of the Framework requires applicants and local planning authorities to demonstrate flexibility on issues such as format and scale, so that opportunities to utilise suitable town centre or edge of centre sites are fully explored. The bounds that can reasonably be set on an applicant's preference and intentions as to "format and

scale" in any individual case will depend on the facts and circumstances of that particular case. The policy in the Framework is not prescriptive in that respect[4].

23. The issue of flexibility ties in with the sequential test. It is reasonable to expect that the search for suitable, alternative sites has not been undertaken against too rigid a set of parameters whilst bearing in mind that the development proposed is the starting point. Has the applicant been open to some alteration to the proposal when looking at other sites? This might, for example, include the extent of the site, the type of store that is or can be accommodated and the availability of on-site car parking. Format refers to different types of retail offer such as discount stores, supermarkets, hypermarkets, department stores, speciality stores, convenience stores and warehouse retailing. However, both this and the products intended to be sold are most likely to be affected by the configuration and size of the site or the nature and type of the proposed or existing building.

24. Previously national policy referred to disaggregation – meaning whether the proposed development can be 'broken down' into smaller constituent parts. There is no longer a requirement for this to addressed but such considerations may be relevant when assessing whether flexibility has been demonstrated. This might particularly be if a large, mixed use development is proposed containing a variety of main town centre uses.

Impact assessment

25. Paragraph 90 of the Framework refers to requiring an impact assessment for retail and leisure development outside town centres which are not in accordance with an up-to-date plan. This applies if the development is above a locally set threshold or the national default of 2,500 sq m gross floorspace. The assessment should cover the impact on investment and on vitality and viability.

26. The PPG explains what the test is, when it should be used, what should be considered and how it should be used in decision-taking[5].

27. Any assessment should be tailored to the particular circumstances of the case having regard to the advice in the PPG. It should conclude on the proportion of the proposal's trade draw likely to be derived from different centres and facilities in the catchment area and the likely consequences for the vitality and viability of existing town centres. Detailed matters likely to be covered include which centre trade is likely to be drawn from and the amount of any diversion, whether and to what extent the proposal would

[4] Warners Retails (Moreton) Ltd v Cotswold District Council and others [2016] EWCA Civ 606

[5] Ref: ID:2b-014-20190722, 2b-015-20190722 and 2b-017-20190722

compete with existing stores, whether the proposal is expected to resolve existing under capacity ("over-trading") and whether it would prevent expenditure taking place outside the area ("leakage"). The impact should have regard to the trading position of the affected centre and whether this is strong or weak rather than simply to the likely percentage changes. For example, a small impact at a poorly performing centre may have a greater effect than a larger one in a thriving centre.

28. Paragraph 91 of the Framework indicates that development should be refused if it is likely to have a significant adverse impact on any of the considerations referred to in paragraph 90.

Need

29. The issue of need is not part of the sequential test or the impact assessment. The previous need test for retail development proposals in Government policy was withdrawn when PPS4 was published in place of PPS6 in December 2009. It was not included in the 2012 Framework or in subsequent versions and should be irrelevant in justifying proposals but may be referred to if a proposal is considered to be fulfilling a gap in need.

Paragraph 91

30. This paragraph sets out circumstances in which national policy expects applications to be refused. However, that does not mean that such an outcome is inevitable nor that the weight to be attached to such a breach could not be outweighed on the facts of an individual case by other matters. It does not set a presumption[6]. In *Sainsburys* the Council attached more importance to benefits such as job creation, the provision of new uses and additional housing and granted planning permission even though the sequential test was failed. The Court endorsed this balancing and commented that the Framework does not suggest that this approach was illegitimate.

Conditions

31. Conditions may be proposed to restrict the range of goods to be sold. This might, for example, relate to convenience or comparison floorspace or to sales of food. Whether any such restrictions are necessary will depend on the evidence presented including the impact of allowing an unfettered retail use. All conditions should only be imposed where the tests in paragraph 56 of the Framework are met. Further general advice is available in the ITM chapter on 'Conditions'.

[6] Asda Stores Limited v Leeds City Council and another [2019] EWHC 3578 (Admin)

Retail development and community facilities outside town centres.

32. The Framework seeks to encourage the rural economy and support locally based services. Paragraph 84 d) states that planning policies and decisions should enable the retention and development of accessible local services and community facilities, such as local shops, meeting places, sports venues, open spaces, cultural buildings, public houses and places of worship.

33. In seeking to promote healthy and safe communities, paragraph 93 c) of the Framework states that planning policies and decisions should seek to 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. Paragraph 93 d) seeks to ensure that established shops, facilities and services are able to develop and modernise, and are retained for the benefit of the community.

34. Inspectors may therefore be faced with deciding on whether a proposal could result in the loss of a 'community facility' and the effect of any such loss. It is not the role of the planning system to prevent competition between retailers. However, if an established retailer is also custodian of a facility, such as a post office, on which the local community depends to meet its day-to-day needs, the matter requires careful reasoning on the basis of evidence before the Inspector.

35. In the case of *Patel, R (On the Application Of) v Dacorum Borough Council* [2019] EWHC 2992, it was found that the viability of a Post Office within a convenience store should have been a material consideration in the assessment of a proposal for an additional convenience store in the village. It was not sufficient to consider the effect on the retail centre as a whole, but whether the proposed development risked the loss of the Post Office arising from the diversion of trade from the individual store.

36. The judgment made it clear that if those risks had been assessed on the basis of any evidence placed before the local planning authority, it might have made a different decision. The Court therefore quashed the grant of planning permission.

    It will not be enough for an operator or the wider community to simply assert that the risk of loss is sufficient to reject proposals for additional retail facilities. However, when a community facility may be at risk, the impact on any host operator, in isolation, is a material consideration. The decision maker should therefore assess that risk having weighed all the information presented. In doing so regard should be given to any specific evidence presented, such as the viability of the existing store, the site's planning history and development plan policies that are relevant to the provision and/or protection of social and community facilities.

The Planning Inspectorate

Rural issues

Updated to reflect 2023 Framework (NPPF)	
What's new since the last version Changes highlighted in yellow made 3 September 2023: • New paragraph 12 added regarding the subdivision of an existing residential dwelling within the meaning of paragraph 80 d) of the NPPF.	
Other recent updates	

Contents

Information Sources

National Planning Policy Framework

Planning Practice Guidance

Core Principles

1. Along with development plan policies, the Framework provides a backdrop to much rural casework. The core planning principles set out in the Framework recognise the intrinsic character and beauty of the countryside and the need to support thriving rural communities within it, as well as encouraging multiple benefits from the use of land in rural areas.

2. Some key Framework themes include:

    - Support for economic growth in rural areas by taking a positive approach to sustainable new development.
    - Support for the conversion of existing rural buildings, and erection of well-designed new buildings in the countryside, to encourage sustainable growth of rural business and enterprises.
    - Promotion of agricultural and other rural business.
    - Support for rural tourism and leisure development elements that respect the character of the countryside.
    - High quality design.
    - Taking account of the economic and other benefits of the best and most versatile agricultural land. Where significant development of agricultural land is necessary, poorer quality areas should be used in preference to that of higher quality (this issue has tended to arise recently in solar farm cases).
    - Although encouragement is given to the re-use of previously developed land, where it is not of high environmental value, the Glossary at Annex 2 of the Framework confirms that land that is or was **last**[1] occupied by agricultural or forestry buildings is excluded from the definition of previously developed land. Additionally, *Dartford BC v SSCLG* [2017] EWCA Civ 141, confirmed that residential gardens which are not in 'built-up areas' are not excluded from the general definition of previously developed land.

[1] The definition of previously developed land in the revised Framework has changed slightly - 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). See the ITM: Green Belts, paragraphs 104 – 110 for further advice.

- Actively manage patterns of growth to make the fullest possible use of public transport, walking and cycling, and focus significant development in locations which are or can be made sustainable.

Initial Casework categories

Dwellings in the countryside and villages[2]

3. Primarily, establish whether the appeal site is in a settlement or the countryside; disputes may arise over this. Refer to the development plan.

4. If there is no settlement boundary in the development plan, assess the evidence before you. This may include the relationship with buildings, boundaries, e.g. to building curtilages and roads, landform and fields/open land. *How does the site relate to the settlement and countryside visually, physically and functionally? Which does it have most affinity with?*

5. Issues relating to location will often arise, e.g. related to adverse visual/transport effects, or access to services. References to the sustainability of the development should be avoided when defining such issues, to prevent confusion with the policy tests in paragraphs 11 and 74 of the Framework. A possible main issue in this regard might therefore be:
'… *whether the proposed development would provide a suitable site for housing, having regard to the proximity of services, the character/appearance of the area and the suitability of the highway network.'*

6. To promote sustainable development, the Framework requires that housing is located where it will enhance or maintain the vitality of rural communities. Consider the stance taken in relevant development plan policies.

7. Similar issues may arise when considering the conversion of rural buildings to residential use. You may need to balance the merits of re-using an existing building, against the disadvantages of an isolated location. Check local development plan policies as they may prefer commercial use as a first option, as opposed to residential.

8. The Framework makes clear in paragraph 80 that new, isolated homes in the countryside should be avoided unless one or more of the five listed circumstances applies. The word 'isolated' is not defined in the Framework.

9. In *Braintree District Council v SSCLG & Ors* [2017] EWHC 2743 (Admin)[3] the judge found "isolated" should be given its ordinary objective meaning of "*far away from other*

[2] ITM: Housing provides detailed guidance about the Framework, Development Plans and casework issues; including housing for rural workers and Green Belts.

[3] The Council had refused permission for two bungalows in the village on the grounds that they were outside a defined settlement boundary in the plan. The Inspector had concluded that, since the proposed new homes would be located on a road in a village where there were a number of dwellings nearby, the proposed development would not result in "new isolated homes in the countryside."

places, buildings or people; remote" (Oxford Concise English Dictionary)[4]. She also found "*The immediate context is the distinction in (2012) NPPF 55 between "rural communities", "settlements" and "villages" on the one hand, and "the countryside" on the other. This suggests that "isolated homes in the countryside" are not in communities and settlements and so the distinction between the two is primarily spatial/physica*l." [5]

10. At the Court of Appeal[6], Lord Justice Lindblom held that:

"31. … in its particular context in paragraph 55 of the (2012) NPPF, the word 'isolated' in the phrase 'isolated homes in the countryside' simply connotes a dwelling that is physically separate or remote from a settlement…"

"32. What constitutes a settlement for these purposes is also left undefined in the NPPF. The NPPF contains no definitions of a "community", a "settlement", or a "village". There is no specified minimum number of dwellings, or population. It is not said that a settlement or development boundary must have been fixed in an adopted or emerging local plan, or that only the land and buildings within that settlement or development boundary will constitute the settlement. In my view a settlement would not necessarily exclude a hamlet or a cluster of dwellings, without, for example, a shop or post office of its own, or a school or community hall or a public house nearby, or public transport within easy reach. Whether, in a particular case, a group of dwellings constitutes a settlement, or a "village", for the purposes of the policy will again be a matter of fact and planning judgment for the decision-maker. In the second sentence of paragraph 55 the (2012) policy acknowledges that development in one village may "support services" in another. It does not stipulate that, to be a "village", a settlement must have any "services" of its own, let alone "services" of any specified kind."

11. Consequently, whether a site for proposed new dwellings is considered 'isolated' or not, will be a matter of fact and planning judgment depending on the particular circumstances of the case before you.

12. In relation to paragraph 80 d) 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 80d) 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.

13. If identified as an issue, consider carefully what effect a new dwelling would have on the character and appearance of the settlement, its rural setting and/or the surrounding countryside.

[4] Paragraph 24 of the judgment.

[5] Paragraph 25 of the judgment.

[6] *Braintree DC v SSCLG, Greyread Ltd & Granville Developments Ltd* [2017] EWHC 2743 (Admin); [2018] EWCA Civ 610

Holiday cottages

14. There is no definition of dwellinghouse in the Act, but in *Gravesham BC v SSE and O'Brien*[7] [1983] JPL 307 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, holiday cottages that meet the *Gravesham* test may be treated as a dwellinghouse[8] for the purposes of applying planning policies and not as a commercial leisure use, even if its occupation is restricted by condition. However, in the case of *Moore v SSCLG* [2012] EWCA Civ 1202, the Court of Appeal held that whether the use of a dwellinghouse for commercial letting as holiday accommodation amounts to a material change of use will be a question of fact and degree in each case, and the answer will depend upon the particular characteristics of the use as holiday accommodation. Consequently, if required to address this issue, Inspectors should specifically address the factors identified in *Gravesham* rather than apply a general principle.

Rural offices or other small scale commercial development

15. The Framework makes it clear in paragraph 90, that the sequential approach applied to applications for town centre development, is not relevant to applications for small scale rural offices or other small scale rural development. You should be mindful of the objectives of paragraph 84 of the Framework which indicates that planning policies should support economic growth in rural areas.

Special area designations

16. National Parks, the Broads and Areas of Outstanding Natural Beauty (AONBs) have the highest status of protection in relation to landscape and scenic beauty and great weight is to be afforded to conserving and enhancing their landscape and scenic beauty. Planning permission should be refused for major developments in these areas other than in exceptional circumstances, and where it can be demonstrated they are in the public interest (see Paragraph 176 of the Framework).

17. One of the Grounds of challenge in *Franks v SSCLG* [2015] EWHC 3690 (Admin) was a failure to give 'great weight' (as required by the Framework paragraph 115 (now 176)) to the conservation of the landscape and scenic beauty of two fields, being distinct from the conservation of the wider AONB. The judgment found in favour of the Secretary of State, however the case demonstrates the need for explicit and careful consideration of Paragraph 176 in decision-making.

18. The judgment in *Mevagissey* provides useful guidance on the approach to be taken in cases where a development is in an AONB, in terms of whether the need for affordable

[7] ITM: Enforcement & Enforcement Case Law refers to the definition of residential uses and summarises *Gravesham.*

[8] Subject to all the permitted development rights of a dwellinghouse.

housing should be considered 'exceptional circumstances'. Paragraph 51 of the judgment states that:

19. "Where an application is made for a development in an AONB, the relevant committee or other planning decision-makers are required to take into account and weigh all material considerations. However, as I have explained above (paragraph 6), the NPPF places the conservation of the landscape and scenic beauty of an AONB into a special category of material consideration: as a matter of policy paragraph 115[9] requires it to be given "great weight", and paragraph 116 of the (2012) NPPF requires permission for a major development such as this in an AONB to be refused save in exceptional circumstances and where it can be demonstrated the proposed development is in the public interest. In coming to a determination of such a planning application under this policy, the committee are therefore required, not simply to weigh all material considerations in a balance, but to refuse an application unless they are satisfied that (i) there are exceptional circumstances, and (ii) it is demonstrated that, despite giving great weight to conserving the landscape and scenic beauty in the AONB, the development is in the public interest".

20. Also, be aware of the statutory purposes and duties for each of these areas. In essence, they state that, in exercising or performing any functions in relation to, or so far as to affect, land in those areas, relevant authorities shall have regard to their stated purposes.

21. The two purposes of National Parks[10] are to conserve and enhance the natural beauty, wildlife and cultural heritage of the area, and to promote opportunities for the understanding and enjoyment of the special qualities of National Parks by the public. Where there is a conflict between the two purposes, greater weight is to be attached to the conservation purpose.

22. The statutory purpose of AONBs[11] is to conserve and enhance the natural beauty of the area. Where the AONB has a Conservation Board, the Board has an additional purpose, to increase public understanding and enjoyment of the special qualities of the area.

23. The purpose of the Broads[12] is to conserve and enhance their natural beauty, wildlife and cultural heritage, promote their enjoyment by the public and protect interests of navigation.

24. An Inspector should clearly demonstrate how the statutory duty has been discharged in any decision/report.

[9] Now paragraph 176 of revised Framework

[10] Section 11A(2) of the National Parks and Access to the Countryside Act 1949 (as amended).

[11] Section 85 of the Countryside and Rights of Way Act 2000

[12] Section 17A of the Norfolk and Suffolk Broads Act 1988

Local landscape designations

25. Paragraph 175 requires that distinctions be made between the hierarchy of international, national and locally designated sites so that protection is commensurate with their status (paragraph 174 a). Where local landscape designations, such as 'Areas of Special Landscape Importance' have been defined, you will need to look at the justification for them. Where they are the subject of development plan policies, the policies must be applied, informed by the Framework. Recent plans are more likely to include criteria based policies relating to landscape character assessments.

Agricultural buildings

26. Many agricultural buildings are permitted development (pd), see the consolidated General Permitted Development Order 2015. Some pd buildings can require prior approval and you may encounter appeals where this has been refused. These are dealt with in a separate chapter of this Manual: The General Permitted Development Order & Prior Approval Appeals. Proposals requiring full permission typically raise concerns about character and appearance.

Loss of community facilities (including public houses & village shops)

27. This has been an increasing concern over recent years. Considering the evidence and any development plan policies: Does the facility provide for people's day to day needs? If the facility closed, would these needs still be met? The Framework seeks to guard against the unnecessary loss of valued facilities and services, particularly where this would reduce the ability of a community to meet day-to-day needs. Indeed, Framework paragraph 84 d) promotes the retention and development of accessible local services and community facilities. Although not specific to rural areas, Framework paragraph 93 also sets out considerations relating to the delivery of social, recreational and cultural facilities and services needed by communities.

Lighting in the countryside

28. Excessive lighting on rural roads, village streets and in other areas of the countryside is a concern to many rural residents. You will need to consider the effect of any lighting related to a proposed development on the character of an area at night, particularly in dark sky areas. What would the impact of any lighting apparatus be on daytime views?

29. Consider the impact of possible light spill. There can also be a subtle, cumulative effect on the character of rural landscapes that tends to blur the distinction between urban and rural areas.

The Planning Inspectorate

Secretary of State Casework

Updated to reflect Current Framework (NPPF)?	Yes
What's new since the last version Changes highlighted in yellow made 16 February 2021: • Annex 1: the template for the report to inform the Competent Authority's Habitat Regulations Assessment has been updated, to reflect changes to the Habitats Regulations following EU departure.	
Other recent updates	

Contents

Information Sources

The approach to decision-making
Costs Awards
GOV.UK - s.77 & s.78 decision letters collection
PPG: Environmental Impact Assessment
GOV.UK - Award of appeal costs in appeals

1. This chapter covers most aspects of Secretary of State Casework, including applications 'called in' under s.77 of the Town and Country Planning Act 1990 (TCPA), appeals that are 'recovered' under s.78 of the TCPA, as well as some specialist applications dealt with under a variety of legislative routes, such as Major Infrastructure under S.76 of the TCPA.

2. Please note what is beyond the scope of this chapter. Costs applications are dealt with separately in the Costs chapter. Information relating to Nationally Significant Infrastructure Projects under the Planning Act 2008 can be found on the National Infrastructure Planning website.

Inspector's Role

3. When writing reports to the Secretary of State or to other Ministers, Inspectors are not, unlike in transferred cases, standing in the shoes of the Secretary of State. In Secretary of State Casework Inspectors are representatives, appointed to conduct the inquiry and report to her/him. Inspectors are appointed to use their professional expertise and experience to assess the evidence and must give clear advice to the Secretary of State concerning the merits of the proposal, including a recommendation.

4. Ensure that the main issues of the case are clear. These may include the reasons for the 'call-in' or 'recovery', if given by the Secretary of State, and/ or the main issues that you consider pertinent to the judgment.

5. Avoid 'tying the Secretary of State's hands'. Whilst presenting your professional judgment, it is necessary to also consider alternatives, ensuring that the Secretary of State has all the evidence to take a different view.

6. Note that if you are simultaneously dealing with a Costs application you will need to obtain all submissions from the inquiry so as to prepare a separate Costs Report. For further information please refer to the Costs chapter.

Case Management

7. The Case Manager for each case will be the Head of Section for the relevant team.

8. Any deviation from the agreed timetable or course of action should be reported to the relevant team dealing with the particular casework.

Targets and priorities

9. PINS and PC in DCLG have a shared timeliness target on ‘call-ins’ and recovered appeals; to issue all decisions in accordance with statutory timetables. Service Level Agreements impose similar timeliness requirements on most other Ministerial casework.

10. Where the case is generated by Specialist Casework, the target will be driven by the relevant Service Level Agreement and regular contact with the relevant specialist area is essential.

11. It is essential that the office is informed if any previously agreed report submission target will no longer be achievable, with the reasons. This is so that remedial action can be taken if necessary, including notifying the decision office of delay and/or varying any published targets.

Programme Officer

12. If a Programme Officer (PO) is to be appointed, this should be done as soon as possible, and certainly some weeks before holding a Pre-Inquiry Meeting. The PO will be responsible normally for arrangements for the PIM, for the PIM note and its circulation, for the inquiry library, arranging the provision of documents and importantly, to act as the first point of call for those wanting to ask questions of the Inspector. The PO will also assist with keeping the inquiry to programme with tasks such as contacting residents and third parties and answering questions about when they are to attend to give evidence or to be present when evidence of interest to them is to be heard. The PO will be able to provide the Inspector with an appearances list and a documents list after the inquiry for use in the report.

Procedural Points

Amended applications

13. Give a brief explanation if the application has been amended since submission or at the inquiry, under the section headed "The Proposal". Clarify whether the amendment was made with the agreement of the LPA in the report. If you or the LPA did not accept a proposed amendment, set out the reasons for this in the report.

14. Where all relevant parties and the Inspector are agreed however, that the amended proposal can be considered without prejudice to any party, or others, or risk of challenge, only report on the amended proposals.

15. *Bernard Wheatcroft Ltd v SSE and another* ruled upon the limitations on what may be regarded as acceptable amendments that can safely be considered.

16. Any modifications to an Order, even those as small as a correction to a postcode in a Schedule, needs to be included within the recommendation as well as being reported on in the main body of the report.

Pre-inquiry meeting (PIM)

17. Specify the date of any pre-inquiry meeting or meetings. This should normally be around 10-12 weeks before the start of the inquiry but it might be longer in very big cases. The preparation time needed for a PIM will normally depend on the size of the case. As soon as possible afterwards, circulate a note of the matters agreed at the meeting to the parties who attended.

18. Also, file a note of the meeting and list it as an inquiry document when writing the report. If the applicant or PO is running a case/inquiry website, ask them to post a copy of the note there. If, however there is no need for a PIM, a pre-inquiry note may be of use and should be circulated to parties as appropriate.

19. If a PO has been appointed, he/she would normally prepare the meeting note and agree it with the Inspector before circulating it as above. If there is not a Programme Officer, the Inspector should adapt his/ her note for the meeting into a note of the points of agreement at the meeting and have this circulated by the Case Manager.

Environmental assessment

20. The Environmental Impact Assessment (EIA) section of the Planning Practice Guidance (PPG) indicates the circumstances where environmental assessment has to be carried out before planning permission can be given. The Town and Country Planning (Environmental Impact Assessment) Regulations 2017 came into effect in May 2017; however transitional provisions continue to apply the 2011 EIA Regulations, in full or in part, in certain circumstances.

21. EIA also applies to other cases that may come before Inspectors such as those made under the Transport and Works Act, Old Minerals Permissions, Interim Development Orders, S174 enforcement cases etc.

22. In cases where an Environmental Statement (ES) is submitted with the application record that the following were produced:

    - an ES under The Town and Country Planning (Environmental Impact Assessment) Regulations 2017 (or other legislation) and if applicable,
    - comments from statutory consultees,
    - comments made by any other person,
    - further information or evidence obtained specifically under Regulation 25 of The Town and Country Planning (Environmental Impact Assessment) Regulations 2017, and
    - any other substantive information relating to the ES provided by the applicant/appellant.

23. These items form the 'environmental information' which must be taken into account. The report must say that this has been done and that the Inspector is satisfied that the requirements have been met, or not as the case may be. In non-TCPA cases, ensure the correct legislation is stated as the basis for production of the ES.

Reporting to the Secretary of State

Reasons for call-in

24. The power to call-in planning applications is very general and the Secretary of State can call-in an application for any reason. In practice, very few applications are called-in every year. They normally relate to planning applications which raise issues of national significance. The call-in letter should be flagged on the file and emailed to the Inspector before the inquiry opens, allowing the call-in matters to be appropriately edited and included in the report.

Reasons for recovery

25. The circumstances under which the Secretary of State would consider recovering an appeal were stated in a written ministerial statement on 30 June 2008. Since then various statements have added case types that would temporarily be recovered including appeals relating to: gypsy and traveller sites in the green belt; renewable energy; and neighbourhood plans.

26. Briefly state the reasons for the Secretary of State recovering the appeal and the date of the letter.

Reasons for refusal

27. If an appeal is against a failure to give notice of decision and the LPA would have refused the application, the putative reasons given by the authority on that occasion are recorded. Where LPA's wording of reasons is lengthy a summary will suffice, with reference to a document containing the reasons in full.

Conditions

28. You must allow for the Secretary of State to depart from your recommendation. For example, your report should therefore include details of conditions and the reasons for them in the event that he/she allows the appeal.

"Split" recommendations

29. It may be that you take the view that an element of the development or works might be acceptable whilst another part is unacceptable. Seek and report on the views of the parties if the development or works are severable. Again, ensure you report to the Secretary of State on the facts and matters of the case in a way that allows his/her departure from your recommendation.

30. When dealing with several linked proposals, one's deliverability may be dependent on the most commercially viable gaining approval or consent. Carefully reflect these considerations in your report and provide explicit justification for your recommendation.

New arguments or considerations after the close of the inquiry

31. New arguments that were not canvassed at the inquiry *must not* be introduced in the conclusions. Introducing new matters on which the parties have not been given an

opportunity to comment may breach natural justice and be likely to lead to a successful challenge in the courts.

32. If you deem a new consideration to be relevant to the decision, after the inquiry has been closed, consult the CPI unit. It is for the decision branch to consider whether to seek the parties' views in such cases or to re-open the inquiry.

Writing Secretary of State Reports

33. General advice on report writing is given in *The approach to decision-making.* A copy of the protocol between PINS and the Planning Casework Unit on Inspectors Reports can be found at Appendix B. The protocol includes a template for the purpose of compiling information to inform the Secretary of State's Habitats Regulation Assessment, at Annex .

34. Where applicable, reasons for recovery or call-in, or the Statement of Matters should inform the report structure, ensuring that all the issues raised by the Secretary of State are clearly set out. Of course, any additional issues identified by the Inspector should be added to this set of issues.

35. The conclusion section of the report brings together the determinative facts and conclusions. New evidence or issues should *not* be presented in the conclusion.

36. It is useful to obtain proofs, summaries and Statements of Common Ground (SOCG) in electronic form as well as hard copy so that parts can be extracted and edited as necessary for the report.

37. Defamatory remarks must *never* be made in reports. This applies equally whether the remarks are the Inspector's own comments or whether something said by a party at the inquiry is being reported. The reporting of any defamatory statement constitutes the publication of a libel.

Objections to rulings made by the Inspector

38. Any objection to a ruling given by the Inspector, and not withdrawn at the close of the inquiry, should be recorded, together with an account of the circumstances, the details of the ruling itself, and the reasons for the Inspector's decision. Whether objected to or not, it is generally a sensible precaution against future disputes to record in the report all rulings on matters such as the acceptance of late evidence.

39. For CPOs and transport reports state how many objections there were to the Order *within the banner header*. At the beginning of the report make clear how many objectors remained at the close of the inquiry, listing the withdrawals.

40. There is no such thing as a deemed withdrawal, and that even if you are certain that an objection will fall away and the parties are making all the right noises, if at the close of the inquiry you do not have an unconditional withdrawal in writing, although you can report the fact that the parties were very close to reaching an agreement, you must treat the objection as extant, and conclude/recommend accordingly.

41. Ensure that objectors and supporters are seen to have been dealt with in your report. If you attribute points to certain objectors you need to make sure everyone gets a mention, usually in a generic paragraph covering one topic; for example, *safety of pedestrians*,

listing the objectors by their number. Also if a PO has kept the list of objectors and supporters up to date, check that the numbers are correct.

42. The inquiry can be closed in writing, where appropriate; for example adjourning to get information.

Adjournments

43. Due to the cost implications which may ensue, Inspectors should record the circumstances, including causes, times and dates, leading to a substantial adjournment of the inquiry - for example:

- the failure of a party to appear at the appointed time, or
- because of a request for time to study a document produced late, or
- because of the need to call additional evidence to deal with new material arising at the inquiry.

44. This is not necessary if the reason for the adjournment was that the inquiry could not be completed in the time originally allocated. In all cases, however, the resumption date *must* be agreed by the Inspector, after checking their availability with Chart, with all relevant parties at the inquiry before leaving. Immediately upon return home, the Inspector should inform Chart and the relevant Casework Manager of the adjournment with the agreed resumption date and this should be confirmed with the parties in writing.

Requests for further information

45. Other than in exceptional circumstances, anything received after the close of the inquiry will normally be sent straight to PC. Whilst it may be more pragmatic that the most expeditious way of concluding determination of the case would be for the Inspector to report on certain matters submitted subsequently in writing, this would need to be discussed with CPL and/or the Major Casework team as far as call-ins and recovered appeals are concerned.

Legal or procedural

46. If legal or procedural submissions were made at the inquiry, for example concerning the need for permission or consent or an alleged failure to comply with the rules, these may be attached as appendices and recorded in the preamble under a suitable heading. Whilst the Secretary of State may obtain his own legal advice, where possible express a view on the matter after considering all the legal arguments, either here or in the Conclusions section of the report. This should be prefaced by a comment that this legal matter will be for the Secretary of State to determine.

47. For procedural clarity, explain that any position you taken on a matter is done so without precluding the possibility that it may be revisited through further procedural provisions. A common phrase used is, "*the inquiry continued without prejudice to the decision which might later be made on the matter*".

48. Legal issues should be referred to in the first paragraph of the conclusions. The form of words to be used should be on the following lines:-

"Whether or not .....is a matter of law, but in my view ....." or

"This is a matter of law, but in my view....."

49. *Do not say* "in my opinion" unless you are legally qualified. Reference should not be made to any legal advice sought during the case from the Secretary of State's legal advisers via the Inspectorate.

Report Conclusions

Purpose and style of conclusions

50. The Inspector's conclusions are the most important part of the report. They are likely to form the basis of the Secretary of State's decision. Ensure that the conclusions are concisely expressed, based on the evidence and policy and with logical reasoning. The Secretary of State's decision letter will include the entire report as an Annexe to the decision letter.

51. The conclusion should be clearly understood by anyone with a reasonable knowledge of the case. It is therefore helpful to include a short summary of relevant information on matters such as a description of the proposal, the planning history, site and surroundings etc. as relevant.

Cross references

52. The Conclusions should include ample references to preceding paragraphs of the report where the relevant material can be found. Cross references should be clearly relevant and located at the end of the sentence or paragraph. It is useful to make it clear if something derives from the probing of evidence. Reference to plans may be made in the conclusions. References to documents will not normally be made, since these should be included in the reporting of the parties' cases. There are however, exceptions such as the SOCG, the agreed list of conditions and if a particular reference is fundamental to an Inspector's reasoning.

53. Before commencing the Conclusions, it is useful to insert a short sentence along the lines that numbers in brackets [n] – or parentheses (n) – indicate source paragraphs in the report from which the Conclusions are drawn. Make use of hyperlinks for easy cross reference and navigation through the report.

Main considerations

54. The conclusions then identify what, in the Inspector's view, are described as the *main considerations* upon which the decision should be *based*. This is a matter for the Inspector's judgement, depending on the nature of the case and the submissions made but in TCPA cases will always include assessment of whether the proposal is in accordance with the Development Plan as required by s.38(6) of the 2004 Act. In call in cases, these considerations will often be similar to the matters identified in the Secretary of State's call-in letter. In TWA cases, the Statement of Matters similarly defines the main considerations.

55. It is not for Inspectors to define the *issues* on which the decision should be *made*, because that would usurp the Secretary of State's functions. For TWA cases and other

specialist casework, there are statutory considerations, such as the Crichel Down Rules, that must be addressed. These should be flagged up by the relevant Secretary of State in the Statement of Matters, or similar.

56. For each identified issue, the Inspector should review the facts and arguments. At the end of each consideration include a short sentence giving the Inspector's conclusion on the matter in dispute.

57. It is imperative that the conclusions section of the report for called in applications comprehensively covers the issues stated in the call-in letter and the arguments that were submitted by the parties at the inquiry, that have been included in the earlier sections of the report. To do this effectively, it may be necessary *to explore and test matters in the SOCG at the inquiry*. Note that parties may require expert evidence for this and should be given advance warning, at the PIM for example. For optimal clarity set out the questions in the report that you asked during the inquiry relating to the Rule 6 issues; this can be done in a footnote or in the body of the text.

58. In inquiries where the Secretary of State has issued a Statement of Matters, it is imperative that the conclusions section of the report comprehensively covers the issues included in that Statement and weighs up the arguments that were submitted by the parties at the inquiry, that have been included in the earlier sections of the report.

59. In recovered appeals, Inspectors should deal with all the reasons for refusal. Where the appeal is against a failure to determine, ensure that you assess the scheme against Government policy.

Overall conclusions

60. At the end there should be a concluding paragraph or paragraphs which bring together the reasoned judgements on the considerations, and the relevant policies of the development plan but without introducing new material. Where necessary, a balancing exercise will have to be carried out if individual conclusions and policies pull in different directions.

Recommendations

Format of the recommendation

61. The Recommendation should flow logically from the Conclusions. In appeal cases, the recommendation will be that the appeal should be allowed or dismissed; in "failure" cases there should be added that permission or consent should be granted, or granted subject to conditions, or refused. In call-in cases the recommendation should be simply that permission or consent is granted, or granted subject to conditions, or that it is refused. In TWA cases, the primary recommendation should be that the relevant Order should be made, with modifications (*which need to be specified in the Conclusions*) or not be made; and (if the Order is to be made, and where appropriate) deemed planning permission be granted, usually with Conditions.

62. Where the recommendation is that the appeal be allowed and permission or consent granted subject to other conditions, the wording is:

    “...subject to the conditions set out in Annex A”.

63. As stated earlier, even if the recommendation is to dismiss the appeal or refuse the application, there should be a further paragraph stating:

"If the Secretary of State is minded to disagree with my recommendation(s), Annex A lists the conditions that I consider should be attached to any permission [or consent] granted".

Submissions that planning permission not required

64. In cases in which there has been argument about whether it is necessary to obtain planning permission for the proposed development, the recommendation should be prefaced by the words:

"If planning permission is required,…"

No recommendation

65. It is open to an Inspector to make no recommendation (Rule 16(1)) but only with very good reason. The reasons must be clearly given in the conclusions, and the CPI should be consulted first as the circumstances where such a course of action might be justified are very rarely encountered. The formal "Recommendation" should be then "For the foregoing reasons I make no recommendation".

Clarity of recommendation

66. Decision Officers have expressed a preference for conclusions to come down clearly and persuasively in support of the recommended decision, even where the arguments have been finely balanced. Otherwise the decision may appear less than convincing and cause dissatisfaction even to the extent of laying the Secretary of State open to challenge simply for following the Inspector's recommendation.

Abortive inquiries

67. When an inquiry has been opened but not continued due to the withdrawal of the application or appeal or because one of the parties is absent, or for any other reason, a formal report to the Secretary of State is not required unless there has been a claim for costs.

Re-opened inquiries

68. Inquiries may be re-opened where fundamental issues, such as notification failure or delivery of significant new evidence to the decision-maker, trigger procedure to do so.

69. The procedure for compiling a report following a re-opened inquiry is the same as for an inquiry at first instance, with the following exceptions:

a. On the title page the date(s) of inquiry are described as "*Date(s) of Re-opened Inquiry*".

b. In the first paragraph of the preamble the Inspector states, "*I re-opened an inquiry...*", after describing the subject matter of the inquiry the date(s) of the original inquiry should be given.

c. The reasons for refusal or call-in matters are not set out in detail, but make reference to where they can be found in their previous report or report of the previous Inspector.

d. The preamble then gives a brief account of the circumstances leading to the re-opening of the inquiry, and describes the matters upon which the parties were invited to make representations.

e. Establish the scope of the report, including further references to those parts of the previous report where description of the appeal or application site, development plan provisions and other background material may be found.

f. Depending on the circumstances, the Inspector's conclusions will usually be confined to those matters upon which further representations have been invited, and any other additional matters raised during the course of the re-opened inquiry. However a recommendation should be given, taking into account the views on other matters expressed in the previous report, on whether the appeal should be allowed or dismissed, or permission or consent granted, as the case may be.

Redeterminations

70. Where the decision of the Secretary of State has been quashed, *the report of the previous Inspector is still before the Secretary of State*. Where a decision has been quashed the procedures for redetermination are set out in the relevant rules (SI 2000 No.1624) which require the Secretary of State to send a written statement of matters upon which further representations are requested or the inquiry to be re-opened. When a further inquiry has been held, the report should be written in the same manner as for a re-opened inquiry, but the preamble which is automatically inserted as a bullet point if "*redetermination*" is selected at the appropriate prompt in the dialog box of the template, will read:

"This report supersedes that issued on [insert date]. That decision on the appeal was quashed by order of the High Court."

71. It was held in *Mulvenna v SSCLG* [2015] EWHC 3494 (Admin)[1] that even where the decision(s) by the Secretary of State to recover planning appeals are found to be unlawful, the appeal decisions themselves are not nullified. This is because the statutory framework confers jurisdiction on the Secretary of State to determine appeals, whatever the lawfulness of the Secretary of State's decisions to recover them for his own determination.

[1] Permission to appeal to the Court of Appeal has been sought. Inspectors should note that pending any Court of Appeal decision, the High Court judgment stands.

Late correspondence

72. Where *redetermination* is required, letters from third parties received before the inquiry or hearing opens should have been placed in the correspondence folder. Any letters received at or during the inquiry should be added to the folder and taken into account by the Inspector. Letters received after an inquiry or hearing has been closed should normally be placed on the file untouched with the covering slip endorsed to the effect that the contents have not been taken into account by the Inspector. It is for the decision branch, not the Inspector, to consider post-inquiry or post-hearing representations. If, *exceptionally*, however an Inspector has expressly asked for additional material at the inquiry or hearing, and it has been copied to the parties, it should be initialled by the Inspector and may be taken into account in writing the report. A note explaining the circumstances should be included in the preamble to the report. If that material is not received until after the report has been submitted, the matter should be discussed with the CPI in case an addendum to the report is required.

Addendum reports

73. Under the *"slip rule",* obvious clerical mistakes or trivial errors that clearly do not affect the meaning of a sentence or phrase in a submitted report may be corrected. If there is any element of doubt about which word or figure is intended the alteration may only be made after consultation with the CPI.

74. If a decision officer discovers a more serious error, omission or obscurity it will be referred in writing to the CPI. If the CPI considers that an addition or correction is needed a written reply will be sought by way of an Addendum Report and the matter will be referred to the Inspector. The Inspector will need to prepare an addendum or corrigendum which will be attached to the report when issued. The title page will include the words:

    "Addendum (or corrigendum) to report"

75. The first paragraph of the preamble will refer to the submitted report and to the request for clarification or amplification. The correspondence giving rise to the addendum or corrigendum should be referred to, and should normally be attached to the report. The corrections or additions to the original report should then be set out, and it must be stated whether the recommendation remains unchanged or a modification is required.

Appendix A: Legislative context

The Town and Country Planning (Inquiries Procedure) (England) Rules 2000 (SI 2000 No 1624), and the Town and Country Planning (Hearings Procedures) (England) Rules 2000 (SI 2000 No 1626) (together with the enforcement Procedure Rules) provide that after the close of an inquiry or a hearing in a non-transferred case, the Inspector shall make a report in writing to the Secretary of State, including his conclusions and recommendations, or the Inspector's reasons for not making any recommendations. An equivalent provision is contained within the Transport and Works (Inquiries Procedure) Rules 2004 (SI 2004 No 2018).

Section 55 of the PCPA 2004 introduced statutory timetabling for s77 called-in applications and s78 recovered appeals, plus any cases linked to them. The Act requires that the decision will be issued within a timetable that is set by the Secretary of State, as soon as possible after the close of the inquiry.

In Wales, Secretary of State Casework is set within a different framework of SIs, but the general principles set out in this Chapter still apply for reports to the National Assembly.

Appendix B: Protocol on Inspector's Reports between PINS and the Planning Casework Unit

Content of Inspector Reports (IRs)

IRs should contain all the material necessary for the Secretary of State to make a decision and to fully understand the Inspector's conclusions. This will also be necessary to enable parties who were not present at the inquiry to fully understand the decision.[2]

IRs should contain sufficient information to assist PCU in reasoning the decision the other way if necessary – SoS may not agree with the recommendation.

IRs should also contain sufficient information to allow PCU to update matters such as housing land supply. This is frequently necessary because inputs to LHN now change regularly. If Inspectors set out their basic calculations, PCU can then build on them when new information comes in.

IRs should reflect policy and guidance at the time they are submitted to PCU. If the inquiry was conducted on the basis of policy or guidance which subsequently changed, this should be very clearly flagged up and addressed in the IR.

Habitats Screening and Appropriate Assessments

Inspectors should set out clearly whether an appropriate assessment is required. Where screening assessments/appropriate assessments or findings in relation to adverse effects on integrity are required, these should be prepared by the Inspector in the format which has been agreed between PINS and PCU. Any necessary consultation with NE/other parties should be carried out before they are sent to SoS. Subject to any necessary updates (e.g. post-inquiry reps), this information to inform the SoS's habitats regulations assessment should be capable of being adopted by SoS with only minimal topping and tailing. See the HRA SoS Reports to Inform the Competent Authority template (Annex 1) for more information on the content of these reports.

In cases where the Inspector recommendation is to refuse and SoS wishes to grant permission, the underpinning work won't necessarily have been done. In such cases, the following course of action should be taken:

a. Where Inspectors have all the necessary information, PCU would seek an addendum report (extending the timetable if necessary) and SoS would then proceed to a decision,

[2] This is subject of course to the proviso that all inquiry evidence is technically before the SoS and PCU may need to go further into the evidence on specific matters.

b. Where Inspectors do not have the information, then they would need to obtain it from parties, possibly by means of a reopened inquiry or through a request following a 'minded to allow' letter. They would then provide an addendum report and SoS would proceed to a final decision.

Addendum reports

In exceptional circumstances PCU may ask for an addendum report to be prepared. This will only be in circumstances where:

a) the IR does not contain sufficient information for the Secretary of State to make a decision and the relevant matters should have been dealt with before the IR came to PCU or:

b) the relevant matters are most appropriately dealt with by PINS, e.g. because PCU do not have the technical expertise, or

c) the relevant matters are most appropriately dealt with by way of reopening the inquiry, e.g. so that evidence can be tested by cross-examination

The request for an addendum report will be made via a letter (for transparency and the audit trail), setting out the reason why the request is being made. That reason will be reiterated in the DL.

If the inquiry doesn't need to be reopened, parties are not notified at this point. If it is necessary to vary the target, we do on so on that basis that 'It has been necessary for the SoS to seek further information from the Planning Inspectorate in order to determine this case. Full details will be provided in the SoS's decision letter. This further information does not relate to any matters which were not before parties at the inquiry.'

If it is necessary to reopen the inquiry before the target has expired, SoS will notify parties that the original timetable no longer applies, and a new timetable will be set by PINS when the addendum report is provided to SoS. If the inquiry is reopened after the target has expired (e.g. pursuant to a 'minded to allow' letter), targets do not apply.

Inquiry documents on Horizon

Inquiry documents will be dated and labelled clearly and consistently in IRs according to an agreed template. Where hard copies of documents are submitted at the Inquiry or after the close of the Inquiry electronic copies will be sought. These will be clearly labelled and dated on Horizon and in the document list.

Any hard-copy-only documents which were handed up at the inquiry which are not possible to be provided electronically should be marked as such on the document list at the end of the IR, and should be easily accessible in the boxes.

Departures from this agreement

Any departures from this agreement should be raised and agreed in advance.

Rebecca Phillips (PINS)

Richard Watson (PCU)

18 November 2019

Annex 1: Habitat Regulations Assessment: Report to Inform the Competent Authority template

Text Highlight Reference System

	Prompt instructing the Inspector on the context and typical text to include in the section concerned.
	Position underpinned by legislation or legal precedent and which should be followed in arriving at a conclusion.
	Example text which can be used and replicated in reports subject to the Inspector's discretion and relevance to the case concerned.

This information should be compiled as an Annex to the main recommendation report.

INFORMATION TO INFORM THE SECRETARY OF STATE'S HABITATS REGULATIONS ASSESSMENT

INTRODUCTION

A brief description of the proposed development, the legislative context and obligations in relation to the HRA Regulations. Please note that the competent authority for the purposes of the Habitats Regulations is the decision maker not the recommending authority.

The Conservation of Habitats and Species Regulations 2017 (as amended) and the Conservation of Offshore Marine Habitats and Species Regulations 2017 (as amended) (for plans and projects beyond UK territorial waters (12 nautical miles)) require that where a plan or project is likely to have a significant effect on a European site[3] or European marine site either

[3] 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.

European sites in the UK will no longer form part of the EU's 'Natura 2000' ecological network. The 2019 Regulations have however created a 'national site network'. The national site network includes existing SACs and SPAs, and new SACs and SPAs designated under the Habitats Regulations 2017 (as amended), as noted above. Ramsar sites do not form part of the national site network, but all Ramsar sites are treated in the same way as SACs/SPA as a matter of policy.

alone or in combination with other plans or projects, and where the plan or project is not directly connected with or necessary to the management of the European site, a competent authority (the Secretary of State in this instance) is required to make an Appropriate Assessment of the implications of that plan or project on the integrity of the European site in view of the site's conservation objectives.

PROJECT LOCATION

A brief description of the receiving environment for the proposed development placing it in context with the European site(s) considered applicable in this instance.

The Proposed Development site is located [INSERT DETAILS] and is in proximity to a/several [UPDATE AS RELEVANT] European site/s [UPDATE AS RELEVANT].

List the site(s) and all the qualifying features of the site(s).

HRA IMPLICATIONS OF THE PROJECT

A description of the impacts and impact pathways from the proposed development to the European site(s) (which may be more than one).

The Proposed Development will generate [INSERT DETAILS] impacts that have the potential to affect the [INSERT DETAILS] site(s) and the following [INSERT DETAILS] qualifying features of the site/s. The impact pathways[4] are [INSERT DETAILS] e.g. air, noise or hydrological connectivity.

PART 1 - ASSESSMENT OF LIKELY SIGNIFICANT EFFECTS

An analysis or whether those impacts and impact pathways identified could result in likely significant effects for any of the European site(s) considered. The assessment needs to be done in relation to the impacts occurring alone and in-combination with other plans and projects. Inspectors need to remember that determining likely significant effects is a low bar and if in doubt it is safer to assume a likely significant effect will occur and progress to the consideration of conservation objectives and assessment of adverse effects on the integrity. Inspectors should note that mitigation cannot be taken into account in the determination of likely significant effects. This is a position established by the Court of Justice of the European Union in its judgment on Case C-323/17 People Over Wind & Peter Sweetman v Coillte Teoranta ('People over Wind') (PPG ID: 65-005-20190722). In arriving at the conclusions regarding likely significant effects regard should be given to the views of the appropriate nature conservation body (in England this is Natural England) and this should be expressed and addressed in this section.

[4] Impact pathways are the routes by which an impact can interact with the features of the European site.

CONSERVATION OBJECTIVES

This section and the assessment of adverse effects on integrity are only necessary in relation to those site(s) and features for which likely significant effect have been identified (see section above). This section should include a description of the conservation objectives for European site(s) that are considered relevant.

PART 2 - FINDINGS IN RELATION TO ADVERSE EFFECTS ON THE INTEGRITY

This section should include a detailed description of the adverse effects on integrity for those site(s) and features which are deemed to be exposed to a likely significant effect from the proposed development either alone or in-combination with other plans or projects. The integrity of the site is the coherence of its ecological structure and function, across its whole area, that enables it to sustain the habitat, complex of habitats and/or the levels of populations of the species for which it was designated (PPG ID: 65-003-20190722). It must demonstrate a consideration of the effects on the delivery of the conservation objectives. Mitigation can be taken into account, but the Inspector must be clear which effects it intends to address, be sure that it is adequately defined, secured and would be in place before harm occurs to the European site(s), and that the mechanism to achieve this would be effective.

Findings should be complete, precise and definitive to ensure there is no reasonable scientific doubt as to all the effects of the proposed development. In order to dispel all reasonable scientific doubt, the reasons given should be explicit and detailed.

In arriving at the conclusions regarding adverse effects on integrity regard **must** be given to the view of the appropriate nature conservation body (Natural England) and this should be expressed and addressed in this section.

HRA CONCLUSIONS

This section must be included regardless of the stage reached e.g. likely significant effects or adverse effect on integrity. It should include an overall conclusion on the findings of the HRA. This should include a summary of the position either for likely significant effects or for adverse effects on integrity.

These conclusions represent my/our assessment of the evidence presented to me/us but do not represent an appropriate assessment as this is a matter for the SoS to undertake as the competent authority.

If an adverse effect on the integrity of a site is concluded and then there is a need to progress to Part 3 – Consideration of Alternatives and Part 4 - Imperative Reasons of Overriding Public Importance.

The Planning Inspectorate

Transport Orders

Updated to reflect Current Framework (NPPF)?	Yes

What's new since the last version

Changes highlighted in yellow made 23 December 2016

- First version published 23 December 2016
- NB: Those elements of this chapter specifically pertaining to Welsh casework are still under consideration. Inspectors handling Welsh casework are advised to proceed with caution in reference to those elements, and to seek advice and clarification where necessary.

Contents

Relevant Legislation, Guidance and Case Law

Legislation

- Highways Act 1980
- Acquisition of Land Act 1981
- New Roads and Street Works Act 1991
- Town and Country Planning Act 1990
- Road Traffic Regulation Act 1984
- The Highways (Inquiries Procedure) Rules 1994 (SI 1994 No. 3263)
- The Compulsory Purchase (Inquiries Procedure) Rules 2007 (SI 2007 No. 3617)
- The Compulsory Purchase (Inquiries Procedure) (Wales) Rules 2010 (SI 2010 No. 3015
- The Compulsory Purchase of Land (Written Representations Procedure) (Ministers) Regulations 2004 (SI 2004 No. 2594)
- The Compulsory Purchase of Land (Written Representations Procedure) (National Assembly for Wales) Regulations 2004 (SI 2004 No. 2730 (W.237))
- The Local Authorities' Traffic Orders (Procedure) (England and Wales) Regulations 1996 (SI 1996 No. 2489)
- The Secretary of State's Traffic Orders (Procedure) (England and Wales) Regulations 1990 (SI 1990 No. 1656)

Guidance

- DCLG's *Guidance on Compulsory purchase process and The Crichel Down Rules for the disposal of surplus land acquired by, or under the threat of, compulsion*, October 2015.
- Revised Circular on Compulsory Purchase Orders (NAFWC 14(2)/2004) Parts 1 and 2
- The Planning Practice Guidance on the award of costs and compulsory purchase and analogous orders.
- Rights of Way: Guidance for Local Authorities (Defra *Circular 1/09*)[1]
- Best Practice for Inquiries Into Local Highway Proposals

[1] Replaces advice and guidance in Circulars: 1/08, 2/93, 3/93, 17/90, 18/90 & 32/81.

Advice

- Public Inquiries into road proposals: What you need to know (Welsh Government 2007)

Case Law

- *Vasiliou v SoS for Transport and another [1991] 2 All ER 77*
- *Bushell & Anor v SoS for Environment [1980] 2 All ER 608*
- *Smith & Others v SoS for Transport and Barnsley MBC [1997 JPL 416]*

Contents

Introduction

1. This chapter of the Inspector Training Manual concerns public local inquiries into schemes and orders made under Parts II and XII of the Highways Act 1980 and, in relation to Compulsory Purchase Orders, the provisions of the Acquisition of Land Act 1981; Toll Orders made under the New Roads and Street Works Act 1991 or under Local Act powers; orders made under Part X of the Town and Country Planning Act 1990; and Traffic Regulation Orders made under the Road Traffic Regulation Act 1984. Reference is also made to the written representation procedure that may be used for Compulsory Purchase Orders.

2. Much of the advice which follows applies equally to all the types of order covered by the chapter, but because of the specific differences which are necessary in the treatment of the various types of order, they are dealt with in separate sections of the chapter.

3. The chapter does not cover inquiries relating to planning applications or to rights of way work (including public path orders and definitive map orders), the Harbours Act 1964 or the Cycle Tracks Act 1984.

4. Nor does the advice in this chapter apply to nationally significant infrastructure projects which would be highway-related development as defined by section 22 of the Planning Act 2008 (PA2008). Section 33(4) of the 2008 Act sets out the interface between the development consent regime and the regulatory regimes established by the Highways Act 1980 and the New Roads and Street Works Act 1991. It is possible that trunk road Highways Act Orders may be promoted in England in future that could give rise to Inquiries – for example, highway development may not meet the relevant threshold set out in PA2008 s22 (so that, in turn, PA2008 s33(4) would not apply) or the de-trunking of a road might include no development and so might be promoted through section 10 of the 1980 Act which, if there were objections, might necessitate an Inquiry, as has happened in the past. Therefore, this chapter does not discount the possibility that a Highways Act Order might be promoted in England by the Secretary of State.

5. No distinction is made in this chapter between schemes and orders: the word order should be taken to mean scheme and the singular may be taken as the plural. All inquiries are public local inquiries. The Secretary of State in this chapter should generally be taken to mean the Secretary of State for Transport (SST) for local authority road schemes under the Highways Act. For trunk road orders, the SST and the Secretary of State for Communities and Local Government (SSCLG) have a joint role. (Although this is the case, 'the Secretary of State' (SoS) is referred to throughout and should be taken to relate to circumstances where it refers to the SST alone or where there are joint responsibilities.) For road orders made under the Town and Country Planning Act, the relevant SoS is SST; under the New Roads and Street Works Act and the Road Traffic Regulation Act, the responsible SoS is SST, though the decision maker on most local authority orders made under the Road Traffic Regulation Act 1984 following any inquiry is the local authority itself. The same applies to designations made under the New Roads and Street Works Act 1991, following any inquiry where the decision maker is, again, the local authority itself.

6. In Wales, the Welsh Ministers (WM) now exercise most of the powers formerly exercised by the SoS for Wales, by virtue of paragraph 30 of Schedule 11 to the Government of Wales Act 2006. Reports are made to the WM. Where the Welsh Government itself promotes a scheme, orders may be prepared in draft by the

WM. Section 22 of the 2008 Planning Act has no effect in Wales and trunk road schemes in Wales are promoted by the WM through the Highways Act 1980.

7. Following the Greater London Authority Act 1999, Transport for London, the Mayor's transport executive, is the highway authority for a network of London's most important roads – the GLA roads. The network is defined in the GLA Roads Designation Order 2000 and the GLA Roads Designation (Amendment) Order 2000. SST continues to have responsibility for motorways and some other roads linking to the national network. The London Boroughs are the local highway authority for other roads in their areas. The Mayor has power under Section 14B of the Highways Act 1980 to make an order directing that a GLA road should become a borough road or a borough road should become a GLA road. In both cases, the borough affected must give consent. Where consent is refused, the SST will then decide whether or not to confirm the order, with or without modification.

Orders made under the Highways Act 1980

8. Under the Highways Act 1980, the Government has a dual role for motorways and trunk roads (also referred to as the strategic road network) as both promoter of orders and as the decision-maker. The highway authority for motorways and trunk roads in England is the SST. In recent times, up until April 2015, the Highways Agency promoted schemes on behalf of the SoS at any Highways Act inquiry. However, since April 2015 this role has fallen to Highways England, the new Government-owned strategic highways company charged with driving forwards the country's motorways and major A roads, through modernising and maintaining the highways, as well as running the network and keeping traffic moving. The SST and the Secretary of State for Communities and Local Government, acting jointly, make the decisions after the inquiry. In Wales, the Welsh Ministers promote motorway and trunk road schemes and take the decision after the inquiry.

9. Decisions concerning the confirmation of orders made by local authorities under the Highways Act 1980, or other relevant Acts in relation to roads, which are not motorways or trunk roads, are made by the SST or the WM.

The origins of Highways Act Orders

10. Orders are prepared by Government departments on behalf of the SoS, the WM, by Highways England or by local authorities. Those prepared by Government departments are published in draft and not made until all the statutory processes have been completed. Local highway authorities authorise the making of orders by council resolutions. The orders are then sealed by the local authority, but do not take effect unless and until **confirmed** by the SoS/WM. It is important to establish that the appropriate procedure has been followed. If a local authority order is submitted for consideration at an inquiry in draft rather than in made form, the matter needs to be raised by the Inspector immediately with the Planning Inspectorate. Each order depends on a section or sections of the Highways Act 1980 and (in relation to Compulsory Purchase Orders), the Acquisition of Land Act 1981. In some cases, these sections specify criteria against which the order needs to be considered. Inquiries normally become necessary because of unresolved objections to a published order. These Acts (including Schedules to them) and regulations made under the Acts set out the procedures for making or confirming orders and, where appropriate, the circumstances in which a public inquiry is to be held.

The statutory basis for inquiries into Highways Act Orders

11. Schedule 1 to the Highways Act 1980 and Section 5 of (and in certain circumstances Schedule 3 to) the Acquisition of Land Act 1981 give the SoS and the WM power to hold inquiries in relation to matters arising under those Acts. Section 13A(3) of the Acquisition of Land Act (in regard to local authority orders) and Paragraph 4A(3) of Schedule 1 to that Act (as amended by the Planning and Compulsory Purchase Act 2004) (in regard to the SoS's and WM's draft orders) prescribe the circumstances where an inquiry or hearing is required.

12. The purposes for which orders or schemes are prepared under the various powers contained in the Highways Act include the following:

    i. Section 10 – to direct that any highway, or any highway proposed to be constructed by the SoS, should become or should cease to be a trunk road;

    ii. Section 14 – to stop up, divert, improve, alter or construct a side road to a trunk road or classified road;

    iii. Section 16 – to authorise the provision of a special road;

    iv. Section 18 – to stop up, divert, improve, alter or construct a side road to a special road;

    v. Section 106 – to construct a highway by means of a bridge over or a tunnel under any navigable waters;

    vi. Section 108 – to divert any navigable watercourse where it is necessary or desirable to do so in connection with the construction, improvement or alteration of a highway, the provision of any new means of access from a highway or the provision of a maintenance compound (or a service area in relation to a special road);

    vii. Section 124 – to stop up a private means of access to a highway;

    viii. Sections 239 to 246 – to acquire land compulsorily (or, under section 250, to acquire rights over land) for highway purposes.

    Section 248 of the Highways Act refers to limited circumstances where land may be acquired, notwithstanding that it is not required immediately.

13. In Wales, useful information on Best Practice for Inquiries into Local Highway Proposals[2] can be obtained via the gov.wales website at http://gov.wales/docs/desh/publications/110420best-practice-en.pdf.

14. Inquiries into orders covered in this Guide are often expressed as being inquiries into objections or to hear representations and objections. However, the task of the

[2] General guidance on the way in which Inspectors prepare for and conduct inquiries is given in the separate Inspector Training Manual Chapter 'Inquiries'.

Inspector is to inquire into the order in the light of the objections. Objectors at an inquiry may seek to show that the proposals of the promoter are ill conceived. If they do, and unless there are cogent reasons for adopting a different procedure, the promoting authority must explain its proposals and say why they are considered to fall within the provisions or tests contained within the Acts that authorise the making or confirmation of the order, and why they are considered to be expedient. This provides both the background against which the various objections can be considered and the basis on which a recommendation can be made on the orders.

15. Although inquiries are convened because of unresolved objections, the scope of the inquiry can be wider. For example, in the case of inquiries into CPOs, an Inspector is required not only to deal with the objections to the order, but must also be satisfied that:

- there is a compelling case in the public interest for the Order to be made;
- this justifies interfering with the human rights of those with an interest in the land affected;
- the acquiring authority has a clear idea of how it is intending to use the land it seeks to acquire;
- the acquiring authority can show that all necessary resources (including funding) to carry out its plans are likely to be available within a reasonable timescale; and
- the scheme is unlikely to be blocked by any impediment to implementation.

16. These requirements are contained in DCLG's *Guidance on Compulsory purchase process and The Crichel Down Rules for the disposal of surplus land acquired by, or under the threat of, compulsion*, from 2015 in relation to CPOs (In Wales, see NAFWC 14(2)/2004 "Revised Circular on Compulsory Purchase Orders" Parts 1 and 2). The Rules and tests to which the Guidance refers are included for the convenience of local authorities and other statutory bodies, to whom they are commended. However, when reporting on a draft CPO promoted on behalf of the SoS, strictly speaking the DCLG Guidance does not apply. Nevertheless, the same tests need to be met in relation to such a CPO because these tests are derived from statute, case law and the European Convention on Human Rights and therefore consideration should still be given to whether the tests are met.

17. The DCLG *Guidance* provides information about the particular considerations which apply to CPOs prepared under certain specific authorising powers; about procedural issues; and about documents which should be submitted with an order. In particular, Section 17 of the *Guidance* concerns special kinds of land afforded additional protection against compulsory acquisition under Part III of the Acquisition of Land Act 1981. It is important to establish at an early stage whether any such land is affected by a CPO coming before a forthcoming inquiry. For example, whether there is any land within the CPO to which Section 19 of the Acquisition of Land Act (a common, open space, fuel or field allotment) applies. Such land may be compulsorily purchased when authorised by Special Parliamentary Procedure or when the relevant Secretary of State is satisfied either that other land, equally beneficial, would be given in exchange for such land or that the giving of exchange land is unnecessary. Section 19 (and Schedule 3 of the same Act) provides details.

If the SoS is prepared to certify his satisfaction with the giving of exchange land then NPCU[3] (the National Planning Casework Unit) will issue a Notice of Intention to issue such a certificate in the case of open space land, while DCLG will issue a Notice of Intention in the case of fuel or field allotment land (the SoS Defra holds responsibility for issuing Notices of Intention for common land). If this gives rise to objections, a Public Inquiry may be held. Therefore, the Inspector will need to know whether a certificate has been applied for or obtained from the SoS regarding the provision of appropriate exchange land. Often such an application will be referred by the SoS to the same inquiry, and the Inspector will then have to consider and report on the adequacy of the proposed exchange land at the same time as reporting on the CPO. But the lack of a Certificate is not fatal to a CPO in such circumstances, since it would remain open to the promoter to pursue Special Parliamentary Procedure (DCLG *Guidance*, section 17, paragraph 192).

18. When considering the amount of land incorporated in the order, the Inspector should give due regard not only to the area of land, but also to the estate or interest proposed to be taken in it. For example, it may well be argued that an order providing for the acquisition of title to the land is excessive because all that is required is for a right to be created under Section 250 of the Highways Act and for that right to be acquired under the CPO.

19. On occasion the circumstances identified in Section 13A(2) of (or Paragraph 4A(2) of Schedule 1 to) the Acquisition of Land Act 1981 may arise and the Written Representations Procedure may be used. The Compulsory Purchase of Land (Written Representations Procedure) (Ministers) Regulations 2004 will apply in such cases (or, in Wales, the Compulsory Purchase of Land (Written Representations Procedure (National Assembly for Wales) Regulations 2004). The Regulations are straightforward.

Inquiries procedure

20. All inquiries concerned with orders and schemes proposed to be made under the Highways Act 1980 are subject to inquiries procedure rules. The current rules of procedure under this Act are:

- The Highways (Inquiries Procedure) Rules 1994 - Statutory Instrument 1994 No 3263 - which apply to inquiries concerned with orders either:
  - proposed to be made by the SoS/WM, or
  - made by a local highway authority or a strategic highways company (such as Highways England) and submitted to the SoS/WM for confirmation.

Inquiries considering highways Compulsory Purchase Orders made under the Highways Act and the Acquisition of Land Act are subject to further Rules, namely:

- In England, in relation to a highways CPO which is the subject of a public local inquiry of which written notice was given on or after 29 January 2008, the Compulsory Purchase (Inquiries Procedure) Rules 2007 – Statutory Instrument 2007 No 3617 - which apply to CPOs whether

[3] CPO Letter of 11 April 2012

published in draft by the SoS or made by a local or other authority and submitted to the SoS for confirmation.

- In Wales, in relation to a highways CPO which is the subject of a public local inquiry of which written notice was given by the WM on or after 31 January 2011, the Compulsory Purchase (Inquiries Procedure) (Wales) Rules 2010 – Statutory Instrument 2010 No. 3015.

- In Wales in relation to a highways CPO which is the subject of a public local inquiry of which written notice was given before 31 January 2011 or in England in relation to a highways CPO which is the subject of a public local inquiry of which written notice was given before 29 January 2008,

    - the Compulsory Purchase by Ministers (Inquiries Procedure) Rules 1994 - Statutory Instrument 1994 No 3264 - which apply to CPOs published in draft by the SoS/WM, or

    - the Compulsory Purchase by Non-Ministerial Acquiring Authorities (Inquiries Procedure) Rules 1990 - Statutory Instrument 1990 No 512 - which apply to CPOs made by local or other authorities and submitted to the SoS/WM for confirmation.

21. The various sets of Rules make fairly standard arrangements for the service of statements of case, the organisation of pre-inquiry meetings, service of statements of evidence and summaries, procedure at the inquiry, site inspections and procedure after the inquiry. The detailed differences between the Rules and the time limits they impose need to be studied. Tier 3 of the DCLG Guidance gives some guidance on procedural matters such as these, split between general procedural issues and those procedural issues applying to some compulsory purchase orders (such as those involving special kinds of land).

22. One point to note particularly is that, under the 1994 Rules and the 2007 Rules, a pre-Inquiry meeting (PIM) called by an Inspector requires 3 weeks' notice, just like a PIM called by the SoS. It should also be noted that the normal practice followed in relation to Highways Act orders is that the SoS does not cause a PIM to be held. Unless it is made plain that a PIM has been called by the SoS, any PIM held will be one which is to be regarded as having been convened at the instance of the Inspector. (PIMs are dealt with in more detail at paragraph 26 below and in Appendix A.)

23. The Highways (Inquiries Procedure) Rules 2004 contain certain differences from the procedure under the Town and Country Planning (Inquiries Procedure) (England) Rules 2000[4], which apply to TCPA Section 78 planning appeal cases. These are that:

    i. there are differences in some of the time limits (statements of evidence need to be submitted three weeks before the inquiry rather than four);

    ii. there is no provision for a statement of matters to be issued by the SoS;

[4] Or the Town and Country Planning (Inquiries Procedure) (Wales) Rules 2003 as appropriate

iii. there is no provision for exchanging comments on the statements of case;

iv. there is no reference to the preparation of a statement of common ground (though that does not mean that this cannot be encouraged by the Inspector);

v. there is no requirement for the Inspector to list the main issues at the outset of the inquiry (though there is nothing to prevent him or her from doing so); and

vi. there is no express requirement for closings to be provided in writing (though there is nothing to stop the Inspector asking for this at the PIM). It is clearly helpful for the Inspector to have closing submissions in writing, and sent electronically to the PINS Case Officer wherever possible.

24. Sometimes the complex of Orders and matters before an inquiry means that a variety of different procedural rules applies. For example, a significant planning appeal under Section 78 or 77 of the Town and Country Planning Act may involve added Road Orders, or there may be an associated Transport and Works Act Order. Where this occurs, there may be conflict between the different provisions of the different sets of Rules. In that situation, it is normal to secure agreement at a PIM on which Rules will apply. This is also the line taken when the matters before the inquiry include, for example, a Harbour Order, for which there are no procedural rules. Very often, it is agreed that the Highways Procedure Rules will apply; but, if the planning applications on appeal represent a significant element of the matters under consideration, it may be appropriate to secure agreement that the Town and Country Planning (Inquiries Procedure) (England) Rules 2000 (or the Town and Country Planning (Inquiries Procedure) (Wales) Rules 2003 *(as amended)* as appropriate) are followed at the inquiry.

Preparing for an inquiry

25. Inquiries into orders under the Highways Act 1980 can sometimes run for many days. The promoting authority is responsible for the inquiry arrangements, such as the venue and the setting out of the inquiry room, unless otherwise agreed with the Planning Inspectorate. For longer inquiries, however, the Inspector may have a Programme Officer, one of whose duties will be to liaise with the parties on the inquiry arrangements.

26. Before larger inquiries (generally those expected to last two weeks or more, or those with a large number of objectors proposing to appear) it is often convenient to arrange a PIM to deal with preliminary matters such as the timing of the submission of statements of evidence, the production of particular information required by the Inspector, clarification of the procedures for the inquiry itself, the preparation of a list of likely Core Documents and the making of a start on the programme of appearances. Appendix A to this chapter contains guidance on the arrangements to be made for a PIM.

27. If it is not possible to arrange a PIM, the Inspector may consider it helpful to issue a pre-inquiry note (PIN), which would set out much of the information which would have been discussed at a PIM and would be useful in providing the main parties and objectors with guidance in advance of the inquiry. Appendix B to this chapter

contains an example of a PIN.

28. The inquiries procedure rules for planning appeals require planning authorities and applicants to prepare and submit an agreed statement of common ground four weeks before the date fixed for the inquiry. Whilst, as noted at paragraph 23 above, there is no equivalent requirement in the procedure rules for highways inquiries, it is nonetheless helpful if parties are able to agree factual information about the proposal and background environmental and other data before the inquiry. The inclusion of this data in mutually agreed statements, probably as core documents of the inquiry, can result in shorter statements of evidence and a shorter inquiry.

29. How such agreement is reached will vary depending on the nature and complexity of the proposal and the matters at issue. Where there are only two or three major parties involved and the issues are fairly straightforward, the Inspector might simply encourage the parties at the PIM to get together with a view to producing a statement of agreed facts. For major inquiries, however, a more formal arrangement may be necessary, particularly where several parties are expected to bring evidence of a technical nature to the inquiry. It is also helpful if the parties are asked to set out in such a common ground document, a list of the issues on which they differ. The provision of such statements at the earliest possible stage of preparation for the inquiry enables the time available before the inquiry to be spent concentrating on the matters in dispute between the parties.

30. An approach which has proved useful in some major inquiries is to set up 'Joint Data Groups' in advance of the inquiry opening. These are small working groups, on which all parties to the inquiry are represented, which would be set the task of assembling and agreeing baseline data relevant to a particular area of the inquiry, e.g. noise, traffic or ecology. In particularly complex cases it may also be appropriate to set up a Joint Working Party, chaired by an Inspector or an Assistant or Deputy Inspector, to co-ordinate and monitor the work of the individual Joint Data Groups. Inspectors considering setting up Joint Data Groups and/or a Joint Working Party are advised to contact the Planning Inspectorate for further advice.

31. One of the issues which might be raised at a PIM, is whether a transcript of the inquiry will be provided. In England, a transcript service may be arranged by Highways England for motorway and trunk road inquiries which are expected to last for more than 16 sitting days. For other cases, transcripts may be allowed at the Inspector's discretion. Transcripts are not normally provided in Wales.

32. Normally, a Programme Officer will be required for an inquiry for which a PIM is necessary. The Programme Officer should be present at the PIM so that he or she can start work on programming and inquiry arrangements. In essence the Programme Officer's role is, on behalf of the Inspector and with his/her approval, to:

a) establish appropriate filing systems;
b) set up and maintain the Inquiry library and the Inquiry website, if there is one;
c) set up and use the Inquiry database;
d) liaise with all parties to the Inquiry;
e) prepare and manage the Inquiry programme;
f) organise the PIM;
g) receive and record all documents submitted to the Inquiry;
h) chase up any late documents within the set deadlines;
i) manage the use of the Inquiry venue;

j) notify respondents of the close of the Inquiry; and
k) arrange hand-over of any relevant issues to the Promoter following the close of the Inquiry.

The Orders before the Inspector

33. The Inspector should always bear in mind what he or she has been appointed to inquire into and therefore upon what he or she is required to make recommendations. The Inspector should be careful to confine his or her consideration to matters within the scope of the inquiry and resist broadening that consideration into matters that are not directly involved in the orders.

Policy, design standards etc

34. The merits and foundations of policies, methodologies, design standards and economic assumptions adopted by the Government are not matters for argument at an individual inquiry. Any argument about them should take place generally and at national level. This was clearly stated as Government policy in a Ministerial statement made in the House of Lords on 25 February 1976 (Appendix C to this chapter), and that approach is supported by the judgement of the House of Lords in the case of *Bushell and Another v SoS for Environment [1980] 2 All ER 608*. (An extract from the judgement of Lord Diplock is attached as Appendix D).

35. In general terms, the policy issues which are not matters for debate at inquiries are:

- the allocation of resources to each of the different transport modes;
- the combination of investment, subsidy, taxation and regulation by means of which the Government seeks to create the most efficient transport system;
- the general assumptions that Government makes about the availability and price of fuels and other economic factors which influence traffic growth;
- the objectives of the Government Road Programme; and
- the general methodologies and the adoption of design standards used in the preparation of schemes and orders - as opposed to their application to particular schemes and orders.

36. Objectors may express disagreement with Government policy, or contend that, for example, Government assumptions on the future level of traffic or the cost of travel are based on outdated information, but there is little point in permitting such disagreement to be pursued. The Inspector's duty is confined to noting the objection and seeing that it does not take up too much inquiry time or distract attention from the main issues. If an objector is determined to pursue objections to general policy beyond reasonable limits he or she should be advised to submit his or her views in writing, either to the Inspector, who will enclose the document with his or her report, or directly to the SoS/WM.

37. Inspectors have to distinguish between those objections which challenge Government policy and those which question the need for the specific proposal. Argument as to whether or not a particular proposal conforms with, or is needed for the implementation of, Government policy is a matter for the inquiry and should be given careful attention by the Inspector.

38. Similarly, the fact that arguments concerning the methodologies and design standards adopted by the Government are out of place at an inquiry does not imply that their application to any particular proposal is immune from being thoroughly tested. Thus, whilst Government or local highway authority witnesses should not be expected to defend or justify national forecasts and general design standards, they are expected to be able to justify the way in which they have been applied to the case at issue and to justify their traffic predictions and assignments.

Compensation and hardship

39. If anyone wishes to object to a CPO on the grounds of hardship and/or inadequate compensation (as distinct from land use), it should be remembered that whilst hardship which cannot be met by compensation is always a relevant consideration, the Acquisition of Land Act 1981 (section 13(4) and Schedule 1 Paragraph 4(4)) provides that the SoS or WM may disregard objections which relate to matters which can be dealt with by the Lands Tribunal, by whom compensation is assessed. Since the assessment of compensation is not a matter for the SoS/WM, the Inspector should neither hear evidence about the calculation of compensation nor seek the disclosure of expected levels of compensation. Authorities are nevertheless normally expected to be able to give the estimated costs of a scheme as a whole, and should do so to a specific valuation date, which should be mentioned in the Inspector's report.

Reopening decided issues

40. Objectors should not be allowed to seek to use the inquiry to reopen issues which have already been decided by a proper planning process. Thus, in the case of an inquiry into supplementary or variation orders, the Inspector should never permit the reopening of matters upon which a decision has already been made after a previous inquiry. For example, an inquiry into objections to a supplementary proposal to build an interchange on a new road, the line of which has already been fixed after a previous inquiry, does not provide an opportunity for the question of the line of the new road to be re-opened. Any representation made in writing in such regard should simply be accepted and attached to the Inspector's report.

41. If a Line Order has been approved, and the inquiry concerns a consequential CPO, an objection challenging the need for the road or based on changing the line would not be heard. A CPO where planning permission for the road has been granted after the precise route has been included in an adopted Development Plan would similarly not give rise to reconsideration of the need for the road. If anyone is determined to make submissions or present such evidence, he or she should be invited to do so in the form of a written submission, which the Inspector can attach to the report.

42. If the Development Plan does not fix a specific route, but merely safeguards a swathe of land, however, there would be scope for objections to the precise line put forward within the safeguarded area of land; but not for objections concerning the need for the road. There could clearly also be objections to any proposal to a proposed alignment which falls outside the safeguarded area. Where planning permission alone has been granted (i.e. in cases where the proposed road does not feature in the Development Plan), this indicates that the LPA consider that the road is an acceptable use of the land concerned; but in those circumstances, objections challenging the need for the road or the particular line would not be ruled out.

43. The development control provisions of the Town and Country Planning Act 1990

apply to the Crown. However, schemes put forward by the SoS or a strategic highways company in exercise of functions under the Highways Act 1980 are permitted development by reason of Class B of Part 9 of the Town and Country Planning (General Permitted Development) Order 2015. Work proposed by a local highway authority on land within the existing boundary of a road which are required for the maintenance or improvement of the road, is permitted development under the first class of Part 9, as is work required for or incidental to the maintenance or improvement of a highway on land outside but adjoining the existing boundary of the highway.

Challenge to the validity of the inquiry

44. If there is a challenge at the opening of the inquiry to the validity of the inquiry because of an alleged failure to comply with statutory requirements, the Inspector should hear the views of all parties. Unless the interests of any of the parties have been seriously prejudiced, the Inspector should endeavour to carry on with the inquiry even if there is an admitted defect. Further reference is made to related issues at paragraph 71 below.

The tests for making or confirmation of the order

45. An Inspector must take account of all arguments relevant to the particular order before him or her. However, the Inspector will be concerned mainly with any tests for the making or confirmation of the order set out in the authorising legislation, with the justification for the order, and the likely environmental, social and economic effects of the particular proposals in the context of balancing the case for the promoter with those of the objectors. The main tests which apply to each type of order dealt with in this chapter are set out in Appendix E.

46. It is for the Inspector to decide how much argument to hear about what and what, in his or her opinion, is unrelated to the vital issues. If the admission of evidence or argument is challenged and the Inspector is in any doubt about it, the best course is to admit the evidence or argument in question. The Inspector should say that the matter will be reported to the SoS/WM, together with the Inspector's own opinion, so that the SoS/WM can decide whether or not to take it into account when reaching a decision.

Consideration of suggested modifications and alternative proposals

47. In relation to modifications, the promoters themselves as well as objectors often seek detailed modifications to the order as submitted. These should be introduced at the earliest opportunity and presented in writing as a formal draft modification, so that everybody concerned can see and understand exactly what is being proposed.

48. Schedule 1 Part 1 and Part II to the Highways Act 1980 gives the SoS/WM the power to modify a road or trunk road order before it is made or confirmed, but if the SoS/WM wishes to do so, paragraph 8(3) (for orders) and paragraph 15(3) (for schemes) of that Schedule provide that, where it is proposed to exercise this power in such a way as to make a substantial change to the order, any person likely to be affected by the proposed modifications must first be given the opportunity to make representations.

49. The re-routing of the whole or a substantial part of a scheme would go beyond what could reasonably be considered as a modification for the purposes of paragraph 8(3) or paragraph 15(3). This is ultimately for the SoS/WM to decide, but could result in the need for the publication of entirely new orders by the promoter

where substantial modifications are involved.

50. Either way, the Inspector will need to obtain all the necessary information about any suggested modification or alternative proposal so that when the SoS/WM comes to make the decision all the relevant factors are known.

51. Whilst a CPO can be modified by the deletion of part of the land it covers or by the acquisition of a lesser interest in the land than previously proposed to be acquired (as referred to in paragraph 18 above), the order cannot be modified to authorise the purchase of further land or a greater interest in land unless all persons interested in the plot of land concerned give their consent (see Schedule 1, Paragraph 5 of the Acquisition of Land Act 1981 for orders published by the SoS/WM and Section 14 of that Act for local authority orders). If it is requested at the inquiry that land should be added to the CPO, the unequivocal written agreement of all persons with an interest in the land must be provided for the Inspector and copies should be enclosed with the Inspector's report.

52. Where there are objections to an order, there are powers in Section 258(2) of (re CPOs), and Schedule 1 Paragraph 19 to (re certain other orders and schemes), the Highways Act 1980 that allow the SoS/WM to give notice to objectors (or by the notice announcing the holding of the Inquiry or hearing) that any person who intends to submit at a local inquiry that the proposed highway should follow an alternative route (or that instead of improving, diverting or altering an existing highway, a new highway should be constructed on a particular route) shall submit sufficient information about the proposed alternative route (or the route of the new highway) to enable it to be identified. Under these provisions in the Highways Act this information must be supplied within a period specified by the SoS/WM of not less than 14 days, provided this is not less than 14 days before the date fixed for the start of the inquiry. Providing a person has supplied the necessary information prior to the expiry of the specified period, the objector should be regarded as having complied with the notice.

53. If an objector has failed to comply with such a notice, under the provisions of s258(3) or Paragraph 19(2) of Schedule 1 to the Highways Act 1980 (as the case may be), the Inspector and the SoS/WM may disregard that objection in so far as it relates to any proposed alternative route or new highway. Nevertheless, in deciding on a course of action, the Inspector should be guided by the principle that he or she should hear anything relevant which is going to enable the right decision to be reached. On the other hand, the late submission of the details of the alternative proposal could leave insufficient time for the promoters and others to give them their due consideration. Even more importantly, it could leave insufficient time for adequate notice of the alternative proposal to be given to those who would be affected by it.

54. Under the Inquiries Procedure Rules, it is not incumbent upon the promoters or anyone else to notify those who would be affected by suggested alternatives to proposed routes. However, in the interests of natural justice it is considered that such people should be notified if possible, and if there appears to be real substance in the alternative proposals being put forward.

55. If an Inspector is faced with a late submission about an alternative to the proposal, he or she should first consider whether it has substance, and only reject it immediately if it patently has not. The Inspector should ask if the persons who would be affected have been notified and, if not, should ask the promoters and any other interested parties at the inquiry for their views on the matter. The Inspector will then have to use his or her judgement as to what is the best course of action to

take, bearing in mind the considerations outlined in paragraph 53 above.

56. If the Inspector decides that the case for the alternative proposal should be heard despite its lateness, it might be possible during a long inquiry to postpone the hearing of the case for that alternative until such time as the people who would be affected by it have been notified and given time to prepare any counter-objections. Alternatively, the Inspector might find it necessary to adjourn the inquiry for a time to enable those affected to be given notice and time to prepare.

57. It is not the role of the Inspector to make a recommendation in favour of an alternative proposal. However, the Inspector must understand any alternatives proposed sufficiently well to be able to decide whether they appear to be worth further investigation. An important factor in such decisions will be whether or not the alternative would overcome or sufficiently mitigate some deficiency in the Order proposal that would otherwise render it incapable of passing the statutory tests. Should he or she come to the conclusion that an alternative proposal before the inquiry warrants further investigation as compared with the order proposal, it would clearly not be logical to recommend the making or confirmation of the orders.

58. When an alternative route is considered at an inquiry, the promoters should produce an evaluation of the merits and practicability of the alternative proposed, whether it would meet the aims and objectives set for the original scheme, taking into account its comparative impacts on the environment and adjoining owners, and comparative costs. When considering comparative costs, there will usually be an assessment of the cost of the delay, which would follow from considering an alternative scheme. An alternative would no doubt require detailed design work, followed in all probability by the preparation of new orders and the holding of a new inquiry. The assessed cost of delay is therefore often very substantial. In *Smith & Others v SoS for Transport and Barnsley MBC [1997] JPL 416)* the Court of Appeal held that delay and its costs could be a material consideration to be weighed along with all others in considering whether an alternative should be further considered, but that except in special circumstances it should not be regarded as an overriding and decisive factor. Decisions should be based upon what is appropriate in the public interest, and therefore all relevant factors should be taken into account.

Accommodation works

59. Anyone affected by an order may put to the Inspector the nature and extent of the accommodation works which the affected person would expect to be carried out if a road proposal were to be implemented. He or she should be allowed to do so, because what is said could have a bearing on whether what is proposed in the order before the inquiry should proceed, with or without modification. However, the detail of the extent of the accommodation works is one of the factors taken into account in the calculation of the compensation payable when a proposal is approved. The precise details of the accommodation works are matters for the promoter of the order and the landowner concerned, and should not therefore be included in the Inspector's conclusions or recommendations. The Inspector should take care to avoid conclusions and recommendations in his or her report which would appear to usurp the functions of the Lands Tribunal.

The inquiry

60. For the most part, inquiries into the orders covered by this chapter follow the same pattern as other public local inquiries. This chapter therefore addresses only points of difference from other public inquiries arising from special considerations

attaching to these orders[5].

Programming the inquiry

61. For larger inquiries, a Programme Officer will be appointed and it will be his or her responsibility, under the guidance of the Inspector, to draw up a provisional programme for the inquiry. As the inquiry proceeds, the Programme Officer should maintain a more detailed day-by-day and week-by-week rolling programme in consultation with the parties concerned and under the general direction of the Inspector. The programme should be displayed on an inquiry notice board and be accessible to the public. The parties should be told at the PIM and/or at the opening of the inquiry that it is their responsibility to keep in touch with the Programme Officer about the inquiry programme.

62. The use of specific inquiry websites is becoming more common, especially for major public inquiries. These are often maintained and updated by the Programme Officer, or possibly by the promoter. Such websites can provide daily updated information on the progress of the inquiry and its forward programme. They can also provide access to electronic versions of proofs of evidence, Core Documents and other useful documents. If a transcript of the inquiry is being prepared, this can also be made available on the website. It has to be remembered, however, that not all people will be able to access such a website, so the more traditional ways of providing this information should still be retained. These include the posting of notices and the deposit of evidence and Core Documents at the inquiry venue and/or Council or promoters offices, and by maintaining an inquiry library at the inquiry venue.

63. As a general rule, public bodies either supporting or objecting to the proposals should if possible be programmed to be heard before individual supporters or objectors, so that the latter know where such public bodies stand in relation to the proposals before they (the individuals) are called upon to present their own cases.

64. Most parties cannot spare the time to attend the whole of a long inquiry, and many attend only during the presentation of the promoter's and their own cases. Whilst there is no obligation on an Inspector to keep them informed, it is good practice to ask the Programme Officer to contact parties whose interests are likely to be seriously affected by evidence which might otherwise be given in their absence. In more major public inquiries, it is normal to maintain a web site, providing daily updated information on the progress of the inquiry and its forward programme.

Objections not previously notified

65. Anyone objecting to the proposal who failed to give notice of their objection within the statutory period or anyone else who comes along wishing to make representations at the inquiry will normally be programmed to speak after the statutory objectors have been heard, provided they have something relevant and not unduly repetitive to say.

Opening the inquiry

66. The Inspector's opening announcements at the inquiry should contain the following basic elements, expanded as necessary:

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[5] For advice on general considerations, see the Inspector Training Manual chapter on Inquiries.

i) the Inspector's name and qualifications and those of any Assistant Inspector and/or Assessor;

ii) reference to the title of the scheme and/or order with which the inquiry is concerned;

iii) that the Inspector is appointed to hold the inquiry by the SST/SSCLG/WM or whichever other SoS or other body (see Sections 4 and 5 below) is listed on the Inspector's appointment to hear the case;

iv) taking a note of those who wish to appear at the inquiry;

v) that the inquiry is necessary because objections to the scheme and/or order have been received and not withdrawn;

vi) that within his or her discretion the Inspector will hear all relevant objections and representations;

vii) that the Inspector will be submitting to the SoS/WM a report on the gist of the evidence and submissions heard at the inquiry, and the written representations received, together with his or her conclusions and recommendations;

viii) that the SoS/WM will consider the Inspector's report together with all the written objections and representations received and will then issue a decision on the matter which is the subject of the inquiry;

ix) that the Inspector cannot settle points of law but that he or she will include in the report the gist of any legal submissions made;

x) that Government policies, and the methodologies, design standards and economic assumptions adopted by the Government are not for debate at the inquiry, but their application to the proposals before the inquiry may be relevant;

xi) that the Inspector cannot deal with the assessment of compensation which will become a matter for negotiation between parties or, if agreement cannot be reached, for determination by the Lands Tribunal – if, but only if, the scheme and/or order is eventually made/confirmed;

xii) an outline of the procedure to be adopted (see Appendices E and F), referring to any procedural matters settled at any PIM;

xiii) a statement to the effect that the Inspector has already made an unaccompanied inspection of the site and/or route of the proposal (insofar he or she has been able to do so without venturing onto private land), and that if he or she deems it necessary or if any party to the inquiry requires it, he or she will be making an inspection of the site or route during the course of the inquiry or at the end of the inquiry, accompanied by representatives of the promoters, the objectors and/or other interested parties. It should be stressed that no evidence or submissions will be heard at the accompanied site visit – it is simply an opportunity for the Inspector to see the site and

surroundings in the context of the evidence which will already have been provided to the inquiry

xiv) a request to the promoters that they will ensure that all the relevant plans are on public display and that (if no Programme Officer has been appointed to the inquiry) they will maintain a library during the course of the inquiry where at least one copy of every relevant inquiry document (including each statement of evidence, written statement and letter received) will be available for public scrutiny;

xv) an explanation of the role of any Programme Officer, Deputy Inspector, Assistant Inspector or Assessor, and a reminder that it is the responsibility of the parties to keep in touch with the Programme Officer;

xvi) a reference to the pre-inquiry meeting (or meetings) if held – or to the pre-inquiry note, if issued;

xvii) a request to the promoting authority for their confirmation that all the appropriate statutory formalities have been observed;

xviii) a request that everyone present should sign the attendance register on each day that they attend; and

xix) details of any domestic matters such as breaks in the morning and afternoon, lunch, sitting times and any health and safety announcements.

Absence of objectors or other parties

67. Apart from the promoters, who must of course attend to describe their proposals and explain their purpose, it is not necessary for any particular party to appear at the inquiry in order to make their views known, since all written objections and other representations are taken into account with the Inspector's report to the SoS/WM. The failure of certain of the objectors and/or other parties to appear at the inquiry is thus no reason for not proceeding with the inquiry.

68. In the rare instances in which there is only one objector, who neither appears nor is represented at the inquiry, the Inspector should immediately adjourn the inquiry for long enough to enable enquiries to be made about the objector's whereabouts. The Programme Officer or a representative of the promoters should be instructed to find out by the quickest means possible whether the objector intends to appear or to be represented. If so, arrangements should be made to await the objector's arrival and then to proceed with the inquiry in the usual way. If not, the promoters should be invited to state their case and to reply to the written objection. Any other people present who wish to be heard, should be heard and the inquiry should then be closed.

69. In the case of a CPO or similar inquiry where the Inspector is told that the sole outstanding objection has been withdrawn, the inquiry should still be opened in the usual way, bearing in mind that the inquiry is into the order itself and not merely the objection.

Legal submissions

70. Only the Courts can interpret the law authoritatively. Legal submissions made at

the inquiry should be recorded in the Inspector's report. The SoS/WM will take a view on the relevance of the legal submission as it relates to the order when reaching a decision on it, but the Inspector should address this issue in his or her conclusions.

71. Submissions which challenge the legality of the inquiry or the validity of the scheme and/or order are sometimes made at inquiries. Such matters are usually not for the Inspector to resolve and therefore he or she should confine himself or herself to hearing (and later reporting on) the arguments put. The inquiry should proceed unless, of course, such submissions result in the promoters withdrawing their proposal or requesting an adjournment in order to deal with the matter raised. In the latter case the Inspector will be required to consider and rule on the request. Anyone who is not prepared to accept that this action on the part of the Inspector is all that can be done should be told that it is open to them to consult their own advisers as to whether any remedy is available. However, if all parties agree that the order has been inappropriately published it would not be sensible to continue with the inquiry. In that case, the inquiry should be closed and a report made to the SoS/WM explaining the circumstances and giving the reasons why no further progress could be made on the order.

72. Whenever legal arguments are put, it is often helpful to obtain these in writing, although this may not be feasible at a short inquiry. Legal submissions, particularly long ones, which can be reduced to writing undoubtedly save inquiry time and help to reduce the possibility of error in recording them. Any documentation of this kind should accompany the Inspector's report.

Procedural submissions

73. Submissions concerned with the procedure to be adopted at an inquiry are very much the concern of the Inspector and are usually made on the opening day of the inquiry (or at a PIM if one has been held), though they may occur at any stage during the proceedings. The views of all concerned should be heard before matters are resolved. The Inspector may well find it useful to adjourn for a short while to consider his or her answer, or to postpone an answer until some specified future date, so as to have adequate time to give the matter the consideration it deserves without delaying the inquiry. In making his or her decision, the Inspector may exercise discretion as to the procedure to be adopted, except where the inquiries procedure rules make specific provision in this regard. Otherwise, the Inspector alone is in control of the inquiry and makes all decisions on procedure.

74. Procedural matters at an inquiry or PIM can be resolved by making a formal ruling, but every effort should be made to try to reach agreement first. The Inspector should prepare this formal ruling in writing, during an appropriate adjournment, and should include the details of the ruling in his or her report, as necessary. If procedural matters have been raised at the PIM, it is advisable for the Inspector to mention any agreed procedural points at the opening of the inquiry, so as to give anyone who was not present at the PIM an opportunity to comment. Without their agreement they would not be bound by decisions made at the PIM.

Requests for adjournment

75. Requests for the adjournment of inquiries should normally be resisted unless there are compelling reasons for acceding to them. Adjournments result in inconvenience and delay and can be costly - often for a considerable number of people. The late receipt of critical evidence may justify an adjournment if another party's case might be prejudiced by the fact that it has not been possible to

consider the evidence concerned. If an adjournment proves unavoidable, it should be announced at the first possible opportunity. Before the adjournment actually takes place, the time, date and place of the resumption must be announced. Inspectors should notify the casework team leader of any adjournment lasting more than a day. See paragraphs 96-101 of the Inspector Training Manual chapter on Inquiries for further general advice.

76. Adjournments without setting a date for resumption (*sine die)* should not be contemplated except in extreme circumstances. Even if there is doubt as to whether the inquiry will have to be continued after the adjournment, a date should be set. In the very rare and unavoidable event of it not being possible to announce the time, date and place of the resumption, the Inspector should announce how the parties and others present at the inquiry are to be notified when the arrangements for the resumption have been completed. For example, with the promoting authority's agreement, the Inspector might announce that they would write to everyone who has appeared at the inquiry or submitted written representations and anyone else present who leaves their address with the Programme Officer.

Evening sessions

77. Public inquiries should normally be conducted during morning and afternoon sittings in the manner of most other public tribunals. Occasional evening sessions for a specific purpose can prove useful, but they should be considered as exceptions. Statutory objectors are entitled to appear at an inquiry, but even they should be required to demonstrate the necessity of an evening session before one is agreed to hear their case. If an evening session is held, it should be towards the end of the inquiry when all other opportunities for hearing an objection have been exhausted. The Programme Officer should collect in advance a list of those wishing to speak together with a brief outline of the points they wish to make. An evening session should be held in lieu of, not in addition to, one of the earlier sessions in the day.

Withdrawn objections, conditionally withdrawn objections and counter objections

78. It is not the job of the Inspector to include information in his or her report to the SoS/WM which is peripheral or irrelevant to the issues in dispute. For example, if an objection is withdrawn before an inquiry opens or during the course of the inquiry, then it would be sufficient to report the fact that it was withdrawn. Usually, no further probing or questioning by the parties should be allowed, neither should the Inspector seek to reintroduce matters covered in the withdrawn objections. However, exceptions to this general rule may be appropriate where the withdrawn objection touched upon issues central to the consideration of the scheme, or raised a matter of national importance, but where the objector felt unable to pursue the objections because he or she was unavailable or unwilling to appear at the inquiry.

79. Participants may state at the inquiry that they would be willing to withdraw their objection if particular provisions were made in (say) a Works Agreement. The Inspector might accept this and recommend confirmation of the orders. However, if the objection is not formally withdrawn, this can leave the SoS/WM with a problem. The Inspector should therefore seek to obtain confirmation of the conclusion of a Works Agreement and a formal withdrawal of the objection. This is particularly the case if there is an outstanding objection from a statutory undertaker. Where such an objection is not formally withdrawn, the order may be subject to Special Parliamentary Procedure, with complex and time-consuming consequences. It is therefore important that Inspectors should obtain all possible

information about such objections. This may, exceptionally, justify adjourning the inquiry for a short period whilst the statutory undertaker is contacted, so that a full explanation of the objection and its consequences may be sought.

80. Whether or not the matter is resolved at the inquiry, the Inspector must deal conclusively with all objections unless the objector has given a written statement withdrawing the objection clearly and unconditionally. Objections should not be considered to be withdrawn until the Inspector receives written confirmation. The recommendation in the Inspector's report should not be based on the assumption that that any objection will be withdrawn. The substance of all outstanding objections must be covered explicitly in the Inspector's report and conclusions.

81. If, after investigation, there is an outstanding 'holding' or 'technical' objection by a statutory undertaker, the Inspector's report should state clearly how much weight should be attached to the objection and why, making explicit whether the land involved is crucial to the scheme. The report can then take this conclusion into account in the final recommendation.

82. There may also be counter-objectors who, whilst supporting the scheme as originally proposed, would object to the provisions set out in any proposed agreement or modification which would satisfy the original objector. It may be difficult to gather evidence on this point, particularly where the suggestion of an agreement or modification only arises during the course of an inquiry, and the supporters of the scheme may be unaware of the potential implications if they are not in attendance. However, the Inspector should, as far as is reasonably practical, ensure that no-one's interests would be prejudiced by any suggested agreement or modification. If there is a potential conflict of interests, this should be taken into account in the conclusions section of the report and brought to the attention of the SoS/WM.

The parties

83. Apart from the promoters, there may be many different parties presenting a variety of different interests and viewpoints at an inquiry. Such parties will normally fall into one or other of three basic categories, as follows.

    i. Those who support the proposal.

    ii. Those who object to it, including those who, in doing so, put forward one or more alternative proposals which they consider to be better than the one which is the subject of the inquiry.

    iii. Those, known as counter-objectors, who oppose such alternative proposals.

The normal sequence of events

84. The normal sequence for any case presented by an advocate with a single witness consists of:

    i. an opening statement by the advocate;

    ii. the evidence-in-chief of the witness (which normally includes the reading of a statement or summary of evidence);

iii. the cross-examination of the witness by each of the parties entitled so to do, and others at the discretion of the Inspector;

iv. re-examination of the witness by the advocate;

v. the Inspector's questions, if any, of the witness; and

vi. a closing submission by the advocate.

85. When more than one witness is called, each is taken through the same sequence as the first witness (i.e. stages ii – v above) before the advocate makes his or her closing submission. The closing submission may well not be made until other parties' cases have been heard.

An unrepresented person

86. When an unrepresented person appears, he or she usually acts as both advocate and witness, but the same principles apply. To avoid confusion between his or her two roles, the person should be asked to give evidence and answer questions from the witness table. If the person is an objector, the opening and closing statements should be made from the objectors' table and any cross-examination of the promoter's witnesses should be conducted from that position. If the person merely wants to make a statement and is not offering himself or herself for cross-examination, he or she should be asked to submit it in writing.

Order of presentation of cases

87. Subject to compliance with any requirement of a specific set of Procedure Rules, in order that everyone with an interest in the matter can be fully apprised of what is involved right from the start, the case for the promoters should normally be presented first, and whenever possible this should be directly followed by the cases of those who support it. The cases of the objectors should follow, and these in turn should be followed by those of the counter-objectors. The promoters have the right to a final reply. The full sequence of events for simpler and for more complex inquiries is set out in Appendices E and F to this chapter. The procedure for more complex inquiries is to be used where there is a significant number of witnesses for the promoter and/or when there is a significant number of supporters or objectors who wish to be heard at the inquiry. Normally, in that situation, many parties will only attend the inquiry to hear the case of the promoters and to present their own support or objection. Discussion on the most appropriate procedure to follow could take place at the PIM, and Inspectors may ask parties if they intend to attend the whole of the inquiry to inform this decision. If it appears likely that parties wish to attend throughout the inquiry, it may be helpful to opt for the simple procedure, since no advantage would be gained (in terms of facilitating non-attendance at the inquiry) by using the more complex procedure.

88. Sometimes, it is convenient in a long inquiry to hear all the evidence from all parties on a particular topic on one day or in one week of the inquiry. This can be particularly helpful where an expert Assessor is sitting to assist in connection with a single topic or a limited range of topics. In that situation, topic based sessions can reduce the proportion of the inquiry for which the Assessor's attendance is required. The basic procedure can be readily adapted to allow this approach to be followed.

Questions of clarification

89. The more complex procedure set out in Appendix G provides an opportunity for questions of clarification to be put to witnesses for the promoters at the time at which they give their evidence in chief. Sometimes there is a fine line between questions of clarification and the cross examination of witnesses. Usually, a question of clarification should be addressed to a specific paragraph in a statement or summary of evidence – if it is not, the question is probably more appropriate to the objector's main case and should be pursued through cross examination.

90. Sometimes the number of objectors who wish to ask questions of clarification makes the practice unmanageable. If this seems likely the Inspector should consider adopting other means to assist objectors in understanding the evidence. If arrangements can be made at the PIM for statements of evidence to be produced four weeks before the inquiry opens (instead of the three weeks provided for in the relevant Rules) the Inspector might insist that any question of clarification should be submitted in writing a week before the opening of the inquiry. If the Inspector is satisfied that any such question raises a matter on which clarification is required, the question could be passed on to the promoters to be answered in writing by the relevant witness at the time at which he or she gives evidence in chief. Alternatively, from his or her pre-reading of the statements of evidence, the Inspector could compile his or her own list of questions and introduce this as an inquiry document. The Inspector should always encourage objectors and the promoting authority to confer outside the inquiry on matters which are not of general interest to the inquiry.

Supporters

91. Except in relation to any aspect of the promoter's case with which they have made it plain that they do not agree, supporters do not have the right to cross-examine the promoter's witnesses, though questions of clarification may sometimes be allowed. Similarly the promoter does not have the right to cross-examine supporters except for clarification or on any point of disagreement. Supporters may cross-examine objectors.

Objectors' cross examination of supporters

92. At the discretion of the Inspector, objectors may cross-examine supporters, but normally should do so only on matters on which the supporters have given evidence or made submissions; they should not normally be permitted to question them on matters to which they have made no reference. This does not apply to such supporters as local authorities or statutory bodies, because the answers to certain questions, which objectors might require to enable them to present their cases properly, might be obtainable only from such authorities and might not be referred to when they present their cases. The Inspector should use his or her discretion in this regard, and should ensure that objectors are not denied the opportunity to ask questions to which they require the answers in order to complete their cases (unless such questions are patently not relevant to the subject of the inquiry).

93. Supporters represented by an advocate may be re-examined by their advocate following cross-examination by objectors. Unrepresented individual supporters should be given the chance to correct any false impression which might have been generated by answers given to questions put in cross examination. They should be told, however, that this should not be taken as an opportunity to introduce new evidence. If it is, then the objector would be liable to further cross examination on

the new material introduced.

Statutory and non-statutory objectors

94. Statutory objectors in the context of Highway Inquiries are those objectors who have a vested interest in land or property which would be affected by the proposals. They should normally appear next and (if the complex procedure is being followed) have the right to cross-examine the promoter's witnesses on their evidence in chief when called upon to present their own cases, and before they present their own evidence. Any evidence the promoter may wish to call to rebut that given by an objector should then be called. Such evidence is liable to be cross-examined in the usual way and when this process is completed the objector has a right to respond by way of additional evidence if conflicting evidence to that provided in rebuttal is available, or in the closing submission referred to in paragraph 97 below. An alternative approach to dealing with rebuttal evidence which is increasingly followed is outlined in Appendix G at paragraph F.2b. This is equally acceptable.

95. Non-statutory objectors, i.e. those people who have objected within the time for objections but who are not statutory objectors, normally follow, and should, at the discretion of the Inspector, be given the same opportunity to question the promoter's witnesses as statutory objectors (including the opportunity to cross examine any rebuttal evidence given on behalf of the promoters). Questioning of the promoter's witnesses by objectors should not normally go beyond the substance of the matters contained in the evidence and submissions they have presented where this is relevant to the subject of the inquiry.

96. The objectors are liable to be cross-examined in turn, not only by the promoter and supporters, but also by counter-objectors to any alternative proposals they (the objectors) might put forward. Such questioning should be confined to the matters on which the objectors have given evidence or have made submissions, and should not normally be permitted to extend to matters to which they have made no reference. Both promoter's and objectors' witnesses may be re-examined by their advocates after cross-examination.

97. At the conclusion of the objector's case, the objector may wish to make a closing submission. This can be made immediately, or, if the Inspector agrees, at a later fixed time, when a considered closing can be made supported by a written copy (see also paragraph 120 below).

Response by the promoter

98. The promoter may reply to the various objectors' cases in a consolidated final reply at the end of the inquiry, or may make a response to each individual objector immediately following the hearing of that objector's case.

Counter objections

99. Counter-objectors should normally appear after the objectors whose alternative proposal they are opposing, but they will usually question the objectors during the presentation of the latter's cases. Counter-objectors may also question the promoter, although their questions to them should not normally be permitted to be used as a means of eliciting support for their cases. However, if a counter-objector, having seen the promoter's rebuttal of an objector's case, believes that such a rebuttal has not addressed a point considered to be important, he or she should be allowed to raise questions on that matter. Counter-objectors are open to

questioning by those to whom they are opposed, and as usual have the right of re-examination and to make a reply.

100. Some counter-objectors may be both objectors in their own right and counter-objectors to other objectors' alternative proposals - and so may appear twice in the inquiry, firstly as objectors and secondly as counter-objectors. If such parties appear only once, the interplay of cross-examination becomes a little more complicated but still follows the same general pattern.

Strict adherence not always possible

101. In practice it may not be possible to adhere strictly to the sequence of events outlined in Appendices E and F because not all parties can make themselves available at any given time, but it is nearly always possible to follow the general pattern.

Evidence

102. At the inquiry, at most only the summary statements of evidence should be read out (unless the Inspector permits or requires otherwise), but the witness may be questioned on the whole of his or her statement. Any amendment made to the summary statement or the full statement (whether correcting a typographical error or amending the evidence in the light of further information) should be noted on the document. Statements of evidence should be listed as inquiry documents, **but the Inspector's eventual report should make it clear that the statements set out the evidence as submitted to the inquiry, while the Inspector's report summarises the evidence as potentially amended in the light of answers to points put to the witness in cross examination**.

103. Evidence or submissions which did not emerge in the pre-inquiry statements, objections or representations should not be automatically debarred simply because no such advance notice was given, as the Rules allow for amendments to be made to Statements of Case. The Inspector has the discretion to allow the introduction of new material at the inquiry and should normally do so provided it is relevant and failure to allow its introduction might risk conclusions being drawn in the absence of knowledge of material considerations.

104. If the promoter seeks to make an addition to his or her case, however, any affected objectors should be given sufficient opportunity (by means of an adjournment if necessary) to consider the new matter, and to give their responses to it. If a new matter is raised by an objector, the promoter should be permitted to call evidence in rebuttal. To achieve this it might be necessary for a new witness or new witnesses with the relevant expertise to be called who may not have been part of the original team put forward by the promoter. The late introduction of new evidence **may** be a ground for an application for an award of costs on the basis of unreasonable behaviour, particularly if an adjournment becomes necessary; and parties should be so advised.

Cross examination

105. The inquiries procedure rules give only the main parties (the promoter and the statutory objectors) the right to cross-examine persons giving evidence at an inquiry. The Inspector should normally permit non-statutory parties to question witnesses similarly, however.

106. The inquiries procedure rules make no distinction between witnesses who support

and those who oppose the respective cases. The Inspector should, nevertheless, limit the questioning of friendly witnesses to the elucidation of matters of fact where these are relevant; drawing out friendly opinion is not cross-examination. However the Inspector should take care to avoid inadvertently preventing anyone from cross-examining an otherwise friendly witness about some aspect of that witness's case which might have an adverse effect upon the would-be questioner's interests.

107. The promoters, or any other public body appearing at an inquiry, must be prepared to make someone available to answer any relevant questions, and unrepresented members of the public should be granted some latitude in the way they go about questioning. However, the cross-examination of a witness should normally be confined to relevant questions on the matters on which that witness has given evidence. Cross-examination of members of the public who have given evidence to the inquiry by the promoters and statutory objectors should also be permitted.

108. Inspectors should be aware that cross-examination might be related to a claim for costs, which will not be made until the end of the inquiry. Such cross-examination must therefore be heard even though it may be irrelevant to the merits of the case.

Re-examination

109. The purpose of re-examining a witness is to enable the witness to clarify points about the evidence already given and/or to seek to redress any unfavourable impression which arose as a result of the cross-examination. It is the witness's evidence which is required, however; advocates should not be permitted to ask their witnesses leading questions (that is, questions which suggest a particular answer) in re-examination.

110. New matter should not normally be introduced in re-examination, but if it is, it should be treated as being new evidence liable to further cross-examination.

Written representations

111. Written representations concerning the subject matter of an inquiry (whether addressed to the Inspector, the Highway Authority or the SoS/WM), received prior to or during an inquiry, become inquiry documents. Such documents form part of the material to be taken into account by the Inspector and the decision maker.

112. All written representations must be taken into account by the SoS/WM unless they can be disregarded under specific powers, such as Section 258 of the Highways Act 1980 (objections amounting to an objection to a made line order or relating to failing to comply with deadlines for alternative proposals); Schedule 1 Paragraph 19 of the same Act (relating to failing to comply with deadlines for alternative proposals); or section 13(4) of or Schedule 1, Paragraph 4(4), to the Acquisition of Land Act 1981 (matters of compensation).

Availability of written representations

113. It follows that the existence of all written representations must be disclosed at the inquiry. Although there is no need for the Inspector or any party to read them out, it may sometimes be appropriate to give the gist in order that the promoting authority's response may be understood by the public. A copy of each one must be made available for public scrutiny during the course of the inquiry.

Response by promoter

114. It is open to anyone to comment in writing or orally, at the Inspector's discretion, upon such representations. The Inspector should make a point of ensuring that the promoter does not neglect to give any response on those matters raised in any written objections which have not been dealt with during the course of the inquiry. This is so that the decision maker may be apprised of each side of every argument.

Round table sessions

115. For longer and more complex inquiries, for example, where there are alternative proposals, it may be helpful for parts of the proceedings to be taken as a round table session – along the lines of a hearing, with only the technical witnesses making contributions in response to a discussion led by the Inspector. Such sessions should only be used as a means of clarifying technical points – either to reach a common understanding of (say) traffic modelling techniques, or how other technical evidence has been prepared. It would probably not be an appropriate means of reconciling different approaches, but only of coming to an understanding of why there are apparently different views being deduced from the same or similar evidence: for example, where these may be the result of different or incompatible technical interpretations. It might be helpful if the Programme Officer took notes of the points made, leaving the Inspector free to direct the discussions. A note of the round-table session should be quickly prepared (over night if possible) and published as an inquiry document. Opposing advocates could then make witnesses available for cross-examination on their evidence in full inquiry session on subsequent days. Round table sessions should be open for all to attend and observe.

116. A round table session is often helpful to allow the promoter of a CPO to take the Inspector through the CPO plot by plot to explain the reason for the proposed acquisition of each of the plots of land or the interests in them included in the CPO. Again, however, it is important to emphasise that such a session is open for all to attend, observe and participate in.

117. In a similar manner, a round table session may be helpful to allow the promoter of side roads orders to take the Inspector through the relevant orders in a step by step basis, to explain why certain existing roads are needed to be stopped up or otherwise modified; what alternative arrangements are to be made to accommodate the affected movements; and why the promoter considers such arrangements would offer a reasonably convenient alternative. Again, it is important to emphasise that such a session is open for all to attend, observe and participate in.

Action to be taken by the Inspector before final right of reply is exercised

118. Before the promoter makes his or her final reply at the inquiry, the Inspector should ask if there is anyone else who wishes to be heard. If there is, the person should be accommodated, provided he or she genuinely has something relevant to say which is not merely repetitive or obstructive. The Inspector should also check that, in either specific or general evidence, the promoter has responded to all of the written representations.

119. Issues concerning human rights may arise at an inquiry either in relation to the impact of a proposal on an individual or in relation to the procedure followed at the inquiry. The Inspector will need to address either of these matters where they are raised (or where it appears to the Inspector himself or herself that a human rights

issue is involved).

Closing submissions

120. The closing submissions of supporters, objectors and the promoters are limited to responding to the cases of the other parties, in the sense that no new evidence may be introduced. However, it is now regarded as acceptable for such closing submissions to include also a summary of the overall case of the party concerned. Where the parties agree to supply such comprehensive closing submissions in electronic form, this can provide the basis for the report of the case of the party concerned, though the Inspector will remain responsible for ensuring that such a submission fully and accurately represents the case of the party concerned as it stood after cross examination. If the promoter has already responded to individual objectors when the latter were presenting their cases, there is no need for him or her to do so again.

Costs

121. After hearing the promoter's reply, the Inspector should be alert to see whether any application for costs is to be made. The mechanism for dealing with costs applications depends on the nature of the inquiry and the type of order which is being considered. In English casework, the guidance in the Planning Practice Guidance on the award of costs and compulsory purchase and analogous orders applies. In Wales the previous circular (under its Welsh designation WO Circular 23/93[6]) continues to have effect.

Applications for costs in relation to Orders drafted by the Secretary of State or WM

122. Section 5 of the Acquisition of Land Act 1981 applies Section 250(5) of the Local Government Act 1972 which provides the costs jurisdiction at public inquiries) to non-ministerial CPOs only. There is therefore no statutory requirement to pay costs to a successful objector to a CPO drafted by the SoS or WM. However, costs may be awarded on a discretionary basis. Objectors to a published scheme or order with an interest in land affected (such as owners, lessees or occupiers) will normally have their reasonable costs of preparing and presenting their cases reimbursed in full or in part if the decision taken following the local inquiry is not to make the published scheme or order, or to modify the proposals so as to diminish or remove its effect on the land in which the objector has an interest. Similarly, there is no provision to award costs against the SoS or WM in relation to a draft CPO on grounds of unreasonable behaviour.

123. In relation to other (non-CPO) orders drafted by the SoS under the provisions of the Highways Act, the costs provisions of the Local Government Act 1972 are applied by Section 302 of the Highways Act 1980 (with some limited exceptions); but such orders do not appear in the list of orders analogous to CPOs in Paragraph: 064 Reference ID: 16-064-20140306 of the Planning Practice Guidance dealing with the award of costs in public inquiries, and the practice is not to entertain such applications. **Inspectors should therefore make no announcement about costs applications when conducting such an inquiry.** If

[6] Inspectors should note that Paragraph 3 of Annex 4 to WO Circular 23/93, on Crown exemption to the application of statutory provisions for awards of costs, was cancelled by a Memorandum on the Crown application of the Planning Acts.

an objector indicates he or she wishes to make an application for costs at a trunk road inquiry, Inspectors should say that no application need be made at the inquiry. The objector should be told that Highways England, on behalf of the SoS, or the Transport Orders branch of the Welsh Government, on behalf of the WM, will invite applications for costs from objectors who successfully object to the compulsory acquisition of their interest in land. Where an objector insists on making a claim (including a claim based on alleged unreasonable behaviour), the Inspector should record the case in the main body of his or her report without coming to any conclusion or making any recommendation on the case. The Inspector should not make a separate costs report.

Applications for costs in relation to local authority road proposals

124. While parties are normally expected to meet their own expenses at public inquiries, where applications for costs relate to a CPO published by a local highway authority, the general power contained in Section 250(5) of the Local Government Act 1972, to make an award of costs to and against the parties at an inquiry, is applied by Section 5(3) of the Acquisition of Land Act 1981. Additionally, paragraph 057 Reference ID 16-057-20140306 of the Planning Practice Guidance outlines that where a 'remaining objector'[7] is defending their rights, or protecting their interests, which are the subject of a CPO, they may have costs awarded in their favour if the Order does not proceed or is not confirmed.

125. Costs will be awarded in favour of a successful remaining objector unless there are exceptional reasons for not making an award. The award will be made by the confirming authority (usually the Secretary of State or WM) against the authority which made the order.

126. Normally, the following conditions must be met for an award to be made on the basis of a successful objection:

(a) the claimant must have made a remaining objection and have

either:

- attended (or been represented at) an inquiry (or, if applicable, a hearing at which the objection was heard); or
- submitted a written representation which was considered as part of the written procedure; and

(b) the objection must have been sustained by the confirming authority's refusal to confirm the order or by its decision to exclude the whole or part of the claimant's property from the order.

127. Where an objector is partly successful in opposing a CPO, the confirming authority would normally make a partial award of costs. In addition, a remaining objection will be successful and an award of costs may be made in the claimant's favour if an inquiry is cancelled because the acquiring authority have decided not to proceed with the order, or a claimant has not appeared at an inquiry having made an

[7] "remaining objector" means a person who is defending their rights, or protecting their interests, which are the subject of a compulsory purchase or analogous order, and who has made a "remaining objection" within the meaning of section 13A(1) of the Acquisition of Land Act 1981.

arrangement for their land to be excluded from the order (section 5(4) of the Acquisition of Land Act 1981).

128. At the inquiry an objector will not, of course, know whether he or she has been successful. When notifying successful objectors of the decision on the order under the appropriate rules or regulations, the confirming authority will generally tell them that they may be entitled to claim costs and invite them to submit an application for an award of costs on the basis of their successful objection. The details of the level of costs are then a matter for negotiation between the respective parties.

129. However, if a CPO objector insists on making an application for costs in the expectation that his or her objection will succeed, the Inspector should simply record it in the main body of his or her report without coming to any conclusion or making any recommendation on the application.

130. Paragraph 060 Reference ID: 16-060-20140306 of the Planning Practice Guidance provides guidance as to where an award of costs may also be made to an unsuccessful remaining objector or to an order-making authority because of unreasonable behaviour by the other party – most likely in relation to procedural matters. Inspectors should be aware that they themselves may also initiate an award of costs if they consider a party has behaved unreasonably and an application is not made. The Inspector will provide a recommendation to the confirming authority for a decision on whether to award costs. Paragraph: 061 Reference ID: 16-061-20140306 confirms that awards of costs can also be made against interested parties, in the context of their having attended the inquiry and behaved unreasonably.

131. Applications for costs from objectors to an order published by a local highway authority under the Highways Act 1980 on grounds of unreasonable behaviour should be dealt with in accordance with the Planning Practice Guidance on the award of costs and compulsory purchase and analogous orders. This states that an award of costs cannot be made both on grounds of success and unreasonable behaviour in such cases; but an award to a successful objector may be reduced if they have acted unreasonably and caused unnecessary expense in the proceedings – as, for example, where their conduct leads to an adjournment which ought not to have been necessary.

132. In relation to CPOs and analogous orders, the Planning Practice Guidance states that an award of costs may be made to an unsuccessful remaining objector or to an Order-making authority because of unreasonable behaviour by the other party. In practice, such an award is likely to relate to procedural matters, such as failing to submit grounds of objection or serve a statement of case, resulting in unnecessary expense – for example, because the inquiry has to be adjourned or is unnecessarily prolonged.

133. An application for costs (on the grounds of unreasonable behaviour) should be made to the Inspector at the inquiry or hearing, or in writing if appropriate. The Inspector may also initiate an award of costs if they consider a party has behaved unreasonably and an application is not made. The Inspector will provide a recommendation to the confirming authority, usually the Secretary of State, for a decision on whether to award costs. However, the Welsh Office Circular 23/93 provides that an application should be made to the SoS *immediately after the inquiry*.

134. In practice, it has for some time been recognised in Wales that the guidance in WO

Circular 23/93 to make such an application immediately after the inquiry could be interpreted as inhibiting the right to a hearing prescribed by the Convention Article 6(1) in the Human Rights Act 1998. Therefore, it has become accepted practice that, if any party insists on making a claim against another party on whatever basis, the Inspector should not refuse to hear it.

135. If an application for costs is heard, an opportunity should also be provided for the other party to reply and for the applicant to have the final comment. The Inspector should report the application, and any response by other parties, to the SoS together with his or her conclusions and recommendation.

Closing actions by Inspector

136. After hearing the promoter's reply, and hearing any costs applications, the Inspector should satisfy himself or herself that there is no unfinished business and that all the inquiry documents, including the attendance list(s) have been handed in. The Inspector should then make arrangements for the accompanied site inspection (if one is to be carried out) and, finally, should declare the inquiry closed.

137. An effect of declaring the inquiry closed is the Inspector can neither hear nor accept any further submissions or evidence, either oral or written. Anyone who wishes to make further representations should be advised to put them in writing and send them to the SoS/WM. It follows that no evidence or submissions can be accepted during a post-inquiry site inspection, and nothing the Inspector then hears can be included in his or her report.

138. Parties to the inquiry might ask when they can expect a decision from the SoS/WM. Once the report is written and submitted, the matter is out of the hands of both the Inspector and the Planning Inspectorate, and therefore it is impossible to give any indication of the likely decision date. An Inspector should not even attempt to estimate the date on which the SoS's/WM's decision will be issued.

139. However, the Inspector may give an indication of when he or she will be submitting his or her report. The Inspector should give his or her estimate of the week commencing date in which it is expected that the report will be sent from the Planning Inspectorate to the SoS/WM. The Inspector should take into account the reporting time allocated/required, work programmes and any other commitments. In addition, the Inspector must include a period to allow for the necessary administrative actions within the Planning Inspectorate. Taking account of all these factors the Inspector should be able to provide a reasonably reliable estimate of the submission date using the phrase "*week commencing"*.

140. For long and complex inquiries, the Inspector may announce a provisional submission date. A more firm estimated date can be obtained by the parties from the Case Officer upon request.

Post-inquiry correspondence

141. No letter or other written representation of any kind, or any other form of documentation received by an Inspector after the close of an inquiry, can be taken into account in composing the report; consequently, Inspectors should not encourage any party to submit them. It is for the SoS/WM, not the Inspector, to consider post-inquiry representations. If any post-inquiry representations are received by the casework team or the Programme Officer, they will need to be forwarded to the SoS/WM, and therefore if any reach the Inspector by means of an administrative oversight, for example, the Inspector should return them

immediately to the casework team. This does **not** apply to documents exhibited at the inquiry and which, in exceptional circumstances, need to be sent on, or copied and then sent on, for the Inspector's use after the inquiry has closed. However, no new matter must be covered in such documents. Any exception to the foregoing should only arise at the express request of the SoS having regard to the requirements of natural justice as described in paragraph 155 below.

142. If towards the end of the inquiry it becomes apparent that there is likely to be significant further evidence or documentation, which the Inspector should take into account and it is not forthcoming at the inquiry, the proper course is to adjourn the inquiry to a specified date, time and place, and to receive that evidence in open session, giving the opportunity for cross-examination as appropriate before the inquiry is closed. Where the documentation is simply confirmation of matters already presented in draft to the inquiry, it may be permissible to close the inquiry in writing after their receipt.

143. Inspectors should not encourage or agree to advocates forwarding copies of their closing addresses after the close of the inquiry since copies would have to be sent to other parties, which could then result in further exchanges and consequent delay in the reporting process. They should be presented in writing or preferably in electronic form at the actual closing of the inquiry.

Site inspections

144. An unaccompanied site visit (see paragraph 66 (xiii)) is made by the Inspector before the inquiry opens simply to gain familiarity with the area affected by the order. During that visit, the Inspector will seek to avoid getting into conversation with anybody, and will not enter on to private land. The Inquiries Procedure Rules allow the Inspector to make further unaccompanied inspections during the course of the inquiry.

145. Accompanied site visits can be carried out while the inquiry is adjourned (perhaps allowing time for advocates to prepare written closing submissions) or shortly after the Inquiry is closed. It should take place in the presence of at least one representative of the promoting authority and at least one representative of the objectors. An accompanied site visit must be undertaken if a request for such a visit is made either by the promoting authority or by one of the statutory objectors.

146. If no representative from the objectors can attend the accompanied site visit, the Inspector can undertake such a visit in the presence of representatives of the promoter and the independent Programme Officer. If this course of action is to be followed, the Inspector should announce his intention to carry out the accompanied site visit in this manner at the inquiry, and seek the views of all parties. If objections are raised which cannot be overcome, the Inspector should seek the necessary permissions to enter onto private land, and should carry out the site visit on an unaccompanied basis. However, an unaccompanied visit should not undertaken after the close of the inquiry, as rule 17 of the Compulsory Purchase (Inquiries Procedure) Rules 2007 prevents this, and the same applies under rule 25 of the Highways (Inquiries Procedure) Rules 1994.[8] In such circumstances it is essential for a detailed site visit itinerary to have been prepared by the parties, supplemented as necessary by the Inspector, so that all parties know where the

[8] In Wales, rule 19 of the Compulsory Purchase (Inquiries Procedure) (Wales) Rules 2010 makes the same restriction on unaccompanied site visits after the close of the inquiry.

Inspector will be going and what he or she will be seeing at the site visit.

147. If an accompanied site visit is arranged but after allowing a reasonable interval after the appointed time no representative of one relevant party has arrived, the visit should be abandoned as an accompanied site visit. The Inspector should make a further unaccompanied site visit if at all possible, although as indicated at 2.141 above, this should not take place after the close of the inquiry.

148. No evidence or submission should be presented to the Inspector during a site inspection, but the parties may draw the Inspector's attention to any feature which has been mentioned in oral or written evidence to the inquiry. This should be explained by the Inspector both when making the arrangements for the accompanied site visit at the inquiry and at the outset of the site visit.

149. An Inspector has no right to enter on to private land without permission. However, it is usually possible to arrange for permission to be given to allow entry on to land which the Inspector wishes to visit, either through the Planning Inspectorate or the Programme Officer, if one has been appointed.

150. For propriety reasons, the Inspector should travel to and from the site visit either alone or accompanied by representatives of both the promoters and the objectors. The Inspector must never share transport with only one of the parties. The travel arrangements should be agreed with all the relevant parties in advance, preferably in open inquiry.

151. As indicated at 2.141 above, once the post-inquiry inspection has been completed, further unaccompanied site visits should be avoided. However if, in exceptional circumstances, the Inspector wishes to make a further inspection, the casework team leader should be consulted so that arrangements can be made for representatives of the various parties to have the chance to be present.

Reopened inquiries

152. The SoS/WM may cause an inquiry to be re-opened if it is deemed necessary to hear new evidence which has come to light since the inquiry closed.

153. Before re-opening an inquiry, the Inspector should study the new material. The SoS/WM will not want the scope of the re-opened inquiry to go beyond issues directly relevant to matters identified by the SoS/WM or for any further representations that may have been sought, to go beyond this. Re-opened inquiries should not be seen as a further opportunity of reintroducing matters heard at the earlier, closed, sessions of the inquiry. The Inspector should at the reopening of the inquiry make a statement to this effect so that there is no misunderstanding as to the purpose of the reopened inquiry.

154. The Inspector should not hear fresh evidence and submissions on matters that have already been considered at the closed inquiry and therefore fall outside the specified scope of the re-opened inquiry, although some flexibility may be advisable. Anyone who is determined to reintroduce matters dealt with at the earlier inquiry should be advised to submit this in a statement in writing to the Inspector. This can then be referred to in his or her report and enclosed for the attention of the SoS/WM.

The Inspector's report

Statutory basis - the Procedure Rules

155. Generally, the most recent editions of the relevant inquiries procedure rules will provide that, after the close of the inquiry, the Inspector shall make a report in writing to the Secretary of State which shall include his/her conclusions and his/her recommendations, or his/her reasons for not making any recommendations.

156. These rules also generally provide that where the Secretary of State [or Minister] differs from the appointed person [the Inspector] on any matter of fact, or after the close of the inquiry takes into consideration any new evidence (including expert opinion on a matter of fact) or any new issue of fact (not being a matter of Government policy) which was not raised at the inquiry, and by reason thereof is disposed to disagree with a recommendation made by the appointed person, he shall not come to a decision which is at variance with any such recommendation without first notifying the parties to the inquiry of his disagreement and his reasons for it, and giving them the opportunity to make fresh representations, or (if new evidence or any new issue of fact, not being a matter of Government policy, has been considered) of asking for a re-opening of the inquiry. There are variations between the inquiry procedure rules, however, and Inspectors are advised to carefully check the detail of the relevant rules.

157. (In certain cases dealt with in Sections 4 and 5 below, the report would be to a local authority rather than to a Secretary of State.)

Aim of the report

158. The report should provide concisely all the information that the SoS/WM will need in order to understand the issues involved and the representations made. However, it is only necessary to report the gist of the cases of the parties, rather than a fully detailed or verbatim record of the evidence and opinions. At the same time, the report should satisfy the parties to the inquiry that their evidence and submissions have been properly understood, fairly reported and accorded appropriate weight.

159. The report should be balanced in its presentation of the cases. It should not be seen to be unduly weighted in favour of one party, or group of parties. The conclusions reached by the Inspector should be clear, logical and robust, and fully support his or her recommendations on the scheme orders.

160. The general guidance contained in the Inspector Training Manual chapter on Secretary of State Casework in cases concerning planning appeals should be followed where this is not inconsistent with the guidance contained in this chapter.

Format of the report

161. The preferred format for the report consists of the following elements:

i. a title page;

ii. a table of contents (for longer reports);

iii. a list of abbreviations and acronyms used (for longer reports);

iv. case details;

v. an introduction or preamble;

vi. a description of the site of the proposal and its surroundings;

vii. the gist of the case for the promoting authority, including the justification for any modifications proposed to the orders;

viii. the gist of the case for the supporters to the proposal;

ix. the gist of the case for the objectors to the proposal;

x. the gist of the case for any alternative route promoted at the inquiry;

xi. the gist of the case for any counter-objectors;

xii. the gist of the response of the promoting authority to the objections made (unless this has been included in the promoting authority's case);

xiii. the Inspector's conclusions;

xiv. the Inspector's recommendations (or his or her reasons for not making any recommendations);

xv. the Inspector's signature in stylised form.

162. Appendices must include:

i) a list of the names and qualifications of those who appeared at the inquiry, but not their addresses;

ii) lists of all the documents, plans and photographs submitted to the inquiry;

iii) any written report produced by an Assessor.

163. The Inspector's report should follow the normal format for a report to the SoS save in relation to the matters identified below, where particular considerations arise from the nature of the orders considered in this guidance. Appendix H provides examples of report layouts.

Introduction or Preamble

164. The introduction or preamble should include:

i) a brief statement on the purpose and scale of the proposal;

ii) the number of objections outstanding at the start of the inquiry and the number since withdrawn; and the number of objectors who appeared or were represented at the inquiry;

iii) a brief summary (general headings) of the main grounds for objection;

iv) the date of any PIM (a note of the PIM being included as an inquiry document), or a reference to the fact that a PIN was issued – with this PIN being listed as an inquiry document;

v) a brief statement about any requests for adjournment and the decision given;

vi) a record that the promoter of the published orders (if present) confirmed that they had complied with all the statutory formalities;

vii) a record of any environmental assessment carried out and any Environmental Statement submitted together with any additional environmental information submitted during the course of the inquiry;

viii) the dates on which formal site inspections took place;

ix) a brief statement about any legal submissions, with a cross reference to any further details of such submissions appearing in the body of the report;

x) the number of alternative routes or sites (if any) put forward by objectors, and the number of counter-objections made to each;

xi) a reference to any application for costs, or (as appropriate) to any suggestion that a party would be making an application for costs;

xii) any other matters the Inspector wishes to bring to the attention of the SoS/WM; and

xiii) the name and qualifications of any Assessor together with a note on his or her particular role.

165. The preamble should end with a note about the format of the report, along the following lines:

> This report contains a brief description of the site of the proposals (the subject of the Order) and its surroundings, the gist of the cases presented and my conclusions and recommendations. Lists of inquiry appearances, documents, plans and photographs are attached.

Description of the site and its surroundings

166. As well as the description of the site itself and its surroundings, a brief description should be provided of any alternative routes or sites put forward by objectors. This can either be done here, or, if the alternative route is a substantial one which justifies its own part in the report, it would be more appropriate for the route description to be contained in that part.

167. References to any plans which might help the decision maker to identify the various features mentioned in a site description should be included. On-site agreements about measurements, physical features, etc, which may have been in dispute at the inquiry, should be recorded so that they can be referred to in the conclusions, if necessary. Where any maps or plans are out of date, it is helpful to mention this.

The case for the promoter

168. The case for the promoting authority should include the following elements:

i) a statement of Government policy relevant to the proposal being promoted, and details of any policy decision or document that has a bearing on the proposal. There is no need to go into detail regarding the content of documents such as the NPPF, because the SoS is aware of the contents of Government policy;

ii) a brief description of the proposal itself and of the need for it (unless its provision is a matter of Government policy);

iii) the reason for the chosen route or location;

iv) where applicable, reference to the details of the Environment Impact Assessment and the published Environmental Statement, together with comments from statutory consultees and any representations made by members of the public and others on the Environmental Statement; and,

v) specific indication of how the relevant statutory tests are satisfied.

169. Note that the case for the promoter may be amended during the inquiry, as objections are considered in detail and negotiations with objectors continue. This may result in some minor changes to the promoter's position, especially if modifications are proposed to address the concerns of some objectors. In some instances, such as where only a few objections have been lodged and where a general rebuttal to these objections has been made, the promoter's changed position can be reported within this section of the report, so that it is the promoter's final position, after responding to objectors that is recorded here.

170. However, where a significant number of objections need to be addressed, it can be helpful to simply record the promoter's initial position within this section, and then have a further section dealing with the response of the promoter to the various objections, after all the other cases have been reported (see paragraph 2.161). The reporting of specific rebuttals to each individual objection should follow the reporting of that objection.

The cases of the supporters

2.152 These should follow the case for the promoter. They may be either grouped together or reported singly, depending upon their extent and content. The cases for public authorities, statutory undertakers and national organisations should normally be reported separately.

The cases of the objectors

171. These should follow those of the supporters and, like the latter, may be either grouped together or reported separately depending upon their extent and content. Again, the cases for public authorities, statutory undertakers and national organisations should normally be reported separately, and where appropriate each should contain the gist of any comments or representations about the Environmental Statement and the likely environmental effects of the proposed development.

172. It is often possible to group individual objections together very effectively under a

number of different subject headings (a topic-based report) thereby giving the reader a comprehensive picture of the nature and weight of the objections relating to the main considerations. However, unrelated objections (which are usually concerned with the effect of the proposal on individual properties) should be reported separately.

173. Usually, statutory objectors should be reported before other objectors and written submissions left to the end and only reported if they raise issues not already covered. Should that not be the case, then a simple statement "*The written submissions did not raise any issues not already reported.*" should be included.

174. Whichever method of reporting is chosen, the headings should be self-explanatory and consistent.

175. Where appropriate, the cases should include a full summary of the objections and, if appropriate, details of the objectors' property and the contended effect on that property of the proposed project, to fully understand their particular cases.

The cases of the counter-objectors

176. The cases of the counter-objectors should for clarity be reported in the most convenient place. This normally would be just after the reporting of those cases containing the proposal to which they were opposed.

The response of the promoter

177. This section of the report should be used to record the promoter's response to each individual objection, both those presented orally at the inquiry (which should be dealt with first) and those submitted as written representations. Where similar topics are covered by more than one objector, the points of objection can be grouped and dealt with on a topic basis. This section of the report should also record and provide details of any modifications to the orders which the propter proposes. This section can also usefully be used to give an overall summary of the promoter's final case.

Conclusions

178. The inquiry procedure rules require that an Inspector shall, in his or her report to the SoS, include his or her conclusions and recommendations. The conclusions must be based on the facts derived from evidence presented to the Inspector at the inquiry and summarised in the body of the report.

179. Conclusions should commence on a new page and be prefaced by words such as:

> Bearing in mind the submissions and representations I have reported, I have reached the following conclusions, with reference being given in square brackets[9] to earlier paragraphs where appropriate.

The purpose of this is to cross-reference each conclusion to the summarised evidence and facts recorded earlier in the report on which it is based.

180. It is then useful to set out the structure which the Inspector will follow in setting out

[9] Or superscript brackets if preferred

his or her conclusions, to help guide the reader through the sections which follow.

Legal issues

181. Any legal issues should be dealt with first and should always be prefaced by wording along the lines of "*whether or not … is the case is clearly a matter of law, but it seems to me that …"*. Whenever possible, the Inspector should then go on to give his or her view of the issue including, if possible or appropriate, the likely alternative outcomes according to whatever view is taken by the SoS/WM on the legal submission(s).

The main considerations

182. It is helpful then to set out what in the Inspector's view are the main considerations on which the decision on each order should be based. This should include any statutory tests which exist for the making of each order or requirements of case law or the European Convention on Human Rights. The likely issues in relation to each type of order are listed in Appendix E.

Orders to be considered individually

183. Each of the published orders must be considered individually as the Inspector is required to reach a separate conclusion on each of the orders. To achieve this it may be helpful to consider the merits of the whole proposal first and then to address the individual orders. There are likely to be more objections to the proposal at large than to individual orders.

184. The case made by the promoters in favour of the scheme and the substance of the objections made either at the inquiry or in the written representations should be examined against the tests identified (see 2.163) as those the order should satisfy. In considering the objections, it is important that the Inspector reaches a conclusion on each one. Therefore, it can be helpful if the order of reporting the objectors' cases is followed in the conclusions.

Consideration of alternatives

185. Although the Inspector is not in a position to make a recommendation in favour of any alternative proposal, any such proposal (and any counter-objections to it) must be given due consideration, and its apparent advantages and disadvantages compared with the published proposal. This is because the Inspector will need to advise the SoS/WM on whether the alternative in question appears to warrant further investigation where the Inspector comes to the conclusion that, whilst the original proposal may be justified in principle, the objections made against it are sufficiently overwhelming to lead the Inspector to recommend against it.

186. There will then follow an overall judgement on the proposal, together with the reasoning which leads to any recommended modification, bearing in mind the submissions and objections made, any relevant policies and any criteria specified in the enabling Act.

Consideration of the findings of any Assessor

187. Where an Assessor has been appointed to sit with the Inspector, he or she will give such advice to the Inspector on the specialised issues arising at the inquiry as may seem to him or her to be necessary. The Assessor should collaborate with the Inspector in the production of his or her report. It is for the Inspector to ascertain

the facts, and to reach his or her own conclusions but, where the specialist issues are complicated or difficult, the Assessor may assist the Inspector by preparing draft findings on those issues, and any conclusions to be drawn from them which the Inspector may adopt. If adopted, however, they become the Inspector's findings and conclusions, and he or she must accept full responsibility for them. Any conclusions of the Assessor should, like those of the Inspector, derive from what he or she has seen and heard at the inquiry.

188. In many cases, all that will be necessary is for the Inspector to state at the end of his or her conclusions: "The Assessor, … agrees with my conclusions in paragraphs … " - provided, of course, that he or she does so. Alternatively, if it is felt that the Assessor's contribution should be more clearly identified, the report can be framed in such a way that the specialist advice can be introduced in appropriate places by the expression "*I am advised by the Assessor that …"*

189. In cases where there has been a great deal of discussion or argument and where the decision turns on specialist issues, it will be more appropriate for the Assessor to produce a written report to the Inspector. The report should only cover those specialist matters upon which the Inspector needs advice. It will be appended to the Inspector's own report and the Inspector will state in his or her report how far he or she agrees or disagrees with it.

190. Any differences of opinion between the Inspector and the Assessor should, wherever possible, be resolved before reports are submitted for decision. Where resolution cannot be achieved, the Inspector should highlight any differences and explain the reasoning behind any conclusion drawn contrary to the advice of the Assessor.

Environmental Impact Assessment

191. This and the following two paragraphs refer to the environmental impact assessment of projects for the construction or improvement of highways for which In England the Secretary of State and in Wales the Welsh Ministers are respectively the highway authority. European Directive 2011/92/EU (as amended) codified an earlier European Directive (on the publication of an Environmental Impact Assessment) which was transposed by regulations into UK legislation. In the case of proposals which are the subject of orders to be made by the SoS/WM under the Highways Act 1980 this requirement is in section 105A of that Act. The promoter (SoS or strategic highways company or WM) must, where appropriate, carry out an environmental assessment of the impact of the proposal. The promoter must, among other things, indicate why the main alternatives to the scheme proposed were dismissed, as well as assessing the measures necessary to make acceptable the impact of the scheme which is proposed.

192. In relation to highways schemes, these requirements are now contained in the Highways (Environmental Impact Assessment) Regulations 2007, which amended the Highways Act under section 105A. These Regulations also require that, where appropriate, the promoting authority must as part of their Environmental Impact Assessment publish an Environmental Statement ("ES") and give appropriate statutory consultees and the public at large, the opportunity to express an opinion on it before approval is given for the project to proceed. The legislation requires the SoS (or strategic highways company)/WM, before deciding whether or not to proceed with a proposal, to consider any opinion on the ES expressed by a statutory consultee or by a member of the public. **The Inspector should therefore ensure that he or she has seen and taken into account any such opinions expressed in reaching his or her conclusions and**

recommendation. The fact that this has been done should be made clear in the report.

193. The ES produced by the promoter, together with any supplementary documents which amplify or update the statement, comments on the ES, and all the relevant evidence given at the inquiry together comprise the environmental information concerning the environmental impact of the proposal. **It should be explicitly confirmed in the conclusions that the ES and other environmental information, including comments and representations made by statutory consultees and members of the public, have all been taken into account by the Inspector.** This environmental information and the Inspector's analysis and views are crucial to the SoS's environmental assessment. If the adequacy of the environmental information is in dispute, the Inspector's view on the matter should be made clear.

The Development Plan

194. If the matters before the inquiry include the grant of planning permission, the Inspector's view of the consistency of the proposal with the Development Plan must be made clear in the report.

The Appraisal Summary Table

195. When consideration is originally given by Government to the relative priority for funding of individual highway schemes, an Appraisal Summary Table (AST) is produced, summarising the impact of the proposal in environmental and economic terms.

196. The AST should normally be used only for its primary purpose of assisting in the assessment of the relative priority of a scheme as against others competing for resources. Unless the AST is before the Inquiry and the value judgements that it contains are raised by any party to the inquiry, it is not necessary for the Inspector to refer to the AST, either at the inquiry or in his or her report. If a value judgement in the AST is challenged by an objector, the Inspector should consider the evidence in support of that judgement, the evidence which criticises it and any rebuttal evidence, and include a conclusion on the issue in his or her report.

Wording of conclusions

197. The Inspector's conclusions should be so worded that they leave people in no doubt that their arguments have been comprehended and fully considered. Reasons should be given why any arguments were not successful. In framing overall conclusions on the orders before the inquiry, the Inspector should follow as closely as possible the wording of any tests contained in the authorising legislation (see 2.163). **Any statutory test should be quoted verbatim from the appropriate sources and not paraphrased.**

Recommendations

198. The Inspector's recommendation should accurately include the title of the Order as used on the Order and use the following form of words depending on which one of the following three courses of action are being recommended:

i) that the (specify) Order be made as drafted (or in the case of a local authority order, be confirmed without modification);

ii) that the (specify) Order be modified by … and that the Order so modified be made (or, in the case of a local authority order, be confirmed); or,

iii) that the (specify) Order be not made (or, in the case of a local authority order, be not confirmed).

199. Proposed modifications can be very long. If so, rather than embody them in the recommendations, it is better to refer to where the detail lies in the report, or in an Appendix to the report - for example, by stating: "be modified as detailed in paragraph … above **or** as referred to in paragraph … above and detailed in Appendix _".

200. When the Inspector is unable to make a recommendation, reasons for this should be given in the report. Under the heading "Recommendation" the Inspector should state:

201. *"For the reasons given in paragraph … I make no recommendation on the (specify) Order."*

202. The Inspector's recommendations must be confined to the Orders that are the subject of the inquiry. They should not include recommendations on other matters or contain advice, suggestions or reasoning. Where circumstances require such items to be necessary, they should be included in the conclusions. The recommendations should flow logically and inevitably from the Inspector's conclusions.

203. An Inspector should never attempt to make a conditional recommendation, because neither the SoS nor the WM are empowered to attach conditions to highway Orders. If an Inspector concludes that an Order should not be made unless and until some negotiation or action has been completed, or before some matter has been dealt with, or some problem investigated and it is not appropriate for the inquiry to be adjourned until that issue has been resolved, the Inspector should say so in the conclusions. The Inspector should then recommend that the Order be not made or confirmed unless the matter in question has been cleared up.

Appendices to the report

Appearance List

204. A list of those who appeared at the inquiry in person is required for all inquiries. It should record the names of those who spoke at the inquiry - whether to make a statement, to present evidence for cross-examination, or to ask questions. It is good practice not to allow anyone to address the inquiry, even by way of a question, without first taking their name and address. The Appearance List should set out the names of those who appeared at the Inquiry. It is advisable, even if the Inspector considers the point they wish to make to be irrelevant or repetitious, as the person concerned may not share that view and may pursue the matter beyond the inquiry. The Appearance List should be attached to the report.

List of documents, plans and photographs

205. Documents, plans and photographs should be given unique numbers and listed in an appendix to the report. It may not be convenient to distinguish between documents, plans and photographs. Where plans and/or photographs are contained within a document, such as in a statement of evidence or an appendix to

such a statement, they do not need to be separately numbered. The Attendance List for each day of the inquiry should be submitted with the inquiry documents, but should not be listed as an inquiry document.

Dispatch of the Inspector's report

206. One copy of the undated report together with all the documents submitted, bearing unique numbers and bundled in logical sequence, should be sent to the Planning Inspectorate for onward transmission to the SoS/WM.

Toll Orders

207. A Toll Order may be made to impose a charge on a new road or on a new section of road. Such a road could (but need not necessarily) be carried on a bridge or through a tunnel. Subsequently, a Toll Order may be made to vary, extend or revoke the original Order for the road. Such orders can be made under the New Roads and Street Works Act 1991, in which case the provisions concerning inquiries are contained in Section 25 of the Act (which applies section 302 of the Highways Act 1980) and in paragraph 6 of Schedule 2 to the Act (which is brought into effect by section 6). But tolling powers for certain specific bridges and tunnels are contained in special or local Acts of Parliament, sometimes of considerable antiquity, and these contain their own provisions detailing how and on what basis applications for revision of the existing tolling arrangements should be dealt with.

208. A Toll Order made under the New Roads and Street Works Act 1991 may be considered alongside Highways Act Orders for a new special road. Such an order might be made by a local highway authority and submitted for confirmation to the SoS although most special roads are promoted by the SoS as the highway authority. Such a Toll Order can only be recommended for approval if the proposed new road is similarly recommended for approval.

209. A Toll Order under Section 6 of the 1991 Act can only be made in relation to a non-NSIP special road proposed to be provided by a highway authority. The order shall state whether the charging of tolls will be by a concessionaire or by the highway authority.

210. A Toll Order under Section 8 of the 1991 Act establishes that a toll Order authorising the charging of tolls by a concessionaire shall specify the maximum tolls that may be charged if, and only if, the road to which the Order relates consists of or includes a major crossing to which there is no reasonably convenient alternative. Section 8 defines the terms 'major crossing' and 'reasonably convenient alternative'.

211. Toll Orders specify the maximum toll which can be charged for different classes of traffic, and may exclude certain vehicles.

212. The 1991 Act does not provide any criterion for the making or confirmation of Toll Orders under the Act. It is sufficient if the SoS is satisfied that it is appropriate to confirm the order.

213. In the same way, in relation to Toll Orders made under special or local Act powers, unless there are specific tests contained in the Act under which the tolling power was granted, the test is whether the SoS is satisfied that it is appropriate to confirm the order having considered the case presented by the promoter alongside all the objections and representations.

214. There are no procedural rules for Toll Order inquiries, so the usual rules of natural justice apply. If the order is dealt with at the same inquiry as an order to which the Highways Inquiries Procedure Rules 2004 apply, it is normal to secure agreement at the PIM that those Rules will also be followed in relation to the Toll Order.

215. Inquiries into Toll Orders can vary substantially in the length of time for which they run, but such an order is unlikely to generate the need for a Programme Officer or a PIM unless the inquiry at which it is to be considered is linked with other orders made under the Highways Act. Nevertheless, a pre-inquiry note may be useful so as to help parties prepare and submit their evidence in a timely way.

216. The guidance relating to inquiries and reports contained in Part 2 above of this chapter applies equally, as appropriate, to Toll Orders, save for the following points:

- In relation to costs, section 25 of the 1991 Act applies to section 302 of the Highways Act 1980, which in turn refers to section 250 of the Local Government Act 1972 that allows a Minister to direct a party to pay inquiry costs where a local inquiry has been caused. However, there is no reference to Toll Orders in the current Planning Practice Guidance on the award of costs and compulsory purchase and analogous orders. The practice is therefore not to entertain applications for costs in connection with Toll Orders. If there is an attempt to make an application, however, the practice outlined at paragraph 131 should be followed.

- Paragraphs 191 to 193 above on Environmental Impact Assessment and paragraphs 195 to 196 on Appraisal Summary Tables do not apply to Toll Orders.

Orders made under Part X of the Town and Country Planning Act 1990

217. Section 247 of the Town and Country Planning Act 1990 gives the SoS/WM power to make an order authorising the stopping up or diversion of any highway in order to enable development to be carried out (among other things) in accordance with a valid planning permission. Note that whilst the planning permission in question is most likely to have been granted as a result of a specific application from a prospective developer, it can also exist as a result of being classed as permitted development under the relevant part of the Town and Country Planning (General Permitted Development) (England) Order 2015.

218. In these cases it is not the place of the SoS/WM to reconsider whether or not planning permission should have been granted, or to interfere in any way with the planning permission. The SoS'/WMs' role is limited to considering the impact that closure of this highway would have on its users and to make a decision which determines where the ultimate public interest may lie, although that decision is likely to involve balancing the public interest benefits of the planning permission's implementation and any harm likely to arise from the closure of the road. The SoS'/WMs role is to balance the overall public interest in interfering with an established public right of way and to come to a decision on that public inter

219. To stop up or divert a highway in these circumstances, it is necessary to obtain an Order under section 247, for which the landowner or developer usually applies. Application is made to the DfT National Transport Casework team ("NTC") in Newcastle, who handle the procedure and following a local inquiry, when

necessary, issue a decision on behalf of the SoS. Very few of these cases are heard at a local inquiry. The Transport Orders branch of the Welsh Government fulfil a similar role on behalf of the WM,

220. The procedure is different in Greater London, following amendments made to Section 247 of the Town and Country Planning Act by Schedule 22 to the Greater London Authority Act 1999 (brought into effect by section 270 of that Act). In Greater London, stopping up orders are made by the Borough Councils. Except where mentioned, however, the guidance given in relation to such orders below also applies in Greater London.

221. Under the 1990 Act, related order making powers are contained in Section 248 (in relation to highways crossing or entering the route of a proposed new highway), Section 249 (in relation to extinguishing rights to use vehicles on highways) and Section 251 (in relation to extinguishing public rights of way over land held for planning purposes).

222. Outside Greater London, NTC will have drafted an order and prepared an order map. If objections are received, NTC will have made the arrangements for an inquiry. Section 252(4) and Schedule 14, Paragraph 3, of the Town and Country Planning Act 1990 detail the circumstances under which a public inquiry should take place for orders drafted under Part X of that Act (for Wales see paragraph 4.3 above).

223. Also under section 252, in Greater London, if there are objections to an order prepared by a Borough Council, the Council proposing to make the order must notify the Mayor of London of the objections and cause a local inquiry to be held. In certain circumstances, set out in section 252(5A), the Mayor of London has to decide whether the holding of an inquiry is unnecessary (and if so the Borough Council may dispense with the inquiry). If an inquiry is to proceed, then the Borough Council will appoint an Inspector to hold the inquiry. In effect, the Inspector will be nominated by the Planning Inspectorate, but will submit his report through the Inspectorate to the Borough Council rather than to the SoS.

224. The Inspector will receive a folder of objections and representations, possibly a statement from the developer, and possibly (outside Greater London) a brief from NTCT setting out the salient points as they see them. The papers should also contain a copy of the planning permission and the plan to which it relates.

The basic tests

225. In the case of orders made under each of the different sections within Part X, there is a basic requirement to be satisfied; but then there is an overall discretion for the SoS to exercise in deciding whether or not the Order is to be made.

Section 247 orders – necessary to enable development to be carried out

226. At the inquiry it will be necessary to establish in relation to a Section 247 order that the development authorised by the planning permission referred to in the order makes the closure or diversion of the highway necessary (where that is the ground relied upon). For it to be desirable or convenient is not sufficient. An outline permission with siting and design reserved is therefore unlikely to justify the order. On the other hand, if detailed permission exists, it is not open to objectors to argue that the development could be carried out in a different manner, which would make closure or diversion unnecessary. It is not possible to reopen consideration of the planning application.

227. If the development has already commenced, the Inspector will need to satisfy himself or herself that the remaining part of the development cannot be carried out (or the part constructed can not be brought into use) without the benefit of the order. If this is not the case, the recommendation should be that the order be not made. The promoter would then have to rely on other provisions such as those in Section 116 of the Highways Act 1980, and bring forward a new application.

228. In a similar manner, if the development in question has actually been completed, or substantially completed, then there is no authority in Section 247 to stop up the highway in those circumstances. As above, in instances such as these, the promoter would have to rely on other provisions, such as Section 116 or Section 118 of the Highways Act 1980 to seek to have the highway stopped up.

Section 248 orders – expedient in the interests of road safety or the movement of traffic

229. Under these orders, the SoS/a strategic highways company/WMs may authorise the stopping up or diversion of highways where they cross or enter the route of a proposed new or improved highway. The basic tests for these orders are:

i) either planning permission must have been granted for the construction or improvement of a highway ("the main highway") or the SoS/WMs or a strategic highways company must propose to carry out such work; and
ii) another highway must cross or enter the route or be otherwise affected by the construction or improvement of the main highway; and
iii) it must be expedient to stop up or divert that other highway either in the interests of the safety of users of the main highway or to facilitate the movement of traffic on the main highway.

Sections 248(2A) and 248(2B) set out the separate provisions for roads controlled by London boroughs.

230. Note that in the case of Section 248 orders it is expediency which is the test in iii) – not necessity.

Section 249 orders – pedestrianisation to improve amenity

231. These orders provide for a highway which is not a trunk road, a GLA road or a road classified as a principal road to be pedestrianised where a local planning authority resolve that to do so would improve the amenity of part of their area. The local planning authority must then apply to the SoS/WM for an order under Section 249 extinguishing vehicular rights over the highway concerned. The status of the road will be a question of fact; whether pedestrianisation would improve amenity would need to be determined on the basis of the evidence provided. Section 249(2A) & 249(2B) set out the separate provisions for roads controlled by London boroughs.

Section 251 orders – land held for planning purposes

232. Under these orders, SoS/WM may extinguish rights of way over land acquired or appropriated for planning purposes and held for the time being by a local authority (or the Broads Authority within the Broads) for the same purposes for which it was acquired or appropriated, to allow the later use of that land for a planning proposal. There is no necessity for a specific planning permission to have been granted at the time of consideration of the order, and application for such orders is often taken forward concurrently at an inquiry with, for example a planning CPO seeking to acquire land for a planning proposal. The SoS must be satisfied that either an

alternative right of way has been or will be provided, or that the provision of an alternative right of way is not required.

The arguments for making such orders if the basic test is met

233. If the basic test in relation to any Part X order is met, that is not the end of the matter. In each case the SoS has discretion whether or not to make the order.

234. The leading case on this issue is *Vasiliou v SoS for Transport and another [1991] 2 All ER 77*, in which the Court of Appeal held that the SoS (and therefore the Inspector) should take into account any significant disadvantage arising from the order, particularly any financial disadvantage. In the Vasiliou case, the Court held that Mr Vasiliou's personal financial loss (arising from stopping up the right of way preventing customers gaining access to a restaurant operated by him) was not, as such, relevant to the planning authority's earlier decision in granting planning permission as it had not been advanced as an exceptional circumstance for consideration (as opposed to resulting impact on locality due to loss of trade, which was a matter to be considered at the planning stage). Approving the stopping up order would, however, have had that effect on Mr Vasiliou, and no compensation would be payable because there is no provision for compensation in the Act for the particular type of order in question. The Court also held that when exercising his discretionary power in deciding whether or not to approve an Order of this type the "Minister ….ought to take into account, the adverse effect his order would have on those entitled to the rights which would be extinguished by his order. The more especially is this so because the statute makes no provision for the payment of compensation to those whose rights are being extinguished."

235. It should be noted, however, that in respect of orders made under s249(2) or (2A), provision exists in section 250 to compensate any person with an interest in land and having lawful access to a highway to which the order relates in respect of (a) any depreciation in the value of their interest which is directly attributable to the order; and (b) any other loss or damage which is so attributable.

236. Following on from the question of loss of access to premises, the Inspector should also consider any wider significant disadvantages to present users of the highway and to the general public, and take them into account. This might (for example) be as a result of an unacceptably long diversion for through traffic, or increased noise and disturbance for residents on a diversion route.

237. Where the highway is to be physically diverted, the convenience of any alternative route to be provided will also be a matter that needs to be taken into account. This diversion route can include, in part, an existing highway; which may or may not be proposed to be improved. However, if the diversion route is wholly on an existing highway, the order should be for "stopping up" and not for a "diversion".

238. Where the diversion route would run over land not in the ownership of the applicant for the order, the Inspector should require the promoter to produce the consent of the land owner concerned in writing (and this needs to be submitted with the report as a document). An alternative to this is that there may be a CPO for the land required for the diversion route and/or improvement to existing highways, either made or in draft - there is provision for this in Section 254 of the Act. If the order is not already confirmed, it may come before the inquiry as a concurrent order.

239. In relation to some orders (for example under Section 247), there may be suggestions that road safety could be compromised by stopping up the highway. If

the highway authority is represented at the inquiry, they should be asked for their view. If not, an effort should be made to establish whether the highway authority commented either on the original planning application or on the draft order. It is then for the Inspector to consider what weight to give to this aspect, taking into account what was seen on the site visit and relevant evidence given at the inquiry.

240. The Defra Circular 1/09: *Rights of Way* (at paragraph 7.15) states when considering the need to balance all the effects of an Order that -

> "The local planning authority should not question the merits of planning permission when considering whether to make or confirm an order, but nor should they make an order purely on the grounds that planning permission has been granted. That planning permission has been granted does not mean that the public right of way will therefore automatically be diverted or stopped up. Having granted planning permission for a development affecting a right of way however, an authority must have good reasons to justify a decision either not to make or not to confirm an order. The disadvantages or loss likely to arise as a result of the stopping up or diversion of the way to members of the public generally or to persons whose properties adjoin or are near the existing highway should be weighed against the advantages of the proposed order."

Procedure at the inquiry

241. There are no Inquiries Procedure Rules for inquiries into orders under Part X of the Town and Country Planning Act 1990. However, it is common practice to secure agreement at the PIM (or to give notice in the pre-Inquiry note, and to secure agreement at the start of the Inquiry) that the Highways (Inquiries Procedure) Rules 1994 should be used. However, where most or all parties are not legally represented it may be appropriate to run the event more akin to a hearing with a roundtable discussion of the issues rather than formal presentation of cases and cross-examination. There can be strong similarities between the effects of a Part X Order and the effects of side roads orders under the Highways Act. If there is a concurrent inquiry into a CPO, the Inquiry Procedure Rules for CPOs, as referred to in paragraph 2.13 above, may apply and be used to determine the matter in accordance with the arrangements set out in that paragraph.

242. The developer will be responsible for the housekeeping arrangements for the inquiry venue. This may be the only inquiry he or she has ever arranged so it is a good idea for the Inspector to arrive in plenty of time to check that the arrangements are satisfactory. There may also be a greater need than usual to explain the procedure to be followed. The Planning Inspectorate produces a note entitled "The Venue and Facilities for Public Inquiries and Hearings", and the Inspector should ask the PINS Casework Team to ensure that a copy is sent to the developer or promoter of the order. It may be advisable to use a Pre Inquiry Note to set out expectations in terms of the submission and exchange of evidence; otherwise a party may arrive at the Inquiry with an enormous volume of written evidence which nobody else, including you, has seen.

243. The usual rules for an award of costs apply to Part X orders. Parties are expected to meet their own expenses, but may claim any extra costs resulting from unreasonable behaviour by the other party. If an application is made at the inquiry, this should be heard immediately before the inquiry is closed, and the Inspector should report separately on this matter to the SoS. In Greater London, the costs report should be submitted to the London Borough concerned.

244. As with Toll Orders, the guidance relating to inquiries and reports contained in Part 2 above applies equally, as appropriate, to Part X orders, save for the following points:

i) there is no scope for the consideration of an alternative proposal at a Part X order inquiry;

ii) it is not appropriate to consider the use of the complex inquiry procedure (Appendix G) at such an inquiry;

iii) the normal announcement about costs should be made at the opening of the inquiry, just as at a Section 78 appeal. This needs to be added to the list of announcements set out at paragraph 66 above;

iv) in Greater London, the opening announcements should make it clear that the Inspector is appointed by and will report to the Borough Council; and

v) no question of an Environmental Impact Assessment or an Appraisal Summary Table will arise.

Traffic Regulation (and similar) Orders

245. Under the Road Traffic Regulation Act 1984 (RTRA 1984), traffic authorities can make Traffic Regulation Orders (TROs) to regulate, restrict or prohibit the use of a road or any part of the width of a road by vehicular traffic or pedestrians. A TRO may take effect at all times or during specified periods, and certain classes of traffic may be exempted from a TRO. Under s121A(3) of the RTRA 1984, in England and Wales outside Greater London, the council of the county or metropolitan district are the traffic authority for all roads in the county (or as the case may be, the district) for which the Secretary of State is not the traffic authority, with powers to make TROs on the roads for which they are responsible. Inside Greater London, the traffic authority (usually the London Borough, can make an 'order similar to a traffic regulation order' as empowered by section 6 of the RTRA 1984. Under s22BB of the RTRA 1984, National Park Authorities can also make similar orders for a number of specific purposes. The SoS (or strategic highways company, or the WM in Wales) has similar powers for trunk roads.

246. TROs under section 1 and similar orders under section 6 can be made for the following purposes:

- avoiding or preventing the likelihood of danger to persons or traffic (including avoiding or reducing, or reducing the likelihood of, danger connected with terrorism – section 22C of the RTRA 1984);
- preventing damage to the road or to buildings nearby (including preventing or reducing damage connected with terrorism – section 22C of the RTRA 1984);
- facilitating the passage of traffic (including pedestrians);
- preventing use by unsuitable traffic;
- preserving the character of a road especially suitable for use by persons on foot or horseback;
- preserving or improving amenities of the area through which the road runs;

- for any of the purposes specified in paragraphs (a) to (c) of section 87(1) of the Environment Act 1995 in relation to air quality;
- to conserve or enhance the natural beauty of listed special areas in the countryside such as National Parks (for a full list see section 22(1) of the RTRA 1984) – and for these cases, the purposes include allowing for improved access to recreational opportunities or to provide for the study of nature (see section 22(2)) or;
- conserving or enhancing the natural beauty of the area (for exclusions to this, including s22(1) cases above, see s22A of the RTRA 1984).

247. Traffic orders made by the SoS/WMs or a strategic highways company (see Regulation 3) are subject to the Secretary of State's Traffic Orders (Procedure) (England and Wales) Regulations 1990. Inquiries into objections to orders made by the SoS/WMs are dealt with by reporting to the SoS/WMs.

248. Permanent traffic orders made by local authorities are subject to the Local Authorities' Traffic Orders (Procedure) (England and Wales) Regulations 1996. Where there are objections, a public inquiry may be held by the local authority, who will appoint an Inspector from a panel chosen by the SoS/WMs on recommendation from the Planning Inspectorate. A public inquiry must be held if (subject to some exceptions in regulation 9, including experimental orders) the order would (a) prohibit loading or unloading of vehicles on any day of the week (i) at all times, (ii) before 07:00 hours, (iii) between 10:00 and 16:00, or (iv) after 19:00, and an objection has been made to the order (other than one which the order making authority is satisfied is frivolous or irrelevant) and not withdrawn, or (b) if the passage of public service vehicles would be restricted and there is an objection from an operator of an affected local service (outside Greater London) or the operator of a London bus service or by Transport for London (in Greater London).

249. The procedure at the inquiry is at the discretion of the Inspector, and it is often the case that the Highways (Inquiries Procedure) Rules 1994 provide a suitable framework. Normally, the Inspector reports to the local authority, but in certain circumstances (set out in detail in paragraphs 13, 14 and 14A of Schedule 9 to the RTRA 1984) the order can only be confirmed with the consent of the SoS/WMs (or a strategic highways company where relevant). These circumstances include the situation where the order would prohibit or restrict access to premises for more than 8 hours in any 24 hours.

250. The Inspector's report in these local authority cases will be addressed to the local authority. If considered appropriate on the basis of the evidence heard, the Inspector can recommend modifications to the order proposed by the local authority. If the order is one which can only be confirmed by the SoS/WMs (or a strategic highways company where relevant), the report will still be made to the local authority, which will then make an application for consent to the SoS/WMs (or strategic highways company where relevant) if it still wishes to proceed.

251. These orders are not the easiest of documents to read and fully understand so it is important to take the time to carefully read and re-read them. Moreover, you should check that the Order would actually do what the local authority intends it to do. It is not unknown for there to be significant errors in TROs prepared by local authorities.

252. The guidance relating to inquiries and reports contained in Part 2 above applies

equally, as appropriate, to these orders, save for the following points.

i) There is no scope for the consideration of a complete alternative proposal at a traffic order inquiry, although the SoS has power to modify the order. If the SoS proposes to modify an order in a way which would substantially affect the character of the order submitted, then, before doing so, the local authority and any other person likely to be concerned must be informed.

ii) It is rarely appropriate to consider the use of the complex inquiry procedure (see Appendix G) at such an inquiry, although very occasionally the scope of a TRO and the level of objection have been found to justify the use of the complex inquiry procedure.

iii) Costs are not available to any party involved in a TRO.

iv) No question of an Environmental Impact Assessment or an Appraisal Summary Table will arise.

APPENDIX A

PRE-INQUIRY MEETINGS

A.1 The purpose of the PIM is to help the Inspector and the participants to prepare for the inquiry proper, and so enable the proceedings to be conducted as efficiently and speedily as possible. It will be a public meeting, presided over by the Inspector, and more than one meeting may be held when the Inspector considers this to be desirable.

A.2 There are two ways in which a PIM might be arranged - (a) by the SoS/WM and (b) by the Inspector. In the first case, the SoS/WM will inform the main parties that a PIM will be held at the same time as he or she announces the holding of the inquiry. This will be at a very early stage in the proceedings and may even be before an Inspector has been appointed. In the second case, the Inspector has the power to call for a PIM to be held if he or she thinks it desirable. Normally, in the cases dealt with in this chapter, the PIM is called on the initiative of the Inspector.

A.3 All the relevant Inquiries Procedure Rules provide that the Inspector shall preside at the meeting and shall determine the matters to be discussed and the procedure to be followed. The rules also provide that the Inspector may bar or remove persons acting in a disruptive manner from the meeting. Once the PIM has been arranged, the Inspector is therefore in control of the subject matter for discussion and the procedure at the PIM, but under the relevant Rules only the SoS can vary the opening date of or the venue for the inquiry.

A.4 Before the PIM, the Inspector should have drafted an agenda for the meeting and, if this has not already been circulated, he or she should have sufficient copies for each of the main participants as well as some spares for the public. Also, the Inspector should have prepared an opening announcement giving his or her name, qualifications, etc, in similar fashion to the opening announcement for the inquiry. The Inspector should outline the purpose of the meeting, emphasising that it is not to hear evidence, but to arrange for the efficient running of the inquiry when it opens. The Inspector should organise an attendance list.

A.5 The Inspector should explain that agreements reached at the PIM are without prejudice to the rights and entitlements of objectors and others who appear at the inquiry without having attended the PIM.

A.6 Any Assistant Inspector, Assessor or Programme Officer should usually attend the PIM, and the Inspector should introduce them and explain their function and the part that they will play at the inquiry. The role of the Programme Officer will be particularly important in the run-up to the inquiry. Details of how he or she can be contacted and the venue of the inquiry library for the deposit and inspection of documents must be clearly stated.

A.7 After the PIM, a note of the conclusions of the meeting is usually circulated to all those who made representations. The note will then be placed in the inquiry library. The Inspector (or possibly the Programme Officer) should therefore take a careful note of the proceedings from which he or she can prepare the final record.

A.8 The following matters are often considered at PIMs.

i) Clarification of the purpose and scope of the inquiry.

ii) Identification of main participants and registration of others wishing to appear at the inquiry.

iii) Identification of any material required by the Inspector and not already covered in the outline statements, and consideration of how this is to be provided, including the progress of any special studies being undertaken, and the need for additional participants.

iv) Responses to any invitation from the Inspector to participants to consider collaboration.

v) Arrangements for the preparation of generally agreed statements of facts, including arrangements for any informal meetings that may be required to assist in preparing such statements.

vi) A review of the timetable for the work to be done before the inquiry opens, including the submission of any further statements.

vii) The role of any Assessors.

viii) Details of the inquiry venue and proposed dates and times of sittings including any provision for evening sessions or for sessions away from the main venue.

ix) The programme for the inquiry.

x) Accommodation and facilities at the inquiry (eg copying, transcripts, telephones, public address system, and facilities for the media).

xi) The form of opening and closing statements.

xii) The presentation of evidence (normally by the reading of summaries only).

xiii) Timetables and arrangements for the submission, circulation, inspection, numbering and listing of documents, statements of evidence and summaries.

xiv) Agreement on the units of measurement, nomenclature, acronyms, etc to be used at the inquiry.

xv) Arrangements for the handling of alternative schemes (where applicable).

xvi) Arrangements for site visits.

xvii) Arrangements for further PIMs (if considered necessary).

A.9 In cases where a PIM is not appropriate, but nevertheless parties may need guidance in preparing for the Inquiry, it is open to the Inspector to produce and have issued to all parties a pre-inquiry note (PIN) so that parties can approach the Inquiry in an awareness of the Inspector's expectations. If this is done, the pre-Inquiry note should be made an Inquiry document. An example of a PIN is given in **Appendix B**.

APPENDIX B

EXAMPLE OF A PRE-INQUIRY NOTE

PUBLIC INQUIRY

THE ……..(SIDE ROADS) ORDER 201X

THE ……..(COMPULSORY PURCHASE ORDER) 201X

EXCHANGE LAND CERTIFICATE IN RESPECT OF SPECIAL CATEGORY LAND

INSPECTOR'S PRE-INQUIRY NOTE

1 Purpose Of This Note

1.1 The purpose of this note is to assist parties in preparing for the Inquiry into objections to the above Orders and Certificate, so that it can run more efficiently than might otherwise be the case. It is being issued to the Acquiring Authority (……) and to those parties who have made representations about the Orders or the Exchange Land Certificate that are to be the subject of the Inquiry.

1.2 The Programme Officer for the Inquiry will be ……. His/Her role will be to ensure that the administrative arrangements for the Inquiry work as smoothly as possible. His/Her contact details are.

- email –
- Tel -
- Mobile No –
- Address – .

1.3 The Programme Officer will work under the Inspector's direction and act as the link between all the participants of the Inquiry and the Inspector. He/She will take no part in the Council's case – or indeed anyone's case. His/Her duties will include arranging the day to day programme of the Inquiry, co-ordinating the distribution and numbering of documents and maintaining the Library of Inquiry documents.

1.4 The website for the Inquiry is: http://www.....

2 Purpose Of The Public Inquiry

2.1 The purpose of the Public Inquiry is to enable the Inspector to gather evidence before making his report to the Secretary of State for Transport (and the Secretary of State for Communities and Local Government insofar as the Exchange Land Certificate is concerned). In his report he will set out the gist of the evidence given to the Inquiry and recommend either that the Side Roads Order and the Compulsory Purchase Order should be confirmed; or that they should be modified and confirmed; or that they should not be confirmed. He will also make recommendations concerning the Application for a Certificate under Section 19 of the Acquisition of Land Act 1981. The Secretaries of State will consider the Inspector's report before making their decisions.

2.2 Discussion about the merits of Government policy, matters of compensation and points of law are outside the scope of the Inquiry. But the application of Government Policy to the scheme promoted by the Council would be a relevant consideration.

2.3 The statutory tests that must be satisfied before the Side Roads Order can be confirmed are that:

a) no highway shall be stopped up unless another reasonably convenient route is available or will be provided before the highway is stopped up.

b) the stopping up of a private means of access shall only be authorised if no access to the premises is reasonably required; or if another reasonably convenient means of access to the premises is available or will be provided.

2.4 Government policy on the compulsory purchase of property is a subject of DCLG's *Guidance on Compulsory purchase process and The Crichel Down Rules for the disposal of surplus land acquired by, or under the threat of, compulsion*, from 2015. There will be justification for making or confirming a Compulsory Purchase Order if each of the following tests are satisfied:

a) there should be a compelling case in the public interest, and the purpose of acquisition should sufficiently justify interfering with the human rights of those with an interest in the land affected. Particular consideration should be given to the provisions of Article 1 of the First Protocol to the European Convention on Human Rights and, in the case of a dwelling, Article 8 of the Convention.

b) the acquiring authority should have a clear idea of how it intends to use the land it is proposing to acquire.

c) the acquiring authority should show that all the necessary resources are likely to be available to achieve the scheme purpose within a reasonable time-scale.

d) the acquiring authority should be able to show that there is a reasonable prospect of the scheme going ahead, and that it is unlikely to be blocked by any impediments to implementation.

2.5 Section 19 of the Acquisition of Land Act 1981 makes provision that insofar as a Compulsory Purchase Order authorises the purchase of any land forming part of a common, open space or fuel or field garden allotment, the Order shall be subject to special parliamentary procedure unless the Secretary of State is satisfied:

a) that there has been or will be given in exchange for such land, other land, not being less in area and being equally advantageous to the persons, if any, entitled to rights of common or other rights, and to the public, and that the land given in exchange has been or will be vested in the persons in whom the land purchased was vested, and subject to the like rights, trusts and incidents as attach to the land purchased, or that the land is being purchased in order to secure its preservation or improve its management.

(aa) that the land is being purchased in order to secure its preservation or improve its management.

b) that the land does not exceed 209 square metres (250 square yards) in extent or is required for the widening or drainage of an existing highway or partly for the widening and partly for the drainage of such a highway and that the giving in exchange of other land is unnecessary, whether in the interests of the persons, if any, entitled to rights of common or other rights or in the interests of the public, and certifies accordingly.

If any of these tests are met, a Certificate can be issued confirming that the special parliamentary procedure need not apply.

2.6 The Inspector's report will address these issues and it will therefore assist the Inspector if evidence given to the Inquiry refers to the tests detailed above, as appropriate.

3 Procedure

3.1 The conduct of the Inquiry and the events leading up to it are set out in Statutory Rules: Highways (Inquiries Procedure) Rules 1994 and the Compulsory Purchase (Inquiries Procedure) Rules 2007.

3.2 Statutory objectors, and the promoter, have a right to appear at the Inquiry. The Inspector may allow others to appear at the Inquiry, in accordance with the Rules, to support or object to the scheme. Those who appear may question others who take a different view, and be questioned by them. This allows the evidence to be tested. The promoter may prepare "rebuttal" evidence in response to evidence given by objectors, and objectors may respond to that when giving their evidence at the Inquiry. All evidence should be relevant and not repetitious.

3.3 In summary, the order of appearing at the Inquiry will be first, the Promoter of the Orders; then supporters of the Orders; then objectors to the Orders. Details of the precise procedure to be followed at the Inquiry, within the general framework set out above (and given in tabular form in the Annexe to this note), will be determined once the number of objectors and supporters who wish to appear has been established. At the end of their appearance, or towards the end of the Inquiry, each party may make a closing submission. The Rules establish that the Council has the right of final reply.

3.4 Closing submissions must not contain new evidence. The purpose of a closing submission might be broadly to briefly summarise your case as it rests at the time of making the submission, to highlight any point on which you have been satisfied by those whose case you oppose and to identify in the cases of those you oppose, those aspects of their cases which you claim not to have been made out, and to make any legal submission associated with your case.

3.5 If any already decided legal case is referred to in your closing submission, full copies of the judgement must be provided with the closing submission. Closing submissions given toward the end of the Inquiry may be made in writing only, or in writing and orally. The same weight is given in either case. A copy of your submission should also be provided electronically. Details of format etc should be discussed with the Programme Officer.

4 Evidence

4.1 Evidence is commonly presented at Inquiries in the form of a written statement (known as a proof of evidence) to be read aloud by the witness. This is usually a text document of one or more pages as the witness chooses. It may be supported by volumes of Appendices and/or Figures. Relevant extracts from authoritative documents may also be submitted, and those often help the Inspector and the Secretaries of State in attributing weight to evidence.

4.2 If the proof of evidence is longer than 1500 words, a separate written summary must also be provided and it is that summary which is read out by the witness at the Inquiry. Alternatively, such evidence may be taken "as read". The Inspector will take into account the whole of that person's evidence, and the witness may be questioned on it all. Proofs of evidence should be sufficient to convey the whole of the witness's evidence (apart from rebuttal evidence) and there should be no need for any oral exposition of such evidence when the witness first appears.

4.3 Units of measurement in proofs and documents should be metric (with imperial equivalents in brackets if considered necessary). Documents should be A4 size (or A3 folded to A4) wherever possible. All documents submitted to the Inquiry will be placed in the Inquiry Library and will be open to public inspection.

4.4 The Library will also contain a number of Core Documents - details can be obtained from the Programme Officer. The relevant documents available to date can be seen on the Inquiry website at http://www.....

4.5 There is no need for the same document to be submitted several times over by different objectors. Objectors should therefore check if the document they wish to refer to is already on the Core Document list. Anything not on the list will need to be separately provided by the parties.

4.6 Appendices should be bound separately from the main proof. They should be paginated throughout and contain a list of the documents included, with page references, at the beginning of the bundle. Individual appendices should be divided with a projecting tab so that they can easily be navigated. An appendix need contain only those extracts that are relevant, not the whole document, but should always include the title page. The full document should, however, be available at the Inquiry.

4.7 Those who wish to rely on material from the internet must provide printed copies of the material in question, as the content of websites can change and it is important that the Inspector and the Secretaries of State see the information the witness intends them to see.

4.8 All written material put to the Inquiry by parties who choose not to appear at the Inquiry will be considered by the Inspector when writing his report. In principle, greater weight is likely to be given to evidence which withstands testing under questioning at the Inquiry.

4.9 The promoter might choose to prepare written rebuttal evidence, in which it responds to points detailed in objectors' proofs of evidence or Inquiry statements. If so, the "rebutted party" should have the opportunity to consider that evidence before they appear at the Inquiry. The promoter should therefore ensure that its rebuttal evidence is delivered to the party in question at least 2 working days before the start of the Inquiry, that is, not later than 10:00am on Friday ……..201X. Copies of all rebuttal evidence should be provided to the Inspector before or during the first morning of the Inquiry.

4.10 General advice on the preparation of evidence can be found on the Planning Portal website: http://webarchive.nationalarchives.gov.uk/20150601165418/http:/www.planningportal.gov.uk/uploads/pins/highways_best_practice.pdf

4.11 The published Notice of the Inquiry, dated ……201X, indicates that anyone who is proposing any alternatives to the published proposals should submit sufficient information to enable such alternatives to be identified, by no later than ……201X. Information on any proposed alternatives submitted after this date may be disregarded.

4.12 The documents to be relied upon by each party should be numbered sequentially and given the prefix numbers which will be allocated by the Programme Officer to indicate their source. (eg 1/1/1 refers to Objector number 1/witness number 1/document number 1). Parties should contact the Programme Officer for guidance regarding the numbering of documents.

4.13 A minimum of 4 copies of each document will be needed – 2 for the Inspector, 1 for the Council and one for the Inquiry Library. Wherever possible, documents should additionally be submitted in electronic form. The documents should be sent to the Programme Officer to arrive no later than ……201X.

5 Timetable

5.1 The Inquiry will open at 10:00am on Tuesday …….201X at ……. It is scheduled to sit for X days, but this may vary once the detailed timetable has been prepared. The normal sitting times of the Inquiry will be 10.00am to 5.00-5.30pm on Tuesdays to Thursdays; on Fridays the Inquiry sessions will start at 9.30am and will finish at mid-afternoon – around 3.00-3.30pm. An earlier, 9.30am start may be needed on other days, depending on progress. The lunch period will normally be from about 1.00pm to 2.00pm and there will be short breaks each mid-morning and mid-afternoon (apart from Friday pm).

5.2 The Programme Officer will co-ordinate the Inquiry programme. To this end he/she will send a Programming Form to all the Statutory and Non-Statutory Objectors and to anyone else who responded to the Notice of the Orders. The form will ask whether the recipient wishes to appear at the Inquiry and will request contact details, information on any proposed professional representation and an estimate of the time likely to be required to give evidence and to conduct cross-examination. It will also seek an indication of which Council witnesses are likely to be cross-examined by the objector or his/her advocate.

5.3 This information will assist in the efficient scheduling of the Inquiry timetable. The programming forms should be completed and returned to the Programme Officer by ……..201X.

A N Other

INSPECTOR

……..201X

ANNEXE

Order of presentation of cases

Inspector's opening preliminaries and announcements	
THE PROMOTER	
Short opening statement by the Promoter	This will allow those people unable to attend the whole of the inquiry to have an understanding of the issues
Witnesses' evidence in chief	
Questions of clarification from objectors, after each witness's evidence	
EACH SUPPORTER	
Presentation of case	
Cross examination by objectors	
Re-examination	
Closing remarks	
EACH OBJECTOR	
The Promoter may wish to present a response or rebuttal	
Objector questions Promoter's witnesses	Where possible Objectors should inform the Programme Officer beforehand which of the Promoter's witnesses are to be cross examined
Re-examination of Promoter's witnesses	
Objector's evidence in chief	Objector presents case including any alternative proposals
Questions by the Promoter	on objection and any alternative
Re-examination of Objector	
(if any counter objectors) Counter objector's evidence	Counter objector (if any) presents counter objection to alternative (if any) put forward by objector

Objector questions counter objector	
Re-examination of counter objector	
Closing remarks by counter objector	
Closing remarks by objector	
OTHERS	
Evidence	After all objectors and counter objectors have completed their cases, any other evidence from interested persons or bodies who may object to the Orders in some way may be heard.
Questions from the Promoter	If any
CLOSING	
Closing submissions on behalf of the Promoter	

The Inspector may also have questions for each witness

APPENDIX C

EXTRACTS FROM A STATEMENT BY BARONESS STEDMAN IN A HOUSE OF LORDS DEBATE ON 25 FEBRUARY 1976

C.1 Hansard column 802: 'These Policy issues include .... the general assumptions which the Government make .... about the future growth of the economy and the broad effects which the Government expect these factors to have on traffic growth, and the design standards which are appropriate to various ranges of traffic volumes and speeds ....

C.2 Hansard column 806: 'I do not believe that discussion involving, as it must, both detailed technical argument and broader discussion of the population and economic assumptions from which these general factors are derived can be of use either to the Inspector in making his recommendation or to the Secretary of State in taking his decision. National forecasts must be discussed and settled nationally. This does not mean, my Lords, that we would attempt to exclude discussion of the particular traffic forecasts used for the road proposal under inquiry....

C.3 Hansard column 807: 'Local conditions may affect actual growth in a particular corridor considerably. As I have already said, objectors may well put forward a case, and the Inspector may accept, that the forecasts presented by the department in support of their proposal have not paid sufficient attention to some particular local factor. The Inspector will, in those circumstances, expect the witness to be able to justify the traffic figures used…'

APPENDIX D

EXTRACT FROM JUDGMENT OF LORD DIPLOCK IN THE CASE OF *Bushell and Another v SoS for Environment [1980] 2 All ER 608*

D.1 '"*Policy*" as descriptive of departmental decisions to pursue a particular course of conduct is a protean word and much confusion in the instant case has, in my view, been caused by a failure to define the sense in which it can properly be used to describe a topic which is unsuitable to be the subject of an investigation as to its merits at an inquiry at which only persons with local interests affected by the scheme are entitled to be represented. A decision to construct a nationwide network of motorways is clearly one of Government policy in the widest sense of the term. Any proposal to alter it is appropriate to be the subject of debate in Parliament, not of separate investigations in each of scores of local inquiries before individual Inspectors up and down the country upon whatever material happens to be presented to them at the particular inquiry over which they preside. So much the respondents readily concede.

D.2 'At the other extreme the selection of the exact line to be followed through a particular locality by a motorway designed to carry traffic between the destinations that it is intended to serve would not be described as involving Government policy in the ordinary sense of that term. It affects particular local interests only and normally does not affect the interests of any wider section of the public, unless a suggested variation of the line would involve exorbitant expenditure of money raised by taxation. It is an appropriate subject for full investigation at a local inquiry and is one on which the Inspector by whom the investigation is to be conducted can form a judgment on which to base a recommendation which deserves to carry weight with the Minister in reaching a final decision as to the line the motorway should follow.

D.3 'Between the black and white of these two extremes, however, there is what my noble and learned friend, Lord Lane, in the course of the hearing described as a "grey area". Because of the time that must elapse between the preparation of any scheme and the completion of the stretch of motorway that it authorises, the department, in deciding in what order new stretches of the national network ought to be constructed, has adopted a uniform practice throughout the country of making a major factor in its decision the likelihood that there will be a traffic need for that particular stretch of motorway in fifteen years from the date when the scheme was prepared. This is known as the "design year" of the scheme. Priorities as between one stretch of motorway and another have got to be determined somehow.

D.4 'Semasiologists may argue whether the adoption by the Department of a uniform practice for doing this is most appropriately described as Government policy or as something else. But the propriety of adopting it is clearly a matter fit to be debated

in a wider forum and with the assistance of a wider range of relevant material than any investigation at an individual local inquiry is likely to provide; and in that sense at least, which is the relevant sense for present purposes, its adoption forms part of Government policy.'

APPENDIX E

THE TESTS FOR THE MAKING OR CONFIRMATION OF ORDERS DEALT WITH IN THIS CHAPTER

While every effort has been made to ensure the correctness of the information contained in this chapter, in every case it should be carefully checked against the latest versions of the relevant Acts, Instruments, Circulars and Guidance. This is to ensure that any subsequent amendments or change of requirements that may have occurred since this chapter was prepared, are taken fully into account.

See also the advice in paragraph E.19 below on the Road Traffic Regulation Act 1984 (sections 32 and 40) that provides powers to acquire land compulsorily for the provision of off-street parking.

Orders under the Highways Act 1980 ("the Act")

E.1 The promoters need to make it clear in every case which authorising sections of the appropriate legislation they rely on for the justification for their orders, and how the statutory test in the legislation, or contained in the authorising section, would be met. Thus under Section 10 of the Act, it should be made clear whether the order is promoted for the purpose of extending or improving or reorganising the trunk road system. It is also necessary under Section 10 for the promoter of a trunk road scheme to show that the requirements of local and national planning, including the requirements of agriculture, have been taken into consideration, and that their proposals are expedient for the purposes intended.

E.2 For an order under Section 14 of the Act, the SoS must be satisfied under the provision in section 14(6) of the Act that another reasonably convenient route is available or will be provided before the highway is stopped up.

E.3 Before approving a scheme for a special road under Section 16 of the Act, the SoS must before making or confirming that Scheme give due consideration to the requirements of local and national planning, including the requirements of agriculture as required under the provisions in section 16(8).

E.4 For supplementary orders relating to special roads under Section 18 of the Act, the SoS must be satisfied in respect of those matters identified in section 18(6) of the Act.

E.5 Under Sections 106 the Act for the construction of a bridge over or tunnel under navigable waters, as part of a scheme made by a local highway authority to be confirmed by the Minister under section 106(3), or in other circumstances as described in Sections 10, 14, 16 and 18 of the Act, the SoS must under the provisions in section 107(1) take into consideration the reasonable requirements of navigation over the waters affected by the order or scheme. The order or scheme must also include plans and specifications to

indicate the position and dimensions of a proposed bridge, including its spans, headways and waterways, and, in the case of a swing bridge, provisions for regulating its operation; or, in relation to a proposed tunnel, plans and specifications to indicate its position and dimensions, including its depth below the bed of the navigable waters.

E.6 An Order made under Section 108 of the Act may authorise a highway authority to divert part of a navigable watercourse, where this is necessary or desirable in connection with the construction, improvement or alteration of a highway (including, in the case of connection with construction of a highway, a highway on a bridge or in a tunnel), the provision of a new means of access from any premises to a highway, or the provision of a maintenance compound or (on if the authority is a special road authority) a service area. Under section 109, where a watercourse is diverted under Section 108, any new length of watercourse created must be navigable in a reasonably convenient manner by vessels of a kind which immediately before the coming into operation of the order were accustomed to use the part of the original watercourse to be replaced.

E.7 For an Order under Section 124 of the Act (to stop up private means of access from a highway to a premises) to be made or confirmed by the Minister (or by the highway authority themselves) under the provisions in section 124(2), it must be shown that continued use of the access is likely to cause danger to or to interfere unreasonably with traffic on the highway (s124(1)), and either that no access to the premises from the highway in question is reasonably required or that another reasonably convenient means of access to the premises is available or will be provided (s124(3)).

E.8 Section 125 of the Act, among other things, authorises the stopping up of a private means of access to premises adjoining or adjacent to land subject to the order or a previous order in conjunction with Orders under section 14 or 18 of the Act (or section 248 of the Town and Country Planning Act 1990), provided that either no access to the premises is reasonably required, or that another reasonably convenient means of access to the premises is or will be available (s125(3)).

E.9 Sections 238 to 246 and 248 of the Act provide powers to acquire land (and new rights over land) compulsorily (or by agreement) for a wide variety of specific purposes in connection with the provision of highways and facilities used in connection with them. This includes compulsory acquisition of exchange land to replace any common, open space or fuel or field allotment affected by a CPO. Section 250 deals with the compulsory acquisition of rights over land.

E.10 In each case, the SoS/WM needs to be satisfied (as a matter of Government policy, expressed in DCLG's *Guidance on Compulsory*

purchase process and The Crichel Down Rules for the disposal of surplus land acquired by, or under the threat of, compulsion and NAFWC 14(2)/2004) that, in relation to compulsory acquisition:

- all the land affected by the order is required for the scheme;
- the acquisition would not be premature (although note that in some cases section 248 allows acquisition in advance of requirements); and,
- a compelling case in the public interest has been made out for the acquisition.

E.11 The SoS/WM also needs to be satisfied that the case for compulsory acquisition of the land covered by the order justifies interfering with the human rights of those with an interest in the land affected; that the acquiring authority have a clear idea of how the land covered by the order would be used; that all necessary resources (including funding) to carry out the plans are likely to be available within a reasonable timescale; and that the scheme is unlikely to be blocked by any impediment to implementation (DCLG *Guidance*, 'Stage 2: justifying a compulsory purchase order', pages 11-13). Where an Exchange Land Certificate is before the Inquiry, the tests in Section 19 and Schedule 3 of the Acquisition of Land Act 1981 should be applied as appropriate, with reference as necessary to 'Section 17: special kinds of land', and 'Section 18: compulsory purchase of new rights and other interests' of the DCLG *Guidance*.

Toll Orders

E.12 A Toll Order under Section 6 of the New Roads and Street Works Act 1991 can only be made in relation to a special road proposed to be provided by a highway authority. The Act does not specify any criterion for the making or confirmation of a Toll Order under Section 6. It is sufficient if the SoS is satisfied that it is appropriate to confirm the order. The same applies to variation orders.

E.13 Under Section 8 of the Act of 1991, any Toll Order shall specify the maximum tolls which may be charged, by a concessionaire, only if the road to which the order refers consists of or includes a major crossing to which there is no reasonably convenient alternative. Subject to any regulations which may be made, 'a major crossing' means a crossing of navigable waters more than 100 metres wide, and 'a reasonably convenient alternative' means another crossing (other than a ferry) which is free of toll and within five miles of the crossing in question. Subject to that point (and some clarification of how one takes relevant measurements), the Act again does not specify any criterion for the making or confirmation of a Toll Order. It is sufficient if the SoS is satisfied that it is appropriate to confirm the order. Again, the same applies to variation orders.

E.14 Orders to vary tolls authorised by local Acts must comply with any tests contained in such Acts.

Orders under Section 247 Town and Country Planning Act 1990

E.15 The Secretary of State may by order authorise the stopping up or diversion of any highway outside Greater London if he is satisfied that it is necessary to do so in order to enable development to be carried out either (a) in accordance with planning permission granted under Part III or section 293A of the 1990 Act, or (b) by a government department. Such an Order may make such provision as appears to the Secretary of State to be necessary or expedient for the provision or improvement of any other highway outside Greater London. In England, Defra *Circular 1/09* applies, paragraph 7.15 of which indicates that the disadvantages or loss likely to arise as a result of the stopping up or diversion of a way that is the subject of the Order to members of the public generally (or to persons whose properties adjoin or are near the existing highway) should be weighed against the advantages of the proposed order.

Orders under Section 248 Town and Country Planning Act 1990

E.16 The tests to be satisfied are as follows.

- Planning permission shall have been granted for the construction or improvement of a highway ("the main highway") or the SoS or a strategic highways company proposes to carry out such work (s248(1)(a));
- Another highway crosses or enters the route of the main highway or is or will be otherwise affected by the construction or improvement of the main highway (s248(1)(b));
- It shall be expedient to stop up or divert that other highway either in the interests of the safety of users of the main highway or to facilitate the movement of traffic on the main highway (s248(2)or s248(2A) as the case may be); and
- If in England, the disadvantages or loss likely to arise as a result of the stopping up or diversion of the way to members of the public generally or to persons whose properties adjoin or are near the existing highway should be weighed against the advantages of the proposed order (Defra *Circular 1/09*).

Orders under Section 249 Town and Country Planning Act 1990

E.17 The tests to be satisfied are:

- Confirm that the highway which is to be pedestrianised is not a trunk road or a GLA road or a road classified as a principal road (s249(1)(b));

- Has the local planning authority by resolution adopted a proposal whereby the proposed pedestrianisation would improve the amenity of part of the local planning authority's area (s249(1)(a)); and,

- If in England, the disadvantages or loss likely to arise as a result of the stopping up or diversion of the way to members of the public generally or to persons whose properties adjoin or are near the existing highway should be weighed against the advantages of the proposed order (Defra *Circular 1/09*).

Orders under Section 251 Town and Country Planning Act 1990

E.18 The tests to be satisfied are:

- Has the land over which the public right of way runs been acquired or appropriated for planning purposes and is it held by a local authority for the purposes for which it was acquired or appropriated (or, under s251(3), if the land is within the Broads is it held by the Broads Authority for any purpose connected with the discharge of any of its functions);

- Has or will an alternative right of way be provided, or is no alternative right of way required (s251(1)); and

- (If in England) the disadvantages or loss likely to arise as a result of the stopping up or diversion of the way to members of the public generally or to persons whose properties adjoin or are near the existing highway should be weighed against the advantages of the proposed order (Defra *Circular 1/09*).

Traffic Regulation (and similar) Orders: The Road Traffic Regulation Act 1984

E.19 The Order must be made for a qualifying purpose. Through section 1 of the Road Traffic Regulation Act 1984 (outside Greater London) or through s6 (in Greater London) these are:

- Avoiding or preventing the likelihood of danger to persons or traffic (including avoiding or reducing, or reducing the likelihood of, danger connected with terrorism – section 22C of the RTRA 1984);
- preventing damage to the road or to buildings nearby (including preventing or reducing damage connected with terrorism – section 22C of the RTRA 1984);
- facilitating the passage of traffic (including pedestrians);
- preventing use by unsuitable traffic;
- preserving the character of a road especially suitable for use by persons on foot or horseback;
- preserving or improving amenities of the area through which the road runs;

- for any of the purposes specified in paragraphs (a) to (c) of section 87(1) of the Environment Act 1995 in relation to air quality;

Under section 22(2) of the Act:

- to conserve or enhance the natural beauty of listed special areas in the countryside such as National Parks (for a full list see section 22(1) of the RTRA 1984) – and for these cases, the purposes include allowing for improved access to recreational opportunities or to provide for the study of nature (see section 22(2)) or;
- conserving or enhancing the natural beauty of the area (for exclusions to this, including s22(1) cases above, see s22A of the RTRA 1984).

If such a restriction is to be imposed, such an order must also specify a form of restriction which is authorised by the Act – such as a vehicle restriction, a direction of travel restriction, a waiting restriction or other prohibition, restriction or regulation identified in section 2 of the Act.

E.20 Subject to these provisions, the SoS must be satisfied that it is appropriate to confirm the order.

E.21 The Road Traffic Regulation Act (Section 40) also provides powers to acquire land (or existing interests in or rights over land) compulsorily for the provision of off street parking or (outside Greater London) for the provision of on-road parking (required under s32, s33(4)(a) or s34). Orders promoted under these provisions must be supported by evidence to demonstrate that the parking provided would relieve or prevent congestion of traffic. Where the resulting parking space would also provide access from the highway or road to adjoining or abutting premises, it is necessary for the evidence to show that it would be possible to ensure that vehicles using the parking space to gain access to the premises in question would, while in the parking space, proceed in the same direction as other vehicles using the parking space are, or are to be, required to proceed (s34(1)).

Overall requirement

E.22 In every case, subject to the specific provisions for each type of order, the SoS needs to be satisfied when making or confirming a relevant traffic order that it is appropriate to do so balancing any public or private disadvantages against the public benefits.

APPENDIX F

PROCEDURE AT INQUIRIES - SIMPLER INQUIRIES

F.1 After the Inspector's opening announcements the proceedings will normally follow the sequence:

i) an opening statement by the advocate for the Promoting Authority;

ii) the promoting authority's presentation of the evidence-in-chief by their witness;

iii) the cross-examination of the promoting authority's witness by objectors;

iv) the re-examination of the promoting authority's witness by their advocate;

v) the presentation of the objector's evidence and representations;

vi) the cross-examination of the objector (or his or her witness if represented) by the promoting authority's advocate;

vii) the reply to the cross-examination (or re-examination if the objector is represented by an advocate) and a final statement by the objector;

[NOTE: stages (ii) to (iv) and stages (v) to (vii) would be followed for each individual witness and objector.]

viii) the closing statement by the promoting authority's advocate;

ix) arrangements for accompanied site inspection; and

x) the Inspector's closure of the inquiry.

F.2 If the Inspector considers that it would be in the interests of the inquiry or necessary to accommodate individuals or unusual circumstances, he or she may vary the procedure accordingly within the requirements of the appropriate inquiries procedure rules. For example, it may be convenient to defer some final statements to the end of the inquiry if the relevant parties wish, normally hearing them in the reverse order of appearance. As an alternative to the case-based sequence described above (that is to say, with each party presenting the whole of their case in turn) it may sometimes be preferable to have a topic-based sequence, where separate topics or issues are identified and each party presents the part of their case relating to each topic in turn.

APPENDIX G

PROCEDURE AT INQUIRIES - MORE COMPLEX INQUIRIES

G.1 After the Inspector's opening announcements, the proceedings will normally follow the following sequence:

i) an opening statement by the advocate for the promoting authority;

ii) the promoting authority's witnesses' presentation of their evidence in chief, one after the other – ie, the whole of the promoter's case;

iii) questions of clarification by objectors to the promoting authority's witnesses;

iv) questions to the promoting authority's witnesses by their advocate about their response to iii).

In the case of supporters, after step iv and before step v the proceedings would follow the sequence:

a) the supporter's presentation of his or her case;

b) cross-examination of the supporter by objectors;

c) re-examination of the supporter by his or her advocate;

d) final address by the supporter's advocate.

Steps a) to d) are then repeated for each individual supporter.

v) cross-examination on evidence in chief of the promoting authority's witnesses by the first objector as a preliminary to vii);

vi) re-examination of the promoting authority's witnesses by their advocate;

vii) the first objector's presentation of his or her case (and introduction of alternative proposals);

viii) The cross-examination of the first objector by the advocate for the promoting authority;

ix) rebuttal evidence presented by the promoting authority's witnesses;

x) cross-examination of the promoting authority's rebuttal evidence by the first objector;

xi) re-examination of the promoting authority's witnesses by their advocate.

xii) first objector's presentation of final address;

xiii) The response of the promoting authority's advocate to the first objector's case.

NOTE: Steps v) to xiii) are then repeated for each individual objector, with provision being made for interested parties to have the opportunity to speak.

Counter-objectors to alternative proposals would normally be permitted to cross-examine the relevant objector after step viii and would then appear at the inquiry after step xi and before step xii. These proceedings would follow the sequence:

a) the counter-objector's presentation of his or her case;

b) cross-examination of the counter-objector by the relevant objector;

c) re-examination of the counter-objector by his or her advocate;

d) the counter-objector's presentation of his or her final address.

xiv) closing address by the promoting authority's advocate;

xv) final arrangements for accompanied site inspections;

xvi) the Inspector's closure of the inquiry.

G.2 In practice, steps i. iii and iv are sometimes omitted and incorporated in v and vi. If the Inspector considers that it would be in the interests of the inquiry or necessary to accommodate individuals or unusual circumstances, he or she may vary the procedure accordingly within the requirements of the appropriate procedure rules. Some of the more normal variations are listed below:

a) objectors have a few questions of clarification for the Promoting Authorities witnesses, or wish to reserve such questions for cross examination – stages iii and iv are then omitted as separate stages and incorporated within stages v and vi;

b) cross examination on evidence in chief and rebuttal evidence are combined – in that event, stage ix comes before stage v; stage v is incorporated with stage x; and stage vi is incorporated with stage xi;

c) some or all final statements are deferred to the end of the inquiry. If all are deferred in this way, it is normal to hear them in the reverse order of appearance;

d) the promoting authority does not close after each individual objection, but closes comprehensively at stage xiv.

APPENDIX H

REPORT LAYOUT

i) General report layout for Transport Orders

ii) Modification to front sheet for Welsh casework.

The Planning Inspectorate

Report to the Secretary of State for Transport

by [Name of Inspector, Qualifications]

an Inspector appointed by the Secretary of State for Transport

[Assisted by [Name of Inspector/Assessor, Qualifications (delete as appropriate)]

Date

HIGHWAYS ACT 1980

ACQUISITION OF LAND ACT 1981

WESSEX COUNTY COUNCIL

CAMELOT WESTERN BYPASS

UPSTREAM BRIDGE, SIDE ROADS AND COMPULSORY PURCHASE ORDERS 2011

Dates of Inquiry: 19 July 2011 to 21 July 2011

Ref: INSERT REFERENCE

CASE DETAILS

1 [**Name of First Order]**

- This Order is made under of the and is known as
- [Name of order-making authority] submitted the Order for confirmation to the Secretary of State for Transport.
- The Order proposes to …….

Summary of Recommendation(s): ……

---

2 **[Name of Second Order]**

- Etc.

---

1. PREAMBLE (OR INTRODUCTION)

2. DESCRIPTION OF THE SITE AND ITS SURROUNDINGS

3. LEGAL/PROCEDURAL SUBMISSIONS

4. THE CASE FOR [THE PROMOTER]

5. THE CASES FOR THE SUPPORTERS

6. THE CASES FOR THE OBJECTORS

7. THE CASES FOR THE COUNTER OBJECTORS

8. THE RESPONSE OF [THE PROMOTER]

9. CONCLUSIONS

10. RECOMMENDATION

A.N. Other

INSPECTOR

[New page]

APPENDIX 1 – APPEARANCES

[New Page]

APPENDIX 2 – INQUIRY DOCUMENTS

The Planning Inspectorate
Yr Arolygiaeth Gynllunio

Adroddiad

Ymchwiliad a gynhaliwyd ar ******

gan *****

Arolygydd a benodir gan Weinidogion Cymru

Dyddiad: *****

Report

Inquiry held on ********

by *****

an Inspector appointed by the Welsh Ministers

Date: *****

The Planning Inspectorate

Tree Preservation Orders

Updated to reflect 2023 Framework (NPPF)?	Yes

What's new since the last version

Changes highlighted in yellow made: 10 January 2023:

- Clarity at Para 44 regarding consent for lesser works
- Para 58 regarding timescales for tree planting

Other recent updates

- First Edition: 27 March 2018

INTRODUCTION

1. Sections 198 – 210 of The Town and Country Planning Act 1990 ('the Act') and Town and Country Planning (Tree Preservation)(England) Regulations 2012 ('the Regulations') form the basis for the implementation of policy for the legal protection of trees.

2. Tree preservation orders (TPOs) offer a mechanism for providing legal protection to trees of significant amenity value, particularly where they are considered to be under threat. As part of this protection procedure, appeals may be made to the Secretary of State (SoS).

3. Under s198 of the Act a local planning authority (LPA) may make a TPO if it appears to them to be expedient 'in the interests of amenity' to make provision for the preservation of trees or woodlands in their area. Generally, TPOs are made when selected trees and/or groups of trees are threatened by a proposed development, and where the trees' removal would have a significant adverse effect upon the local environment. However, in deciding which trees and woodlands should be protected in the interests of amenity, LPAs exercise a wide discretion. Government advice in the Planning Practice Guidance (PPG) to LPAs is that they should use TPOs to protect selected trees and woodlands "if their removal would have a significant negative impact on the local environment and its enjoyment by the public".

4. The PPG also sets out what should be considered by the local authority when assessing amenity value and the following should be taken into account:

- *Visibility*
  The extent to which the trees or woodlands can be seen by the public will inform the authority's assessment of whether the impact on the local environment is significant. The trees, or at least part of them, should normally be visible from a public place, such as a road or footpath, or accessible by the public[1].

- *Individual, collective and wider impact*
  Public visibility alone will not be sufficient to warrant an Order. The authority is advised to also assess the particular importance of an individual tree, or of groups of trees or of woodlands by reference to its or their characteristics including:

  - size and form;
  - future potential as an amenity;
  - rarity, cultural or historic value;
  - contribution to, and relationship with, the landscape; and
  - contribution to the character or appearance of a conservation area.

[1] *Wilkson Properties Ltd v Royal Borough of Kensington & Chelsea* [2010] EWHC 3274 (QB)

- *Other factors*
  Where relevant to an assessment of the amenity value of trees or woodlands, authorities may consider taking into account other factors, such as importance to nature conservation or response to climate change. These factors alone would not warrant making an Order.

Specifying the trees and woodlands in a Tree Preservation Order

5. Each TPO must specify the trees, groups of trees or woodlands to which it relates. It follows that TPOs should not be used to protect shrubs, bushes or hedges - although a TPO may be used to protect trees growing out of hedgerows or lines of trees of a reasonable height that may once have been managed as hedgerows. TPOs should not normally be made in respect of fruit trees where these are cultivated for the production of fruit, as such work may be exempt[2], although a TPO may be appropriate where the commercial operation has ceased or is ceasing. It would, however, be reasonable to make a TPO in respect of individual domestic garden fruit trees where these are not cultivated for the production of fruit[3].

6. Each TPO must include a schedule describing the trees, group of trees, or woodlands and a map showing their location. Trees may be classified:
   - as individual specimens (each tree - T1, T2 etc. - shown encircled in black on the map);
   - in groups (each group - G1, G2 etc. - shown within a broken black line on the map);
   - by reference to an area of trees (the boundary of each area - A1, A2 etc. - indicated by a dotted black line on the map);
   - as woodlands (the boundary of each woodland - W1, W2 etc. - indicated by a continuous black line on the map).

7. Each **individual specimen** should merit protection in the interests of amenity in its own right. The **group and woodland** classifications enable the protection of trees that merit protection as a collective unit where the individual category would not be appropriate. In such cases each tree need not individually merit protection in the interests of amenity but the unit, as a whole, should. Woodland TPOs also protect trees which are planted or grow naturally within a woodland area after the TPO was made[4]. The same does not apply to group TPOs. This is because the purpose of a woodland TPO is to safeguard the woodland unit as a whole, which depends on regeneration or new planting. The **area** classification, while it will usually apply to a collection of trees with individual amenity value, may include by default trees that would not otherwise merit individual protection. It only protects those trees standing at the time the TPO was made. The area category is intended for short-term protection in an emergency and may not be capable of providing appropriate long-term protection.

8. All TPO's made since April 2012 should accord with the model form of order which can be found in the Schedule to the Regulations. For TPOs made prior to April 2012, s193

[2] Regulation 14(d)
[3] see PPG - Paragraph: 084 Reference ID: 36-084-20140306
[4] *Distinctive Properties (Ascot) v SSCLG & Royal Borough of Windsor & Maidenhead* [2015] EWCA Civ 1250

of the Planning Act 2008 provides that these orders continue to have effect with the omission of all their original provisions, apart from the information identifying the protected trees[5]. The original provisions have been replaced by those set out in the 2012 Regulations. There is no requirement for LPAs to remake, amend or reissue historic orders.

9. The Regulations specify that all new orders shall not take effect (other than provisionally) unless confirmed within 6 months of the order being made. Transitional arrangements provided that any orders made before April 2012 had a 6 month period to allow for their confirmation. The transitional period expired on 5th October 2012.

The requirement to obtain consent

10. A TPO prohibits the (1) cutting down, (2) uprooting, (3) topping, (4) lopping, (5) wilful destruction, or (6) wilful damage of the trees protected by the order. Anyone who wishes to carry out such work on a protected tree must apply to the LPA for permission, using the standard application form published by the Secretary of State and providing the required information according to the Regulations. The LPA may grant consent and attach any condition as specified in Regulation 17(2) of the Regulations, or otherwise refuse consent under the order.

[5] The schedule containing the specification of the protected trees and the annotated map.

APPEALS

Rights of appeal

11. As part of the protection regime, appeals may be made to the SoS in relation to:

- Refusal of an application for consent under any order or grant consent subject to conditions;
- Refusal of an application for any consent, agreement or approval of that authority required by a condition imposed on a grant of consent under an order, or grant such an application subject to conditions; or
- Failure to determine any such application as referred in the points above within the period of 8 weeks beginning with the day after the date on which the application was received by the LPA.

12. The SoS has delegated the appeal functions to the Inspectorate and on determining an appeal an Inspector may:

- allow it, either in total or in part;
- dismiss it;
- reverse or vary any part of the LPA's decision;
- deal with the application as if it had been made to him/her in the first place.

Appeal Procedures

13. Most appeals are dealt with through a fast-track written representations procedure. For these cases, a decision is made on the basis of the original application and its supporting information, the decision of the LPA and the reasons given for making that decision, the grounds of appeal plus any further information requested by the Inspector. Consideration is confined to the matters that were before the LPA when the decision on the application was made. There is no scope for new reasons to be introduced in the grounds of appeal and there is no mechanism to exchange representations during the appeal.

14. Whilst the Regulations[6] make provision for the parties to exercise their right to be heard, TPO hearings and inquiries are not governed by statutory rules of procedure. The Procedure Guide for Appellants[7] sets out the approach that PINS will take to administer these procedures.

Assessment of site and trees

15. The following information may need to be collected for each tree, although the degree of detail will depend on the site situation and grounds of appeal:

[6] Regulation 23(2)
[7] A guide for Appellants (Tree Preservation Orders – consents for works) – see sections 11 and 12.

- species of trees
- height
- height of clear stem/clearance from ground to lowest part of crown
- branch spread or canopy shape (if relevant)
- maturity
- past treatment and growth performance
- anticipated growth or response to treatment
- presence/absence of visible defects, abnormalities, damage, damaging agents, disease or decay and their extent and significance
- assessment of amenity both in the context of the immediate location and wider viewpoints.

Amenity/Character and Appearance

16. Most TPO appeals are against the LPA's refusal of consent. In these cases the Inspector must always consider[8]:
    - the amenity value of the tree or trees in question;
    - how the amenity value would be affected by the proposed work; and
    - the reasons given for the application.

17. Amenity issues need to be considered whether or not the appellant raises them. Appeals can succeed on amenity grounds alone. The grounds of appeal may be misconceived, and there may be no sound arboricultural reasons for the work, but if the proposal would not have a significant impact on local amenity, it may still be appropriate to allow the appeal.

18. The PPG advises LPAs to develop ways of assessing amenity in a consistently objective way. Inspectors must, therefore, demonstrate a consistent approach. All decisions should include an assessment of the amenity of the appeal tree, and the likely impact of the proposed work on local amenity. In their amenity assessment Inspectors should consider those factors set out in paragraph 4 and:

    - public visibility of appeal tree;
    - the impact of the appeal tree (individually or within its "group" or woodland);
    - size and future growing potential;
    - presence of other trees;
    - suitability to setting;
    - any special factors; and
    - the likely impact of the proposed work on the local amenity.

[8] See PPG – Paragraph: 103 Reference ID 36-103-20140306

19. If the appeal tree is part of a group of trees specified in the TPO, the Inspector's decision should consider the likely impact of the proposal on the amenity provided by the group as a whole. It may be that the group of trees has a considerable amenity value, but that the proposed work on the appeal tree would not significantly affect that value.

20. In relation to applications to cut down trees in a woodland, the Inspector should take into account the importance of promoting woodland management, although there may be cases where amenity factors outweigh the silvicultural justification for the proposed work.

Appeals against Conditions

21. There are a small number of appeals against conditions (for example, to plant a replacement tree).

22. The primary purpose of a TPO is to protect trees from unnecessary or unjustified felling, and the majority of TPOs are made with this intention in mind. However, by their nature all trees will eventually die, and thus they cannot be preserved indefinitely. A secondary, and almost equally important, purpose of a TPO is to secure a continuity of trees on a particular site for the benefit of the local environment. When felling becomes inevitable, a condition requiring replacement planting will secure this objective. However the replacement tree will not be protected by the same TPO as its predecessor and it will be matter for the Council to decide whether or not the replacement planting warrants protection. The replacement of protected trees should be supported, provided

- it is in the interests of amenity to do so, and
- the requirements of the condition(s) are reasonable and necessary.

23. Inspectors should include in their decisions an assessment of how local amenity will be served by the proposed replacement tree. Whether a replacement tree is likely to be in the interests of amenity will depend on:

- the impact of the original tree's removal on local amenity;
- the extent to which the replacement tree will be publicly visible; and
- its likely impact on amenity in the long term (individually or in its "group" or woodland setting).

24. If it is in the interests of amenity to plant a replacement tree, the LPA's condition or direction should be reasonable. Bear in mind that you may use your powers to vary the terms of the condition. Appellants may question the size of tree required, the species or location, or the time given in which to comply with the condition. You should treat each ground of appeal on its arboricultural merits bearing in mind the characteristics of the site and what you would regard to be a common sense solution. If the location of the replacement tree specified in a condition is unsuitable, is there an alternative spot on the site? If the size of the replacement tree were, in your view, unreasonable, what would be a reasonable size? If the species of tree is unsuitable would an alternative species be more appropriate?

Conservation areas

25. If the appeal tree is in a conservation area, s72 of the Planning (Listed Buildings and Conservation Areas) Act 1990 requires the Inspector, before reaching a decision on the appeal, to pay special attention to the desirability of preserving or enhancing the character or appearance of the conservation area.

26. The appeal file should indicate whether or not the appeal tree is in a conservation area. Inspectors should include in their decisions a brief assessment of the general character and appearance of the area that is in the general vicinity of the tree. They should then go on to assess in the normal way the amenity of the tree and the impact of the proposal on local amenity, but should also include a judgement on the proposal's likely impact on the character or appearance of the conservation area. There is no requirement to apply the tests in paragraph 202 of the National Planning Policy Framework.

Dangerous Trees

27. Permission is not required for the felling or cutting of a tree protected by a TPO which is dead, the removal of dead branches from a living tree, works which are necessary to remove an immediate risk of serious harm or where the work is required to abate an actionable nuisance. LPAs should not determine applications made to them for works to trees which are excepted. It is usually obvious when a tree is dead. However, it can be difficult to ascertain when there is an immediate risk. It should be borne in mind that, whilst dangers to the public should be removed as speedily as possible, many tree defects can be dealt with or managed by judicious pruning.

28. Decisions involving potentially dangerous trees should be submitted to the office as soon as possible after the site visit and a note placed on the file identifying the need for the decision to be issued swiftly. As long as this process is followed it should not be necessary for further action to be taken. Under no circumstances should an Inspector make any comment on the safety of the tree during their site inspection.

29. Where exceptionally it is considered that the danger to person/s or property is so imminent that it could occur prior to the issue of the decision then a note should be sent by e-mail to the office as soon as possible following the visit setting out the concerns and the reasons for them. The office will then write to the parties drawing attention to the exceptions to the requirements for consent set out in Regulation 14.

Content of the decision

Material Considerations

30. The law requires you to have regard to all "material considerations" before reaching a

decision, and then state the reasons for your decision to allow or dismiss the appeal. The PPG[9] states that this includes development plan policies where relevant. The Inspector must therefore deal with each of the appellant's principal grounds of appeal, although there is no need to deal with every point mentioned in support of those grounds. The original reasons for making the application must also be considered.

Grounds of Appeal

31. Grounds of appeal often allege that the appeal tree is unhealthy, potentially dangerous or is causing or will cause damage to buildings, walls, drains etc. Inspectors must deal with each case on its merits, in the light of the written submissions and the site visit. Relevant factors will include the detailed characteristics of the tree, any evidence of damage and the nature of the site. The PPG[10] advises that applications which involve alleged damage to property should be supported by providing technical evidence from a relevant engineer, building/drainage surveyor or other appropriate expert. The standard application form requires evidence that demonstrates that the tree is a material cause of the problem and that other factors have been eliminated as potential influences so far as possible. The guidance notes for applicants sets this out in more detail.

Validity of an Order

32. Inspectors are required to determine an appeal on its merits. The fact therefore that work to a tree/s may not require consent because of the exceptions in the Regulations is not a matter that normally needs to be considered. An appellant may argue that the order is invalid; however s284 of the Act makes clear that the validity of an order cannot be challenged in any legal proceeding (which includes appeals) except by way of application to the High Court within 6 weeks of the TPO being confirmed. Where appellants have questioned the validity of a TPO, Inspectors are advised to make clear in their decision that it is not a matter for consideration.

Status of the Order

33. Concerns regarding the confirmation status of the order may arise during the course of the appeal. For example, appellants may argue that the order has not been confirmed and that the order no longer is in effect.
LPAs are asked to provide evidence of confirmation with the appeal questionnaire. A suitably endorsed and dated order is usually provided as evidential proof that the order has been confirmed and continues to have effect.

34. The LPA may be unable to locate a copy of the endorsed order and may rely on other forms of evidence to demonstrate confirmation, such as statutory declaration(s), minutes of Council meetings, extract from the Land Charges Register, previous decisions on TPO consent applications. You may have to exercise judgment whether or not sufficient evidence of confirmation has been provided, as a preliminary matter. If on

[9] See PPG – Paragraph: 90 Reference ID: 36-090-20140306
[10] See PPG – Paragraph: 69 Reference ID: 36-069-20140306

the balance of probabilities there is enough evidence to demonstrate confirmation, you should note this in a procedural paragraph and proceed to determine the merits of the case. If you reach the view that there is insufficient evidence of confirmation, please contact the Tree and Hedge Team to discuss next steps.

Is the tree protected?

35. Where the species of an individual tree or tree forming part of a group, which is the subject of the appeal, does not correspond with that shown in the schedule of the order this will not necessarily mean that the tree is not protected. The key test is whether you had looked at the scene immediately after the making of the TPO it would have been apparent which trees had been covered.[11] Consequently, if the tree is in the exact position shown on the plan or the number of trees in the group accords with that recorded on the schedule and the only difference is the species, it would normally be reasonable to hold that the tree was protected by the order even though the wrong species was identified on the schedule.

36. Where a tree forms part of an area order, you will have to reach a view whether the tree was present at the time the order was made. As this could involve orders made many decades ago, you will have to rely on best evidence available and your observations at the site visit to conclude on this matter.

37. Occasionally legal points may be raised by appellants that do need to be addressed in the decision. Most legal or procedural points are best dealt with briefly at the start of the decision. Any special designation of the surrounding land or buildings should be particularly referred to e.g. SSSI, AONB, conservation area, listed building.

MAIN ISSUES

38. The decision should be as concisely written as possible but should set out clearly the conclusions of the Inspector on such matters as the health and aesthetic value of the appeal tree(s) and the likely effect of the proposal on either the tree(s) which are the subject of the appeal or on nearby trees. All major issues raised in the grounds of appeal should be commented on and reasoned conclusions arrived at. The Inspector should consider not only the physical impact of what is proposed but must have regard to all the representations made. Points not covered in the submissions should not be introduced. However, if the submissions are too limited or ambiguous to reach a judgement or something of particular relevance was observed during the site visit which was not referred to in the representations it may be necessary to go back to the parties. Advice should be sought from the office before determining whether in a particular case it would be appropriate to do so.

[11] *JR Charles & Son Ltd v Barnet London Borough Council* [2005] EWHC 1056 (Admin)

Health and Condition of the tree.

39. The present condition of the tree and its situation must be assessed as seen. However if the grounds of appeal for removal of the tree relate to loss of light and the tree has been heavily reduced so it now obstructs less light, it would still be appropriate to consider likely re-growth and future effects of such work. Judgement should also be based on that rather than relying on the present situation only. Continued growth of a tree is always a factor that should be taken into account.

40. If the grounds of appeal for removal of a tree arise from concern for safety which has been impaired by events occurring after the LPA's decision (e.g. storm damage, or groundwork affecting or severing roots) then this must be taken into account. If it has been possible to ascertain the condition of the tree at the time of the refusal of consent by the LPA and a view can be taken as to whether the refusal would have been warranted this should be stated. This should be followed by an explanation of how later events have changed the situation as this may have a bearing on any compensation claimed.

Conservation Area

41. If a tree is situated in a conservation area an evaluation should be made not only of the contribution the tree makes to preserving or enhancing the character or appearance of the conservation area, but also the effect of the proposal in that regard. This also applies to replanting whether as part of an appeal or as a proposed condition of consent.

Replacement Planting

42. Where the appeal relates to felling the Inspector can, if he or she allows the felling of a tree, require the planting of a replacement. Both the LPA and the appellant should have provided comments on whether they believe it would be appropriate to plant a replacement tree and its size, species and location.

43. Although the powers of the Inspector are wide ranging, the use of these powers has to be justified and their exercise is generally constrained by considerations of natural justice. There would need to be very strong reasons to vary or reverse any part of a consent. But this may occur, for instance, where management of a group of trees is being considered on appeal, and the Inspector concludes that different trees within the group should be felled and/or retained to those specified by the LPA in the notice.

Extent of the works

44. Regulation 23 of the 2012 Tree Regs says:

(1) Where an appeal is made under regulation 19 the Secretary of State may—

(a) allow or dismiss the appeal; or

(b) reverse or vary any part of the decision of the authority (whether the appeal relates to that part of it or not),

c) and may deal with the application as if it had been made to the Secretary of State in the first instance.

45. Regulation 23 is, therefore, a wide-ranging power which will allow the Inspector to consider whatever is necessary to decide the appeal before them. However, this should always be tempered with the acknowledgement that whatever is decided does not lead to prejudice to any party.

46. Less work than that applied for can be approved, for example 20% rather than 30%, provided it is of a similar type. Precision and accuracy are particularly important where specific work is being allowed to a tree, especially if the degree of work to be allowed is the subject of the appeal or the wording of the application is imprecise. Take guidance from BS3998[12]. The required work should be clearly described in the decision and there should be no need to specify the details in a condition. If appropriate, annotated drawings or photographs (if submitted and agreed by the parties) can be helpful for accurate specification of certain works. can be referred to as part of the decision.

47. Where the Inspector considers that the work or extent of the work applied for is not justified for the reasons given by the appellant or otherwise, the temptation to give helpful advice as to what alternative works might be appropriate should be avoided. This is a matter for the LPA to consider. However, if the LPA has suggested alternative work and it is considered that this would overcome the problem then it would be helpful to indicate this in the decision.

Use of conditions

48. The Tree Regulations make provision for conditions to be applied to consents, with regulation 17(2) limiting their scope to:

- Conditions relating to the planting of replacement trees (ie requiring trees to be planted; requiring how, when and where planting is to be done; requiring things to be done or installed to ensure the protection of any replacement trees);
- Conditions requiring approvals to be obtained from the person giving consent;
- Conditions specifying the standard to which the works must be carried out; and
- Conditions specifying that the works may be carried out on multiple occasions or within a specified time period only.

Conditions should meet the tests set out in the PPG[13] and the National Planning Policy Framework. If conditions are applied to the consent, the PPG states that reasons should be given.

49. In the absence of a bespoke condition, Regulation 17(4) specifies the following defaults:

- any consent is valid for a two year period, starting from the date of the consent;

[12] Online access to the standard is available from BSOL; contact the Knowledge Centre for information about registering for access.

[13] In addition to the generic advice on the use of conditions, advice on the use of conditions in TPO consents can be found in the following paragraph of the PPG: Paragraph: 096 Reference ID: 36-096-20140306

and

- the works granted may only be carried out once.

Where the Inspector intends to grant consent unconditionally, the defaults set out in Regulation 17(4) should be cited in the decision letter, as a matter of good practice.

Supporting and further information

50. Whilst it is always preferable to be able to come to a definite conclusion on the grounds of appeal, sometimes essential information required to make a definite judgement will not have been provided and could not be ascertained from the visual site inspection. This is most frequently associated with alleged damage or risk of damage to buildings. In these situations it may exceptionally be necessary to conclude that the grounds of appeal have not been substantiated due to insufficient information, in which case the appeal can only be dismissed.

51. The Regulations make provision for the Inspector to require further information[14] from the parties for fast-track cases. In view of the need for decisions to be made swiftly, further information should only be required where it is considered essential.

Challenging a decision

52. The validity of the appeal decision can be challenged in the High Court under s288 of the Town and Country Planning Act 1990. Any challenge must be made within 6 weeks of the appeal decision.

[14] Regulation 22

TREE REPLACEMENT NOTICES

53. The enforcement procedures relating to the duty to replace TPO trees are set out in the PPG[15]. Under s206 of the 1990 Act, landowners are placed under a duty to replace a protected tree that has been felled in contravention of a TPO, or because the tree is dead or it presents an immediate risk of serious harm. The landowner is required to plant another tree of an appropriate size and species at the same place as soon as he/she reasonably can. If the land changes hands, the duty to replant transfers to the new owner. Trees which are planted in accordance with the duty are automatically protected by the original TPO, even if they are of a different species.

54. In relation to trees in woodlands, the duty arises only where trees are removed in contravention of the TPO and not because they are dead or they present an immediate risk of serious harm. The duty can be complied with by planting the same number of replacement trees on or near the land on which the original trees stood, or on other land agreed between the LPA and the landowner, and in such places as the LPA designates. Trees planted within the woodland specified in the order in accordance with the duty, are automatically protected by the original order.

55. If it appears to the LPA that the duty has not been complied with, it may require replacement trees to be planted. This is done by serving on the landowner a Tree Replacement Notice (TRN) under s207 of the Act[16]. The TRN has to be served within 4 years from the date of the alleged failure to comply with the duty to plant a replacement tree. The power to serve a TRN is discretionary, dependent upon the amenity value of the removed tree, and the reasonableness of requiring its replacement.

56. Failure to comply with a TRN is not a criminal offence. If a replacement tree is not planted within the period specified in the TRN (which may be extended by the LPA) the LPA may enter the land, plant the tree, and recover from the landowner any reasonable expenses incurred. Anyone who wilfully obstructs a person exercising this power is guilty of an offence and liable on summary conviction in a magistrate's court to a level 3 fine on the standard scale[17].

57. A person upon whom a TRN has been served has a right of appeal to the Secretary of State. The procedure for appeals against TRNs is explained in the PPG[18]. An appeal may be made on any of the following grounds as set out in the TRN appeal form:

    - that the provisions of the duty to replace the trees or the conditions of consent requiring the replacement of trees are not applicable, or have been complied with;
    - that the duty to replace trees should be dispensed with in relation to any tree;
    - that the requirements of the notice are unreasonable in respect of the period, or the size or species of trees specified in it;
    - that the planting of a tree/trees in accordance with the notice is not required in the interests of amenity or would be contrary to the practice of good forestry;
    - that the place on which the tree is/trees are required to be planted is unsuitable

[15] See 'Replacing Protected Trees' PPG - Tree Preservation Orders and trees in conservation areas
[16] If a tree in a conservation area is removed, uprooted or destroyed in contravention of s211 of the Act, there is a duty to plant replacement trees under s213. A TRN under s207 may be served to enforce the s213 duty.
[17] See PPG - Paragraph: 162 Reference ID: 36-162-20140306
[18] See PPG - Paragraph: 165 Reference ID: 36-165-20140306

for that purpose.

58. Section 206 requires owners to plant a tree as soon as they reasonably can, in practice that may not be until sometime after the requirement arises. Mynors et al in *The Law of Trees, Forests & Hedges* gives the following example:

If a tree is felled unlawfully in say January 2023, and then there is a period of negotiation as to whether a replacement is required, it may be unreasonable to expect the owner to plant a new tree before September 2023 or even Spring of 2024; if the planting does not take place, the TRN could, therefore be served at anytime between September 2027 or Spring 2028.

59. Interestingly, Mynors flags that "oddly there is no ground of appeal that the notice is out of time - that is, that it was served more than four years after the time when the tree was due to be planted". Thus, any finding on the four years should be as a 'matter of fact and degree' on the evidence available.

60. Any appeal must be made in writing before the TRN takes effect. This is an absolute time limit; the SoS has no discretion to accept late appeals. The procedure followed is set out in the Procedure Guide for Appellants[19].

61. On determining an appeal an Inspector may:

- quash the notice;
- correct any defect, error or misdescription in the notice unless the notice is so fundamentally defective that correction would result in a substantially different notice; or
- vary any of its requirements, provided it can be done without causing injustice to either party.

It follows that the notice should be drafted with care.

62. The validity of an Inspector's decision in respect of an appeal against a TRN, or for an associated application for an award of costs, may be challenged in the High Court[20]. The challenge must be made within 28 days of the date of the decision.

63. Advice concerning TRNs can also be found in the 'Enforcement' chapter.

[19] A Guide for Appellants (Tree Replacement Notices)

[20] See section 289(2) of the Town and Country Planning Act 1990

FELLING LICENCES

64. The Forestry Act 1967[21] requires that a licence to fell growing trees must be obtained from the Forestry Commission. However there are a number of exceptions[22] from the licensing requirements, examples being (this list is not exhaustive):

- Trees with a diameter of less than 8cm;
- Cases where the quantity of timber to be felled is less than 5 cubic metres in any calendar quarter;
- Felling fruit trees, or trees growing in a garden, orchard, churchyard or designated public open space.
- To prevent danger or abate a nuisance;
- Felling as part of an approved planning application;
- Felling in compliance with any obligation imposed by or under an Act of Parliament;
- Works undertaken by statutory undertakers[23] that are essential to the provision of these services.

65. Where the proposal for felling relates to trees which are subject to a TPO, the work may require both a felling licence and consent under the order. Section 15(1)a of the Forestry Act 1967 makes provision for this situation, requiring that the application for the work is made to the Commission. The LPA are consulted on the application. If the LPA has no objection to the proposal, the Commission may grant the licence and the trees can be felled. No separate consent under the order is required.

66. If the LPA objects to the granting of a licence, the Commission will refer the application to SSHCLG, to deal with the matter as if it had been an application for consent under the order. An Inspector may be appointed to report to the SoS on the matter. If the SoS grants consent, this is sufficient to authorise the works and no separate felling licence is required.

67. The Forestry Act also makes provision for the Commission to refer the matter to the LPA for determination but since 1979 government policy has been to refrain from exercising this procedure.

[21] Section 9(1)
[22] Section 9(2);(3) and (4).
[23] See Regulation 4(2) of the Forestry (Exceptions from the Restrictions of Felling) Regulations 1979

COSTS

68. Costs may be awarded for cases dealt with by fast track appeal procedure, as well as those by hearings and inquiries. In the case of appeals proceeding by the fast-track procedure, the costs application must be made in writing when the appeal is submitted, if the application is made by the appellant, or within 14 days of the date of the 'start date' letter for the appeal, if the application is made by the local authority. Comments will be exchanged between the parties. The decision on the costs application will normally be given at the same time as the appeal decision.

69. In the case of hearings and inquiries, all costs applications must be formally made to the Inspector before the hearing or inquiry is closed. Any such application must be brought to the Inspector's attention at the hearing or inquiry, and can be added to or amended as necessary in oral submissions.

70. If the application relates to behaviour at a hearing or inquiry, the applicant should tell the Inspector that they are going to make a costs application before the hearing is adjourned to the site, or before the inquiry is closed. The Inspector will then hear the application, the response by the other party, and the applicant will have the final word. The decision on the award of costs will be made after the hearing or inquiry.

71. Inspectors may exercise their powers to make an award of costs where they have found unreasonable behaviour, including in cases where no application has been made by another party.

COMPENSATION

72. Part 6 of the 2012 Regulations contain provisions for LPAs to pay compensation for loss or damage caused or incurred as a consequence of:

    - Refusing consent
    - Granting a consent subject to conditions
    - Refusal of matters required under a condition.

73. Claims must be made with 12 months of the LPA's decision, or SoS decision on an appeal, and must be for not less than £500. Special considerations apply to forestry operations in protected woodlands.

74. When a claim has been received, the LPA should consider whether any loss or damage has arisen as a consequence of the decision on consent. It should consider whether the loss or damage has arisen within 12 months of its decision, or the SoS determination. Any disputes regarding compensation shall be referred to and determined by the Land Chamber of the Upper Tribunal.

75. Whilst Inspectors have no involvement in determining claims for the payment of compensation, the PPG[24] advises that if the decision maker believes that some loss or damage is likely to arise if consent is refused or granted subject to conditions, consent should not be granted automatically. The entitlement to compensation should be taken into consideration alongside other key considerations, such as the amenity value of the tree and the justification for the proposed works, before a decision is made.

[24] See PPG: Paragraph: 090 Reference ID: 36-090-20140306

ANNEX A - CASE LAW (TO BE AWARE OF)

- *Burge & Anor v South Gloucestershire Council* [2016] UKUT 300 (LC) – a decision relating to a compensation claim concerning subsidence and the LPA's decision to refuse the felling of a protected tree. The decision only addresses compensation and contains no findings whether the LPA lawfully refused consent to fell.

- *JR Charles & Son Ltd v Barnet Borough Council* [2005] EWHC 1056 (Admin) – addresses whether a wrongly identified tree would be covered by an order.

- *Distinctive Properties (Ascot) v SSCLG & Royal Borough of Windsor & Maidenhead [2015] EWCA Civ 1250* – the judgment concerns a TRN to restock clear felled woodland, subject to a TPO; provides clarification on the meaning of the term 'tree'. See also *Palm Developments Ltd v SoS CLG* [2009] EWHC 220 (Admin).

- *Perrin & Ramage v Northampton Borough Council & Anors [2007] EWCA Civ 1353*– concerns the exemption to TPO controls where tree work is necessary for the prevention or abatement of a nuisance. The judge concluded that all possible solutions should be considered, including the consideration of alternative engineering works, to determine the minimum works necessary to prevent or abate the nuisance. The effect of alternative engineering works should be weighed up against the effect of works to the tree. Engineering works which may be more minor than the works to the tree may be sufficient to prevent or abate the nuisance in some cases.

  The judgment does not affect the approach Inspectors should take to determine TPO appeals. Appeals should still be determined in their merits, having regard to the amenity value of the tree and the evidence provided in support of the proposed works. The possibility of any action under the exemption remains a separate matter.

- *Wilkson Properties Ltd v Royal Borough of Kensington & Chelsea [2010] EWHC 3274 (QB)* - ground 3 considers the issue of amenity value to the public.

- *Evans v Waverley Borough Council [1996] 655 (CA)* – found that the LPA's power to modify an order should not be construed narrowly. However there are limits to what can be a modification and the essential nature of the order cannot be changed or transformed into 'another animal'.

The Planning Inspectorate

Trees

Updated to reflect Current Framework (NPPF)?	Yes
What's new since the last version Changes highlighted in yellow made 18 August 2021: • Updated to reflect the revised Framework published July 2021	
Other recent updates	

Contents

Information Sources

National Planning Policy Framework, sections 12 and 15

Planning Practice Guidance

BS 5837: 2012 Trees in relation to design, demolition and construction – Recommendations

BS 3998: 2010 Tree Work - Recommendations

Introduction

1. Section 197 of the Town and Country Planning Act 1990 places a duty on LPAs to ensure, whenever it is appropriate, that in granting planning permission for any development, adequate provision is made, by the imposition of conditions, for the preservation and planting of trees. This applies equally at the appeal stage.

2. The judgment in Distinctive Properties (Ascot) v SSCLG & RB Windsor & Maidenhead [2015] EWCA Civ 1250 provides clarification about the definition of "tree" under the Town and Country Planning Act 1990. It found in paragraph 42 that a tree is to be so regarded at all stages of its life, subject to the exclusion of a mere seed. A sapling will count as a tree, as will a seedling once it can be identified as a species which normally takes the form of a tree.

3. The effect of a development on trees, both those statutorily protected and those with no protection can arise where the proposal includes removal of trees, where they may be threatened by development close by, or where they might have implications for future occupiers of the development proposed.

4. The Framework confirms that the planning system should contribute to and enhance the natural and local environment. Paragraph 130(b) advises that to achieve well designed places, planning policies and decision should ensure that developments are visually attractive as a result of good architecture, layout and appropriate and effective landscaping. In relation to trees, paragraph 131 of the Framework states:

5. Trees make an important contribution to the character and quality of urban environments and can also help mitigate and adapt to climate change. 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. Applicants and local planning authorities should work with highways officers and tree officers to ensure that the right trees are planted in the right places, and solutions are found that are compatible with highways standards and the needs of different users.

6. However, footnote 50 provides flexibility for circumstances where tree-lined streets would not be appropriate.

7. Paragraph 180(c) advises that development resulting in the loss or deterioration of irreplaceable habitats (such as ancient woodland and ancient or veteran trees) should be refused, unless there are wholly exceptional reasons and a suitable compensation

strategy exists. Footnote 63 of the Framework gives as an example of exceptional reason, infrastructure projects (including nationally significant infrastructure projects, orders under the Transport and Works Act and hybrid bills), where the public benefit would clearly outweigh the loss or deterioration of habitat.

8. Further advice for Inspectors relating to consideration of ancient woodland and veteran trees in England can be found in the Biodiversity chapter of this manual.

9. Where the presence of trees on the site, or the effect on them of a proposed development, has been referred to in the reasons for refusal it is likely that trees will form part of a character and appearance issue – such as *the effect of the development on the character and appearance of the area, including its effect on (protected) trees.*

Site visits

10. Ensure that you know which tree/trees are at issue. If necessary, get the parties to point out the tree(s) to which they are referring, so that both you and others are sure about which specimens are at issue.

11. Are the trees broadly in the locations that you expected them to be, having regard to the plans? You might also need to look at the crown spread and height where, for example a proposed driveway might pass underneath or close to a crown spread, or where a tree is close to a proposed building, wall or hard standing. Also consider the relationship of the tree/s to proposed habitable room windows, patios, garden areas etc: In doing so, take into account any shade the tree/s may cast at different times of day. The tree's potential for future growth could have a significant impact.

12. As well as examining the relationship of the tree/s to any proposed building, driveway etc. make sure you also check whether any changes to ground levels (either cutting away or increasing levels) or the route of any necessary service trenches that might affect the tree/s.

13. You might estimate the ultimate height and spread of trees, but do not use such figures in your Decision. Remember that what you see will only be a snap shot in time. Moreover, any contribution in terms of amenity/screening is likely to vary depending on the seasons. If it is a deciduous specimen, what is the difference? You might be assisted, on occasion, by photographs taken at different times of the year, if submitted with the evidence.

14. Do trees on adjacent land overhang the site? Could trees on adjacent land be affected by the development? Where can the trees be seen from; what is the contribution to visual amenity? The amenity value of an individual tree may be less than its value as part of a group; therefore, if there is a group, look at each one individually, and take a more distant view of the group as a whole.

15. Only seek on-site measurements if absolutely necessary. See the Site Visit section of this manual for further advice in this regard. It is seldom essential to refer to precise heights, girths, sizes, spreads etc. In simple S78 casework, it is likely to be sufficient to explain that, for example, 'The oak tree is substantial in size and located towards the front of the site…' 'it is an attractive specimen and makes a significant and positive contribution to the visual amenity of the area (as recognised by its inclusion in the TPO)…' 'the proposed

houses would be located close to the tree canopy and large parts of the garden areas would be under their spreads' etc.

16. Unless the matter is in dispute, it is generally safe to assume that a tree survey is accurate, unless of course, it looks obviously wrong on site.

17. Avoid making any comments during the visit about the condition of specimens – remain neutral.

Decision-making

18. In your reasoning, you will need to assess the amenity value of the trees (a matter for subjective judgement) their form, size, height and longevity; their prominence from public vantage points and contribution to the visual amenity of the wider area; and their setting. Is the tree worth keeping?

19. You will then need to identify how the trees would be affected by the development proposed (direct or indirect?). Would the effect be material? Matters to which you might have regard include its existing and potential contribution to the character and appearance of the area. Would the tree survive even without the development proposed?

20. Consider opposing Arboricultural evidence against the detailed advice in BS 5837, and apply common sense and judgement, as in other cases of competing specialist advice.

21. If there is no agreed tree evidence, do not try and identify the tree by name (refer to it in other ways e.g. in the south-west corner of the site). Do not make comments either, on the health or life expectancy of the tree, although it might be appropriate to make comments along the lines that *'I have no substantiated evidence before me to demonstrate that the tree would be unlikely to survive on site for many years.'*

22. A common argument about trees is along the lines that, '…it would be better to fell the tree now, and replace it with one or more new ones' – you will need to consider how long the tree is likely to survive, and its current and on-going potential to contribute to visual amenity. Think about how long it might take for replacement specimens to reach maturity/make a similar contribution. Where could they be planted?

23. Also look at the effect the tree/s may have on future occupiers of the proposed development. Prospective house purchasers may be unaware of a tree when deciding to buy a house, or may, initially, place a high value on the contribution that it makes to the setting of a property, failing to appreciate the implications/problems of living next to a large tree, until it is too late. Be aware that it is difficult for a Council to resist applications to prune or fell in circumstances where safety is at issue, or where damage is being sustained e.g. root spread. Rooms may also become unduly gloomy, or gardens may be heavily shaded etc. increasing pressure to alter or remove the tree. Be careful though not to mix this up with living conditions. In this regard, it is the translation of potential adverse effects that might lead to future pressure to prune or fell (i.e. character and appearance) that is the issue.

24. There may be mention of root protection areas (RPAs). You will need to give thought to: exactly what work is proposed in those areas; the depth of any works; the type of foundations; the effects of different materials and methods of construction.

25. The majority of roots are in the top 600mm of soil. Damage can be caused by cutting the roots, compaction of the soil structure (e.g. by movement of vehicles or storing heavy materials or equipment under their canopies), or by pollution (e.g. by diesel or lime in cement). Damage can also occur from changes in ground level particularly where this affects existing surface water flows. You might want to bear in mind that young trees can generally withstand more root-loss than older trees. Fully mature trees may die if 5-10% of their roots are damaged. If RPAs are at issue, look to BS 5837 for further guidance.

26. Could protective fencing be erected and still leave room for building works? (E.g. scaffolding, storage of materials, site huts etc. see BS 5837 for where the fencing should go). It may occasionally be possible to construct foundations or hard surfaces within the RPA of a tree, but this needs special care (*see sections 11.6 – 11. 10 of BS 5837*) and should be avoided wherever possible.

27. When writing decisions, there is less chance of error if trees are referred to by their common name rather than their botanical name. If there is any doubt about the common name, you should normally refer to the tree in some other way (e.g. the tree in the south west corner of the site).

28. Don't forget that if a tree is protected by a TPO, and it is directly in the way of a development that you have allowed, you have automatically given consent for the felling of that tree, see paragraph 083 of the PPG. However, other protected trees might be affected indirectly by the development e.g. root severance. In such cases, consider seeking specialist advice and contact a SIT in the first instance.

29. Trees in conservation areas are also protected from indiscriminate felling. In England, as with TPO trees, if the felling etc. of a non-TPO specimen within a Conservation Area forms part of a scheme that you allow, no separate consent will be required, see paragraph 134 of the PPG.

30. If permitting development which involves felling or other works to trees subject to a TPO, or within a conservation area, you should make clear that you have had full regard to this. Take full account of the status of the trees concerned, and the implications of the proposal for public amenity or for the character or appearance of the conservation area, as appropriate. Bear in mind that trees with no statutory protection can also often play an important role in the amenity of an area and may influence the outcome of your decision.

31. Consideration of all the matters referred to above should help in weighing the balance of the evidence. Don't get carried away and remember not to stray from the evidence before you. If in doubt, seek specialist advice.

Conditions

32. The PPG contains the six tests that conditions must satisfy. Specifically, in relation to trees, remember to include on-going maintenance clauses where necessary. As a starting point, PINS suite of suggested model conditions contains conditions relating to

trees (nos 133-147) and landscaping (nos 103-109) which you can adapt to meet the specific circumstances of the case.

Other Information Sources

Arboricultural Practice Notes (APN) (Tree Advice Trust). Particularly APN 12 – Through the trees to Development (re no-dig construction of driveways etc.)

NHBC Technical Standards (2011) Chapter 4.2 Building near Trees Invaluable for foundation depths near trees, foundations on sloping ground and water demand.

Mitchell: Trees of Britain and Northern Europe. This is widely regarded in the profession as the most authoritative reference work, giving growth rates and sizes of mature trees.

Forestry Commission (2010): Managing ancient and native woodland in England Practice Guide.

There is now an app available for Inspector iPhones called Pl@ntNet which helps identify trees and shrubs by analysing any photograph. Not to be used for decision making purposes but helpful for increasing your plant ID knowledge.

Please note: Unless the parties have drawn these sources specifically to your attention, do not refer directly to them in your decision. Whilst the Arboricultural Practice Notes may be submitted as evidence, the Tree Advice Trust no longer exists and the documents are no longer available or subject to review. It will be for the Inspector to decide if the evidence submitted has any relevance/weight and it would be prudent to rely on the argument itself rather than the argument in a specific APN.

Appendix A

Life Expectancy of Trees

As a very general guide, some of the common tree species can be grouped into 6 categories of useful safe life expectancy under garden or parkland conditions.

300 years +	Yew
200-300 years	London plane, English oak, sweet chestnut, sycamore, lime
150-200 years	Cedar of Lebanon, Scots pine, hornbeam, beech, Norway maple
100-150 years	Ash, Norway spruce, walnut, red oak, horse chestnut, field maple, monkey puzzle, mulberry, pear
70-100 years	Rowan, whitebeam, apple, wild cherry, Indian bean tree, black locust, tree of heaven
50-70 years	Poplars, willows, cherries, alders, birches

Source: Amenity Valuation - The Helliwell System Revised, Arboricultural Journal 1994

Appendix B

Ultimate Heights and Spread of some Selected Trees

Tree	Ultimate Diameter Spread of Crown (m)	Normal Ultimate Height in an Urban Situation (m)
Maple	18	18
Cherry	8	9
Rowan	5	9
Birch	14	17
Whitebeam	10	18
Lime	16	30
Sycamore	20	28
Ash	18	17
Plane	18	30
Hawthorn	8	9
Robinia	14	15
Common alder	14	15
Hornbeam	16	18
Beech	20	30

Tree	Ultimate Diameter Spread of Crown (m)	Normal Ultimate Height in an Urban Situation (m)
Cypress	12	24
Crab apple	8	7
Wild cherry	16	18
Willow	14	18
Pine	8	20
Apple	9	8
Plum	8	8
Oak	20	22
Horse chestnut	20	28

Source: Arboricultural Research Note May 1990

Issued by DOE Arboricultural Advisory and Information Service

Appendix C

Relative tolerance of some tree species to development impacts

Common name	Relative tolerance	Comments
Box elder	Good	Tolerant of root loss
Norway maple	Moderate/good	Moderately tolerant of root pruning
Sycamore	Moderate	
Alders	Good	Considerable resistance to "contractor pressures"
Birch	Poor/moderate	Intolerant of root pruning. Mature trees particularly sensitive to development impacts
Deodar cedar	Good	Tolerant of root and crown pruning
Hawthorn	Moderate	Intermediate tolerance to root loss
Beech	Poor	Mature trees particularly susceptible
Ash	Moderate	Moderately tolerant of root pruning
Holly	Good	
Walnut	Poor	Intolerant of root loss and mechanical injury
Tulip tree	Poor/moderate	Intolerant of root pruning and mechanical injury
Norway spruce	Moderate	Intolerant of root loss
Scots pine	Good	Tolerant of root loss

London plane	Poor/good	Response is location dependent.
Lombardy poplar	Moderate/good	Tolerant of minor amounts of fill. Intolerant of changes in soil moisture. Decays rapidly
Douglas fir	Poor/good	Tolerant of fill if limited to 25% of root zone. Tolerates root pruning, but not poor drainage
Oaks	Moderate	
False acacia	Poor	Intolerant of root injury
Willow	Moderate/good	Moderately tolerant of root pruning. Considerable resistance to “contractor pressure”
Rowan	Moderate	Tolerant of root loss
Lime	Moderate/good	Moderately tolerant of root pruning. Considerable resistance to “contractor pressure”
Horse Chestnut	Moderate/good	Relatively resistant to “contractor pressure”

Source: Plant User Spec Guide, adapted from Matheny & Clark

NB Bear in mind that there should be no works within the root protection areas defined on any survey and in accordance with BS5837. Do not rely solely on this list.

The Planning Inspectorate

Unconventional Oil and Gas

Updated to reflect Current Framework (NPPF)?	**Yes**
What's new since the last version **Changes highlighted in yellow made 20 September 2018:** • Updated paragraphs 54 and 55 to reflect the changes introduced by The Town and Country Planning (Environmental Impact Assessment) Regulations 2017	
Other recent updates	

Contents

Introduction

1. Inspectors make their decisions on the basis of the evidence before them. Consequently, they may, where justified by the evidence, depart from the advice given in this training material, although the National Planning Policy Framework and the Government's Planning Practice Guidance will still be relevant in all cases.

2. This training material[1] applies to casework in England only for appeals (including recovered appeals) and called–in applications under the Town and County Planning Act 1990 and the Pollution Prevention and Control Act 1999.

3. Unconventional hydrocarbon development is not explicitly within the scope of the Nationally Significant Infrastructure Project regime, detailed under s14 of the Planning Act 2008 (as amended).

4. At present onshore gas and oil extraction is explicitly excluded from the Business and Commercial categories introduced under the Growth and Infrastructure Act 2013[2], although certain pipelines and gas storage facilities do fall under the 2008 Act, where they relate to major production or distribution facilities.

5. Environmental Permitting appeals fall under The Environmental Permitting (England and Wales) Regulations 2016 and abstraction licensing appeals fall under the Water Resources Act 1991.

Types of Unconventional Oil and Gas

6. Conventional gas comes from a 'source' rock that was buried and heated at considerable depth. Temperature increases with depth, and hydrocarbons (organic compounds consisting entirely of hydrogen and carbon), such as oil and gas, are released from the source rocks at different rates depending on how fast the rocks are heated. Due to the pressure underground, these hydrocarbons migrate upwards and may find their way into a porous 'reservoir' rock. If this is overlain by an impermeable 'cap' (or 'seal') rock the hydrocarbons become trapped.

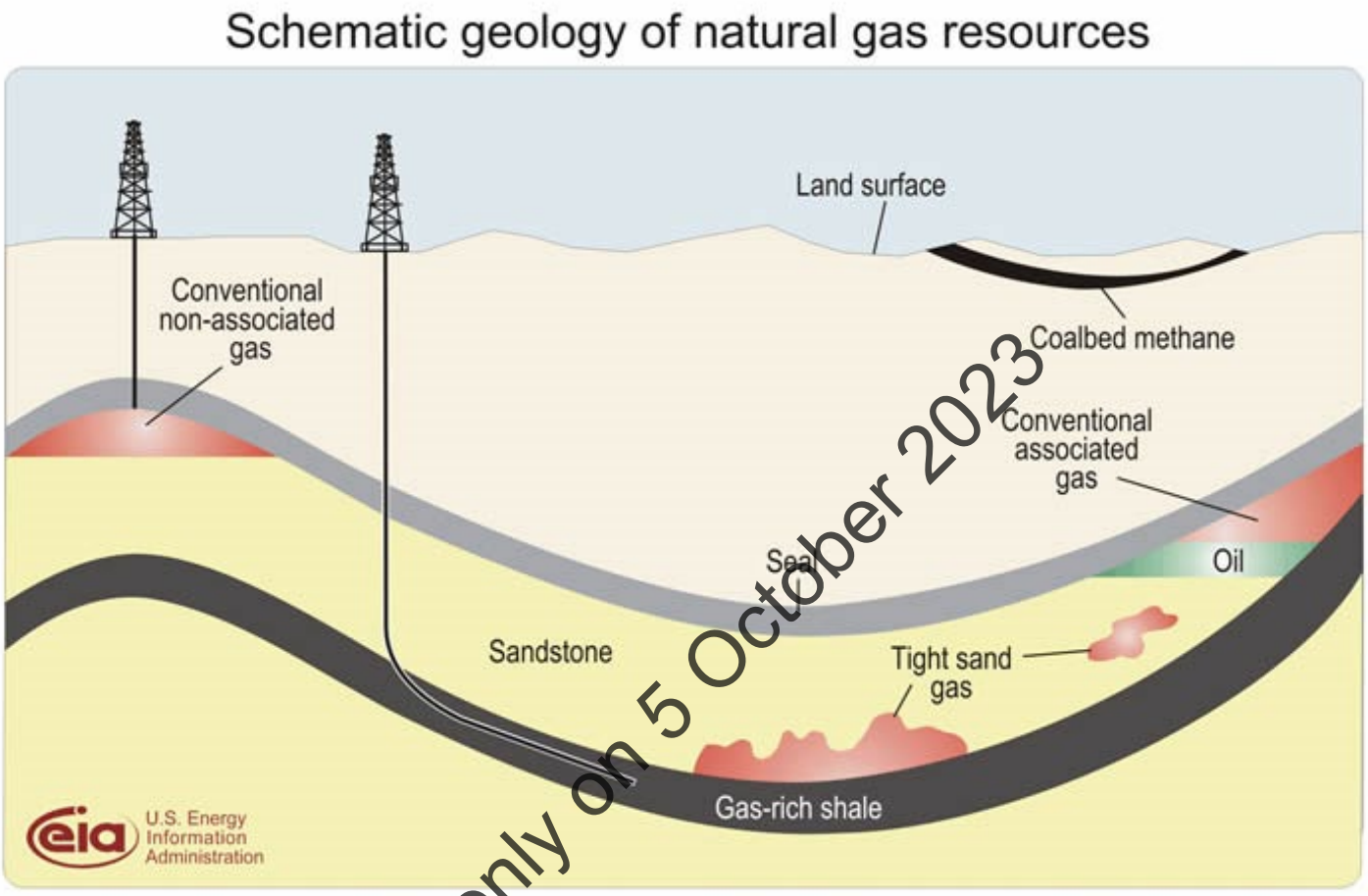
7. The hydrocarbons are extracted by traditional (mainly vertical) drilling methods through the cap rock into the reservoir. These hydrocarbons, which can be relatively easily recovered, are known as conventional hydrocarbons and have been exploited for more than 100 years. North Sea gas is a conventional hydrocarbon.

8. Alternative fossil fuels, also known as 'unconventional hydrocarbons' or unconventional oil and gas (UOG) comprise three potential sources of mainly natural gas (which may present a partial replacement for the declining production of natural gas from conventional onshore and offshore gas reservoirs). Unlike conventional oil

[1] Additionally, the RTPI have published a document providing an overview of fracking proposals and the planning system.

[2] Planning Act 2008 s35(2) and The Infrastructure Planning (Business or Commercial Projects) Regulations 2013.

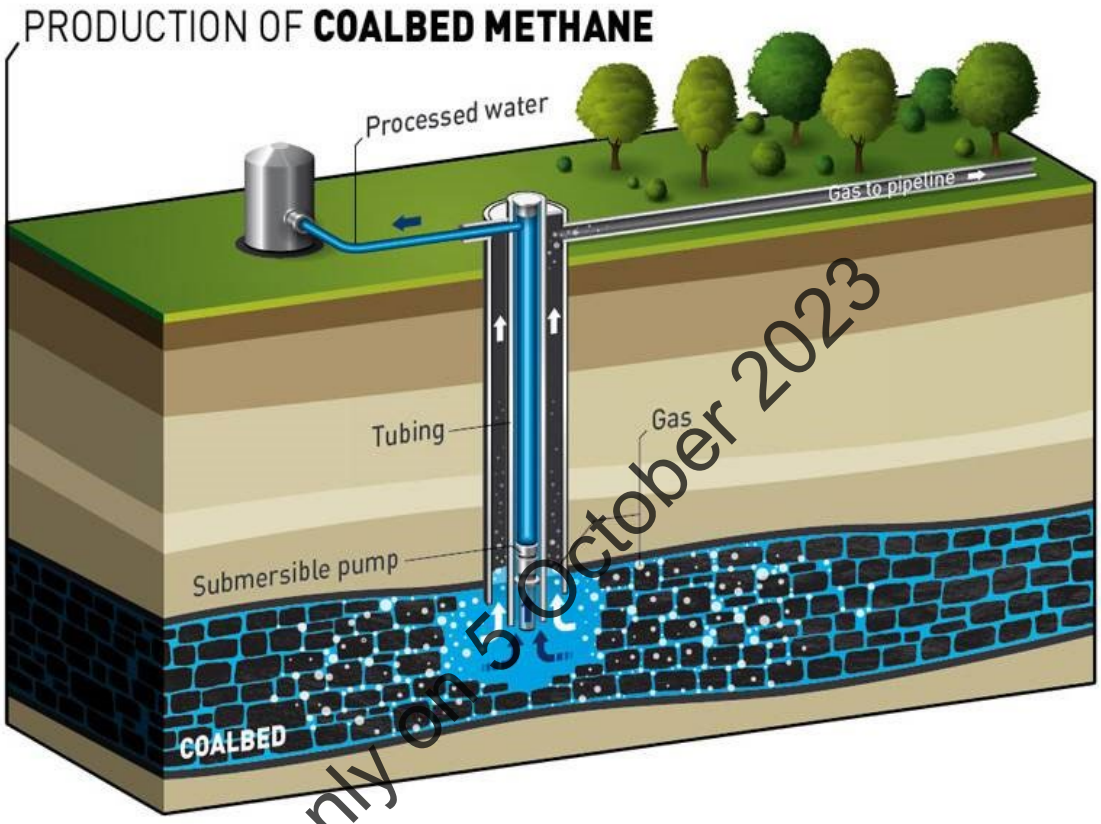
and gas reservoirs, unconventional oil and gas does not flow naturally through the rock, making extraction more difficult. The term 'unconventional' refers to the methods of extraction used (usually involving vertical, followed by horizontal drilling), which may include hydraulic fracturing (fracking). The picture below illustrates the depth of the various types of oil and gas:



(Picture source: https://upload.wikimedia.org/wikipedia/commons/b/bb/GasDepositDiagram.jpg

9. The three types of UOG are listed below:

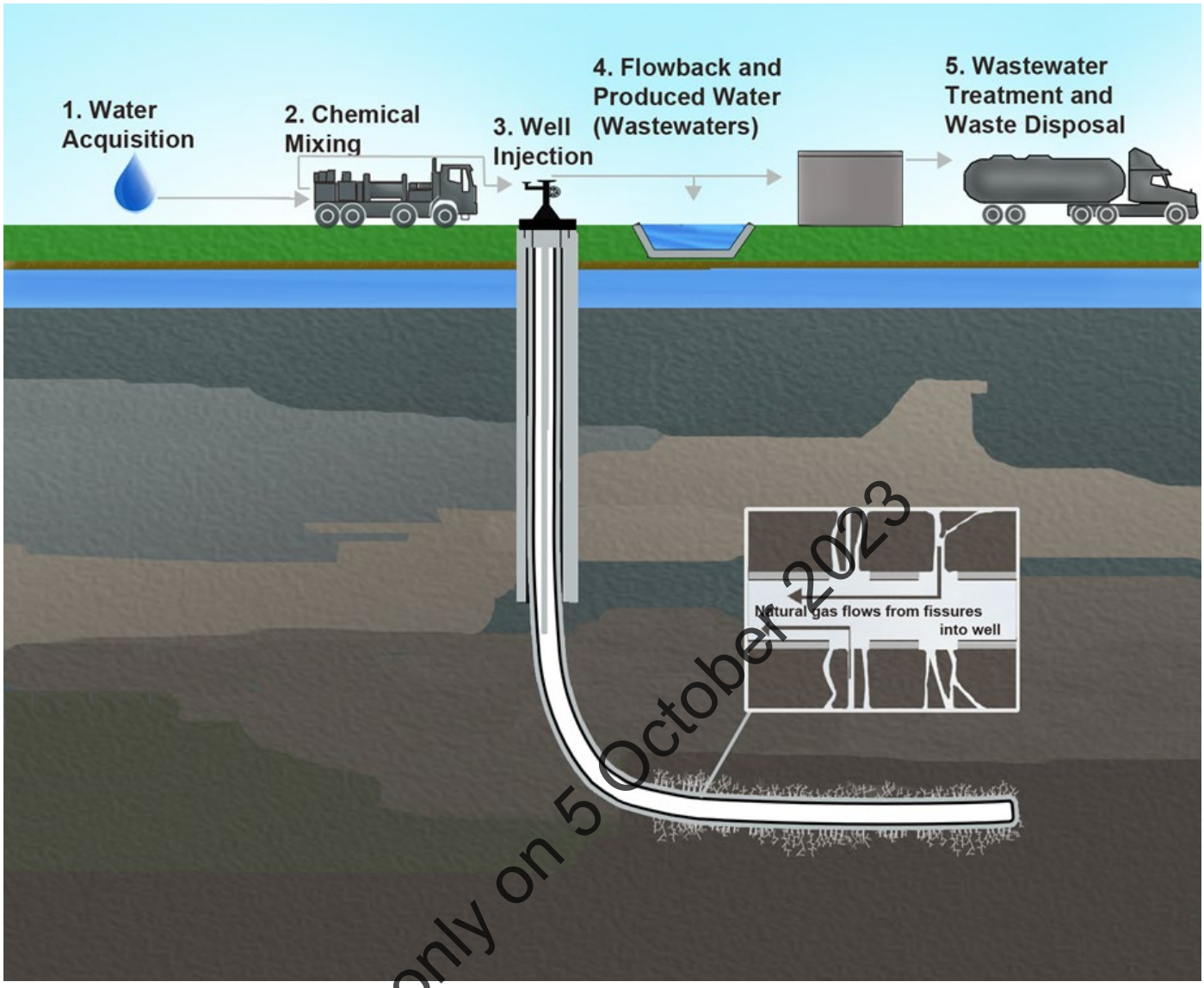
Coal Bed Methane (CBM): Natural gas contained in coal. The methane is absorbed into the surface of the coal and the methane contained in the coal does not migrate to other rock strata (layers). The gas is released by pumping out the water that occurs naturally in coal seams (cleats), to reduce the underground pressure on the coal. The picture below illustrates the extraction process:



(Picture source: http://www.total.com/sites/default/files/thumbnails/image/gisements-specifiques-production-zoom.jpg)

Tight Gas: Natural gas found in low permeability rock, i.e. sandstone, siltstones and carbonates. While a conventional gas formation can be relatively easily drilled and extracted from the ground unassisted, tight gas requires more effort to pull it from the ground because of the extremely tight formation in which it is located. In order to overcome these challenges, there are a number of additional procedures that can be enacted to help produce tight gas, such as drilling more wells, or fracturing and acidizing the wells.

Shale Gas and Oil: Natural gas or oil found in fine grained, organic-rich shale rock. Shale gas is mostly composed of methane. The gas is both produced and trapped within the shale. It is only when the shale is drilled and artificially fractured that the gas is released from the rock and can be extracted. The process of artificially fracturing the rock is called ‘fracking’. The picture below illustrates the extraction process:



(Picture source: https://upload.wikimedia.org/wikipedia/commons/7/73/Hydraulic_Fracturing-Related_Activities.jpg)

Policy, legislation and guidance

Government Energy Policy

10. The Government are of the view that UOG can enhance the UK's energy security, provide economic growth and be an important part of the transition to a low carbon future[3]. It should be noted that there has been successful exploration of UOG in the United States, where this has proved a valuable source of energy. The UK has potentially large shale resources[4], but as yet we do not know how much of this is recoverable or economically viable to recover.

11. The **Overarching National Policy Statement for Energy (EN-1)** contains policy capable of being a material consideration, particularly where it refers to security of supply and the anticipated role of gas in energy production (as at paragraph 3.6.2).

Planning

12. **National Planning Policy Framework (MHCLG, July 2021) –** Section 17, paragraphs 210-212. The policy makes clear that minerals planning authorities (MPAs) should identify and include policies for extraction of mineral resources of local and national importance in their area. This includes unconventional hydrocarbons, such as shale gas and coal-bed methane. MPAs must ensure that mineral extraction does not have an unacceptable impact on the natural or historic environment or human health.

13. **Planning Practice Guidance for Minerals (DCLG, March 2014) –** Provides advice on how minerals planning policy may deliver sustainable economic growth, whilst ensuring environmental protection. This guidance incorporates the former PPG for Onshore Oil & Gas (published July 2013), mainly at section 9 and Annexes A, B & C, providing clarity on the role of the planning system and interaction with separate environmental health and safety regime regulation on extraction of onshore oil & gas, including shale. However, the general advice should also apply (where appropriate) for proposals involving shale oil & gas. The PPG for minerals was updated on 28 July 2014 to include guidance on natural heritage and world heritage sites[5].

14. **Minerals Planning Guidance & Minerals Policy Statements (ODPM, DCLG)** – These documents have been replaced and superseded by the NPPF in March 2012 and the web-based Planning Practice Guidance launched in March 2014.

15. **Minerals and Waste Local Plans** – As the issue of shale gas proposals has appeared only recently, where local planning policy on shale gas proposals exists it has not yet transferred into policies and site allocations within the Minerals and Waste Local Plans

[3] https://www.gov.uk/government/groups/office-of-unconventional-gas-and-oil-ougo

[4] The BGS estimate the total volume of shale gas in the Bowland-Hodder area in North England is about 1300 trillion cubic feet (central estimate) – see report 'The Carboniferous Bowland Shale gas study: geology and resource estimation [BGS, Dec 2013].

[5] See PINS Note 10/2014.

in the MPAs areas where potential shale gas deposits have been identified[6]. However some MPAs have produced briefing notes, setting out the background and how applications should be dealt with[7].

Permitting

16. **Environmental Permitting Core Guidance (Defra, March 2013)** – provides guidance for operators, regulators and other parties interested in facilities requiring a permit under The Environmental Permitting (England and Wales) Regulations 2016. It sets out the main provisions of the regulations and the views of the Secretary of State, how the regulations should be applied and how terms should be interpreted. The regime aims to primarily regulate industrial facilities to control against harm to the environment or human health, implementing European legislation[8] and promoting Best Available Techniques (BAT). Guidance for appeals is at Chapter 13.

17. **Directive Specific Guidance Notes (Defra) -** These documents accompany the Regulations and describe the general permitting, compliance requirements and guidance on each of the EU Directives implemented through the permitting regime and should be read in conjunction with the Core Guidance described above.

18. **Secretary of State's Guidance: General Guidance Manual on Environmental Permitting Policy and Procedures for A2 and B Installations (Defra, April 2012) -** This manual is the principal guidance issued by the Secretary of State and the Welsh Government on activities regulated by Local Authorities (LA) and gives practical advice on the operation of the LA regulated pollution control regime and how it should be applied and interpreted. The guidance for appeals can be found at Chapter 30.

Sector Specific Guidance

19. Part A1 (high risk activities, regulated by the Environment Agency [EA]):

Horizontal Guidance Notes (EA) - A series of guidance notes applying to all sectors and relating to specific issues such as odour emissions, Environmental Risk Assessment, noise and site conditions reports.

Regulatory Guidance Notes (EA) - This is a series of guidance notes on interpretation of the regulations and regulatory issues produced for Agency staff to assist them in determining Environmental Permit applications.

Technical Guidance Notes (EA) - These guidance notes aim to provide operators and regulators with advice on indicative standards of operation and environmental

[6] Currently the Carboniferous Bowland-Hodder shale area (across a large area of central England) and the Jurassic Weald Basin (across Kent, Sussex and south east England).

[7] For example, Onshore gas and oil operations in Lancashire – Briefing note (Lancashire CC, 16 September 2013)

[8] Primarily the Industrial Emissions Directive (2010/75/EU) and the Waste Framework Directive (2008/98/EC), and in the case of shale gas permits the Water Framework Directive (2000/60EC), Mining Waste Directive (2006/21/EC) and Groundwater Directive (2006/118/EC).

performance relevant to specific sectors, allowing assessment of compliance with regulations and setting out BAT for that sector and setting out BAT principles (from EC BAT Reference documents - BREFs) to be taken into account when deciding applications.

20. Part A2 & Part B (lower risk activities, regulated by the Local Authority):

Local Authority Sector Guidance Notes (Defra) - Statutory guidance issued by the Secretary of State for specific LA-IPPC (Local Authority – Integrated Pollution Prevention and Control) Part A2 industrial activities, giving details of mandatory requirements affecting emissions and impacts from installations and general BAT assessments.

Local Authority Process Guidance Notes (Defra) - Statutory guidance issued by the Secretary of State for specific industrial activities giving details of mandatory requirements affecting emissions to air from LAPPC (Local Air Pollution Prevention and Control) Part B installations and guidance on BAT/Best Available Techniques Not Entailing Excessive Cost (BATNEEC) assessment.

21. **Onshore Oil & Gas Sector Guidance** – Guidance on environmental permits for onshore oil and gas operations in England.

22. **Decommissioning onshore oil and gas wells drilled before 1 October 2013** – A regulator position statement which sits alongside the Sector Guidance.

Written Ministerial Statements (WMS)

23. Applications for shale gas developments will be expedited through the planning process, as part of a range of measures, first announced on 13 August 2015[9] to support the exploration and development of shale gas and oil resources. Two separate WMSs[10] were published on 16 September 2015 by DCLG and DECC (now BEIS), which replace the Shale gas and oil policy statement of 13 August 2015. The WMSs should be taken into account in planning decisions and plan-making. The range of measures applies from the date of publication (16 September 2015) and are outlined below:

Planning for Onshore Oil and Gas – DCLG WMS

Appeals against any refusals or non-determination of planning permission will be treated as priority cases for urgent resolution.

Recovery of appeals - The Secretary of State for Communities and Local Government may want to give particular scrutiny to these appeals and has revised the recovery criteria to include proposals for developing shale gas. This new criterion will

[9] Shale gas and oil policy statement by DECC and DCLG.

[10] Planning for Onshore Oil and Gas [HCWS201], Greg Clark (DCLG) & Shale Gas and Oil Policy [HCWS202], Amber Rudd (DECC).

be added to the recovery policy issued on 30 June 2008 and applies for a period of two years (until 16 September 2017), when it will be reviewed.

Called-in applications - The Secretary of State will also consider calling in shale applications. Each case will be considered on its individual merits in line with policy. Priority will be given to any called-in planning applications.

Underperforming authorities - The Government will consider determining applications made to underperforming local planning authorities that repeatedly fail to determine oil and gas applications within statutory timeframes. The scheme is separate to the statutory regime under s62A of the 1990 Act. This new non-statutory regime will be subject to the same criteria as that for major development and will operate for three years, until late 2019, after which the scheme will be reviewed.

Shale gas and oil policy – DECC WMS

Sharing shale income with communities – a sovereign wealth fund will be formed, which will give a share of the tax revenues from shale gas production to host communities. This will be in addition to payments already committed to from operators announced in 2014. HM Treasury published Shale Wealth Fund: consultation in August 2016, inviting responses up to 25 October 2016.

Safety and environmental protection – The Government is confident that the right protections are now in place to explore shale safely. The Annex to the WMS sets out the measures put in place to reinforce existing regulatory regimes - the Infrastructure Act 2015 has introduced a range of additional requirements and safeguards for 'fracking' operations. S50 of the Act inserts new s4A into the Petroleum Act 1998, which sets out planning and other conditions that should be met before a hydraulic fracturing consent can be issued by the Secretary of State for Energy and Climate Change (now BEIS) through the Oil and Gas Authority; a new s4B defines thresholds for proposals, above which s4A applies, together with other definitions and also provides for draft regulations setting out areas to be excluded from underground 'fracking' activities. Fracking will only be allowed to take place beyond 1200 metres below a 'relevant surface area'. On 10 March the Onshore Hydraulic Fracturing (Protected Area) Regulations 2016 were made, which provide definitions of "protected groundwater source areas" and "other protected areas" for the purposes of s4A of the Petroleum Act 1998. These regulations came into force from 6 April 2016 when s4A(3) and the remaining parts of s4A & s4B of the 1998 Act take effect through the provisions of the latest Infrastructure Act 2015 Commencement Order. An Annex to Inspectors decisions/reports has been drafted to cover provision of information requirements under s4A in order to confirm to the Secretary of State for Business, Energy & Industrial Strategy that the Inspector is satisfied that the planning requirements under conditions 1, 6, 7, 9, 10 & 11 of the table at s4A have been met.

Permitted Development

24. On 13 August 2015 the Government published its response to the consultation to amending permitted development rights to allow the drilling of boreholes for groundwater monitoring. The response document is also inviting views on proposals for further rights to enable, as permitted development, the drilling of boreholes for seismic investigation and to locate and appraise shallow mine workings. On 17 December 2015 the Government published its response to the second consultation on proposals to extend permitted development rights, concluding with the intention to draft an amendment order to the General Permitted Development Order (GPDO) in 2016.

25. The GPDO Amendment Order came into effect on 6 April 2016. In summary the Order allows permitted development rights for drilling of boreholes for monitoring and investigative purposes for onshore petroleum exploration. Permitted development rights apply to both the temporary use of land for environmental monitoring (no more than 28 days – new Class JA, amendment to part 17 of Schedule 2 by Article 14) and the longer use of land (up to 6 months, except for groundwater monitoring where the period can be extended to 24 months – new Class KA, amendment to Article 5 by Article 13).

26. Relevant existing conditions and restrictions on current permitted development rights for mineral exploration will apply[11] in addition to those specified at KA.2 and JA.2. Article 15(1) sets out the transitional provisions for development under Class J of part 17, Schedule 2, where the Order does not apply to development that has started, but not completed on the date on which the Order comes into force.

27. The Order also makes small changes for existing permitted development rights under Classes J and K of Part 17 of Schedule 2 to the GPDO – Class J is amended so that development will not be allowed in the Broads; both Classes are amended to align with new Classes JA and KA in respect of the height restriction on any structure, which is raised to 15 metres, in line with modern drilling techniques.

28. Permitted development rights are withdrawn if development requires an Environmental Impact Assessment.

How the licensing system operates

29. An overview of the permitting and permissions process is available here.

30. The OGA issues licences that grant exclusivity to operators in licence areas, to explore for and produce petroleum. These are known as Petroleum Exploration and Development Licences (PEDL) and these give exclusive rights for exploration within a defined area, but do not grant permission for operations on the land. Operators wishing to drill a well must negotiate access with landowners. Permission must be granted by the Coal Authority if the well encroaches on coal seams.

31. The operator then needs to seek planning permission from the MPA. The operator must consult with the environmental regulator: the Environment Agency (EA), who are statutory consultees to the MPA.

32. The MPA will determine if an environmental impact assessment (EIA) is required. The OGA will give consent to drill only when:

    The MPA has granted permission to drill and the relevant planning conditions have been discharged;

    All the necessary permits from the EA are in place;

[11] Under Annex C of the PPG for Minerals

The Health and Safety Executive (HSE) has notice of and is satisfied with the well design;

The operator has arranged an examination of the well design by an independent, competent well examiner; and

The British Geological Survey (BGS) has been notified of the intent to drill.

33. If the well needs more than 96 hours of testing to evaluate its potential to produce hydrocarbons, the operator must apply to OGA for an extended well test (once all other consents and permissions have been granted).

34. The PPG contains a diagram showing the outline of the process for drilling an exploratory well (see figure 2).

35. If an operator wishes to start production from a development site, they start again with the process described above: the landowner permissions and MPA planning consent; EA consultation; and appropriate environmental permit and HSE notification before OGA will consider approving the development.

36. Appeals against MPA decisions are dealt with by the Planning Inspectorate.

Permitting / Licensing Requirements

37. Operators may have to obtain environmental permits[12] for the following activities under The Environmental Permitting (England and Wales) Regulations 2016[13]:

Groundwater activity (unless the EA is satisfied that there is no risk of inputs to groundwater)

Mining waste activity (likely to apply in all circumstances)

Industrial emissions activity (when the operator intends to flare more than 10 tonnes of gas per day)

Radioactive substances activity (likely to apply in all circumstances)

Water discharge activity (if surface water runoff becomes polluted).

38. Other licences needed may include:

Groundwater investigation consent[14] (to cover drilling and test pumping where there is the potential to abstract more than 20 m^3/day in the production process)

[12] Onshore oil and gas operations are covered by a standard rules permits for certain activities e.g. management of waste (without well stimulation) but may require a bespoke permit for operations not covered under standard rules.

[13] Regulation 12 of The Environmental Permitting (England and Wales) Regulations 2016.

Water abstraction licence[15] (if the operator plans to abstract more than 20 m^3/day for own use rather than purchasing water from a public water supply utility company)

Flood Risk Activities[16] - Environmental Permit may be required for work in, under or over a main river; on a near a flood defence on a main river; in the flood plain of a main river or on a near a sea defence. Some activities may be exempt or excluded from EPR regime[17] and will not require a permit.

Planning and permitting casework

39. Hydraulic fracturing planning appeals are dealt with under the Town and Country Planning Act 1990.

40. The PPG mentions that MPAs are required to plan for the steady and adequate supply of minerals, by designating Specific Sites, Preferred Areas, and Areas of Search, and that the focus of the planning system should be on whether the development itself is an acceptable use of land, and the impacts of those uses, rather than any control processes, health and safety issues, or emissions themselves where these are subject to approval under regimes. It should be presumed that these non-planning regimes will operate effectively.

41. In looking at the relationship between the planning decision-making process and other regulatory regimes, the NPPF paragraph 122, Minerals Planning Practice Guidance paragraphs 12 and 112, Waste Planning Practice Guidance paragraphs 49 and 50, and the case of *R (oao Frack Free Balcombe Residents Association) v West Sussex CC* [2014] EWHC 4108 (Admin) are relevant.

Casework considerations

42. In relation to the need for the proposed development, the WMS sets out the Government's view that there is a national need to both explore and develop shale gas and oil resources. In addition to the WMS, on the question of need Inspectors should note that paragraph 142 of the NPPF and paragraph 91 of the Minerals Planning Practice Guidance are relevant. In summary, to gain the support of the WMS the proposed shale gas development must constitute a safe and sustainable development in the light of the NPPF.

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[14] s32 of the Water Resources Act 1991

[15] s24 of the Water Resources Act 1991 & The Water Resources (Abstraction & Impounding) Regulations 2006

[16] Schedule 25 of The Environmental Permitting (England and Wales) Regulations 2016.

[17] Under Part 4 Schedule 3 (exemptions) and Part 2 of Schedule 25 of The Environmental Permitting (England and Wales) Regulations 2016.

43. Of the cases received so far – the MPAs' grounds of refusal or conditional permission and consequently the grounds for appeal have all related to 'standard' planning issues, rather than permitting / licensing concerns, namely traffic (e.g. HGW movements) and effects on (usually rural) highways, noise impacts, and adverse effects on the landscape of the area and visual amenity. Paragraphs 144 and paragraph 147, first bullet, of the NPPF and paragraphs 5, 10, 11 and 13 of the Minerals Planning Practice Guidance are particularly relevant. Paragraph 147 of the NPPF distinguishes between the three phases of development (exploration, appraisal and production).

44. It should be noted that as a general rule Environmental Permits for activities associated with UOG are obtained from the Environment Agency before the planning application has been considered, therefore permitting-specific issues do not need to be considered in detail as part of the planning process. However, consideration of permitting-specific issues should not be completely ruled out, as they may need to be explored in certain circumstances, such as where an error has been alleged regarding previously-granted permits.

45. Advice regarding the assessment of noise issues, including the application of relevant policy, legislation and guidance, is given in the Noise chapter. In particular, Inspectors should note the detailed guidance on noise matters given in the Minerals Planning Practice Guidance.

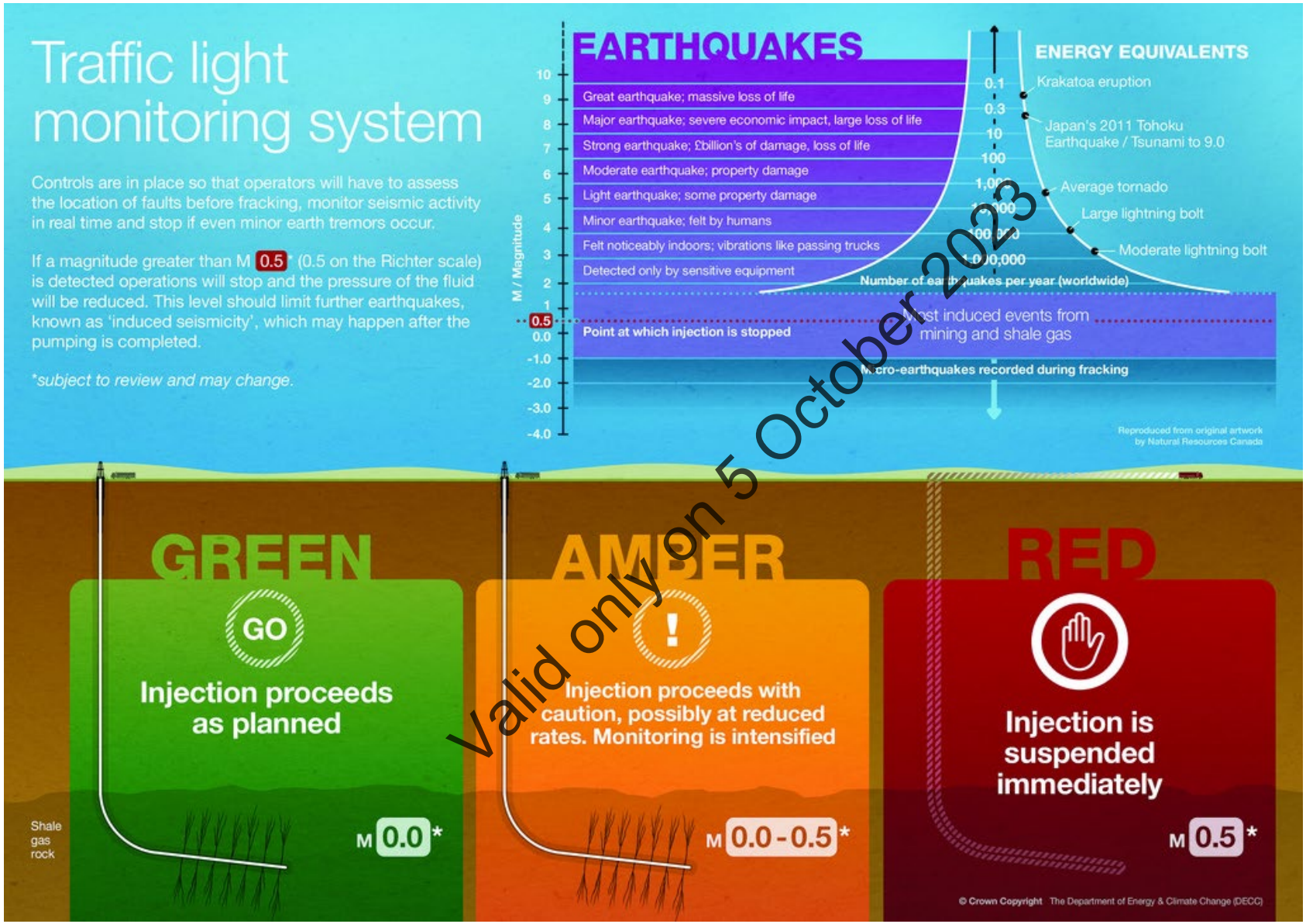
46. Casework considerations are addressed in the PPG, as follows:

- noise associated with the operation;
- dust;
- air quality;
- lighting;
- visual impact on the local and wider landscape;
- landscape character;
- archaeological and heritage features (further guidance can be found under the Minerals and Historic Environment Forum's Practice Guide on mineral extraction and archaeology);
- traffic and highways (should be covered in the relevant Minerals and Waste Local Plan, which should include policy on increased traffic, any highways works and visual impact of increased traffic (in particular HGV traffic));
- risk of contamination to land;
- soil resources;
- geological structure/induced seismic effects (e.g. Preese Hall drilling 2011 <M2.4) – Traffic Light system of monitoring – Green = Go [proceed as planned]; Amber = Injection proceeds with caution [monitoring is intensified for M0.0-0.5]; Red = Injection is suspended [for >M0.5] (as per the picture, below)
- impact on best and most versatile agricultural land;

- flood risk;
- land stability/subsidence;
- internationally, nationally or locally designated wildlife sites, protected habitats and species, and ecological networks;
- impacts on nationally protected landscapes (National Parks, the Broads and Areas of Outstanding Natural Beauty);
- nationally protected geological and geo-morphological sites and features;
- site restoration and aftercare;
- surface and, in some cases, ground water issues;
- water abstraction.

47. Inspectors should be aware that potentially Natural England's National Character Areas could be referred to in evidence.

48. Details of the environmental and technical issues likely to occur and be considered in applications (and therefore any appeals arising) for shale gas are set out in Onshore Oil & Gas Sector Guidance.



(Picture source: https://www.flickr.com/photos/deccgovuk/11435544754/sizes/l).

49. Inspectors should be alive to the possibility that NORM (naturally occurring radioactive materials) issues could be present. Further information is provided in Strategy for the management of Naturally Occurring Radioactive Material (NORM) waste in the United Kingdom.

50. Details of the environmental and technical issues likely to occur and be considered in applications (and therefore any appeals arising) for shale gas are set out in Onshore Oil and Gas Sector Guidance.

Natural Heritage & World Heritage Sites and Recovery of Appeals

51. Inspectors will need to be aware of the WMS[18] by the Parliamentary Under Secretary of State (Lord Ahmad of Wimbledon) published on 28 July 2014, which announces two initiatives concerning hydraulic fracturing (fracking) proposals – firstly, the publication of additional guidance within the Planning Practice Guidance on Minerals[19] in relation to the consideration of the effects of proposals on AONBs, National Parks, the Broads and World Heritage Sites; and secondly the option for the Secretary of State to recover appeals on unconventional hydrocarbon proposals for a period of 12 months in order to ensure that the Government's guidance for this type of development is applied as intended.

52. This recovery policy was extended to apply until 16 September 2017, as part of a package of policy announcements published on 16 September 2015. This package included the Shale gas and oil policy statement by DECC and DCLG.

53. The new guidance applies from 28 July 2014 and can be a material consideration in planning decisions. The weight to be attached to the guidance will be down to the decision-maker. However, it should be noted that this is guidance and not policy.

Environmental Impact Assessment

54. Applications for exploratory, appraisal and production phases that fall within a project category listed at schedule 2, column 1 of the Town and Country Planning (Environmental Impact Assessment) Regulations 2017, and:

    a. exceed or meet the applicable threshold set out in column 2[20]; or

    b. is to be sited in or near to a sensitive area[21]

    will need to be screened to establish whether Environmental Impact Assessment (EIA) is required. If it is determined that the proposed development is likely to have significant effects on the environment, by virtue of factors such as its nature, size or

[18] WMS Planning for unconventional oil and gas – DCLG, 28 July 2014.
[19] PPG for Minerals Para 223 Ref ID: 27-223-20140728.

[20] Proposals will need screening if the 'area of works' for deep drilling is >1ha – Schedule 2 (1)(2)(d); or if the surface industrial installation for the development exceeds 0.5 hectare – Schedule 2 (1)(2)(e).

[21] As defined in Regulation 2(1).

location, EIA will need to be undertaken. Where hydraulic fracturing leads to extraction of more than 500,000 cubic metres of gas per day, or more than 500 tonnes per day of oil, it will fall under the description in Schedule 1 (14) of the EIA Regulations 2017, and EIA will be required. Relevant appeals and applications, including those with EIA screening opinions by local authorities, are routinely screened by PINS Environmental Services Team.

55. Additional information regarding EIA can be found in the Environmental Impact Assessment chapter. Advice on addressing EIA in decisions and reports is available in The approach to decision-making chapter.

Habitats Regulations Assessment

56. Applications for conventional oil and gas developments may affect European sites and their qualifying features, depending on the location and nature of the development. Where Habitat Regulations Assessment matters are identified, Inspectors are directed to the Biodiversity chapter and the Habitats Regulations Assessment Handbook further guidance.

Site visits

57. Due to the often especially contentious nature of those appeals, Inspectors are advised to familiarise themselves with the 'Health and safety when carrying out site visits' section of the Site Visits chapter.

Hearings & Inquiries

58. The guidance given in the Hearings and Inquiries chapter applies to unconventional oil & gas appeals.

59. Inspectors should be aware that due to the novel nature of unconventional oil & and gas proposals, there may be a greater likelihood of parties raising non-planning related points at hearings and inquiries. Therefore, Inspectors should be especially careful to ensure that all parties present at events are clear regarding the main planning issues, and that any non-relevant discussion is respectfully curtailed. In particular, matters of principle which have been considered and decided by Government, such as the need for unconventional oil and gas extraction, are unlikely to be within scope. It may be necessary to direct parties to raise their concerns with the Government through their elected representatives.

60. As the Government is confident that the right protections are now in place to explore shale safely (see *Shale gas and oil policy – DECC WMS*), matters involving climate change, public health, and seismicity are unlikely to be relevant to an Inspector's decision in planning terms, insofar as they seek to challenge the Government's stated position on these topics as set out in the WMS and other national policies.

61. Extra steps may need to be taken to ensure that appropriate security arrangements are in place, so that the event can be held safely and without any interruptions. Therefore, Inspectors may wish to ask support staff to contact the relevant LPA, to confirm that appropriate arrangements are made.

Human Rights and the Public Sector Equality Duty

62. Inspectors are reminded to refer to the Human Rights and the Public Sector Equality Duty and the Social Inclusion and Diversity chapters, where human rights and / or equalities matters have arisen.

The Planning Inspectorate

Waste Planning

Updated to reflect Current Framework (NPPF)?	Yes

What's new since the last version

Changes highlighted in yellow made 30 March 2022:

- Paragraph 1.4, footnote 3 - refers to amended definition of waste
- Paragraph 2.27 - Reference to the revised Waste Management Plan for England
- Paragraph 2.29-2.33 added – to include reference to the Resources and Waste Strategy;
- Paragraph 2.41 – reference to the Environment Act 2021
- Paragraph 2.44 – Updated to reflect the revised NPPF;
- Paragraph 2.53 – Reference to the NPS for Geological Disposal Infrastructure;
- Paragraph 2.58 - refers to the implications of Exiting the EU.
- Various updates / amendments throughout

Other recent updates

Contents

Introduction

1. Inspectors make their decisions on the basis of the evidence before them. Consequently, they may, where justified by the evidence, depart from the advice given in this training material, although the National Planning Policy Framework (NPPF) and the Government's Planning Practice Guidance (PPG) and National Policy Statements (NPS) will still be relevant in all cases.

2. This chapter is concerned with waste planning casework and National Infrastructure waste related casework. However many of the same issues arise in connection with examinations of waste development plan documents. Appeals under the Environmental Permitting Regulations 2016 and associated casework such as waste carriers licensing is covered in the Environmental Permitting Inspector Training Manual (ITM) Chapter.

3. This training material applies to casework in England only[1].

Definition of 'Waste'?

4. Under the current EU Waste Framework Directive (rWFD)[2], waste is defined in Article 3(1) as *"any substance or object which the holder discards or intends or is required to discard"*[3]. Defra has issued further guidance[4], taking into account recent case law.

Types of Waste

5. In waste casework, reference will be made to 'waste streams'. The following are the most common (see Glossary for definitions):

   Inert Waste

   Municipal Solid Waste

   Household waste

   Hazardous waste

   Clinical waste

[1] In Wales, policy and guidance on waste can be found in – Planning Policy Wales: Edition 11 [WG, Feb 2021] and TAN 21: Waste [WAG, Feb 2014] and accompanying TAN 21: Practice Guidance.

[2] EU retained law Revised Waste Framework Directive 2008/98/EC.

[3] As amended by the Annex to EU Council Regulation 2017/997.

[4] Guidance on the definition of waste: 2018 Waste Framework Directive amendments [Defra, August 2021].

Industrial waste

Commercial waste

Radioactive waste

Biodegradable waste

6. The European Waste Catalogue (EWC) brought into UK law by the List of Wastes (England) Regulations 2005[5], sets out the many types of waste for classification purposes. Although mainly used for the purposes of regulation and pollution control, these categories are sometimes relevant to waste planning casework.

Principles, Policy, Legislation and Guidance

Principles of waste management

7. The underlying principles are to avoid harm to the environment and to protect human health.

8. Waste Management is defined under Article 3(9) of the rWFD as "the collection, transport, recovery and disposal of waste, including the supervision of such operations and the after-care of disposal sites, and including actions taken as dealer or broker".

Brief Timeline of Environmental Law and Policy

9. **1848-1971 -** the development of waste management law in the UK has been sporadic. Local Authorities were given powers, then duties in relation to accumulations of noxious wastes in 1848, by the Public Health Act 1848, enhanced by the Sanitary Act 1866. These provisions provided the basis for what is now statutory nuisance control. These were complemented to some degree by the Planning Act 1947, which gave Authorities planning control over new waste management sites.

10. **1972** – The Local Government Act 1972 established the Waste Disposal Authorities (WDAs) in England and Wales, essentially the County Councils or District Councils who are responsible for waste disposal in their area. The Environmental Protection Act 1990 established powers for District Councils as Waste Collection Authorities (WCAs) who are responsible for collection, whereas waste disposal is the responsibility of the County Council. For Unitary Authorities, they have responsibility for both waste disposal and collection.

11. **1974–Date** – before 1974 the UK was seen as the 'dirty man of Europe'. Most of the country's waste was tipped and very little recycling was going on. The UK was well behind much of Europe in waste management. Further to the UKs accession to the EEC and introduction of European legislation in the form of the first Waste

[5] SI 2005/895

Framework Directive[6] - in terms of planning, the main outcome was that responsibility for pollution control was taken out of the planning system and placed in a separate, pollution control regime. As a result, planning was expected to concentrate on the use of the land.

12. **1990** – The Town and Country Planning Act 1990 placed a duty on the established Waste Planning Authorities (the County Councils and Unitary Authorities) to produce a waste local plan or to include waste polices in their minerals local plan.

See Paragraph 2.27-2.53 for Key Waste Planning Legislation and Policy:

European Waste Policy and Legislation:

13. **European Waste Policy Overview** - In Europe in 2018, each person uses about 16 tonnes of material per year, of which 5.2 tonnes become waste[7]. Although the management of that waste continues to improve in the EU, the European economy still loses a significant amount of potential 'secondary raw materials' such as metals, wood, glass, paper, plastics present in waste streams. In 2018, total waste production in the EU amounted to 2.34 billion tonnes. 54.6% of this was recovered (37.9% recycled, the rest used for backfilling or incinerated with energy recovery), with the remaining being landfilled (38.5%) or incinerated without energy recovery or other disposal, of which an estimated 600 million tons could be recycled or reused.

14. For household waste alone, each person in Europe is currently producing, on average, half a tonne of such waste per year. Only 40% of it is reused or recycled and in some countries more than 80% still goes to landfill.

15. Turning waste into a resource is one key objective of EU waste policy, using the principles of a **circular economy** (see below). The objectives and targets set in European legislation have been key drivers to improve waste management, stimulate innovation in recycling, limit the use of landfilling, and create incentives to change consumer behaviour.

16. Improved waste management also helps to reduce health and environmental problems, reduce greenhouse gas emissions (directly by cutting emissions from landfills and indirectly by recycling materials which would otherwise be extracted and processed), and avoid local impacts such as landscape deterioration by landfilling, increase in water and air pollution, as well as litter.

17. The European Union's approach to waste management is based on the "waste hierarchy". In line with this, the 7th Environment Action Programme[8] sets the following priority objectives for waste policy in the EU:

[6] Directive 75/442/EEC

[7] Includes all forms of waste – mainly commercial/industrial; construction and demolition as well as household waste i.e total 'waste' generation (2.34 billion tonnes/year) divided by population of European Union (500 million) – Source: Environmental Data Centre on Waste [Eurostat].

[8] Which entered into force in January 2014. EU Member states have a duty to ensure it is implemented and that priority objectives are met by 2020.

- To reduce the amount of waste generated;
- To maximise recycling and re-use;
- To limit incineration to non-recyclable materials;
- To phase out landfilling to non-recyclable and non-recoverable waste;
- To ensure full implementation of the waste policy targets in all Member States.

18. The development and implementation of EU waste policy and legislation takes place within the context of a number of wider EU policies and programmes including 7th Environment Action Programme, the Resource Efficiency Roadmap and the Raw Materials Initiative.

19. The Circular Economy Package was announced in December 2015. It is a statement, which points to future policy direction. The aim is to 'close the loop' of product lifecycles through greater recycling and re-use; to replace the 'linear economy' of make/use/dispose and instead keep resources in use for as long as possible It also identifies the need for measures during the production phase to extend product life, measures to improve recovery and recycling and measures to improve the market for recovered and waste materials – see 2.3.3 below for further details.

EU Directive Policy Drivers:

Landfill Directive[9]:

20. **Landfill Diversion** – under the EU retained law Landfill Directive there are targets (see below) that member states should meet in order to reduce the amount of biodegradable municipal waste (BMW) sent to landfill. In England these targets, together with the UK Landfill Tax and the now cancelled Landfill Allowance Trading Scheme (LATS), has (in part) led to a substantial growth in waste management technologies that can now process waste, rather than being sent to landfill (e.g. Anaerobic digestion, incineration, mechanical biological treatment (MBT) plants etc. (see section 3).

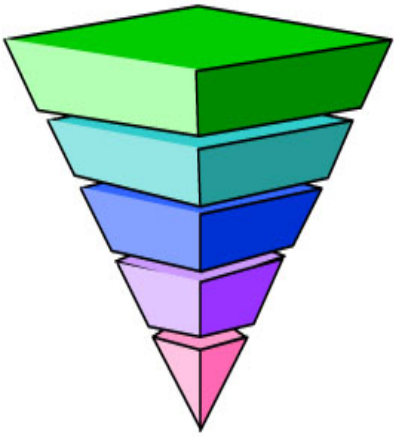
Waste Framework Directive[10]:

21. **Waste Hierarchy (Article 4)** – the hierarchy gives top priority to waste prevention, followed by preparing for re-use, then recycling, other types of recovery (incl. energy recovery), and the least desirable being disposal (e.g. via landfill). The 2011 Regulations require those involved in waste management (and waste producers) to take all 'reasonable' measures to apply the hierarchy (except where justified). Regulators under the Environmental Permitting regime must ensure the hierarchy is applied when exercising their functions. This also applies to waste planning

[9] EU retained law Directive 1999/31/EC.

[10] EU retained law Directive 2008/98/EC.

authorities and other decision-makers. Defra have published guidance on the application of the waste hierarchy[11].



22. **Principles of Proximity and Self-sufficiency (Article 16)** – The proximity principle highlights a need to treat and/or dispose of wastes in reasonable proximity to their point of generation. The self-sufficiency principle works to establish an adequate 'local' network of waste facilities for recovery of mixed municipal waste collected from private households using the most appropriate methods and technologies, taking into account best available techniques (BAT).

23. **Waste Management Plans (Article 28)** – requires every member state to produce a plan, which sets out an analysis of the current waste management situation in the country concerned, as well as the measures to be taken to improve the quality of waste materials for preparation for re-use, recycling, recovery and disposal and an evaluation of how the plan will support implementation of the rWFD.

24. **Circular Economy**[12] – emphasises the use of waste as a resource, which means a greatly increased attention to economic benefits of waste management, rather than relying solely on original principles of environmental protection and human health.

25. As well as creating new opportunities for growth, a more circular economy will:

- reduce waste
- drive greater resource productivity
- deliver a more competitive UK economy.

[11] Guidance on applying the waste hierarchy, Defra, June 2011.

[12] Circular Economy Package Policy Statement [Defra, July 2020]

- position the UK to better address emerging resource security/scarcity issues in the future.

- help reduce the environmental impacts of our production and consumption in both the UK and abroad.

Waste Targets

26. Emphasis now on waste recovery, re-use and recycling – under the requirements of Articles 10 & 11 of the EU retained law Waste Framework Directive 2008/98/EC (WFD):

    - 50% by weight of recyclable household (and similar waste streams) should be re-used or recycled by 2020; - rate was 44% in 2013-14.

    - 70% by weight of construction & demolition waste to be re-used, recycled or recovered by 2020.

27. Emphasis no longer on landfill diversion – as EU targets under Article 5 of EU retained law Directive 1999/31/EC have been or are likely to be met:

    - 50% of 1995 quantities by 2012/13

    - 35% of 1995 quantities by 2019/20

28. The Circular Economy package sets out proposed Waste Targets for 2030[13]:

- Recycle 65% of municipal waste
- Maximum of 10% of all waste to landfill
- Recycle 75% of all packaging waste
- Specific targets for certain packaging materials

Other drivers

29. **Renewable Energy Targets** - As part of the drive for energy from renewable resources to meet the Renewable Energy Directive[14] target:

- 20% of energy from renewable resources by 2020 target the Government supports efficient energy recovery (energy from waste / refuse-derived fuels) to reduce climate change impacts

30. The above policy drivers promote a shift from waste disposal to waste as a resource (through re-use, recycling or as fuel in Energy from Waste plants or as a refuse derived fuel [RDF]).

31. **Industrial Emissions Directive -** Implemented through amendments to the Environmental Permitting Regulations 2016[15], incorporates the Integrated Pollution Prevention and Control Directive, the Waste Incineration Directive - requiring strict emission limits for Incinerators, Large Combustion Plant Directive – requiring strict emission limits for combustion plants and 5 other related environmental Directives.

32. EU retained law related to waste:

Waste Framework Directive (WFD) 2008/98/EC[16]

Landfill Directive (LFD) 1999/31/EC

Industrial Emissions Directive (IED) 2010/75/EC[17]

Batteries Directive 2006/66/EC

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[13] Circular Economy: closing the loop – Clear targets and tools for better waste management factsheet [EC, Dec 2015].

[14] Article 3 of EU retained law Directive 2009/28/EU.

[15] SI 2016/1154

[16] EU retained law Directive 2008/98/EC Repeals the previous WFD 2006/12/EC and the Hazardous Waste Directive 91/689/EEC.

[17] EU retained law Directive 2010/75/EC Recasts and replaces 7 previous waste related Directives – 78/176/EEC, 82/883/EEC, 92/112/EEC, 1999/13/EC, 2000/76/EC, 2008/1/EC and 2001/80/EC.

End of Life Vehicles (ELV) Directive 2000/53/EC

Waste Electrical and Electronic Equipment (WEEE) Directive 2012/19/EU

Packaging Waste Directive 94/62/EC

Mining Waste Directive 2006/21/EC

National Waste Policy:

National Waste Policy Overview – The Waste Management Plan for England (WMPE)[18]

33. This document sets out an overview of waste management in order to satisfy Article 28 of the EU retained law rWFD and Schedule 1 of the Waste (England and Wales) Regulations 2011, together with policies contained within the Resources and Waste Strategy 2018 and the move to a more Circular Economy through the 2020 Regulations[19], the WMPE includes:

- An analysis of the current waste management situation in the geographical entity concerned, as well as the measures to be taken to improve environmentally sound preparing for reuse, recycling, recovery and disposal of waste, and an evaluation of how the Plan will support the implementation of the objectives and provisions listed in the Waste (England and Wales) Regulations 2011;
- The type, quantity and source of waste generated within the territory, the waste likely to be shipped from or to the national territory, and an evaluation of the development of waste streams in the future;
- Existing major disposal and recovery installations, including any special arrangements for waste oils, hazardous waste, waste containing significant amounts of critical raw materials, or waste streams addressed by specific legislation;
- An assessment of the need for the closure of existing waste installations and for additional waste installation infrastructure in accordance with the proximity principle. An assessment of the investments and other financial means, including for local authorities, required to meet those needs is carried out;
- Information on the measures to attain the objective of diverting waste suitable for recycling or other recovery (in particular municipal waste) away from landfill or in other strategic documents;
- An assessment of existing waste collection schemes, including the material and territorial coverage of separate collection and measures to improve its

[18] WMPE [Defra, Jan 2021], which replaces the previous Waste Strategy 2007 and NWMPE 2013.

[19] Waste (Circular Economy) (Amendment) Regulations 2020, SI 2020/904

operation, of any exceptions to requirements to collect waste separately, and of the need for new collection schemes;

- Sufficient information on the location criteria for site identification and on the capacity of future disposal or major recovery installations, if necessary;
- General waste management policies, including planned waste management technologies and methods, or policies for waste posing specific management problems;
- Measures to combat and prevent all forms of littering and to clean up litter;
- Waste management plans must:
    - include the measures to be taken so that, by 2035:
    - the preparing for re-use and the recycling of municipal waste is increased to a minimum of 65% by weight.
    - the amount of municipal waste landfilled is reduced to 10% or less of the total amount of municipal waste generated (by weight).
    - Conform to the strategy for the reduction of biodegradable waste going to landfill required by section 17(1) of the Waste and Emissions Trading Act 2003
    - Conform to the provisions in paragraph 5(1)(b) of Schedule 10 to the Environmental Permitting (England and Wales) Regulations 2016
    - For the purposes of litter prevention, conform to:
    - the programme of measures published pursuant to regulation 14(1) of the Marine Strategy Regulations 2010;
    - each programme of measures proposed and approved under regulation 12(1) of the Water Environment (Water Framework Directive) (England and Wales) Regulations 2017 for river basin districts that are wholly or partly in England.

34. In addition, Schedule 1 to the Waste (England and Wales) Regulations 2011 sets out other obligations for the Plan which have been transposed from the EU retained law rWFD. These other obligations include:

- In relation to packaging and packaging waste, a chapter on the management of packaging and packaging waste, including measures taken pursuant to Articles 4 and 5 of that Directive.
- Measures to promote high quality recycling including the setting up of separate collections of waste where practicable and appropriate to meet the necessary quality standards to enable recycling.
- Measures to encourage the separate collection of bio-waste with a view to the use of composting and anaerobic digestion of the waste.

- Measures to be taken to promote the re-use of products and preparing for re-use activities; and

- To ensure that targets are met by 2020:

(a) at least 50% by weight of waste from households is prepared for re-use or recycled.

(b) at least 70% by weight of construction and demolition waste is subjected to material recovery.

Resources and Waste Strategy[20]

35. The strategy, promised under the 25 Year Environment Plan, sets out how material resources should be preserved by minimising waste, promoting resource efficiency and moving towards the circular economy, which emphasises the use of waste as a resource for economic benefit by re-use, remanufacture, repair or recycle as well as for environmental protection. The plan also sets out mechanisms to minimise the damage caused to the environment by reducing and managing waste safely and tacking waste crime, combining actions to take now and a policy direction for the longer term – in line with the 25-year plan.

36. The key strategic ambitions include:

- Double resource productivity by 2050
- Eliminate avoidable waste of all kinds by 2050
- Eliminate avoidable plastic waste in the next 25 years
- Work towards eliminating food waste to landfill by 2030
- Work towards all plastic packaging placed on the market being recyclable, reusable or compostable by 2025.

37. One of the **strategic principles** is to provide incentives, through regulatory or economic instruments (if necessary) and ensure the infrastructure, information, skills are in place for people to do the right thing. This obviously will mean investment in new waste management facilities to ensure the appropriate infrastructure is in place in the right areas – which may result in waste planning and permitting appeals/call-ins/NSIPs.

38. **Section 2.2.6** – Support large-scale reuse and repair through national planning policy, which states that 'for large scale reuse and repair, the National Planning Policy for Waste (NPPW) should continue to embrace the circular economy and integrate resource and waste management to maximise reuse in accordance with the waste hierarchy (see Appendix A) and paragraph 8 of the NPPW (i.e. minimise

[20] Our Waste, Our Resources: A Strategy for England [HM Government, Dec 2018]

the impacts of waste when determining non-waste related development by ensuring sufficient provision for waste management from the construction and operation of the site). The Government will continue to work across departments to ensure the planning system helps deliver the objectives – this includes aligning the NPPW and Waste PPG with this strategy'.

39. **Section 3.2.1** – Driving greater efficiency of Energy from Waste (EfW) plants by encouraging use of the heat the plants produce, which states that 'As part of the review of the Waste Management Plan for England (WMPE) in 2019, Defra will work with MHCLG to ensure the WMPE, the NPPW and Waste PPG reflects the policies set out in the strategy. This will consider how to ensure, where appropriate, future plants are situated near potential customers for heat networks from Combined Heat and Power (CHP) Plants.

National Waste and Waste Planning Legislation:

40. **Control of Pollution Act 1974**[21] - which tightened up waste legislation and led to much wider control of waste disposal and regulation of waste sites.

41. **The Town and Country Planning Act 1990**[22] - Section 55 defines the meaning of development. The deposit of refuse or waste materials on land is a material change of use but building, engineering or other operations will often be involved. Where a site is already in use for waste disposal, note section 55(3)(b). The 1990 Act has been extensively amended. In particular, as regards waste, Schedule 1 of the *Planning and Compensation Act 1991*[23] applies to development involving the depositing of refuse or waste materials and some of the provisions of the 1990 Act relating to mineral working, particularly the duration of planning permission and the imposition of restoration and after-care conditions. The Environment Act 1995 amends the provisions for review of mineral permissions, including the deposit of mineral waste.

42. **General Permitted Development Order 2015**[24] grants planning permission for certain classes of development. The deposit of waste can be 'permitted development' under Part 6 (agricultural operations: note the conditions and limitations as set out), Part 12 (deposit by a local authority at a site in use for that purpose in 1948), and Part 17, Class I (mineral waste tipping).

43. **Town and Country Planning (Use Classes) (Amendment) Order 1995**[25] - Order removing use classes B3-B7, which illustrates the move away from pollution control in the planning regime.

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[21] 1974 C. 40.

[22] 1990 C. 8.

[23] 1991 C.34

[24] SI 2015/596

[25] SI 2005/297.

44. **Environmental Protection Act 1990**[26] - Part 2 sets out the provisions for waste management licensing (WML). This has been extensively amended and largely replaced by the Environmental Permitting Regulations 2016.

45. **Environment Act 1995**[27] - Part 1 established the Environment Agency as the responsible body for waste regulation in England and Wales. The Agency administers the waste permitting system (see below). Section 92 introduces the requirement for a national waste strategy.

46. **Pollution Prevention and Control Act 1999**[28] - This Act contains enabling provisions for making regulations to cover a wide range of waste management purposes and amends preceding legislation. See ITM Chapter on Environmental Permitting for further details.

47. **Environment Act 2021**[29] – This Act makes provision about targets, plans and policies to improve the natural environment; establishes the Office for Environmental Protection (OEP), which takes on the former governance roles of the EC in holding the Government to account on environmental matters. Regarding Waste and Resource Efficiency, Part 3 of the Act:

- Provides for regulations related to producer responsibility obligations and for disposal costs relating to their products;
- Makes provision for regulations relating to resource efficiency information and efficiency requirements, such as deposit schemes and charges for single use items and carrier bags;
- Make provision for waste management, such as separate collection arrangements, electronic waste tracking, the regulation of hazardous waste, powers to prohibit or restrict transfrontier shipments of waste, and amendments to the procedures for making regulations and orders under the Environmental Protection Act 1990;
- Amends the Environment Act 1995 to provide powers to make charging schemes available to Environment Agency;
- Amends legislation relating to enforcement powers for waste and environmental matters;
- Amends the Environmental Protection Act 1990 in relation to littering enforcement and penalties for fly tipping;

[26] 1990 C. 43.

[27] 1995 (c. 25).

[28] 1999 (c. 24).

[29] 2021 (c. 30)

- Enables the SoS to regulate polluting activities relating to permits and exemptions from permits.

48. **The Town and Country Planning (Prescription of County Matters) (England) Regulations 2003**[30] – Regulation 2(a) prescribes classes of waste operations and land uses that should be dealt with by the WPA.

49. **The Environmental Permitting Regulations 2016**[31] - supersede the provisions of the Environmental Protection Act 1990 and implement the permitting requirements under the EU retained law Industrial Emissions Directive (and other relevant Directives) for certain categories of waste management sites and many other types of industrial installation with potentially harmful consequences for human health and/or the environment. See ITM Chapter on Environmental Permitting for further details.

50. **Waste (England and Wales) Regulations 2011**[32] – Transposes the EU retained law rWFD into UK law to apply the revised 'waste hierarchy' (Article 4); to impose duties to improve the use of waste as a resource; requires waste management plans (Article 28); imposes duties on planning authorities when exercising planning functions in relation to waste management – Article 13 (protection of human health and the environment), Article 16(1) (in part) and Article 16(2) and (3) (household waste collection methods to enable appropriate quality of material for recycling).

National Waste Planning Policy:

51. **National Planning Policy Framework (NPPF)**[33] – should be read in conjunction with the Planning Policy for Waste. Waste is encompassed under the overarching environmental objective to achieve 'sustainable development' at paragraph 8 c); paragraph 20 requires that policies should set out an overall strategy for the pattern, scale and quality of development and make sufficient provision for: b) infrastructure for transport, telecommunications, security, waste management, water supply, wastewater, flood risk and coastal change management, and the provision of minerals and energy (including heat). Paragraph 2 of the NPPF refers to the requirement for planning policies and decisions to reflect international obligations and statutory instruments.

52. **National Planning Policy for Waste (NPPWa)**[34] - sets out national policy for waste planning. All inspectors undertaking casework with a waste interest should read the NPPWa and be familiar with it. DCLG published the NPPWa on 16 October 2014 (replacing PPS10). The NPPWa should be read alongside the NPPF and National

[30] SI 2003/1033.

[31] SI 2016/1154.

[32] SI 2011/988.

[33] NPPF [MHCLG, July 2021]

[34] NPPWa [DCLG, Oct 2014]

Policy Statements (NPS) for waste water and hazardous waste. In summary the policy changes are as follows:

i) Green Belt – strengthens protection for the Green Belt by removing the reference to giving weight to locational needs and wider environmental & economic benefits when considering applications for waste facilities in the Green Belt - to bring waste policy in line with paragraphs 147-148 of the updated NPPF. The revised policy makes clear that LPAs should consider brownfield sites first;

ii) Implement the EU retained law rWFD – to encourage increase in use of waste as a resource; greater emphasis on waste prevention (Article 9)[35] and recycling (Article 11)[36], whilst protecting human health and the environment (Article 13); reflects the principles of proximity and self-sufficiency (Article 16);

iii) Local Plans – reinforces the importance of Local Plans and emphasises the duty of co-operation between waste planning authorities, as required by s33A of the Planning and Compulsory Purchase Act 2004[37];

iv) Identification of suitable Waste sites - encourages the use of heat as an energy source, where EfW development is considered; use of the proximity principle and taking into account only existing operational capacity when assessing need;

v) Evidence Base - ensure use of the best available waste data/information in plans and decision-making, to avoid using spurious evidence. Requirement for waste authorities to monitor & report on waste arisings and how the waste is treated;

vi) Other minor revisions to implement requirements under the WFD, transposed through the Waste Regulations 2011.

53. **Planning Practice Guidance for Waste**[38] – provides guidance on the implementation of waste planning policy. The guidance replaces the PPS10 Companion Guide and takes into account the now superseded guidance. The PPG also replaced the EU Waste Framework Directive Guidance for local planning authorities. Note: this guidance will be updated to reflect the revised NPPF and should be treated with caution.

[35] Article 9 requires proposals for waste prevention (in Article 29), i.e. mesures for eco-design policy to address waste generation, the presence of hazardous materials and promote recyclable products leading to setting of 2020 objectives.

[36] Article 11.1 specifies facilities for separate collection of paper, metal, plastic and glass shall be set up by 1 January 2015 – to help meet Article 11.2(a) target of 50% recycling (and preparing for re-use) of household and similar waste by 2020. The Article 11.2(b) recycling target for construction & demolition waste is 70% by 2020.

[37] 2004 C. 5.

[38] PPG for Waste [DCLG, March 2014]

National Infrastructure:

54. **Legislation** – Part 3 of the Planning Act 2008[39] provides for certain proposals to be considered as Nationally Significant Infrastructure Projects (NSIPs) when over the specified thresholds; for waste these include:

- Hazardous Waste Facilities (s30) – involves the final disposal or recovery of hazardous waste with a capacity of a) for hazardous waste disposal by landfill or in a deep storage facility >100,000 tonnes per year or b) in any other case, >30,000tonnes per year or c) where the alteration of a hazardous waste facility will result in increase in capacity specified in a) and b) above.

- Radioactive Waste Geological Disposal Facilities (s30A) – involved the final disposal of radioactive waste, where a) the point of disposal is to be constructed at a depth of >200 m beneath the surface of the ground or seabed and b) the natural environment surrounding the facility is expected to act (together with any engineered measures) to inhibit the transit of radionuclides from the disposal area to the surface. There are other parameters which need to be met within s30A (4)-(6) to be considered a development within s14(1)(q) of the Act.

55. The deep boreholes required to investigate sites for suitability as deep geological disposal facilities are likely to be NSIP in their own right and may require over 10 years of work to construct.

- Generating Stations (s15) – involves the construction or extension of a generating station (for the purposes of this chapter proposals involving EfW facilities) where its capacity is ≥50 megawatts.

56. **Nationally Significant Infrastructure Projects (NSIPs) – National Policy Statements** – The NPPF does not contain specific policies for nationally significant infrastructure projects for which particular considerations apply. These are determined in England (and Wales) in accordance with the decision-making framework set out in the Planning Act 2008 and relevant national policy statements for major infrastructure, as well as any other matters that are considered both important and relevant (which may include the National Planning Policy Framework). National policy statements form part of the overall framework of national planning policy, and are a material consideration in decisions on planning applications.

57. **Hazardous Waste NPS[40]** - This NPS sets out Government policy for Hazardous Waste Infrastructure and includes specific policy measures for such sites that need to be given consideration:

[39] 2008 C. 29.

[40] NPS for Hazardous Waste: a framework document for planning decisions on nationally significant hazardous waste infrastructure [Defra, June 2013].

a) **To protect human health and the environment** – stringent legislative controls are in place to control the management of waste with hazardous properties;

b) **Implementation of the waste hierarchy** – to produce less hazardous waste, using it as a resource where possible and only disposing of it as a last resort;

c) **Self-sufficiency and proximity** – to ensure that sufficient disposal facilities are provided in the country as a whole to match expected arisings of all hazardous wastes, except those produced in very small quantities, and to enable hazardous waste to be disposed of in one of the nearest appropriate installations;

d) **Climate change** – to minimise greenhouse gas emissions and maximise opportunities for climate change adaptation and resilience.

58. The Government aims to meet these objectives by encouraging the development of a robust infrastructure network to manage hazardous waste.

59. **Renewable Energy Infrastructure NPS (EN-3)**[41] – This NPS, which should be read in conjunction with EN-1[42], sets out Government policy for renewable energy infrastructure, which includes Biomass/EfW generating stations. The policies set out in EN-3 are additional to those on generic impacts set out in EN-1. EN-1 sets out the Government's conclusions that there is significant need for new major energy infrastructure (section 3.3). EN-1 section 3.4 and paragraph 2.5.1 of EN-3 state that the combustion of biomass for electricity generation is likely to play an important role in meeting the UK's renewable energy targets. It should be noted that these plants can be built as Combined Heat and Power (CHP) Plants and could also have Carbon Capture and Storage (CCS) technology applied. The suite of Energy NPSs are currently under review and draft revised NPSs are subject to consultation to ensure they are fit for purpose and reflect the latest Government energy policy, in particular with regard to the Energy White Paper[43].

60. **Geological Disposal Infrastructure**[44] - provides guidance in order to determine applications for permanent disposal facilities for higher level radioactive waste (from nuclear power plants, medical treatments, research and defence activities). Section 1.6 sets out considerations for radioactive waste disposal facilities; section 1.7 sets out sustainability considerations for these facilities. Section 5.13 sets out waste management considerations relation to non-radioactive waste arising, including assessment for managing waste impacts and mitigation measures for geological disposal proposals.

[41] NPS for Renewable Energy Infrastructure (EN-3) [DECC, July 2011]

[42] Overarching NPS for Energy (EN-1) [DECC, July 2011]

[43] Energy White Paper: Powering or net zero future [HM Government Dec 2020]

[44] NPS for Geological Disposal Infrastructure [BEIS, July 2019]

Interaction of Planning and Pollution Control Regimes

61. The Waste PPG advises that there are a number of issues which are covered by other regulatory regimes and waste planning authorities should assume that these regimes will operate effectively. The focus of the planning system should be on whether the development itself is an acceptable use of the land and the impacts of those uses, rather than any control processes, health and safety issues or emissions themselves where these are subject to approval under other regimes. However, before granting planning permission decision-makers they will need to be satisfied that these issues can or will be adequately addressed through the pollution control regimes.

62. On some matters, the dividing line between planning and pollution control may not be clear-cut. Noise, dust, odour and hours of operation are examples. In general, to be a material planning consideration, the pollution issue should relate to the use of land. It may be helpful to consider the degree to which the pollution control authority (usually the Environment Agency [EA]) is able to address the risk in carrying out its statutory responsibilities. The classic case on this is *Gateshead MBC v Secretary of State and Northumbrian Water Group Plc*[45], which has been supported in subsequent cases.

63. At the appeal stage, it may not be known what conditions the EA will impose or even whether they are likely to grant a permit. However, a fair idea should be able to be gained on these matters from consultation responses from the EA and from knowledge of the subject areas of the respective control regimes. Applicants are now encouraged to make concurrent applications for planning permission and a waste environmental permit. However, they are sometimes reluctant to do so before planning permission is granted, due to the considerable costs involved in the permitting process.

64. Where a permit has already been granted or is likely to be decided during the course of the appeal, it is necessary to find out from the main parties how the permit application is progressing. If the permit is granted then it will be very useful to obtain a copy of the permit and the EA's decision document[46], which is particularly useful as it describes how the permit application has been determined; a record of the decision-making process; shows how all the relevant environmental factors and key issues have been taken into account and justifies specific permit conditions and contains a brief history of the site (including planning history). This may be useful to frame how the environmental issues are dealt with and alleviate public fears on environmental effects of the proposal as the document should explain the adequacy of environmental management techniques for the operation.

Implications of Exiting the EU

65. The UK left the EU on 31 January 2020 and the transitional arrangements that were put in place ended on 31 December 2020. From 1 January 2021, Defra needs to

[45] [1995] Env. L.R. 37

[46] Industrial Emissions Directive Permits issued by the EA.

ensure that the EU environmental law that applied at 31 December 2020[47] can continue to operate appropriately in UK law by ensuring domestic legislation implements retained EU law and any international obligations. The Environment Act 2021[48] enshrines environmental principles into UK law and makes provision for a framework of environmental governance. The following will continue from 1 Jan 2021:

- the UKs legal framework for enforcing domestic environmental legislation by UK regulatory bodies or court systems
- environmental targets currently covered by EU legislation - they are already covered in UK legislation
- permits and licences issued by UK regulatory bodies

66. Current legislation is changed from 1 Jan 2021 to:

- remove references to EU legislation (which should be referred to in decisions / reports as 'Retained EU Law Directive / Regulation xx/xxxx/xx')
- transfer powers from EU institutions to UK institutions
- make sure the UK meets international agreement obligations

Waste Management Facilities/Techniques

Waste Management Options:

(a) Household Waste Sites/Bring Sites:

- *Household waste sites* - (sometimes called civic amenity sites because they started with the Civic Amenities Act 1967) are operated by the WDAs for householders to dispose of bulky and other items. These provide an increasing range of recycling facilities including items such as garden waste and waste oil. Notwithstanding their benefits to the wider community, planning applications for such facilities can attract strong objections on grounds of noise and traffic generation. The need for them to be open at weekends can exacerbate this.
- *Bring sites* - At a smaller scale are bring banks provided by the WCAs for disposing of small quantities of bottles, paper, cardboard, etc. These also require some care in location to avoid noise nuisance, as potentially they may be used at any hour of the day or night.

(b) Recycling / disposal:

[47] EU Exit Web Archive – The National Archives

[48] 2021 (c.30).

- *Waste Transfer Station (WTS)* – depot for temporary deposition of co-mingled municipal waste, prior to loading into larger vehicles for bulk transport for processing or disposal.

- *Materials Recovery Facility (MRF or 'Murf')* – often co-located with WTS – to separate and prepare recyclable materials for 'end markets' – Two types *'Clean' MRF* (separated) or *'Dirty' MRF* (co-mingled).

    - *Landfill* - A modern non-inert landfill is usually implemented in a series of cells which are filled in sequence. Each cell is prepared by lining the base and sides with low permeability material (clay and/or an artificial liner), over which a drainage blanket is laid, including perforated pipes to collect leachate and convey it from the site for treatment and disposal. Tipping then proceeds in a series of 'lifts', within which pipework is installed to collect landfill gas. The waste tipped each day is covered with inert material to minimise odours and windblown litter, keep out birds and vermin and reduce water ingress. On completion the cell is covered with an impermeable layer, keyed into the basal liner, and interim restoration is carried out pending the completion of restoration when the relevant phase is complete, which may consist of one or more cells. Landfill sites are strictly regulated and many wastes are now banned (e.g. all liquids, hazardous wastes [unless in designated cells or at the very few designated hazardous wastes landfill sites]). As waste treatment options (rather than disposal) is a major policy driver, very few new landfill sites are being developed, so this chapter focuses on waste treatment and emerging technology.

(c) Waste treatment / energy recovery by:

- Biological Treatment (Composting, Anaerobic Digestion [AD]);
- Mechanical Biological Treatment (multi-process for separation of mixed waste);
- Mechanical Heat Treatment (multi-process for separation of mixed waste);
- Thermal Treatment (Incineration, Pyrolysis, Gasification)

Biological Treatment:

(a) Aerobic Digestion (composting):

- *Windrow Composting* – for garden waste, by natural biodegradation, which can be promoted by turning or forcing air through the 'windrows' or 'piles' of composting material.

- *In-vessel Composting* – for material containing food waste, which is heated to kill pathogens, conforming to Animal by-Products Regulations. Then followed by a period of outdoor composting.

- Anaerobic Digestion (AD) – this technology is being encouraged by Government[49]:

- Biodegradable Municipal Waste (BMW) converted into 'digestate' and biogas, by microbial action without oxygen in enclosed vessels.

- Output products (digestate and liquor) can be applied to land as 'fertiliser'. The biogas can be burnt for electricity generation or CHP.

Mechanical Biological Treatment (MBT):

- Multi-stage treatment process for mixed MSW waste:

- Preparation (bag splitting and size reduction of waste materials);

- Mechanical separation (into recyclables, biodegradable, combustible and a 'reject' [unsuitable materials] fraction).

- Biological Treatment: either drying to produce refuse-derived fuel (RDF) for use in CHP, Cement Kilns, Co-firing with coal or biomass, use in Advanced Thermal Technologies (Pyrolysis/gasification) or composting/AD for applying to land & energy from biogas.

Mechanical Heat Treatment (MHT):

- Multi-stage treatment process for mixed MSW waste:

- Initial Mechanical separation (to remove large items and 'reject' fraction).

- Heat treatment: Either by Autoclaving to 'cook' the waste, sanitising it or continuous process in non-pressurised rotating kiln. Also removes labels/glue and greatly reduces volume of waste.

- Materials separation: materials removed from MHT vessels, recyclables (glass, metals, plastics) and 'fibre' or floc. The floc can then treated to be used as RDF or akin to compost/AD.

Thermal Treatment:

i) Incineration: Moving grates, Fluidised Bed Technology, other kilns; or

ii) Advanced Thermal Treatment (ATT): Pyrolysis, Gasification.

[49] See Anaerobic digestion strategy and action plan [DECC/Defra, June 2011]

i) **Incineration** (proven for large throughput):

- Mixed Waste (MSW) or RDF combusted to reduce volume and hazardous properties, can also be used to generate electricity and/or heat.
- *Moving Grate technology* used in most incinerators, where waste is continuously fed into the furnace (undergoing complete combustion) and ash is continuously discharged at the other end. There are also fixed grates.
- *Fluidised Bed Combustion (FBC)* technology requires waste to be 'processed' to reduce particle size, which is then 'suspended' by the action of a blown bed of bubbling or circulating particles (coarse sand). FBC provides for more effective breakdown of chemicals and heat transfer.
- *Rotary Kiln* involves complete/partial rotation vessel in a 2-stage process where waste is rotated in the kiln (exposing it to heat and oxygen), then moves down into a secondary combustion chamber (for complete combustion).

By-products:

- The bottom ash from incineration can contain metals (for recycling). Any remaining solid ash can be used for aggregate replacement or non-hazardous waste for disposal. The gases from combustion (NOx, SOx etc are cleaned using 'scrubbers' prior to release). Fly ash[50] i.e. ash produced (in small dark flecks) by combustion and carried in the air can also contain hazardous material such as heavy metals, dioxins and Polycyclic Aromatic Hydrocarbons (PAHs), which have been linked to cancer.

ii) Advanced Thermal Treatment (ATT) (not yet proven for large scale:

67. *Pyrolysis* involves Pre-sorted MSW or prepared RDF (as only carbon-based materials can be pyrolysed), broken down by heat (without oxygen) to produce gas (syngas). The syngas can be condensed to form oil – used as fuel. A solid char also produced, which requires specialist disposal or additional treatment (by gasification).

68. *Gasification* using Pre-sorted MSW or prepared RDF heated at higher temperature (with air/oxygen), with steam which 'cracks' producing further oxygen, reacting further with the carbon. Syngas also produced, also solid ash (which could be recycled or disposed of).

69. All waste incinerators have to comply with the EU retained law Waste Incineration Directive requirements (now EU retained law Industrial Emissions Directive), applied through EPR for emissions and disposal of ash and for flue gas clean up measures (via scrubbers).

[50] Fly ash from coal-fired power plants can be used in blended cements as it has been shown to add strength and improve workability otherwise as a 'waste' product it would be sent to landfill. E.g CEM II Blended Cements produced by CEMEX.

- Incinerators considered a *'Disposal'* operation (D10)[51], unless plant passes the R1[52] assessment (currently 10 plants in UK are classed as), based on:

  Type of waste burned (MSW);

  Equipment used; and

  The energy efficiency threshold (should be around 0.65)

- The Government is keen on incinerators classed as *'Recovery'* operations as they are higher up the waste hierarchy

- The Government is also keen on the use of Combined Heat and Power (CHP) as a low carbon technology[53] for provision of District Heating networks e.g. Sheffield EfW Plant (Veolia).

Hazardous Waste Treatment

70. Most Hazardous Waste is not now landfilled, but is dealt with by the methods described below as restrictions on certain substances and material allowed to be landfilled have taken effect (e.g. ban on organics and liquids).

    - In England there are still seven operational Hazardous Landfill sites; and

    - A small number of suitably licensed non-hazardous landfill sites accepting Stable Non-Reactive Hazardous Waste (SNRHW) e.g. asbestos sheeting.

71. Methods for treatment of hazardous waste include:

72. *High Temperature Incineration (HTI)* – up to 1200°C to ensure complete combustion – can deal with oily sludges, contaminated soils/packaging, liquids, dangerous substances/clinical waste, also low-level radioactive materials (incl. NORM).

73. Some municipal incinerators permitted to take specified Hazardous Wastes e.g. contaminated packaging.

74. *Specialist recycling plants* – can deal with a range of Hazardous Wastes including oils, batteries, WEEE waste, ELV.

75. Recent trends in Hazardous Waste treatment demand include:

[51] Disposal Operation (D 10 – Incineration on land), specified in Annex 1 of rWFD.

[52] Recovery Operation (R1 – Use principally as a fuel or other means to generate energy), specified in Annex II of rWFD.

[53] CHP pages on DBEIS website

- Hazardous Waste from quarries and mines resulting from the transposition of the EU retained law Mining Waste Directive (2006/21/EC) leading to rise in demand for facilities to recover and dispose of this waste.

- Air Pollution Control (APC) residues (high pH, high heavy metal & persistent organic pollutants (POPs) [e.g. Dioxin] from filters/scrubber residue) - from rise in numbers of operating incinerators/EfW plants – traditionally usually concentrated and landfilled or stored underground[54].

Emerging Technology

76. *Plasma torch/arc* - Research using HT >1400°C (which breaks down waste pumped into plasma stream into atoms and ions), resultant gases may need to be 'cleaned', some gases used as fuel (H, CO_2).

77. *Infrared heating* – destroys waste by heating to 900°C with IR radiation, resultant gases may need to be 'cleaned'.

78. *Pyrolysis* – Dioxins have been chemically reduced and effectively destroyed in small scale electric reactor, waste gases can be burned as fuel.

79. Other thermal processes include:

    - supercritical water oxidation;
    - catalytic incineration;
    - microwave (plasma); and
    - solar reflectors.

80. Chemical techniques include:

    - Dechlorination;
    - Oxidation - (e.g. Winwox process developed by UK AEA) to break down organic waste components;
    - Electrochemical incineration - e.g. SILVER II process, developed by UK AEA for treatment by oxidation using Silver (II) ions of organic waste (including chemical weapons).

81. Biological techniques include:

    - *Activated sludge treatment* - adapted from oxidation process used in the sewage treatment, can deal with organic and some hazardous waste.

[54] The derogation allowing APC residues to be landfilled is due to end as new technolgy emerges to deal with this type of waste, e.g. Carbon8 process for use as replacement for aggregates in concrete – awaiting Government decision in 2016.

- *Designer organisms* - to deal with difficult to break down compounds, such as organochlorine (e.g. PCBs, pesticides/ herbicides), although there would be a risk of 'engineered' organisms present in the environment.

Casework Considerations

82. **Environmental Impact Assessment** – Waste proposals may require EIA, and Inspectors undertaking waste casework should ensure that they are familiar with the relevant legislation and policy (See further detail above and EIA Inspector Training Manual Chapter). The Inspector will need to be satisfied that where the proposal is EIA development that the Environmental Statement submitted is adequate and conforms to the requirements of Schedule 4 of the EIA Regulations[55].

83. **Public opinion/perception of waste/waste facilities** – in general, public opinion of proposed waste facilities is negative, due to many factors including a lack of understanding of the processes involved; the views of the media and perhaps an embedded perceived mistrust of waste companies (in view of a relatively few high-profile major pollution incidents at waste sites e.g. large fires, major odour incidences and vermin infestations). The Inspector will need to reassure attendees at events that environmental concerns will be given due consideration as part of the determination of the appeal/application. For waste incinerators, the main concern of most objectors tends to be the impact of emissions on public health. This is difficult to deal with at a planning inquiry. Controls over emission limits and their enforcement are matters for the Environment Agency via the environmental permitting process (see forthcoming Inspector Training Manual Chapter), but an Inspector will need to satisfy him/herself whether controls will be effective. Whether the fears are valid or not, they are certainly genuine and cause real anxiety, and in the interest of giving people a fair hearing it will normally be appropriate to hear such evidence. However, a proportionate approach will need to be taken to ensure that it does not require excessive Inquiry time or the submission of large volumes of evidence.

84. **Traffic/access (internal/external)** – the suitability of any internal haul road(s); the suitability of the road network around the site; the effect on the existing access or effect on road network of new access and additional traffic movements that would require reliance on local roads; the rail network and possible links to ports.

85. **Landscape / visual impacts** – general considerations will include an acceptable design to produce a development which respects landscape character[56]; the need to protect landscapes or designated areas of national importance (National Parks, the Broads, Areas of Outstanding Natural Beauty and Heritage Coasts) localised height restrictions (for stacks in particular). The waste facilities that are likely to have the most visual impact are:

    i) **Landfill sites** - most will have a significant adverse visual impact during the operational phase. There is the sight of vehicles of various kinds moving about,

[55] SI 2017/571.

[56] Designing Waste Facilities: A guide to modern design in waste [Defra/CABE, 2008].

litter fences, bunds and heaps of cover material, and often flocks of seagulls, usually in an otherwise rural area. The impact will vary during the life of the site as filling moves across the various phases and takes place at different levels. Often it is the final phase in creating a domed landform which is the most intrusive, although by then any screen planting will have had longer to mature. Careful planning of a landfill can greatly affect the degree of visual impact. The area which is operational and unrestored at one time should be kept to a minimum. Early restoration of the first phases gives an encouraging impression of progress and can be designed to screen later phases.

ii) **Incinerators** – a waste incinerator is a very large building with a tall chimney stack, so will have a significant visual impact. Arguably, an operator's best course is to accept this and rise to the architectural challenge by commissioning a design which makes a positive contribution to the character of an area, rather than engage in the hopeless task of trying to conceal it. The locations where such a plant can be visually acceptable whilst also meeting the other constraints may be limited in some areas. Large industrial or brownfield sites may offer the best potential. On the other hand, these can be areas where the Council is pinning regeneration hopes, and an issue may be what effect an incinerator would have on that. Development plan documents should provide policy on locational criteria or suitable sites.

86. **Nature Conservation** – includes any adverse effects on a site of international importance for nature conservation (Special Protection Areas, Special Areas of Conservation and RAMSAR Sites), a site with a nationally recognised designation (Sites of Special Scientific Interest, National Nature Reserves), Nature Improvement Areas and ecological networks and any protected species.

87. **Air emissions/odours and dust** - Considerations will include the proximity of sensitive receptors, including ecological as well as human receptors, and the extent to which adverse emissions can be controlled through the use of appropriate and well-maintained and managed equipment – i.e. scrubbers and filters using granular activated carbon.

88. **Noise/vibration** – from tipping of waste, lorry movements and general industrial machinery noise from both inside and outside of buildings. Considerations will include the proximity of sensitive receptors. Intermittent and sustained operating noise may be a problem if not properly managed particularly if night-time working is involved; hours of operation can arise as an issue, with consideration of suitable conditions. Noise assessment usually carried out using the BS4142 methodology – see Noise ITM Chapter.

89. **Litter / vermin / birds** - Some waste management facilities, especially landfills which accept putrescible waste, can attract vermin and birds. The numbers, and movements of some species of birds, may be influenced by the distribution of landfill sites. Where birds congregate in large numbers, they may be a major nuisance to people living nearby. They can also provide a hazard to aircraft at locations close to aerodromes or low flying areas. As part of the aerodrome safeguarding procedure (ODPM/DfT Circular 1/2003) local planning authorities are required to consult aerodrome operators on proposed developments likely to attract birds. Consultation arrangements apply within safeguarded areas (which should be shown on the policies map in the Local Plan). The primary aim is to guard against new or increased hazards caused by development. The most important types of development in this respect include facilities intended for the handling, compaction, treatment or disposal of household waste.

90. **Human Rights / PSED** – fears over effects of waste management on public health may raise Human Rights/PSED issues – see ITM Chapter for further information on how to deal with these issues.

91. **Defining main issues** – siting, need, effects on the environment/public health and effects on landscape are likely to be main issues in waste management planning casework and need to be treated as such when assessing the case and drafting the decision letter or report due to the very often contentious (though highly subjective) nature of the issues arising. Advice on defining the main issues can be found in 'The approach to decision-making' ITM Chapter.

92. **Conditions / Obligations / CIL** – There are a range of measures that may be employed, depending of the type of waste facility involved; these include:

i) **For Landfill Sites** – possible section 106 agreement or undertaking covering lorry routing. This is a difficult area as lorries cannot be prevented from using the public highway except through a traffic regulation order, so the enforceability of such an agreement depends on the control exercised by the operator over lorry drivers visiting the site, and what disciplinary measures are available in the event of breaches. If an operator can show sufficient control over all vehicles visiting the site, there would seem to be no obstacle in principle to an agreement binding the route(s) followed. The evidence will need to be considered carefully and advice sought if necessary. Some control can be exercised by conditions governing the design of access and signing to encourage drivers to enter and leave a site only in one direction. Section 106 agreements may also cover road improvements and the provision of passing bays.

Hours of working conditions are normally applied to landfill sites, but these cannot cover the driving of vehicles on the public highway. Note that there may be the potential problem of vehicles waiting in the road near residential properties before the site opens.

ii) **For Waste Incinerators** - traffic generation is related to the size of plant, and as incinerators usually have a large capacity the effect on the local road network will be an important issue. This will include noise, dust, pollution and other amenity impacts of traffic. Although an incinerator generally has to operate for 24 hours a day, it has buffer storage such that refuse vehicle movements can be more restricted. Planning conditions will accordingly be appropriate.

iii) **For Composting/AD Plants** – most of the issues are the same as for other facilities, so planning conditions covering such matters as closing doors (to prevent odours) and hours of operation may be appropriate.

It should be noted that any conditions should not duplicate or conflict with any operational or other conditions that may be attached to an environmental permit.

93. **Waste Framework Directive [2008/98/EC]**[57] – the following articles should be given due consideration when determining applications and appeals[58] relating to waste facilities: Article 4 (waste Hierarchy), also capable of being a material consideration; Article 13 (protection of Human Health and the Environment); Article 16 (Principles of self-sufficiency and proximity) and Article 28 (Waste Management Plans).

Case Law

94. Cornwall Waste Forum (St Dennis Branch) v SSCLG & SITA Cornwall Ltd[59] – confirms the principle that the Inspector does not have to deal with matters that are dealt with in the environmental permit (in this case, an assessment under the Habitat Regs).

95. R (Bristol City Council) v SSCLG[60] – confirms the importance of robust analysis of capacity needed to deal with commercial and industrial waste.

96. D Skrytek v SSCLG, Derbyshire County Council & Resource Recovery Solutions (Derbyshire) Ltd[61] - confirmed the Inspector's reasoning that WFE with some energy recovery comes higher than disposal by landfill in the hierarchy.

97. Veolia ES (UK) Ltd v SSCLG, Hertfordshire CC, Welwyn Hatfield BC, New Barnfield Action Fund & Gascoyne Cecil Estates[62] – confirmed the need to evaluate consequences of a Waste Site Allocations Plan (where finding proposed waste site complied in principle with Green Belt policy).

98. Hertfordshire CC v SSCLG & Metal and Waste Recycling Ltd[63] – where breach of planning permission has been defined in the form of a material change of use (MCU) (by increase in throughput), the LPA cannot introduce different issues to establish a MCU.

Planning Casework Types where Waste arises:

- Planning (s78); and
- Enforcement Appeals (s174)

99. (including Minerals waste operations, WEEE, ELV, batteries reclamation facilities);

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[57] EU retained law

[58] Annex 1 of PPG for Waste [DCLG, March 2014]

[59] [2012] EWCA Civ 379.

[60] [2011] EWHC 4014 (Admin)

[61] [2013] EWCA Civ 1231

[62] [2015] EWHC 91 (Admin)

[63] [2012] EWCA Civ 1473

- National Infrastructure:
    - Energy from Waste (s15) >50MW;
    - Hazardous Waste Facilities (s30) >100,000 tpy (landfill), >30,000 tpy (any other facility);
    - Radioactive Waste Geological Disposal Facilities (s30A) >200m below surface;
- Waste Local Plans;
- Local Development Plans;
- Neighbourhood Planning;
- Environmental:
    - Environmental Permitting (s31 EPR2016);
    - Waste Carriers (Article 4 COP[A]A1989).

(these are covered in the Environmental Permitting ITW Chapter).

Example Decisions

Planning Appeals:

100. APP/H4315/A/14/2224529 – S78 Appeal by B Moore, Former Ravenglass Warehouse and other land, Lock Street, St Helens, WA9 1HS – Decision dated 2 August 2015. Refusal of permission for change of use of warehouse building to form a 10.6MW Energy from Waste plant (with 39 metre high stack) to use feedstock comprising of refuse derived fuel (RDF), together with relocation of existing materials reclamation/recycling facility to accept non-hazardous waste to the application site; demolition of existing waste recycling facility. Main issues were the need for the proposal; the carbon output; impact on residential and environmental quality; impact on listed lock; whether the proposal constitutes sustainable development and in accordance with the development plan. Inspector concluded that i) the EfW plant was not in accordance with the development plan and the potential harm is not outweighed by the benefits and that aspect should be dismissed; ii) the relocation of the recycling facility and redevelopment of the former site for industrial uses has clear advantages and should be allowed. Appeal allowed in part.

101. APP/H4315/A/14/2215104 – S78 Appeal by BEL (NI) Ltd, Anglezarke Road, Sankey Valley Industrial Estate, Newton-le-Willows, WA12 8DN – Decision dated 16 September 2014. Refusal of permission for 4.8MW combined heat and power plant (including external plant, and machinery and 27 metre exhaust stack). Main issues were the effect of traffic on highway safety; and the effect on local residents in regard to noise and disturbance and air quality. Inspector concluded that on balance the harm to highway safety and the Council's waste management strategy (raised by interested parties) is not outweighed by other matters. The proposal would not amount to 'sustainable development'. Appeal dismissed.

102. APP/Y1138/W/15/3003677 – S78 Appeal by Nomansland Biogas, Menchoine Farm, Nomansland, Tiverton, Devon EX16 8NP – Decision dated 18 March 2016. Failure to

decide on a s73 application for permission for an Anaerobic Digestion facility (revised scheme) without complying with condition 10 regarding installed capacity (500Kw) as increase in capacity to 1000Kw is sought. Main issue was whether varying the condition would result in harm to the local amenity, in terms of noise and disturbance due to increased traffic to supply the increase in feedstock. Inspector concluded that the appeal did not adequately address the potential harm to the local amenity. Appeal dismissed.

Enforcement Appeals:

103. Notice 1: APP/D0121/C/15/3006506 & 3006507 – S174 Appeals on grounds (b), (c), (f) & (g) by Mr and Mrs J O'Malley, Land at Oxleaze Farm, Oxleaze lane, Dundry, North Somerset – Decision dated 22 April 2016. Enforcement notice alleging without planning permission the change of use of land from agriculture to mixed use of agriculture and the deposit/spreading of waste on the land. The notice requires cease of depositing/spreading of waste on the land; restoration of the land to its former level and reseed with grass.

104. Notice 2: APP/D0121/C/14/3000364 & 3000365 – S174 Appeals on grounds (a), (b), (c), (f) & (g) by Mr and Mrs J O'Malley, Land at Oxleaze Farm, Oxleaze lane, Dundry, North Somerset – Decision dated 22 April 2016. Enforcement notice alleging without planning permission the deposit/spreading of waste on the land. The notice requires cease of depositing/spreading of waste on the land; remove all imported waste material and restoration of the land to its former level and reseed with grass.

105. The main issues were i) if the waste used (under a U1 use of waste in construction waste exemption) ceased to be classed as waste once it had been engineered onto the land (to be used as platform for a barn granted prior approval in 2012); ii) was the development permitted as there was no active agricultural use on the land; iii) was the development operational development or material change of use? If so, was that appropriate development in the Green Belt. The Inspector concluded that i) there was no evidence that the imported material had ceased to be waste; ii) no express planning permission had been granted for the use or for the engineering or other operations undertaken on the land; and iii) the development was a material change of use and the activities required planning permission and it would constitute harm to the Green Belt. All appeals were dismissed and the enforcement notices upheld with revisions for compliance timescales.

National Infrastructure:

106. **WS010001 – Application by Augean South Ltd, Land at Northamptonshire Resource Management Facility, Stamford Road, Kings Cliffe, Northamptonshire PE8 6XX - Order made 11 July 2013.** Application for a development consent order for a hazardous waste facility and other development to i) increase the capacity of existing soil treatment plant from 100,000 to 150,000 tonnes per annum; ii) construction of new landfill void for hazardous waste and low level radioactive waste disposal of up to 150,000 tonnes per annum. The main issues were national waste policy; impact on health; transport & traffic; safety provisions; impacts on ecology, landscape and cultural heritage; socio-economic impacts. The Examining Inspector recommended and SoS agreed that the Order should be granted as there is a compelling case for authorising the scheme, in particular given the high demand for both hazardous waste landfill capacity and low level radioactive waste landfill capacity and this is not outweighed by the potential adverse impacts of the proposal.

107. **WS010003** – Application by Whitemoss Landfill Ltd, Land at White Moss Road South, Skelmersdale, WN8 9TH - Order made 20 May 2015. Application for a development consent order for new landfill void for disposal of some range of hazardous waste as at existing landfill site at rate of 150,000 tonnes per annum; as part of the void creation: extraction and stockpiling and some exportation of clay, mudstones and general fill for engineering use at the site and exportation; extraction and exploration of coal. The main issues were harm to the Green belt; geological setting and impact on water resources; completion/restoration of the site within the Order timescale; health & socio-economic impacts; landscape and visual impacts; wildlife & habitats; effect on residential amenity; traffic and transport. The Examining Inspector recommended and the SoS agreed that the Order should be made as the need for national hazardous waste infrastructure (set out in the NPS), with other benefits of the proposal (location, use of existing infrastructure and the restoration of the site) justifies very special circumstances to make the Order.

Annex A - Preparation, and conduct at Waste Inquiries, hearings and Site Visits

Waste management proposals on any significant scale are likely to go to inquiry because of the degree of public interest, and to be of a sufficient complexity and duration as to require a PIM. Guidance on the conduct of these is in ITM Chapter on Inquiries. There may also be an EIA in such cases and this is likely to be complex, so you should be familiar with the ITM Chapter on EIA. Also adding to the bulk of the file there may be lots of plans (especially in landfill cases), and perhaps a copy of the Environmental Permit application, draft working plan; the Permit decision document[64] and Permit/Varied Permit (if decision is known) and for landfill cases a hydrogeological risk assessment.

If the proposal concerns an existing waste management site, consider arranging an unaccompanied pre-inquiry visit. Alternatively, a visit during the inquiry, perhaps if an adjournment is needed, can be very helpful in understanding the evidence. It should also shorten the visit at the end of the inquiry, although this will normally still have to be carried out. If there is a lot of public objection, you may have to consider holding an evening session, but take account of the burden upon yourself in undertaking this. These matters should be canvassed at the PIM, if appropriate.

A written reps case may require more site visit time than normal, especially in a landfill case. The site may cover a large area and you should ensure that there is no ambiguity about the meeting place, asking the office to liaise with the parties about this if necessary. Sometimes the parties will offer to convey you around the site by vehicle: it is for you to decide whether this is appropriate, balancing the savings in time against the better impression that might be gained on foot. You will usually need to use your PINS-provided hard hat, protective footwear and high viz clothing. Where additional protection is required (e.g. eyewear) this should be provided by the site operator. Be mindful that any open wounds/areas of broken skin should be covered when visiting a site where bio-aerosols are likely to be present.

Much of this advice also applies to site visits carried out in inquiry or hearing cases. With a large site, plan your itinerary carefully to ensure you see all that you need to see. The same applies where you need to see other locations in the vicinity. Where the parties request you to tour a lot of locations, get them to prepare an itinerary and perhaps provide transport. If everyone involved can fit into a minibus or similar, this can be more effective (and safer) than travelling in convoy.

[64] As noted in paragraph 2.3.5.4 - this document can be very useful as it provides a brief history of the site (including planning history) and an assessment of the EAs reasoning for the permit decision.

Annex B - Waste Local Plans

Waste planning authorities (WPAs) should prepare Local Plans which identify appropriate areas for waste management infrastructure which will meet the needs of their area to deal with the waste streams produced in line with the waste hierarchy.

Types of waste to be covered - Waste planning authorities should plan for the sustainable management of waste including:

- Municipal/household
- Commercial/industrial
- Construction/demolition
- Low Level Radioactive
- Agricultural
- Hazardous
- Waste water

Meeting rWFD obligations - Waste Local plans must include the following to ensure they have met the requirements of Article 28 of the rWFD[65], as transposed by r7 and r8 and Schedule 1 to the 2011 Regulations[66]:

- Details of existing major disposal and recovery installations;
- An assessment of the need for the closure of existing waste management facilities and the need for additional waste installation infrastructure; and
- Sufficient information on the location criteria[67] for site identification and on the capacity of future disposal or major recovery installations.

Duty to co-operate - The duty to co-operate as required under the 2004 Act[68] applies to waste planning as it is a strategic issue that requires co-operation between WPAs, other LPAs and public bodies in order to ensure that suitable and sustainable waste management infrastructure is in place.

[65] EU retained law Directive 2008/98/EC.

[66] SI 2011/988. See paragraphs 004-10 of the Waste PPG.

[67] See Annex B of NPPW.

[68] S33A & S20(5)(c) of 2004 C. 5. See 6th bullet point of paragraph 6 of NPPW and paragraphs 015-016 of the Waste PPG.

Evidence base required to identify need for new facilities[69] – Information on the available waste management capacity in the relevant area will help inform forward planning in Local Plans of waste infrastructure required to meet the future needs of the area. This will require an assessment of future requirements for additional waste management infrastructure, with reference to forecasts for future waste arisings. Assessing waste management needs is likely to require:

- An understanding of waste arisings from within the planning authority area, including imports and exports (A);
- identifying the waste management capacity gaps in total and by particular waste streams (B);
- forecasting the waste arisings both at the end of the period that is being planned for and interim dates (C); and
- assessing the waste management capacity required to deal with forecast arisings at the interim dates and end of the plan period (D).

The *capacity gap* can be determined by calculating D minus B at the end and interim dates.

Some points on Waste Data:

i) Step A – Base year waste arisings:

- MSW is rarely contested-good data
- Hazardous waste amounts are likely to be small-again good data
- C+I waste - last reasonable survey in 2009 but for regional purposes
- How have they done it?
- Survey or manipulation of other data?
- Is it waste arising in the area or managed in the area?

ii) Step B – Base year waste management capacity:

- Sources are facility operators, original planning applications or EA permit data
- May not reflect actual throughput in case of planning applications while permits issued in ranges so may be theoretical
- Insist on remaining landfill void assessment

[69] See paragraph 22 of the Waste PPG and papagraphs 2-3 of the NPPW.

- Understand the reliance on out-of-area facilities
- Beware objectives of those challenging the figures-those who want facilities will argue its overstated, those who don't will say it's understated
- Is the approach taken reasonable?

iii) Step C – Forecasting waste arisings – MSW factors:

- There are two elements to this. The first is how waste per household will change, second is the forecast requirements at different levels of the hierarchy
- First point. There will be good past trend data on waste per hh but why did it happen and is it one-off or repeatable?
- Effect of waste minimisation strategies and economy on waste
- What is outcome assumed? No growth per hh so change just down to hh change or change to both?
- Second point. Recycling rates-are those assumed reasonable?
- Kerbside collection practices, type of area (rural, suburban or high density)

Forecasting waste arisings – other factors:

- In absence of local data, what assumptions have been made for other waste streams and are they reasonable?
- Generally assume no growth in C+I or CDE. Why?
- Often argued that waste growth de-coupled from economic growth-evidence locally?
- How have cross boundary waste movements been taken into account?
- Given uncertainty outcomes must be expressed as ranges
- Are there any special factors such as a nuclear power station that has or will close?

iv) Step D – Waste capacity required:

- Should be a simple bit of maths for each level in the waste hierarchy but:
    - Is it already influenced by policy or strategy?
    - Assumptions made about provision for or by other areas?
    - Self sufficiency or net self sufficiency?
    - How have the capacity requirements been turned into land for site finding?

Site allocation[70]

- Identify sites and/or areas suitable for types of waste management facility; avoid stifling innovation.
- Plan for disposal of waste and recovery of mixed municipal waste in line with the *proximity principle* recognising need to serve catchment areas large enough to secure economic viability of the plant.
- Use broad range of locations, co-locate with complementary activities, look to use any heat as an energy source, priority to previously developed land (PDL) and employment use sites.

Site identification[71]

- Likely to follow a very traditional site selection process looking at site types listed in Appendix B of the NPPW.
- Need evidence that those sites chosen are deliverable for ALL the facility types they are listed for.
- Beware of EfW facilities - they will generally need an emissions stack that could raise heritage and habitats risk assessment (HRA) issues as well as landscape issues if the stack is of significant height/scale. If the facility maybe a combined heat and power (CHP) plant, the end users of the heat generated should be considered.

1. [70] See paragraph 4 of the NPPW and paragraphs 037-041 of the Waste PPG.
2. [71] See paragraph 4 of the NPPW and paragraphs 037-041 of the Waste PPG.

Annex C - Waste Management – Glossary of Terms

Term	Abbreviation	Explanation
Activated Carbon	AC	Very porous carbon, acts as adsorbent for aromatic organic pollutants – can adsorb large quantities of gases, extensively used for odour control.
Advanced Thermal Treatment	ATT	A generic term to describe energy from waste technologies (primarily those that use Gasification or Pyrolysis) which are more efficient at recovering energy than conventional methods. See separate definitions of Gasification, Pyrolysis and Thermal Treatment for further details.
Anaerobic Digestion	AD	Biological treatment for organic wastes such as food and green garden/ horticultural waste, where plant and animal materials (biomass) are broken down by micro-organisms in the absence of oxygen, using an enclosed system, under controlled conditions. The main end products are "biogas" which can be used to generate heat or power, and "digestate" (a compost-like material that can be used as a fertiliser). As the process is enclosed in a building, AD does not require a large site, but must be an appropriate distance away from "sensitive receptors" such as housing and community facilities, because of potential health risks.
Best Available Techniques	BAT	Means the most effective and advanced stage in the development of activities and their methods of operation which indicates the practical suitability of particular techniques for providing the basis for emission limit values and other permit conditions designed to prevent and, where that is not practicable, to reduce emissions and the impact on the environment as a whole: (a) 'techniques' includes both the technology used and the way in which the installation is designed, built, maintained, operated and decommissioned; (b) 'available techniques' means those developed on a scale which allows

		implementation in the relevant industrial sector, under economically and technically viable conditions, taking into consideration the costs and advantages, whether or not the techniques are used or produced inside the Member State in question, as long as they are reasonably accessible to the operator; (c) 'best' means most effective in achieving a high general level of protection of the environment as a whole - from Article 3 of the EU retained law Industrial Emissions Directive 2010/75/EU (formally the IPPC Directive), BAT reference documents for the basis for setting of permits/licence conditions under the Environmental Permitting Regime and EPR 2016.
Best Available Techniques Not Entailing Excessive Costs	BATNEEC	The most effective techniques for an operation at the appropriate scale and commercial availability, where the benefits gained by using the technique should bear a justifiable relationship to the cost (unless emissions are very toxic) – an updated version of Best Practicable Means (BPM).
Best Practicable Environmental Option	BPEO	Establishes the option which provides the least damage to the environment as a whole at an acceptable cost. BPEO was included in Pt I of the Environmental Protection Act 1990 as basis for the IPC authorisation process.
Biodegradable Waste		Waste that is subject to being broken down by microbial action.
Biological Treatment		A method of treating waste that uses biological processes, involving micro-organisms, to break down the waste. Examples of this form of treatment include Anaerobic Digestion and Composting. Treatment of waste water and sewage, and some specialised methods of contaminated soil treatment, also involve biological treatments.
Biomass		Biological materials (i.e. derived from plants or animal sources) which are used as a source of fuel to generate energy. Biomass energy generating plants do not all use

		waste as feedstock: some generate energy from energy crops grown specifically for the purpose, whereas others may use a combination of biomass crops and pre-treated waste wood and/ or Refuse Derived Fuel (RDF). See separate definition of Refuse Derived Fuel.
By-Product		The term “by-product” is defined in Article 5 of the EU retained law Waste Framework Directive (2008/98/EC) as a “substance or object, resulting from a production process, the primary aim of which is not the production of that item,” where the following conditions are met: (a) Further use of the substance or object is certain; (b) The substance or object can be used directly without any further processing other than normal industrial practice; (c) The substance or object is produced as an integral part of a production process; and (d) Further use is lawful, i.e. the substance or object fulfils all relevant product, environmental and health protection requirements for the specific use and will not lead to overall adverse environmental or human health impacts. Such a product is not regarded as “waste” if these conditions are met. It is implicit that if these conditions are not met, the product is likely to be a “waste.” Quality Protocols have been developed by the Environment Agency in association with the Waste and Resources Action Programme (WRAP) for various products, to establish the conditions that must be met for them to qualify as a product rather than as a “waste”.
Ceramic filter		Method of ‘cleaning’ waste gases from treatment processes, where particles are collected on the surface of the element, as filtration continues the layer of particle deposits becomes thicker, forming a ‘cake’. The cake is removed for disposal.

Chemical Treatment		A method of treating waste that uses chemicals to treat waste to neutralise or reduce its harmfulness, prior to further treatment, recovery or disposal. These methods are often used to treat Hazardous Wastes (see separate definition) but chemical treatments are also applied in waste water treatment.
Circular Economy		An alternative to a traditional linear economy (make, use, dispose) in which we keep resources in use for as long as possible, extract the maximum value from them whilst in use, then recover and regenerate products and materials at the end of each service life.
Civic Amenity Site	CA	See Household Waste Recycling Centre.
Clinical Waste		Waste generated by healthcare activities (hospitals, GPs surgeries, vets, laboratories, may range from plasters, used needles to drugs and body parts).
Co-mingled Waste		Mixed Waste stream, where waste has not been segregated at source (kerbside collection). Is easier for households and has been shown to boot overall recycling rates, but increases cost and increases contamination risk.
Commercial and Industrial Waste	C&I	Waste generated by industry and by businesses. The fraction of C&I waste that is similar in nature to household waste (for example, food, green waste, paper, card, cans, glass and plastics) is “municipal” waste according to the definition in Article 2 (b) of the EU retained law Landfill Directive – see definition of Municipal Waste below for details.
Composting		A method of biological treatment that involves breaking down organic waste into a soil-like substance, using various micro-organisms in the presence of oxygen. Can be done in “open windrows” or “in-vessel” (see separate definitions). The end-product is compost which has various horticultural and agricultural uses. As there are potential

		risks to health from “bio-aerosols” and in some cases, animal by-products, composting is normally only allowed on sites that are an appropriate distance away from away from “sensitive receptors” such as housing and community facilities. The Environment Agency has issued guidance on developments that require both planning permission and environmental permits, which explains the risks.
Construction and Demolition Waste	C&D	Waste generated by the construction and demolition process. This waste stream therefore includes various building materials, including concrete, bricks, gypsum, wood, glass, metals, plastic, solvents, asbestos and excavated soil, many of which can be recycled.
Controlled Waste		Waste from agricultural, mining and quarrying, sewage sludge and dredging spoils, accounting for 60% of the total are regarding as having relatively low potential for causing harm to human health of the environment.
Combined Heat and Power	CHP	A term used to describe the process of capturing and using heat that is a by-product of the electricity generation process (for example, heat generated by energy from waste facilities). It involves putting into place infrastructure (e.g. pipework) to supply the surplus heat to developments nearby (such as an industrial estate or housing estate), that have a demand for it, which otherwise have to be met by a conventional boiler or energy generating system.
Disposal		Defined in Article 3 (19) of the EU retained law Waste Framework Directive (2008/98/EC) as “...any operation which is not recovery even where the operation has as a secondary consequence the reclamation of substances or energy.” A detailed (but non-exhaustive) list of the operations that fall under the definition of “recovery” is set out in Annex I of the Directive. In other words, it means any waste management operation whose main purpose is to get rid of the waste, even if some value is recovered in the process. Therefore, incineration may be disposal if

		the main purpose is not energy recovery. The deposit of excavation waste onto or into land (landfill or land-raising) is also usually regarded as waste disposal although there are “grey areas” where material is being used for land remediation or landscaping purposes.
Duty of Care		Applicable to those who import, produce, carry, keep, treat or dispose of controlled waste or as brokers have control of such waste must take all reasonable measures to achieve protection of the environment and prevention of harm to human health by measures outlined in s34 of the Environmental Protection Act 1990.
Energy from Waste / Energy recovery	EfW	Use of residual waste as a fuel to generate energy (see below for definition of Residual Waste). There are various types of facility for generating energy from waste or from “refuse derived fuel” (see below for definition). These include municipal energy from waste facilities for incineration of waste with energy recovery, and more advanced technologies which are more efficient at recovering energy, for example, by generating energy from gas produced by other waste treatment processes such as pyrolysis, gasification and anaerobic digestion (AD). Defra has produced guidance (2014) on the issues around energy from waste and the options available.
Environment Act 1995		Act which established the Environment Agency (EA) and SEPA and set out their functions, rights and liabilities and made provisions on contaminated land, control of pollution, conservation, fisheries and National Parks.
Environmental Permitting Regulations 2016	EPR2016	Regulations made under powers in the Pollution Prevention and Control Act 1999, transpose various EU Directives – IPPC, Waste. Landfill, Incineration, End of Life Vehicles, Large Combustion Plants & others, which extend the EP regime under the previous 2007 regulations, which streamlined the Waste Management Licensing and Pollution Prevention and Control regimes into one permitting and compliance system. The 2010 regulations

		added water discharge consenting, groundwater authorisations, radioactive substances regulations to the regime and transposed the permitting parts of the EU retained laws Mining Waste and Batteries Directives.
Environmental Protection Act 1990		Act which made provision for improved pollution control, re-enact provisions of the Control of Pollution Act 1974 with respect to waste, modifications to functions of the regulatory bodies. Introduced Integrated Pollution Control regime – all major emissions are considered simultaneously and not in isolation – see IPPC.
European Waste Catalogue	EWC	Harmonized, non-exhaustive list of waste types. Each waste type is given a 'six digit' code, made up of 'two digit' sub-codes. In general the catalogue describes the type of process and the industry/sector from which the waste type arises. Hazardous wastes are assigned a asterisk '*' after the code. These codes are used in permits to set out the permitted waste types for relevant waste installations. The list was transposed under the List of Waste Regulations 2005.
Gasification		A type of Advanced Thermal Treatment/ Energy Recovery technology, which under strictly controlled temperature conditions, converts biomass and/ or pre-treated wastes into gas (syngas), which can then be either used as a source of energy or converted into electricity. The other main product is a solid ash residue. This method of treatment is only suitable for pre-treated wastes, such as Refuse Derived Fuel (RDF), which may be generated on-site from residual waste, or be imported from another facility which processes residual waste into RDF. See also separate definitions of Advanced Thermal Treatment, Biomass, Energy Recovery, Refuse Derived Fuel, Residual Waste and Thermal Treatment.
Hazardous Waste		Defined in Article 2 (2) of the EU retained law Waste Framework Directive (2008/98/EC) as "...waste which displays one or more of the hazardous properties listed in Annex III." In other words, waste whose properties are likely to cause risks to

		health, the environment or water quality. Annex III of the Directive provides a (non-definitive) list of properties that render waste "hazardous," and the Environment Agency has produced guidance on the types of waste that are likely to be hazardous.
Household Waste		There is no standard definition of household waste but in general it means waste generated by households. Most of this waste is collected from local councils from households through kerbside collections or household waste recycling centres (HWRCs), although some household waste is also dealt with by the commercial waste sector (e.g. skip hire).
Household Waste Recycling Centre	HWRC	Facility operated by or on behalf of a local council, where local residents can bring waste (also referred to as a Civic Amenity Site or a "tip")
Incineration		The combustion of waste, either with or without energy recovery. Municipal energy from waste plants tend to be referred to as "incinerators" although they normally recover some energy, and the most recently developed plants are efficient enough to qualify as a waste "recovery" operation (see separate definition of Recovery).
Industrial Emissions Directive	IED	EU retained law - EU Directive which recasts the IPPC and 6 other existing directives, following extensive review of the existing policy. Aims to achieve high level of protection of the environment and human health taken as a whole by reducing emissions across the EU, in particular better application of BAT. Environmental permits should set conditions in accordance with the principles and provisions of the IED. Transposed through amendments to the EPR.
Inert Waste		Waste that does not undergo any significant physical, biological or chemical changes likely to cause risks to health or to the environment or to affect water quality – the legal definition of "inert waste" can be found in Article 2 of the Landfill Directive (1991/31/EC). This type of waste can be

		disposed of at any permitted Landfill site. Certain types of inert waste such as clean waste soils may also be disposed of onto land for the legitimate purpose of restoration, land remediation or landscaping.
Integrated Pollution Prevention and Control	IPPC	The IPPC Directive 96/31/EC sets out an integrated environmental approach to the regulation of certain industrial activities. This means that emissions to air, water (including discharges to sewer) and land, plus a range of other environmental effects, must be considered together. It also means that regulators must set permit conditions so as to achieve a high level of protection for the environment as a whole. These conditions are based on the use of the Best Available Techniques (BAT), which balances the costs to the operator against the benefits to the environment. IPPC aims to prevent emissions and waste production and where that is not practicable, reduce them to acceptable levels. IPPC also takes the integrated approach beyond the initial task of permitting through to the restoration of sites when industrial activities cease. Covers Part A(1) – EA Regulated (IPPC) and Part A(2) – LA Regulated (LA-IPPC) installations, but not Part B – LA Regulated (LA-PPC) installations (which concerns lower risk installations that concern emissions to air only). Note that all are regulated under the EPR2016.
In-Vessel Composting	IVC	See separate definition of Composting. This method involves composting in an enclosed environment, allowing greater control over the process than “open windrow” composting. The waste is usually shredded before processing. There are various systems available using containers, silos, bays or tunnels, rotating drums, or an enclosed hall. The end-product is compost which has various horticultural and agricultural uses. This method can be used to compost food and green garden/ horticultural waste mixtures, because composting takes place in an enclosed environment, with accurate temperature control and monitoring. The end-product is compost which can be used by farmers and

		gardeners to improve soil. There are various systems depending on the type of container or building used. It does not require such a large site as Open Windrow Composting but must still be an appropriate distance away from "sensitive receptors" such as housing and community facilities, because of potential health risks from "bio-aerosols" and animal by-products.
Landfill		Defined in Article 2 (g) of the EU retained law Landfill Directive (1991/31/EC) as: "A waste disposal site for the deposit of the waste onto or into land (i.e. underground), including: Internal waste disposal sites (i.e. landfill where a producer of waste is carrying out its own waste disposal at the place of production), and A permanent site (i.e. more than one year) which is used for temporary storage of waste but excluding: Facilities where waste is unloaded in order to permit its preparation for further transport for recovery, treatment or disposal elsewhere; Storage of waste prior to recovery or treatment for a period less than three years as a general rule, or storage of waste prior to disposal for a period less than one year.
Landfill Diversion		Ways of recovering value from waste instead of disposing of it to landfill – see separate definition of Landfill.
Landfill Gas	LFG	Generated in Landfill sites by anaerobic decomposition of municipal waste – consists of predominantly Methane (CH_4) and Carbon dioxide (CO_2). Directed through system of pipes to vents and maybe used as fuel for onsite boilers for site energy needs. Needs to be monitored for many years after site is closed and capped.
Leachate		Seepage of liquid through a waste disposal site or spoil heap (mainly from municipal

		waste landfill sites). Leachate characterized by high Biological Oxygen demand (BOD), high ammonia, organic nitrogen, volatile fatty acids, has high pH – requires collection (from sumps) and treatment before being discharged to controlled waters. May need to be monitored for many years after landfill site is closed and capped. Should be prevented from entering controlled waters by use of low permeable barrier i.e. geological and synthetic liner.
Material Recycling Facility / Materials Recovery Facility.	MRF	Facility that uses mechanical techniques to sort, separate and recover raw materials from mixed household wastes, such as paper, card, cans, glass and plastics, which can then be re-used by industry, or recycled into new products. It therefore fits into either the “Preparing for Re-use” or “Recycling” steps of the “waste hierarchy.” Other more specialised materials recovery techniques can also be used to recover value from other types of waste generated by households and businesses, such as waste electrical and electronic equipment (WEEE).
Mechanical and Biological Treatment	MBT	Use of a combination of techniques to extract as much value as possible from mixed wastes. This involves two or three stages of treatment on the same site. There is often an initial mechanical sorting and separation stage to recover materials suitable for recycling, followed by processing and/ or treatment of the residue, to prepare it for a final treatment stage, when any remaining residual waste is used to recover energy and/ or prepared for disposal. In this combination the final stage involves some form of biological treatment.
Mechanical Heat Treatment	MHT	Use of a combination of techniques to extract as much value as possible from mixed wastes. This involves two or three stages of treatment on the same site. There is often an initial mechanical sorting and separation stage to recover materials suitable for recycling, followed by processing and/ or treatment of the residue, to prepare it for a final treatment stage, when any remaining residual waste is used to recover energy and/ or prepared for disposal. In this combination the final stage involves some form of thermal or heat

		treatment.
Municipal Waste		Defined in Article 2 (b) of the EU retained law Landfill Directive 1991/31/EC as "...waste from households, as well as other waste which, because of its nature or composition, is similar to waste from household."
Non-Hazardous Waste		Waste that is neither inert nor hazardous (see separate definitions), which can include pre-treated organic wastes and stabilised residues from waste treatment. This type of waste can only be disposed of at a permitted Non-Hazardous Landfill site or another facility permitted to accept it.
Non-Controlled Waste		Waste arising from municipal (waste from household and small businesses), commercial and industrial, construction and demolition activities. These wastes account for 40% of the total and contain environmentally damaging by-products when they degrade. Other substances may be toxic or hazardous to health in other ways.
Operational Risk Appraisal	Opra	Methodology for formal risk assessment for processes subject to EPR2016. Environment Agency assess the risk to the environment of the running of the process and to target resources and charges as appropriate, dependent on the risk – consists of three 'Tiers' Teir 1 being the simplest processes with the lowest risk, Tier 3 being the most complex with high risk activities. A permit can cover more than one activity and in more than one tier. Opra has been replaced as part of the EA's review of charges with a performance-based regulation system. However, some Opra guidance remains in use
Plume		Steam of gas issuing from a stack which retains its identity and is not completely dispersed in the surrounding air. Near the stack the plume Is often visible due to water droplets, smoke or dust that it contains, but often persists downwind after it has become invisible to the naked eye (albeit in much less concentrations).

Preparing for Re-Use		Defined in Article 3 (16) of the EU retained law Waste Framework Directive (2008/98/EC) as "...checking, cleaning or repairing recovery operations, by which products or components of products that have become waste are prepared so that they can be re-used without any other pre-processing."
Proximity Principle		One of the principles to be applied to the disposal of residual waste and recovery of mixed municipal waste from households and other sources where collected as part of the same collection arrangements, under Article 16 of the EU retained law Waste Framework Directive (2008/98/EC) – the other principle to be applied in parallel is 'self-sufficiency" (see separate definition). The objective is to enable these wastes to be managed at "one of the nearest appropriate installations, by means of the most appropriate methods and technologies, in order to ensure a high level of protection for the environment and public health" – in other words, that waste facilities should be appropriately located in relation to the sources of waste, so that the impacts on the environment and health are minimised. However, national policy guidance advises that when planning for local requirements, economies of scale and the particular locational requirements of certain facilities also have to be taken into account, and will often determine where facilities are developed (NPP for waste, paras. 1, 4, 6 - 8).
Pyrolysis		A type of Advanced Thermal Treatment/ Energy Recovery technology, which under strictly controlled temperature conditions, converts biomass and/ or pre-treated wastes into gas, which can then be either used as a source of energy or converted into electricity. Other by-products include liquid and solid residue ("char") which can be used as fertiliser. This method of treatment is only suitable for pre-treated wastes, such as Refuse Derived Fuel (RDF), which may be generated on-site from residual waste, or be imported from another facility which processes residual waste into RDF. See also separate definitions of Advanced Thermal Treatment, Biomass, Energy Recovery, Refuse Derived Fuel, Residual Waste and

		Thermal Treatment.
Radioactive Waste		Waste that undergoes radioactive decay (may be from laboratories, health facilities or the nuclear energy industry).
Recovery		Defined in Article 3 (15) of the EU retained law Waste Framework Directive (2008/98/EC) as "...any operation the principal result of which is waste serving a useful purpose by replacing other materials which would otherwise have been used to fulfil a particular function, or waste being prepared to fulfil that function, in the plant or in the wider economy." A detailed (but non-exhaustive) list of the operations that fall under the definition of "recovery" is set out in Annex II of the Directive. Essentially, "recovery" of waste is the same as "Landfill Diversion" (see separate definition). The generation of energy from waste may qualify as "recovery," but only where the technology achieves the levels of efficiency required by the Directive (see Annex II, R1).
Refuse Derived Fuel	RDF	Residual waste which has been pre-treated (for example by being screened and shredded) to produce a fuel which can then be used to generate energy at a Biomass, Energy from Waste or Advanced Thermal Treatment facility. Refuse Derived Fuel is still technically a "waste" and not a product. Operations that involve the processing of residual waste into RDF may qualify as "recovery" but do not fall within the definition of "recycling" (as is sometimes claimed). See separate definitions of Advanced Thermal Treatment, Biomass, Energy from Waste, Recycling, Recovery and Residual Waste.
Residual Waste		Waste left over from treatment or recovery processes, once the re-useable and recyclable waste has been removed.
Recycling		Defined in Article 3 (17) of the EU retained law Waste Framework Directive (2008/98/EC) as "...any recovery operation by which waste materials are reprocessed into products, materials or substances whether for the original or other purposes. It

		includes the reprocessing of organic material but does not include energy recovery and the reprocessing into materials that are to be used as fuels or for backfilling operations."
Re-Use		Re-use is defined in Article 3 (13) of the EU retained law Waste Framework Directive (2008/98/EC) as "...any operation by which products or components that are not waste are used again for the same purpose for which they were conceived."
Scrubber		Device for flue gas cleaning e.g. spray towers, packed scrubbers and jet scrubbers – removes particles down to 1 micrometre in diameter when used with water. Can also control gaseous pollutants (used with alkaline solution). Scrubbers produce sludge, that requires dewatering and disposal.
Self-Sufficiency Principle		One of the principles to be applied to the disposal of residual waste and recovery of mixed municipal waste from households and other sources where collected as part of the same collection arrangements, under Article 16 of the EU retained law Waste Framework Directive (2008/98/EC) – the other principle to be applied in parallel is "proximity" (see separate definition). The objective is for Member States to "to establish an integrated and adequate network of waste disposal installations and of installations for the recovery of mixed municipal waste" taking into account "best available techniques" – in other words that within the UK an adequate network of facilities should be developed so that each area should have enough capacity to meet its requirements. Therefore, achieving "net self-sufficiency" means having in place (or having the capability to develop) the infrastructure needed to manage a tonnage of waste equivalent to the tonnage of waste expected to arise in the area over the period being planned for – if each area can achieve this, in theory the whole country will have enough capacity. However, there is no expectation that all of the municipal waste and residual waste arising in a particular area will necessarily be recovered or disposed of in the same area, or that every area should have every

		type of waste disposal or recovery facility, as this is not likely to be economically viable in every case (NPP for waste, paras. 1, 4, 6 - 8).
Stack gases		The gases discharged up a chimney stack for dispersion into the atmosphere. May also be termed 'Flue gases' or 'Exhaust gases'.
Tallow		Animal fat obtained from animal rendering processes, which can be used as fuel in boilers – will need to conform to Waste Incineration Directive emission limits, now applied through the EU retained law Industrial Emissions Directive.
Thermal Treatment		A method of treating waste that involves heating it. Examples of thermal treatment are Anaerobic Digestion, Energy Recovery and Incineration – see separate definitions of these technologies.
Treatment		Defined in Article 3 (14) of the EU retained law Waste Framework Directive (2008/98/EC) as "...recovery or disposal operations, including preparation prior to recovery or disposal." See separate definitions for the meaning of "recovery" and "disposal."
Waste		Defined in Article 3 (1) of the EU retained law Waste Framework Directive (2008/98/EC) as "any substance or object which the holder discards or intends or is required to discard." As it is not always easy to determine whether material is a "waste" or a "by-product," Defra has issued guidance (2012) on the legal definition of waste.
Waste Hierarchy		The waste hierarchy is a system for ranking methods of managing waste by preference, according to how efficiently they make use of resources - see Figure 1 for details. The legal definition of the waste hierarchy can be found in Article 4 of the EU retained law Waste Framework Directive (2008/98/EC), which states that it is to be applied as a priority order in waste prevention and management legislation and policy. Defra has issued guidance (2012) on applying the

		"waste hierarchy" when considering waste management options. There is separate guidance (2011) on applying the "waste hierarchy" when considering options for hazardous waste.
Waste Management Industry Training and Advisory Board	WAMITAB	Awarding organisation that develops qualifications for those working in the 'Waste' industry for operatives through to management. Specific Waste Management qualifications under the WAMITAB (Certificate of Technical Competence - CoTC) are required in order to be classed as 'competent operator' for regulated facilities under the Environmental Permitting Regime and EPR2016.
Waste Projections		Forecasts or predictions of the amounts of waste likely to arise over a given period. The estimates are usually calculated by "projecting" from estimated current arisings (the "baseline"), and applying assumptions about how waste is likely to grow or fall over time, which may relate to the amount of new development expected to take place and other factors such as economic trends.
Windrow Composting		See separate definition of Composting. This method of composting is carried out in the open air or in a large covered area, and is only suitable for green garden or horticultural waste, such as grass cuttings, tree and shrub prunings and leaves. The waste is shredded and laid out in long piles called "windrows," which are mechanically turned from time to time to aid the process of breakdown of material. The end-product is compost, which has various horticultural and agricultural uses. This type of operation requires a large site that is an appropriate distance away from "sensitive receptors" such as housing and community facilities, because of potential health risks from "bio-aerosols."

Selected definitions adapted from:

Dictionary of Environmental Science and Technology (Fourth Edition), Porteous, Andrew, Wiley 2008

The Planning Inspectorate

CASE LAW AND PRACTICE GUIDE 5 - WATER RELATED CASEWORK

[Contents may not be current, presently under review]

Scope of Guidance:

This guide covers water related considerations in planning and some other casework eg Drought Orders. However, it does not cover water related appeals under other environmental legislation eg water abstraction licences or discharge consents.

Updated to reflect Current Framework (NPPF)?	Yes

What's new since the last version

Changes highlighted in yellow made 3 February 2011:

- New paragraph 95 advises on EA's revised approach to providing flood risk advice to LPAs.
- Additional references made to equivalent publications in Wales.

This guide provides practical advice to Inspectors to assist them in carrying out their role consistently and effectively when dealing with planning and other casework involving water related issues. In particular it identifies relevant Court judgements which need to be taken into account.

This guide does not provide policy advice, nor does it seek to interpret Government policy. In addressing policy issues Inspectors will be expected to have regard to the policy guidance produced by the relevant Government Department. In the event that there appears to be a discrepancy between the advice in this guide and national guidance, the latter will be conclusive as the

original policy source.

The Planning Inspectorate will continually update this guide to reflect legislative changes, Court decisions and practical experience. The guides are under review to reflect the National Planning Policy Framework and the National Planning Practice Guidance, although the specialist guides are likely to take longer to complete.

Relevant Legislation and Guidance
European Legislation

Bathing Waters Directive (76/160/EEC)[1]
Dangerous Substances Directive (2006/11/EC)
Drinking Water Directive (98/83/EC)
Freshwater Fish Directive (2006/44/EC)
Groundwater Directive (2006/118/EC)
Nitrates Directive (91/676/EEC)
Integrated Pollution Prevention and Control Directive (2008/1/EC)
Shellfish Waters Directive (2006/113/EC)
Urban Waste Water Treatment Directive (91/271/EEC)
Water Framework Directive (2000/60/EC)

Primary Legislation

Reservoirs Act 1975
Environmental Protection Act 1990 (EPA)
Water Resources Act 1991 (WRA)
Water Industry Act 1991 (WIA)
Land Drainage Act 1991 (LDA)
Environment Act 1995 (EA95)
Pollution Prevention and Control Act 1999 (PPCA)
Water Act 2003
Marine and Coastal Access Act 2009
Flood and Water Management Act 2010

Selected Statutory Instruments

Water Supply (Water Quality) Regulations 2000 – SI No 3184
Private Water Supply Regulations 2009 – SI No 3101 (England only)
Private Water Supply Regulations 1991 – SI No 2790 (Wales only)
Waste Management Licensing Regulations 1994 – SI No 1056
Surface Water (River Ecosystem) (Classification) Regulations 1994 – SI No 1057
Anti-Pollution Works Regulations 1999 – SI No 1006
Control of Pollution (Oil Storage) (England) Regulations 2001- SI No 2954
Water Resources (Abstraction and Impounding) Regulations 2006 – SI No 641

Contaminated Land (England) Regulations 2006 – SI No 1380 (SI No 2989 in Wales)
Environmental Permitting (England & Wales) Regulations 2007 – SI No 3538
Flood Risk Regulations 2009 – SI No 3042
The Environmental Permitting (England and Wales) Regulations 2010

Circulars

20/89 (WO47/89) Water Act 1989
14/91 (WO 44/91) Planning and Compensation Act 1991
17/91 (WO 62/91) Water Industry Investment
3/99 (WO 10/99) Use of Non-Mains Sewerage
Defra 01/2006 EPA 1990: Part IIA – Contaminated Land
02/2009: The Town and Country Planning (Consultation) (England) Direction 2009

Planning Policy Guidance

PPG10 - Protection of Surface and Underground Water	Paras A34-A36
PPG12 - Infrastructure Provision & Utilities Infrastructure	Paras 6.14- 6.21
PPG20 – Coastal Flooding	Paras 2.13-2.19
- Coastal Location for Waste Water and Sewage Treatment Plants	Para 3.17
PPS23 - Water Quality	Annex 1
PPS 25: Development and Flood Risk	
PPS 25: Development and Flood Risk Practice Guide	
PPS25 Supplement: Development and Coastal Change	
PPS25 Supplement: Development and Coastal Change Practice Guide	

Wales

Planning Policy Wales: March 2002	paras 12.2 – 12.4 and 13.2-13.4
TAN 15: Development and Flood Risk	
Environment Strategy for Wales (WAG 2006)	
Strategic Position Statement on Water (WAG 2009)	

Other Guidance

Making Space for Water (Defra 2005)
Future Water – the Government's Water Strategy for England (Defra 2008)
Adapting to Coastal Change: Developing a Policy Framework (Defra 2010)

Selected Environment Agency *(EA)* Documents

Policy and Practice for the Protection of Groundwater
Policy Regarding Culverts
An Action Plan for Flood Defence
Sustainable Urban Drainage

Note: The EA has its own Pollution Prevention Guidelines (PPGs) which deal with the prevention of water pollution from many possible sources and should not be confused with the Planning series of PPGs

Other Selected Technical Advice

Environmental Permitting Guidance – Water Discharge Activities (Defra December 2010 Version 2.0)
BRE Digest 365 – Soakaway Design (BRE 1991)
BS 6297: Code of Practice for the Design and Installation of Drainage fields for use in Wastewater Treatment (BSI December 2007) [Available in hard copy from TQ Library]

Water Pollution

Annex A – Inspectors' checklist for appeals and called-in applications

Contents

Introduction

1. This guide gives advice on issues relating to water supply, sewerage, sewage disposal, flooding and the prevention of pollution of surface and underground waters, as they may arise in general planning casework. These are all matters which are covered by other legislation, but may also be material planning considerations in general casework. As with other planning considerations, the likely future effect of the proposed development should be adequately assessed, and this guide is intended to assist Inspectors who may not be fully aware of water policy and the terms used.

2. The statutory water and sewerage undertakers throughout England and Wales deal with water supply and sewerage within their statutory areas. The Environment Agency (EA) are responsible for policing and protecting the quality of inland, coastal and underground waters, for conserving and enhancing water resources, for licensing water abstractions and for consenting effluent discharges. They are also very much concerned with the prevention of flooding and have statutory powers to manage flood risk to existing properties and assets, whether this is from the sea or from rivers. As things stand, the EA have responsibilities for 'main rivers' (watercourses designated as such on main river maps), whilst local authorities have responsibilities for non-main river watercourses, and Internal Drainage Boards (IDBs) are responsible for draining certain low-lying areas. Responsibility for dealing with surface water run-off from highways and from other hard-surfaced development varies from location to location; sewerage undertakers, local planning and highway authorities and the EA may all be involved.

3. The EA are a statutory consultee for certain kinds of development. In practice however most LPAs consult the EA and the statutory water and sewerage undertakers on any relevant developments. Their views should therefore be available at the decision stage. With regard to flooding, PPS25 calls for a Flood Risk Assessment (FRA) for all development proposals in Flood Zones 2 and 3 and for developments of one hectare or more in Flood Zone 1 (paragraph E9). In Wales TAN15 does the same and provides more specific advice on requirements.

4. The principal function of The Water Services Regulation Authority (OFWAT) is to regulate the financial affairs of the statutory water and sewerage undertakers in England and Wales. As part of that duty, OFWAT carries out a Periodic Review every five years when all water and sewerage undertakers have to submit their Asset Management Plans (AMPs) for approval. OFWAT sets the price limits ('K factors') that Companies can charge, but at a level that is intended to allow for their approved commitments, including all identified new schemes. Particularly on larger developments, it is sometimes stated that no money has been allocated for the necessary works in the current AMP determination. But, additional 'pass-through' funding may be authorised by OFWAT if the company can demonstrate that there are stringent planning requirements for a scheme. The company may need to make an appeal if it is to demonstrate that these requirements are met.

5. Circular 17/91 Water Industry Investment: Planning Considerations draws attention to the need for a large capital programme by the water industry to be carried out over a short time scale. Even though the intention was to facilitate urgent improvements in the early 1990s, this Circular is still extant and it urges planning decision makers to have due regard to the duties imposed on the water industry by European Directives.

Supplementary Plans And Policies

6. The EA's policies on such things as *Groundwater protection (*paragraphs 123-126) or the use of *Sustainable Drainage Systems (*SUDS) (paragraphs 52-65) may be referred to in appeals. These are national policy documents. Some have been subject to some form of public consultation, but many have not and/or are in draft form. In planning casework they are most unlikely to carry the same weight as Development Plan policies. Inspectors need to be aware that the EA have their own Pollution Prevention Guidelines which are referred to as PPGs.

7. The EA have produced national and regional water resources strategies that look 25 years ahead: Local Environment Agency Plans (LEAPs); and Catchment Abstraction Management Strategies (CAMS) that set out potential problems and solutions for each river catchment. In coastal areas, there may be Estuary or Coastal Management Plans, Shoreline Management Plans, Coastal Habitat Plans, Heritage Coast Management Plans and Integrated Coastal Zone Management Plans. Whilst policies in these various documents do not have the same weight as those in the Development Plan, in most cases they have been subject to at least some public consultation process and can be given appropriate weight in reaching a decision.

Water Supply

Water undertakers, private water supplies

8. Water is supplied by the privatised Water Companies (plcs), or by Water-only Companies, which were formed many years ago under their own Acts of Parliament and still provide considerable quantities of water across the country. Within their areas of supply, these Water-only Companies perform the role of Statutory Water Undertakers whilst the plcs are the Statutory Undertakers for both water and sewerage in their areas, and they are also the Sewerage Undertakers in the areas of the Water-only Companies. There are also a considerable number of Private Water Supplies where a private individual or firm operates their own water source eg an abstraction from a river, well or borehole. A small proportion of these sources also supply water to other persons.

Potable water supplies

9. A supply of potable (drinkable) quality water is available from the mains of the statutory water undertaker for the area. Under Section 45 of the Water Industry Act 1991 (WIA), the owner or occupier of a building can requisition a domestic water supply connection, if a suitable water main exists. A private water supply from a surface water abstraction, well or borehole may also provide a suitable alternative, but the Local Authority (LA) is obliged to inform itself as to the wholesomeness and sufficiency of the water. Sections 77-85 of the WIA confer powers on the LA to require improvements to be made, or require an alternative supply.

Water quality standards

10. The Water Supply (Water Quality) Regulations 2000 implement EC Directive 98/83/EC on the Quality of Water Intended for Human Consumption, and they prescribe certain standards of wholesomeness for water supplied for domestic and food production purposes. Private water supplies are regulated by The Private Water Supply Regulations 1991.

Non-domestic supplies

11. Non-domestic supplies are often required on industrial premises for process, washing or boiler water. Under S55 of the WIA, undertakers should make the supply available, unless they would incur unreasonable expense in doing so, or their present and probable future supply obligations would be put at risk.

Embargoes on unplanned development

12. The provision of a water supply should be taken into account in any major development arising through the Development Plan process. However, acting on advice from the Water Undertakers, Local Planning Authorities have occasionally placed embargoes on unplanned development because of a lack of suitable public water supplies. Possible reasons for this may include the distance to public water mains, or inadequacies in capacity of the source works, the water treatment works, service reservoirs, pumping installations or water mains. With the existing infrastructure, it may be virtually impossible to supply water. Inspectors should be aware however that a main can be requisitioned under S41 of the WIA, subject to a financial contribution if the scheme would incur a deficit. If major works are required, the cost could be prohibitive for a small development. A good quality private water supply may overcome these objections. In determining such appeals, it will be necessary to have regard to the obligations placed on the LA and the Water Undertaker by the WIA, and possibly also by the Water Resources Act 1991 (WRA) or the Environment Act 1995 (EA95).

Abstraction licences

13. A licence is required to abstract water from above or below ground (except for very small quantities, such as the supply for one house). The Water Undertakers are responsible for the future planning of their own water requirements and are now required to produce Water Resource Management Plans. The EA manage the overall water resources for the area. The EA determine licence applications under the terms of the WRA as amended by the 2003 Water Act.

Water efficiency

14. Water Undertakers have a duty under Section 93A of the WIA (inserted by the EA95) to promote the efficient use of water, and they now produce Water Efficiency Plans. Among other things, they are actively managing their mains leakage to reduce it to an economic minimum, with annual leakage targets set by OFWAT. They are also encouraging the use of water saving and recycling schemes both in industry and in the home. Such schemes can show considerable financial benefits for some industrial users, whilst water metering, the installation of water saving appliances and the recycling of greywater or rainwater are also becoming features of some new residential schemes. Recycled water generally needs treatment, even though it is usually only to be reused for such purposes as flushing toilets or garden watering. Clearly, the treatment process needs sound operation and maintenance procedures, and Inspectors should be satisfied that such systems will be provided before allowing such schemes.

Drought Plans, Permits And Orders

15. Water companies have a duty (S39B WIA) to produce plans that show how, in

drought conditions, they will provide water supplies without placing undue reliance on drought permits or drought orders. Drought plans must describe measures that the company will take to restrain demand; to use other sources; and, to monitor the effectiveness of such measures, including the environmental effects. S2 of the Drought Plan Direction 2005 specifies further details that are to be included. Guidance from the EA Water Company Drought Plan Guidelines 2005 version 2.0 indicates the expected content of such plans and points out that they should be consistent with current water resources management plans, particularly in terms of the assumptions made when calculating source deployable outputs that would trigger the need for a drought permit or order.

16. Drought plans should provide details of sites that might be affected by drought permits/orders. Where a permit or order would impact on a protected site (eg SAC/SPA/Ramsar/SSSI), the plan must identify any mitigation measures, and Natural England (NE) or Countryside Council for Wales (CCW) must be consulted over its production. As a statutory undertaker, the water company is a competent authority for the purposes of The Conservation of Habitats and Species Regulations 2010. It must therefore carry out an appropriate assessment of the implications (of its drought actions) for any European site, such as an SAC. A preliminary assessment should be included in the drought plan and this should be updated as part of the environmental report which accompanies an application for a permit/order. (Permits and orders are not formally subject to EIA requirements.) If there are no alternative solutions and the company cannot conclude that actions identified in the order/permit would not adversely affect the integrity of the European site, the Secretary of State/ Welsh Ministers must be given the opportunity to decide whether there are imperative reasons of overriding public interest for the permit/order to be authorised.

17. An application for a drought order (or emergency order) may be made to the Secretary of State for the Environment, Food and Rural Affairs [Defra SoS] (or Welsh Assembly) by the EA or, more commonly, by a water company. Water companies may also apply to the EA for a drought permit. Once an application has been submitted and advertised (Sch 8 WRA), seven days are allowed for objections to be made. Those objections are then considered at a hearing (or rarely an inquiry) that is governed by the Drought Orders (Inquiries Procedure) Rules 1984 SI No.999 ('the Rules').

18. A drought permit may be warranted if a serious deficiency of water supplies exists or is threatened as a result of an exceptional shortage of rain (S79 WRA). A drought order may be justified when there has been an exceptional shortage of rain resulting in a serious deficiency in water supplies, or such a deficiency in the flow or level of any inland water as to pose a serious threat to flora or fauna (S.73 WRA). Justification for an emergency drought order is that the deficiency in water supplies is likely to impair the economic or social well-being of people in the area (S73 WRA).

19. Applications for permits/orders must demonstrate the exceptional shortage and be supported by evidence that measures, identified in the drought plan, have already been taken in an attempt to avoid the need for a permit/order. Such measures might include the use of alternative sources and actions to reduce demand, such as temporary (S76 WIA) restrictions on the use of hosepipes for watering gardens or washing private cars.

20. Drought permits can authorise applicants to take water from specified sources, or they can modify existing restrictions on the taking of water, for a period of up to six

months. Ordinary drought orders may also affect others, for up to six months, by regulating abstractions and discharges and by authorising water companies to limit those uses of water that are set out in the Drought Direction 1991. Emergency drought orders are in force for up to 3 months, but go further than ordinary orders in that they allow companies to make unfettered decisions over the uses of water and over the form of its supply. The duration of orders and permits may be extended. Further details are provided in the 2005 DEFRA/WA/EA guidance on Drought Orders and Drought Permits ('Defra guidance').

21. The advice that follows refers to hearings, but applies equally to inquiries. Both procedures are covered by the Rules (Rule 2) and, whilst counsel may prefer the formalities of an inquiry, it is for the Inspector to determine the most suitable approach (Rule 7).

22. Once an application for an order/permit has been made, or shortly before, a suitable Inspector will be alerted to the possible need for a hearing. The hearing will be arranged as quickly as possible and will be held if there are objections to consider, irrespective of whether the objector wishes to be heard.

23. The file should contain the draft order/permit, a supporting statement from the applicant, an environmental report and relevant parts of the drought plan. Objections may arrive with the file or thereafter. PINS will also suggest that the water company prepares an agreed statement of common ground with the EA, so as to speed up the hearing.

24. PINS will provide the Inspector with copies of the 1984 procedural rules and the Defra guidance. In addition, the Inspector may find it helpful to take copies of PPS9 and DEFRA Circular 01/2005 (ODPM 06/2005) to the hearing.

25. At the start of the hearing, the applicant should be asked to confirm that all of the necessary publicity and notification has been given to the proposed order/permit. If they have not been provided beforehand, copies of the relevant advertisements, notifications and lists of persons notified should be taken as hearing documents. If the applicant proposes modifications to the permit/order, in response to objections, care must be taken to ensure that no-one would be unduly prejudiced by consideration of the revised version, for example, additional works might be proposed which would affect other people.

26. The applicant and objectors, or their representatives, are normally allowed to speak at the hearing and the Inspector has the discretion to hear from objectors who failed to lodge their objections within the seven day period. The applicant generally speaks first, but it is unlikely that proofs of evidence will be provided by any party and there is no requirement for written statements to be provided, let alone read. The Inspector may choose to hear the parties present their cases (in a succinct form), before allowing discussion, followed by the parties' questions, and then closing submissions. Alternatively, the Inspector may opt to ask questions on particular points and then, at a later stage, give the parties the opportunity to raise other matters. Closing submissions should finish with the applicant. There is no statutory requirement for a site visit [Rule 8(2)], but an unaccompanied visit before the hearing may help the Inspector to understand the context for the provisions of the permit/order.

27. The Inspector will need to consider hydrological evidence in support of the claim that there has been an exceptional shortage of rain. There is no guidance on the meaning of an exceptional shortage; this is because every drought is different and it

is generally for the water company to demonstrate the case by reference to the type of drought and to the source that is affected. Support for the claim, by the EA, is likely to carry significant weight.

28. The Inspector will also look for evidence to show that those measures have been taken which the drought plan identifies as being necessary to reduce reliance on the use of permits or orders for the area in question. Sections 3.1 – 3.2 of the Defra guidance suggest that a permit should be refused if other options for public water supply remain or if proportionate actions such as publicity campaigns, hosepipe bans, pressure reduction and leakage control, have not been taken. Evidence on matters such as the company's progress with leakage control, and with promoting the efficient use of water, is available in OFWAT's report on security of supply. The Inspector may need to ask for this if it has not been provided, but the matter is at issue.

29. If the Inspector is satisfied that there is a serious deficiency of water, as a result of an exceptional shortage of rain, this must nevertheless be balanced against the environmental and other consequences. Consideration of the consequential effects of the order/permit often involves evidence about the effects on biodiversity and may also include effects on the uses of water that are available to others. Forewarning of such effects should be provided by the drought plan for the area.

30. If time allows, it can be helpful to prepare a list of questions that are structured to fit in with the likely form of the report. The list can be circulated at the hearing, or before, so as to given the parties maximum warning of any additional documents that might be needed.

31. Another advantage of the hearing procedure is that, if necessary, the Inspector can prepare a summary of each party's case in advance; read it out at the hearing; get any necessary amendments; and then insert it directly into the report. In addition, advance warning can be given of a request for closing submissions to be provided, in electronic form, on the day after the hearing closes. A further way of reducing reporting time may be to ask the water company to provide a succinct summary of the distribution system.

32. The report is produced in the same format as a normal Secretary of State report; this meets the Rule 9 requirement that Inspectors include their "findings of fact". There is no need to reproduce the wording of the draft order/permit, or of proposed modifications to it, within the report; references to the relevant documents will suffice. A report on a drought order is made to the DEFRA SoS and includes a recommendation that the order is made in the form sought, or in some modified form, or that the order is not made. Reports on drought permits are made to the EA, but no recommendations or directions are made.

33. The EA can recover their costs under S64 of the 2003 Water Act. S65 makes provision for awards of costs to other parties under the terms of the 1972 Local Government Act and, in the absence of specific guidance, it would seem appropriate to consider applications against the same criteria as in planning casework.

Impounding and Reservoir Safety

34. The impounding of water requires a licence under the terms of the WRA, and the Reservoirs Act 1975 provides a safety regime for the larger raised reservoirs, ie

those designed to hold more than 25,000m^3 of water above the natural level of the adjoining land. The latter act is predominantly concerned with the safety of dams.

Sewerage

35. Sewerage is the transfer of wastewater by sewers, which may be pipes or open channels. 'Drain' and 'sewer' are defined in S219(1) of the WIA. To all intents and purposes, a single curtilage is served by a drain, whereas a sewer collects the drainage from more than one curtilage. A lateral drain is that section of drain which runs from the curtilage to the collecting sewer.

36. Surface water sewers, or storm sewers, collect and convey rainwater to a nearby watercourse. Foul sewers convey domestic sewage and wastewater, together with trade effluents, for treatment at waste water treatment works (WWTWs). Modern sewerage employs 'separate' systems, so that surface water from roofs and paved areas is excluded from the foul flows conveyed for treatment. Older systems were generally 'combined'. Any sewer may suffer infiltration by groundwater.

37. Storm sewage is that amount of wastewater which, as a result of rain or snowmelt, is over and above the daily normal dry weather levels expected at the WWTW.

38. Combined sewer overflows (CSOs) discharge to streams/rivers, or the sea/estuaries. These discharges are regulated by consents or environmental permits, issued by the EA, but frequent overflows (or breaches of the consent/permit conditions) may indicate that the sewerage system is overloaded and cannot satisfactorily accept any further connections.

39. The construction, operation and maintenance of an adopted sewerage system is the responsibility of the statutory sewerage undertaker. This is normally the water company, although local authorities sometimes perform the necessary functions on an agency basis.

40. Each sewerage undertaker has a duty (S94 WIA) to provide an effective system of sewers in its area. These sewers become public sewers to which the owners/occupiers of premises, and the owners of private sewers, have a right to connect (S106) and thereby drain foul water and surface water. Under S106B (to be inserted by S42 of the 2010 Flood and Water Management Act (FWMA), the standard of construction of the lateral drain, and arrangements for its adoption by the undertaker, are to be the subject of an agreement under S104. Owners/occupiers may requisition a sewer (S98) or, in circumstances where environmental problems would otherwise arise, the undertaker may be obliged (S101A) to provide one.

41. A sewerage undertaker cannot refuse to allow connection, or dictate where such a connection should be made, on the grounds that some part of the sewerage system is overloaded (see Barratt Homes Ltd v Dwr Cymru Cyfyngedig). However, planning permission can be refused on the basis that the existing sewerage system is unable to cope with the wastewater flows likely to be generated by the proposed development. This may be because of limitations in the size of the pipes; in the flow rating of pumping stations; or in the capacity of the WWTW that is served by the system.

42. Under S99 of the WIA, a developer may fund the relevant proportion of the works needed to overcome inadequacies in the sewerage and treatment arrangements. Nevertheless, these can be expensive works which small-scale development could

not support.

43. The discharge of trade effluent to a public sewer requires the undertaker's consent. Such consent may be subject to conditions (S121 WIA). S122 affords the applicant a right of appeal against the undertaker's decision, or its failure to reach a decision.

44. Careful consideration should be given to permitting any development that would drain to a public sewer in situations where there is clear evidence to show that the sewerage system is overloaded, or where policies/guidance indicate that the limited capacity which remains is reserved for essential development. In themselves, decisions to allow small developments might have little impact on the quality and frequency of discharges from the system, but incrementally such decisions can have significant effects.

45. The sewerage undertaker may have long term plans for works to improve the system, but priorities change and the works themselves may take a long time to complete. A condition to the effect that development should not be occupied until such works have been carried out should only be attached if there is a firm indication that the works are likely to go ahead in the foreseeable future. Inclusion of a project in the water company's AMP may provide the necessary reassurance, but a signed contract is better. Certainly, Inspectors should be cautious of any arrangement whereby newly constructed housing would be left vacant pending completion of the improvements. An agreement (S106 TCPA) between the developer and the undertaker might overcome the difficulty. Alternatively, planning permission might be subject to a planning condition that development should not begin until the undertaker's scheme is complete; in such a case, consideration should be given to the likelihood of the scheme being carried out within a certain timescale and to the potential consequences that might arise if this did not happen.

46. In circumstances where the undertaker is unable to provide sufficient sewerage/treatment capacity to serve a proposed development, the developer might suggest use of a package treatment plant; in such cases the EA's view of the proposals would be an important consideration. If the package plant is to remain in single ownership, it is reasonably likely that the quality and quantity of effluent from it can be effectively regulated by the EA. However, if ownership is to be shared amongst occupiers of a housing development, for example, it is difficult for the EA to enforce conditions of the discharge consent, and proper maintenance and operation of the plant cannot be assured. If a joint management company is proposed, there should be specific and legally binding arrangements in place, to ensure effective control of the plant, before permission for the development is granted.

Sewage Disposal

Appropriate disposal system

47. All foul sewage needs an appropriate disposal system. Before submitting a planning application, developers are advised to consult the sewerage undertaker and, where no mains sewerage is available, the EA on the proposed arrangements for foul drainage (PPS23 Annex 1). In urban areas the Sewerage Undertaker will invariably provide the relevant treatment facilities, but in rural conditions individual dwellings or small groups of properties may discharge to small private facilities.

Non-mains sewerage

48. The use of private facilities raises amenity considerations. In Wales, paragraph 12.4.3 of *Planning Policy Wales* advises that non-mains sewage proposals "…should be the subject of an assessment of their effects on the environment, amenity and public health in the locality.". Annex A to Circular 3/99 (10/99 in Wales) on Non-Mains Sewerage sets out the approach to considering the sewerage and sewage disposal for new developments. Paragraph 3 says that "…the first presumption must always be to provide a system of foul drainage discharging into a public sewer" and that this should be done in conjunction with the Sewerage Undertaker for the area.

49. The next paragraph indicates that if, by taking into account the cost and/or practicability, it can be shown that connection to a public sewer is not feasible, a private sewage treatment plant may be considered. Examples of high costs or impracticality might be the requirement for a long length of expensive sewer or pumping main, or the need to cross a major obstruction such as a motorway or a wide river. Even so, this may not represent disproportionate cost, or be unduly impracticable, for a substantial development.

Septic tanks

50. The Circular advises that a septic tank should only be considered if the developer demonstrates that connection to either a public sewer or a private treatment plant is not feasible.

51. Nevertheless, the EA may object to a private treatment works even if it is feasible in practical terms. Indeed, it is the EA's policy increasingly to oppose the use of private treatment works in areas served by a public sewer, even if that sewer is overloaded. This is because private works tend to be poorly maintained and/or incorrectly operated; as such they generally pose a risk to the quality of the receiving water. In a 2004 appeal decision, the National Assembly for Wales endorsed the policy. Inspectors should therefore have very good reasons for departing from the policy, if it is presented at appeal.

52. Further acknowledgement of this position is given by 2002 amendments to The Building Regulations 2000 (Approved Document H1) which indicate that if direct/indirect connection to a public sewer is not reasonably practicable, the preferred option is for either a septic tank which has an appropriate form of secondary treatment or another wastewater treatment system or, failing that, a cesspool.

53. Septic tanks have been used quite widely in the past for rural properties and they provide a degree of treatment for foul sewage. They retain most of the solids, which then have to be removed by tanker from time to time, and they allow partially treated effluent to percolate into the ground. Sewage discharges to the groundwater (or to surface water) require a discharge consent under S85 of the WRA, and the EA have powers to prohibit polluting discharges under Section 86.

54. In considering the possible use of a septic tank, Annex A to Circular 3/99 (10/99 in Wales) requires full assessment of 11 separate matters, namely:

The contravention of recognised practices
An adverse effect on water sources/resources
A health hazard or nuisance
Damage to controlled waters
Damage to the environment and amenity
Overloading of the existing capacity of the area
Absence of suitable outlets
Unsuitable soakage characteristics
High water table
Rising groundwater levels
Flooding

If any one of these considerations shows that the proposed development would be likely to lead to significant environmental, amenity or public health problems in the area, that would normally be sufficient to justify dismissing the appeal.

55. The criterion 'contravention of recognised practices' includes consideration of the EA's '*Groundwater protection: policy and practice'.* For aquifers, that document identifies three Source Protection Zones around groundwater abstraction points. Within the Inner Source Protection Zone (Zone I), it is the EA's policy not to accept sewage discharges to the groundwater. Therefore, apart from mains sewerage, the only acceptable disposal method is the use of a sealed cesspool (see paragraphs 60 and 61 below).

56. In considering possible 'damage to the environment and amenity', particular care should be taken to avoid damage to SSSIs, AONBs and public open spaces, bearing in mind also that a proliferation of septic tank discharges can cause considerable harm to the water environment.

57. The discharge of effluent from a septic tank will be into the ground, via an appropriate distribution system of filter drains and is therefore a potential source of pollution of the groundwater. The distribution system needs to be properly designed taking into account the results of the ground percolation tests carried out in accordance with BS 6297: 2007 – Code of practice for the d*esign and installation of drainage fields for use in wastewater treatment*.

58. Provision of a septic tank to serve a dwelling is permitted development, under the terms of Class E, Part 1 of Schedule 2 to the (1995) General Permitted Development Order (GPDO), unless it is between the dwelling and the highway; within 20m of the highway; has a capacity of more than 10 cubic metres; is outside the curtilage of the dwelling; or serves more than one dwelling. In other circumstances, planning permission is needed and Inspectors should have good evidence that the ground has adequate soakage characteristics, and that an appropriate area of land for the percolation system can be provided within the Appellant's control before such permission is granted. It is unlikely to be acceptable to allow a development subject to a condition that percolation tests are carried out at a later stage.

59. Also, it should be borne in mind that the discharge from a septic tank may still need consent from the EA, even if the tank itself is permitted development. In all cases, effluent that is discharged to the ground must be discharged above the level of the water table. High, or rising groundwater levels may therefore preclude the use of a septic tank, as would a propensity to flooding.

Cesspools

60. Properly installed watertight cesspools, from which the effluent is frequently removed and effectively treated, can provide technically acceptable means of foul sewage disposal. Circular 3/99 (10/99 in Wales) recognises however that environmental, amenity and public health problems do occur as a result of frequent overflows due to poor maintenance, irregular emptying, lack of suitable vehicular access for emptying and also lack of capacity. The Circular therefore says that similar considerations to those for septic tanks should be taken into account before allowing a development that would drain to a cesspool. The EA consider cesspools to be only really acceptable where non-mains sewerage has to be provided within an Inner Source Protection Zone.

61. BS 6297:2007 gives advice on the design of small STWs and cesspools and, for a cesspool draining one dwelling, recommends a minimum distance of 15m to a dwelling, but 25m if more than one dwelling is drained (paragraphs 8.2.1 and 6.2.2.2.1 respectively). It also recommends consideration of the prevailing wind direction and the adequacy of the vehicular access for tankers. Furthermore, in practice there is a possibility that a cesspool could leak. If Inspectors intend to allow a cesspool, they should therefore be fully satisfied that it would have adequate capacity, be properly watertight throughout its lifetime, and that proper arrangements would be made for regular emptying before it becomes full.

Private STW, Package Plants, RBCs & HiPAFs

62. Private Sewage Treatment works, in the form of package plants, use treatment processes that are much the same as those used at the bigger 'public' Sewage Treatment Works which are operated by the sewerage undertakers. In principle, perfectly satisfactory effluents can be obtained. These package plants frequently consist of Rotating Biological Contactors (RBCs) or High Performance Aerated Filter

Units (HiPAF).

63. In addition to some settlement zones, RBCs feature plates which rotate on a horizontal axis such that the bacteria living on the plate, which treat the sewage, are alternately in the liquid and then in the air. A HiPAF has settlement zones before and after the filter unit, in which the submerged filter media is artificially aerated. Both types of plant can be quite compact and can therefore be easily covered over, which is an advantage in visual terms and in the reduction of offensive odours, though they cannot be airtight because air is needed for the treatment process.

64. Where a private plant is proposed to serve a development which will always remain in one ownership (eg a factory), the EA can issue the necessary discharge consent and then monitor and enforce the effluent quality in future. Where however such a plant is proposed for a housing development, which would eventually be dispersed among many different ownerships, there can be difficulties in ensuring future maintenance of the plant and the enforcement of the discharge consent. In the latter case, the EA would have great difficulty in enforcing discharge consent conditions against any one person, though joint management companies may be formed for this purpose. An Inspector should therefore be very sure that some specific and legally binding arrangements would ensure effective control of the plant before allowing such a scheme.

Public STWs, Reed Beds and Sludge Disposal

65. 'Public' Sewage Treatment Works are provided and operated by the water companies. They have traditionally been designed to screen all incoming flows to remove gross solids and then to accept up to three times the dry weather flow of sewage for full treatment. Between three and six times dry weather flow would usually be given partial treatment by some form of settlement in storm water tanks, before discharge to the receiving watercourse, and that retained after the storm has passed would usually be returned to the head of the works for treatment. Because of the high dilution rates, above six times dry weather flow may be considered acceptable for discharge directly to a watercourse via storm water overflows. Larger works may be designed to formulae defined by the Storm Overflow Committee (Formulae A & B).

66. The final effluent, storm flows and any other discharges from a Sewage Treatment Works must have discharge consents, on which there will be a number of conditions. The quality and use of the receiving watercourse will determine the conditions. Conditions for final effluent, generally specify the 'Upper Tier' requirements (ie the concentrations which must not be exceeded in any sample) and the 'Look-up Table' requirements (which stipulate the concentration which must not be exceeded in a particular number of samples). In most cases such conditions will be specified for the ammonia and suspended solids (SS) content and the biochemical oxygen demand (BOD) of the final effluent. Other standards for parameters such as metals, pesticides, nutrients or colour may be required at certain works.

67. Traditionally, sewage treatment works have incorporated different processes in different places across the site of the works. Preliminary treatment at the works inlet removes grit, and screens remove the larger solids. Sedimentation in tanks provides Primary Treatment to clarify the raw sewage. This is generally followed by a biological Secondary Treatment stage where aerobic bacteria in activated sludge or percolating filters reduce the Biochemical Oxygen Demand (BOD) of the sewage and normally convert ammonia to nitrate. These stages are typically followed by Final

Settlement Tanks where organic material resulting from the biological stage settles out. In some cases, Tertiary Treatment is also required. Examples of tertiary processes include Nitrifying Filters, to reduce ammonia concentrations, Sand Filters/Grass Plots/Gravel Clarifiers to reduce suspended solids and BOD, and Ultra Violet light/Microfiltration/Chlorination to disinfect the effluent. The treatment is usually designed on the basis of the population equivalent BOD loading; in other words the strengths of any trade effluent discharges to the sewers are converted to the equivalent load produced by a certain number of people and added to the actual population served.

68. Most modern Sewage Treatment Works operate on similar principles, but there may be less physical separation between the various processes and, in some cases, the works may be totally/partially enclosed. This can allow the footprint and impact of the works to be reduced. Odour control will nevertheless be an important consideration if the facility is sited close to footpaths, housing or areas where people work.

69. Constructed Wetlands (or Reed Beds) are sometimes used to treat the wastewater from communities with a population equivalent of one or two thousand. Applications include the treatment of domestic sewage, highway run-off, water from airports and construction sites, leachate from landfill sites and waste water from various agricultural and industrial processes. They can provide the main treatment process, preceded only by preliminary screening and a little settlement, or they may be used as a tertiary stage to polish the final effluent. Treatment is provided in shallow gravel or earth filled beds planted with vegetation, usually Phragmites australis reeds. Effluent flows mostly horizontally through or over the surface of the bed, past the roots of the reeds, to an outlet where it discharges to the receiving watercourse. It is essentially a biological process in which complex chemical and microbial interactions occur and, if properly designed, can produce very satisfactory effluent. These systems are relatively easy to construct, operate and maintain and, although they often need more land than a conventional works, the ‘natural look’ of growing reeds may be a visual benefit in planning terms.

70. As with the sewerage system, it may be said that a sewage treatment works has only limited further capacity, which should be reserved for 'essential development'. In such cases, it may appear that to allow just one or two dwellings would not significantly affect the water environment, but incrementally such decisions can have considerable effects, and Inspectors should give serious consideration to the consequences that might follow from their decisions.

71. A Sewerage Undertaker will often have plans for future improvements to their Sewage Treatment Works. The same considerations apply as for sewer improvement schemes.

72. The increased use of onshore treatment processes, the ending of sewage sludge dumping at sea in 1998 and various restrictions on the disposal of sewage sludge to agricultural land, have led to proposals for a variety of sludge handling installations in recent years.

Surface Water Drainage and Sustainable Drainage Systems (SUDS)

73. The creation of impermeable hard surfaced areas, where none existed before, reduces the opportunity for rainfall to percolate into the ground and increases the rate of run-off from the land. This increases the risk of flooding (and pollution) of the

downstream catchment as a result of overloaded rivers and sewers.

74. The creation of more than five square metres of impermeable hard surface, in a front garden, now requires planning permission. However, householders can lay permeable surfaces (see DCLG Guidance) using permitted development rights and there are proposals to extend such rights to certain commercial and business uses (PG 5.55-5.57.)

75. SUDS (PPS25 Annex F, PG F7-F14 and TAN15 Appendix 4 in Wales) seek to mimic natural drainage arrangements through systems designed to store water, slow its flow and encourage its infiltration into the ground. Available techniques vary in complexity from water butts through to engineered wetlands; typically, a combination is used. The most appropriate arrangement is determined by the nature of the site and the development proposed; infiltration systems may not be a practical option at some locations. Whatever system is used, its long term effectiveness will depend on proper maintenance and, as things stand, this is to be funded by the developer.

76. The need to limit surface water run-off from new development is best dealt with at source, and at an early stage in the design process. PPS1, PPS25, TAN15 (in Wales) and some development plan policies, encourage the use of SUDS for this purpose. Information (FRAs) submitted in support of proposals should demonstrate how run-off from the developed site would be no greater than it was before, for rainfall up to the severity of a 1% annual probability event, bearing in mind the effects of climate change.

77. Part H of the Building Regulations imposes certain requirements, in terms of drainage from roofs and paved areas. It also sets out an order of priority for the removal of the drained water from the site; infiltration systems are preferred to a discharge to a watercourse, which in turn is preferred to a discharge to sewer.

78. Once Section 32 of the FWMA is in force (probably 2011), any new construction works which have implications for surface water drainage will be subject to the requirements of Schedule 3 of the FWMA. This is irrespective of whether planning permission is required for the works. Drainage systems will need approval by a SUDS approving body (SAB), which would normally be a county council or unitary authority, following consultation with bodies responsible for management of the receiving water or pipeline, such as the EA, sewerage undertaker or highway authority. Indeed, under the terms of Schedule 3, the S106 WIA right of connection to the public sewer following construction works is qualified by the need for such approval.

79. Schedule 3 also makes the following provisions. Application for approval of the drainage system can form part of an application for planning permission or can be made separately. Approval, which may be subject to conditions, should only be granted if the system meets national standards for sustainable drainage. Consultation on these standards took place in 2010. Systems must be adopted and maintained by the SAB, unless the drainage serves a publicly-maintained road or a single property. Once the necessary regulations are in place, there will be a right of appeal against decisions concerning applications for approval and the duty to adopt. (Introduction of the appeal system is likely to be phased, starting with larger developments.)

80. Pending formal adoption arrangements, an Interim Code of Practice promotes the

use of model agreements designed to ensure that responsibility for maintenance of the SUDS would be assumed by the LA, highway authority or sewerage undertaker, as appropriate; these agreements could be secured by planning obligations. In the absence of such an obligation, and pending any change in the law regarding the adoption of these drainage arrangements, a planning condition could be used to encourage the proper use and maintenance of SUDS in development. PINS have published conditions which might be suitable, subject to the particular circumstances of the case and to the requirements of local development documents (LDDs).

81. For surface water drainage that does not require approval under Schedule 3, Section 42 of the FWMA qualifies the S106 WIA right of connection to a public sewer. Such connections must be subject to a S104 WIA agreement which makes provision for adoption of the connection and for the standard of construction. Where such a connection is to be made, it should meet published government standards unless otherwise agreed.

82. As a general guide, pending publication of government standards, connections should be designed to cope with a 1 in 30 year rainfall event. It may be acceptable for rainfall in excess of this to flood nearby ground for short periods, but the site should be designed to channel the water away from vulnerable areas.

83. Surface water drainage from a development should be designed to mimic drainage from the undeveloped site, so far as is practicable. Demonstration of this is a requirement for all FRAs, even for sites in zone 1.

84. The use of SUDS should be encouraged, even in situations where there is no development policy or supplementary planning document in place to guide their provision. Pending a statutory requirement for such schemes, consideration should be given to securing the use of SUDS in any development that would otherwise increase flood risk elsewhere in the catchment. An exception to this might be small developments, of perhaps 10 dwellings or less, where flood risk has not been raised by the parties and the case is being dealt with by the written representations procedure. For larger developments and in all cases where increased flood risk is an issue, but the use of SUDS has not been suggested, Inspectors will need to go back to the parties for their views on possible conditions.

85. Where a SUDS scheme is to be used, arrangements must be made for its long term maintenance; this is best achieved through a planning obligation worded in accordance with model agreements set out in the Interim Code of Practice . In the absence of such an agreement, and subject to the views of the parties involved, arrangements for the management and maintenance of the SUDS can be addressed through a suitably worded condition. The wording of such a condition would depend on whether or not a SUDS scheme has been proposed and, if so, whether the proposals make suitable provision for ensuring that the scheme will continue to operate properly over the lifetime of the development.

86. If an appropriate SUDS scheme has been submitted with the proposals, but without details of implementation, management and maintenance, the condition might be worded:

No development shall take place until details of the implementation, maintenance and management of the sustainable drainage scheme have been submitted to and approved by the local planning authority. The scheme shall be implemented and thereafter managed and maintained in accordance with the approved details. Those

details shall include:

a timetable for its implementation; and

a management and maintenance plan for the lifetime of the development which shall include the arrangements for adoption by any public body or statutory undertaker, or any other arrangements to secure the operation of the sustainable drainage scheme throughout its lifetime.

87. If a SUDS scheme is required, but nothing suitable has been proposed, the development might be conditioned along the following lines:

No building hereby permitted shall be occupied until surface water drainage works have been implemented in accordance with details that have been submitted to and approved in writing by the local planning authority. Before these details are submitted an assessment shall be carried out of the potential for disposing of surface water by means of a sustainable drainage system in accordance with the principles set out in Annex F of PPS25 (or any subsequent version) [Appendix 4 of *TAN15* in Wales], and the results of the assessment provided to the local planning authority. Where a sustainable drainage scheme is to be provided, the submitted details shall:

provide information about the design storm period and intensity, the method employed to delay and control the surface water discharged from the site and the measures taken to prevent pollution of the receiving groundwater and/or surface waters;

include a timetable for its implementation; and

provide a management and maintenance plan for the lifetime of the development which shall include the arrangements for adoption by any public authority or statutory undertaker and any other arrangements to secure the operation of the scheme throughout its lifetime.

88. As always, the framing of condition(s) should be adapted to suit the circumstances of the case and the requirements of the local development framework (LDF).

Flooding

Introduction

89. Flooding often causes misery and, despite the EA`s flood warning system, can result in loss of life. It places heavy demands on the emergency services and its consequences can be very expensive in financial terms. Following events in the 1990s and 2000s, there is no longer certainty that home insurance (and therefore mortgages) will be available in areas at risk from flooding.

90. Riverine flooding results from high rainfall, or a rapid thaw of lying snow, generating run-off that cannot be accommodated in the river channel. Coastal flooding however is the result of major storms and wave action, often associated with tidal surges, which create high waves that inundate the land, overtopping or breaching any coastal defences that may exist.

91. Localised flooding can occur practically anywhere as a result of heavy rainfall overloading the local drainage system, or possibly due to blockages of streams and

culverts.

92. Policy in relation to flood defence, in England, is determined by DEFRA. Their responsibilities include setting policy aims, objectives and targets for the Operating Authorities (EA, IDBs and LAs), providing guidance, funding a research and development programme and grant aiding flood defence schemes which meet the Government's criteria. With DCLG's land use planning policy responsibilities both departments work together on policy in relation to development and flood risk matters.

93. PPS25 makes it very clear that flooding from any source may be a reason to refuse planning permission. In Wales, TAN15 includes similar advice.

94. The responsibility for safeguarding land and property from flooding rests with the owner. Nevertheless, in the interests of the wider social and economic wellbeing of the country, the Government aims to reduce the risks from flooding to people, property and the natural environment. Following widespread flooding in the 1990s and 2000, and in anticipation of future development pressures, PPS25 was issued in 2001. This made it clear that Government was looking for a step-change in the responsiveness of the land-use planning system to the issue of flood risk. A significant change did occur, but rising concerns over the effects of climate change and a need for further clarity over the Government's approach to sustainable development led to the publication of PPS25 in December 2006, superseded by a new version in March 2010. Guidance on the implementation of this policy was published in June 2008, in the PPS25 Practice Guide, which was revised in December 2009. They have yet to take account of the Flood Risk Regulations (2009) and the FWMA. The Regulations are in force but dates have not been set for the main provisions of the Act to come into effect.

95. The EA provides the lead advice on flood risk in relation to land use planning and is a statutory consultee on planning applications where a FRA is required. As at January 2011, we understand that the EA are changing their approach to advising LPAs on flood risk in relation to individual applications. They will continue to advise the LPA on the potential risk, within the context of PPS25, and make it clear if they consider that flood risk levels are inappropriate and why. They will also recommend that the LPA request advice from other bodies where they think it appropriate. However, they will no longer provide a decision on whether a proposed development is appropriate and whether the risk can be managed. The EA consider that is for the LPA, who are better placed to take into account other factors which are not in the EA's remit, such as structural safety, emergency planning, and building resistance and resilience measures. The EA have drafted internal guidance on the new approach, which is yet to be finalised, but they have already begun to apply it. They intend to issue external guidance once they have concluded discussions with DCLG.

96. The FWMA gives the EA (in England) and Welsh ministers (in Wales) overall responsibility for flood risk management. Under the terms of the (2009) Flood Risk Regulations, which transpose the Flood Risk Directive (2007/60/EC), the EA must assess and manage the risk of flooding from the sea, main rivers and reservoirs, whilst 'lead local authorities' (county councils or unitary authorities) have the equivalent responsibility in relation to flooding from ground and surface waters. In support of this, various specified authorities (such as internal drainage boards, highway authorities and water companies) are required to provide relevant information on request. Responsibility for publishing flood risk maps, assessments and management plans (regardless of the source of flooding) lies with the EA.

Climate change

97. Climate change has a significant effect on flood risk. Rainfall patterns are shifting; we expect to see more days of rain in future and an increase in the average intensity of rainfall events. Sea levels are also rising, although the effect of this is coloured by the fact that the land mass in England is generally falling in the south-east and rising in the north and west. Annex B to PPS25 (or Appendix 2 of TAN15 in Wales) provides detailed advice on the allowances that should be made, for climate change, when considering the future risk of flooding from rivers and the sea.

Flooding from rivers, drainage systems and other inland sources

98. A number of factors, such as the previous rainfall pattern and the moisture already in the soil, can greatly affect the chance of flooding. But, increasing the impermeable area within a catchment, by providing hard surfaced development, will increase the run-off to the watercourses, unless mitigating measures have been employed.

99. Surface water flooding occurs when the quantity of water cannot pass downstream because of inadequate pipe or channel capacity, or quite often because of constrictions at bridges or culverts. Any constrictions that exist in rivers can be made much worse by trapped floating debris which, apart from tree branches etc, in major floods, can even include cars or caravans. Sewers and other surface water drains can also become blocked by debris, after a heavy rainfall event, but serious flooding as a result of inadequate drainage, such as that experienced by residents of Hull in 2007, is more commonly caused by inadequate capacity in the system.

100. Groundwater flooding occurs when underground water levels rise above the surface. This is most likely to occur in low lying areas, above chalk or sandstone. Here, water levels rise gradually during the winter and subside slowly during the summer. Such flooding, when it occurs, can take weeks or months to dissipate.

101. When river flooding occurs, built development within the flood plain will both impede the passage of flood water, and at the same time reduce the capacity of the flood plain to store the volume of flood water. The storage of water in washlands reduces the volume which needs to be carried downstream until the peak flows subside, when the stored water can drain back into the normal river channel. Both the obstruction of water flows and the loss of storage capacity will raise flood water levels to some extent in the area, thereby increasing the severity of the flooding, and probably causing more properties to be flooded. The obstruction of flood flows will increase water levels upstream, whilst the loss of storage will increase levels downstream.

102. The EA have flood defence powers in relation to all main rivers, but there are also many non-main watercourses for which the LA have powers under the Land Drainage Act 1991. Land drainage consents are required from the EA for developments on, over or under a river and close to a riverbank.

103. The amount, location and duration of rainfall is a very variable matter. There is no absolute maximum storm. However, statistically the severity of a particular storm can be assessed in terms of its rainfall intensity and duration. The severity of storms is now described in terms of their percentage probability of occurring in any one year. This helps to explain the fact that, just because there was a rainfall event of that magnitude last year doesn't mean there is any difference in the probability of another one occurring this year. Statistically, a 1% flood has a 26% probability of occurring once in 30 years and a 49% probability of occurring once in a typical lifetime of 70

years.

Coastal flooding

104. Sea defences may protect the general coastline from the sea. They may also extend up tidal reaches of rivers, thereby protecting the land behind them from flooding.

105. Significant proportions of the coastal floodplains have been developed over the years with, in many cases, associated coastal defence works. Hard defences such as sea walls are expensive to construct and maintain. They can still be overtopped, breached or have their foundations washed out and this may become more likely as a result of climate change. If flooding from the sea does occur, this can be very rapid and the consequences may be severe.

106. Where tidal defences protect sizeable developed areas, there is little choice but to maintain them, though there are few instances in which they are likely to be extended. In some places, such as areas of coastal squeeze where coastal features in front of a sea defence are being degraded, it may be considered more sustainable to adopt a policy of managed retreat (or managed set-back) to allow the sea to encroach naturally onto the land, to a new line of defence. This would be reflected in shoreline management plans. National policy (PPS25 Supplement: Development and Coastal Change) requires such areas to be identified as Coastal Change Management Areas (CCMAs) wherein particular policies will apply. The development of salt marshes or mud flats in this way can itself create a soft defence feature, which at the same time will probably increase biodiversity. There are a number of possible options between these two extremes. Proposals for development within a CCMA should be considered against policies designed to secure compatibility with the long term objectives for that Area.

Flood zones

107. Table D.1 of PPS25 defines flood zones 1, 2 and 3a according to their expected probability of flooding from rivers and the sea if flood defences did not exist. It does not distinguish between developed and undeveloped areas. The annual probability of flooding is low (<0.1%) in zone 1 and medium in zone 2. (In zone 2, the annual probability of flooding from rivers is 0.1-1.0% and from the sea is 0.1-0.5%). Zone 3a includes all areas where the probability is greater than this.

108. Zone 3b is the functional floodplain (PG 4.87-4.95). Unlike the other zones, it takes flood defences into account and is not rigidly defined on the basis of one particular probability criterion. It is that area where water is expected to flow or be stored at times of flood and it should be agreed between the EA and the LA on the basis of flooding probabilities that take local circumstances into account. It can even include developed areas, such as car parks and roads, that are intended to operate as washlands during flood events.

109. The EA's website has a flood map of England and Wales which gives both a preliminary indication of areas that are in zones 2 and 3a, and provides some details of where flood defences exist. It also shows the EA's assessment of the likelihood of flooding, bearing in mind the presence of such defences; however, this does not affect definition of the flood zone for the purposes of PPS25. In Wales TAN15 defines flood zones in a slightly different way and includes Development Advice Maps which define the zones to which the policies apply.

110. Whilst more detailed and precise maps have been produced for certain areas of likely future development, the EA's website flood map is generally indicative and cannot be used for individual properties. Also, it takes no account of sources of flooding, other than rivers and the sea, or of the potential impact of climate change.

111. The EA has also produced an initial map of areas susceptible to surface water flooding. Until it is developed further, this map is only available to LAs.

112. In accordance with the 2009 Flood Risk Regulations, the EA will publish (by 22 December 2013) flood hazard maps and flood risk maps for each river basin district. These will take account of surface water flooding information provided by the (county council or unitary authority) lead local flood authority. The maps will indicate the numbers of people and types of activity that are likely to be affected by flooding, as well as the extent, depth and flow of water that is likely to arise during particular flood events. They will be reviewed by no later than 22 June 2019.

Flood risk assessment and the sequential approach to planning and development control

113. An FRA, which is fit for purpose, aims to ensure that flood risks of all kinds are taken into account in the location and design of new development. In these terms, it is the first step in the appraisal process. Appendix B of the PG provides a checklist of matters for inclusion in an FRA.

114. In terms of location, information within an FRA should enable the decision maker to ensure that, wherever possible, development in a flood risk area is avoided. In design terms, the FRA should take climate change into account and should consider the effects of flooding on development; the effect of development on flood risk elsewhere; and the mitigation of those effects.

115. Regional FRAs, where they exist, provide a broad overview of flood risk and may identify key areas where more detailed study is needed.

116. LPAs are responsible for Strategic Flood Risk Assessments (SFRAs). These take all types of flood risk into account, including that from overloaded surface water drains. Level 1 SFRAs are needed to inform the sequential testing of land allocations. Where it is necessary to apply the exception test to potential allocations, a level 2 SFRA is needed.

117. In addition, and in accordance with the 2009 Flood Risk Regulations, the EA will produce and publish (by 22 December 2011) preliminary FRAs for each river basin district. In addition to flood risk arising from main rivers, reservoirs and the sea, these FRAs will take account of the potential for flooding from groundwater and surface water sources.

118. A site specific FRA is the responsibility of the developer. This FRA should take climate change into account, over the lifetime of the scheme, and should provide such evidence as is necessary to support application of the sequential and exception tests. It is needed for all new development in flood zones 2 or 3 and for development of more than one hectare in zone 1. An FRA is also required for development (or change of use to a more vulnerable class) that would be affected by flooding from sources other than the sea or rivers (PPS25 E9). It should be produced in consultation with the LPA/EA and should accompany the application.

119. Planning permission should not be granted for development unless the decision maker is satisfied that sufficient information has been provided in the FRA to allow proper consideration of the risks involved. A developer's failure to provide a site specific FRA in support of an application can be a reason to refuse planning permission.

120. The detail and complexity of an FRA should be proportionate to the scale and nature of the development and to the risks involved. An SFRA, where available, should provide the starting point for a site specific FRA. Advice on the preparation of FRAs, at all levels of the planning system, is provided in PPS25 (Annex E) and in the PG (Chapter 3). It may also be the subject of policies in LDDs. Information to assist in the preparation is available on the EA's web site, but the adequacy of the FRA is ultimately a matter for the decision maker to consider.

121. Developers must prepare site specific FRAs for any proposed development in flood zones 2 or 3 and for any scheme of 1ha or more in zone 1. This is particularly relevant to windfall sites. Unless a site has been allocated for the proposed use following sequential testing, underpinned by a SFRA, it is the responsibility of developers to demonstrate that their proposals satisfy the sequential test.

The Sequential Test

122. The sequential test is the second stage in the appraisal of development, in flood risk terms, and must be applied before the exception test. Its purpose is to ensure that development only takes place in areas at risk from flooding if there are no reasonably available alternative sites at locations where the risk is less.

123. The appropriate area of search for alternative sites is across the LPA area when considering development plan documents (DPD) allocations. However, for sites that have not been sequentially tested as part of the LDF process, developers should assemble evidence of alternative sites that might be considered suitable for the type of development that is proposed. For housing, this might include information contained in Strategic Housing Land Availability Assessments. Further guidance is provided in the PG (4.15-4.45).

124. Flood zones provide the starting point for considering whether one site is at less risk than another. A location in zone 1 is therefore preferred to a location in zone 2, which in turn is preferable to a zone 3 location. However, account should also be taken of sites within the same zone, but at lower risk of flooding [see R (on application of Thomas Bates & Son Ltd) v Secretary of State for Communities and Local Government and Maldon District Council [2004] EWHC 1818], and of flooding from sources other than rivers and the sea, such as groundwater and surface water drains.

125. The sequential test should be applied to proposals for new development on sites that are known to be at risk of flooding from any source; this would include, but not be limited to, any location outside of flood zone 1.

126. Before granting planning permission for a scheme in an area at risk from flooding, the decision maker must be satisfied that the requirements of the sequential test would be met. The responsibility therefore rests with LPAs, Inspectors and the SoS; it does not fall within the remit of the EA. However, as the PG (4.28) suggests, proposals to develop sites that have not been sequentially tested as part of the LDF process, but are at risk of flooding, should be supported by evidence of pre-application

discussions with the LPA and EA over the availability of alternative sites that are at lower risk.

127. Certain types of development are exempt from sequential testing. These include minor development, such as extensions and alterations as defined in footnote 7 of PPS25, and schemes to redevelop an existing property where this would not result in an additional dwelling. Renewable energy projects are also exempt, under the terms of national planning policy, as are changes of use. However, as the PG (4.42) points out, changes of use can increase the flood risk vulnerability of a site and LPAs may wish to consider the acceptability of such changes in the formulation of LDD policies. Also, Inspectors may want to consider the sustainability benefits of schemes such as the conversion of riverside industrial buildings, to provide dwellings, and to decide whether these would outweigh the harm caused by placing people and their homes in an area where the probability of flooding is high. Certainly (PG 4.44), any change of use to a caravan site or similar occupancy (PPS25 D19-21) needs to meet the sequential test's requirements.

128. Examples decisions which apply the sequential test at appeal: APP/V0510/A/08/2076608; and APP/D3315/A/08/2086917.

129. In certain situations where the sequential test cannot deliver development that is necessary for the purposes of sustainability, for example to avoid blight, the exception test may be used. Table D.3 (in PPS25) shows the vulnerability classes and flood zones where this might apply.

Flood Risk Vulnerability

130. Some types of development, such as permanently occupied caravans, are particularly vulnerable to the effects of flooding. Table D.2 of PPS25 classifies types of development according to their vulnerability. Further advice on the application of these classifications to particular types of development (eg emergency services facilities, water compatible development, basements, critical infrastructure and tank storage facilities) is provided in the PG (4.70-4.86).

131. Table D.3 of PPS 25 identifies those vulnerability groups that are permissible in particular flood zones, subject to the requirements of the sequential test. It also identifies vulnerable groups that should not be permitted in certain zones, regardless of the outcome of the sequential test. In addition, it highlights those groups that might be permitted, subject not only to the sequential test, but also to the exception test.

132. English Heritage has also published Advice on Flooding and Historic Buildings (2010).

133. If the sequential test has been met and the vulnerability classification of the development is "appropriate" for the flood zone, as set out in Table D.3 of PPS25, there should be no "in principle" objection to the development on flood risk grounds. If it is inappropriate (as shown by a cross in the Table), the development should not be permitted. In other cases, it is necessary to apply the exception test.

The Exception Test

134. The exception test has 3 arms (PPS25 D9) and it is for the developer to demonstrate, through the FRA, that each of these is met.

135. The first is that the sustainability benefits of the development must outweigh the flood risk; guidance on the approach to be followed is provided in the PG (4.48-4.50).

136. The second arm is that the scheme must be on previously developed land that is developable, under the terms of PPS3; if it is not, there should be no reasonably available alternative sites on such land.

137. The third is that the development must not increase the risk of flooding elsewhere (where possible, it should reduce the overall risk) and that it would itself be "safe" over its lifetime, given the effects of climate change. The PG (4.53-4.69) provides advice on the safety aspects, including the need for safe access and egress. Chapter 6 of the PG addresses the design considerations, whilst Chapter 7 provides advice on the management of the residual risks which would remain after the development had taken place. These chapters expand on the guidance in PPS25 Annex G.

138. The decision maker should apply the exception test only after the sequential test and only in circumstances where there are large areas in flood zones 2 and 3 (PPS25). It is applicable to land allocations and to development control decisions, other than those which relate to minor development (PPS25 footnote 7) and changes of use. Proposals for minor development or a change of use are nevertheless subject to FRA requirements as set out in Table D.1 of PPS25.

139. Where, following application of the sequential test, it is reasonable to consider development in an area of flood risk, the decision maker should be satisfied, from the FRA, that the residual risks would be safely managed and that essential infrastructure would remain functional at times of flood. Temporary and demountable flood defences are not generally suitable for new development, but developers may contribute towards more permanent arrangements. It must also be clear that the design of the development itself takes sufficient account of the need for flood resistance and resilience [see 'Improving the flood performance of new buildings: flood resilient construction' (DEFRA/DCLG/EA 2007)] and that, where necessary, suitable flood warning and evacuation plans are in place.

140. In order to avoid worsening the risk of flooding elsewhere, development should neither increase the rate of run-off from the site, nor should it obstruct the flow or storage of floodwater on the site. Even a single building will have some impact and decision makers should be wary of allowing development which, if widely repeated, could result in a significant net cumulative effect.

141. Raising land that is subject to tidal flooding, but is not needed to convey flood water, is unlikely to affect flood risk elsewhere. That is not the case with flooding from rivers. Here, the provision of off-site storage may compensate for a loss of on-site storage, but only if it drains freely and at the same elevation. Reliance on void space, below a building, would require robust arrangements (such as a legal agreement) to prevent it from being used to hold anything that might impede flood flows or reduce flood storage. Subject to such arrangements, and to suitable flood warning and evacuation measures (PG 7.27), it may be acceptable to design a scheme with flood compatible development (such as a car park) at ground floor level and vulnerable development (such as a residential use) above.

142. Floodwater may take a considerable time to recede and Inspectors should bear in mind that residents stranded in safe havens may be reluctant to remain there. This can place additional pressure on the emergency services, at times of flood, and

thereby dilute the help available to others who are in need. Reliance on privately funded emergency transport should be viewed with particular caution, because of the difficulty of ensuring that this would be properly functioning, maintained and available when it is needed.

143. In considering the safety of access arrangements, even shallow depths of murky floodwater can be dangerous, because of unseen hazards such as lifted manhole covers. If the potential for some flooding is to be accepted, the route should be designed, and if necessary signed, with this in mind.

144. Although it is the responsibility of the LPA to apply the sequential and exception tests as appropriate at application stage, Inspectors, as the decision-maker at appeal stage, must satisfy themselves about the application of the tests, and make it clear that they have done so in their decision.

Caravan and camping Sites

145. Caravan and camping sites have often been located on coastal or riverside sites, but their occupants are very vulnerable to flooding. Caravans are likely to be swept away and it can be difficult to operate an effective warning system. Permanently occupied caravans and park home sites are not acceptable anywhere in zone 3 but could, at least in theory, be permissible in zone 2 if the exception test were to be passed. However, subject to satisfaction of the sequential test, sites for short-let or holiday caravans and camping can be permitted in zone 2 provided that robust warning and evacuation plans would be put in place; this should normally be required by condition.

Sequential approach to development at risk from other sources of flooding

146. The principle of directing development towards areas of low flood risk, wherever possible, also applies to other sources of flooding apart from rivers and the sea. With existing data, it may not be possible to establish the probability of flooding from such sources. However, expert judgement may allow areas of relatively high risk to be identified thereby enabling a sequential approach in which development is steered away from those areas. Under current arrangements, advice from water companies may be particularly relevant in cases where surface water flooding is likely to arise as a result of an overloaded urban drainage system.

147. Events in 2007 showed that basement dwellings are vulnerable to flooding, not only from rivers and the sea, but also from groundwater and from overloaded surface water drains. If, following application of the exception test, a basement dwelling is to be permitted in an area of flood risk, there must be an upper level available to which occupants can escape at all times.

Residual risk

148. In order to ensure that development is safe, it is necessary to manage the residual risks that would remain after account has been taken of the site's location and any flood defences which may already exist. This might include locating the more vulnerable uses within the lowest risk parts of the site (or upper floors of buildings); installing or improving existing defences and ensuring that these would be properly maintained throughout the lifetime of the development; establishing suitable flood warning, emergency and evacuation plans; and designing the building(s) and routes of access, so that occupants and property would not be harmed.

149. In the case of public utility infrastructure, the impact of an extreme flood event on the wider community needs careful consideration. It is essential that critical infrastructure remains functional at times of flood.

150. Temporary and demountable flood defences are not (in general) considered suitable for new development, but Annex G to PPS25 gives detailed guidance on the use of developer contributions towards more permanent defence and mitigation works. Inspectors should however be aware that such defences can obstruct flood flows and reduce floodwater storage, thereby making flooding worse elsewhere in the catchment. Indeed, hard-engineered defences may not be sustainable in the long term, whereas soft-engineering techniques such as the creation, preservation or enhancement of natural flood meadows, washlands or salt marshes and mud flats can be of great value in attenuating flooding, as well as contributing to biodiversity.

151. Annex G (to PPS25) also gives advice on the resilience and resistance of buildings. Minor extensions or alterations to an existing house are unlikely to raise significant flood-risk issues, but they must be designed and constructed to the same flood protection standards as are already in place. Where new buildings are permitted in an area that could flood, including behind flood defences, they should now be designed in such a way as to minimise the harm that would arise from flooding. Such matters as the use of appropriate floor and wall materials, or high level electrical circuits, can at least speed up, and reduce the cost of, recovery after a flood.

152. Development which obstructs flood flows will increase floodwater levels upstream. Similarly, development that reduces the available storage of floodwater, within the flood plain, will increase water levels downstream. Even a single dwelling will have some effect and Inspectors should be wary of allowing development that, if widely repeated, could cumulatively have a significant effect**.** Article 4 Directions may also be implemented where permitted development might affect watercourses.

153. Schemes sometimes propose a void space under the building in order to reduce the obstruction and loss of flood storage capacity. Such voids can be used by the occupier as domestic storage space, but even if not so used, they tend to trap floating debris in storm conditions, thereby largely negating their supposed advantages.

154. Where, in exceptional circumstances and subject to suitable flood warning measures, residential development is permitted in zone 3a, it may be reasonable to provide parking (or other flood compatible use) on the ground floor, with residential accommodation above. If this ground floor area is designed to flood, it will be necessary to prevent subsequent alterations or inappropriate uses of the area that would reduce flood storage or inhibit flood flows; this can be achieved through suitably worded conditions or legal agreements.

155. If a development would be in the washlands of a river, where the consideration is simply one of flood water storage, the provision of an equivalent storage capacity may be an acceptable way of compensating for the loss caused by the development. Such replacement capacity must be at the same elevation in order to accommodate the floodwater at the same stage of the flood event, otherwise it would not properly compensate for the development. A void at a lower level would fill up too early in the flood and would not provide the required compensation. The storage area must also drain quickly back to the river in order not to remain as a ‘pond’ that would be unavailable for the next flood.

156. The FRA should show how all aspects of managing residual risk take into account the particular characteristics of a flood event which might affect that location. Further guidance is contained in Chapter 7 of the Practice Guide.

The application process

157. Developers seeking permission for a scheme in a flood risk area should conduct pre-application discussions with the LPA and the EA. This will enable the LPA to inform the developer of the information needed to support the application and allow the sequential and exception tests to be applied at determination stage. In any event, it is the developer's responsibility to produce the FRA; failure to do so can be a reason to refuse planning permission (or dismiss an appeal).

158. The EA are a statutory consultee for RSSs, LDDs, sustainability appraisals, strategic environmental assessments and specified categories of planning application where flood risk is an issue (Development Management Procedure Order 2010, Article 16 and Schedule 5). These categories include any proposal to develop land in zone 2 or 3 except for "minor development" as defined in footnote 7 on p7 of PPS25. The EA's standing advice, on development and flood risk, is provided to LPAs so that they can determine low risk applications without needing to consult the EA for an individual response. If, contrary to a sustained objection by the EA, the LPA is minded to grant permission for "major development" (as defined in the Town and Country Planning (Flooding)(England) Direction 2007), which would include a residential development of 10 dwellings or more, or 0.5 ha or more, the Secretary of State must be given the opportunity to call the application in.

Development and Flood Risk in Wales

159. Planning Policy Wales (PPW) and Technical Advice Note 15 (TAN15) provide flood risk planning policy and technical advice. The aim of TAN15 is to direct new development away from areas at high risk of flooding. To that extent it is similar to PPS25. However, the tests used to justify development in such areas differ from those set out in the sequential and exception tests of PPS25; the requirements for FRA are also different.

160. In terms of flood zones, TAN15 defines zones C1 and C2 as defended and undefended areas of the floodplain, zone C as areas within the extreme (0.1%) flood outline, zone B as an area wherein site levels should be checked against the extreme (0.1%) flood event and zone A as an area outside the extreme flood outline. Unlike England, the extent of these zones is defined by a combination of the EA indicative flood mapping, geomorphological mapping of river flood plains, and the British Geological Society drift data.

161. The EA advise LAs to undertake a Strategic Flood Consequences Assessment, as part of the local development plan process, although neither TAN15 nor PPW specify this as a requirement.

162. Decisions on development and flood risk in Wales should be based on development plan policy and the Welsh Assembly advice in TAN15.

River maintenance

163. The EA are responsible for the maintenance of those rivers and streams which are designated as main river. They therefore need ready access to the banks for this

purpose and quite often seek an unobstructed access strip along one or both sides of the river so that plant and machinery can be used in their maintenance work.

Culverts

164. The EA have published their policy regarding culverts, which states that, in general, watercourses should not be culverted because of the adverse ecological, flood defence and other effects that are likely to arise. The EA's consent is required under the Land Drainage Act 1991 and they only anticipate approving culverting where there is no practicable alternative, or the detrimental effects would be small, and where adequate mitigation is provided. Indeed, the EA seek to have watercourses that have been culverted restored to open channels wherever practicable.

Water Pollution

Introduction

165. PPS23 explains that the planning and pollution control systems are separate but complementary, and that planning authorities should work on the assumption that the pollution control regimes will be properly applied and enforced. The same advice is contained in Planning Policy Wales. The planning considerations should therefore take into account any potential for pollution, but only to the extent that it may affect the current and future uses of land. Whilst certain specified waste management activities need planning permission, as a pre-requisite to the grant of a pollution prevention and control (PPC) permit by the EA, much time can be saved by pursuing the necessary approvals, under the planning and pollution control regimes, in parallel.

166. PPS23 also points out that the need for compliance with EU water legislation should be considered in the preparation of DPDs and may be material to the consideration of individual planning applications. Amongst these, the Water Framework Directive (2000/60/EC) is notable in that it provides the main driver for protecting and enhancing water quality in the future. Statutory River Basin Management Plans will be produced which will have a direct bearing on land use planning.

167. The EA are responsible for maintaining and improving the quality of all controlled waters which include groundwater, surface water and some coastal waters. The EA's consent is required for the discharge of potentially polluting material to a surface watercourse or to groundwater. *The EA also have power to serve anti-pollution works notices on a relevant person, if they consider that pollution of controlled waters is occurring, or is likely to occur.*

168. Diffuse sources of pollution such as nitrates and pesticides applied in the course of agriculture, and various chemical compounds derived from vehicles on major roads can, in total, have just as damaging an effect as the more clearly identified point sources of pollution. Because of the national actions required to control them, it is unusual for such diffuse sources of pollution to be major considerations in planning appeals.

River Water

169. River water quality is classified under the River Ecosystem Scheme as follows:

RE1 - Water of very good quality, suitable for all fish species

RE2 - Water of good quality, suitable for all fish species

RE3 - Water of fair quality, suitable for high class coarse fish populations

RE4 - Water of fair quality, coarse fish populations *may be present*

RE5 - Water of poor quality which is likely to limit coarse fish populations.

This classification system is used to determine effluent consent standards and for comparative purposes.

170. The above classification is not easily utilised for land use planning purposes, and the EA give the following illustrations of the different standards which might be incorporated in Development Plans:

Threshold	Outcome
1. Very poor water quality	Developers turn their backs on the river and it has no recreational appeal.
2. Activities of volunteer groups in clearing rubbish and planting reeds, stabilising banks and encouraging community projects.	A less intimidating environment encourages access and a presumption against depositing litter and waste.
3. Upgrading of water quality so that it does not smell.	Developers are prepared to face the river rather than back onto it.
4. Upgrading of water quality to basic fishery standard.	Wildlife returns, as do anglers and basic forms of waterside recreation. A waterside location becomes a significant selling point for properties.
5. Upgrading to good quality fisheries.	Developers are prepared to make water a major feature of development. Contact water sports become possible and restaurants, bars and cafes are attracted to the waterside.

171. EA discharge consents are designed to prevent the deterioration of river water quality and to achieve the requirements of statutory water quality objectives, including those that flow from EU Directives. It is also important to prevent the escape of potential pollutants, such as oil, into surface water drains as these frequently discharge uncontrolled into nearby watercourses. Fuel oils and other stored substances which could harm water quality should therefore be kept within a suitable bund to prevent

spillage being washed into the surface water system or directly into the receiving watercourse. A suitably constructed bunded area also serves to protect groundwater from the effects of spillage. The Control of Pollution (Oil Storage) (England) Regulations 2001 give more detail on the location, design and construction of such installations, although the regulations do not apply in Wales.

Groundwater

172. Chemical pollution of an aquifer can be almost impossible to remedy. Water abstractions from the aquifer may have to be stopped and alternative supplies found, at very high cost. The escape of leachate from landfill sites and other areas of contaminated land may therefore be of major concern to the EA. The potential for new contamination to arise is generally controlled through provisions of the Environmental Protection Act 1990 (EPA) and The Environmental Permitting (England and Wales) Regulations 2010.

173. Land that is already contaminated may be voluntarily remediated, as part of a redevelopment project, or compulsorily remediated under Part IIA of the EPA and the 2006 Contaminated Land Regulations. These Regulations require land to be cleaned up to a standard suitable for the existing or proposed use. Defra Circular 01/2006 provides statutory guidance for England. Part 2A Statutory Guidance on Contaminated Land (2006) was issued at the same time in Wales (albeit not as a numbered Circular) and provides similar guidance.

174. Under this regime, local authorities have a duty to inspect land within their areas. For land to be registered as contaminated there must be "significant risk of significant harm" from contaminants present on the site through an identified pollutant linkage with a receptor. If the local authority, in consultation with the EA, decide that the land is a Special Site, which includes any that would affect controlled waters, the EA becomes the enforcing authority, instead of the LA. In either case, the enforcing authority have a duty to remedy the situation by serving a remediation notice on the "appropriate person" who may be the person that caused the contamination to be present on the land, or the owner, or the occupier of the land.

175. With the introduction of this regime and the encouragement to redevelop previously developed land, Inspectors should be aware that detailed site investigation may be necessary to identify possible contamination on a site before there is any certainty over what remedial action will be required. Accordingly, that information may be necessary before outline permission is granted, unless it is very clear that the proposed use will be acceptable.

176. The EA has its own *Policy and Practice for the Protection of Groundwater* under which it has identified Source Protection Zones around all significant groundwater abstractions.

177. Zone 1 – the Inner Source Protection Zone, is defined by the 50 day travel time for groundwater to the source. Within this time, biological decay is unlikely to be an effective protection against pollution and the EA would not wish to see waste disposal, sewage sludge spreading, septic tanks, farm slurry, oil storage or pipelines. This Zone is not defined where the aquifer is confined by significant clay cover.

178. The identification of Zone 2 – the Outer Source Protection Zone, is based on the attenuation likely to be provided by a 400 day travel time. Within this zone there are less restrictions, but EA policy is still to prevent waste disposal sites and the disposal

of pesticides. Again this zone is not defined where the aquifer is confined.

179. Zone 3 is the rest of the *source* catchment, where certain types of waste disposal may be acceptable, if properly contained, though there may anyhow be restrictions on nitrates and pesticides from agriculture, if the monitoring of the source shows the need. Maps identifying Source Protection Zones and vulnerable aquifer outcrops are available from the EA.

180. Irrespective of the above EA policy, The Environmental Permitting (England and Wales) Regulations 2010 prohibit the discharge of the most harmful List I Substances (including mercury, cadmium, oil and some other organic compounds) to the groundwater and greatly limit the somewhat less harmful List II Substances.

181. Special precautions are necessary to guard against, and monitor for, leakage from underground tanks and pipelines at petrol filling stations and similar installations.

ANNEX A - INSPECTORS' CHECK LIST: APPEALS AND CALLED IN APPLICATIONS IN ENGLAND (the checklist stages are different in Wales)

The effect of development on flood risk elsewhere must be addressed if it has been raised as a concern. Irrespective of this, SUDS should be encouraged in all new development other than small schemes where flood risk is not an issue and the appeal is being dealt with by the written representations procedure. The use and maintenance of SUDS should be secured by obligation or condition.

The following checklist applies to development that would be in flood zones 2, 3a or 3b and to development of more than a hectare in flood zone 1, as well as to schemes that would be at risk of flooding from any source.

Stage 1: Has the developer submitted a FRA that addresses the risk of flooding to the development and the effect of the development on flood risk elsewhere? The FRA should contain sufficient information to support the Inspector's application of the Sequential Test and Exception Test, where appropriate. It should also show how surface water drainage from the developed site would be no greater than before.

The FRA should take climate change into account and should be proportionate to the risks involved. The planning authority (or EA) should have been consulted over its production. PPS25 Annex E provides guidance on the minimum requirements.

Stage 2: Are the proposals exempt from the requirements of the Sequential Test? If so, jump to stage 4. Exemptions include development that would be in flood zone 1 and not at risk of flooding from any source; minor development (as defined in PPS25 footnote 7) such as alterations and extensions; redevelopment of an existing property where this would not create an additional dwelling; renewable energy projects; and (unless LDDs say otherwise) changes of use to anything other than caravan, or similar, accommodation.

Stage 3: Does information in the FRA demonstrate that the Sequential Test is met, by showing that there are no reasonably available alternative sites in areas where the risk of flooding is lower? If not, the proposals run contrary to one of the fundamental aims of government policy and there is no need to consider flood risk further.

Stage 4: Consider the development's Flood Risk Vulnerability against the classification in Table D.2 of PPS25, as clarified by the Practice Guide (4.70-4.86). Table D.3 indicates the classes of development that are permissible in particular flood zones, as well as those that are not. The remainder are only permissible if the exception test is met.

Stage 5: Apply the Exception Test to proposals for "essential infrastructure" in zones 3a or 3b; to proposals for "highly vulnerable development" in zone 2; and to proposals for "more vulnerable" development (such as housing) in zone 3a. This test should not be applied unless the Sequential Test has been met. The Exception test has three arms, each of which must be satisfied.