The Planning Inspectorate
Yr Arolygiaeth Gynllunio

Inspector Training Manual | Index

How to use the Inspector Training Manual

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

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

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

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

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

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

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

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

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

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

The Knowledge Centre

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Role of the Inspector


What's New since the last version

Changes highlighted in yellow made **7 February 2020**:

This chapter has been significantly updated.

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The Planning Inspectorate

1. The Planning Inspectorate is a joint Executive Agency of the Ministry for Housing, Communities and Local Government (MHCLG) and the Welsh Government.

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

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

   - Planning, enforcement and listed building appeals
   - Applications which have been 'called-in' by the Secretary of State or Welsh Ministers

- National Infrastructure Applications/Developments of National Significance
- Development plan examinations
- Rights of Way and other specialist casework
- Work for other government departments (including the Departments for Environment, Food & Rural Affairs and Transport)

4. Our purpose and vision are as follows:

Purpose[1] ***–*** *The Planning Inspectorate deals with planning appeals, national infrastructure planning applications, examination of local plans and other planning and specialist casework in England and Wales, delivering impartial decisions, recommendations and advice to customers in a fair, open and timely manner.*

Vision[2] *- To provide a customer-focused, professional centre of excellence as trusted, independent and innovative planning experts, meeting the Government's objectives at a local and national level whilst working with others to improve the planning system.*

Values *– Openness, Fairness and Impartiality.*

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

The Planning Inspector and the Secretary of State[3]

6. Some Inspectors are employed by the Planning Inspectorate (salaried Inspectors) and others are appointed on a contract basis to work on specific cases (non-salaried Inspectors – NSIs).

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

- **'Transferred casework'** – This is where you are appointed by the Secretary of State to determine appeals. You are not acting as their delegate in any legal sense, but are required to exercise your own independent judgement, within the framework of national policy as set by government[4]. You must have the same regard to the Secretary of State's policies as they would. Schedule 6 of the 1990 Act provides the authority for planning appeals to be determined by Inspectors[5]. Most appeals are 'transferred'.

- **'Secretary of State casework'** - This includes applications which are 'called-in' (under section 77 of the 1990 Act)[6] and appeals which are 'recovered' by

[1] From Strategic Plan 2019 - 2024 and The Planning Inspectorate Annual Report and Accounts 2018/19.
[2] From Strategic Plan 2019 - 2024.
[3] Reference to the Secretary of State should be read to include the Welsh Ministers
[4] See paragraph 21 of Suffolk Coastal District Council v Hopkins Homes Ltd [2017] UKSC 37
[5] Schedule 14 of the Act applies to footpath and bridleway orders. Different legislation applies to some other types of casework – for example, Schedule 3 of the 1990 (Listed Buildings and Conservation Areas) Act, Schedule 15 of the Wildlife and Countryside Act 1981 and Schedule 6 of the Highways Act 1980 (public rights of way)
[6] See *Procedural Guide: Called-in planning applications – England*

the Secretary of State (under Schedule 6 of the Act)[7]. In both cases you write a report with recommendations and the final decision is made by the Secretary of State. You are the Secretary of State's representative and must write your report and make recommendations in the context of the Secretary of State's policies.

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

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

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

The 'Franks' Principles

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

Openness means that you must get no secret briefings. All policy and evidence should be available to the parties just as it is to the Inspector.

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

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

Natural Justice and 'Wednesbury' Reasonableness

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

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

- takes into account factors that ought not to have been taken into account, or

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

- fails to take account of factors that ought to have been taken into account, or
- takes a decision that was so unreasonable that no reasonable authority would ever consider taking it.

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

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

Human Rights and equality

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

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

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

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

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

20. Further advice is also provided in 'Human Rights and the Public Sector Equality Duty'.

Code of Conduct

21. The Planning Inspectorate's Code of Conduct sets out the conduct expected of inspectors. It is based on the Franks Principles and the Seven Principles of Public Life (selflessness, integrity, objectivity, accountability, openness, honesty and leadership) set down by Lord Nolan as Chairman of the Committee on Standards in Public Life in 1995.

22. You should be familiar with the Code and abide by it when dealing with appeals. However, no code or guidance can set out all of the circumstances which might arise. If you have any doubt as to whether your conduct might pose a risk to the Inspectorate's reputation for impartiality, integrity and high professional standards, you should seek advice from your line manager.

Civil Service Code

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

Apparent bias

24. Inspectors should avoid giving the impression that they have made up their mind on an issue or are favourably disposed to any party. The Courts have decided the relevant test is whether 'a fair-minded observer to conclude that there was a real possibility that the tribunal was biased'[8]. This requires a '"look at all the circumstances as they appear from the material before it, not just at the facts known to the objectors or available to the hypothetical observer at the time of the decision."'[9].

25. In Satnam Millenium Ltd v SOSHCLG & Warrington BC [2019] EWHC 2631 (Admin) the Court accepted that different inspectors have different styles and levels of formality. The judge noted that 'Although it would avoid some problems if inspectors were [automatons], it could create others at an inquiry with feelings running high and large numbers of the public attending. This was all very much part of a legitimate judgement about how to run a difficult Inquiry in those venues, with the facilities, and participants there were.'[10] The judge also noted 'I cannot see that a degree of chattiness, or avoidance of the appearance of being rude, such as others may adopt, is indicative of a possibility of bias', although Inspectors should ensure the same level of formality is applied to all participants[11].

26. At inquiries or hearings other than a general greeting, discussions on procedure should be avoided. If you are approached by any party outside the formal session you should make clear that any queries should be

[8] Porter v Magill [2001] UKHL 67
[9] National Assembly for Wales v Condron [2007] 2 P&CR 4 Richards LJ at [50]
[10] See paragraph 234 of Satnam Millenium Ltd v SOSHCLG & Warrington BC [2019] EWHC 2631 (Admin)
[11] Ibid paragraph 251.

made in open session. Directing, loudly, a person to the LPA, the appellant or a Programme Officer often makes sense since they can often help.

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

Procedures for determining appeals[12]

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

- Written representations
- Hearings
- Inquiries

29. You should be aware of the relevant rules and regulations[13], including in particular:

- The Town and Country Planning (Hearings Procedure) (England) Rules 2000
- The Town and Country Planning Appeals (Determination by Inspectors) (Inquiries Procedure) (England) Rules 2000
- The Town and Country Planning (Appeals) (Written Representations Procedure) (England) Regulations 2009
- The Town and Country Planning (Section 62A Applications) (Written Representations and Miscellaneous Provisions) Regulations 2013 and The Town and Country Planning (Section 62A Applications) (Hearings) Rules 2013[14]

30. Appeal procedures are set out in the following documents which are available on GOV.UK or via the Knowledge Library[15]:

- Procedural Guide: Planning appeals – England[16]
- Procedural Guide: Called-in planning applications – England
- Procedural Guide: Enforcement appeals – England
- Procedural Guide: Certificate of lawful use or development appeals - England

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

[12] Where statutory procedural rules exist and a rule expressly refers to a particular type of event or action without giving the Inspector discretion as to how that event or action should be dealt with, the Inspector has no discretion to depart from or dispense with it. See paragraph 49 of the High Court judgment in *Turner v SSCLG & Others* [2015] EWHC 375 (Admin).
[13] In Wales, use the Welsh Regulations and procedural rules. These are available in the Wales Knowledge Library.
[14] Where applications are made directly to the Secretary of State - in local authority areas where the authority has been designated for not adequately performing their function of determining applications.
[15] Welsh versions of these procedural guides are available on GOV.Wales.
[16] The *Procedural Guide – Planning appeals – England* applies to planning appeals, householder development appeals, minor commercial appeals, listed building appeals, advertisement appeals and discontinuance notice appeals. It also applies to appeals against non-determination. For more information see GOV.UK.

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

Changing the procedure for determining an appeal

33. PINS has the power (under S319(A) of the 1990 Act) to determine the procedure by which appeals are decided. The criteria for determining appeals are set out in the guides referred to above. It is important that appeals are dealt with by the most appropriate procedure in order that the evidence can be properly understood and, where necessary, tested. The procedure can be changed by the Inspector – and, where necessary, should be.

34. When allocated a case you should consider whether it is an appropriate one for you to determine, and whether the procedure is likely to be suitable. In most cases the team leader/case officer will make the initial procedure decision based on the published criteria, the nature of the case and the matters at issue. Where this differs from the appellant's choice of procedure the reasons for the determined procedure will be included in the start letter. However, where the team leader/case officer are unsure of the most appropriate procedure they will, on occasion, contact the Inspector to obtain your view. If you consider that you need the views of any of the parties before you can determine the procedure then you should contact your case officer confirming what information is required and by when[17]. If you determine that an appeal should follow a different procedure from that requested by the appellant, then you should provide reasons for your decision so that these can be included in the start letter.

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

Challenges and complaints

36. Planning appeals can be challenged in the High Court[18]. However, the Courts will only be concerned with the legality of the decision and not with the planning merits of the case. There are four potential outcomes following a challenge:

- The challenge is withdrawn
- The challenge is successfully defended
- The challenge is successful

[17] See Inspector & Case Officer/Team Leader Responsibilities.
[18] Further guidance can be found in the ITM: High Court Challenges.

- The Planning Inspectorate decides not to defend the decision and so 'submits to judgment'

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

38. Complaints can be made to the Planning Inspectorate or to the Ombudsman (although the Ombudsman will normally refer the complainant to the Planning Inspectorate if our own complaints process has not been exhausted). Some complaints can be made pre-decision. However, even if a complaint is upheld, the original decision will still stand.

Conflicts of interest

Preclusions from casework

39. You should not take on any casework where there might be something in your private, professional or financial life which could conflict with your duty to act fairly, openly and impartially. You must not deal with casework where there could be a potential conflict of interest or a perception of bias.

40. The Team Leader will apply general preclusions (for instance relating to the area in which you live). However, you must also consider whether there might be a potential conflict of interest in relation to specific casework. You must always advise the Team Leader where you consider a general preclusion should apply or if you feel you should be precluded from a specific case.

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

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

42. If you have any doubts about whether there could be a perceived conflict of interest – consider:

- how might the parties to the appeal react if they knew the circumstances?

- if you are still uncertain, discuss the circumstances with your Seconded Inspector Trainer, Sub Group Leader or Professional Lead (salaried Inspectors) or the Contract Management Unit (Non Salaried Inspectors).
- do this as early as possible so that, if necessary, the appeal can be transferred to another Inspector.

43. The need to carefully consider potential conflicts of interest is illustrated by the Ortona case.[19] The Inspector had previously worked for a County Council where he had direct responsibility for the formulation and implementation of transport policies which were directly at issue in the appeal. Although 4 years had passed since he left the County Council, the Court of appeal found that a fair minded observer would have concluded that there was a real possibility of bias. The decision was quashed.

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

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

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

Involvement in PINS' casework in a private capacity

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

- not use your position as an Inspector to influence a decision or outcome
- avoid putting yourself in a position where a decision-maker (eg a LPA) or others might reasonably perceive that you have sought to use your position as an Inspector to influence a decision or outcome
- consider carefully whether making a representation or objection on a plan, NSIP or application/appeal might constrain your future ability to carry out PINS casework (for example because it might bring into question your ability to impartially consider similar issues elsewhere when carrying out your own casework)

[19] *R. (on the application of Ortona Ltd) v SSCLG* [2009]

- ensure that you do not discuss any case you are making representations about with the PINS decision maker, their manager or any other PINS staff who might be involved in the case

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

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

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

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

47 Where an NSI is involved in an appeal as part of their private practice, you should announce at the inquiry or hearing that the NSI has carried out work for the Inspectorate[20]. In written representations cases, the Inspectorate will inform the main parties in writing[21]. This does not alter the standing instruction that NSIs should not advertise or promote themselves on the basis that they have undertaken such work.

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

49 Where the business partner or colleague of a NSI appears at the inquiry or hearing, you will need to make an announcement only if the NSI him/herself has been involved in the appeal scheme.

Gifts and hospitality

50 This is covered in the Staff Handbook and in 'Acceptance of Gifts, Benefits and Hospitality' on GOV.UK. It is also referred to in the Conflict of Interest Policy.

51 The underlying principle is that you must not accept gifts or hospitality or receive any other benefits which might be seen to compromise your personal judgement or integrity. Consequently, you should never accept gifts or hospitality from anyone connected with an appeal or other casework. This includes accepting offers of a cup of tea or coffee on a site

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

visit. It is best to decline any such offers politely while being sensitive to any cultural norms.

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

53 If you are offered or accept a gift or hospitality, it may need to be reported in the Gifts and Hospitality Register kept by Governance. The 'Acceptance of Gifts, Benefits and Hospitality' provides further guidance and a form for reporting the matter via the Head of Inspectors.

Contact with the parties

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

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

Social networking websites

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

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

Annex A: Planning Decisions during Elections

Background

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

Action

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

3. The Cabinet Office has produced specific General Election Guidance 2019 for civil servants which Inspectors should be aware of. There is specific reference to public bodies such as PINS in Section O on page 41 but other sections are also relevant. In particular, the preface sets out general principles for civil servants.

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

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

In England

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

6. For casework where we make a recommendation/report to the Secretary of State it will be for the Secretary of State to consider the implications of any decision released during this period of sensitivity, so reports should

be submitted as usual. However, if Inspectors working on this casework wish to discuss any concerns, they should contact one of the Professional Leads (PfLs) for Planning, or their SGL.

7. As National Infrastructure Examinations are required to comply with a statutory time limit, once the Preliminary Meeting has been notified and the Examination Timetable has been set the examination is expected to run to the published timetable. If you have concerns about arrangements for any event or the status of any Interested Parties (IPs) (such as where MPs are/are not standing in the election or there are other candidates registered) then please discuss these with the PfL for National Infrastructure.

Transferred Appeals

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

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

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

11. Where the SGL/PfL agrees a decision should be held back, the decision should be held **by the Inspector** until the period of sensitivity is over (until 13 December 2019). Case officers are aware of these arrangements and will ensure that any decisions held back are promptly issued once sent in by Inspectors after the election.

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

Local Plan Examinations

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

14. However, given we are now in the pre-election period and in order to avoid making announcements that could be politically sensitive, the Planning Inspectorate will not be issuing any letters regarding the soundness or legal compliance of local plans, or final reports (including for fact check[22]), until after the election.

In Wales

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

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

Overview of how Inspectors work


What's New since the last version:

Changes highlighted in yellow made **28 May 2019**:

Updated paragraph 8, and added Annex A, regarding efficient and effective decision writing and preparation.

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Read this chapter together with the Role of the Inspector **chapter and the** Staff Handbook.

Your working environment

1. Working from home has advantages – no daily commute, a degree of control over the organisation of your working day and the flexibility to work around personal and domestic commitments.

2. However, home working requires you to be disciplined to work efficiently and effectively and to ensure that work does not encroach unduly on your home life (or vice versa). In addition, it can be lonely especially for those who have been used to working in a busy office.

3. Make sure your home office is large enough to accommodate a desk and chair, IT equipment including a printer, file storage and space to spread plans and documents. You should plan your space so that you can work safely and efficiently. Working on the dining room table is not advised. The room should also be well lit, heated and ventilated. You will be spending a lot of your working time in your home office!

4. PINS can arrange to supply any necessary furniture and IT equipment. You will also receive a starter pack of stationery. You can order additional supplies online using the Order Stationery form.

Organising the work

5. Case work is normally organised in weekly or fortnightly blocks by the Team Leader who builds programs of work for Inspectors 8 to 10 weeks in advance. While you are in training the standard workload will initially be 6 written representations (WR) cases a fortnight (or 3 cases a week). If hearings are introduced casework will be charted at 1 Hearing and 1 WR in a week. Once you have graduated and depending on complexity, the standard casework is 8 WR a fortnight. Generally, you are expected to have enough time in each fortnightly block to read the appeal files, conduct the site visits/hearings and write your decisions. The above numbers will be dependent on other factors such as any additional travel time deemed appropriate.

6. Make sure you establish a routine that maintains your work/life balance. A working week is 37 hours. Try to avoid working long days just because you are at home. Some Inspectors find it is best to have a definite start and finish time, even if this might vary from day to day. Whatever hours you work, it is best to put your work away at the end of each day so that you have a clear break from it.

7. Take regular breaks throughout the day during which you leave your work. Aim to have a break from the computer screen for 5 minutes in every hour.

8. PINS has performance targets. These are under consistent focus from ministers seeking to ensure development activity is not unduly held up. These translate into individual targets that all Inspectors are expected to achieve, unless there are sound extenuating circumstances. You must, therefore, organise your work in such a way to complete your decisions in a

timely manner. This **video** of an Inspector who averaged one week for event to decision has some very useful guidance. In it he also refers to *Effective Decision Writing* (see **Annex A**, below), another useful tool. Please do not leave despatching your decisions until they are near to your personal target or put decisions to one side for too long before a final read. Please despatch each decision as soon as practically possible.

9. If you find that it is taking you longer than expected to complete your work, please talk to your Seconded Inspector Trainer (SIT) whilst you are in training. Once graduated from training and confirmed in post that discussion should be with your Sub Group Leader (SGL). It is very important that you do this before any backlog of work has been built up. You should have a system to help you keep track of your work, for example a casework log. Instructions on how to view your programme report on Horizon are given in 'Inspector Horizon Instructions'.

10. With casework being programmed 8 to 10 weeks in advance it is expected that Inspectors will review all cases assigned to them as early as possible. This gives an opportunity for the Inspector and their Case Officer to identify and resolve any potential problems e.g. need to change the appeal procedure. Inspectors can view the cases assigned to them via the 'My Programme' folder in Horizon. Inspectors should refer to the 'Inspector and Case Officer/Team Leader responsibilities' guide.

11. Inspectors develop their own patterns of work. However, a common working week for new Inspectors when dealing with their written representations cases would be:

    Monday – further preparation on the case files to prepare for the site visits

    Tuesday – carry out the site visits

    Wednesday & Thursday – write the decisions

    Friday – check the decisions prior to their submission and carry out any administrative tasks

    However, many Inspectors alter this pattern and carry out preparation on the Friday or Thursday of the week before, particularly when on a full caseload as this allows the visits to be done on the following Monday, thus leaving more of the remaining week to write their decisions. This also means that if there are any problems (for example, a neighbour who should have been notified of the site visit but hasn't) there is some chance of sorting them out. It also allows some flexibility if a particular case contains a lot of written material.

12. Make sure you are on top of administration: filing; keeping your records of appeal casework up-to-date; booking hire cars; rail tickets and hotels; submitting expenses claims and filling in your movement and work record (MWR). Don't let these tasks build up, they can take more time than you might expect. You also need to make sure you keep up to date with

information about PINS procedures and planning policy. Look at the 'Home' and 'News' pages on the Intranet regularly, especially the Knowledge updates section which the Knowledge Centre uses to highlight relevant news, training material and advice. There is also a wealth of information stored in the Knowledge Library, which has dedicated sections for England and Wales, including the Inspector Training Manual. An allowance is made for this 'administration' in your working fortnight.

13. Finally, when you are working at home you have some flexibility over the hours that you work. However, it is important that you are capable of being contacted during normal office hours by Case Officers, Team Leaders and your SIT/SGL. Ensure your contact details on PINS Intranet are up to date and inform the Team Leader of any changes so that they can update Chart.

Keeping in touch

14. While you are in training, the SITs are your first port of call for work related queries. Your SIT is your line manager and is there to provide advice and support.

15. Inspectors can feel somewhat isolated given the nature of the job. Consequently, it is important that you keep in regular touch with other Inspectors. When you have 'graduated' you will be placed in a sub-group with other Inspectors who will generally meet around 2 or 3 times a year. Your Sub Group Leader and the experienced Inspectors in your sub-group are an important source of advice. If budgetary constraints allow there are usually annual training events and other courses.

16. In addition, many intakes of Inspectors keep in touch by e-mail groups and over the phone (because, after all, you've been through the same training experience!). This can be an important source of support and contact for Inspectors. However, you are strongly advised not to discuss the detail of your casework with others and you must never rely on other Inspectors to make judgements for you about your cases. You are the decision maker, not anyone else, and your SIT/SGL is there to provide support on casework matters.

17. The Forum on the Intranet contains information mainly about social matters, including Inspector Social Groups.

18. The Planning Casework Operations (PCO) process means that Inspectors work in partnership with their allocated Case Officer and you are likely to be in regular contact with both the Case Officer and the Team Leader; it is important that Inspectors read and adhere to the responsibilities set out in Inspector & Case Officer/Team Leader Responsibilities guidelines. Most communication with Temple Quay House is by telephone, e-mail and the Intranet. Any 'paper' mail is posted to you. Case files are delivered by Royal Mail (Parcelforce). You will generally need to receive and sign for the parcel. Most parcels are dispatched to arrive before 17.30 the following day.

Dress code

19. There is no dress code for any PINS staff, including Inspectors, when working in or out of the office or at events. It is up to you to decide on what you wear. The only exception to this is where it is necessary wear Personal Protective Equipment (PPE) to help ensure your health and safety.

Travel

20. Whatever mode of travel you use for work you should take account of effectiveness and cost. You are encouraged to use public transport where possible, but this is not always realistic, especially if your site visits are geographically dispersed. If using public transport this usually means the train (standard class only), bus, tram and underground. Occasionally air travel can be the cheapest option. Taxis can be used for work, but only in some particular specified circumstances.

21. The Government has a contract with Redfern Travel and all train, air and ferry tickets must be booked online using this contract. London Underground travel cards can also be booked in this way. These costs will be paid directly by PINs.

22. If you travel by car, you can use your own (for which a mileage rate is paid) or you can use a hire car. PINS has a contract with Enterprise and you book cars online. PINS will pay the hire car charge direct. However, you will need to pay for petrol and claim it back. You should only use the hire car for PINS business. You can claim back any parking costs but you are responsible for any parking fines. Some Inspectors travel by bike (for which a rate is paid). If you intend to use your own car it must be insured for business use. PINS will need confirmation of this.

23. On some occasions you may need to stay away from home overnight; for example, if a hearing or inquiry venue is too far away from your home for travel on the day to be practicable or if it is not feasible to travel and carry out all of a site visit programme from home in one working day.

24. All overnight accommodation should be booked online using the Redfern Travel contract. The costs of overnight accommodation, including breakfast will be paid directly by PINs. When you are away overnight you can claim the costs of lunch and an evening meal (no alcohol). You will need to pay for these and then claim the costs back. Receipts are needed to support claims made. Your expenses claims can be checked at any time.

25. If you are working away from home but not staying overnight you can claim a day subsistence allowance to cover the cost of meals.

26. The aim of Inspector work programmes is to minimise travel time and an element of travel time is built into casework allocations. However, additional travel time will normally be granted at the rate of half a day where the one way travel time is between 3-4 hours and a full day where the one way travel time is over 4 hours.

27. More information is provided on the Intranet guide: Travel and Subsistence policy. The rates payable for travel and the cost limits for meals and overnight accommodation are set out in Annex A to this policy.

28. Finally, remember to take your Planning Inspector identity card with you when travelling on PINs business.

Health and safety

29. PINS has specific guidance for Inspectors available on the Intranet with on line training modules.

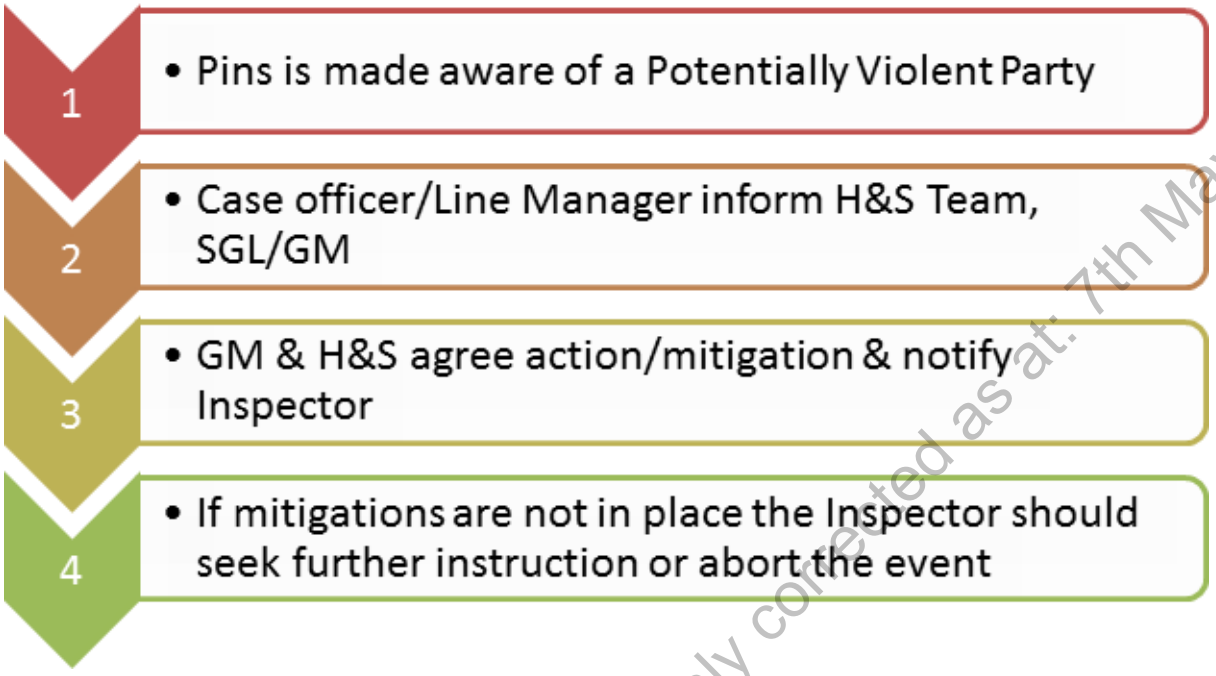
30. Working alone can lead to a sense of isolation. It is best not to bottle any problems up - instead, talk to your SIT or SGL. In addition, PINs provides a counselling and support service to staff through The Employee Assistance Programme. This Service is available to offer confidential advice and counselling in assisting you to face difficulties and help you to continue to be efficient and effective at work. More information is provided in the Staff Handbook.

31. Always drive safely. Leave plenty of time and don't rush to get to a site visit. Don't drive for long distances without taking regular breaks. If you cannot get home until late at night you can arrange to stay away overnight so that you can complete your journey safely the next day. Carefully consider any risks when carrying out site visits. You must carry the Lone Worker Protection System handset when working away from home.

32. More information is provided within the Intranet guides, specifically the Health, Safety and Wellbeing guidance and the notes on conducting site visits and Hearings and Inquiries safely. The Inspector Health and Safety Guidance also provides supplementary advice and information to that contained in the risk assessments and training modules.

Potentially violent parties procedure

33. The Inspectorate's procedure on handling potentially violent parties is summarised in the diagram below:



34. The full procedure on handling potentially violent parties is provided in a flow chart, available via this hyperlink.

Notification of Absence

35. Use the HR Self Service system (via SAP) to manage your attendance (Guide to HR Self Service). HR Self Service leave requests will be considered and signed-off by PCO team leaders. Team leaders may, when necessary, need to liaise with the appropriate SIT/SGL.

36. Notification of sick absence should be made to the Inspector Development and Support Team (IDST) without delay. IDST will notify your case manager and your line manager, who will contact you to discuss your absence.

Reading, marking and progression

37. Your casework will be read by a SIT or other Inspector Reader before it is issued until you have reached the required standard. The relevant progression scheme is set out separately.

38. Your decisions will need to be submitted in accordance with time based targets and, in terms of their content, will be marked as 'Issuable' or 'Not Issuable' as follows:

Issuable	An 'Issuable' decision is one which is free from any significant errors and so could be issued without a significant risk of a justified complaint or successful High Court challenge. However, it may not be a 'perfect' decision.
Not Issuable	A decision which is 'Not Issuable' is one that contains a significant error that would be likely to lead to a justified complaint or a successful High Court challenge. Some decisions may contain a number of 'smaller' errors. Taken individually these might not lead to a justified complaint or successful High Court challenge. However if, taken cumulatively, they would significantly undermine the authority of the decision and confidence in it, the decision would be 'Not Issuable'.

Conclusion

39. The Intranet contains a range of useful information. It is helpful to become familiar with it, particularly the location of the Guides categories page which has guides covering all casework and appeals areas as well as for further information on Human resources, Travel etc. The Library is also a valuable source of up to date information relevant to your work.

Annex A: Efficient and effective decision writing and preparation

This Annex sets out some tips for dealing with appeal casework efficiently and effectively. However, these are not instructions and different Inspectors have to find what works for them. In addition, the tips may not be applicable for each case.

To be efficient and effective means being able to carry out the casework to the required standard, as quickly as possible, without getting bogged down in peripheral or irrelevant planning or procedural matters.

Reading the file

1. Skim the file (electronic or paper) quickly so you know what's in it – check you have the key documents (application form, plans, decision notice, appeal form, grounds of appeal, questionnaire, statements, interested party comments) – and be aware of what else is on the file (eg supporting documents submitted with the application or appeal).

2. Look first at the plans and broadly understand what the proposed development is.

3. Then focus on the decision notice, grounds of appeal and statements and define the main issues from them – in most cases the main issues will derive from the decision notice – so arguably that is usually the key document. The important thing is to define and be clear on the main issues and to avoid getting caught up in peripheral matters.

4. Don't read every word in the statements – skim quickly and focus on those paras that deal with the crux of the cases – understand where the parties are coming from – what are their key arguments/the essentials?

5. Skim read letters from interested parties – do they raise any potential main issues, anything that needs to be looked at on site or anything that needs to be covered in *other matters* if they would be the losing party.

6. Set up the decision template before the site visit or event and fill in the banner heading. Type notes into the template as you prepare – eg in summary form or as a list - the main issues, key points you will want to cover in reasoning, any other matters, relevant plan policies, any procedural matters, key conditions. You will then have a framework to start with when you write up.

7. Set some time aside in the week before to start preparation (eg on Thursday or Friday) so you are aware of any main issues or other matters that need to be resolved.

8. Try to reach an initial view about what you might conclude for each main issue – ie how you might deal with it in your decision – what things will you

need to see on site to help make your mind up? But be prepared to change your mind at the site visit.

9. Make sure you have a clear list of things you need to see on site. Write this at the same time as filling in the template.

10. Make an initial assessment about whether any supporting documents or studies are likely to be essential reading (eg if the issue is the effect on daylight – a daylight study will be essential reading – if the issue is daylight and the parties are agreed that flood risk is not a concern, then the Flood Risk Assessment is unlikely to be critical).

11. Don't read documents you don't have to read. For example, if it is clear that you will be dismissing because of a main issue deriving from the decision notice (eg character and appearance), do you need to read every word of a large number of interested party comments about an issue which is not of concern to the Council or technical reports which could only relate to conditions? However, if you later decide to allow the appeal, you will need to read them in more detail. In any case, only read those parts of supporting documents that are going to be critical to your reasoning - e.g. related to a main issue, supporting a condition or providing evidence to deal with objections from interested parties.

12. If anything is missing (eg policies, plans, documents) – ask for them now don't leave it until later when it may cause delay.

Site visit

13. Try to decide how you are going to deal with the issues and what your decision will be before leaving the site. Some people find that the longer the gap between the site visit and the decision, the harder it is to reach a conclusion.

14. Try to write your site visit notes in the form of words, phrases or sentences that you will use in your decision. Or think about how you will word the key parts of your decision as you walk away from the site or on the journey home (but do make sure you drive safely). If you have time before the next site visit or if you are travelling by public transport – draft out any key points or lines of reasoning. Make sure everything you do is focused on how you will write the decision.

Writing the decision

Reaching a decision

15. Instead of writing the decision out in full, spend a few minutes initially setting out a bullet point structure (or if you did this when preparing – spend a few minutes refining it). Much of the battle is working out broadly what to say, ie how each main issue will be resolved. Don't draft your decision until you have a clear structure.

16. Usually when you return from site visits, you will know how to deal with most issues. But often there will be one or two difficult matters that you haven't resolved. Try to decide on these straight away. But don't labour on them. Going round in circles wastes valuable time. After say 15 minutes, try a different approach - leave the issue and mull it over when walking the dog or making a cup of tea or leave it overnight (it may give you a new perspective) or pick up the phone and talk with a SIT, SGL, or mentor (as appropriate).

17. Alternatively, try dealing with the easier elements of the decision first (eg other matters, easily resolved main issues, procedural matters, conditions) – not only does this feel better psychologically (look, you have written 60% already…), it subconsciously gets you into the reasoning zone. Also, it may be difficult, it is never as hard as you think – there is always a solution to everything!

18. If you are unsure which way to go on an issue, try bullet pointing the reasoning for both alternatives. Which reasoning is most robust? Don't write two alternative decisions out in full – you do not have the time.

19. Sometimes the quickest way to separate what is relevant from what is not, is to start from your conclusion (assuming you know what it is), and work backwards through the key steps in your reasoning. That way, all the deadends that you might otherwise have been tempted along just disappear.

20. Be conscientious and treat each case with the respect it deserves. But don't agonise over them. Many cases are finally balanced and there may not be a definitive right or wrong answer. Instead your decision needs to be well reasoned and justified. Once you've reached a conclusion about the decision, try to stick to it. Constantly revisiting things will just delay matters. Approach your decisions with pragmatism and confidence and be decisive.

Time management

21. Be careful about your use of time. In a programme of say 4 SVs/week you have around 1 day to prepare all four, one day to visit them, 0.5 days to write each decision to a good draft and 1 day to finalise all four decisions and to do your administration.

22. Set overall work targets – ie a good first draft of decision 1 by midday and decision 2 by 5pm – then set sub-targets within that – eg first issue by 10am etc.

23. Aim to complete your good first draft of each decision within 1-3 days of the event while the evidence and the site visit are fresh in your mind. It is also better to have four good first drafts finished by the Friday of the site visit week rather than a couple sent to Despatch and two not even started.

24. If you feel your work programme is not realistic, discuss this early on with your Case Officer. If you need additional reporting time, make sure you secure this as early as possible. Take steps to resolve any emerging backlogs early on. This is all part of managing your casework effectively. Discuss any issues with your SIT or SGL as necessary. Don't allow backlogs to build up.

25. Use a table, list or spreadsheet to manage your casework setting clear targets to complete each case.

Coverage

26. Be ruthless about what you leave in and out and how much you write on each issue and matter. See The approach to decision-making chapter (particularly, coverage, main issues and other matters). Remember *South Bucks v Porter* and don't cover winning party issues which you are not defining as main issues. The more you write, the longer it takes, and the risk of errors increases.

27. Don't include unnecessary detail. Things to avoid/limit are – descriptions of the site, surroundings and proposal which are not critical to your decision, long descriptions of policy (keep it simple unless the interpretation of a policy is vital to your decision) and reiteration of the cases of the parties.

Drafting

28. Refine your concise decision writing skills – it will pay off in the long run. Read through your decisions on another day. Read them out loud. Eliminate awkward sentences and phrases. Remove repetition. Does each sentence/para contribute to your reasoning? If the reader is left thinking 'so what', it can be excluded. Aim for elegance.

29. Consider a production line approach to decision writing – eg write four good first decision drafts, then for each in turn consider if you've dealt with all necessary arguments and points, then proof read each decision, then set them aside and carry out a final read of all four on another day. Then send all 4 to Despatch.

30. If you are struggling with the precise wording, try reading it out loud. Does your wording flow? Does it make sense? Does it say what you want it to? Imagine explaining it to a friend.

31. Dealing with conditions can take a long time. Use the PINS model conditions where you can (modified as necessary). Consider whether all the suggested conditions are really necessary? Are you sure they are? (see the Inspector Training Manual and the PPG on this).

32. Develop your own systems for proof-reading and allow enough time for it.

Other points

33. Take regular short breaks. Don't avoid having breaks or skip lunch, it is counter-productive.

34. Try to avoid regularly working long hours. The Inspector's job is mentally demanding and your efficiency is likely to deteriorate if you work very long hours each day. If necessary, talk with your SIT or SGL about the management of your casework.

The approach to decision-making

What's New since the last version

Changes highlighted in yellow made **27 February 2019**:

Advice on sensitive personal information in decisions updated, and moved to Annexe 10.

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Introduction

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

What makes a good appeal decision?

2. In summary, you should aim to ensure that your decision is:

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

3. A check list for producing robust appeal decisions can be found in Annex 7.

The main parts of a decision

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

Banner heading
Reference numbers and factual details about the appeal (see annex 5 for more information).

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

Procedural matters (if any are necessary)
This will usually only be necessary if you have to clarify how you have dealt with the appeal.

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

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

any other suggested conditions.[1] You will also need to deal with any planning obligations.[2]

Conclusion

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

Use of headings

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

Development plan, material considerations and national planning policy

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

"If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be made in accordance with the plan unless material considerations indicate otherwise." (Planning and Compulsory Purchase Act 2004, s38(6)).

7. The government's Planning Practice Guidance[3] advises that the scope of what can constitute a material consideration is very wide. Indeed, the courts have concluded:

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

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

9. The courts have confirmed that Inspectors need to make their decisions (on planning appeals and on listed building consent appeals) on the basis of the development plan and national policy which are in place at the time of their decision - rather than at the time of the event or any earlier stage. Where relevant policy has changed it is likely that you will need to offer the parties the opportunity to comment[4].

[1] See 'Conditions' for further advice
[2] See 'Planning Obligations' for further advice
[3] ID 21b-008-20140306 ('What is a material planning consideration?') – but in Wales, see Planning Policy Wales (PPW) section 3.1
[4] *Cheshire East BC v SSCLG* [20 March 2013] - "*The NPPF came into effect after the public inquiry in this case, but before the Inspector's decision. The Inspector gave the parties an*

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

11. Unless you are very sure, avoid making pronouncements about what is, or is not, a material consideration. Ultimately, it is for the courts to decide if something is a material consideration. However, the weight, if any, which should be given to a particular consideration is a matter for the decision maker's discretion.[5] Consequently, it is best to give a clear indication of why the particular matter has not been sufficient to outweigh your other findings or to be determinative (if that is your conclusion).

12. Further good practice advice on the development plan, supplementary planning documents and national planning policy can be found in Annex 2 and on some commonly occurring material considerations in Annex 3.

Coverage

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

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

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

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

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opportunity to make submissions on its effect in this case, and he applied the NPPF in determining the appeal. He was right to do so."

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

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

16. Ensure that:

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

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

Main issues

Identifying main issues

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

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

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

21. In appeals against non-determination there will be no formal reasons for refusal. However, the LPA should have made any concerns clear in its appeal statement/full statement of case.

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

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

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

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

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

- Sometimes the benefits argued by an appellant could form a main issue, particularly if the weight to be attached to them is critical and the degree of benefit is contested by the LPA. An example might be housing supply or the need for a particular type of development.

Framing main issues

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

Check - are your main issues:

- written in a simple, straightforward way?

- short - avoiding long sentences with sub-clauses?

- neutral – to avoid any suggestion that you have determined the outcome before considering the merits of the cases? So, for example: *'The effect of the proposed development on the character and appearance of the area'* rather than: '*Would the significant bulk of the building harm the character of the area*?'

- framed in such a way that they allow you to evaluate all the relevant arguments? - ie do your main issues and your reasoning correlate?

- clear and specific about the alleged harm? For example: *'the effect on the living conditions of neighbouring residents at 4 Main Street with particular regard to overlooking and loss of daylight'* – but avoid long winded main issues - if there are a number of dwellings and different concerns you may just need to refer to '*the effect on the living conditions of neighbouring residents*.'

- focused on the practical consequences of the development, rather than any technical or semantic points? – For instance, if there is an argument about whether the scheme amounts to 'over-development' or `backland development' – try to look at the underlying concern. For example, in such cases might the substantive concern be about *character and appearance* or *living conditions* - for example.

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

- that you have dealt with any topic that leads to the appeal being dismissed as a 'main issue'. An issue which leads to an appeal being dismissed cannot logically be regarded as a less important '*other matter*'? and

- that the main concerns you have identified each form a separate main issue (for instance, character and appearance, living conditions etc)?

25. Have you avoided:

    - using vague expressions such as 'amenity' which may be open to different interpretations?

    - making presumptions? For example don't refer to the effect on the *rural character* of the area if the parties disagree over whether it is rural;

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

26. Examples of the phrasing of some main issues are provided in Annexe 4.

Other matters

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

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

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

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

    - a losing appellant may be justifiably concerned if you have not addressed potential benefits (for example, that an extension might improve living accommodation) or the existence of similar developments locally or an alleged fallback position – because it could be argued that your balancing of factors, for and against the proposal, was flawed.[6]

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

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

30. There is no need to conclude on or even mention winning parties' other considerations unless you have substantive evidence on the matter.[7] This is because:

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

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

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

Issues that have not been raised by any parties

32. Exceptionally, it may occur to you that there is an issue or matter that has not been raised as a concern by anyone (including where you may consider departing from the matters agreed in a Statement of Common Ground)[8]. If so consider the following:

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

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

Reasoning

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

[7] If such a matter has been discussed at length you may wish to indicate briefly why it has not been central to your decision.
[8] See paragraphs 23 and 25 in *Claire Engbers v SSCLG & South Oxfordshire DC* [2015] EWHC 3541 (Admin).

34. Unlike the rules governing appeals dealt with at public inquiries and at hearings, the Town and Country Planning (Appeals) (Written Representations Procedure) (England) Regulations 2009 do not include a specific duty to give reasons for a decision on a written representations appeal in England. However, case law has established that there is nevertheless such a requirement in practice: 'the duty to give reasons here derives either from the principles of procedural fairness applied in the statutory context of a written representations appeal or from the legitimate expectation generated by the Secretary of State's long-established practice of giving reasons in such cases, or both'[9].

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

36. Your reasoning should take you logically to your conclusions on each of the main issues and any 'other matters' (where it is necessary to reach a conclusion on them) and then to your overall conclusions. All reasoning should be 'reasonable' in the Wednesbury sense (see the 'Role of the Inspector' chapter for more detailed explanation).

37. When drafting your reasoning:

- have you dealt with each issue separately and in turn?
- are your findings and conclusions clearly based on reasoning and not on assertion? Reasoning is where the final view on an issue follows on from your analysis – words and phrases like 'because', due to', 'as a result', 'consequently' and 'accordingly' usually indicate that some reasoning has been applied;
- is it clear from your decision that you have understood the arguments put to you and how you have dealt with conflicting expert evidence?
- have you addressed all the main arguments raised by the losing party (or parties) in relation to a specific main issue?
- have you considered that simply because a party says that something is a material consideration, it does not mean that it necessarily should be regarded as such by the decision maker if it cannot reasonably be said to be one? It would risk the decision being unlawful if an "immaterial" consideration were taken into account.
- have you assessed whether any material considerations (if before you) might lead to a different conclusion from that indicated by the development plan?
- have you considered if a dismissal could be avoided by imposing conditions?
- has your reasoning been expressed with tact? How will it be received by those reading it? Have you avoided (whether overt or implied) criticism of the parties, local and national policies, the nature of the locality or other developments that have been drawn to your attention?

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

- are your issues logically ordered? It can be best to start with issues where you are concluding that there would be harm or where there is an issue of principle - for example, relating to the location of development or housing need.
- Have you interrogated the evidence to identify any contradictions or inconsistencies and explained how you have resolved the issue? Note that where a decision turns on a matter of fact, it is sensible to cross-check that fact against all of the evidence base that has been submitted. It may be necessary to consult the parties when a contradictory matter of fact cannot be satisfactorily resolved.

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

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

39. In your reasoning, have you avoided:

- introducing problems, issues or evidence which would come as a surprise to the parties?
- Wavering / appearing irrational? Your reasoning should not appear to head broadly in one direction only to conclude the opposite;
- re-opening discussion on a matter or issue which you have already concluded on?
- exaggerating the harm or the benefits of a scheme?
- making 'helpful comments' indicating that a proposal which is to be dismissed would be made acceptable if certain amendments were made? Such comments go beyond your remit and might fetter the judgement of future decision makers. It should, however, be clear from your reasoning why what is before you is not acceptable. It is then for the parties to decide whether or not this leaves scope for a different approach in the future;
- stating that a particular matter 'adds to your concerns'. This is because it could be unclear to the parties whether, without that 'additional concern' the appeal would have been allowed or dismissed. Overall it is best practice to consider whether a particular concern would result in substantive, significant or material harm – or not.
- Using the term 'reduced weight'. In the case of *Daventry DC v SSCLG* the judge considered that the Inspector erred in law by using this term, as it was not sufficiently precise. Para 52 of the judgment states, "the term 'reduced' is not sufficiently clear – it begs the question reduced from what to what?" Terms such as 'limited' 'moderate' or 'substantial' are more precise and specific. Inspectors should also note the advice contained in para 20 of Annex 2 relating to the use of the exact terminology in policy and legislative tests.

40. Conclusions – have you:

- reached a clear conclusion on each main issue? It is best practice to conclude against the main issue as you defined it;
- made sure you have very clearly identified what the harm would be if you are dismissing?
- resolved tensions between conflicting policies and come to an overall conclusion on compliance with the development plan as a whole?
- made explicit your findings as appropriate, on the presumption in favour of sustainable development[10]? Remember (by way of shorthand broadly accepted by the Courts) that paragraph 7 of the NPPF states that there are three dimensions to sustainable development: economic, social and environmental (albeit

[10] See Annex 2 paragraphs 18-20 below and paragraphs 18-26 of the Housing Chapter

that the NPPF paras 18-219 constitute the Government's view of what sustainable development means)[11].

- where statutory presumptions apply, eg to do no harm to the setting of listed buildings or conservation areas, demonstrably applied that presumption separately from the normal balancing exercise?
- where concluding that there is harm in respect of some main issues but not others – made it clear that, despite this, the harm identified is sufficient to justify dismissing the appeal (if that is so)?
- concluded on whether any alleged benefits would outweigh any harm that you have identified? (to avoid a challenge that you have not taken relevant matters into account);
- reached an overall conclusion on the appeal? For example, the template suggests: "For the reasons given above, I conclude that the appeal should be allowed/dismissed."

41. When concluding – have you avoided:

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

Clarity and concise decision writing

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

43. When reviewing a draft of your decision:

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

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

- the decision is addressed to the parties to the case, who are well aware of the relevant facts, their arguments, the physical characteristics of the site

[11] If the development plan is absent silent or out of date the application of paragraph 14 teaches the decision maker how to decide whether the development is sustainable in consideration of the policies in the framework taken as a whole – see *Cheshire East BC v SSCLG* [2016] EWHC 571(Admin)

and its surroundings and the details of the proposals. Do you need to recite these things back to them?

- can any essential references to the characteristics of the site, area and planning history be woven into your reasoning? Are these references as brief as possible?

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

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

- is your reasoning unnecessarily detailed?

- are any references to sections of Acts essential?

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

Procedural matters

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

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

    - **the nature or scope of the proposal** - for example, if this is disputed or unclear or the description of the proposed development has been amended during the application or appeal process (see Annex 5 for more information)

    - **the plans on which your decision is based** - for example, if revised plans have been provided during the appeal process or if there is disagreement about relevant plans (see Annex 1 for more information).

    - **banner heading -** any significant variations to matters set out in the heading. For example, the description of development or the site address (see Annex 5 for more information)

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

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

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

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

- **appeals against non-determination (including from non-validation notices[12] [13])** - the LPA's objections to the proposal (or its views on what further information needs to be provided);

- **arguments that the proposal, or part of it, does not need planning permission;**

- **application for costs** – has been dealt with in a separate decision;

- **redetermination** – your approach following a successful High Court Challenge;

- **validity of the application/appeal** – your approach.

- **doubt about whether the application decision is a grant or refusal –** detailed below.

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

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

50. It should also be noted that a LPA has no power to withdraw an issued decision and issue a corrective notice without issuing a formal revocation, as confirmed by *Gleeson Developments Limited v SSCLG & ors* [2014] EWCA Civ 1118. Therefore if we receive an amended decision notice it is of no standing and should be disregarded, except in

[12] Planning Practice Guidance ID14-053-20140306 ('What steps are available to an applicant in cases where the local planning authority has served a non-validation notice?')
[13] Appeal decision reference 2213307 ('Appeal B', at page 6 (see link)) provides a suggested approach, for non-validated application appeals.

the circumstance where the notice is invalid by virtue of failing to meet the requirements set out in article 35 of the DMPO 2015.

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

52. In summary, the approach is:

- To be valid, a decision must include all of the required elements, which are set by the relevant statute (here, the DMPO). If the decision is missing required elements, it will not be valid, so a second decision can be reissued to correct it.
- There is no power for decisions to be withdrawn and reissued (*Gleeson*). Decisions can only be withdrawn by using the statutory procedure which involves the payment of compensation (ss97-100 TCPA)
- If the decision notice is not clear, the test becomes what a reasonable person reading it would conclude it means (*Carradine*, *Mannai*)
- In interpreting the decision, extrinsic evidence can be used to help the reader interpret it (*Ashford*)

53. More information is provided about the procedural matters listed above and others in Annexe 1.

Obtaining evidence

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

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

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

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

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

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

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

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

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

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

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

57. Advice on what to do if the parties provide, or seek to provide, late evidence is provided in Annex 1.

Natural justice - fairness

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

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

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

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

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

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

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

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

60. Further advice on this topic is provided in Annex 1 ('Late representations and evidence') and in 'Hearings' and 'Inquiries'.

Consistency

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

62. Consequently, consistency in the planning process is important and like cases should be decided in a like manner. A previous appeal decision is capable of being a material consideration where the previous decision is sufficiently closely related to the issues that regard should be had to it. Although you are entitled to disagree with an earlier decision (whether on the same site or elsewhere) if there are sound reasons for so doing, you should only do so where you have demonstrably had regard to it and given substantiated (which does not necessarily mean elaborate) reasons for departing from it, having regard to the importance of consistency.[20]

[19] *Wainhomes (South West) Holdings limited v SSCLG* [2013] EWHC 597 (Admin)
[20] *Fox Strategic Land and Property Ltd v SSCLG & Anor* [2012] EWHC 444 (Admin) (02 March 2012)
St Albans City & District Council v SSCLG [2015] EWHC 655 (Admin)
N Wiltshire DC v SSE (1993) 65 P. & C.R. 137
St Albans City & District Council v SSCLG [2015] EWHC 655 (Admin)

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

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

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

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

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

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

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

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

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

Proof reading, editing and typing conventions

68. Your decisions should be well presented, and visually consistent with other Inspectors' decisions. Have you followed the advice in the 'PINS Style Guide'? Including in Appendix 1 which specifically relates to appeal decisions and reports.

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

70. Further advice on proof reading is provided in Annex 6.

Advice on citations

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

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

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

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

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

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

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

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

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

75. The year should always be cited first, in square brackets. In the Journal of Planning & Environment Law (JPL), the cited year will be that of the

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

[1992] JPL page…

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

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

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

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

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

78. Listed below are commonly-used abbreviations:

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

Seeking advice

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

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

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

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

81. When seeking advice:

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

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

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

84. If a decision on the planning merits cannot properly be decided without a complicated or difficult legal issue being decided upon first, then jurisdiction might need to be recovered by the Secretary of State[23]. If this possibility arises consult with your Group Manager.

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

Annexe 1 Procedural matters and other scenarios

Amended plans and proposals

1. The '*Procedural Guide – Planning Appeals – England*'[24] advises that:

   If an applicant thinks that amending their application proposals will overcome the local planning authority's reasons for refusal they should normally make a fresh planning application. (Annexe M.1.1)

   If an appeal is made the appeal process should not be used to evolve a scheme and it is important that what is considered by the Inspector is essentially what was considered by the local planning authority, and on which interested people's views were sought. (Annexe M.2.1)

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

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

4. If revised plans are submitted with the appeal or during the appeal process you will need to consider whether to accept them and you will need to explain your approach. In doing so you should apply the 'Wheatcroft Principles' (*Bernard Wheatcroft Ltd v SSE* [JPL 1982 P37]):

   "Of course, in deciding whether or not there is a substantial difference the local planning authority or the Secretary of State will be exercising a judgement, and a judgement with which the courts will not ordinarily interfere unless it is manifestly unreasonably exercised. The main, but not the only criterion on which that judgement should be exercised is whether the development is so changed that to grant it would deprive those who should have been consulted on the changed development of the opportunity of such consultation."

5. In considering whether to accept revised plans:

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

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

[24] Also see the related *Procedural Guide – Called-in planning applications – England*. See the planning portal for more information.

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

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

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

8. Advice on dealing with amended proposals is also provided in 'Hearings' and 'Inquiries'.

Late representations and evidence

9. In written representations cases you should, wherever possible, make your decision using the information and evidence provided on file. Rule 16(1) of the *Written Representations Procedure Regulations 2009* provides the authority to do this[25]. However, there may be circumstances where it is necessary to accept or to seek evidence/information after the final deadlines have passed.

10. Advice on the acceptance of new material during an appeal is provided in *'Procedural Guide – Planning Appeals – England'* (see especially Annexe B).

11. In some circumstances late representations/evidence should be accepted either by the case officer or by you when carrying out a hearing or inquiry. Examples include:

    - where it would be in the interests of natural justice
    - where there have been material changes in circumstance that are directly relevant to the appeal. This could include new or emerging local or national policy, recent relevant decisions made by the LPA or at appeal or the adoption of a CIL charging schedule. See Wainhomes v SSCLG where the court took the view that the discretion to take into account relevant appeal decisions submitted after the statutory deadlines should have been exercised.
    - Also Wiltshire Council v SSCLG & others, where the court found that, in both the appeals considered, late evidence on the Core Strategy final report should have been taken into account. In one of the appeals in this case, the judge exercised discretion not to quash the decision, but stated that the Inspector was clearly in error.

12. Sometimes the case officer will ask whether you wish to accept late evidence. In the light of 'Wainhomes' and `Wiltshire' do not reject evidence simply because it is late. However, if there are no exceptional circumstances, you can choose not to accept such evidence, even if you

[25] In Wales, the Town and Country Planning (Referrals and Appeals) (Written Representations Procedure) (Wales) Regulations 2003

have seen it. See paragraph 54 above in relation to issues of fairness and acceptance of late evidence.

Further to paragraphs 11 and 12, before you decide whether to accept late representations or evidence you need to know what it is and why it is said to be relevant. If a consideration could be material to the decision a conscious and informed decision must be taken as to whether to admit it. Reliance on the simple fact of it being "late" and/or that no more evidence is required will be unlikely to stand legal scrutiny.

13. If you consider further evidence or information is essential beyond that which has been provided by the parties:

    - make your request in writing via the case officer
    - if, on an accompanied site visit, you indicate to the parties that additional information is required on a factual matter arising from the site visit, you should inform the case officer immediately so that the document is not turned away. An additional safeguard is to ask the party to label the material "as requested by the Inspector". It is best to ask the case officer to confirm such requests in writing. Such information should only be requested in exceptional circumstances.
    - see 'Obtaining evidence' in 'The approach to decision making' for examples of circumstances where you might need to seek further evidence.

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

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

15. Remember:

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

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

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

17. It may be argued that the proposal which is before you does not require planning permission. Alternatively, you might reach this view yourself. However, the question of whether or not permission is required does not affect the validity of the appeal. Consequently, unless the appellant withdraws the appeal you should decide it on its merits.

18. An application under section 191 or 192 of the 1990 Act is often the best way to test whether a development or proposed development is lawful. There is a right of appeal.

19. If such arguments have been made, and particularly if you intend to dismiss the appeal, you could address this as a procedural matter at the start of your decision. For example:

    The appellant has questioned whether the [proposed development] requires planning permission. However, this is not a matter for me to determine in the context of an appeal made under section 78 of the Town and Country Planning Act 1990. It is open to the appellant to apply to have the matter determined under sections 191 or 192 of the Act. Any such application would be unaffected by my determination of this appeal.

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

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

Outline applications

22. The power to grant outline planning permission is contained in s92 of the 1990 Act and Article 5 of The Town and Country Planning (Development Management Procedure) (England) Order 2015[26]. These allow the LPA to grant permission subject to a condition specifying reserved matters for the authority's subsequent approval.

23. It is important to remember that the outline permission is the planning permission.

24. The five 'reserved matters' (as defined in the 2010 Order) are access, appearance, landscaping, layout and scale. Information about the scope of the reserved matters and the use of conditions is provided in 'Conditions'.

25. When dealing with outline applications have you:

    - Explained that the proposal has been made in outline and established which (if any) of the reserved matters are before you now and which are reserved for future consideration? This should be clear from the application form and/or statements. You must deal with any matters for which approval is sought at the outline stage – assuming you have the necessary detailed plans.

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

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

- Clarified how you are dealing with any submitted plans? Sometimes these plans will be labelled as illustrative or indicative. These terms tend to be used interchangeably although it might be inferred that they have different nuances with 'indicative' perhaps suggesting something firmer than 'illustrative'. If the plans show details of matters which are clearly reserved for future consideration, then you should explain that you are considering these plans (or the relevant parts of them) solely on the basis that they have been submitted for illustrative or indicative purposes – even if they have not been explicitly labelled as such.

26. Be careful when dealing with illustrative or indicative plans. They show how the site might be developed and will usually have been provided by the appellant in an attempt to demonstrate that an acceptable detailed scheme could be advanced at the reserved matters stage.

    - Do not treat illustrative/indicative plans as you would plans accompanying a full application. The appellant is not tied to such plans and there may be alternative ways of developing the site.

    - However, has the appellant argued that the illustrative/indicative scheme is what is intended to be built? Or has any other detailed scheme been suggested? If not, you may be entitled to attach significant weight to the illustrative/indicative plans (i.e. they may provide, or fail to provide, evidence that an acceptable scheme is capable of being advanced at the reserved matters stage). However, you do not need to spell out what weight you have attached to the plans – you just need to explain how they have informed your decision.

Reserved matters applications

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

28. When considering such appeals:

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

    - Remember that planning permission has already been granted. Whatever might be argued by the parties, you can only consider the acceptability of the reserved matters which are before you. There is no scope to reconsider matters which were dealt with (or should have been dealt with) at the outline stage.

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

Consequently, interested parties might be unaware that they would be able to comment on all matters (i.e. the proposal as a whole) and not just those which were reserved.

Split decisions (in appeal decisions)

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

30. If you are considering a split decision:

- Are you very sure that the two parts are clearly severable, both physically and functionally (i.e. could the part being allowed be capable of being built and then used for its intended purpose without the other part)?
- Could this result in any injustice to one of the parties? This would be unlikely if the merits of both parts have been considered through the appeal process and/or if there have been no objections to the part being allowed.
- Have you considered whether there are any EIA implications? For example, consider the impact that the partly approved development may have on any EIA screening decision taken by the LPA or Secretary of State. If there is doubt in this regard consider if a referral under Regulation 14 (2) of the EIA Regulations is necessary. Alternatively where an EIA has been undertaken and an ES is provided, consider if a partly approved scheme could result in new or different significant environmental effects beyond those currently assessed. For example, removal of development required to mitigate environmental harm. In these circumstances consider if a formal request for further information under Regulation 25 of the EIA Regulations may be necessary. If you have any doubts about the EIA implications you may wish to consult the Environmental Services Team.

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

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

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

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

33. If you issue a split decision have you:

- provided adequate reasoning for both parts of the proposed development and reached a clear conclusion on each?
- explained that the two parts are clearly severable?

- reached a formal decision on both parts? (the template provides example wording for split decisions)
- made sure that any conditions you have imposed are relevant to the part of the development you have allowed?

Split decisions (made by the local planning authority)

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

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

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

    - If you conclude that the element the LPA granted planning permission for is unacceptable (or if the proposal as a whole is considered unacceptable), the comments of the parties must be sought before a decision is issued.
    - This will give the appellant the opportunity to withdraw the appeal and retain the permission as granted by the LPA.
    - You should point out that, if the permission for that part of the development allowed by the LPA has already been implemented and the appeal is not withdrawn, the appellant risks losing the permission that has been granted and that, in such circumstances, the development will be unlawful and it will be for the LPA to decide whether it is appropriate to take enforcement action.
    - If the appeal is not withdrawn you can proceed to make your decision.

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

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

    - Decide whether to deal with the appeals in one or more decision documents. Usually they can be dealt with in one – although very different proposals are sometimes best dealt with separately.
    - Check that you have amended the template to reflect that there is more than one appeal. For example, both appeal numbers should appear in the header at the top of each page.
    - Do you need a procedural matter to explain your approach? – for example:

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

- **One decision document**: *'As set out above there are two appeals on this site. They differ only in [e.g. the detail of the design of the proposed extensions]. I have considered each proposal on its individual merits. However, to avoid duplication I have dealt with the two schemes together, except where otherwise indicated.'*
- **Two or more decision documents**: *'I have also dealt with another appeal (Ref:#) on this site. That appeal is the subject of a separate decision.'*

Conjoined appeals (two or more appeals on separate sites)

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

- Decide whether to deal with the appeals in one or more decision documents. Usually they should be dealt with in separate documents, albeit that, where appropriate, text concerning policy and conceivably other matters may be common to both/all:
  - **Two or more decision (or SoS Report) documents:** This is the preferred approach and should always be used where the appeal sites are dispersed with different appellants and various different interested parties, and the reasoning on some matters is common but on others not.
  - **One decision/Report document:** Only consider using this approach where the appeal sites adjoin, and the issues are clear and not complex. When doing so, adhere to the advice in Hope and Lisa Taylor and Others v The Secretary of State for Communities and Local Government and North Warwickshire Borough Council [2012] EWHC 684 (Admin) (22 March 2012) where the judge said the key question was "*whether, on a fair reading of the decision letter, the Inspector has had regard to the considerations material to each site, has reached separate conclusions for each site, however expressed, and has not allowed the fact that the appeals were conjoined to obscure the need to reach different decisions on each if the merits of either case so warranted, and has given legally adequate reasons for his decisions on each site [paragraph 32] . . . He has properly divided the report into common and individual sections, the former dealing with issues common to both sites and the latter with the personal and planning considerations arising on each site separately. There is no improper confusion between the two. He draws the distinction between common and individual issues, both when setting out the evidence and in his appraisal in the overall balance and conclusions*

section of the letter. He expressly refers to the two developments and the two Appellants [paragraph 33].".

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

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

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

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

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

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

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

Appeals after the event ('retrospective applications')

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

45. Such development is often described by the parties as being for the 'retention of the building' or the 'continuation of the use'. However, you should avoid using these terms in your formal Decision, if you are allowing the appeal. This is because S55 of the 1990 Act describes 'development' as 'the carrying out of building etc. operations or the making of material changes of use' - and not as their 'retention' or 'continuation'.

46. In these appeals have you:

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

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

Redetermination following a High Court Challenge

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

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

50. The effect of a successful challenge under section 288 is that the decision is quashed and the appeal will be redetermined. The quashed decision is treated as if it has not been made and is incapable of ever having had any legal effect. This principle was established in *Hoffman La Roche & Co AG v SSTI* [1975] AC 295 and was reaffirmed in *Arun District Council v SSCLG* [2013] EWHC 190. The role of the new Inspector is, therefore, to redetermine the case. It is not to review the previous appeal decision.

51. It is possible that the main parties may agree with some of the conclusions reached by the first Inspector and this should be acknowledged in the redetermined decision. How you then deal with this will depend on the circumstances of the case. However, these matters are before you, as they would be in any appeal. Where such

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

matters are before you (especially where they are agreed by the parties), they can be material considerations and, if so, you would need to explain your reasons for any differences in your and the previous Inspector's reasoning.

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

53. There is a significant difference between s288 and s289 challenges. Under s289 the decision is not quashed following a successful challenge. The High Court Practice Direction states that *'where the court is of the opinion that the decision appealed against was erroneous in point of law, it will not set aside or vary that decision but will remit the matter to the Secretary of State*[29] *for re-hearing and determination in accordance with the opinion of the court'.*

54. The matter of s289 remittals was considered by the court of appeal in *R (on the application of Perrett) v SSCLG* [2010] and the judges affirmed that in these cases there should be a rehearing sufficient to enable the SoS to remedy the error identified by the court and to make a determination in accordance with the opinion of the court. In these cases, it will sometimes be necessary to scrutinise the judgment of the court or the consent order (if the SoS submits to judgment), particularly if the parties are not agreed as to the scope or method of redetermination.

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

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

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

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

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

Confidential evidence

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

- there is no provision in the appeal regulations for representations to be treated as confidential. The relevant procedural rules require evidence sent to the Inspector as part of the appeal to be sent to certain persons. Generally evidence submitted to the Inspector must be copied to the appellant, the LPA and any other statutory party.
- If they want the evidence to be taken into account it must be made available for public inspection by the LPA. The hearing and inquiry procedural rules require the LPA to allow any person to visit their offices to inspect all the evidence they produce and receive as part of an appeal. This can be done by publication on a website but it does not have to be[32]. It is for the LPA to determine whether or not it is necessary and reasonable to publish appeal documentation on their website in consideration of the circumstances of the case. PINS cannot control what happens to the information after it is received by the LPA or any other party, as part of the appeal. The written representations procedure rules do not contain a requirement to make the appeal documentation available for inspection but the LPA may still choose to do so.
- If they want the evidence to remain confidential – you will not be able to take it into account (and it will be removed from the file).[33]

Sensitive personal information in decisions

60. Please see Annexe 10, below.

61. Defamatory and unacceptable remarks (also see Annexe 9 of this chapter – Guide to Defamation Law)

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

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

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

[32] Rule 6(13) & 6(13)(A) of the Town and Country Planning Appeals (Determination by Inspectors) (Inquiries Procedure) (England) Rules 2000, Rule 6(13) & 6(13)(a) of The Town and Country Planning (Inquiries Procedure) (England) Rules 2000, Rule 6(6) & 6(6A) of The Town and Country Planning (Hearings Procedure) (England) Rules 2000.
[33] Exceptions may be made in the interests of national security and where a confidential annex to an EIA includes the location of protected species
[34] In Wales, Welsh Ministers

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

Environmental Impact Assessment

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

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

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

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

72. The ES is a key component of the environmental information required for decision-makers. It presents the appellant's/applicant's assessment of the likely significant environmental effects associated with the proposed development. There is a statutory obligation on the decision-maker before issuing a decision to have regard to the environmental information[39] and particularly that contained within the ES (although not

[35] In Wales, The Town and Country Planning (Environmental Impact Assessment) (Wales) Regulations 2017 (the 2017 Regulations (Wales)).
[36] In Wales, see section 6.2 of the Development Management Manual and Circular 11/99
[37] Regulation 14(2), The Town and Country Planning (Environmental Impact Assessment) Regulations 2017 and in Wales Regulations 13 (2) of The Town and Country Planning (Environmental Impact Assessment) (Wales) Regulations 2017.
[38] In Wales, Regulation 24 of the 2017 Regulations (Wales).
[39] Regulation 3, The Town and Country Planning (Environmental Impact Assessment) Regulations 2017.

limited to this)[40]. There is also a duty to examine the environmental information and reach a reasoned conclusion, and to ensure that the decision specifically states that due regard has been taken.[41]

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

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

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

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

77. Further advice is available in Environmental Impact Assessment.

Design and access statements

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

[40] Regulation 2(1), The Town and Country Planning (Environmental Impact Assessment) Regulations 2017.
[41] Regulation 26(1), The Town and Country Planning (Environmental Impact Assessment) Regulations 2017.
[42] In Wales, see SI 2012/801 Art 7: note the different requirements for information

Temporary permissions

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

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

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

References to court proceedings

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

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

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

References to litigation permission hearing judgments

83. If, in evidence, a party provides legal submissions citing a litigation permission hearing judgment (which was delivered after the date of the Practice Direction (Citation of Authorities) (a Direction dealing with civil litigation procedural matters)) Inspectors must not rely on that judgment unless satisfied that the permission hearing judgment contains an express statement that it purports to establish a new principle or to extend the present law.

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

advice before taking account of the permission hearing judgment in their determination of the appeal.

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

Measurements

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

- Are references to any measurements essential?
- If so, are precise measurements vital or can they be qualified by using terms such as 'about', 'approximately', 'more than', less than' etc.?
- Measurements taken by scaling off a plan may not be accurate (and so must be avoided).
- If you intend to rely on a measurement – has it been agreed by the parties? Alternatively, has it been referred to by one party or shown on a plan and not challenged by any other - or was taken on your site visit and agreed by the parties? If not, might one of the parties justifiably take issue with your use of the measurement?
- If you convert from imperial to metric ensure that you do so accurately.
- In the exceptional event that you perform your own calculations, you must have absolute certainty that the figures are correct, and check them thoroughly.

Retention of notes

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

88. You should retain your hearing / inquiry / site visit notes for 3 months following the issue of your decision or following the Secretary of State's decision – unless the appeal has been subject to a High Court challenge – in which case your notes should be kept until completion of the High Court proceedings (and those of the higher courts where relevant).

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

The person making the appeal is not the applicant

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

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

- Written representations - ask the case officer to write to the appellant to secure authorisation from them
- Inquiry or hearing – ask the appellant to secure authorisation from the applicant – ideally before the event is closed.

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

92. See Annexe 5 on the banner heading if the appellant has died.

Curtilage

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

Annexe 2 The development plan, supplementary planning documents and national planning policy

National planning policy

1. The National Planning Policy Framework was published in March 2012. It is often referred to as 'the Framework' or 'NPPF'. Annex 3 to the Framework lists the policy documents which it replaced, including Planning Policy Statements and Planning Practice Guidance (PPS and PPG).[43]

2. The Planning Practice Guidance was published by DCLG on 6 March 2014 as a web-based resource.
https://www.gov.uk/government/collections/planning-practice-guidance
It is intended to reflect and support the Framework. It was accompanied by a note explaining which documents have been deleted (including circulars and practice guides).

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

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

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

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

The development plan

Background

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

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

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

[43] The Framework does not apply in Wales – see Planning Policy Wales and associated Technical Advice Notes (TANs), Circulars and guidance. Only statements by Welsh Ministers can be relied on in Wales.

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

Regional Strategies

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

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

Unitary Development Plans, Local Plans and Local development Frameworks

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

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

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

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

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

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

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

16. The High Court judgement in the 'Cherkley'[44] case considered the status of the supporting text to saved policies in Local Plans. The judge concluded that the saving of certain listed policies had the effect in law of preserving all the supporting text. And that therefore appropriate resort could be had to supporting text when interpreting and applying saved policies. However the supporting text should not be given the force of policy where, to apply it, would conflict with the policy itself. Although the Court of Appeal subsequently overturned the decision it nevertheless confirmed the High Court judge's findings on this point and added that if there were something in the supporting text that contained an additional criterion not referred to in the policy itself, it could not be said that such a criterion had the force of a policy – it did not trump the policy, as stated in paragraph 16 of the Court of Appeal's judgment.[45]

Casework considerations – the Framework and development plan

17. The Framework (in the section on implementation) advises that:

- its policies are material considerations which should be taken into account from the day of its publication (paragraph 212).
- development plans may need to be revised, as quickly as possible, to take into account its policies (paragraph 213).
- due weight should be given to relevant policies in existing plans according to their degree of consistency with the Framework - the closer the policies in the plan to the policies in the Framework, the greater the weight that may be given. (paragraph 215).
- policies should not be regarded as out-of-date simply because they were adopted before the Framework (paragraph 211).

18. The courts have examined the link between paragraphs 215 and 14 (decision taking & the presumption in favour of sustainable development) of the NPPF:

"*Any inconsistency between those policies [ie in the development plan] and the NPPF would render them out of date and cause the approach set out in paragraph 14 of the NPPF to be engaged*." Colman v SSCLG [2013] EWHC 1138 (Admin)

Paragraph 14 provides that where the development plan is absent, silent or out of date the presumption in favour of sustainable

[44] *Cherkley Campaign Ltd v Mole Valley DC v Longshot Cherkley Court Ltd* [2013] EWHC 2582 (Admin), 22 August 2013.
[45] *Cherkley Campaign Ltd, R (on the application of) v Mole Valley DC & Anor* [2014] EWCA Civ 567 (07 May 2014).

development means that permission should be granted unless "*any adverse impacts would significantly and demonstrably outweigh the benefits*" or "*specific policies in [the] Framework indicate development should be restricted*."

19. Following exploration as part of a High Court challenge, our advice is that the first bullet of paragraph 109 of the Framework is not a restrictive policy, pursuant to the second indent of paragraph 14 and footnote 9 in the Framework.

20. The courts have also considered the application of paragraph 14 of the NPPF and the presumption in favour of sustainable development. In *Cheshire East BC v SSCLG* [2016] EWHC 571(Admin) Mr Justice Jay explained that where the development plan is absent silent or out of date paragraph 14 of the NPPF guides decision makers on how tensions between the different dimensions of sustainable development (social, environmental and economic) should be reconciled. In these circumstances the application of paragraph 14 teaches decision makers how to decide whether a proposal, if approved, would constitute sustainable development (paragraphs 19 – 26 of the judgment)[46].

21. In *East Staffordshire BC v SSCLG and Barwood Strategic Land* [2016] EWHC 2973 (Admin) the Court confirmed that the presumption in favour of sustainable development exists within paragraph 14. Where a plan is <u>not</u> absent silent or out of date the presumption means approving development that accords with it without delay. Development that is in conflict with such a plan cannot benefit from the presumption in favour of sustainable development[47]

22. In dealing with casework – consider:

    - The Planning Practice Guidance states that the Framework "*must be taken into account where it is relevant to a planning application or appeal.*"[48] You will generally need to conclude against the Framework if it has been relied on by the parties or if it is of direct relevance. However, you do not necessarily have to refer to the Framework if it has not been relied on and you are satisfied that relevant development plan policies are consistent with it.

    - Has it been argued that a relevant policy is not consistent with the Framework (and so is out of date[49]) or that 'reduced weight' should be given to a policy because of its age[50]? If so, you will need to address this

[46] In these circumstances there is no need for any separate assessment of sustainability as suggested in the case of William Davis v SSCLG [2013] EWHC (Admin)
[47] See paragraphs 18-26 of the Housing Chapter for further detail.
[48] ID 21b-010-20140306 ('What role does the National Planning Policy Framework have in decision taking?').
[49] The NPPF does not prescribe the weight to be given to policies deemed to be out-of-date. Weight is a matter for the decision maker, policies that are considered out of date in accordance with the NPPF can still be accorded weight and should not automatically be disregarded *Crane v SSCLG* [2015] EWHC 425 (Admin) and *Suffolk Coastal DC v Hopkins Homes Ltd and Richborough Estates Partnership LLP & Cheshire East v SSCLG* [2016] EWCA Civ 168 (see Housing chapter for further detail).
[50] Age alone is not a sufficient basis for reducing the weight to be given to development plan policies, potentially even when the time period over which the Plan was designed to extend has elapsed, as NPPF paragraph 211 provides that "policies in the Local Plan (and the London Plan)

argument in your reasoning, particularly if it has been raised by the losing party. Inspectors should note that the use of the term 'reduced weight' in a decision should be avoided, see paragraph 39 of this chapter for further advice.

- What if the issue of consistency has not been raised? Are you satisfied that there is no obvious inconsistency? If so, it is not necessary to refer to consistency or to paragraph 215 of the Framework. Instead it will usually be sufficient to conclude against relevant development plan policies and, where relevant, the Framework.

- Have you used the same terminology and applied exactly the tests as used in the Framework or legislation (for example in paragraphs 215 and 14, eg approving proposals unless adverse impact significantly and demonstrably outweigh the benefits etc, not vice versa)? This helps show the parties, and the Courts where applicable, that you have considered these matters correctly.

- Have you made explicit your findings as appropriate, on the presumption in favour of sustainable development? See housing chapter for further detail on the application of paragraph 14.

A flowchart which summarises the approach and key issues when considering paragraph 14 of the Framework has been included below to assist. Further information may also be found with paragraphs 18-24 of the Housing chapter.

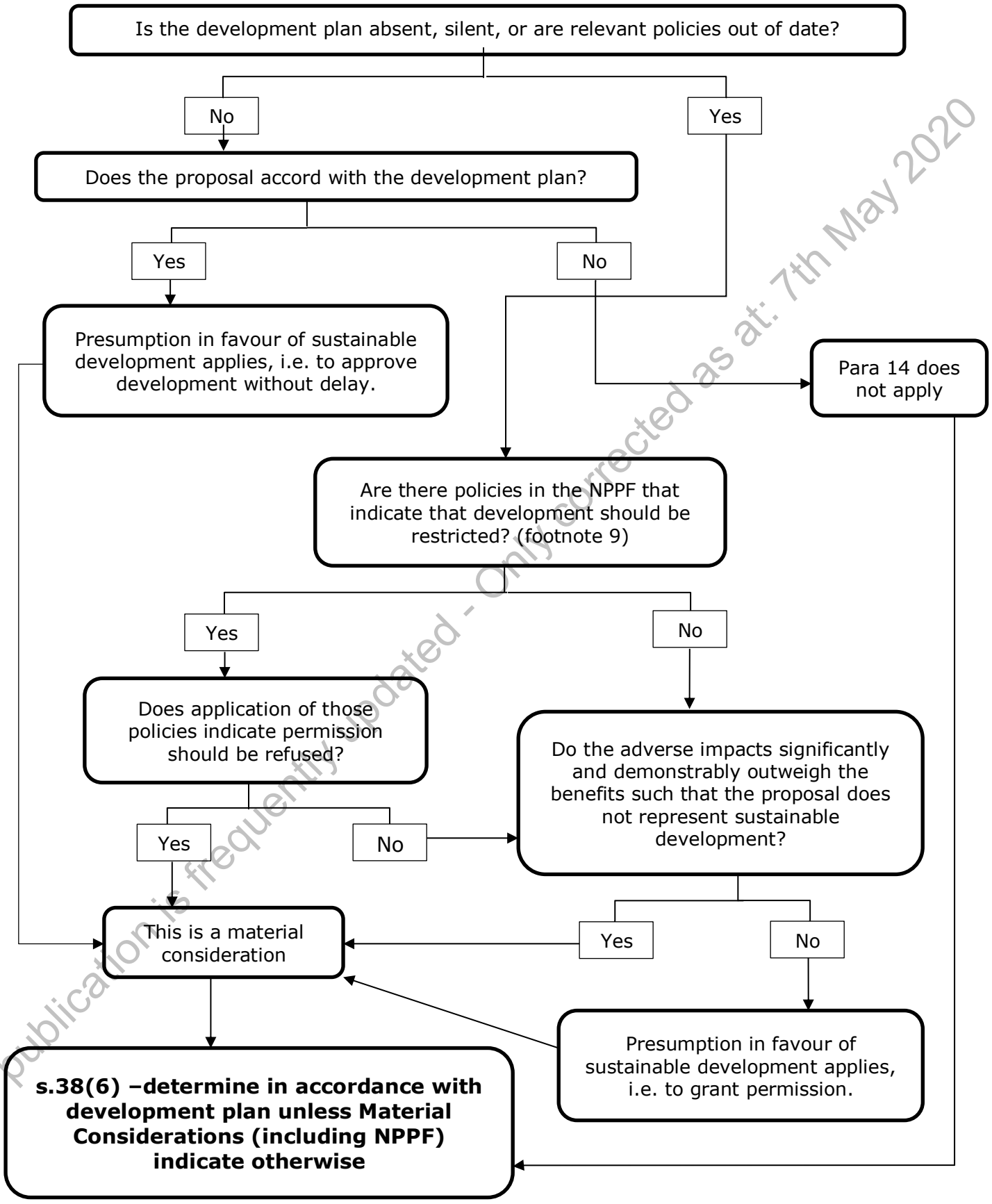
23. Neither the Framework nor any other national policy guidance can of itself provide that provisions of a development plan are no longer applicable[51] and you must apply address and conclude on development plan policies and s.38(6) in your decisions. The weight to be accorded to conflict with development plan policies deemed to be out of date in accordance with the NPPF is for the decision maker to judge in the circumstances of the case.[52]

should not be considered out-of-date simply because they were adopted prior to the publication of this Framework". Inspectors need to apply NPPF paragraph 215 and analyse in what way, and to what extent, the policies were not consistent with the NPPF (*Daventry District Council v SSCLG and Gladman Developments Limited* [2015] EWHC 3459 (Admin) – see paragraph 39).

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

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

Paragraph 14 and the Development plan[53]



[53] This flow chart should be read alongside the detailed information contained in the TM regarding the various elements of paragraph 14 - in particular paragraphs 17-22 of Annexe 2 of this Chapter

Casework considerations – the development plan

24. In dealing with the development plan - consider:

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

- Is your decision based on the most directly relevant current development plan policies. Be careful, development plans which were emerging when the appeal was made may since have been adopted. They may delete policies in earlier development plans which have been relied on by the parties. Sometimes the parties will alert you to a policy change and LPAs are requested to do so - but it may not always happen. If there is any doubt it is best to check with the LPA via the case officer. An example might be where the evidence before you indicates that a plan was submitted for examination some time ago – is it possible that there is now an Inspector's Report, has there been (or is there shortly to be following the Examiner's report) a referendum into a Neighbourhood Plan or has the plan been adopted? A national database of Local Plan progress can be found on the Portal[54]. However, although it is regularly amended it may not be fully up to date. [55].

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

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

  "As has often been observed, development plans are full of broad statements of policy, many of which may be mutually irreconcilable, so that in a particular case one must give way to another. In addition, many of the provisions of development plans are framed in language whose application to a given set of facts requires the exercise of judgment. Such matters fall within the jurisdiction of planning authorities, and their exercise of their judgment can only be challenged on the ground that it is irrational or perverse. Nevertheless, planning authorities do not live in the world of Humpty Dumpty: they cannot make the development plan mean whatever they would like it to mean." (paragraph 19)[56]

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

- Are your references to policy as brief as they can be? Have you avoided setting out long free-standing summaries of policies? You may need to go

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

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

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

into more detail if the interpretation, application or relevance of the policy is disputed. See the section on 'concise decision writing' for more advice.

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

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

25. Concluding on the development plan

- Your attention will often be drawn to a large number of policies. Have you been selective about which you need to refer to? You need only assess the proposal against policies which are relevant to the main issues[57]. However, in doing so you should deal with any relevant policies which have been raised by the **losing party** in support of their case, or are contained within a Statement of Common Ground or similar.

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

- Have you clearly stated how the proposal complies or fails to comply with the relevant main policies you have identified? It is helpful to use the same terminology because it helps show that you have correctly assessed the proposal against the policy. If there is a breach of a particular policy there may still be overall compliance with the plan[58]. You need to acknowledge and resolve tensions between policies where they exist[59].

- The approach is not mechanistic, and you do not have to explicitly refer to your statutory duty under s38(6)[60] but it is best practice to do so. It should be clear to any reader that you have discharged your statutory duty by consideration of the policies in the development plan relevant to the main issues. You should reach a conclusion on any tension between them through your planning balance leading to an overall conclusion, based on the evidence before you, on the development plan as a whole. See *Lark Energy Limited v SSCLG, Waveney District Council* [2014] EWHC 2006 (Admin) (20 June 2014) (paragraph 56) also *Tiviot Way Investments v SSCLG* [2015] EWHC 2489 (Admin) (Paragraph 30-31).

Emerging development plans

26. Emerging policies do not have the same statutory force accorded to adopted policies under s38(6) of the 2004 Act.

[57] *Tiviot Way Investments v SSCLG* [2015] EWHC 2489 (Admin) paragraph 27
[58] *R v Rochdale Borough Council ex parte Milne* [2000] EWHC 650 paragraph 49
[59] Ouseley J. said in *R. (on the application of Laura Cummins.) v Camden London Borough Council* [2001] EWHC (Admin) 1116 (paragraph 164), it may be necessary for an authority *"in a case where policies pull in different directions to decide which is the dominant policy: whether one policy compared to another is directly as opposed to tangentially relevant, or should be seen as the one to which the greater weight is required to be given".*
[60] *Gill v SSCLG* [2015] EWHC 2660 (Admin) Paragraph 22

27. In the case of *Woodcock Holdings Limited v SSCLG & Mid Sussex DC and one other* [2015] EWHC 1173 (Admin), where the Secretary of State dismissed the appeal because the proposal conflicted with, and was premature in relation to, the emerging Neighbourhood Plan, the judge found that, with regard to:

    - the first ground of challenge[61], the SSCLG had failed to give reasons explaining how he had applied the second and third criteria set out in paragraph 216 of the Framework.

    - the third ground of challenge[62], he found that paragraphs 14 and 49 of the NPPF do apply to the housing supply policies in a draft development plan, including a draft Neighbourhood Plan.

28. Several Secretary of State decisions have considered what weight should be attached to an emerging Neighbourhood Plan. In one decision[63] the Secretary of State attached significant weight to the conflict with an emerging Neighbourhood Plan in view of the advanced stage the plan had reached. This did not however out-weigh the lack of a 5 year housing land supply and the benefits to increasing supply (appeal allowed).

29. In an earlier decision[64] that predated *Woodcock Holdings* (in relation to the same neighbourhood plan as above), the Inspector and Secretary of State gave significant weight to an emerging Neighbourhood Plan where the Plan had yet to proceed to examination or referendum. Though the benefits of the proposal were considered to be substantial, the SoS concluded that the adverse impacts in regard to conflict with the NP and in consequence the harm to the perceived effectiveness of the neighbourhood planning process, together with adverse environmental impact, would significantly and demonstrably outweigh the benefits (appeal dismissed).

30. Consider:

    - Will it be clear from your decision that you know that the policies are not part of an adopted development plan?

    - Do the emerging policies significantly change the approach from those in the adopted plan? If not, they are unlikely to have any significant bearing on your decision?

    - Do the emerging policies advance a significant change from the adopted ones? If so, what weight should you give them? Apply paragraph 216 of the Framework – ie: What is the stage of preparation? Are there any unresolved objections to the policies? How significant are these objections?

[61] That the Secretary of State failed to take into account and apply his own policy in relation to the weight to be given to an emerging plan contained in paragraph 216 of the NPPF (see paragraphs 138-146 of the judgment in particular)
[62] That the Secretary of State failed to take into account and apply his own policy that housing policies are 'out of date' if there is no 5 year housing land supply (paragraphs 49 and 14 NPPF) when considering the alleged conflict between the proposed development and housing policies in the draft Neighbourhood Plan(see paragraphs 86-115 of the judgment)
[63] DCLG: WP/2013/0398/OM PINS: APP/H2835/A/14/2221102
[64] DCLG: WP/2013/0457/OM PINS: APP/H2835/A/14/2213617

How consistent are the emerging policies with the Framework? However, do not ascribe weight to an emerging policy if you are unsure about its status – instead, seek clarification.

- When considering the stage of preparation you should note that the purpose of a Local Plan examination is for the Examiner to consider whether the plan is 'sound'. Accordingly, it is possible that a policy could be amended or deleted as a result of the examination or that the plan is withdrawn or found unsound. However, the weight which can be attached to an emerging policy will significantly increase if an Examiner has issued a report which concludes that the policy is sound.

- Ensure that, before sending your decision in for issue or to the Inspector Support reading unit, it refers to the most up to date plan (as development plans which were emerging when the appeal was made may since have progressed/been adopted).

Prematurity

31. It may be argued that an appeal proposal would be premature because it would undermine the plan-making process. Consider any such arguments against the advice in the Planning Practice Guidance[65] which answers the question "*in what circumstances might it be justifiable to refuse planning permission on the grounds of prematurity*?"[66]

32. Again, in 'Woodcock Holdings Limited', the judge found that, with regard to the second ground of challenge[67], the Secretary of State failed to:

    "appreciate the limited scope of the examination of a neighbourhood plan and the implications this undoubtedly has for reliance upon prematurity in relation to that process as a reason for refusing planning permission."

33. Brandon Lewis Minister of State for Housing and Planning wrote to the Chief Executive of the Planning Inspectorate on 16 March 2016 confirming the government's commitment to neighbourhood planning. The letter requests that the issue of appeal decisions close to a referendum of a neighbourhood plan is avoided to prevent such decisions influencing the outcome of the referendum.

Supplementary Planning Documents and Guidance

34. The Glossary to the Framework explains that Supplementary Planning Documents (SPD):

    - add further detail to development plan policies but are not part of the plan
    - can be used to provide further guidance on specific sites or particular issues
    - are capable of being a material consideration

[65] In Wales, see PPW section 2.6
[66] ID 21b-014-20140306 (`Determining a planning application', paragraph 014)
[67] That the Secretary of State failed to take into account and apply his own policy on prematurity contained in the Planning Practice Guidance (see paragraphs 129-137 of the judgment in particular)

35. The Town and Country Planning (Local Planning) England Regulations 2012 set out what is needed in terms of public participation and adoption. They also require that policies in an SPD must not conflict with the adopted development plan.

36. Although SPDs were introduced in 2004 you may still encounter Supplementary Planning Guidance (SPG). These do not have the same statutory basis as SPD but, nevertheless, are capable of being material planning considerations.

37. Where SPD or SPG have been relied on consider:

- Do they add anything of specific relevance beyond what is set out in development plan policy? If not, it may be sufficient to conclude against any overall aims set out in the SPD/SPG.

- Have you demonstrated through your reasoning that you have had appropriate regard to any relevant SPD/SPG? Have you explained whether the proposal complies with any detailed guidance? If so, it is not necessary to set out what weight you have given to the SPD/SPG - unless this has been contested.

- SPD/SPG is often used to set out detailed 'requirements' (for example, relating to intervening distances between buildings or minimum room sizes). If a proposal fails to comply with this detailed guidance, have you explained whether or not this would result in any significant harm? The fact that a proposal falls short of what is sought may be an indication of harm. However, this is not necessarily an inevitable conclusion. You still need to apply your own judgement.

- Has the status of the document as SPD been questioned? In R(OAO Wakil (t/a Orya Textiles) v Hammersmith and Fulham LBC 2012 the adoption of a document which purported to be an 'SPD' was quashed because it had been wrongly characterised as an SPD rather than as a DPD. Accordingly, the relevant procedural and SA/EIA requirements had not been met. The judgment in R. (on the application of RWE Npower Renewables Ltd) v Milton Keynes BC [2013] EWHC 751 concerned a Wind Turbines SPD. The court concluded that a policy in the SPD was in conflict with the adopted development plan and so was contrary to Regulation 8(3) of the Town and Country Planning (Local Planning) (England) Regulations 2012.

- Does the SPD/SPG provide guidance on financial contributions? If so, you still need to consider whether any such contributions would comply with paragraph 204 of the Framework and Regulation 122 of the Community Infrastructure Regulations 2010 where applicable. Look carefully at the SPD/SPG – does it provide up to date evidence which helps you assess compliance? See 'Planning Obligations' for more advice.

Annexe 3 Commonly occurring 'other considerations'

Other developments and local authority or appeal decisions

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

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

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

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

Fallback

3. The potential exercise of permitted development rights or an extant planning permission or the resumption of a lawful use may be claimed as a 'fallback' position that justifies (or helps justify) a proposal. In such cases it is likely to be argued that the alleged 'fallback' would have similar or worse effects than the appeal proposal.

4. In *Gambone v SSCLG* a two stage approach was set out, where a determination must first be made concerning whether the fallback position is a material consideration, before weight is ascribed. An Inspector should ask him/herself the following two questions:

   1) Is there greater than a theoretical possibility that the development might take place?

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

In order to determine 1 above, you will need from the parties the following:

- information on the nature and content of the alternative uses or operations which is sufficiently particular to enable the necessary comparison to be made
- evidence as to the likelihood of the alternative use or operations being carried on or carried out

5. You are likely to need to consider:

   - Would it be significantly more harmful than the appeal scheme or would the effect be similar or less harmful?
   - If a genuine fallback exists is this a sufficient justification for a proposal which would cause significant harm (particularly if the degree of harm would be similar)?

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

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

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

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

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

7. Similar arguments might be pursued with regard to a lapsed planning permission. Given a lapsed permission cannot be implemented you might consider:

   - Have circumstances changed in the meantime?
   - Would planning permission be likely to be granted in the same terms now?

8. A party may seek to introduce evidence that an existing or potential use or development is lawful notwithstanding that there is no Certificate of Lawfulness of Existing Use or Development (CLEUD) or of Proposed Use or Development (CLOPUD) under s191 or s192 TCPA 1990. Circumstances where this may arise include:

   a. to support a 'fallback' argument that the development for which permission is being sought is less harmful than an existing lawful development, or a development that could be carried out under permitted development rights;
   b. to support an argument that the proposed development is compliant with policy. For example paragraph 89 of the NPPF makes the replacement of a building 'not inappropriate' in the green belt, provided the new building is in the same use and not

materially larger than the one it replaces; although not expressly stated, the policy would be interpreted as limited to buildings whose use was lawful.

9. It is not the role of the Inspector dealing solely with an application for planning permission to conduct an exercise as to lawful use or operation (such as would normally be formally determined by a lawful certificate application), in order to decide whether the appellant might be able to rely on permitted development rights as a fallback (see *Saxby v SSSE*). However, that does not mean that the Inspector can simply ignore arguments over lawfulness in the absence of a CLEUD or CLOPUD, rather it will require that the Inspector carries out some assessment of the weight that should be ascribed to the evidence which will vary greatly from case to case provided always that it passes the threshold of materiality.

10. Where a dispute arises in a written representations appeal as to the factual basis for a claim of lawfulness, the Inspector should consider whether it would be appropriate to convert the appeal to an oral event. An inquiry (not a hearing) would be necessary if determining the facts would involve taking evidence on oath.

Precedent

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

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

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

Personal circumstances

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

    - Have regard to the Planning Practice Guidance[68] [69]

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

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

- Do such arguments outweigh any harm that you have found? Is the proposal for a permanent or a temporary development? Does this affect your assessment of the degree of harm (if any) that would result and your subsequent balancing of the issues?

Fear of some potential adverse effect

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

15. The following court cases considered this issue:

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

Other matters

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

    - *Property values* – See the Planning Practice Guidance which states that "[the courts] have taken the view that planning is concerned with land use in the public interest, so that the protection of purely private interests such as the impact of a development on the value of a neighbouring property or loss of private rights to light could not be material considerations." (21b-010-130729).

    - *'Right to a view'* – It is useful to bear in mind the observations of Ousely J in The Queen on the Application of *Laura C and Others v London Borough of Camden, The Secretary of State for the Environment Transport and The Regions* [2001] EWHC Admin 1116 on such matters:

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

regarded as determining a civil right by reference to the value of the property, and yet cannot of itself be considered relevant."

- *Damage to property* - Is there any substantive evidence the appeal proposal would be likely to result in such damage and that, even if so, it would not be covered under separate legal rights?

- *Disturbance during construction* - For how long would this last? Would this be a temporary effect? How severe would any effects be? Could it be dealt with by condition limiting hours and/or requiring a construction method statement?

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

- *The planning officer recommended approval/pre-application discussions were favourabl*e - Does this materially affect your consideration of the planning merits of the case? Planning authorities are not bound to accept the recommendations of their officers and your assessment should be based on an impartial assessment of the planning merits. If one party considers the other has behaved unreasonably they have the option of applying for costs.[70]

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

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

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

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

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

Annexe 4 Examples of main issues

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

Best interests of the child

- See the Human Rights and the Public Sector Equality Duty chapter, and also the Gypsy and Traveller Casework chapter.

Character and appearance

- The effect of the proposed extension on the character and appearance of [the building] and the surrounding area.
    - The effect of the proposal on the street scene along [street name].

Conservation Area/setting of a listed building

- See Historic Environment chapter

Living conditions – existing neighbours

- The effect of the proposed extension on the living conditions of the occupants of [property], with particular reference to [privacy/outlook/sunlight/daylight/potential for noise and disturbance].
- The effect of the proposed hot food takeaway on the living conditions of nearby residents, with particular reference to [noise and disturbance/cooking smells/availability of on-street parking].

Living conditions – future occupants of the development

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

Highway safety

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

Flood risk

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

Vitality and viability of centres

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

Accessibility of services

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

Financial contributions

- The effect of the proposal on the provision of [education/community/open space etc] in the area.
- Whether the proposal makes adequate provision for any additional need for [education/community/open space etc] arising from the development.

Human Rights

- See the Human Rights and Public Sector Equality Duty chapter.

Annexe 5 Banner heading and details of the case

Introduction

1. It is important that you:

- select the correct template for the type of appeal (for example, planning application, advert, appeal against conditions, prior approval). This will help ensure the correct Act or Statutory Instrument is referred to. Note that different templates apply in Wales.
- carefully check that the details of the case are accurate in both the banner heading and the formal decision (if allowing).

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

Qualifications and event and decisions dates

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

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

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

Appeal reference

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

Address

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

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

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

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

Name of appellant(s)

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

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

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

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

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

Name of the Council/LPA

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

Application reference number

16. This should be taken from the Decision Notice.

Date of the application

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

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

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

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

Date of refusal/decision

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

The development proposed

22. The description of development in the banner heading should **always** come from the planning application form – and should generally be a direct quote.

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

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

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

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

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

- For clarity - if the original description was inaccurate or wholly unclear.
- To leave out the superfluous – for example, if you remove words which are not acts of development (e.g. 'retrospective/retention').
- To explain that the proposal was amended before the LPA determined it (and to make clear on what basis you have determined the appeal).

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

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

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

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

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

Annexe 6 Proof reading

1. Are factual details correct, including:

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

2. Have you considered:

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

3. Grammar, spelling, syntax and readability

- Is your use of tenses correct and consistent? (would/could/should if referring to a proposed development)
- Are your apostrophes in the right place? (Appellant's, or appellants' – be careful!)
- Is your use of commas and semi-colons correct? The misuse or abuse of either can materially affect the meaning of what you write.
- Are all spellings correct (use the spell-checker but don't rely on it)
- How does your decision read – try reading it out loud. Are all sentences clear, unambiguous and straightforward to follow? Is there any repetitious wording?
- Read as a whole – will the reader be able to understand why the matter was decided as it was and what conclusions were reached on the main issues?

Annexe 7 Check list for producing robust appeal decisions

1. Preparation – have you:

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

2. Site visit – have you

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

3. The decision: have you

- got all the details in the heading correct? (be especially careful with appeal against conditions cases)
- covered any necessary matters in a procedural/preliminary section (eg outline development, amended plans, amendments to matters in the heading, changes in national or local policy, failure of a party to attend the SV, grounds for refusal in non-determination cases, arguments that planning permission is not required etc)?
- clearly defined the main issues in a specific and neutral manner?
- for each main issue:
    - refreshed yourself on the correct approach by looking at relevant Inspector best practice advice?
    - covered the relevant arguments made by the main parties?
    - reached clear findings and justified them (ie reasoning rather than assertion)?
    - reached a firm conclusion against the relevant issue (as you defined it)?
    - reached a firm conclusion against the relevant development plan policies (and briefly and accurately summarised them)?
    - reached a firm conclusion against the Framework, the Planning Practice Guidance and SPD (where relevant)?
    - covered any relevant Human Rights and / or Public Sector Equality Duty matters (see the Human Rights and the Public Sector Equality Duty chapter for more information)?

- concluded whether the proposal is or is not in accordance with the development plan, read as a whole, and provided clear reasons for coming to that view?
- if you are allowing - have you dealt with all the main points raised by the LPA and interested parties opposing the development?
- if you are dismissing - have you dealt with all the main points made by the appellant (including fallback positions and developments argued to set a precedent)?
- if necessary, have you balanced any findings that would weigh for and against the proposal in order to reach an overall conclusion?
- if allowing – have you:
    - explained why you are or are not imposing any conditions suggested by the LPA and other parties?
    - imposed all the conditions you have said you are going to (including those which flow logically from your reasoning)?
    - checked that the conditions comply with paragraph 206 of the Framework and 'Use of Planning Conditions' in the Planning Practice Guidance
    - avoided imposing conditions that would be a surprise?
- dealt with any planning obligations in accordance with current guidance?
- said whether or not development plan policies are consistent with or in conflict with the Framework and attributed weight to emerging development plan policies (where relevant)?
- reached a final conclusion on the appeal?
- ensured that the decision does not contain any sensitive personal data or other information that is sensitive in nature? If it is essential to include this information, please refer to the advice above.

4. Refining your decision - have you:

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

5. Checking your decision – have you:

- put your decision to one side and then come back to it fresh on a different day (subject to the target date allowing time for this)?
- checked all the main arguments are covered? (read through the cases one last time)
- ensured that any relevant Human Rights and / or Public Sector Equality Duty matters are sufficiently covered (see the Human Rights and the Public Sector Equality Duty chapter for more information)?
- double-checked that the decision does not contain any sensitive personal data or other information that is sensitive in nature? If it is essential to include this information, please refer to the advice above.

- checked the tense is correct ('would' not 'will' unless retrospective)?
- checked all factual details are correct (including everything in the heading and street names, policy numbers, compass points and document titles)?
- checked grammar and punctuation are correct?
- checked any conditions imposed?
- read and re-read your decision (for readability, coherent structure, logical reasoning, internal consistency and accuracy)?
- ensured that before sending your decision to the case officer or to the Inspector Support reading unit that your decision refers to the most up to date plan?[71]

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

Annexe 8 Reading (quality assurance) process

For English casework, the following case types are currently being pre-issue read by the relevant Group Manager (GM):

- Only bespoke casework appeals where the Inspector is working above Band (unless agreed by GM);

- Re-determinations;

- Secretary of State casework where judged appropriate by the appointed Inspector in liaison with the Major Casework team;

- Appeals concerning the weight to be attached to made neighbourhood plans in the circumstances described in the relevant Written Ministerial Statement (see PINS Note 09/2016).

Inspectors may submit casework for a second opinion where necessary (for example where novel or specialist issues are raised, particularly if the Inspector is new to them or working above grade) but only following discussion with their sub group leaders. A degree of pre-issue reading on bespoke cases will still be undertaken by the Major Casework team.

Reading as part of any mentoring process are unaltered by the above arrangements.

Decisions falling into the above categories should be sent by Inspectors to the IDST Reading mailbox.

For Welsh casework, decisions and reports which require reading prior to issue should be sent to the Decisions Wales inbox.

Annexe 9 – Defamation Law: Brief Overview

What is defamation law?
Defamation law is concerned with the protection of reputations.

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

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

To break it down further:

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

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

Does privilege attach to statements made in the course of appeals/proceedings dealt with by PINS?
It may well apply:

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

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

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

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

> 8 It has long been recognised that one of the consequences of according immunity to such communications is that sometimes it can operate to protect a malicious informant. As was observed by Lord Simon of Glaisdale in *D v National Society for*

the Prevention of Cruelty to Children [1978] AC 171, 233:

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

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

Conclusions

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

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

A combination of the 1990 Act and secondary legislation provides some method of control by Inspectors over behaviour at proceedings
Disruptive behaviour can be dealt with under the Procedure Rules (for example Rule 15(9)) by way of exclusion from the proceedings
Delays caused by disruptive behaviour can be dealt with through costs awards

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

Annexe 10 Sensitive personal information in decisions

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

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

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

4. In May 2017, the Information Commissioner's Office (ICO) considered a case where Basildon BC had published a statement in connection with a planning application that contained sensitive personal data, including the names, ages and health and disability issues of family members.[72] It was possible to identify each person and their homes.

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

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

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

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

[72] See PINS Note 05/2017

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

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

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

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

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

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

Question: Does your decision / report include special categories of personal data or personal data relating to children?

Yes

Question: Is it truly essential to refer to this personal data?

Yes

Question: Is it possible to avoid including the sensitive personal data in the decision /report by…?

- Referring only to the **documents** that containing the sensitive personal data only – not the data itself;
- **Generalising** – giving broad descriptions, eg, mentioning 'health' rather than a specific medical condition, or 'ethnicity' rather than a specific ethnic origin;
- Excluding any data that could be used to **identify** children and/or health conditions and/or educational needs.

Yes

- Complete the *Check list for producing robust decisions* (Annexe 7);
- Send the decision to the Case Officer for despatch.

No

- Refer to the sensitive personal data **once only** (cross-referencing as required) to assist with redaction;
- Send the decision to IDST for **reading** [Non-salaried Inspectors should approach the NSI Contract Management Unit in the first instance, on which the NSI CMU will liaise with the Knowledge Centre].

No

- Do not refer to this sensitive personal data in the decision / report;
- Complete the *Check list for producing robust decisions* (Annexe 7);
- Send the decision to the Case Officer for despatch.

No

- Complete the *Check list for producing robust decisions* (Annexe 7);
- Send the decision to the Case Officer for despatch.

The appeal file

What's New since the last version

First edition: 4 August 2015.

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Inside right-hand side of file (working from the back): 4

Information Sources

PINS Procedural Guide – Called-in planning applications – England – 23 March 2016

Introduction

1. You can normally expect to receive the files at least one week before the date of the visit. If it is not with you by the Wednesday of the week before, contact Chart. When you get the file, you should study it carefully and in good time, before carrying out the site inspection.

2. You can expect all procedural stages to be properly and expertly undertaken by the case officer. Remember though, that when you have the file, it cannot also be with Procedure and it is then your responsibility to see that all procedural details are completed and that you print off copies of any later correspondence, e.g. email request from you to Case Officer for further information, and subsequent responses from the parties, and place them on the file. Householder Appeals Service (HAS) cases are dealt with electronically so you will only get a buff folder containing the relevant plans. Everything else will need to be viewed via

the portal. Further guidance on HAS cases is set out in a separate part of this Manual and will be covered in a separate session during training.

3. Although you will have a minute of appointment for each case, it is stored electronically in the office and is not printed for the file.

Front cover

4. ***Colour -*** A yellow folder is used for all S78 cases other than HAS. NB You might get folders of other colours where a batch of old folders is being used up.

5. ***Case number*** – e.g. APP/Z0116/A/12/2174136/WF

- APP indicates an appeal, as opposed to some other form of case – e.g. a drought order, or an appeal relating to an Environmental Permit.
- Z0116 is the unique local planning authority code – in this case, Bristol City Council.
- The letter 'A' indicates a S78 planning appeal and HAS cases are prefixed with a D. You may also come across E cases, for applications for Conservation Area Consent. If you get a file with some other initial here, seek advice from the office. It might be an admin error or it might be that the case has been wrongly allocated to you.
- 12 is the year in which the appeal was received by PINS.
- 2174136 is the serial number of the appeal. In correspondence with the office, you only need to refer to this seven digit number.
- Sometimes the initials WF/NWF appear as part of the appeal reference on the front of the file. These have no relevance to the Inspector's work (they simply denote the Procedure area for managing the case) and should not be included on the decision letter.
- Treat the details of the appellant/applicant, agent, site address and description of development, as set out on the cover, with caution. They may not have been transposed correctly from the material in the file. *Always* refer to the original documents which are in the file.

6. **Allocation** - I/H/WR

WR i.e. Written Representations, should be ringed.

7. **Jurisdiction** - indicates whether the case is transferred to an Inspector (PINS) for determination, or whether determination remains with the Secretary of State (SoS); you should not get any SoS cases.

8. The series of letters underneath (or sometimes next to the Allocation) indicates:

- The level at which the case has been allocated: A-H, with H being the lowest (but not necessarily the simplest!). You will begin with level F-G cases but should not get any level F cases in the first couple of weeks. If you do, contact your SIT.

- Any specialism required: (GA) = general allocation, (AD) = appearance and design, (AV) = advertisements etc.
- ASV/ USV = Accompanied/ Unaccompanied site visit.
- If there is insufficient space in the folder for all the material submitted, the file maybe accompanied by blue wallets. The number of blue wallets will, where relevant, should be indicated here too.
- If there has been an application for costs, this should be indicated here as well, through the addition of the word COSTS.

9. ***Case officer contact details*** - These are written vertically on the LH side of the cover. Be aware that occasionally the case officer is changed. The team 'number' should also be there e.g. Team P16. Where contact is required, you should email the Team in-box, copying in the individual case officer, the Reading Unit Inspector Training into the correspondence.

10. ***Ladder*** - All file movements – including when you return the file to the office – should be recorded on the 'ladder' or grid on the front of the file

11. ***Target date*** – 'Overall' is the target date for the **issue** of the decision and is a PINS performance measure – if there are two dates, it is the later date. PINS has to meet tough timeliness measures and you should always prioritise your work to meet the date if at all possible.

12. ***Type of procedure, date and time*** - These are recorded at the bottom left of the file cover. When you receive the file, check ASV timings with relevant letter on the file against what you asked chart to arrange. However, the date shown for a USV will always be the Monday of the week in which you are expected to do it. It is up to you exactly when within the week you carry it out.

13. ***Inspector name –*** sometimes you will see another Inspector's name that has been crossed out and yours added. That could be for any number of reasons and has no bearing on your appointment to carry out the case.

14. The flap inside the back cover includes notes made by Procedure staff.

Inside left-hand side of file

15. ***INT 1 Form*** - This is a checklist for use by Procedure staff

16. ***Buff plans folder*** - This should contain all the plans – and sometimes photographs - submitted with the appeal. NB: these may include not just the application plans, but also supplementary or even amended plans. Beware! Occasionally, one or more of the application plans may not have found its way into the plan folder because it is bound into another

document on the file. If there are a great many plans, these may also be in a separate blue wallet (see above).

17. ***Annex A Matrix allocation/Comments sheet*** - Sets out the allocation level for the case. The actual allocation score sheet should be in the blue folder on the file -see below. These are carried out by experienced case officers but can, occasionally, go awry. If you think the allocation is wrong, such that it affects the question of whether you think you should conduct the case, contact your SIT. This allows also for comments on the choice of procedure, though that is normally better done as a file note after consultation with your SIT.

18. ***Buff plans folder*** - This should contain all the plans – and sometimes photographs - submitted with the appeal. NB: these may include not just the application plans, but also supplementary or even amended plans. Beware! Occasionally, one or more of the application plans may not have found its way into the plan folder because it is bound into another document on the file. If there are a great many plans, these may also be in a separate blue wallet (see above).

19. ***USV? –*** If you think that an ASV that you have carried out could have been carried out as a USV, you need to explain why.

20. ***INT 12 Form (three page form)*** – All relevant parts must be filled in when you send the file back into the office or on to another person.

Inside right-hand side of file (working from the back)*:*

21. ***Buff folder*** - This should contain appeal supporting documents, including:

- The appeal form
- Grounds of appeal (if not included in the appeal form)
- Planning application form & relevant Certificates
- LPA decision notice (unless the appeal is against non-determination)
- Design and Access Statement where relevant

22. Supporting documents (other than the plans, which should be in the plan folder)

23. The documents should be flagged and secured using treasury tags (see paragraph 4.31 below)

24. Requests for a copy of the Decision Letter should also be flagged – again, if not, attach a flag yourself.

25. Any correspondence from MPs will be in a separate folder (green) and should be flagged accordingly.

26. ***Blue folder*** – this includes copies of administrative correspondence in chronological order, from Procedure to the appellant/ agent and the LPA. Allocations matrix attached to inside front cover.

27. ***LPA Questionnaire (not HAS)*** - This is completed by the LPA and, in some appeals, may comprise their entire case. It should be accompanied by all the documents necessary to support the decision. Check to see whether the site is in the Green Belt, AONB or a Conservation Area, or subject to a TPO.

28. The questionnaire should be accompanied by:

- The appeal notification letter and a list of persons notified – double check that this has been sent out;
- Copies of all relevant letters from any interested person, statutory consultee, or public organisation commenting on the original application;
- Any relevant planning officers' report to committee (including any relevant committee minute, especially where a decision went against officer recommendation) or delegated report on the application;
- Relevant development plan policies;
- Any relevant supplementary planning guidance, with details of consultation, modification and adoption;
- Any relevant supplementary planning document, with date of adoption;
- Any other documents relevant to the appeal such as Tree Preservation Order Certificates, map of the Conservation Area etc;
- Any conditions which the LPA consider necessary if the appeal were to be allowed (although this may be sent on later).
- A separate questionnaire is used for HAS cases.
- ***Appellant's statement*** - Unless the appellant is relying on the grounds of appeal, their statement expanding on those grounds, should be submitted within 6 weeks of the start date and will appear on the file, together with any appendices.

29. Other than in HAS cases, there will also be*:*

- ***LPA statement*** - unless the LPA rely on the questionnaire material, their further written representations, expanding on their reasons for refusal, should be submitted within 6 weeks of the start date and will be on the file, together with any appendices. If the statement is submitted late, it will be returned to the sender and a note recording this fact will appear on the file.

- ***Final comments from the main parties*** - The LPA and the appellant are allowed to comment on each other's 6-week statements and on the representations from interested persons. Any such statements will also appear on the file. Again, if submitted late, they will be returned to the sender and a note recording this fact will appear on the file. Beware – if this has happened, the party may try and press the returned information on you at the site visit. – see separate section on Site Visits.

- ***Briefing notes*** - For certain types of case, e.g. those involving a protected species, or a TPO, you will find a standard PINS or CLG briefing note on the file.

- ***Flagging*** – many documents will be flagged on the file by the case officer to help with navigation. These include the planning Decision, appeal form, any related prior applications. Questionnaire, listing descriptions, Conservation Area maps, Article 4 Direction, policies, statements, rule 6 parties, 3rd parties requests for you to view/for a copy of the appeal decision, MP correspondence, Costs.

Site visits

What's New since the last version

Changes highlighted in yellow made **19 October 2018**:

Deletion of Paragraph 41 to align advice regarding viewing sites from a neighbouring property where this has not previously been arranged, and consequential minor amendments.

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Introduction

1 This advice relates to appeals carried out by the written representations procedure. Separate advice is provided in 'Hearings' and in 'Inquiries' – although most of the principles set out here apply. The same general advice also applies in Wales[1].

2 You should be aware of what the *Procedural Guide – Planning appeals – England*[2] and the *Guide to taking part in planning, listed building and conservation area consent appeals proceeding by written representations* say about site visits. For Wales - The Town and Country Planning Development Management Procedure)(Wales) (Amendment) Order 2015 and the *Procedural Guidance - Planning appeals and called-in Planning applications - Wales*.

3 The parties may read these and will have a legitimate expectation that you will follow what is said.

4 The *Procedural Guide(s)* explains that the purpose of the site visit in written representations casework is to enable the site and its surroundings to be viewed. (paragraph D.8.1 for England, paragraph C.8.1 for Wales).

5 There are 3 types of site visit:

- **Accompanied (ASV)** – where it is only possible for you to see everything you need to by going on to the appeal site. You need to be accompanied by representatives from the LPA and the appellant (i.e. the main parties). Third parties[3] may also attend with the agreement of the appellant/landowner. This procedure also allows you to visit neighbouring land with the agreement of the landowner or occupier.

- **Unaccompanied (USV)** – where you can see everything you need to from a public area such as a road and so have no need to go on the appeal site or any other private land. Consequently, the appellant, LPA and third parties do not attend.

- **Access Required (ARSV)** – where you carry out the site visit unaccompanied but with the permission of the appellant. The appellant's or agent's presence is required solely to provide access.

6 The ARSV procedure is mostly used in Householder and Commercial appeals. See the separate advice covering this type of procedure.[4]

[1] Town and Country Planning (Appeals) (Written Representations Procedure) (England) Regulations 2009. In Wales it was introduced for applications made after 22 June 2015.
[2] The *Procedural Guide – Planning appeals – England* applies to planning appeals, householder development appeals, minor commercial appeals, listed building appeals, advertisement appeals and discontinuance notice appeals. It also applies to appeals against non-determination. The *Procedural Guide –Called-in planning applications – England* applies to all applications which are 'called-in'. Also see *Procedural Guide - Enforcement appeals – England* and *Procedural Guide - Certificate of lawful use or development appeals – England*. See the Planning Inspectorate's homepage on GOV.UK for more information.
[3] This can include statutory consultees, local residents, interest groups and other persons
[4] 'Householder, advertisement and minor commercial appeals'

7 It is for the parties to decide who should represent them and you should not expect a particular LPA officer or the appellant's agent to attend.

8 For most people the site visit will be the first and possibly the last time they come into contact with an Inspector. Therefore, the way you conduct the site visit is extremely important.

9 Your site visit must be carried out in accordance with the Franks' Principles (openness, fairness and impartiality) and the Code of Conduct. The advice in this guide will help you do this. Information about the Code and the Franks' Principles can be found in 'Role of the Inspector'.

10 Your dress at all site visits should be smart and formal, regardless of whether they are accompanied or unaccompanied. You should always take your PINS ID card and have a supply of "Calling cards". Make sure your car does not have any badges or stickers which might cause people to doubt your impartiality. For the same reason you should not wear ties or badges that identify an organisation or society.

Before the site visit

11 Chart will contact you by e-mail about your forthcoming programmes of written representation cases. You should email the Charting Officer as soon as possible with the dates and times when you intend to carry out accompanied site visits (and the time slots for Access Required site visit appeals) and the date that you want to receive your case files. It is also helpful to note the dates on which you intend to carry out USVs.

12 When timing site visit programmes:

- Make sure you leave enough time to conduct the site visit without being rushed and to travel safely to the next site visit. As a rough guide, a straightforward site visit relating to a smaller case (for example, a house extension) might usually take around 15-20 minutes.

- Check for any information provided by the Charting Officer which indicates that you might need to allow more time for any site visits (for example if there are a large number of third party requests to view from neighbouring properties or the site is very large)[5].

- Tools such as Google Maps and Bing Maps can help you work out how long it will take to travel between sites. However, allow enough time to cope with potential traffic delays, your unfamiliarity with an area and finding somewhere to park.

- Allow for short winter days and longer journeys in rush hours and school traffic.

[5] Third party names and addresses will be added to the Chart page for each appeal. These are displayed under the LPA, Agent and Appellant details.

- Try to work out where you will park if the site is in a city/town centre or any area where parking is likely to be restricted. Public transport can be the best solution in such areas.

- Check to make sure that the offered programme of visits is practical.

- Think carefully about how many site visits you can reasonably do in one day. If you have a programme of 8 or 9 visits, do you need to consider an overnight stay?

13 The parties may ask you to view the site at a particular time or day of the week. It is for you to decide if this is necessary. Is the case one where you could reasonably use your experience and judgement to assess the effects of a proposal even if you do not visit at the suggested time? If so, you must provide the Charting Officer with a written explanation as to the reasons why. However, if the request can be easily accommodated into your programme then it is good practice to do so.

14 If your visits are a long way from home you will be given a full or half travel day. Arrange your site visits so you do not have to work an excessively long day. If necessary, book an overnight stay in a hotel and travel down the day before or split your site visits over two days.

15 You should receive the paper file(s) on the day you have requested; if there are delays with obtaining files and/or the delivery then the Charting Officer will keep you informed[6]. Please contact the Charting Officer if you have not received the file on the day you have specified in order that checks can be made with the courier as to why. In Wales, plans are sent separately.

16 When you first receive the file – check the following and take up any problems with the Charting Officer straightaway:

- Is the time and date of the site visit what you arranged?

- Do you have any potential conflicts of interest? (see 'Role of the Inspector')

- Is the case suitable for the written representations procedure? (see 'Role of the Inspector')

- Have all third parties who wished to participate in the site visit been notified? If not, can this be rectified? – refer to the Notes section of the Chart page[7].

- Is there enough information to allow you to find the site (especially in rural areas)? – Google Maps and Bing Maps can be helpful.

[6] In Wales, following e-mail notification, for HAS cases use the Appeals Casework Portal to download case details – plans are sent on request.

[7] The Charting Officer will add a note confirming third parties have been informed of the site visit arrangements. If there is a third party noted and there is no note confirming notification, the Inspector must contact the Charting Officer. If additional third parties are identified and have not been noted on the Chart page as being notified, contact the Charting Officer immediately so that letters can be sent. Third party notifications that are passed to the Charting Officer after the site visit arrangements have been made will be forwarded separately to the Inspector.

- Will it be obvious where you will meet the parties (for example if the site is large and has several entrances)?

- Is it necessary to visit the site at a particular time of day? Has this been requested by any of the parties?

- If the site has been arranged as USV is it likely that you will be able to see everything you need to? If not, can the visit be re-arranged as an ASV or ARSV but within the same programme?

17 Contact the Charting Officer immediately if you are unable to carry out a site visit because of a conflict of interest, illness or the need to change the procedure. Return the file to the Case Officer with a note explaining the circumstances.

18 The site visit is your opportunity to see the site and its surroundings and to assess the significance of what has been set out in the written representations.

19 Before you carry out the site visit – have you:

- Made sure you understand the proposal and the main issues and have identified the relevant plans?

- Made a list of everything you want to see on the site visit, including in the surrounding area – and anything you want to check with the parties (for example, in relation to physical features)?

- Made a note of any third parties who might be attending?

- Identified any missing documents (policies, conservation area plans, third party representations etc.) and asked the Case Officer to secure them?

- Got your clipboard, case files (or relevant extracts from them, including the plans), a contact number for the Charting Officer, ID card, sat nav and maps?

Accompanied site visits

20 The *Procedural Guide – Planning appeals – England* states that:

"In some circumstances we may deem it necessary for the Inspector or his/her representative to be accompanied by both the appellant (or agent) and a representative of the local planning authority and, where appropriate, interested people."(D.8.7).

A site visit is not an opportunity for anyone present to discuss the merits of the appeal or the written evidence they may have previously provided. The Inspector or his/her representative will therefore not allow any discussion about the case with anyone at a site visit, except that if it is an accompanied site visit (referred to in paragraph D.8.7 above) the Inspector or his/her representative may ask the invited parties to point out physical features that they have referred to in their written evidence. (D.8.8).

In the Procedural Guide for Wales it is paragraph C.8.4.

You should always aim to arrive on time. However, if you are delayed:

- Are you able to contact the Charting Officer so they can attempt to let the parties know your estimated arrival time?

- Will you still have time to see what you need at the site visit and to get to any subsequent sites safely and on time? If not, could you visit the site later in the day if the parties are willing to do so? Alternatively, do you need to cancel the site visit? If it is safe to do so, contact the Charting Officer who will attempt to contact the parties.

21 If you arrive early:

- Wherever possible avoid waiting outside the site. If you have travelled by car, park around a corner or further down the street - unless parking on the appeal site is unavoidable – but, if so, seek the appellant's permission.

- Take the opportunity to look at the wider area and to visit any sites and developments which have been referred to by the parties.

22 When arriving for the site visit:

- Arrive exactly at the arranged time or just 1 or 2 minutes early.

- Try to arrive on your own. Inspectors and LPA officers seen arriving together has been identified by appellants as a perceived indication of unfairness and lack of impartiality.

- If the LPA representative is waiting alone outside the site, consider asking them to go on ahead to check if the appellant is on site.

23 At the start of the site visit:

- Introduce yourself.

- Check who is present – attempt to locate any missing parties you are expecting. It is good practice to make a note of the names of those present and who they are representing.

- If hands are shaken – make sure you shake hands with everyone (so you are seen to be fair and impartial).

- Explain that the purpose is for you to see the site and surroundings and that you cannot listen to any representations/discussion/arguments - but that the parties can point out physical features. If necessary, remind the parties of this during the site visit.

- Explain how you will deal with any requests from third parties to attend the site visit or view from their property (see below for more advice on this)

- Explain the order of your site visit (for example, when you will view from neighbouring properties, if you intend to carry out any part of the visit unaccompanied or if you have already visited other sites or locations unaccompanied).

- If you have already met the LPA representative or the appellant's agent at a previous site visit that day – make this clear to the other parties and explain that you have no other connection with that person.

24 During your preliminaries you should also:

- Confirm with the main parties that you have the plans on which the LPA made its decision and clarify the status of any other plans that you may have (for example, were any plans superseded before the LPA made its decision or submitted with the appeal). Look carefully at revised plan numbers, particularly if there have been a number of amendments.

- If there is a disagreement about the plans (eg which were before the LPA) ask the parties to resolve the matter between themselves. Do not take part in any discussions and physically divorce yourself from the parties while any discussions are going on. If the parties cannot resolve the dispute write to them via the Case Officer.

25 During the site visit:

- Be polite – but make sure you are also firm and authoritative.

- Never allow yourself to be left alone with any of the parties

- The parties do not need to follow you around. It can often be best to ask them to wait at a particular point while you see what you need to.

- Turn down all offers of hospitality.

- Politely avoid getting drawn into any conversations about the case or other matters - remarks that may seem harmless could be misrepresented (for example, avoid commenting on how lovely the site is or the view).

- You can ask the parties to confirm particular physical features which have been referred to in written statements (for example a particular property or tree or the location of a Conservation Area or Green Belt boundary) – but frame any questions neutrally.

- If it is necessary to check any measurements – ask the parties to do this and to agree the figure.

- Make sure you take into account any mobility difficulties of those attending.

- If the weather is poor, check that the parties are content that you continue. In extreme circumstances you may need to delay or abort the visit.

26 At the end of the site visit:

- Do not leave the site until you have seen everything you need to allow you to write a robust and well-reasoned decision.

- It can be helpful to ask the parties if they are content that you have seen everything and if there is anything else they wish to point out.

- Thank everyone and make sure you are the first to leave. Do not leave the site with anyone else.

27 See also the advice on site visits in 'Human Rights and the Public Sector Equality Duty'.

Transport

28 Wherever possible, it is best to use your own transport to travel to any other sites that you have been requested to view. However, sometimes it may be more practical to accept a lift - for example if there are a number of sites and there are good reasons why the parties should accompany you.

29 There may also be occasions where the appellant will need to arrange transport - for example, where the site is very large or if it is a long distance away from any roads and specialist 4x4 transport may be required. Where possible, it is best to arrange this in advance.

30 If you accept a lift, you should ensure that you are accompanied by someone representing the LPA and the appellant.

Representations and late evidence

31 You should firmly resist accepting any evidence or revised plans which you may be offered at the site visit. This is to avoid any accusations of unfairness. On the site visit, depending on the circumstances, you might advise that:

- evidence should be submitted on time unless there are any exceptional circumstances
- you cannot accept any evidence on site
- if someone wishes to submit additional evidence they should contact the Case Officer immediately to explain why late evidence is being submitted (however, you should not give any indication that it will be accepted)

32 There may be cases where you have identified beforehand that a plan or a document is missing (for example a full extract from the development plan or SPD). If so, in order to save time, you can request that the relevant party provides you and the other main party with the missing copy at the site visit. However, any such requests must be made via the Case Officer and documented in writing. You would also need to carefully explain this procedure to any third parties attending the site visit.

33 You can find further information in 'The approach to decision-making'.

Viewing the appeal site from a neighbouring property

34 Neighbours or interested parties will sometimes request that you view the appeal site from nearby land or buildings. Case Officers will aim to flag any such requests and the Charting Officer will then write to confirm when your site visit will take place. Check that none have been missed.

35 The *Procedural Guide – Planning appeals – England* states that:

> "arrangements will be made with individual neighbours where it is considered to be necessary to view the site from their property." (D.8.3). Paragraph C.8.3 for Wales.

36 The *Guide to taking part in planning, listed buildings and conservation area consent appeals proceeding by written representations - England* states that:

> "At the appeal site visit, the Inspector or his/her representative will decide if it is necessary to view the site from your property" [ie a neighbouring property to the appeal site]. If so, he/she will visit your property and you will be required solely to provide access. Where both the appellant and an LPA representative (and, where appropriate, any interested person) were present at the appeal site visit they will accompany the Inspector or his/her representative during the visit to your property." (9.4)
>
> See the "Guide to taking part in planning appeals proceeding by written representations – Wales" if appropriate.

37 If you are satisfied that you can properly judge the effect of the proposal on neighbours from within the appeal site it is not essential that you visit neighbouring sites (see *Hallinan v SSE and Barnet LBC* [1993] JPL 584). However, it is good practice to look at the site from nearby land or buildings if neighbours or third parties have specifically requested that you do so – unless there are compelling reasons not to. If you have been asked to view from a large number of neighbouring properties, you may be able to agree to visit a representative sample.

38 At the start of your site visit:

- Make sure third parties who have requested that you view from their property are present. If they are not present go and ring their doorbell[8]/knock at their door.
- Note any requests to view and explain that you must be accompanied by a representative from the LPA and the appellant (to ensure fairness). Check that this is acceptable to the neighbour.
- If the neighbour refuses to allow the appellant or their agent onto their land – would they allow you to go on their land unaccompanied? Would the other parties be agreeable to this? Would the parties be able to have a clear view of you from the appeal site or the road?

[8] It is possible that an individual may rely upon a doorbell as an adaptive measure due to a sensory impairment eg for a deaf person the doorbell may make lights flash or a device vibrate.

- Explain when you will visit neighbouring properties. This will usually be after you have inspected the appeal site. You can then suggest that the neighbour returns to their property while you visit the appeal site itself.

39 You should not enter neighbouring land if the site owner/occupier or their representative is not present, unless you have received advanced written authority to do so. Consequently, if they are absent you will need to consider:

- Can you see everything you need to from the appeal site (if necessary, go back onto the site to double check)? If you cannot see what you need to, the site visit will have to be re-arranged (through the Charting Officer). Explain this to the main parties. In practice, this is likely to be a rare occurrence.

40 Chart provides a 'calling card' for Inspectors to use where they have been asked to view the site from a property but the owner/occupier did not answer. The card is not meant to be used as a replacement for calling and clearly if everyone who needs to attend the site visit is present, then the Inspector will advise those present as to what s/he will do and where observations will take place from. Neither will the calling card replace any of the Chart processes that are normally undertaken after an Inspector informs the office that s/he was unable to complete the site visit. A link to the card is here for salaried Inspectors.

Third parties who request to attend the site visit

41 The Guide[9] for those taking part in appeals states that although the appellant and LPA may sometimes both need to be present, there is normally no need for other people to attend the site visit.

42 Nevertheless, it is not unusual for neighbours and other interested parties to ask to attend. Any such requests should be flagged on the file.

43 At the site visit explain that third parties can only go on the appeal site if the appellant agrees. This is because the site will usually be private property with no general right of access. In some cases there may also be health and safety or insurance reasons why it would not be appropriate for third parties to go on to the site. If the appellant denies access, you may need to explain to the third party that you have no power to compel access. You can also reiterate that the purpose of your site visit is to see the site and surroundings, that you cannot listen to any representations and that you will be accompanied by the LPA. However, you can ask if the third parties would like to draw your attention to any physical features which they would like you to see while carrying out the visit.

Requests to view other sites in the area

44 Sometimes you will be asked to view other sites in the area, for example where it is argued that similar developments have been carried out. The

[9] Guide to taking part in planning, listed building and conservation area consent appeals proceeding by written representations – England – see 9.2 and 9.3

extent to which you comply with such requests is for you to decide. However, it is good practice to visit sites that are reasonably close to the appeal site, if locational details have been provided which allow you to find them without undue searching.

45 When visiting other sites:

- See the advice in 'The approach to decision-making' on 'Natural justice – fairness' about what to do if the other site has not previously been referred to in evidence.
- Seek the agreement of the parties that you can visit these sites unaccompanied (or confirm that they are content that you carried out an unaccompanied visit before you visited the appeal site).
- Remember that you must view these sites from a public place.
- Annex 3 of 'The approach to decision-making' provides further advice about dealing with other developments and decisions as material considerations in your reasoning.

Failure of a party to attend

46 If one of the main parties fails to attend an accompanied site visit:

- Wait for about 5 minutes to see if they arrive.
- If they don't arrive, try to contact them to find out if they are on the way (via the Charting Officer or you can ask the main party who is present to try to contact them direct).
- Explain how long you can wait. You need to leave enough time to be able to arrive at your next site visit on time having travelled safely.
- Wait separately from any parties who are present. Make any necessary conversations as brief as possible and do not get drawn into any discussions.

47 If the missing party cannot be contacted or cannot attend or would not be able to arrive in time – consider the following options:

- **Could you carry out the visit unaccompanied** – ie can you see everything you need to from public land? If so, explain this to those present and ask them to leave so you can carry out an unaccompanied visit
- **If the appellant is present**, you can go on to the appeal site provided they give their permission. However, you will need to carry out the visit unaccompanied and so will need to ask the appellant to wait inside or leave the site.[10] You will also need to ask any third parties to leave. *The Procedural Guide - Planning Appeals – England* is sufficiently flexible to allow this course of action. It states that: "In some circumstances we may deem it necessary for the Inspector or his/her representative to be accompanied by both the appellant (or agent) and a representative of the local planning authority, and,

[10] This then becomes an ARSV – see 'Householder, advertisements and minor commercial appeals' for more advice about this type of visit.

where appropriate, interested people" D.8.7. The *'Guide to taking part in planning, listed building and conservation area consent appeals proceeding by written representations - England'* states that "On occasions, both the appellant and the LPA's representative will need to be present during the site visit." (9.2)

- **If the appellant is not present** and you need to go onto the appeal site it is likely that you will need to abandon the site visit.[11] If so, inform the Charting Officer and return the file to the Case Officer with a note explaining the circumstances. However, in some cases, the appellant may give oral consent for you to go on the site over the phone (via the Charting Officer or the LPA officer) – so allowing you to go onto the site unaccompanied. However, you should only exercise this option if you are absolutely sure that permission has been given and that it would be safe to go on the site unaccompanied. You will then need to ask the LPA and any other parties to leave.

- **Where the site visit is abandoned and requests have been made to view the appeal site from a neighbouring property** you should explain to the third party (visiting any third parties if they are not present) that the site visit has been abandoned, and why, and that they will be advised of the new arrangements.

- **Post-event actions** - If you carry out the visit unaccompanied (ASV/ARSV to USV) or because there was a change in procedure from ASV to ARSV you must inform the Charting Officer so they can make a note on the Inspector Scheduling System and the Horizon file.

48 If none of the parties attend:

- Check the file – are you in the right place at the right time?

- Is there another entrance to the site where the parties might be waiting?

- Contact the Charting Officer. Have there been any changes of which you are unaware? Are the parties on the way?

Unaccompanied site visits (USV)

49 The parties to the appeal will not attend and you will not normally be able to enter the appeal site because you will not have the appellant's agreement to do so. You would normally only view the appeal site and its surroundings from the road, a public right of way or some other public vantage point, and would not normally go onto neighbouring sites. If you decide that you need to access a neighbouring site in order to reach a sound decision, you will need to abandon the site visit (see paragraph 50).

50 If you are unable to see everything you need to in order to reach a sound decision you will need to abandon the site visit. You should inform the

[11] See *R. (on the application of Tait) v SSCLG* [2012] EWHC 643 (Admin) - After considering the letter sent to the Claimant, PINS guidance and existing case law, the judge found that it was "clear practice" that when an accompanied site visit is undertaken there must be representatives from both parties and that the Claimant had a legitimate expectation that the Inspector would not undertake an accompanied site visit in her absence.

Charting Officer straightaway. If it is possible for you to keep the case you should keep the file (but remember to tell the Case Officer). If you are advised that the case will be re-allocated to another Inspector you should return the file to the Case Officer with a note explaining why an accompanied site visit is required.

51 If you are approached by the appellant or neighbours during an USV, briefly and politely explain the purpose of the visit, note that you cannot listen to any comments or representations and that it is necessary for you carry out the visit unaccompanied. Do not get drawn into conversation. If they wish to make their views known, explain that they should write to PINS.

Taking photographs

52 It is up to you to decide whether you want to take photos to help you remember the site. However, make sure that taking photos does not distract you from looking carefully at what you need to see when you are on site. It should not be a substitute for your own observations and on-site assessment.

53 If you intend to take photos you should ask the parties first (if it is an ASV or ARSV) and make sure they have no objections. Tell the parties that it is only to help you picture the site as an aide-mémoire. If you do take any photos they should be kept with your own notes. They could be the subject of a Freedom of Information request.

Health and safety when carrying out site visits

54 The PINS Policy statement on health and safety is as follows:

The Planning Inspectorate is committed to the protection of the health safety and welfare of all our employees, our customers, the public and all persons working under the control of the organisation. Securing this commitment is an important management objective that contributes to business performance.

55 For salaried Inspectors information and advice is provided on the Intranet about 'health and wellbeing'. In particular, see the 'Health and Safety Training Guides'. This provides links to training modules and risk assessments relating to the conduct of site visits, driving safely for work and working remotely in safety. You may also find the RTPI Good Practice Note on '*Personal Safety at Work*' helpful.

56 The Inspector guidance explains that you should carry out a 'dynamic risk assessment' when undertaking site visits. This is because you have a responsibility to take reasonable care for your own health, safety and welfare as well as those around you who may be affected by your acts or omissions.

57 For Non Salaried Inspectors, their companies or, in the case of NSIs who are sole traders – the NSIs themselves, have responsibility for managing

their own health and safety. In deciding what measures are necessary NSIs may wish to consider the guidance for salaried inspectors set out in the paragraphs that follow. Further information for NSIs is provided in the *General Terms and Conditions* and in the *NSI Notes*.

58 Some key points to consider are set out below. When travelling to and from site visits:

- Don't increase the risks from the normal hazards of driving by working or driving for excessive periods of time. A working period of 10 hours in a day is a reasonable maximum for Inspectors travelling to and from site visits by car. If you cannot carry out your site visits in one 10 hour day then book an overnight stay in a hotel and travel down the day before or split your site visits over two days.

- Don't rush to get to site visits if you are late. Contact the Charting Officer to let them know how late you may be so they can inform the parties. You should always drive safely.

- Always consider postponing a journey when the weather is bad. If so, contact the Charting Officer so that they can inform the parties.

- If you feel it would be unsafe to use public transport or walk (perhaps because of an inner city or remote location or due to the time of day), it is reasonable to use a taxi and to ask the driver to wait until you have completed the visit. Remember to get a receipt.

- If you use a hire car take time to familiarise yourself with the controls and to adjust the driving position.

59 When carrying out the site visit:

- Be aware of any advance warning of potential risks which have been placed on the appeal file or which are shown on the Chart page for the appeal. Might you need any protective clothing/equipment?

- If you visit a construction site, factory/warehouse, quarry, waste operations site, nursing home, hospital or similar, always report to the site office/reception and follow any health and safety instructions, including in respect of personal protective equipment.

- Consider any risks and how you might deal with them. For example, are there any hazardous buildings/structures? Is there any moving machinery or vehicles? Will you be checking visibility splays at a junction or working on a busy highway or one without pavements? Is there a possibility of animal attack? What are the ground conditions? Are there any issues relating to bio-security (for example, when visiting farms)[12]?

- Is any protective clothing necessary? Do you need a hard hat, high visibility jacket or safety shoes/boots. Salaried Inspectors can order these from PINS here.

- If you feel uncomfortable about the situation that you are entering into, do not carry on with the visit or that part of it. This might involve circumstances

[12] See the DEFRA publication on 'Biosecurity Guidance to Prevent the Spread of Animal Diseases'

where you are being asked to climb scaffolding, stepladders or go onto unprotected roofs. Only carry out a site visit if you think it is safe to do so.

- Take shelter if the weather is bad.

60 When conducting site visits you will be working alone:

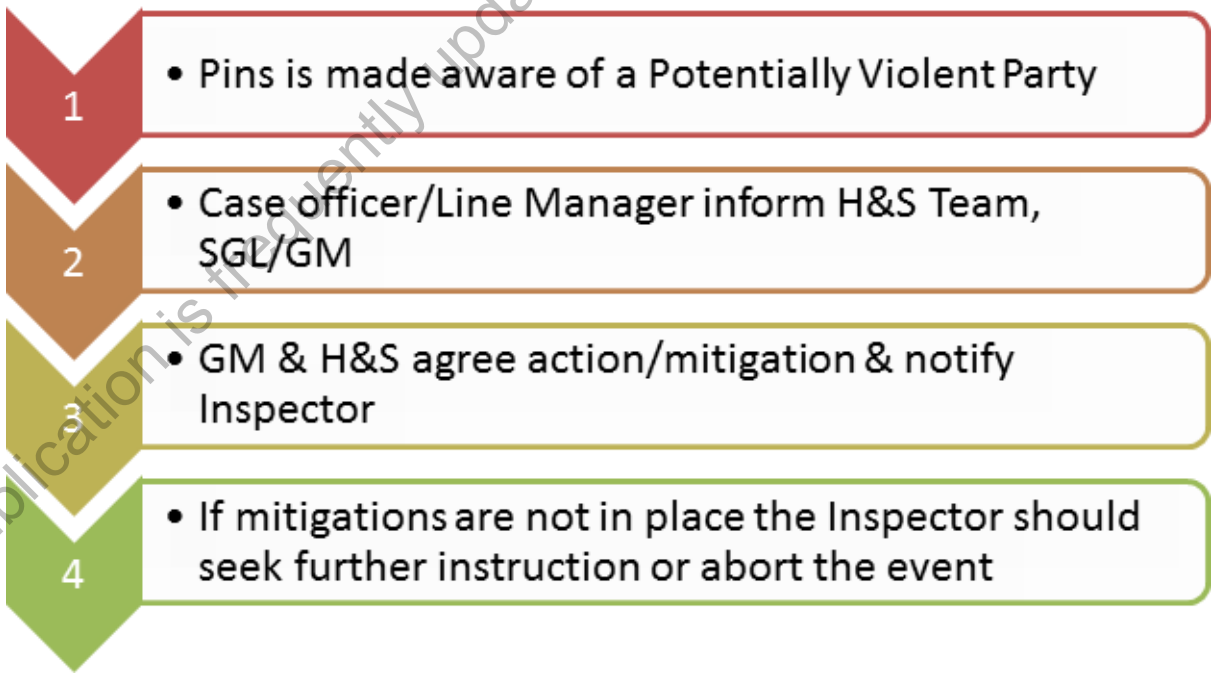
- Salaried Inspectors are provided with a lone worker protection system via a mobile handset. Guidance on its use can be found on the 'Health and Safety Training Guides' section on the Intranet.

- It is good practice to tell someone at home where you are going and what time you expect to be back. If this is not possible consider asking someone else in PINS to fulfil this role. In addition, make sure you have phone numbers for Chart and your line manager.

61 All Inspectors, whether salaried or non-salaried, should always report accidents, dangerous occurrences or near misses to PINS. This can allow lessons to be learnt and may help prevent such problems arising in future. To report an accident or potential incident, salaried Inspectors should fill in the online form and inform your Sub Group Leader or SIT. NSIs should inform CMU.

Potentially violent parties procedure

62 The Inspectorate's procedure on handling potentially violent parties is summarised in the diagram below:



63 The full procedure on handling potentially violent parties is provided in a flow chart, available via this hyperlink.

Hearings

England

What's new since the last version

Changes highlighted in yellow made 6 January 2020:

This chapter has been significantly updated

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Introduction

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

2. This advice relates mainly to the conduct of hearings in planning, advertisement and listed building consent appeals, although the principles set out may have wider relevance.

3. Further advice on the conduct of enforcement (s174) and lawful development certificate (s195) hearings can be found in the 'Enforcement' chapter of the ITM.

4. Advice about hearings relating to applications made direct to the Planning Inspectorate in respect of underperforming authorities in England can be found in PINS Note 44/2013r1 and in *'Planning Applications Process: Section 62A Authorities in Special Measures'.* Please note that there are differences in format and procedure when compared to s78 appeals.

Background

5. Hearings were introduced in 1982 as an alternative to public inquiries. They were originally known as 'informal hearings' and are sometimes still referred to in this way.

6. Hearings are *inquisitorial*. They can be thought of as a structured discussion which is led by the Inspector. The inquisitorial burden falls on the Inspector.[1]

7. In contrast, inquiries are *adversarial*. The parties present their cases to the Inspector and witnesses are subject to cross-examination. The inquisitorial burden mainly falls on the opposing party rather than the Inspector.

8. Despite the differences, hearings are, nevertheless, a formal and structured procedure.

Legislation and procedural guidance

9. The statutory rules governing hearings are contained in the Town and Country Planning (Hearings Procedure) (England) Rules 2000 (SI 2000/1626) (which have been amended on a number of occasions subsequently).

[1] See *Dyason v SSE & Chiltern* [1998].

10. Procedural guidance can be found in 'Planning Appeals: Procedural Guide – England' and 'Guide to taking part in planning and listed building appeals proceeding by a hearing'.

The hearing process

11. The hearing process is set out in the Rules and in the Planning Appeals: Procedural Guide – England. In summary, it is as follows:

Process	Timescale	Rule
Appellant's full statement of case, appeal form, all supporting documents and the draft statement of common ground	Provided with the appeal	Article 37(1) and (3) of SI 2015/595[2] Rule 6(1)
PINS gives notice that a hearing is to be held. The date of the notice is the 'starting date'	As soon as is practicable	Rule 3A
LPA send letter to interested parties[3] telling them any representations must be sent within 5 weeks of the start date	Within 1 week from the 'start date'	Rule 4(2)(b) and Rule 6(3)
LPA sends questionnaire and supporting documents to PINS and appellant	Within 1 week from the start date	Rule 4(2)(a)
Appellant sends full statement of case to each statutory party	As soon as practicable after the LPA have provided details of statutory parties as required by Rule 4(1)	Rule 6(1)
LPA sends full statement of case to PINS and statutory parties	Within 5 weeks of the start date	Rule 6(1A)
Appellant and LPA ensure agreed Statement of Common Ground is sent	Within 5 weeks of the start date	Rule 6A(1)(b)
Interested parties send any representations	Within 5 weeks of the start date	Rule 6(3)
LPA provides details about hearing arrangements and tells interested people	At least 2 weeks before the hearing	Rule 7(5)(b)
Appellant sends a copy of any draft planning obligation	At least 10 working days before the hearing	N.2.4 of *Procedural Guide - Planning*

[2] The Town and Country Planning (Development Management Procedure) (England) Order 2015.
[3] Any statutory parties and any other person who made representations about the application occasioning the appeal. The term 'statutory party' is defined in Rule 2(1)

		Appeals – England
Hearing takes place	Normally within 10 weeks of the start date, or the earliest date after which is practicable	Rule 7(1) states 'not later than 10 weeks after the start date, unless he [Secretary of State] considers such a date impracticable'
Inspector makes decision	The overall PINS targets are: 80% within 14 weeks 100% within 26 weeks[4]	

Objectives

12. In accordance with the Planning Inspectorate's Code of Conduct and the Franks Principles (See 'Role of the Inspector') you have three main objectives when holding a hearing:

    - To ensure that the evidence is thoroughly examined and tested to enable you to reach a reasoned decision or recommendation.
    - To ensure all parties and interested persons have a reasonable opportunity to participate and to have a fair hearing.
    - To manage the hearing in an effective and pro-active manner, making efficient use of time.

Changing the procedure for determining an appeal

13. PINS has the power (under s319(A) of the 1990 Act) to determine the procedure by which appeals are decided[5]. The criteria for determining appeals are set out in Annex K of the Planning Appeals: Procedural Guide – England. It is important that appeals are dealt with by the most appropriate procedure in order that the evidence can be properly understood and, where necessary, tested.

14. The procedure can be changed by the Inspector and, where necessary, should be. Ideally, this should take place before the hearing opens, but if need be you can close a hearing so that an inquiry can be arranged.

15. Rule 11(3) states that if you decide that cross-examination is necessary, you should consider, after consulting the appellant and LPA, whether the hearing should be closed, then an inquiry held instead.

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Who is entitled to appear at a hearing?

16. The appellant and any statutory party[6] are entitled to appear at the hearing - Rule 9(1).

17. However, Rule 9(2) states that there is nothing in Rule 9(1) that shall prevent you from permitting any other person to appear and such permission shall not be unreasonably withheld. The starting point, therefore, is that you should be prepared to hear from anyone who attends. In doing so you should encourage collaboration between parties and the avoidance of repetition.

18. A person who is entitled to appear may do so on his own behalf or may be represented by another person - Rule 9(3).

Statement of common ground

19. Rule 6A requires the LPA and appellant to prepare an agreed Statement of Common Ground within 5 weeks of the start date.

20. Advice on the content, form and purpose of the statement is provided in Annex S of the Planning Appeals: Procedural Guide – England. The aim is to ensure that the hearing focuses on the material differences between the LPA and appellant.

Preparation before the hearing

21. When the hearing is entered into an inspector's programme you should:

- Check that you should not be precluded from the case (See PINS 'Conflict of Interest Policy' and the advice in the Inspector Training Manual chapter on the Role of the Inspector)
- Check that the case grading and any specialism are within your competence. You should inform the Case Officer within 2 weeks of being notified that you have been scheduled to determine the case if it is **not** an appropriate case for you to determine, giving reasons why
- Check that you are happy with the start time (usually 10am – although you can suggest a later start time – say 11am – if this would allow you to avoid the cost of an overnight stay).
- Sort out your travel arrangements and if necessary, book a hotel for the night before. The Case Officer will ensure that you are informed of the hearing arrangements within 2 working days of these being confirmed by the LPA and will update you promptly of any changes.

22. Depending on your individual preference, you may not need a paper file with all the documentation in and will be content to work predominantly

electronically. If this is the case, consider what, if any documents, you may need in paper and let the Case Officer know so that only those documents are printed out. Remember that the screen size is limited, and if you are typing your notes that you may not be able to see what is being referred to at the same time, so you may need a paper set of, for example, certain plans or documents.

23. Any notes you make need to be retained after the decision has been issued in line with the timescales set out in 'the approach to decision making'.

24. At an early stage after your appointment you should:

- Check the venue, start time, and date. If it is not clear from the file you can ask the case officer to check if the LPA will provide you with a parking space.

- Check that you should not be precluded from the case, for example, because one of the parties is a relative or a close associate (see PINS 'Conflict of Interest Policy' and the advice in the Inspector Training Manual chapter on the Role of the Inspector).

- Check that you have the letters of notification of the hearing – see paragraphs 73 to 0 below for more information on what to do if there are potential problems with the notification.

25. Nearer the day of the hearing carry out your detailed preparation:

- Read the documents systematically

- Are there likely to be any procedural problems (eg complaints about the venue) – is it possible to resolve these in advance?

- Do you understand the proposal and know which are the relevant plans?

- Are any documents missing (appeal notification letters, development plan policies, SPD, Statement of Common Ground, conditions etc)? If so, request them via the case officer (see below regarding any Pre-hearing note). At this stage they may need to be e-mailed or brought to the hearing (or both).

- Has reference been made to a planning obligation? If it is missing then chase it up through the case officer.

- Who is likely to attend? Are any interested parties likely to want to speak?

- Are there any procedural matters on which you might need to seek clarification (eg the nature of the proposed development, amended proposals, revised plans, which matters are reserved etc)?

- Identify the main issues. This will help you structure the hearing. Start by looking at the reasons for refusal, the main parties' Statements of

Case and the Statement of Common Ground. See 'The approach to decision-making' for further advice.

- Have any other matters been raised by interested parties? How will you deal with them? See 'The approach to decision-making' for further advice.

- Establish relevant development plan and national policy. Do you need to consider whether the former is consistent with the latter or whether policies are out-of-date? See 'The approach to decision-making' for further advice.

- Prepare an 'agenda' comprising a list of items that you want to cover at the hearing. It is up to you how detailed it is. This will depend on the nature of the case and what will be helpful to the parties and to you. See Annex 1 for examples. If you have time it is helpful to ask the case officer to send the agenda to the main parties before the day of the hearing.

- Prepare a list of questions you want to ask during the hearing in relation to procedural matters, main issues, other matters, conditions (and planning obligations, if relevant). These should be devised to help you gain a better understanding of the case and to test the evidence. Questions should be focused on the main issues and any relevant other matters. Do not raise unnecessary side issues.

- Prepare your opening and closing remarks (see Annex 2 for some examples)

- Prepare a list of features you want to see on the site visit (and add to it during the hearing, as necessary)

- Check the weather forecast and travel news before you set off in case there might be problems

26. When leaving home for the hearing make sure you have everything you need. See the checklist in Annex 3.

27. If you are intending to use your laptop/tablet ensure that it is fully charged in case there is no nearby power supply.

Pre-hearing note

28. If you have time it is often useful to send out a pre-hearing note to the main parties. This can set out the agenda for the hearing itself, including your initial identification of the main issues.

29. Such a note can also include queries you may have as to any procedural matters, amended plans, or missing documents so that the main parties can arrange for them to be responded to at the hearing more efficiently.

30. It is useful to ask the LPA to put this note on its website. Interested parties can often register for 'alerts' on LPA websites when new information is

posted on a case so that they can also be made aware of it prior to the hearing.

Pre-hearing visit to the site and venue

31. It is good practice to carry out an unaccompanied site visit before the hearing. This can be done the day before the hearing, or on the morning before if you have time. Alternatively, you may be able to visit on an earlier day (for example, if you are carrying out site visits nearby).

32. Be discreet. You can only view the site from publicly accessible land. If you are approached by anyone explain your purpose as briefly as possible. Politely, but firmly, decline any attempts to involve you in conversation.

33. The advantages of a pre-hearing visit are that it can:

    1 show the parties that you know the site
    2 help you to follow and understand site specific evidence
    3 help you ask informed questions
    4 ensure that you know where the site is and how to get there from the hearing venue

34. However, pre-hearing site visits are not always essential - for example, if relevant features cannot be seen from public land, there are no issues regarding the wider area and you are confident of finding your way to the site.

35. When you are unfamiliar with the area, it can be helpful to visit the hearing venue beforehand so that you know how to find it and where to park.

The day of the hearing

36. Aim to arrive at the venue around 45 - 60 minutes before the hearing opens. This will allow you to:

    - ensure the room is suitable for the hearing. Subject to there being sufficient room for the public the best option is a small committee or meeting room where all the participants can sit around a large table or series of tables. Council chambers are less suitable unless the arrangements allow the participants to sit reasonably close to each other. If the room is unsatisfactory, or requires furniture to be moved, return to the reception and request changes. See in particular paragraphs 8 to 14 and 27 of 'The venue and facilities for public inquiries and hearings' on Gov.uk

    - check the room is suitable in terms health and safety requirements. See Annex 4 for a checklist. What are the procedures if an alarm should sound? You may be able to ask the person showing you to the room or at Reception. If they do not know, ask the Council when opening.

    - check that the room will be accessible. See paragraph 7 of 'The venue and facilities for public inquiries and hearings'. This explains that LPAs are responsible for ensuring that venues are accessible, but this does

not absolve inspectors of responsibility. It states that if you consider the facilities to be unacceptable you will adjourn until a more accessible venue is provided

- check that water will be available for all. You can accept the offer of tea/coffee if it has been provided for all participants

- if you are intending to use your laptop/tablet ask for any necessary wi-fi codes and login your device. If this proves not possible set up your mobile phone as a 'hot-spot'. Find the nearest power socket and, subject to health and safety considerations relating to cables, ensure that there is a power supply to where you will be sitting

- in the case of one day hearings, there is no requirement for LPAs to provide a retiring room during the hearing, although some may still do so. However, you can ask if there is somewhere you can wait away from the parties.

37. Once you have set out your papers and name plate it is best to leave the room so that you are not left alone with just one of the parties. If some of the participants arrive whilst you are setting up you should ask them to wait outside until you have finished. It is best to take your own notes with you. Avoid getting involved in any discussion. If anyone wants to engage you in conversation about the appeal, ask them to raise it once you have opened the hearing. However, you can deal with matters relating to the hearing venue.

Opening the hearing

38. Return to the room a few minutes before the hearing starts.

39. While you wait to formally open the hearing you can use the time to power up your laptop/tablet, check the main parties are present, distribute the agenda, circulate the attendance sheet and encourage all those who intend to speak to sit around the table (or to sit where they will be able to participate).

40. Open the hearing at the appointed time. Use the clock in the room (if there is one and it is reasonably accurate).

41. Your opening should be delivered in a confident and purposeful manner. Look up and avoid undue reference to your notes/screen. The aim should be to set the scene for the discussion and to keep the opening as short as possible.

42. An example of an opening is provided in Annex 2. However, it is not prescriptive and can be adjusted to suit your own style and the case, provided that you cover the essential items.

43. The standard hearing format is set out in the example agendas in Annex 1. It is usually best to deal with procedural and factual matters first before moving onto a discussion of the main issues, other matters and then conditions. Costs applications should be heard at the end.

44. The essential items to cover in your opening include:

- **Preliminary matters** – Check that everyone can hear you. Set out the appeal before you (address and description of development) and that you have been appointed by the Secretary of State

- **Appearances** – take the names of those who intend to speak. It is not necessary to take the names of people who intend only to observe. However, if they subsequently decide to speak, you will need to remember to record their names so that they can be listed in your decision

- **Attendance sheet** – it is best to ask everyone who attends to fill this in and to start a new sheet on the second day, of two day hearings (it can help with complaints relating to attendance)

- **Housekeeping** – timing of breaks, emergency exits and procedures, make sure mobile phones will not disturb the proceedings (see below for more information)

- **Filming and recording** – you should ask if anyone intends to film or record the event (see separate section below for further information)

- **Notification letters** - make sure that you have a copy of the Council's letters of notification of (1) the appeal and (2) the time, date and place of the hearing. It is best to secure these at the start of the hearing before any discussion takes place (in case they were not sent or were incorrect and the hearing has to be adjourned). See below for further advice if there is a problem

- **Representations** – note those you have received and, if necessary, allow the main parties to check they have the same copies

- **Site visit** – make preliminary arrangements – see further advice below

- **Conditions (and any planning obligation)** – explain that there will be a discussion about conditions (and planning obligations, if relevant) but that it will be without prejudice to the outcome of the appeal

- **Costs** – explain that you are not inviting any costs applications but, that if there are any, they should be made at the venue before the site visit. Note any applications for costs already received. (see the Costs Awards ITM chapter). For further advice, see below

- **Procedural matters** – seek clarification on anything which is uncertain (eg the description of development or, in outline applications, which matters are reserved)

- **Plans** – clarify which plans were before the LPA when it made its decision and the status of any other plans (superseded, illustrative or submitted with the appeal?). If revised plans were submitted with, or during the appeal process, you will need to explain how you intend to deal with them

- **Late evidence** (if there is any) - explain your approach; are you accepting it? (see separate section below for further advice)

- **Main issues** – Rule 11(4) states that, at the start of the hearing, you will identify what are, in your opinion, the main issues to be considered and any matters on which further explanation is required. Ask the parties if they agree

with your identification of the main issues. If there is disagreement, ensure any additional issues are added to the agenda where necessary

- **Discussion** – make it clear to participants that the hearing will take the form of a structured discussion which you will lead and that there is no need for anyone to repeat comments which have already been covered by other participants[7]

- 'Procedural matters', 'Plans' and 'Late evidence' are best dealt with prior to main discussion. More information is provided on these issues below and in 'The approach to decision-making'

The 'inquisitorial burden'

45. In a hearing, the Inspector has responsibility for examining the evidence. At the end of the hearing you must be satisfied that all the points needed to make a properly informed decision have been adequately tested. See *Dyason v SSE & Anor* [1998]:

> "Planning permission having been refused, conflicting propositions and evidence will often be placed before an inspector on appeal. Whatever procedure is followed, the strength of a case can be determined only upon an understanding of that case and by testing it with reference to propositions in the opposing case. At a public local inquiry, the Inspector, in performing that task, usually has the benefit of cross-examination on behalf of the other party. If cross-examination disappears, the need to examine propositions in that way does not disappear with it. Further, the statutory right to be heard is nullified unless, in some way, the strength of what one party says is not only listened to by the tribunal but is assessed for its own worth and in relation to opposing contentions."
>
> "There is a danger, upon the procedure now followed by the Secretary of State of observing the right to be heard by holding a "hearing", that the need for such consideration is forgotten. The danger is that the "more relaxed" atmosphere could lead not to a "full and fair" hearing but to a less than thorough examination of the issues. A relaxed hearing is not necessarily a fair hearing. The hearing must not become so relaxed that the rigorous examination essential to the determination of difficult questions may be diluted. The absence of an accusatorial procedure places an inquisitorial burden upon an Inspector."

46. However, while you have a duty to conduct an inquisitorial hearing, you are entitled to rely on the case put forward by a professionally represented appellant. There is no need for you to root out a case which an appellant had failed to put, especially when represented. (*Francis v First SoS & anor* [2008]). The same principle applies to the case put forward by the LPA.

A 'fair crack of the whip'

47. It is important to make sure that everyone has the chance to consider and comment upon evidence which you might rely on in making your decision.

[7] *Guide to taking part in planning, listed building and conservation area consent appeals proceeding by a hearing – England (paragraph 13.5).*

Consequently, all potentially important issues should be identified and discussed at the hearing. If necessary, this may involve allowing an adjournment so that the relevant party (or parties) can consider their response. This could apply if:

- one party raises a new argument or introduces new evidence
- you raise an issue which is not contested or has not been mentioned or has only been mentioned in passing (and so which the parties could not reasonably expect you to rely on).

48. This was addressed in: *Castleford Homes Ltd v SSETR* [2001] as cited in *Van Dem Boomen & Anor, R (on the application of) v Ashford Borough Council & Anor* [2007]:

> "Did the claimant have a 'fair crack of the whip?' [ie a fair chance or opportunity]. Was the claimant deprived of an opportunity to present material by an approach on the part of the Inspector which he did not and could not have, reasonably have anticipated?"
>
> "It is obviously helpful if an Inspector does flag up issues which the parties do not appear to have fully appreciated or explored. The point at which a failure to do so amounts to a breach of the rules of natural justice and becomes unfair is a question of degree, there being no general requirement for an inspector to reveal any provisional thinking. It involves a judgment being made as to what is fair or unfair in a particular case."

49. And also in *Edward Poole v SSCLG & Cannock Chase DC* [2008]:

> If a party to an inquiry reasonably believes that a matter which was in dispute has been dealt with by way of agreement in a statement of common ground, it may well be unfair to allow the apparently agreed issue to be reopened without giving the party a proper opportunity to address the issue, if necessary, by calling expert evidence.
>
> It is essential that Inspectors recognise that if they do intend to depart from what is the agreed position between the principal parties, it may be necessary to accede to applications for adjournments to enable the parties to address the (now disputed) issue or issues properly by way of expert evidence.

Running the hearing discussion

50. Some general points:

- Be authoritative, firm and proactive - make it clear from your demeanour and approach that you are in charge (but without appearing arrogant or dismissive).
- You should always lead the discussion – prevent the parties becoming involved in a dialogue between themselves as far as possible – however, you can allow one party to put a question to another if you feel this would be helpful.

- Cross examination should not be permitted, unless you consider it is required to allow a thorough examination of the main issues - Rule 11(2). However, in that case you may wish to consider whether the appeal should be heard by means of an inquiry.[8]

- Unrepresented appellants may not be familiar with hearings – you may need to take steps to ensure that they are engaged and are put at ease.

- Involve interested parties and make sure they can have their say (they may have concerns which are not shared by the LPA) – don't let the hearing become a 3 way event between the appellant, LPA and you – ask the main parties to explain any planning jargon or technical terms.
- Do not allow one party to dominate the proceedings.

- Maintain firm control – stop any distracting, disruptive or disrespectful behaviour quickly.

- Keep the proceedings moving on at a reasonable pace – encourage participants to focus on the matter at hand and politely halt any repetitious contributions.

- Seek to avoid any indication of apparent bias (see The Role of the Inspector).

51. In order to successfully take on the 'inquisitorial burden' consider the following:

- Try to get the parties to agree on factual matters and then focus on the key differences between them.

- Make sure you understand the evidence and the parties' position on it, particularly where it is technical or complex (for example noise, traffic, 5 year housing supply, financial viability) – seek clarification where necessary.

- Make sure you explore everything you might later rely on in your decision –you must raise any substantive matters that the main parties have not fully covered in their statements of case.

- If someone disagrees with an acknowledged expert on a subject – ask them to explain why they have reached that view.

- Ask the main parties to respond to important points made by the other party.

- If the LPA confirms that it no longer wishes to defend a reason for refusal – ask them to explain their reasons and allow interested parties to comment.

[8] See the section on 'Changing the procedure for determining an appeal' in 'Role of the Inspector' and paragraphs 13 to 14 above.

- Phrase your questions neutrally. Try to keep them short and simple. Only ask one question at a time.

52. You will be seeking to understand the impact and planning consequences, of a proposal. In doing so you will need to consider how the arguments made by the parties stand up when tested. The burden of proof generally lies with the party who made the point. Examples of questions you might ask include:

    - Which development plan policies are relevant? Are they consistent with the Framework/PPW? Does the proposal comply with policy? What is the aim of the policy?

    - Would the proposal cause harm? For example - How should the character and appearance of the area be defined? Would the building fit in or would it appear incongruous in relation to its surroundings? Why? Where would it be seen from? Could any potential harm be overcome by conditions?

53. You should not:

    - make the case for any of the parties

    - ask 'leading questions' (which indicate what the answer might be)

    - say anything that might indicate you agree with one party on a contested issue.

54. You will also need to deal with:

    - **Conditions** – these are usually best discussed as a separate item after the main issues and other matters have been dealt with (although they may also be directly relevant to the discussion about a particular main issue or other matter). You will need to consider whether the suggested conditions meet the 6 tests in paragraph 55 of the Framework[9], even if they have been agreed by the main parties. Consider any conditions which have emerged during the hearing discussion or have been suggested by interested parties. Remember that for most appeals the written consent of the applicant to the imposition of pre-commencement conditions is required. See 'Conditions' ITM chapter and PINS Note 13/2018r2 'Pre-Commencement Conditions: S100ZA, Town and Country Planning Act' for further advice.

    - **Planning Obligations** – this could be covered either as a separate item or as an integral part of the issue to which it relates. You will need to assess whether the obligation complies with the 3 tests in paragraph 56 of the Framework[10] (and CIL Regulation 122 if relevant) and whether it would be effective. See 'Planning Obligations' for more advice.

55. There are two conventions which have previously been applied in hearings – that the appellant should have the last word and that the main parties should be invited to make final or closing comments. However, neither is specified as a requirement in the Rules or in Planning Appeals: Procedural Guide – England. You are not obliged to follow these conventions and you should only request this if it would be helpful.

Hearing site visits

56. Under Rule 12 you have two options:

- Leave the hearing open so that discussion can take place on site (ie adjourn the hearing in the venue and resume it on the appeal site).
- Close the hearing at the venue and conduct a conventional site visit.

57. You should only leave the hearing open and allow discussion at the site visit if all the following criteria are met:

- A discussion on site would be helpful.
- You can ensure that all parties present at the hearing would have the opportunity to attend the adjourned hearing (ie on the site) and that no party would be placed at a disadvantage – Rule 12(1)(a)&(b) *[for example, a party might be disadvantaged if they are unable to hear or participate in the discussion – you will need to ask if the appellant will let all relevant participants onto their land].*
- The LPA, the appellant or any statutory party has not raised reasonable objections to it being continued at the appeal site – Rule 12(1)(c).
- Conditions on site will be suitable for discussion and note taking (this may depend on the weather and noise environment).

58. Even if you do leave the hearing open it is best to advise the parties in your opening that they should make their main points at the hearing venue.

59. If the hearing is not adjourned to the appeal site, Rule 12(2) allows you to inspect the site during the hearing or after its close. Usually, you will visit the site after the hearing has closed. However, you might wish to visit it during the hearing if:

- an earlier site visit is necessary to help you understand the discussion
- the hearing is unlikely to be completed before it goes dark (ie in mid-winter).

60. If you carry out a site visit during the hearing or after its close, Rule 12(3) requires that you ask the appellant and LPA whether they wish to be present.

61. Rule 12(4) requires that:

- where you intend to carry out an accompanied site visit, you will announce the date and time during the hearing

- the site visit will be carried out in the company of the appellant and LPA (where either have requested they wish to be present)

- at your discretion, you may also be accompanied by any other person entitled or permitted to appear at the hearing who is appearing or did appear at it.

Late evidence – before or during the hearing

62. Rule 11(9) states that you may allow any person to alter or add to their full statement of case. Rule 11(11) allows you to take into account any written representation or evidence or any other document received by you before the hearing opens or during it (provided that you disclose it at the hearing). Rule 11(7) allows you to refuse evidence where it would be irrelevant or repetitious. However, the Rule states that if you refuse to permit oral evidence, the person may submit the evidence in writing before the close of the hearing. In line with the Inspector & Case Officer/Team Leader responsibilities, you should respond to any queries from the Case Officer as to whether late evidence received before the hearing should be accepted within 3 working days of the date of the query.

63. It is best to establish early on if anyone intends to submit new evidence or documents. If you do accept them, this allows everything to be copied and exchanged at the outset and any need for an adjournment to be considered. This will help avoid further disruptions to the hearing.

64. If you are offered late evidence you will need to decide whether to accept it. The Planning Appeals: Procedural Guide – England in E.9.1 to E.9.5 provides advice and states that:

    - no-one should attempt to "get around" the rules by taking late evidence to the hearing - E.9.1

    - late evidence will only be accepted "exceptionally" - E.9.3 (this might for example, include, where relevant, a recent decision on a similar development, a recent appeal decision or a change in development plan or national policy – see Annex B to the Procedural Guide on '*Can there be new material during an appeal?*'. More advice is provided in 'The approach to decision-making')

65. Planning Appeals: Procedural Guide – England states in E.9.3 that before deciding whether, exceptionally, to accept late evidence, you will require:

    - an explanation as to why it was not received by PINS in accordance with the rules; and

    - an explanation of how and why the material is relevant; and

    - the opposing party's views on whether it should be accepted.

66. It goes on to state in E.9.4 that inspectors will refuse to accept late evidence unless fully satisfied that:

    - it is not covered in the evidence already received; and
    - it is directly relevant and necessary for their decision
    - it would not have been possible for the party to have provided the evidence when they sent PINS their full statement of case; and
    - it would be procedurally fair to all parties (including interested people) if the late evidence were taken into account

67. In practice, inspectors tend to accept late representations having regard to the rules of natural justice (whilst warning of the risk of costs and allowing an adjournment where necessary). In the context of a hearing and before the evidence has been heard, it can be difficult to make an informed decision about the potential relevance of the representation to your decision although an explanation can be sought and the document skim read either in whole or in part if that would assist. Nevertheless, acceptance can often be the most prudent action to take. In any event, the overriding consideration is to be fair to all parties.

68. If you accept late evidence, you should advise about the possibility of a costs application being made.

69. If you decide to accept late evidence, you will need to make sure that both you and the other main party (and potentially other interested parties) have the chance to read and understand it. You should seek the views of the parties on this. You have 3 main options:

    1. If the new evidence is straightforward it may be possible to avoid adjourning or, alternatively, you and the parties may be able to read it during a short comfort break or over lunch.

    2. If the evidence is more substantial, you might need to adjourn for a specific period (say 30 minutes) but still resume on the same day.

    3. If the evidence is complex, substantial and/or technical you might need to adjourn to another day. This could be the case if one of the parties might reasonably wish to seek advice from an expert.

70. The same principles apply if an interested person requests that you accept late evidence.

Amended plans and proposals

71. If amended plans have been provided with the appeal or during the appeal process, you will need to decide whether you intend to determine the appeal on the basis of these plans or those which were before the Council when it made its decision. You should seek the views of the main parties and any interested persons.

72. You will need to decide if accepting the revised plans would deprive those who should have been consulted on the changed development of the opportunity of such consultation (ie the 'Wheatcroft Principles'). Further advice is provided in Annex 1 to the ITM chapter entitled 'the approach to decision-making', and Annex M of the Planning Appeals: Procedural Guide – England[11].

Notification letters

73. There should be 2 notification letters: the first about the appeal and the second about the hearing. Check that the copies of the letters you receive from the LPA are correctly dated, relate to the appeal and have been sent to the correct people. If the second letter about the hearing is not on the file, get the Case Officer to check it was sent as this could avoid adjourning a hearing having travelled to it; re-scheduling may be necessary (see below).

74. Rule 4(2)(b) requires that:

> The local planning authority shall ensure that within 1 week of the starting date any (i) statutory party; and (ii) other person who made representations to the local planning authority about the application occasioning the appeal, has been notified in writing that an appeal has been made and of the address to which and of the period within which they may make representations to the Secretary of State.

75. Rule 7(5) states that:

> "The Secretary of State may in writing require the local planning authority to take one or both of the following steps – (a) not less than 2 weeks before the date fixed for the holding of a hearing, to publish a notice of the hearing in one or more newspapers circulating in the locality in which the land is situated; (b) to send a notice of the hearing to such persons or classes of persons as he may specify, within such period as he may specify."

76. If the correct notification has not taken place you will need to decide whether to adjourn the hearing to another date in order to allow it to be carried out. You will need to do this if you consider that there is a significant risk that the interests of an interested party would be prejudiced because they did not know about the appeal, only found out about the appeal 2 weeks before it was due to take place or were not notified or given little notice of the hearing. Seek the views of the parties at the hearing and consider the circumstances.

Note taking

77. You need to record the discussion and your notes will probably be the only record of what took place. However, you do not need to keep a word by

word account. Instead focus on the main points made, particularly those which have not previously been set out in writing. If necessary, you can ask the parties to slow down or repeat a point if you wish to make sure you record it accurately.

78. You need to strike the right balance between engaging with the parties and taking notes.

79. A more thorough note will be needed if a costs application is made orally (see below).

80. Bear in mind that your notes may subsequently be disclosed, for example, if a request is made by one of the parties. See the ITM chapter on 'the Approach to Decision-making' on the retention of notes.

Costs applications

81. National guidance on the award of costs is provided in the Appeals section of the government's '*Planning Practice Guidance*'.[12] All costs applications must be formally made before the hearing is closed[13].

82. Regardless of whether you close the hearing before or after the site visit, any application for costs is best heard in the venue. It is not advisable to try and hear a costs application on site and it is best to avoid the inconvenience of having to return to the hearing venue.

83. If the costs application has been made in writing:

- does the applicant intend to add anything to it, orally?
- has the written application been provided beforehand to the other party and to you? If not, ensure copies are provided and, if necessary, allow an adjournment for both you and the other party to read it
- (if it was provided beforehand) has the other side responded to it in writing? If so, do they have any further response? If they have not prepared a written response, they should be given the opportunity to respond orally
- where both you and the parties have had adequate opportunity to read and understand the application and any response, these do not need to be read out

84. If the costs application is made, or added to, orally, the other side should be given the chance to respond and the applicant should then be given the chance to respond to any new points.

[13] In England, see the Planning Practice Guidance ID 16-035-20161210 "All costs applications must be formally made to the Inspector before the hearing or inquiry is closed, but as a matter of good practice, and where circumstances allow, costs applications should be made in writing before the hearing or inquiry. Any such application must be brought to the Inspector's attention at the hearing or inquiry and can be added to or amended as necessary in oral submissions."

85. In some cases, it may be reasonable, in the interests of fairness, to allow an adjournment so that a response to a costs application can be prepared. That adjournment should usually be short in length given that the costs regime should be well understood and the response should usually be given by one of the hearing participants rather than by someone who had not previously been present.

86. If the costs application and response is made orally, you will need to take a full note. Ask the parties to proceed at a steady pace.

87. Clarify whether the application is seeking a full or partial award. If partial, then what for? Intervene to seek clarification if need be.

88. If both parties make applications these should be heard one after the other.

89. If the hearing is adjourned to another day, then any costs applications should be heard at the end of the resumed event.

90. For further advice on costs awards in planning appeals dealt with by hearings, please see the ITM chapter on Costs Awards.

Adjournments

91. Try to keep adjournments to the minimum necessary.

92. However, short adjournments may be necessary and can be helpful. For example:

    - if it would be reasonable to allow a party to read new evidence and to prepare their response (or if you need to read it)

    - to allow the parties to discuss and seek agreement on a particular matter

93. Adjournments may be requested by the parties or offered by you. Remember that unrepresented appellants may not be aware that they can ask for an adjournment.

94. All adjournments must be to a definite time and place. This should be announced before adjourning. After an adjournment the hearing is 'resumed'.

95. When you return home, e-mail the Case Officer (via the casework team mailbox) and the casework Team Leader (via their personal mailbox) at the same time. You should:

    - include wording for the Case Officer to write to the parties to explain what has happened and what the next steps will be and;

    - ask the casework Team Leader to adjust your programme to accommodate the reconvened date.

Closing the hearing

96. You may be asked when your decision will be issued. It is best to refer to the standard target time for that type of casework.

97. Before you leave the venue, it is good practice to check that everyone has said what they want to, that all matters have been covered and that you have received all necessary documents, including the attendance sheet.

98. Remember to close the hearing (either at the venue or the site visit).

After the hearing – late evidence or unforeseen circumstances

99. In transferred appeals, Rule 14(2) states that you may disregard any written representations, evidence or documents received after the hearing has closed. However, if, after the close of the hearing, you propose to take new evidence into account which was not raised at the hearing you shall afford those entitled to appear at the hearing with an opportunity to make written representations or to ask for the re-opening of the hearing – Rule 14(3). In line with the Inspector & Case Officer/Team Leader responsibilities, you should respond to any queries from the Case Officer as to whether late evidence received after the hearing should be accepted within 3 working days of the date of the query.

100. Rule 14(4) allows you to re-open the hearing if you think fit and states that you shall do so if requested by a person entitled to appear at the inquiry when the circumstances in Rule 14(3) apply.

101. In some cases, unforeseen issues may arise after the hearing has closed but before you have made your decision. This could include a change in national or local planning policy or a relevant appeal decision.[14] These issues may be brought to your attention by one of the parties or they may be apparent to you for other reasons. In either case, if the issue is one which might reasonably have a bearing on your decision, you should:

- accept the evidence offered (or proactively raise the issue) and allow the parties to comment in writing
- consider if the hearing should be re-opened.

102. The requirements in respect of non-transferred appeals are set out in Rule 15. Further advice about late representations and evidence can be found in the ITM Chapter on the approach to decision-making.

After the hearing – writing your decision

103. Your approach to writing the decision is likely to be similar to cases considered by written representations. However, if a specific point was only raised at the hearing or if particular matters were agreed, then this should be mentioned.

[14] In *Wainhomes v SSCLG* [2013] EWHC 597 the issue of 5 year supply was central. The Inspector declined to consider two recent appeal decisions. However, these decisions dealt with the same issues and might have caused the Inspector to reach a different conclusion. Consequently, they should have been taken into account.

104. At the end of your decision you will need to add lists of:

- appearances (the attendance sheet provides a useful double check on spellings of names)
- any documents, plans and photos handed to you during the hearing as evidence.

105. The attendance sheet and the Council's letter(s) of notification should not be listed as documents

Rulings

106. You may be asked to make a ruling (although the party making the request may not have used the term 'ruling'). This might for example, be about whether you will accept new evidence or revised plans. If so, ask each party, in turn, for their views. Give yourself sufficient time to consider the points made. If necessary, adjourn for a short period. Keep a careful note of any discussion and the conclusions you reached.

107. It may not always be necessary to make a ruling at the hearing. For example, if there is an unresolved dispute as to whether an application is for 10 or 12 dwellings, it might be possible to examine both possibilities at the hearing and to resolve the dispute in your decision letter.

108. See the ITM chapter on Inquiries for more information on rulings.

Legal representation

109. Rule 9(3) allows that a person who is entitled to appear may be represented by another person. It is up to the party to decide who represents them and this may be a solicitor or barrister. However, this should not affect how you run the hearing. If necessary, you can remind the parties that there will be no cross examination and that any questions should be put through you.

A main party is not present, or someone is taken ill

110. If one of the principal parties is not present at the appointed time, open the hearing. Establish who is there and explain the position. It is possible that the person is ill, that they have been delayed while travelling or that they have gone to the wrong venue.

111. If the appellant is missing, ask the LPA to try to contact them. If the LPA is not present, ask the appellant to try to contact them. If the appellant/LPA does not have the contact details, adjourn, phone the office and ask the Case Officer to try and contact the missing party.

112. Adjourn initially for 15-20 minutes. More than one adjournment may be needed to establish the position. If it is feasible, allow a reasonable period of time for the missing party to arrive so that the hearing can continue on the same day.

113. If there is no prospect of the missing person attending and you have no reason to believe that they have behaved irresponsibly, explain that you do not intend to continue with the hearing without one of the principal parties present (because to do so could be unfair).

114. In most cases the first preference will be to try to rearrange the hearing. Explain that you will not be able to arrange a new date as one of the main parties is missing and that the office will be in contact subsequently. Adjourn the hearing. When you return home, e-mail the Case Officer (via the casework team mailbox) and the casework Team Leader (via their personal mailbox) at the same time. You should:

    - include wording for the Case Officer to write to the parties to explain what has happened and what the next steps will be and;
    - ask the casework Team Leader to adjust your programme to accommodate a reconvened date.

115. If exceptionally, you consider that it might be possible to carry out the case by the written representations procedure, you should first seek the views of those present. If there is support for this view, and you consider it reasonable in the circumstances, close the hearing and carry out the site visit (but this will only be an option if the site visit can be done unaccompanied). On your return home, contact the Case Officer who will write to the parties.

116. If you consider that one of the parties has acted irresponsibly or unreasonably – see the advice in the ITM Chapter on Inquiries.

117. If one of the principal parties falls ill during the proceedings, you may need to adjourn the hearing, including if necessary, to another day. This will depend on the severity of the illness and the demands of the event. The same will apply if you fall ill.

118. If the hearing is to be re-arranged, you should hear any application for costs at the end of the re-arranged hearing.

119. If you subsequently intend to complete the case by the written representations procedure, it is possible that before you close the hearing, one of the parties may indicate that they wish to make an application for costs. If so, you should hear this. You should then prepare a report on the costs application. The report and appeal file should be forwarded to the Costs and Decision Team when the appeal decision has been issued. The Costs and Decision Team will complete the costs process and make the costs decision.

Withdrawal of the appeal

120. If this happens on your arrival at the event you do not have to formally open the hearing. However, the withdrawal of the appeal must be confirmed to you there and then in writing. You should also ensure that any

interested parties arriving for the hearing are made aware that it has been withdrawn.

121. If the hearing has opened, the appellant can withdraw the appeal verbally as long as it is announced to the hearing.

122. If the appeal is withdrawn during an adjournment to a different day the hearing can be closed in writing. You will need to make sure all parties are informed. However, if the appeal is withdrawn very close to the day of resumption, it may be necessary to resume the hearing briefly and then close it in person.

123. If any party seeks to apply for costs, refer them to the Award of Costs section of the Planning Practice Guidance[15]. This advises that any applications should be made to the Inspectorate's Costs and Decisions Team within 4 weeks of receiving confirmation that the appeal has been withdrawn.

Challenges to the validity of the appeal or application

124. Listen to the arguments put to you. Unless the interests of a party have been seriously prejudiced you should continue with the hearing. A breach of the Rules does not itself invalidate the proceedings or require redress. If no-one is at a disadvantage, the breach is unlikely to be serious.

125. If objections persist you may need to advise the person making them that, although you intend to continue with the hearing, they may also make their concerns known by writing to the office straightaway.

Filming and recording

126. The presumption is that filming and recording will be allowed. You should ask if anyone intends to film or record the event. If so, check that everyone is comfortable with this (for example, they may not wish to have their faces shown or voice recorded). If there are concerns, you can ask that filming/recording is restricted to certain angles. It is unlikely to be appropriate to film children or vulnerable adults even if no objections are raised. If filming/recording does take place, ask that it is carried out responsibly.

127. If filming or recording goes ahead, make sure that it is not disruptive or distracting, that it does not discourage anyone from participating and that there are no safety problems (for example, trip hazards or access obstructions). It is for you to decide whether filming or recording would be acceptable. However, the general principle is that it should be allowed.[16]

[16] The *Procedural Guide - Planning Appeals – England* advises that "Provided that it does not disrupt proceedings, anyone will be allowed to report, record and film proceedings including the use of digital and social media". (3.5.1) and that "If anyone wants to record or film the event on equipment larger than a smart phone, tablet, compact camera, or similar, especially if that is likely to involve moving around the venue to record or film from different angles, they should contact [PINS] and the local planning authority in advance to discuss arrangements." (3.5.2).

128. If PINS receives a request to film or record beforehand, the Press Office will ensure that the case officer informs you that this is being proposed.

Video evidence

129. You may be asked to view video evidence (for example showing highway conditions or a virtual reality model of the proposed development). If so, you should make sure that all those at the hearing can see the recording and are able to comment on it.

Unacceptable remarks

130. You should issue a warning if anyone makes a potentially slanderous or discriminatory remark. See the Inspector Training Manual chapters on Human Rights and the Public Sector Equality Duty and The Approach to Decision-making for more information. The advice in Annex 5 to this chapter, Managing Disruptive Parties, may also be relevant in this context.

Audibility, linguistic or literacy difficulties

131. If someone advises that they cannot hear the discussion, invite them to sit closer where they can clearly see you and the main parties. Ask the parties to speak up and to look up when speaking. If it seems that audibility will be a continuing problem, for example, if there are large numbers of people present, consider an adjournment so that microphones can be arranged.

132. Paragraph 14 of the 'The venue and facilities for public inquiries and hearings' states that venues should have an installed and operational hearing loop and that a sign language interpreter should be arranged if necessary.

133. Some participants may not have a good understanding of English or may have poor literacy skills. See the advice in the Inspector Training Manual chapter on Human Rights and the Public Sector Equality Duty. This may involve finding someone who can assist the participant (sometimes referred to as a 'McKenzie friend').

Hearing evidence under oath or affirmation

134. There is no power for inspectors to take evidence on oath or under an affirmation at hearings. Where, at a hearing, it becomes clear that evidence on oath or under an affirmation is necessary to resolve disputed facts you will need to abort the hearing and arrange for an inquiry to be held. For further advice see 'Inquiries'.

Annex 1

Agenda - examples

Example 1 (where fewer details are necessary)

Appeal ref []
Hearing [date]
Appeal by [appellant]
Proposed [development] at [site address]

1. **Preliminary matters**

   Plans

2. **Planning policy**

   Local Plan
   Policies LS1, LS3, EN1, EN6, EN7, EN8, EN11, EN15, EN16, TP1
   Consistency with the National Planning Policy Framework

3. **Main issues**

   1. The effect on the character and appearance of the area.

   2. The effect on flood risk.

   3. The effect in respect of noise, smell, light and water pollution

   4. The effect on highway safety

   5. The effect on protected species

4. **Other matters**

5. **Conditions and planning obligations (without prejudice)**

6. **Costs, closing and site visit**

Example 2 (where more detail is appropriate)

Appeal ref []
Hearing [date]
Appeal by [appellant]
Proposed [development] at [site address]

Matters for Discussion

1. **Introduction**

2. **Points of clarification:**

- Site address and description of the development.
- Clarification as to which buildings are which.

3. **Main Issues**

- Whether or not the proposal would be inappropriate development in the Green Belt.
- The effect of the proposal on the openness of the Green Belt.
- The effect of the proposal on the setting/significance of the nearby listed building.
- The effect of the loss of the lime tree.
- Whether any harm by reason of inappropriateness, and any other harm, would be clearly outweighed by other considerations. If so, would this amount to very special circumstances necessary to justify the proposal?

4. **Whether or not the proposal is inappropriate development in the Green Belt**

- Is development plan policy consistent with the Framework?
- Does the proposal constitute limited infilling or partial/complete redevelopment of a previously developed site in accordance with sub-paragraph 145 g) of the NPPF?
- What is the extent of previously-developed land on the site?
- Is the land which currently contains no buildings previously-developed land?
- Does the proposal constitute the replacement of a building in accordance with sub-paragraph 145 d) of the NPPF
- Can a single building replacing more than one building be in accordance with sub-paragraph d)?

- Which buildings on the site are in the same use as the proposed building?
- Should ancillary buildings be counted as buildings to be replaced?
- Is there still disagreement over the size of [] and, if so, is this crucial to the determination of the appeal?
- Would the replacement be materially larger?

5. **Effect on the openness of the Green Belt**

6. **Effect on the setting/significance of the listed building**

7. **Effect of the loss of the lime tree**

   - Contribution to the character/appearance of the area?
   - Wildlife habitat contribution?

8. **Other considerations**

   - Demolition of 'unsightly' buildings
   - Potential for extension of existing buildings through permitted development rights
   - Are the circumstances of the development approved under Appeal Ref [] comparable to those of this case?

9. **Any other planning matters**

10. **Whether or not any other considerations clearly outweigh any harm to the Green Belt and any other harm**

11. **Conditions (without prejudice to the outcome of the appeal)**

12. **Cost Applications (if any)**

13. **Arrangements for Site Visit**

14. **Close**

Annex 2

Hearing opening and closing - example[17]

This opening covers all the matters that you might need to cover but does not need to be adhered to for every event and the exact wording can be adjusted. The aim is to conduct this part of the hearing in a business-like and professional manner and for it to be kept as short as possible so that it only covers essential matters.

Before opening

Is the venue suitable and accessible?
Do you know the fire escape procedures?

While waiting to open the hearing:

- check the main parties are present
- distribute the agenda
- circulate the attendance list
- encourage all those who intend to speak to sit around the table (or where they will be able to participate)

Introduction

Good morning. The hearing is now open.

My name is []

I am the Inspector appointed by the Secretary of State to conduct this Hearing and to determine the appeal by []

This appeal results from the decision of [LPA] to refuse planning permission for a proposal described as [] at []

This would be a good time to switch mobile phones off (or turn them to silent)

In the event of a fire alarm [note fire exits, evacuation routes, assembly point, fire alarm testing/drills]

Can everyone hear what I'm saying?

The hearing today will be a structured discussion which I shall lead based on an agreed agenda. The purpose is to enable all of you to put forward

your points of view and to help me get the information I need to make my decision.

But before we start the discussion there are a few formalities I need to complete.

Appearances

Firstly, can I take the names of all those who wish to speak and their interest in the case:

For the appellants
For the LPA/Council[18]
[record name, position in organisation]

Does anyone else wish to speak?
[record name, interest in case and address]

Is the attendance list circulating? Can everyone who is here add your name, contact details and professional qualifications. Please write clearly. If anyone does not want their contact details to be seen by anyone else you will need to fill in a separate form.

If anyone else wants to speak during the hearing, please let me know if I've not already taken your name – and please fill in the attendance list.

[if anyone asks for a copy of the decision advise that it will be made available on the Planning Portal]

Filming/recording

Does anyone intend to film or record the event?

[If so] – does anyone have any objections to this? [if so, can they be resolved by restricting filming to certain angles?]

[If filming/recording takes place] – please make sure any filming or recording is carried out responsibly and does not interfere with the smooth running of the hearing

Notification letters

Can I have a copy of the Council's letters of notification

- of the appeal and
- confirming the date, time and location of the Hearing

[if not already provided & satisfactory]

[18] Where the appeal is in a National Park, be careful to use the term 'Authority' rather than 'Council'

[check – were the letters sent to those they should have been, in time – eg at least 2 weeks before the hearing – are the details of the date, time and venue correct?]

[If the letters cannot be provided, were not sent or are incorrect – consider whether the interests of any parties would be prejudiced – is it necessary to adjourn the hearing to allow the correct notification to take place?]

Representations

I have copies of representations made in response to the:

- appeal notification
- original planning application consultation and the appeal notification

I will take these into account in reaching my decisions

[if there is any doubt about whether the main parties have seen all of these – offer the opportunity to check them - eg during an adjournment]

Site visit

I've already been able to see the appeal site from [road] and so have a general awareness of the site and its surroundings [or refer to any specific features]

However, I will be making a site inspection later

[if necessary, to go on private land] I will need to be accompanied by a representative from the appellant and LPA.

[if not necessary to go on private land] – I will be able to visit the site unaccompanied.

[if interested parties are present] – Does anyone else wish to attend the site visit - other parties can attend the site visit – but will need permission from the appellant to go on the appeal site.

At this stage, my intention is to close the hearing here [to ensure interested parties can hear/participate and/or because conducting/recording discussion on site can be difficult]

If so, the site visit would be solely to enable me to see the site and surroundings. I will not be able to listen to any representations or discussions – therefore, it is important that you make any comments before we leave here.

[discuss any alternative arrangements – eg if site visit needs to take place earlier in the day perhaps due to daylight issues]

Conditions

We will need to have a discussion about what conditions might be appropriate were I to allow the appeal.

This is standard procedure. It does not indicate that I have made up my mind on the case. Nor will the discussion affect the Council's position in relation to the proposal.

Is the list of conditions provided by the Council/in the Statement of Common Ground up-to-date?

Costs

I am not inviting any applications for costs – but if any are to be made this should be done here before the site visit [or alternatively note any receipt of written applications for costs or indications that a cost application will be made – and that you will deal with these later]

[if necessary, remind the parties of the power to initiate an award of costs but not necessary to include on every occasion]

Procedure [only if necessary because there are concerns about whether a hearing is a suitable procedure]

[eg if the criteria for an inquiry might apply – see Annex K of *Procedural Guide - Planning appeals – England* or if large numbers of people are present]

[explore whether the procedure is appropriate with the parties]

[If I decide during the discussion that this procedure is not appropriate I will close the hearing and ask the office in Bristol/Cardiff to arrange for the appeal to be dealt with by means of an inquiry]

Main issues

[hand out agenda if not already circulated]

The agenda sets out what I regard to be the main issues [read out]

In addition, I shall wish to cover the following [highlight any procedural issues and other matters you want to cover]

Does anyone disagree or have any comments? [amend main issues, as necessary]

During the discussion I will invite contributions from one side and then the other [and then from any interested persons] – if you want to make a point or feel I am moving on before you have said all you want to please tell me.

I have read all the written statements – and so there is no need to repeat material – although you can draw my attention to something specific.

[There will be no formal presentation of cases or cross examination – unless I specifically agree to it]

Evidence

[deal with any late evidence]

All documents and evidence should already have been provided

Not inviting any – but if you intend to submit any, please tell me now

If anyone intends to submit further evidence - ask

- Is the material relevant?
- Why was it not received in accordance with the timetable [set in the Rules]?
- Are there any exceptional circumstances for it being provided now rather than with the statement of case?
- Seek the views of the other parties – have they seen the material?
- Would an adjournment be needed (how long, same day, different day)?
- If appropriate, warn about risk of costs application

Note, if necessary, that the other party could apply for costs and the Inspector could initiate costs [if the behaviour was unreasonable and led to unnecessary expense]

Plans

Clarify which plans were before the LPA when it made its decision.

Clarify the status of any other plans (superseded, illustrative, revised plans provided at appeal)

If revised plans submitted at appeal – decide whether to accept – ask:

- Would they materially change the proposal?
- Would any party be prejudiced – because they might have been denied an opportunity to comment having regard to Wheatcroft principles

Decide whether to accept or not

Timing

[deal with any issues relating to timing of hearing]

I will take a break mid-morning [and for lunch and mid-afternoon if still sitting]

Aim to finish no later than 5pm

Any questions

Are there any questions at this stage about the procedural side of the hearing?

Agenda

Start with agenda item 1

[before moving on to discuss 'any other matters' check that no one wishes to add anything in respect of the main issues]

[before moving on to discuss conditions – check that there are no further planning issues that anyone wants to raise]

Closing and site visit

Costs

Are there any applications for costs?

Listen to any costs applications:

- Is the application available in writing (if not already provided)?
- Explain procedure – application – response – final comments on any new points.
- Remind party they need to demonstrate unreasonable behaviour which has resulted in unnecessary expense.
- Note that references should be made to the guidance on the award of costs in the Appeals section of the government's '*Planning Practice Guidance*' or *Welsh Office Circular 23/93*.
- Please proceed at a steady pace – need to take notes [If costs application made verbally].
- Seeking full or partial award?
- Allow the other party an adjournment to consider response if necessary [if the application is made verbally or a written application is added to].

or if the costs application has already been made in writing:

- Do you still wish to proceed with your written application for costs?
- Do you intend to add anything to the application?

- Allow the other party to respond.
- Any final response?

Site visit

I shall now make arrangements for the site visit.

[Accompanied or unaccompanied?]

Who will attend for:

- the appellant
- the council
- any interested parties?
    - interested parties need permission of appellant to go on appeal site

It seems to me we have completed the discussion – so I will close the hearing before going to the site – can I just check that the LPA and the appellant do not wish to be present - consequently:

- the purpose is for me to see the site.
- can point out physical features
- but will not listen to any further discussion of merits

[or]

It would helpful to continue the discussion on the site – so I will not close the hearing until the end of the site visit

Check how long to get to site?
Discuss any travel arrangements [if travelling with the appellant and LPA]
Confirm time and best place to meet
Deal with arrangements to visit any other sites
Confirm any parking arrangements
Any health and safety issues?

Before we leave may I have any outstanding:

- attendance sheets
- documents

Thank you all for your contributions
The hearing is now closed
[or the hearing is now adjourned]

Annex 3

List of things to take

- Appeal documents
- Opening and questions
- Agenda (several copies)
- Attendance form (take several copies)
- The Framework, Planning Practice Guidance, relevant Circulars etc
- Hearing Rules (SI 2000/1626)
- Procedural Guide - Planning Appeals – England
- GPDO England 2015 and DMPO England 2015 (if relevant)
- Name plate
- ID card
- Stationary (scale rule, pens, pencils, sharpener, post-its, notebook or pad)
- Up to date information on charted cases and holidays (in case of adjournment)
- Clipboard
- Laptop/tablet
- Power extension lead (if you are intending to use your laptop/tablet)
- Satnav and maps
- Hire car details
- Train tickets
- Hotel booking
- Bus/train timetables
- Red triangle, torch, de-icer etc
- Lone worker protection system (LWPS) mobile phone
- Personal protective equipment – eg safety hat, high visibility jacket etc (if necessary)
- Phone numbers – case officer, chart, sub-group leader, Redfern

- Personal items (money, mobile phone, watch, overnight bag etc)
- Have you left details of your itinerary with someone (and given them a point of contact if they are unable to reach you)? See 'Site visits' for advice on health and safety when carrying out site visits.

Annex 4

Health and safety checklist

When arriving at the venue – check the following:

	Yes/no	Any comments
Arrangements for activating the fire alarm and contacting emergency services		
The sound of the alarm and if there are any different alarm signals		
The evacuation procedure from the hearing room, the location of fire exits, evacuation routes and assembly points		
Any planned fire alarm testing or fire evacuation drills		
The location of toilets		
Ensure persons attending at the start of each day are aware of the above		
Check that fire exists from the hearing room are not blocked by tables or chairs etc		

Annex 5

Managing Disruptive Parties

1. As a responsible employer PINS has a duty of care to its staff. Our Customer Charter states that we expect all staff to be treated with courtesy and respect and warns that we will not tolerate rude or abusive behaviour. All staff are entitled to carry out their duties without fear of abuse or harassment.

2. Our decisions impact on people, their homes and communities and passions can run high. Much of what is set out here can be found in the Inspector Training Manual (ITM). The advice in the ITM and the training you received in conducting Hearings and Inquiries will enable you to deal with most situations. The purpose of this note is to advise on the steps to follow when these strategies fail and more serious action is required.

Powers

3. Rule 11 (8) of the Town and Country Planning (Hearings Procedure) (England) Rules 2000[19] empowers Inspectors to require participants at Hearings and Inquiries to leave if they are being disruptive[20]. The Inspector may refuse to allow the person who has been asked to leave to return or permit a return only on such conditions that the Inspector may specify. Rule 11 (10) allows the Inspector to proceed in the absence of any person entitled to appear at it.

4. Advice on what to do if a main party is absent can be found in the ITM. In brief, where you consider that a party's absence is as a result of unreasonable behaviour you may hear the cases of the other parties (including costs[21]) and, if possible, carry out an unaccompanied site visit. Where an accompanied visit is necessary, agree a time and date with the parties present giving time for the absent party to be notified.

5. S79(6A) of the Town and County Planning Act 1990, as amended by s18 of the Planning and Compensation Act 1991, states that:

> 'If at any time before or during the determination of such an appeal it appears to the Secretary of State that the appellant is responsible for undue delay in the progress of the appeal, he may -
>
> (a) give the appellant notice that the appeal will be dismissed unless the appellant takes, within the period specified in the notice, steps as are specified in the notice for the expedition of the appeal; and

[19]Also Rule 11 (8) of the Town and Country Planning (Enforcement) (Hearings Procedure) (England) Rules 2002 No 2684
Rights of Way: Rule 9(9) of the Rights of Way (Hearings and Inquiries Procedure) (England) Rules 2007
NSIP: Section 95 of the Planning Act 2008

[20] Any person required to leave may submit any evidence or other matter in writing before the close of the Hearing or Inquiry

[21] Note that any costs decisions will be dealt with by the Costs and Decisions Team where a party is not present

(b) if the appellant fails to take those steps within that period, dismiss the appeal accordingly'[22].

What is unreasonable/unacceptable behaviour?

6. Basically, anything which disrupts the smooth running of a Hearing or Inquiry and prevents you from focusing on the arguments or any other party from making their case. This could range from threats or shows of aggression to constant low-level interruptions, particularly if they are aimed at destabilising another party's attempt to make their case.

7. The ITM advises that the general principle is that filming and recording should be allowed. However, if you consider the way you or the event is being filmed or recorded to be intimidating you should ask that it stops. If the person recording refuses this constitutes unreasonable behaviour.

What to do about unreasonable/unacceptable behaviour?

8. As stated above your training will have equipped you to deal with most above. All these avenues should be explored before proceeding to the following stages. If a party's behaviour becomes disruptive you should:

   i. Explain why their behaviour is unreasonable and that if they continue you will adjourn to give them time to calm down/reflect. If necessary/appropriate you could set conditions for their return (see Rule 11 above). Explain that if you are forced to adjourn because of their unreasonable behaviour you have the power to instigate an award of costs against them.
   ii. That if they continue to behave unreasonably you will invoke your powers under Rule 11 (10) and have them removed.
   iii. That if they are removed, they may submit any evidence or other matter in writing before the close of the Hearing or Inquiry if they are a main party,
   iv. You will either hear the other parties cases and proceed to a decision or, if the excluded person attempts to thwart the proceedings by refusing to co-operate thereafter[23], dismiss the appeal under S79(6A).

   All the above needs to be properly documented in order that any subsequent complaint or challenge may be defended.

15. If a party refuses to leave, adjourn and request the Council to use its security team to accompany the disruptive person from the premises. If that is not possible or in the event of serious disruptive behaviour or threat activate your lone worker protection alarm or call 999[24].

[22] Does not apply to enforcement cases
[23] For example by denying access to the site
[24] Section 4(1)(a) of the Public Order Act 1986 states that a person is guilty of an offence if he uses towards another person threatening, abusive or insulting words or behaviour with intent to cause that person to believe that immediate unlawful violence will be used against him or another by any person, or to provoke the immediate use of unlawful violence by that person or another, or whereby that person is likely to believe that such violence will be used or it is likely that such violence will be provoked.

Suggested text for requiring an Appellant/Agent or Advocate to leave an event

Appellant/Agent:

Mr/Ms X, I have asked you on 3 occasions now not to interrupt me/AN Other. If you do so again, I will exercise my powers under Rule 11(8) of the Town and Country Planning (Hearings Procedure) (England) Rules 2000 and require you to leave. I will consider whether to make an award of Costs against you/your client for unreasonable behaviour.

If relevant: [I will also take action to report your unreasonable behaviour to your Professional Institution.]

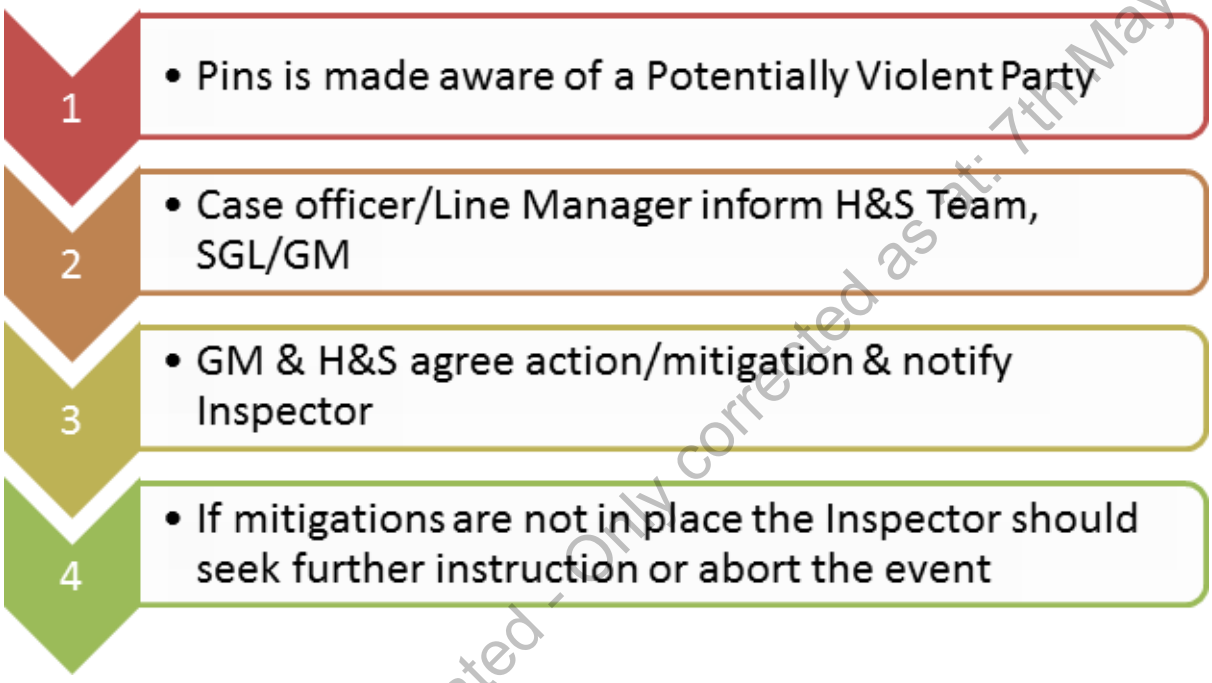
Barrister/Solicitor:

Mr/Ms X, I have asked you on 3 occasions now not to interrupt me/AN Other. If you do so again I will exercise my powers under Rule 11(8) of the Town and Country Planning (Hearings Procedure) (England) Rules 2000 and require you to leave. I will consider whether to make an award of Costs against your client for unreasonable behaviour. I will also take action to report your unreasonable behaviour to [The Bar Standards Board] [The Law Society].

Annex 6

Potentially violent parties procedure

1. The Inspectorate's procedure on handling potentially violent parties is summarised in the diagram below:



2. The full procedure on handling potentially violent parties is provided in a flow chart, available via this hyperlink.

Inquiries

What's New since the last version

Changes highlighted in yellow made 28 March 2018:

Annexe L added to provide advice on the Inspectorate's procedure for handling potentially violent parties, which includes a hyperlink to the full procedure.

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Introduction

1 Inspectors make their decisions on the basis of the evidence before them and the circumstances of the inquiry. Consequently, they may, where justified by the evidence or to facilitate the smooth and fair running of the inquiry, depart from the advice given in this guide.

2 This advice relates mainly to the conduct of inquiries in planning, advertisements[1] and listed building consent appeals although the principles have wider relevance. The procedures in Wales are broadly similar but reference should be made to the relevant rules relating to Wales (see below).

3 Further advice on the conduct of enforcement (s174) and lawful development certificate (s195) inquiries can be found in 'Enforcement and lawful development certificates' Training Manual chapter.

Background

4 Inquiries are *adversarial*. The parties present their cases to the Inspector and witnesses are subject to cross-examination. The inquisitorial burden of challenging a party's case falls mainly on the opposing party. This is in contrast to hearings where an inquisitorial burden falls on the Inspector.[2] Nevertheless, you must ensure you have sufficient information to arrive at a reasoned decision intervening where necessary to ensure this is so.

Legislation and procedural guidance

5 The statutory rules governing inquiries are:

Section 78 appeals determined by the Inspector - The Town and Country Planning Appeals (Determination by Inspectors) (Inquiries Procedure) (England) Rules 2000 (SI 2000/1625)[3]

Section 77 and s78 appeals determined by the Secretary of State - The Town and Country Planning (Inquiries Procedure) (England) Rules 2000 (SI 2000/1624)[4]

[1] For advertisement appeals in England made before 6 April 2015 which have not been determined by that date the advertisement hearings are subject to the Town and Country Planning (Inquiries Procedure) Rules 1974. However, they are dealt with as hearings. See Annex 2 of the 'Advertisement appeals' TM chapter.
[2] See Dyason v SSE & Chiltern [1998] 75 P&CR 506.
[3] In Wales - The Town and Country Planning Appeals (Determination by Inspectors) (Inquiries Procedure) (Wales) Rules – SI 2003/1267 amended by SI 2007/2285. For applications (and subsequent appeals) made on or after 5 May 2017, The Town and Country Planning (Referred Applications and Appeals Procedure) (Wales) Regulations 2017 will apply.
[4] In Wales – The Town and Country Planning (Inquiries Procedure) (Wales) Rules – SI 2003/1266 amended by SI 2007/2285. For applications (and subsequent appeals) made on or after 5 May 2017, The Town and Country Planning (Referred Applications and Appeals Procedure) (Wales) Regulations 2017 will apply.

6 These Rules have been amended on a number of occasions since 2000. It is, therefore, important to use consolidated versions.

7 References to the Rules in this document are to the 'Determination by Inspectors' Rules (SI 2000/1625 in England, 2003/1267 in Wales) unless otherwise stated.

8 Procedural guidance can be found in:

Procedural Guide - Planning Appeals – England[5] *and* *Procedural Guidance – Planning appeals and called-in Planning applications – Wales*[6]

9 Guidance is also available for those taking part in inquiries:

Guide to taking part in planning, listed building and conservation area consent appeals proceeding by an inquiry – England; and, in Wales, the *Guide to taking part in planning appeals proceeding by inquiry - Wales*

The inquiry process

10 The inquiry process is set out in the Regulations and in the *Procedural Guide - Planning Appeals – England.* In summary, it is as follows:

Process	Timescale	Rules
Appellant's full statement of case, appeal form, all supporting documents and the draft statement of common ground	Provided with the appeal	Article 37(1) and (3) of SI 2015/595[7] (England); Articles 26(1) and (3) of SI 2012/801 (Wales)
LPA notify in writing any statutory party[8] and any other person who made representations (i.e. 'interested persons') telling them when and where representations must be sent to the Secretary of State.	Within 1 week from the start date	Rule 4(4)(b)
LPA provides questionnaire and supporting documents	Within 1 week from the start date	Rule 4(4)(a)
LPA provides full statement of case	Within 5 weeks of the start date	Rule 6(1)
Secretary of State/Welsh Ministers may require anyone who has notified a wish to appear at the inquiry to provide a full statement of case ("Rule 6 party")	Within 4 weeks of being notified.	Rule 6(6)
Appellant and LPA ensure agreed	Within 5 weeks of the start	Rule 15(1)(b)

[5] The *Procedural Guide – Planning appeals – England* applies to planning appeals, householder development appeals, minor commercial appeals, listed building appeals, advertisement appeals and discontinuance notice appeals. It also applies to appeals against non-determination. The *Procedural Guide – Called-in planning applications – England* applies to all applications which are 'called-in'.
[6] In Wales see also Circular 7/2003 Planning (and analogous) appeals and call-in procedures.
[7] The Town and Country Planning (Development Management procedure) (England) Order 2015.
[8] The term 'statutory party' is defined in Rule 2(1) but broadly means anyone making a representation in response to a site notice, local advertisement or notice to owners and occupiers within the specified timescale.

statement of common ground is provided	date	
Statutory and interested parties send any representations	Within period notified by LPA under Rule 4(4)(b) – but generally within 5 weeks of the start date	Rule 4(4)(b) & F7.2 of the Procedural Guide – England
Proofs of evidence provided by appellant and LPA (& any others entitled to appear, including Rule 6 parties)	No later than 4 weeks before the date of the inquiry	Rule 14(3)
LPA publishes notice of inquiry, notifies parties and posts a site notice	Not less than 2 weeks before the inquiry	Rule 10(5)(b)&(c)
Appellant provides final draft of any planning obligation	No later than 10 working days before the inquiry	N.2.4 of *Procedural Guide Planning Appeals – England (K.2.4 in Wales)*
Inquiry takes place	Not later than 16 weeks after the start date unless the Secretary of State considers such a date impracticable.	Rule 10(1)(a)
Inspector makes decision	The overall PINS targets are: 80% within 22 weeks 100% within Service Level Agreement for bespoke inquiries	Note – all inquiries expected to sit for 3 days or more will be subject to an agreed bespoke programme – F.4 *Procedural Guide Planning Appeals – England (O.13 in Wales)*

Objectives

11 In accordance with the Planning Inspectorate's Code of Conduct and the Franks' Principles (See 'Role of the Inspector') you have three main objectives when holding an inquiry:

- To ensure that the evidence is thoroughly examined and tested to enable you to reach a reasoned decision or recommendation
- To ensure all parties and interested persons have a reasonable opportunity to participate and to have a fair hearing
- To manage the inquiry in an effective and pro-active manner, making efficient use of time.

Before the inquiry

Who is entitled to appear at an inquiry?

12 The appellant, local planning authority and various other bodies[9] are entitled to appear at the inquiry – as set out in Rule 11(1).

[9] This includes certain other local authorities in the area, parish/community councils, 'Rule 6 parties' and statutory parties.

13 However, - Rule 11(2) states that there is nothing in Rule 11(1) that shall prevent you from permitting any other person to appear and such permission shall not be unreasonably withheld. The starting point, therefore, is that you should be prepared to hear from anyone who attends.

14 A person who is entitled to appear may do so on his own behalf or may be represented by another person - Rule 11(3).

Statements of case, proofs of evidence and statements of common ground

15 The appellant is required to provide their **full statement of case** (including full particulars, documents and evidence) when making their appeal.[10] The LPA must do the same within 5 weeks of the start date.[11] Annexe J of the *Procedural Guide - Planning Appeals – England* provides more detail about what should be included. See also Rule 2(1) on "full statement of case".

16 **Proofs of evidence** are the documents which contain the evidence of specific witnesses:

- Proofs of evidence should be provided 4 weeks before the inquiry - Rule 14(3)
- A summary is required unless the proof is less than 1500 words – Rule 14(2)
- If a summary is provided – only the summary should be read out at the inquiry (unless the Inspector permits otherwise) – Rule 14(5)
- Cross-examination can be on any part of the proof – even if only a summary is read out – Rule 16(7)

17 The case for the appellant, LPA and any Rule 6 party should already have been set out in full in their statement of case. Consequently, the main purpose of a proof of evidence is to allow expert witnesses to:

- marshal previously provided evidence in a way which is convenient to the presentation of their case at the inquiry
- give their opinion on the evidence provided by other parties in their statements of case.

18 The *Procedural Guide - Planning Appeals – England* provides more advice about the contents of a proof, their length and the need for summaries (see annexe F.11). See also Annexe O on 'What is expert evidence?'

19 There is no reference in the Rules or the Procedural Guide to supplementary or **rebuttal proofs**. We do not encourage the provision of supplementary or rebuttal proofs. If these are offered or received less than 4 weeks before the inquiry, the case officer will check with you on whether they should be accepted. If they are offered at the start of the

[10] See Article 37(3) of The Town and Country Planning (Development Management procedure) (England) Order 2015 (Article 26(3) in Wales).
[11] Rule 6(1).

inquiry, consult with the parties as to whether they should be accepted and, if necessary, adjourn to allow everyone to consider the material presented. Costs applications relating to the receipt of such documents will be dealt with in the normal way. Bear in mind that rebuttal proofs can sometimes be helpful, particularly if they deal with points that could reduce the need for cross-examination and so reduce the inquiry time.

20 Rule 15 requires the LPA and appellant to provide an agreed **statement of common ground** within 5 weeks of the start date.

21 Advice on the content, form and purpose of the statement of common ground is provided in Annex T to the *Procedural Guide - Planning Appeals – England* (E.8 of the Wales guidance). The aim is to ensure that the inquiry focuses on the material differences between the cases of appellant and the LPA.

Pre-inquiry meetings

22 Rule 7(2) states that the Inspector shall hold a pre-inquiry meeting:

- If it is expected that the inquiry will last for 8 days or more (unless it is unnecessary)
- For shorter inquiries, if it is necessary.

23 The aim of the meeting is to make the inquiry more effective by ensuring the procedure and programme is streamlined and that the issues are clarified. The meeting is purely procedural and does not go into the merits of the case.

24 The parties should be given at least 2 weeks notice of the meeting – Rule 7(3).

25 More advice can be found in Annexe D. An example of a pre-inquiry note can be found in Annexe E.

Preparation before the inquiry

26 When the inquiry is confirmed by Chart:

- Check that you should not be precluded from the case (See PINS Conflict of Interest Policy)
- Check the case grading and any specialism are appropriate
- Sort out your travel arrangements and if necessary, book a hotel.

27 When you get the appeal file, check

- the venue, start time, and date. If it is not clear from the file you can ask the case officer to check if the LPA will provide you with a parking space.
- that you should not be precluded from the case, for example, because one of the parties is a relative or a close associate (see Conflict of Interest Policy).

- that it is within your capabilities

28 Nearer the day of the inquiry carry out your detailed preparation:

- Read the file systematically
- Do you understand the proposal and know which are the relevant plans?
- Identify the main issues (you will announce these in your opening remarks). Start by looking at the reasons for refusal, the main parties' statements of case, the statement of common ground and proofs of evidence. See 'The approach to decision-making' for further advice.
- Have any other matters been raised by interested parties (eg neighbours, MPs, statutory consultees)? See 'The approach to decision-making' for further advice.
- Are there likely to be any procedural problems (eg complaints about the venue, likely requests for postponements or adjournments) – is it possible to resolve these in advance?
- Are any documents missing? (development plan policies, SPD, SOCG, conditions etc) If so, request them through the case officer. At this stage they may need to be emailed or brought to the inquiry (or both). However, you may find that case officers have returned any late evidence or documents.[12] Reaching a judgement on whether to accept late evidence/documents is not always straightforward. A difficult balance has to be struck between ensuring your inquiry runs smoothly while sending out a consistent general message about the need to provide evidence on time. This will depend on the circumstances. For example, it may be pragmatic to accept documents which have been referred to in a statement of case or proof. However, the acceptance of significant new evidence is perhaps best considered at the inquiry itself when the views of the parties can be sought (if so, see the section below on '*Late evidence offered at or before the inquiry?*').
- Has reference been made to a planning obligation? If it is missing then ask for a final draft version through the case officer. (see 'Planning Obligations' for more information)
- Ask for any missing appeal notification letters and the list of people notified by the LPA if it is not on the file
- Who is likely to attend? Are any third parties likely to want to speak? Might they want to be heard early on?
- In Wales, are translation facilities likely to be needed? Contact the case officer to see if there have been any requests to conduct all or part of the proceedings in Welsh and, if so, to ensure translation is arranged
- Are there any procedural matters on which you might need to seek clarification (eg the nature of the proposed development, amended proposals, revised plans, which matters are reserved etc)

[12] Although case officers will often first seek the advice of the Inspector

- Establish relevant development plan and national policy. Is any clarification necessary? Do you need to consider whether the former is consistent with the latter? See 'The approach to decision-making' for further advice

- Prepare your opening and closing remarks, including a list of those who are likely to appear (see Annexe A for an example) and the main issues as you see them

- Prepare a list of questions (on any procedural matters, the main issues and any other matters) that you would specifically like the parties to address. Where time allows it is good practice to provide a list of questions for the parties to consider – preferably by email in advance through the case officer or, if not, at the start of the inquiry. This can help the advocates and parties focus on what you consider is essential and it also shows that you are familiar with the case. If you intend to raise an issue that might be a surprise to the parties it is best to notify them in advance of the inquiry through the case officer

- Prepare a list of features you want to see on the site visit (and add to it during the inquiry, as necessary)

29 When leaving home for the inquiry make sure you have everything you need.

Pre-inquiry visit to the site and venue

30 It is good practice to carry out an unaccompanied site visit before the inquiry. This can be done the day before or on the morning before you open (if there is time).

31 Be discreet. You can only view the site from public land. If you are approached explain your purpose as briefly as possible. Avoid getting involved in any conversation.

32 The advantages of a pre-inquiry visit are that it can:

- show the parties that you know the site and how it relates to its surroundings
- help avoid unnecessary explanation about the site
- help you to follow and understand site specific evidence
- help you ask informed questions
- ensure that you know where the site is and how to get there from the inquiry venue
- check that the site notice has been posted (especially if you know this might be an issue).

33 However, pre-inquiry site visits are not always essential (for example, if relevant features cannot be seen from public land or if the issues relate to policy only - and you are confident of finding your way to the site).

34 You may also find it helpful to visit the inquiry venue on the day before so that you know how to find it and where to park.

35 If you stay overnight, do not talk with any guests as they might be involved in the inquiry.

The day of the inquiry

36 Aim to arrive at the venue around 45-60 minutes before the inquiry opens and report to reception. This will allow you to:

- Ensure the room and venue is suitable for the inquiry. Are you happy with arrangements, including the position of the witness table? If the room is unsatisfactory or requires furniture to be moved, return to the reception and request changes. See 'The venue and facilities for public inquiries, hearings and examinations' on Gov.uk which provides advice on the location of the venue and the layout of the inquiry room. Annex 1 to this document provides a suggested layout for the inquiry room.

- Check the room is suitable in terms of health and safety requirements. See Annexe C of this guide for a checklist.

- Check that the room will be accessible. See paragraph 7 of 'The venue and facilities for public inquiries, hearings and examinations'. This explains that LPAs are responsible for ensuring that venues are accessible but this does not absolve Inspectors of responsibility. It states that if you consider the facilities to be unacceptable you will adjourn until a more accessible venue is provided.[13]

- Check that water will be available for all. You can accept an offer of tea/coffee if it has been provided for all participants.

- Check if you have a 'retiring room' or, if not, where you can wait away from the parties. A retiring room allows you to avoid contact with the parties before the inquiry opens and in breaks. It is also somewhere you can work. Paragraph 10 of 'The venue and facilities for public inquiries, hearings and examinations' says that one should be provided.

- Decide whether or not to use any PA system. Make sure you know how it works. However, the acoustics may only be apparent when the room is full so be prepared to adjust your approach.

37 Once you have set out your papers and nameplate it is best to leave the room so that you are not left alone with just one of the parties. Take your own notes with you. Avoid getting involved in any discussion. If anyone wants to engage you in conversation about the appeal, ask them to raise it once you have opened the inquiry. However, you can deal with matters relating to the inquiry venue (eg the layout of the room).

38 Return to the inquiry room a few minutes before the inquiry starts. Most Inspectors aim to enter about 2 minutes before.

39 While you wait to formally open the inquiry you can use the time to check the main parties are present, circulate the attendance sheet and ask people to sit down.

[13] In Wales, - if necessary, check that translation facilities have been provided. For more information, see the Wales Inspector Guidance – Working in Wales Overview.

Running the inquiry

The order of the inquiry

40 The Rules govern the procedures at an inquiry[14]:

Rule 16(1) - "except as otherwise provided in these Rules, the Inspector shall determine the procedure at an inquiry"

Rule 16(4) – the LPA shall begin and the appellant has the right of final reply (unless you determine otherwise) – other persons will be heard in such order as you determine.

Rule 16(5) - A person entitled to appeal shall be entitled to call evidence and the appellant, LPA and any statutory party shall be entitled to cross-examine persons giving evidence.

41 A typical running order is:

1. **Inspector's opening announcements** including identification of main issues and the running order

2. **Opening statement from the main parties** – usually the appellant followed by the LPA and any Rule 6 party

3. **LPA's case** – hear each witness in turn
   - Examination-in-chief led by LPA's advocate
   - Cross examination of witness by appellant's advocate
   - Any other questions to the witness (from any other parties who are supporting the proposal and who intend to speak)
   - Re-examination of witness by LPA's advocate

4. **Cases for other parties opposing the proposal** – usually starting with those who have a right to be heard[15]
   - Their evidence and then cross-examination/questions from the appellant

5. **Appellant's case** – hear each witness in turn
   - Examination-in-chief led by appellant's advocate
   - Cross examination of witness by LPA's advocate
   - Any other questions to the witness (from any other parties who have spoken in opposition to the proposal)
   - Re-examination of witness by appellant's advocate

6. **Cases for other parties supporting the proposal** – usually starting with those who have a right to be heard:
   - Their evidence and then cross-examination/questions from the LPA (and any Rule 6 party opposing)

7. **Conditions and planning obligations** – by means of a hearing type discussion

8. **Closing submissions** – usually ending with the appellant

[14] Note that there are specific differences relating to enforcement and LDC inquiries
[15] To avoid repetition, at this stage, you can ask if there are any questions which have not already been put to the witness

9. **Cost applications** – if any

10. **Site visit arrangements** and collect outstanding documents and attendance list

11. **Close inquiry**

42 Previous advice to Inspectors[16] indicated that any statutory parties, Rule 6 parties and interested persons would typically be heard after the appellant and LPA. However, the advantage of following the order set out above is that the full case against the proposal is made at the outset before the appellant presents their case. This can help reduce repetition.

43 However, you can vary this order. For example:

(1) If an issue relates to complex or technical matters (for example, noise, 5 year land housing supply or traffic generation- it can be helpful to deal with witnesses on an issue-by-issue or topic basis. However, you should seek the agreement of the parties first, preferably by email beforehand. For example:

- LPA's noise witness
- Appellant's noise witness
- LPA's traffic witness
- Appellant's traffic witness.

(2) You may need to hear third parties out of turn because of their availability.

44 An indicative programme can be found in Annexe B.

45 It is good practice to check that everyone has been heard before you move on.

Opening the inquiry

46 Open the inquiry at the appointed time. Use the clock in the room (if there is one and it is reasonably accurate).

47 Your opening should be delivered in a confident and purposeful manner. Look up and avoid undue reference to your notes.

48 An example of opening remarks is set out in Annexe A. However, these are not prescriptive and can be adjusted to suit your own style and the case, provided that you cover the essential items.

49 The essential items to cover in your opening are set out below. You can vary the order.

Preliminary matters – the appeal before you (appellant, site address and description of development) and that you have been appointed by the Secretary of State. Check that everyone can hear you. Note the emergency exits and procedures (see below for more information). Ask for mobile phones to be off or

[16] In the now replaced Procedure Guidance Note 4 Conduct of Inquiries March 2012

silent and that no calls are made/taken during the inquiry. State the timing of breaks.

Appearances – take the names of the advocates, who is instructing them, the witnesses they intend to call and anyone else who wishes to speak. If anyone is speaking for an organisation ask them to give their position and their authority to give evidence for the organisation. It is not necessary to take the names of people who intend only to observe. However, if they subsequently decide to speak, you will need to remember to record their names so that they can be listed in your decision. Clarify any qualifications if not already provided in written form. Check the order of witnesses. Check when third parties will be available.

In Wales - establish whether the parties wish to speak in Welsh – and if so, ensure that translation facilities are provided if needed.

Attendance list – it is best to ensure that everyone who speaks has filled it in so you have a record of their details. It is also good practice to request that all those who attend fill it in (even if they do not speak). Start a new sheet on each subsequent day of the inquiry. A full record can help with complaints relating to attendance. If anyone does not want their details to be seen by other people who fill in the attendance list after them they can fill in a separate sheet (make sure you take some spare copies).

Filming and recording – you should ask if anyone intends to film or record the event (see separate section below for further information).

Notification to interested parties – make sure that you have a copy of the LPA's letters of notification of (1) the appeal and (2) the time, date and place of the inquiry and the list of those to whom these were sent. It is best to secure these at the start of the inquiry before the opening statements are made and any evidence heard (in case any problems with the notification might prejudice the interests of any parties and so lead to an adjournment). See below for further advice if there is a problem.

Representations from interested parties – note those you have received and, if necessary, allow the main parties to check they have the same copies.

Statement of common ground and proofs of evidence– note the full statement of cases and proofs you have received, any summaries. Are any or sufficient spare copies available or that can be made available for interested parties?

Plans – Clarify which plans were before the LPA when it made its decision and the status of any other plans (superseded, illustrative or provided with the appeal?). If revised plans were provided with, or during, the appeal process you will need to explain how you intend to deal with them. See 'The approach to decision-making' for more information.

Late evidence/documents (if there are any) explain your approach – are you accepting it? (see further advice on this below). You will need to list any documents accepted at the inquiry at the end of your decision. It is best to number them as received and keep a running list.

Procedure – explain the order of the inquiry and its format – eg opening statements, process of cross-examination and re-examination, discussion on conditions (without prejudice) and any planning obligations, closing submissions,

costs (noting that, in England, you have the power to initiate costs[17]) and site visit.

Time estimates – ask the advocates to supply estimates for evidence in chief and cross-examination. Will the inquiry be completed in the allotted time? Do you need to seek the assistance of the advocates to ensure it does? Explain about breaks for lunch etc. It can be helpful to outline a general timetable (a timetable is required for inquiries of 8 days or more – Rule 8(1). You can ask for time estimates before the inquiry through the case officer. Following this, you can also send out a draft timetable beforehand which can be discussed during your opening.

Main issues and any other matters – Rule 16(2) states that, at the start of the inquiry, the Inspector shall identify what are, in his opinion, the main issues to be considered and any matters on which further explanation is required. Ask the parties if they agree with your identification of the main issues and be prepared to amend them. Rule 16(3) allows people appearing to refer to any issue they consider relevant. It can be helpful to set out your main issues and any related questions in writing.

Procedural matters – seek clarification on anything which is uncertain (eg the description of development or, in outline applications, which matters are reserved).

Commence – start with the opening statements for the appellant and LPA.

General approach

50 Inquiries are more formal than hearings. Witnesses are formally introduced by their advocates and there is a set procedure in terms of evidence in chief, cross-examination and re-examination which is led by the advocates[18].

51 However, it is important that you demonstrate that you are in charge of the proceedings. Avoid being tentative, passive or quiet. Clearly direct the transition between different stages of the inquiry – for example:

"Mr A – you may now cross-examine Mrs B"
"Mrs C – would you now call your 2nd witness"

52 Although you must retain an appropriate degree of formality, you can smile and inject a degree of humour if you think it is necessary to help relax the participants – but do so carefully, and avoid referring to controversial subjects or making light of the issues at the inquiry.

53 It is for you to decide whether the advocates sit or stand during the inquiry. In a small venue, with a small number of people, it is usually best that they stay seated. However, in larger venues with more people

[17] see advice on the Inspector's initiation of an award of costs in the Cost Awards chapter of the Inspector Training Manual
[18] An advocate is usually a legal professional who presents or pleads a party's case - in planning inquiries they will often be either Counsel (a barrister) or Queens Counsel (colloquially known as 'silks') – sometimes the appellant may act as their own advocate or their agent may be their advocate

attending it may be necessary for them to stand so that people can see who is speaking.

54 Witnesses should generally be asked to sit at the witness table. However, see the advice below about interested persons.

55 Be prepared to intervene in the proceedings. Careful interventions can assist your understanding of the arguments and may help reduce the length of an inquiry. For example, you might intervene:

- To suggest a brief adjournment to allow the parties to reach agreement on a particular matter if you feel that would be more productive than the adversarial approach (for example, on conditions or technical matters). This could be during a slightly extended lunch break or overnight.
- To suggest that a particular point or issue is discussed by means of a round table discussion (ie this need not be confined to the discussion of conditions – it may be helpful where technical matters are being discussed and can help the parties focus on areas of disagreement)
- To ensure the inquiry is run efficiently and effectively (see 'Your interventions' below).
- To ask your own questions (see 'Inspector's questions' below).

Opening statements

56 This is where the main parties (including Rule 6 parties) briefly outline their overall case. It sets the scene for what is to follow and can be particularly helpful to third parties. Encourage brevity – 5-15 minutes should be enough for even the most complex of cases. They should not be used to recite or present evidence.

Examination-in-chief

57 This is where individual witnesses are taken through their evidence by their own advocate. Most witnesses prepare a proof of evidence. If so, it is not necessary for the proof to be read out in full. However, where there are members of the public or other parties present who have not seen the proofs it can be helpful for the summary to be read out to provide context. Nevertheless, discourage the reading out of too much factual material.

58 The examination in chief has three purposes:

- It allows the advocate to highlight key points in the witnesses evidence
- It helps make third parties aware of the case in more detail
- It allows the witness to settle in before being cross-examined

Cross-examination

59 This is the key part of the adversarial inquiry process and the point at which the evidence of one party is tested by the advocate for the opposing side. Advocates may ask a series of questions that are intended to lead the witness for the opposing side towards a particular answer. The aim of the questioning may not always be clear at the outset and it is best to avoid intervening too early. However, the advocates have a duty to assist the inquiry, so be prepared to intervene when the questioning does not appear to be helping you. Consider asking – 'where is this going?'

Re-examination

60 This is where the advocate has the opportunity to ask questions of their own witness following examination by the opposing advocate. Generally, this will be used in an attempt to clarify matters or recover ground that may have been lost in cross-examination. However, it should only be directed at matters raised in cross-examination. It should not be used to introduce new points or ask leading questions (i.e. where the question suggests the expected answer). If it is, the opposing advocate may justifiably object.

Conditions and obligations

61 You will also need to deal with:

Conditions – these are usually best dealt with after all the witnesses and third parties have been heard, and by means of an Inspector led discussion involving the appellant, LPA and any interested third parties. You will need to consider whether the suggested conditions meet the 6 tests in paragraph 206 of the Framework[19], even if they have been agreed by the main parties. Consider any conditions which have emerged during the inquiry, have been suggested by third parties or which you wish to advance. Emphasise that the discussion is standard practice and does not indicate that you have made up your mind. See 'Conditions' for further advice.

Planning Obligations – also generally best considered by means of an Inspector led discussion - you will need to assess whether the obligation complies with the 3 tests in paragraph 203 of the Framework[20] (and CIL Regulation 122 if relevant) and whether it would be effective (see Annexe N of the *Procedural Guide - Planning Appeals – England*.) Alternatively, if the obligation was central to a main issue, it may already have been discussed. However, you might have questions about its format, wording and effectiveness. See 'Planning Obligations' for more good practice advice.

Closing submissions

62 Invite each party who called witnesses to make a closing submission. It is usual to finish with the appellant. Generally, it should not be necessary to interrupt a closing submission. However, you should intervene if it appears that new evidence is being introduced or new points made or if anything is unclear.

[19] In Wales, see Circular 16/2014
[20] In Wales, see Circular 13/97 and Wales Inspector Guidance – Planning Obligations & CIL

63 You can ask the advocates before they start, or at any point during the inquiry, to cover any particular points in closing. You can also seek clarification at the end of their submission. This could be important if significant concessions were made in cross-examination.

64 If the inquiry lasts 8 or more days the closing submissions should be provided in writing - Rule 16(14). Written submissions are often provided in shorter inquiries and are invariably helpful. You can request them at the start, but you cannot require them. Sometimes you may be able to arrange the programme so that the advocates have time to prepare their closings in writing - for example, by arranging the site visit (which advocates do not normally attend) at the start of the final day.

65 Well prepared closing statements can be very helpful when writing your decision as they will summarise the key points. Take careful notes if they are not submitted in writing or if advocates depart from their script. If a reference is made to a legal judgment – try to secure a full reference and if possible a copy of the judgment.

66 You should not accept the offer of a written version after the inquiry as there is a risk that new points could be raised necessitating further exchanges between the parties. In addition, third parties would not be able to hear (or see) all of the closing submissions.

Costs applications

67 National guidance on the award of costs is provided in the Appeals section of the government's *Planning Practice Guidance*.[21] All costs applications must be formally made before the inquiry is closed[22].

68 Before closing the inquiry ask if any party intends to apply for costs. To assist with timetabling there is no reason why you should not ask about the costs intentions of the parties in your opening. However, you should always provide the formal opportunity at the end of the inquiry.

69 If the costs application has been made in writing:

- Does the applicant intend to add anything to it, orally?
- Has the written application been provided beforehand to the other party and to you? If not, ensure copies are provided and, if necessary, allow an adjournment for both you and the other party to read it
- If it was provided beforehand, has the other side responded to it in writing? If so, do they have any further response? If they have not prepared a written response, they should be given the opportunity to respond orally.

[21] In Wales, see Circular 23/93 Awards of Costs Incurred in Planning and Other (Including Compulsory Purchase Order) Proceedings.

[22] In England, see the Planning Practice Guidance ID 16-035-20140306 "All costs applications must be formally made to the Inspector before the hearing or inquiry is closed, but as a matter of good practice, and where circumstances allow, costs applications should be made in writing before the hearing or inquiry. Any such application must be brought to the Inspector's attention at the hearing or inquiry, and can be added to or amended as necessary in oral submissions."

- Where both you and the parties have had adequate opportunity to read and understand the application and any response, these do not need to be read out.

70 If the costs application is made, or added to, orally, the other side should be given the chance to respond and the costs applicant should then be given the final chance to respond.

71 In some cases it may be reasonable, in the interests of fairness, to allow an adjournment so that a response to a costs application can be prepared.

72 If the costs application and response is made orally, you will need to take a full note. Ask the parties to proceed at a steady pace.

73 Clarify whether the application is seeking a full or partial award. If partial, then what for? Intervene to seek clarification if need be.

74 If both parties make applications these should be heard one after the other. Start with the LPA.

75 If the inquiry is adjourned to another day, then any costs applications should be heard at the end of the resumed event.

Closing the inquiry

76 After the closing submissions but before closing the inquiry you should:

- Make arrangements for the site visit (and to any other sites)
- Collect the attendance list and any outstanding documents

77 In some rare cases you may accept that additional material can be provided after closing – for example a completed s106 agreement where all that is lacking are the signatures. If so, set a firm timetable for it to be received. You should also be clear about any opportunities for the parties to comment in writing on such material. Make it clear that if the material is not received on time, you will proceed to make your decision without it.

78 You may be asked when your decision will be issued. It is best to refer to the overall PINS targets (see table in paragraph 11). There is no requirement in the Rules or advice in the Procedural Guide that says you must specify a date.

79 Before you close the inquiry it is good practice to check that everyone has said what they want to, that all matters have been covered and that you have received all necessary documents, including the attendance sheet. Thank everyone for their attendance and contributions. Do not leave anything behind.

80 You should formally close the inquiry before leaving the venue (unless you are due to resume the inquiry on another day, in which case it should be adjourned).

Site visit

81 Rule 17 provides that:

- You may make an unaccompanied inspection before or during the inquiry without giving notice - Rule 17(1)
- You may visit the site in the company of the appellant, LPA and any statutory party during an inquiry or after its close and shall do so if requested by the appellant or LPA - Rule 17(2)
- If you intend to make an accompanied inspection this must be announced – Rule 17(3)

82 Given the inquiry proceedings are based on the formal presentation and examination of evidence, it is not appropriate to allow discussion at the site visit (as you might with a hearing which has not yet been closed). Consequently, site visits are conducted in the same way as for written representations cases. The purpose is for you to see the site and surroundings. Explain that you cannot listen to any representations/discussion/arguments - but that the parties can point out physical features.

83 In many cases the site visit will take place after the inquiry has closed. However, it can sometimes be beneficial to visit the site in an adjournment – for example:

- Where visiting the site will help you understand the evidence
- In winter time when daylight hours are short (to help avoid the inquiry running onto an extra day)
- To allow the advocates time to prepare written closing statements

However, the disadvantage is that it can lead to a lengthy adjournment that might be inconvenient for third parties not attending the site visit.

84 In cases where it is necessary to go onto the site, the visit will need to be accompanied. However, if the site is visible from a public place it may be possible to carry out an unaccompanied site visit – but only with the agreement of the parties.

85 If the visit is accompanied, representatives of both the appellant and LPA must be present. Third parties may attend, although if the site visit is to go on private land, the permission of the landowner will be required. Try to discourage large numbers from attending by explaining the purpose of the visit and asking for representatives.

86 If you travelled to the venue by public transport it may be expedient to accept a lift from one of the main parties. If so, you must ensure that a representative of both the appellant and the LPA travels in the vehicle. Explain this to any interested persons.

87 If the site visit reveals something that you feel is important but which was not discussed during the inquiry, you will need to seek the written views of the parties.

88 Some of the advice in 'Site Visits' is also relevant including on the conduct of the visit and about requests to view other sites in the area, taking photographs and health and safety.

Your interventions

89 You should intervene:

- To stop discourteous/disruptive behaviour by anyone to you or to any of the parties
- To control aggressive or bullying behaviour by an advocate
- Where the advocate is seeking to score points which are not directly relevant to your consideration of the planning merits of the case
- Where the witness is being evasive or is not answering the question
- To prevent repetitious questions or answers
- To prevent unhelpful or irrelevant questions
- To prevent questions which are outside the witnesses expertise/knowledge
- To prevent questions and answers which seem calculated to annoy
- To prevent leading questions during the examination-in-chief or re-examination – ie the advocate should not be suggesting the answer to a question which they are asking of their own witness. If necessary, ask the advocate to re-frame the question.
- To remind interested persons that this is their opportunity to ask a question of the witness – not to make a statement

You may need to intervene to stop cross-examination on legal matters if it does not appear to be assisting. Such matters are normally dealt with in submissions rather than through the cross-examination of a non-lawyer by an advocate.

90 Usually, a polite reminder will be effective. You will generally find that advocates will do their best to assist you.

91 Inquiries may be attended by large numbers of people who have strong feelings about the proposal. People may be unfamiliar with the planning system and inquiry procedures. They may be frustrated by having to wait to present their case. You may need to take active control:

- Act very quickly to stop any disruption – including audible whispering, general conversation, gasps, applauding, booing or unsolicited comments. It will usually be enough to stress that you need quiet so that you can hear all the participants and that the procedures are designed to allow everyone to have their say.

- If feelings are running high, you could amend the programme so that interested persons are allowed to speak first. However, you should seek the views of the main parties before doing this.

- A short adjournment can sometimes help restore calm.

92 If the approaches outlined above are not successful you have the power to:

- Refuse to permit irrelevant or repetitious evidence or cross-examination – Rule 16(6). However, be aware that the Rule states that if you refuse to permit oral evidence, the person may submit the evidence in writing before the close of the inquiry – so you need to tell them that.

- Require a person behaving disruptively to leave, refuse to permit the person to return or permit them to return subject to conditions but you should allow any such person to submit any evidence in writing before the close of the inquiry - Rule 16(9) - so you need to tell them that.

- Proceed with an inquiry in the absence of a person entitled to appear at it – Rule 16(11).

93 Only rarely will you find it necessary to give a formal warning or ask someone to leave. If you do, make a careful written note of the case reference, main parties, date, venue and a summary of the behaviour, warning and response (for future reference in the event of a complaint). If you have asked someone to leave and they refuse or if disorderly behaviour is disrupting proceedings despite your best attempts to ensure control, you should contact building security in the first place. Your final option is for the police to be called, preferably by building security[23] and/or to adjourn to another day.

Your questions

94 You can and should intervene to ask questions of a witness. This might be to seek clarification on a particular point or to address something that you feel has not been covered adequately. It is best to ask questions during the relevant part of the evidence-in-chief, or if not, at the end of it, so that the advocate can re-examine their witness if need be. Alternatively, you should offer the opportunity to re-examine.

95 You do not necessarily need to ask both main parties the same questions. However, you must ensure you are fair to both parties. Any questions you ask must be framed neutrally.

Adjournments

96 Rule 16(13) allows you to adjourn an inquiry.

97 Short adjournments may be necessary and can be helpful. For example:

[23] Section 4(1)(a) of the Public Order Act 1986 relating to disorderly behaviour applies

- if it would be reasonable to allow a party to read new evidence and to prepare their response (or if you need to read it).
- to allow the parties to discuss and seek agreement on a particular matter – for instance, the wording of conditions.

98 An adjournment to another day will be necessary if the inquiry over-runs the time allocated for it. In some cases a change in circumstance or new evidence may also necessitate an adjournment to a different day, for example, if natural justice requires that parties are given adequate time to respond. Contact Chart as soon as possible who will confirm the details to the parties. If the date, time and place are announced before the adjournment no further notice is required – Rule 16(13).

99 All adjournments must be to a definite time and place. Seek the views of the parties. This should be announced before adjourning – Rule 16(13).

100 After an adjournment the inquiry is 'resumed'.

101 Try to keep adjournments to a minimum – any adjournment should be necessary or helpful. Depending on the circumstances it might be appropriate to warn about the risks of a costs application.

Note taking

102 You need to record the discussion and your notes may well be the only record of what took place. However, you do not need to keep a word by word account. Instead focus on the main points made, particularly those which have not previously been set out in writing. If necessary, you can ask the parties to slow down or repeat a point if you wish to make sure you record it accurately.

103 You need to strike the right balance between engaging with the parties (through eye contact) and taking notes. You also need to manage the event as a whole.

104 A more thorough note will be needed if a costs application or legal submission is made orally. Ask the parties to speak slowly so you can make a thorough note of what they say.

105 It can be helpful to record the start and finish times of the various stages of the inquiry. This allows you to monitor whether the advocates are sticking to their time estimates.

106 Be aware that your notes might have to be made available following a request from one of the parties (for example, in connection with a complaint or High Court challenge).

Conduct of the parties at the inquiry

Discussion between an advocate and their witness

107 Once cross-examination of a witness has started, they should not be permitted to discuss evidence with their own advocate until their re-examination has been completed (for example, during breaks). Consequently, where possible, it is best to avoid adjourning over lunch or over night where cross-examination has started but re-examination has not been completed. If this is not possible you should remind the witness of the need to avoid communicating with their advocate in the adjournment.

Who has the right to cross-examine?

108 Under Rule 16(5) only the appellant, the LPA and statutory parties[24] have the right to cross-examine persons giving evidence. However, in the interests of natural justice, Rule 6 parties should always be allowed to cross-examine and interested persons should normally be allowed to ask questions of a witness giving evidence for the side they oppose. Try to make sure that questions do not repeat those already put by the opposing advocate.

109 The convention is that statutory parties should normally be given the opportunity to present their case and cross-examine/ask questions before other third parties.

Interested persons and third parties

110 Interested persons (often also called 'third parties' or interested people) may not be able to stay for all the proceedings. You cannot expect them to be familiar with the inquiry process and the planning system or to have full knowledge of the case or to offer solutions or alternatives. Accordingly:

- You may need to hear from people out of the normal order – seek the agreement of the main parties.
- Try to ensure that people do not feel intimidated by the proceedings or any of the participants. It is your role to help ensure that they can get across their arguments. In some cases people may feel more comfortable speaking from where they are sitting rather than from the witness table.
- Ask if they are prepared to be cross-examined/or to be asked questions – inform them that that this will increase the weight that can be attached to their evidence (untested evidence carries less weight).
- You may need to help interested parties frame their questions.

[24] The term statutory party is defined in Rule 2(1).

111 There is nothing in the Rules to prevent an interested person or party making an opening statement or a closing submission. However, this will usually only be done by any Rule 6 parties and organisations/groups and is at the Inspector's discretion. This will usually be after the main parties have opened and before the appellant has closed.

Rule 6 parties

112 Rule 6(6) allows the Secretary of State or Welsh Ministers to require 'any other person' to provide a statement of case. In most cases "Rule 6 status" will have been sought by a third party who wishes to take an active part in the inquiry. There will be a letter on the file requiring a statement of case. To have "Rule 6" status the third party must have complied with the requirement to provide a statement of case within 4 weeks of being required to do so. They will often be legally represented.

113 In most cases the Rule 6 party will prepare a proof of evidence and will take part in the same way as the appellant and LPA – ie through the presentation of evidence in chief, cross examination and re-examination and the making of opening statements and closing submissions.

114 You will need to adjust the standard running order to accommodate Rule 6 parties. If they are opposing the proposal:

- any opening statement and closing submission from a Rule 6 party would usually follow the LPA
- witnesses for a Rule 6 party would normally be heard after the LPA but before the appellant
- Rule 6 parties can cross-examine the appellant – usually after the LPA

115 Further advice is provided in the '*Guide to Rule 6 for interested parties involved in an inquiry – planning appeals and called-in applications – England*' and '*Guide to taking part in planning appeals proceeding by inquiry – Wales*'.

Can people ask a question of "their own side"?

116 Occasionally, third parties may want to ask a question of a witness who is on the same side as them. Although there is nothing in the Rules to say that this should not be allowed, the general convention is that a witness should not be cross-examined by their own side. However, if there are fundamental differences between parties who are, nevertheless, seeking the same outcome to the appeal, it can be reasonable to allow questions. In some cases it may work best if any questions are put through you.

Advocates who are also witnesses

117 Sometimes professional persons may appear in a dual capacity as an advocate and as an expert witness. This should not normally present any difficulties. However, it is important to distinguish between the two roles

and they should sit at the witness table when giving evidence. For obvious reasons, they will be unable to re-examine themselves.

Expert witnesses

118 The weight to be afforded to the evidence of an expert witness could depend on their qualifications and experience. This is because the evidence of an expert in a particular field should be well informed. However, it is the quality of the evidence that is of primary importance (and the degree to which it stands up to being tested under cross-examination).

Officers who disagree with their local authority

119 An LPA does not always accept the advice of its professional officers and, consequently, some decisions are made 'against recommendation'.

120 In these circumstances, it is for the LPA to decide whether to call such officers as witnesses. If they do it is reasonable for the opposing advocate to ask questions about their own professional views and the advice they provided to the LPA. It will be for you to decide what bearing any answers have on the weight you attach to particular evidence. It will usually be established that there is a distinction between their own professional view and their representation of the views of the authority at the inquiry.

121 However, in many cases the LPA will employ a consultant or use a different officer or an elected member to give evidence instead.

Appearances by more than one authority

122 In areas where there are two tiers of local government, the authority responsible for dealing with the application is the "local planning authority" for the purpose of the Rules - Rule 2(1).

123 The other authority has a right to appear and give evidence at any inquiry into such a case - Rule 11(1)(c). However, they are not entitled to cross-examine witnesses and can only do so at the Inspector's discretion. This is because the 'other authority' is not defined as a statutory party and so is not included in the list of parties entitled to cross-examine in Rule 16(5). However, if there are significant differences in the case of the two authorities, the other authority should be allowed to cross-examine on these matters.

124 Any attempt to cover the same ground should be prevented if it is repetitious. Cross-examination must be permitted if a refusal to allow it would result in a denial of natural justice to the authority. Where there is no significant difference between the two cases, you should make it clear that only one of the advocates will be allowed to cross-examine. This should be the one with the right to do so (ie the LPA).

125 Where any local authority has expressed in writing an adverse view which has been included in the LPA's statement of case, that local authority may be required to make a representative available at the inquiry (Rule 12). The representative may be called as a witness by the LPA. Alternatively, the authority may wish to present its own case, particularly if its evidence is contrary to that of the //LPA.

Representatives of organisations

126 Check the position of anyone who states that they are representing an organisation. Do they have authority to represent the organisation? It can also be helpful to know the number of members and how the organisation arrived at their position on the appeal (for example, was there a committee approval?).

Representatives of government departments

127 Where the Secretary of State or the Historic Buildings and Monuments Commission for England (also called "English Heritage") has given a direction[25] or the Secretary of State, another Minister of the Crown or a government department or certain other bodies have expressed a view about the application[26] the appellant, LPA or a person entitled to appear can apply in writing for a representative to appear at the inquiry – Rule 12(1).

128 Rule 12(2) states that in these circumstances the Secretary of State or Welsh Minister shall make a representative available. That person shall give evidence and be subject to cross-examination – Rule 12(3).

129 Rule 12(4) requires that the representative shall not be required to answer a question which is directed to the merits of government policy (although such questions can be asked – it is up to the representative to decide how or if they should respond).

130 The LPA may call such representatives as witnesses. Otherwise they should normally be called upon to give their evidence independently at an early stage in the proceedings.

131 To be taken into account, departmental evidence must be made available to the other parties. The departmental witnesses are required by Rule 12 to give evidence and to be subject to cross-examination to the same extent as other witnesses. The balancing of departmental views against other material considerations is a matter for the Secretary of State/Welsh Minister or the Inspector acting on his behalf.

132 Sometimes representatives of a government department attend the inquiry other than in pursuance of the above rule. They may then appear

[25] Under Rule 4(2)(a) or (b). In Wales, the National Assembly/Welsh Ministers.
[26] Under Rule 4(2(c)

on their own, or be called by a party. You should give them the same protection against questioning on the merits of government policy.

Assessors/specialist advisors

133 An Assessor is a specialist adviser, usually scientific or technical, selected to assist you by hearing, testing and weighing evidence of a specialised nature that may be outside the normal experience of the Inspector but which may have an important bearing on the issues to be decided. See Annexe K for more information.

Issues that might arise during or after the inquiry

What if a main party is not present?

134 If one of the main parties is not present at the appointed time - open the inquiry. Establish who is present by taking appearances and explain the position. It is possible that the person is ill, has been delayed while travelling or has gone to the wrong venue.

135 If the appellant is missing, ask the LPA to try to contact them. If the LPA is not present ask the appellant to try to contact them. If the appellant/LPA does not have the contact details, adjourn, phone your charting manager and ask Chart to try and contact them.

136 Adjourn initially for 15-20 minutes. More than one adjournment may be needed to establish the position. If it is feasible, allow a reasonable period of time for the missing party to arrive so that the inquiry can continue on the same day.

137 If there is no prospect of the missing person attending and you have no reason to believe that the missing party has behaved irresponsibly, explain that you do not intend to conduct the inquiry without one of the main parties present (because to do so could be unfair) and will therefore have to adjourn it.

138 In most cases, the first preference will be for the inquiry to be rearranged (by Chart). Explain that you will not be able to arrange a date to re-open as one of the main parties is missing and that the case officer will be in contact later. Adjourn the inquiry. When you return home, contact Chart who will write to the parties. Remember to keep the case officer informed.

139 If exceptionally, you consider that it might be possible to carry out the case by the written representations procedure, you should first seek the views of those present. If there is support for this view and you consider it reasonable in the circumstances, close the inquiry and carry out the site visit (but this will only be an option if the site visit can be done unaccompanied). On your return home, contact Chart who will write to the parties.

140 If you consider that one of the parties has acted irresponsibly or unreasonably – see the advice in Annex H.

141 If one of the main parties falls ill, you may need to adjourn the inquiry, including if necessary to another day. This will depend on the severity of the illness and the demands of the event. The same will apply if you fall ill.

142 If the inquiry is to be rearranged you should hear any application for costs at the end of the re-opened inquiry.

143 If you subsequently intend to complete the case by the written representations procedure, it is possible that one of the parties may indicate that they wish to make an application for costs. If so, you should hear this before you close the inquiry. You should then prepare a report on the costs application. A copy of the report should be sent to the Costs Reports mailbox. A note should also be placed on the appeal file for Despatch to the effect that the appeal file and report should be forwarded to the Costs and Decision Team when the appeal decision has been issued. The Costs and Decision Team will complete the costs process and make the costs decision.

What if the venue is not large enough?

144 No-one should be precluded from attending an inquiry even if they do not want to speak. If it becomes clear that the venue is not large enough you will need to adjourn to allow the LPA to find a more suitable place to hold the inquiry – if at all possible on the same day. Open the inquiry and seek the views of the main parties.

145 Do not accept a suggestion that people should be admitted on a first come first served basis or that attendance should be prioritised in any way.

Rulings

146 You may be asked to make a ruling at any stage of the inquiry (although the party making the request may not use the term 'ruling'). This might for example, be about

- whether you will accept new evidence or revised plans.
- whether a procedural problem may have led to unfairness which needs to be remedied.
- whether the appeal or application is valid.
- whether the inquiry should be adjourned for some reason.

147 Ask the parties for their views. Hear from the party making the request first then from anyone opposing it. Ask any questions you may have. If

necessary, adjourn for a short period to consider the points made. Keep a careful note of any discussion and the conclusions you have announced.

148 In some cases it may be advisable to prepare the ruling in writing. This would be appropriate where there are legal matters or complex issues on which the appeal may turn.

149 When considering a ruling, bear in mind the following:

- natural justice - the ruling should not put any party at a significant disadvantage
- your own interest - provided there is no breach of natural justice, a point may best be resolved on the basis of how you may best be helped
- a breach of the Rules does not itself invalidate the proceedings or require redress - if no-one is at a disadvantage, the breach is unlikely to be serious
- a breach of the Rules in the course of producing evidence does not render that evidence inadmissible – however, you may need to consider whether an adjournment may be necessary
- a simple common-sense ruling is more likely to be appropriate than one which is complex, or is based on complicated reasoning
- where possible it is best to reach a conclusion at the inquiry– however, in some circumstances it might be possible or preferable to ensure all possibilities are examined at the inquiry and then resolve the dispute in your decision
- where a ruling is sought you must give clear guidance to the parties. It is essential that all concerned understand any ruling you give even if they are unhappy about its implications.

150 Try to be aware of the precise terms of any relevant legislation, but seek the assistance of the advocates and invite them to address you on the relevant provisions. One important aspect is the extent to which the relevant Rules give you specific powers. Your ruling will carry greater weight if made in pursuance of such a power. In planning cases, the Rules make it clear that it is for you to determine the procedure except as provided otherwise in the Rules – Rule 16(1). Ensure that you are looking at the most recent amended version of the Rules (but check any transitional arrangement/significant dates). It is essential that you study the Rules and act in accordance with them at all times. In addition to the appropriate Acts and Rules, any stated objectives of the legislation should be taken into account.

151 When a ruling has to be given, if a party persists in objecting, you should advise them that you intend to proceed with the inquiry but if they have a complaint they should contact the Quality Assurance Unit. Alternatively,

they would have the option of applying for judicial review or, once the decision had been issued, making a High Court challenge.

152 You should never say that a ruling has been based on instructions or advice from the office as you alone are in control of the inquiry proceedings, and make all rulings.

What if the LPA no longer intends to defend a reason for refusal?

153 The LPA may announce at the start of the inquiry, or before it, that they no longer intend to defend a particular reason for refusal. Occasionally they may explain that they no longer have any objections to the proposal. Even though this may have been made clear in writing, it is helpful to ask the LPA to explain the reasons for their position, particularly if third parties are present.

154 The LPA may state that it no longer intends to present any evidence on these matters, or at all. However, if you have questions or if there are third parties who oppose the proposal on these grounds you may request that the LPA witness is made available to answer questions. If the issue is a technical one (eg traffic) it can be advantageous to hold a session where the expert witnesses for the LPA and appellant share the witness table and answer any questions from you and other parties in turn.

155 In these circumstances, the appellant may still want to present their evidence-in-chief on the subject, particularly if there are third party objections. Similarly they may wish to ask questions of third parties opposing the proposal. You should allow this.

156 However, if the LPA declines to present evidence they should not be allowed to cross-examine the appellant. Essentially, therefore the evidence of the appellant will be un-tested – except by any questions that you or third parties raise.

157 Where the LPA no longer intend to defend a particular reason for refusal or have any objections to the proposal, the appellant may decide to make an application for costs, or you may decide to initiate an award of costs.

What if there are no notification letter(s) or site notice?

158 There should be 2 notification letters – the first about the appeal and the second about the inquiry. Check that the copies of the letters and site notice you receive from the LPA are correctly dated, relate to the correct appeal and venue and have been sent to the right people. A site notice should also have been posted.

159 Rule 4(4)(b) requires that:

> The local planning authority shall ensure that within 1 week of the starting date any (i) statutory party; and (ii) other person who made representations to the local planning authority about the application occasioning the appeal, have been notified in writing that an appeal has been made and of the address to which and

of the period within which they may make representations to the Secretary of State (or in Wales, the National Assembly).

160 Rule 10(5) states that:

> The Secretary of State may[27] in writing require the local planning authority to take one or more of the following steps – (a) not less than 2 weeks before the date fixed for the holding of a inquiry, to publish a notice of the inquiry in one or more newspapers circulating in the locality in which the land is situated; (b) to send a notice of the inquiry to such persons or classes of persons as he may specify, within such period as he may specify; or (c) to post a notice of the inquiry in a conspicuous place near to the land …

161 If the correct notification has not taken place you will need to decide whether to adjourn the inquiry to another date in order to allow it to be carried out. However, you will only need to do this if you consider that there is a significant risk that the interests of a third party could be prejudiced because they did not know about the appeal, only found out about the appeal 2 weeks before the inquiry was due to take place or were not notified or given little notice of the inquiry. For example, were they deprived of the opportunity to attend or respond to evidence? Seek the views of the parties at the inquiry and consider the circumstances.

162 Be pragmatic. A breach of the Rules does not inevitably require an adjournment to carry out further publicity. You are looking to see whether any party has been unreasonably disadvantaged.

What if late evidence is offered at or before the inquiry?

163 Rule 16(10) states that you may allow any person to alter or add to their full statement of case. Rule 16(12) allows you to take into account any written representation or evidence or any other document received by you before the inquiry opens or during it (provided that you disclose it at the inquiry).

164 Advice on accepting late evidence before the inquiry can be found in the section above on 'preparation for the inquiry'.

165 It is best to establish early on in the inquiry if anyone intends to submit new evidence or documents. This will allow the documents to be copied in one go and the need for an adjournment to be considered (to allow the witnesses and you to read them). This can help avoid serial disruptions.

166 If you are offered late evidence at the inquiry you will need to decide whether to accept it. The *Procedural Guide - Planning Appeals – England'* in F.12.1 to F.12.5[28] provides advice and states that:

[27] Although the Rule uses the term 'may' in practice the Secretary of State will usually require these steps to have been taken to ensure adequate notification and publicity. (For Wales, read 'National Assembly').
[28] In Wales, see section E.11 of the relevant Procedural Guidance.)

- no-one should attempt to "get around" the rules by taking late evidence to the inquiry - F.12.1)
- late evidence will only be accepted "exceptionally" - F.12.3 (this might for example, include, where relevant, a recent decision on a similar development, a recent appeal decision or a change in development plan or national policy – see Annexe B to the Guide ('Can there be new material during an appeal?'. More advice is provided in 'The approach to decision-making')

167 The *Procedural Guide - Planning Appeals – England'* states in F.12.3 that before deciding whether, exceptionally, to accept late evidence, you will require:

- an explanation as to why it was not received by us in accordance with the rules; and
- an explanation of how and why the material is relevant; and
- the opposing party's views on whether it should be accepted.

168 It goes on to state in F.12.4 that Inspectors will refuse to accept late evidence unless fully satisfied that:

- it is not covered in the evidence already received; and
- it is directly relevant and necessary for his or her decision;
- it would not have been possible for the party to have provided the evidence when they sent us their full statement of case[29]; and
- it would be procedurally fair to all parties (including interested people) if the late evidence were taken into account

169 If you intend to accept late evidence you should advise about the possibility of a costs award being made in the event of any adjournment (F.12.5) by you or an application being made by one of the parties (see B.2.3). This will allow the party the opportunity to consider whether or not to submit the evidence.

170 In practice, Inspectors tend to accept late representations (whilst warning of the risk of costs and allowing an adjournment where necessary). In the context of an inquiry and before the evidence has been heard, it can be difficult to make an informed decision about the potential relevance of the representation to your decision. Consequently, acceptance can often be the most prudent action to take. In any event, the overriding consideration is to be fair to all parties.

171 If you decide to accept late evidence you will need to make sure that the other main party (and potentially other interested parties) have the chance to read and comment on it. You should seek the views of the parties on this. You have 3 main options:

1. If the new evidence is straightforward it may be possible to avoid adjourning or, alternatively, you and the parties may be able to read it during a short adjournment or over lunch.

2. If the evidence is more substantial, you might need to adjourn for a specific period (say 30 minutes) but still resume on the same day.

[29] See B.2.1 of Annexe B to the Guide. This refers to recent decisions and changes in national or local policy.

3. If the evidence is complex, substantial and/or technical you might need to adjourn to another day. This could be the case if one of the parties might reasonably wish to seek advice from an expert or if you need time to read and understand the new evidence.

172 The same principles apply if an interested person requests that you accept late evidence.

173 If you intend to adjourn for a significant period of time because a party wishes to submit late material, you should explain that there could be costs implications.

174 Keep a running list of any documents received.

Should I accept evidence after the inquiry has closed?

175 Rule 18(2) states that the Inspector may disregard any written representations, evidence or document received after the close. The intention of the Rule is to ensure that the parties provide evidence and documents, including s106 obligations on time. However, you should exercise this right with care. There may be occasions where you do need to accept late evidence (see the paragraph below).

176 In some cases important matters may arise after the inquiry has closed but before you have made your decision. This could include a change in national or local planning policy or a relevant appeal decision. A failure to take these into account could leave a decision vulnerable to challenge in the High Court.[30] Issues may be brought to your attention by one of the parties or they may be apparent to you for other reasons. In either case, if the issue is one which might reasonably have a bearing on your decision, you should:

- accept the evidence offered or proactively raise the issue - and allow the parties to comment in writing. Rule 18(3) states that if, after the close of an inquiry, you propose to take new evidence into account which was not raised at the inquiry you shall afford those entitled to appear at the inquiry with an opportunity to make written representations or to ask for the re-opening of the inquiry. You can give your views on the most appropriate method of handling the matter, but the inquiry must be re-opened if the LPA or appellant ask for it – Rule 18(4). Alternatively, you might decide the inquiry should be re-opened.

177 It is possible that immediately after closing you are asked to listen to someone who has not been heard. You can reduce the risk of this happening by double checking before you close. However, if it does occur, and if everyone is still present, you can ask the parties if they agree to briefly re-opening the inquiry. However, if this is not possible then no further representations can be heard. You should ask the person

[30] In Wainhomes v SSCLG [2013] EWHC 597 the issue of 5 year supply was central. The Inspector declined to consider two recent appeal decisions. However, these decisions dealt with the same issues and might have caused the Inspector to reach a different conclusion. Consequently, they should have been taken into account.

who wanted to speak to send their representations to the case officer by a certain date and note on the file that further representations are expected (see note on Int 12).

Amended plans and proposals

178 If amended plans have been provided with the appeal or during the appeal process, you will need to decide whether you intend to determine the appeal on the basis of these plans or those which were before the LPA when it made its decision. You should seek the views of the main parties and any interested persons. If at all possible decide on this at the start of the inquiry.

179 You will need to decide if accepting the revised plans would deprive those who should have been consulted on the changed development of the opportunity of such consultation (ie the 'Wheatcroft Principles'). Further advice is provided in Annexe 1 in 'The approach to decision-making' and Annexe M of the *Procedural Guide - Planning Appeals – England* (Annex I of the Welsh Procedural Guidance).

Ensuring a 'fair crack of the whip'

180 It is important to make sure that everyone has the chance to consider and comment upon evidence which you intend to rely on. Consequently, all potentially important issues should be identified and discussed at the inquiry. If necessary, this may involve allowing an adjournment so that the relevant party (or parties) can consider their response. This could apply if:

- One party raises a new argument or introduces new evidence
- You raise an issue which is not contested or has not been mentioned or has only been mentioned in passing (and so which the parties could not reasonably expect you to rely on).

181 This was addressed in: Castleford Homes Ltd v SSETR [2001] as cited in Van Dem Boomen & Anor, R (on the application of) v Ashford Borough Council & Anor [2007]:

"Did the claimant have a 'fair crack of the whip?' [ie a fair chance or opportunity] Was the claimant deprived of an opportunity to present material by an approach on the part of the Inspector which he did not and could not have reasonably have anticipated?"

"It is obviously helpful if an Inspector does flag up issues which the parties do not appear to have fully appreciated or explored. The point at which a failure to do so amounts to a breach of the rules of natural justice and becomes unfair is a question of degree, there being no general requirement for an Inspector to reveal any provisional thinking. It involves a judgment being made as to what is fair or unfair in a particular case. "

And also in Edward Poole v SSCLG & Cannock Chase DC [2008]:

"If a party to an inquiry reasonably believes that a matter which was in dispute has been dealt with by way of agreement in a statement of common ground, it may well be unfair to allow the apparently agreed issue to be reopened without giving the party a proper opportunity to address the issue, if necessary by calling expert evidence."

"… if an Inspector is to take a line which has not been explored, perhaps because a party has been under the misapprehension as to the true position of its opponents, …, fairness means that an Inspector give the party an opportunity to deal with it."

What if the appellant wishes to withdraw the appeal or application?

182 If this happens on your arrival at the event you do not have to formally open the inquiry. However, the withdrawal of the appeal must be confirmed to you there and then in writing. You should also ensure that any interested parties arriving for the inquiry are made aware that it has been withdrawn.

183 If the inquiry has opened, the appellant can withdraw the appeal orally as long as it is announced to the inquiry. However, it is best to ask for confirmation in writing.

184 If the appeal is withdrawn during an adjournment to a different day the inquiry can be closed in writing. You will need to make sure all parties are informed. However, if the appeal is withdrawn very close to the day of resumption, it may be necessary to resume the inquiry briefly and then close it in person. In either case, ensure that the case officer writes to all parties to confirm that the appeal has been withdrawn.

185 If any party seeks to apply for costs refer them to the relevant section of the government's Planning Practice Guidance (it is under "Appeals") which advises that any applications should be made to the Planning Inspectorate by letter or application form (on the Planning Portal) within 4 weeks of receiving confirmation that the appeal has been withdrawn.[31] In Wales, refer to Circular 23/93.

What if the validity of the appeal or application is challenged?

186 Listen to the arguments put to you. Unless the interests of a party have been seriously prejudiced you should continue with the inquiry. A breach of the Rules does not itself invalidate the proceedings or require redress. If no-one is at a disadvantage, the breach is unlikely to be serious. If objections persist you may need to advise the person making them that, although you intend to continue with the inquiry, they should make their concern known in writing to the case officer straightaway.

Requests for recovery of jurisdiction by the Secretary of State

[31] Planning Practice Guidance paragraph 035 ID 16-035-20140306

187 In the case of a transferred appeal, you may be asked to refer the case to the Secretary of State. If so, note the arguments put forward and inform the parties that consideration will be given to seeking the Secretary of State's ruling as to whether jurisdiction should be recovered. After the inquiry, the matter must be brought to the attention of the office immediately so that a decision on recovery can be made.

Hearing evidence under oath

188 You have the statutory authority at an inquiry to take evidence on oath (or under an affirmation) or to require the person examined to make a declaration of the truth of the matter in respect of which he or she is being examined. Hearing evidence on oath is unlikely to be necessary at most s78 inquiries, although it may occur where factual evidence is disputed. However, it is more common in enforcement and LDC inquiries. Further advice is provided in 'Enforcement and lawful development certificates'.

Withdrawal of a sole objection to an order

189 In the case of compulsory purchase and similar orders where you are told that a sole or sole-outstanding objection has been withdrawn, the inquiry should be opened in the usual way, bearing in mind that the inquiry is into the order itself and not merely the objection, that the inquiry has been advertised and that third parties may wish to be heard. The extent to which evidence needs to be given in support of the case stated by the LPA is a matter for your discretion in the light of the particular case. You will make a recommendation in the usual way.

Requests for a witness statement

190 You have the power under s250(2) of the Local Government Act 1972 to issue a summons. It is a power that is used very rarely and should be exercised with extreme caution and only as the very last resort. Instead this can normally be resolved by a clear request from you that the attendance of a particular person would be helpful. In any case, although you can compel someone to attend, you cannot require them to speak. Seek advice before you require attendance. For more information see Annexe G.

Should I hear evidence in private?

191 Section 321 of the 1990 Act requires that inquiries are held in public – ie oral evidence shall be heard in public and documentary evidence shall be open to public inspection.

192 An exception to this is where public disclosure would be contrary to the national interest because it related to national security. In such cases the Secretary of State can direct the hearing of evidence in private (in 'camera'). If this arises seek guidance from a Group Manager.

193 Commercial confidentiality or the privacy of individuals is not, on its own, a sufficient justification for an in camera session. Such requests should be dismissed.

Should I allow filming and recording?

194 The presumption is that filming and recording will be allowed. You should ask if anyone intends to film or record the event. If so, check that everyone is comfortable with this (for example, they may not wish to have their faces shown or voice recorded). If there are concerns, you can ask that filming/recording is restricted to certain angles. It is unlikely to be appropriate to film children or vulnerable adults even if no objections are raised. If filming/recording does take place ask that it is carried out responsibly.

195 If filming or recording goes ahead, make sure that it is not disruptive or distracting, that it does not discourage anyone from participating and that there are no safety problems (for example, trip hazards or access obstructions. It is for you to decide whether filming or recording would be acceptable. However, the general principle is that it should be allowed.[32]

196 If PINS receives a request to film or record beforehand, the Press Office will ensure that the case officer informs you that this is being proposed.

Other issues that might arise

197 Advice on the following can be found in 'Hearings'

- The validity of the appeal or application is challenged
- Video evidence?
- Unacceptable remarks
- A participant cannot hear
- A participant cannot speak English or read.

198 And advice on the following can be found in 'The approach to decision-making':

- Requests for split decisions
- Confidential evidence
- Arguments that planning permission is not needed.

After the inquiry has closed

[32] The *Procedural Guide – Planning Appeals – England* advises that "Provided that it does not disrupt proceedings, anyone will be allowed to report, record and film proceedings including the use of digital and social media. (3.5.1) and that "If anyone wants to record or film the event on equipment larger than a smart phone, tablet, compact camera, or similar, especially if that is likely to involve moving around the venue to record or film from different angles, they should contact [PINS] and the local planning authority in advance to discuss arrangements." (3.5.2) (See section 3.6 of the Welsh procedural guidance.)

199 Once the inquiry has been closed and any subsequent written representations received, your approach to writing the decision is likely to be similar to cases considered by written representations. However, if an important point was only raised at the inquiry or if relevant matters were agreed or conceded, then this should usually be mentioned.

200 At the end of your decision you will need to add lists of:

- Appearances (the attendance sheet provides a useful double check on spellings of names)
- Any documents, plans and photos handed to you during the inquiry. The lists need to be comprehensive but it is not always necessary to refer to every individual document – for example – "bundle of documents submitted by Mrs #"

201 The attendance sheet should not be listed as a document and the LPA's letter(s) of notification should only be listed if it was provided at the inquiry, rather than before.

202 All documents received at the inquiry should be numbered and placed on the top right hand side of the file (unless bulk requires that they are placed in a separate folder). The attendance sheet should be put on the top left hand side of the file.

Re-opened inquiries

Circumstances

203 Inquiries may be re-opened in the following circumstances:

- following a reference back to the parties - in transferred planning cases under Rule 18(4) or in non-transferred cases under Rule 17(7) of the Secretary of State Rules[33]
- at the discretion of the Inspector (in transferred cases) or of the Secretary of State (in non-transferred cases)
- when a decision has been quashed by the High Court (re-determination)

204 The section above on 'Accepting evidence after the inquiry has closed' provides more advice.

Procedures at a re-opened inquiry

205 When **new evidence** is to be considered, someone representing the source of that new evidence will attend the re-opened inquiry to give the relevant evidence and submit to cross-examination directed to this evidence but not to any other points.

[33] In Wales, the Minister on behalf of the National Assembly (under SI 2003/1266).

206 When a **new issue of fact** has caused the inquiry to be re-opened, the parties concerned will have been told what it is and they will be entitled to bring any evidence that reasonably bears on it. It may or may not be necessary in this type of case for anyone to attend and give evidence, although you can explain how you would like to proceed. If anyone does appear, this will be on the terms set out in the preceding paragraph.

207 Rule 17(5) and (7) of SI 2000/1624 allows the Secretary of State to re-open an inquiry, but only before he has issued his decision. This is a rare occurrence and on past occasions the Secretary of State has written to the parties to explain why the inquiry is being re-opened. The full examination of the evidence already given that relates to the issue that led to re-opening will need to be permitted, and it may well be that further evidence of the issue will have to be considered. It should not, however, be necessary to hear all over again the evidence already given on the issue and in many cases it may well be that the inquiry will take the form of argument rather than evidence.

208 When re-opening the inquiry, you should emphasise that the proceedings are strictly limited to the consideration of the specific topic or matter that requires further examination.

209 Normally, the re-opened inquiry is taken by the original Inspector, but if not, new Inspectors should add that they have studied the documents, plans, etc, and read the Inspector's report of the original inquiry (if already published). This should help to shorten the proceedings.

210 After the opening announcement you should take the appearances in the usual way. The usual procedure at inquiries regarding the press, notification of the decision and the list of persons present should be complied with. Before any representations are heard, you should explain the procedure to be adopted and if there are any objections you should hear them and, if possible, resolve them by agreement. It may be relevant to invite the parties to consider what conditions, if any, might be imposed in relation to the matters discussed. The usual reference to applications for costs should be made.

211 You should say, where a departmental representative is present, that the representative, whose name should be given, is present to give evidence and answer questions.

212 The Rules regarding the previous submission of Rule 6 statements and proofs of evidence do not apply in a re-opened planning inquiry. However, the case officer will normally have written to the parties to require statements and proofs. If this has not been done you can set out a timetable for the receipt of evidence before the resumption. Consequently, it will not usually be necessary for the parties to read evidence out in full.

213 The body or person responsible for producing the new evidence or calling attention to the new issue should be asked to present their case first. This will normally be in the form of a statement which, usually, will have been

circulated to the principal parties beforehand and is subject to examination in the usual way. The parties should then be heard in turn, followed by the interested persons, with the applicant or appellant being allowed the right of final reply. The inquiry should then be closed. An accompanied inspection of the site should be made if necessary.

Voluntary re-opening

214 Powers are also available to you to enable an inquiry to be re-opened voluntarily when not required by the rules. Inquiries should only be re-opened voluntarily in exceptional circumstances (eg when the issue is likely to be of particular concern to third parties) as the point at issue can usually be dealt with by written representations. If you consider that a transferred inquiry should be re-opened, you should consult your sub group leader or Group Manager. The Secretary of State may decide that a non-transferred inquiry should be re-opened in order that some factor, which was not discussed at the inquiry, can be taken into account.

Redeterminations

215 An inquiry may be re-opened for the redetermination of a case when the decision has been quashed by the court (High Court, Appeal Court or Supreme Court).[34]

216 The quashed decision is treated as if it had not been made and is incapable of having had any legal effect.

217 Procedure at the re-opened inquiry follows the normal sequence. In your opening announcement, you must make clear that you are re-opening the inquiry held earlier and that the case has to be re-determined as the previous decision was quashed by the court.

218 Because you must deal with the case 'de novo', all the original issues should be considered, as well as taking into account any new evidence or material changes since the first inquiry (eg the emergence of new development plan policies). However, there may be scope for saving time in relation to matters unaffected by the court's decision and rehearsed extensively previously. Where this is the case you should carefully canvass this possibility with the parties. Ask them whether there are any parts of the original evidence which do not need to be reheard and obtain their agreement in advance. Make clear any areas where it has been agreed that it is unnecessary for further evidence to be given.

219 For more information, see 'Redetermination following a High Court challenge' in Annexe 1 to 'The approach to decision-making'.

[34] Redetermined appeals can also be dealt with by means of a hearing or by written representations. See s319A of the 1990 Act and Rule 20.

Long inquiries

220 Advice on the holding of long inquiries can be found in Annexe H.

Call-in applications

221 Under s77 of the Town and Country Planning Act 1990 the Secretary of State may call in planning applications to be referred to him for a decision instead of being dealt with by LPAs. See Annexe L for more information.

Annexe A

A Inquiry opening

Before opening

Is the venue and room suitable and accessible?
What are the fire escape procedures?
PA and sound loop
Translation facilities (in Wales)

While waiting to open:
- check the main parties are present and seated where you might expect
- circulate the attendance list

Introduction

Good morning, the time is now 10 o'clock and the inquiry is open.

Can everyone switch off their mobile phones or set them to silent.

Can everybody hear me? *[if not please move closer]. If at any time anyone cannot hear please indicate and I will try and make arrangements so that you can.*

My name is [], I am a [chartered town planner] and I have been appointed by the Secretary of State to hold this inquiry.

The inquiry is into an appeal made by [], under s78 of the Town and Country Planning Act 1990 against the decision of [LPA[35]] to refuse planning permission for [] at []

[or the failure of [LPA] to give notice of their decisions within the prescribed period for …]

[note if anyone observing from the Planning Inspectorate]

Can the [LPA] please explain the emergency evacuation procedures?

Appearances

I shall now take the names of those who wish to speak.

<u>For the appellant</u>

advocate
[record name and whether Queens Counsel/Counsel etc and who instructed by]

[35] Where the appeal is in a National Park, be careful to use the term 'Authority' rather than 'Council'

witnesses
[record name, clarify position in organisation and qualifications]

Check order of witnesses being called

For the LPA/Council

advocate
[record name and whether Queens Counsel/Counsel etc and who instructed by]

witnesses
[record name, clarify position in organisation and qualifications if necessary]

Check order of witnesses being called

Anyone else?

Is there anyone else who would like to say something at the inquiry?

I need to know
- your name and address
- whether you are representing anyone or any group [and if you have authority to do so]
- whether you support or object to the proposed development
- any qualifications you want recording (please add them to the attendance sheet)
- I assume you will be happy to answer questions on your evidence and to be cross examined?
- do you have any specific time restrictions?

If you speak, give evidence or ask questions during the inquiry your name will be listed in my decision letter.

If a large number:
- don't need to hear the same evidence twice – not an effective use of inquiry time
- consider nominating a representative/s who can deal with main points

Attendance list

Is there an attendance list circulating? Please add your name and address to it – as clearly as possible – and any qualifications you wish to be recorded

Is anyone from the press present? – add names to list

Please make sure the attendance list is returned to me at the end of each day

[start new attendance list for each day]

Filming/recording

Does anyone intend to film or record the event?

I have no objections to this, provided it does not become disruptive? If anyone does have a difficulty with this please let me know now.

[If filming/recording takes place] – please make sure any filming or recording is carried out responsibly and does not interfere with the smooth running of the inquiry.

Notification letters

Can I have a copy of the Council's letters of notification

- of the appeal
- confirming the date, time and location of the inquiry and
- the list of those to whom the notification was sent

[if not already provided]

Has the Council notified all relevant parties and has the site notice has been posted?

[check – were the letters sent to those they should have been, in time – are the details of the date, time and venue correct?]

[If the letters cannot be provided, were not sent or are incorrect – consider whether the interests of any parties would be prejudiced – if they would be adjourn to allow the correct notification to take place. Be wary of offers to provide the letters later on in the inquiry]

Representations

I have copies of representations made in response to the:

- appeal notification
- original planning application consultation and the appeal notification

I will take these into account in reaching my decision

[if there is any doubt about whether the main parties have seen all of these – offer the opportunity to check them - eg during an adjournment – or consider giving out a list if you have one]

Proofs of evidence

I have received proofs of evidence [and summaries] from

Appellant

Council

I have read all of these proofs and so I would expect them to be largely taken as read.

Are there any spare copies for interested parties?

[if for some reason, the main parties do not appear to have each other's proof, consider adjourning at the end of the opening]

Procedure

I shall follow the procedure in the 2000 Inquiry Procedure Rules *[ie The Town and Country Planning Appeals (Determination by Inspectors) (Inquiries Procedure) (England) Rules 2000]*[36]

Are the parties familiar with the procedures?

Short version – if all present are familiar [eg if there are no interested parties present]

- Opening statements?
- Council's witnesses
- Appellant's witnesses
- Conditions/obligations
- Closing submissions
- Costs
- Site visit
- If lasting more than 1 day can material be left in the room overnight?

Full version (usually necessary if third parties are present)

1. When I have concluded my opening remarks, I will invite the appellant and the council to each make a brief opening statement, which should be no longer than [5-15 minutes – depending on case]. This will help everyone to understand the main arguments.

2. [Then I will hear from any third parties who need to leave early]

3. I will then ask the council to present their case and evidence first – so everyone can hear their objections to the proposal

4. The appellant's advocate will than have an opportunity to cross-examine the witness and the Council's advocate may then put some questions in re-examination.

5. There will be an opportunity for questions from any interested parties intending to speak in support the proposal and I may also have some questions

6. It will then be helpful to hear from local residents (and any other interested parties) opposing the proposals. Those who give evidence will normally be expected to answer questions on their evidence from the appellant's advocate and again, I may also have some questions.

7. I will then ask the appellant to present their evidence in the same way (ie case/evidence – cross-examination by the Council – re-examination by the appellant)

[36] Or as relevant and in Wales – the 2003 Rules

8. I will indicate when local residents and others who have indicated that they wish to speak and who oppose the proposal will be able to ask questions of the appellant's witnesses.

9. I will generally ask any questions I have during the evidence in chief or before re-examination. [or alternatively say that you may ask questions at any stage in the proceedings]

10. I will then hear a discussion on conditions [and planning obligations]. This is standard procedure. It does not indicate that I have made up my mind on the case and does not weaken the Council's continued opposition to the proposal or the appellant's case that planning permission should be granted. Is the list of conditions /in the agreed statement of common ground up-to-date?

11. I am not inviting any applications for costs but if anyone intends to make an application for an award of cost this should be done here before I close the inquiry. [note any receipt of written applications for costs or indications that a cost application will be made]

12. In addition, I have a power to initiate an award of costs, whether or not any applications have been made by the parties, and, if I were to do this, it would follow a written process with the relevant party after the appeal decision is issued.

13. I will then hear closing submissions from the Council and the appellants [request closing submissions in writing whenever possible – generally for inquiries of 2 or more days - but only required by Rule 16(14) for inquiries lasting 8 or more days]

14. I have already visited the site on my own, and am familiar with it and its surroundings. However, I will be making a site visit after I close the inquiry [I will need to be accompanied on the site visit by both main parties.] I will close the inquiry here – so the site visit will be solely for me to see the site and surroundings – no discussion.

15. Any comments on this running order?

16. Request advocates sit all the time/stand all the time [usually sit unless standing necessary for audibility/visibility].

17. Please note the position of the witness table. This is where I will hear from the various witnesses at the relevant time.

18. If lasting more than 1 day can material be left in the room overnight?

Time estimates

This inquiry is scheduled for # days. I need to establish a programme to ensure that it runs efficiently.

Can I ask both advocates to advise me, as best they can, on their time estimates [note these on proforma] [alternatively, seek time estimates before the inquiry and then discuss them at the inquiry]

The Council

- Evidence in Chief of Council's witnesses
- Re-examination of Council's witnesses
- Cross examination of appellant's witnesses

The Appellant

- Evidence in Chief of appellant's witnesses
- Re-examination of appellant's witnesses
- Cross examination of the Council's witnesses

[assess timings – following introduction and openings likely to have about 5 to 5.5 hours on first day and about 6 to 6.5 hours on subsequent days if sitting from 10am to 5pm with 1 hour for lunch and mid-morning/mid-afternoon breaks – but consider earlier starts on subsequent days]

[if necessary, outline targets for what will be covered each day]

I will break for lunch around 1 o'clock with short breaks in the morning and afternoon. I will seek the assistance of the advocates in finding suitable times to break mid-morning and mid-afternoon and aim to finish at around 5pm.

Plans

Clarify which plans were before the LPA when it made its decision.

Clarify the status of any other plans (superseded, illustrative, revised plans provided at appeal)

If revised plans submitted at appeal – decide whether to accept – seek the views of participants:

- Would they materially change the proposal?
- Would any party be prejudiced – because they might have been denied an opportunity to comment

Documents

Secure any missing or final copies of documents (eg statement of common ground, planning obligations, conditions)

All documents and evidence should already have been provided – however, if you intend to submit any, please tell me now

If anyone intends to submit further evidence - ask

- Is the material relevant?

- Why was it not received in accordance with the timetable [set in the Rules]?
- Are there any exceptional circumstances for it being provided now rather than with the statement of case?
- Seek the views of the other parties – have they seen the material?
- Would an adjournment be needed (how long, same day, different day)?
- If necessary, warn about risk of costs application
- Decide whether to accept [see advice in main text]

Note that the other party/parties could apply for costs and the Inspector could initiate costs [if the behaviour is unreasonable and led to unnecessary expense]

Only exceptionally will material received after the close of the inquiry be taken into account

Main issues and other matters

The main issues as I see them are [].

Has anyone got any comments?

[Outline any specific questions you may have about the main issues, other matters or procedural matters.]

Commence

That concludes my opening remarks

Are there any queries about the procedure or other matters before we start?

In that case may I ask the appellant's advocate to make a short opening statement.

Opening statements, evidence, closing statements, conditions and obligations

See 'indicative programme' below

Costs applications

Are there any applications for costs?

Listen to any costs applications

- Is the application available in writing? (if not already provided)
- Explain procedure – application – response – final comments on any new points
- Remind party they need to demonstrate unreasonable behaviour which has resulted in unnecessary expense
- Note that references should be made to the relevant sections within the government's Planning Practice Guidance regarding costs (under "Appeals"

- Please proceed at a steady pace – need to take notes [If costs application made or added to orally]
- Seeking full or partial award?
- Allow the other party an adjournment to consider response if necessary [if the application is made verbally or a written application is added to]

or if the costs application has already been made in writing:

- Do you still wish to proceed with your written application for costs?
- Do you intend to add anything to the application?
- Allow the other party to respond
- Any final response

Site visit

I shall now make arrangements for the site visit.

[Accompanied or unaccompanied?]

Who will attend for:
- appellant
- Council
- Any interested parties (or representatives)?
- Interested parties need permission of appellant/landowner to go on appeal site

I will close the inquiry here - consequently:
- Purpose is for me to see the site
- Can point out physical features
- But will not listen to any further discussion of merits

Check how long to get to site?
Discuss any travel arrangements [if travelling with the appellant and LPA]
Confirm time and best place to meet
Deal with arrangements to visit any other sites
Confirm any parking arrangements

Closing

Before we leave may I have any outstanding:
- attendance sheets
- documents

Thank you all for your contributions

The inquiry is now closed

End of day adjournment

Suitable point to adjourn the inquiry

Can I have the attendance sheet and any documents

Run through check list of outstanding documents/work and who is responsible

Is it possible to leave material in this room overnight?

Inquiry is adjourned until [time, date, place]

Resumption on subsequent day

Good morning, the time is now 10 o'clock and I shall resume this inquiry into the appeal made by [] against the decision of [] to refuse planning permission for []

This is the second day of the inquiry

First the usual reminders:

- mobile phones off or silent
- would everyone please sign the attendance sheet for today's proceedings
- aim to break for lunch around 1pm, finish if at all possible by 5pm with suitable breaks mid morning and afternoon.

On the first day I heard from: []

In a moment I will hear from: []

Before I do

- does anyone else wish to speak today who has not already indicated that they wish to do so?
- are there any procedural or housekeeping matters
- ask for any documents previously requested

B Indicative programme

1. Inspector's opening remarks

2. Appellants opening statement

3. Council's opening statement

4. Council's evidence

First witness

		Time estimate
1	Council's evidence in chief	
2	Cross examination (by appellant's advocate)	
3	Any interested party questions from supporters of proposal	
4	Inspector questions	
5	Re-examination (by Council's advocate)	
		Total -

Second witness

		Time estimate
1	Council's evidence in chief	
2	Cross examination (by appellant's advocate)	
3	Any interested party questions from supporters of proposal	
4	Inspector questions	
5	Re-examination (by Council's advocate)	
		Total -

5. Interested parties (opposing proposal)

Hear (1) evidence, then generally (2) Appellant's questions and (3) Inspector questions.

1	
2	
3	

6. Appellants evidence

First witness

		Time estimate
1	Appellant's evidence in chief	
2	Cross examination (by Council's advocate)	
3	Any interested party questions from those opposing the proposal	
4	Inspector questions	
5	Re-examination (by appellant's advocate)	
		Total -

Second witness

		Time estimate
1	Appellants evidence in chief	
2	Cross examination (by Council's advocate)	
3	Any interested party questions from those opposing the proposal	
4	Inspector questions	
5	Re-examination (by appellant's advocate)	
		Total -

7. Interested party evidence (supporting proposal)

Hear (1) evidence, then generally (2) Council's questions and (3) Inspector questions.

1	
2	
3	

8. Conditions and planning obligations

9. Closing submissions

Generally, Council and any other parties (eg Rule 6) and then appellant

10. Costs applications

Any applications for costs

11. Site visit

Arrangements for

12. Closing

Annexe C

C Health and safety checklist

When arriving at the venue – check the following:

	Yes/no	Any comments
Arrangements for activating the fire alarm and contacting emergency services		
The sound of the alarm and if there are any different alarm signals		
The evacuation procedure from the inquiry room, the location of fire exits, evacuation routes and assembly points		
Any planned fire alarm testing or fire evacuation drills		
The location of toilets		
Ensure persons attending at the start of each day are aware of the above		
Check that fire exits from the inquiry room are not blocked by tables or chairs etc		

D Pre-Inquiry Meetings

Unless stated otherwise, the references in this Annexe are to The Town and Country Planning Appeals (Determination by Inspectors) (Inquiries Procedure) (England) Rules 2000 (SI 2000 No 1625)[37].

Background

1 The Rules (SI 2000/1625) apply to the following:

- appeals made under s78(1) or 78(2)
- appeals in relation to listed building consent.

2 Similar provisions in respect of pre-inquiry meetings (PIMs) are included in the CPO Inquiries Procedure Rules 2007[38] and the advice contained in this Annexe is equally relevant in cases held under these Rules.

3 The Town and Country Planning (Inquiries Procedure) (England) Rules 2000 (SI 2000/1624)[39] apply where the Secretary of State will determine an appeal made under s78 or in relation to listed building consent. Under Rule 5, special pre-inquiry procedures apply. These are used very rarely and few Inspectors are likely to become involved with them. The main special features of the procedure are the serving by the Secretary of State of a statement of the matters which appear to him to be likely to be relevant; the preparation of outline statements (see definition in the rules) by the parties at an early stage; and publication in a newspaper of a notice of the PIM. The last measure enables unknown parties to come forward and register as participants; they are therefore able to play a full part in the inquiry from the earliest stages including the obligation to produce statements as required.

Arrangements

4 All inquiries (SoS or transferred) lasting 3 days or more, and all inquiries into a called-in application, will follow a bespoke timetable.

5 Under Rule 7(2)(a) of the 2000 Inquiries Procedure Rules for transferred inquiries a PIM will be arranged for all inquiries expected to last for 8 days or more, unless the Inspector does not consider one is needed. Rule 7(2)(b) enables an Inspector to hold a PIM for shorter inquiries if he or she considers it desirable. In practice these cases should be identified at an early stage, normally through the bespoke procedure, albeit in consultation with the Inspector. Similar arrangements apply for Secretary of State cases.

[37] In Wales, SI 2003/1267 as amended by SI 2007/2285. All references to 'the 2000 rules' in this annexe apply to SI 2003/1267 in Wales.
[38] Compulsory Purchase (Inquiries Procedure) Rules 2007 (SI 2007/3617)
[39] In Wales, SI 2003/1266 (Town and Country Planning (Inquiries Procedure) (Wales) Rules).

6 In practice, PIMs may be arranged for inquiries of 6 days or more. The decision whether or not to hold a PIM will take into account the particular circumstances of the case and the parties' views. As these cases will be following a bespoke inquiry timetable the date and time of the PIM will normally be fixed in consultation with you once the date of the inquiry has been set. Ideally the PIM will be scheduled between the receipt of the LPA's full statement of case and the receipt of proofs of evidence. Held at this juncture the PIM will be able to influence the nature and scope of the evidence to be presented at the inquiry and give adequate time for any subsequent informal or technical discussions between the parties.

7 If considered necessary, on transferred cases, you may serve notice of a statement of matters about which you wish to be informed under Rule 7(1). This should be done within 10 weeks of the starting date.

8 The PIM will be arranged to suit your programme and travelling arrangements but a Monday afternoon has often been found to be suitable in the past. Your programme will be adjusted to accommodate PIMs, and to provide the necessary balance between inquiry and reporting time.

9 Preparing for, travelling to, holding the PIM and writing notes of the meeting afterwards usually involves at least three days' work. However, the time spent can result in a considerably more efficiently run inquiry, with the result that the normal ratio of sitting to reporting days may be able to be adjusted. In these circumstances therefore it is essential that you discuss with the office revised time allocations to reflect any time saving as soon as possible following the PIM.

Preparation

10 The PIM is intended to save time at the inquiry itself and to make it more effective. Streamlining the procedure and programme and clarifying the issues will help achieve these objectives. In turn the effectiveness of the PIM will depend largely on the care with which it is arranged.

11 All relevant parties, including those entitled to appear at the inquiry whose names appear on the file at the time, should be invited to the PIM. In cases where there is a lot of public interest consideration should also be given as to whether to request that public notice is given of the PIM to enable interested persons to also attend.

12 As soon as you are aware that a PIM has been arranged, you should contact the case officer, and the Programme Officer, if the parties have made arrangements for one, because speedy communication between them will be vital.

13 A preliminary step for you is to decide whether the list of invited participants should be extended. The additions could well include representatives of societies or groups who have made representations but have not indicated whether they intend to appear at the inquiry itself.

14 Another consideration would be whether or not further PIMs are required. Initially only one PIM will be arranged and it will be for you to fix dates for any subsequent meetings. This eventuality can arise in the case of more complex inquiries, perhaps involving several developers, which require further technical meetings or for which it is necessary to meet again to finalise the programme. Also where there is large-scale public interest it may be beneficial to have a further PIM to discuss procedural and programming matters.

Conduct of the meeting

15 Rule 7(4) of the 2000 Inquiries Procedure Rules requires that the Inspector shall preside at the PIM and shall determine both the matters to be discussed and the procedure to be followed. The Inspector also has the power to require any person present who, in his or her opinion, is behaving in a disruptive manner to leave.

16 The relative level of informality of a s78 hearing will often be appropriate for many smaller PIMs. However, a PIM can sometimes be large, and include non-participants who are nevertheless interested in the proceedings. In such cases a more formal approach will be needed to ensure the business is conducted efficiently. Nevertheless, you should not discourage questions, even from those not directly involved. A few minutes spent courteously and carefully explaining or ventilating some matter at the PIM can save hours or even days of preparation or inquiry time, and avoid potential frustration and acrimony.

17 Some Inspectors have found that it is useful to have copies of the "Guide to Rule 6 for interested parties involved in an inquiry – planning appeals and called-in applications" with them to hand out to any Rule 6 parties – especially if their advocate is not legally qualified.

18 A pre-inquiry function of the Inspector specifically mentioned in Rule 8 is the arrangement of the timetable for the inquiry. Because some participants, especially inexperienced ones, will not initially have a clear idea of their likely contribution to the inquiry, the PIM should not be launched straight into this topic. It is better for matters such as the main issues and the nature of the evidence likely to be called by the main parties to be discussed before timetabling is considered. The matters covered in that discussion will assist inexperienced participants in forming a realistic view about their contribution to the timetable.

Agenda for the PIM

19 As previously indicated the parties will be informed at an early date in general terms of the matters to be discussed at the PIM. The actual agenda however is a matter for you, having regard to the circumstances of the particular case. The following comments may be useful in preparing an agenda. It can also be useful to prepare a draft note outlining your expectations and a timetable (which can then be the basis of your formal note of the PIM).

1. Introduction

Introduce and explain the role of any Assistant Inspector, Assessor and/or Programme Officer at the outset. It may be sensible to clarify the details of the proposals under consideration, particularly if the scheme has undergone amendments subsequent to the initial application. It should be emphasised that the PIM is solely procedural in nature and that no discussion of the merits of the proposal will be heard, especially if there are a number of third parties present. Finally you should explain to all parties that inability to attend or to be represented at the PIM in no way prejudices any right to make representations at the inquiry itself.

2. Inquiry Venue and Accommodation Arrangements

Check the adequacy and suitability of the accommodation for the numbers expected to attend the inquiry, particularly in its opening phase; the need for a public address system; the availability of a retiring room for the Inspector and of consultation rooms for the principal parties; the provision of photocopying and telephone facilities; etc. In long complex and/or particularly contentious inquiries where disruption might occur or a high degree of media interest is expected the physical arrangements for the inquiry will need particularly careful consideration.

3. Inquiry Dates and Sitting Times

Rule 8(1) of the 2000 Inquiry Procedure Rules requires you to prepare a timetable for the inquiry if it is expected to last for more than 8 days (and it can also be helpful in shorter inquiries). Rule 8(3) enables the timetable to be varied during the inquiry as needs be. In considering the timetable it will also be necessary to address what would be a suitable order of case presentation, the possibility of hearing evidence on a topic basis and, for multi-appeal cases, the merits of dealing with policy or strategic issues at a plenary session.

It will also be necessary to assess the extent of public interest and make an estimate of the time interested persons are likely to need to present their evidence. The question of evening sessions may arise, particularly if a significant level of local interest is involved. In multi-appeal cases the possibility of dealing with policy and strategic issues (as opposed to site specific matters) at a plenary session may need to be addressed as well as the desirability of short opening statements being made by the principal parties on the first day of the inquiry.

4. Identification of the Main Issues and Areas of Agreement

The 2000 Rules require the Inspector to identify at the start of all inquiries what he or she considers to be the main issues.[40]

For longer inquiries the PIM presents the opportunity for these to be aired at an earlier stage in the process. At the PIM you should therefore identify

[40] Rule 16(2)

what you see the issues as likely to be and invite comments from the parties. This exchange can have a considerable influence on the shape and form of the inquiry itself.

It also presents a good opportunity to focus the parties on what is needed in the agreed statement of common ground and to emphasise that they need to use the time before the inquiry to meet informally and to narrow further the issues for discussion. **Statements of common ground** should as a minimum cover matters such as the site and surroundings, planning history, relevant policies, and agreed conditions and planning obligations. In addition, where the case involves complex topics of evidence, the basic technical and statistical information underpinning those subject areas can usefully be agreed because, this helps the parties to clarify and refine the fundamental matters in dispute. Similarly it can be helpful for the parties to set out the areas on which they disagree. Annex T of the *Procedural Guide - Planning Appeals – England* gives more guidance on these statements.

The PIM also offers an opportunity for you to draw to the parties' attention any deficiencies you have identified in the documentation and to give the parties initial notification of any matters on which you wish to be informed under Rule 7(1).

In cases where an Environmental Statement has been provided the PIM presents an opportunity to point out any deficiencies identified and ask the promoter to put in hand arrangements to make them good before the inquiry.

5. Nature and Format of Evidence

Arrangements for the receipt of proofs of evidence should cover written summaries of proofs as required by Rules 14(1) & 14(2). It needs to be stressed to the parties that Rule 14 requires summaries, where they are necessary, to be sent to the Inspector at the same time as the proofs of evidence and no later than 4 weeks before the inquiry. If written statements or summaries are to be read then arrangements for the public deposit of proofs of evidence need to be made for the benefit of interested parties. Parties should be reminded that legal submissions and, for inquiries expected to last for 8 days or more, closing submissions, will be required in writing before the close of the inquiry.

In cases, which can generate large amounts of detailed technical evidence (for example, about retail trade impact or highways and traffic matters), you should ask the case officer to dispatch letters setting out the key topics on which basic information needs to be presented to inform the issues in dispute, if this has not already been done. These letters should be sent out before the PIM to focus the parties on some of the matters that will be discussed at the PIM.

6. Listing, Numbering and Availability of Documents

Agree document numbering conventions.

It is generally helpful for proofs and documents to be numbered to identify the party originating the document; for documents to be numbered in sequence separately from proofs; for each party to keep a list of the documents they have sent and to give it to you at the end of the inquiry; for appendices to be kept separate from proofs and be indexed, tabulated and paginated; and for there to be a set of core documents. Documents should be bound in such a way that bindings can be undone quickly without damaging the document.

Time can be saved at the opening of the inquiry by asking the main parties to provide details of their professional witnesses in advance.

7. Inquiry Library

Arrangements can be made for the assembly of core documents and other relevant material such as application plans, proofs, appendices, and summaries, to form the basis of an inquiry library. Responsibility for its upkeep throughout the inquiry needs to be allocated amongst the main parties and arrangements made for its location during the inquiry. Arrangements also need to be made for the placing of inquiry material on deposit at the LPA's offices before the inquiry so that members of the public may see them.

After the pre-inquiry meeting

20 Immediately following the PIM, you, or any Programme Officer, should prepare notes of the meeting setting out the matters agreed, including procedural arrangements and inquiry timetable deadlines for receipt of proofs of evidence and documents. The file should then be returned to the case officer for the notes to be sent to the parties invited to the PIM and to anyone else who asked for a copy.

E Example of a pre-inquiry note

(*This note relates to a called-in inquiry under s77 but can be appropriately adapted for other inquiries)*

Appeal Ref: Proposal & Address
INQUIRY PROCEDURE ADVICE NOTE

The Inspector has read the file and having regard to the matters on which the Secretary of State wishes to be informed sets out below the issues, which need to be addressed in evidence.

1. Issues to be addressed at the inquiry

The call-in letter will form the basis for this section.

2. Appearances

The Inspector should be notified of the names of the advocates and whom they propose to call within 4 weeks of the date of the inquiry *[insert a date]* by means of an email to the Planning Inspectorate. [if not already provided].

3. Venue, dates and times of sitting

The inquiry will open on [] and is expected to last for up to [] days.

The venue for the inquiry is []. The LPA should ensure that the venue is suitable for disabled access.

The inquiry will open at 1000 hours on the first morning and thereafter it will resume daily at 0930 hours. Normally, the inquiry will adjourn at about 1700 hours every day. A break for lunch will normally be for one hour at a convenient point and there will be mid-morning and mid-afternoon breaks of about 15 minutes each.

4. Accommodation and facilities at the inquiry

The Inspector should be provided with a retiring room and a parking space.

5. Inquiry procedure

The procedure at the inquiry will generally follow the 2000 Inquiry Procedure Rules. Whilst normally the LPA would present their case first, as the LPA are in support of the called-in application, the applicants will be invited to present their case first.

6. Programming the inquiry and inquiry timetable

The Inspector will wish to ensure that inquiry time is efficiently used. He/she asks that all advocates provide their estimates of the time they expect to take in evidence in chief and cross-examination. He/she requests that this information should be received no later than 2 weeks before the inquiry opens ie *insert a date*. This will enable him/her to programme the inquiry before it opens and send the timetable to all parties in advance.

7. Form of evidence and opening and closing statements

A. Statements of common ground (SoCG)

Parties are referred to the advice in Annex T of the *Procedural Guide - Planning Appeals – England* (Annex E of the Welsh guidance). The statement of common ground (SoCG) should have been received 6 weeks after the application was called-in. As it has not yet been received the Inspector requests that an SoCG be received by no later than []. The SoCG should cover all the matters set out in T.2.5 of the Procedural Guide.

B. Proofs and summaries

The timetable for receipt is as set out in the Inquiry Procedure Rules ie 4 weeks before the start of the inquiry, *insert a date*. This deadline applies to all participants at the inquiry.

Parties are reminded of the strict application of the Rules by the Planning Inspectorate – proofs received out of time will be returned.

There is no provision within the Rules for Rebuttal Proofs or Supplementary Proofs. However, where these may save Inquiry time arrangements will be made for their acceptance and circulation if the Inspector is notified in advance. Any such Supplementary or Rebuttal statements should be submitted at least 1 week before the Inquiry and marked for the attention of the Inspector.

Units of measurement should be in metric and all documents should be numbered and prefixed by something which identifies the author eg LPA 1. Appendices should be tabulated and paginated and filed separately from the proofs.

The Inspector will want 2 copies of each proof of evidence, one for submission to the Secretary of State and one for use at the inquiry, but only one copy of any appendices and the core documents. A copy of the proofs and documents should be available for each main party who intends to take part in the inquiry. A further copy should be available on the day of presentation of any evidence in case of any third party interest.

All proofs/documents should be numbered in sequence and a list kept by each main party to give to the Inspector on disc at the end of the inquiry.

C. Core Documents

The Inspector requests that all parties agree on a list of core documents (CD) to be referred to by those giving evidence. Appendices to evidence should contain only those documents not already included in the CD bundle. The CD list should be prepared by the Council and received by the Inspector on disc in MS Word at least 4 weeks before the inquiry ie *insert a date*.

D. Opening and closing statements

Openings statements:

All main parties will be permitted to make an opening statement at the beginning of the inquiry. Opening statements are to be produced in writing and shall not exceed 15 minutes in length. The statement should be given a document number within the relevant parties' series.

Closing statements:

These are to be emailed to the Planning Inspectorate (in the form of an MS Word document). The Inspector will endeavour to make time within the programme to permit this. Closing statements should follow the issues set out and should provide a summary of the case to be put to the Secretary of State. In his/her report to the Secretary of State it is the Inspector's intention to use the closing submissions as the basis of his/her summary of a party's case.

Closing statements should be concise and written in a simple format – for example:

- Verdana 11 pt with consecutive paragraph numbers;
- use sub headings only where needed to maximise clarity
- references to documentary evidence to include relevant document number, page and paragraph (whether a core document, appendix to a proof or a proof)
- reference to oral evidence should give the day of the evidence, the name of the witness and whether given in evidence in chief, in cross-examination or in re-examination.

Sub headings should be in **bold** and sub-sub headings in *italics*. Minimal additional formatting should be used to avoid complications when the text is pasted into the report.

The Inspector recognises that closing submissions may be subject to some alteration and elaboration when given orally and so he/she should be supplied with a type written double spaced transcript, which he/she can annotate at the time and insert where appropriate into the text supplied on disc. The transcript should be given a document number within the relevant parties' series.

The co-operation of all parties with this advice will assist the Inspector in producing his/her report quickly.

8. Conditions and obligations

Conditions: Proposed conditions should be supplied by email to the Planning Inspectorate as part of the statement of common ground. Any alternative wording of, or additional, conditions proposed by any party should also be supplied on disc.

Planning obligations: The parties are reminded that any obligation that is proposed must be signed and sealed before the close of the inquiry. A draft of the proposed obligation should be received at least 10 days before the inquiry.

9. Site visits

The Inspector will look at the site and its surroundings informally before the inquiry but will carry out formal accompanied visits during or after the inquiry. If there are any other sites which any party consider he/she needs to visit a list should be given to the Inspector at the opening of the inquiry. This can be added to during the inquiry.

F Absence of a main party – irresponsible behaviour

1 If you have reason to believe that the appellant has behaved irresponsibly, the case of the LPA and those of any other parties present may be heard, as may any applications for costs. Where it is possible to make an unaccompanied site visit the inquiry should be closed. On such a visit particular care should be taken not to get into conversation with any person near or at the site or to trespass on private property.

2 If it is clear from the pre-inquiry site visit that an accompanied site visit is necessary, agree this with the LPA and any other parties who wish to be present and a time when they are available to attend the site. The date should be 4 to 6 weeks ahead to allow time for contact to be made with the absent party. The inquiry should then be closed.

3 The file should be returned to the case officer and PINS will write to the parties telling them of the date and time that you will attend to visit the site. The letter will draw the parties' attention to s79(6A) of the Town and County Planning Act 1990 as amended by s18 of the Planning and Compensation Act 1991. This indicates

If at any time before or during the determination of such an appeal it appears to the Secretary of State that the appellant is responsible for undue delay in the progress of the appeal, he may -

(a) give the appellant notice that the appeal will be dismissed unless the appellant takes, within the period specified in the notice, steps as are specified in the notice for the expedition of the appeal; and

(b) if the appellant fails to take those steps within that period, dismiss the appeal accordingly.

4 In this case, the steps necessary to expedite the appeal will be for the appellant or his/her representative attending the site visit allowing the Inspector and the other parties onto the site. If the appellant fails to turn up to the site visit or fails to allow the Inspector onto the site, the site visit should be aborted and the file returned to the case officer so that the appropriate letter can be issued dismissing the appeal. In that event, any correspondence about costs that pre-dates the site visit should be considered in the report to Costs Branch. Any correspondence that post-dates the report should be directed to the Costs Branch.

5 Section 79(6A) does not apply to enforcement cases. In such cases, you will first determine whether the appellant has acted responsibly or irresponsibly. After closing the inquiry, if it is necessary to enter the site, arrange to meet the parties at the site and see if the appellant or anyone else with authority to allow entry is there and will let you in. If you and other parties are let in the site visit can take place. If not, abort the visit, return the file to the case officer and PINS will write to the appellant

inviting further representations on the issue and the costs application if any. You will then determine the appeal on the basis of the evidence before you.

6 If the appellant has not allowed entry to check vital measurements, he/she has failed thereby to satisfy you on the balance of probability that his/her own asserted measurements (if any) are correct and accordingly has failed to discharge the onus of proof which is on him/her to demonstrate that the development is lawful and the appeal dismissed with or without costs. However s324 of the 1990 Act does provide for rights of entry.

7 Where an application for costs is made you will prepare a report for Cost Branch who will complete the process.

G Requests for a witness summons

General

1. The Inspector (not the Department or the Planning Inspectorate) has the power under Section 250(2) of the Local Government Act 1972 to issue a summons. It is a power that is used very rarely and should be exercised with extreme caution and only as the very last resort. A blank witness summons form can be found in 'Enforcement and Lawful Development Certificates'.

2. Parties applying for a summons should be made fully aware that they are required to pay out-of-pocket expenses, including compensation for loss of earnings where appropriate, to the witness they want to be summonsed. The party who applied for it must serve the summons and they are liable for any costs involved. If these responsibilities are accepted, you must then consider the case for issuing the summons.

3. Before issuing a summons you must be reasonably satisfied that:

   - the evidence to be given by the witness is likely to be material to the case
   - the witness is the appropriate person to give the evidence
   - they will not come unless a summons is served
   - the production of a sworn affidavit would not obviate the need for personal attendance.

4. If you decide that a summons ought to be issued the proceedings may have to be adjourned (to a fixed date) because the summons has to be drawn up and has to be signed by you personally. An alternative is to continue with the inquiry, hearing other evidence until the date on which summoned witnesses are required to attend. In either case, you will need to know the name and address of the person requesting the summons, the name and address of the person summoned (the witness) and what documents, if any, the witness may be asked to produce. You need to get written confirmation from the person requesting the summons that they are prepared to meet all justifiable costs.

5. You may, very exceptionally, find it necessary to issue a witness summons of your own volition to elicit information which has not been forthcoming from the case as presented by the parties and where the parties have declined your invitation to adduce further evidence. You should bear in mind that PINS will have to pay expenses to the witness. You should consult the office before embarking on this course.

6. If a witness fails to appear in response to a summons, the inquiry must be continued and the non-appearance reported to the office. The party who requested the summons may commence legal proceedings. However, it should be noted that if a witness does appear, and refuses to give

evidence, he or she may be liable on summary conviction to a fine or imprisonment.

Attendance of representatives of government departments and local government officers

7. The main section on 'Representatives of government departments' outlines the circumstances in which representatives of government departments appear at inquiries under the inquiries procedure rules. The Rules make similar provision for the appearance of representatives of local authorities. In such circumstances, the issue of witness summonses to secure attendance does not arise. Nor should the issue of a witness summons be necessary to secure such attendance in other circumstances. Government departments generally undertake to provide a representative to give evidence if they are requested to do so by either party to an appeal.

8. The attendance of local government officers (otherwise than in pursuance of the inquiries procedure rules) should normally be secured by agreement and without recourse to a summons. Requests for attendance of a local government officer should be made to the employing authority. You should find out whether the evidence to be given is factual or concerns matters of expert opinion. In the latter case, the party who desires the attendance of the witness might reasonably be expected to engage some other suitably qualified person. You should be aware of the fact that some local authorities, like some government departments, may insist upon the issue of a summons to secure the attendance of their employees.

H Long inquiries

Pre-inquiry meetings

1 Under Rule 7(2) a pre-inquiry meeting (PIM) will normally be held for inquiries expected to last for 8 days or more. However, you are not precluded from arranging PIMs for shorter inquiries if you think it is desirable. A PIM enables time to be saved at the inquiry and helps to make it more effective but it will usually account for at least 3 days of your time (including preparation, travelling and issuing a follow-up letter) as well as an extra input of time from the parties' representatives.

2 A pre-inquiry note is at Annexe E. The importance of thorough preparation cannot be over-emphasised; an effective PIM establishes your authority and gives the parties confidence in you, besides ensuring that the inquiry runs smoothly and efficiently. It is for you to determine the matters to be discussed and the procedure to be followed. You may require anyone behaving in a disruptive manner to leave the meeting.

3 In addition to these powers, when holding a PIM you should be aware of other specific powers such as sending to the parties a statement of matters about which information is sought (Rule 7(1)), and specifying the date for the receipt of proofs (Rule 8(4)), which you are able to exercise before an inquiry opens. You should study the Rules with care and ensure that you have an up to date copy with you at the PIM. If you are minded to exercise any of these powers (other than an unaccompanied pre-inquiry site visit allowed for by Rule 17(1)), consider carefully any relevant advice in the Procedural Guide and whether what you have in mind would cut across the normal administrative procedures. You must be satisfied that it is administratively practicable and ensure that the Procedure EO is notified as soon as possible of any action to be taken.

4 You should bear in mind that you do not have the power to postpone the date an inquiry is to open. That is a function for the Secretary of State, under rule 10 of the Inquiries Procedure Rules 2000[41]. If faced with such a request at a PIM the parties should be advised to write to the Planning Inspectorate.

5 If faced with an inquiry where you consider a PIM would be of benefit but one has not been arranged, you should inform your Group Manager.

Programme officers

6 A Programme Officer may be appointed to assist you in the administrative and procedural aspects of a long inquiry, particularly one in which there are many participants.

[41] In Wales, the National Assembly under rule 10 of SI 2003/1266.

7 The appointment of a Programme Officer will only happen exceptionally. However, it can be of considerable benefit to the Inspector. Therefore the parties to the inquiry should be encouraged to supply such an officer. However, discretion needs to be exercised if the impartiality of the Programme Officer is not to be questioned and the principles of natural justice prejudiced.

8 It is unlikely that a Programme Officer provided by the appellant or by one of the interested parties would be generally accepted as being impartial. Nor is it probable that such an officer would be able to attend at the inquiry venue for long periods before the opening of the inquiry. The LPA is clearly the most appropriate source. However, it would not normally be appropriate to appoint someone who previously had been involved in the case. Someone associated with the LPA' planning department may be acceptable, subject to the following paragraph.

9 The Programme Officer upon appointment must be accepted and recognised by all as an officer of the inquiry responsible to and under the sole direction of the Inspector. During the pre-inquiry period and throughout the inquiry itself, the Programme Officer must be and must be seen to be completely impartial. You should make these points, at the PIM and at the opening of the inquiry, with some emphasis.

10 The extent to which you can delegate tasks will depend upon the individual capabilities of the Programme Officer, who ideally should be a calm discreet person and an able and thorough organiser, capable of working without supervision. It is essential that the Programme Officer is capable of dealing directly with the public. The principal duties should be solely related to administrative and procedural matters. In particular the Programme Officer could be responsible for:

- maintaining a list of all those attending the PIM and the inquiry
- taking notes at the PIM and drafting a note for you to approve for circulation (although you may find it preferable to adapt any notes made before the PIM for this purpose)
- organising the inquiry programme, under your direction , in such a way as to secure the efficient running of the proceedings with as little inconvenience as possible to all the parties
- ensuring that the necessary physical arrangements have been made for the inquiry, eg the layout of the inquiry room and the provision of photocopying facilities
- dealing with pre-inquiry correspondence on programming and coordinating/advising on a day-to-day basis of times of attendance at the inquiry
- acting as a control co-ordinator for the receipt and distribution of proofs of evidence and ensuring that all documents received before and during the inquiry are properly recorded and distributed
- holding a master set and up-to-date schedule of all proofs of evidence and other documents
- preparing and keeping up to date the list of appearances and documents

- where a number of sites have to be visited after a long inquiry the Programme Officer may be able to plan the visits. This must be done under your direction, since you are responsible for compliance with the procedural rules.

11 The Programme Officer should be provided with a desk and a telephone outside the inquiry room, if possible near the main entrance.

Assistant Inspectors

12 Assistant Inspectors have been appointed in a number of very long inquiries. Although their status is not established by any reference in the Rules, no objection has been received to their appointment. An Assistant Inspector operates at all times under your authority, as responsibility for the running of the inquiry and the contents of the report must remain with the appointed Inspector. An Assistant Inspector assists you over the whole range of duties, both during the inquiry and in drafting the report. The Assistant is thus able to relieve the pressure on you during the inquiry and contribute to a significant reduction in the time taken to submit the report.

13 It is for you to decide what tasks an Assistant Inspector is given, but they may be asked, among other things to:

- follow the proceedings at all inquiry sessions conducted by you, taking notes and asking questions of the witnesses as appropriate
- conduct sessions of the inquiry on specific topics, on behalf of, and always in your presence
- maintain the master set of inquiry documents, ensure that they are correctly numbered and list them; and hand to you a copy of any document referred to
- draft parts of the report, including sections on particular topics

14 The Assistant Inspector should attend the PIM and, if possible, all sessions of the inquiry and all accompanied site visits. In the unlikely event of your becoming ill after the inquiry has been opened, it would thus be possible for the Secretary of State to appoint the Assistant Inspector in your place if this seemed appropriate in all the circumstances. In this way the need to re-start or re-open the inquiry could be avoided.

Planning Assistants

15 If you are provided with a Planning Assistant you should briefly introduce the Planning Assistant and explain his or her functions at the PIM and at the start of the inquiry. You should make it clear that the work undertaken by the Planning Assistant is not in substitution for your performance of your own function. You should also make it quite clear that irrespective of the help the Planning Assistant gives, you will consider all the evidence and representations and the reasons given for the decision or recommendation will be yours alone. As is the case with, for example, summary material supplied by LPAs or report drafts prepared by an Assistant Inspector, it is important that you should read the background

material and be satisfied that the summary or draft is accurate and reasonable before adopting it as your own.

The inquiry

16 Long inquiries often create unusual situations. The opening tends to take longer than usual, but not so much longer if an effective pre-inquiry meeting has been held. The following matters may need to be covered in addition to the usual preliminary points:

- introduce and explain the role of the Assistant Inspector, Assessor, Planning Assistant and Programme Officer as appropriate. Announce the Programme Officer's telephone number and contact address
- announce the fact that a PIM has taken place, emphasising that it was concerned only with the arrangements for the inquiry and that no evidence or representations were heard. Ensure that copies of the letter recording the points made at the PIM are available, particularly to those who were not present. It is often useful to include this letter or the notes of the PIM as an inquiry document, and you can then refer to it in the preamble to the report
- if it has already been arranged at the PIM and displayed on the inquiry notice board, work out the programme in as much detail as practicable, taking into account the convenience of all parties. Third parties, particularly local residents, often find it difficult to attend all the day-time sessions, so it is advisable to identify a particular session later in the programme when they will be heard
- at the PIM you should have agreed a simple system for the numbering of documents, proofs etc. This should enable them to be kept in order and retrieved quickly and other documents added to the list as they are received, so that the list is continually updated. You should remind the parties of the agreed numbering system when you open the inquiry
- establish the number of copies of statements and other documents required to be available for distribution at the inquiry. Again this should have been covered at the PIM but can be confirmed if necessary at the inquiry.

17 The opening day, particularly the morning, usually has the highest attendance both of the public and the media. Although it must be a secondary consideration, if possible arrange the programme so that long and detailed discussion of preliminary matters is avoided. Not only does it give a good public impression of the inquiry process, but it also prevents restlessness and frustration, which can cause problems for you. Ways of achieving this include:

- when taking the appearances obtain the particulars of only the main parties at the inquiry; ask all others who are not already listed on the programme (if one has been prepared) to hand in names and addresses to the Programme Officer;
- if a PIM has not been held and the programme cannot be worked out quickly, defer it until after the lunch adjournment. It may be possible for the Programme Officer to sort out the problems of individual parties

during the adjournment and prepare a draft programme for the Inspector's approval in the afternoon;
- provided it is not of major significance, defer any points about the terms of the application and exactly which plans and letters form part of it;
- announce the number of representations already received and ask for any further representations to be handed in but do not attempt to check that the principal parties have copies of them all. Ask the Programme Officer to prepare a list and to check this with the parties so that the position can be confirmed later in the inquiry.

18 At a major public inquiry with a lot of media and local interest it is particularly useful for all main parties represented by a professional advocate to give a short opening statement, one after the other before the evidence for the first party is heard. This helps all those present to understand what the inquiry is about. If a PIM has been held this can have been suggested and agreed then.

19 It is sometimes advantageous to organise the programme on a "topic" basis rather than the usual case-by-case sequence. This is particularly appropriate where there are a number of clearly defined issues with a considerable technical content; all the evidence on an issue can thereby be heard together, so helping you to absorb the evidence and saving the time of technical witnesses (and perhaps of the Assessor). But it is good practice to obtain the agreement of the parties to this course and to give them plenty of warning by raising it at the PIM. It can result in some untidiness; for instance a third party whose case centres on the issue in question but who wishes to mention other aspects may not be able to come back on a different day to complete his case. Even when a topic basis is adopted it is often advantageous to allow residents, at sessions organised specifically to hear members of the public, to deal with all relevant topics.

Evening sessions

20 Evening sessions may occasionally be necessary when it is impossible for people to attend an inquiry during the day. It should be remembered that countless tribunals nation-wide are held during the day and most people can usually arrange to be present at some time during the normal inquiry hours of a long inquiry. Both you and the parties need the evenings to prepare for the following day and evening sessions are particularly tiring and onerous. An evening session should therefore be an exceptional occurrence. If one is arranged there should only be one other morning or afternoon sitting on the same day.

21 An evening session needs to be carefully arranged and controlled. It is part of the inquiry and not a public meeting and all speakers must observe the normal rules of inquiries, addressing you rather than the public at large. You should make it clear, when the evening session is announced, that witnesses heard in the day sessions will not be available for cross-examination in the evening session. If possible the Programme Officer should collect a list of those wishing to speak in advance together with a

brief outline of the points they wish to make; you should hear those listed first before asking if any others wish to speak. You should attempt to prevent repetition, but you should exercise discretion when the participants are inexperienced in such proceedings and wish to express genuine and deeply held views.

Joint inquiries and non-planning cases

22 Some joint inquiries are difficult to programme; eg a joint inquiry into an application for planning permission and a compulsory purchase order relating to the same site, where the relevant procedural rules cannot be strictly followed. In such cases you must be ready to decide what the programme should be if the parties cannot reach an acceptable agreement. It may be helpful to discuss this conflict of procedure with your Group Manager beforehand.

23 When considering the programme of an inquiry other than a s78 case, it should be remembered that the party that is asking the Secretary of State (or Welsh Ministers) to do something should normally go first and end last. Thus, if the subject of the inquiry is the confirmation of an order, the order making authority should go first.

24 If the Secretary of State is making a proposal such as a modification or revocation order his representative should make his statement first. You should declare at the outset what variant of the Rules should be applied, and ask the main parties to consent to it. One of the variants designed for the more complex housing cases may be useful for some order-making planning cases, particularly where there are many diverse objections. The procedures customarily followed in inquiries under the Highways Acts should not, however, be used in other types of case.

Controlling the pace of a long inquiry

25 You (and your Assistant Inspector, Assessor and Planning Assistant) must remain alert, receptive and temperate throughout the inquiry. This cannot be done if you fail to set a reasonable pace, as inquiries that go on for many weeks are tiring both physically and mentally. Unless you are blessed with an exceptional constitution, the self-discipline required more often entails limiting the hours worked rather than increasing them.

26 Sensible pacing starts before the inquiry opens and continues to the close – and indeed right through the reporting period. It is suggested that:

- you should ensure that you have adequate time for preparation; your programme immediately before that should not include cases of significant size and all outstanding work should be completed if at all possible. (This includes any management tasks)
- the inquiry programme should be based on two 3-hour sessions a day, Tuesday to Thursday, and a shorter sitting day on Friday. Sessions may be extended by half an hour or so in order to keep up with the programme and exceptionally, Monday afternoon may be used for this purpose. Monday evenings can be useful for evening sessions, if

necessary. But if an evening session is held on any other day, only one other inquiry session should be held on that day

- breaks in mid session not exceeding 10 minutes can be valuable but must not be abused. It is essential that all parties return within the time specified by you
- it is essential to be realistic when estimating how long the various stages of the inquiry will take. The programme should put the participants under some pressure - which may have to be absorbed on occasion by modestly extended sessions - but not too much. If gaps in the programme occur, it may be possible to bring forward an item or make a site visit; or the time may be required for reading proofs
- if possible, after 3 or 4 weeks a more substantial adjournment may be appropriate if the inquiry is programmed to last much longer than that. At this stage it can be helpful to have a break to read in more detail the proofs of the evidence yet to be heard. (It is sometimes appropriate to programme a complicated technical topic to follow a break). The adjournment should be incorporated into the programme and regarded as a firm commitment. Sometimes it is convenient to adjourn for a brief period that contains a public holiday or a PINS meeting.
- Sub-Group Leaders facing a long inquiry should consider asking a colleague to deal with day-to-day queries from members of their sub-groups.

Annexe I

I Assessors at inquiries

The status of an Assessor

1 An Assessor (as defined under Rule 2(1)) is a specialist adviser, usually scientific or technical, selected to assist you by hearing, testing and weighing evidence of a specialised nature that may be outside the normal experience of the Inspector but which may have an important bearing on the issues to be decided. Assessors are appointed by the Secretary of State or National Assembly for a particular inquiry and should hold a letter or minute to that effect in case their status is challenged. In planning cases the Assessor's name and qualifications will be notified to the parties together with the matters on which the Inspector is to be advised.

2 It is important that Assessors should not have had any previous connection with the proposal the subject of the inquiry or any professional association or connection with the parties. Where the number of experts in the relevant field is so small that this condition cannot be wholly met it will usually be desirable for some statement of the precise position to be made at the beginning of the inquiry. It is also important that the Assessor should not have taken a public stance on the policies at issue in the inquiry. If Assessors realise, after accepting the appointment, that they have had some previous connection with the case or the parties, or if any other situation arises in which they might find their position a source of embarrassment to themselves or to PINS, they should mention it immediately to you (if they are in touch by this time) or otherwise discuss it with PINS.

3 Once an appointment as an Assessor has been offered there should be no private communication by them with the parties or with any interested person before or during the inquiry. If the Assessor considers that further information should be obtained from any of the parties before the inquiry, they should, after discussion with you, ask the case officer to obtain it.

Function of an Assessor

4 The Assessor's task is to evaluate the specialist evidence within their field that is presented at the inquiry and so far as possible to indicate the weight which it should, in their opinion, be given in your conclusions.

5 It is the Assessor's responsibility to ensure that, as far as possible, all relevant facts within their specialised field are obtained. It is your duty to see that the Assessor is afforded every opportunity to obtain those facts.

Before the inquiry

6 Assessors are sent copies of the inquiry papers as soon as possible after accepting the appointment. They are also notified of the name of the Inspector. It is important that you and the assessor should discuss the

case at an early stage. For small inquiries, discussion on the telephone may be sufficient, but for more complex cases a meeting is usually necessary. Where a pre-inquiry meeting is held with the parties it is usually appropriate for the Assessor to attend, so there is the opportunity for you to meet immediately beforehand. It will also be necessary to meet immediately before the inquiry.

7 Matters which might be discussed at an appropriate stage before the PIM or the inquiry include:

a. the precise boundaries of the Assessor's specialist interest in relation to the subject matter of the inquiry - sometimes these are not obvious;

b. the definition of issues and topics on which evidence will be needed; the adequacy of the specialist evidence coming forward; whether further information should be obtained from the parties; whether it appears that a witness does not intend to take into account a key document (eg a published technical report) known to the Assessor; and whether there are any serious inconsistencies which the parties could be asked to clear up before the inquiry. Such matters may form the basis for advice to the parties at a pre-inquiry meeting;

c. the programming of the inquiry with particular reference to the specialist content and whether it is necessary for the Assessor to attend all sessions;

d. whether there will be an advantage in an accompanied site visit being conducted before or during the inquiry, so that features noted at the visit can be discussed in the inquiry;

e. points of procedure on which the Assessor requires clarification, including points arising from this advice;

f. you will also wish to know how the Assessor sees the specialist issues standing at the beginning of the inquiry and the particular aspects which need to be pursued.

8 The full statements of case, statement of common ground and witnesses' proofs of evidence should be available before the inquiry. Copies of those that are received in good time will be sent to the Assessor. The Assessor must arrange adequate preparation time before the inquiry so that the evidence can be closely studied and points of clarification and follow-up questioning identified. The evidence should be fresh in the mind when the witness is called, as it may well not be read out at the inquiry; frequently only a short summary is presented before cross-examination starts. If for any reason - such as late receipt of the proofs of evidence - the Assessor would prefer the evidence (or parts of it) to be presented more fully, this should be discussed with you beforehand.

The conduct of the inquiry

9 It should always be remembered that you are the person appointed to conduct the inquiry. Even when specialist issues are being argued it is you who is being addressed by parties and who has the right to put questions to witnesses and those appearing on behalf of the parties. When specialist issues arise, it may be enough for the Inspector to put questions suggested by the Assessor.

10 However, if the Assessor puts the questions, there should be no suggestion of partiality either in the manner in which they are put or in the phrasing. There must be no attempt to cross-examine, to lead, or to discredit a witness by embarking on a line of questioning more appropriate to an opposing advocate. Comments or expressions of opinions of any kind must be scrupulously avoided.

11 In the event of any dispute an Assessor should leave decisions on procedure to be handled by you. You are responsible for the conduct of the inquiry, even though the dispute may concern evidence or matters which fall within the province of the Assessor's specialised field.

12 Indeed the Assessor should not interrupt the proceedings at any stage. If an important point arises which needs to be cleared up immediately, a note should be passed to you. Assessors should not attempt to hold whispered conversations with you when being addressed by others; you have to be seen at all times to pay undivided attention to the representations. If it is essential to speak to you, the proceedings would have to be halted momentarily, or formally adjourned.

13 Sitting by your side, Assessors must share a courteous, temperate judicial approach. They should support you by being soberly dressed and always punctual. Even when it is clear that they have no direct involvement in the proceedings at a particular stage, they should not show that they are obviously thinking of other things, for instance by excessive shuffling of papers and hunting for documents.

The site visit

14 Although there is no objection to the Assessor and you paying an unaccompanied visit to the site before the inquiry is held (provided that discretion is exercised and that entry to private property is not entailed), it is usual to make a formal site inspection during or after the inquiry in company with representatives of the main parties and of such other parties as have the right to accompany you or do so at the your discretion. However, it may occasionally be appropriate to arrange for an accompanied site visit to take place before the inquiry opens, but care should be taken to ensure that all parties are aware of this.

15 The Assessor, as well as you, must not be accompanied, at any stage of the visit, by the representative of one party without the presence of a representative of the other parties present. You should keep close to each other throughout the visit, because if something is pointed out to one, the other should also be aware of it. New evidence cannot be adduced during the visit, nor any comments made, but it is legitimate for the parties to

direct your joint attention to physical features which they believe are important to the case(s).

16 If a site visit, taking place after the inquiry is closed, reveals to the Assessor that there are new aspects of the case that have not been raised at the inquiry and which are likely to influence the conclusions, then you should be consulted and steps taken in accordance with established procedures to refer such matters to the parties for comment before the report is completed. It is therefore of particular importance that Assessors should prepare carefully for the inquiry. They may need to make arrangements with you to look at the site in advance in order to foresee what information they will need to obtain on matters which may be important but which may not otherwise be raised during the inquiry.

The Inspector's report or decision

17 The Assessor will give such advice to you on the specialised issues arising at the inquiry as may seem to be necessary, and will collaborate in the production of the report or decision. It is for you to ascertain the facts, and to reach your own conclusions. Where the specialist issues are complicated or difficult, the Assessor may assist you by preparing draft findings on those issues and any conclusions to be drawn from them which you may adopt. It must be clearly understood, however, they become your findings and conclusions, and you must accept full responsibility for them. Any draft conclusions of the Assessor's should, like yours, derive from what has been seen and heard at the inquiry.

18 Assessors' conclusions will be arrived at in the light of their specialist knowledge and experience and a background of generally accepted data on such matters can be assumed. The Assessor should not, however, take into account any new or controversial technical material which has not been canvassed at the inquiry.

19 In many cases, all that will be necessary is for you to state at the end of his/her conclusions, "The Assessor, [Mr] ..... agrees with my conclusions in paragraphs ....." provided, of course, that is so. Alternatively, if it is felt that the Assessor's contribution should be more clearly identified, it should be possible to frame the report in such a way that the specialist advice can be introduced in appropriate places by the phrase "I am advised by the Assessor that ....".

20 However, in cases where there has been a great deal of argument and where the decision turns on specialist issues, it may be appropriate for the Assessor to produce a written report to you. In a Secretary of State case, this is appended to your own report and you state how far it is accepted. In a transferred case, it is not normally appended to the decision, but a reference to its existence is made and it is made available for inspection.

21 An Assessor’s advice or conclusions should not go beyond what is necessary for the decision. Reports should only be necessary where the issues or detailed technical data and calculations are unusually intricate.

22 If a report is produced, it must bear the Assessor's signature. It should carry the appropriate file reference and be headed by the appropriate brief title, such as "Compulsory Purchase Order .....", and the suffix "Assessor's Report".

J Call-in applications

Background and policy

1 Under s77 of the Town and Country Planning Act 1990 the Secretary of State (or Welsh Ministers) may call in planning applications to be referred to him for a decision instead of being dealt with by LPAs. Inquiries into these applications are held under section 77. The Town and Country Planning (Inquiries Procedure) (England) Rules 2000 9SI 2000/1624) apply (or, in Wales, SI 2003/1266).

2 The call-in is effected by a direction which requires the planning application to be referred to the Secretary of State. The direction can only be given before the application is decided by the LPA, that is, before the decision notice has been issued. The Secretary of State may sometimes issue a holding direction. This is often used following a public request for call-in procedures to be used and allows a `breathing space' while the National Planning Casework Unit considers the arguments for and against call-in. The Secretary of State's call-in letter identifies the reasons for the direction and the matters about which the Secretary of State particularly wishes to be informed for the purposes of considering the application (the Secretary of State's Rule 6 statement).

Pre-inquiry meetings (PIMs) and pre-inquiry preparation

General

3 Because of their scale, complexity and nature, call-in cases are particularly challenging for Inspectors. Careful and thorough preparation during the pre-inquiry stages will enable inquiries to be conducted effectively, avoid pitfalls, and assist Inspectors in preparing reports which comprehensively inform and advise decision-makers.

4 PIMs are especially useful in all call-in cases except the smallest and most straightforward ones. This is because of the differences between them and s78 inquiries, and because they are more likely to present you with the unexpected.

5 PIMs will be arranged for call-in cases expected to last 8 days or more. There may be good grounds for calling a PIM in shorter call-in cases. If you are allocated a call-in case expected to run for less than 8 days, you should give consideration to the desirability of calling a PIM under Rule 7(2). Among factors which might point to the desirability of calling a PIM in such cases are if the LPA or the applicant has suggested that a PIM would be desirable, or if the inquiry is likely to:

- involve three or more major parties,
- give rise to many issues,

- give rise to significant quantities of technical or statistical evidence eg retail impact analysis, highways evidence, nature conservation evidence.

6 You should call for the file well in advance of the date any PIM might need to be arranged. There may be more information on the file than when the case was allocated. For a shorter inquiry you will need to decide whether or not a PIM is needed. In the more complex cases it is useful anyway to have an early sight of the file since it gives you an advance view of what the case might involve.

Pre-inquiry administrative arrangements

7 It is important that you approach a called-in application with a fresh and unbiased mind. So the National Planning Casework Unit have the task of culling letters from third parties from the file and replacing them with a schedule setting out the names and addresses of those other than the applicant and LPA who have made representations before the application was called-in. Where a PIM is to be held, PINS' Major Casework team invites those listed on this schedule to it. You should be aware that the schedule provided by the National Planning Casework Unit may be incomplete, and that you may therefore need to deal with complaints from third parties who were not invited or notified, both at the PIM and at the inquiry. Often it will be sufficient to explain that the PIM is not concerned with merits and to ensure the complainants are provided with copies of the PIM Notes.

At the PIM

8 The conduct of PIMs in call-in cases is not significantly different from those for other types of case, although on occasions large-scale attendance by the public occurs because of local controversy. Neither is the content likely to vary much from s78 cases, except that particular care and attention will need to be paid to the evidence the parties should produce and the procedure at the inquiry – especially as the only opposition to the proposal may be from third parties (including Rule 6 parties) whose advocate may not be legally qualified and the third parties may not be familiar with inquiry procedures and required documents. It may be helpful to refer them to the Planning Inspectorate's *Guide to Rule 6 for interested parties involved in an inquiry – planning appeals and called-in applications* (or *Guide to Rule 6 for interested parties involved in an inquiry - enforcement appeals and certificate of lawful use or development appeals*), if in England; or, in Wales, the *Guide to taking part in planning appeals proceeding by inquiry*.

Calling for evidence at the PIM

9 A key source of evidence to be considered is the list of matters about which the Secretary of State or Welsh Ministers particularly wishes to be informed. The list usually starts with a reference to whether or not the proposal conforms with the policies of the various parts of the development plan for the area, or of emerging plans. Relevant policies may be available on the

file, although coverage at this stage is sometimes incomplete. The parties should be asked to comment on the factors which might affect the weight to be given to relevant policies of any emerging plan, or to any important supplementary planning guidance. They should be asked to provide evidence if necessary on whether or not parts of the existing development plan are up-to-date. Circumstances can change between the drafting of the Secretary of State's call-in letter and the start of the inquiry.

10 A number of specific matters are normally identified in the call-in letter, such as the effect of a proposal on the vitality and viability of a town centre, or on traffic conditions. It is useful to identify at the PIM the principal national policy tests which need to be applied in considering these specific matters.

11 You should bear in mind you are expected to probe those aspects of the parties' cases which stand a risk of not being properly tested if there is little or no opposition, for example, where the LPA are in favour of the proposal. Accordingly, the reasons for the call-in should be studied closely. These can indicate areas of concern to the Secretary of State, especially relating to national policy, which are not identified specifically in the list of matters about which the Secretary of State particularly wishes to be informed.

12 The list of matters will often end with a catch-all reference to any other matters which the Secretary of State finds relevant to his decision. The Secretary of State's list is effectively a preliminary list, prepared before the receipt of evidence. It is normal for other matters to emerge before the inquiry. It is prudent to try to identify these for reference at the PIM.

13 Papers on the file, such as committee reports and consultation responses from sources such as the County Archaeologist, should be checked for material points. The letters of third parties and interested persons can be useful in identifying significant information not possessed by the LPA or the applicants, for example the presence on the site of protected species. Maps on the file should also be checked. They can show features, including landfills, former industrial sites which could be contaminated, and archaeological find spots, which the principal parties might neglect to mention.

14 Before the inquiry, prepare lists of questions for individual witnesses. In cases where the evidence of one side, or part of it, is unlikely to be tested properly by the other side, your questions assume greater importance. In those circumstances you must draw up the lists of questions with particular care and thoroughness.

15 You may wish to explain that you intend to be more inquisitorial than normal – to test the evidence – and that that this does not indicate bias on your part. Inspector's reports that, for example, dismiss residents' concerns about traffic generation solely because "there was no expert evidence to demonstrate harm" are unlikely to reassure anyone that the issue has been properly assessed. You should establish the actual position, so far as practicable, and then express your own conclusion on the basis of what is available. Be willing, if necessary, to ask the parties

(ideally at a PIM) to provide additional information to assist you.

At the inquiry: procedure

16 Under the 2000 Rules (in Wales, the 2003 Rules as amended) the normal procedure at inquiries is for the LPA to present its case first. However this may not be the most suitable approach in some types of call-in case, such as those where the LPA are in favour of the development. In such cases the applicant will usually present the more substantial case with the LPA acting in a supporting role. Under Rule 15(4) you have discretion to vary the normal inquiry procedure and in these circumstances it is often sensible to hear the applicant's case first, others supporting the development being heard next, followed by those opposing it.

17 In cases where the LPA oppose the development and they are the only party entitled to appear who is in opposition then they should be asked to give their evidence first in line with the standard procedure set out in the 2000 Rules. However if they are in support and it is another authority or party which provides the main opposition, for example the County Council, then it could present a more logical sequence to hear those in favour initially followed by those in opposition. In all cases where the Inspector considers it may be appropriate to exercise his or her discretion to vary the normal procedure this should be done within the principles of natural justice and after taking the views of the parties into account.

18 Closing submissions would be made in reverse order. Third parties and interested persons not making substantial cases could be heard on a date towards the end of the inquiry fixed by you after consultation with the parties.

19 If there has been no PIM and you have formed a preliminary view that a procedure different from the standard one might be more appropriate, you should raise this as part of the opening announcement, and settle it after taking into account the views of the parties.

20 Where a residents' group or similar is the main opposing party, they may lack experience of planning inquiries. Time spent explaining the procedure and programme will not be wasted, as residents' ideas may have been formed from participating in public meetings. Common expectations are that the LPA will go first, and that the residents' group will act as a panel, answering each point from the other side as it is made. The group might indeed have prepared their participation on this basis, and might be caught off-guard by the structured inquiry approach. You should offer impartial help.

21 In a call-in inquiry you might be more inclined than in other cases to make a point of asking interested persons whether they have any questions for each of the applicant's witnesses. This would be particularly so if the opposition to large parts of the applicant's case comes only from individuals who are not organised in a group.

22 In circumstances such as this it is possible the individuals concerned might apply for legal aid (public funding) on the basis of Article 6(1) of the European Convention on Human Rights. However, neither you nor the Secretary of State (or the National Assembly for Wales) can entertain applications for public funding. If faced with such a request you should explain this and suggest means of mitigating any disparity of resources. You should offer to assist those unfamiliar with inquiry procedure as far as possible consistent with your role. It could also be suggested that the individuals might be able to co-operate with another party sharing part or all of the same case; and that assistance may be available from Planning Aid (the address is in the *Guide to taking part in planning, listed building and conservation area consent appeals proceeding by an inquiry – England* and in the *Guide to Rule 6 for interested parties involved in an inquiry – planning appeals and called-in applications – England*) (or, for Wales, in the *Guide to taking part in planning appeals proceeding by inquiry*), Citizens Advice Bureaux, or other organisation offering free assistance or funding. If a party decides nevertheless to apply for public funding, it may be necessary to adjourn the inquiry to give time for the application to be processed, although in a long inquiry it may be possible to rearrange the programme to avoid an adjournment. See 'Human Rights and the Public Sector Equality Duty' for further advice.

23 Since, in call-in cases the decision is for the Secretary of State, you should be especially careful not to be too rigid in identifying the main issues as required by Rule 15(2). It may be appropriate to use a phrase like "main considerations upon which it seems likely at this stage that the Secretary of State will base the decision."

24 In a call-in case which has generated a lot of local opposition and media interest there can be special merit in asking the advocates for the main parties and any substantial third parties to give a short opening statement at the start of the inquiry. This will give those not closely involved in the proceedings a succinct overview of the main points of the cases for and against.

Reporting

25 In structuring your conclusions, you may find it is best to follow the order of the matters about which the Secretary of State particularly wishes to be informed, finishing with any other matters raised by the parties or by you. Where this order is not followed, you should ensure that you conclude upon every one of the matters identified by the Secretary of State.

K Managing Disruptive Parties

1. As a responsible employer PINs has a duty of care to its staff. Our Customer Charter states that we expect all staff to be treated with courtesy and respect and warns that we will not tolerate rude or abusive behaviour. All staff are entitled to carry out their duties without fear of abuse or harassment.
2. Our decisions impact on people, their homes and communities and passions can run high. Much of what is set out here can be found in the Inspector Training Manual (ITM). The advice in the ITM and the training you received in conducting Hearings and Inquiries will enable you to deal with most situations. The purpose of this note is to advise on the steps to follow when these strategies fail and more serious action is required.

Powers

3. Rule 15 (9) of the Town and Country Planning (Inquiries Procedure) (England) Rules 2000[42] and Rule 11 (8) of the Town and Country Planning (Hearings Procedure) (England) Rules 2000[43] empower Inspectors to require participants at Hearings and Inquiries to leave if they are being disruptive[44]. The Inspector may refuse to allow the person who has been asked to leave to return or permit a return only on such conditions that the Inspector may specify. Rule 15 (11)[45] and Rule 11 (10) allow the Inspector to proceed in the absence of any person entitled to appear at it.
4. Advice on what to do if a main party is absent can be found in the ITM. In brief, where you consider that a party's absence is as a result of unreasonable behaviour you may hear the cases of the other parties

[42] Rule 16 (9) of the Town and Country Planning Appeals (Determination by Inspectors) (Inquiries Procedure) (England) Rules 2000 No 1625, or Rule 18 (9) of the Town and Country Planning (Enforcement) (Inquiries Procedure) (England) Rules 2002 No 2686, or Rule 17 (9) of the Town and Country Planning (Enforcement) (Determination by Inspectors) (Inquiries Procedure) (England) Rules 2002 No 2685
For Wales: Rule 11(8) of the Town and Country Planning (Hearings Procedure) (Wales) Rules 2003, 16 (9) of the Town and Country Planning Appeals (Determination by Inspectors) (Inquiries Procedure) (Wales) Rules 2003, 15(9) of the Town and Country Planning (Inquiries Procedure) (Wales) Rules 2003, 11 (8) of the Town and Country Planning (Enforcement) (Hearings Procedure) (Wales) Rules 2003, 17(9) of the Town and Country Planning (Enforcement) (Determination by Inspectors) (Inquiries Procedure) (Wales) Rules 2003 and last but not least Rule 18 (9) of the Town and Country Planning (Enforcement) (Inquiries Procedure) (Wales) Rules 2003.
Rights of Way: Rule 9(9) of the Rights of Way (Hearings and Inquiries Procedure) (England) Rules 2007
Also Rule 11 (8) of the Town and Country Planning (Enforcement) (Hearings Procedure) (England) Rules 2002 No 2684
NSIP: Section 95 of the Planning Act 2008

[44] Any person required to leave may submit any evidence or other matter in writing before the close of the Hearing or Inquiry

[45] As footnote 1, the number will change depending on the procedure

(including costs[46]) and, if possible carry out an unaccompanied site visit. Where an accompanied visit is necessary agree a time and date with the parties present giving time for the absent party to be notified.

5. S79(6A) of the Town and County Planning Act 1990, as amended by s18 of the Planning and Compensation Act 1991, states that:

> 'If at any time before or during the determination of such an appeal it appears to the Secretary of State that the appellant is responsible for undue delay in the progress of the appeal, he may -
> (a) give the appellant notice that the appeal will be dismissed unless the appellant takes, within the period specified in the notice, steps as are specified in the notice for the expedition of the appeal; and
> (b) if the appellant fails to take those steps within that period, dismiss the appeal accordingly'[47].

What is unreasonable/unacceptable behaviour?

6. Basically anything which disrupts the smooth running of a Hearing or Inquiry and prevents you from focusing on the arguments or any other party from making their case. This could range from threats or shows of aggression to constant low level interruptions, particularly if they are aimed at destabilising another party's attempt to make their case.
7. The ITM advises that the general principle is that filming and recording should be allowed. However, if you consider the way you or the event is being filmed or recorded to be intimidating you should ask that it stops. If the person recording refuses this constitutes unreasonable behaviour.

What to do about unreasonable/unacceptable behaviour?

8. As stated above your training will have equipped you to deal with most situations without needing to revert to any of the measures set out above. All these avenues should be explored before proceeding to the following stages. If a party's behaviour becomes disruptive you should:
   i. Explain why their behaviour is unreasonable and that if they continue you will adjourn to give them time to calm down/reflect. If necessary/appropriate you could set conditions for their return (see Rules 15 and 11 above). Explain that if you are forced to adjourn because of their unreasonable behaviour you have the power to instigate an award of costs against them.
   ii. That if they continue to behave unreasonably you will invoke your powers under Rule 15 (11) [48] or Rule 11 (10) and have them removed.

[46] Note that any costs decisions will be dealt with by the Costs and Decisions Team where a party is not present
[47] Does not apply to enforcement cases
[48] Check that you are using the correct Rule

iii. That if they are removed they may submit any evidence or other matter in writing before the close of the Hearing or Inquiry but if they are a main party,

iv. You will either hear the other parties cases and proceed to a decision or, if the excluded person attempts to thwart the proceedings by refusing to co-operate thereafter[49], dismiss the appeal under S79(6A).

9. All the above needs to be properly documented in order that any subsequent complaint or challenge may be defended.

10. If a party refuses to leave, adjourn and request the Council to use its security team to accompany the disruptive person from the premises. If that is not possible or in the event of serious disruptive behaviour or threat activate your lone worker protection alarm or call 999[50].

Suggested text for requiring an Appellant/Agent or Advocate to leave an event
Appellant/Agent:

Mr X, I have asked you on 3 occasions now not to interrupt me/AN Other. If you do so again I will exercise my powers under Rule 15(9)[51] of the Town and Country Planning (Inquiries Procedure) (England) Rules 2000/ Rule 11 (8) of the Town and Country Planning (Hearings Procedure) (England) Rules 2000 and require you to leave. I will consider whether to make an award of Costs against you/your client for unreasonable behaviour.
If relevant: [I will also take action to report your unreasonable behaviour to your Professional Institution.]

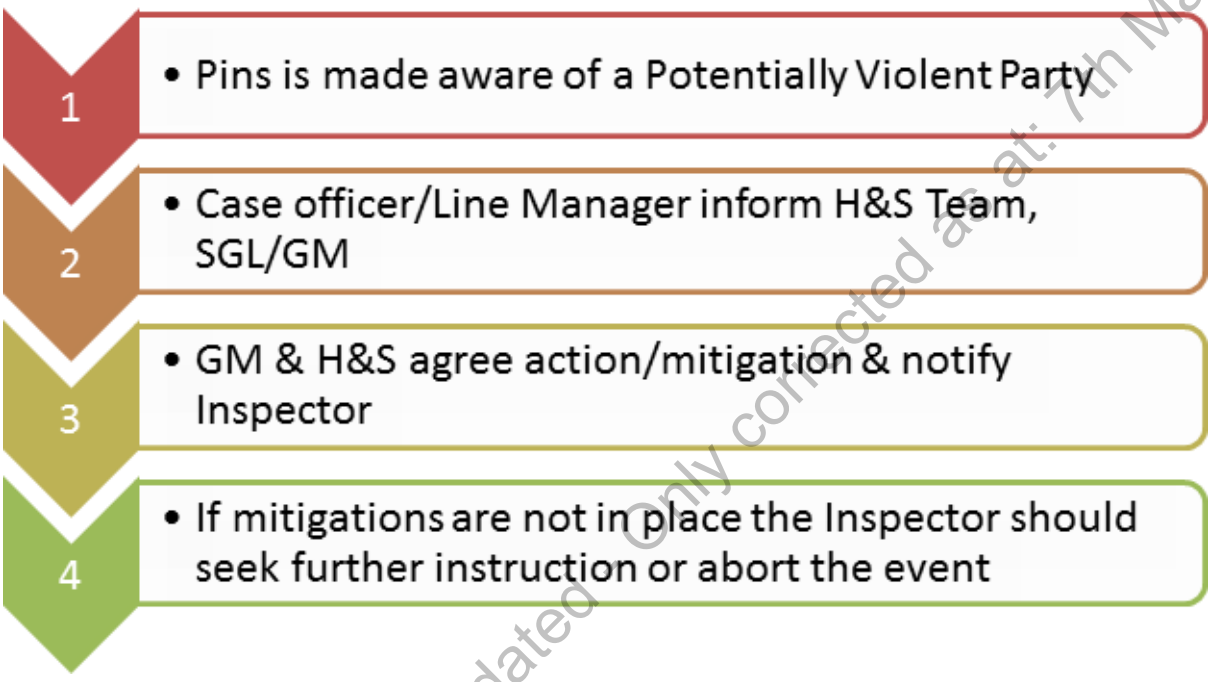
Barrister/Solicitor: Mr X, I have asked you on 3 occasions now not to interrupt me/AN Other. If you do so again I will exercise my powers under Rule 15(9)[52] of the Town and Country Planning (Inquiries Procedure) (England) Rules 2000/ Rule 11 (8) of the Town and Country Planning (Hearings Procedure) (England) Rules 2000 and require you to leave. I will consider whether to make an award of Costs against your client for unreasonable behaviour. I will also take action to report your unreasonable behaviour to [The Bar Standards Board] [The Law Society].

[49] For example by denying access to the site
[50] Section 4(1)(a) of the Public Order Act 1986 states that a person is guilty of an offence if he uses towards another person threatening, abusive or insulting words or behaviour with intent to cause that person to believe that immediate unlawful violence will be used against him or another by any person, or to provoke the immediate use of unlawful violence by that person or another, or whereby that person is likely to believe that such violence will be used or it is likely that such violence will be provoked.
[51] Check that you are using the right Rule
[52] Check that you are using the right Rule

ANNEXE L

L Potentially violent parties procedure

1. The Inspectorate's procedure on handling potentially violent parties is summarised in the diagram below:



2. The full procedure on handling potentially violent parties is provided in a flow chart, available via this hyperlink.

Complaints and how to avoid them

What's New since the last version

March 2017 - Annex A added regarding the 'slip rule' process

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Human Rights Act 1998 (s7(1)(a))

Introduction

1. PINS Customer Quality Team (CQ) uses a wide definition of the term 'complaint'. *Any adverse comment about any aspect of an appeal decision is regarded as a complaint, regardless of whether the letter in general is couched in positive terms.*

2. For example, a request for clarification, indicating that doubt exists over what is meant, is an implied complaint; and if it is found that the request has been necessitated by an error or wording that is genuinely capable of being misunderstood or confused, the complaint will be regarded as justified.

3. The greatest proportion (about 60%) of complaints comes from interested party objectors.

4. A complaint is an allegation that the Planning Inspectorate, in processing and deciding the casework for which it is responsible, did something material it shouldn't have done, or didn't do something material it should have done. In practice, this means that where there is still time to correct an error, and this is done, it will not be counted as a complaint, provided that it cannot have a material impact on the correct processing, or outcome, of the case. The definition of a Justified Complaint is therefore

one where, following thorough and impartial investigation, the complaint is upheld.

5. JCs are categorised as either:

Minor - judged not to have affected the outcome of the case, usually of little consequence. For example, errors of a typographical or minor factual nature, misspelled names etc are not included in the definition of justified complaint, as such errors would potentially be correctable under the Slip Rule. These are still recorded as errors so that Seconded Inspector Trainers (SITs) or Sub-Group Leaders (SGLs) can be made aware of any issues requiring remedial coaching or training.

Significant – potentially affecting the outcome of the case or perceived by the public as prejudicial to a party's interests. For example, if an Inspector fails to notice a window on an elevation of a dwelling opposite a proposed neighbouring extension where the issue is one of overlooking, the error may well be significant. If the window is located on another elevation where overlooking would not result, the error is more likely to be minor.

6. Categories of justified complaints

- Improper conduct of site visit/hearing/inquiry.
- Taking into account an irrelevant factor / Failing to take into account/give appropriate weight to a relevant factor/ Misinterpreted a relevant factor or policy.
- Inadequate reasoning.
- Significant errors of judgement/perversity.
- Inclusion of unnecessary or inappropriate comments.
- Conditions errors/omissions/oversights.
- Failure to comply with rules of natural justice.

7. In all instances where a clear error has occurred and this is agreed by the Inspector, CQ will reply without further input. Where there is any element of doubt or the issues are not clear-cut, CQ will seek not only the Inspector's comments but also those of the Group Manager (GM) (also the SIT for those in training) before coming to an independent view. The complaint would only be confirmed as justified with the agreement of the GM, or the Head of Inspectors, should a disagreement arise.

8. Once investigations are complete, CQ will reply, copying to Inspector's SGL and GM, with an appropriate explanation or apology, or both.

9. The table below presents some tips for avoiding common causes of justified complaints.

Potential problems	Check the following:
Factual matters	• Allowed/dismissed – are they the same in both decision and conclusion? Beware missing "not"s! • References, names, addresses, dates • LPA and parties' names • Policy reference • Page & paragraph numbering (check for missing text) • Compass points • Have plans have been amended? – if so, clarify which you are dealing with
Reasoning	• Ensure you conclude on all main issues and development plan policies • Ascribe weight to emerging plans as appropriate, if they change anything • Show that you have had regard for any statutory requirements (but not necessary to state sections of Acts, etc) • SPG/SPD –Address compliance with the Regulations if contested and clarify the weight afforded if it adds anything • Write for the losing party • Character & Appearance issue? Briefly establish existing C & A first before assessing proposal against it, particularly in Conservation Areas • , where test is stronger (but avoid too much unnecessary description). • It is not sufficient simply to reach a view on any matter – you must say why. • Deal with any relevant previous appeal decisions: if reaching a contrary conclusion, say why. • Where important, differentiate between matters of fact & those of personal judgement/opinion. • Do not engage in theorising or making unsubstantiated assumptions. • Don't neglect interested parties' views, particularly if relevant or well-researched: As mentioned above, about 60% of complaints are from them. • Do not be afraid of making third party views a main issue (if appropriate) simply because LPA have not refused on those grounds. • Dismissing a failure case? Don't forget to refuse planning permission too

	• Outline development – clarify what matters are reserved. • S.106 Undertakings – don't dismiss appeal simply through lack of one, consider whether necessary and if so, identify harm that would arise without one. • Do not include matters likely to come as a surprise to parties without first canvassing their views.
On site	• Avoid being with just one of the parties during an accompanied site visit. • Be diplomatic. • Conduct yourself in a professional manner. • Don't discuss the merits of the case with the parties. • Don't accept documents on site
Conditions	• Check all conditions are Framework and PPG compliant. • Ensure all intended ones are included. • Include reasons why/why not imposed. • Do not add your own without canvassing the parties' views first. • Check that opening/closing times make sense, use 24-hour clock. • Avoid using terms like weekday/weekend – refer to precise days of the week. • Don't forget implementation clauses.
Style & good practice	• Establish a proof-reading regime that works for you and use it every time. • Don't rely on the computer spell-checker. • Avoid using double negatives – too easy to omit an important "not". • Phrase main issues neutrally. • Use plain English • Write positively and concisely. • Be diplomatic. • Avoid making helpful comments.

The Parliamentary and Health Service Ombudsman

10. The Ombudsman's function is to investigate complaints by those who claim to have sustained injustice as a consequence of maladministration arising from action taken by or on behalf of a government department. The term maladministration encompasses such things as bias, neglect, incompetence, discourtesy, a failure to follow proper procedures and serious delay.

11. The Ombudsman's powers are limited to the investigation of the administrative functions of government. S/he can therefore investigate to see whether there has been maladministration in the decision making process, but cannot change in any way an Inspector's decision.

12. The Ombudsman receives thousands of complaints a year, many of which are sifted out at an early stage. When the Ombudsman is satisfied that there is a case to answer, she writes to the Chief Executive of PINS,

setting out the details of the complaint and asking for a report. Inspectors involved in a complaint will be advised by PINS on the necessary procedures.

Annex A – Correction of Errors in Decisions (Slip Rule)

1. Part 5 of the Planning and Compulsory Purchase Act 2004 (as amended) (the 2004 Act) allows the Inspectorate to issue a 'Correction Notice' to correct certain types of errors in decisions, provided that the error is contained in the decision document but does not form any part of the reasons given for the decision (see Section 59(5) of the 2004 Act). The provisions of the 2004 Act are only intended to correct obvious clerical mistakes, typographical errors, omissions or accidental slips, which are obvious to the parties concerned. By definition, correctable errors would not materially affect the reasoning in the decision if an amendment is made. The process for correcting such errors is often referred to as the "Slip Rule".

2. Once issued, a corrected decision has full legal status, carries a fresh date (except for wrongly dated decisions – see below) and will replace (and be subject to the same provisions as) the original in all respects. The fresh date has the effect of resetting any High Court challenge period.

What qualifies as a "Slip Rule" request?

3. The statutory requirements in Part 5 of the 2004 Act must be met before a correction notice is issued. A judgement has to be made as to whether the error in question is correctable under legislation and it is in the public interest to make the correction.

4. A "Slip Rule" request can be made by any person. In addition to the above criteria, for a request to be valid it must have been made in writing, relate to a decision type permitted to be corrected under legislation and submitted within the relevant High Court challenge period.

5. This criterion also applies to the Secretary of State or Inspectors who detect errors in their own decisions and wish to make a "Slip Rule" request.

Registering and answering requests

6. The Customer Quality Team is responsible for recording and processing "Slip Rule" requests and making decisions on whether corrections should be made, having assessed the context of the request and sought

comments from the appointed Inspector. The Customer Quality Team is also responsible for notifying the relevant parties about any intended correction.

7. Corrected decisions are sent to all parties who received a copy of the original decision. A procedural paragraph explains that the original decision has been superseded, with the following standard wording inserted above the first paragraph in the new decision, which reads:

8. "This decision is issued in accordance with Section 56(2) of the Planning and Compulsory Purchase Act 2004 (as amended) and supersedes the decision issued on …"

9. This paragraph is purposefully numberless, in order not to cause an effect on the existing paragraph numbers within the decision.

10. The covering letter, referred to as the Correction Notice, specifies the correction of the error and accompanies the amended decision, which supersedes the original decision once issued.

11. In the circumstances where a correction is not made, the original decision continues to have full force and effect. That decision not to correct an error is communicated to the relevant parties by the Customer Quality Team, in accordance with Section 57(1) (b) of the 2004 Act.

Correcting Wrongly Dated Decisions

12. The "Slip Rule" should not be used where the error involves an incorrect date (or no date) on an issued decision. Such errors cannot be left uncorrected, however, as this could have major implications to the parties and the enforceability of a decision.

13. When such errors occur, the decision should be correctly dated and reissued by the relevant casework team to all parties who received the original decision, along with an apology and explanation for the mistake. It is legally necessary that the corrected decision date must be the date that the appeal decision was originally made – being the date that should have been correctly included in the decision in the first instance.

14. As it is not a "Slip Rule" change, responsibility for reissuing the appeal decision rests with the relevant casework team who issued the original decision. It is important for them to provide an explanation as to why the reissued decision is being sent. Any complaints arising from the reissuing of a decision will then be answered by the Customer Quality Team.

Further information

15. For further information and assistance about the "Slip Rule" process, please contact the Customer Quality Team. "Slip Rule" requests received in any business area are forwarded to the Customer Quality Team as a priority matter. Colleagues in all business areas are responsible for:

16. Being aware that any person can make a "Slip Rule" request;

17. Identifying where such requests are made within correspondence sent to PINS; and

18. Notifying the Customer Quality Team (✉ feedback@pins.gsi.gov.uk) of requests that need to be considered in compliance with legislation.

19. The Customer Quality Team is responsible for handling all requests made, advising on the statutory requirements for "Slip Rule" and following the process for correcting decisions.

High Court Challenges

What's New since the last version

Last revised: 27 April 2018. Updates for clarification throughout the chapter including updated hyperlinks.

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Who can challenge a decision?

Time limits for making a challenge

Grounds of challenge

Power of the Court

Role of the Government Legal Department

Handling challenges for PINS

Evidence and Witness Statements

Costs and outcomes

Information Sources

Court Judgments

Knowledge Matters

The Inspector Training Manual, particularly the chapters on Role of the Inspector, The approach to decision-making, Human Rights and the Public Sector Equalities Duty.

Relevant Legislation

Criminal Justice and Courts Act 2015

Equality Act 2010

Human Rights Act 1998

Planning (Listed Buildings and Conservation Areas) Act 1990

Town and Country Planning Act 1990

Introduction

1. Almost inevitably one of the parties to an appeal will not welcome the Inspector's decision. Complaints about decisions are therefore not unusual and they are sometimes accompanied by a request that the decision be reversed or reconsidered.

2. An appeal decision can only be reconsidered following a successful challenge in the High Court, or where a decision is made to consent to judgment before it gets to court.

Who can challenge a decision?

3. Section 288(1) of the Town and Country Planning Act 1990 ('the Act') provides a right of challenge for any person aggrieved by a section 78 planning appeal decision to challenge the validity of that decision in the High Court. Over time, this has come to mean that anyone who has made representations during the course of an appeal is likely to be able to exercise the right to challenge under section 288 of the Act. The grounds are (a) that a decision is not within the powers of the Act or (b) that any of the relevant requirements have not been met (such as procedural requirements, regulations, rules) and as a result prejudice has occurred.

4. Section 289(1) of the Act provides a right of challenge to the Appellant, the Local Planning Authority or any other person having an interest in the land to which the notice relates. Challenges by any other party can only be made by Judicial Review. This relates to challenges to decisions on appeals against enforcement notices made under s174, and other notices under s207 and s215.

5. Decisions may also be challenged under s288 / s289 on the basis of Inspector's duties arising from the Human Rights Act 1998 and the Equality Act 2010 (see paragraph 13 below).

Time limits for making a challenge

6. High Court challenges proceed under different legislation depending on the type of appeal and the period allowed for making a challenge varies accordingly.

7. Any challenge made to **planning appeal decisions** must be made within six weeks (42 days) from the day after the date of the decision. This is a statutory time limit and cannot be extended. These are normally applications under Section 288 of the Town and Country Planning Act 1990 to quash Inspectors' decisions on appeals brought under section 78 against decisions by local planning authorities to refuse planning permission or to grant subject to conditions. Section 288 claims can also challenge enforcement appeals allowed under ground (a), deemed application decisions or Lawful Development Certificate appeal decisions. When an application is made under section 288, permission from the Court is required in order to bring the claim. Permission is decided by a judge on the papers initially. If permission is refused, the claimant can request that it is reconsidered at an oral hearing.

8. For **listed building consent** appeal decisions, challenges are made under Section 63 of the Planning (Listed Buildings and Conservation Areas) Act 1990

and must also be made within six weeks from the day after the date of the decision.

9. Any challenge made to **enforcement appeal decisions** must be made within 28 days of the date of decision, unless the Court extends this period. Enforcement appeal decisions can be challenged under Section 289 of the Town and Country Planning Act 1990. Listed building or conservation area enforcement appeal decisions can be challenged under Section 65 of the Planning (Listed Buildings and Conservation Areas) Act 1990. To challenge an enforcement decision under Section 289 or Section 65 permission of the Court must be obtained before a legal challenge can be made. Permission is dealt with at an oral hearing. If the Court does not consider that there is an arguable case, it can refuse permission.

10. Where a local authority grants planning permission, a party who was not the applicant for permission may not bring a section 78 appeal but may, if they can demonstrate a sufficient interest in the matter, challenge the local authority's decision by way of a judicial review application. Judicial review claims may also be brought in relation to planning decisions which are not caught by sections 288 or 289, including some procedural decisions. The time limit for making a claim for Judicial Review is 3 months from the date of a decision. However, where the application for judicial review relates to a decision made by the Secretary of State or local planning authority under the planning acts, the claim form must be filed not later than six weeks from the date of the decision.

11. Section 284 precludes any challenge to decisions on section78 appeals except by way of application to the High Court under section 288.

12. As part of reforms to reduce challenges of little merit to planning decisions, s91 and Schedule 16 of the Criminal Justice and Courts Act 2015 have introduced the requirement for leave of the court to be obtained before a legal challenge can be made, including challenges made to decisions on planning appeals under s288 of the Act, as referred to in paragraph 7, above, and under s63 of the Planning (Listed Buildings and Conservation Areas) Act 1990, with effect from 26 October 2015. Applications for leave must be made within the six-week period following the decision or action being challenged.

Grounds of challenge

13. The Act defines the grounds on which a challenge may be made. For Inspector's decisions some broad categories of challenge have developed from case law including: (1) the decision is illogical / irrational (2) there was a failure to take account of a material consideration (3) inadequate reasons were provided for the decision (4) there was a failure to correctly interpret or apply local or national planning policy and (5) natural justice / procedural fairness requirements were not met. In addition, Human Rights Act and Equality Duty grounds might on occasion be incorporated into an s288 / s289 challenge on the basis that an Inspector failed to give proper consideration to these matters.

14. The Court is only interested in the legality or otherwise of the issued decision and decision-making process, and the courts have made clear on a number of occasions that an Inspector's conclusions on the planning merits of an appeal cannot be challenged directly through the courts.

15. Of the five broad categories in paragraph 13 above, the two most common grounds of challenge are that the reasoning in the decision letter is inadequate or that the decision is irrational (sometimes known as the *Wednesbury*[1] test). Occasionally the grounds will include a natural justice challenge i.e. an accusation that the Inspector has in some way failed to act fairly or that there has been a procedural error.

Powers of the Court

16. If the Court is satisfied that the decision contains an error in law, and as a result the interests of the claimant have been substantially prejudiced, the Court will usually quash the decision and return the appeal to the Secretary of State for reconsideration, although the Court may also exercise its discretion not to quash / remit the decision in some rare cases. It should be noted that when a section 288 claim succeeds, the Court will quash the decision and remit it for reconsideration, whereas in section 289 appeals the decision is not quashed, but is remitted for reconsideration with the opinion / direction of the Court. In either case, the Court has no power to substitute the Inspector's decision on the planning merits of the appeal with one of its own. The Court does however, have the discretion not to quash / remit a decision if it is satisfied that, despite an error in law, the Inspector's decision would inevitably have been the same in any event. In practice though, this is relatively rare.

Role of the Government Legal Department

17. A claimant's grounds of challenge to a planning appeal decision will be set out in a claim form and should be lodged with the Administrative Court within the six week period. The claim form must then be served on the Government Legal Department (GLD), who acts for the Secretary of State in such cases. Even in transferred cases the challenge is always made against the Secretary of State rather than the Inspector. In addition to providing us with legal advice on the challenge, GLD will appoint and brief Counsel to represent the Secretary of State should the case eventually get to Court.

Handling challenges within PINS

18. GLD will send a copy of the claim form to PINS High Court section who will ask the Inspector, via email, for his or her initial comments on the grounds of challenge. Inspectors will normally be given 5 working days to respond, due to the tight timescales of the challenge process. These are passed to GLD who will then provide advice on the merits of the challenge and appoint Counsel to advise further if required. On the basis of the GLD advice, plus any advice from Counsel and any further comments from the Inspector and their GM, we will then decide whether the challenge can be successfully resisted. We will instruct GLD accordingly and they will brief Counsel either to prepare the Summary Grounds of Defence (to be filed within 21 days of service of s288 claims) or to attend the oral permission hearing (in enforcement appeals). We will always resist a challenge unless there has clearly been an error in law that has substantially prejudiced one of the parties to the appeal.

[1] From *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223. See paragraphs 12-14 of the Role of the Inspector chapter for further advice on this matter.

19. In providing initial comments, try to be as prompt as possible, as litigation is costly. Focus on the essence of the case that is being made by the party, however you must respond to all of the grounds unless they are matters beyond your remit e.g. admin matters. If that is the case, make clear in your comments the points to which you are responding.

20. If you have made a mistake e.g. used a wrong measurement or direction, or policy, put your hands up, acknowledge the mistake and move on. Learn from it and try to make sure that you do not make the same mistake again. Where it is plain that an Inspector has gone seriously wrong e.g. relied on an old policy, we will instruct GLD not to resist the challenge and submit to the judgment of the court, on the papers. This normally avoids the need for a formal court hearing and can save considerable costs. The decision will be quashed and the appeal returned to the Secretary of State for re-determination.

Evidence and Witness Statements

21. The majority of challenges are either successfully resisted or withdrawn by the Claimant before they get to court. In those cases that do reach court, typically about 6 to 9 months after the decision letter has been issued, it is not normally necessary for an Inspector to provide a witness statement or otherwise attend court. Occasionally though, GLD will advise us that one is necessary. Witness statements cannot expand on reasons. They will be factual. An example would be where unfairness is alleged against the Inspector e.g. about behaviour at a site visit. Where GLD have clear instructions / comments from the Inspector on the relevant issues, they will normally produce a first draft, which will be forwarded to the Inspector for comment. In other cases, where further explanation is needed, GLD may ask the Inspector to prepare a first draft.

22. If you are asked to provide a witness statement, check the draft with great care. If there is anything in it that is not entirely accurate, or it omits something relevant, you should make any amendments and return the witness statement to the High Court team, who will then forward it on to GLD for consideration. Once you advise the High Court Team that you are content with the witness statement, you will be provided with a clean version to sign. The signature on the witness statement must be handwritten. Inspectors are ultimately responsible for the content of their statements. Although it is very rarely exercised, the courts do have the power to order an Inspector to attend the hearing for cross-examination. Inspectors should therefore only agree a statement if they would be willing to defend its contents under cross-examination. It is our policy not to allow Inspectors to be cross-examined unless there is a Court Order, or unless Counsel has clearly advised that it would be in our interests to provide oral evidence.

Costs and outcomes

23. If a challenge is successfully resisted in court that is normally the end of the matter, although unsuccessful claimants can seek permission to appeal to the Court of Appeal. Costs usually follow the event, i.e. if the case is won the claimant will be ordered to pay PINS legal costs, and if the case is lost, PINS will have to pay the claimant's costs. If a challenge succeeds, the planning appeal

will be re-determined by PINS from the start, with a different Inspector who will consider the issues afresh.

Advertisement appeals

Updated to reflect updated revised Framework (NPPF): Yes

What's New since the last version

Changes highlighted in yellow made **17 October 2019**:

- References and links to Planning Practice Guidance updated;
- Paragraph 116 concerning the display of advertisements on telephone kiosks updated to reflect amendment legislation; and
- Paragraphs 119 & 120 inserted to provide advice where an associated prior approval appeal is to be dismissed as being outside the permitted development right.

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Introduction

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

2 Some of the good practice advice in 'The approach to decision-making', 'Conditions', 'Householder, Advertisement and Minor Commercial Appeals' and 'Site Visits' applies to advertisement appeal casework.

3 This advice applies to casework in England only.[1]

Legislation, policy and guidance

4 Section 220 of the Town and Country Planning Act 1990 sets out the legal basis for the restriction and regulation of the display of advertisements.

5 The display of advertisements is regulated by the 'The Town and Country Planning (Control of Advertisements) (England) Regulations 2007'. This was amended in 2007, 2011, 2012 and 2013. It is important to use an up to date consolidated version. You should note that Schedule 4 of the Regulations sets out modifications to the 1990 Act in relation to advertisements.

6 Under the Regulations there are 3 types of advertisements:

Exempt from control (Regulation 4(2)) – these can be displayed without needing express or deemed consent and are set out in Schedule 1 (for example, advertisements on enclosed land and on moving vehicles[2]).

Deemed consent (Regulation 6) – these are granted consent under the Regulations subject to standard conditions[3] and are set out in Schedule 3 (for example estate agents 'for sale' signs). Each of the classes of advertisements in Schedule 3 are subject to conditions and limitations (relating to such matters as size, height and illumination).

Express consent (Regulation 9) – all other applications require express consent through an application to the LPA.

[1] PINS Wales produces separate material for Wales which summarises differences in policy.
[2] See Planning Practice Guidance ID 18b-066-20140306 'What action is possible against unauthorised advertisements alongside highways?' for guidance on when advertisements on vehicles require express consent.
[3] The only exception is Class F in Schedule 1 where condition 4 (maintaining structures or hoardings in a safe condition) does not apply - see Planning Practice Guidance ID 18b-003-20140306 – 'How is consent obtained to display advertisements?'

7 Regulation 17 confirms the right of appeal under Section 78 of the 1990 Act[4] where the LPA has refused express consent (or failed to determine the application) or against a condition imposed on a deemed consent.

8 National policy is set out in paragraph 132 of the National Planning Policy Framework (the Framework).

9 Further guidance is provided in the government's Planning Practice Guidance. This deals with, amongst other things:

- Definition of an advertisement (s336 of the 1990 Act)
- Requirements for consent
- Applications for express consent – procedure, and - determination, appeals, and revocation
- Additional restrictions on the display of advertisements
- Enforcement against specific unauthorised advertisements
- Considerations affecting public safety
- Considerations affecting amenity

10 The procedures for advertisement appeals are set out in detail in Annexe R of the Procedural Guide - Planning Appeals – England[5] (The 'Procedural Guide').

11 You will need to be familiar with the content of these documents. Although they are referred to throughout this good practice advice they are not repeated in full.

Procedure

12 Appeals relating to express consent are dealt with by:

Written representations – mostly under the 'Commercial Appeals Service' (CAS).[6] See 'Householder, advertisement and minor commercial appeals' for best practice advice. However, some appeals may not be suitable for this procedure (see C.3.5 of the 'Procedural Guide' for information).

Hearing/inquiry – see below for more information

13 The Secretary of State can determine the procedure used to decide advertisements appeals (see R.5.1 and Annexe K of the Procedural Guide). Most cases will be suitable for the written representations procedure and only a minority are dealt with by means of a hearing.

[4] As modified by Schedule 4 of the Regulations

[5] The Procedural Guide – Planning appeals – England applies to planning appeals, householder development appeals, minor commercial appeals, listed building appeals, advertisement appeals and discontinuance notice appeals. It also applies to appeals against non-determination. The Procedural Guide –Called-in planning applications – England applies to all applications which are 'called-in'.

[6] Under Part 1 of The Town and Country Planning (Appeals) (Written Representations Procedure) (England) Regulations 2009 (Statutory Instrument 2009/452) as amended by The Town and Country Planning (Appeals) (Written Representations Procedure and Advertisements) (England) (Amendment) Regulations 2013 - Statutory Instrument 2013/2114

Appeals relating to express consent

What are the most common types of casework?

14 Casework most commonly involves fascia and projecting signs on shops and commercial premises, poster panels, free standing display units, totem signs and large PVC sheets wrapped around buildings. Some commonly used terms are set out in Annex 1 to this guide.

What should be the wording in the banner heading?

15 The regime for regulating advertisements is separate to that of planning. Consequently, the banner heading should read:

> The appeal is made under Regulation 17 of the Town and Country Planning (Control of Advertisements) (England) Regulations 2007 against a refusal to grant express consent[7].

What are the relevant considerations?

16 Your assessment is confined to the issues of **amenity** and **public safety**:

- Regulation 3(1) – "A local planning authority shall exercise its powers under these Regulations in the interests of amenity and public safety, taking into account - (a) the provisions of the development plan, so far as they are material; and (b) any other relevant factors."

- Framework paragraph 132 – "Advertisements should be subject to control only in the interests of amenity and public safety, taking account of cumulative impacts."[8]

How should the effect on amenity be assessed?

17 Regulation 2 states that 'amenity' includes aural and visual amenity. Further advice is in the Planning Practice Guidance which also points out that, where relevant, the noise generated by advertisements needs to be considered.[9]

18 Regulation 3(2) states that factors relevant to amenity include:

> the general characteristics of the locality, including the presence of any feature of historic, architectural, cultural or similar interest

[7] Appeals may also be made where the local planning authority granted express consent subject to conditions, and also where that authority neither gave notice of their decision nor gave a notice under s70A to decline to determine the application within 8 weeks from receipt of the application.

[8] See also Planning Practice Guidance ID 18b-026-20140306 *'What factors can a local planning authority take into consideration when determining an advertisement application?'*

[9] See Planning Practice Guidance ID 18b-027-21040306 *'How can 'amenity' be defined when considering applications for express consent?'*

19 When assessing the effect on visual amenity have regard to paragraph 132 of the Framework and paragraph 079 in the section on Advertisements in the Planning Practice Guidance.

20 Concerns about aural amenity do not occur very often. However, there may occasionally be concerns about potential noise disturbance from advertisements with moving motorised parts or the flapping of a flag displayed close to residential windows.

How should the effect on public safety be assessed?

21 Regulation 3(2)(b) states that factors relevant to public safety include:

> (i) the safety of persons using any highway, railway, waterway, dock, harbour or aerodrome (civil or military)
>
> (ii) whether the display of the advertisement in question is likely to obscure, or hinder the ready interpretation of, any traffic sign, railway signal or aid to navigation by water or air
>
> (iii) whether the display of the advertisement in question is likely to hinder the operation of any device used for the purpose of security or surveillance or for measuring the speed of any vehicle.

22 The Planning Practice Guidance provides detailed guidance on the assessment of the possible effect on 'public safety'.[10] This covers the main types of advertisements which may cause danger to road users and the ways in which advertisements can affect the safety of railways, aircraft and aerodromes, waterways, docks and harbours and the prevention of crime. The Planning Practice Guidance emphasises that all advertisements are intended to attract attention but proposed advertisements at points where drivers need to take more care are more likely to affect public safety. Examples are given from paragraph 067 onwards as to what may constitute harm to public safety.

Can other matters be taken into account?

23 Sometimes issues which are not related to amenity or public safety may be raised by the parties. For example, it may be argued that there is (or isn't) a need for the advertisement, or that it would have economic benefits and would represent sustainable development in line with the Framework. Concerns might be expressed about the content of the specific advertisement.

24 However, advertisements should be subject to control only in the interests of amenity and public safety. There is no indication in the Regulations, Framework or Planning Practice Guidance that any other factors can be taken into account either for, or against, a proposal – with the sole

[10] See Planning Practice Guidance ID 18b-028-20140306 '*What considerations should local planning authorities take into account in assessing public safety in relation to advertisement applications?*' and further guidance on the consideration of, and consultation regarding, possible effect of advertisements on public safety.

exception of sign posting in rural areas.[11] In relation to the content of the advertisements, the Planning Practice Guidance states:

> Unless the nature of the advertisement is, in itself, harmful to amenity or public safety, consent cannot be refused because the local planning authority considers the advertisement to be misleading (in so far as it makes misleading claims for products), unnecessary, or offensive to public morals. (ID 18b-026-20140306)

25 If necessary, you can explain this by reference to the Framework Regulation 3(1) and relevant extracts from the Planning Practice Guidance.

Should any existing advertisements in the area be taken into account?

26 Subject to the advice in the Planning Practice Guidance[12], existing advertisements may be taken into account where it is considered they form part of the character of the area against which the impact on amenity is being assessed.

27 Although the decision maker has the power to disregard any advertisement that is being displayed (Regulation 3(3)), this should be used with caution. It is important that clear reasons are given why it is considered appropriate to disregard any other signs. The judgment in *Retail Media Ltd v SSETR & Macclesfield BC* [2000] EWHC Admin 398 emphasised the need for adequate reasoning in decisions. The aim is to achieve a consistency of approach in reasoning, whilst recognising that the resulting conclusions and decisions must always turn on the merits of the particular case. Where existing advertisements in the same locality as the appeal site are referred to by one or more of the parties and consistency is a major plank of the appellant's case, those advertisements and the question of consistency must be referred to in the decision. Points to consider are:

a) Are the Council aware of the legality of the other signs and are they taking steps to do anything about them?
b) Is it clear what the similarities or differences between the appeal sign and those that are to be disregarded are?
c) Can the necessity of formally disregarding any signs be avoided, by acknowledging the other signs but making it clear they do not set a precedent, then explaining that the appeal has been dealt with on its own merits and it has been found to be harmful or acceptable for its own specific reasons? Even if nearby signs are very similar in impact, the effect of cumulative harm or the overloading of an area can both be arguments used to avoid the need to disregard signs.

[11] Planning Practice Guidance ID 18b-032-20140306 – '*What additional considerations may apply when considering applications for sign posting in rural areas?*'
[12] Planning Practice Guidance ID 18b-079-20140306 – '*What does "amenity" mean?*'

Conservation areas and listed buildings

28 Section 72(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 requires that special attention shall be paid to the desirability of "*preserving or enhancing the character or appearance"* of a Conservation Area. This statutory duty applies in advertisement appeals (in so far as it relates to the consideration of 'amenity'). This is because Section 72 applies to the exercise of any functions under the planning acts and the court has held that in reaching a determination under the regulations you are exercising a function under the 1990 Planning Act.[13]

29 The statutory duty under s66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 requiring decision makers to have special regard to preserving the [listed] building or its setting or any features of special architectural or historic interest only applies to the consideration of whether to grant planning permission.

30 However, the fact that a building is listed is likely to be a relevant material consideration when considering the effect on 'amenity' (for example, in terms of its appearance, features and setting).[14] In addition, listed building consent might be required.

31 The policy in paragraphs 192-196 of the Framework does not need to be considered when determining advertisement consent appeals within a conservation area or in relation to a listed building, as the policy only applies to the heritage-related consent regimes under the Planning (Listed Buildings and Conservation Areas) Act 1990. Advice on the application of the Framework to listed building consent appeals in relation to advertisements is set out in the next paragraph.

Listed building consent applications and advertisements

32 Chapter 16 of the Framework applies to applications for listed building consent in relation to advertisements.[15] Paragraph 194 of the Framework states that any harm or loss to a heritage asset should require "clear and convincing justification". Substantial harm to or loss of a grade II listed building, park or garden should be exceptional, while substantial harm to or loss of designated heritage assets of the highest significance should be wholly exceptional.

33 Paragraphs 195 and 196 of the Framework require the decision maker to assess whether a proposal will lead to substantial or less than substantial

[13] *R. (on the application of Clear Channel UK Ltd) v First Secretary of State, R (on the application of Clear Channel UK Ltd) v Islington LDC* [2004] EWHC 2483

[14] See Regulation 3(2)(a) - factors relevant to amenity include the general characteristics of the locality, including the presence of any feature of historic, architectural, cultural or similar interest.

[15] See footnote 62 of the Framework, which clarifies that Chapter 16 of the Framework applies to heritage-related consent regimes under the Planning (Listed Buildings and Conservation) Areas Act 1990. This does not extend directly to advertisement decisions but similar considerations will apply when, for example, determining an advertisement decision which is related to a listed buildings consent application.

harm to, or total loss of significance of, a designated heritage asset. If the harm is assessed as substantial, or resulting in the total loss of significance of a designated heritage asset paragraph 195 confirms that consent should be refused unless there are substantial public benefits that outweigh that harm or loss or all of the four criteria listed in the paragraph apply. If the harm is less than substantial, paragraph 196 requires this harm to be weighed against the public benefits of the proposal, including securing its optimum viable use. Further, pursuant to paragraph 197, any effect on the significance of a non-designated heritage asset should also be taken into account.

34 In your decision on whether to grant listed building consent you should apply the relevant policies in the Framework and explain your assessment of any harm to the heritage asset and the weight attached to any public benefits. Then you need to reach a conclusion on whether those benefits are sufficient to outweigh the identified harm.

Can development plan policies be taken into account?

35 Section 38(6) of the Planning and Compulsory Purchase Act 2004 does not apply to advertisement appeals. Instead, your starting point is the effect on 'amenity' and/or 'public safety' (rather than whether the proposal accords with the development plan). However, under Regulation 3(1) in England, you should take the provisions of the development plan into account if they are material. Regulation 3 states:

> A local planning authority shall exercise its powers under these Regulations in the interests of amenity and public safety, taking into account - (a) **the provisions of the development plan, so far as they are material**; and (b) any other relevant factors.

36 To show that you have taken material provisions into account it is good practice to assess whether or not the proposal complies with the relevant policy. So, for example, in a straightforward case you might say:

> I have taken into account policy [] of the [Local Plan] which seeks to [protect amenity] and so is material in this case. Given I have concluded that the proposal would/would not harm amenity, the proposal conflicts/does not conflict with this policy.

What if the site is within an Area of Special Control?

37 LPAs have the power under Regulation 20 to designate Areas of Special Control for Advertisements (ASCA). These place additional restrictions on the display of advertisements. In an ASCA some advertisements that would otherwise benefit from deemed consent will require express consent (but see paragraph 37 below). The Planning Practice Guidance provides further information.[16]

[16] Planning Practice Guidance ID 18b-055-20140306 – '*What is an area of special control?*'

38 In most cases the presence of the ASCA will have little bearing on your assessment of the proposal - which should be considered on its merits in respect of the effects on amenity and public safety. However, it is good practice to acknowledge that the site is within an ASCA.

39 Very occasionally, you might find that the appeal is for a type of sign for which there is no provision in the Regulations for express consent to be granted within an ASCA.[17] In such cases you must refer the file back to the Case Officer so that the parties can be informed and their comments sought. The appeal may need to be declined.

40 Regulation 21(2) (b) requires that in an ASCA a directional sign[18] must be "reasonably required". You should assess whether this is so, particularly if you consider that the proposal is acceptable in terms of its effects on amenity and public safety.

What are standard conditions?

41 Under Regulation 14(a) all advertisements which are granted express consent are subject to the five standard conditions set out in Schedule 2 of the Regulations. You do not need to set these out as separate conditions. However, in order to draw them to the attention of the appellant, your formal decision should state:

> The appeal is allowed and express consent is granted for the display of [insert description of advertisement] as applied for. The consent is for [five] years from the date of this decision and is **subject to the five standard conditions set out in the Regulations** (and the following additional condition(s): [insert any non-standard conditions]).

Can non-standard conditions be imposed?

42 Any additional non-standard conditions must be set out in full and should be supported by specific and relevant planning reasons.[19] Examples of non-standard conditions are set out in PINS suite of suggested planning conditions, which will be available in DRDS when the interim solution is launched (see 'Conditions'). Information is also provided in R.4 of the 'Procedural Guide' (including in R.4.5 in relation to restrictions on size or colour and R.4.6 in relation to illumination).

[17] For example, an advertisement falling within Classes, 7B, 15, 16 or 17 of Schedule 3 to the Regulations

[18] Regulation 21(2)(b) refers to an advertisements "for the purpose of announcement or direction in relation to buildings or other land in the locality"

[19] Planning Practice Guidance ID 18b-034-20140306 – '*What conditions can be imposed on an express consent?*'

Illumination intensity restriction

43 Advice in 'Technical Report No 5: Brightness of Illuminated Advertisements (Third edition 2001)' by the Institution of Lighting Engineers (now known as the Institute of Lighting Professionals) has now been replaced by that in 'Professional Lighting Guide 05 (PLG 05) Brightness of Illuminated Advertisements' by the Institute of Lighting Professionals. A hardcopy is available in the Library although electronic copies are not available.

44 Although Condition Number 45 in PINS suite of conditions now reflects this change, it is not possible to reflect this in DRDS. Therefore Inspectors will need to make manual changes as highlighted below in green:

The intensity of the illumination of the [sign] permitted by this consent shall be no greater than [**] candela. [If a figure is not mentioned in representations then say "within that recommended by the Institute of Lighting Professionals (for a sign within Zone ....) in its Professional Lighting Guide 05 (PLG 05) Brightness of Illuminated Advertisements (or its equivalent in a replacement Guide)."]

Can conditions be imposed which limit consent to a specific period?

45 Advice is provided in the Planning Practice Guidance.[20]

46 All consents are automatically given for 5 years, unless specifically stated - Regulation 14(7)(b). If you are content that the consent should be for 5 years, you do not need to impose a specific condition. However, it is good practice to refer to this period in your formal decision:

> The appeal is allowed and express consent is granted for the display of [insert description of advertisement] as applied for. **The consent is for five years from the date of this decision** and is subject to the five standard conditions set out in the Regulations (and the following additional condition(s): [insert any non-standard conditions]).

47 If the appellant has applied for a period of consent which is less than 5 years then you should make it clear that the consent is only for the period sought (even if you have no evidence to indicate that a longer period would not be appropriate or that the shorter period sought is necessary).

Should conditions be imposed that require the advertisement be removed at the end of the relevant period of consent?

48 After 5 years (or whatever period you specify) the advertisement can continue to be lawfully displayed as it will have the benefit of deemed consent under Class 14 of Schedule 3 of the Regulations. An

[20] See Planning Practice Guidance ID 18b-036-20140306– '*How long does an express consent last?*'

advertisement with deemed consent can only be removed if discontinuance action is taken by the local planning authority.

49 However, an advertisement will not benefit from deemed consent under Class 14 if it would contravene a condition which has been imposed on an express consent (Class 14(b)). Consequently, if you consider an advertisement would be likely to be unacceptable at the end of the 5 year period (or any other period you consider relevant) you would need to impose a non-standard condition requiring that it is removed from the site at the end of that period. However, you should only do this if you have firm evidence to indicate that the advertisement would be likely to be unacceptable at the end of the specified period. Are there convincing reasons why might this be so?

50 A condition requiring the removal of an advertisement is more likely to be necessary in circumstances where you consider that a consent of less than 5 years is justified (because you will, presumably, have concluded that the advertisement is unlikely to be acceptable after the relevant time period you have imposed).

51 There is an example of a condition in PINS suite of suggested planning conditions.

Should a condition be imposed requiring development to be carried out in accordance with the approved plans?

52 This is not necessary as your decision grants *express consent,* not *planning permission*. The condition is meant to facilitate applications under s73 for minor material amendments to a planning permission and so is not relevant when granting express consent for the display of an advertisement.[21]

If the LPA has made a split decision, which advertisements are before me at appeal?

53 This depends on the approach taken by the LPA:

1) If the LPA has refused consent for some signs and granted others - you only need to deal with the signs which have been refused.

2) If the LPA has granted consent but attached a condition effectively refusing consent for some signs - you only need to deal with the signs which have been refused.

3) If the LPA has refused some of the signs applied for but has not granted consent for the others, despite indicating that it has no objection to them, your decision should relate to all the signs contained within the original application.

54 If it is not clear which signs are before you in the appeal you will need to go back to the parties.

[21] See Planning Practice Guidance on 'Flexible options for planning permissions'

What if it is argued that express consent is not required?

55 If it is argued that express consent is not required, you can acknowledge this, but note that, as the appeal follows an application for express consent, you are determining it on that basis.

56 However, if an applicant for express consent specifically requests a determination, the Judge in *Thomas v NAW & Neath Port Talbot* [2009] EWHC 1734 (Admin) found that the Inspector has the jurisdiction to determine the issue. So, if a determination has been requested, you should make one. However, you would need to have been provided with sufficient evidence to allow you to reach a reasoned conclusion.

57 You should not deal with advertisements which:

- have been withdrawn from the application because they do not need express consent
- the appellant and LPA agree do not require express consent.

58 Advice regarding applications for a s191 or s192 certificate to determine whether an advertisement display is lawful or requires express consent can be found in 'Enforcement and lawful development certificates'.

Do advertisements require planning permission?

59 The display of advertisements is controlled through a specific approval process and separate planning permission is not required in addition to advertisement consent.[22]

60 Although advertisement consent grants permission for the structure, planning permission for a structure does not grant consent for any advertisement. When planning permission is sought for a structure the effect a likely advertisement would have on amenity may be considered as part of the balancing exercise.

How are site visits conducted in written representations cases?

61 Advertisement appeals are mainly carried out under the 'Commercial Appeals Service' (CAS) and the site visit procedures are set out in 'Householder, advertisement and minor commercial appeals.'[23] As most advertisements are intended to be visible from a public place, the site visits will be usually be unaccompanied. 'Site visits' provides advice about site visits where the appeal is not dealt with under CAS.

What is the format of an advertisement decision?

62 The format of the decision and your approach to writing it should be generally the same as for other planning appeals, including, in terms of

[22] See Planning Practice Guidance ID: 18b-001-20140306 – '*Background*'
[23] Some appeals will fall outside the scope of CAS (for example, where the appeal is against non-determination). See the Procedural Guide - Planning Appeals – England for more information

defining the main issues, reasoning, conditions and conclusions.[24] However, there are differences between advertisement appeals and planning appeals (for example see the sections above on the matters that can be taken into account). You may need to explain these differences and your approach should it be relevant.

Can there be an award of costs?

63 The parties can submit a claim for costs.[25] The procedure and approach is the same as for s78 appeals.

[24] See 'The approach to decision-making' for further advice
[25] In England – see Planning Practice Guidance chapter *Appeals* '*The award of costs - general*'.

Hearings

64 For advertisement appeals made before 6 April 2015 which have not been determined by that date the hearings are subject to the Town and Country Planning (Inquiries Procedure) Rules 1974 – see Annex 2.

65 For advertisement appeals made from 6 April 2015 the Town and Country Planning (Hearings and Inquiries Procedure) (England) (Amendment and Revocation) Rules 2015 amend the 2000 Rules so that they apply to advertisement appeals which are to be dealt with by a hearing or an inquiry in England. Further advice can be found in 'Hearings' and in 'Inquiries'.

Appeals against conditions

66 Regulation 17 states that sections 78 and 79 of the 1990 Act shall apply in relation to applications for express consent. Section 78 of the 1990 Act (as modified by Part 3 of Schedule 4 to the Regulations), provides a right of appeal against a grant of express consent subject to conditions. These are in effect Type 1 ('section 79' appeals), although the time period for an appeal is 8 weeks (not 6 months). After the initial period for making a Type 1 appeal has expired it is possible to make a fresh application for a new consent without the offending condition. More advice can be found in 'Appeals against conditions'.

67 The banner heading should state:

> The appeal is made under Regulation 17 of the Town and Country Planning (Control of Advertisements) (England) Regulations 2007 against conditions imposed when granting express consent.

68 Regulation 17 refers only to sections 78 and 79 and there is no mention of sections 73 or 73A. Consequently, a local planning authority has no power to accept an application made under either of these sections to grant advertisement consent for an advertisement without complying with a condition(s) imposed on a previous consent (Type 2 and Type 3 as described in the 'Appeals against Conditions' chapter). Such appeals should be turned away as invalid when they are received. If one makes it through the system to you the Inspector, you will need to ask your case officer to issue a letter explaining the situation and offering a chance for the appellant to withdraw or you will dismiss the appeal because of a lack of jurisdiction. A sample letter is at Annex 3.

Discontinuance Notices

69 Discontinuance action deals only with advertisements being displayed with deemed consent. Class 14 of Part 1 of Schedule 3 of the Regulations grants deemed consent to any advertisement that has been displayed with express consent once the express consent expires, and Class 13 grants deemed consent for an advertisement that has been displayed on a site continually for 10 years without any express consent. A notice may thus be served in respect of either a particular advertisement or a site used for the display of advertising.

70 Generally a discontinuance notice will be used against a site benefitting from a Class 13 deemed consent displaying one or more hoardings or large poster panels which have been in place for 10 years or more.

71 The Courts in *Westminster City Council v Moran* [1998] EWHC Admin 637; held that "continually" does not mean "continuously". An interruption in the use of the site for display of advertisements since 1974 does not deny the user deemed consent. Hence the display of advertisements on a basis which is regularly occurring is sufficient to secure deemed consent rights. However, Class 13 does not apply if there has been a material increase in the extent to which the site has been used. In *R (oao) Clear Channel UK Ltd v Hammersmith & Fulham LBC* [2009] EWCA Civ 2142, the courts held that a larger structure with a different form of illumination was a material change which meant the deemed consent that had been built up over the previous 10 years had been lost and the display of the sign was unlawful.

72 Express consent cannot be discontinued, and neither can an unlawful advertisement. The local planning authority has powers to deal with the latter category in the Magistrates Courts.[26]

73 A discontinuance notice is a formal document that, once it takes effect, can result in conviction for non-compliance. In this respect it is similar to an enforcement notice. However, an important distinction is that a discontinuance notice can only be served against a lawful display.

The stricter tests – substantial injury/danger to the public

74 A discontinuance notice may only be served where the planning authority is satisfied that the removal of the advertisement is necessary 'to remedy a substantial injury to the amenity of the locality or a danger to members of the public' (regulation 8 (1)).

75 The Courts have accepted that the test in regulation 8 is somewhat stricter than that applicable where an application for express consent is being considered, but it is suggested that in practice this is likely to be a distinction without a difference. [*R (Clear Channel (UK) Ltd v S of S*

[26] See Planning Practice Guidance ID: 18b-061-20140306 – '*Can an appeal be made against a removal notice?*'

[2004] EWHC 2483 Admin]. Even so, there may be cases where harm is found but that this is judged not to amount to substantial injury.

76 In *Palisade* it was held that: "to spoil the character and appearance of an area conveys very well, in my view, the effect that is relevant for the purpose of these proceedings, that is to say, the effect of inflicting substantial injury to the amenities of an area."

77 As regards 'danger to the public', although there is no case law to establish this, it should be noted that this too appears to be a stricter test than applicable when considering an application for express consent, where powers are exercised 'the interests of public safety'.

78 Where an advertisement is being displayed following the expiry of a grant of express consent, the considerations that were taken into account in granting that express consent would clearly be relevant (although not the only factor) in considering whether to take discontinuance action. [*R (Clear Channel (UK) Ltd)*.] Regulation 8 (8) requires a LPA, in considering whether to serve a discontinuance notice, to have regard to any material change in circumstance that has occurred (that is, since the advert was first displayed – whether with deemed or express consent). However the Courts have also accepted that there does not need to have been a material change in circumstances to justify the service of a notice, although there will be in some cases. *[O'Brien v S of S and Doncaster MBC* [2001]. Equally, it is not sympathetic to the argument that a particular advertisement has been in existence for many years. [*Chequepoint (UK) Ltd*].

Discontinuance action in a conservation area

79 Where a site of an advertisement is within a conservation area, it has been held that the exercise of the power to serve discontinuance notices under the Regulations is a function by virtue of the 1990 Act, and thus one to which applies the duty (under section 72 of the Planning (Listed Buildings and Conservation Areas) Act 1990) to pay special attention to the desirability of preserving or enhancing the character or appearance of the area. [*R (Clear Channel (UK) Ltd*, at paragraphs 29-42].

Contents of discontinuance notice

80 Advice on the contents of the discontinuance notice is given at paragraph 49 and 50 of the PPG. In particular the site or the advertisement to be discontinued should be clearly and precisely defined. If, for example, a poster panel at first floor level on the flank wall of a building is the target for removal and there are other advertisements at lower level on that wall which are not, the latter will be covered by the terms of the notice too if the site is merely specified as the flank wall.

81 The notice should also include the date on which it is served and must specify the period at the end of which it will take effect (regulation 8(4)). Any appeal to the Secretary of State against the notice must be made before it comes into effect and in the absence of any such appeal, the

advertisement will be unauthorised and thus render those responsible liable to prosecution.

82 The effective date of the notice must be at least 8 weeks after the date on which it is served. This means 8 weeks after the date it is received by the person on whom it is served, not 8 weeks after the date it is posted. Although there may be various recipients, there is only one notice, so it is important that it is issued to all intended recipients at the same time.

83 The date by which the display or use of the site must be discontinued must be specified in the notice and must be a reasonable period of time depending on any works which will be needed for the display to cease. This period, often 4 weeks, is designed to give time to remove the display and any supporting structures. Requests are sometimes made at appeal to extend the period but a plea that the display should remain for a further period of a year to allow a poster company to honour a commercial contract is unlikely to be relevant to the purpose of the period.

Service of a notice on the advertiser

84 A discontinuance notice is to be served on 'the advertiser'. This is defined, in regulation 2, as:

> (a) the owner of the site on which the advertisement is displayed;
> (b) the occupier of the site, if different; and
> (c) any other person who undertakes or maintains the display of the advertisement;

and any reference in the Regulations to the person displaying an advertisement shall be construed as a reference to the advertiser.

When the notice comes into effect

85 Anyone served with a notice may appeal against it at any time before it is due to come into effect. As noted above, the effective date of the notice must be a date not less than 8 weeks after service. Where an appeal is made the notice has no effect until the appeal is determined or withdrawn (regulation 8(5)).

Withdrawal or variation of a notice by the LPA

86 A planning authority may withdraw a discontinuance notice or, if no appeal is pending, extend its compliance period. In either case, the authority is required to notify those served with the original notice (regulation 8(6)). If the time for compliance is extended, this is generally an act of grace without legal consequences [*Joyner v Guildford Corporation* (1954) 5 P&CR 30)].

Correction/variation of a notice at appeal

87 Section 79 of the 1990 Act, as modified by Schedule 4 Part 5 of the Regulations, enables the Secretary of State at appeal to allow or dismiss the appeal or to correct any defect, error or misdescription in a discontinuance notice. Any part of the notice may also be reversed or varied, whether or not the appeal relates to that part.

88 Many appeals contain a challenge to the validity of the notice, but the Courts, as in Enforcement cases, have supported the view that unless there is an identifiable injustice to one or more of the parties involved, the Secretary of State's powers of correction can be widely applied.

89 In a case where the date of service contained an error in the year (2006 rather than 2007) legal advice obtained was that the error in that particular case did not affect the validity of the notice.

90 If the local planning authority have failed to notify one or more of the advertisers, the fact they are aware of the appeal and have provided representations suggests their interests have not been prejudiced. Similarly mistakes in the identification of the site or the scope of the notice can be rectified, subject to the same test of injustice.

Delegated Authority

91 A challenge to a discontinuance notice is sometimes made on the grounds that the local authority does not have the proper authority to serve it. This challenge might be on the basis that the person signing the notice did not have delegated authority to do so; or more fundamentally that the Council's Constitution does not provide for notices to be issued other than by the Executive.

92 It may be necessary, depending on the nature of the challenge and information supplied in relation to it, to obtain a copy of the Council's Constitution. However, invariably, decisions relating to planning matters are delegated to committee or to delegated officers and the latter are entitled to arrange for the discharge of their functions by subordinate officers. Section 234 of the Local Government Act 1972 (as amended) provides for authentication of documents by the 'proper officer' of the authority.

93 On the matter of functions which are the responsibility of the executive, The Local Authorities (Functions and Responsibilities) (England) Regulations 2000 (as amended) make clear that planning matters are not those for an executive of the authority. The list of functions in Schedule 1 of those Regulations refers to advertisement consents and does not specifically mention discontinuance of advertisements. However the related power, in section 220 of the 1990 Act, is a wider power to 'make provision for restricting or regulating the display of advertisements', under which the advertisement Regulations, which include the power for discontinuance, were made. Moreover, the list of functions is not exhaustive in listing every single function relating to development control.

94 The judgment in *Swishbrook Ltd v Secretary of State for the Environment and Islington BC* [1990 JPL 824] deals with other matters of challenge, including finding that the omission in a notice of the formal title of the officer who signed the notice (the 'proper officer') did not invalidate the notice.

Nullity

95 A discontinuance notice will be a nullity – and not merely invalid – where it is defective on its face. The correct test to apply is similar to that in the enforcement case *Coventry Scaffolding Co (London) Ltd v Parker* [1987] JPL 127, where it was held that, in considering whether an enforcement notice was a nullity, it was legitimate to look beyond the notice and to consider whether, in the light of surrounding circumstances, the recipient was sufficiently and clearly apprised of its effect, and what he had to do as a result of it. This echoes the earlier formation of the test in *Miller-Mead v Minister of Housing and Local Government* [1963] 2 QB 196: "does the notice tell [the person on whom it is served] fairly what he has done wrong, and what he must do to remedy it."

96 Where a notice is a nullity on its face (and not merely invalid), it has no legal effect. There is thus no right of appeal to the Secretary of state. Such notices should be spotted before an appeal is allocated to an Inspector for decision. However, if upon receipt of a file, an Inspector forms the view that a notice is a nullity, they should inform both parties of their intention to take no further action, subject in the interests of natural justice, to any comments from the parties (the appellant and the authority).

Quashing a notice/Express Consent

97 Where it is decided that there is no substantial injury to amenity or danger to the public (as the case may be) the notice should be quashed. It should also be quashed where it contains an error that is fundamental to its purpose and is incapable of correction without prejudice to the parties on whom it was served.

98 The Act, as modified by Schedule 4, enables the Secretary of State to deal with the matter as if an application for express consent had been made and refused for the reasons stated for the taking of discontinuance action. In quashing a notice regard can be had to this power. However, since the exercise of this power is discretionary, it is not necessary to formally consider the matter at appeal unless a request has been made for this to be done.

99 If such a request has been made, it does not follow that a decision to quash a notice should necessarily result in a grant of express consent. A display that has been found not to cause substantial injury might well nevertheless be detrimental to amenity and thus unsuitable for grant of express consent. In any event, with the quashing of the notice the advertisement will continue to benefit from deemed consent. If a period

of express consent is granted it will prevent any further discontinuance action until after the expiry of the period of this consent.

100 A request is sometimes made at appeal for express consent for an alternatively sized advertisement in the event that the appeal display is considered to create substantial injury. However, the power in the Act, as modified, is limited to consideration of the proposal at appeal. A modified proposal invariably amounts to a new proposal, which should not be entertained. Upholding the notice does not prevent the appellant from seeking a separate express consent from the planning authority.

Discontinuance action and the Human Rights Act

101 It was held in the Courts in 2000 that the right to display (with deemed consent) an advertisement might constitute a 'possession' within the terms of article 1 to the First Protocol to the European Convention on Human Rights; and that, if it did, the deprivation of that possession, in the absence of a general right to compensation, might constitute a breach of the Convention – although not where it could be established that such dispossession was in the public interest and subject to conditions provided by law [*O'Brien v Secretary of State and Doncaster MBC* [2001] JPL 375, at paragraph 20]. Subsequent case law has tended to support that view, but has indicated that the planning system generally does represent a proportional and fair balancing of competing interests. A challenge to discontinuance action based on an argument of breach of human rights would accordingly be doomed to failure.

Enforcement

102 It is an immediate offence, under s224 of the 1990 Act and Regulation 30, to display an advertisement that requires express consent without having obtained it. The Regulations also provide for the issue of discontinuance notices to remove lawful advertisements displayed with deemed consent (see above).

103 For further advice on enforcement see the section on advertisements in the 'Enforcement' chapter.

Regulation 7 Directions

104 Local planning authorities may propose that the Secretary of State should make a direction under Regulation 7 that removes deemed consent from certain types of advertisements in a specific area. The following points should be noted:

- a direction does not forbid display: it merely requires express consent to be obtained;
- a direction applies to a particular area or a particular case. Such cases are rare.
- a direction will relate to a particular class of advertisements within Schedule 3 of the Regulations (or a specific category of advertisements within a class)

- Class 12 (advertisements inside buildings) and Class 13 (sites used for the display of advertisements for the last 10 years) cannot be the subject of such directions;
- directions can be for a specific period of time or indefinite. Generally they have been for 5 years or a similar length of time.
- there is a statutory requirement for proposed and approved directions to be published in the press - see Regulations 7(2) and (7).

105 The Planning Practice Guidance provides guidance on when a Regulation 7 direction might be appropriate.[27]

106 All requests for Regulation 7 directions are determined by the Secretary of State, following the submission of a report by an Inspector.

107 The LPA will apply for the direction to DCLG, providing maps of the area to be covered and evidence of harm caused and their efforts made so far to combat the harm. DCLG pass the papers on to the Planning Inspectorate who appoint an Inspector.

108 If you are appointed you should carry out a detailed site visit of the area. Get a feel for its overall character and the prevalence or otherwise of relevant advertisements.

109 Your report should be sent to the Procedure Team who will forward it to DCLG for a decision. It should contain a recommendation to confirm the direction or not. In the case of a Direction covering a number of areas or streets, the recommendation can exclude certain areas, but cannot include new ones.

110 It is important the LPA make it clear how long they wish the Direction to last. If they haven't the Procedure Team should obtain that information before the report is written. You can recommend a different time limit, or introduce a limit where an indefinite period is requested, but only with good reasons.

Area of Special Control of Advertisements (ASCA) Orders

111 Regulation 20 requires every local planning authority from time to time to consider whether any part or additional part of its area shall be designated as an ASCA. Such designations are approved by the Secretary of State.[28]

112 Stricter controls apply within an ASCA. The display of certain types of advertisement is prevented altogether, since there is no provision for express consent to be granted for them. These are: poster-panels and the like (other than those specified in regulation 21(2)(a) or falling within

[27] See Planning Practice Guidance ID 18b-042-20140306 – '*How can a local planning authority restrict deemed consent?*'
[28] See Planning Practice Guidance ID: 18b-055-20140306 – '*What is an area of special control?*'

Class 8), balloon advertising (Class 15), advertisements on telephone kiosks (Class 16)[29], certain flag advertisements (those falling within Class 7B) and certain illuminated signs (those falling within regulation 21 (3)).

113 As regards restrictions on deemed consent, the effect of the designation places somewhat tighter limits on advertisements that may be displayed with deemed consent. The advertisements within Classes 4A, 4B and 8 in Schedule 3, which would normally benefit from deemed consent, lose their deemed consent status altogether in an area of special control. However, they can be displayed provided express consent is obtained.

114 New or modified areas of special control are designated by an order made by a local planning authority and approved by the Secretary of State in accordance with the provisions of Schedule 5 of the Regulations. The procedure is similar to that for a Regulation 7 Direction. It involves a two-stage publication, the first by the local authority when seeking approval for the order and the second after the order has been approved. However, unlike the regulation 7 procedure, the forms of notice to be used are specified in the Regulations and there is a requirement for publication for 2 successive weeks in at least one local newspaper.

115 Also unlike the regulation 7 procedure, there is a provision for the holding of an inquiry as an alternative to a hearing to consider representations of objection to a proposed order. In practice no such inquiries have been held, although there have been hearings.

116 Various orders are in force in many parts of the country. These are mostly rural areas although some parts of urban areas are also covered, including parts of Cheltenham and Durham.

117 Local planning authorities are charged with reviewing their areas of special control at least once every 5 years, although it is understood that few do so in practice. It is possible that the character of an area may have changed considerably since designation so that it is unlikely it would now be considered appropriate to be an ASCA. Nevertheless, unless specifically revoked it still prevents the relevant classes of adverts from being granted express consent and any appeal on the grounds the ASCA was no longer relevant would be bound to fail.

118 Where a review is undertaken and a local planning authority proposes to revoke an order, a similar procedure of formal publication and approval is necessary before this can be done.

[29] NB: However see 'Advertisements on telephone kiosks' below, regarding removal of deemed consent for the display of non-illuminated advertisements on the glazed surface of a telephone kiosk.

Advertisements on telephone kiosks

119 Class 16 of the Regulations used to grant deemed consent for the display of non-illuminated advertisements on the glazed surface of a telephone kiosk, unless the kiosk was a K2 or K6 model designed by Giles Gilbert Scott, or was within an AONB, conservation area, National Park or an area of special control. This right was removed on 25 May 2019.[30] From that date the display of any advertisement on the external surface of a telephone kiosk requires consent. However, if the advertisement was in place on or before 24 May 2019 it will continue to benefit from deemed consent. [31]

120 Whilst s222 of the Town and Country Planning Act 1990 allows for minor development involved with fixing an advertisement to an existing kiosk, it does not grant permission for the kiosk itself. The display of the advertisement and the construction of the kiosk are two distinct and separate developments. To resolve this situation, there would have to be two applications/appeals – one for advertisement consent and one for planning permission or the required prior approval.

121 If an Inspector is presented with one appeal and not the other, the correct approach is to deal only with the matter at hand. It is advisable to state that the other consent is not being considered in the current appeal. For example:

a. When considering advertisement consent, state that planning permission/prior approval is not being considered and would require separate consideration; or
b. When considering planning permission/prior approval, to state that only the construction of the kiosk is being considered and not advertisement consent.

122 Where both appeals are present, but the kiosk proposal is to be dismissed as being outside the permitted development right, the associated advertisement appeal will still need to be dealt with. It will be necessary for the advertisement consent application to describe the structure upon which the advertisement will be displayed; however, that structure would require a separate planning permission, whether granted by the GPDO or by the Local Planning Authority, which could be obtained at a later date.

[30] See regulation 19(2) of the Town and Country Planning (Permitted Development, Advertisement and Compensation Amendments)(England) Regulations 2019
[31] See Planning Practice Guidance ID: 18b-009-20190722 – 'Do advertisements on telephone kiosks need express consent?'

123 If an associated advertisement appeal does not describe the structure on which it will be displayed, then the advert appeal may need to be dismissed.

124 Further advice in relation to phone kiosks can be found in the Mobile Telecommunication chapter and the General Permitted Development Order and Prior Approval Appeals chapter.

Annex 1

Commonly used terms

Historic limitations on the printing process tied the outdoor advertising industry to the use of a modular format based on the size of a standard printed poster sheet. Modern printing technology means that the industry is no longer confined to standard sizes. However, the terminology and size references still persist:

4 sheet (1.5 x 1m) and 6 sheet (1.9m x 1.3m) – a small format typically seen on the forecourt of shops and in shopping centres/parades – will be in the form of a freestanding display unit or attached to a building/structure

48 sheet (3 x 6m) – the standard size poster panel for the industry – often attached to buildings but also freestanding

96 sheets (3 x 12m) – twice the size of 48 sheets – usually free standing

Scrolling posters – usually 48 sheet in size – previously a mechanical rotation typically of 3 advertisements in sequence – but often now by means of a light emitting diode (LED) display

PVC sheets/shrouds/wraps – often wrapped around scaffolding to buildings or hung on the elevation of a building – can be very large (eg the same size as the building)

Annex 2

Hearings for appeals made before 6 April 2015 which have not been determined by that date

Rules

1 These advertisement hearings remain subject to control under the Town and Country Planning (Inquiries Procedure) Rules 1974.

2 This is because saving provisions were included which indicate that the 1974 rules continue to apply to advertisements. They are not dealt with under the Town and Country Planning (Hearings Procedure) (England) Rules 2000.

3 It is common practice to refer to the event as a hearing rather than as an inquiry.[32]

Statements

4 Rule 6(2) requires that the LPA provides a written statement of any submission they propose to put forward at the inquiry (no later than 28 days before).

5 The appellant is only obligated to provide a statement if required by the Secretary of State – Rule 6(6). However, the 'Procedural Guide' states that both the appellant and the local planning authority are *required* to provide a written statement of the representations they intend to put forward 28 days before the date of the hearing. So, the 'Procedural Guide' gives effect to Rule 6(6) and both main parties are, therefore, obliged to provide statements.

Procedure

6 It is important to note the following Rules relating to the procedure at the hearing[33]:

> 10(1) Except as otherwise provided in these Rules, the procedure at the inquiry shall be such as the appointed person shall in his discretion determine.
>
> 10(2) Unless in any particular case the appointed person with the consent of the applicant otherwise determines, the applicant shall begin and shall have the right of final reply; and the other persons entitled or permitted to appear shall be heard in such order as the appointed person may determine.

[32] For example, the Procedural Guide – Planning appeals – England refers to 'hearings'
[33] PINS practice is to refer to the event as a 'hearing'

10(3) The applicant and the local planning authority shall be entitled to call evidence and cross-examine persons giving evidence, but any other person appearing at the inquiry may do so only to the extent permitted by the appointed person.

7 In most cases it will be possible to run the event along the same lines as a s78 hearing. In doing so, you would take on the inquisitorial role and would be responsible for leading the discussion and testing the evidence. However, given Rule 10(3) you should first seek the agreement of the main parties. Further advice on running a hearing can be found in 'Hearings'.

8 In some circumstances it might be appropriate to adopt a more formal approach. For example, this might be where the parties wish to exercise their right under Rule 10(3) to call evidence and cross-examine[34]. If so, you could adopt the following procedure:

- Allow the appellant or their representative (and/or witnesses) to present their case based on their written statement. You would then provide an opportunity for the LPA to ask any questions of the appellant
- The LPA would then present their case based on their written statement. This could include any submissions by representatives of the Highways Agency or other highway authority who are not officers of the LPA but who are attending to speak on their behalf rather than merely being present as interested third parties. You would then provide an opportunity for the appellant to ask any questions of the LPA.
- You would ask your questions at relevant points during or after the main parties cases
- You would then invite any other parties present who wish to speak to do so.

9 The event should be closed in the room and not at the site visit.[35]

Agenda and questions

10 It can be helpful to prepare an agenda (see 'Hearings' for more information) but given that the issues will be limited to considerations of amenity and/or public safety, this may not always be necessary. However, it is always good practice to prepare a list of questions which you want to have answered.

Site visits

11 The Rules:

- allow you to inspect the site unaccompanied before or during the hearing - Rule 11(1).
- require you to inspect the site after the close of the hearing if requested by the applicant or LPA - Rule 11(2)

[34] However, recourse to an inquiry for the purposes of cross-examination would be exceptional and should be discouraged.

[35] Rule 11(2) states that "The appointed person may, and shall if so requested by the applicant or the local planning authority before or during the inquiry, **inspect the land after the close of the inquiry** and shall, in all cases where he intends to make such an inspection, announce during the inquiry the date and time at which he proposes to do so."

- state that the applicant and LPA are entitled to accompany you on the site inspection – but you do not have to defer your inspection if a party is not present at the appointed time - Rule 11(3)

12 In most cases you will be able to see the site from a public place. If so, you can ask the parties if they agree that you visit unaccompanied.

13 The Rules indicate that the hearing/inquiry should be closed before the site visit.[36] Consequently, if the parties attend you should advise them that you will not be able to hear any discussion about the case but they can refer you to physical features.

[36] See footnote 35 above regarding Rule 11(2).

Annex 3
Sample Letter for consulting with the appeal parties

Having given this appeal further consideration, the Inspector is concerned that it is not procedurally possible to amend or delete a condition on advertisement consent in the manner requested by the appellant. The reasons for this are set out in the paragraphs
below:

> The display of advertisements is subject to a separate consent process within the planning system, which is set out in the Town and Country Planning (Control of Advertisements) (England) Regulations 2007 (the Regulations). The decision notice for the application
> [the application number of your appeal scheme] (the approved scheme) indicates that it was determined under the Regulations. It is an advertisement consent rather than a planning permission.
>
> Following the granting of the approved scheme on [date of consent], the appellant sought to vary condition(s) [XX] of the approved scheme by submitting an application [reference and date of the application purporting to be under appeal]. This application was refused by the Council on [date of refusal]. The application was expressed as an application to vary conditions of a [planning permission/advertisement consent – however it was worded by the appellant], and was made to the Council under Section 73 of the Town and Country Planning Act 1990 (as amended) (the Act) and treated as such by the Council.
>
> Section 73 of the Act allows applications to be made for a new planning permission to develop land without complying with a condition(s) imposed on a previous planning permission. Although Section 220(3) of the Act enables the Regulations to apply a wide variety of provisions of the Act to advertisement consent applications, modified as may be specified in the Regulations, they do not apply Section 73. As a result, it is not possible to amend or delete the conditions of the approved scheme under Section 73 of the Act.

Accordingly, the Inspector would be minded to dismiss the appeal unless the appeal were to be withdrawn. Please could both the appellant and the Council provide comments on this letter within 10 working days of the date of this letter.

[NB substitute 73A for 73 when appropriate]

Air Quality

England

What's New since the last version

First Edition: 11 December 2017

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1 Introduction

1.1 Inspectors make their decisions on the basis of the evidence before them. Consequently, they may, where justified by the evidence, depart from the advice given in this training material, although the relevant regulations and statutory guidance will still be relevant in all cases.

1.2 This chapter is concerned with air quality and air quality considerations in planning and related casework. Detailed guidance on environmental licensing and permitting casework is covered in the Environmental Permitting ITM Chapter. Guidance on Environmental Impact Assessment (EIA) can be found in the EIA ITM Chapter. Detailed guidance on Habitats Regulation Assessment (HRA) can be found in CL&PG4: Biodiversity.

1.3 This training material applies to casework in England[1].

Brief history of air pollution

1.4 Air pollution can be defined as 'the presence or introduction to the air of a substance which has harmful or poisonous effects on the environment, human health and material property'. Air pollution remains a major environmental problem in modern society. In the modern society the emphasis has shifted from pollution caused by coal and industry to those associated with motor vehicle emissions.

1.5 Studies have suggested that bad smog events[2] caused the premature deaths of thousands of people. In the UK in the 1950s and 60s smog events led to public outcry and to Government action regarding air pollution. This resulted in the first Clean Air Act in 1956[3]. In 1961 the UK established the first co-ordinated national air pollution monitoring network, called the National Survey, which monitored black smoke and sulphur dioxide emissions at about 1200 sites. Several further pieces of legislation and additional monitoring networks were introduced in the UK to tackle and measure air quality in the UK.

Atmosphere and fundamentals of air pollution chemistry

1.6 Unpolluted air consists of a number of gases that have fairly constant proportions in the global atmosphere, these are listed below[4]:

[1] Welsh AQ information can be found on the Welsh Government Website.

[2] e.g. the London smog event of December 1952 – where coal pollution mixed with fog, causing major health impacts. It is estimated that 4,000 people had dies as a result of the smog and 100,000 more were made ill by the effect of the smog on the respiratory tract. A modern equivalent of this event was the Eastern China Smog event in December 2013, where $PM_{2.5}$ and SO_2 from coal burning and industrial sources combined with lack of air flow and allowed a thick smog layer to accumulate over a wide area.

[3] 1956 (c.52) – introduced smoke control areas in which only smokeless fuels could be used, resulting in a shift towards the use of cleaner coal, electricity and gas. The Act also introduced measures to relocate power stations away from cities and for the height of some chimney stacks to be increased. This Act was repealed by Schedule 6 of the Clean Air Act 1993.

[4] The proportions are for dry air – without water vapour molecules.

Chemical	Symbol	Proportion by volume
Nitrogen	N_2	78.1%
Oxygen	O_2	20.9%
Argon	Ar	0.93%
Carbon dioxide	CO_2	370ppm
Neon	Ne	18ppm
Helium	He	5ppm
Methane	CH_4	1.7ppm
Hydrogen	H_2	0.53ppm
Nitrous oxide	N_20	0.31ppm

1.7 it is important to recognise the distinction between natural and man-made (anthropogenic) constituents in the atmosphere, both of which can effect air quality. For example, sulphur dioxide (SO_2) is produced by the combustion of sulphur contained within coal and heavy fuel oils but is also a main constituent of emissions by volcanoes and via oxidation of dimethyl sulphide released by oceanic phytoplankton. Therefore both natural and man made emissions can contribute to global trends in atmospheric composition and local effects. Pollutants can be in the form of solid particles, liquid droplets or gases. Air Pollutants can be classified as either:

- Primary pollutant – emitted directly from a known source e.g. Nitrogen dioxide (NO_2) or Particulate Matter (PM_{10}, $PM_{2.5}$) from vehicle exhausts.

- Secondary pollutant – formed when primary pollutants react in the atmosphere and form other pollutants e.g. Nitrogen dioxide[5] (NO_2) reacts with water (H_2O) to form Nitric acid (HNO_3)[6].

1.8 Atmospheric chemistry is extremely complex and there are many factors that can influence distribution and concentrations of emissions and therefore air quality, these include topography, weather and chemical reactions in the air. Inspectors will not be required to understand the complex detail of these factors.

Air Pollution – source types and effects:

1.9 **Point Source (stationary) and Area Sources -** A point source of air pollution refers to an emission source that does not move, also known as a stationary source. Point sources include factories, power plants, incinerators and other industrial processes. The term area source is used to describe many small sources of air pollution located together whose individual emissions may be below thresholds of concern, but whose collective emissions can be significant. Residential wood burners are a good example of a small source, but when combined

[5] Maybe formed from Nitric oxide (NO), which is oxidised to form NO_2.

[6] $3NO_2 + H_20 \rightarrow 2HNO_3 + NO$.

with many other small sources, they can contribute to local and regional air pollution levels. Area sources can also be thought of as non-point sources, such as housing developments and landfill sites.

1.10 **Mobile Sources -** A mobile source of air pollution refers to a source that is capable of moving under its own power. In general, mobile sources imply "on-road" transportation (e.g. heavy goods vehicles [HGVs] and light goods vehicles [LGVs] but also everyday operational vehicles such as cars, sport utility vehicles, and buses. In addition, there is also a "non-road" or "off-road" category that includes gas-powered lawn tools and mowers, farm and construction equipment, recreational vehicles, boats, planes, and trains.

1.11 **Agricultural Sources -** Agricultural operations, those that raise animals and grow crops, can generate emissions of gases and particulate matter. For example, animals confined to a barn or restricted area (rather than field grazing), produce large amounts of manure. Manure emits various gases, particularly ammonia into the air. This ammonia can be emitted from the animal houses, manure storage areas, or from the land after the manure is applied. In crop production, the misapplication of fertilizers, herbicides, and pesticides can potentially result in aerial drift of these materials and harm may be caused. Other source include land management techniques, mobile generators and other small plant for construction purposes.

1.12 **Natural Sources –** as mentioned above, it is important to note that emissions can come from both anthropogenic sources and natural sources, a further example would be Nitrogen Dioxide (NO_2), where the major sources are road transport (as a product of combustion) and also from energy generation using coal or oil, but can also be produced naturally by lightning, where the very high temperature in the vicinity of the lightning bolt causes atmospheric oxygen and nitrogen to react and form NO_2. High levels of NO_2 can cause respiratory problems (inflammation of airways and lung function), may also have adverse effect of vegetation (leaf, needle damage and reduced growth) and acidification and/or eutrophication (nutrient enrichment) of sensitive habitats (especially water bodies) and leads to excess growth of algae and plants, which may result in oxygen depletion. Wild fires, dust storms and volcanic activity also contribute gases and particulates to our atmosphere.

Major Air Pollutants in the UK - Sources

1.13 The sources of major air pollutants present in the UK and subject to compliance under international conventions and associated protocols as well as European Directives, transposed in to UK law are detailed below.

1.14 **Nitrogen Oxides (NOx)** - All combustion processes in air produce oxides of nitrogen (NO_X). Nitrogen dioxide (NO_2) and nitric oxide (NO) are both oxides of nitrogen and together are referred to as NO_X. Road

transport is the main source, followed by the electricity supply industry and other industrial and commercial sectors.

1.15 **Sulphur Dioxide (SO_2)** - UK emissions are dominated by combustion of fuels containing sulphur, such as coal and heavy oils by power stations and refineries. In some parts of the UK, notably Northern Ireland, coal for domestic use is a significant source.

1.16 **Carbon Monoxide (CO)** - Formed from incomplete combustion of carbon containing fuels. The largest source is road transport, with residential and industrial combustion making significant contributions.

1.17 **Ozone (O_3)** - Ozone is not emitted directly from any human made source. It arises from chemical reactions between various air pollutants, primarily NO_X and Volatile Organic Compounds (VOCs), initiated by strong sunlight. Formation can take place over several hours or days and may have arisen from emissions many hundreds, or even thousands of kilometres away.

1.18 **Particulate Matter ($PM_{2.5}$/PM_{10})** – Particulate Matter is generally categorised on the basis of the size of the particles (for example $PM_{2.5}$ is particles with a diameter of less than 2.5µm). PM is made up of a wide range of materials and arise from a variety of sources. Concentrations of PM comprise primary particles emitted directly into the atmosphere from combustion sources and secondary particles formed by chemical reactions in the air. PM derives from both human-made and natural sources (such as sea spray and Saharan dust). In the UK the biggest human-made sources are stationary fuel combustion and transport. Road transport gives rise to primary particles from engine emissions, tyre and brake wear and other non-exhaust emissions. Other primary sources include quarrying, construction and non-road mobile sources. Secondary PM is formed from emissions of ammonia, sulphur dioxide and oxides of nitrogen as well as from emissions of organic compounds from both combustion sources and vegetation.

1.19 **Polycyclic Aromatic Hydrocarbons (PAHs)** - There are many different PAHs emanating from a variety of sources. This strategy uses benzo[a]pyrene (B[a]P) as a marker for the most hazardous PAHs. The main sources of B[a]P in the UK are domestic coal and wood burning, fires (e.g. accidental fires, bonfires, forest fires, etc.), and industrial processes such as coke production. Road transport is the largest source for total PAHs, but this source is dominated by chemicals thought to be less hazardous than B[a]P.

1.20 **Benzene (C_6H_6)** - Has a variety of sources, but primarily arises from domestic and industrial combustion and road transport.

1.21 **1, 3 Butadiene** - Mainly from combustion of petrol. Motor vehicles and other machinery are the dominant sources, but it is also emitted from some processes, such as production of synthetic rubber for tyres.

1.22 **Ammonia (NH_3)** - Mainly derived from agriculture, primarily livestock manure/slurry management and fertilisers. Small proportion derived from variety of sources including transport and waste disposal.

Principles of Air Quality Management

1.23 The UK Government's air quality management strategy, established through legislation, policy and guidance implement the following the key principles:

- The setting of national standards and reduction targets for all main pollutants (derived from International/European obligations);
- Supplementing national policies with new systems for local air quality management, focussed on designated areas of risk (see sections on Local Air Quality Management [LAQM] and Air Quality Management Areas [AQMAs]);
- Integrating air quality considerations with planning, transport and other policies; and
- Promoting a balanced approach to emission control designed to secure the most cost effective improvement process; and including maintaining control of domestic emissions, whilst pressing for the continued improvement of industrial emissions on the basis of Best Available Technique Not Entailing Excessive Cost (BATNEEC) and securing major improvements in vehicle emissions.

2 Policy, legislation and guidance

Hierarchy

2.1 In general terms, similar to other environmental objectives UK Air quality legislation is driven by European and international obligations, which can be summarised in the following hierarchy:

International – Conventions, protocols

European – Directives, Daughter Directives, Regulations

National – Acts, Regulations

Local – Council Order e.g. AQMA designation

International Legislation:

2.2 **UNECE Convention on Long-Range Transboundary Air Pollution (CLRTAP)**[7] – Ratified in 1983, the aim of the Convention is that Parties shall endeavor to limit and, as far as possible, gradually reduce and prevent air pollution including long-range transboundary air pollution. Parties develop policies and strategies to combat the discharge of air pollutants through exchanges of information, consultation, research and monitoring.

2.3 **UNECE Protocol to Abate Acidification, Eutrophication and Ground Level Ozone (the Gothenburg Protocol)**[8] – extension of the CLRTAP set national emissions ceilings for 2010 up to 2020 for four pollutants: sulphur dioxide (SO_2), nitrogen oxides (NOx), volatile organic compounds (VOCs) and ammonia (NH_3). It builds on previous Protocols that addressed sulphur emissions.

2.4 **UNECE Protocol Concerning the Control of Emissions of Nitrogen Oxides (the Sofia Protocol)**[9] – extension of the CLRTAP, the Protocol requires Parties to control or reduce emissions of nitrogen oxides. Furthermore, Parties are requested to introduce pollution control measures for major existing stationary sources and to apply national emissions standards to major new stationary and mobile sources, based on best available technologies that are economically feasible.

European Legislation:

2.5 **EC Ambient Air Quality and Cleaner Air for Europe Directive (the Ambient Air Quality Directive)**[10] – merges most of existing legislation into a single directive (except for the fourth daughter directive) with no change to existing air quality objectives. There are new air quality objectives for $PM_{2.5}$ including the limit value and exposure related objectives. Includes the possibility to discount natural sources of pollution when assessing compliance against limit values and the possibility for time extensions of three years (PM_{10}) or up to five years (NO_2, benzene) for complying with limit values, based on conditions and the assessment by the European Commission. Subsequently transposed into UK law under the Air Quality Standards Regulations 2010[11].

2.6 **EC Directive relating to Arsenic, Cadmium, Mercury, Nickel and Polycyclic Aromatic Hydrocarbons in Ambient Air (the Fourth Daughter Directive)**[12] - completes the list of pollutants initially described in the Framework Directive. Target values for all pollutants except mercury are defined for the listed substances, though for PAHs, the target is defined in terms of concentration of benzo(a)pyrene which

[7] CLRTAP [UNECE, 1979]
[8] Gothenburg Protocol [UNECE, 1999]
[9] Sofia Protocol [UNECE, 1988]
[10] Directive 2008/50/EC – repeals the following EC Directives: Framework Directive 96/62/EC, 1-3 daughter Directives 1999/30/EC, 2000/69/EC, 2002/3/EC, and Decision on Exchange of Information 97/101/EC.
[11] SI 2010/1001
[12] Directive 2004/107/EC

is used as a marker substance for PAHs generally. Only monitoring requirements are specified for mercury.

2.7 **EC Directive on National Emissions Ceilings for Certain Atmospheric Pollutants (the National Emissions Ceiling Directive)[13]** – sets equivalent ceiling limits as the Gothenburg Protocol for SO_2, NO_X, NH_3 and volatile organic compounds for countries to meet from 2010 onward in European law. Subsequently transposed into UK law under the National Emission Ceilings Regulations 2002[14].

National Legislation:

2.8 **Environmental Protection Act 1990** - imposes duties on local authorities to deal with 'statutory nuisances'[15]. These include smoke emitted from premises so as to be prejudicial to health or a nuisance; fumes or gases emitted from premises so as to be prejudicial to health or a nuisance or any dust, steam, smell or other effluvia arising on industrial, trade or business premises as to be prejudicial to health or a nuisance.

2.9 **Clean Air Act 1993[16]** - introduced to address air pollution from smogs caused by widespread burning of coal for residential heating and by industry. The legislation targets smoke emission from chimneys and premises and smoke emissions from residential and non-residential furnaces. Although some activities fall on Defra and the Devolved Administrations, the key CAA measures are applied and supervised by Local Authorities and include the:

- Control of dark smoke;
- Prohibition of cable burning except at authorised installations;
- Designation and supervision of smoke control areas – control of smoke emission and constraints on the types of appliances and fuels which can be used in such areas;
- Approval of chimney heights for non-residential furnaces;
- Control of grit and dust emissions from non-residential furnaces (up to thresholds in EPR);
- Approval of new non-residential furnaces;
- Approval of abatement equipment for use on non-residential furnaces.

2.10 The CAA regulates combustion and other activities (including domestic combustion) which provide significant contribution to the UK total emission for many pollutants. Consequently they are also important contributors to local air quality.

[13] Directive 2001/81/EC – Directive 2016/2284/EU repeals and replaces 2001/81/EC from 30 June 2018 and ensures emission ceilings for 2010 shall apply until 2020 and sets more ambitious targets for 2030, based on the revised Gothenburg Protocol.
[14] SI 2002/3118
[15] Sections 79-82 in Part III of 1990 (c.43)
[16] 1993 (c. 11)

2.11 **Environment Act 1995**[17] – as mentioned above the Act requires UK to produce a national Air Quality Strategy. Part IV of the Act requires local authorities in the UK to review air quality in their area and designate air quality management areas (AQMAs) if improvements are necessary. Where an AQMA is designated, local authorities are also required to work towards the Strategy's objectives prescribed in regulations for that purpose. An air quality action plan describing the pollution reduction measures must then be put in place. These plans contribute to the achievement of air quality limit values at local level to contribute to the requirements of the Ambient Air Quality Directive.

2.12 **Air Quality (England) Regulations 2000**[18] **–** These Regulations prescribe the relevant period and set out the air quality objectives to be achieved by the end of that period. The objectives are the same as those set out in the Air Quality Strategy. Where any of the prescribed objectives are not likely to be achieved within any part of a local authority's area within the relevant period, the authority concerned will have to designate that part of its area as an AQMA[19]. An action plan covering the designated area will then have to be prepared setting out how the authority intends to exercise its powers in relation to the designated area in pursuit of the achievement of the prescribed objectives[20].

2.13 **Air Quality Standards Regulations 2010**[21] **–** transposes the Ambient Air Quality Directive and the Fourth Air Quality Daughter Directive and therefore sets legally binding limits for concentrations in outdoor air of major air pollutants that impact public health such as particulate matter (PM_{10} and $PM_{2.5}$) and nitrogen dioxide (NO_2). Also sets targets for levels in outdoor air of certain toxic heavy metals and polycyclic aromatic hydrocarbons.

2.14 **National Emission Ceiling Regulations 2002**[22] **-** transposes the National Emissions Ceiling Directive and therefore sets emission limits for which sets national emission limits (ceilings) for SO_2, NO_X, NH_3 and volatile organic compounds for countries to meet from 2010 onwards, equivalent to those in the UNECE Gothenburg Protocol.

National Policy:

2.15 **Air Quality Strategy -** The Air Quality Strategy for England, Scotland, Wales and Northern Ireland[23] sets out the air quality objectives[24] and policy options to further improve air quality in the UK from the present and the long term. As well as direct benefits to public health, these options are intended to provide important benefits to quality of life and help to protect our environment.

17 1995 (c.25)
18 SI 2000/928
19 Under s83(1) of the Environment Act 1995
20 Under s84(2) of the Environment Act 1995
21 SI 2010/1001
22 SI 2002/3118
23 Air Quality Strategy Cm7169 – Vol 1; Vol 2 [Defra, July 2007]
24 National Air Quality Objectives and European Directive limit and target values for the protection of human health [Defra].

2.16 Volume 1 of the strategy provides an overview and outline of the UK Government and devolved administrations' ambient (outdoor) air quality policy. It sets out a way forward for work and planning on air quality issues, details objectives to be achieved, and proposes measures to be considered further to help reach them. The strategy is based on a thorough and detailed analysis of estimating reductions in emissions and concentrations from existing policies and proposed new policy measures, and quantification and valuation of benefits and estimated costs (the analysis is set out in more detail in Volume 2 of the strategy and the updated Third Report by the Interdepartmental Group on Costs and Benefits (IGCB)).

2.17 The Environment Act 1995 requires the strategy to include statements on 'standards relating to the quality of air' and objectives for the restriction of levels at which substances are present in the air. Standards have been used as bench marks or reference points for the setting of objectives. For the purposes of the strategy:

- **standards** are the concentrations of pollutants in the atmosphere which can broadly be taken to achieve a certain level of environmental quality. The standards are based on assessment of the effects of each pollutant on human health including the effects on sensitive subgroups or on ecosystems
- **objectives** are policy targets often expressed as a maximum ambient concentration not to be exceeded, either without exception or with a permitted number of exceedances, within a specified timescale.

2.18 **National Planning Policy Framework (NPPF)[25] -** Paragraph 77 bullet point 2: the Local Green Space designation should only be used where the green area is 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.

2.19 Paragraph 109 bullet point 4: the planning system should contribute to and enhance the natural and local environment by preventing both new and existing development from contributing to or being put at unacceptable risk from, or being adversely affected by unacceptable levels of soil, air, water or noise pollution or land instability.

2.20 Paragraph 120: To prevent unacceptable risks from pollution and land instability, planning policies and decisions should ensure that new development is appropriate for its location. The effects (including cumulative effects) of pollution on health, the natural environment or general amenity, and the potential sensitivity of the area or proposed development to adverse effects from pollution, should be taken into account. Where a site is affected by contamination or land stability issues, responsibility for securing a safe development rests with the developer and/or landowner.

[25] NPPF [DCLG]

2.21 Paragraph 124: planning policies should sustain compliance with and contribute towards EU limit values or national objectives for pollutants, taking into account the presence of Air Quality Management Areas (AQMAs) and the cumulative impacts on air quality from individual sites in local areas. Planning decisions should ensure that any new development in an AQMA is consistent with the local Air Quality Action Plan (AQAP).

2.22 Paragraph 143 bullet point 6: in preparing Local Plans, LPAs should set out environmental criteria, in line with the policies in the NPPF, against which planning applications will be assessed so as to ensure that permitted operations do not have unacceptable adverse impacts on the natural and historic environment or human health, and take into account the cumulative effects of multiple impacts from individual sites and/or a number of sites in a locality.

2.23 Paragraph 144 bullet point 4: when determining planning applications, LPAs should ensure that any unavoidable dust and particle emissions and are controlled, mitigated or removed at source.

2.24 The Glossary at Annex 2: defines 'pollution' as anything that affects the quality of land, air, water or soils, which might lead to an adverse impact on human health, the natural environment or general amenity. Pollution can arise from a range of emissions, including smoke, fumes, gases, dust, steam and odour.

National Guidance:

2.25 **Local Air Quality Management: Policy Guidance (LAQM.PG16)[26]** – This guidance has been designed to maximise the public health benefits of local authority action, in particular on priority pollutants such as NO_2 and Particulate Matter (PM10/PM2.5). A key element in streamlining the LAQM process is that while the quality of information is retained, the requirements are more consistent and less burdensome and enable local authorities to clearly point to the actions that are being or will be taken. The guidance is statutory[27] and applies to local authorities in England only (except for those in London) who should have regard to it on action in respect of responsibilities affecting local air quality, including planning and transport.

2.26 **Local Air Quality Management: Technical Guidance (LAQM.TG16)[28] -** This technical guidance is designed to support local authorities in England and the devolved administrations (excluding London) carrying out their duties under the Environment Act 1995, and subsequent regulations. LAQM is the statutory process by which local authorities monitor, assess and take action to improve local air quality. Where a local authority identifies areas of non-compliance with the air quality objectives set out in Table 1.1, and there is relevant public

[26] LAQM.PG(16) [Defra, April 2016]
[27] As required under Part IV of the Environment Act 1995
[28] LAQM.TG(16) [Defra, April 2016]

exposure, there remains a statutory need to declare the geographic extent of non-compliance as an Air Quality Management Area (AQMA) and to draw up an action plan detailing remedial measures to address the problem. A general introduction to the system is provided in the Policy Guidance documents

2.27 **Local Air Quality Management: Practice Guidance**[29] - Defra has also produced Practice Guidance on some of the more directly effective and ambitious measures that local authorities can take to improve air quality. Local authorities are not required to have regard to the Practice Guidance, but they will find it useful if they are considering establishing one of the schemes covered by the guidance. The guidance also refers to existing policy on economic appraisal.

2.28 **UK Plan for Tackling Roadside Nitrogen Dioxide Concentrations**[30] – originally drafted by Defra in order to comply with a Supreme Court Judgment[31], which ordered revised Air Quality Plans (AQPs) by the end of 2015. The judgment explicitly stated that the UK breached the 2008 Ambient AQ Directive, which sets limits (in Annex XI[32]) for NO_2, not by failing to apply for a derogation but by failing to put in place sufficient plans to secure compliance. Parts of the UK would not be compliant until 2030 (the Directive requires compliance by June 2010, which can be extended by 5 years under Article 22). The UK is divided into 43 zones (for AQ monitoring and reporting purposes). In 2013, 38 of the 43 zones were assessed as exceeding the maximum annual limit of NO_2 emissions.

2.29 After 3 rounds of Court cases[33], the 'final' plan was published on 26 July 2017, as required by the Court Order, issued on 21 November 2016[34] which specified the following:

i) that the current AQP remains in place and should continue to be implemented until a modified AQP is adopted;

ii) That Defra publish a draft modified AQP[35] by no later than 24 April 2017; and

iii) That Defra publish a final modified AQP by no later than 31 July 2017.

2.30 This UK AQP aims to focus on the most immediate air quality challenge, i.e. to reduce NO_2 concentrations around roads where the current levels are above legal limits within the shortest possible timescale. The Government announced that the AQP is one part of the wider programme to deliver clean air.

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29 LAQM Practice Guidance [Defra]

30 NO_2 Plan – An Overview; NO_2 Plan – Detailed Plan; NO_2 Plan – Technical Report; Supporting Document – EA1995 (Study for NO_2 compliance) AQ Direction 2017 [Defra/DfT July 2017]

31 R (ClientEarth) v SoS EFRA, [2015] UKSC 28, *(on appeal from [2012] EWCA Civ 897).*

32 Limit values: for one hour period - 200µg/m^3 not to be exceeded by >18 times in a year; for calendar year – 40µg/m^3 by 1 January 2010.

33 ClientEarth submitted a further HC challenge to the AQ Plan on 26 October 2017 on the grounds that i) The latest plan backtracks on previous commitments to order 5 cities to introduce clean air zones by 2020; ii) The plan does not require any action in 45 local authorities in England, despite them having illegal and levels of air pollution; iii) The plan does not require any action by Wales to bring down air pollution as quickly as possible.

34 Court Order dated 21 November 2016 [Claim No. CO/1508/2016].

35 Complying with the requirements of Article 23(1) of Directive 2008/50/EC and r26(2) of SI 2010/1001.

2.31 Local areas where breaches of the legal limits are still occurring are required to produce their own action plans within eight months and final plans by the end of 2018. It should be noted that the devolved administrations in London are pressing ahead with their own implementation to achieve compliance. Non-London Local authorities affected will have access to a range of options to tackle poor air quality in their plans, e.g. changing road layouts to reduce congestion, encouraging uptake of ultra-low emissions vehicles and use of innovative retrofitting technologies and new fuels and encouraging use of public transport. If these measures are not enough, local authorities will have the option for restrictions on polluting vehicles through either restricting these vehicles to using affected roads only at certain times or the introduction of charging zones. The Government has stated that all other measures should be exhausted before imposing charging zones. The plans will be assessed by Government to check for effectiveness, fairness and that they represent good value. The Government will support local authorities to develop the plans by measures set out in the AQP including:

- A £255 million implementation fund for all immediate work required to deliver plans within eight months to address poor air quality in the shortest time possible;
- A Clean Air Fund for councils to bid for money to introduce new measures such as changing road layouts to cut congestion and reduce idling vehicles, new park and ride services, introducing concessionary travel schemes and improving bus fleets.
- A £40 million Clean Bus Technology Fund grant scheme - part of a £290 million National Productivity Investment Fund announced in the Autumn Statement 2016 - to limit emissions from up to 2350 older buses.

2.32 Also announced on 26 July 2017:

- Van drivers are set to be given the right to use heavier vehicles if they are electric or gas-powered, in measures that will help improve air quality in towns and cities across the country.
- Manufacturers found to be using devices on their vehicles to cheat emissions tests could face criminal and civil charges, with fines of up to £50,000 for every device installed, under proposed new laws.

2.33 Actions which the Government is already taking are set out in Annexes A to H of the AQP; a summary of the additional actions are described in Table 2 on pages 19-22 of the detailed AQP. Table 3 on page 31 lists the local authorities with persistent exceedances required to undertake action to reduce NO_2 emissions to within statutory limits within the shortest possible time.

2.34 Paragraph 6 of the AQP refers to the ban on the sale of all new conventional petrol and diesel cars in the UK by 2040 and the ambition for the UK to be a world leader in electric vehicle technology. Volvo has already announced that all new models will be electric from 2019 and other manufacturers have also announced plans to move away from conventional fuels.

2.35 As this is the 'final' AQP, Inspectors will need to have regard to it and attach appropriate weight to the objectives and proposed actions where relevant air quality issues arise in casework, in particular to:

- **development which may negatively impact on compliance** - such as new roads, new housing and industrial development; and

- **development intended to contribute positively to compliance** - such as alteration of existing roads; new or upgraded infrastructure for cleaner, e.g. electric cars and any associated charging infrastructure, through to infrastructure to encourage walking and cycling. It should be noted that as the Court Order specifies that the current AQ plan remains in place. Inspectors should therefore attach appropriate weight to this current AQP.

2.36 Objections may be raised to proposals that would involve activities that could potentially negatively impact local air quality in towns and cities which are currently non-compliant, or at risk of planned compliance being delayed, or an existing compliance being subsequently exceeded. The decision maker should attach appropriate weight to issues raised that suggest NO_2 emissions will be altered by the proposal, or by revisions to local plans (including waste local plans), in non-compliant zones where draft air quality improvement plans are under consultation.

2.37 Inspectors should consider if the views of parties should be sought on any further evidence that should be requested on the basis of forecasting or measures intended to ensure local compliance or the potential introduction of further Clean Air Zones (CAZs).

2.38 Inspectors will wish to consider, in their examination of matters, the basis on which any forecasting has been made in areas which are not in compliance with the Directive limits or may be brought in to non-compliance as a result of proposed developments or plans, and what level of margin may be required to avoid any potential new non-compliance or delay in achieving compliance.

2.39 **Air Quality Planning Practice Guidance (PPG)[36]** - paragraphs 001 - 004 sets out the circumstances where air quality is relevant to planning, and emphasises the role of Air Quality Management Areas (AQMAs), cumulative impact from smaller sites and point source pollution, which will need consideration in local/neighbourhood plans in order to help

[36] Air Quality PPG [DCLG]

meet air quality targets. Paragraph 005 sets out the circumstances when air quality could be relevant to planning decisions Paragraph 006-007 sets out the requirements for an air quality assessment and how impact can be mitigated. For planning casework conditions and obligations may be used to secure mitigation (providing the relevant tests are met) as set out in paragraph 008 of the PPG.

2.40 **Minerals PPG**[37] – Paragraphs 013 sets out the principal issues that mineral planning authorities should address, one of which is air quality. Annex C sets out Model Planning Conditions for hydrocarbon extraction. Paragraph 142 sets out a condition for dust and air quality.

London Specific Guidance:

2.41 Air quality in London is devolved to the Mayor of London, who has a supervisory role, with powers to intervene and direct local authorities in Greater London under Part IV of the Environment Act 1995.

2.42 **Local Air Quality Management: Technical Guidance (LLAQM.TG16)**[38] **-** This technical guidance has been prepared by the Greater London Authority (GLA) to support London boroughs in carrying out their duties under the Environment Act 1995 and connected regulations. Although the LLAQM technical guidance is largely based on the updated national guidance LAQM.TG(16), it does incorporate London-specific elements of the LAQM system.

2.43 **Local Air Quality Management: Policy Guidance (LLAQM.PG16)**[39] **-** As part of the Mayor's commitment to improving air quality he has also introduced this Local Air Quality Management system for London ("LLAQM"), in order to reflect the unique challenges, opportunities, and policies within London, and to enable enhanced focus on and co-ordination of local authority air quality work. The basic statutory framework remains the same as for other areas in the UK. Air quality in the capital is devolved to the Mayor of London, who has a supervisory role, with powers to intervene and direct local authorities in Greater London under Part IV of the Environment Act 1995.

Transport Guidance:

2.44 **Design Manual for Roads and Bridges (DMRB)** – Volume 11, section 3, Part 1[40] of the DMRB provides guidance on the assessment of impacts that road projects may have on local and regional air quality. It includes a calculation method to estimate local pollutant concentrations and regional emissions for air including those for carbon. Where appropriate, this advice may be applied to existing roads.

[37] Minerals PPG [DCLG]
[38] LLAQM.TG (16) [Mayor of London, 2016]
[39] LLAQM.PG(16) [Mayor of London, 2016]
[40] HA 207/07 – Environmental Assessment Techniques, Air Quality [HA, May 2007]

2.45 **Transport Analysis Guidance (WebTAG)** – TAG Unit A3[41] sets out a six step methodology for environmental appraisal of transport projects with regard to air quality impacts as follows:

- Scoping;
- The quantification of air quality impacts;
- The appraisal of local air quality impacts (see section 3.2);
- The appraisal of regional air quality impacts (see section 3.3);
- Monetary valuation of air quality impacts (see section 3.4); and
- Consideration of the distributional impacts of changes in air quality (see TAG Unit A4.2[42]).

2.46 **Aviation Policy Framework** – Published in 2013 by DfT, sets out the Government's policy on aviation and sets out the parameters within which the Airports Commission would work. Section 3 deals with environmental impacts. Paragraphs 3.46-3.55 deals with air quality and other local environmental impacts. Section 9.5 of the Airports Commission Final Report[43] sets out the environmental impacts and assessment of the shortlisted schemes[44], which informed the commission's recommendations. Paragraphs 9.52-9.96 deals with impacts of air quality.

Environmental Permitting Guidance:

2.47 **Air Emissions Risk Assessment Guidance** - The IED[45] require that all industrial operations in sectors covered by this EU Directive carry out air quality assessments and make provisions to minimise emissions. The IED also requires that Best Available Techniques (BAT)[46] is be used to control air emissions, taking into account the cost, which should be reasonable for the changes to be implemented. Guidance on Air Quality and IED is contained within the Environment Agency Air Emissions Risk Assessment Guidance[47].

2.48 **Odour Management Horizontal Guidance (H4)[48]** - This guidance covers the regulatory requirements with regard to odour, advice on the management of odour, odour conditions on permits and the aspects that

[41] TAG Unit A3 – Environmental Impact Appraisal [DfT, December 2015]
[42] TAG Unit A4.2 – Distributional Impact Appraisal [DfT, December 2015]
[43] Airports Commission: Final Report, July 2015
[44] 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.
[45] Directive 2010/75/EU.
[46] 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).
[47] Air Emissions Risk Assessment for your Environmental Permit [EA, Feb 2016]
[48] Odour Management–H4 [EA, March 2011]

should be dealt with in an odour management plan (OMP)[49]. This guidance does not apply to waste water treatment facilities (unless they are subject to the IED Directive), standalone water discharges, groundwater authorisations, radioactive substance activities or any other activity which is not subject to an odour condition in a permit.

Nationally Significant Infrastructure Projects (NSIPs) - National Policy Statements

2.49 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:

2.50 **Overarching Energy (EN-1)[50]** – Section 5.2 deals with air quality and emissions and sets out general considerations for air quality limits, requirements for the applicants assessment of impacts of a proposal and mitigation measures as set out if the Air Quality Strategy and AQ Standards Regulations 2010 mentioned in 2.4.1 & 2.4.5 above.

2.51 **Fossil Fuel Electricity Generating Infrastructure (EN-2)[51]** – Section 2.5 sets out general considerations for air quality limits, requirements for the applicants assessment of impacts of a proposal and mitigation measures as set out if the Air Quality Strategy and AQ Standards Regulations 2010 mentioned in 2.4.1 & 2.4.5 above

2.52 **Renewable Energy (EN-3)[52]** – Paragraphs 2.5.53 – 2.5.58 set out specific air quality considerations for Biomass and Waste Combustion Plants and refers to the generic information on air quality legislation and emission limit values in EN-1 mentioned above.

2.53 **Gas Supply Infrastructure and Gas and Oil Pipelines (EN-4)[53]** – Section 2.18 covers specific air quality considerations relating to gas emissions from gas reception facilities projects and refers to the potential effects of theses facilities.

2.54 **Nuclear Power Generation (EN-6)** – Paragraph 3.12.3 of Volume I [54]points out that a new nuclear power station is unlikely to be associated

[49] Odour Management Plans for Waste Handling Facilities [EA, November 2010]
[50] EN-1 [DECC, July 2011]
[51] EN-2 [DECC, July 2011]
[52] EN-3 [DECC, July 2011]
[53] EN-4 [DECC, July 2011]
[54] EN-6 Vol I [DECC, July 2011]

with significant air quality impacts during operation, but the impact may be greater during the construction phase. Volume II[55] briefly mentions potential site specific effects on air quality at the eight sites chosen for new nuclear generation throughout Annex C.

Transport:

2.55 **Ports**[56] – Section 5.7 covers air quality and emissions considerations and the requirements for assessment of air quality impacts and mitigation from ports infrastructure proposals. Section 5.8 covers dust, odour, smoke and steam emissions considerations and the requirements for assessment of air quality impacts and mitigation.

2.56 **National Networks**[57] – Paragraphs 5.3 – 5.15 covers air quality impacts arising from roads and rail infrastructure proposals and refers to the European legislative requirements set out above. It also covers the requirements for assessment of air quality impacts and mitigation for rail and road infrastructure proposals.

Waste:

2.57 **Hazardous Waste**[58] – Section 5.2 sets out air quality and emissions considerations in infrastructure projects concerning recovery and/or disposal of hazardous waste, particularly where proposals are within or adjacent to AQMAs or Natura 2000 sites. Section 5.2 also covers the requirements for assessment of air quality impacts and mitigation for hazardous waste proposals. Section 5.6 covers dust, odour, smoke and steam emissions considerations and the requirements for assessment of air quality impacts and mitigation.

Water:

2.58 **Waste Water**[59] – Section 4.11 sets out air quality and emissions considerations in infrastructure projects concerning waste water treatment plants. Section 4.11 also covers the requirements for assessment of air quality impacts and mitigation for rail and road infrastructure proposals. Section 4.12 covers dust, odour, smoke and steam emissions considerations and the requirements for assessment of air quality impacts and mitigation.

Other Guidance:

2.59 **WHO Air Quality Guidelines**[60] – are designed to provide guidance in reducing the health impacts of air pollution. The guidance provides suggested limits for particulate matter, ozone, nitrogen dioxide and

[55] EN-6 Vol II [DECC, July 2011]
[56] Ports NPS [DfT, January 2012]
[57] National Networks NPS [DfT, December 2014]
[58] Hazardous Waste NPS [Defra, June 2013]
[59] Waste Water NPS [Defra, March 2012]
[60] WHO Air Quality – Global Update 2005 [WHO, 2006]

sulphur dioxide. The limits in the EU Ambient Air Quality Directive[61] are based on this guidance.

2.60 **IAQM Land-Use Planning & development Control: Planning for Air Quality[62]** - This document has been developed for professionals operating within the planning system. It provides them with a means of reaching sound decisions, having regard to the air quality implications of development proposals. It also is anticipated that developers will be better able to understand what will make a proposal more likely to succeed. This guidance, of itself, can have no formal or legal status and is not intended to replace other guidance that does have this status. For example, industrial development regulated by the Environment Agency, and requiring an Environmental Permit, is subject to the EA's risk assessment methodology, while for major new road schemes, Highways England has prepared a series of advice notes on assessing impacts and risk of non-compliance with limit values.

2.61 **IAQM Guidance on the Assessment of Odour for Planning[63]** - This guidance is for assessing odour impacts for planning purposes. This document is not intended to provide guidance on odour for environmental protection regulatory purposes (e.g. Environmental Permitting, statutory nuisance investigations, etc.) and specific odour guidance from the EA and Defra addresses that need. Odour can be an important issue for waste-management proposals developments, wastewater treatment works (WWTWs), some industrial processes, and rural activities (e.g. farming and biosolids application to fields). The relevant LPA must consider whether a proposed development (an odour source itself or nearby new receptors such as residential dwellings) will be a suitable use of the land. The planning system should guide development to the most appropriate locations: ideally, significant sources of odour should be separated from nearby odour-sensitive users (receptors) or failing this employ mitigation measures in order to make a proposal acceptable.

2.62 **Building Regulations (Approved Document F: – Means of ventilation[64]) –** deals with the requirements and provisions for adequate ventilation provided for buildings where people go, of which any fixed systems for mechanical ventilation should be tested and adjusted to achieve adequate ventilation as required by Schedule 1 and regulations 39, 42 and 44 (in so far as it relates to fixed systems for mechanical ventilation) of the Building Regulations, as amended. It also deals with regulations 20(1) and 20(6) (in so far as it relates to in so far as it relates to fixed systems for mechanical ventilation) of Approved Inspectors Regulations, as amended.

[61] Directive 2008/50/EC
[62] IAQM Planning for Air Quality Guidance [IAQM, EPUK, Jan 2017]
[63] IAQM Guidance on the Assessment of Odour for Planning [IAQM, May 2014]
[64] Approved Document F: Means of Ventilation [HM Government, 2010]

2.63 **Air Quality – Certification of automated measuring systems (BS EN 15267 Series)** – part 1 specifies the general principles, including common procedures and requirements, for the product certification of automated measuring systems (AMS) for monitoring ambient air quality and emissions from stationary sources. BS EN 15267-1 consists of the following sequential stages:

a) Performance testing of an automated measuring system
b) Initial assessment of the AMS manufacturer's quality management system
c) Certification
d) Surveillance.

2.64 Parts 2-4 covers in more detail the performance criteria, initial assessment, post certification surveillance and design changes on the performance of measuring systems.

Emerging Policy/Guidance:

2.65 **Draft Airports National Policy Statement: new runway capacity and infrastructure in the South East of England** – Following consultation in 2017, a revised draft Airports NPS[65] was published on 25 October 2017.

2.66 The Airports NPS provides the primary basis for decision making on development consent for a North-West runway at Heathrow Airport and an important consideration with regard to other applications for runways and airport infrastructure in London and the South East. The NPS sets out

- The Government's policy on the need for new airport capacity in the South East of England;
- Why the Government believes the need is best met by a North-West runway at Heathrow airport; and
- The specific requirements that the applicant for a new North-West runway will need to meet in order to gain development consent.

2.67 Air quality impacts of airport expansion are assessed in general at paragraph 5.22. The requirements for air quality assessment are set out in paragraphs 5.31-5.33 and mitigation measures are detailed at paragraphs 5.34-5.40.

Interaction of Planning and Pollution Control Regimes

2.68 The Waste PPG advises that there are a number of issues (including air quality) which are covered by other regulatory regimes and planning authorities should assume that these regimes will operate effectively. The focus of the planning system should be on whether the development itself is an acceptable use of the land and the impacts of those uses, rather than any control processes, health and safety issues or emissions

[65] Revised Draft Airports NPS [DfT, October 2017]

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.

2.69 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*, which has been supported in subsequent cases.

2.70 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.

2.71 Where a permit has already been granted or is likely to be decided during the course of the appeal, it is necessary to find out from the main parties how the permit application is progressing. If the permit is granted then it will be very useful to obtain a copy of the permit and the EA's decision document, which is particularly useful as it describes how the permit application has been determined; a record of the decision-making process; shows how all the relevant environmental factors and key issues have been taken into account and justifies specific permit conditions and contains a brief history of the site (including planning history). This may be useful to frame how the environmental issues are dealt with and alleviate public fears on environmental effects of the proposal as the document should explain the adequacy of environmental management techniques for the operation.

3 Casework Considerations

Introduction

3.1 Any air quality issue that relates to land use and its development is capable of being a material planning consideration. The weight, however, given to air quality in making a planning application decision, in addition to the policies in the local plan, will depend on such factors as:

- the severity of the impacts on air quality – the overall degradation or improvement in local air quality and its effect on the compliance with national air quality objectives and EU limit values;

- the air quality in the area surrounding the proposed development – whether the development will materially affect any air quality action plan or other strategy in the area;

- the likely use of the development - the length of time people are likely to be exposed at that location and whether the development would introduce new public exposure; and

- the positive benefits provided through other material considerations.

Detailed Effects of air pollution

a) Health Effects

3.2 As stated in section 1 above, various air pollutants can have serious health impacts. Below are detailed description of the health effects of the main pollutants in the UK which are likely to referred to in evidence:

3.3 **Particulates (PM_{10}/$PM_{2.5}$) -** Some estimates suggest that particulates are responsible for up to 10,000 premature deaths in the UK each year. The extent to which particulates are considered harmful depends largely on their composition. The effects of particulate emissions are considered detrimental due to their composition, containing mainly unburned fuel oil and polycyclic aromatic hydrocarbons (PAHs) that are known to be carcinogenic among laboratory animals. Particulates may originate from many other sources including cement manufacturing processes, incineration and power generation, meaning localised instances of particulate pollution are common. The categorisation of particles through size has recently become important when assessing their effects on health. This is due to the fact that particles of less than 10 micrometres (mm^3) in diameter can penetrate deep into the lung and cause more damage, as opposed to larger particles that may be filtered out through the airways' natural mechanisms.

3.4 **Ozone** - Ozone differs from most pollutants in that it is created as a secondary pollutant by the action of sunlight on volatile organic compounds (VOCs) and oxides of nitrogen, often over several days. This results in ozone being widely dispersed as a pollutant, and can form in greater concentrations in rural areas. As ozone concentrations are particularly dependant on sunlight, episodes are always likely to develop following sustained periods of warmth and calm weather. Ozone is a toxic gas that can bring irreversible damage to the respiratory tract and lung tissue if delivered in high quantities. Levels during air pollution episodes have peaked at around 250 ppb. At these concentrations ozone is likely to impair lung function and cause irritation to the respiratory tract. Asthmatics are known to adopt these symptoms more easily.

3.5 **Oxides of Nitrogen** - The oxides of most concern are nitric oxide (NO) and nitrogen dioxide (NO_2). The latter is more damaging to health, due to the toxic nature of this gas. NO is more readily emitted to the atmosphere

as a primary pollutant, from traffic and power stations, and is often oxidised to nitrogen dioxide following dispersal. Health effects of exposure to NO_2 include shortness of breath and chest pains. The effects of NO include changes to lung function at high concentrations.

3.6 **Carbon Monoxide** - Transport, tobacco smoke and gas appliances are the major sources of carbon monoxide. Its link with haemoglobin, the oxygen carrying component of the blood stream, forms carboxyhaemoglobin (COHb) which can be life-threatening in high doses. The effects of carbon monoxide pollution are more damaging to pregnant women and their foetus. Research into smoking and pregnancy shows that concentrations within the blood stream of unborn infants is as high as 12%, causing retardation of the unborn child's growth and mental development.

3.7 **Lead** - Lead emissions have significantly reduced in recent years but lead is still a serious air pollutant especially to those living near to areas of dense traffic in cities where leaded fuel may still be in use. Damage to the central nervous system, kidneys and brain can result when levels in the blood reach concentrations of 800 mg/litre. Much of the concern regarding pollution from lead centres around its effects on child health. Children exhibit vulnerability to the toxic effects of lead at much lower concentrations than for adults. It has been shown that there is a strong link between high lead exposures and impaired intelligence.

3.8 **Sulphur dioxide** - The health effects of sulphur dioxide pollution were exposed graphically during the "Great Smog" of London in 1952. This resulted in approximately 4000 premature deaths through heart disease and bronchitis. Since then, however, emissions have been significantly reduced through legislative measures. Research has shown that exposure for asthmatics is significantly more damaging than for normal subjects. Concentrations above 125 ppb may result in a fall in lung function in asthmatics. Tightness in the chest and coughing may also result at levels approaching 400 ppb. At levels above 400 ppb the lung function of asthmatics may be impaired to the extent that medical help is required. Sulphur dioxide pollution is considered more harmful when particulate and other pollution concentrations are high. This is known as the synergistic effect, or more commonly the "cocktail effect." Therefore the monitoring networks in the UK incorporate both smoke and sulphur dioxide.

3.9 **Volatile Organic Compounds (VOCs) -** Some VOCs are quite harmful, including the following: Benzene - may increase susceptibility to leukaemia, if exposure is maintained over a period of time. Polycyclic Aromatic Hydrocarbons (PAH) - forms of this compound can cause cancer. There are several hundred different forms of PAH, and sources can be both natural and man-made. Dioxins - sources of dioxins vary, although the manufacturing of organic compounds as well as the incineration of wastes and various other combustion processes involving chlorinated compounds may also produce dioxins. Health effects are as much a problem due to ingestion, as inhalation, such is the problem of dioxins entering the food chain from soils. 1,3 Butadiene - there is an apparent correlation between butadiene exposure and a higher risk of cancer. Sources are

manufacturing of synthetic rubbers, petrol driven vehicles and cigarette smoke.

b) **Effects on Ecosystems and Wildlife**

3.10 Atmospheric pollution can adversely affect the natural environment in a number of ways. Pollutants such as sulphur dioxide and nitrate cause acidification (via 'acid rain'), which can cause significant damage to both living and non-living components of ecosystems. Eutrophication occurs when pollution delivers an excess of nutrients to ecosystems resulting in decreased biodiversity, for example by causing algal blooms in rivers and lakes which can wipe out fish populations.

3.11 Pollutants such as ozone and nitrogen can directly cause toxic damage to all living ecosystem components, and particularly to plants. Deposited heavy metals are stable and persistent environmental pollutants which cannot be degraded or destroyed. As such they may accumulate in soil, water and sediments and cause damage to both the environment and human health.

3.12 All of these effects result in significant subsequent impacts on both biodiversity and ecosystems, with resulting impacts on agriculture/aquaculture and other activities in these areas.

3.13 The extent of these impacts are assessed using critical loads and levels, which are estimates of the concentration of one or more air pollutants above which there is risk of damage to the environment. The term 'critical load' refers to the deposition of pollutants from the air to land and water, while 'critical level' refers to pollutant concentrations in the atmosphere. These are important parameters and are often referred to in Environmental Statements and Habitat Risk Assessments where for example a new road project or proposed Poultry shed would result in the release of nitrogen oxides and ammonia (NH_3) respectively, resulting in nitrogen deposition (N-deposition) on nearby sensitive areas, i.e. 'European Sites' - SPAs/SACs and/or areas where protected species exist[66].

c) **Effects on Heritage assets**

3.14 There are many materials affected by acidic deposition as most materials are liable to some degree of damage. Those most vulnerable are: limestone; marble; carbon-steel; zinc; nickel; paint and some plastics. Stone decay can take several forms, including the removal of detail from carved stone, and the build-up of black gypsum crusts in sheltered areas. Metal corrosion is caused primarily by oxygen and moisture, although SO_2 does accelerate the process. Most structures and buildings are affected by acid deposition to some degree because few materials are safe from these effects. In addition to atmospheric attack structures that are submerged in acidified waters such as foundations and pipes can also be corroded. The effects of acid deposition on modern buildings are considerably less

[66] See Biodiversity CL&PG for further information.

damaging than the effects on ancient monuments. Limestone and calcareous stones which are used in most heritage buildings are the most vulnerable to corrosion and need continued renovation.

Weather and Air Quality

3.15 The weather has an important effect on air pollution levels. Generally, windy weather causes pollution to be dispersed whilst still weather allows pollution to build up. Coastal locations and open areas often experience more windy weather and are therefore likely to experience better air quality. The wind direction also affects air pollution. If the wind is blowing towards an urban area from an industrial area then pollution levels are likely to be higher in the town or city than if the air is blowing from another direction of for example, open farmland. Sunshine can also affect pollution levels. On hot, summer days, pollution from vehicles can react in the presence of sunlight to form ozone. The pollution that causes ozone to be formed is usually generated from vehicles in cities and towns but because this pollution can be transported by winds, high levels of ozone may be found in the rural countryside. The pressure of the air also affects whether pollution levels build up. During high pressure systems, the air is usually still which allows pollution levels to build up but during low pressure systems the weather is often wet and windy, causing pollutants to be dispersed or washed out of the atmosphere by rain.

Effects of Topography on Air Quality

3.16 Concentrations of pollutants can be greater in valleys than for areas of higher ground. This is because, under certain weather conditions, pollutants can become trapped in low lying areas such as valleys. This happens for example, on still sunny days when pollution levels can build up due to a lack of wind to disperse the pollution. This can also happen on cold calm and foggy days during winter. If towns and cities are surrounded by hills, wintertime smogs may also occur. Pollution from vehicles, homes and other sources may become trapped in the valley, often following a clear cloudless night. Cold air then becomes trapped by a layer of warmer air above the valley – this is a 'temperature inversion'. See Annex C for the relationship between influences on air quality.

Local Air Quality Management

3.17 Local authorities have a central role in achieving improvements in air quality. Their local knowledge and interaction with the communities that they serve mean that they are better able to know the issues on the ground in detail and the solutions that may be necessary or appropriate to the locality. Through the Local Air Quality Management (LAQM) system local authorities are required to assess air quality in their area and designate Air Quality Management Areas (AQMAs) if improvements are necessary. Where an AQMA is designated, local authorities are required to produce an Air Quality Action Plan (AQAP) describing the pollution reduction measures it will put in place.

3.18 **AQMAs** – Section 83(1) of Part IV, Environment Act 1995 requires local authorities to designate an AQMA where:

i) any one or more AQ objectives are not being met; and
ii) where people are likely to be regularly present and therefore exposed to the emissions

3.19 Schedules 2 & 3 of the Air Quality Standards Regulations 2010 or Table 2 of Part 1 of the UK Air Quality Strategy 2007 set out all the UK Air Quality Objectives. It is important to note that an AQMA can be one street or cover very large areas.

3.20 **AQAPs** – section 84 of the Environment Act 1995 requires local authorities to develop an Action Plan to improve air quality in the AQMA, the plan should include:

- pollution sources;
- quantification of impacts of the proposed measures;
- present clear timescales;
- how accountability and ownership will be measured (in order to fulfil its goal - all partners e.g. Highways England or Environment Agency to take responsibility for actions and engage constructively in the process).

3.21 There are currently over 700 active AQMA's around the UK (600 in England)[67], mostly for Nitrogen Dioxide (NO_2). It is important to note that AQMAs remain in place in order comply with the AQ objectives unless it can be shown that the objectives are being met and can be sustained even if the AQMA is revoked or amended. If an AQMA is revoked - a local Air Quality Strategy (AQS) can be put in place to ensure AQ remains high profile and to ensure a quick response if AQ deteriorates in the area.

3.22 **Clean Air Zones (CAZs) -** Defra/DfT published the Clean Air Zone Framework document[68] on 5 May 2017, which sets out the principles for setting up CAZ's in England. A CAZ defines an area where targeted action is taken to improve AQ and resources should be prioritised to shape the urban environment to deliver improved health benefits and support economic growth. CAZs aim to address all sources of pollution, (including NO_2 and PM) and reduce exposure by using a range of measures tailored to that particular location. Points to note in particular are:

- General approach – areas, hours of operation, vehicle types
- Charging options – non-charging/charging (what levels to charge), exemptions and discounts

[67] List of Local Authorities with AQMAs; AQMA interactive map [Defra, 2017]
[68] CAZ Framework Document [Defra/DfT, May 2017]

- Expected to deliver – support for local growth and ambition; accelerate transmission to a low emission economy; and immediate action to improve AQ and health.

Air Quality Monitoring and Modelling Techniques

Introduction

3.23 As mentioned in paragraph 2.28 above the UK is divided into 43 zones, for the purposes of monitoring, reporting and compliance with European Directives, divided into:

- 28 agglomeration zones (large urban areas); and
- 15 non-agglomeration zones[69]

3.24 Each of these zones has its own identification code (UK0001 – UK0043)[70]. The air quality assessment for each pollutant is derived from a combination of measured and modelled concentrations.

Where are we now? – Current Air Pollution in the UK

3.25 According to the latest annual report on air quality in the UK for 2016[71], the UK is compliant for the majority of pollutants, but is still non-compliant with respect to the annual mean targets for NO_2 in the vast majority of the 43 air quality monitoring and assessment zones. A summary of the results are as follows:

- The UK met the limit value for hourly mean nitrogen dioxide (NO_2) in all but two zones.
- Six zones were compliant with the limit value for annual mean NO_2. The remaining 37 exceeded this limit value.
- Four zones exceeded the target value for benzo[a]pyrene.
- Three zones exceeded the target value for nickel.
- All zones met both the target values for ozone.
- All zones except one exceeded the long-term objective for ozone (for protection of human health).
- Five zones exceeded the long-term objective form ozone (for protection of vegetation).
- All zones met the limit value for daily mean and annual mean concentration of PM_{10}.
- All zones met the target value for annual mean concentration of $PM_{2.5}$.

[69] Equivalent to the former Government Regional Offices in England and the boundaries agreed by the Scottish Government, Welsh Government and Department of the Environment in Northern Ireland.

[70] See Table 4-1 and Figure 4-1 of Air Pollution in the UK 2016 [Defra, Sept 2017].

[71] Air Pollution in the UK 2016 – full report; Compliance assessment summary [Defra, September 2017] as required by Directive 2008/50/EC on Ambient Air Quality and the Fourth Daughter Directive 2004/107/EC. Previous annual reports can be accessed on the uk-air.defra.gov.uk website. The European Environment Agency (EEA) have produced a report, the Air Quality in Europe – 2017 report [EEA, 2017], which provides Europe-wide emissions data for a range of pollutants up to and including 2015.

- All zones met the limit values for sulphur dioxide (SO_2), carbon monoxide (CO), lead and benzene (C_6H_6).

3.26 **National Atmospheric Emissions Inventory (NEAI) -** The UK National Atmospheric Emissions Inventory (NAEI)[72] is developed and maintained by Ricardo Energy & Environment, in collaboration with Aether, Centre for Ecology & Hydrology, and Gluckman Consulting. The NAEI is funded by the BEIS, Defra, the Scottish Government, the Welsh Government and the Northern Ireland Department of Agriculture, Environment and Rural Affairs.

3.27 The NAEI estimates annual pollutant emissions from 1970 to the most current publication year for the majority of pollutants. A number of pollutants are estimated from 1990 or 2000 to the most current publication year due to the lack of adequate data prior to the later date and the specific reporting requirements for each pollutant. The NAEI is made up of the Greenhouse Gas Inventory (GHGI) and the Air Quality Pollutant Inventory (AQPI).To deliver these estimates, the NAEI team collect and analyze information from a wide range of sources – from national energy statistics through to data collected from individual industrial plants.

3.28 **Automatic Monitoring Networks –** Automatic Networks produce hourly pollutant concentrations, with data being collected from individual sites by modem. The data go back as far as 1972 at some sites. Examples include:

i) **Automatic Urban and Rural Network (AURN)** – The AURN is the UK's largest automatic monitoring network and is the main network used for compliance reporting against the Ambient Air Quality Directives. It air quality monitoring stations measuring oxides of nitrogen (NO_x), sulphur dioxide (SO_2), ozone (O_3), carbon monoxide (CO) and particles (PM_{10}, $PM_{2.5}$). These sites provide high resolution hourly information which is communicated rapidly to the public, using a wide range of electronic, media and web platforms.

ii) **Automatic Hydrocarbon Network** – Automatic hourly measurements of speciated hydrocarbons, made using an advanced automatic gas chromatograph (VOCAIR), started in the UK in 1992. By 1995, monitoring had expanded considerably with the formation of a 13-site dedicated network measuring 26 pollutants continuously at urban, industrial and rural locations. Currently there are 4 sites measuring 29 pollutants continuously at urban and rural locations using an advanced automatic Perkin Elmer gas chromatograph.

iii) **Automatic London Network** - The Automatic London Network is a subset of 14 sites on the AURN which also form part of the wider London Air Quality Network (LAQN) run by King's College ERG.

3.29 **Non-Automatic Monitoring Networks -** Non-automatic Networks measure less frequently compared to automatic networks - either daily,

[72] NAEI Homepage

weekly or monthly - and samples are collected by some physical means (such as diffusion tube or filter). These samples are then subjected to chemical analysis, and final pollutant concentrations calculated from these results.

i) **UK Eutrophying & Acidifying Network (UKEAP)** – The UKEAP network project combines two Defra atmospheric pollutant monitoring projects, which have measured air pollutants at rural sites across the UK over the past two decades. This network provides information on deposition of acidifying compounds in the United Kingdom. Its main emphasis has always been the assessment of potential impacts on UK ecosystems. Other measurements including sulphur dioxide, nitrogen dioxide and particulate sulphate have also been made within the programme in order to provide a more complete understanding of precipitation chemistry in the United Kingdom.

ii) **Acid Waters Monitoring Network (UKAWMN)** – The UKAWMN, funded by a consortium led by Defra, was established in 1988 to monitor the chemical and ecological impact of acid deposition in areas of the UK believed to be sensitive to acidification. Over twenty years on, its database provides an extremely valuable long-term record of water chemistry and biology which is unique for upland freshwater systems in the UK.

iii) **Heavy Metals Network** – The network monitors the concentrations in air, and the deposition rates of a range of metallic elements at urban, industrial and rural sites. Comprising 24 monitoring sites - all stations (except Lough Navar) measure Arsenic (As), Cadmium (Cd), Chromium (Cr), Cobalt (Co), Copper (Cu), Iron (Fe), Manganese (Mn), Nickel (Ni), Lead (Pb), Selenium (Se), Vanadium (V) and Zinc (Zn) in the PM_{10} fraction of air. Measurements of ambient vapour phase mercury concentrations are made at 2 stations (Runcorn Weston Point and London Westminster). Additionally, heavy metals in deposition are measured at 5 rural sites with mercury in deposition additionally measured at 4 of these stations.

iv) **Black Carbon Network** – The UK Black Carbon research monitoring programme began operation in September 2006. The purpose of the network is to continue a historical data set of black smoke which dates back to the 1920s and monitor black carbon concentrations.

v) **Polycyclic Aromatic Hydrocarbon (PAH) Network** – The PAH Network, which has operated since 1991, currently monitors the ambient concentrations of PAHs in the UK atmosphere by sampling PAHs at 31 sites across the UK. The PAH Network has strong links with the Toxic Organic Micro Pollutants (TOMPs) Network, which monitors at fewer sites – six in total. Three of these TOMPs sites also provide samples to be analyzed for the PAHs allowing the assessment of PAHs at 34 sites. The background monitoring sites at

Auchencorth Moss and Harwell provide data to ensure the UK complies with the EMEP monitoring requirements.

vi) **Toxic Organic Micro-Pollutants (TOMPs) Network** – The TOMPs network measures ambient air concentrations for a range of persistent organic pollutants (POPs) across the UK. The network was set up in 1991 with monitoring sites at urban and rural locations. The sites are Manchester (MAN), London (LON), Hazelrigg (HR) near Lancaster, Weybourne in Norfolk, High Muffles (HM) in North Yorkshire and Auchencorth Moss (AUCH) south of Edinburgh. The network has provided over 25 years of continuous data and as such comprises a considerable and important dataset which can be used to provide estimates of the change in atmospheric concentrations over time and response to policy interventions.

vii) **Non-Automatic Hydrocarbon Network** - The UK Non-Automatic Hydrocarbon Network measures ambient benzene concentrations at various sites around the United Kingdom. As the Objectives and Limit Values for benzene relate to the annual average concentration, it is not necessary to use a monitoring method with short time resolution. Sampling is therefore undertaken using pumped samplers, located at monitoring stations operated within the Automatic Urban and Rural Network (AURN)

viii) **Particle Numbers and Concentrations Network** – Particulate matter (PM) in the atmosphere generally comprises solids and liquids, with particle sizes that range from a few nanometres (nm) in diameter to about 100 micrometres (µm). The chemical composition of PM is varied and the constituents of PM at any location will depend on many factors such as local emission sources and meteorological conditions. The purpose of this research is to improve understanding of the composition of particulate matter in the UK.

3.30 **Design Manual for Roads and Bridges (DMRB) –** The DMRB Screening Model published by the Highways Agency (now Highways England) can be used for Review and Assessment purposes. Guidance on using the DMRB[73] explains where the model can be found and how it should be used. The model can be run to predict pollutant concentrations at receptor locations near to roads. It can be used to predict annual mean concentrations of nitrogen dioxide (NO_2) and PM_{10}, as well as oxides of nitrogen (NO_x), carbon monoxide, benzene and 1,3-butadiene. It also predicts the number of exceedances of 50 g/m^3 as a 24-hour mean PM_{10} concentration.

3.31 **Stack height calculations –** using HMIP 1993 'Guidelines on Discharge Stack Heights for Polluting Emission. Technical Guidance Note D1 (Dispersion)' - this document is now out-of-print. It provides a simple but versatile method for calculating the minimum permissible chimney height to safeguard against short-term air quality impacts, for any pollutant species. It allows for building downwash effects but not terrain effects.

[73] Guidance on Running the DMRB Screening Model [HA, April 2009]

3.32 Care should be taken in using the D1 method, in terms of defining the local background (Bc) and the current air quality guideline value (Gd). The default values set out in the HMIP document (dated 1993) are out-of-date. For Gd, the current statutory short-term Air Quality Strategy objectives should be used instead of values provided in Table 1 of the D1 Guidance. For Bc, local measured or estimated relevant percentile of the short-term background concentrations should be used instead of values provided in Table 2 of the D1 Guidance. Typically, these can be calculated from hourly/daily monitoring data from AURN monitoring stations or other local monitoring station[74].

3.33 **Emissions Factors Toolkit (EFT) -** published by Defra and the Devolved Administrations to assist local authorities in carrying out Review and Assessment of local air quality as part of their duties under the Environment Act 1995. The EFT allows users to calculate road vehicle pollutant emission rates for NOx, PM_{10}, $PM_{2.5}$ and CO_2 for a specified year, road type, vehicle speed and vehicle fleet composition.

3.34 The EFT is updated periodically due to updates to underlying data including emissions factors. Users are therefore advised to check this page regularly to ensure they are using the most up to date version of the tool for their studies.

3.35 The current version of the EFT is version 7.0. The EFT User Guide[75] explains in detail the methodology, datasets and assumptions used in the development of the EFT. It consolidates previously available information and guidance on the use of the EFT, and provides information regarding previous versions.

3.36 **Pollution Climate Mapping (PCM) -** Background annual average $PM_{2.5}$ concentrations for the year of interest are modelled on a 1km x 1km grid using an air dispersion model (Pollution Climate Mapping), and calibrated using measured concentrations taken from background sites in Defra's Automatic Urban and Rural Network. Data on primary emissions from different sources from the National Atmospheric Emissions Inventory and a combination of measurement data for secondary inorganic aerosol and models for sources not included in the emission inventory (including re-suspension of dusts) are used to estimate the anthropogenic (human-made) component of these concentrations. By approximating LA boundaries to the 1km by 1km grid, and using census population data, population weighted background $PM_{2.5}$ concentrations for each lower tier LA are calculated. This work is completed under contract to Defra, as a small extension of its obligations under the Ambient Air Quality Directive (2008/50/EC).

3.37 **Community Multiscale Air Quality (CMAQ) Modelling System -** a sophisticated atmospheric dispersion model developed by the United States Environmental Protection Agency (EPA) to address regional air

[74] The EA use Dispersion factor calculations as part of their Air Emissions Risk Assessment tool for an Environmental Permit.
[75] Emissions Factors Toolkit v7.0 – User Guide [Defra, August 2016].

pollution problems. An example of a regional air pollution problem is a multi-state area where ozone or fine particulate levels exceed the US health standards. In addition to simulating the emission, advection, diffusion, and deposition of air pollutants, CMAQ treats a wide array of chemical reactions that occur throughout the lower atmosphere. Evidence submitted in UK casework may cite comparisons to this methodology.

Air Quality Evidence:

Reports and submissions

3.38 AQ reports are required for developments likely to impact on air quality, particularly for proposed developments in or adjacent to agglomeration Zones affected by risk of non-compliance with AQ objectives and/or subject to AQMAs. Reports should in general focus on evidence of current and predicted emissions, but more specific reports may be needed for particular types of development site and may include the following:

- **Local Air Quality Data** – obtained from established national network monitoring/NEAI and/or an independent local assessment.
- **Air Quality Assessment Report** – Should assess:
    I. the existing air quality (baseline);
    II. predict the future air quality without the proposal (future baseline);
    III. predict future air quality with proposal.
    IV. Possibility of cumulative impacts[76].
- **Traffic Assessment** – using Trip Rate Information Computer System (TRICS) for trip generation data from new developments; WebTAG and/or DMRB methodology for impact appraisal as part of the cost-benefit analysis.

3.39 Ideally, an air quality assessment report should contain the following:

a. Relevant details of the proposed development;
b. The policy context for the assessment;
c. Description of the relevant air quality standards;
d. The basis for determining significance of effects arising from the impacts;
e. Details of the assessment methods;

[76] i.e. modelling a future scenario - With 'committed' development excluded and then included to allow the cumulative impact of all such future developments with planning permission to be assessed as one combined impact at selected receptors.

f. Model verification;

g. Identification of sensitive locations;

h. Description of baseline conditions;

i. Assessment of impacts;

j. Description of construction phase impacts;

k. Cumulative impacts and effects;

l. Mitigation measures;

m. Summary of assessment results - which should include:

- Impacts during the construction phase of the development (usually on dust soiling and PM_{10} concentrations);
- Impacts on existing receptors during operation (usually on concentrations of nitrogen dioxide, PM_{10} and $PM_{2.5}$);
- Impacts of existing sources on new receptors, particularly where new receptors are being introduced into an area of high pollution;
- Any exceedances of the air quality objectives arising as a result of the development, or any worsening of a current breach (including the geographical extent);
- Whether the development will compromise or render inoperative the measures within an AQAP, where the development affects an AQMA;
- The significance of the effect of any impacts identified; and
- Any apparent conflicts with planning policy.

3.40 It should be noted that Data is likely to contain 'bias adjustment factors' (for year, locality and interference) and/or figures derived from conversion calculations (i.e. from NO_x to NO_2).

3.41 You will need to be aware of types of emission level requirements (from the AQS Regulations 2010) – The National Air Quality Objectives:

- **Limit values** – legally binding which must not be exceed. They are set for individual pollutants and are made up of a concentration value, an averaging time over which it is to be measured, the number of exceedances allowed per year, if any, and a date by which it must be achieved. Some pollutants have more than one limit value covering different endpoints or averaging times.

- **Target values** – to be attained where possible, taking all necessary measures, but the costs should not be disproportionate to the benefits.

3.42 **Evidence base -** One question that needs to be considered when presented with AQ reports and data is How reliable is the evidence base? Reports suggest that there are data accuracy issues concerning AQ monitoring data from national networks e.g. Automatic Urban and Rural Network (AURN) real-time data (e.g. diffusion tubes for NO_2) or Non-Automatic Networks (for smoke, SO_2, PAH), which collect samples which are then analysed and figures calculated. Possible calculation errors, equipment errors. Make sure sampling data obtained using accepted sampling techniques, locational criteria and methodology as specified in the Directive 2008/50/EC and Local Air Quality Management Technical Guidance (LAQM.TG16).

3.43 You should be aware that there have been recent issues raised on evidence reliability and deliberate manipulation of AQ data:

i. **Cheshire East Council** – have admitted deliberate manipulation of NO_2 AQ data to appear better than it actually is for the period 2012 -2014 (there are 2 current Court cases where the Local Plan issued in July 2017 is being challenged as inaccurate as the flawed data was not taken into account).

ii. **Waverly Borough Council** – has admitted publishing incorrect NO_2 AQ data for Jan 2016 – Sept 2017, attributed to use of standard low accuracy 'cheap' diffusion tubes (rather than expensive MCERTS approved Chemiluminescence method) and use of incorrect bias factors.

iii. **Wealden judgment** – found HRA advice from Natural England which formed the basis for Local Plan policies, to be flawed in its analysis and conclusions regarding the in-combination effect of Nitrogen deposition on a European protected site (Ashdown Forest SAC) – See PINS Note 02/2017.

3.44 **Identifying Erroneous Data -** Different instruments require data to be processed in different ways. This is discussed later in the individual sections on each pollutant. However, in all cases, the local authority should identify and delete erroneous data, and there are various common themes irrespective of pollutant or instrument, such as:

- Instrument history and characteristics: Has the equipment malfunctioned in this way before?
- Calibration factors and drift: Rapid or excessive response drift can make data questionable.
- Negative or out of-range data: Are the data correctly scaled?
- Rapid excursions or "spikes": Are such sudden changes in pollution concentrations likely?

- Characteristics of the monitoring site: Is the station near a local pollution sink or source which could give rise to these results?

- Effects of meteorology: Are such measurements likely under these weather conditions?

- Time of day and year: Are such readings likely at this time of day/week/year?

- The relationship between different pollutants: Some pollutant concentrations may rise and fall together (for example, from the same source). For example, CO, NOx and PM10 are all vehicle derived pollutants.

- Results from other sites in the network: These may indicate whether observations made at a particular site are exceptional or questionable. Data from national network or other sites in the area can be compared for a given period to determine if measurements from a particular station are consistent with general pollution concentrations. If any high concentrations are identified (seen as spikes) at the local site, further examination is required.

- Quality Assurance Audit and Service reports: These will highlight any instrumental problems and determine if any correction of the data is necessary.

3.45 **Environmental Impact Assessments and Habitats Regulation Assessments -** Some air quality assessments will be undertaken for development that falls within the scope of the Environmental Impact Assessment (EIA) Directive[77]. Such assessments will need to recognise the requirements of the EIA Regulations[78], in respect of the need to define likely significant effects and identify mitigation, for example. Further information on the EIA process can be found in the EIA ITM Chapter.

3.46 A detailed Air Quality Assessment will need to be carried out as part of the Environment Statement. As part of the assessment consider:

- Would the proposed development (including mitigation) lead to an unacceptable risk from air pollution, prevent sustained compliance or fail to comply with Habitats Regulations;

- How could an amended proposal be made acceptable (where practicable); and

- Note that there is now an additional requirement under the 2017 EIA regulations (which came into effect in May 2017) - when considering granting permission, conditions on the permission

[77] Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment, as amended by Directive 2014/52/EU

[78] The Town and Country Planning (Environmental Impact Assessment) Regulations 2017 implement the requirements of the EIA Directive.

should include measures to monitor any potential significant adverse effects on the environment.

3.47 The requirements of the Habitats Directive[79] and Birds Directive[80] relevant to impacts on air quality also need to be considered for certain developments. Where additional emissions may result in likely significant effect on a European site[81], the Habitats Regulations[82] require that an assessment of the implications for the European site is undertaken before permission is granted. Where development is likely to generate increased transport movements along route corridors in proximity to European sites, Annex A of PINS Note 02/2017 identifies guide questions to assist Inspectors with consideration of Habitats Regulation Assessment (HRA).

3.48 Detailed advice for Inspectors undertaking HRA can be found in CL&PG4: Biodiversity.

3.49 **Decay rates –** the rate at which the pollutant 'disappears' as a result of absorption, chemical reaction or removal by rain needs to be factored into any air quality modelling scenario and taken into account in air quality assessments.

3.50 **Meteorological data and the Daily Air Quality Index –** as noted in paragraph 3.15 above, the weather plays an important role in air quality, through dispersion of pollutants in the atmosphere affected by wind direction, wind speed and atmospheric turbulence (and stability). Defra's air quality forecasts are produced by the Met Office using the AQUM[83] forecast modelling system. The Met Office model uses UK and European maps of annual average pollutant emissions to simulate the release of these chemicals into the atmosphere. These are then allowed to react at rates dependant on factors such as pollutant concentration, temperature and amount of sunlight. The Pollutants are then transported and dispersed within the model according to the winds and the concentrations are re-evaluated. Using the concentrations calculated in this way throughout the forecast period, the Daily Air Quality Index (DAQI)[84] is calculated as an average over prescribed time periods. The forecast is improved by incorporating recent observations of air quality from across the UK from the Automatic Urban and Rural Network (AURN). Forecasts are produced on a UK Map and are also available for 5000 locations (searchable by location or postcode)[85]. Weather data and/or DAQI data will be used in air quality assessments, where deemed necessary, so it will be useful for Inspectors to know how and where this data has been obtained from.

[79] Directive 92/43/EEC on the conservation of natural habitats and wild fauna and flora.

[80] Directive 2009/147/EC on the conservation of wild birds.

[81] 'European sites' are: candidate Special Areas of Conservation (cSACs), Special Areas of Conservation (SACs) and Sites of Community Importance (SCIs) designated pursuant to the Habitats Directive; and Special Protection Areas (SPAs) designated pursuant to the Birds Directive.

[82] The requirements of the Habitats and Birds Directives have been transposed into domestic legislation by the Conservation of Habitats and Species Regulations 2017 ('the Habitats Regulations')

[83] Air Quality in the Unified Model.

[84] DAQI – levels of air pollution and recommended actions/health advice. The index is from 1-10 and divided into four bands from low (1) to very high (10).

[85] Daily Pollution forecasts from the Met Office.

3.51 **Public concerns / perceptions of Air Quality -** You will need to deal adequately with any concerns over public health to allay perceived 'fear' if an event is held and will need to make sure that any questions over the reliability of AQ data with regard to either stand alone AQ Assessments, as Part of an Environmental Statement or Habitats Regulation Assessment or regarding the basis for Local Plan policies are dealt with appropriately. Obviously you will need to make sure the issues and concerns over public health and reliability of data are dealt with sufficiently in the decision/report.

3.52 **Local Plan considerations –** Local Plans can have an effect on air quality by setting out the parameters of what development is proposed and where, and any policies that encourage sustainable transport. Therefore in plan making, it is important to take into account AQMAs, CAZs, LEZs or other areas where there could be specific requirements or limitations on new development because of air quality concerns and compliance with Directive requirements. Air quality is a consideration in Strategic Environmental Assessment and sustainability appraisal can be used to shape an appropriate strategy, including through establishing the 'baseline', appropriate objectives for the assessment of impact and proposed monitoring.

3.53 Paragraph 002 of the Air Quality PPG advises that – when carrying out a review of air quality as part of the local air quality management (LAQM) regime, a Local Plan may need to consider:

- the potential cumulative impact of a number of smaller developments on air quality as well as the effect of more substantial developments;
- the impact of point sources of air pollution (pollution that originates from one place); and,
- ways in which new development would be appropriate in locations where air quality is or likely to be a concern and not give rise to unacceptable risks from pollution. This could be through, for example, identifying measures for offsetting the impact on air quality arising from new development including supporting measures in an air quality action plan or low emissions strategy where applicable.

3.54 It should be noted that in light of the Whealdon Judgment (see Case Law section below) and the reliability of evidence and data highlighted in the Cheshire East data scandal that Inspectors will need to rigorous in their consideration of air quality assessment reports (in particular the methodology used and the data sets informing them) than may influence local plan policies. However, there is a limit to what Inspectors can do in order to 'test' the evidence reliability. PINS Note 02/2017 gives advice on the role of Inspectors in relation to local plan examinations and HRA.

4 Mitigation techniques

Introduction

4.1 Paragraph 008 of the Air Quality PPG states that mitigation options will be locationally specific, will depend on the proposed development and should be proportionate to the likely impact. The PPG also stresses the importance of the need for local planning authorities to work with applicants to consider appropriate mitigation so as to ensure the new development is appropriate for its location and unacceptable risks are prevented.

4.2 Mitigation can be secured using planning conditions, e.g. to require the installation of a suitable ventilation system and obligations, which could be used to secure financial contributions to require a 'car club' to be set up, where necessary, providing the relevant tests are met[86]. Combinations of conditions and obligations can be used to fund Low Emission Strategies and the Community Infrastructure Levy can also be a mechanism to require developers to contribute to new local infrastructure to improve air quality.

4.3 Examples of mitigation include:

- alteration of the design and layout of a development to increase separation distances from sources of air pollution;
- using green infrastructure, in particular trees, to absorb dust and other pollutants;
- improving the means of ventilation;
- promoting infrastructure to promote modes of transport with low impact on air quality;
- controlling dust and emissions from construction, operation and demolition; and
- contributing funding to measures, including those identified in air quality action plans and low emission strategies, designed to offset the impact on air quality arising from new development.

4.4 All these options will have features of the general approaches to mitigation, which can be applied to a range of casework. These are detailed below:

General Mitigation Options:

4.5 **Prevention –** Preference should be given to preventing or avoiding exposure and/or impacts to/of the pollutant in the first place by eliminating or isolating potential sources or by replacing sources or activities with alternatives. This is usually best achieved through taking air quality considerations into account at the development scheme design stage.

[86] See paragraph 003 of the Use of Planning Conditions PPG and the Planning Obligations PPG.

4.6 **Minimisation –** Reduction and minimisation of exposure/impacts should next be considered, once all options for prevention/avoidance have been implemented so far as is reasonably practicable (both technically and economically). To achieve this reduction/minimisation, preference should be given first to:

i. mitigation measures that act on the source; before

ii. mitigation measures that act on the pathway; which in turn should take preference over

iii. mitigation measures at or close to the point of receptor exposure.

4.7 These options should all be subject to their effectiveness, cost and practicality. In each case, measures that are designed or engineered to operate passively are preferred to active measures that require continual intervention, management or a change in people's behaviour.

4.8 **Enhancing Dispersion –** improving the dispersion of an emission has the effect of lowering the pollutant concentration to which receptors are exposed to within a more acceptable threshold. This can be achieved by increasing the stack height (see paragraphs 3.31-3.32 on stack height calculations above) or decreasing the process which causes the emission. However, this merely displaces the problem and does not provide a longer term solution and therefore is not considered appropriate for most scenarios.

4.9 **Offsetting –** the impact of a new development's air quality impact may be offset by proportionately contributing to air quality improvements elsewhere (including those identified in air quality action plans and low emission strategies). This option should only be considered once all the above the options have been exhausted.

Air Pollution Control (APC) Techniques[87]:

4.10 For industrial process regulated by the EA and Local Authorities under the Environmental Permitting regime (see EP ITM Chapter) that produce emissions there are various ways to minimise or prevent the pollution occurring by controlling the emissions at source:

i) modification of the process to minimise the production of wastes, or to avoid releasing the wastes to the atmosphere;
ii) collection of particulate materials;
iii) absorption of toxic gases

4.11 Some techniques can be used to control both the particulates and gases; others are applicable to only one. The following paragraphs briefly describe some of these APC techniques:

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4.12 **Control of smoke –** can be achieved by use of more efficient combustion through design alterations to the combustion chamber and the control of the fuel & air supply.

4.13 **Control of grit, dust and fumes from industrial plant –** there are broadly five ways to in which the escape to the atmosphere of particulate matter can be controlled or prevented at source. The best solution for a particular process will depend on the size and shape of the particle(s) involved:

i) process modification to prevent particulates becoming airborne by use of protective enclosures.

4.14 If this method is not practically possible, airborne particulate matter can be separated out of a contaminated gas stream by the use of:

ii) gravity and inertial forces in a mechanical separator by e.g. a cyclone dust separator;
iii) a liquid (wet method) for 'washing' the particulates out of the atmosphere by using either scrubbers or wet arrestors e.g. simple demisters/dedusters or tower/spray scrubbers (e.g. venturi scrubber);
iv) a fabric filter by use of bag or cartridge filters; or
v) electrostatic forces in an electrostatic precipitator

4.15 **Control of gaseous pollutants** – it is necessary to use control systems to minimise gaseous emissions by either combustion or recovery. These are briefly detailed below:

i) Combustion techniques – the use of flares, conventional furnace systems or thermal/catalytic incinerators;

ii) Recovery techniques – the use of adsorption by activated charcoal or absorption by dissolution in e.g. wet scrubbers or condensers or by simple chemical reaction e.g. flue gas desulphurisation (FGD).

4.16 **Odour Control -** There are several industrial, agricultural and domestic activities that can give rise to odours. Some offensive odours (e.g. hydrogen sulphide – 'rotten eggs' smell) are due to toxic gases, but others may be non-toxic at the concentrations emitted. Waste gases with offensive odours can originate from a variety of sources, such as:

- The production process;
- The storage area;
- Leakage from pumps and compressors;
- During transfer of material;
- Open wastewater treatment or waste composting plants;
- Spreading of sewage sludge and farm slurry on land

4.17 The options for controlling odours (at source) are largely similar to those controlling gaseous pollutants, including:

i) Chemical reaction by oxidation to neutralize the odour;
ii) Use of scrubbers;
iii) Incineration;
iv) Adsorption on activated charcoal;
v) Biotechnical methods, e.g. bioscrubbers/biofiltration
vi) Enhanced dispersion

4.18 **Air Pollution Control Regulation -** The Environment Agency (EA) has a remit to regulate the emission of gases, smoke or odours emitted from industrial and agricultural activities if they are subject to controls under the Environmental Permitting regime[88]. Local authorities rather than the EA regulate statutory nuisance under Part III of the Environmental Protection Act 1990[89]. The definition of statutory nuisance in this act includes emissions arising from industrial or commercial premises which is prejudicial to health or a nuisance. The provisions require a local authority to investigate any complaints of statutory nuisance and also to inspect their area from time to time to identify any potential statutory nuisances which ought to be dealt with. If the activity is regulated under the Environmental Permitting Regulations 2016[90], the EA may deal with nuisance issues arising if the nuisance relates to the regulated emissions.

4.19 **Planning and Air Pollution Control -** The planning system has an important role in preventing or minimising particulate, gaseous or odour impacts from new or changed developments by regulating the location and, to a certain extent, the specification of some design and control parameters of these activities. However, as noted above the processes are regulated by the EA or Local Authority and the advice on the interaction of the planning and pollution control regime at paragraph 2.8 above should be used. Paragraph 006 of the Air Quality PPG advises that where the proposal relates to large and/or complex industrial activities, the EA should be able inform the planning process by identifying:

- if an environmental permit is also required before the proposed development can start operating;
- if there are likely to be any significant air quality issues that may arise at the permitting stage (so there are 'no surprises'); and
- whether there are any special requirements that might affect the likelihood of getting planning permission (e.g. the height of chimneys).

4.20 **Smoke Control Areas –** Many parts of the UK are designated as smoke control areas where you cannot emit smoke from a chimney unless you're burning an authorised fuel or using 'exempt appliances' as specified under the Clean Air Act 1993[91]. Persons can be fined up to £1,000 in the event of an unauthorised emission. In a smoke control areas you can only burn an

[88] See EPR ITM Chapter for details of the EP regime
[89] C.43
[90] SI 2016/1154
[91] C.11

approved fuel[92] or a 'smokeless' fuel[93] or an unauthorised fuel in an exempt appliance[94].

Emissions reduction from transport:

Introduction

4.21 As stated above nitrogen dioxide (and to a lesser extent other pollutants) emissions from transport sources[95] remain the most pressing of the air quality problems facing the UK, both from the effects on health/environment and compliance with the AQ objectives derived from the Ambient AQ Directive. Hence the focus from government on reducing these emissions from transport and the various rounds of Court cases relating to the Air Quality Plan (see paragraph 2.3.16). There are various options to mitigate emissions from transport, some of theses have already been covered earlier in this chapter, e.g. CAZs, Some outlined in the AQ Plan and London initiatives, others are detailed in Annex D and Annex K of the Air Quality Plan and other government documents[96] - some of these options are detailed below:

4.22 **Modal shift –** the most obvious mitigation would be to shift to more sustainable transport modes, i.e. from private vehicles to public transport or better still cycling and walking. Other modal shifts should also be encouraged, e.g. for freight from road from rail and sea. In planning terms, siting of housing and other developments that generate traffic should aim to be placed within easy access of public transport hubs and/or where practical the creation of shared pedestrian/cycle ways.

4.23 **Traffic Speed and flow –** can impact on NOx emissions, which are typically higher when an engine is under higher loads (e.g. during acceleration). Schemes that tackle road congestion, which will reduce the 'stop-start' traffic and higher engine loads and consequently will reduce engine emissions.

4.24 **Low emission vehicles –** the UK Governments aim is for every car/van to be a zero emission vehicle by 2050. Promoting uptake of ultra low emission vehicles (ULEVs), i.e. vehicles powered by electric batteries is the aim of the Office for Low Emission Vehicles (OLEV)[97]. The 2016 Autumn Statement included an additional £80 million for ULEV charging infrastructure, £50 million for ULEV taxis and funding for low emission buses. There is also ongoing research into electric vehicle batteries and a range of other ULEV technologies. The UK now has more than 11,500 public chargepoints for plug-in vehicles, including Europe's largest network

[92] List of authorised fuels designated under s20 of the Clean Air Act 1993.
[93] Anthracite, semi-anthracite, gas or low volatile steam coal.
[94] List of exempt appliances designated under s21 of the Clean Air Act 1993.
[95] Up to 50% of NO_2 emissions in UK are from road vehicles and accounts for up to 80% of roadside NO_2 emissions.
[96] AQ Plan and Zone Plans [Defra, July 2017]; Strategy to improve Air Quality [Highways England, August 2017]; Rail Sustainable Development Principles [RSSB, May 2016]; Business Case and Sustainability Assessment – Heathrow Airport North West Runway [Airports Commission, July 2015]
[97] OLEV- Agency of DfT/BEIS

of rapid chargepoints. The OLEV will continue to provide a range of support to grow the network further and to make it easy and convenient to own and use a plug-in vehicle. It is likely that more and more schemes will come forward which will allow for OLEV charging infrastructure in order to fulfil the Government's aims.

4.25 The Automated and Electric Vehicles Bill[98] will increase the access and availability of chargepoints for electric cars, while also giving the government powers to make it compulsory for chargepoints to be installed across the country and enabling drivers of automated cars to be insured on UK roads. It should be noted that this will need the associated energy infrastructure to enable rapid growth in the use of OLEVs through installation of large battery storage facilities as part of the National Grid network[99].

4.26 **Alternative Fuels –** the development of vehicles using alternative (cleaner) fuels, i.e. liquefied natural gas, hydrogen or liquefied petroleum gas or retrofitting existing vehicles could be an important element of reducing emissions of NOx and help in the goal towards zero emissions by 2050. The corresponding energy and fuel delivery infrastructure will also need to be developed to fuel the increase in demand.

4.27 **Other Measures** – there are a range of other measure that could form part of an AQAPs, including:

- commitment to working closely with relevant authorities responsible for highways and/or environmental regulation on possible emissions reduction measures where trunk roads and/or industrial sources are major local sources of pollutants;
- local traffic management measures to limit access to, or re-route traffic away from, problem areas. Low emission zones are a possible solution that some authorities have been looking at in this context;
- commitment to developing or promoting green travel plans and/or to using cleaner fuelled vehicles in the authority's own fleet;
- integrate the AQAP into the Local Transport Plan (LTP), where local road transport was a primary factor in the declaration of an AQMA, if not already completed;
- strategy for informing members of the public about air quality issues, perhaps via local newsletters or other media;
- quality partnerships with bus or fleet operators to deliver cleaner, quieter vehicles in return for the provision of better bus lanes or more flexible delivery arrangements;

[98] Bill 112 2017-19, currently progressing through bill stages.
[99] See Chapter 3 of Future Energy Scenarios 2017 [National Grid, July 2017]

- in the longer term, perhaps, congestion charging schemes and/or workplace parking levies.

4.28 **Rail electrification -** Electric trains typically provide faster and more reliable journeys than diesels. They are also better for the environment being zero emission at point of use as well as quieter and more carbon efficient. Around one third of rail lines are already electrified including most of the intercity routes and the commuting lines coming into London. As a result around 60% of passenger journeys are on electric trains. Further rail electrification is under way. Approximately 100 miles of the Great Western Main Line has been electrified over the last 8 years.

4.29 **Aviation –** current emissions at airports from aircraft are only 1% of UK NOx emissions. Road transport sources are the main contributor of emissions around airports so improvements in sustainability in access to and from airports are important in tackling air quality around airports. The UK government policy on aviation-related air quality is to seek improved international standards to reduce emissions from aircraft and to encourage the aviation industry to put in place measures to reduce emissions for which it is responsible. Industry is working together to reduce airport-related emissions through measures including operating aircraft more efficiently, introducing efficient new technology, using landing charges to incentivise cleaner aircraft, reducing vehicle emissions within the airport boundary and sustainable surface access.

4.30 **Ports and Shipping -** Connecting ships and other vessels to on shore electricity supply at ports and marinas can help reductions in pollutant emissions through alleviating the need for on board energy generation. The International Convention for the Prevention of Pollution from Ships (MARPOL)[100] regulates pollution from ships, and the overwhelming majority of states, including the UK, are parties to it. Annex VI sets out limits for sulphur oxides and NOx emissions, both inside and outside waters designated by the International Maritime Organisation (IMO) as an emission control area (ECA), which will need to be complied with. The UK government is also looking to reduce ship emissions near densely populated conurbations.

5 Case law

5.1 Gladman Developments Ltd v SSCLG and Swale BC, 06/11/2017, [2017] EWHC 2768 (Admin):

This was a s288 claim against an Inspector's decision on appeals against the refusal of planning permission for residential development and mixed residential and care home development in Newington, Kent.

The case was successfully defended in the High Court and it usefully confirmed the position regarding the application of *ClientEarth v SSEFRA* [2016] EWHC 2740 and the need for compliance with the Ambient Air Quality Directive (2008/50/EC) requirements 'in the shortest time

[100] MARPOL [IMO, 1983]

possible', of which the Air Quality Plan is the UK government's response. Additionally, the case clarified the application of paragraph 122 of the NPPF, and considerations regarding the effectiveness of mitigation techniques, and where there are conflicts with the Air Quality Action Plan (for the Air Quality Management Areas).

On another important point, the Judge concluded that the Inspector was not required to assume that the local air quality would improve by any particular amount within any particular timeframe.

Inspectors should therefore note the correct approach to casework as outlined in the judgment with regards to the consideration of the air quality requirements of the Ambient Air Quality Directive and the NPPF, and the impacts that any proposal would have on both Air Quality generally and compliance with the Directive.

5.2 R. (on the application of Shirley) v SSCLG, Canterbury CC & Corinthian Mountfield Ltd, 15/09/2017, [2017] EWHC 2306 (Admin):

This case involved a Judicial Review challenge to the SoS's refusal to call in a planning application for a major development in South Canterbury for 4,000 houses on agricultural land. The claimants argued that the SoS should have called in the application and refused planning permission because the proposed development would cause a further exceedance of limit values in breach of EU environmental law and it is the SoS's duty under the EU Directive 2008/50/EC to ensure that pollutant limit values are not exceeded. The claim was dismissed on all grounds. The Court found that the Directive does not require planning applications to be called in by the SoS to bring about compliance with air quality thresholds. Rather, the remedy provided for by the Directive in the event that limit values are exceeded is the production and implementation of an Air Quality Plan to cease exceedances and ensure that any exceedance period is kept as short as possible. The Court also found that it was not irrational for the SoS to point out that matters of substantive concern in relation to air quality could be addressed by the local planning authority or, alternatively, within a legal challenge to their decision. It was noted that the powers of the local planning authority were identical to the powers of the SoS in terms of granting or refusing planning permission or imposing any conditions.

5.3 Wealden DC v SSCLG, Lewes DC, South Downs NPA and Natural England 20/03/2017, [2017] EWHC 351 (Admin):

The challenge was brought under s113 of the Planning and Compulsory Purchase Act 2004, and sought to quash part of the core strategy prepared and adopted jointly by Lewes DC and South Downs NPA ('the Joint Core Strategy' or JCS). The challenge related to the requirement of the Habitats Directive and Regulations to consider the likely significant effects of projects or plans on European protected sites, individually or in-combination, before deciding whether Appropriate Assessment (AA) was required. The relevant effect in this case was with regard to increased levels of deposition of nitrogen resulting from increased traffic movements

on a road traversing the Ashdown Forest Special Area of Conservation (SAC). The Court considered two issues, whether:

a. the JCS was in breach of the requirements of the Habitats Directive, in that they failed to take account of the Wealden Core Strategy (WCS) when assessing whether the JCS would have a likely significant effect upon the SAC; and

b. the Inspector failed to have regard to representations made by the Wealden DC during the examination process that the WCS could have an in-combination likely significant effect on the SAC when considered with the JCS.

In respect of (a), the Judge found that the JCS HRA did take account of the in-combination effects at the scoping (likely significant effects) stage. However the Judge found that NE's advice, that the JCS would not have a significant environmental effect on the SAC either alone or in-combination and so could be scoped out of the appropriate assessment stage, was erroneous.

The scoping mechanism/methodology used by NE derived from Highways England's Design Manual for Roads and Bridges (DMRB) and, in part, from an assessment approach used by the Air Quality Technical Advisory Group (AQTAG), who provide scientific advice to Defra. The Judge found that the methodology was not scientific, sensible or logical. He could not understand why NE was advising that a cumulative assessment did not require the aggregation of the known effect from the WCS and the JCS when considering in-combination effect.

In respect of (b), the judge found that the Inspector should have recognised that NE's advice was wrong and that he acted in a Wednesbury unreasonable manner in accepting that advice. PINS Note 02/2017 sets out the case and implications in more detail.

6 Example Decisions

6.1 Planning Appeals:

a) APP/E5330/W/15/3006475 – Manor Way, Blackheath, London

Failure to determine proposed 130 residential units, main issue related to:

- Requirement for proposal to implement LEZ on the site in the form of a Low Emission Transport Scheme;
- RB Greenwich is AQMA, NPPF para 124 requires decisions to ensure development consistent with local AQAP.

The Inspector concluded that requirement was not necessary as other measures were in place, but dismissed on grounds of lack of affordable housing provision.

b) APP/V2255/W/15/3067553 & 3148140 – London Road, Newington, Kent

Failure to determine proposed 330 dwellings (+ 60 extra care units) & alternative proposal of 140 dwellings (+60 extra care units), 1 of 11 main issues related to:

- The effect of the proposal (incl. mitigation measure) on AQ, particularly on Newington and Rainham AQMAs (the LPA raised no objection on AQ grounds);
- NPPF para 124 requires decisions to ensure development consistent with local AQAP.

Inspector concluded that the proposal will have an adverse effect on AQ, particularly the AQMAs, conflicting with NPPF paras 120 & 124. Dismissed as the negative impacts on AQ and the effect on landscape character were not outweighed by the benefits.

c) APP/Q1445/W/15/3130514 – Ovingdean, Brighton

Refusal to grant proposal for 100 dwellings & associated infrastructure, 1 of 5 main issues related to:

- The effect of the proposal on AQ, particularly on Rottingdean AQMA;
- NPPF para 124 requires decisions to ensure development consistent with local AQAP; issues raised by third parties on adequacy of AQ assessment methodology for traffic data

The Inspector concluded that the proposal would not have an adverse effect on AQ as suitable measures would be in place to mitigate impact (e.g. promote sustainable transport). Dismissed as the negative impacts on the landscape character were not outweighed by the benefits.

d) APP/T5150/W/16/3157330 – Craven Park, Harlesdon, London

Refusal to grant proposal for 6-storey building for 21 self-contained flats, 1 of 2 main issues related to:

- The effect of the proposal on local AQ for the living conditions of future occupants of the proposed development;
- Appeal site lies within an AQMA and the site experiences high levels of NO2, due to location in the middle of a busy traffic island. Mitigation measures included an 'air handling' system to provide satisfactory internal air AQ.

The Inspector concluded that the proposal would provide a appropriate balance between internal AQ and satisfactory living conditions. Dismissed as the benefits were not outweighed by the harm to the character and appearance of the surrounding area and also conflicts with objectives of the London Plan and the NPPF with regard to AQ.

e) APP/Z0116/W/17/3167991 – St Philip's Marsh, Feeder Road, Bristol

Refusal to grant permission for proposed bio-diesel powered generators; 1 of 2 main issues related to:

- The effect of the proposal of the development on local AQ, with particular regard to human health;
- Appeal site is within the St Philip's Marsh AQMA; AQ assessment predicted that increase in NO_2 levels would result in breach of compliance for 1-hr mean at adjacent sites. Also concerns over calculations and methodology for predicted emissions for this type of generator.

Inspector concluded emission levels and mitigation measures have not been clarified and not been demonstrated that the impact would be acceptable. Appeal dismissed.

6.2 **Enforcement Appeals:**

APP/R5510/C/16/3163200 & 3163365 – Rainbow Industrial Estate, Trout Road, West Drayton, Middlesex

Enforcement Notice for use of land for car parking without planning permission; 1 of 4 main issues related to:

- The effect of the proposal of the development on local AQ;
- Appeal site is within the Hillingdon AQMA; AQ assessment confirmed the predicted increase in NO_2 levels would be 'imperceptible'. LPA argued that trip generation would produce emission levels higher than that at a public car park.

Inspector concluded that as emission levels are likely to be lower than those the LPA has permitted on the site and therefore the use would not be detrimental. Appeals were allowed and permission granted.

6.3 **Transport Casework:**

TWA/13/APP/06 – Midland Metro (Birmingham City Centre) Extension Land Acquisition and Variation Order and Request for Deemed Planning Permission

In July 2005 the SoS made The Midland Metro (Birmingham City Centre Extension, etc.) Order 2005, which authorised an extension to the Midland Metro Line 1 tramway in Edgbaston, Birmingham. The purpose of the Midland Metro (Birmingham City Centre Extension Land Acquisition and Variation) Order 201[X] is to confer further powers of compulsory acquisition on the West Midlands Passenger Transport Executive ("Centro") for the purpose of the works authorised by the 2005 Order (the compulsory acquisition powers of which expired in 2010), to authorise a variation in the alignment of the tramway authorised in Paradise Circus

Queensway by the 2005 Order and to authorise the compulsory acquisition of land associated with that variation.

The effects of the development in relation to air quality and dust were seen to be negligible and the development was seen as having benefits by improving connectivity with the rail network and therefore would promote modal shift consistent with the aims of the Local Transport Plan and the AQAP. Mitigation measures included restricting HGV movements and following the Construction Code of Practice (CoCP).

The Inspector recommended that the Order and deemed planning permission should not be granted due to the harm to a listed building, the setting of listed buildings and character and appearance of the area. The SoS decided to make the Order and grant the planning direction, subject to modifications.

Annex A

Preparation, and conduct at Inquiries, hearings and Site Visits where Air Quality is a main issue

1. As stated previously air quality can be a main issue in many types of proposal and many involved proposals of a significant scale, which are likely to go to inquiry because of the degree of public interest, and to be of a sufficient complexity and duration as to require a PIM. Guidance on the conduct of these is in ITM Chapter on Inquiries. There may also be an EIA in such cases and this is likely to be complex, so you should be familiar with the ITM Chapter on EIA. Also adding to the bulk of the file there may be lots of plans (especially in transport and waste cases), and perhaps a copy of the Environmental Permit application, the Permit decision document and Permit/Varied Permit (if decision is known).

2. If the proposal concerns an existing industrial facility, consider arranging an unaccompanied pre-inquiry visit. Alternatively, a visit during the inquiry, perhaps if an adjournment is needed, can be very helpful in understanding the evidence. It should also shorten the visit at the end of the inquiry, although this will normally still have to be carried out. If there is a lot of public objection, you may have to consider holding an evening session, but take account of the burden upon yourself in undertaking this. These matters should be canvassed at the PIM, if appropriate.

3. A written reps case may require more site visit time than normal, especially, where the proposal involves an industrial facility. The site may cover a large area and you should ensure that there is no ambiguity about the meeting place, asking the office to liaise with the parties about this if necessary. Sometimes the parties will offer to convey you around the site by vehicle: it is for you to decide whether this is appropriate, balancing the savings in time against the better impression that might be gained on foot. You will usually need to use your PINS-provided hard hat, protective footwear and high viz clothing. Where additional protection is required (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.

4. Much of this advice also applies to site visits carried out in inquiry or hearing cases. With a large site, plan your itinerary carefully to ensure you see all that you need to see. The same applies where you need to see other locations in the vicinity. Where the parties request you to tour a lot of locations, get them to prepare an itinerary and perhaps provide transport. If everyone involved can fit into a minibus or similar, this can be more effective (and safer) than travelling in convoy.

Annex B

Air Quality – Glossary of Terms

Term	Abbreviation	Explanation
1,3 Butadiene		1,3-butadiene, like benzene, is an organic compound emitted into the atmosphere principally from fuel combustion e.g. petrol and diesel vehicles. Unlike benzene, however, it is not a constituent of the fuel but is produced by the combustion of olefins. 1,3-butadiene is also an important chemical in certain industrial processes, particularly the manufacture of synthetic rubber. It is handled in bulk at a small number of industrial locations. Other than in the vicinity of such locations, the dominant source of 1,3-butadiene in the atmosphere is the motor vehicle. 1,3-Butadiene is a known, potent, human carcinogen.
Acid Deposition		The total atmospheric deposition of acidity is determined using both wet and dry deposition measurements. Wet deposition is the portion dissolved in cloud droplets and is deposited during precipitation events. Dry deposition is the portion deposited on dry surfaces during periods of no precipitation as particles or in a gaseous form. Although the term acid rain is widely recognized, the dry deposition portion ranges from 20 to 60% of total deposition.
Acid Rain		When atmospheric pollutants such as sulphur dioxide and nitrogen oxides mix with water vapour in the air, they are converted to sulphuric and nitric acids respectively. These acids make the rain acidic, hence the term 'acid rain'. Acid rain is defined as any rainfall that has an acidity level beyond what is expected in non-polluted rainfall. Acidity is measured using a pH scale, with the number 7 being neutral. Consequently, a substance with a pH value of less than 7 is acidic, while one of a value greater than 7 is basic. Generally, the pH of 5.6 has been used as the baseline in identifying acid rain, with precipitation of pH less than 5.6 is considered to be acid precipitation.
Air Pollution Bandings		The Air Pollution Information Service uses four bands to describe levels of pollution. The bands are Low, Moderate, High and Very High. Healthy people do not normally notice any effects from air pollution, except occasionally when air pollution is "Very High".
Air Pollution Bulletins		Air Pollution Bulletins are issued daily for each zone of the UK. The bulletins show current and forecast air quality for the next 24 hours. The forecast air quality is categorised using four Air Pollution Bandings and also using a numerical Air Pollution Index.
Air Pollution		The Air Pollution Index is a numerical index for air pollution ranging from 1 to 10 related to the Low, Moderate, High and

Index		Very High Air Pollution Bandings.
Air Pollution Information Service		The Air Pollution Information Service provides free of charge, detailed, easy-to-understand information on air pollution. This information is particularly important to people with medical conditions which may be aggravated by poor air quality. The latest information is available by freephone, on Ceefax and Teletext, and via the Internet. The Service gives regionally based summaries and detailed information on current pollution levels, as well as forecasts for the next 24 hours.
Air Quality Management Area	AQMA	If a Local Authority identifies any locations within its boundaries where the Air Quality Objectives are not likely to be achieved, it must declare the area as an Air Quality Management Area (AQMA). The area may encompass just one or two streets, or it could be much bigger. The Local Authority is subsequently required to put together a plan to improve air quality in that area - a Local Air Quality Action Plan.
Air Quality Objectives	AQO	The Air Quality Objectives are policy targets generally expressed as a maximum ambient concentration to be achieved, either without exception or with a permitted number of exceedances, within a specified timescale. The Objectives are set out in the UK Government's Air Quality Strategy for the key air pollutants.
Air Quality Standards	AQS	Air Quality Standards are the concentrations of pollutants in the atmosphere which can broadly be taken to achieve a certain level of environmental quality. The Standards are based on assessment of the effects of each pollutant on human health, including the effects on sensitive sub-groups.
Air Quality Strategy		The Air Quality Strategy for England, Scotland, Wales and Northern Ireland describes the plans drawn up by the Government and the Devolved Administrations to improve and protect ambient air quality in the UK in the medium-term. The Strategy sets Objectives for the main air pollutants to protect health. Performance against these Objectives is monitored where people regularly spend time and might be exposed to air pollution.
Ambient Air		The air (or concentration of a pollutant) that occurs at a particular time and place outside of built structures. Often used interchangeably with "outdoor air".
Annual Mean		The annual mean is the average concentration of a pollutant measured over one year. This is normally for a calendar year, but some emissions are reported for the period April to March, which is known as a pollution year. This period avoids splitting a winter season between two years, which is useful for pollutants that have higher concentrations during the winter months.
Automatic Monitoring		AQ Monitoring is usually termed "automatic" or "continuous" if it produces real-time measurements of pollutant concentrations. Automatic fixed point monitoring methods exist for a number of pollutants, providing high resolution data averaged over very short time periods. BAM, TEOM and

		FDMS instruments are all automatic monitors.
Beta Attenuation Mass Monitor	BAM	The BAM (Beta Attenuation Mass Monitor) measures particulate concentrations automatically. The mass density is measured using the technique of Beta attenuation. A small Beta source is coupled to a sensitive detector which counts the Beta particles. As the mass of particles increases the Beta count is reduced. The relationship between the decrease in count and the particulate mass is computed according to a known equation (the Beer-Lambert law).
Benzene	C_6H_6	Benzene is an aromatic organic compound which is a minor constituent of petrol (about 2% by volume). The main sources of benzene in the atmosphere in Europe are the distribution and combustion of petrol. Combustion by petrol vehicles is the largest component (70% of total emissions) whilst the refining, distribution and evaporation of petrol from vehicles accounts for approximately a further 10% of total emissions. Benzene is emitted in vehicle exhaust as unburnt fuel and also as a product of the decomposition of other aromatic compounds. Benzene is a known human carcinogen.
Black Smoke		Black Smoke consists of fine particulate matter. These particles can be hazardous to health especially in combination with other pollutants which can adhere to the particulate surfaces. Black Smoke is emitted mainly from fuel combustion. Following the large reductions in domestic coal use, the main source is diesel-engined vehicles. Black smoke is measured by its blackening effect on filters. It has been measured for many years in the UK. Now interest is moving to the mass of small particles regardless of this blackening effect.
Carbon Monoxide	CO	Carbon monoxide is a colourless, odourless gas resulting from the incomplete combustion of hydrocarbon fuels. CO interferes with the blood's ability to carry oxygen to the body's tissues and results in adverse health effects.
Chemiluminescence		The reference method for NO_2 monitoring. Which requires analyses of the samples in a laboratory and is therefore considerably more expensive than diffusion tubes. This technique alternates between two modes: • Measuring NO by reacting NO with ozone which forms a photon of light, which is measured; and • Catalysing the NO_2 in the air over a molybdenum convertor which converts the NO_2 to NO. The air is then reacted with ozone. This gives the mixing ratios of both NO and NO_2 together, which is known as oxides of nitrogen (NOx). NO_2 is then calculated as NOx minus NO. These results are then converted to concentrations in $\mu g/m^3$
Co-operative Programme for Monitoring and	EMEP	The EMEP programme consists on three main elements: 1. Collection of emissions data;

Evaluation of the Long Range Transmission of Air Pollutants in Europe		2. Measurements of air and precipitation quality; 3. Modelling of atmospheric transport and deposition of air pollution. EMEP regularly reports on emissions, concentrations and/or deposition of air pollutants, the quantity and significance of transboundary fluxes and related exceedances to critical loads and threshold levels. The EMEP programme is carried out in collaboration with a broad network of scientists and national experts that contribute to the systematic collection, analysis and reporting of emissions data, measurement data and integrated assessment results.
Committee on the Medical Effects of Air Pollutants	COMEAP	Committee on the Medical Effects of Air Pollutants, COMEAP is an Advisory Committee of independent experts that provides advice to Government Departments and Agencies on all matters concerning the potential toxicity and effects upon health of air pollutants.
Computer Programme to calculate Emissions from Road Transport	COPERT	is an software program for the calculation of air pollutant emissions from road transport. The technical development of COPERT is financed by the European Environment Agency (EEA), in the framework of the activities of the European Topic Centre on Air and Climate Change. In principle, COPERT has been developed for use to estimate emissions from road transport to be included in official annual national inventories. The COPERT methodology is also part of the EMEP/CORINAIR Emission Inventory Guidebook. The Guidebook, developed by the UNECE Task Force on Emissions Inventories and Projections, is intended to support reporting under the UNECE Convention on Long-Range Transboundary Air Pollution and the EU directive on national emission limits. The use of a software tool to calculate road transport emissions allows for a transparent and standardized, hence consistent and comparable data collecting and emissions reporting procedure, in accordance with the requirements of international conventions and protocols and EU legislation.
Data Capture		"Data capture" is the term given to the percentage of measurements for a given period that were validly measured.
Days with Exceedances		The number of days with exceedances is the number of days on which at least one period has a concentration greater than, or equal to, the relevant air quality standard (the averaging period will be that defined by that Standard). Since the National Air Quality Standards cover different time periods (15 min average, 24 hour running mean etc.), this gives a useful way of comparing data for different pollutants.
Deposition		See Acid Deposition
Diffusion Tube		inexpensive and many can be installed over a geographical area. The low cost per tube permits sampling at a number of points in the area of interest; which is useful in highlighting "hotspots" of high concentrations, such as alongside major roads. They are less useful for monitoring around point sources or near to industrial locations. It should be noted that

		diffusion tubes are not the reference method and the results are of low accuracy, which require bias adjustment factors to be used to 'correct' the results.
Dispersion Model		A dispersion model is a means of calculating air pollution concentrations using information about the pollutant emissions and the nature of the atmosphere. In the action of operating a factory, driving a car, or heating a house, a number of pollutants are released into the atmosphere. The amount of pollutant emitted can be determined from a knowledge of the process or actual measurements. Air Quality Objectives are set in terms of concentration values, not emission rates. In order to assess whether an emission is likely to result in an exceedance of a prescribed objective it is necessary to know the ground level concentrations which may arise at distances from the source. This is the purpose of a dispersion model.
Emission Factor		An emission factor gives the relationship between the amount of a pollutant produced and the amount of raw material processed or burnt. For example, for mobile sources, the emission factor is given in terms of the relationship between the amount of a pollutant that is produced and the number of vehicle miles travelled. By using the emission factor of a pollutant and specific data regarding quantities of materials used by a given source, it is possible to compute emissions for the source. This approach is used in preparing an emissions inventory.
Emission Inventories		Emissions inventories estimate the amount and the pollutants that are emitted to the air each year from all sources. There are many sources of air pollution, including traffic, household heating, agriculture and industrial processes. The UK National Atmospheric Emissions Inventory (NAEI) can be accessed: http://www.naei.org.uk/
Environmental Quality Standards	EQS	Values, defined by regulation that specifies the maximum permissible concentration of a potentially hazardous chemical, generally in air or water. For Air these are defined in the Ambient Air Quality Directive (2008/50/EC).
Expert Panel on Air Quality Standards	EPAQS	The Expert Panel on Air Quality Standards (EPAQS) was set up in 1991 to provide independent advice to the UK Government on air quality issues, in particular regarding the levels of pollution at which no or minimal health effects are likely to occur. The Panel's recommendations were adopted as the benchmark standards in the National Air Quality Strategy. EPAQS has now been merged into the Department of Health's Committee on the Medical Effects of Air Pollutants (COMEAP).
European Union Air Quality Directives		The European Union has been legislating to control emissions of air pollutants and to establish air quality objectives since the early 1970s. European Directives on ambient air quality require the UK to undertake air quality assessment, and to report the findings to the European Commission on an annual basis. Historically this has been under the Air Quality Framework Directive (1996/62/EC) and the Daughter Directives (DD) (1st DD -1999/30/EC, 2nd DD -2000/69/EC, 3rd DD 2002/3/EC and 4th DD- 2004/107/EC). In June 2008, a new Directive came into force: the Council Directive on

		ambient air quality and cleaner air for Europe (2008/50/EC), known as the "Air Quality Directive". This Directive consolidates the first three Daughter Directives, and was transposed into the Regulations in England, Scotland, Wales and Northern Ireland in June 2010. The 4th Daughter Directive remains in force.
Exceedance		An exceedance defines a period of time during which the concentration of a pollutant is greater than, or equal to, the appropriate air quality criteria. For Air Quality Standards, an exceedance is a concentration greater than the Standard value. For Air Pollution Bandings, an exceedance is a concentration greater than, or equal to, the upper band threshold.
Filter Dynamics Measurement System	FDMS	The Filter Dynamics Measurement System (FDMS) monitors the core and volatile fractions of airborne particulate matter. The instrument is based on TEOM technology, measuring the mass of particles collected on a filter, whilst also accounting for loss of semi volatile material. The FDMS records gravimetric equivalent particulate data. Measurements recorded in the UK by the instruments are now used in the Volatile Correction Model (VCM) to correct TEOM measurements for the loss of volatile components of particulate matter that occur due to the high sampling temperatures employed by the instrument.
Gravimetric Measurements of Particulate Matter		Instruments are available which pass air through a filter which is weighed before and after sampling. The concentration of PM_{10} or $PM_{2.5}$ can then be calculated as the increase in mass of the filter divided by the volume of the sample expressed to ambient conditions. Due to the very tight controls that should be applied to the filter weighing and conditioning procedures, local authorities are advised to use an independent filter weighing service. The service should be UKAS.
Greenhouse Gases	GHG	Greenhouse gases are atmospheric gases such as carbon dioxide, methane, chlorofluorocarbons, nitrous oxide, ozone, and water vapour that slow the passage of re-radiated heat through the Earth's atmosphere.
Hydrocarbons		Hydrocarbons are compounds containing various combinations of hydrogen and carbon atoms. They are emitted into the air by natural sources (e.g. trees) and as a result of fossil and vegetative fuel combustion, fuel volatilization, and solvent use. Hydrocarbons are a major contributor to smog.
Local Air Quality Action Plan	LAQAP	When a Local Authority has set up an Air Quality Management Area, AQMA, it must produce an action plan setting out the measures it intends to take in pursuit of the Air Quality Objectives in the designated area. The plan should be in place, wherever possible, within 12-18 months of designation and should include a timetable for implementation. http://laqm.defra.gov.uk/action-planning/action-planning.html

Local Air Quality Management	LAQM	The Local Air Quality Management (LAQM) process requires Local Authorities to periodically review and assess the current and future quality of air in their areas. A Local Authority must designate an Air Quality Management Area (AQMA) if any of the Air Quality Objectives set out in the regulations are not likely to be met over a relevant time period. http://www.defra.gov.uk/environment/quality/air/airquality/local/
Maximum Hourly Average		The maximum hourly average is the highest hourly reading of air pollution obtained during the time period under study.
Microgrammes per cubic meter	$\mu g/m^3$	A measure of concentration in terms of mass per unit volume. A concentration of 1 $\mu g/m^3$ means that one cubic metre of air contains one microgram (10-6 grams) of pollutant.
National Atmospheric Emissions Inventory	NAEI	The NAEI compiles annual estimates of UK emissions to the atmosphere from sources such as road transport, power stations and industrial plants. These emissions are estimated to inform policy, and to help to identify ways of reducing the impact of human activities on the environment and our health. The NAEI is funded by Defra, the Scottish Executive, the Welsh Assembly Government and the Department for the Environment in Northern Ireland.
National Air Quality Statistics		The emissions and concentration statistics shown in the air quality database are National Statistics. National Statistics are produced to high professional standards set out in the National Statistics Code of Practice. They undergo regular quality assurance reviews to ensure that they meet customer needs. They are produced free from any political interference.
Oxides of Nitrogen	NO_x	Combustion processes emit a mixture of nitrogen oxides (NO_X), primarily nitric oxide (NO) which is quickly oxidised in the atmosphere to nitrogen dioxide (NO_2). Nitrogen dioxide has a variety of environmental and health impacts. It is a respiratory irritant which may exacerbate asthma and possibly increase susceptibility to infections. In the presence of sunlight, it reacts with hydrocarbons to produce photochemical pollutants such as ozone. NO2 can be further oxidised in air to acidic gases, which contribute towards the generation of acid rain.
Ozone	O_3	Ozone (O_3) is not emitted directly into the atmosphere, but is a secondary pollutant generated following the reaction between nitrogen dioxide (NO_2), hydrocarbons and sunlight. Whereas nitrogen dioxide acts as a source of ozone, nitric oxide (NO) destroys ozone and acts as a local sink (NO_X-titration). For this reason, O_3 concentrations are not as high in urban areas (where high levels of NO are emitted from vehicles) as in rural areas. Ambient concentrations are usually highest in rural areas, particularly in hot, still and sunny weather conditions which give rise to summer "smogs".
Polycyclic Aromatic Hydrocarbons	PAHs	Polycyclic Aromatic Hydrocarbons (PAHs) belong to a large group of organic compounds, several of which have been shown to be carcinogenic. The Expert Panel on Air Quality Standards (EPAQS) (now merged into the Department of

		Health's Committee on the Medical Effects of Air Pollutants (COMEAP)) recommended a standard for PAHs of 0.25 ng/m^3 using benzo[a]pyrene (B(a)P) as a marker compound.
Particulate Matter	PM	Airborne PM includes a wide range of particle sizes and different chemical constituents. It consists of both primary components, which are emitted directly into the atmosphere, and secondary components, which are formed within the atmosphere as a result of chemical reactions. Of greatest concern to public health are the particles small enough to be inhaled into the deepest parts of the lung. Air Quality Objectives are in place for the protection of human health for PM_{10} and $PM_{2.5}$ – particles of less than 10 and 2.5 micrometres in diameter, respectively.
Parts per billion	ppb	Parts per billion, ppb, describes the concentration of a pollutant in air in terms of volume ratio. A concentration of 1 ppb means that for every billion (10^9) units of air, there is one unit of pollutant present.
Parts per million	ppm	Parts per million, ppm, describes the concentration of a pollutant in air in terms of volume ratio. A concentration of 1 ppm means that for every million (10^6) units of air, there is one unit of pollutant present.
Percentile		A percentile is a value below which that percentage of data will either fall or equal. For instance, the 98th percentile of values for a year is the value below which 98% of all of the data in the year will fall, or equal.
Persistent Organic Pollutants	POPs	Persistent Organic Pollutants (POPs) are chemical substances that persist in the environment as they are resistant to environmental degradation via chemical, biological or photolytic processes. The compounds are known to bioaccumulate through the food web and pose a risk of causing adverse effects to human health and the environment. These include dioxins and furans (see TOMPS).
Plume		Steam of gas issuing from a stack which retains its identity and is not completely dispersed in the surrounding air. Near the stack the plume is often visible due to water droplets, smoke or dust that it contains, but often persists downwind after it has become invisible to the naked eye (albeit in much less concentrations).
Running mean		This is a mean - or series of means - calculated for overlapping time periods, and is used in the calculation of several of the National Air Quality Standards. For example, an 8-hour running mean is calculated every hour, and averages the values for eight hours. The period of averaging is stepped forward by one hour for each value, so running mean values are given for the periods 00:00 - 07:59, 01:00 - 08:59 etc. This can also be considered as a "moving average". By contrast, a non-overlapping mean is calculated for consecutive time periods. Using the same 8-hour mean example, this would give values for the periods 00:00 - 07:59, 08:00 - 15:59 and so on. There are, therefore, 24 possible 8-hour running means in a day (calculated from

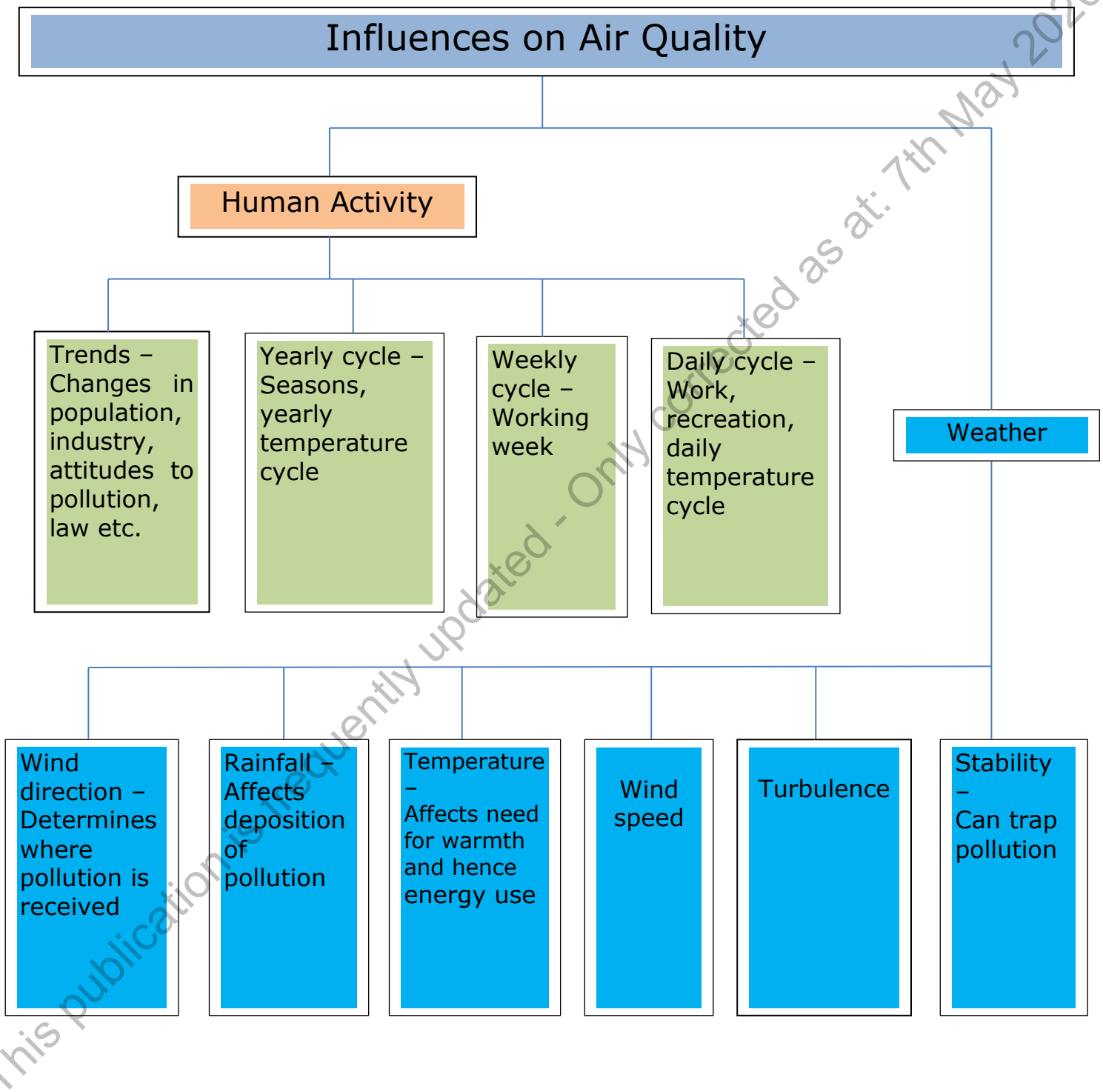
		hourly data) and 3 non-overlapping means.
Scrubber		Device for flue gas cleaning e.g. spray towers, packed scrubbers and jet scrubbers – removes particles down to 1 micrometre in diameter when used with water. Can also control gaseous pollutants (used with alkaline solution). Scrubbers produce sludge, that requires dewatering and disposal.
Stack gases		The gases discharged up a chimney stack for dispersion into the atmosphere. May also be termed 'Flue gases' or 'Exhaust gases'.
Sulphur Dioxide	SO_2	Sulphur dioxide is a corrosive, acidic gas which combines with water vapour in the atmosphere to produce acid rain. Both wet and dry deposition have been implicated in the damage and destruction of vegetation and in the degradation of soils, building materials and watercourses. SO_2 in ambient air is also associated with asthma and chronic bronchitis.
Tapered Element Oscillating Microbalance	TEOM	TEOMs collect particles on a small oscillating filter. The change in oscillation frequency of the filter is proportional to the change in PM_{10} and $PM_{2.5}$ concentrations. TEOMs are operated at 50°C and as such lose volatile components of the PM_{10} and $PM_{2.5}$. Therefore correction factors need to be taken into account.
Toxic Organic Micropollutants	TOMPs	Toxic organic micropollutants (TOMPs) are produced by the incomplete combustion of fuels. They comprise a complex range of chemicals some of which, although they are emitted in very small quantities, are highly toxic or carcinogenic. Compounds in this category include PAHs (Polycyclic Aromatic Hydrocarbons), PCBs (PolyChlorinated Biphenyls), Dioxins and Furans.
Trajectory Model		The trajectory model is used to predict episodes of photochemically generated pollutants in the summer, where long-range transport is an important factor in producing high UK concentrations. It uses the output of numerical weather prediction models as its input, and predicts how air masses have been transported for the preceding 96 hours. These pathways are known as "back trajectories". The model uses a simplified chemical scheme to predict the formation of ozone as the air travels to the UK. Concentrations of the secondary particle contribution to PM_{10} are also predicted by this model.
Volatile Organic Compounds	VOCs	VOCs are organic chemicals that have a high vapour pressure at ordinary room temperature. The EU defines VOCs as having a boiling point less than or equal to 250^0C (482^0F). Their high vapour pressure results from a low boiling point, which causes large numbers of molecules to evaporate or sublimate from the liquid or solid form of the compound and enter the surrounding air, a trait known as volatility. For example, formaldehyde, which evaporates from paint, has a boiling point of only –19°C (–2°F). VOCs are numerous, varied, and ubiquitous. They include both human-made and naturally occurring chemical

		compounds. Most scents or odours are of VOCs. Some VOCs are dangerous to human health or cause harm to the environment. Anthropogenic VOCs are regulated by law, especially indoors, where concentrations are the highest. Harmful VOCs typically are not acutely toxic, but have compounding long-term health effects. Because the concentrations are usually low and the symptoms slow to develop, research into VOCs and their effects is difficult.
Zones and Agglomerations		The UK has been divided into zones and agglomerations for the purposes of air pollution monitoring, in accordance with EC Directive 96/62/EC. There are 16 zones. They Match: 1. The boundaries of England's Government Offices for the Regions; and 2. The boundaries agreed by the Scottish Executive, National Assembly for Wales, and Department of the Environment in Northern Ireland There are 28 agglomerations in the UK. An agglomeration is defined as any urban area with a population greater than 250,000.

Selected definitions adapted from:
Dictionary of Environmental Science and Technology (Fourth Edition), Porteous, Andrew, Wiley 2008; and
Defra Air Quality Glossary at - https://uk-air.defra.gov.uk/air-pollution/glossary

Annex C

Relationship between influences on air quality



Appeals against Conditions

What's New since the last version

Changes highlighted in yellow made 19 April 2017:

- Annex B (pages 16-17) - minor amendments highlighting that s73 cannot apply if the original permission has lapsed - even if this is during the appeal process.
- Annex D (page 24 and footnote 29) - reference to *Avon Estates* judgment added. It clarified that the temporary permission ceases to exist at the end of the specified period, as do its conditions, **except** for the time limiting condition which survives until the time for enforcement action has passed.

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Introduction

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

2 References are to the Town and Country Planning Act 1990 (the Act) unless otherwise stated.

3 General practice advice about the use of conditions can be found in the Conditions chapter.

4 This advice applies to casework in England only[1].

The different types of cases

5 There are several different types of conditions appeals. It is important that you establish which type is before you, that you are clear about the powers you have and that you select the correct template. You should clarify your approach in a preliminary paragraph if there is any doubt or confusion about the type of case or if you consider the main parties may have followed an incorrect approach.

6 Appeals will have been submitted in an attempt to 'remove' or 'modify' a condition which it is argued is not necessary. For example, the appeal may seek to remove a restriction on opening hours or it may seek longer opening hours.

7 The five main types of conditions appeals are set out below. The first three are the most common:

A. Type 1 (s79) – appeals directly following a conditional **grant** of planning permission (see Annexe A)

B. Type 2 (s73) – appeals following a **refusal** of an application to carry out development without complying with a condition imposed on a permission (see Annexe B)

C. Type 3 (s73A) - 'Condition breached' – appeals following a **refusal of an application to 'retain' development** without complying with a condition imposed on the permission (see Annexe C)

D. Type 4 – appeals seeking to extend **'temporary permissions'** (see Annexe D)

E. Type 5 – appeals seeking to **extend standard time limits** for implementing a permission (see Annexe E)

The flow chart in Annexe F should help you decide which type of appeal you are dealing with. A summary checklist is at Annexe G.

[1] PINS Wales produces separate material for Wales which summarises differences in policy.

8 Examples of the standard templates for each type of appeal are set out in Annexe H.

National planning policy and guidance

9 National policy on the use of conditions, including the 'six tests' is in the National Planning Policy Framework in paragraphs 203-206. Suggested model conditions can be found in Appendix A (which remains extant) of the now cancelled Circular 11/95 and on the Planning Portal (these will be replaced and updated by PINS in an expanded list of conditions in the forthcoming DRDS interim solution). More detailed guidance can be found in the government's Planning Practice Guidance - in particular see the following:

> What options are available to an owner who does not wish to comply with a condition?[2]
>
> Flexible options for planning permissions (which covers 'non-material amendments', 'minor material amendments' and amending conditions under section 73).

'Minor material amendments' and 'non-material amendments'

10 'Minor material amendments' can be sought by making an application under s73 to vary or remove a condition attached to a planning permission. There is no statutory definition of a minor material amendment although the Planning Practice Guidance explains what might constitute a 'minor material amendment'[3] and that s73 can only be used if there is a condition on the original permission which lists the approved plans which can be varied.[4] There is a right of appeal under s78.[5]

11 If an application has been made retrospectively to amend approved plans, you can proceed to determine the appeal in accordance with s73A and grant retrospective permission for the development already carried out.[6]

12 The Planning Practice Guidance provides guidance on making a 'non-material amendment' to a planning permission under s96A of the Act.[7] The application is made to the LPA and there is no right of appeal.[8]

[2] Planning Practice Guidance ID 21a-031-20140306 in the section on 'Use of Planning Conditions'
[3] See Planning Practice Guidance ID 17a-017-20140306
[4] See Planning Practice Guidance ID 17a-018-20140306 – it is possible to add a plan(s) condition using an application under s96A and this enables the use of a s73 or s73A application.
[5] See Planning Practice Guidance Annex A: summary comparison table in ID 17a-019-20140306
[6] *Lawson Builders Ltd v SSCLG* [2015] EWCA Civ 122
[7] See Planning Practice Guidance ID 17a-002-20140306 to 17a-012-20140306
[8] See Planning Practice Guidance ID 17a-012-20140306

Cases that are not really condition appeals

13 Some appeals may relate to only a part of a site that was subject to a wider planning permission. For example, this could arise on 'open plan' estates where the original permission was conditioned to prevent walls and fences being erected to the front of houses (often by removing permitted development rights).

14 If a householder now wants to carry out a development which is precluded by condition, they may seek to achieve this by applying to:

- have the condition removed for their plot (although this may not specifically achieve a permission for what they seek to do – for example, if the works they propose would require planning permission)
- erect the fence, wall or extension etc (sometimes with no reference to the previous restrictive condition)

15 The intention of such conditions will generally be to bring the development under LPA control rather than to absolutely prohibit any such development. Consequently, provided you have details of the development which is being proposed, it is usually best to treat the application as seeking planning permission for the development as sought by the appellant (rather than as an attempt to modify the condition insofar as it relates to their plot). Explain your approach in a procedural matter. If this might come as a surprise or prejudice the interests of the parties – seek their views.

Prior approvals

16 Decision-makers have sometimes imposed conditions on prior approval cases that are not deemed conditions as set out in the GPDO. Although the legality of doing so has not been tested by the Courts, the GPDO does not provide any general authority for imposing additional conditions beyond the deemed conditions. There are however specific powers in the two circumstances below:

- under paragraph A.4(12), Schedule 2, Part 1 of the GPDO "The local planning authority may grant prior approval unconditionally or subject to conditions reasonably related to the impact of the proposed development on the amenity of any adjoining premises."; and,

- under paragraph W(13) of Schedule 2, Part 3 of the GPDO "The local planning authority may grant prior approval unconditionally or subject to conditions reasonably related to the subject matter of the prior approval.".

17 In the above two circumstances the options available to you are analogous to those in 'ordinary' conditions appeals, except that the subject matter of the condition must be limited to that specified.

18 Where conditions have been imposed where the GPDO makes no provision for them, then they should be removed.

Refusal to approve details required by a condition (including reserved matters)

19 These are appeals against the refusal by the LPA to approve details required by a condition. The most common are reserved matters appeals following the grant of outline permission. However, appeals can be made in respect of any condition which requires the submission and approval of details. In effect, the appeal is seeking approval for the submitted details; which you will either approve (if the details submitted address the requirements of the condition) or dismiss – it is not for you to reconsider the planning permission or discuss whether the condition is necessary (the appeal before you is not one against the condition).

20 The appeal is made under s78(1)(b) – "*the Right to appeal against planning decisions and failure to take such decisions. (1) Where a local planning authority - (b) refuse an application for any consent, agreement or approval of that authority required by a condition imposed on a grant of planning permission or grant it subject to conditions …*"

21 Examples of the templates to use are provided in Annexe H.

Deemed Discharge of Conditions (England s74A (2) (a))

22 To ensure planning conditions are cleared on time so that development granted planning permission can start on site without delay, planning provisions within the Infrastructure Act 2015 made amendments to the TCPA 1990. This allowed the Secretary of State to provide by development order (2015 DMPO)[9] for the deemed discharge of certain conditions[10] attached to planning permissions which require the consent, agreement or approval of the LPA.

See Annex J for details of the s74A provisions.

'Invalid' conditions

23 The power to impose conditions is widely drawn widely in legislation (s70(1) and s72). However, the courts have limited the decision-maker's discretion to impose conditions in three ways; firstly, a condition must fulfil some planning purpose; secondly it should fairly and reasonably relate to the development being allowed and thirdly it should not be Wednesbury unreasonable (see House of Lords case – *Newbury DC v SSE*

[9] The Town and Country Planning (Development Management Procedure) (England) Order 2015

[10] S74A (6) exempt conditions ie ones that should only be discharged where a formal decision has been made. Schedule 6 of 2015 DMPO lists exemptions.

[1981] AC 578). In addition, government policy in the Framework states that planning conditions should only be imposed where they comply with the six well known tests. The six tests overlap with the Newbury principles.

24 A condition which fails to comply with the Newbury principles and the six tests will be invalid as the six tests must all be satisfied.[11] Consider:

a. Does the disputed condition comply with the three legal principles in 'Newbury'? Does it comply with the 6 tests?

b. If not, having regard to the intended purpose of the condition, could any defects be resolved by redrafting?

c. If not, is the condition severable? (ie could the condition be removed without causing unacceptable harm?) If the control sought by the condition is necessary, the condition would go to the heart of the permission and it would not be severable.

d. If the condition is not severable (ie because without such control there would be unacceptable harm) and the defect cannot be rectified by re-drafting, can any essential control be secured by non-planning powers or via an executed s106?

25 After considering stages a-d above the possible appeal outcomes are:

Section 79 (Type 1)

- If the condition is not necessary and so is severable, you have the power to vary the original permission by deleting the disputed condition.

- If the condition is necessary (and so is not severable) and the defects to the condition can be resolved by redrafting, you have the power to vary the original permission (ie by deleting the condition and imposing a replacement).

- If the matter that the condition sought to control is necessary, the defects to the condition cannot be resolved by redrafting and there is no other means of control, you would need to dismiss the appeal and refuse planning permission (you will first need to provide the appellant with an opportunity to withdraw the appeal – see A10 for further advice).

Section 73 (Type 2)

- If the condition is not necessary and so is severable, you can allow the appeal and grant permission without the disputed condition – the appellant could then choose which permission to implement

[11] See *Seymour Holdings Pension Fund v SSCLG* [2013] EWHC 3555 (Admin) which provides a good summary of what you need to have in mind when dealing with appeals against conditions

- If the defects to the condition could be resolved by redrafting you would grant a new planning permission subject to a varied condition. However, the appellant would still be able to implement the original permission.

- If the defects cannot be resolved by redrafting, the condition is necessary (and so not severable) and there are no other means of control, you would need to dismiss the appeal. Issues relating to the extant permission would be for the appellant and Council to deal with.

Section 73A (Type 3)

- The options are the same as for s73 Type 2.

Writing the decision

Main Issues and introductory paragraphs

26 You need to make sure that the phrasing of your main issue is wide enough to cover all the matters you need to address. Examples include:

1. Whether the condition is necessary [and reasonable] having regard to [the safety of pedestrians, cyclists and drivers using ….]

2. The main issue is the effect that removing [varying] the condition would have on [the safety of pedestrians, cyclists and drivers using ….]

3. The main issue is the effect that varying the opening hours would have on [the living conditions of neighbouring residents on …]

4. The main issues are the effect that removing condition # would have on the living conditions of neighbours and the effect that removing condition # would have on the character and appearance of the area.

27 It can be helpful to briefly explain which conditions are in dispute and what the appellant is seeking. Sometimes your explanation of the relevant circumstances can lead into your main issue (under a heading that might be entitled '*Background and main issue*'). For example:

A hot food takeaway is now trading at the appeal site. The appellant wishes to extend the opening hours from those originally imposed to between 0600 and 2300 hours every day of the week. The main issue is the effect that these proposed opening times would have on the living conditions of neighbouring residents in [].

Planning permission has been granted for 4 dwellings. The appeal seeks permission to carry out the development without complying with condition 12. This requires the provision of a footway along []. The main issue is whether the footway is necessary to ensure the safety of pedestrians, cyclists and drivers.

28 The issue (ie the alleged harm if the condition were varied or removed) should be clear from the LPA's appeal statement (and the reason for refusal in s73/s73A cases). Usually, the LPA's concern will stem from the reason given for the condition when permission was granted. However, the LPA may now argue that the condition is necessary for different or additional reasons. Your consideration of the appeal must be based on present circumstances and so is not confined to the original reasons given for imposing the condition. If the LPA has argued that there are additional/different reasons, it can be helpful to explain this in a background paragraph.

Reasoning

29 In appeals against conditions cases have you considered the following:

1. Is the condition necessary? What would be the effect of removing or varying the condition? Would it lead to any significant harm? Does it still serve a useful purpose having regard to the current development plan and material considerations?

2. If the condition is necessary, is it enforceable, relevant to planning, relevant to the development to be permitted, precise and reasonable in all other respects? If not, could it be amended so that it would comply with these tests?

3. Is your conclusion clear? Will the parties understand the outcome? The term 'allow' can be misleading. This is because it is used where a disputed condition is retained but in a modified (and sometimes more onerous) form. Consequently, in some cases, although you may be allowing the appeal, the appellant will not achieve what they sought. Do you need to explain clearly what the effect of your decision is?

4. Have you referred to and, as necessary, concluded against relevant development plan policies and SPD, relevant parts of the Framework (including the 6 tests) and the Planning Practice Guidance (if relevant)?

5. You do not generally need to refer to non-disputed conditions, unless you have significant concerns about them.

Other casework issues

Multiple permissions, applications and appeals

30 Sometimes you will find that there has been a long history of planning permissions, s73 applications and appeals against conditions on the site. You will need to be sure about which condition, from which planning permission is in front of you. If it is unclear, seek clarification from the parties. It is usually best to explain your approach in a procedural paragraph or at the start of your reasoning.

Previous permissions allowed by an LPA under s73

31 There is no power under s73 to vary or remove a condition on an existing permission.[12] The only power to do this is at appeal under s79. However, you will sometimes find that, where an LPA has previously allowed a s73 application to remove or vary a condition, the decision notice will purport to amend the original decision by deleting or varying the condition (rather than by granting a new permission). However, the effect of the decision will have been to create a second permission. You will need to be clear which decision your appeal relates to. In such cases, it can be helpful to set out the basis of your approach in a procedural paragraph.

32 In the circumstances described above, the question of whether or not any conditions imposed upon the original permission have been transferred over to the second permission will be arguable and is likely to depend on an interpretation of the precise wording used on the decision notice[13].

33 If you are allowing the appeal you will need to consider how to describe the development in your formal Decision. Usually you will use the description of development given on the planning permission (for example, "the erection of 10 houses"). However, if the LPA's s73 approval purports to vary the original permission, there may be no description of development (for example, it may just refer to amending the original permission by deleting/varying a condition). In most such cases you will usually be able to use the description of development from the original approval, but if in doubt seek clarification from the parties.

Appeals which would significantly change the proposal

34 The Planning Practice Guidance states that, although conditions can be used to make a minor modification to a proposal, conditions that would make a development substantially different from that set out in the application should not be used.[14] By extension there may be cases where removing a condition would significantly change the proposal. The following example illustrates this.

> The LPA gave permission for the replacement of an existing house on a different siting within the same plot. The site was in a rural location where the development plan accepted replacement dwellings but precluded additional dwellings. The permission was, therefore, subject to a condition which required that the existing house was demolished before the replacement house was occupied. This reflected the

[12] See Planning Practice Guidance ID 21a-031-20140306, ID 17a-015-20140306 and advice in this guide on Type 2 appeals – i.e. whatever the outcome of a s73 application or appeal, the original permission will remain unaltered with all its original conditions intact. If a s73 application or appeal is allowed a second separate planning permission is created.

[13] See discussion in *R (oao) Reid & Reid Motors v SSTLR & Mid-Bedfordshire DC* [2002] EWHC 2174 (Admin)

[14] See Planning Practice Guidance ID 21a-031-20140306 - "provided the conditions do not materially alter the development that was subject to the original permission" and ID 21a-012-20140306 - "A condition that modifies the development in such a way as to make it substantially different from that set out in the application should not be used."

description of development which referred to the demolition of the existing house. The appellant then sought to have the condition removed. This would have resulted in two dwellings on the site, instead of the one originally applied for. You would need to consider whether such a significant change could be achieved through an appeal against a condition.

35 If amending the condition would result in a material change to the proposal that could prejudice the interests of 3rd parties, you may need to dismiss the appeal for that reason without addressing the substantive issues relating to the disputed condition. However, it is likely that you would need to first seek the views of the main parties. If the appeal is dismissed or withdrawn, the appellant would then have the option of applying to the LPA to seek planning permission for the revised development.

Appeals against conditions where development has already been carried out

36 In the recent case of *Lawson Builders Ltd v SSCLG* [2015] EWCA Civ122 the Court of appeal confirmed that there is a fluidity between sections 73 and 73A and that in an appropriate case (depending upon the nature and stage of the development), a decision maker considering an application (made under s73) to proceed with a development without complying with conditions attached to an existing permission might grant, under s73A, retrospective permission for development already carried out and in addition impose conditions under s70.

37 In the Lawson case, the circumstances were that the development had been carried out in accordance with the existing permission albeit in breach of a condition precedent (strictly irremediable) and therefore the court said it was implicit that the Inspector had been using the power given by s73A to grant permission retrospectively which caused no prejudice. Although the court did not indicate in what instances use of the power might not be appropriate, an example might be where the development that has been carried out is quite different from that previously granted, such as a material change of use or a change between use/operations, in which event prejudice might be caused by use of the s73A power.

Annexe A

A. Type 1 (s79) appeals

A1. What is the appeal?

The appeal is made directly against a condition imposed on a planning permission. The appellant will have a concern about one or more conditions and will be seeking to have that condition removed or modified.

A2. Who makes the appeal and when?

The appeal must be made by the original applicant within 6 months of the grant of permission.[15]

A3. Is there a decision notice?

There will be only one decision notice – that granting planning permission for the development subject to conditions. This is because the appeal is made directly against a condition which has been imposed on that planning permission. Consequently, the LPA has not refused permission for anything.

A4. What is the relevant legislation?

The right of appeal is provided in s78(1)(a) of the Act. This provides the applicant with the right to appeal:

> "*where an LPA refuse an application for planning permission or grant it subject to conditions.*"

A5. What powers do I have?

In determining the appeal, s79(1) allows the Inspector to:

> *"(a) allow or dismiss the appeal, or*
> *(b) reverse or vary any part of the decision of the LPA (whether the appeal relates to that part or not) and may deal with the application as if it had been made to him in the first instance."*

Consequently, the original planning permission is at risk and you have the authority to reverse the original decision (ie to refuse planning permission), or to amend or delete existing conditions and/or to impose new ones.

A6. Why does PINS call this type a S79 appeal?

[15] Appeals made under the 'Householder Appeals Service' (HAS) and 'Commercial Appeals Service' (CAS) must be made within 12 weeks from the date of the local planning authority's decision.

Although the right of appeal is under s78, PINS refers to these appeals as 's79' to distinguish them from appeals which follow a refusal of permission by an LPA (ie Types 2 and 3). The term s79 is not used in the decision template.

A7. What happens if I decide the disputed condition is necessary?

You would dismiss the appeal. The permission would remain unaltered.

A8. What happens if I decide the disputed condition is necessary but should be modified?

This might occur where you agree with an appellant's argument that the condition should be modified (for example, to extend opening hours) or where you consider modification is necessary to meet the 6 tests (for example, to make the condition enforceable).

In these circumstances, you would allow the appeal and alter the permission by removing the condition and replacing it with a modified version. You should not vary the permission so that part of a condition remains in force, but the remainder is superseded by a new condition. Instead, in order to ensure clarity, you should delete the original condition in its entirety and replace it with a new one.

So for example, if a condition restricted opening to 1100 to 1300 and 1700 to 2200, and you intend to extend evening opening until 2300 but leave lunchtimes unaltered – you should delete the original condition and replace it with one specifying all the new hours (ie 1100-1300 and 1700-2300).

A9. What happens if I decide the disputed condition is unnecessary?

You would allow the appeal and vary the original permission by removing the condition. The original planning permission and your decision would be read together. You would not be creating a new separate planning permission for the development.

A10. What happens if I consider that the original planning permission was fundamentally flawed?

You would dismiss the appeal and refuse planning permission – so reversing the original decision. However, this would be an unusual occurrence. You should ask yourself - is the original decision so fundamentally flawed that it would result in unacceptable harm?

A decision to refuse permission would clearly put the appellant in a worse position than they were in before they made the appeal and is also very likely to come as a surprise. If you are convinced that planning permission should not have been granted in the first place, to ensure natural justice you should ask the case officer to send a letter to the appellant briefly explaining your concerns and giving them the opportunity to comment and withdraw the appeal. The case officer will have a standard letter that can be adapted. If the appeal is not then withdrawn you can proceed to make your decision.

A11. What happens if I decide that there is a problem with a condition that has not been disputed by the appellant or that an additional condition is necessary?

You have the power under s79 to vary or add a condition. However, would significant harm result if an existing condition is not amended or if a new condition is not imposed? In most cases you will not need to look beyond the disputed conditions.

If you do intend to modify or delete a non-disputed condition, has it been discussed in the written representations or at the hearing or inquiry? If it would be a surprise, you would need to go back to the parties to give them an opportunity to comment. You will need to set out your concerns, together with the possible wording of any revised or additional condition you consider to be necessary.

A12. What is the 'decision' if I decide that an original condition should be replaced with a more onerous one or that an additional condition should be imposed?

If you make *any* change to the original permission, you will be 'allowing' the appeal, even though this may not give the appellant what they have sought. Consequently, it is important to make sure that the effect of your decision is clear in your reasoning and conclusions. The resulting 'permission' will be the original decision as modified by your more onerous or additional condition(s).

A13. Does it matter if the planning permission has been implemented or if the condition is not being complied with?

No. It makes no difference to your consideration of this type of appeal. For example, a condition might require that a window in a new house is obscure glazed. It does not matter whether the house has been built or partially built (with or without obscure glazing to the window), or that it has not been built.

A14. What happens if the planning permission has already expired?

As long as the appeal is made within the statutory period following the decision date, it does not matter that the permission which is granted by the LPA has expired. Effectively, what is being challenged by the appeal is the decision, rather than the resulting permission.

You will be considering the matter afresh (s79(1)) and have the power to come to a different decision to that of the LPA - this may include varying the condition for the implementation period of the planning permission.

As an extreme example, imagine that the LPA grants planning permission subject to a condition that the development must be commenced within 12 hours of the decision – this would probably mean that the permission would expire even before the applicant had received notice of the decision. If it mattered that the permission had already expired, the applicant would not have any right of appeal against the LPA's decision.

A15. How should the standard condition regarding the time limit for the commencement of the development be dealt with?

You would usually leave it unaltered.

A16. Which decision template should I use?

The correct template is:

PLG conds (1) variation of existing (s79(1))

Annexe B

B. Type 2 (s73) appeals

B1. What is the appeal for?

The appeal will follow, and will be against, the refusal by an LPA of an application for planning permission[16] to carry out development without complying with a condition which has been imposed on a planning permission. Alternatively, it could follow the LPA's failure to determine such an application.

Section 73 appeals are often described as being to 'vary', 'modify' or 'remove' conditions. However, this is not strictly the case. If the appeal is allowed a new permission is created and the original permission remains extant and unaltered (along with the conditions attached to it).[17]

B2. Who makes the appeal and when? (and what happens if the original permission has lapsed without being implemented?)

The appeal does not have to be made by the original applicant. However, it must be made within 6 months of the date of the LPA's refusal to 'remove' or 'vary' the condition[18] (or within 6 months of the expiry of the period for determination – if the LPA did not make a decision).

It does not matter whether or not the planning permission has been implemented (provided it is still within the time limit for implementation). However, if the permission has been implemented and the disputed condition has been breached it may be necessary to deal with the appeal as a Type 3 (s73A) case (see Annexe C).

If the original permission has been implemented, there is no time limit on when the application can be made to the LPA to 'vary' or 'remove' the condition.

If the original permission has not been implemented, the appeal must be made and the appeal determined **before** the standard time limit has elapsed – in most cases this will be 3 years from the date of a full permission.

Once the standard time limit has passed without the permission being implemented there will be no extant permission and so s73 does not apply[19].

[16] The appeal must therefore be publicised as an application for planning permission. If the correct notification procedures have not taken place, in the interests of natural justice, you may need to ask the LPA to give interested parties notification of the appeal.

[17] As confirmed in Planning Practice Guidance ID 21a-031-20140306 – "It should be noted that the original permission will continue to exist whatever the outcome of the application under section 73 …"

[18] Appeals made under the 'Householder Appeals Service' (HAS) and 'Commercial Appeals Service' (CAS) must be made within 12 weeks from the date on the notice of the local planning authority's decision.

[19] See s73(4) of the 1990 Act – *"This section does not apply if the previous planning permission was granted subject to a condition as to the time within which the development to which it*

Consequently, it is not possible to 'remove' or 'vary' a condition attached to a lapsed permission. This scenario might arise because the LPA accepted an application in relation to a lapsed permission or because the permission has lapsed at some point during the appeal process. In such circumstances, you should write to the main parties explaining why you consider that there is no extant permission to 'vary'. It is likely that the appeal would be invalid. If necessary, seek advice (see the section on *seeking advice* in The approach to decision-making chapter). The appellant would have the option of making a new planning application to the LPA.

As an expired planning permission ceases to exist other than as a point of reference in the planning history, where the relevant permission has lapsed it will be necessary to set out in the decision letter that there can be no s73 appeal and that no further action will be taken on the appeal.

B3. Is there a decision notice?

There will usually be two decision notices. The first being the original grant of planning permission subject to conditions, the second being the LPA's decision to refuse permission to remove or modify the disputed condition. However, if the appeal is against non-determination there will only be the original grant of planning permission.

In some cases you may be presented with more than two decision notices. See the advice in 'other casework issues' (paragraphs 24-27).

B4. What is the relevant legislation?

Section 73 allows for an application to be made to an LPA: "*to develop land without compliance with conditions previously attached.*"

Section 73(2) requires that the LPA "*shall consider only the question of the conditions subject to which planning permission should be granted".*

Section 73(2)(a) allows LPAs to grant planning permission "*subject to conditions differing from those subject to which the previous planning permission was granted, or that it should be granted unconditionally…*"

Section 73(2)(b) states that "*if they decide that permission should be granted subject to the same conditions as those subject to which the previous permission was granted, they shall refuse the application.*"

The right of appeal is provided in s78(1)(a). This is the right to appeal where an LPA "*refuse an application for planning permission, or grant it subject to conditions.*"

related was to be begun and that time has expired without the development having been begun."

B5. What powers do I have?

Whatever decision you make, the original permission is not at risk and it remains intact and unamended.[20] Section 73(2) makes it clear that the LPA (and, therefore, by extension the Inspector) "*shall consider only the question of the conditions subject to which planning permission should be granted.*"

The Planning Practice Guidance[21] states that:

> "…. under s73 the LPA must only consider the disputed condition/s that are the subject of the application – it is not a complete re-consideration of the application."
>
> "A local planning authority decision to refuse an application under section 73 can be appealed to the Secretary of State who will also only consider the condition/s in question"
>
> "in granting permission under section 73 the local planning authority may also impose new conditions – provided the conditions do not materially alter the development that was subject to the original permission and are conditions which could have been imposed on the earlier permission"

Section 73 is drafted widely and so, in addition to considering the disputed condition(s), it does provide the power to attach new conditions, to not attach conditions which were previously imposed or to attach modified versions of them. However, in most cases you will not need to look beyond the disputed condition. Nevertheless, if after having regard to the advice in the Planning Practice Guidance, you consider it essential to look beyond the disputed condition, perhaps because a consequential change would be logical following your conclusions on the disputed condition, consider:

- Would attaching a new condition or deleting or modifying an existing condition materially alter the development?
- Would your approach come as a surprise to the parties and, if so, whether they should be given the opportunity to comment

However, you cannot extend the time limit within which a development must be started or an application made for the approval of reserved matters.[22]

B6. Why do PINS call this type a s73 appeal?

This is because an application seeking permission to carry out a development without the condition (or with a different one) is initially made to the LPA under s73.

B7. What happens if I decide the disputed condition is necessary?

You would dismiss the appeal. The original permission would remain extant and unaltered.

[20] Planning Practice Guidance ID 21a-031-20140306 and ID 17a-015-20140306
[21] Planning Practice Guidance ID 21a-031-20140306
[22] Planning Practice Guidance ID 17a-014-20140306 and s73(5) of the 1990 Act

B8. What happens if I decide that the disputed condition is necessary but should be modified (for example, to ensure that it is enforceable)?

This might be because you agree with the appellant that a less restrictive condition is appropriate (for example, allowing longer opening hours) or because a condition which is necessary needs to be modified to comply with the 6 tests (for example, to ensure it is enforceable).

In both cases you would allow the appeal and grant a new planning permission for the development subject to the modified condition. However, the original permission would remain intact and unamended and so the appellant could choose to implement either permission.

B9. What happens if I decide the disputed condition is unnecessary?

You would allow the appeal and grant a new planning permission for the development without the disputed condition. The original permission would remain intact and unamended. However, the appellant would be able to choose which permission, if any, to implement (and would presumably choose to implement the one without the disputed condition).

B10. If I allow the appeal, how should I deal with any other conditions imposed on the original permission?

If you allow the appeal, you will be granting a new planning permission which is totally separate from the original permission. Any conditions which were attached to the original permission will not automatically be carried over to the permission you have granted.

The second permission will only be subject to any conditions which you specifically impose.[23] If you impose no conditions the second permission could be totally unfettered.[24]

Therefore, you need to consider whether any previous conditions should be imposed on the permission you grant. In doing so, you have two main options:

a) Review all the conditions previously imposed and decide whether or not each one should be imposed on the permission you are granting – applying the 6 tests in paragraph 206 of the Framework. However, do you have sufficient evidence to make a reasoned decision on each condition[25]? For example, do you know which conditions have been discharged? Could the outcome of this exercise come as a surprise to the parties? – or:

[23] See Planning Practice Guidance ID 21a-031-20140306 – "*To assist with clarity, decision notices for the grant of permission under section 73 should also repeat the relevant conditions from the original permission, unless they have already been discharged.*" The same guidance is repeated in ID 17a-015-20140306

[24] This issue of whether conditions from the original permission applied to the 2nd permission was considered in *Queen oao Reid v SSTLGR and Mid Beds DC* [2002] EWHC 2174 (Admin)

[25] The appeal questionnaire will be updated to include a requirement for this information to be provided.

b) If you have insufficient information about whether or not the other, uncontested, conditions imposed on the original permission have been discharged or remain relevant you should re-impose all of them. Issues relating to whether any of the conditions have been discharged would be for the appellant and LPA to deal with. However, it would have to be made clear in the decision why you have taken this course of action, for example along the lines of:

> *"The guidance in the Planning Practice Guidance makes clear that decision notices for the grant of planning permission under section 73 should also repeat the relevant conditions from the original planning permission, unless they have already been discharged. As I have no information before me about the status of the other condition(s) imposed on the original planning permission, I shall impose all those that I consider remain relevant. In the event that some have in fact been discharged, that is a matter which can be addressed by the parties."*

B11. What happens if I decide that there is a problem with a condition that has not been disputed by the appellant, or that an additional condition is necessary?

If you are allowing the appeal you have the power to impose any conditions you consider necessary, not to impose a previous condition you consider unnecessary or to impose a different version of a previous condition. However, you will need to consider if your action would come as a surprise to the main parties. See B5 above.

B12. How should the standard condition regarding the time limit for the commencement of the development be dealt with?

Section 73(5) states *that:*

> *"Planning permission must not be granted under this section to the extent that it has effect to change a condition subject to which a previous planning permission was granted by extending the time within which - (a) a development must be started; (b) an application for approval of reserved matters (within the meaning of section 92) must be made."*

This is confirmed in the Planning Practice Guidance.[26]

Consequently, if you allow the appeal and grant planning permission, you should not extend the time period within which the development must start from that set out on the original permission. Instead, the time limit should run from the date of the original permission (usually 3 years from the date of a full permission). You will therefore need to adjust the standard time limit condition (and any conditions relating to the submission of reserved matters), so that the permission you grant runs from the date of the original permission.

[26] Planning Practice Guidance ID 17a-014-20140306

The case of *R (on the application of Hill) v First Secretary of State* [2005] EWHC 1128 illustrates the type of issues that can arise if the time limit conditions are not carefully considered.[27]

If the original development has been started, you will not need to impose a time limit condition. This will only apply if the development that has been started is the same as that for which you are granting permission. You will therefore need to check whether the details are the same.

If the appeal application *only* seeks to extend the time limit for starting the development – see the advice in Annexe E relating to Type 5 appeals.

B13. Do the Environmental Impact Assessment Regulations apply?

This is answered in Planning Practice Guidance ID 17a-016-20140306.

B14. Which decision template should I use?

The correct template is:

PLG conds (2) variation (s73) – refusal or
PLG conds (2) variation (s73) – failure

[27] The Inspector allowed a s73 appeal and granted a new outline permission. In doing so he re-imposed the original condition requiring that the application for the approval of reserved matters be made within 3 years of the original approval. However, this date had already passed and so the permission could not be implemented. Accordingly, the consideration of the disputed conditions was academic. However, the Inspector had not been asked to remove the time limit condition and so could not be criticised for not doing so. Nevertheless, the Judge noted that local planning authorities and Inspectors should be on their guard when dealing with s73 applications and be astute to consider any issues arising in respect of time limits imposed on the original permission.

Annexe C

C. Type 3 (s73A) - 'Condition breached' appeals

C1. What is the appeal for?

These are appeals where development authorised by a planning permission has been carried out without compliance with one or more conditions. They will follow the refusal of an application to the LPA to 'retain' the development without complying with the disputed condition. They can be seen as a retrospective application for development. In some cases the appellant may suggest an alternative version of the disputed condition (for example, with different opening hours).

If the condition was breached before the planning application was made – the appeal should be dealt with under s73A.

If the breach occurred after the planning application was made – the appeal should be dealt with under s73.

C2. Are there any differences between s73 and s73A appeals?

The practical differences are limited and the advice given above for s73 Type 2 appeals generally applies. However, be careful with the tense you use (because the development has already been carried out and the condition breached).

You will need to consider the planning merits of allowing the development to continue without compliance with the disputed condition. Has the failure to comply with the condition resulted in material harm (or would it be likely to cause harm over time)?

If the condition is unnecessary – you would allow the appeal and grant a new (retrospective) permission without the disputed condition.

If the condition is necessary (and does not require any modification), you would dismiss the appeal even if the breach could not be remedied. The original permission would remain unaltered.

If the original condition is necessary but needs to be modified – you would allow the appeal and impose a revised condition on a new planning permission (and the original permission would remain intact).

If you are allowing, you will need to decide how to deal with any other conditions which were originally imposed. You can choose to impose previous conditions, to vary them, to omit them or to add new ones. If so, do you need to give the parties a chance to comment? See the advice in B5 above regarding Type 2 s73 appeals before doing so.

You should not impose a condition limiting the time for commencement, because the development has already begun.

C3. What is the relevant legislation?

Section 73A(1) & s73A(2)(c) provide that "*On an application made to a local planning authority, the planning permission which may be granted includes planning permission for development carried out before the date of the application […] without complying with some condition subject to which planning permission was granted*."

The right of appeal is provided in s78(1)(a) where an LPA *"refuse an application for planning permission, or grant it subject to conditions."*

C4. Which decision template should I use?

The correct template is:

PLG conds (3) breach (s73A(2)(c) – refusal or
PLG conds (3) breach (s73A(2)(c) – failure

Annexe D

D. Type 4 – appeals seeking to extend 'temporary permissions'

D1. What is the appeal for?

Where a planning permission has been granted subject to a condition that the use shall cease (or buildings/works are removed) within a given period of time, the appellant can seek to extend the permission, or to make it permanent.[28]

D2. How might the appellant seek to make the permission permanent?

There are 3 ways in which an appellant might seek to achieve this. You should always make it clear how you have dealt with the appeal:

Type 1 (s79)

The appeal would seek to directly remove or vary the relevant condition. See the advice in Annexe A on Type 1 appeals.

Type 2 (s73)

The appellant would have applied to the LPA to have the condition 'removed' or 'varied'. This application would need to be made before the temporary period expired. If the application is refused, or not determined, an appeal can be made. See the advice in Annexe B on Type 2 appeals.

Type 3 (s73A)

Where a use continues or buildings remain, after the specified temporary period, s73A(2)(b) may be used to seek a planning permission having retrospective effect.

s73A(3)(b) permits the application to be 'back dated' "*so as to have effect from – (b) if it was carried out in accordance with planning permission granted for a limited period, the end of that period.*" It can be good practice to backdate permissions where there is evidence that a failure to do so could cause problems, perhaps by invalidating a waste management or caravan site licence. You can use a modified version of the standard decision wording:

I allow this appeal and grant planning permission for the [description of original act of development] at [address] **effective from** [insert date the time-limit expired] in accordance with application Ref [] dated [] etc.

If you allow the appeal, you will be granting a new planning permission. The original permission will have expired because the original time limit has passed and so any conditions attached to it cannot apply to the second permission[29].

[28] The power to grant a 'temporary' permission is provided under s72(1)(b)

[29] *Avon Estates Ltd v Welsh Ministers* [2011] EWCA Civ 553 – this case discussed the status of a temporary permission which had expired. The Court decided that at the end of the period specified within the time limited condition, the permission ceased to exist as did its conditions

Consequently, any necessary conditions must be imposed on the permission you grant.

D3. Which decision template should I use?

The templates to use are:

PLG conds (4) ex temp pp (s73A(2)(b) – refusal or
PLG conds (4) ex temp pp (s73A(2)(c) – failure

D4. Is there any national guidance on 'temporary' planning permissions?

The Planning Practice Guidance provides guidance on the use of conditions to grant planning permission for a temporary period only (ID 21a-014-20140306).

(which no longer bind the land and cannot be enforced), **except** for the time limited condition which survives until the time for enforcement action has passed.

Annexe E

E. Type 5 – appeals seeking to extend standard time limits for implementing permission

E1. What is the legal basis for these appeals?

Permission cannot be granted under s73 to extend time limits for commencement (normally 3 years on a full permission and 3 and 2 years on outline permission). Section 73(5) states:

> "Planning permission must not be granted under this section to the extent that it has effect to change a condition subject to which a previous planning permission was granted by extending the time within which –
> (a) a development must be started;
> (b) an application for approval of reserved matters (within the meaning of section 92) must be made."

The Planning Practice Guidance also confirms that a s73 application cannot be used to vary the time limit for implementation.[30]

However, s93(3) of the 1990 Act provides for the right of appeal against conditions relating to the commencement of development.[31] Such appeals will be s79 (Type 1) cases.

E2. Which decision template should I use?

The correct template is:

PLG conds (1) variation of existing (s79(1))

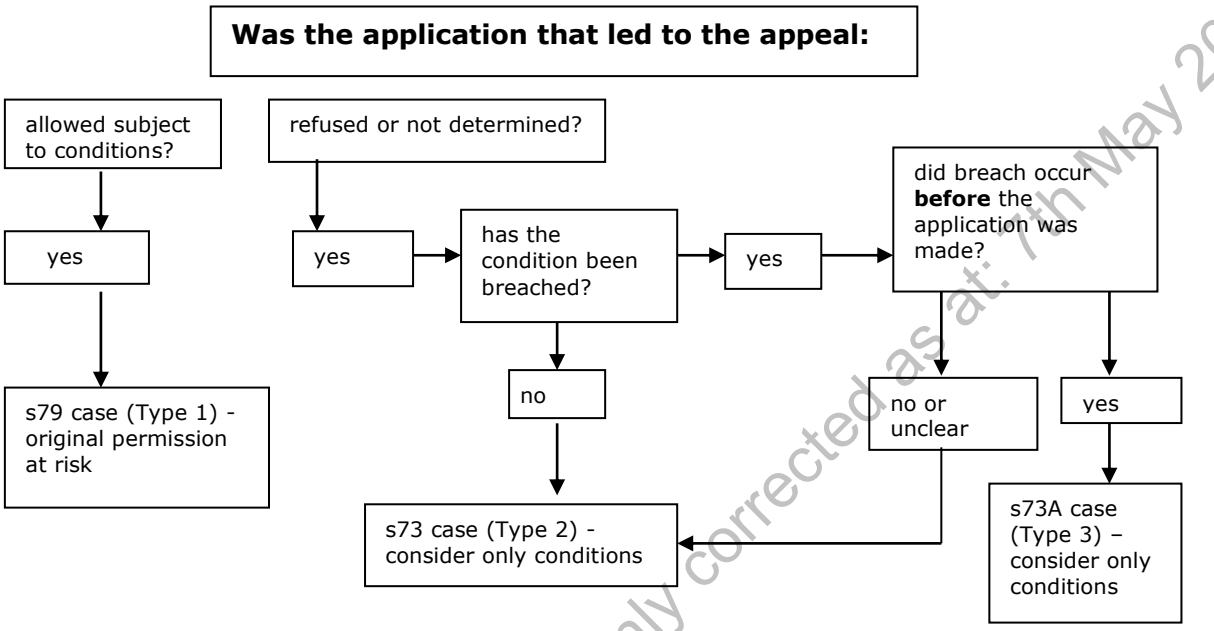
E3. Is there any discretion to impose time limits for commencement which are longer or shorter than the standard periods?

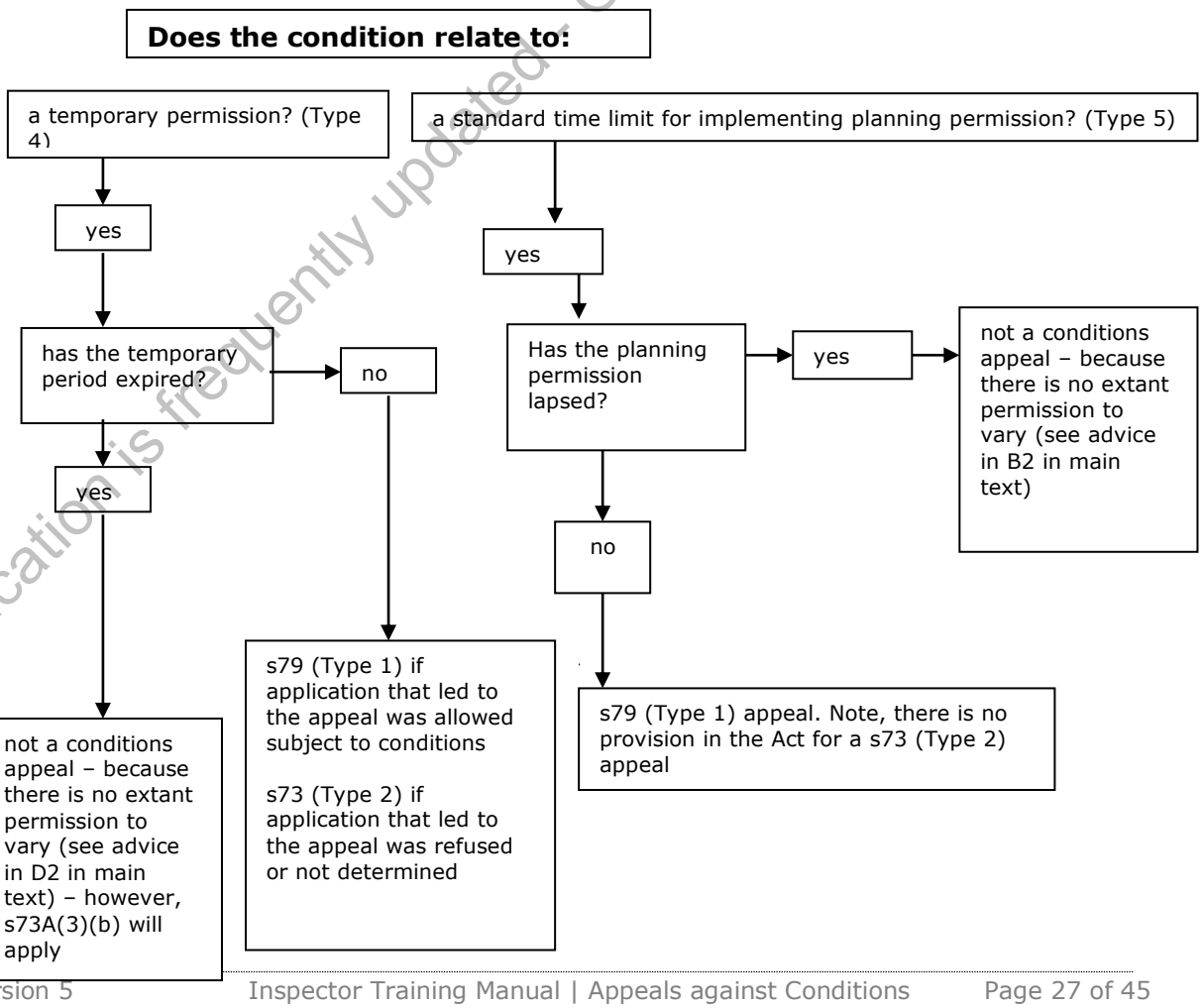
LPAs have the discretion under s91(1)(b) and s92(4) to impose time limits for commencement which are longer or shorter than the standard periods. The Planning Practice Guidance provides guidance.[32]

[30] Planning Practice Guidance ID 17a-014-20140306
[31] Section 93(3) states: "… the fact that any of the conditions of the permission are required by the provisions of section 91 or 92 [time limits for commencement] to be imposed, or are deemed by those provisions to be imposed, shall not prevent the conditions being the subject of an appeal under section 78 against the decision of the authority"
[32] See Planning Practice Guidance ID 21a-027-20140306 and ID 21a-028-20140306

Annexe F

F. Flow chart





For further advice refer to the detailed section relating to the relevant appeal type.

Annexe G

G. Summary checklist

1. Are you clear which type of appeal it is and what your powers are?

2. Have you selected the correct template? See the flow diagram in Annexe F.

3. Have you checked that what you have written in the banner heading and in the formal decision (if allowing) is correct? Look at the example templates in Annexe H.

4. In s79 appeals the whole permission is before you (and so is at risk).

5. In s73 appeals, the original permission is not at risk. You can only consider "the question of the conditions subject to which planning permission should be granted."

6. If you allow a s73 appeal, you will be creating a new standalone permission. If so, have you imposed all necessary conditions?

7. Section 73A appeals are very similar to s73 appeals – the main difference is that, in s73A appeals, the appealed condition will have been breached.

8. Does your main issue accurately reflect the matter that is in dispute?

9. Will it be clear from your decision what the appellant is seeking and is this reflected in your main issue?

10. If you are removing, altering or replacing a condition or adding a new one, you will be 'allowing' the appeal (even if this would not give the appellant what they have sought)? Will the outcome of your decision be clear to the parties? Does it give the appellant what they want, or not?

11. In s79 appeals, do not partially remove a condition. Instead delete it in its entirety and replace it with a new one.

12. If you are minded to amend or delete existing conditions or to add new ones, would this come as a surprise to the parties? If so, should you give them the chance to comment?

13. In s79 appeals, would the appellant be left in a worse position (for example, because you might reverse the decision or impose a more onerous condition)? If so, give the appellant the opportunity to withdraw the appeal.

14. Be careful how you deal with conditions limiting the period for commencement.

Annexe H

H. Examples of standard wording

Note: these templates may not use exactly the same wording as on DRDS.

A. Type 1 (s79) appeal
Template: PLG conds (1) variation of existing (s79(1))

Appeal Decision

Site visit made on []

by []

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

Decision date:

Appeal Ref: []
[address]

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a grant of planning permission subject to conditions.
- The appeal is made by [*appellant's name*] against the decision of [*LPA's name*].
- The application Ref [ ], dated [ ], was approved on [ ] and planning permission was granted subject to condition[s].
- The development permitted is [*insert description of development given on planning permission*].
- The condition[s] in dispute [is] [are] No[s] [ ] which state[s] that: [*quote condition/s in full]*.
- The reason[s] given for the condition[s] [is] [are]: [*quote reason/s in full*].

Decision

1. The appeal is allowed and the planning permission Ref [*insert p app ref*] for [*insert description of development given on planning permission*] at [*insert address*] granted on [*insert date of planning permission*] by [*insert name of LPA*] Council, is varied by deleting condition(s) [*insert nos of any conditions to be deleted*] [and substituting for them the following conditions: [*set out any varied or additional conditions*]].

OR

1. The appeal is dismissed.

B. Type 2 (s73) appeal – refused
Template: PLG conds (2) variation (s73) - refusal

The Planning Inspectorate

Appeal Decision

Site visit made on

by []

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

Decision date:

Appeal Ref: []
[*address*]

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission under section 73 of the Town and Country Planning Act 1990 for the development of land without complying with conditions subject to which a previous planning permission was granted.
- The appeal is made by [*appellant's name*] against the decision of [*LPA's name*].
- The application Ref [ ], dated [ ], was refused by notice dated [ ].
- The application sought planning permission for [*description of original act of development*] without complying with [a] condition[s] attached to planning permission Ref [ ], dated [ ].
- The condition[s] in dispute [is] [are] No[s] [ ] which state[s] that: [*quote condition/s in full*].
- The reason[s] given for the condition[s] [is] [are]: [*quote reason/s in full*].

Decision

1. The appeal is allowed and planning permission is granted for [*description of original act of development– usually from the planning permission*] at [*address*] in accordance with the application Ref [*insert ref for application subject of the appeal <u>not</u> the original permission*] dated [*insert date for application subject of the appeal <u>not</u> the original permission*], without compliance with condition number[s] [*list all conditions which have been successfully appealed against or have been discharged or are no longer relevant*] previously imposed on planning permission Ref [*insert ref no from original planning permission*] dated [*insert date from original planning permission*] and [subject to the following conditions: [*set out in full all conditions which you intend to impose on the permission you are granting*].

Note 1 – this is template decision option: PLG s73 conds – allow (no ref to old): it does **not** include the highlighted section which needs the relevant parts to be inserted manually until DRDS can be undated.
Note 2 - this would be the option to use where you intend to grant permission subject to conditions and you need to set out all the relevant conditions from the original permission together with any new ones – ensure you delete the superfluous end option: [without compliance with the conditions previously imposed on the planning permission Ref [ ] dated [ ]].

OR

2. The appeal is allowed and planning permission is granted for [description of original act of development] at [ ] in accordance with the application Ref [ ] dated [ ] [without compliance with the conditions previously imposed on the planning permission Ref [ ] dated [ ].

Note 1 – this is template decision option: PLG s73 conds – allow (no ref to old)
Note 2 - you should only use this option where you intend to grant permission without any conditions – ensure you delete [subject to the following conditions: [ ]].

OR

3. The appeal is dismissed.

Note: - You would be 'allowing' the appeal if you decide that the disputed condition is unnecessary, the disputed condition is necessary but needs modification or if you vary or delete any other condition or add a new condition. Consequently, there may be circumstances where you are allowing the appeal even though the outcome will not have been that sought by the appellant.

B. Type 2 (s73) appeal – failure to determine
Template: PLG conds (2) variation (S73) - failure

The Planning Inspectorate

Appeal Decision

Site visit made on []

by []

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

Decision date:

Appeal Ref: []
[address]

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a failure to give notice within the prescribed period of a decision on an application for planning permission under section 73 of the Town and Country Planning Act 1990 for the development of land without complying with conditions subject to which a previous planning permission was granted.
- The appeal is made by [*appellant's name*] against [*LPA's name*].
- The application Ref [ ] is dated [ ].
- The application sought planning permission for [*description of original act of development*] without complying with [a] condition[s] attached to planning permission Ref [ ], dated [ ].
- The condition[s] in dispute [is] [are] No[s] [ ] which state[s] that: [ ].
- The reason[s] given for the condition[s] [is] [are]: [ ]

Decision

The decision options when allowing are the same as for Type 2 (s73) appeal – refusal

When dismissing the option is:

The appeal is dismissed and planning permission is refused for [].

C. Type 3 (s73A) 'Condition breached' appeal – refused
Template: PLG conds (3) breach (s73A(2)(c) - refusal

The Planning Inspectorate

Appeal Decision

Site visit made on []

by []

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

Decision date:

Appeal Ref: []
[address]

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission under section 73A of the Town and Country Planning Act 1990 for the development of land carried out without complying with conditions subject to which a previous planning permission was granted.
- The appeal is made by [*appellant's name*] against the decision of [*LPA's name*].
- The application Ref [ ], dated [ ], was refused by notice dated [ ].
- The application sought planning permission for [*description of original act of development – usually from planning permission*] without complying with [a] condition[s] attached to planning permission Ref [ ], dated [ ].
- The condition[s] in dispute [is] [are] No[s] [ ] which state[s] that: [ ].
- The reason[s] given for the condition[s] [is] [are]: [ ].

Decision

The decision options when allowing are similar to Type 2 (s73) appeal – refusal

1. The appeal is allowed and planning permission is granted for [description of original act of development] at [] in accordance with the application Ref [] made on the [] without complying with condition(s) No(s) [*list all conditions which have been successfully appealed against or have been discharged or are no longer relevant*] set out in planning permission No [] granted on [] by the [] Council, but otherwise subject to the following conditions [] [without compliance with the conditions previously imposed on the planning permission Ref [] granted on [] by the [] Council]

Note 1 - template decision option: PLG s73A conds retro – allow (no ref to old)
Note 2 - this would be the option to use where you intend to grant permission subject to conditions and need to set out all the relevant conditions in full from the original permission together with any new ones **or** where you intend to grant permission without any conditions (ensure the correct ending is used by deleting the superfluous option).

OR:

2. The appeal is dismissed.

C. Type 3 (s73A) 'Condition breached' appeal – failure
Template: PLG conds (3) breach (s73A(2)(c) - failure

The Planning Inspectorate

Appeal Decision

Site visit made on

by []

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

Decision date:

Appeal Ref: []
[address]

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a failure to give notice within the prescribed period of a decision on an application for planning permission under section 73A of the Town and Country Planning Act 1990 for the development of land carried out without complying with conditions subject to which a previous planning permission was granted.
- The appeal is made by [*appellant's name*] against [*LPA's name*].
- The application Ref [ ] is dated [ ].
- The application sought planning permission for [*description of original act of development*] without complying with [a] condition[s] attached to planning permission Ref [ ], dated [ ].
- The condition[s] in dispute [is] [are] No[s] [ ] which state[s] that: [ ].
- The reason[s] given for the condition[s] [is] [are]: [ ].

Decision

The decision options when allowing are the same as for Type 3 (s73A) appeal – refusal

When dismissing the option is:

The appeal is dismissed and planning permission is refused for [].

D. Type 4 temporary permission appeal – refusal

Template: PLG conds (4) ex temp pp (s73A(2)(b)) – refusal (note: only use this template if the appeal is being considered under s73A)

Appeal Decision

Site visit made on []

by []

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

Decision date:

Appeal Ref: []
[address]

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission under section 73A of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 for [*description of original act of development*] for which a previous planning permission was granted for a limited period.
- The appeal is made by [*appellant's name*] against the decision of [*LPA's name*].
- The application Ref [ ] is dated [ ].
- The application sought planning permission for [description of original act of development] granted planning permission for a limited period Ref [ ], dated [ ].
- The permission is subject to a condition requiring the [cessation of the use] [removal of the buildings or works] on or before [ ].
- The reason given for the condition is: [ ].

Decision

The appeal is allowed and planning permission is granted for the [description of original act of development] at [address] **effective from [insert date the time limit expired]** in accordance with application Ref [] dated [] subject to the following conditions: [].

Note 1 – this is template decision option – PLG expired temporary permission - allow
Note 2 – use the wording in **bold** if you intend to back date the permission.

OR

The appeal is dismissed.

D. Type 4 temporary permission appeal – failure

Template: PLG conds (4) ex temp pp (s73A(2)(b)) – failure (note: only use this template if the appeal is being considered under s73A)

The Planning Inspectorate

Appeal Decision

Site visit made on []

by []

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

Decision date:

Appeal Ref: []
[address]

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a failure to give notice within the prescribed period of a decision on an application for planning permission under section 73A of the Town and Country Planning Act 1990 for [description of original act of development] for which a previous planning permission was granted for a limited period.
- The appeal is made by [*name of appellant*] against [*name of LPA*].
- The application Ref [ ] is dated [ ].
- The application sought planning permission for [description of original act of development] granted planning permission for a limited period Ref [ ], dated [ ].
- The permission is subject to a condition requiring the [removal of the buildings or works] [cessation of the use] on or before [ ].
- The reason given for the condition is: [ ].

Decision

The decision option for allowing is the same as for Type 4 temporary permission appeal – refusal

When dismissing the option is:

The appeal is dismissed and planning permission is refused for [].

Prior approval case
Template: DEV Order appln – conditional grant

The Planning Inspectorate

Appeal Decision

Site visit made on

by []

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

Decision date:

Appeal Ref: []
[address]

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a grant, subject to conditions, of approval required under a development order.
- The appeal is made by [*name1 of appellant*] against the decision of [*name of LPA*].
- The application Ref [ ], dated [ ], was granted approval by notice dated [ ] subject to [a] condition[s].
- The development granted approval is [ ].
- The condition[s] in dispute [is] [are] No[s] [ ] which state[s] that: [ ].
- The reason[s] given for the condition[s] [is] are: [ ].

Decision

1. The appeal is allowed and the approval Ref [ ] for the [siting, appearance, or whatever] of [development] at land at [ ] granted under the provisions of [whichever order] on [ ] by the [ ] Council is varied by deleting conditions(s) No(s) [ ] [and substituting for them the following condition(s) [ ].

Note 1 – this is template decision option – DEV Order appln – conditions variation on appeal.

The appeal is allowed and approval is granted under the provisions of [whichever order] for the [siting, appearance, or whatever] of [development] at land at [ ] in accordance with the terms of the application Ref [ ], dated [ ], and the plans submitted with it.

The appeal is allowed and approval is granted under the provisions of [whichever order] for the [siting, appearance, or whatever] of [development] at land at [ ] in accordance with the terms of the application Ref [ ], dated [ ], and the plans submitted with it, subject to the following condition[s].

OR

2. The appeal is dismissed

Refusal to approve details required by a condition (including reserved matters)

This is the template to use where the LPA has refused to approve details which have been submitted pursuant to a condition. It is most commonly used where the LPA has refused a reserved matters application. In effect, the appeal is seeking approval for the submitted details.

The appeal is made under S78(1)(b) – "*the Right to appeal against planning decisions and failure to take such decisions. (1) Where a local planning authority - (b) refuse an application for any consent, agreement or approval of that authority required by a condition imposed on a grant of planning permission or grant it subject to conditions …*"

Current DRDS options

Note that the options listed below do not cover all the different scenarios and that subject to the scope of the DRDS review they may be addressed then.

PLG details pursuant (eg reserved matters) – conditional
Appeal Ref: APP/00000/
address]

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a grant subject to conditions of consent, agreement or approval to details required by a condition of [a planning permission]/[a consent]/[an agreement]/[an approval].
- The appeal is made by [name1] against the decision of [name2].
- The application Ref [ ], dated [ ], sought approval of details pursuant to condition[s] No[s] [ ] of [a planning permission]/[a consent]/[an agreement]/[an approval] Ref [ ] granted on [ ].
- The development proposed is [ ].
- The condition[s] in dispute [is] [are] No[s] [ ] which state[s] that: [ ].
- The reason[s] given for the condition[s] [is] [are]: [ ]

PLG details pursuant (eg reserved matters) – failure
Appeal Ref: APP/00000/
[address]

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a failure to give notice within the prescribed period of a decision on an application for consent, agreement or approval to details required by a condition of [a planning permission]/[a consent]/[an agreement]/[an approval].
- The appeal is made by [name1] against [name2].
- The application Ref [ ], dated [ ], sought approval of details pursuant to condition[s] No[s] [ ] of [a planning permission]/[a consent]/[an agreement]/[an approval] Ref [ ] granted on [ ].
- The development proposed is [ ].
- The details for which approval is sought are: [ ].

PLG details pursuant (eg reserved matters) – refusal
Appeal Ref: APP/00000/
[address]

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant consent, agreement or approval to details required by a condition of [a planning permission]/[a consent]/[an agreement]/[an approval].
- The appeal is made by [name1] against the decision of [name2].
- The application Ref [ ], dated [ ], sought approval of details pursuant to condition[s] No[s] [ ] of [a planning permission]/[a consent]/[an agreement]/[an approval] Ref [ ], granted on [ ].
- The application was refused by notice dated [ ].
- The development proposed is [ ].
- The details for which approval is sought are: [ ].

Decisions

PLG details pursuant cond grant - allow

The appeal is allowed and the approval Ref [ ] given to the details pursuant to conditions Nos [ ] of a planning permission Ref [ ]) given on [ ] is varied by deleting conditions [ ] [and substituting for them the following conditions: [ ]].

PLG details pursuant cond grant – allow (failure cases)

The appeal is allowed and the [ ] details submitted pursuant to conditions Nos [ ] attached to planning permission Ref [ ] granted on [ ] in accordance with the application dated [ ] and the [plans] submitted with it are approved.

PLG res matters allow

The appeal is allowed and the reserved matters are approved, namely [list the reserved matters concerned] details submitted in pursuance of condition No [ ] attached to planning permission Ref [ ] dated [ ].

PLG res matters dismiss

The appeal is dismissed and approval of the reserved matters is refused, namely:[specify the reserved matters covered] details submitted in pursuance of condition [ ] attached to planning permission Ref [ ] dated [ ].

Annexe I

I. Conditions attached to Listed Building Consents

1. The provisions are simpler than those for planning applications. S20 of the Planning (Listed Building and Conservation Areas) Act 1990 allows 3 types of appeals to be made:

Type 1 - appeals within 6 months of the original grant of consent

2. These are analogous to S79 planning appeals. S22 gives an inspector the right to deal with the application as if it had been made to him or her in the first place. So you can dismiss the appeal and refuse to grant listed building consent, or can attach whatever new conditions you think fit. However, as in planning appeals, care should be taken when exercising these powers that the principles of natural justice are not offended.

Type 2 -appeals following refusal of an application to vary/discharge a Condition

3. If the application is refused or allowed subject to further conditions, an appeal can be made. Such an appeal should be made within six months of the date of the notice of decision by the LPA or of the expiry of the period of determination. In these cases you can, by virtue of S22, deal with the appeal as if it has been made to you in the first instance. In this case, however, the application was only to vary or discharge the condition(s). The original consent is not at risk but you can remove any or all of the conditions on the consent (regardless of whether they were the subject of the appeal or not) and attach new ones. Again, if these powers are to be exercised, and any conditions other than those subject to the appeal are to be removed, varied or added to, then the parties must be given a chance to comment.

Breach of conditions cases

4. There are no separate provisions for dealing with breach of conditions cases. Thus they should be dealt with as in the paragraph above.

Type 3 - appeals against the refusal of a scheme required by a condition

5. The third type of appeal allowed by S20 is where a scheme is required, by condition, to be agreed with the LPA and the submitted scheme is refused, or allowed subject to further conditions. Again, the whole application is before the Inspector. So even if the appellant only wished one of the conditions that have been attached to be removed, the original consent is at risk. However, be aware of the requirements of natural justice and follow the same principles as for planning appeals.

Granting consent

6. If an appeal is allowed, a new consent is **not** granted. Instead the original consent is altered by deleting, varying or adding any relevant conditions to it.

Relationship to S78 Conditions Appeals

7. Often a condition on a planning permission will duplicate that on a Listed Building Consent. In such cases the appeals will usually travel together. Separate decisions will have to be reached on each appeal, as not only are the issues likely to be different, but the powers available to you, and the way any permission might be worded, will also be different.

Annex J

J - Deemed Discharge Of Conditions (England s74A (2) (a))

J1. What is a deemed discharge of conditions

Planning provisions within the Infrastructure Act 2015[33] inserted a new section 74A into the Town and Country Planning Act 1990. This allows the Secretary of State to provide by development order (2015 DMPO)[34] for the deemed discharge of certain conditions[35] attached to planning permissions which require the consent, agreement or approval of the LPA. Once a deemed discharge notice has taken effect the LPA are not able to take enforcement action or stop development on site on the basis that the condition had not been complied with.

J2. Definition s74A (3)

"Deemed discharge of a condition means that the local planning authority's consent, agreement or approval to any matter as required by the condition is deemed to have been given."

J3. Timing of the deemed discharge provisions

The deemed discharge provisions apply only to conditions attached to planning permissions where the planning application for planning permission was made on or after **15 April 2015**. The SoS has the general power to do this under s74A(9) TCPA, and has done so in the 2015 DMPO, article 47(5)).

J4. What is the relevant legislation?

Infrastructure Act 2015, Chapter 7
Town and Country Planning Act 1990
The Town and Country Planning (Development Management Procedure) (England) Order 2015
Article 28 - Deemed discharge
Article 29 - Deemed discharge notice
Article 30 – Exemptions
Article 47(5) – Transitional provisions
SCHEDULE 6 — Deemed discharge: 12 exemptions (included are those relating to reserved matters; the investigation and remediation of contaminated land; highway safety; sites of special scientific interest and investigation of archaeological potential)

[33] Infrastructure Act 2015, Chapter 7, Part 5, section 29 - Infrastructure Act 2015, Chapter 7 - Explanatory notes paragraphs 142- 153
[34] The Town and Country Planning (Development Management Procedure) (England) Order 2015
[35] S74A (6) exempt conditions are ones that should only be discharged where a formal decision has been made. Schedule 6 of 2015 DMPO lists the types of exempt conditions where this process is not appropriate, for example ones where there are potential risks to human or environmental wellbeing.

J5. Who makes the deemed discharge notice

The deemed discharge process is **activated** by the developer giving "the deemed discharge notice" (requirements set out article 29) **after 6 weeks have elapsed** from the day after the written application for approval of the details required by the condition in question was received by the LPA. The developer confirms in the notice that no appeal has been made under s78, and the date after **expiry of a further 2 weeks** or such period as may be specified (as there is flexibility for applicants and the LPA to agree a different time period) on which the deemed discharge is to take effect.

J6. Deemed discharge notice

The notice states that the consent, agreement or approval required by the condition will be deemed to have been given if the LPA have not responded within the timeframe of the notice.

The developer will not be deemed to have complied with the condition until the later of the end of the 8 week determination period or the date specified in the deemed discharge notice.

If the LPA refuses the application within the 8 week period or before the date in the deemed discharge notice the appellant has the usual right of appeal.

If the LPA issues a decision after the specified date, **it will have no effect** and they are not able to take enforcement action or stop development on site on the basis that the condition had not been complied with.

J7. Appeals after deemed discharge notice given

Although s74A(8) gives the power for an order to modify the appeal provisions where the steps taken to bring about deemed discharge have been taken, this power has **not** been exercised in the new DMPO.

This means that although the applicant cannot appeal and then serve a deemed discharge notice (the deemed discharge notice must include a statement confirming that no appeal has been made (article 29(3)(b)), they can serve a deemed discharge notice and then appeal (whether before or after the deemed discharge notice has actually taken effect). However, by the time the appeal is looked at, the date in the deemed discharge notice is likely to have passed, so the appeal will almost certainly be dealt with as below.

J8. What is the effect on appeals

Section 73 applications/appeals, to vary or remove a condition, would **not** be covered by the deemed discharge process as the provisions only apply to applications "*for any consent, agreement or approval required by a condition or limitation attached to a grant of planning permission*" (DMPO, article 27(1)).

An example is where a condition requires the approval of the LPA for a landscaping scheme before commencement of development. A s73 application would seek to vary/remove that condition whereas a s74A application would

seek to establish that the developer is deemed to have complied with the condition.

There is potential for PINS to receive appeals where there are "deemed discharge" disagreements between the applicant and LPA, although it is expected that this would mainly arise in enforcement or LDC appeals. Some examples of issues that might arise are given below:

- disputes over whether the condition(s) is one to which s74A applies or comes within the exemption list of Schedule 6
- whether a deemed discharge notice was correct and validly made to the LPA
- whether the LPA gave notice[36] of their decision before the specified date
- in enforcement/LDC appeals there could be potential arguments that the development did not benefit from deemed discharge (same sort of disputes as above).

In such cases the Inspector would have to establish the situation in planning law terms and determine these issues on the basis of the evidence presented before deciding the appeal accordingly (in a similar way to prior approval cases).

J9. What powers do I have?

If the Inspector considers the condition in question has deemed consent (ie the deemed discharge notice has taken effect), he should make this clear in the decision:

- in **planning cases** the appeal should be dismissed with no further consideration of the merits of the details submitted as they already have the LPA's deemed consent.
- in **enforcement/LDC cases** the appeal will be determined on the basis that any development/details subject to the effective s74A application complies with the condition.

If it is considered on the evidence that there is no deemed consent the Inspector would go on to determine the appeal whether for planning/enforcement/LDC in the usual way.

J10. What decision template should I use?

There are no specific templates for appeals involving deemed discharge issues. The appeal will either be allowed or dismissed using the current relevant DRDS template for the case work type before you ie:

- PLG details pursuant (see annexe H)
- PLG enf

[36] Like prior approval applications there can be arguments about whether the notice has been given. There is statute in place with the effect that notices can be deemed to have been received in the normal course of post, even if they arrive late or never actually arrive, as long as the person giving notice can prove postage.

- LDC appln

Biodiversity

England

What's New since the last version

Changes highlighted in yellow made **09 March 2020**:

The version comprehensively replaces the text in version 4.

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Legislation

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The Town and Country Planning (Environmental Impact Assessment) Regulations 2017

The Conservation of Habitats and Species Regulations 2017

The Conservation of Offshore Marine Habitats and Species Regulations 2017

Wildlife and Countryside Act 1981

Countryside and Rights of Way Act 2000

Natural Environment and Rural Communities Act 2006

Protection of Badgers Act 1992

Policy

Revised National Planning Policy Framework (updated February 2019)

Circular 06/2005: Biodiversity and geological conservation - statutory obligations and their impact within the planning system

Marine Policy Statement

A Green Future: Our 25-year plan to improve the environment

Guidance

Planning Practice Guidance: Natural Environment

Protected species: how to review planning applications (including links to Standing Advice for Species) (Natural England and Defra, 2016)

Biodiversity 2020: A Strategy for England's wildlife and ecosystem (Defra, August 2011)

Planning Portal guidance: European Protected Species

Natural England Guidance Note: European Protected Species and the Planning Process - Natural England's Application of the 'Three Tests' to Licence Applications

BS 42020:2013 Biodiversity - Code of practice for planning and development [1]

Chartered Institute of Ecology and Environmental Management Ecological Impact Assessment Guidelines

Chartered Institute of Ecology and Environmental Management Guidelines for Preliminary Ecological Appraisal

Chartered Institute of Ecology and Environmental Management Sources of Survey Methods

Chartered Institute of Ecology and Environmental Management Guidelines for Accessing and Using Biodiversity Data

Defra (2012) The Habitats and Wild Birds Directives in England and its seas Core guidance for developers, regulators & land/marine managers December 2012 (draft for public consultation)

Defra (2012) Habitats and Wild Birds Directives: guidance on the application of article 6(4) Alternative solutions, imperative reasons of overriding public interest (IROPI) and compensatory measures.

EU Guidance document on managing Natura 2000 sites

EU Guidance document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC

EU Guidance document on Article 6(4) of the 'Habitats Directive' 92/43/EEC

Habitats Regulations Assessment Handbook by David Tyldesley Associates[2]

Design Manual for Roads and Bridges: LA 118 Biodiversity Design (Highways England, 2020)

Design Manual for Roads and Bridges: LA 115 Habitats Regulation Assessment (Highways England, 2020)

[1] Access to this document is available through BSOL but you will need to register for access. Please contact the Knowledge Centre for assistance.
[2] Please contact the Knowledge Centre for log in details.

INTRODUCTION

1. This chapter of the Manual provides relevant information and advice to support Inspectors in appropriately addressing biodiversity matters in decision-making. This chapter provides a background to the relevant legislation, policy and methodologies for assessment of biodiversity. It explains what to look for when reviewing an Ecological Appraisal (often provided as a standalone report where no Environmental Statement (ES) is required) or a biodiversity/nature conservation chapter of an ES.

2. It should be noted that biodiversity is a broad topic area often comprised of discreet specialist topics; this chapter does not address these in detail. Where necessary this chapter refers Inspectors to other publications and referenced information that can support more detailed understanding. The chapter is structured to ensure that each part includes a section on 'decision-making'. The decision-making section suggests questions that you may find useful to consider when addressing biodiversity issues.

Why is there a need to consider Biodiversity?

3. The UK is signatory to a number of European and global Conventions in respect of biodiversity, including: the protection of wetlands of international importance (Ramsar Convention); the protection of sites of international cultural or natural significance (World Heritage Convention); the regulation of wildlife trade (CITES); the protection of species and habitats of European importance (Bern Convention); the protection of migratory species (Bonn Convention); the Convention on Biological Diversity (CBD); and the OSPAR Convention to address the protection of the marine environment in the North-east Atlantic.

4. Since 2010 various national and international initiatives have led to an update in the Government's biodiversity strategy. In September 2010, a review of the existing system of wildlife sites in England was published called 'Making space for nature'. The review was led by Sir John Lawton (and often referred to as the Lawton review). The review found that many of the wildlife sites are too small, the losses of certain types of habitats have been so great that the area remaining is no longer enough to halt additional biodiversity losses without major effort and that outside the statutory wildlife sites, most of the semi-natural habitats important for wildlife are generally insufficiently protected and under-managed. The review made recommendations about how a coherent and resilient ecological network could be achieved.

5. In October 2010 the CBD meeting held in Nagoya, Japan adopted a revised Strategic Plan for Biodiversity for 2011-2020 which included the Aichi Biodiversity Targets. The UK are committed to contributing to these targets. In June 2011 Government published a White Paper 'The Natural Choice: securing the value of nature' which outlined its response to both the Lawton review and the Aichi Biodiversity Targets. The UK National Ecosystem Assessment (UK NEA) was also published at the same time. This was the first analysis of the benefits the natural environment provides to society and to economic prosperity.

6. In August 2011 the Government published 'Biodiversity 2020: A strategy for England's wildlife and ecosystem services' (Biodiversity 2020). This document sets out the strategic direction for biodiversity policy up to 2020. It explains how the Government will deliver on the commitments made at the Nagoya CBD meeting, taking into account the evidence in the UK NEA and the Lawton Review. The overall aim of the strategy is '*to halt biodiversity loss, support healthy well-functioning ecosystems and establish coherent ecological networks, with more and better places for nature for the benefit of wildlife and people'.*

7. Compared to previous national biodiversity strategies, the emphasis has shifted very much to an approach of working at a landscape scale to achieve a more integrated large-scale approach to conservation rather than focussing on individual sites or species. However, it does still refer to priority habitats and species and the strategy does still acknowledge the need for targeted action for particular species, as with the previous iterations of national biodiversity action plans.

8. With regard to planning and development, the strategy states that:

> '*Through reforms of the planning system, we will take a strategic approach to planning for nature. We will retain the protection and improvement of the natural environment as core objectives of the planning system. We will pilot biodiversity offsetting, to assess its potential to deliver planning policy more effectively…We want the planning system to contribute to our objective of no net loss of biodiversity…'.*

9. In January 2018 the government published its plan to improve the environment 'A Green Future: Our 25 Year Plan to Improve the Environment'. The plan emphasises the need to maintain and enhance the 'natural capital' of the UK (although the proposals in it largely relate to England). Natural capital is defined in the plan as:

> "*the sum of our ecosystems, species, fresh water, land, soils, air and seas…* [which] *bring value to people and the country from the services that provide such as the provision of food, clean air and water, wildlife, energy, wood, recreation and protection from hazards*."

10. It states that the government will produce a new strategy for nature to build on Biodiversity 2020. It will also look to develop a Nature Recovery Network of 500,000 ha of additional wildlife habitat to complement and connect England's best wildlife sites. A national framework for green infrastructure standards will be produced to ensure the availability of accessible green space.

11 The plan seeks to embed a 'net environmental gain' principle to allow the delivery of development, particularly housing, without increasing overall burdens on developers. This would be done through planning authorities developing locally-led strategies to enhance the natural environment across their area. It notes that current planning policy requires a net gain in biodiversity where possible and that some local authorities, private developers and infrastructure companies have already implemented a net gain approach.

12. DEFRA undertook a consultation on the potential for a mandatory policy for biodiversity net gain (Dec 2018 – Feb 2019) for the whole of England but as yet this has not been made law.

LEGISLATION AND POLICY

13. Statutory obligations on decision-makers in relation to protected sites and species are derived from the following legislation:

- Council Directive 94/43/EEC 1992 on the conservation of natural habitats and of wild fauna and flora ('the Habitats Directive') – requires Member States to take measures to maintain or restore the natural habitats and species listed in the Annexes to the Directive to favourable conservation status. Also encourages Member States in their land-use planning and development policies to encourage the management of features of the landscape which are of major importance for wild fauna and flora, specifically features such as rivers or hedgerows which are essential for migration, dispersal and genetic exchange of wild species.
- Council Directive 2009/147/EC on the conservation of wild bird ('the Birds Directive') – requires Member States to provide for the protection, management and control of naturally occurring wild birds and their nests, eggs and habitats.
- Conservation of Habitats and Species Regulations 2017 (the Habitats Regulations) – transposes the Birds and Habitats Directives and includes strict system of protection for European sites and European Protected Species. Requires decision-makers to undertake appropriate assessment where significant effects on a European site are likely and only to give consent if there are no adverse effects on the integrity of a European site unless other legal tests have been met. Places a duty on decision-makers to have regard to the requirements of the Habitats Directive in the exercise of their functions.
- Wildlife and Countryside Act 1981 – includes powers to designate, manage and Sites of Special Scientific Interest (SSSIs). Provides protection to the species of birds, animals and plants listed in the schedules to the Act and also general protections for all wild species of birds, animals and plants.
- Protection of Badgers Act 1992 – makes it illegal to kill, injure or take a live badger or to interfere with badger setts.
- Natural Environment and Rural Communities Act 2006 – requires the Secretary of State to prepare lists of species and habitats types of principal importance. Also includes a duty on all public authorities to have regard, in the exercising of their functions, to the purpose of conserving biodiversity.
- Marine and Coastal Access Act 2009 – includes powers to designate and protect Marine Conservation Zones (MCZs). Imposes duties on public authorities (including PINS) when considering effects on MCZs where an

act is capable of significantly '*hindering the achievement of the conservation objectives*' of the MCZ in question.

14. Decision-makers are also required to have regard to relevant national and local policy for biodiversity including:

- National Planning and Policy Framework ('the Framework') – in particular paragraphs 8, 174 –177 and the natural environment section of the Planning Practice Guidance (PPG);
- Circular 06/2005: Biodiversity and Geological Conservation – Statutory Obligations and their Impacts within the Planning System ('the Circular'); and
- Relevant Local Plan policies.

GENERAL CONSIDERATIONS RELATING TO BIODIVERSITY

Biodiversity in the Framework

15. Paragraph 8 of the Framework states that, "*Achieving sustainable development means that the planning system has three overarching objectives, which are interdependent and need to be pursued in mutually supportive ways (so that opportunities can be taken to secure net gains across each of the different objectives)*". To promote the effective use of land, paragraph 118 states that "*planning policies and decisions should encourage multiple benefits from both urban and rural land, including through mixed use schemes and taking opportunities to achieve net environmental gains – such as developments that would enable new habitat creation or improve public access to the countryside".* Specific policies relating to conserving and enhancing the natural environment are contained in section 15 of the Framework. Paragraph 170 lists the objectives for the planning system for biodiversity as:

"*The planning system should contribute to and enhance the natural environment by:*

- *(…) recognising the wider benefits from natural capital and ecosystem services;*
- *minimising impacts on biodiversity and providing net gains in biodiversity, including by establishing coherent ecological networks that are more resilient to current and future pressures."*

16. The Framework lists the points that Local Plans should address in relation to biodiversity at paragraph 171, whilst paragraph 174 sets out how plans should ensure that biodiversity and geodiversity are protected and enhanced. Paragraph 175 lists the principles which should be applied when determining planning applications.

17. The PPG (paragraph 009, Reference ID: 8-009-20190721) refers to the duty under the NERC Act to have regard, in the exercise of their functions to the purpose of conserving biodiversity. It goes on to say that, "A *key purpose of this duty is to embed consideration of biodiversity as an integral*

part of policy and decision-making throughout the public sector, which should be seeking to make a significant contribution to the achievement of the commitments made by government in its 25 year Environment Plan".

Ecological appraisal/assessment

15. It is important that developments likely to affect biodiversity contain adequate, up-to-date information to effectively evaluate the impacts. This will include relevant site (field) surveys and desk-based studies to inform the baseline position.

16. It is typical for ecological appraisals/assessments[3] to be provided to accompany a proposed development. The appraisal/assessment may be a 'stand-alone' report but for developments where an environmental impact assessment (EIA) is required they are likely to form part of the Environmental Statement (ES). Schedule 4 of the relevant regulations require that, biodiversity (2017 EIA Regulations) or fauna and flora (2011 EIA Regulations) must be considered where significant effects are likely to result from development proposals. For more information please refer to the Environmental Impact Assessment chapter of the manual.

17. The scope of any appraisal/assessment will depend on the nature of the development proposals and the types of habitats and species which are likely to be affected by it. The initial stage of an appraisal/assessment is sometimes referred to as a preliminary ecological appraisal. If carried out in line with the CIEEM guidance, it should comprise a site (field) survey as well as a desk-based study of including consideration of the historical biological records and nature conservation designations. Field survey is likely to comprise a 'Phase 1' survey, which is designed to identify and map the broad habitats on site and note the potential for protected species to occur. The Phase 1 survey may identify the need for 'Phase 2' surveys, looking at specific habitats or species groups (e.g. bats) and the results of these may also be included with the report. The standard methodology for Phase 1 survey was developed by the Joint Nature Conservation Committee (JNCC).

18. The purpose of an ecological appraisal or ecological assessment is to establish a baseline so that key nature conservation constraints and opportunities, if any, can be identified. It can also determine the need for and scope of further assessment including full ecological impact assessment (EcIA).

19. In general, the EcIA is used to describe an ecological assessment that goes further than establishing the baseline and identifying possible constraints to development. This kind of assessment identifies specific impacts anticipated to arise from the proposed development and predicts the likely effects to specific ecological receptors – designated sites, habitats, and species or species groups. This kind of assessment is normally adopted in the preparation of an ES and can also be a robust approach for non-statutory assessment where it is relevant to do so.

[3] Appraisal is typically referred to in cases where no EIA is required, and the information is provided on a non-statutory basis. Assessment is typically referred to in cases where an EIA is required and the information is provided as part of the statutorily required Environmental Statement.

20. EcIA is a standardised approach to clearly describe in a robust way what the anticipated significant effects of a proposed development will be. A robust EcIA, will be adhere to the fundamental aspects taken from the 2018 CIEEM guidance which include:

- An overview of the process and underpinning principles, with a methodology for valuing ecological features, describing impacts, and determining significance of effects.
- The scope of the assessment should be clearly described, including how consultation has defined the matters to be addressed and how the zone of influence for the proposed development has been established.
- A robust baseline should be established, in line with the scope, to identify the ecological conditions in the absence of the proposals. Methods of data collection should be clearly described, and any limitations/assumptions explained.
- There should be an explanation of how different ecological features affected by the proposed development should be valued, taking into account geographical context, and the important features identified. The methodology for valuation should be consistent with that described in the overview.
- Impacts should be assessed using the most complete and up to date information about the development proposals and be based on the realistic worst-case scenario. Impacts should be characterised in terms of their permanence, temporal scope and geographical magnitude, whether adverse or beneficial, direct or indirect.
- An explanation of the legal and policy framework throughout and the consequences of the findings for decision-making.

Mitigation hierarchy

21. Mitigation measures are generally defined as measures which avoid effects altogether ('avoidance measures') or which reduce effects from the proposed development to the point where they are no longer significant. Measures which provide replacement habitat (for instance, creating a new area of wildflower meadow to replace an existing meadow which would be lost as a result of the proposed development) are described as compensation or compensatory measures. Measures which are designed to deliver additional habitats/features of ecological value, over and above the biodiversity which would be lost as a result of the proposed development, are classed as enhancements.

22. Paragraph 175 of the Framework includes a number of principles that should be applied by decision-makers when planning applications/appeals are being determined with a view to conserving and enhancing biodiversity. One of these principles is that, "if significant harm from a development cannot be avoided, adequately mitigated, or, as a last resort, compensated for, then planning permission should be refused". PPG (Paragraph: 019

Reference ID: 8-019-20190721) refers to this approach as the 'mitigation' hierarchy.

23. The implication of this approach is that the proposed development should ideally be designed and constructed in a way which avoids effects altogether; if this is not possible then mitigation measures should only be employed where it is not possible to avoid effects altogether, and compensation should only be used where mitigation is not possible.

24. It is important to note that any proposed mitigation measures should be specific to a potential harm that is likely to be caused. For example, if an applicant/appellant is proposing to install bat boxes, this will only mitigate the effects of the development if the species of bats likely to be affected will actually use bat boxes and if they are appropriately sited.

25. It should also be made very clear how the delivery of avoidance or mitigation relied upon by the applicant/appellant has been secured and will be delivered. This may be through the use of suitable planning conditions or other legal agreements such as section 106 agreements.

26. Where compensatory measures are required, they should provide at least an equivalent value of biodiversity to that which is being lost. As with mitigation, compensatory measures should be secured through suitable legal agreements e.g. planning conditions or planning obligations.

27. Biodiversity offsetting involves identifying the biodiversity value that would be lost to development and then using metrics to quantify the extent of any compensation required. Proposals should ensure there would be no net loss of biodiversity and preferably a net gain. It should be noted that the compensation would not necessarily provide a replacement for the habitat that has been lost nor does it necessarily need to be located in the same geographical area.

28. Specific considerations apply to compensatory measures for effects on European sites which are discussed in the section on European sites in Annex B.

Net gain

29. As noted above, paragraph 170 of the Framework requires that planning policies and decisions should contribute to and enhance the local environment in a number of ways, including provision of net gain for biodiversity. PPG defined biodiversity net gain as works which deliver *"measurable improvements for biodiversity by creating or enhancing habitats in association with development. Biodiversity gain can be achieved on-site, off-site or through a combination of on-site or off-site measures"* (paragraph 022, Reference ID: 8-022-20190721). One method of securing off-site compensation is to make payments to a 'habitat bank' (which could be run by private individuals or companies, NGOs or local authorities) to deliver new or enhanced areas of habitat.

30. There is no one approach which is mandatory for use in calculating if a biodiversity net gain would be achieved through implementing a policy or

planning permission. However, Defra and NE have developed a Biodiversity Metric 2.0 (which replaces the original version published in 2012) and associated guidance on how to use it. PPG advises that the metric can be used to demonstrate whether or not biodiversity net gain will be achieved (paragraph 025 (Reference ID: 8-025-20190721)).

31. The metric uses the habitat type, area and condition of the existing habitats on a site as a measure of its biodiversity value and calculates the baseline 'biodiversity unit' value for each habitat type. The biodiversity units for the development post-development are also calculated based on the areas of habitats that would be retained on the site plus any enhanced or newly created habitats. The change in biodiversity value is calculated by subtracting the baseline unit values for each habitat type from the post-construction unit values of retained, created or enhanced areas of habitat of the same type.

32. Biodiversity net gain is intended to work with the mitigation hierarchy and not to replace it. According to PPG, it should offer a genuine additional benefit, over and above any measures intended to provide compensation for the loss of biodiversity. It does not override the protection for sites and species covered by the various designations and/or legal protections which are described further in the section on Sites and Habitats Designations below (PPG paragraph 024 (Reference ID: 8-024-20190721)).

Decision-making

33. When reviewing ecological information, you may find it helpful to consider the following points:

- The report should be dated and the dates of any surveys undertaken should be given. The names and qualifications of authors and surveyors should be included. Surveys older than around two years may be unreliable, but this will be influenced by the species/habitats concerned and the particular circumstances of the site concerned. Environmental Services Team (EST) can give further advice on this point.

- It is good practice to include the survey conditions and methodologies. Many ecological surveys are seasonal and must be carried out at an appropriate time of year. NE's standing advice contains a table identifying the months when surveys should be undertaken for protected species. EST can provide advice on survey seasons for other habitats and species. If the surveys were done outside the recommended times, perhaps because of poor weather conditions, an explanation should be provided regarding any implications for the survey results. Available professional guidance should be referred to (for example the JNCC 2010, Handbook for Phase 1 habitat survey referred to above), and any departures from this guidance explained/justified. Any limitations on the assessment should be explained in terms of their effect on the results.

- Appropriate plans, maps and figures should be included, in line with available professional guidance.

- The report study area should be sufficient to cover address the entirety of the area affected by the development proposals (and so it is typical for the study area to extend beyond the development site boundary). The study area should be clearly defined and justified.
- The appraisal/assessment may have been carried out at an early stage in the design of the proposals. If this is the only ecological information submitted, the report should give confidence that the information about the proposals at the time of survey/reporting is sufficient to identify any potential ecological constraints.
- Does the report clearly explain the likely impacts arising from the proposed development and how these would affect biodiversity in the vicinity of the proposed development?
- Does the report explain how the ecological features affected by the proposed development have been valued and how this has been taken into account in assessing the effects of the development?
- Have avoidance, mitigation, compensation and enhancement measures been described and related to specific effects? How have the measures been secured? The appraisal/assessment should describe the residual effects following implementation of mitigation which will point to the effectiveness of proposed mitigation so that this can be understood.
- Where biodiversity net gain is proposed, have the net gain calculations been presented? Does the report explain the methodology used? Does it describe the baseline biodiversity value? Is it clear how the actions necessary to secure retention/improved management/creation of new habitats would be delivered? Has the applicant/appellant applied the mitigation hierarchy before applying the biodiversity net gain approach?

SITE AND HABITAT DESIGNATIONS

European sites

What are European sites?

34. Sites designated under the Habitats Regulations are known as European sites or Natura 2000 sites and include: Special Areas of Conservation (SACs); Sites of Community Importance (SCIs); and candidate SACs (cSACs) designated under the Habitats Directive; and Special Protection Areas (SPAs) designated under the Birds Directive.

35. NPPF Paragraph 176 stipulates that the following sites should be given the same protection as European sites (note that the policy position is different in Wales):

- potential SPAs (pSPAs) and possible SACs (pSACs);
- listed or proposed Ramsar sites; and

- sites identified, or required, as compensatory measures for adverse effects on European sites, pSPAs, pSACs, and listed or proposed Ramsar sites

SSSIs

36. The SSSI designation applies to terrestrial locations but may also extend into intertidal areas out to the jurisdictional limit of local authorities, generally taken to be the Mean Low Water (MLW) in England. It should be noted that terrestrial European sites such as SPAs and SACs will also usually be designated as SSSIs. However, the interests of the European site may be narrower than the features for which the SSSI is designated. For instance, a SAC may be designated for a particular species of butterfly while the SSSI covering the same land may be designated for that butterfly species but also for other invertebrate species. In this example, effects on the butterfly would be subject to the tests in the Habitats Regulations but would also have to be considered as an SSSI designated feature. The other invertebrates would only be considered as a SSSI designated feature.

37. PINS and the SoS are a 'section 28G authority' in respect of the Wildlife and Countryside Act 1981.[4] A 'section 28G authority' has the duty set out in section 28G(2), *"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*".

38. SSSIs are protected under the Wildlife and Countryside Act 1981 from damaging operations, including development proposals. Natural England (NE), as the government's statutory adviser on nature conservation (the statutory nature conservation body (SNCB)), must be consulted by a Local Planning Authority (LPA) considering development proposals that would affect a SSSI in England. This applies even if the proposals would not actually take place within the boundaries of the SSSI. NE has notified LPAs in England of consultation zones around SSSIs, which can be viewed on the MAGIC website; NE asks to be consulted on certain types of development within these zones.

39. As PINS qualifies as a section 28G authority, section 28I of the Wildlife and Countryside Act applies. This means that if you are intending to give consent for development that would be likely to damage the features for which the SSSI has been designated you must notify the relevant SNCB (NE if the site is in England, NRW if it is in Wales and SNH if it is in Scotland) **prior** to reaching your decision. The SNCB must be allowed 28 days in which to comment. If you decide to grant permission against the SNCB's advice, a condition must be attached that prohibits commencement of development from 21 days of the date of that decision. This will allow the SNCB to consider any further action. The SNCB must be sent a copy of the decision.

40. The Framework gives a high level of protection to SSSIs, stating that '… *proposed development on land within or outside a Site of Special Scientific Interest (either individually or in combination with other developments)*

[4] As amended by the Countryside and Rights of Way Act 2000.

should not normally be permitted. Where an adverse effect on the site's notified special interest features is likely, an exception should only be made where the benefits of the development, at this site, clearly outweigh both the impacts that it is likely to have on the features of the site that make it of special scientific interest and any broader impacts on the national network of Sites of Special Scientific Interest…'.

Decision-making

41. Advice in relation to European sites and Habitats Regulations Assessment, can be found at Annex B of this chapter.

42. When considering the effects on SSSIs from a development proposal, it may be helpful to consider the following points:

- How has the applicant/appellant identified which SSSI(s) designated features could be affected? What rationale have they used? Have NE or any other party suggested additional SSSI(s) features which could be affected?
- Does the evidence presented by the applicant/appellant consider both individual effects from the proposed development and the combined effects with other developments? Do the comments from the LPA and NE suggest that there are any other developments that should be included in the assessment?
- Has the applicant/appellant presented robust evidence on the effects of the development? Have they considered both direct effects (eg habitat loss) and indirect effects (eg changes to air quality or hydrological conditions)? Have they considered effects from all phases of the development? Have NE or any other parties raised concerns about the methods used to gather data and predict effects?
- If mitigation is being relied on to avoid adverse effects, are specific measures described? Do they deal with the adverse effects resulting from the development proposals? What evidence is there about the effectiveness of the proposed mitigation measures? Are the measures secured through conditions or other legal agreements? Have NE, the LPA or any other party raised concerns about the adequacy of the mitigation?
- Considering the effects on the designated features of the SSSI, are adverse effects likely? Are the benefits from the development proposals likely to outweigh the damage to the SSSI and the broader SSSI network?
- If you are minded to grant permission for development likely to damage the SSSI's designated features, have you notified the relevant SNCB and allowed them 28 days to comment?
- If you are minded to grant permission against the advice of the SNCB, have you attached a condition which prohibits commencement of development until 21 days after the date of your decision? Have you sent a copy of your decision to the SNCB?

National Nature Reserves (NNR)

43. NNRs are designated by NE under the National Parks and Access to the Countryside Act 1949 and the Wildlife and Countryside Act 1981 (as amended). They are managed to conserve their habitats or to provide special opportunities for scientific study of the habitats communities and species represented within them. NNRs contain examples of some of the most important natural and semi-natural terrestrial and coastal ecosystems in the UK. In addition, they may be managed to provide public recreation that is compatible with their natural heritage interests.

44. NE manages about two thirds of England's NNRs. The remaining reserves are managed by organisations approved by NE, for example, the National Trust, Forestry Commission, Royal Society for the Protection of Birds (RSPB), Wildlife Trusts and LPAs.

Decision-making

45. There are no specific legislative or policy requirements in relation to effects from development proposals on NNRs. However, most NNRs are likely to also be designated as European sites or SSSIs so you should establish which designations apply and deal with them accordingly.

Local sites

46. A number of local designations for biodiversity exist in England, including statutory designated Local Nature Reserves (LNRs), and non-statutory sites such as Sites of Nature Conservation Importance/Interest (SNCIs), Sites of Importance for Nature Conservation (SINCs), County Wildlife Sites (CWS), Biological Heritage Sites (BHS), and Protected or Notified Road Verges/Roadside Verge Nature Reserves. These non-statutory sites are often referred to as Local Wildlife Sites (LWS).

47. Under the National Parks and Access to the Countryside Act 1949 LNRs may be declared by LPAs after consultation with the relevant SNCB. LNRs are declared and managed for nature conservation, and provide opportunities for research and education, or simply enjoying and having contact with nature.

48. Paragraph 174 of the Framework requires that plans should identify, map and safeguard components of wildlife-rich habitats and wider ecological networks, including the hierarchy of international, national and locally designated sites. It is typical for Local Plans to include policies which give some protection for LWS in the area covered by the plan. The PPG provides some additional guidance on how LWS should be considered in paragraphs 011 (Reference ID: 8-011-201900721) and 012 (Reference ID: 8-012-20190721).

Habitat designations

Habitats of principal importance/priority habitats

49. Under s41 of the NERC Act 2006, the Secretary of State must publish a list of the types of habitat which are of principal importance for the purpose of conserving biodiversity. These areas of habitat, although they are not necessarily part of a designated site, are key to the delivery of Biodiversity 2020. They are also referred to as priority habitats or UK Biodiversity Action Plan habitats.

Ancient woodland and ancient and veteran trees

50. As with habitats of principal importance, ancient woodland and veteran trees may well occur outside the boundaries of designated wildlife sites. The Framework defines ancient or veteran trees as, *"A tree which, because of its age, size or condition is of exceptional biodiversity, cultural or heritage value*. Ancient woodland is defined as '*An area that has been wooded continuously since at least 1600 AD. It includes ancient semi-natural woodland and plantations on ancient woodland sites.".* NE maintains an ancient woodland inventory which can be accessed online but it is not comprehensive as it does not record woodlands smaller than 2 hectares. LPAs or biological records centres may also have their own ancient woodland inventory which record smaller sites.

51. NE and the Forestry Commission have published standing advice that deals with ancient woodland and ancient and veteran trees. It should not be assumed therefore that an absence of comments from either of these bodies implies that there are no effects on ancient woodland or ancient and veteran trees. The standing advice explains how NE and the Forestry Commission would expect to see effects assessed and tree surveys carried out. They also advise how the mitigation hierarchy could be applied in cases affecting ancient woodland and ancient and veteran trees.

52. Paragraph 175 of the Framework states that planning permission should be refused for "development resulting in the loss or deterioration of irreplaceable habitats such as ancient woodland and ancient or veteran trees unless there are wholly exceptional reasons and a suitable compensation strategy exists". It should be noted that 'irreplaceable natural habitat' does not simply refer to ancient woodland. The Framework glossary defines it as, *"habitats which would be technically very difficult (or take a very significant time) to restore, recreate or replace once destroyed, taking into account their age, uniqueness, species diversity or rarity. They include ancient woodland, ancient and veteran trees, blanket bog, limestone pavement, sand dunes, salt marsh and lowland fen."*

Local ecological networks

53. Paragraph 170 of the Framework refers to the need to minimise impacts on biodiversity and to provide net gains for biodiversity, *"including by establishing coherent ecological networks that are more resilient to current and future pressures".* The PPG advises that all the different statutory and

non-statutory designations for habitats and species will form part of local ecological networks, along with key natural systems and processes within the area, main landscape features which, due to their linear or continuous nature are important for the migration, dispersal and genetic exchanges of plants and animals and areas with potential for habitat enhancement or restoration, including those necessary to help biodiversity adapt to climate change. This description refers back to the definition of ecological networks in the 'The Natural Choice: securing the value of nature' White Paper (Paragraph: 011 Reference ID: 8-011-20190721).

54. You should be aware that the nature conservation value of land outside designated sites may also be a material consideration, particularly where it contributes to maintaining a network of natural habitats which are essential for network of natural habitats which are essential for migration, dispersal and genetic exchange. Effects on ecological networks may also exacerbate effects on sites or species that are covered by statutory designations for instance by removing important migration or feeding routes.

Decision-making

55. When considering effects on sites and habitats **other than European sites and SSSIs** you may find the following questions helpful to consider:

- What evidence has been presented by the applicant/appellant about biodiversity features (it may be helpful to refer to the 'decision-making' in the ecological appraisal/assessment section) that could be affected by development proposals? Have other parties provided evidence that additional biodiversity features could be affected?
- Has the mitigation hierarchy been applied? If harm cannot be avoided, has mitigation been considered before compensation? How has the delivery of mitigation and compensation been secured (conditions, planning obligations, Community Infrastructure Levy (CIL))? If this has not been done, then consider refusing permission.
- Would 'irreplaceable habitats' such as ancient woodland be lost or deteriorate as a result of the development proposals? Effects may be indirect as well as direct, for instance increased emissions of nitrogen oxides could affect the composition of ancient woodland flora. If so, is the need for the development and the benefits from it sufficient to outweigh this loss or deterioration?
- Have opportunities been taken to incorporate biodiversity into the development?
- Is the primary objective of the development proposals to conserve or enhance biodiversity? If so, the Framework says the development should be supported.
- Do the development proposals enhance biodiversity? The PPG says that biodiversity enhancement should be led by a local understanding of ecological networks and should seek to include habitat restoration, re-creation and expansion, improved links between existing sites, buffering of existing important sites, new biodiversity features within development

and securing management for long term enhancement (Paragraph 017 Reference ID: 8-017-20140306).

SPECIES

Legally protected species

56. Concerns relating to protected species often arise in planning application/appeal casework. These may be raised by the LPA or by third parties, including wildlife trusts and neighbours. As noted above, the majority of species are protected by three pieces of legislation:

    - the Habitats Regulations;
    - the Wildlife and Countryside Act; and
    - the Protection of Badgers Act.

    Carrying out activities that would lead to an offence under any of this legislation (including surveying) requires a licence from NE which is separate from any planning consent.

57. Species protected under the Habitats Regulations are often referred to as European Protected Species (EPS) and are subject to a high level of legal protection. Individual animals are protected against killing, capture, disturbance and sale. It is also illegal to damage or destroy a breeding place or place of rest. Plants protected under the Habitats Regulations cannot be deliberately picked, collected, uprooted, destroyed or sold. The EPS most commonly encountered species in planning casework include great crested newts, all species of bat, dormice, otter, smooth snakes and sand lizards.

58. The Wildlife and Countryside Act makes it illegal to intentionally kill, injure or take any wild bird or to take, damage or destroy any wild bird's nest while it is in use or to take or destroy an egg. Species listed in Schedule 1 of the Act have additional protection, making it illegal to intentionally or recklessly disturb them while they're nesting or disturb their dependent young. Species most likely to be encountered during planning casework include barn owls and kingfisher.

59. Under the Wildlife and Countryside Act adder, grass snake, common lizard and slow worm are all protected against intentional killing, injury and sale. Along with common frog, toad, smooth newt and palmate newt they are protected against sale. Other species of animal listed in Schedule 5 of the Act are also protected against intentional or reckless damage/destruction/obstruction of access to any structure or place used for shelter or protection or disturbance to an animal when it is using such a place. Species most likely to be encountered during planning casework include water vole and white-clawed crayfish.

60. It is also an offence under the Act to release or allow to escape into the wild any animal species listed on Schedule 9 (Part I) or cause to grow in the wild any plant listed on Schedule 9 (Part II). The aim of this is to control invasive non-native species in order to protect biodiversity.

61. Annex C of this chapter lists some of the species most frequently encountered in planning appeals and applications and the legislative protection that covers them.

Policy position

62. Circular 06/2005 states that the presence of a protected species is a material consideration when a development proposal is being considered which would be likely to result in harm to the species or its habitat. It goes on to say that it,*"… is essential that the presence or otherwise of protected species, and the extent that they may be affected by the proposed development, is established before the planning permission is granted, otherwise all relevant material considerations may not have been addressed in making the decision"* (paragraph 99).

63. Although the Circular states that surveys should only be required where there is a reasonable likelihood of species being present, it advises that surveys should be carried out before planning permission is granted. Consequently, it advises that surveys should only be required by condition in exceptional circumstances. Although parties often suggest that surveys can be conditioned, this is highly unlikely to be an acceptable or appropriate course of action. The only circumstance where it may be acceptable is if the applicant/appellant has undertaken recent surveys for protected species and is proposing to undertake final checks just before construction begins to make sure that no species have recently colonised the development site. In the event that exceptional circumstances do arise then the advice at paragraph 63 – 67 below on imposing planning conditions applies.

64. Concluding whether or not there is a reasonable likelihood of a protected species being present is a matter of judgement based on what is before you. You will need to weigh the evidence from both the applicant/appellant and any other parties who say that protected species would be affected by the development proposals. Evidence submitted by the applicant/appellant should contain at least a desk study and basic walkover survey of the application/appeal site which explains if there are any features that are likely to be used by protected species. Reference to the section on ecological appraisal/assessment may be helpful here.

65. Be very cautious about relying on what you see (or don't see) on a site visit. You may not be qualified to recognise signs indicating the presence or absence of a particular species and the species in question may be nocturnal, hibernating or away. Wild species may be using land where you would not expect them to be present. Previously developed land for instance can be a surprisingly rich wildlife habitat, particularly if water bodies, scrub or rough grassland are present.

66. Where you consider that there is credible evidence of reasonable likelihood of protected species being affected, and the matter has been aired but survey information is either missing or inadequate, or suggested mitigation measures are unlikely to be effective, the appeal is likely to have to be dismissed.

67. If there has not been prior airing of the issue, it may be necessary to allow the main parties an opportunity to comment, prior to reaching a decision. Where an appeal is being dismissed on other grounds it would not usually be necessary to go back to the parties and reference could simply be made in the decision to the potential need for further investigation in the event of another application being submitted.

Advice from Natural England (NE)

68. NE now provides the majority of their advice on effects on protected species from development proposals through their standing advice. The advice covers effects on bats, great crested newts, badgers, dormice, water voles, wild birds, reptiles, plants, white-clawed crayfish, invertebrates, freshwater fish and natterjack toads. However, NE should still be contacted if there are protected species or specific issues that are not included in the standing advice. Where an LPA has indicated that protected species are likely to be affected by the proposed development, the LPA should provide either a copy of the relevant standing advice or comments from NE. If this is not present, it should be requested via your case officer.

69. Article 18(3)(d) of the DMPO 2015 precludes reliance on standing advice where the development is EIA development or the standing advice was published more than two years before the date of the application for planning permission and the guidance has not been amended or confirmed as being current. If you are relying on the standing advice you should check to see if the advice is still current.

Use of conditions

70. Circular 06/2005 advises that any necessary measures to protect species should be in place through conditions and/or planning obligations, before permission is granted. The power (by s70 of the Act) to impose conditions is a way of both defining the limits of that process and also controlling the way that process itself is carried out. This might include conditions relating to hours of work or the erection of protective fencing around trees. It could also include the control of the development for protection of habitats such as nesting birds during the breeding season.

71. In the case of using a condition to control site clearance during the bird breeding season, although disturbance to breeding birds is an offence in itself (in the same way as damage to trees protected under a TPO), imposing a condition to protect against disturbance for the duration of the works is a straightforward mitigation of the effects of the development. Where evidence points to habitats for breeding birds on a proposed development site, the imposition of such a condition to regulate the development would not be construed as being for an ulterior purpose as opposed to a planning purpose. The condition would be enforceable because any breach of clearance works during the breeding season would be detectable from a site visit with enforcement action in the form of a stop notice or injunction as appropriate.

Species licensing

72. Decisions about whether a licence can be granted are the responsibility of NE and are separate from the decision to authorise (or not) planning permission. NE advise that if planning permission is required it should be obtained before an application is made for a mitigation licence. However Circular 06/2005 advises that the duty under Regulation 9(3) of the Habitats Regulations (to have regard to the requirements of the Habitats Directive in the exercise of functions) applies to cases involving effects on EPS. The Circular states that *"planning authorities should give due weight to the presence of EPS on a development site to reflect these requirements, in reaching planning decisions, and this may potentially justify a refusal of planning permission"* (paragraph 118).

73. NE can only issue a licence if the following tests have been met:

    - the development is necessary for preserving public health or public safety or other imperative reasons of overriding public interest;
    - there is no satisfactory alternative; and
    - the action will not be detrimental to maintaining the population of the species concerned at a favourable conservation status in its natural range.

74. The Circular requires that when effects on EPS are being considered in appeals, decision-makers should 'have regard' to the 3 tests that are used when licences are being determined. There have been several court cases since 2009 where the question of how far a decision maker, who is not directly responsible for granting a licence, has to go in considering these tests.

75. The Supreme Court ruled in the *Morge*[5] case that the LPA is not expected to duplicate the licensing role of NE. An LPA should only refuse permission if Article 12 of the Habitats Directive was likely to be infringed and if it was unlikely that a derogation was likely to be made under Article 16 of the Directive (in other words, NE were unlikely to issue a licence). Subsequent cases[6] in lower courts followed the same approach as *Morge* and if anything went further in suggesting that decision-makers need not engage too deeply with the licensing tests.

76. For species protected by Habitats Regulations or the Wildlife and Countryside Act, licences may be general, class or individual licences. General licences are usually for low risk activities associated with land management. Class licences are issued annually to registered users who meet NE's competency requirements. Registered users can carry out low-impact activities listed on the licence without applying for individual licences for each development.

77. Unlike the other class licences, the Bat Low Impact Class Licence (BLICL) is not published online. NE are concerned about the risk of mis-use by

[5] *Morge v Hampshire County Council* [2011] UKSC 2
[6] *R (Prideaux) v Buckinghamshire CC and FCC Environment UK Ltd* [2013] EWHC 1054 (Admin) & *Cheshire East Council v SSCLG for Rowland Homes Ltd* [2014] EWHC 3536

consultants who are not registered to use the licence and so do not usually release the documents unless they receive Freedom of Information or Environmental Information Regulations requests. They will then release the documents in a redacted form with the names of persons and sites removed.

78. Where a BLICL is included in the appeal documents, the appellant may refer to NE's request that it should be kept confidential. In these circumstances, the general principles around the use of confidential evidence in appeals should be applied (see 'The approach to decision-making', Annexe 1). Inspectors may wish to (if they think it is necessary) consider requesting a redacted version of the BLICL from the appellant which hides the name of the site and of any persons referred to on the face of the licence. Provided the appellant and NE are satisfied that the redacted version of the BLICL longer needs to be confidential, it can be taken into account in the decision.

Changes to species licensing in England

79. In December 2016 NE and DEFRA issued four new 'licensing policies' (see Annex D for the full wording) with a view to making it faster and easier to for developers to get an EPS licence while providing greater security to populations of protected species. These policies introduce greater flexibility around excluding and relocation of EPS from development sites and the location of new habitats provided to compensate for habitat that would be lost to development. NE may accept lower survey effort where costs would be disproportionate, ecological impacts can be predicted and mitigation or compensation will maintain the conservation status of the local EPS population.

80. Applicants for licences are still expected to demonstrate that they have followed the 'avoid-mitigate-compensate' hierarchy. Compensation is only acceptable if it can be demonstrated that it provides greater benefits to the local EPS population than exclusion/relocation. Provision of off-site compensation habitat is only acceptable if it provides greater benefits to the local EPS population than on-site measures.

81. Since February 2017, the Government has been funding a national roll-out of 'district licensing' for great crested newts. This approach is based on a pilot project carried out by NE and Woking Borough Council (WBC) in 2016. NE will carry out surveys across a district to establish the size and location of great crested newt populations in the area. This information is used to establish the areas within a district where compensatory habitats should be provided which can be incorporated into the local authority's green infrastructure strategy.

82. The LPA then takes on the responsibility of providing and managing the compensation habitat. Developers are then able to make a financial contribution towards the management of this habitat (tariff rates will be set by local authorities). NE issues a licence to the local authority, rather than for individual development sites. If developers choose to do this then the LPA can authorise development that would affect great crested newt, effectively granting an EPS licence and planning permission at the same time. Survey requirements may also be lower, compared with the level

required for applications for individual site licences. NE is also investigating the possibility of using private companies or NGOs as partners if local authorities are unable or unwilling to participate in the scheme.

83. Developers will still be able to apply for individual site licences if they wish. Coverage of district level licences is still restricted, with NE targeting those areas where they currently receive the greatest number of licence applications.

84. NE is continuing to review the way the wildlife licensing system works in England and further changes are likely in future; the 25-year plan for the environment specifically states that DEFRA will look to further streamline protected species licensing. Changes currently under consideration include NE charging for providing licences and moving to licensing individual consultants rather than issuing site-specific licences for all work relating to bats.

85. Notwithstanding the proposed changes to the licensing system in England, the duties on decision-makers remain the same. In line with the findings in *Morge* and the requirements in Circular 06/2005, you are not required to apply the '3 tests' but simply to consider whether an offence would be likely under the Habitats Regulations (meaning that Article 12 of the Habitats Directive would be infringed) and if there is any reason in principle why a licence would not be granted (so a derogation would not be granted under Article 16 of the Habitats Directive). Where a BLICL or district-level great crested newt licence is in place then it can be assumed that NE have applied the relevant tests and concluded that they would not be infringed.

Priority species

86. You may also see references in applicant's/appellant's survey reports to 'priority species'. These are also known as species of principal importance; under the NERC Act 2006, the Secretary of State must publish a list of species which are of principal importance for the purpose of conserving biodiversity. The same legislative and policy considerations apply as for priority habitats (see section on non-statutory habitats for further advice).

Decision-making

87. When dealing with casework where protected species are an issue you may find it helpful to consider the following points:

    - Is there a reasonable likelihood of legally-protected species being present and being adversely affected by the development proposals? NE's standing advice includes a section on where protected species are likely to be found, although this should be treated with some caution as the presence of suitable roosting or feeding habitat does not mean that protected species are actually present.

    - Have surveys been provided? Are the surveys adequate for assessing the effects of the proposals? The advice on surveys in previous sections will help you in deciding this and it is likely that the LPA will have drawn attention to any perceived deficiencies. NE's standing advice explains what they regard as acceptable survey methods for particular species,

the timing of the surveys and the age of survey data. If surveys are inadequate, then appeals should normally be refused as it will not be possible to ascertain the likely impact on the species. If the applicant/appellant is seeking to rely on conditions requiring survey rather than actually presenting a survey, are you satisfied that the requirements of Circular 06/2005 have been met?

- Do the surveys show if there would be adverse effects on any identified protected species? Does the applicant/appellant's report explain how the significance of effects on protected species has been evaluated?
- If mitigation is being proposed to avoid adverse effects, are the measures specifically designed to deal with those effects? Will it be possible to secure the mitigation through the imposition of conditions or has a planning obligation been submitted which, would ensure such measures are implemented? Conditions may be imposed to secure mitigation measures or to safeguard avoidance measures, for example the sensitive timing of certain works. NE's standing advice describes what they regard as acceptable mitigation measures.
- If mitigation measures are not feasible, are any compensation measures such as the creation of new habitat proposed? Check NE's standing advice for suggestions on suitable compensation measures.
- With regard to an effect on EPS, is it likely that the development proposals would lead to an offence under the Habitats Regulations? If so, is there any reason assume that a licence would not be granted? If the answer to both questions is yes then you should consider dismissing the appeal.
- Is the applicant/appellant relying on consent from a local authority with a district-level licence for great crested newts? If so, has the applicant/appellant committed to paying the appropriate tariff? If not, has the LPA and/or NE raised any objections?

MARINE PLANNING AND OFFSHORE SITES

Marine planning

88. The UK Marine Policy Statement sets the policy framework for the marine planning systems across the UK. All marine plans must conform with the policy statement. The seas around England have been divided into 11 areas which extend inland as far as Mean High Water. By 2021 the Marine Management Organisation should have produced a Marine Plan for each area. Marine Plans have a similar purpose to Local Plans, in that they set the objectives and policies for the way sea areas should be managed and how marine industries such as fishing and energy installations are developed. Marine Plans are a material consideration for all planning decisions for the sea, coast, estuaries and tidal waters.

89. Consents for individual works in the marine environment are granted through marine licences which are also issued by the MMO.

Marine designations

90. While this would rarely be the case, it may be possible for an onshore development to affect an offshore designation. A variety of areas have been protected under different pieces of legislation – these are generally referred to as Marine Protected Areas[7]. Marine SACs and SPAs are referred to as European Marine Sites (EMS) and are protected under the Habitats Regulations (or the Conservation of Offshore Marine Habitats and Species Regulations 2017 for European sites over 12 nm from the coast). The requirements on competent authorities/decision-makers dealing with proposals affecting European Marine Sites are the same as for terrestrial European sites (see Annex B of this chapter for more information).

91. In order to ensure that various marine operational activities undertaken by planning, navigation or harbour authorities comply with the requirements of the Habitats Directive, both the Habitats Regulations and the Offshore Marine Regulations provide for the preparation of management schemes for EMS. Such schemes are likely to be required where there is a mixture of commercial and recreational activities as well as for sites which fall either side of the mean low water mark. Once established, a management scheme governs the exercise of the functions of the relevant authorities and has legal status (see Regulation 36(1) of the Habitats Regulations). It may be a material consideration if a proposed development would affect (or be affected by) the management scheme.

92. Other components of Marine Protected Areas are Marine Nature Reserves (MNR) and Marine Conservation Zones (MCZ). Statutory MNRs in England were established under the Wildlife and Countryside Act 1981. The purpose of MNRs is to conserve marine flora and fauna and geological features of special interest, while providing opportunities for study of marine systems. There is only one MNR designated in England – Lundy Island. However, since the introduction of the Marine and Coastal Access Act (2009) MNRs in England are to be replaced by Marine Conservation Zones (MCZs).

93. Packages of conservation advice, including the list of features for which the site is designated and conservation objectives, for both MCZs and European Marine Sites are available from NE's website (although it should be noted that the MCZ packages are still being written so not all of them are available yet).

Marine management schemes

94. In order to ensure that various marine operational activities undertaken by planning, navigation or harbour authorities comply with the requirements of the Habitats Directive, the Habitats Regulations and the Offshore Marine Regulations provide for the preparation of management schemes for European Marine Sites. Such schemes are likely to be required where there is a mixture of commercial and recreational activities as well as for sites which fall either side of the mean low water mark. Once established, under Regulation 38(1) of the Habitats Regulations a management scheme governs the exercise of the functions of the relevant authorities and has

[7] The MPA network comprises SPAs and SACs, Ramsar sites, SSSIs and MCZs

legal status. It may be a material consideration if a proposed development would affect (or be affected by) the management scheme.

Duties of public authorities in relation to MCZs

95. Under s125 of the Marine and Coastal Access Act, all public authorities which exercise any function that is capable of affecting (other than insignificantly) the protected features of an MCZ or any process on which those features depend must exercise their duties in the manner which the authority considers will best further the conservation objectives for the MCZ. If this is not possible then the authority must exercise its functions in the way which the authority considers least hinders the achievement of the conservation objectives. If the achievement of the conservation objectives is likely to be significantly hindered then the appropriate nature conservation body (NE up to 12nm from the coast and the JNCC from 12 to 200nm) must be informed.

96. Where a public authority is responsible for determining an authorisation for an act which is capable of significantly affecting the protected features of an MCZ or an ecological or geomorphological process that it depends on, then it can only grant consent if the applicant/appellant seeking the authorisation can satisfy them that:

- there is no other means of proceeding with the act which would create a substantially lower risk of hindering the achievement of those objectives,
- the benefit to the public of proceeding with the act clearly outweighs the risk of damage to the environment that will be created by proceeding with it, and
- the person seeking the authorisation will undertake, or make arrangements for the undertaking of, measures of equivalent environmental benefit to the damage which the act will or is likely to have in or on the MCZ.

Decision-making

97. When dealing with casework that could affect the marine environment, it may be helpful to consider the following points:

- Is the proposed development within an area covered by a Marine Plan? What are the implications for the policies within the Marine Plan if permission is granted?
- Would European sites or SSSIs be affected? If so, refer to the advice on these designations within this chapter and Annex B.
- Would the proposed development be capable of affecting a MCZ? If it is then:
  - Do you have the conservation objectives and/or conservation advice package? If not, NE should be able to provide them.
  - Would the conservation objectives be undermined by the effects of the proposed developments?

- If the conservation objectives would be undermined, is there any way of proceeding with the proposed development that would avoid or reduce the risk of not delivering the conservation objectives? This could mean carrying it out in a different way or at a different location.
- Does the benefit of proceeding with the proposed development outweigh the risk of damage to the environment?
- If the benefit of proceeding does outweigh the environmental damage to the MCZ, are measures of 'equivalent environmental benefit to the damage' being proposed? How will they be secured and delivered? Do NE agree that the measures will offer equivalent environmental benefit?

ANNEX A

RELEVANT CASE LAW

This list excludes case law relevant to European Sites, which can be found at Annex B, Appendix 1.

- *Andrew Bagshaw and Shirley Carroll v Wyre Borough Council* [2014] EWHC 508 (Admin)
- *Anthony Elliott, John Payne v SSCLG, the London Development Agency and the London Borough of Bromley* [2012] EWHC 1574 (Admin)
- *Buglife (the Invertebrate Conservation Trust) v Thurrock Thames Gateway Development Corporation and Rosemound Developments Ltd* [2009] EWCA Civ 29
- *Cheshire East Council v SSCLG and Rowland Homes Ltd* [2014] EWHC 3536
- *Morge v Hampshire CC* [2010] EWCA Civ 608
- *Prideaux v Buckinghamshire County Council and FCC Environment UK Limited* [2013] EWHC 1054 (Admin)
- *Woolley v Cheshire East BC and Millennium Estates Ltd* [2009] EWHC 1227 (Admin)

ANNEX B

HABITATS REGULATIONS ASSESSMENT

INFORMATION SOURCES

Legislation

Council Directive 92/43/EEC 199 on the conservation of natural habitats and of wild fauna and flora ('Habitats Directive')

Council Directive 2009/147/EC on the conservation of wild birds ('Birds Directive')

The Conservation of Habitats and Species Regulations 2017

The Conservation of Offshore Marine Habitats and Species Regulations 2017

Policy

National Planning Policy Framework

Circular 06/2005: Biodiversity and Geological conservation - Statutory obligations and their impact within the planning system

Guidance

European Commission (updated November 2018) Managing Natura 2000 sites: the provisions of Article 6 of the Habitats Directive 92/43/EEC

European Commission (2001) Assessment of plans and projects significantly affecting Natura 2000 sites

European Commission (2007/2012) Guidance document on Article 6(4) of the 'Habitats Directive' 92/43/EEC

Defra (2012) The Habitats and Wild Birds Directives in England and its seas Core guidance for developers, regulators & land/marine managers December 2012 (draft for public consultation)

Defra (2012) Guidance on competent authority coordination under the Habitats Regulations

Defra (2012) Habitats and Wild Birds Directives: guidance on the application of article 6(4) Alternative solutions, imperative reasons of overriding public interest (IROPI) and compensatory measures.

Planning Practice Guidance – Appropriate Assessment

Natural England Research Report - Small-scale effects: How the scale of effects has been considered in respect of plans and projects affecting European sites – a review of authoritative decisions (NECR205)

Design Manual for Roads and Bridges (DMRB) – LA115 Habitats Regulations Assessment (Highways England, 2020)

Habitats Regulations Assessment Handbook by David Tyldesley Associates (the DTA Handbook)[8]

[8] Contact the Knowledge Centre for login details

INTRODUCTION

Legislative context

1) The Conservation of Habitats and Species Regulations 2017 ('the Habitats Regulations') transpose the Habitats Directive and the Birds Directive into English and Welsh law. The aim of the Directives is to conserve key habitats and species across the EU by creating and maintaining a network of sites known as the Natura 2000 network.

2) The Habitats Regulations also apply to Scotland and Northern Ireland (including the adjacent inshore region) as regards reserved and excepted matters respectively. The Conservation of Offshore Marine Habitats and Species Regulations 2017 ('the Offshore Marine Conservation Regulations') transpose the Directives in the offshore marine area. The offshore marine area is defined in the Offshore Marine Conservation Regulations but broadly encompasses UK territorial waters (from 12 nm offshore to the edge of the UK's Exclusive Economic Zone).

3) The 2017 versions of the Regulations are consolidated versions incorporating all the amendments made to the 2010 Habitats Regulations and the 2007 Offshore Marine Conservation Regulations. As with previous iterations of the regulations, they require competent authorities before granting consent for a plan or project, to carry out an appropriate assessment (AA) in circumstances where the plan or project is likely to have a significant effect on a European site, alone or in-combination with other plans or projects.

4) The AA must consider the implications of the plan or project for the European site's conservation objectives and the appropriate nature conservation body must be consulted. If the AA demonstrates that the integrity of a European site would be affected then consent for the plan or project can only be granted if there are no alternative solutions, the plan or project must be carried out for imperative reasons of overriding public interest (IROPI) and compensatory measures will be provided which maintain the ecological coherence of the Natura 2000 network.

5) The competent authority is usually the body which is responsible for granting consent to carry out an activity such as development or plan making. It should be noted that the regulations apply to all consenting activities including the making of development plans. The process of considering the effects from a plan or project on European sites is usually referred to as Habitats Regulations Assessment (HRA) although it should be noted that this term does not actually appear in the Habitats Regulations.

Site designations and conservation objectives

6) Sites designated under the Habitats Regulations are known as European sites and European marine sites. They are sometimes colloquially referred to as habitats sites, Natura 2000 or N2K sites. European sites include; Special Areas of Conservation (SACs); Sites of Community Importance (SCIs); candidate SACs (cSACs); and Special Protection Areas (SPAs).

They form part of the 'Natura 2000' site network which covers all EU Member States.

7) The statutory definition of European sites and European marine sites are set out in Regulation 8 of the Habitats Regulations as follows:

- a fully designated Special Area of Conservation (SAC);
- a candidate Special Area of Conservation;
- a Site of Community Importance (SCI);
- a site containing either a priority habitat or species that is being consulted upon;
- a fully classified Special Protection Area (SPA); and
- any eligible SCI submitted to the European Union.

8) Paragraph 176 of the National Planning Policy Framework 2019 (the Framework) identifies additional sites that should be given the same protection. These comprise:

- any potential SPA;
- any possible or proposed SAC;
- any listed or proposed Ramsar site; and
- any sites required for compensatory measures.

9) Ramsar sites comprise wetlands of international importance that are listed under the Ramsar Convention which resulted from the Convention on Wetlands of International Importance held in Ramsar, Iran in 1971. The main aim of the convention is the conservation and wise use of all wetlands as a contribution towards achieving global sustainable development goals.

10) Site designation and provision of advice regarding effects on European sites is the responsibility of the statutory nature conservation bodies (SNCBs). For European sites and Ramsar sites in England, the relevant SNCB is Natural England (NE). For sites in Wales, Scotland and Northern Ireland, Natural Resources Wales (NRW), Scottish Natural Heritage (SNH) and the Department of Agriculture, Environment and Rural Affairs (DAERA) respectively are the relevant bodies. For sites which cross the English/Welsh and English/Scottish borders, responsibility is split between the SNCBs. For marine sites outside the 12nm limit the relevant body is the Joint Nature Conservation Committee (JNCC).

11) European sites have conservation objectives which are produced by the relevant SNCB and which are usually available through their websites. NE has published conservation objectives for terrestrial sites and conservation advice for European marine sites. NRW has published conservation objectives for European marine sites; conservation objectives for terrestrial sites can be searched for through this page of the NRW website.

12) When dealing with effects on a Ramsar site you should check with the relevant SNCB what conservation objectives should be used as these sites do not usually have published conservation objectives.

13) The majority of European and Ramsar sites (other than marine sites) are also designated as Sites of Special Scientific Interest (SSSI). However, it should be noted that the boundaries of the SSSI and the European site may not be the same. Some European sites are composed of a number of separate SSSI sites. In other cases, the SSSI boundary may extend beyond the boundary of the European site. The SSSI designation may also include additional features which are not qualifying features of the European site. The SSSI designation is a national designation and is not subject to the requirements of the Habitats Regulations.

HABITATS REGULATIONS ASSESSMENT

Procedural stages of HRA

14) HRA is the process of assessing the effects from a plan or project on European sites it is usually divided into stages or steps (see the diagram below which is based on Figure 1 of Circular 06/2005), which the competent authority is required to complete. The four stages are:

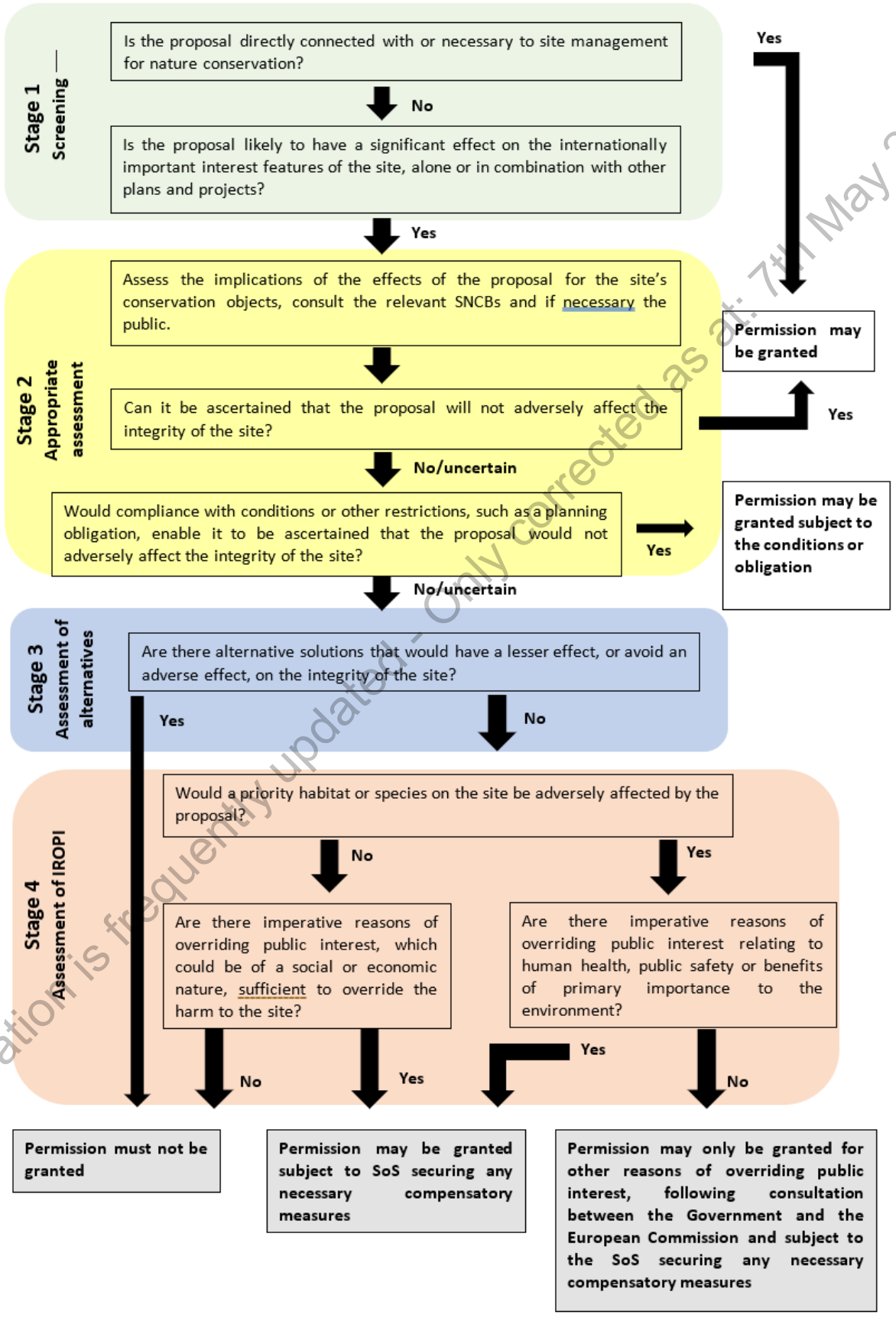
- Stage 1 - 'Screening' which establishes whether there is a pathway for effect on the designated features of a European site and whether significant effects are likely.
- Stage 2 – 'AA' which establishes whether there would be adverse effects on the integrity of the features of a European site and if there are, how could these be modified through mitigation.
- Stage 3 – 'Assessment of alternatives' establishes whether there are any alternative solutions that would avoid or reduce the effects on the site while achieving the same outcomes as the proposed development.
- Stage 4 – 'Imperative Reasons of Overriding Public Interest (IROPI)' establishes a justification in support of the harm to the European site and explains if and how compensatory measures can be provided to make up for the loss of the habitats or species.

15) Progression through the stages should be made in order, as shown in Figure 1. Specific questions have to be addressed at each stage. Depending on the answer to these questions, consent may be granted, or the assessment has to move to the next stage.

16) This annex to the biodiversity chapter provides a broad overview of the HRA process and relevant case law. General guidance on the requirements of HRA and AA in the planning process is also provided in the Planning Practice Guidance from MHCLG. More detailed information regarding the process, principles of and relevant case law relating to HRA can be found in the DTA handbook which is updated as a living document. Please contact

the Knowledge Centre for login details. EST or the Knowledge Centre can also advise on specific points.

Figure 1



Relationship with environmental impact assessment

17) It is not unusual for the evidence relied on by an applicant/appellant in their HRA to be based on evidence gathered as part of the environmental impact assessment (EIA) for a project. The Town and Country Planning (EIA) Regulations 2017 require the Secretary of State or relevant authority, where appropriate to co-ordinate the HRA and EIA. The EU has prepared guidance on this procedure[9]. The guidance focuses on certain steps of the EIA procedure and identifies ways of streamlining different environmental assessments in the context of joint and/or coordinated procedures. However, as the UK has opted for a co-ordinated procedure rather than a joint procedure and therefore the EIA and HRA do not have to be presented in a single document; it is up to the applicant/appellant to decide how they want to present the evidence relevant to HRA and EIA.

18) A major difference between the approach in EIA and HRA is that the EIA Regulations allow for mitigation measures to be taken into account when the likely significance of environmental effects is being considered. This is no longer the case in HRA.

STAGE 1 – ASSESSMENT OF LIKELY SIGNIFICANT EFFECTS

Assessment of effects alone and in combination with other plans or projects

19) The initial consideration of effects on European sites should be conducted at a broad scale and designed to identify all impacts from the proposed development which are likely to result in significant effects on the qualifying features of European sites. It should be noted that a likely significant effect (LSE) can arise even when the effects of the proposed development occur outside of the legal boundaries of a European site. For instance, water abstraction occurring at some distance from a European site could result in a LSE to the hydrology of the site a considerable distance away and may indirectly affect the qualifying features. Where the qualifying features of a site include highly mobile species such as bats or birds then it is highly likely that they will be using land outside of the European site boundaries (NE refer to such land as 'functionally linked land'). Impacts from the proposed development which result in LSE on functionally linked land need to be assessed within the HRA and considered in context with the relevant European site and specific qualifying features.

20) Decisions taken on LSE and/or adverse effects on the integrity of a European site (see Stage 2) should adopt the **precautionary principle**. The precautionary principle requires that where it is **unclear whether an effect would be significant, it must be assumed that such an effect would be, unless there is objective evidence to the contrary**.

[9] Commission guidance document on streamlining environmental assessments conducted under Article 2(3) of the EIA Directive.

21) The precautionary principle was established in the 'Waddenzee' case (ECJ [2004] C-127/02) where the European Court of Justice ruled that in the light of the precautionary principle embedded in the Habitats Directive, a risk of significant effects exists if it cannot be excluded on the basis of objective information that the plan or project would have significant effects on the conservation objectives of a European site. The Waddenzee case was further reinforced by the judgment in 'Sweetman v An Bord Pleanála' (ECJ [2013] C-258/11). An insignificant effect will be one that does not threaten to undermine the conservation objectives for the site.

Mitigation and LSE

22) Prior to April 2018, case law[10] in England and Wales allowed competent authorities to consider the effects of proposed mitigation measures into account when determining if a plan or project would lead to LSE on European sites. However, this position changed following a judgment by the Court of Justice of the European Union generally referred to as the 'People over Wind' case[11]. The judgment concluded that it is not acceptable for a competent authority to take mitigation measures into account when considering LSE. These measures can only be considered at the AA stage (Stage 2), when effects on the integrity of European sites are being considered (see PINS Note 05/2018r3 for additional detail). This ruling has been upheld in the UK courts[12].

23) In August 2018, the conclusion of the Langton case[13] was that measures which were integral to a project (in this case, conditions on badger culling licences) '*are not mitigating or protective measures which featured in the People Over Wind ruling'* and could therefore be taken into account when screening for LSE. The advice in the PPG also suggests that a distinction can be made between measures which are integral to the design and physical characteristics of a proposed development (eg location, layout and timing) and those which are intended primarily to avoid or reduce effects on European sites. Integral measures can be taken into account when screening for LSE (see Paragraph 007, Reference ID:65-007-20190722). It is not always easy to identify what is an 'integral' measure. Where doubt exists, Inspectors are advised to act with precaution and address such measures in the Stage 2 assessment.

Considering in-combination effects

24) There is no definition in the Habitats Regulations or the Directive of the plans and projects that need to be considered when assessing in-combination effects. Circular 06/2005 suggests the following categories of plan or project (note that these are not just planning consents but any relevant plan or project) should be addressed in the assessment:

[10] *Hart DC v SSCLG & Others [2008] EWHC 1204 and Smyth v SSCLG* [2015] EWCA Civ 174
[11] *People Over Wind & Peter Sweetman v Coillte Teoranta* C-323/17
[12] *Gladman Developments Ltd v SSHCLG and Medway Council* [2019] EWHC 2001 (Admin)
[13] *R (on the application of) Langton v SSEFRA & ANOR* [2018] EWHC 2190 (Admin)

- Outstanding consents that are not fully implemented;
- Ongoing activities or operations that are subject to continuing regulation such as drainage consents (but note that the effects of these projects may have already been captured in the HRA baseline); and
- Proposed plans or projects subject to a current application for any kind of authorisation, permission, licence or other consent.

25) How far emerging plans and proposals should be taken into account will be a matter of judgement based on the extent to which there is a realistic prospect of their being implemented. However, when coming to a view, it is prudent to have regard to the precautionary principle. Unless there is objective evidence to indicate that an emerging plan or project is unlikely to be adopted and/or implemented then it should normally be considered.

26) Good practice advice contained in the DTA handbook suggests that the first point to consider is if the development proposals would have significant effects on European site features on their own. If there is LSE alone then it is not necessary to consider in-combination effects. This should only occur for plans and projects where there is a defined impact pathway and the effect would not be de minimus. Consequently, whilst the effect may not have a significant ecological impact alone it may add to an existing impact and thus become significant.

STAGE 2 – ASSESSMENT OF ADVERSE EFFECTS ON INTEGRITY/APPROPRIATE ASSESSMENT

27) If LSE cannot be excluded, then the competent authority must undertake an AA. Regulation 63 of the Habitats Regulations require a competent authority to '*make an appropriate assessment of the implications for that site in view of that site's conservation objectives (…) the competent authority may agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the European site or the European offshore marine site (…)'*.

28) It should be noted that, in accordance with paragraph 177 of the Framework, **the presumption in favour of sustainable development does not apply where the plan or project is likely to have a significant effect on a European site, unless an AA has concluded that there would be no adverse effect on the integrity of the site.**

29) Regulation 63(2) of the Habitats Regulations states that a person applying for any such consent, permission or other authorisation must provide such information as the competent authority may reasonably require for the purposes of the assessment or to enable them to determine whether an AA is required. The applicant/ appellant is therefore responsible for providing the information that the competent authority requires to undertake an assessment.

30) It is important that the evidence can withstand scientific scrutiny and embodies the precautionary principle. It must be detailed and sufficiently robust to ensure that the integrity of the Natura site would not be adversely

affected. European case law confirms that, in order to reach this conclusion, there must be no reasonable scientific doubt. Whilst this is a high bar, this test does not require absolute certainty and decisions are often necessary on the basis of imperfect evidence.

31) The AA must consider the conservation objectives for the affected European site(s) and the effect the proposed development would have on the delivery of those objectives. In the light of the conclusions about the effects on the delivery of the conservation objectives, the competent authority must decide if the integrity of the site would be affected. There is no definition of site integrity in the Habitats Regulations – the definition that is most commonly used is in Circular 06/2005 which 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 classified*'.

32) In order to avoid an adverse effect on integrity, the favourable conservation status of a habitat or species must either be maintained or not further degraded or impeded from achieving a favourable conservation status. Consequently, you will not only need to establish the conservation status of the qualifying features that would be affected but also their condition and whether the proposal would make them unfavourable or increase the time that they might take to recover if they are already unfavourable. All European sites are subject to regular condition assessment and you will need to consider the relevant site condition unit rather than just the overall condition for the site.

33) The concept of integrity applies to the whole site and not simply the part nearest to the proposed development. Applicants/appellants may present evidence asserting that as only a small area of a European site would be affected there cannot be an adverse effect on integrity. This may well be the case but this should be treated with considerable caution since the qualifying features, whether they are habitats or individual species, are unlikely to be evenly distributed across a site.

34) Consequently, the key question is not what percentage of the European site area is likely to be affected but whether effects on that area would undermine the conservation objectives associated with specific qualifying features. NE produced a review in February 2016 on how the scale of effects has been considered in relation to effects on integrity in previous decisions which may be of relevance (NECR205).

35) As noted in the Stage 1 assessment of LSE, site integrity can also be affected by impacts occurring outside the European site boundary. For example, greater horseshoe bats, which feature in a number of SACs, require different roosting conditions at different times of the year. They will typically migrate between their major roosts and smaller temporary roosts following routes through woodland and along hedgerows. They avoid gaps in the canopy and well-lit areas so putting even a small access road through a hedgerow used as a commuting route could affect their ability to move between roosts and to feed. This could lead to a decrease in the population of the species occurring in the SAC and therefore affect the integrity of the European site.

36) Neither the Habitats Regulations or the Habitats Directive specify the form or contents of an AA, so it is open to the competent authority to produce it in the form that they choose. In terms of guidance on the content of an AA, the PPG states that (see Paragraph 003 Reference ID: 65-003-20190722):

- *an appropriate assessment must catalogue the entirety of habitat types and species for which a site is protected*; and
- *an appropriate assessment must identify and examine the implications of the proposed plan or project for the designated features present on that site, including for the designated features present on that site, including the typical species of designated habitats as well as the implications for habitat types and species present outside the boundaries of that site and functionally linked; insofar as those implications are liable to affect the conservation objectives of the site*.

This advice is in line with the ruling provided by the Court of Justice of the European Union in November 2018[14] ('the Holohan judgment').

Consultation with the SNCBs

37) Regulation 63(3) of the Habitats Regulations requires the competent authority to consult the relevant SNCB and to have regard to any representations they make. If the SNCB has already submitted evidence relevant to the AA or chosen to participate in proceedings, then that may be sufficient to satisfy Regulation 63(3) of the Habitats Regulations. However, care should be taken to ensure that the SNCB has seen any information relevant to the AA. The public may also be consulted if it is considered appropriate (see Regulations 63(3) and 105(2) of the Habitats Regulations).

38) The competent authority is only required to have regard to the views of the SNCB and is not bound by them. There have been recent examples in the UK courts where judges disagree with NE's advice on effects on European sites[15]. However, the Holohan judgment states that '*where the competent authority rejects the findings in a scientific expert opinion recommending that additional information be obtained, the 'appropriate assessment' must include an explicit and detailed statement of reasons capable of dispelling all reasonable scientific doubt concerning the effects of the work envisaged on the site concerned'.* This advice is also contained in the PPG (see Paragraph 003 Reference ID: 65-003-20190722). If the competent authority chooses not to follow the SNCB's advice, the AA should clearly explain why and what evidence was relied on in reaching their own conclusions.

39) That said, you will need to ensure that the SNCB advice is not generic and speaks to the specific impacts that would be associated with the proposed development. If the advice is generic or you do not have the necessary

[14] Case C-461/17 [2019] Holohan and Others v An Bord Pleanála
[15] *Wealden DC v SSCLG, Lewes DC and South Downs NPA [2017] EWHC 351, Canterbury City Council v SSHCLG and Crondall Parish Council v SSHCLG* [2019] EWHC 1211 (Admin)

information to reach a decision, then you should go back to the parties even if this means missing casework targets. You should ensure that the impact on specific qualifying features is quantified as far as possible and that the SNCB directs you to exactly which conservation objectives would be undermined and how the proposed development would affect its condition.

Mitigation and the 'integrity test'

40) Regulation 63(6)[16] of the Habitats Regulations state that "In considering whether a plan or project will adversely affect the integrity of the site, the authority must have regard to the manner in which it is proposed to be carried out or to any conditions or restrictions subject to which they propose that the consent, permission or other authorisation should be given (…)".

41) The implication of this is that, if adverse effects on integrity are anticipated to occur (or it is uncertain whether they will occur) then the competent authority must give regard to any measures that could be delivered which would avoid these effects and ensure that implementation of those measures are secured through the consent or other means.

42) The types of measures that could be used vary considerably. They could be modifications to the nature of the consent so that adverse effects can be avoided. Avoiding or reducing effects at source is always likely to be more effective than mitigating them once they occur. For instance, if the European site feature in question is a population of over-wintering birds, a condition could prevent works being carried out during the months when the birds are present. This is likely to be more effective and easier to implement than trying to find ways to control noise and visual disturbance from construction activity during the breeding season.

Consents seeking flexibility for delivery

43) It is not unusual for an applicant/appellant to state that detailed construction methods will only be finalised post-consent. To address uncertainty in this regard it is typical that they will undertake an assessment of construction effects based on the most 'likely' construction methods. The assessment would then be undertaken having regard to the most extreme effects likely to arise from construction (the worst case scenario). The applicant/appellant should provide a justification for the definition of the worst case scenario thus allowing the AA to adequately assess construction effects.

44) However, it should be noted that the Holohan judgment determined that a competent authority may grant consent for a plan or project which leaves the applicant/appellant free to determine '*certain parameters relating to the construction phase, only if that authority is certain that the consent includes conditions that are strict enough to guarantee that those*

[16] Regulation 28 of the Offshore Marine Conservation Regulations

parameters will not adversely affect the integrity of the site'. This statement is also included in the advice in the PPG (see Paragraph 003 Reference ID: 65-003-20190722).

Distinction between mitigation and compensation

45) Provision of greenspace, landscaping and habitat management may also be appropriate forms of mitigation but should be considered carefully. If the plan or project is likely to lead to the loss of habitat which is either a qualifying site feature or supports a qualifying feature, then replacement of that habitat either within or outside the European boundaries should be treated as compensation rather than mitigation. Compensatory measures (which are discussed further below) cannot be taken into account when reaching conclusions on effects on site integrity.

46) The position on provision of replacement habitat within the boundaries of a European site is based on several judgments made by the Court of Justice of the European Union (CJEU), notably the Briels[17] and Grace-Sweetman[18] judgments.

47) It should be noted that the Grace-Sweetman judgment is not dealing with a situation where completely new habitat would have been created but one where the proposals would have involved restoration of one habitat type and improved management of another to provide replacement foraging habitat.

48) One of the implications of this judgment is that competent authorities need to think carefully about mitigation measures proposed to be carried out within the boundaries of the site. In situations where the plan or project would lead to the loss of habitat and measures are proposed which would replace that habitat, either through recreation, restoration or improved management of existing habitat, it is more appropriate to consider these measures as compensatory rather than mitigatory.

49) Habitat loss can take two forms – it can be a direct loss or it can be a functional loss. In the case of functional loss, a species may stop using an area of habitat because of increased levels of noise or disturbance resulting from a development. Even though the habitat is still present it is effectively lost to the affected species.

50) If the habitat that would be lost is 'functionally linked land' (land regularly used by species which are designated features but is outside of the boundaries of the European site) then replacement of this habitat, provided it occurs outside the boundaries of the European site can still be viewed as mitigation.

51) Equally, provision of open space outside the boundaries of a European site can be viewed as mitigation rather than compensatory measures if it isn't intended to replace habitat lost from within the European site. For example, for the Thames Basin Heaths SPA, NE advise that effects from

[17] Case C-521/12 Briels and Others v Minister van Infrastructuur en Milieu
[18] Case C-164/17 Grace and Sweetman v An Bord Pleanála

increased recreational use could disturb the ground nesting birds (Dartford warbler, nightjar and woodlark) which are the designated features of the SPA. They advise the use of Sustainable Alternative Natural Greenspace (SANGs) – areas of open space closer to housing developments than the SPA, -which are intended to draw some of the visitors that would otherwise go to the SPA.

52) Provision of alternative habitats for the bird species would constitute compensation. Provision of alternative natural greenspace to reduce the number of human visitors can be classed as mitigation because it avoids or reduces the effects of disturbance associated with increased visitor pressure.

Mitigation for in-combination effects

53) Dealing with in-combination effects can be difficult, particularly in cases where multiple small contributions could add up to an adverse effect on the integrity of a European site. In some cases, NE has worked with the affected local authorities to develop a strategic approach to the delivery of mitigation for the effects of development. The best-known example is the mitigation proposals for the Thames Basin Heaths SPA but there are a number of other examples.

54) In the case of the Thames Basin Heaths SPA, the potential adverse effect on integrity arises from housing developments located within proximity of the SPA. An increase in the number of residents living close to the heaths is anticipated to lead to an increase in recreational use of the heaths. The SPA is designated for nightjar, woodlark and Dartford warbler, all of which nest on the ground and are likely to be affected by the disturbance associated with increased leisure use. Putting housing in close proximity to the SPA could also lead to an increase in predation on the birds from pet cats.

55) The mitigation measures advocated by NE and the local authorities take the following forms:

- No net new residential development within 400m of the SPA;
- For residential development that is between 400 metres and five kilometres of the SPA:
    - Provision of new open space ('Suitable Alternative Natural Greenspace' (SANGs)); and
    - Provision of measures to manage access on the SPAs (including provision of wardens, signage and public education) alongside monitoring of visitor use and bird populations ('Strategic Access Management and Monitoring' (SAMMs)).

56) The affected local authorities in Hampshire, Surrey and Berkshire have formed a Joint Strategic Partnership. NE, the Forestry Commission and various Non-Governmental Organisations (NGOs) are also members. The partnership has produced a Delivery Framework which provides a detailed description of the mitigation measures they advise. These measures have

been translated into Supplementary Planning Documents (SPD) and position statements by the local authorities, which explain what they expect developers to provide to mitigate effects on the SPA.

57) Developers can either make financial contributions (via s106 or CIL) towards the delivery of the SANGs and SAMMs or, for larger developments, provide their own 'bespoke' measures. If a developer is not willing to make the financial contributions and does not provide mitigation that meets the requirements of the local authority, it is likely that they will refuse to grant planning permission.

58) It should be noted that this approach was originally designed to prevent the need to undertake an AA – the mitigation measures could be taken into account when determining LSE. As noted above, following the 'People Over Wind' judgment, this is no longer possible. However, the mitigation measures can still be taken into account when considering adverse effects on integrity.

59) It is of course still open to applicants/appellants to make a case that their proposals would not lead to adverse effects on integrity or to offer alternative forms of mitigation.

STAGES 3 AND 4 – NO ALTERNATIVE SOLUTIONS, IMPERATIVE REASONS OF OVERRIDING PUBLIC INTEREST AND COMPENSATORY MEASURES

60) If the competent authority cannot exclude adverse effects on the integrity of a European site then it can only grant consent if there are no alternative solutions with a lesser effect on the features of a European site, IROPI and compensatory measures can be put in place (this equates to a derogation under Article 6(4) of the Habitats Directive). Defra produced guidance in December 2012 on these tests. The guidance states that it represents interim guidance that would be absorbed into new overarching guidance in 2013. However, since the overarching guidance was never produced the 2012 document 'Habitats and Wild Birds Directives: guidance on the application of article 6(4)' remains the only guidance from Defra on the application of the IROPI, alternative solutions and compensatory measures tests.

61) The Defra guidance states that the competent authority is responsible for ensuring its decision takes account of all relevant evidence. The competent authority should not require information from the applicant/appellant or other parties which are unlikely to be material to its decision and should work cooperatively with the applicant/ appellant, NE (or other SNCBs as relevant), other interested parties and the appropriate authority. The appropriate authority is the relevant Secretary of State.

62) If the competent authority is satisfied that all three tests have been met and intends to grant consent, they must give the relevant Secretary of State a minimum of 21 days notice before finally doing so. This will allow the appropriate authority to direct the competent authority not to agree to the proposed development if they do not agree that the 3 tests have been met. If the appropriate authority is satisfied that the compensatory

measures are secured and sufficient to maintain the coherence of the European site network then they are responsible for informing the European Commission that compensation has been secured.

Alternative solutions

63) The Defra guidance states that the competent authority must be able to demonstrate objectively the absence of feasible alternative solutions that would achieve the aims of the proposed development. The guidance advises that "*the competent authority should use its judgement to ensure that the framing of alternatives is reasonable".* It gives examples of what might constitute an alternative solution. For instance, in the case of flood defence works around a flood-prone village, an alternative solution would be a less ecologically harmful way to conduct the works but not reducing the works to protect fewer homes or relocating the population of the village.

64) The guidance also advises that the "do-nothing" option should be included as part of the consideration of alternatives to form a baseline from which to gauge other alternatives. It should also help in understanding the need for the proposal.

IROPI

65) With regard to IROPI, the guidance advises that it should be dealt with on a case by case basis in the light of the objective of the particular plan or project and its particular impacts on European site(s) affected. However, for any proposed development to meet the IROPI test it must be essential for it to proceed and serving a public interest which outweighs the harm to the integrity of the European site(s).

66) If the plan or project would have an adverse effect on the integrity of a priority habitat or species, as defined under Annex 1 and Annex 2 of the Habitats Directive, then a stricter IRoPI test applies and consent can only be granted for reasons relating to:

- human health, public safety, or beneficial consequences of primary importance to the environment; or
- other imperative reasons of overriding public interest agreed by the European Commission.

67) The competent authority must be satisfied that the plan or project is required, indispensable or essential and that clear public benefits would be derived. These benefits must demonstrably outweigh the potential harm that would be caused to a site and should be long-lasting rather than just short-term. Plans and projects that are consistent with National Policy Statements have an inherent and substantial public interest benefit but should nevertheless still be tested.

68) The UK government can also seek the opinion of the European Commission as to whether particular reasons constitute IROPI. It should be noted that

this only applies to sites designated under the Habitats Directive (i.e. SACs) and so does not apply to SPAs or Ramsar sites.

Compensatory measures

69) Compensatory measures are intended to maintain the ecological coherence of the network of sites designated under the Habitats and Birds Directives across the EU. The Defra guidance states that this can include the creation or re-creation of a comparable habitat to the one which is being lost and which in time could be designated as a European site. Alternatively, it could require the creation or re-creation of a comparable habitat as an extension of an existing European site.

70) The competent authority must have confidence that the measures proposed will be sufficient to offset the harm. The Defra guidance identifies factors that should be taken into account including the evidence for technical feasibility of the proposed measures, the existence of a clear plan for undertaking the compensation, distance from the affected European site and the time required to establish the measures to the required quality.

71) One of the major points the competent authority needs to consider is the amount of compensatory habitat that is required. The Defra guidance emphasises the need to provide only the level of compensation that as is required to maintain the integrity of the European site network. It also puts weight on the need for the compensation requirements to be sufficiently flexible to allow for uncertainty surrounding the harm caused by a development or the effectiveness of the compensation. It may be necessary to provide a greater area of compensatory habitat than the area damaged if it is uncertain how well the proposed measures will work and/or potential actions that could be taken if compensation is less successful than predicted. However, if the harm is less than anticipated or the compensatory measures are more successful than expected, compensation requirements "*should be sufficiently flexible to scale back the compensation required in such cases. Habitats legislation should not be used to force applicants to over-compensate".*

72) Compensation should be secured before planning permission is given (the Defra guidance refers to the need for the competent authority to be satisfied that all the necessary legal, technical, financial and monitoring arrangements are in place). Where possible compensation measures should be complete before adverse effects on a European site occurs although the Defra guidance says that damage may occur before compensatory measures are fully functioning. This may be acceptable provided undertakings have been made that the measures will in time provide completely functioning habitat and additional compensation is provided to account for this.

73) The guidance emphasises the need for cooperation between the competent authority, the applicant/ appellant and the relevant SNCB (usually NE) in designing and considering the compensatory measures required.

OUTLINE AND DUAL CONSENTS

Outline planning permission

74) Regulation 70 of the Habitats Regulations states that:

> '(2) where the assessment provisions apply, the competent authority may, if it considers that any adverse effects of the plan or project on the integrity of a European site or a European offshore marine site would be avoided if the planning permission were subject to conditions or limitations, grant planning permission, or, as the case may be, take action which results in planning permission being granted or deemed to be granted, subject to those conditions or limitations.
>
> (3) Where the assessment provisions apply, outline planning permission must not be granted unless the competent authority is satisfied (whether by reason of the conditions and limitations to which the outline planning permission is to be made subject, or otherwise) that no development likely to adversely affect the integrity of a European site or a European offshore marine site could be carried out under the permission, whether before or after objecting to approval of any reserved matters'.

75) The competent authority can therefore only grant outline planning permission if it can be demonstrated that there would be no adverse effects on the integrity of a European site. Conditions and planning obligations can be used to avoid adverse effects on the integrity of a European site, but they need to be capable of preventing any development taking place which would have an adverse effect on the integrity of a European site.

76) At the reserved matters stage, the assessment carried out for the outline matters may be sufficient to determine if adverse effects on integrity could be excluded. However, it should always be re-visited and updated as required. The assessment may have to be updated to take account of details (such as the location of lighting) which were not included in the outline planning permission. It may also be the case that a European site has been designated since the outline permission was granted which could be affected by the proposed development and which would need to be included in any assessment.

77) If an assessment of the detailed matters shows that adverse effects on integrity cannot be excluded, then approval of the reserved matters would not be in accordance with the decision granting outline planning permission and should be refused.

Proposals that require dual consents

78) Many proposals eg power stations, waste management facilities, water treatment plants etc, require consents such as environmental permits or abstraction licences in addition to planning permission. Decisions on such consents are also subject to the assessment provisions of the Habitats Regulations, and Regulation 67(2)[19] provides that a competent authority is

[19] Regulation 35(2) of the Offshore Marine Conservation Regulations

not required to assess any implications of a plan or project that would be more appropriately assessed by another competent authority.

79) The fact that a particular impact, eg air quality, on a protected site will also be subject to HRA for a separate consent does not negate the requirement for the competent authority for the planning consent to assess whether a proposal is likely to have a significant effect and whether it is necessary to undertake AA. However, if with the benefit of information before them they are satisfied that a particular impact is more appropriately assessed by another competent authority, then they are not required to consider whether it is necessary to undertake AA in relation to that particular impact.

80) Defra issued guidance in July 2012[20] which advises on situations where, because of different consenting processes for different aspects of development (eg a development that requires both planning permission and an environmental permit), more than one competent authority may need to undertake an AA or at least determine if one is required. The guidance states that '*where previous decisions have been taken in relation to the appropriate assessment requirements for a plan or project, competent authorities should adopt the parts of the earlier assessment that are robust and have not become outdated by further information or developments. The competent authority may still need to undertake additional work to ensure its own assessment and decisions are robust'.*

81) However, the guidance also makes it clear that, where competent authorities adopt the reasoning, conclusion or assessment of another competent authority they must be satisfied that:

- '*No additional material information has emerged, such as new environmental evidence or changes or developments to the plan or project, that means the reasoning, conclusion or assessment they are adopting has become out of date;*
- *The analysis underpinning the reasoning, conclusion or assessment they are adopting is sufficiently rigorous and robust. This condition can be assumed to be met for a plan or project involving the consideration of technical matters if the reasoning, conclusion or assessment was undertaken or made by a competent authority with the necessary technical expertise.'*

82) Where a number of interlinked decisions need to be taken, the guidance encourages coordinated working between competent authorities, including the possibility of agreeing a lead competent authority or undertaking a shared appropriate assessment.

[20] Guidance on Competent Authority Coordination under the Habitats Regulations

APPLYING THE HABITATS REGULATIONS IN CASEWORK

83) When dealing with HRA matters, you may find it helpful to consider the points listed below. If you are dealing with a case where the issue relates to the air quality effects from increased transport movements then you should also look at Annex A of PINS Note 02/2017r2.

General

84) Consider whether you are the competent authority for the purposes of the Habitats Regulations. The competent authority is generally the decision maker (see Regulation 7 of the Habitats Regulations and Regulation 5 of the Offshore Marine Conservation Regulations for a full definition of competent authorities).

85) In the case of most appeals therefore, you are the competent authority with responsibility for undertaking these assessments. For Secretary of State casework, you will be making recommendations to the Secretary of State in relation to HRA matters.

86) Work through the stages of the HRA process as summarised in Figure 1 in order. Reach a conclusion about LSE (Stage 1) before proceeding to consider adverse effects on integrity (Stage 2). Conclude on adverse effects on site integrity before considering no alternative solutions, IROPI and compensatory measures (Stages 3 & 4).

87) Is an AA actually required? If LSE can be excluded (see section below) then AA is not required. Are you planning to dismiss the appeal on other grounds? If so, no further consideration of HRA matters is required as there is no prospect of planning permission being granted. For Secretary of State casework, you should complete the HRA elements of the reporting template irrespective of the recommendation. This will provide opportunity for the Secretary of State to come to his own view on HRA matters.

88) Could you adopt any HRA/AA already undertaken by the local planning authority? As noted in the section on dual consents, Defra guidance encourages competent authorities to adopt all or parts of earlier assessments, **provided they are robust and no new information or developments have come forward which would mean that they are outdated.**

89) If the information necessary to inform your assessment has not been provided, it should be requested from the applicant/ appellant or the SNCB. Advice from the SNCB given in relation to an emerging local plan should not be relied on for the purpose of a project level assessment. Appropriate advice (if it has not already been provided) should be requested from the SNCB. While advice from the SNCB should be accorded considerable weight, it should not be relied on without careful examination and testing particularly if it is of a generic nature.

90) Whichever stage of HRA you reach, you should provide a reasoned conclusion in your report which explains, with reference to the appropriate evidence, whether you think LSE or adverse effects on integrity can be

excluded, how you have had regard to any advice from the SNCBs, the mitigation you have relied on and the evidence regarding the effectiveness of that mitigation.

91) It is important to be careful about the language you use in recommendation reports and decisions. It is safest to stick to the terms used in the Habitats Regulations ('likely significant effect' and 'adverse effect on integrity' for instance) rather than describing effects as 'de minimis' or using hybrid terms such as 'significant adverse effects on integrity' as this would mean your conclusions could be relying on tests that do not in fact appear in the Habitats Regulations. The Environmental Services Team (EST) can give advice on this point.

LSE

92) Helpful points to consider:

- What evidence has been presented regarding the environmental impacts of the proposed development? Are there pathways that could lead to effects on European sites? Please note that if no such pathways have been identified then no LSE can arise nor can any in-combination effects.
- What rationale has the applicant/ appellant used to decide which sites (if any) would be significantly affected? Does the SNCB agree with their approach or have they suggested any other European sites that should be considered?
- Has any other party suggested European sites that could be significantly affected? Third parties may argue that a particular site meets the criteria for a European site and should be treated as such. However, it is for Government, not Inspectors to determine whether a site should be designated. An area of land should only be treated as a European site if it has reached the public consultation stage (a proposed or potential SAC or SPA).
- Does the evidence provided by the appellant/ LPA assessment explain:
    - What the impacts from the proposed development would be eg increased traffic movements leading to alterations to air quality? Is this evidence robust?
    - What the effect would be on the designated site qualifying features? How sensitive are the affected species/ habitats to the effects? How would the change resulting from the proposed development affect the condition (favourable conservation status) of the species or habitat? Are there indirect effects?
    - Would the conservation objectives of the European site(s) be undermined?
- Which plans or projects has the applicant/ appellant identified in their 'in combination' assessment? What rationale have they used for identifying these plans and projects? Has the LPA or SNCB identified any other plans or projects which should be included in the assessment?

- Have you identified any plans or projects not mentioned by the parties which could be material to the decision? If so, have the parties had an opportunity to comment?
- Do you understand the relative contribution of the proposed development to effects on the European site alone and in-combination with other plans and projects?
- If the applicant's/ appellant's evidence and/ or the LPA's assessment concludes that there would be no LSE, are you satisfied that they have reached this conclusion without relying on mitigation?
- When considering the likelihood of significant effects have you applied the precautionary principle?

Adverse effects on site integrity/AA

93) Helpful points to consider:

- Do you have access to the citation, conservation objectives and supplementary advice documents for the European site? You must ensure that you obtain copies of this information rather than simply relying upon hyperlinks.

- Does the information in the applicant/appellant's evidence and/or the LPA's assessment allow you to understand and appreciate the entirety of habitat types and species for which a European site is protected, i.e. qualifying features? Have specific features been identified? Has the condition (favourable conservation status) of the feature been established?

- Do you have sufficient information to establish whether the effects of the proposed development would prevent the delivery of the conservation objectives for the European site?
    - What evidence has been relied on by the applicant/ appellant and/or the LPA in reaching their conclusions? How has it been derived? Is the evidence robust?
    - Are effects temporary or permanent? If they are temporary, how long would they last? Would this be long enough to affect the delivery of the conservation objectives by affecting key stages in the life cycle of the species which are qualifying features?
    - What is the conservation status of the site? If the site is already in unfavourable condition then any adverse effects from development proposals could slow or even prevent the delivery of the conservation objectives.
    - Would there be effects on 'functionally linked' land which could in turn affect the designated features of the European site(s)?

- Considering the effects on the delivery of the conservation objectives, would the integrity of the European site be adversely affected? There

should be '*no reasonable scientific doubt…as to the absence of such effects''*[21]

- Have mitigation measures been relied on to avoid adverse effects on integrity? If so, what evidence is there that they would:
  - Avoid, cancel or reduce the effects of the proposed development?
  - Be effective without causing harm to other ecological receptors?
  - Address all the potential effects on site integrity?
  - Be in place before harm occurred to the features of the European site(s)?
  - Appropriately secured through conditions, planning obligations or Community Infrastructure Levy payments? The new duty upon LPA's to publish annual infrastructure funding statements[22] will assist when considering whether unilateral undertakings would provide sufficient certainty that mitigation can be delivered.
- If the applicant/ appellant is relying on 'strategic' mitigation measures to avoid adverse effects on integrity eg provision of alternative greenspace through CIL, are the measures relevant to the effects from the proposed development? For instance, securing alternative greenspace may not be much use in mitigating the effects from air or water pollution.
- Has the SNCB been consulted? What is their position regarding adverse effects on the integrity of European site(s)? If the SNCB has not commented previously or you wish for clarification of their views then it may be helpful to use the template letters provided in PINS Note 05/2018r3.
- If the SNCB advises that additional information needs to be obtained and you disagree with that advice, do you have the evidence to include an explicit and detailed statement of reasons capable of dispelling all reasonable doubt concerning the effects of the proposed development?

Alternative solutions, IROPI and compensatory measures

94. If adverse effects on the integrity of a European site cannot be excluded, then consent can only be granted if the remaining tests in the Habitats Regulations can be met. If you are faced with this situation then you should take advice from your Seconded Inspector Trainer or Group Manager and/or EST on how to proceed.

95. It should be noted that when you are decision maker and in a situation where you conclude that adverse effects on integrity cannot be excluded there is no obligation to move to consider alternative solutions, IROPI and

[21] C-127/02 Wadenzee case

[22] Section 121A and schedule 2 of The Community Infrastructure Levy Regulations 2010 as amended by the Community Infrastructure Levy (Amendment) (England) (No 2) Regulations 2019

compensatory measures. The European Court of Justice has recognised that the application of Article 6(4) (which is the article of the Habitats Directive which allows for the consideration of these tests)[23]. It is open to you to seek views on these points but if the applicant/ appellant is of the view that adverse effects on integrity would not occur, they are unlikely to have prepared the relevant evidence. This is particularly difficult in relation to compensatory measures since designing a scheme to provide suitable compensation that meets the requirements of the SNCB is rarely straightforward.

[23] C-241/08 European Commission v French Republic

APPENDIX 1

Relevant case law

- Basses Corbieres Judgment ECJ [2000] C-374/98
- Briels and others v Minister van Infrastructuur en Milieu ECJ [2014] C-521/12
- The Bund Naturschutz Judgment ECJ [2006] C-244/05
- *Champion v North Norfolk District Council* [2015] UKSC 52
- The Dragaggi Judgment ECJ [2005] C-117/03
- European Commission v the French Republic [2010] C-241/08
- *Forest of Dean Friends of the Earth v Forest of Dean District Council* [2014] EWHC 1353 (Admin)
- *Gladman Developments Ltd v SSHCLG and Medway Council* [2019] EWHC 2001 (Admin)
- Grace and Sweetman v An Bord Pleanála [2018] C-164/17
- *Hart DC v SSCLG & Others* [2008] EWHC 1204
- Holohan and Others v An Bord Pleanála [2019] C-461/17
- *Humber Sea Terminals Ltd. v SoS for transport* [2005] EWHC 1289
- *Langton, R (on the application of) v SSEFRA & ANOR* [2018] EWHC 2190 (Admin)
- *Lewis v Redcar & Cleveland BC* [2007] EWHC 3166
- *No Adastral New Town Ltd v Suffolk District Council and SSCLG* [2014] EWHC 223 (Admin)
- *Newsum v Welsh Assembly Government* [2005] EWHC 538
- People Over Wind and Peter Sweetman v Coillte Teoranta ECJ [2018] C-323/17
- *Smyth v SSCLG* [2015] EWCA Civ 174
- Sweetman v An Bord Pleanála ECJ [2013] C-258/11
- The Santona Marshes Judgment ECJ [1993] C-355/90

- Commission v United Kingdom ECJ [2005] C-6/04
- The Waddenzee Judgment ECJ [2004] C-127/02
- *Wealden District Council v SSCLG, Lewes District Council and South Downs National Park Authority* [2017] EWHC 351

APPENDIX 2

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.

The scenarios set out in the table are:

1. Where the effect on a European site is a reason for refusal but there is no mechanism for securing any mitigation measures.

2. Where the effect on a European site is a reason for refusal but a completed S106 was submitted with the appeal.

3. Where the effect on a European site is a reason for refusal but a Unilateral Undertaking was submitted with the appeal.

4. Where the parties agree that the European site would be adversely affected by the proposal. Contributions towards mitigation measures were agreed prior to determination of the application and have been secured by an appropriate mechanism (e.g. S106 agreement or UU/S111).

5. Where the parties agree that the European site would be adversely affected by the proposal. However, no details of appropriate mitigation measures have been agreed; instead it is suggested that they could be secured by a condition.

6. Where there is a dispute between the parties about the effects of the proposal on the protected site and any potential mitigation measures required and there is a shortfall in the 5YHLS.

7. Where the site is within a zone of influence of a European site, but no screening assessment has been undertaken; the Council is aware of the issue, but the appellant has very limited knowledge of possible consequences.

8. Where the site is within a zone of influence of a European site & the parties have agreed that mitigation is required, but this has not been secured through any planning obligation or other appropriate mechanism.

	Scenario	Information provided with appeal	General approach	If dismissing for other reasons:	If the adverse effect on the European site would be the only reason to dismiss or if minded to allow:
1	The lack of an obligation to mitigate the adverse effects on the integrity of the designated site is a RfR. Need for the obligation may or may not be contested by appellant, but no obligation is provided with the appeal. Both parties are aware of the need to address the issue.	RfR is based on adopted policies and possibly an SPD which may include reference to a mitigation strategy agreed by NE. However, neither party has provided information about the site-specific effects on the protected site which would enable you to undertake an AA. No evidence of site-specific consultation with NE has been provided.	Deal with as a Main Issue, unless dismissing for other reasons. As the LPA is objecting, it has already concluded that there would be a likely significant effect on the interest features of the designated site. However, this assessment may have been based on an area wide Habitats Regulation Assessment (HRA). Hence the reason for requiring the obligation to secure mitigation measures.	Deal with it as an 'Other Matter' Refer briefly to the matter, by making reference to the European site that would be affected. However, there is no need for you to consider the implications upon it because the scheme is unacceptable for other reasons.	Ensure that you know which European site is affected and the reasons that it has been designated. Under the Habitats Regulations you are the competent authority. You therefore need to have the information necessary to assess the effect of the proposal. As the parties are both aware of the issue, they should have provided information to support the appeal. It is not necessary to go back to them. If there is enough information to determine that there would be a likely significant effect either alone or in combination with other plans and projects, then in the absence of a mechanism to secure any necessary mitigation measures, you have no alternative other than to **dismiss the appeal.** If there is **not** enough information to determine that there would be a likely significant effect either alone or in combination with other plans and projects and no evidence of consultation with NE on the specific proposal, then instigate that consultation in accordance with the advice in PINS note 05/2018r3. Having considered the views of NE if you conclude there would be no likely significant effect either alone or in combination with other plans and projects and no mitigation is therefore required, proceed to **allow the appeal**.

	Scenario	Information provided with appeal	General approach	If dismissing for other reasons:	If the adverse effect on the European site would be the only reason to dismiss or if minded to allow:
2	The lack of an obligation is a RfR. A completed obligation in the form of a s106 has been provided with the appeal.	The RfR was based on adopted policies and SPD as scenario (1). The need for mitigation was agreed post determination and the obligation secured. **But** Neither party has provided information about the site-specific effects on the European site, which would enable you to undertake an AA. There is no evidence of site-specific consultation with NE	Following refusal of the application the parties have agreed, or it is clear, that the proposal would have a likely significant effect either alone or in combination with other plans or projects. Acknowledge the S106 in procedural section and (if sure) confirm that LPA has withdrawn its RfR. Take account of the S106 in reaching your decision. If allowing, or the effect on the protected site is the only reason to dismiss, an AA is required. If dismissing for other reasons deal with as an 'Other Matter' If minded to allow or conclude that it is the sole reason to dismiss deal with as a Main Issue.	Deal with it as an 'Other Matter' Refer briefly to the matter, by making reference to the site that would be affected. However, notwithstanding the S106, there is no need for you to consider the implications of the proposal on the protected site because the scheme is unacceptable for other reasons.	Ensure that you know which European site is affected and understand your duties under the HRA. (As with scenario 1) Ensure that you have the information you need to do the AA. This is likely to mean that NE must be consulted in accordance with the advice set out in PINS note 05/2018r3. You should also go back to the LPA, if necessary, to ask for any additional information that you require to do the AA (such as evidence underpinning any agreed mitigation strategy). This should include sufficient information to enable you to understand the proposed mitigation and to be able to assess its effectiveness and relevance to the site. Ensure that if the LPA specifically consulted NE, you have a copy of its response. On receipt of the information, undertake the AA, considering the effects of development and then assessing whether or not the proposed mitigation would be effective in respect of the specific proposal before you. Then satisfy yourself that the obligation will deliver that mitigation in a timely manner. **Only allow** if you are certain there would be no adverse effect on the integrity of the European site. If you cannot be satisfied (beyond all reasonable scientific doubt), give reasons for this and **dismiss the appeal.** If lack of information is a determining factor, ensure that efforts to secure it are referred to in the decision.

	Scenario	Information provided with appeal	General approach	If dismissing for other reasons:	If the adverse effect on the European site would be the only reason to dismiss or if minded to allow:
3	The lack of an obligation is a RfR. The appellant has provided a completed Unilateral Undertaking (UU) with the appeal	Appellant has agreed to make a contribution towards mitigation. It may, or may not, be clear on what basis the amount has been calculated from the evidence submitted.	Following refusal of the application it has been agreed, or is clear, that the proposal would have a likely significant effect either alone or in combination with other plans or projects. Acknowledge the UU in a procedural section and say that you will return to the matter later. If allowing, or the effect on the protected site is the only reason to dismiss, an AA is required. If dismissing for other reasons deal with as an 'Other Matter' If minded to allow or conclude it is the sole reason to dismiss deal with as a Main Issue.	Deal with it as an 'Other Matter' Refer briefly to the matter, by making reference to the site that would be affected. However, notwithstanding the UU, there is no need to consider the implications of the proposal on the protected site because the scheme is unacceptable for other reasons.	Follow the procedure set out in scenario (2) to secure all the necessary information to undertake the AA and consult NE if necessary. If you decide to dismiss the appeal for lack of information, ensure that efforts to secure it are referred to in your decision. In addition seek the views of the LPA on the UU and confirm whether or not it is willing to withdraw the RfR on that basis if that has not been done already. You will also wish to be satisfied that the Council intends to use the contribution to deliver the identified mitigation measures in an effective and timely manner. Remember that the Council is not a signatory to the UU. However, now that pooling restrictions have been lifted the use of UUs may diminish. **Only allow** if you are certain there would be no adverse effect on the integrity of the European site. If you cannot be satisfied (beyond all reasonable scientific doubt), give reasons for this and **dismiss the appeal**.

	Scenario	Information provided with appeal	General approach	If dismissing for other reasons:	If the adverse effect on the European site would be the <u>only</u> reason to dismiss or if minded to <u>allow</u>:
4	There is no RfR relating to the effect of the scheme on a European site. The parties have agreed that mitigation measures are required and these have been secured prior to the Council determining the application. This was done through an appropriate mechanism such as a S106 agreement or UU/S111	The S106/UU/S111 has been provided with the appeal. But either no other details have been provided or only limited information which would be insufficient to enable an AA to be undertaken.	By implication, probably due to the location of the proposal, it is agreed that it would have a likely significant effect either alone or in combination with other plans or projects. Acknowledge the presence of the mechanism to contribute towards mitigation in a procedural section and indicate that you will return to the matter later. If allowing, or the effect on the protected site is the only reason to dismiss, an AA is required. If <u>dismissing</u> for other reasons deal with as an '<u>Other Matter</u>' If minded to <u>allow or</u> conclude it is the <u>sole reason to dismiss</u> deal with as a <u>Main Issue.</u>	Deal with it as an 'Other Matter' Refer briefly to the matter, by making reference to the European site that would be affected. However, there is no need for you to consider the implications upon it because the scheme is unacceptable for other reasons.	Follow the procedure set out in scenario (2) to secure all the necessary information to undertake the AA and consult NE. Ensure that the appellant has been given the opportunity to comment on NE's response and has seen the information provided by the LPA so that the decision is not a surprise. **If allowing**: Ensure that you are satisfied that the mechanism for securing the mitigation measures is appropriate and that any financial contribution will be used in a timely manner. **If dismissing**: Provide very clear reasons why, even with mitigation measures, you were not satisfied that the integrity of the protected site would not be adversely affected. **Only allow** if you are certain there would be no adverse effect on the integrity of the European site. If you cannot be satisfied (beyond all reasonable scientific doubt), give reasons for this and **dismiss the appeal**.

	Scenario	Information provided with appeal	General approach	If dismissing for other reasons:	If the adverse effect on the European site would be only reason to dismiss or if minded to allow:
5	The Council or the appellant has suggested that a scheme of mitigation is required that could be secured by means of a suitably worded condition in the event that the appeal was allowed.	The wording for such a condition has been provided. It is a Grampian style condition, but requires details to be submitted and agreed in the future. No scheme of mitigation has therefore been specifically identified.	Following refusal of the application it has been agreed, or is clear, that the proposal would have a likely significant effect either alone or in combination with other plans or projects. If allowing, or the effect on the protected site was the only reason to dismiss, an AA is required (unless you consider that a condition would not secure the mitigation). If dismissing for other reasons deal with as an 'Other Matter'. If considering allowing, deal with as a Main Issue.	Deal with it as an 'Other Matter' Refer briefly to the matter, by making reference to the European site that would be affected. However, there is no need to consider the implications upon it because the scheme is unacceptable for other reasons.	Follow the procedure set out in scenario (2) to secure all the necessary information to undertake the AA and consult NE. In addition: **BUT:** Are you satisfied that a condition would deliver the necessary mitigation? How could you be certain in the absence of the details being agreed at the appeal stage? The PPG chapter on the use of planning conditions (paragraph 010) advises that no payment of money or other consideration can be positively required by a condition when granting planning permission. In exceptional circumstances, it may be possible to use a negatively worded condition to prohibit development until a specified action has been taken, where there is clear evidence that the delivery of the development would be at serious risk; in such cases the 6 tests should also be met. Unless full details of what is proposed as mitigation was set out before you, it is unlikely that you could be persuaded that a condition would meet the test of precision and could deliver effective mitigation in a timely manner. In that event there would be no need to undertake a full AA because the required mitigation could not be delivered. **Only allow** if you are certain there would be no adverse effect on the integrity of the European site. If you cannot be satisfied (beyond all reasonable scientific doubt), give reasons for this and **dismiss the appeal**.

	Scenario	Information provided with appeal	General approach	If dismissing for other reasons:	If the adverse effect on the European site would be only reason to dismiss or if minded to allow:
6	The Council has refused the application because of the effects on the protected site. This is disputed by the appellant who is seeking: Either: To demonstrate that there would be no likely significant effect either alone or in combination with other plans or projects: And/or: if it is found that there would be a significant effect it could be mitigated in some way to avoid any adverse effect on the integrity of the site.	The Council refused on the basis of proximity to a protected site, relying on policies and an SPD but with little site-specific assessment. The appellant provides information/data to try and demonstrate that there would be no effects – either individually or in combination. It then went on to suggest mitigation measures that could be employed in the event that adverse effect on the integrity of the site was found. Both parties have provided additional information with the appeal. This may be a critical issue if the Council is unable to demonstrate a 5YHLS as Paragraph 11d)(ii) would apply.	Consider whether or not any other reasons for refusal are likely to be determining factors in your assessment. If there is likely to be fine balance arising from the other issues which could cause you to consider allowing the appeal, or the effect on the protected site was the only reason to dismiss, an AA may be required. If dismissing for other reasons deal with as an 'Other Matter' If this would be the sole reason for dismissing deal with as a Main Issue If considering allowing, deal with as a Main Issue.	Deal with it as an 'Other Matter' Refer briefly to the matter, by making reference to the European site that would be affected. However, there is no need to consider the implications upon it because the scheme is unacceptable for other reasons.	Follow the procedure set out in scenario (2) to secure all the necessary information to undertake the AA and consult NE. Ensure that the appellant has been given the opportunity to comment on NE's response and has seen the information provided by the LPA so that the decision is not a surprise. As this matter is central to the case there is likely to be significant amounts of evidence from both parties about the effects on the site. Assess the effects on the basis of the evidence before you and having particular regard to NE's response. If you find that there would be no likely significant effect on the protected site either individually or in combination you can consider allowing the appeal, weighing up the other issues and taking account of whether or not Paragraph 11d)(ii) is engaged. If you find that there would be likely to be a significant effect, go on to consider whether any proposed mitigation measures would be effective in the context of your AA. If you conclude that mitigation would not be effective – Paragraph 11d)(i) provides a clear reason for dismissing the appeal. If you conclude that mitigation would be effective, go on to consider if there is an appropriate means of securing its delivery in a timely manner. If you are satisfied that it can be secured then you can apply Paragraph 11(d)(ii) in the absence of a 5YHLS. **Only allow** if you are certain there would be no adverse effect on the integrity of the European site. If you cannot be satisfied (beyond all reasonable scientific doubt), give reasons for this and **dismiss the appeal**.

	Scenario	Information provided with appeal	General approach	If dismissing for other reasons:	If the adverse effect on the European site would be only reason to dismiss or if minded to allow:
7	There is evidence before you (possibly from an officer report) that the site is within a zone of influence of a protected site. No screening assessment has been undertaken.	It is possible that NE has indicated that the proposal should be subject to a Habitats Regulations Assessment. Very limited information is available with the appeal; e.g. no assessment of likely significant effects or any potential mitigation measures.	Consider whether or not any other reasons for refusal are likely to be determining factors in your assessment. If dismissing for other reasons, set out your duties as the competent authority in a procedural/preliminary paragraph and indicate that you will return to the matter later in your decision. Go on to deal with it as an 'Other Matter' If this would be the sole reason for dismissing deal with as a Main Issue. If considering allowing, deal with as a Main Issue.	Deal with it as an 'Other Matter' Refer briefly to the matter, by making reference to the European site that would be affected. However, there is no need to consider the implications upon it because the scheme is unacceptable for other reasons.	Follow the procedure set out in scenario (2) to secure all the necessary information to undertake the AA and consult NE. Ensure that the appellant has been given the opportunity to comment on NE's response and has seen the information provided by the LPA so that the decision is not a surprise. Assess the effects on the basis of the evidence before you and having particular regard to NE's response. If you find that there would be no likely significant effect on the protected site either individually or in combination you can consider allowing the appeal. If you find that there would be likely to be a significant effect, go on to consider whether any proposed mitigation measures would be effective in the context of your AA. **Only allow** if you are certain there would be no adverse effect on the integrity of the European site. If you cannot be satisfied (beyond all reasonable scientific doubt), give reasons for this and **dismiss the appeal**.

	Scenario	Information provided with appeal	General approach	If dismissing for other reasons:	If the adverse effect on the European site would be only reason to dismiss or if minded to allow:
8	There is evidence before you (possibly from an officer report) that the site is within a zone of influence of a protected site. The parties have agreed that mitigation is required. But this has NOT been secured through any planning obligation or other appropriate mechanism.	It is possible that NE has indicated that the proposal should be subject to a Habitats Regulations Assessment. NE may have indicated that mitigation is required and should be secured in line with an agreed set of tariffs. But there's no evidence that NE was specifically consulted on the appeal proposal	Consider whether or not any other reasons for refusal are likely to be determining factors in your assessment. If dismissing for other reasons, deal with it as an Other Matter If this would be the sole reason for dismissing or considering allowing set out your duties as the competent authority in a procedural/preliminary paragraph. Go on to deal with it as a Main Issue	Deal with it as an 'Other Matter' Refer briefly to the matter, by making reference to the European site that would be affected. However, there is no need to consider the implications upon it because the scheme is unacceptable for other reasons.	Ensure that you know which European site is affected and the reasons that it has been designated. Under the Habitats Regulations you are the competent authority. You therefore need to have the information necessary to assess the effect of the proposal. As the parties are both aware of the issue, they should have provided information to support the appeal. It is not necessary to go back to them. If there is enough information to determine that there would be a likely significant effect either alone or in combination with other plans and projects, then in the absence of a mechanism to secure any necessary mitigation measures, you have no alternative other than to **dismiss the appeal.** If there is **not** enough information to determine that there would be a likely significant effect either alone or in combination with other plans and projects and no evidence of consultation with Natural England (NE), then exercise a precautionary approach. As it seems likely that there could be an adverse effect on the integrity of the site and no mitigation measures have been secured, you have no alternative other than to **dismiss the appeal**

ANNEX C

SPECIES DESIGNATIONS IN ENGLAND FOR FREQUENTLY ENCOUNTERED SPECIES

NB The duty to have regard for biodiversity under s40 of the Natural Environment and Rural Communities (NERC) Act 2006 applies to all these species.

Reptiles and amphibians	
Adder	Wildlife and Countryside Act 1981 Schedule 5 s9.1 and s9.5a
	Species of principal importance under s41 of the NERC Act 2006
Grass snake	Wildlife and Countryside Act 1981 Schedule 5 s9.1 and s9.5a
	Species of principal importance under s41 of the NERC Act 2006
Great crested newt	The Conservation of Habitats and Species Regulations 2017 Schedule 2
	Wildlife and Countryside Act 1981 Schedule 5 s9.5a
	Species of Principal Importance under s41 of the NERC Act 2006
Sand lizard	The Conservation of Habitats and Species Regulations 2017 Schedule 2
	Wildlife and Countryside Act 1981 Schedule 5 s9.4b, 9.4c and 9.5a
	Species of Principal Importance under s41 of the NERC Act 2006
Slow worm	Wildlife and Countryside Act 1981 Schedule 5 s9.1 and s9.5a
	Species of principal importance under s41 of the NERC Act 2006
Smooth snake	The Conservation of Habitats and Species Regulations 2017 Schedule 2
	Wildlife and Countryside Act 1981 Schedule 5 s9.4b, 9.4c and 9.5a
	Species of principal importance under s41 of the NERC Act 2006
Viviparous lizard (sometimes called the common lizard)	Wildlife and Countryside Act 1981 Schedule 5 s9.1 and s9.5a
	Species of principal importance under s41 of the NERC Act 2006

Mammals	
Bats, all species	The Conservation of Habitats and Species Regulations 2017 Schedule 2
	Wildlife and Countryside Act 1981 Schedule 5 s9.4b, 9.4c and 9.5a
Barbastelle, Bechstein, noctule, brown long-eared, greater horseshoe and lesser horseshoe bats	Species of principal importance under s41 of the NERC Act 2006
Badger	Protection of Badgers Act 1992
Otter	The Conservation of Habitats and Species Regulations 2017 Schedule 2
	Wildlife and Countryside Act 1981 Schedule 5 s9.4b, 9.4c and 9.5a
	Species of principal importance under s41 of the NERC Act 2006
Water vole	Wildlife and Countryside Act 1981 Schedule 5 s9.4a, 9.4b, 9.4c and 9.5a
	Species of principal importance under s41 of the NERC Act 2006
Birds	
Birds, all species	Wildlife and Countryside Act general protection, part 1
Barn owl	Wildlife and Countryside Act, Schedule 1, part 1
Black redstart	Wildlife and Countryside Act, Schedule 1, part 1
Kingfisher	Wildlife and Countryside Act, Schedule 1, part 1
Peregrine	Wildlife and Countryside Act, Schedule 1, part 1

<u>Protection provided by The Conservation of Habitats and Species Regulations for species listed in Schedule 2:</u>

It is an offence under Regulation 43 to:

- deliberately capture, injure or kill any wild animal of a European Protected Species;
- deliberately disturb wild animals of any such species, including in particular any disturbance likely to:
  - impair their ability to survive, breed, reproduce or nurture their young;
  - in the case of animals of a hibernating or migratory species, to hibernate or migrate; or
  - to significantly affect the local distribution or abundance of the species to which they belong;
- deliberately take or destroy the eggs of such an animal;
- damage or destroy a breeding site or resting place of such an animal; or
- to be in possession of or to control, transport, sell or exchange any live or dead animal which is a European Protected Species, or part of any such animal.

Activities which would lead to an offence under Regulation 43 can only go ahead if Natural England has issued a European Protected Species licence.

Protection provided by the Wildlife and Countryside Act:
It is an offence under Part I of the Act to intentionally:

- kill, injure or take any wild bird;
- take, damage or destroy any wild bird's nest while it is in use; or
- take or destroy an egg.

For the bird species listed in Schedule 1 of the Act it is also an offence to intentionally or recklessly:

- disturb them while they are nesting; or
- disturb their dependent young.

It is an offence under s9 of the Act to:

- 9(1) – intentionally kill, injure or take any animal included in Schedule 5 of the Act;
- 9(4)(a) – intentionally or recklessly damage or destroy any structure which any wild animal specified in Schedule 5 of the Act uses for shelter or protection;
- 9(4)(b) – intentionally or recklessly disturb any animal listed on Schedule 5 while it is occupying a structure or place which it uses for shelter or protection;
- 9(4)(c) – intentionally or recklessly obstruct access to any structure or place which any animal listed on Schedule 5 uses for shelter or protection;
- 9(5)(a) – sell or offer for sale any live or dead a wild animal (or any part of wild animal) listed in Schedule 5 of the Act.

Protection provided by the Protection of Badgers Act:
It is an offence under the Act to:

- 1(1) – wilfully kill, injure or take (or attempt to kill, injure or take) a badger;
- 2(1) – cruelly ill-treat a badger;
- 3(1) – intentionally or recklessly damage a badger sett or any part of it, destroy a badger sett, obstruct access to or any entrance of a badger sett, cause a dog to enter a badger sett or disturb a badger when it is occupying a sett.

ANNEX D

LICENSING POLICIES

DEFRA/NE policies on licensing of proposals likely to affect European Protected Species:

1. ***Greater flexibility when excluding and relocating EPS from development sites***: *Defra considers that compensation for EPS can be delivered without the need to relocate or exclude populations, where: exclusion or relocation measures are not necessary to maintain the conservation status of the local population; the avoid-mitigate-compensate hierarchy is followed; and compensation provides greater benefits to the local population than would exclusion and/or relocation.*

2. ***Greater flexibility in the location of newly created habitats that compensate for habitats that will be lost***: *If the licensing tests are met and the avoid-mitigate-compensate hierarchy is followed, off-site compensation measures may be preferred to on-site compensation measures, where there are good reasons for maximising development on the site of EPS impacts, and where an off-site solution provides greater benefit to the local population than an on-site solution.*

3. ***Allowing EPS to have access to temporary habitats that will be developed at a later date***: *Where development (such as mineral extraction) will temporarily create habitat which is likely to attract EPS, Defra favours proposals which enable works to proceed without the exclusion of EPS, where the conservation status of the local population would not be detrimentally affected. On completion of development such sites must contribute to the conservation status of the local population as much or more than the land use which preceded development. The measures to achieve this should be set out in a management plan and secured by a legal agreement.*

4. ***Appropriate and relevant surveys where the impacts of development can be confidently predicted***: *Natural England will be expected to ensure that licensing decisions are properly supported by survey information, taking into account industry standards and guidelines. It may, however, accept a lower that standard survey effort where: the costs or delays associated with carrying out standard survey requirements would be disproportionate to the additional certainty that it would bring; the ecological impacts of development can be predicted with sufficient certainty; and mitigation or compensation will ensure that the licensed activity does not detrimentally affect the conservation status of the local population of any EPS.*

Character and Appearance

What's New since the last version

First edition: 4 August 2015.

Broad Approach

Analysis of Context

Analysis of Proposal

Practical Points

Information Sources

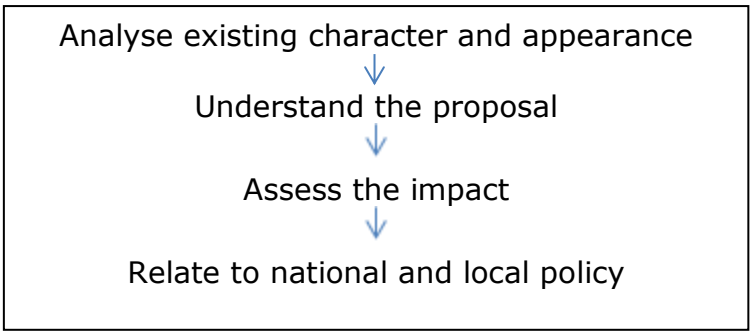
National Planning Policy Framework – Chapter 7 Requiring Good Design

Planning Policy Guidance: Design

Building for Life 12 – January 2015 update

Broad Approach

1. Appearance can be described as the *outward visible qualities*, whereas character is the *sum of all the qualities which distinguish an area*.
2. Design should establish a strong sense of place, using streetscapes and buildings to create attractive and comfortable places to live, work and visit. It should respond to local character and history, and reflect the identity of local surroundings and materials, while not preventing or discouraging appropriate innovation. (Framework; para 58).
3. Permission should be refused for development of poor design that fails to take the opportunities available for improving the character and quality of an area and the way it functions. (Framework; para 64)
4. *Summary approach*: weave the reasoning on the proposal in with a description of how you assess the character and appearance, rather than setting out that assessment as a freestanding statement.



5. Establish the facts. Identify:

- The site and its locality.
- The proposed development type and form.
- The relevant policies, designations and statutory constraints.

6. Assess the existing character and appearance of the surrounding area. The questions below provide a structured approach to assessing the design context for the proposal.

- What makes the locality distinctive?
- What gives it a sense of place?
- What is the quality of the area?
- Is it urban, suburban, rural?

7. Focus on those features relevant to the proposal under consideration.

- Understand the design of the proposal.
- What is its form and function?
- Its physical and human relationship with the site?
- Have the design values on which it is based been articulated, for example in a design and access statement? (refer to checklist below)
- Is there adequate information (particularly for outline applications)?

8. Assess the effect of the proposal on its surroundings. Consider how the character or appearance of the place might be changed, were the proposal to go ahead.

- Would this change be material?
- Would it be harmful to the character or appearance?
- Would it improve the quality of the area?

9. Assess the proposal against relevant design policies and designations

Analysis of Context

10. Aspects to consider:

- Characteristics of area – topography/aspect/features, urban/rural, function/activity.
- Quality of environment – good/indifferent/poor.
- Strong sense of place/on the cusp of different areas.
- Building line, skyline, set back, window lines.
- Type of existing buildings – varied or uniform, density.
- Patterns of buildings.
- Space around/between buildings - continuity/gaps. 'Outdoor rooms'.
- Scale: human, monumental, child-sized, engineering.
- Proportions.
- Sculptural quality/elegance.
- Appearance – form, materials, height, massing.
- Boundary treatments – heights and patterns of walls, hedges, fences, shrubs.
- Landscaping – open spaces, verges, trees.

11. Try to identify local distinctiveness. Pick out what is relevant to the proposal.
12. Understand the character and appearance in relation to development plan policies, Supplementary Planning Guidance and conservation area assessments or village plan documents.
13. Also consider any form of Landscape Visual Impact Assessment, most commonly based on the third edition Guidelines for Landscape and Visual Impact Assessment (GLVIA) produced by the Landscape Institute, presented in support of the proposals by the appellant, or opposing them by the Council.
14. Take time to compare the methodologies applied and the scope of their assessments, including the identified viewpoints. Also consider the magnitudes of effect identified and the number and type of 'receptors' in such reports and then calibrate these against your own assessment based on what you saw on site.

Analysis of Proposal

15. Matters to consider:

- How would it relate to its context?
- Would it promote or reinforce local distinctiveness?
- Does it include/omit factors of good design?

- How would it relate to patterns of buildings or gaps?
- Is it legible? (Where is the front door?)
- Is it well articulated?
- Would it sit comfortably/ be inclusive towards the public realm/ create a pleasant place?
- Would it be elegant?
- How would views be affected?
- Would materials blend/contrast pleasantly?

Practical Points

16. Be sure you really understand the drawings. If not, take time to work out, or have pointed out at the visit, the position, height etc. of the proposal.
17. Remember the differing statutory duties regarding conservation areas, the setting of listed buildings, National Parks and AONBs, covered in other Chapters.
18. Take a robust approach to poor designs. Even inoffensive buildings may not be adequate if they fail to take the opportunities available for improving the character and quality of an area and the way it functions.
19. Do not attempt to impose architectural styles or particular tastes and do not stifle innovation, originality or initiative through unsubstantiated requirements to conform to certain development forms or styles. It is however proper to seek to promote or reinforce local distinctiveness (Framework paragraph 60).
20. Ensure that land is used efficiently without compromising the quality of the environment.
21. Consider cumulative effects; to date or in the future.
22. Think about whether conditions are needed to secure key aspects of the design: building materials, window details, external colour scheme. If it is a key matter in the design of the building, a feature or material may need to be the subject of a specific condition.

Community Infrastructure Levy (CIL): Examination of a Charging Schedule

England

What's New since the last version:

Changes highlighted in yellow made on **3 October 2019** to reflect the following:

- Amendments to the CIL Regulations which came into force on 1 September 2019 and the accompanying updates to the PPG.
- Changes to the Viability chapter of the PPG published on 9 May 2019.

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Introduction

1. This guide provides an overview for use by Inspectors in order to assist them in carrying out their role consistently and effectively when undertaking examination of a charging schedule in England.

2. This guide does not provide policy advice, nor does it seek to interpret Government legislation or guidance. In addressing policy issues Inspectors must have regard to the statutory guidance produced by MHCLG. In the event that there appears to be a discrepancy between the advice in this guide and the statutory guidance, the latter will be conclusive as the original policy source.

Reform of developer contributions

3. Following the Government's review of developer contributions carried out in 2017-18, amendments to the CIL Regulations came into force on 1 September 2019. The changes are intended to make developer contributions simpler, more flexible and transparent. An explanation of all of the changes is given in PINS Note 12/2019. The main changes as they affect CIL examinations are:

   a. the statutory requirement for consultation on the preliminary draft schedule, the 4-week minimum time period for consultation on the draft charging schedule, and the requirement to advertise consultations and the CIL examination in a local newspaper have all been removed to make it faster and simpler to introduce or amend a CIL (Regulation 3);

   b. to make developer contributions more flexible, the restriction on the pooling of funds for a single infrastructure project from no more than five S106 planning obligations has been removed, and both CIL and S106 obligations can now be used to fund the same item of infrastructure (Regulation 11);

   c. to introduce greater transparency, the Regulation 123 list has been replaced with an annual infrastructure funding statement, to be produced by charging authorities, setting out the infrastructure list and how charging authorities have used both S106 and CIL developer contributions to fund infrastructure (Regulation 9)

4. The PPG chapter on CIL was also updated on 1 September to incorporate the amended Regulations and provide advice on their application. The implications of these changes for CIL examinations are considered below in paragraphs 64-68 and 72-74.

Relevant policy and guidance

5. The Community Infrastructure Levy is no longer specifically referenced in the latest revised National Planning Policy Framework (February 2019) ("the updated revised Framework"). However, the

Planning Practice Guidance (PPG) on the Community Infrastructure Levy (chapter 25) and Viability (chapter 10) provide detailed guidance on the purpose of CIL, its relationship to the development plan, how rates should be set, the evidence required to support them and the basis for the examination of CIL charging schedules.

6. The Viability chapter was comprehensively revised in July 2018 to reflect changes to the assessment of viability in the new Framework and further updated in May 2019. The CIL chapter was updated in March 2019 to reflect changes arising from the new Framework and updated again in September 2019 to address the changes introduced by the CIL Amendment Regulations.

5. The following is a summary of the key points of national policy and guidance which set the context for CIL examinations:

   a. Plans should set out the contributions expected from development and such policies *(i.e. defining the contributions)* should not undermine the deliverability of the plan (NPPF, paragraph 34);

   b. CIL is a tool for local authorities to help deliver infrastructure to support the development of the area [1], which can include pooling a proportion of CIL receipts to fund cross-boundary strategic infrastructure[2];

   c. CIL charging schedules should be consistent with and support the implementation of up-to-date Plans[3];

   d. The policy requirements for development contributions in Plans should be informed by an assessment of viability that takes into account all relevant policies, including the cost implications of the CIL[4];

   e. The total cumulative cost of all relevant policies and developer contributions *(including CIL)* should not undermine the deliverability of the plan[5];

   f. The CIL is expected to have a positive effect on development across the local plan area *(i.e. by helping to fund new infrastructure)* and CIL rates should strike an appropriate balance between securing the additional investment for infrastructure needed to support development and its potential effect on the viability of developments[6]

[1] *PPG Paragraph: 001 Ref ID: 25-001-20190901 – What is the Community Infrastructure Levy?*
[2] Paragraph: 159 Ref ID: 25-159-20190901 – *Can groups of charging authorities pool a proportion of their Community Infrastructure Levies?*
[3] *PPG Paragraph: 011 Ref ID: 25-011-20190901 – What is a charging schedule?*
[4] PPG Paragraph: 001 Ref ID 10-001-20190509 – *How should plan makers set policy requirements for contributions from development?*
[5] *PPG Paragraph: 002 Ref ID 10-002-20190509 – How should plan makers and site promoters ensure that policy requirements for contributions from developers are deliverable?* and Paragraph 166 Ref ID: 25-166-20190901 – *How does the Community Infrastructure Levy relate to other developer contributions?*
[6] *PPG Paragraph: 010 Ref ID: 25-010-20190901 – How are Community Infrastructure Levy rates set?*

Relevant legislation

6. The following are the key statutory instruments for CIL:

   Planning Act 2008: sections 205 -225

   Planning Act 2008: Explanatory Notes

   Localism Act 2011: Section 114-115

   Localism Act 2011: Explanatory Notes

   The Community Infrastructure Levy Regulations 2010 No. 948

   Explanatory Memorandum to the Community Infrastructure Levy Regulations 2010 SI 2010 948

   Explanatory Memorandum to the Community Infrastructure Levy (Amendment)(England) (No2) Regulations 2019 SI 2019 1103

Starting point: essential and other reading

7. The starting point for any Inspector undertaking CIL examination work must be to consider fully:

   a. Part 11 of the Planning Act 2008 (as amended by paragraphs 114 and 115 of the Localism Act 2011);

   b. the 2010 CIL Regulations (as amended) and the 2011, 2012, 2013, 2014, 2015 and 2019 CIL Amendment Regulations (the consolidated version of the 2010 Regulations above incorporates the amendments arising from these instruments);

   c. The Planning Practice Guidance (PPG) on CIL and Viability;

   d. The CIL Reports – Key themes briefing at Annex 2.

The examiner (Section 212)

8. The charging authority [not the Secretary of State] appoints the examiner, who is 'independent' and 'suitably qualified and experienced'

9. With the examiner's agreement, the charging authority can appoint an assistant e.g. development economics advisor, although in practice such appointments are unusual.

10. PINS will recover the examiner's costs plus expenses from the charging authority.

Content of a charging schedule (Regulation 12)

11. The charging schedule must name the charging authority and contain the rates (set at pounds per square metre) at which CIL is to be chargeable in the authority's area.

12. It must provide an explanation of how the chargeable amount will be calculated.

Differential rates (Regulation 13)

13. A charging authority may set differential rates:

    - For different zones in which development would be situated;
    - By reference to different intended uses of development;
    - By reference to the intended gross internal area of development;
    - By reference to the intended number of dwellings or units to be constructed or provided under a planning permission.

14. A charging authority may set supplementary charges, nil rates, increased rates or reductions.

15. Where differential rates are set by zone, the charging schedule must identify the location and boundaries of zones (Regulation 12(2)(c) requires this to be on an Ordnance Survey map which shows National Grid lines and reference numbers).

'An appropriate balance' (Regulation 14)

16. In setting rates (including differential rates) in a charging schedule, a charging authority must strike an appropriate balance between the desirability of funding from CIL (in whole or in part) the actual and expected estimated total cost of infrastructure required to support the development of its area, taking into account other actual and expected sources of funding; and the potential effects (taken as a whole) of the imposition of CIL on the economic viability of development across its area. Further guidance is given in the PPG[7].

Submission of the charging schedule

17. Regulation 19 outlines the documentation that the charging authority must submit to the examiner:

    a. the draft charging schedule,

[7] PPG Paragraph: 009 Reference ID: 25-009-20190315 – *How does a section 73 application which amends a planning condition affect the levy liability?*

b. a statement setting out the number of representations made in relation to the draft charging schedule and a summary of the main issues raised, or a statement that no representations were made,
c. copies of any representations made in relation to the draft charging schedule
d. where the draft charging schedule was modified following publication, a statement of modifications and
e. copies of the relevant evidence

18. Hard copies of all the above must be provided. Those documents specified under a, b and d above must also be sent electronically as should those specified under c and e if practicable to do so.

19. Preferably at the same time, but as soon as possible after submission, the charging authority must:

- place a copy of the Regulation 19 documents at its principal office and other places it considers appropriate
- It must publish the draft charging schedule (a), the representations statement (b) and any statement of modifications (d) on its website.
- As far as it is practicable to do so, the other documents (c) and (e) specified in Regulation 19 should also be placed on the website.
- A statement that the Regulation 19 documents are available for inspection and where they can be seen must also be published on the website.

20. At the same time the charging authority must notify those persons who requested to be informed that the draft charging schedule has been submitted to the examiner.

21. Charging authorities must notify all persons who have made a representation on the draft charging schedule of the place, date and time of an examination session at least 4 weeks before it takes place and must publish those details on its website (Regulation 21(8) as amended by the 2019 Amendment Regulations). In addition:

- Anyone who wishes to be heard in relation to any modifications made after the draft charging schedule was first published (under Regulation 16) must inform the charging authority in writing within 4 weeks of the draft charging schedule being submitted to the examiner (Regulation 21(5)).
- Charging authorities must notify those persons of the place, date and time of an examination session at least two weeks before it takes place (Regulation 21(11)).

Statement of modifications

22. The charging authority can modify a draft charging schedule after publication by means of a statement of modifications, under Regulation 16. Regulation 19(4) requires that, where a draft charging schedule has been so modified, the charging authority must do the following before submitting the draft charging schedule for examination:

    - send a copy of the statement of modifications to each of the consultation bodies invited to make representations at the preliminary draft stage (those consultation bodies specified under Reg 16 as amended by the 2019 Amendment Regulations);

    - publish the statement of modification on its website.

23. Regulation 21(3) requires that where a charging authority modifies a draft charging schedule after it is published in accordance with Regulation 16, any person may request to be heard by the examiner in relation to those modifications. This right to be heard applies only in relation to the modifications made to the draft charging schedule as set out in the statement of modifications (Regulation 21(4).

24. The examiner will need to examine the charging schedule as amended by the statement of modifications, regardless as to whether or not the hearings have taken place. Therefore, the examiner will not need to recommend what was in the statement of modifications as a change in their report.

The Purpose: examiner checklist

25. Has the charging authority complied with the procedural requirements in the 2008 Act and the 2010 Regulations (as amended)? The 2010 Regulations have been amended on several occasions subsequently (see paragraphs 6 and 7 above), and examiners should ensure that they use an up to date consolidated version of the Regulations.

26. Has the draft charging schedule been supported by appropriate available evidence - economic viability and infrastructure planning?

27. Has the draft charging schedule been informed by the charging authority's draft list of the infrastructure it intends will be, or may be, wholly or partly funded by CIL (Reg 14(5))?[8]

28. Are the proposed rate(s) informed by and consistent with the evidence?

[8] NB. The 2019 CIL Amendment Regulations state that from 31 December 2020 the 'infrastructure list' will be a charging authority's Infrastructure Funding Statement.

29. Does the evidence show that the proposed rate(s) would be consistent with the relevant plan and that the combined effect of the CIL and other developer contributions would not undermine the deliverability of the plan?[9]. Note that the 'relevant plan' includes any strategic policy including those set out in any Spatial Development Strategy[10].

30. Does the draft charging schedule comply with Regulation 12(2) as to how Charging Zone Maps are presented? It is important that the exact extent of the boundaries of the zones must be clear so that an owner or developer can see into which zone any particular property falls.

Examination procedure

31. The Inspectorate will normally apply principles and practices of local plan examinations in all appropriate respects.

32. The charging authority will need to appoint a Programme Officer.

33. The examiner will do an initial paper based examination, to include identifying main issues and questions.

34. A pre hearing meeting (PHM) will not be necessary (in most cases).

35. Hearing sessions will be conducted as a roundtable discussion, similar to a Local Plan examination hearing.

36. Anyone who has made a representation has a right to be heard (section 212(9)). However, this right is qualified by Regulation 21(12). At the discretion of the examiner other parties may be heard.

The report

37. The examiner should prepare a clear and concise report which will be subject to our quality assurance process before being sent to the charging authority for 'fact check'.

38. The report may recommend that draft Charging Schedule be approved, rejected or approved with specified modifications[11].

39. The examiner must give reasons for the recommendations.

40. The charging authority must publish the recommendations and reasons.

[9] Paragraph 011 Reference ID: 25-011-20190901– *What is a charging schedule?*; *Paragraph: 040 Reference ID: 25-040-20190901 – What is in the examiner's report?*; and Paragraph: 166 Reference ID: 25-166-20190901 – *How does the Community Infrastructure Levy relate to other developer contributions?*

[10] PPG Paragraph: 012 Reference ID: 25-012-20190901 – *What is a 'relevant plan'?*

[11] PPG Paragraph: 040 Reference ID: 25-040-20190901 *What is in the examiner's report?*

Examiner's recommended modifications

41. Where necessary to ensure that the schedule is consistent with the evidence an examiner can recommend a modification to lower a CIL rate, without the need for consultation, so long as this would not come as a surprise to the charging authority nor result in selective assistance (under European Commission regulations, which includes conferring of a selective advantage to any undertaking.[12] However, there may be occasions where even a lower rate should be subject to consultation through a statement of modifications. This might be the case, for example if it is based on new evidence and there might be persons who could reasonably argue that their interests would be prejudiced if they were denied an opportunity to comment.

42. Where there are representations arguing that the rates proposed by the charging authority are too low to strike the appropriate balance between funding infrastructure and ensuring the viability of development (which is sometimes argued by Parish Councils), it might also be inappropriate to reduce rates without consultation.

43. A modification to increase a CIL rate should only ever be recommended following public consultation. Such modifications should generally be avoided but may be appropriate when necessary to ensure consistency with the evidence, where the charging authority supports the modification and where the alternative would be to not approve the schedule.

44. If the charging authority has prepared a statement of modifications in accordance with the Regulations, the schedule being examined is the one which was submitted for examination as modified by the statement. Consequently, it is not necessary to recommend modifications made through a statement of modifications in the examiner's report.

Localism Act: Sections 114-115

45. Section 114 directly relates to the examination, the recommendations of the examiner and adoption of the charging schedule and came into force on 16 November 2011. It amends sections 211 – 213 of the Planning Act 2008 and also inserts a new section 212A.

46. It makes clear that "appropriate available evidence" must inform a charging schedule and provides regulation making powers to further define that term if necessary.

47. It removes the requirement on the charging authority to specifically make a declaration of compliance with the charging schedule drafting requirements on submission to the examiner. However the examiner must check for such compliance.

[12] – PPG Paragraph 022 Ref ID: 25-022-20190901 – *Can differential rates be set?*

48. It limits the binding nature of examiner's detailed recommendations, giving the authority scope to decide exactly how to correct non-compliance with statutory drafting requirements. In order to adopt, the authority is required to correct any failure to comply specified by the examiner but has more discretion about how to do this e.g. it may depart from the detail of recommendations on mix of charges for different classes of development.

49. Section 115 concerns wider CIL regime changes and has been commenced (on 15th January 2012) by separate order.

50. It clarifies that CIL may be spent on the ongoing costs of providing infrastructure (e.g. improvement, replacement, operation, maintenance) as well as its initial provision.

51. It provides regulation making powers to require authorities to pass a specified proportion of CIL receipts to another party, such as a parish council where new development takes place. It provides that such a proportion may be spent on infrastructure or other matters addressing demands that development places on the area. It further provides that regulations may allow a specified proportion of CIL spent by an authority in an un-parished area to be spent on infrastructure or other matters to address those demands.

Practical handling of the examination

52. Examinations are normally conducted in essentially the same way as for local plans, although not all need hearing sessions. For those that do, normal duration is one or two days.

53. The PPG advises that the charging authority should sample an appropriate range of types of sites across its area reflecting the nature of sites and type of development proposed for allocation in the plan (see paragraphs 019 of the CIL chapter of the PPG and 003 and 004 of the Viability chapter).

54. The PPG also emphasises the importance of considering strategic sites and suggests site specific viability assessments be undertaken for those that are critical to delivering the priorities of the Plan.[13] So, the issue for the examiner is whether the sampling and the sites tested in the viability assessments reasonably reflects the planned development that is likely to come forward.

Viability Assessment

55. To date the methodologies and terminologies used in economic viability assessments have varied considerably. However, paragraph 57 of the revised Framework now states that all viability assessments, including any undertaken at the plan making stage *(usually CIL and Local Plan Viability Assessments are undertaken*

[13] Paragraph: 005 Reference ID: 10-005-20180724 – *Why should strategic sites be assessed for viability in plan making?*

together), should reflect the recommended approach in national planning guidance, including a series of standardised inputs. Paragraph 020 of the CIL chapter of the PPG also states that charging authorities should use evidence in accordance with the PPG on viability.

56. The relevant guidance on viability assessments is contained in the updated version of the Viability chapter of the PPG, published in July 2018 alongside the new Framework and updated in May 2019. Unlike local plan examinations there were no transitional arrangements in the Framework for CIL examinations.

57. Where a submitted CIL charging schedule has been prepared under the previous Framework, the examiner may consider (if necessary having sought the views of the charging authority) whether any viability assessment prepared prior to publication of the new Framework and PPG viability guidance generally accords with that policy/guidance, applying reasonable judgement so as to not unnecessarily delay examinations.

58. The government's recommended approach to viability assessments for planning (including CIL) is set out in paragraphs 010 to 019 of the Viability chapter 10 of the PPG and, specifically for CIL charging schedules, in paragraphs 019 to 021 of the CIL chapter of the PPG.

59. CIL Examiners should familiarise themselves with this guidance prior to undertaking the examination. In summary it explains that viability assessment is a process of assessing whether a site is financially viable, by looking at whether the value generated by a development (known as the gross development value or GDV) is more than the cost of developing it. This includes looking at the key elements of gross development value, costs, land value, landowner premium and developer return.[14]

60. The PPG contains detailed guidance on the standardised inputs for these elements of the assessment. Of particular note is the recommended approach to defining benchmark land values as an input to the assessment of development costs, which to this point have been the subject of much debate at CIL examinations. The updated PPG establishes that benchmark land values should be based on existing use value plus a premium for the landowner (called EUV+).[15]

61. Alternative use value (AUV) can be used to inform the benchmark land value of a site, but paragraph 017 of the Viability chapter of the PPG is clear that this should be limited to those alternative uses which would fully comply with up to date development plan policies, and where the use can be implemented on the site, there is evidence of market demand for the use and it can be explained why the alternative use has not been pursued.

[14] Paragraph: 010 Ref ID: 10-010-20180724
[15] Paragraphs 013 to 016 of the Viability chapter of the PPG

62. For CIL purposes, the overall approach taken towards assessing viability for a particular use generally involves assessing all the development costs (including the cost of land, build costs, finance, professional fees and developer profit). This is then taken away from the value (GDV) of the completed development. If there is a surplus the development would be viable and the surplus could in theory be used to pay a CIL charge (the surplus is sometimes referred to as the maximum possible theoretical CIL charge).

63. However, the PPG advises that it would be appropriate to ensure that a 'buffer' or margin is included, so that the levy rate is able to support development when economic circumstances change[16]. This should always leave a reasonable viability "margin" or "cushion" for all types of scheme to which a CIL charging rate applies.

64. There are other published sources of advice on viability assessment to which reference may be made in CIL examinations. These include the Harman Report on "Viability Testing Local Plans" (June 2012) and the RICS Professional Guidance on Financial Viability in Planning (August 2012). The Harman report, in particular, remains a useful resource as background advice, but does not have any formal or legal status in the planning system. The NPPF and the associated planning practice guidance comprise the Government's recommended approach to viability in planning. For this reason, where reference to published guidance on viability assessment is necessary, examiners reports should rely on the NPPF and PPG rather than the Harman or RICS reports.

65. The national guidance is clear that the assessment of development costs must include the total cost of all relevant policy requirements, including contributions towards affordable housing set out in the adopted local plan.[17] For this reason, it is not acceptable or appropriate to use a lower target or percentage as an input for the cost of affordable housing on the basis that this is all that is being achieved at present.

Differential Rates

66. As referenced above, the Regulations allow charging authorities to set differential rates for different geographical zones, types or uses of development and scales of development. However, differential rates must be supported by viability evidence alone and should not be used as a means to deliver policy objectives, for example to support retail in one area rather than another or to support development in a regeneration area. It will also be important to ensure that setting differential rates does not have a disproportionate effect on particular

[16] PPG Paragraph: 020 Ref ID: 25-020-20190901 – *How should development be valued for the purposes of the levy?*
[17] PPG Paragraph: 012 Ref ID: 10-012-20180724 – *How should costs be defined for the purpose of viability assessment?*

sectors or specialist forms of development e.g. housing needed for different groups in the community such as accessible and adaptable housing.[18]

67. This includes in respect of the thresholds within the same use class and any boundaries between charging zones, such as town centre and out-of-centre. The guidance and regulations allow for charging differential rates for distinct types of development within the same Use Class (Regulation 13(1)(b) and PPG Paragraph: 023 Reference ID: 25-023-20190901[19]). But any such distinction in a charging schedule can only be based on viability evidence. So, for example, it is important that charging higher CIL rates for larger format or out of centre A1 retail development is not used as a means of restricting this form of development in favour of town centre A1 retail development by placing it at an economic disadvantage. Viability evidence must demonstrate the ability of larger format or out of centre retailing to viably support a higher CIL rate.

Seeking further viability evidence and 'sensitivity testing'

68. If the examiner is likely to conclude that a specific rate is set too high after considering the viability evidence, it can be helpful to ask the charging authority to set out its view on what the rate should be set at on a '*if I were to conclude*' basis, before, during or after the hearings. In addition, it is quite common for examiners to request additional viability assessments based on different specified assumptions about certain costs and/or values before or after hearing sessions. This is often known as 'sensitivity testing'. Similarly it is common for examiners to request site-specific viability assessments on strategic development sites which are critical to the delivery of the development plan, where these have not been provided as part of the evidence and there is dispute or uncertainty about the development costs.

Infrastructure Planning Evidence

69. In setting rates charging authorities are to have regard to the actual and expected costs of infrastructure required to support the development of its area and, as part of the appropriate balance, the extent to which it is desirable to fund this from CIL taking account of other sources of funding. In assessing whether the appropriate balance has been struck, examiners will need to test that the infrastructure planning evidence is sufficient to confirm the aggregate infrastructure funding gap, and the target amount of funding the charging authority proposes to raise through CIL.[20] This is usually set out in an Infrastructure Delivery Plan (IDP) and/or in the draft charging schedule (DCS) and submitted as evidence for the examination.

[18] PPG Paragraph: 022 Ref ID: 25-022-20190901 – *Can differential rates be set?*
[19] *PPG Paragraph: 023 Reference ID: 25-023-20190901 – How can rates be set by type of use?*
[20] PPG Reference ID: 25-018-20190901 – *What infrastructure planning evidence is required at examination?*

70. Previously charging authorities were also required to set out in a 'Regulation 123 list' the infrastructure projects or types which they intended to fund through the CIL and were not allowed to seek S106 planning obligations for infrastructure on the Regulation 123 list. However, under the 2019 CIL Amendment Regulations, from 1 September 2019 onwards, the requirement for a Regulation 123 list has been removed and charging authorities can use both CIL and S106 obligations to fund the same piece of infrastructure.

71. Regulation 123 lists will be replaced by annual infrastructure funding statements (IFS), which amongst other things, should set out the infrastructure projects or types to be funded wholly or partly by CIL.[21] The first IFSs must be published by 31 December 2020. Until then existing 'Regulation 123 lists' are likely to remain useful to inform infrastructure planning evidence in the preparation and examination of charging schedules.

72. As with the Regulation 123 list, the IFS or any interim infrastructure list is not before you for examination. Whilst it may be part of the evidence base submitted with the Charging Schedule, its purpose is to identify the infrastructure for which there is a funding gap justifying the charging of a levy[22]. It is important that you do not get drawn into considering, discussing or reporting on the content of the IFS/infrastructure list other than as necessary to assess the infrastructure planning evidence and the infrastructure funding gap.

73. However, given that both CIL and S106 obligations can now be used to fund the same infrastructure projects, in order to confirm the extent of the funding gap that demonstrates the need for a CIL, it may be necessary to clarify as part of the examination what proportions of the cost of each infrastructure project identified in the infrastructure list or IFS it is anticipated the charging authority will fund through the levy and through S106 obligations.

74. The IFS or infrastructure list may include infrastructure outside of the authority's area, such as strategic cross-boundary infrastructure, for which charging authorities can pool a proportion of CIL receipts. Any such proposal should be supported by a Memorandum of Understanding explaining the proportion of CIL from the charging authority area to be pooled for this purpose.[23] This will be relevant in identifying the infrastructure funding gap.

Residual S106 Costs

75. Examiners will also need to be clear that the allowances for S106 costs in the development appraisals in the submitted economic

[21] PPG Paragraph: 018 Reference ID: 25-018-20190901 – *What infrastructure planning evidence is required at examination?*
[22] PPG Paragraph: 018 Ref ID: 25-018-20190901 – *What infrastructure planning evidence is required at examination?*
[23] PPG Paragraph: 159 Ref ID: 25-159-20190901 – *Can groups of charging authorities pool a proportion of their Community Infrastructure Levies?*

viability evidence are consistent with anticipated future use of S106 obligations to fund infrastructure identified in the IFSs or infrastructure lists. Given that both CIL and S106 obligations can now be used to fund the same item of infrastructure, examiners should ensure that any allowance for such 'residual' S106 costs in appraisals is consistent with this. Further advice on this is given in paragraph A2.30 of Annex 2 below.

Payment by instalments policies

76. Policies enabling the payment of CIL by instalments may accompany or form part of CIL Charging Schedules submitted for examination. They can assist the viability of development by phasing CIL payments over the lifetime of the construction thereby assisting cash flow. You are likely to encounter representations which seek changes to the instalments policy to increase the length of time over which charges may be paid, or, if no instalments policy is proposed, request that one be introduced.

77. Whilst the instalments policy itself is not before you for examination, the existence of one or the willingness of the charging authority to introduce one can be a material consideration in assessing the viability of proposed rates. It may be necessary to establish whether the financial appraisals used to test the viability of CIL have assumed payment of the CIL charge up front or by instalments and if the latter whether an instalments policy is or would be in place to support this. If the appraisals have assumed the former, then the intention to introduce an instalments policy would allow a greater margin for viability.

Relationship between the CIL Charging Schedule and Local Plan

78. Where a CIL and Plan are submitted together it has been common practice in recent years to only start the CIL examination when the plan examination is well-advanced (so the plan basis for the CIL is reasonably stable). If this is the case, you should explore the timing with the LPA before concluding on programming.

Consultation on Draft Charging Schedules

79. Following the 2019 CIL Amendment Regulations it is for charging authorities to decide how they wish to consult. There is no requirement to consult on a preliminary draft charging schedule nor a statutory minimum consultation period on the draft charging schedule (DCS). However, the PPG states that where a CIL is being introduced for the first time or significant changes are being proposed to an existing CIL, charging authorities will be expected to consult for a minimum of 4 weeks on the DCS.[24]

[24] PPG Reference ID: 25-032-20190901 – *What consultation is required in the draft charging schedule?*

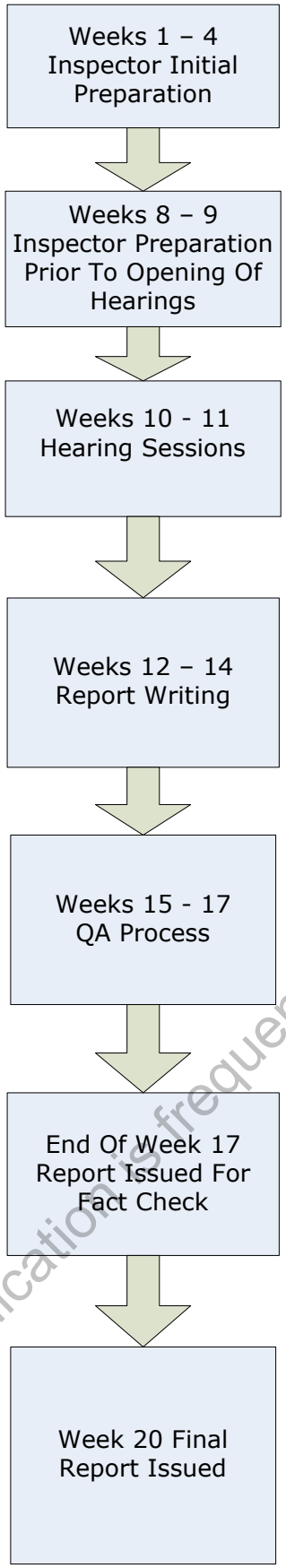
80. Examiners must therefore consider whether the charging authority has given adequate time for consultation on the DCS, particularly for consultations of less than 4 weeks, taking account of the scale and complexity of the CIL proposals. This should be done as part of the assessment of legal and procedural compliance.

81. The 2019 CIL Amendment Regulations also make it a requirement that charging authorities must 'take into account' any representations made on the DCS before submitting it for examination. This should be set out in the statement of representations required to be submitted under Regulation 19(1)(b).

82. There are transitional provisions for charging schedules on which consultation had commenced before 1 September 2019:

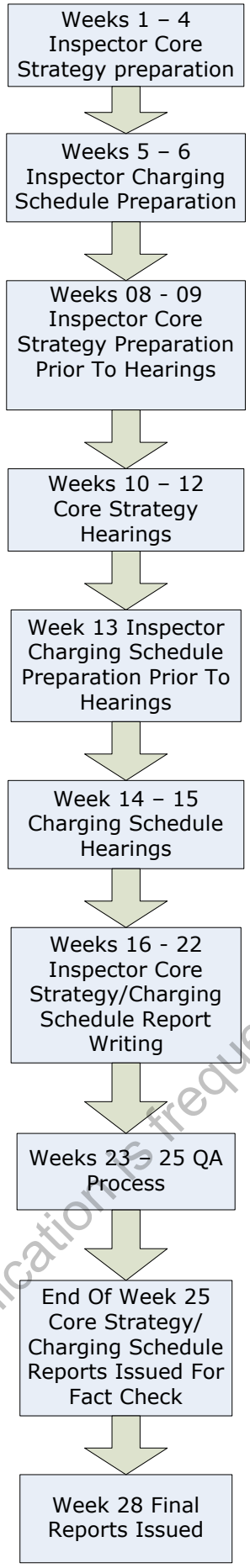
    a. Where a DCS had already been published, the former Regulations on consultation apply;
    b. Where a preliminary DCS had already been consulted on any representations on it should be taken into account before the DCS is published.

Annex 1: Indicative timelines for examinations



A. Charging Schedule Examination (up to 5 hearing days, no PHM)

B. Local Plan /Charging Schedule Joint Examination (NO PHM)



Annex 2

Community Infrastructure Levy Key Themes from Reports 2013-2016

March 2016

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Introduction

A2.1 This is a reference guide to some of the key themes which have emerged in reports on examinations of Community Infrastructure Levy (CIL) charging schedules from 2013-2016. This report sets out extracts from the relevant reports and provides a brief commentary. Most of these reports can be found on the Local Plans/CIL Guide on PINS intranet or alternatively on the relevant examination websites. MHCLG has indicated that an update of the CIL chapter of the PPG will be published later in the autumn 2018, to address any further consequential changes arising from the new NPPF. This report will be reviewed in full again at that point.

A2.2 Please let the Plans Team (copying in the Knowledge Centre) know if there are particular issues you would like covered or that you think are of relevance.

Report structure and style

A2.3 The structure and style of individual reports will vary depending on the particular examination. The CIL report template should be used to ensure consistency. However, the report to Crawley Borough Council is a good example of a clear, concise and well-written report. It firstly sets out the position on the local plan and the infrastructure planning evidence, including the funding gap and the contribution CIL may make. It then moves on to assess the economic viability evidence and the modelling assumptions before concluding on the proposed residential and commercial rates.

Statement of Modifications – changes do not need to be recommended as modifications

A2.4 The Regulations allow the charging authority to modify the draft charging schedule after it has been published through a Statement of Modifications – as defined in Regulation 11(1).[25]

A2.5 If the Council has carried out consultation on a Statement of Modifications, the proposed revised rates will then form the basis for the examination. This applies even if the consultation is carried out during the course of the examination, including after the hearing sessions. Consequently, the changes advanced in a Statement of Modifications do not need to be set out as recommendations in the report. The approach taken should be explained in the report.

Dudley – paras 4 & 5

"The Council carried out further consultation in January and February 2015 on a 'Statement of Modifications'. This advanced changes to clarify the approach to retail charging at Merry Hill & Waterfront and to increase the charge for 'Retirement Housing with le ss than 25% affordable housing' in one postcode area.

Consequently, the basis for the examination is now the submitted draft charging schedule of July 2014 as amended through the Statement of Modifications.

[25] PPG Paragraph: 019 Reference ID: 25-019-20190901 – *How could local authorities prepare their evidence to support a levy charge?*

Accordingly, I do not need to recommend any of the changes set out in the Statement of Modifications in my report. In reaching my conclusions, I have taken into account the representations made in response to the March and July versions of the charging schedule and to the Statement of Modifications."

Infrastructure planning evidence and justification for CIL

A2.6 It is necessary for Examiners' reports to explain that the Council has assessed what infrastructure will be necessary to deliver the development set out in the Local Plan and broadly how it will be funded. The report should then outline the extent that CIL will contribute to any shortfall in funding. This should be covered as briefly as possible. Infrastructure funding statements will replace the Regulation 123 list as part of the infrastructure planning evidence as from 31 December 2020.

Hambleton – paras 7 and 8 (infrastructure evidence)

"The Core Strategy (L/219) was adopted in 2007 with Development Policies (L/220) and Allocations (L/221) following in 2008 and 2010 respectively. Annex 4 of the Allocations document includes a *Strategic Infrastructure Plan*. Following liaison with partner organisations the Council prepared a *Draft Infrastructure Development Plan Update* in January 2014 (L/211). This sets out the key infrastructure schemes required to support the main elements of growth in the development plan.

The costs of the key infrastructure schemes, along with confirmed sources of funding, are set out in the *Infrastructure Funding Gap* document (Ref L/212). This was updated in July 2014 to take into account the latest position on developer contributions and the availability of Local Enterprise Partnership (LEP) funding (P/608 & S/304)."

Hambleton – paras 10-12 (infrastructure cost and funding)

"The total cost of the required infrastructure is around £33.7 million. Confirmed funding sources add up to about £8.9 million leaving a significant funding gap of around £24.9 million (S/304).

The revenue from CIL over the development plan period is projected to be about £13.4 million, based on the reduced charge of £55 for private market housing (P/617). This does not take into account the proposed reduction of the rate for supermarkets to £90. However, the vast majority of the projected revenue (around £13 million) is forecast to come from housing development. After taking into account administration fees (at 5%) and the 'meaningful proportion' passed on to parish councils (15-25%), CIL revenue is likely to be about £10.6 million (P/617).

It is apparent that the proposed charges would not make anything like a full contribution to the funding gap. Nevertheless, the figures clearly demonstrate the need to introduce a CIL to help deliver the infrastructure which is necessary to support planned growth."

Infrastructure Funding Statement (formerly the Regulation 123 List) – scope and coverage

A2.7 The IFS should set out the infrastructure projects and types which the Council intends will be funded wholly or partly from CIL income. It is not formally examined as part of the CIL Examination because, under S212 of the 2008 Planning Act, the examination is only of the *charging schedule*.

A2.8 Some representors may argue that changes should be made to the list, usually to include additional projects.

Dudley – para 13 (scope of list and effect on funding gap)

"Some representors have argued that the draft Regulation 123 list should include additional or different infrastructure projects. For example, the Highways Agency has suggested that it should refer to the enhancement of the four Black Country motorway junctions. However, adding further infrastructure requirements would simply increase the already significant funding gap (see below). Consequently, it would not lessen the justification for introducing a CIL. Furthermore, the Council has confirmed that it will review the Regulation 123 list from time to time."

Hambleton – para 9 (scope of list)

"The infrastructure to benefit from CIL funding is set out in the Draft Regulation 123 List (L/214). Representors have questioned the need for some infrastructure projects and whether some of these should be funded by CIL payments made in other parts of the district. Others have suggested additional infrastructure that might be funded. However, the Council considers that the list includes those schemes which are essential to the delivery of the planned growth and I have no substantial evidence to indicate otherwise. Furthermore, it is not the role of this examination to re-open infrastructure planning issues that have already been considered when the development plan was put in place. However, the Council advised at the hearing that it would periodically review the list."

Is there a relevant plan?

A2.9 The *Planning Practice Guidance* (PPG) states that charging authorities should ensure that the combined total impact of CIL and other developer contributions does not in the deliverability of the Plan. The March 2019 update to the PPG now defines the *relevant Plan* as any strategic policy, including those set out in any Spatial Development Strategy.[26]

A2.10 Many CIL schedules have been submitted in the context of an up-to-date and recently adopted Local Plan. However, some have been submitted concurrently with a Local Plan or in advance of the submission of a Local Plan for examination. The Act and Regulations do not prevent this. It is common practice to only start the CIL examination when the plan examination is well-advanced so the plan basis for the CIL is reasonably stable. However, whatever stage it has reached the Examiner is likely to need to consider whether the emerging Plan provides an appropriate basis for setting CIL. For example, does the emerging Plan provide a

[26] PPG Paragraph: 012 Reference ID: 25-012-20190901 - *What is a 'relevant Plan'?*

sufficiently stable basis for assessing the scale, distribution and type of development likely to come forward?

Birmingham - para 24 (local plan being examined separately)

"The 'development' of the city, in the terms envisaged in S.205 of the Planning Act 2008, is clear, and the strategy of concentrating most growth on largely brownfield sites within the urban area, supported by strategic Green Belt releases, is very unlikely to change. There is a sufficiently stable development plan backcloth to enable high level CIL viability assessments to be made. However, my comments should not be treated as any predetermination of the Plan's outcome and, at the examination Hearings, the Council did concede that there could be circumstances that would require the CIL proposals to be revisited e.g. any changes to the Green Belt housing release (which has its own tightly drawn CIL zone). However, those are matters to be addressed if and when they arise."

Lewes - para 31 (local plan and CIL being examined at the same time)

"The Lewes Local Plan Part 1 – Joint Core Strategy is being examined and is presently subject to proposed main modifications. Provided that the LP is adopted in the modified form proposed it will provide an appropriate basis for the concurrent adoption of the CIL charging schedule."

Rother – paras 30 and 31 (Core Strategy adopted but no site allocation plan)

"It is represented that until such time as there is an allocations plan in force, it is not possible to have a clear understanding of the infrastructure requirements for the district, and thus there is not a firm foundation to assess the economic effect on development arising from different levels of CIL charging. The situation in Rother District is that the adopted CS will be followed by a Development and Site Allocations Plan (DaSA). The Council is currently working to produce initial proposals for consultation. The period for initial public consultation is not yet fixed, but it is anticipated to commence in Autumn 2015. Therefore the DaSA has not yet begun to emerge in public.

Nevertheless, in my view the CS, adopted a bare twelve months ago, provides a framework of sufficient clarity, identifying the main types of development and their locations over the period to 2028. The only references in the regulations and guidance are to the "relevant plan" and "the local plan in England"; there is also reference elsewhere to an up-to-date plan. The emphasis in the regulations and guidance is on providing evidence of an aggregate funding gap that demonstrates the need to put in place the levy. Quite clearly the DaSA will fill in considerably more detail than the CS, but the policies of the CS have been sufficiently detailed to enable differentiation of charge by geographical area to be undertaken, reflecting the nature of development anticipated across the district. Many CIL examinations have led to the approval of CIL Charging Schedules on such a development plan basis, and indeed in some cases, on plans which are far less up-to-date. I see no reason to fault the Rother DCS on this basis."

Do proposed differential rates comply with the Regulations?

A2.11 The Regulations only allow for differential CIL rates to be set in relation to:

- different zones
- different intended uses
- intended gross internal area of development
- intended number of dwellings or units

A2.12 An early task for the Examiner will be to ensure that the schedule's rates clearly fall within one or more of these categories. If there is doubt on the matter, ask the Council to clarify its approach.

A2.13 The Guidance makes it clear that different intended uses are not limited to TCPA Use Classes. However, the Examiner will need to be assured that the proposed differentiation reflects what can reasonably be considered to be a different intended use.

A2.14 It is also important to be alert to circumstances where differential rates are being proposed but which do not stand out from the schedule – for example, a rate of £x for convenience retail, no specific reference to any other retail and a £0 rate for all other uses. This would be proposing a differential rate by use.

A2.15 The Regulations require that Zones (including those relating to individual sites) must be identified on an Ordnance Survey based map which shows National Grid lines and reference numbers. Consequently, it is not possible to differentiate according to the existing greenfield/brownfield status of land, unless the land in question is shown on a map base.

Eastbourne – para 45 (apartments as a different use)

"The legislation allows for differential rates by reference to intended uses of development. The PPG makes it clear that the definition of "use" for this purpose is not tied to the Town and Country Planning (Use Classes) Order 1987, and gives the example of applying differential rates to social housing if that is justified by viability evidence. In this case, the evidence indicates that the viability of apartments is quite different to other forms of housing development in Eastbourne. Part of the reason for this is the additional development costs associated with creating shared access, circulation and outside amenity areas. Furthermore, these features of apartment blocks mean that such buildings are used in a materially different manner to individual dwellings with private gardens. I am, therefore, satisfied that the application of a differential rate to apartment developments would be in accordance with the relevant legislation and national guidance."

Hambleton – para 20 (apartments as a different use)

"Apartments fall within the same use class as houses. However, the Planning Practice Guidance states that the definition of 'use' is not tied to the classes of development in the *Town and Country Planning Act (Use Classes Order) 1987*.[27] Apartments generally have a shared access from the street and from internal communal areas. In this sense they are not used in the same way as houses.

[27] Paragraph: 023 Reference ID: 25-023-20190901 - *How can rates be set by types of use?*

Furthermore, other charging schedules, which have been found sound, have accepted apartments as a different use. [footnote ref to specific examples]"

London Borough of Tower Hamlets – para 46 (different retail uses)

"…. shopping destinations which are designed to enable many or most customers to arrive, and take home their purchases, by car can readily be distinguished at the planning application stage, and are a different use in CIL terms, from retail development which is not so designed. However, to provide clarity and to ensure effective and fair implementation of CIL in Tower Hamlets, and it is necessary to include the Council's more detailed definition in the schedule itself."

Hambleton – paras 21-22 (different retail uses)

Some representors have expressed concern that supermarkets and retail warehouses are not different uses. However, a supermarket has different characteristics to a neighbourhood convenience store and tends to be used in a different way. The same applies when comparing a retail warehouse to a high street comparison store. Furthermore, as noted above, the PPG advises that such differentiation need not be tied to the Use Classes Order. The Council's definitions set out criteria which will allow a clear differentiation to be made between these uses.

Rother – paras 4-11 (differentiation by brownfield/greenfield status - not compliant with the Regulations)

In this case, the Council had sought to advance differential rates depending on whether the development would be on greenfield or brownfield sites. However, these sites were not shown on a map base.

"It can be seen that differentiation by brownfield and greenfield does not fall within regulation 13(1)(b), (c), or (d). The only basis on which the distinction could be made would be if brownfield and greenfield areas were able to be defined by zones. The Council has confirmed that it would be impractical to identify all the sites within the two descriptions by zonal mapping: it had been the Council's intention that individual sites would be identified by assessing which category the site fitted, at the time of imposing the Levy. Counsel's Opinion noted that the word "must" in regulation 12(2) indicated that the requirement to identify zones on a map by which charges would be differentiated was mandatory, and confirmed that the Council's approach does not fall within the scope of the regulations and therefore cannot be adopted. As a result, the Council has reconsidered the intended differentiation of charge between brownfield and greenfield."

Wigan CIL – para 74 (need to show zones on an OS map)

The Regulations require that differential rates set by zone must be shown on an Ordnance Survey map which shows National Grid lines and reference numbers and an explanation of any symbols or nations. However, there have been cases where the maps were not on an OS base or failed to fully comply with the Regulations. Any such shortcomings can usually be overcome by means of a recommendation. In the first example below, the Council provided revised maps, but that may not always be necessary.

"Following submission of the DCS, the Council amended the residential changing zone maps to add grid reference numbers to the Ordnance Survey bases in accordance with Regulation 12(2)(c) of the CIL Regulations 2010. Although mainly presentational changes, as they have been made post submission and to comply with the Regulations, the Council has asked me to include them in my recommended modifications (**EM6**)."

Rother CIL – paras 19 & 20 (need for zone boundaries to be clear and on a map showing grid lines)

Finally, two points with regard to the compliance of the Zones Map with the regulations:

i. It is important that the boundaries of zones are clear, so that landowners/developers can see clearly which zone a site is within. This cannot be said of Zone 3 in the submitted DCS. The Council has produced an inset map to clarify the boundaries of the sub-zones of Zone 3.

ii. Regulation 12(2)(iii) requires the map to show national grid lines and reference numbers. This point is easily answered by the addition of grid lines and numbers on the map.

The Council has asked me to deal with all these issues by stipulating modifications in my recommendations. I have done so, as can be seen in the Appendices to this report.

Dudley CIL – paras 56 and 57 (can development in a particular area be excluded from the CIL system?)

In this case the Council had proposed that retail development in a town centre should be excluded from the CIL system altogether. The examiner did not accept this approach and concluded that the Council was, in effect, proposing a nil rate (which the examiner subsequently concluded was justified on the basis of viability evidence). Paras 52-64 of the report set out the reasoning in full.

"The Council is seeking to achieve this aim by excluding comparison retail at Merry Hill from the CIL system altogether. This is the reason for the Statement of Modifications proposing that the 'rate' should be changed from £0 to 'N/A'. However, regardless of how the schedule is phrased, I find it difficult to accept that what is being proposed does not amount to a differential rate of £0 as provided for in Regulation 13. In particular, it relates to a *different zone* (Merry Hill & Waterfront) and to a *different intended use of development* (comparison retail).

Following from this, the key question is whether a nil rate is justified by viability evidence. The Planning Practice Guidance advises that *differences in rates need to be justified by reference to the economic viability of development* and that differentiation should only be applied *where there is consistent economic viability evidence to justify this approach*. However, *differential rates cannot be used as a means to deliver policy objectives*. The PPG also advises that developers may be asked to contribute to infrastructure in several ways and that, where justified, some site-specific mitigation can be required by means of a planning obligation."

Setting out the overall approach to viability assessment and rate setting

A2.16 The terminology used in viability assessments and rate setting will often vary from one charging authority to another. Consequently, it can be helpful to set out briefly the approach taken early on in report. The same terminology should then be used through-out the report. Paragraph 57 of the new Framework now states that all viability assessments should reflect the recommended approach in national planning guidance, including a series of standardised inputs. Accordingly, terminology should as far as possible be consistent with the Viability chapter of the PPG. The following report extract pre-dates the new Framework and PPG, but remains a useful example.

Hambleton – para 16

"The viability assessments are based on a residual valuation approach, using standard assumptions for a range of inputs such as building costs and profit levels. In summary, they seek to establish a *residual value* by subtracting all costs (except for land purchase) from the value of the completed development (the *Gross Development Value*). The price at which a typical willing landowner would be prepared to sell the land (the *Benchmark Land Value*) is then subtracted from the *residual value* to arrive at the *overage* or '*theoretical maximum charge'*. This is the sum from which the CIL charge can be taken provided that there is a sufficient *viability buffer* or *margin*."

Is the approach to site sampling justified?

A2.17 The PPG advises that the charging authority should sample an appropriate range of types of sites across its area reflecting the nature of sites and type of development proposed for allocation in the plan. (see paragraphs 019 of the CIL chapter of the PPG and 003 and 004 of the Viability chapter). The issue for the examiner is whether the sampling in the viability assessments reasonably reflects the planned development that is likely to come forward?

A2.18 Viability assessments rarely assess every possible development type or use. Instead the issue can be whether a specific development type that has not been assessed is significant for the delivery of the development plan; for example a strategic site or brownfield sites if the plan relies on this.[28]

Hambleton – paras 27 & 28 (residential sampling)

"The residential viability assessments have looked at scenarios for low, moderate and high value sites, in each case assuming a standard 1 ha (gross) site area of which 0.9 ha will be developable. In addition, an assessment has been carried out for the strategic North Northallerton site.

Hambleton is a rural district and the largest settlements are the market towns of Northallerton and Thirsk. With the exception of the strategic North Northallerton site, most of the allocated sites in the development plan are less than 2.5-3 ha in size. While developers may currently be proposing development on larger unallocated sites, CIL is premised on providing

[28] Paragraph: 005 Reference ID: 10-005-20180724 – *What are the principles for carrying out a viability assessment?*

infrastructure to support planned growth. In this context, the sampling covers a reasonably representative selection of the types and sizes of planned residential development."

Lewisham – para 22 (no assessment of commercial leisure)

"The VA did not assess other types of development such as commercial leisure (within the D2 uses class). I consider this issue later in the report. However, I accept that the VA has sought to assess the types of development of greatest significance for the Borough over the plan period. The evidence used by the Council to inform its charging schedule cannot test every type of development. Some of the untested types of development may not be viable with the CIL rate proposed, but provided that they are not significant for the delivery of the plan as a whole, then the approach is reasonable. I note that of the 5 strategic allocations only one – Lewisham Gateway - has a specific quantum of leisure space identified in the policy (SSA6) and that outline planning permission for this scheme has already been granted. I do not regard the delivery of further commercial leisure schemes as critical to the delivery of development in the Borough taken as a whole."

Has an appropriate buffer or margin been applied?

A2.19 The Guidance advises that CIL charges should not be set right at the margins of viability and indicates it would be appropriate to include a buffer or margin (ID 25-019-20190315). Many viability assessments/studies determine the maximum amount of CIL a development can viably pay and then, applying a "buffer", set an actual CIL rate someway below the maximum. Typically "buffers" vary between 10% and 50%.

A2.20 In general terms the larger the "buffer" the less impact CIL is likely to have on the viability of development.

London Borough of Bexley – para 22 (25% buffer)

"Moreover, the reasonable buffer or margin (of at least 25%) applied to the possible maximum CIL rates that could viably be charged according to the VS is able to mitigate the potential impacts of such site specific factors on overall viability."

Hambleton – paras 16 & 74 (25-50% buffer)

"The Planning Practice Guidance states that it would be appropriate to include a buffer or margin so that the levy rate is not set at the margins of viability and is able to support development when economic circumstances adjust. This can also provide some degree of safeguard in the event that gross development values have been over-estimated or costs under-estimated and to allow for variations in costs and values between sites. The Council has therefore assumed that the charges should be no more than 50-75% of the overage.

As noted above the Council considers that the rate should not exceed 75% of the maximum theoretical charge. On this basis the maximum theoretical CIL charge for a retail warehouse would be £61 sqm and for a supermarket £126 sqm. A charge of £40 sqm for a retail warehouse would represent around 66% of this theoretical maximum, leaving a margin of £21 sqm. The charge of £90 for supermarkets would represent about 71% of the theoretical maximum, leaving a margin of £36 sqm. This is a reasonable viability cushion and provides

sufficient flexibility to allow for some variations in costs and values without adversely affecting viability."

London Borough of Tower Hamlets – para 52 (25% buffer)

"Bearing in mind that the proposed rate is reduced by 25% from the maximum level of CIL demonstrated to be viable, I am not persuaded that any of the other detailed criticisms of the assumptions used in the hotel appraisals would be likely to significantly undermine the viability of this CIL rate for most hotel development across the borough."

The use of historic planning obligation (s106) evidence to help justify CIL rates

A2.21 Comparisons may be made between historic planning obligation (s106) receipts and forecast CIL income. In some cases this can provide a 'sense check' on the likely viability of the proposed CIL rates. However, it is unlikely to be determinative. This is because historic planning obligation requirements may have been higher or lower than many developments could viably support, contributions may not have been secured on a comparable basis and there is no requirement in the legislation, regulations or guidance that CIL income should not exceed that historically secured through planning obligations.

Hambleton – para 61

"Furthermore, in 3 out of 8 recent housing developments, the CIL revenue (plus residual S106 costs) would be lower than the S106 contributions which were secured. This analysis is based on the levels of affordable housing that were actually achieved which ranged from 8 to 50%. However, if affordable housing had been provided at full policy levels the overall CIL payments would have been reduced because affordable housing is exempt from paying CIL. This would have resulted in the CIL revenue being lower than the S106 costs in 6 out of the 8 cases. Furthermore, this analysis is based on the earlier higher proposed rate of £65 rather than the current reduced rate of £55. Overall, therefore, the evidence indicates that CIL would not be significantly more expensive to housing developers than the current S106 regime. This helps demonstrate that a residential charge of £55 is reasonable."

Are rates for strategic sites and other significant areas of growth justified?

A2.22 Authorities may decide that the essential infrastructure for a strategic site should be funded by s106 obligations rather than by CIL income and that a nil rate should therefore be set. Sometimes this is seen by the charging authority as a pragmatic solution, given that the infrastructure will be specifically intended to serve just one strategic site/development (and so should be funded by it rather than by pooling contributions via CIL).

A2.23 However, this in itself, would not justify a nil CIL rate for a strategic site. This is because CIL must be justified by viability evidence. So the issue will be whether the viability assessments show that the particular infrastructure costs of strategic site development (eg roads, schools etc) are such that a contribution towards CIL would not be viable. In these

circumstances, a zero CIL rate for specific development on the site would be justified. In other circumstances, the evidence may justify a lower CIL rate than in other zones.

A2.24 It is also important to be clear about whether a proposed differential rate for a strategic site refers to all, or just specific, uses.

London Borough of Bexley – paras 19-22 (a lower rate is justified, but the nil rate suggested by representors would not be)

"The Council's evidence, supported by almost all representors in principle, is clear that the northernmost part of the borough has a lower level of viability for new development, in comparison with the proposed southern charging zone. It is also the area, not least at Thamesmead and Abbey Wood, most in need of new investment in regeneration projects and where the majority of new housing is expected to come forward over the CS period.

Accordingly, it is critical to the delivery of the plan, notably its social and economic objectives, that any CIL rate imposed should not give rise to a serious risk to delivery in viability terms in this locality, bearing in mind issues relating to ground conditions, including the need for piled foundations. However, these constraints are well known and should already be reflected in local land values and do not give rise to any additional requirements in regard to flood defences."

The evidence is clear that the lower CIL rate across the northern zone would be economically viable. So, the suggestion that all or some parts of that zone, notably those where regeneration projects are most needed at present or just alongside the river, should be nil rated for the CIL would introduce an unjustified inconsistency and unnecessary complexity to the prospective charging regime. It would also potentially risk conferring direct financial advantage on a few particular schemes and/or developers, as well as perhaps setting a form of precedent for the expected treatment of future regeneration projects in the area. Moreover, the reasonable buffer or margin (of at least 25%) applied to the possible maximum CIL rates that could viably be charged according to the VS is able to mitigate the potential impacts of such site specific factors on overall viability."

Dudley - paras 52-60 (a nil rate for comparison retail in the town centre was justified by viability evidence)

"It is clear that the extent and cost of these infrastructure works would be very significant. Indeed, the Infrastructure Delivery Plan refers to costs of £25 million for a 'pre-rapid transit busway' and £12.75 million for improvements to the quality bus network. In this context, the Viability Assessment concludes that the cost of the infrastructure works are likely to be in excess of any calculated CIL charge. The earlier Viability Assessment (December 2012 version) also concluded that if these infrastructure costs were funded through a S106 agreement "there would quite probably be no additional surplus remaining to contribute towards CIL." Given the extent and cost of the works, these are reasonable conclusions. Consequently, a nil rate for comparison retail is justified by reference to appropriate available evidence relating to economic viability."

Kensington & Chelsea – paras 71-72 (a strategic site should be modified to set a nil rate)

"Overall, I am not convinced that the Council's evidence base supports its CIL approach for the Kensal site. The development economics of this large and complex site are clearly very different to those of other tested sites, yet the site is treated the same for CIL purposes in terms of setting the proposed rates (within Zone F). Whilst I accept that CIL will always be a relatively small proportion of development costs, the Council's evidence does not convince me, particularly given the substantial number of unknowns, that viability will not be compromised. That compromise may not be the difference between 'viable' and 'not viable', but it could result in reductions in affordable housing requirements, or strategic infrastructure requirements, all of which are important elements of the 'relevant plan's' objectives.

Whilst I have taken a pragmatic view on the CIL / Affordable Housing relationship on other sites, I do not feel that this can be the case on the strategic Kensal site, given its scale and importance in delivering the substantial proportion of the planned new market and affordable homes in line with the relevant plan. It would not serve a positive purpose to impose the Council's proposed CIL charge in these circumstances as the potential effects could be significant. Accordingly, I conclude that an additional zone should be defined around the Kensal site and a £0 psm CIL rate applied (EM2/EM3). My conclusion should not be interpreted as a finding that the Kensal site cannot ever support a CIL charge but, rather, that there is currently insufficient evidence to support the treatment of the site in the same way as other sites in Zone F. Given that the site will not come forward before 2018, the Council has a good opportunity to develop a much more detailed evidence base and revisit the issue of CIL for the Kensal strategic site."

Wiltshire – para 67 (lower rates on strategic sites were justified)

"The key issue here is whether the Council's proposed CIL rates would actually threaten viability and prevent important strategic schemes happening. The proposed CIL charges are effectively discounted 'normal' rates and would be £40 psm for the strategic sites falling in Charging Zone 1 (five of the tested sites) and £30 psm for those falling in Charging Zone 2 (two of the tested sites). Although views were expressed that such sites should not receive discounted rates, I do not agree, as the evidence demonstrates the substantial additional site specific infrastructure costs that would fall on these sites."

Are the geographical charging zone boundaries justified?

A2.25 Examiners will often be faced with arguments that the boundaries between zones are incorrectly drawn and that a particular area or site should be moved into a different (typically lower) charging zone.

Worthing – para 27

"I accept that defining boundaries between zones is not easy and that almost inevitably zones will include some development out of kilter with that which predominates in the area. Indeed, it is possible that the Cissbury Chase and Yeoman Chase evidence referred to above reflects this. It is thus likely that with a nil rate for the low value areas some residential development which would be viable with the £100 CIL charge will take place and that a small amount of CIL income will be foregone. However, this in an almost inevitable feature of CIL: there will always be development which, in reality, could viably pay a higher level of CIL than the rate proposed."

London Borough of Bexley – para 26

"As proposed, the boundary between the northern and southern charging zones is clearly delineated by a main railway line, running almost east to west through the borough. Although there is some information indicating differing land values within the identified zones, including for specific small localities, these are not so marked as to justify introducing any further complexity to the schedule through additional zones. In contrast, the railway marks a transition in character and viability between parts of the borough, with firm evidence of an overall material difference in valuation terms either side, which reinforces it as the logical choice to provide a boundary between charging zones in this area of the borough at present."

London Borough of Tower Hamlets - paras 26 and 27

"There is evidence that some residential properties in the part of Cubitt Town proposed to be located in Zone 1 have values much closer to those typical of the, lower value, Zone 3. However, these are existing properties (which as they stand would not be subject to CIL). The Council's contention that any new residential development in this area would be highly likely to be smaller but of a higher quality is a persuasive one. Consequently, the assumption that the value (per sq m) of new residential development in Cubitt Town would be higher than that of some existing property in this area is sound.

It is also argued that the Lanark Square area, proposed to be located in Zone 1, has more in common with the southern area of the Isle of Dogs which is located in Zone 2. However, the evidence submitted by the representor does not support this: whilst the quoted £625 per sq ft value is below the average assumed value for Zone 1, it is well in excess of the minimum £575 sq ft value. The 25% buffer by which the maximum viable CIL rates have been reduced to the actual proposed CIL rates should ensure that development of below-average value in a particular zone remains viable with CIL in place. Moreover, given that property values can vary markedly over a short distance, there is no inherent flaw in the schedule proposing that, in places, Zones 1 and 3 will abut each other, without the "buffer" of an intermediate Zone 2."

Are 'nominal charges' justified?

A2.26 Some authorities have proposed low or nominal rates for specific zones on the basis that these rates will have a negligible effect on the viability of development and/or on the amount of development that will come forward.

Dudley – paras 26, 28, 29 & 31 (nominal charges were not justified)

"Table 6.2 of the Viability Assessment sets out the proposed CIL rates for open market housing. The 2nd and 3rd columns list the surplus or deficit per m^2 for each of the postcode areas. This shows that, in many areas, residential development is not viable (with or without affordable housing). Nevertheless, in a significant number of these areas, a charge of £20 psm is proposed.

However, while development in some parts of these postcodes might be viable, this does not justify setting a charge of £20 psm where the appraisals show that most residential development would not be viable. Furthermore, the postcode areas affected by this approach cover a significant area of the borough.

I accept that a charge of £20 psm would only represent a small percentage of development costs. Nevertheless, the charging schedule indicates that this would result in an average charge of £1,760 per dwelling. It has been suggested that this cost might be reflected in a Lower Threshold Land Value. However, there is no firm evidence that this would be the case. Consequently, in these postcodes, there is a significant risk that imposing this charge would make marginal developments unviable and unviable developments even more unviable. This would be likely to threaten the delivery of housing across a significant part of the local authority area, both as things stand now and if economic circumstances were to improve.

The Planning Practice Guidance states that there is no requirement for a proposed rate to exactly mirror the evidence. However, it also advises that the proposed rates should be informed by and consistent with the evidence on economic viability across the charging area, that it may not be appropriate to set a charge right at the margins of viability and that, where viability is low, very low or zero, the charging authority should consider setting a low or zero rate in that area. The proposed CIL charges in these postcode areas are not consistent with this guidance."

Affordable housing – has this been correctly taken into account in the viability assessments?

A2.27 The PPG chapter on CIL states that an authority "should take development costs into account when setting its levy rate or rates" and that "development costs include costs arising from existing regulatory requirements, and any policies on planning obligations in the relevant plan, such as policies on affordable housing".[29] Affordable housing is often a significant cost and sensitivity analyses in Viability Appraisals can demonstrate that the viable level of CIL for residential development increases significantly if affordable housing requirements are reduced or waived.

A2.28 "Taking account" of policies on affordable housing in setting CIL rates has been interpreted by some examiners as meaning that the CIL rate should be based on the assumption that the relevant plan's policy on affordable housing will be met in full. The new PPG chapter of Viability emphasises that when setting policy requirements, particularly for affordable housing, these should be set at a level which takes account of housing and infrastructure needs and allows for development to be deliverable.[30] Therefore, the assumption should be that the policy compliant requirement for affordable housing has already been tested and found to be viable at the plan making stage and should be applied in full when testing CIL rates.

A2.29 However, plan policies on affordable housing often allow some flexibility in relation to viability. Therefore, examiners may have to consider opposing arguments as to whether this flexibility should, or should not, be taken into account in setting CIL rates. The two examples below illustrate how these arguments have been dealt with in previous CIL examiners' reports. The second example below relates to a London borough, where the examiner concluded that a % affordable housing

[29] Paragraph: 021 Ref ID: 25-021-20190315 – *How should development costs be treated?*
[30] Paragraph: 002 Ref ID: 10-002-20180724 – *How should plan makers and site promoters ensure that policy requirements for contributions from development are deliverable?*

assumption in a viability appraisal could reasonably be lower than the borough-wide target.

Mid-Devon - paras 10-17 (CIL should be assessed on full affordable housing requirements)

"The CS sets an overall target for affordable housing provision of 30% and it confirms that the delivery of affordable homes is a key issue for the District. For what are described as urban sites, however, the target in the AIDPD is 35% (Bampton, Crediton, Cullompton and Tiverton). The Council has not used the 35% figure but has utilised a figure of 22.5% in its calculations (a 36% reduction on its target) because it states that this represents the average percentage of affordable housing currently being achieved. However, reference is made to a current planning application at Farleigh Meadows in Tiverton, where the full 35% provision has been offered by the developers, although I acknowledge that sites in other locations have achieved much lower provision.

The policies in the Development Plan (DP) reflect the Council's objective which is to achieve at least 35% affordable housing on 'urban sites'. This approach accords with the advice in the National Planning Policy Framework (NPPF) which advises that requirements for affordable housing should be set out. The NPPF also advises that CIL charges should be worked up and tested alongside the local plan.

There was discussion regarding the terminology used and it is correct that policy AL/DE/3 refers to a *target* of 35% affordable housing provision. However, it is clear that there is a very significant need for affordable housing in the District and policy AL/DE/2 states that 2,000 or more affordable dwellings should be *provided* between 2006 and 2026.

The DP policies – including where appropriate the affordable housing targets - will remain the starting point in the consideration of any planning application. The key test is therefore whether or not the assumptions upon which the proposed level of CIL are based would undermine the delivery of the DP targets, particularly with regard to affordable housing provision. The CSCSP advises that consideration should be given to the implications of the charge for the priorities that the Council has identified in its DP7 and the specific example of affordable housing targets is given.

I consider that it is reasonable to conclude that the use of the 22.5% figure by the Council will be seen as a reason not to seek the achievement of the full target and consequently it will put the provision of affordable housing at serious risk. If the Council wishes to reduce the percentage of affordable housing to be provided (assuming such an approach could be justified, bearing in mind the advice in the NPPF that in principle the full objectively assessed needs for market and affordable housing should be met) then this should be achieved through a review of the adopted policies. The Council should have taken all its policy requirements, including affordable housing, into account when setting the CIL rate and on this basis it can be concluded that the viability evidence, on which the proposed charge of £90 per sqm is based, is not robust.

Following the identification of affordable housing provision as an issue of significant concern, the Council did submit evidence to show that if the calculations were based on 35% affordable housing provision, then a lower CIL charge of £40 per sqm would be viable. The five viability appraisals were re-assessed. The urban extension models at Cullompton and Tiverton and the urban infill model at Bampton were found to be viable with the lower charge. The situation with regard to the urban infill site models at Crediton and in a village location are described as marginal but bearing in mind there are likely to

be considerable variables between such sites, there is no reason to conclude that the lower charge would put at serious risk overall development in the area.

Reference was made by the Council to the Redbridge CIL charge which is based on a 30% affordable housing provision, rather than on 50% which is the requirement in the Redbridge Core Strategy. I have not seen the evidence from which the Examiner drew his conclusions and can therefore only give little weight to this matter.

On the issue of affordable housing I conclude that the Council should have based its analysis on the foundation provided by the adopted DP and that the calculations should have reflected the 35% affordable housing target. I therefore recommend that the Charging Schedule is modified accordingly by reducing the charge from £90 per sqm to £40 per sqm, as set out in **EM1** in Appendix A."

Lewisham – paras 16-17 (reasonable to assess CIL on basis of 35% affordable housing rather than borough-wide policy target of 50%)

"Core Strategy policy CSP1 sets a Borough-wide target of 50% affordable housing provision. It specifically allows for viability to be taken into account in considering the appropriate provision in any particular development. The Council may seek less affordable housing where there is already a high level of affordable housing, such as in the Deptford area where 4 of the 5 strategic allocations are based. In practice, the delivery of affordable housing has not achieved the 50% target in recent years, although 2010/2011 and 2011/12 came close with 49 % and 47% provision respectively. The 50% target takes into account that some development will be 100% affordable housing.

The baseline assumption used in the VA for the provision of affordable housing in the residential scheme examples is 35%, with a 70%/30% split between social rented and intermediate housing (VA, 4.17). The Council estimate that CIL liable developments will need to deliver only 35% affordable housing (in combination with other 100% affordable housing projects) to meet the Core Strategy's 50% overall target (VA, 4.16). There is no evidence to the contrary. Policy CSP1 is also clearly intended to be applied flexibly to reflect local housing circumstances and site characteristics. It would be inappropriate therefore to use the overall 50% Borough-wide strategic target for the assessment of individual development schemes. Nevertheless, some postcodes in the Borough are able to deliver 50% affordable housing with the proposed CIL rates (VA, paragraph 7.26). I therefore consider that the VA assumption of 35% is reasonable and that the introduction of the CIL as proposed would not undermine achieving the aim of policy CSP1 across the Borough over the plan's lifetime."

Residual S106 costs – have these costs been correctly taken into account in the viability assessments?

A2.30 The contents of the infrastructure funding statement or infrastructure list can have an effect on development costs and therefore on viability. Under the 2019 CIL Amendment Regulations infrastructure can now be funded by both CIL and S106 obligations. If the Council intends to seek such S106 contributions, these costs should be included in the viability appraisals. The combination of paragraphs 012 Ref ID: 10-012-20180724 of the Viability chapter and 020 Ref ID: 25-020-20140612 of the CIL chapter of the PPG makes this clear. And the Framework and PPG are clear that local authorities should ensure that the combined total

impact of CIL and other developer contributions does not undermine the deliverability of the plan (Paragraph 34 of the Framework and PPG Ref ID: 25-093-20190315).

Dudley – para 24

"Residual costs from S106 contributions are assumed at 0.5% of construction costs. The Viability Assessment explains that the only frequent post-CIL S106 contributions are likely to be in relation to air quality and public art. The Council has subsequently clarified that, although some air quality and public art projects would be funded by CIL (as specified in the Regulation 123 list), there may also be a need for some on-site mitigation or provision. The Council has also confirmed that, if there is any justification to secure contributions towards education infrastructure, this would be covered by the CIL charge and so would not be subject to any contributions through planning obligations."

Hambleton – para 71

"The Council has assumed that, after CIL has been introduced, residual S106 costs would be limited in amount. A representor has suggested that much higher figures should be applied citing examples of developments in other parts of the country where a wide range of contributions have been sought. However, the Regulation 123 list includes strategic road network and transport infrastructure and under the Regulations any post-CIL contributions made by means of S106 would be very tightly controlled. In this context, the residual costs assumption of £50 sqm for retail warehouses and £100 sqm for supermarkets seems reasonable and I can see no reason why the imposition of CIL would lead to any double charging for infrastructure."

Enfield – para 17 (Reg 123 list applies CIL funding to just one strategic site)

In this case the Reg 123 list only sought to use CIL to pay for two items of infrastructure in relation to one strategic site (delivering a minimum of 5,000 homes). The examiner concluded that the main issue for him was whether the S106 costs for developments which would not receive any funding from the Reg 123 list had been adequately taken into account in the viability assessments. The overall conclusion is set out below. Paras 10-17 of the report set out the reasoning in full.

"In the light of the above I am satisfied that, although the R123list is very unusual, and it is necessary to guard against unfair charges for developments which do not come within the scope of that list, the Viability Assessment which is submitted to justify the proposed CIL charge levels has made adequate provision in the individual scenario assessments for the S106 obligations which are likely to arise from both the extant S106 SPD and from the successor document which is currently emerging."

Reaching conclusions on viability assessments

A2.31 The Examiner's Report will need to consider whether or not the viability evidence supporting the CIL schedule is appropriate and robust. The level of detail in the report may depend on the extent to which the evidence is challenged.

A2.32 In many cases the assumptions about the costs and value of development will be subject to detailed criticism. The new Viability

chapter of the PPG now provides detailed guidance on the standardised inputs for viability assessments, which viability evidence submitted in support of a CIL Charging Schedule should be consistent with (as expected by paragraph 57 of the new NPPF). However, other than for developers return, the PPG does not define what a particular cost or value should be. Whilst the Harman Report contains guidance on the value of certain cost inputs, such as strategic infrastructure and utility costs and fees, there is often no clear right or wrong answer about what a particular cost or value should be.

A2.33 It is worth noting that the Planning Act 2008 requires the use of 'appropriate available evidence' (S211(7A)) and the PPG chapter on CIL states that the Government recognises that the available data is unlikely to be comprehensive[31] (Ref ID: 25-019-20190315).

A2.34 If you are persuaded that cost assumptions are too low and/or development value assumptions are too high, you will need to consider the likely effect on the ability of development to viably pay CIL, having regard to the size of any buffer/margin (see section above on *'Has an appropriate buffer or margin been applied?'*). Clearly, the smaller the buffer, the less the scope there will be for development costs to be higher than assumed (or values lower) without the proposed CIL rate rendering development unviable.

A2.35 Many examiners have asked Council's to re-run appraisals for certain development types or zones (sometimes known as 'sensitivity testing') and this can lead to different (lower) rates being justified. Indeed, if the Examiner concludes that rates are set too high, it is helpful to have clear evidence to justify the setting of a lower rate.

A2.36 The following extracts set out the approaches taken by examiners.

Hambleton – paras 46 & 47 (example of detailed consideration of specific costs)

"The cost of building the houses is based on BCIS mean values for general estate housing. This is a realistic assumption for the 1 ha sample sites. Higher costs have been factored in for the moderate and higher value sites to reflect better specifications. The BCIS database is constantly and retrospectively updated as information about new developments is received. Consequently, the reported build costs for a specific period may vary over time. However, it is not unreasonable to base the assessments on the BCIS data available at the time the viability study was being prepared.

An allowance of 10% of build costs has been made for other *construction costs*, including gardens, estate roads & footpaths/pavements, utility connections and landscaping. This is a reasonable assumption for the 1 ha sample sites, given that the Benchmark Land Value relates to readily developable sites and that much of the land supply is comprised of smaller sites where there will be less, if any, need for *secondary infrastructure* such as extensive spine roads, major utilities extensions or strategic landscaping. While there may be some sites where there are significant abnormal construction costs, these are unlikely to be typical and this would, in any case, be reflected in a lower land value. In

[31] Paragraph: 020 Reference ID: 25-020-20190901 – *How should development be valued for the purpose of the levy?*

addition, such costs could, at least to some degree, be covered by the sum allowed for contingencies."

Dudley – para 68 (Council provides evidence to justify a revised rate)

"The proposed rate of £95 would take most of the surplus of £101 for public houses and restaurants and would exceed the surplus of £93 for hot food takeaways. A charge of this size would, therefore, result in most such development being at best only marginally viable. The Council has confirmed that applying a buffer of 25% would allow the rate to be set at £67.50 across the borough and that it would accept a change along these lines. This would represent around 67% of the maximum potential charge for public houses and restaurants and around 73% for hot food takeaways. This would leave a satisfactory margin so helping to ensure viability. The rate for A3-A5 uses at Merry Hill & Waterfront and the Remaining Areas should be amended accordingly. **(EM10)"**

Hambleton – para 57 (overall conclusions)

"There is considerable scope for disagreement about the values and costs of individual inputs to the model and seemingly small changes can have a significant effect on viability. However, there are often no absolute right or wrong answers. Instead, assumptions have to be based on judgement informed by appropriate and available evidence. This is particularly so in relation to land values, given that the Benchmark Land Value is the price a typical willing landowner would be prepared to sell the land for once CIL is introduced and given the relatively limited information available on actual transactions. Indeed, to some degree, I agree with the DVS report which states that establishing the level at which a landowner would release development land is subjective (albeit based on appropriate and available evidence). For the reasons outlined above, I consider that, in broad terms, the assumptions are reasonable."

Gedling – para 36 (overall conclusions)

"I recognise that there are different opinions on individual cost elements and that small variations in some could cumulatively have an impact on viability. However there are no definitive right or wrong figures to be applied and the assumptions made by the Council in their VA, in the main reflect appropriate industry costs and are not set significantly low. The existence of contingency costs and significant viability buffers reinforces the Council's approach and provides reasonable margins for any additional costs."

CIL Rates for Retail Development

A2.36 Where a single rate for all retail development is proposed the Examiner will need to be assured that it would not have a significant effect on all planned retail development likely to come forward. However, authorities will often propose more than one retail rate differentiating them by zone, type of development or scale (or a combination of these).

A2.37 It is common for authorities to propose differential rates for supermarkets/superstores/retail warehouses and then for all other retail development. Examiners will need to be satisfied that such differentiation is made on the basis of different uses (the precise wording of the relevant definitions can be important here – see section above on

'Do the proposed differential rates comply with the Regulations?') and that the viability evidence justifies the differential rates.

A2.38 In some cases differential retail rates may be set on the basis of scale – eg different rates for retail development of less than and more than 280 sq m. Again Examiners are likely to need to be assured the viability evidence supports these differential rates. For example, if the evidence only relates to sample retail developments of 100 sqm and 3,000 sqm, would this provide a sufficient justification for using 280 sqm as the 'threshold' between different rates? Finer grained sampling might be necessary to justify this.

A2.39 In some cases it may not be clear whether differential retail rates are being proposed on the basis of type of use or scale and authorities may need to be asked to clarify their position.

A2.40 A multi-storey/undercroft car parking would be liable to pay CIL because it is a building, whereas open car parking would not. CIL costs for a retail scheme including a multi-storey/undercroft car park would consequently be significantly higher than for a similar scheme including open car parking. Examiners may face arguments that CIL would therefore render unviable retail schemes with "in-building" car parking and that, as a result, ancillary parking should be excluded from the CIL charge.

LB Tower Hamlets- para 46 (need to clarify definitions of uses)

"…. shopping destinations which are designed to enable many or most customers to arrive, and take home their purchases, by car can readily be distinguished at the planning application stage, and are a different use in CIL terms, from retail development which is not so designed. However, to provide clarity and to ensure effective and fair implementation of CIL in Tower Hamlets, and it is necessary to include the Council's more detailed definition in the schedule itself."

Southwark – para 72 (distinction between different retail uses)

"Concern regarding the Revised Draft retail rates tested in the VS mainly concerned the higher rate of £250 psm for 'destination' retail developments. These were defined as comprising large shopping centres, malls and supermarkets, invariably providing car parking, high volume sales and high unit rents and values but often occupying brownfield sites, such as former industrial areas, with lower initial costs. Following my Interim Finding that the distinction between destination and other retail uses was not made out, the 'destination retail' category and the related CIL rate of £250 is deleted in the SoM and this modification is also endorsed."

Southwark – Para 74 (no justification for a nil rate below 280 sqm)

"However, there is a proposition that retail development below 280 sqm should be nil-rated, citing other London CIL Schedules, in the interest of promoting local shopping provision. Treating the Southwark RDCS on merit however, the VS assesses a wide range of retail operations including some well below that size threshold. Any development below 100 sqm is not liable for CIL in any event, whilst there is potential that many developments would reuse existing

floorspace, also not subject to CIL. On the available evidence, the case for a differential zero rate for retail development below 280 sqm is not made out."

Rother – para 49 (sampling justified)

"It is represented that the retail CIL rates generally, and for out-of-centre retail floorspace in particular, are unrealistic. It is suggested that a large convenience retail store of circa 5,000 sq.m should be tested. In response the Council points out that it is the planned floorspace of the CS which should be used to determine the appropriate typologies. The CS sets out the following targets for convenience floorspace in the main towns: Bexhill – 2,000 sq.m; Rye – 1,650 sq.m; Battle – 1,000 sq.m. Thus, if a single operator took all the floorspace in any of these locations, to meet policy objectives it would not exceed the typology tested of 2,500 sq.m. There appears to be no evidence of a larger store being promoted in Rother District, but in any event it would not put the delivery of the plan at risk if its viability proved to be problematical."

Worthing – para 36 (multi-storey and undercroft car parking)

"Although it is not a factor specifically tested in the appraisals, the Council does not contradict the contention that the proposed retail CIL charge could threaten the viability of retail development which incorporates car parking in a building (eg a multi-storey or undercroft car park). I concur with this point and it is common sense evidence that such car parking provision, on which CIL would be levied, would be unlikely to add any more value to a development than would an open car park on which CIL would not be levied. The Council envisages that there will not be many such developments during the plan period, although that does not address the potential viability problems for the schemes which do come forward, even if there are only a small number of them. Moreover, the CS identifies retail development in Worthing town centre as an important element of the Borough's regeneration. The Council also suggests that a developer could apply for planning permission for the car park separately from the retail unit to avoid having to pay CIL on the car park. However, even if feasible, this would be unnecessarily complicated. Consequently, given the potential for CIL to undermine the viability of retail development incorporating ancillary car parking in buildings, it is appropriate to specifically exclude ancillary car parking from the CIL charge. Modification **EM2** is therefore necessary. [EM2 was as follows: 'Retail (A1-A5), *excluding ancillary car parking*']"

CIL Rates for Community Facilities

A2.41 Community Facilities are often zero rated in CIL schedules, either specifically or within an "all other development" zero rate. However, some schedules do propose a charge for such facilities, although this will usually be small. Having regard to the representations made on the matter an Examiner will need to be assured that there is evidence to support whatever rate is proposed.

Barking & Dagenham

"The police and the London Fire and Emergency Planning Authority (LFEPA) argued that their vital community safety should be excluded from the payment of the levy…However, police and fire station developments are liable for more substantial Mayoral CIL charges of £20 psm and, in spite of the representation from LFEPA…I have seen no substantive evidence such as an economic appraisal to demonstrate that Barking and Dagenham's proposed charge would make the provision of new fire station facilities unaffordable."

Bexley - para 34

"In contrast, the Council's decision to apply nil rates to new buildings for education, medical/health and emergency services uses strikes an appropriate balance and is valid in viability terms in that such schemes usually involve an element at least of public funding to proceed economically. Some may also receive CIL income and their inclusion in the schedule would add a layer of unnecessary complexity to the overall charging regime in the borough without raising any material level of additional CIL income over the plan period."

Southwark – para 75

"There were objections from statutory infrastructure providers, specifically of sewage and water facilities and fire stations, that it is illogical and inappropriate for the 'All Other Uses' rate to be charged against such publicly funded development. There was also local objection in principle to the 'All Other Uses' rate being charged for community facilities such as public halls, youth clubs or child care facilities, especially given that the Mayoral CIL is already charged on all development. It was my Interim Finding that, despite exemptions applying to certain charitable organisations, the 'All Other Uses' rate was not substantiated. In the SoM it is reduced to nil and this modification, too, is endorsed."

CIL Rates for Elderly Persons Dwellings /Residential institutions and Extra Care housing/ Sheltered housing

A2.42 It is sometimes argued that sheltered/elderly persons accommodation etc has significantly higher costs than mainstream housing and that proposed CIL charges would render such development unviable. Where this is argued an Examiner may consider it appropriate to request the Council to undertake specific viability appraisals of such development if they have not already done so. Again, the examiner needs to be sure this represents a different use. Paragraph 021 of the CIL chapter of the PPG provides further specific guidance on this.

Watford - para 40

"….. there is no evidence before me to suggest that such schemes would be rendered unviable with a modest CIL charge in place. Based on the evidence I consider the £120 psm charge to be reasonable and comfortably below the modelled maximum."

Worthing – paras 30 & 31

"The majority of points addressed above apply equally to sheltered housing as to general purpose residential development, and based on the specific updated appraisal undertaken (CD06/12), maximum viable CIL levels for sheltered housing generally lie in the middle of the range of levels for the other appraised types of residential development as set out in paragraphs 15 and 16 above……. Consequently, even accounting for slower sales rates than assumed by the Council, it is unlikely that CIL would threaten the viability of most sheltered housing development in the Borough."

Rother – para 48

"It was argued in representations that the rates set for sheltered/retirement homes had not been tested appropriately in the EVA due to a lack of allowance for the extent of communal floorspace provision that is provided in this type of

accommodation. I invited the Representor and the Council to meet in order to assess the matter technically whereby typical floor plans could be examined and measured: a more suitable method of dealing with the matter in contention than at a hearing. The result was a Statement of Common Ground in which it was agreed an acceptable 'buffer' for retirement development would be around 30%. Greenfield sites should be ignored because these are rarely suitable for specialist forms of older person accommodation. It was further agreed that the proposed CIL rates were acceptable within the zones apart from Battle, Rural North & West where there would be a negative buffer. It was mutually agreed that a modification would be put forward that the CIL rate within Zone 1 – Battle, Rural North & West should be reduced from £200 to £140 for Sheltered /Retirement Homes. Since this reduction is clearly supported by the additional viability testing, I will recommend the modification."

CIL Rates for Student Housing

A2.43 Student housing often differs in viability terms from mainstream housing and frequently will be the subject of a specific viability appraisal and potentially a differential rate. If not already produced an examiner might consider it appropriate to request the preparation of such appraisals where student housing development is likely to take place and it is argued that its viability differs from mainstream housing. The evidence may also point to differential rates for student accommodation which is provided for a profit and that which is operated at below-market rents levels.

London Borough of Tower Hamlets – para 61

"Given that the evidence clearly identifies that any CIL charge would be highly likely to render unviable below-market rent student housing and that it is not guaranteed that Charitable or Exceptional Circumstances Relief would apply to such development … it is necessary to modify the schedule to set a nil rate for this use…"

London Borough of Lambeth – para 17

"I conclude that the Council's CIL rate is higher than is justified on the basis of viability…I will recommend the figure of £215 as the revised CIL rate for student accommodation; a rate which should be applied to 'nominated' and 'direct let' student accommodation at market rents."

CIL Rates for Hotels

A2.44 Where a CIL charge is proposed it is a common argument that the viability of budget hotels is very different from other types of hotel. Consequently the examiner may need to be assured that an appropriate range of types of hotel have been appraised.

East Hampshire – para 53 (issues about hotel typology sampling)

The appropriate hotel CIL rate was a significant issue in this examination which is covered in detail in paras 40-53 of the report. The overall conclusion is as follows:

"I appreciate that the assumptions used have been challenged by a representor with local experience. However, overall, I consider that the budget hotel

typology is reasonably representative of what is likely to come forward and that the values and costs have been reasonably established."

Tower Hamlets – para 52 (additional typology sampling required)

"In response to criticism that budget hotels were not adequately appraised, the Council submitted, as part of its Supplementary Evidence, an appraisal of the Bethnal Green Travelodge using information provided by Travelodge."

Lambeth – para 36 (lower rate justified by evidence)

The examiner concluded that the proposed rates should be lowered based on an assessment of the evidence relating to build costs and yields. This is set out in paras 25-36 of the examiner's report. Only the conclusion is presented below.

"I will therefore recommend that the Rate for hotel development in Zone A should be modified to £100 and the Zones B and C should have a Nil rate. On the basis of the available evidence, such modifications meet the need, as a matter of judgement, to come to an appropriate balance between the need for CIL funds and the delivery of development."

Southwark – paras 67-70 (rate proposed appropriate)

"The main objection, from budget hotel operators, is that the rate of £125 for all except Zone 1 fails to recognise the further variation in values across Zones 2 and 3, with only sites relatively close to the boundary of Zone 1 having been assessed and none toward the southern edge of the Borough.

It is further claimed that the examples taken fail to reflect the room size standards set by various budget hotel companies of up to 24 sqm net or 34 sqm gross. However, the Council bases its assessments on actual planning permissions granted. It is not practical to differentiate between types of budget or luxury hotel operation which can change within a permitted use. Moreover, in those examples assessed within Zones 2 and 3, the lower rate is well below the maximum CIL capacity of any type of hotel. Furthermore, there is further evidence of budget hotel promoters achieving lower building costs per room than those input to the VS appraisals.

The hotel rates appear overall to be sufficiently conservative to be justified on the evidence."

CIL rates for gypsy & Traveller development

A2.45 Separate rates for G&T sites are unusual for the reasons set out below.

London Legacy Development Corporation – para 22

"The Charging Schedule does not distinguish between different types of residential development. However, there is no evidence that would indicate that a differential approach to rates would be justified. In the case of gypsy and traveller sites these are normally regarded as a sui generis use for which a nil rate is proposed. In any event, the stationing of caravans is a use of land and CIL only applies to buildings, with various exemptions including minor developments of less than 100 sqm."

Other matters – exceptional relief, instalments policy etc

A2.46 Charging authorities may grant discretionary relief if there are exceptional circumstances to justify doing so, if they consider it expedient and if they consider a CIL payment would have an unacceptable impact on the economic viability of the proposed chargeable development (Regulation 55). The PPG states that an authority wishing to offer such relief must first publish a notice of their intention to do so. It is sometimes argued that a Council's intention to provide relief, (where the criteria in Regulation 55 apply), could help justify setting a rate for developments that would not generally be able to sustain a CIL charge. Examiners should consider very carefully the weight to be given to any such arguments, taking into account that such relief can only be applied where there are 'exceptional circumstances'. The examiner in the first case below concluded that the possibility of relief in exceptional circumstances did not justify a charge in an area where the evidence indicated that most residential development would not be viable.

A2.47 Representations may focus on a range of matters which lie outside the scope of the examination, because they do not relate to the schedule. These can generally be dealt with quite briefly, as in the second example below.

Worthing – para 28 (exceptional circumstances relief did not help justify a rate where most development would not be viable)

"At the hearing the Council referred to the possibility of Exceptional Circumstances Relief being applied in respect of residential development in low value areas made unviable by CIL. However, its name implies that this relief should be applied to development which is exceptionally not viable because of CIL. In this case the evidence clearly identifies that most residential development in low value areas would not be viable and thus a finding that, in reality, a specific such scheme could not viably pay the proposed CIL charge would not be an exceptional circumstance. Notwithstanding this, whether or not the Council decides to introduce an Exceptional Circumstances Relief policy is primarily not a matter for consideration in the Examination."

Hambleton – para 79 (covering various 'other matters')

"Representors have raised concerns about the instalments policy, relief in exceptional circumstances, the amount of CIL receipts which will be passed to Parish Councils and the mechanisms for doing so. However, the instalments policy is a matter for the Council, the other issues are controlled by the relevant regulations and the percentage of funds passed to Parish Councils is decided at a national level. That said, I note that, under Regulation 55, the Council intends to make provision for relief in exceptional circumstances. While the number and timing of instalments is arguable, the existence of an instalments policy of any sort can only assist viability by allowing payments to be staggered."

Reaching a final conclusion and the need for a review

A2.48 Reports need to reach an overall conclusion. In some cases examiners have specifically suggested that a review should be carried out, although this has not been expressed as a modification. The 2 year period

suggested in the first example was based on the specific circumstances of this CIL. Other periods (or none) may also be appropriate.

Hambleton - para 80

"In overall terms, the Council has used appropriate and available evidence to inform the assumptions about land and development values and likely costs. This evidence indicates that the overall development of the area, as set out in the development plan, will not be put at risk if the proposed charging rates are applied. I can, therefore, see no reason why the proposed rates might discourage development or have any significantly adverse effects on the local economy, employment rates or the achievement of the development plan's vision and objectives. However, it would be prudent for the Council to review the CIL charges within 2 years of adoption to ensure that development remains viable, particularly given that some of the evidence dates back to reports published in 2009 and 2010."

Royal Borough of Kensington and Chelsea - paras 81 and 82

In addition to these modifications, I consider it appropriate to make a recommendation that, given the particular circumstances that have been highlighted through this examination, the Council should undertake an early review of its CIL regime.

There are three principal reasons for this recommendation. First, it will allow for the local effects of the CIL charges in practice to be carefully monitored. Second, it will also allow for any revisions to affordable housing policies to be devised, adopted and reflected in the CIL regime. Third, it will provide an opportunity to revisit the CIL approach to the strategic site at Kensal. It is clearly a matter for the Council to consider the timing of such a review, although it would seem sensible to undertake it before the anticipated commencement of the strategic development at Kensal. Such a review, which the Council has indicated that it is likely to undertake in any event, will provide the opportunity to evolve and refine the CIL regime in a positive manner and should ensure that it is aligned with any key changes in policy requirements and with the progress on the borough's most significant strategic development site.

Crawley – paras 38-40

The CBLP [Local Plan] and the IDS [Infrastructure Delivery Schedule] provide a clear framework for planned growth and necessary infrastructure in Crawley borough. There is a substantial infrastructure funding gap that justifies the imposition of a CIL.

The Council's flat rate residential development CIL charge of £100 psm will not threaten the viability of planned residential development. Indeed, the evidence indicates that the CIL would be set at a level where there will be a comfortable viability buffer across all tested development scenarios. The Council's evidence also supports its differentiation and the CIL charges for various types of retail development, which are set with substantial headroom to avoid any risk to scheme viability.

Overall, I conclude that the Crawley Borough Council Draft Community Infrastructure Levy Charging Schedule satisfies the requirements of Section 212 of the 2008 Act and meets the criteria for viability in the 2010 Regulations (as amended). I therefore recommend that the Charging Schedule be approved.

CIL reports assessed

This document is based on the assessment of a large number of reports which were finalised between 2013 and 2015. Those included in this report are listed below.

CIL	Report date
London Boroughs	
Barking and Dagenham	28/05/2014
Bexley	30/12/2014
Enfield	18/12/2015
Lambeth	19/05/2014
Lewisham	23/01/2014
Southwark	27/02/2015
Tower Hamlets	14/11/2014
Kensington and Chelsea	22/12/2014
Outside London	
Birmingham	04/06/2015
Crawley	25/02/2016
Dudley	16/03/2015
Eastbourne	13/01/2015
East Hampshire	19/10/2015
Hambleton	23/12/2014
Gedling	14/05/2015
Lewes	17/07/2015
London Legacy Development Corporation	27/11/2014
Rother	01/09/2015
Watford	18/08/2014
Wigan	28/12/2015
Wiltshire	16/03/2015
Worthing	19/11/2014
Woking	09/07/2014
Mid-Devon	20/02/2013

Compulsory Purchase and other Orders

England & Wales

Status of Chapter – March 2020:
This chapter is being revised. Although the general advice in the chapter remains good, it does not allow for delegation of decisions to Inspectors and may not be up to date in relation to some Guidance.

What's New since the last version

Changes highlighted in yellow made 13 September 2017:

Added paragraphs 3.3 and 3.4 highlighting the implications of the Public Sector Equality Duty, and providing guidance on how to handle sensitive information.

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1 Introduction

1.1 This chapter of the Inspector Training Manual is a guide to the work of PINS in handling work on compulsory purchase and other Orders apart from those under the Housing Acts, public rights of way, tree preservation, Listed Buildings and those relating to water and sewerage. It complements the general advice in the Inspector Training Manual about the conduct of inquiries and the reporting of such cases, and provides information on various types of Order.

An Inspector may, within the normal confines of the legislation and case-law, vary any arrangements described by this guidance.

1.2 This chapter advises on:

(a) general CPO policy;

(b) pre-inquiry action;

(c) conduct of CPO inquiries;

(d) CPOs dealt with by written representations;

(e) reporting;

(f) costs and charges;

(g) types of CPO;

(h) grounds of objection to CPOs;

(i) compulsory purchase and special kinds of land; and

(j) other Orders.

1.3 **Relevant Statutory Sources and Guidance**

England

Acquisition of Land Act 1981 (as amended)
Town and Country Planning Act 1990 (as amended)
Planning and Compulsory Purchase Act 2004
The Housing and Planning Act 2016 (see also the Housing and Planning Act 2016 (Commencement No.2,Transitional Provisions and Savings) Regulations 2016 (SI 2016 No. 733)
SI 2004 No. 2595 Compulsory Purchase of Land (Prescribed Forms) (Ministers) Regulations 2004[1]

[1] Prescribed forms do not apply where the acquiring/confirming authority is the National Assembly for Wales

Wales	SI 2004 No. 2594 Compulsory Purchase of Land (Written Representation Procedure) (Ministers) Regulations 2004
	SI 2007 No. 3617 The Compulsory Purchase (Inquiries Procedure) Rules 2007
	Guidance on the compulsory purchase process, and the Crichel Down Rules for the disposal of surplus land acquired by, or under the threat of, compulsion (DCLG, 2015)
	Planning Practice Guidance on the award of costs and compulsory purchase and analogous orders
	Acquisition of Land Act 1981 (as amended)
	Town and Country Planning Act 1990 (as amended)
	Planning and Compulsory Purchase Act 2004
	The Housing and Planning Act 2016 (see also the Housing and Planning Act 2016 (Commencement No.2,Transitional Provisions and Savings) Regulations 2016 (SI 2016 No. 733)
	OPDM Circular 06/2004 Compulsory Purchase and the Crichel Down Rules[2]
	NAFWC 14/2004 Revised Circular on Compulsory Purchase Orders (Part 1) (Part 2) ***Please contact PINS Wales for Emerging Guidance***
	SI 1994 No. 512 Compulsory Purchase by Non-Ministerial Acquiring Authorities (Inquiries Procedure) Rules 1990[3]
	SI No. 1994 No. 3264 The Compulsory Purchase by Ministers (Inquiries Procedure) Rules 1994
	Compulsory Purchase (Inquiries Procedure) (Wales) Rules 2010 (SI 2010 No 3015)
	Compulsory Purchase of Land (Written Representations Procedure) (National Assembly for Wales) Regulations 2004 (SI 2004 No 2730 (W237))
	SI 2004 No 2732 Compulsory Purchase of Land (Prescribed Forms) (National Assembly for Wales) Regulations 2004

1.4 **Glossary of Abbreviations Used**

The following standard abbreviations are used in this section:

ALA	Acquisition of Land Act 1981 (as amended)
CPO	Compulsory Purchase Order
NPCU	National Planning Casework Unit
HCA	Homes and Communities Agency
IP Rules	The Compulsory Purchase (Inquiries Procedure) Rules 2007
LPA	Local Planning authority
PCPA	Planning and Compulsory Purchase Act 2004
PIM	Pre-Inquiry Meeting
SPP	Special Parliamentary Procedure

[2] The October 2015 DCLG Guidance cancelled ODPM Circular 06/2004 in England only. There may therefore be some residual categories of CPOs in Wales where ODPM Circular 06/2004 still applies.

[3] These Rules apply in Wales until such time as they are revoked by Welsh Ministers.

SSCLG	Secretary of State for Communities and Local Government
TCPA	Town and Country Planning Act 1990 (as amended)

1.5 **Definitions**

Acquiring Authority means the Minister, local authority, Homes and Communities Agency or other person who may be authorised to purchase land compulsorily (Section 7 of the ALA).

Confirming Authority means when the acquiring authority is not a Minister, the Minister having power to authorise the acquiring authority to purchase the land compulsorily (Section 7 of the ALA)

Authorising Authority is the confirming authority in the case of a non-Ministerial Order, or the 'appropriate authority' in the case of a Ministerial Order. For an order proposed to be made in the exercise of highway land acquisition powers, the Secretary of State for Transport and the Planning Minster will act jointly as the appropriate authority. In any other case, it means the Minister (see paragraph 4(8) of Schedule 1 to the ALA 1981.

Remaining Objector means a person who has made a remaining objection within the meaning of Section 13A of, or paragraph 4A(1) of Schedule 1 to, the Acquisition of Land Act 1981 – that is, a 'qualifying person' (generally an owner, lessee, tenant or occupier of land) who has made a 'relevant objection' which has been neither disregarded (for example because it relates solely to matters of compensation) nor withdrawn.

2 CPOs – Background

2.1 CPOs are made by an acquiring authority under specific legislation ('the enabling Act'), and many require confirmation by the Secretary of State for Communities and Local Government (SSCLG) or other appropriate Government Minister or, in Wales, the Welsh Ministers ('the confirming authority') (see definitions section 1.5 above). If there are valid remaining objections to a CPO then the confirming authority must hold an inquiry under s13A(3)(a) or hearing under section s13A(3)(b) of the Acquisition of Land Act 1981 ('ALA') (unless there is agreement to proceeding by way of written representations (see section 7 below)). In practice, inquiries are the norm, although it remains at the Inspector's discretion to hold a hearing, the absence of procedural rules relating to hearings render this procedure inadvisable The confirming authority has the authority under sub-section 13(4) of the ALA to disregard any objection which relates exclusively to matters which can be dealt with by the tribunal by whom compensation is to be assessed (the Upper Tribunal (Lands Chamber). The confirming authority also has the discretion under Section 5(1) of ALA to cause an inquiry (but not a hearing) to be held for the purpose of executing any of his powers and duties under that Act. The confirming authority may, therefore, decide to hold an inquiry even if there are no remaining objections to a CPO.

2.2 Inspectors may be appointed to hold inquiries where the confirming authority is, or is additionally, a Minister other than the SSCLG. In these cases the Inspector must have received proper authority to hold the inquiry and should ensure that the correct pre-inquiry procedures have been observed. This may

include cases where the initial scrutiny of the submitted Order has been carried out by a Government department other than NPCU. The name and title of the Minister concerned must be known for reference at the inquiry and for addressing in the Inspector's Report.

2.3 Although inquiries are held and written representations site visits carried out because objections have been made, the inquiry and the report is into the CPO itself. Following the inquiry or written representations case site visit, the Inspector must recommend whether the CPO should be confirmed with or without modifications or not confirmed, or explain in rare cases why no recommendation is made. The report must therefore deal with the whole of the CPO, and not just those parts to which objection(s) have been made. In Inquiry cases, it should record the case for objections where no inquiry appearance is made.

2.4 Inspectors should be aware that the National Planning Casework Unit (NPCU) is part of DCLG and as such share the same email and telephone system as PINS. Inspectors must not contact NPCU directly, all communication should be via the Environment and Transport Team. If an Inspector is contacted directly by NPCU by email, s/he must not respond, but should forward the email to the Environment & Transport Team. If contacted by telephone, the Inspector should explain briefly that s/he cannot talk to them and should ask them to contact the Environment and Transport Team.

3 CPOs – General Policy

3.1 The DCLG Guidance 2015[4] confirms the value the Government places on the appropriate use of compulsory purchase powers as a means of assembling the land needed to help deliver social and economic change. In all cases, CPO's need to be fully justified, their use being restricted to cases where there is a compelling case in the public interest sufficiently justifying interfering with the human rights of those with an interest in the land affected (see Tier 1 Para 2 of the Guidance). In this respect, regard must be had to the provisions of Article 1 to the First Protocol to the European Convention on Human Rights (protection of property) and, in the case of a the compulsory purchase of a dwelling where an objector has an interest, to Article 8 of the Convention (right to respect for private and family life).

3.2 All public sector bodies are bound by the Public Sector Equality Duty (PSED) set out in s149 of the Equality Act 2010. As a public authority every Inspector must comply with the PSED in the exercise of their functions. It is a duty on the Inspector personally regardless of equality issues being raised by any party. The duty is to have due regard to the need to:

- eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Act;
- advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;

[4] In Wales, NAFWC 14/2004.

- foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

3.3 If any person or persons with protected characteristics are likely to be affected by the decision then the Inspector must have due regard to the equality aims set out above. Having due regard requires gathering relevant information from the parties to ensure that the impact of any decision on a person / persons who share a relevant protected characteristic is clearly understood. Where a decision is likely to have an impact on a person / persons who share a relevant protected characteristic the Inspector must address this specifically in their report and the report should reflect the fact that the Inspector has complied with the PSED. It is essential that Inspectors are familiar with the training material in the Human Rights and the Public Sector Equality Duty chapter.

3.4 In doing so, Inspectors should be mindful that if information submitted comprises sensitive personal data or is otherwise sensitive in nature, for example children's names, ages and educational needs, notwithstanding that it may be or address a crucial or determining consideration, you **must not refer in detail** to this information in your report (please see *Sensitive Information* in Annexe 1 of The approach to decision-making chapter, for more information).

3.5 The acquiring authority will need to demonstrate that it has taken reasonable steps to acquire all of the land and rights in the Order by agreement. Compulsory purchase is intended as a last resort.

3.6 It is in the interests of acquiring authorities to provide a comprehensive justification for a CPO including a clear explanation of the purposes to which the land would be put if compulsorily acquired, and whether the scheme of implementation has firm prospects of success. Each case will be considered on its merits.

4 Pre-inquiry action

4.1 The advice in the Inspector Training Manual chapter on Inquiries regarding preparation before the inquiry also applies to inquiries into CPOs. The DCLG Guidance 2015 provides acquiring authorities with comprehensive guidance on the preparation, promotion, confirmation and implementation of CPOs to which the ALA applies. For most CPOs the relevant Inquiries Procedure Rules are the 2007 Rules (IP Rules) which bring CPO inquiries generally into line with planning inquiry procedures. Joint CPO and planning or highway inquiries may be held when special or hybrid procedures are necessary.

4.2 When an Order is made it will be submitted by the acquiring authority to NPCU (in DCLG) (or in Wales, PINS Wales) who will carry out the initial administration of the process and undertake procedural checks. Inspectors should understand the grounds on which CPOs can be made and confirmed. They need to be familiar with the relevant parts of the enabling Act (which can sometimes be of

some age and specialist nature) and have these with them at the inquiry. The IP Rules should also be studied and taken to the inquiry for reference. It should not be assumed that every acquiring authority has extensive experience of the process of making and seeking the confirmation of CPOs, although it is expected that the initial screening of draft Orders by NPCU/PINS Wales will usually have identified any obvious errors of procedure or content.

4.3 The IP Rules (Rule 4) enable an authorising authority to hold a pre-inquiry meeting (PIM). This must be held not later than 16 weeks after the 'relevant date' (the date of the written notice of intention to cause an inquiry to be held). Normally Ministers will call a PIM only in exceptional circumstances (for example as a result of public interest because of regional/national implications, or complexity and where there is much third party interest). Rule 5 requires the acquiring authority to serve an outline statement on each remaining Objector, and in the case of a non-Ministerial Order, to the authorising authority, not later than 8 weeks after the relevant date. There is also a discretionary power available to the authorising authority to require any remaining Objector and others wishing to appear at the inquiry, to serve within eight weeks of the notice an outline statement on him/her. Outline statements are intended to assist the Inspector and other parties in preparing for the inquiry. They should contain the principal submissions and identify key issues.

4.4 Rule 6 enables the Inspector to hold a PIM in cases where it is considered desirable and the authorising authority has not required one. Not less than three weeks' written notice of the PIM is required to be given to the authorising authority, the acquiring authority (in the case of a non-Ministerial Order), each remaining Objector, others entitled to appear and those whose presence at the meeting appears to the Inspector to be desirable. It is for the Inspector to determine the matters to be discussed and procedures to be followed. Where a PIM is not arranged, and there is a significant number of objectors requiring a multi-day inquiry, there is likely to be merit in an Inspector arranging for a procedural Pre-Inquiry Note (PIN) to be issued by the PINS Environment and Transport team and setting out procedural matters and possibly a draft inquiry programme. The Inspector should draft the note for the case officer (or Programme Officer where one has been appointed) to issue. PINs do not feature in any Regulations, but are widely used and accepted by parties.

4.5 An acquiring authority is required to send a Statement of Case to each remaining Objector and, in the case of a non-Ministerial Order, to the authorising authority, within 4 weeks of the conclusion of any PIM, or 6 weeks after the relevant date in any other case (Rule 7). The authorising authority may also require by notice in writing any remaining Objector, or anyone who has notified it of an intention to appear at the inquiry, to send a statement of case to it and anyone specified in the notice. This should be done within 6 weeks of the notice.

4.6 Paragraph 29 of Tier 1 of the 2015 Guidance states that requiring objectors' statements of cases is a useful device for minimising the need to adjourn inquiries as a result of the introduction of new information. The intention is to enable the parties to know as much as possible about each other's case at an

early stage to enable a focus on matters in dispute and to see whether there is scope for negotiation. In addition, Rule 7(5) provides the opportunity for the authorising authority or Inspector to require such further information as they may specify about the matters contained in the statement of case. The Environment and Transport Team will be able to facilitate any such requests.

4.7 The 2004 Prescribed Forms Regulations[5] set out the prescribed forms of notice and other procedural matters to which the ALA applies. Although the CPO will have been examined by the procedure staff at NPCU (or in Wales, PINS Wales) to ensure conformity with the relevant regulations, Inspectors should satisfy themselves that the Order and Order Map are in the prescribed form.

4.8 Minor correctional modifications to CPO documentation (the Order, Order Map and Order Schedule) may be left to NPCU (or in Wales the Welsh Assembly Government which is the decision branch). Significant substantive modifications should, however, be raised at the inquiry, so that the agreement of the acquiring authority can be sought or its views obtained and reported. All parties should be made aware at the inquiry of the nature and extent of any proposed modification. Paragraph 40 of Tier 1 of the 2015 Guidance states that, where potential modifications have been identified before the inquiry, the Inspector will normally wish to provide an opportunity for them to be debated. Such cases might, for example, include where NPCU (PINS Wales) has suggested a more appropriate wording for the Order which the confirming authority would wish to use if the Order was confirmed or, more frequently, where there are apparent discrepancies between the Order Schedule and the Order Map. It must be borne in mind that modifications cannot be made which have the effect of adding to the land included within the Order as shown on the Order Map without the consent of all persons with an interest in the land (section 14 ALA). Nor can a CPO be considered or confirmed for a different purpose from that for which it was made.

4.9 Discrepancies sometimes occur between the Order Map and the Order Schedule. If possible, such matters, if they require amendments being made to the Order Map, should be clarified by the production of a corrected map before the end of the inquiry; changes to the Order Schedule may be more appropriately dealt with in the Inspector's recommendation if it is one of confirmation of the CPO. The Secretary of State should be left in no doubt from the Inspector's report as to the specific details of any recommended modification.

4.10 Inspectors should be particularly vigilant in identifying whether any land within the CPO amounts to 'special kinds of land' as defined in sections 16-19 of the ALA. The categories of land include: land of statutory undertakers, land owned by a local authority, land owned by the National Trust and held by them inalienably, and land forming part of a common, open space, fuel or field garden allotment. Particular protection is given to such land against compulsory purchase. These circumstances are likely to occur most frequently in cases where electricity or gas substations or other statutory undertakers' installations are included within the Order area and where the statutory

[5] In Wales, the SI 2004 No 2732 Compulsory Purchase of Land (Prescribed Forms)(National Assembly for Wales) Regulations 2004 apply.

undertaker has objected to the Order. The Inspector should identify what action, if any, the acquiring authority is taking to satisfy the requirements of sections 16-19. The Inspector may need to reach a view as to whether such action, or any perceived lack of action, is likely to affect the Inquiry proceedings, such as by a request or the need for adjournment of the inquiry. This and related issues are dealt with further in section 13 below.

5 Conduct of a CPO inquiry

5.1 The advice in the Inspector Training Manual Chapter 'Inquiries' applies generally. The Inspector Training Manual Chapter on Housing CPOs gives guidance on the conduct of Housing Act CPO inquiries. An alternative ('Method B') order of proceedings is suitable for inquiries where many Objectors are appearing and has proved to be effective, particularly where Objectors are concerned primarily about the effect on their property rather than the principle of the Order. However the parties sometimes have views about the procedure, and it would be advisable to discuss it with them before finally deciding on which procedure to use – this can be raised at a PIM or canvassed in a PIN (or earlier). The 'Method B' procedure is set out in Annex 1.

5.2 It used to be general practice after opening the inquiry for the Inspector to ask a representative of the acquiring authority (usually its advocate) to read out the notice published in a newspaper and displayed on or near the land informing the public about the inquiry (traditionally known as the Convening Notice). If the Order Schedule is a long one it is customary to take that as read. However, an 'announced' opening more akin to the opening of a s78 planning inquiry may be no less appropriate. This may be so particularly where a CPO inquiry is held jointly with an inquiry into a related matter such as a section 78 appeal or called-in application, in which circumstances it may be simpler for the Inspector to make a composite opening announcement, identifying all the matters with which the inquiries are concerned.

5.3 The ALA, the IP rules and 2004 Prescribed Forms Regulations contain requirements as to the form, content, placing and display of notices. The enabling Acts concerned may contain similar requirements. Failure to comply with statutory requirements may result in a challenge to the validity of the CPO, or a request for an adjournment. The acquiring authority must be asked to confirm that it has complied with all the statutory formalities. Any submissions about the formalities, on legal or procedural grounds, may then be heard together with the response from the authority and any reply from the Objector(s). It is often useful to ask the Objector(s) if his or her interests have been prejudiced by the alleged failure to comply with the statutory formalities and, if so, in what manner. This information can then be included in the Inspector's report.

5.4 Even if lack of compliance with the formalities has been alleged or conceded it is generally desirable to allow the Inquiry to proceed, without prejudice to any decision that might subsequently be made on such matters by the SSCLG or other Minister as confirming authority. However, where there is a real possibility that an interested party may have been substantially prejudiced (see section 24(2) of the ALA), an adjournment of the inquiry, or at least the hearing

of that objection, for a specified but limited period may be advisable (see *Davies v SSW* [1997] JPL 102 and *Performance Cars Ltd v SSE* [1997] P&CR 92 CA). Requests for adjournments require careful consideration, to avoid the possibility of unfairness to objectors (see *Webb v SSE* [1990] 22 HLR 274).

5.5 In line with planning inquiries the IP Rules require the advance submission of written evidence that anyone wishes to rely upon at an inquiry. Anyone intending to give evidence by reading a 'statement of evidence' (neither the Rules nor the Guidance refer to 'proofs of evidence') must submit this statement, and any summary, to the Inspector not later than 3 weeks before the start of the inquiry (or as specified in a timetable if a PIM has been held or PIN issued). Summaries should be provided when a statement exceeds 1,500 words and generally only these should be read at the inquiry (Rule 15).

5.6 Rule 16 of the IP Rules provides that, except as otherwise provided, the Inspector shall determine the procedure at the inquiry. However, unless the Inspector so determines with the consent of the acquiring authority, the Rules provide that the authority shall begin and have the final right of reply, both in its general case and that in relation to individual objections. Other persons entitled or permitted to appear may appear in whatever order the Inspector may determine. The sequence of other events described in the Inspector Training Manual chapter on Inquiries may often be appropriate, with suitable variations where the occasion demands.

5.7 It is usually more sensible for any supporters of the acquiring authority to be heard immediately after the authority itself, especially where they have a direct interest in the Order. Remaining Objectors have, under Rule 16(3) of the IP Rules, the right to cross-examine the acquiring authority's witnesses. Whilst not common, it is possible that a joint inquiry CPO/appeal/call-in inquiry may be held where the sole Objector is also the appellant or applicant it may be convenient to proceed as for a s78 appeal, but with the authority having the right of final reply in respect of the Order only. The "authority" will have two different capacities if it is the same Council in both, one as LPA and the other as acquiring authority. The evidence in the inquiry must be led making such distinctions clear and the report(s) written likewise.

5.8 The acquiring authority must always be invited to comment on objections where no appearance is made and its response must be summarised in the Inspector's report.

5.9 If asked about the likely submission date of a report to the Confirming Authority, Inspectors should state that PINS will send the report to the SoS as soon as they can. For a clearer idea of likely submission to the SoS, parties should seek advice of the Environment and Transport Team, but they should wait until a week after the inquiry has closed.

6 Conduct of inquiries into SSCLG or other Ministerial Orders

6.1 A CPO made by the SSCLG, other authorised Minister or in Wales the Welsh Ministers is prepared in draft, and the purpose of the inquiry is to determine whether it should be made, not confirmed. In such an inquiry, the case for the

SSCLG, Minister or National Assembly should be heard first. It may be presented orally by a representative from the Department concerned, or may be in writing. Such a procedure would also apply where the SSCLG/National Assembly proposes to confirm a Revocation Order made under section 97 of the TCPA 1990 (see also paragraph 14.3 – 14.6 below). A Departmental representative will normally attend any inquiry and state the case for the Order.

7 CPOs dealt with by Written Representations or hearing

7.1 There is provision in the PCPA (Part 8) for CPOs in respect of which objections have been received to be confirmed without the need to hold a public inquiry, but only in certain circumstances. Section 13A has been inserted into the ALA, which, supported by the provisions of the 2004 Written Representations Regulations[6], details these circumstances. The Order should not be subject to the Special Parliamentary Procedure (SPP) under section 17 of the ALA; it should, in the case of an Order to which Section 16 of the ALA applies, benefit from a certificate given under subsection (2) of that Section; and every person who has made a remaining objection must have consented in the prescribed manner to the written representations procedure. Even if all these conditions are met, the confirming authority has the *discretion* not to apply the procedure and to opt for a public inquiry instead.

7.2 The written representations procedure requires a site inspection to be carried out by the Inspector, which all the remaining Objectors have a right to attend. The normal rules of protocol apply as to site visits for s78 planning appeals though where an unaccompanied visit is not possible, an accompanied visit, rather than an ARSV, is advisable. The Inspector then composes a report to the SSCLG, other Minister or, in Wales, the Welsh Ministers.

8 Reporting

8.1 The general principles of reporting to the Secretary of State (see the Inspector Training Manual chapter on Secretary of State Casework) apply with equal force. The aim must be to give concisely to the Confirming Authority all the information necessary for it to understand all the issues, and to advise it on any technical implications of the case.

8.2 The Inspector must take account of objections to a proposal, report on those objections, reach clear conclusions based on carefully explained reasoning and, unless there are exceptional reasons for not doing so, make a recommendation on the proposal. There is no obligation to list the facts on which conclusions are based, but it must be clear on which evidence the relevant reasoning is based. See the Inspector Training Manual chapter on the approach to decision making. The SSCLG or other Minister who makes a decision on the Order relies heavily on the Inspector's reasoning in the report and very few Inspectors' recommendations on CPOs are not agreed to. It is worth noting the *Horada v SSCLG* judgment which provides a useful synthesis on the duty to give reasons, where it was found that the SoS had failed to give intelligible and adequate

[6] In Wales, the Compulsory Purchase of Land (Written Representations Procedure)(National Assembly for Wales) Regulations 2004 (SI 2004 No 2730 (W237)) apply.

reasons for disagreeing with an Inspector's recommendation to not confirm a CPO. Reasons must be sufficiently detailed to enable the reader to understand why the matter was decided as it was, and what conclusions were reached on the principle matters. The degree of particularity required will depend on the nature of the issues.The duty to give reasons does not however mean that every detail of the proposed scheme should be explored or mean that there is a duty to show that protection for those affected is absolute. If detailed legal points are raised these should be recorded. NPCU have advised that, in CPO casework, it is not generally necessary for an Inspector to comment on legal matters. However, if the Inspector considers that there are important reasons for doing so, s/he should seek legal advice and indicate in the report that these are detailed matters of law and that it is for the Secretary of State to reach his/her conclusions in this regard.

8.3 The form of report may vary according to the case, but a general guide to the kind of format that will assist the Secretary of State is set out in Annex 2. Reports should be as succinct as possible, readable, fairly reflect the parties' cases and follow a sequence which allows ready appreciation of the objections and responses without any unreasonable or excessive need for the reader to cross refer to different parts of the report. However, that is not to suggest that it is inappropriate in the Inspector's conclusions to provide and rely upon references to earlier parts of the Report. Indeed such references are crucial to demonstrate that the reasons and conclusions are supported by evidence and argument. There is a range of templates for Inspectors' CPO reports, offering a choice of introductory bullets corresponding to the main enabling provisions.

8.4 When an inquiry is held jointly with a related appeal or call-in, the issues are often so interlinked that a single report will be possible even when more than one Secretary of State is concerned. Separate reports (with cross-references) may be necessary where there are distinct regimes with different legal tests. This matter should be discussed with the relevant GM before the inquiry is opened or site visit carried out. If there are differences they should be distinguished in the description. Irrespective of the way the report(s) and the Inspector's conclusions are handled in respect of the different matters, separate recommendations will always be necessary in relation to the separate tasks the Inspector has been appointed to carry out. A joint list of appearances can be appended, but separate lists of documents, plans and photographs may sometimes be necessary.

8.5 In simpler cases a joint report, separated into clearly definable sections, may be prepared to two Confirming Authorities (Ministers).

9 Costs and Departmental Charges

9.1 Detailed advice is set out in the Government's Planning Practice Guidance (PPG)[7]. Successful Objectors to CPOs and analogous Orders are normally

[7] In Wales, see the NAFWC 14/2004 Revised Circular on Compulsory Purchase Orders, Part 1 and Part 2.

awarded their costs. No application need be made at the inquiry or during the written representation procedure by an Objector since the decision whether or not to confirm the Order will not have been issued. This matter need not be addressed in the report.

9.2 Awards of costs may be made on the grounds of unreasonable conduct by an Objector or the acquiring authority. Costs are not awarded on both the grounds of success and unreasonable behaviour. The advice on costs in the Government's Planning Practice Guidance applies generally. An application for costs made at a joint inquiry into an Order and appeal or call-in must be heard at the inquiry, and a separate report submitted. The costs attributable to the different matters (i.e. appeal or CPO) must obviously be distinguishable. Where a late Objector (such as a person claiming title to all or part of the land who had not previously been identified in the Order Schedule) is heard at the inquiry the circumstances must be reported as part of the case for that Objector, to enable eligibility for costs to be properly assessed.

9.3 PINS expenses are recoverable in Order cases and Inspectors must attach a completed copy of a CIR1 form (available via the Environment and Transport team) when the report is submitted. Inspectors should ensure that detailed records are kept of activities and expenses in case of queries from acquiring authorities. **These must correspond with time recorded on the Inspector's weekly MWR.** In joint inquiry cases the CIR1 form should be placed on the file containing the report; it should show the times both for the whole inquiry and the part for which expenses are recoverable.

10 Sealed Orders and Maps

10.1 Sealed copies of the Order and Order Map will be located in a folder attached to the file. These are legal documents and must not be marked or mutilated in any way, and should never be used as inquiry documents. However, often the sealed copy is retained by the NPCU (PINS Wales).

11 Types of Compulsory Purchase Order

11.1 Most CPOs involve acquisitions by local authorities for urban regeneration, town centre land assembly and other planning purposes under Section 226 of the TCPA 1990 as amended by Section 99 of the PCPA. Land can be acquired compulsorily if an acquiring authority thinks that this will facilitate the carrying out of development, redevelopment or improvement on or in relation to land under Section 226(1)(a).

11.2 The intention behind the amendment was to encourage local authorities to make greater use of paragraph (a) in subsection 226(1), including as part of regeneration initiatives. Paragraph (b) in subsection 226(1), which refers to land being acquired because it is 'required for a purpose which it is necessary to achieve in the interests of the proper planning of an area', remains substantively unchanged.

11.3 Subsection 226(1A) requires the power under paragraph (a) in subsection 226(1) to be exercised only if the local planning authority thinks that the development, redevelopment or improvement is likely to contribute to the economic, social or environmental well-being of its area. This provision is linked to the duty that many acquiring authorities have under section 2 of the Local Government Act 2000 to promote those objectives. The DCLG Guidance 2015 on Orders under Section 226 of the TCPA is set out in Tier 2 Section 1 Paragraph 76 sets out a non-exhaustive list of the matters that are to be considered on confirmation which are: whether the purpose for which the land is being acquired fits in with the adopted Local Plan or where no up to date Local Plan exists, the National Planning Policy Framework; the extent to which the proposed purchase will contribute to the achievement of the promotion or improvement of the economic, social or environmental wellbeing of the area; the potential and deliverability of the scheme for which the land is being acquired (which necessarily entails a consideration as to whether the proposed scheme is likely to be viable); and whether the purpose for which the acquiring authority is proposing to acquire the land could be achieved by any other means including considering the appropriateness of any alternative proposals put forward.

11.4 'Tier 2: Enabling Powers' of the 2015 DCLG Guidance sets out advice on a range of Enabling Acts. This includes guidance on Orders made by local authorities and urban development corporations under the Local Government Act 1972; by the HCA under s9 of the Housing and Regeneration Act 2008; by local housing authorities under s17 of the Housing Act 1985 (dealt with in the Inspector Training Manual chapter on Housing CPOs); by authorities under s93(2) of the Local Government and Housing Act 1989; under the Education Act 1996; under s47 of the Planning (Listed Buildings and Conservation Areas) Act 1990; and under the National Parks and Access to the Countryside Act 1949.

11.5 In all types of Order it is essential for the Inspector to understand the powers which exist under the enabling Act and be aware of the criteria for compulsory purchase which must be taken into account in the making and confirmation or non-confirmation of the Order concerned. The ALA lays down the procedure to be followed in the case of the compulsory purchase of land by a local authority or Minister, by virtue of any other enactment. The procedure in the ALA has been adopted in many Acts containing powers of land acquisition.

12 Grounds of objection to CPOs

12.1 There is wide scope for objections to CPOs. Some common grounds are that:

(i) The Order is invalid. This is a legal submission on which the Inspector would not be expected to reach conclusions. The submissions of each side should be noted and reported (if they are lengthy and / or complex, it is good practice to seek them in writing and to append them as a document to the Inspector's report), and legal advice should be sought via the relevant Group Manager at the earliest possible opportunity.

(ii) The land is not needed for the purposes proposed. Inspectors have to exercise judgement in deciding whether the land is so required and/or whether it is

necessary to achieve such a purpose. CPOs should only be made, and can only be confirmed, where there is a compelling case in the public interest.

(iii) The site is unsuitable for the purposes proposed. Authorities are expected to establish before making CPOs that schemes can proceed without planning difficulties. Paragraphs 74 and 75 of the 2015 Guidance (or in Wales Circular 14/2004 Part 1 and Part 2) give guidance about planning requirements in connection with CPOs. Amongst other things, paragraph 70 should be noted, which refers to the right contained in section 245(1) of the TCPA to disregard objections which, in the Secretary of State's opinion, amount to an objection to the development plan. This power is unique to CPOs made under section 226 of the TCPA.

(iv) Equally suitable or better sites are available. It is for the Inspector to decide whether evidence should be heard about alternative sites. However, in relation to Planning CPOs it is necessary to investigate alternative sites in a meaningful way (see *GLC v SSE & London Dockland Development Corporation* [1986] JPL 193). If an Inspector concludes that a more suitable site exists, it is sufficient to say that on the evidence available the Order land is not considered to be the most suitable for the purposes proposed. Inspectors should, however, be cautious about expressing definite opinions on the relative merits of alternative sites and must do so only with the benefit of credible and appropriately tested tested evidence concerning such sites.

(v) The costs arising from confirmation of the Order would be excessive. Submissions that other agencies could acquire and/or develop the Order land at less cost to the public purse should be carefully reported. In most cases the Inspector should be able to reach a conclusion in the light of the facts and relevant Government policy. If not, the report should explain why.

(vi) The Order has been made for an improper or ulterior motive. Historically Inspectors have tended to accept assurances given by Councils as elected public bodies regarding the propriety of their actions. However, occasionally an Objector alleges that an Order has been made for a covert or inappropriate purpose different to the purpose stated on the Order. A defining case in this respect was *Don & Don (trading as Northern Markets) v SSE & Manchester City Council* [1994] JPL B85, arising from an Order made under subsection 226(1)(b) of the TCPA 1990. The Court, as one of the reasons for quashing the Order, held that the Inspector had failed to make a finding on whether the acquiring authority had acted with proper motives. Inspectors must therefore, on being presented with allegations of an improper or ulterior motive in the making of a CPO, obtain information at the inquiry and endeavour to reach a conclusion on the allegation in their report. In general terms, it follows that an Inspector must deal with all matters of substance raised at the inquiry, irrespective of whether or not they relate to planning or other principal matters connected with the Order.

(vii) The Order represents a form of state aid, public procurement, or subsidy. Objectors may make this argument in regard to Land Transfer Agreements, and this argument may be potentially valid, however it is inappropriate to reach a

conclusion on this with regards to the CPO itself. The making of a CPO cannot in itself be a state aid or public procurement exercise as it merely empowers the local authority to acquire land. (See NPCU/CPO/L5240/73807)

(viii) That s233 of the TCPA 1990 has not been complied with. This section requires that, in respect of the giving of consent to disposals, relevant occupiers are offered a suitable opportunity for accommodation so far as is practicable. It was made clear in *Crabtree (A) Ltd v Minister of Housing* (1966) 17 P&CR 232 that the issue of compliance with s233 was a matter that could and should be raised by objection to the CPO. If allegations of non-compliance are made Inspectors should hear the merits of all objections and make a recommendation; however non-compliance with this section may then go to the legality of the CPO and the decision whether to confirm it.

12.2 Section 14 of the ALA 1981 stipulates that CPOs on confirmation shall not, unless all interested persons' consent, take in land not included in the original Order. An Inspector who contemplates recommending adding land to a CPO must therefore do so with the greatest caution, only with the relevant landowner's consent in writing, and only after consulting his/her Group Manager.

13 Compulsory purchase and special kinds of land

Appropriation Orders

13.1 Where a CPO includes a statutory undertaker's land acquired for the purposes of the undertaking and the undertaker submits duly-made representations under Section 16 of the ALA 1981, the CPO cannot be confirmed unless the Minister connected with the service which the undertaking represents ('the appropriate Minister') certifies that the land can be taken and not replaced (by other land owned or available for acquisition by the undertaker where necessary) without serious detriment to the undertaking. The certification (or evidence of it) should be made available by the acquiring authority at the CPO inquiry.

13.2 Similar provision exists in Schedule 3 to the ALA in the case of the acquisition of 'new rights' over land where full ownership is not required (e.g. the compulsory creation of a right of access). 'Right' is defined in Section 28 of the ALA and 'new right' is explained in paragraph (2) and in Part II of Schedule 3, parts of which relating to commons, open spaces etc were amended by Schedule 15 to the Planning and Compensation Act 1991.

13.3 Section 16 of the ALA does not apply to CPOs made under powers in Section 31 of the Act if the Order is confirmed jointly by 'the appropriate Minister' and the SSCLG or other making or confirming Minister or authority. Similarly, the provision of a certificate under Schedule 3 in the cases of new rights does not apply in these circumstances. Thus, such Orders may be jointly made or confirmed notwithstanding a Section 16 representation. The joint basis for the inquiry, report and final decision should be reflected in the Inspector's appointment to the case.

13.4 In all cases where land owned by a statutory undertaker is included in an Order, the acquiring authority should be asked to confirm at the inquiry that it has received copies of any Section 16 representations made to the appropriate Minister, and to supply any representations received direct. Inspectors should check Section 16 representations beforehand. If a PIM is to be held or a PIN issued, Inspectors should clarify such matters at that stage. Although it rarely happens, Inspectors should be aware that there is a provision for the confirming SoS to appoint a separate (non PINS) Inspector/appointee to deal with s16 matters to a different timetable. Where this is apparent Inspectors should contact the Environment and Transport Team as soon as possible so that they can establish that the scope of your brief for the PINS case is clear.

13.5 Special provisions apply to National Trust land and land owned by local authorities and statutory undertakers.

13.6 Where an authority holds land for a particular purpose it may, by Order made under Section 229 of the TCPA and confirmed by the SSCLG, appropriate land to any other purpose for which it may be authorised to hold land. In the case of land forming part of a common or open space, Section 19 of the ALA 1981 will apply. This provides for SPP unless the Minister certifies that equally sizeable and advantageous land is being given in exchange, or that the land does not exceed 209 square metres (250 square yards), or that the land is required for highway widening and the giving of exchange land is unnecessary.

13.7 Under Section 232 of the TCPA, land held for planning purposes may be appropriated to another purpose, but if it forms part of a common or is held or managed by the authority in accordance with a local Act, then the consent of the SSCLG is required.

Crown Land

13.8 Paragraph 71 and paragraphs 217-220 of the 2015 Guidance deal with Crown Land. As a general rule Crown Land cannot be compulsorily acquired as legislation does not bind the Crown unless it states to the contrary. There are some limited exceptions to the general rule that compulsory purchase powers do not apply to Crown Land. A Crown interest in land should generally not be included in an Order unless there is: a) agreement under Section 327 of the Highways Act 1980 which provides for the use of compulsory purchase powers; or b) the Order is made under an enactment listed in the Appendix or in any other enactment which provides for compulsory acquisition of interests in Crown Land. Where b) applies Crown Land should only be included where the acquiring authority has obtained (or is, at least, seeking) agreement from the appropriate authority. The confirming authority will have no power to authorise compulsory acquisition of the relevant interest or interests without such agreement.

14 Other Orders

Highway Stopping-up or Diversion Orders under the TCPA

14.1 Sometimes the implementation of development for which planning permission has been granted involves the making of an Order by the Secretary of State for Transport under Section 247 of the TCPA to secure the stopping-up or diversion of any highway (including footways) necessary to enable the development to be carried out. If the development also requires land to be acquired and as part of the land assembly process a CPO is made to which there are objections, any objections to the draft Section 247 Order can be heard and the draft Order considered at the same inquiry as that relating to the CPO (though care should be taken to ensure that the proceedings are clearly distinguished to avoid confusion.) Where reference is made in a CPO Statement of Reasons to the need for a SUO, the casework team will seek advice as to the progress of the draft SUO and aim to combine it with the consideration of the CPO. Where it appears to an Inspector that that has not taken place, s/he should contact the PINS case officer at the earliest possible opportunity because considering both Orders at once provides for greater efficiency, including in the use of PINS resources, and greater certainty for all parties concerned.

14.2 In these circumstances the Inspector's report will in England be a joint one, to the SSCLG and the Secretary of State for Transport. The Inspector's appointment to hold what are in effect concurrent inquiries and submit the report should reflect the dual nature of the task and should bear the authorisation of both Secretaries of State. As in the case of Ministerial CPOs, the Inspector's recommendation to the Secretary of State for Transport is whether or not the section 247 Order should be made, not confirmed.

Revocation, Modification and Discontinuance Orders

14.3 The power for the local planning authority to revoke or modify planning permission is in Section 97 of the TCPA, and the power for the local planning authority to require the discontinuance of use or alteration or removal of buildings or works is in Section 102 of the TCPA. In deciding whether action under these powers is expedient, the local planning authority must have regard to the development plan and other material considerations.

14.4 Under Section 97(3) the powers to revoke or modify may be exercised (a) where the permission relates to the carrying out of building or other operations, at any time before those operations have been completed; and (b) where the permission relates to a change of use of land, at any time before the change has taken place; providing (Section 94(4)) that the revocation or modification of permission for operational development shall not affect operations previously carried out. Any opposed revocation/modification order under s97 Act must be confirmed by the Secretary of State (s98(1) 1990 Act.

14.5 Such Orders can be made if the authority considers it expedient having regard to the development plan and to any other material considerations (e.g. because of a material change in circumstances since the original permission was granted). A revocation or modification Order potentially leaves the local planning authority liable to pay compensation under Section 107 of the TCPA including compensation for abortive work and for any other loss or damage directly attributable to the revocation or modification. The implications of the

cost of compensation is a material consideration in determining whether to revoke or modify a planning permission (*R. (Health and Safety Executive) v Wolverhampton County Council* [2012] 1 WLR 2264).

14.6 Compensation under Section 107 is payable by the local planning authority, irrespective of whether the Order was made by the local authority or exceptionally by the SSCLG under the provisions of Section 100. However, Schedule 1, paras. 16 to the TCPA provides that the SSCLG may, after consultation with the local planning authority, direct that the authority shall be entitled to a reimbursement of some or all of the compensation payable (in certain circumstances.

14.7 Service of a Discontinuance Order under Section 102 of the TCPA does not imply that the use or operations are unlawful or illegal, in fact, the opposite. Breaches of planning control (unlawful uses, activities and operations) may be remedied without compensation by taking planning enforcement action. Unlawful uses which already constitute a planning offence can be remedied by prosecution or, failing that, default action by the local planning authority. It is only uses and operations which are, or would be, lawful for planning purposes which may need to be discontinued (or their permissions revoked or modified as the case may be).

14.8 Lawful uses can grow or be intensified without necessarily involving a material change of use, but to such an extent that serious detriment is caused. Uses or operations which once were, or would have been, acceptable on the land may no longer be so as a result of subsequent changes in the local planning circumstances, including changes in planning policy. Whilst the issues for discontinuance will often be the same as for revocation or modification, the issues must include, in addition, consideration of the present impact of the use etc on the surroundings.

14.9 The Order may provide for the discontinuance of uses and the removal or alteration of buildings, or may impose conditions on the continuance of the use. It may at the same time grant permission for an alternative use of the Order land. Section 102(6) deals with the acquiring authority's duty to make alternative accommodation available where the Order involves displacement of persons residing on the Order land.

14.10 The SSCLG when confirming discontinuance Orders may modify them and grant permission for alternative development, and Inspectors should be prepared at inquiries to hear arguments for such modifications.

14.11 Inspectors in any doubt on the foregoing matters should consult the Group Manager before holding the inquiry or preparing the report.

15 Check List

15.1 Inspectors are asked to check (see also the checklist in the Inspector Training Manual chapter on Secretary of State Casework):

Pre-event

- The allocation of the case and that it is an appropriate specialism (most CPOs and SUOs can be conducted under the "Gen" specialism;
- Understand the nature of the Order and the relevant enabling Act and Part of the Act under which it is made and whether the Order and Order Map appear to be in the correct prescribed form;
- Has the correct authority been given to hold an inquiry/ written representation site visit by the appropriate Minister?
- Is there a need for a PIM or, if not, a PIN?
- The date and time arranged for the inquiry or visit;
- Venue for the inquiry; are there likely to be access issues, particularly for any known disabled or impaired participants/attendees?
- From what can be seen on the file, the nature and extent of the cases and numbers of witnesses likely to be called or others wishing to speak, does the time allowed for the inquiry appear adequate? If not, flag up with Chart to alert the parties and ascertain their views;
- Agree which method of proceeding is appropriate i.e. if there are many appearing Objectors is 'Method B' the better option?
- Note any correspondence on the file between NPCU and the acquiring authority about the making of the Order(s) which may require modifications to be specified and recommended if the Order(s) was (were) to be confirmed (e.g. names, addresses, interests, correct colouring of the Order Map(s).

At the inquiry

- Check whether the Statutory Formalities have been complied with and whether there are any questions arising;
- If not done pre-inquiry, decide which method of proceeding is appropriate i.e. if there are many appearing Objectors is 'Method B' the better option?
- If an Order Map requires amendment has an amended Map been produced before the close of the inquiry?

The Report

- Is the name of the Order correctly and precisely recorded?
- Have the Statutory Formalities been recorded as being complied with together with any comments on non-compliance?
- The sequence of objections and responses should be simple and logical thus minimising the need to cross refer to other parts of the report;
- Do the conclusions flow logically from the assessment of the cases summarised and address the whole of the Order, not simply those parts to which objection has been made?

- Are there appropriate cross-references in the conclusions to source paragraphs in the earlier part of the report where the evidence relied upon for those conclusions is to be found?
- The conclusions should contain no new facts or introduce evidence not summarised in the earlier part of the report;
- Has a conclusion been reached that there is or is not a compelling case in the public interest for confirmation/authorisation of the Order(s)?
- Has a conclusion been reached regarding impact on Human Rights with reference to the specific rights in the European Convention on Human Rights which might be affected?;
- In the recommendation is the name of the Order exactly as written on the Order?
- If confirmation/authorisation with modifications is recommended is it clear within the recommendation what those modifications are?
- When submitting the report has the CIR1 form been completed?

Annex 1: Method B order of proceeding at an inquiry

ACQUIRING AUTHORITY'S CASE:

(1) opening statement by advocate

(2) all witnesses in turn:

(a) evidence-in-chief on common or general matters.

(b) questions by Inspector on matters of fact or common interest only.

NB cross-examination by objectors is generally deferred.

FIRST OBJECTION:

(1) Acquiring authority's case on that objection:

(a) evidence-in-chief by authority's witness(es) specific to the objection.

(b) cross-examination of all or any of acquiring authority's witnesses by Objector

(c) re-examination

(d) Inspector's questions (if not dealt with during evidence).

[repeated for each subsequent witness]

(2) Objector's case:

(a) evidence-in-chief by Objector's first witness.

(b) cross-examination by acquiring authority.

(c) re-examination

(d) Inspector's questions (if not dealt with during evidence/xx).

(e) procedure repeated for objector's second and subsequent witnesses (if appropriate).

(f) Objector's submissions (if appropriate)

(g) Acquiring authority's specific reply to objection (unless deferred to final submissions – if so, ensure objector will be present).

SECOND AND SUBSEQUENT OBJECTIONS

Same procedure as for first objection.

OBJECTIONS WHERE NO APPEARANCES MADE

[The acquiring authority should respond to these, if this has not been included in its general evidence. If it has, this must be made clear.].

INTERESTED PERSONS

ACQUIRING AUTHORITY'S FINAL SUBMISSIONS

CLOSE OF INQUIRY

Annex 2: CPO Template

The Planning Inspectorate

CPO Report to the Secretary of State for Communities and Local Government

by A N Other DipTP MRTPI

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

Date

[NAME OF ENABLING ACT][8]

ACQUISITION OF LAND ACT 1981

NAME OF COUNCIL IN WHOSE AREA THE ORDER LIES

APPLICATION [BY THE[9]]

[NAME OF ORDER-MAKING AUTHORITY][10]

FOR CONFIRMATION OF [THE[11]]
[NAME OF ORDER][12]

Inquiry held on

Inspections were carried out on [ ].

File Ref(s): /00000/

[8] As in heading to the sealed Order, including use of capitals.

[9] These two words used only if the acquiring authority is not the Council.

[10] If not the Council.

[11] Omit this word if the word 'The' is included in the title of the Order.

[12] Name the Order exactly as cited in the sealed Order, including punctuation. In the case of SSCLG and other Ministerial Orders the references throughout should be to authorization and not confirmation.

File Ref: /00000/
[address]

- The Compulsory Purchase Order was made under section 226(1)(a) of the Town and Country Planning Act 1990 and the Acquisition of Land Act 1981 by [*name of Council*] on [*date*].
- The purposes of the Order are [*state the purpose as stated in the enabling Act or in the Order, as amplified in the Statement of Reasons*].
- The main grounds of objection are [*briefly summarise*].
- When the inquiry opened there were [*number*] remaining objections and [*number*] non-qualifying additional objections. [*number*] objections were withdrawn and [*number*] late objections were lodged.

Summary of Recommendation: that the Order be [confirmed with/without modification/not confirmed]

Procedural Matters and Statutory Formalities

[if you announced that you had replaced another Inspector, say so here, giving the name and initials of the Inspector concerned, but not their qualifications]
[The Convening Notice was read]. The Acquiring Authority (AA)/Council confirmed its compliance with the Statutory Formalities. There were no submissions on legal or procedural matters. [I*f there were submissions concerning the validity of the Order they should be reported here, irrespective of what stage they were made during the inquiry. If necessary there should be sub-headings relating to those who made the submissions. The AA's reply and any comments or rulings by the Inspector should be included.*]
[If the inquiry was adjourned the reason should be given, if necessary under headings of those requesting, consenting or objecting to the adjournment, and including the Inspector's decision.] [Any rulings by the Inspector should be dealt with here. Any written ruling or ruling read out from a script should be included as an inquiry document]

The Order Lands and Surroundings

[*The extent of the description is a matter for discretion, depending upon the case. The aim should be to help the Secretary of State to understand those physical features of the land(s) and buildings that may have a bearing on the case. [See also the Inspector Training Manual chapter on Secretary of State Casework]. Personal opinions should be avoided. Factual information about issues raised at the inquiry should also be recorded.]*
[State the location of the Order land(s) in relation to the town centre or other landmark, and the situation of the land in relation to adjoining roads or land. Mention any conspicuous features, e.g. steep slope.]
[Describe the Order land(s) and any buildings thereon in general terms]
[If a listed building is involved describe its general condition and state of repair, with particular attention to any features of special architectural or historic interest. The statutory list description may be set out here if not included in the case for one of the parties, or as a document. You should state whether the building seen agrees with the listing description. If not, the differences should be noted. Similarly other Designated/Non-Designated features should be described.]
[Describe the immediate surroundings by main use and character, mentioning any special features e.g. canals, railway embankments, conservation areas.]

[Describe any alternative sites or other properties mentioned during the inquiry and visited during the course of the site inspection.]
[Indicate whether there are any other Protected Assets affected; details should be on the protected Assets Certificate submitted by the acquiring authority]

The Case for the Council [Acquiring Authority]

[*Generally the case for the acquiring authority should be reported first and should record the whole of its general case, although in as concise a form as is practicable. Sub-headings may be used where appropriate. Any modifications to the Order suggested by the authority should be recorded.*]

Submissions Supporting the Council

[*How these are reported is a matter for discretion having regard to their substance and how they were made. Some may require headings in the same manner as the principal parties (e.g. parish/town councils, national amenity bodies, established local societies*].

The Objections

[*It is usually appropriate for ease of identification to report objections in ascending order of reference numbers as given in the Schedule to the Order, taking the lowest number in a group as the key number. This applies whether or not objections are remaining, or late. However, it will often be beneficial to report firstly the objections in respect of which there was an inquiry appearance, and then the objections reliant upon written representations and any withdrawn objections, in separate sections of the report. In any event, it should be made clear if the objection was not the subject of an inquiry appearance.*]

Reference No

Address

Name of Objector – Legal Interest

[*Reference number and street address as given in the Order Schedule. Omit if only one property is included in the Order. List all the references, addresses and names of the Objectors where there are appearances by the same advocate. If there was no appearance the summary of the principal grounds of objection should include, if appropriate, any amplification in subsequent correspondence.*]

[*If the objection has been withdrawn, say so, giving the grounds for withdrawal or partial withdrawal (if known). This may be important in an assessment of costs, e.g. if a building is to be excluded but land is still to be acquired. It may, however, be sufficient to state simply that the objection was withdrawn by letter dated …*]

[*If the withdrawal is made subject to conditions it should be dealt with as remaining, although sometimes the matter can be resolved, for example by an undertaking by the acquiring authority to preserve a right of way or not to implement a confirmed Order if certain specified works are carried out within a defined period*]

[*It may be convenient to deal with a number of withdrawn objections together*]

Case for the Objector

[Record the Objector's case in logical order, including the Objector's reply to the acquiring authority's case.]

Response by the Council

[Do not repeat anything already in the authority's general case, or introduce any fresh matter. This section is unlikely to be necessary in cases where there is only a single objection. If the section is included, a useful first sentence is sometimes 'The general case applies', and then the specific response related to the objection.]

Description

[*Sufficient description should normally have been included under the general description of the Order lands and surroundings. However it may sometimes be necessary to clarify some points arising from the Objectors' cases in more detail if the Order covers a large number of properties of different kinds, several of which are the subject of objection. If a description is given, expressions of opinion should be avoided.*]

Other Submissions opposing the Council

[See comment on Submissions supporting the Council above.]

Response by the Council

[See comment on response by the (Council) AA above]

Unopposed Lands

[*This section is only required where there are some parts of the Order that are not subject to objection, and then not in every instance. If the description of the unopposed lands is adequately covered by the general description of the Order lands, then the section will not be necessary. Otherwise only a brief description will usually be necessary, but sufficient to support any conclusions the Inspector may reach in regard to that part of the Order area.*]

Conclusions

[As in any report to the SSCLG, the facts on which the Inspector's conclusions are based must be clear. The general guidance in the Inspector Training Manual chapter on Secretary of State Casework applies. The origin of every factual statement should be identifiable from the text, generally by indicating the source paragraph in parentheses.]

It is advisable to begin the report as follows (tailored to circumstances):
The CPO seeks to acquire rights and ownership of land shown on the Order Map for the purpose of securing development of [xxxxx]. It is made under Section 226

(1)(a) of the Town and Country Planning Act 1990 (as amended by the Planning and Compulsory Purchase Act 2004). The power granted is intended to assist a local authority to fulfil its duties of promoting the economic, social and environmental well-being of its area.
Paragraph 76 of the DCLG Guidance lists the factors to be considered for the purposes of an Order made under the well-being power. The conclusions are framed around these considerations as follows:

[*Facts should cover the whole of the Order and not be confined to those parts to which objections have been made. They should normally be verifiable and not open to dispute. However, conflicting estimates of e.g. the costs of repair may be attributed to the parties making them. Any relevant undertakings by the AA should be included.*]
[*Conclusions, like facts, must relate to the Order as a whole as well as to objections. They often conveniently fall into two categories. First express a reasoned view on the merits of the Order itself, having regard to the section of the enabling Act under which it was made, and to conclude that it meets the requirements of the Act, or that the Order should be modified, or that the Order should not be confirmed. Secondly, decide whether all or any of the objections are decisive, whether any modifications should be made, or whether the Order should not be confirmed. The outcome of these considerations should be summed up clearly and explicitly, giving reasons for any modifications or reasons why the Order should not be confirmed.*]

Recommendation

I recommend that the [*insert full title of Order*] [be not confirmed] [be confirmed] [be confirmed with the following modifications]:
[example] the exclusion/deletion of Reference(s) ……..
[*In the case of SSCLG or other Ministerial Orders, the reference should be to authorisation, not confirmation.*]

[*Reference numbers and street addresses of the properties to be excluded must be given in the recommendation, generally as in the Order Schedule. Properties to be excluded should be hatched green (by the Inspector) on a copy of the Order Map (<u>not the sealed copy</u>). The hatched copy should be included as Plan A in the Plans List.*]

CONDITIONS

What's New since the last version

Chapter comprehensively re-written in March 2020.

Changes highlighted in yellow made **9 April 2020**:

- Minor amendment to checklist.
- New paragraphs 14 – 16 added giving advice on permission in principle.

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CONDITIONS CHECKLIST

Do the conditions meet the **three legal tests**? • Imposed for a planning and no other purpose, however desirable. • Fairly and reasonably related to the development permitted. • Not so unreasonable that no reasonable planning authority could have imposed them.	
Do the conditions meet the **six policy tests**? • Necessary. • Relevant to planning. • Relevant to the development to be permitted. • Enforceable. • Precise. • Reasonable in all other respects.	
Have you checked the advice in the **PPG**?	
Have you given **reasons** for imposing **and** not imposing conditions?	
Have you **imposed all the conditions you have said you will?** • **Tip**: Write a list of conditions and then tick them off. • The **plans** condition should normally be imposed to create certainty for all parties and to allow for applications for minor material amendments.	
Have you checked the wording of the **PINS model conditions?** • via 'PINS Help' in DRDS • …or this **link**	
Are the conditions accurate and **complete**? • Are **details** to be submitted for approval? • Is an **implementation** clause necessary? • …**timing** clause? • …**retention** clause? • …**maintenance** clause? • Have you deleted **'tailpiece' phrases** which could allow significant changes to the development? • **Tip:** Ensure that the wording of any model conditions is adjusted to suit the circumstances of the case and do not rely on or accept uncritically the proposed wording put forward by LPAs.	
Is the permission **retrospective**? • Do **not** include a 'standard' commencement condition. • **Do** impose the 'plans' condition but with care. • Do **not** impose pre-commencement conditions. • **Do** use a 'retrospective' condition to ensure the submission of details.	
Have you **addressed** all of the conditions suggested by **all** of the parties? • Have you considered whether any conditions **not suggested** by the parties should be imposed? • Would any such conditions come as a surprise to the parties?	

INTRODUCTION

1 This chapter sets out legal, policy and practical considerations regarding the imposition of conditions on planning permissions in England[1].

2 This chapter is written with planning appeals in mind but contains advice that is relevant to **all** casework where existing or proposed conditions are before the decision-maker.

3 Inspectors make their decisions on the evidence before them, which may sometimes justify departure from the advice given in this chapter.

THE LEGAL FRAMEWORK

The 'Compulsory Standard Conditions'

4 Section 91(1) of the Town and Country Planning Act 1990 (TCPA90) provides that every planning permission shall be granted or deemed to be granted subject to the condition that the development to which it relates must be begun not later than the expiration of specified periods.

5 S92(2) provides that outline planning permission for development consisting in or including the carrying out of building or other operations, shall be granted subject to specified conditions.

6 The 'compulsory statutory conditions' apply to permissions granted by planning authorities, Inspectors or the Secretary of State.

Powers to Impose other Conditions

7 S70(1)(a) empowers a planning authority, subject to s62D(5), s91 and s92, to grant planning permission on application unconditionally or '**subject to such conditions as they think fit**'.

8 The s70(1)(a) power must be interpreted with regard to the legal tests and policy tests described below, the development plan, other material considerations including the National Planning Policy Framework (the Framework) and the Planning Practice Guidance (PPG), plus any case law which may be relevant to legal and/or policy matters.

9 S72(1) describes particular types of conditions which may be imposed under s70(1) 'without prejudice to the generality of' that section:

> ***(a) for regulating the development or use of any land under the control of the applicant…or requiring the carrying out of works*** *on any such land, so far as appears…to be expedient for the purposes of or in connection with the development authorised by the permission;*
>
> ***(b) for requiring the removal of any buildings or works authorised by the permission, or the discontinuance of any use of land*** *so authorised, at the end of a specified period, and the carrying out of any works required for the reinstatement of land at the end of that period.*

10 Planning permission granted subject to a s72(1)(b) condition shall be referred to as 'planning permission granted for a limited period'; s72(2).

11 S77(4)(a) provides that the powers set out under s70 and 72(1) apply to applications referred to the Secretary of State.

[1] PINS Wales produces separate training material for Wales.

12 S100ZA(1), added by the Neighbourhood Planning Act 2017, sets out restrictions on powers to impose conditions. It states that the Secretary of State may by regulations provide that:

(a) conditions of a prescribed description may not be imposed in any circumstances on a relevant grant of planning permission for the development of land in England

(b) conditions of a prescribed description may be imposed on any such grant only in circumstances of a prescribed description, or

(c) no conditions may be imposed on any such grant in circumstances of a prescribed description.

13 S100ZA(5) and (6) provide that permission may not be granted subject to a pre-commencement condition without the applicant's written agreement to the terms, except in such circumstances as may be prescribed; see advice below on the *Town and Country Planning (Pre-Commencement Conditions) Regulations 2018*.

14 S58A(1) and s59A of the TCPA90 make provision for the grant of 'permission in principle' for housing-led development of land in England. Under s58(3) and s70(2ZZA), a grant of permission in principle consent must be followed by an application for technical details consent (TDC), which must be determined in accordance with the permission in principle. The PPG confirms that there are two stages to this consent route[2].

15 S70(2ZZB) states that an application for TDC is an application for planning permission. It follows that conditions cannot be imposed on a grant of 'permission in principle'[3], that is, at the first stage, because that is **not** a grant of planning permission. A permission in principle consent remains in force for a prescribed period during which time the application for TDC must be made[4].

16 S70(2ZZB) provides that a TDC application must particularise '*all matters necessary to enable planning permission to be granted without any reservations of the kind referred to in section 92*' – meaning that this is not an outline permission where matters can be reserved for future consideration. Conditions may be imposed in the usual way on a grant of permission made at TDC stage[5].

17 Schedule 5 of the TCPA90 deals with Mineral Working conditions.

Development Orders

18 Planning permission granted by any development order may be subject to conditions or limitations as specified. Conditions on classes of permitted development (PD) are conditions on a grant of planning permission, but s70(1), s72(1), s79(1) and s100ZA of the TCPA90 do not apply.

19 Advice on the grant of an *express* permission subject to conditions which withdraw PD rights is given below. The General Permitted Development

[2] PPG paragraph 58-001-20180615
[3] PPG paragraph 58-020-20180615
[4] Under s58A(3) and s70(2ZZC) of the TCPA and the Town and Country Planning (Permission in Principle) Order 2017 (as amended) a permission in principle remains in force for three years where granted upon application to a local authority, or five years where granted through a brownfield register.
[5] PPG paragraph 58-021-20170728

Order and Prior Approvals Appeals chapter covers other matters relating to conditions, including imposing conditions in prior approval appeals.

Appeals against Conditions and Retrospective Permission

20 The Appeals against Conditions chapter gives full advice on such appeals; information given here is to assist with comprehension of this chapter.

21 There is a right of appeal under s78(1)(a) to an authority's decision to grant planning permission subject to conditions. S79(1)(b) enables the Secretary of State, and by extension an Inspector dealing with such appeal, to 'reverse or vary any part of the decision…and…deal with the application as if it had been made to [them] in the first instance'.

22 S73 allows for a grant of permission for the development of land without compliance with conditions subject to which a previous permission was granted. On such an application, the decision-maker shall only consider the question of the conditions that should be imposed on the permission.

23 Where an application is made under s73A, permission is sought for development which has already been carried out – whether it was carried out in breach of a disputed condition or without prior grant of permission. An application under s73A is 'in all respects a conventional planning application, save that development will have been commenced'[6].

24 If a s73 appeal is made in relation to development that has been carried out in breach of a condition, it may be necessary to determine the appeal as though it were made under s73A, because the power to grant permission will derive from s73A and s70[7].

25 For advice on the imposition or discharge of conditions under s174(2)(a) and s177 in Enforcement casework, see the Enforcement chapter.

Deemed Discharge of Conditions

26 S74A(1) of the TCPA90, added by the Infrastructure Act 2015, empowers the Secretary of State to provide by development order for the deemed discharge of a condition that requires any consent, agreement or approval of a planning authority; see advice on deemed discharge below.

The Legal Tests

27 While planning authorities, the Secretary of State and Inspectors may impose 'such conditions as they think fit', the House of Lords held in *Newbury DC v SSE & Others* [1980] 2 WLR 379, [1981] AC 578 that conditions must be:

- Imposed for a planning purpose and no other purpose, however desirable;
- Fairly and reasonably related to the development permitted;
- Not so unreasonable that no reasonable planning authority could have imposed them – that is, '*Wednesbury*' unreasonable[8].

28 These are the '*Newbury'* or legal tests. While there is some overlap, they should not be confused with the policy tests described below. The legal tests will rarely be addressed in planning appeal casework. Questions

[6] *Wilkinson v Rossendale BC* [2002] EWHC 1204 (Admin), cited in *R (oao Thomas) v Merthyr Tydfil CBC & Merthyr Motor Auctions* [2016] EWHC 972 (Admin)
[7] *Lawson Builders Ltd & Lawson & Lawson v SSCLG & Wakefield MDC* [2015] EWCA Civ 122
[8] *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] (Court of Appeal)

relating to the validity of conditions normally arise only in Enforcement appeals proceeding on legal grounds.

29 In s73 or s73A appeals against conditions, you may decide to remove or 'vary' a condition in accordance with the policy tests, but do **not** have the power to decide whether the condition is or is not lawful.

OVERVIEW OF PLANNING POLICY

The Policy Tests

30 The Framework states in paragraph 54 that planning authorities should consider whether otherwise unacceptable development could be made acceptable through the use of conditions.

31 However, paragraphs 55 of the Framework and 21a-003-20190723 of the PPG state that conditions should only be imposed where they are:

1) Necessary;
2) Relevant to planning;
3) Relevant to the development to be permitted;
4) Enforceable;
5) Precise; and
6) Reasonable in all other respects.

32 The PPG refers to these as the 'six tests' and states that each of them needs to be satisfied for each condition that a planning authority (or, by extension, an Inspector) intends to apply[9].

33 The PPG also advises that any proposed condition which fails to meet one of six tests should not be used, even if it is suggested by an applicant, members of a planning committee or third party[10]. Even if all parties to an appeal agree to a condition being imposed, the Inspector as the decision-maker will need to establish whether the condition would be necessary and meet other tests.

34 Paragraph 55 of the Framework is emphatic that 'conditions should be kept to a minimum'. Paragraph 21a-018-20190723 of the PPG repeats this aim and encourages pre-application discussions as well as 'rigorous application of the six tests' to reduce the need for conditions.

Necessary

35 The PPG states[11]:

> *…used properly, conditions can enhance the quality of development and enable development to proceed where it would otherwise have been necessary to refuse planning permission, by mitigating the adverse effects. The objectives of planning are best served when the power to attach conditions to a planning permission is exercised in a way that is clearly seen to be fair, reasonable and practicable. It is important to ensure that conditions are tailored to tackle specific problems, rather than standardised or used to impose broad unnecessary controls.*

36 Since conditions may only be imposed where doing so is necessary to avoid a refusal of planning permission, it follows that you should be able to show why permission would be refused if the condition could not be imposed. The condition should be needed to make the development

[9] PPG paragraph 21a-003-20190723
[10] PPG paragraph 21a-005-20190723
[11] PPG paragraph 21a-001-20140306

acceptable in planning terms, and not be wider in scope than is necessary to achieve the desired objective.

37 In considering whether a condition is necessary, bear in mind that it is usually not possible to rely on the description of development to control, restrict or limit a development. It was held in *I'm Your Man Ltd v SSE & North Somerset DC* [1999] 4 PLR 107 that there is no direct or implied legal power to impose a time limitation on a planning permission except by means of 'temporary' condition[12].

38 When granting permission, any restriction to the development should be secured by condition, whether that be a limitation to opening or operating hours, the occupation of the site or the duration of the permission. Even if the description of development purports to contain a restriction, such as a proposal for 'a dwelling for occupation by a farm worker', a restriction to that end will only be enforceable if secured by condition; see advice on temporary, personal and occupancy conditions and withdrawing PD and change of use rights by condition below.

39 It is not necessary to impose a condition to define what is permitted if the permission itself does so properly. It was held in *Winchester CC v SSCLG & Others* [2013] EWHC 101 (Admin) upheld in [2015] EWCA Civ 563 that a permission granted for a 'travelling show peoples site' could not be interpreted as a general permission for a residential caravan site, although no occupancy condition had been imposed, because a 'travelling show people's site' is a sui generis use, and other conditions imposed were commensurate with the permission being for that use.

Relevant to planning

40 Planning conditions must relate to planning objectives **and** be within the scope of the permission. Conditions must not be used to control matters that are subject to other primary legislation, such as the environmental protection, building control or highways acts. Conditions must neither be used to control matters that are subject to separate planning regulations, such as advertisement control or tree preservation.

Relevant to the development being permitted

41 Conditions must be 'fairly and reasonably' relevant to the development being permitted. It is not sufficient for a condition to relate to planning objectives, it must also be justified by the nature or impact of the development. And a condition cannot be imposed to remedy a pre-existing problem which was not created and would not be exacerbated by the development before you.

Enforceable

42 An unenforceable condition for the purposes of the six tests would be one where it is impossible for the planning authority to detect a breach of the condition. This is a practical question, and it should not be merely difficult

[12] In *I'm Your Man*, permission had been granted for '*sales, exhibitions, and leisure activities for a temporary period of seven years'*. Held that the permission for the use was a permanent one because no condition had been imposed to require that the use must cease at the end of the seven years. Where use continues after a temporary permission has expired, enforcement action should be taken against a breach of the condition.

for the authority to monitor compliance. A judgment should be made as to whether monitoring in the circumstances would be unreasonably onerous or practicably impossible.

43 Whether a condition is enforceable is relevant to the legal tests. A condition which is merely difficult to enforce would not necessarily be invalid[13] – but one that is impossible to enforce or incomplete might be regarded as absurd and so invalid for that reason[14]. A condition that is not reasonably enforceable is not reasonable for *Newbury* purposes[15].

Precision

44 While *Newbury* requires Inspectors to interpret conditions previously imposed to so as to 'give it a sensible meaning', it does not follow that the test of precision can be taken lightly when drafting any new conditions.

45 Conditions must be worded so that they can be understood by the appellant and/or their successor(s) in title, the authority and interested parties. The condition must be clear as to what is required and, where relevant, by when. Any rights being removed by condition should be precisely explained by reference to the relevant legislation.

46 The Courts will interpret conditions based on the natural and ordinary meaning of the words – including the meaning conferred by grammar. It was held in *Telford and Wrekin Council v SSCLG & Growing Enterprises Ltd* [2013] JPL 865 that a condition requiring that details of products to be sold '*should be submitted to and agreed in writing by the local planning authority*' did not prohibit the sale of goods **not** on the list because of the difference in meaning between 'shall' and 'should'.

Reasonable

47 Any condition which places an unjustified and disproportionate burden on the appellant will be unreasonable. The question of what is proportionate may depend on the circumstances of the case; for example, a condition that requires the maintenance of a landscape scheme for five years may be reasonable where permission is granted for a major housing estate but not where permission is granted only for a single house on a small plot.

48 It is always unreasonable to impose a condition which would nullify the benefit of the permission, for example, if it is suggested that the use of a building as a hot food take-away is permitted subject to a condition which limits opening hours to the extent that it would be impossible to run a viable take-away business. If the use would only be acceptable with such restricted opening hours, it may be necessary to refuse permission.

49 Conditions should not contradict the permission. If you permit a 'house and garage', it would be unreasonable to impose a condition which stops the garage from being built – subject to advice below on split decisions.

Conditions to Avoid

50 Paragraph 21a-005-20190723 of the PPG sets out specific circumstances where conditions should **not** be used:

[13] *Bizony v SSE* [1976] JPL 306
[14] *Penwith DC v SSE* [1986] JPL 432; *Bromsgrove DC v SSE* [1988] JPL 257
[15] *R v Rochdale MBC, ex parte Tew* [1999] 3 PLR 74

- Conditions which unreasonably impact on the deliverability of development.
- If details are submitted with an outline application for approval, conditions cannot be imposed to reserve these matters for future consideration.
- Conditions requiring development to be carried out in its entirety.
- Conditions requiring compliance with other regulatory requirements.
- Conditions requiring that land is given up or ceded to other parties.
- Positively-worded conditions requiring the payment of money or other consideration.

Model Conditions

51 On publication of the PPG, pre-existing Government guidance in *Circular 11/95: Use of Planning Conditions* was cancelled – except that Appendix A to the Circular was retained. It sets out various national model conditions.

52 Planning authorities may use their own lists of model conditions, although PPG paragraph 21b-021-20190723 encourages them to consider national model conditions where appropriate in the interests of consistency.

53 PINS provides its own suite of planning conditions. This can be accessed via 'PINS Help' in DRDS or this **link**. The list is not exhaustive, and the conditions given may need to be amended if appropriate to the case.

54 PPG paragraph 21b-021-20190723 states that model conditions can improve the efficiency of the planning process, but it is important not to apply them in a rigid way or without regard to whether the six tests will be met. **This advice applies to national, local and PINS model conditions**. Treat the wording of any suggested condition with caution and do not rely on it meeting the tests especially if further details are sought; see advice on the Anatomy of Conditions below.

IMPOSING CONDITIONS IN PLANNING APPEALS

The Parties and Conditions

55 The planning authority will be asked to provide a list of suggested conditions with the questionnaire. They may provide the list with their statement or via other documentation such as their committee report.

56 If the authority does not provide a list, consider whether they ought to be asked to provide one but there is no imperative to allow them that opportunity. You may wish to ask for suggested wording if the authority has only provided a brief outline of conditions to be imposed.

57 Always check whether the appellant, statutory consultees and/or other parties have suggested conditions; it is not unusual for the Highways Authority or Environment Agency to do so[16]. The need to impose these must be considered against the relevant tests. Sometimes parties will indicate that certain measures might be necessary, such as landscaping – even if they have not discussed conditions in terms. You should consider whether such proposals could and should be secured by condition.

58 As part of their reasoning, Inspectors may need to address whether a condition suggested by an appellant would overcome the harm identified.

[16] PPG paragraph 21a-016-20140306

59 'Informative' notes set out on planning permissions do not carry any legal weight and cannot be used in place of a condition[17].

Natural Justice

60 An Inspector may take the view that a condition which has **not** been suggested would be necessary to make a development acceptable. You should not impose conditions where the parties, including third parties, would reasonably expect but did not have any opportunity to comment[18].

61 A condition may come as a surprise to the parties if it was not mentioned in the written representations or at the hearing or inquiry. You would then need to give the parties a chance to comment unless:

- The appellant has commented on the mitigation that the condition would achieve, for example, obscure glazing.
- Other parties have proposed some mitigation and the appellant has had an opportunity to comment.
- The condition is 'standard' and obviously uncontentious for the case, such as use of matching materials as indicated on the plans or application form.
- The condition is required to secure the provision and/or retention of part of the proposal shown on the plans such as the layout of parking spaces.

62 Inspectors may need to re-draft suggested conditions suggested by the parties so that they comply with the six tests or simply for precision or clarity. It is normally possible to do this without referring back to the parties if the essence of the condition is unchanged.

63 If you re-draft a condition, consider whether doing so will make it more onerous or otherwise change its meaning or effect, such that the parties would expect to have an opportunity to comment.

Drafting Conditions

64 Conditions imposed on a permission are likely to be scrutinised by the parties. Small drafting errors or omissions can alter the intended meaning of a condition or prevent it from being enforced, such that a high court challenge or further application or appeal may follow. Conditions must therefore be carefully written and checked.

65 Where several conditions are imposed, it improves the look and flow of a decision if they are set out in a schedule at the end. You would need to word the 'decision' so that planning permission is granted '*subject to the conditions set out in Schedule 1*' or similar and the schedule is so headed.

66 Where possible, use the PINS suite of planning conditions to ensure consistency and best practice. However, you should always consider whether a relevant standard condition would need to be modified, or a non-standard condition should be used to reflect the circumstances of the case, and perhaps deal with specific requirements of the parties.

67 It is always necessary to check whether every suggested condition:

- Contains any unnecessary requirements or overly detailed specifications of particular requirements. This sort of assessment should be undertaken, for

[17] PPG paragraph 21a-026-20140306
[18] *Jory v SSTLGR* [2002] EWHC 2724

example, with 'landscaping' conditions. It may be reasonable to leave the planning authority to decide, for example, the extent and species of planting.

- Refers to any statutory instrument, policy or guidance document which may be subject to future updates or withdrawal such as the GPDO, *Planning Policy for Traveller Sites* or British Standards. Consider whether it is necessary to refer to the document at all and, if so, whether the condition can be worded to remain enforceable and otherwise stand the test of time.
- Purports to delegate approval of a scheme to another party, such as the Environment Agency. Approval is the responsibility of the planning authority and it will be for them to decide whether or not to consult with any other parties when considering if a submitted scheme is acceptable[19].

'Anatomy' of a Condition

68 Many planning conditions have different component parts, such as a requirement to submit details for approval, and implementation (and retention) in accordance with the approval.

69 When considering suggested conditions, you must consider whether each suggested component is necessary – and if any necessary components are missing, for the condition to fulfil the reason for its imposition:

- If **further details** are required, they should be submitted to and approved by the local planning authority in writing.
- An **implementation clause** should be included where it is necessary to control how the development is carried out: '*Development shall be carried out in accordance with the approved details*'.
- A **timing clause** should be included where it is necessary to control when something is done: '*The dwellinghouse hereby approved shall not be occupied until a parking space has been laid out in accordance with the approved plan'.*
- A **retention clause** should be included where it is necessary that something is retained in posterity: '*The parking space shall thereafter be retained for use for parking by the occupiers of the approved dwellinghouse at all times*'.
- **Maintenance clauses** are occasionally necessary to ensure that the works or installation being required will remain effective. Maintenance should be in accordance with the approved details or with the scheme to be approved by the planning authority[20].

70 If an essential component part is missing, the condition as a whole may be sufficiently flawed that the entire decision is at risk of challenge or the condition may be unenforceable.

The Order of Conditions

71 PPG paragraph 21a-024-20140306 advises that, in addition to precise drafting, clear ordering of conditions on a decision notice will help them to be understood – and it is good practice to list the conditions in the order that they will need to be satisfied.

72 The PPG states that a good structure is:

- Standard time limit;
- Details and drawings subject to the permission;
- Any pre-commencement conditions;

[19] PPG paragraph 21a-016-20140306

[20] See model conditions 83 (contaminated land), 107, 108 and 109 (landscape), 145 (trees) and 151, 152 and 153 (sustainable drainage) in the PINS suite of planning conditions and DRDS.

- Any pre-occupancy or other early stage conditions;
- Conditions relating to post-occupancy monitoring and management.

Reasons for Imposing (or not Imposing) Conditions

73 Planning authorities must determine planning applications in accordance with the *Town and Country Planning (Development Management Procedure) (England) Order 2015* (DMPO). Article 35(1) states:

When the local planning authority give notice of a decision or determination on an application for planning permission or for approval of reserved matters— (a) where planning permission is granted subject to conditions, the notice must state clearly and precisely their full reasons—(i) for each condition imposed; and (ii) in the case of each pre-commencement condition, for the condition being a pre-commencement condition.

74 The PPG also states that clear and precise reasons must be given by the local planning authority for the imposition of every condition[21].

75 The DMPO 2015 and PPG do not place the same onus on Inspectors to give reasons for imposing conditions, but it is still necessary to do so. As described in the Procedural Guide to Planning Appeals, an Inspector's duty is to give reasons for their decision – as a whole, and thus including the decision to impose conditions – in writing. The Courts interpret the duty as meaning that the reasons must be adequate and intelligible[22].

76 You must look at the evidence to support each condition proposed by the planning authority, appellant, statutory consultees and/or other parties. You must be satisfied and must explain why each condition is necessary or not as a matter of planning judgment. Reasons such as 'in the interests of proper planning' or 'for the avoidance of doubt' are not adequate.

77 It is essential that the parties can understand the reasons for a decision. If you are dismissing the appeal:

- Explain why any condition(s) that were proposed specifically to overcome the harm you are concerned about would not remedy or be sufficient to remedy the harm so that permission can be granted.
- Consider whether other suggested conditions are relevant to your reasoning, or central to the case of the losing party and would need to be addressed.

78 If the appeal is being allowed, you must clearly explain your reasons:

- For imposing any conditions other than the standard time limits – making it clear why each condition is necessary to avoid refusal of permission;
- For **not** imposing conditions suggested by the parties, including statutory and other third parties; and
- For any timing requirements, particularly in relation to retrospective permissions and pre-commencement or pre-occupation conditions.

79 The reasons for imposing an uncontested condition should be brief. Even in other cases, the reasons for imposing or not imposing conditions should proportionate in length and detail to the relevant matter. Note that:

- The test of necessity is often the most critical; refer to other tests only where they are decisive in some respect, for example, lack of enforceability is the reason for not imposing a condition;

[21] PPG paragraph 21a-023-20140306
[22] *Verdin v SSCLG & Cheshire West and Chester BC & Winsford Town Council* [2017] EWHC 2079

- Minor changes to suggested conditions should be explained briefly; it may suffice for example to state at the outset that you have amended the wording of the condition(s) for clarity or to meet the six tests.
- More reasoning may be required if you intend to make any substantial changes to a suggested condition.
- More reasoning may be needed when imposing or not imposing conditions that are contentious and/or unusual;

80 It is essential that you **double check** your decision to be sure that there is consistency between your reasoning on the main issue(s), reasoning in the Conditions section, overall conclusion and actual decision. If you indicate that a condition would be necessary, it must actually be imposed.

81 In *Lambeth LBC v SSCLG & Aberdeen Asset Management* [2019] UKSC 33, the Supreme Court addressed whether a s73 permission should be interpreted as containing a condition imposed on previous permission(s) to restrict the use of the premises. Finding the answer to be yes, it was held that '*the absence of a reason would not affect the validity of the condition (see Brayhead (Ascot) Ltd v Berkshire CC [1964] 2 QB 303)'*.

82 However, validity goes only to the legal or *Newbury* tests, and *Lambeth* does not alter any of the advice about the importance of giving reasons for imposing or not imposing conditions in appeal decisions.

CASEWORK ISSUES

Interpreting Conditions

83 Full advice on the interpretation of planning permissions as well as conditions is given in the Enforcement chapter. Key principles are summarised here, however, since it may be necessary to interpret a condition in s79, s73 or s73A appeals, or indeed *any* PINS casework where the planning history is relevant.

84 It was held in *Newbury* that an Inspector has a duty to interpret a condition to give it a sensible meaning if they can[23]. The Courts have subsequently developed a pragmatic and purposive approach to the interpretation of conditions in law[24].

85 Paragraph 37 of the high court judgment in *Dunnett Investments Ltd v SSCLG & East Dorset DC* [2016] EWHC 534 (Admin) (upheld in [2017] EWCA Civ 192) summarises the key principles:

- Conditions must be construed in the context of the permission as a whole[25];

[23] Citing Lord Denning in *Fawcett Properties Ltd v Buckinghamshire CC* [1961] AC 636: it is 'the daily task of the courts to resolve ambiguities of language…and to construe words so as to avoid absurdities or to put up with them…this applies to conditions in planning permissions as well as to other documents'.

[24] Examples of the Courts taking a purposive approach to interpreting conditions include *FSS v Arun DC & Brown* [2006] EWCA Civ 1172, where it was held that two conditions could be read together to gain a sensible meaning; or *Barlow v SSTLR & Uttlesford DC* (QBD 14.11.02 Sullivan J) where the term "rating" could be interpreted to refer to Council Tax.

[25] See also *Carter Commercial Developments Ltd v SSE* [2002] EWHC 1200 (Admin); a condition should be interpreted in a 'benevolent manner within its context, which includes the permission it limits'.

- Conditions should be construed in a common sense way, so that the Court should give the condition a sensible meaning if possible;
- Consistent with that, a condition should not be construed narrowly or strictly;
- There is no reason to exclude an implied condition, but a planning permission is a public document which may be relied upon by parties unrelated to those originally involved[26];
- The fact that breach of a condition may be used to support criminal trials means that a 'relatively cautious approach' should be taken;
- A condition must be construed objectively; not by what the parties may or may not have intended at the time but what a reasonable reader construing the condition in the context of the permission as a whole would understand;
- A condition should be clearly and expressly imposed;
- A condition is to be construed in conjunction with the reason for its imposition so that its purpose and meaning can be properly understood;
- The process of interpreting a condition as for a planning permission, does not differ materially from that appropriate to other legal documents.

86 *Lambeth LBC v SSCLG & Aberdeen Asset Management* [2019] UKSC 33 concerned a retail unit where a planning authority had granted permission under s73 without restating conditions imposed on previous permissions to limit the range of goods sold.

87 From the wording of the proposal and the operative part of the s73 permission, the Supreme Court held that the 'obvious and only natural interpretation' was the Council had approved what was applied for, namely the variation of one condition. There is nothing to indicate an intention to remove the restriction on the sale of food goods.

88 The s73 permission was thus read to the effect that it carried forward a previous condition, although that had not in fact been imposed. *Lambeth* underscores the extent to which conditions should be given a 'sensible meaning' – and this principle must be followed in all casework[27].

89 This benevolent approach to the interpretation of previous conditions should not be taken as lessening the Inspector's duty to impose new conditions properly. Any permission granted at appeal will be at risk of challenge if conditions do not meet the six tests including precision, or are incomplete, or are not imposed at all when they should be[28].

Conditions and Planning Obligations

90 In some cases a particular requirement or restriction could reasonably be achieved by imposing a planning condition or by the appellant entering into a planning obligation under s106 of the TCPA90.

91 Paragraph 54 of the Framework states that '*Planning obligations should only be used where it is not possible to address unacceptable impacts through a planning condition.*' Even if it would be equally possible to

[26] *Trump International Golf Club Scotland Ltd & Another v the Scottish Ministers* [2015] UKSC 74
[27] See, for example, *R (oao Network Rail Infrastructure Ltd) v SSEFRA* [2018] EWCA Civ 2069
[28] In *Lambeth*, the Supreme Court endorsed *R (oao Reid) v SST* [2002] EWHC 2174 (Admin) that 'it is highly desirable that all the conditions to which the new [s73] planning permission will be subject should be restated…and not left to a process of cross-referencing'.

overcome an objection via condition or obligation, the PPG states that a condition should be used[29]. Conditions are preferable because they:

- represent the most straightforward approach for all parties.
- can be re-drafted by the Inspector.
- are imposed upon and thus form part of the planning permission.
- are easier to enforce and can be enforced in perpetuity.
- are easier to vary or remove.

92 However, a condition cannot override, supersede or revoke a completed planning obligation. If a completed obligation has been provided, it will be essential to consider whether a duplicating condition would be necessary.

93 As noted above, the PPG is clear that positively-worded conditions cannot be imposed which require the payment of money[30]. The PPG also advises that a positively-worded condition which requires an applicant to enter into a planning obligation is unlikely to be enforceable.

94 The PPG continues that a negatively-worded condition which requires an applicant to enter into a planning obligation is unlikely to be appropriate in the majority of cases; entering into an obligation prior to a grant of permission is the best way to ensure certainty and transparency.

95 However, the PPG continues that:

'In exceptional circumstances a negatively worded condition requiring a planning obligation or other agreement to be entered into before certain development can commence may be appropriate, where there is clear evidence that the delivery of the development would otherwise be at serious risk (this may apply in the case of particularly complex development schemes).'

96 If a planning authority wishes to use such a negatively-worded condition, they should discuss it and agree the heads of terms with the applicant before permission is granted[31]. An Inspector should have regard to and, where appropriate, test any evidence of such discussions.

97 See the Planning Obligations chapter for further advice.

When and How Conditions Come into Effect

98 When and how conditions come into effect depends on the stage of the permission or development that they relate to.

99 If works are carried out in breach of a condition precedent, the permission would not have been lawfully commenced. The development will be without planning permission unless particular circumstances apply as described in the Enforcement chapter. The meaning of 'condition precedent' is given in advice below on pre-commencement conditions.

100 Where a condition is imposed requiring that the development is not carried out except in complete accord with the approved plans, but the development does not in fact conform to the plans:

- If the deviation from the plans is relatively minor, the Council can enforce against a breach of the condition but not the development as a whole.

[29] PPG paragraph 21a-011-20140306
[30] PPG paragraph 21a-005-20190723
[31] PPG paragraph 21a-010-20190723

- If the deviation from the plans is substantial, perhaps because the building is sited in a significantly different position from that approved, the development as a whole is without planning permission.

101 Thus, the plans condition comes into effect when the development is commenced and remains effective for the lifetime of the permission.

102 Where it is necessary to secure the approval of further details of the development, but these are not of such significance to justify delaying works on site, it may be appropriate to word the condition so as to require the submission of the details before occupation of the development.

103 Pre-occupation conditions, and conditions which relate to the lifetime of the development do not come into effect until the permission has been commenced or implemented. For example:

- A condition requiring that trees on the site are protected during construction would not prevent damage to them before the permitted works are begun;
- A condition removing PD rights for extensions to an existing house would not prevent PD extensions being added before the permission is commenced.
- A condition specifying the opening hours of a hot food take-away would not come into effect until the permission has been implemented.

104 If pre-occupation or other conditions are not complied with, the authority would need to enforce against a breach of condition, not development without planning permission. This is the case even where there has been a breach of a temporary or personal permission.

Amended Applications

105 The PPG advises that, if some detail (or lack of detail) given in a planning application is unacceptable, it is often best to invite the applicant to revise or resubmit the application. It would not be appropriate to modify the development so as to make it substantially different from that proposed. However, it may be possible to impose a condition that would result in a minor modification to the development[32].

106 It was held in *Bernard Wheatcroft Ltd v SSE* [1982] JPL 37 that amended plans can be accepted on appeal and approved through a grant of conditional permission provided there is no substantial difference between what was originally applied for and the amended scheme. The test is:

'*whether the development is so changed that to grant it would be to deprive those who should have been consulted on the changed development of the opportunity of such consultation'.*

107 Inspectors should decide on the basis of that test whether they could grant permission subject to a condition that would serve to modify the proposed development by tying the permission to revised plans.

Split Decisions

108 When deciding a planning application or appeal, the planning authority or Inspector may make a 'split decision' whereby permission for part of the development is allowed and part is refused. Full advice on split decisions is set out in 'the Approach to Decision-making' chapter.

[32] PPG paragraph 21a-012-20140306

109 Inspectors deciding appeals made under s79 of TPCA90 may also make a split decision, since they may 'reverse or vary any part of the decision of the local planning authority…'; see Appeals against Conditions.

110 The PPG advises that where a planning authority considers part of the development unacceptable, it is normally best to seek amended details[33]. If those are provided, permission can then be granted subject to a 'plans' condition which clearly refers to the amended drawings[34].

111 Where a split decision is made, take care to ensure that any conditions imposed relate only to the part of the development being allowed.

Revoking Permissions and Replacement Buildings

112 A planning permission can only be revoked by the planning authority or the Secretary of State following the process (with provisions for compensation) set out under s97 and s100 of the TCPA90.

113 A planning application may be determined with regard to a planning obligation whereby the appellant agrees to not implement a previously granted but unimplemented permission. A planning condition cannot be imposed to achieve the same end.

114 Where permission is sought for an **alternative to a previously approved but not yet built** development:

- Consider whether the previous permission remains extant[35] and, if so, whether it would be physically possible to carry out both developments.
- If so, consider whether that would be acceptable or if there are compelling planning objections to both developments going ahead.
- If so, a completed planning obligation would be required to prevent both permissions being implemented. If there is no obligation, the appeal should be dismissed on the basis of the harm that would result from there being no means of preventing both developments from going ahead.

115 However, conditions can assist where permission is sought for a **new building to replace one that is existing and lawful**. If it is proposed to construct a replacement building, and that could be done without the existing being demolished, and there are sound planning objections to both structures being in place, a condition may require that the existing is demolished before the appeal development is commenced.

Conflicting Conditions

116 It is crucial that conditions are not imposed which would conflict with others on the same permission – or conflict with conditions imposed on an existing permission that is still extant and relevant to the site.

117 For example, if you need to impose a condition requiring the provision and retention of a visibility splay with no obstructions over 0.6m – or

[33] PPG paragraph 21a-013-20140306

[34] PPG paragraph 21a-013-20140306 suggests that, in exceptional circumstances, and where the acceptable and unacceptable parts of the development are clearly distinguishable, it may be appropriate make a split decision by using a condition to grant permission for only part of the development. But this can be difficult to achieve in practice when it is simpler and safer to permit part and refuse part of the development as above.

[35] In a s78 appeal, you should make no determination as to whether a previous permission has been lawfully commenced or implemented, even if the parties are agreed, but you can record any such agreement and/or if the time limit for commencement has not lapsed.

there is a pre-existing condition to that effect – it would be unreasonable to impose another condition requiring that the development is landscaped in accordance with a plan that shows trees within the splay. The appellant would be put at risk of enforcement action if they plant the trees and thereby breach the visibility splay condition.

Discretionary or 'Tailpiece' Conditions

118 Conditions are sometimes worded to suggest that the requirements may be changed, usually by including a phrase such as 'unless otherwise agreed by the local planning authority in writing'. These are sometimes referred to as a 'tailpiece' phrases or conditions.

119 Such wording should be considered with care and avoided where possible, because it can create a risk that developers will seek to make significant changes to the development and/or to circumvent the statutory routes to vary conditions, depriving third parties of the opportunity to comment.

120 It was held in *Midcounties Co-operative Ltd v Wyre Forest DC* [2009] EWHC 964 that a tailpiece added to a condition to limit floor space allocations *'makes it hopelessly uncertain what is permitted. It enables development not applied for, assessed or permitted to occur. It side steps the whole of the statutory process for the grant of permission and the variation of conditions…'*

121 In *Hubert v Carmarthenshire CC* [2015] EWHC 2327 (Admin), permission had been granted for the construction of a wind turbine and it was held that a condition stating that the turbine should be of certain dimensions '*unless given the written approval of the local planning authority*' could lead to the approval of a turbine of a greater scale and environmental impact than had been permitted; the clause had to be removed.

122 Tailpiece conditions may be used where the potential for change would be minor, perhaps where a condition requires the implementation of a planting scheme submitted with the application, to give the authority scope to agree changes to the timing or species planted.

Discharge of Conditions

123 Details required by condition must be submitted to the planning authority in writing in accordance with Article 27(1) of the DMPO[36]. Fees are payable on an application for written confirmation of the discharge of condition(s) and/or that condition(s) have been satisfied[37].

124 Planning authorities are subject to the usual 8 week target to give notice of their decision on a request to discharge a condition; the clock starts on the day following receipt of the application; Article 27(2). A longer period can be agreed in writing with the applicant but, if no decision is made within 12 weeks, the authority must return the fee[38].

125 The provisions do not apply to prior approval applications, although those are in effect applications made in accordance with pre-commencement conditions imposed on permitted development. The provisions also do not

[36] An application to discharge a condition is not the same as an application for non-material changes to a planning application, the procedure for which is set out in Article 10 of the DMPO.
[37] PPG paragraph 21a-033-20140306
[38] PPG paragraph 21a-033-20140306

apply to applications for the approval of reserved matters pursuant to a grant of outline permission; Article 27(3).

126 An application as required by a condition imposed on permission for EIA development is subject to the DMPO except that the planning authority has 16 weeks to make its decision; Article 68(2) of the Town and Country Planning (Environmental Impact Assessment) Regulations 2017[39].

127 There is a right of appeal under s78 of the TCPA90 where an application to discharge a condition is refused or not determined within the statutory period[40]. Such appeals are determined essentially like any other made under s78, that is, on the basis of the main planning issues.

128 The overriding question for the Inspector in these cases is whether the details submitted are sufficient and acceptable for the condition to be discharged, with regard to the condition itself, the reason for imposing the condition, the nature of the development permitted, the objections raised by the authority (if any) and submissions by the appellant.

129 For example, in an appeal against a refusal to approve 'landscaping' details required by condition, the main issue might be: '*the effect of the proposed landscaping scheme on the character and appearance of the approved development*'.

Deemed Discharge

130 Where an applicant has concerns about the timeliness of a planning authority in giving notice of a decision to discharge a condition imposed on a permission granted for the development of land in England after 15 April 2015[41], they may secure the 'deemed discharge' of the condition[42].

131 This provision exists to 'avoid unacceptable delays and costs at a stage in the development process where applicants are close to starting on site or where development is underway'[43].

132 The applicant must follow the proscribed procedure, or their only recourse against an authority's failure to determine an application to discharge a condition will be by making an appeal as above.

133 Under s74A(1) of the TCPA90 and Article 28(1) of the DMPO, a condition is deemed to be discharged where:

(a) the applicant has submitted details required by the condition in accordance with Article 27;

(b) the applicant has given notice in accordance with Article 29[44]; and

(c) the period for the authority to give notice to of their decision on the application has elapsed without such notice being given to the applicant.

[39] PPG paragraph 21a-034-20190723
[40] In DRDS, the appeal type is 'PLG details pursuant (eg res matters) – conditional grant/failure/refusal'
[41] PPG paragraph 21a-042-20190723
[42] PPG paragraph 21a-034-20190723
[43] PPG paragraph 21a-041-20190723
[44] PPG paragraph 21a-045-20190723

134 Under Article 28(2), deemed discharge takes effect on the date specified in the 'Article 29 notice'[45] **or** 14 days after the day immediately following that on which the notice is received by the authority (whichever of those is later)[46] **or** on such later date as may be agreed by the applicant and the authority in writing[47].

135 Article 30 of the DMPO states that the deemed discharge provisions under Article 28 do not apply where (a) the condition falls within the exemptions listed in Schedule 6; or (b) the applicant and the planning authority have agreed in writing that the provisions of s74A of the TPCA90 do not apply.

136 The exemptions set out in Schedule 6 of the DMPO relate to:

- EIA development – in specified circumstances.
- Conditions intended to manage the risk of flood.
- Sites of Special Scientific Interest – in specified circumstances.
- Conditions relating to the assessment or remediation of contaminated land.
- Conditions relating to the investigation of archaeological potential.
- Conditions relating to highway access or an agreement to be entered into pursuant to s278 of the Highways Act 1980 as to execution of works.
- Conditions requiring the approval of Reserved Matters.
- Conditions requiring [actions pursuant to] a planning obligation
- Conditions imposed on a permission granted by development order.

137 See also the Appeals against Conditions ITM.

Viability

138 References to viability in the 'Use of Conditions' chapter of the PPG are:

- Conditions should not be imposed if they would unreasonably impact on the deliverability of development with regard to the Framework and supporting guidance on viability[48].
- Conditions can be used to stipulate the sequence or phasing of development, or ensure that a particular element in a scheme is provided by a particular stage, so long as the authority discusses and agrees the condition with the applicant before permission is granted, to understand how the requirements would fit into the planned sequence for developing the site, impacts on viability, and whether the tests of reasonableness and necessity will be met[49].

139 As noted above, any condition placing 'unjustifiable and disproportionate financial burdens on an applicant' would be unreasonable, whether or not viability is raised as a material consideration.

TYPES OF CONDITION

The Standard Commencement Condition

140 The standard 'three year' condition for the commencement of development is deemed to be imposed on every planning permission. It is

[45] No earlier than the 8 week date by when the authority should give notice of their decision.
[46] PPG paragraph 21a-044-20190723
[47] See also PPG paragraph 21a-043-20190723
[48] PPG paragraph 21a-005-20190723
[49] PPG paragraph 21a-008-20140306

good practice to expressly impose the condition on every grant of permission for completeness. That advice does not apply, however:

- Where the appeal does **not** concern an application for full permission[50],
- Where the development has already begun and so planning permission would be granted on a retrospective basis.

141 S91(1)(b) of the TCPA90 allows planning authorities to modify the standard condition and impose a longer or shorter time limit for the start of the development. The Framework and PPG advise that[51]:

- A shorter period may be appropriate to encourage the commencement of development, where non-commencement has previously had negative impacts and/or to ensure that proposed housing is implemented in a timely manner, where this would expedite the development without threatening its deliverability or viability.
- A longer period may be justified for very complex projects where there is evidence that three years is not long enough for completion of the preparations necessary before development can start.

Outline and Reserved Matters

142 The Approach to Decision-making chapter provides full information on outline and reserved matters appeals.

143 When considering the imposition of conditions, it is crucial to bear in mind that planning permission for the development is granted at outline stage. An application for the approval of reserved matters is, by definition, an application for the approval of details pursuant to the permission.

144 Article 2 of the DMPO defines the matters that may be 'reserved for future consideration' as:

- access[52];
- appearance;
- landscaping;
- layout; and
- scale[53].

145 When dealing with an appeal for outline planning permission, you must clarify at the start which matters are for approval at this stage, if any; which matters are reserved for future consideration; and which plan(s) in front of you are for approval or simply indicative or illustrative.

146 The key conditions to impose on any grant of **outline permission** will be:

- The standard condition requiring that details of the reserved matters are submitted for approval[54].
- The standard condition specifying when the reserved matters application must be submitted by'[55].

[50] Such as appeals concerning applications for outline permission or prior approval.
[51] Paragraph 76 of the Framework and PPG paragraph 21a-027-20140306
[52] Under Article 5(3), where access is a reserved matter, the outline application must state the area or areas where access points to the development proposed will be situated.
[53] Scale, except in the term 'identified scale', means the height, width and length of each building proposed within the development in relation to its surroundings.
[54] S92(2)(a) of the TCPA90; model condition (2) in the PINS suite of planning conditions and DRDS
[55] S92(2)(b) of the TCPA90; model condition (3) in the PINS suite of planning conditions and DRDS

- The standard condition specifying when the development permitted must be commenced by'[56].
- The 'plans' condition – which should only list the plans submitted for approval, not any indicative or illustrative plans[57].
- Any conditions that are necessary in respect of the principle of development, for example, a restriction to the number of houses or height of buildings.
- Any conditions which are necessary with regard to matters for approval at outline stage; for example, if the application includes details of the site access for approval, any condition pertaining to access and highway safety must be imposed on the outline permission[58].
- Any conditions which are necessary to control matters that fall outside of the scope of the reserved matters, such as drainage or contamination.
- Any conditions which are necessary to clarify what should be submitted at reserved matters stage, for example, if the landscaping scheme should include tree planting, or the layout should include car parking spaces.

147 If you are dealing with an appeal for the approval of some or all of the **reserved matters**, you can only impose conditions which directly relate to the matters you are approving[59].

148 For example, if you approve the details of 'appearance' as a reserved matter, you may impose a condition requiring that particular windows are obscure-glazed, since that condition could not have been reasonably imposed before the plans were submitted.

Temporary, Personal and Occupancy Conditions

149 Where permission is granted under s72(1)(b) for a limited period, it is essential not only that the duration of the permission is specified in a condition[60], but also that the condition requires the removal of the permitted structures and/or the discontinuance of the permitted use at the end of the period, plus the carrying out of any works required to reinstate the land to its previous condition.

150 Those stipulations apply whether you are imposing a 'temporary' condition to limit the duration of the permission to a specific period of time or a 'personal' condition which would limit the duration of the permission to the period that it is required by the appellant or occupier.

151 However, the PPG is clear that it would rarely be reasonable to impose a condition which requires the demolition of a building that is intended to be permanent. Moreover, a condition that requires the demolition of a building would be unlikely to relate fairly and reasonably to the development when the permission being granted is for a change of use[61].

152 The PPG advises on the circumstances where it may be appropriate to impose a temporary condition:

[56] S92(2)(c) of the TCPA90; model condition (4) in the PINS suite of planning conditions and DRDS
[57] PPG paragraph 21a-005-20190723
[58] PPG paragraph 21a-025-20140306
[59] *R v Newbury DC ex parte Stevens & Partridge* [1992] JPL 1057; PPG paragraph 21a-025-20140306
[60] See the advice on the 'Necessary' test above
[61] PPG paragraph 21a-014-20140306

- A trial run is needed to assess the effect of the development on an area;
- It is expected that the planning circumstances will have changed in a particular way by the end of the temporary period;
- To enable the temporary use of vacant land or buildings prior to longer-term proposals coming forward.

153 Unless the circumstances provide a clear rationale, it will rarely be justifiable to grant a second temporary permission, and there is no presumption that permanent permission should be granted once the temporary period has expired.

154 The PPG advises that, since planning permission runs with the land, it is rarely appropriate to provide otherwise, but sometimes development that would not normally be permitted may be justified because of who would benefit from the permission[62].

155 It is important to bear in mind that planning permission is required for a material change of use of land, but not for any change of who occupies the site. If it is necessary to restrict the enjoyment of a use to a person or group of persons, the restriction must be achieved by way of condition.

156 Such conditions typically need to be considered where there is some policy objection to permitting the proposed use on an unconstrained basis, for example, residential use of land or a building in the countryside.

157 Personal and occupancy conditions differ in that:

- A personal condition will be imposed where the justification for granting permission rests on the personal circumstances of the appellant or occupier, while an occupancy condition will be imposed where the type of occupier will make the use acceptable in planning terms.
- A personal condition would set out the name(s) of the individuals who would benefit from the permission; an occupancy condition would not.
- A personal condition would endure for such time as proscribed, but an occupancy condition would normally apply in perpetuity.

158 A condition limiting the benefit of a permission to a company is inappropriate because its shares could be transferred to other persons without affecting the legal personality of the company.

159 Types of occupancy conditions include[63]:

- 'Agricultural' occupancy conditions, which restrict occupation of a dwellinghouse to those involved in local agriculture. This type of condition may be adapted for those taking majority control of a farm business, or forestry or other essential rural workers, in accordance with the circumstances of the case and paragraph 79 of the Framework.
- 'Seasonal' or 'holiday' occupancy conditions, which restrict occupation of a caravan site or dwellinghouse in order to support the tourism industry and/or prevent occupation as a permanent home.
- Occupation by persons of a certain age.

[62] PPG paragraph 21a-015-20140306
[63] See model conditions 21, 22, 23, 36 and 38 in the PINS suite of planning conditions and DRDS. Gypsy and traveller sites are also subject to occupancy conditions; see the Gypsy and Traveller Casework chapter. Affordable housing conditions may include occupancy clauses; see the Housing chapter.

- Staff occupancy conditions.
- 'Live/work' occupancy conditions.

160 The PPG does not recommend the use of conditions to restrict a use to holiday lets, but an appeal decision was recently quashed by the high court in part because the Inspector failed to consider the imposition of such a condition[64].

161 It is unlikely that an occupancy condition which requires the keeping of a register of occupiers would be considered unworkable or unlawful under data processing regulations, because the condition itself would provide a lawful basis for the processing of relevant personal data.

162 However, if you find that it would be unreasonable for the condition to require the keeping of a register, alternative ways to ensure that the premises is only occupied as stipulated would be:

- Leave it to the planning authority to enforce the occupancy condition in the usual way, bearing in mind their powers of investigation and particularly to issue a Planning Contravention Notice under s171C of the TCPA90, or
- Include a requirement in the condition that the appellant must submit a statutory declaration under the Statutory Declaration Act 1835 to the authority at regular intervals to confirm the use and occupation of the site.

163 Personal and 'agricultural', staff or live/work occupancy conditions should be worded to extend the benefit of the permission to 'resident dependants'. It was held in *Shortt & Shortt v SSCLG & Tewksbury BC* [2015] EWCA Civ 1192 that, as a matter of ordinary language, 'dependants' can include persons in relationships which involve non-financial dependency, such as emotional support and care.

164 It is possible to impose a condition which limits the number of people occupying a development, for example, a house in multiple occupation, so long as this is reasonable and necessary. The condition should be enforceable, since a breach would be difficult but not impossible to detect.

165 Any breach of a temporary, personal or occupancy condition would not become immune from enforcement action for a period of ten years under s171B(3) of the TCPA90 – although use of a building as a dwellinghouse (or the breach of a condition which prevents such use) becomes immune after four years under s171B(2); see the Enforcement chapter.

The 'Plans' Condition

166 While advice to this effect in the 'use of conditions' section of the PPG has been deleted, it remains good practice to grant permission subject to a condition which specifies the approved plans. Your reason for imposing the condition would be that it creates certainty for all parties; that applies particularly but not only where revised plans have been submitted.

167 Imposing a plans condition allows the appellant to make a s73 application for 'minor material amendments' to the permission. Indeed, s96A of the TCPA90 allows an applicant to seek the *addition* of a 'plans' condition for this very reason. If a new permission is granted under s73, it should be

64 *Great Hadham Country Club Ltd & Morgan v SSCLG & East Hertfordshire DC* [2019] EWHC 1203 (Admin)

subject to a new plans condition which lists the plans that show the development subject to minor material amendments[65].

168 If none of the parties suggests imposing a plans condition, you should still do so, and do not need to confer with the parties first. It should not come as a surprise to any party that the development permitted should be carried out as shown on the approved plans.

169 However, it is not appropriate to impose a plans condition:

- On a grant of permission for development involving a change of use only.
- On a grant of outline permission where all submitted plans are indicative or illustrative – unless there is a Masterplan or other drawing showing an outline scheme that is agreed to necessarily fix the parameters of the development.

170 If the development has already been carried out, it may be unnecessary to impose a plans condition. If that is the case, it is still good practice to refer to the plans in the effective part of the decision:

*The appeal is allowed, and planning permission is granted for [ ] at [ ] in accordance with the terms of the application, Ref [ ], dated [ ], [**and the plans numbered x, y and z**], subject to the following condition[s]: [ ][66].*

171 However, you should always be mindful that permission is granted for the development applied for, which may not be the same as the development on the ground. If there are differences between what is proposed and what was actually built, impose a plans condition to require that the development is completed in accordance with the plans.

172 Ideally the condition will list the plans by number or title. If the plans are not numbered or named, the condition should refer to those 'submitted' and perhaps the date of the plans or date of receipt by the authority. If there are many plans, they should be listed in a schedule that is referenced in the condition and appended to the decision[67].

173 If it is necessary to require the submission and approval of further details, you should impose the standard plans condition and word the 'details' condition along the following lines:

Notwithstanding condition # [the plans condition], the development hereby permitted shall not be occupied until details of # have been submitted to and approved in writing by the local planning authority. Development shall be carried out in accordance with the approved details.

174 If the plans show some unacceptable detail which can simply be omitted from the development, and is therefore not fatal to a grant of permission, you should adapt the standard plans condition along the following lines:

The development hereby permitted shall be carried out in accordance with the following approved plans: [insert plan numbers] except in respect of the [specify the detail] shown on plan [insert plan number].

175 The standard plans condition cannot require that all features shown on the plans are provided or retained, or that the development and all of its component parts must be completed. The condition can only ensure that the development accords with the plans if and insofar as it is carried out.

[65] PPG paragraph 17a-018-20140306
[66] This wording should not be used if a plans condition is imposed
[67] See model conditions 5, 6, 7 and 8 in the PINS suite of planning conditions and DRDS.

176 If it is essential – assuming the permission is implemented – that some specific feature shown on the plans is provided, such as proposed parking spaces or landscaping, you must impose an additional condition to ensure that the feature is delivered and, if necessary, retained.

Outstanding Details and Pre-Commencement Conditions

177 Even when full, as opposed to outline permission is granted, it may be necessary to impose conditions requiring the submission and approval of details which were not provided as part of the planning application.

178 The PPG states that is '*important that the local authority limits the use*' of such conditions '*other than where it will clearly assist with the efficient and effective delivery of development*'. Planning authorities are expected to discuss such conditions with the applicant to ensure that unreasonable burdens would not be imposed.

179 The PPG also emphasises that the timing for the submission of details should meet with the planned sequence for developing the site. Conditions that unnecessarily affect an appellant's ability to bring a development into use or occupation, or otherwise impact on the proper implementation of the permission should not be used[68].

180 Conditions that require the approval of details must specify when the information should be submitted to the planning authority, otherwise, the condition will be unenforceable. The timescale is normally:

- **Before the development is commenced** (for example, '*No development shall take place until…*'); or
- **Before the development is occupied or used** (for example, '*No dwelling hereby permitted shall be occupied until…*'); or
- **By a specified time** (for example, '*Within x months of the date of this decision…*'); this wording is required where the development has been begun and planning permission is sought retrospectively.

Pre-commencement Conditions[69]

181 The term 'pre-commencement condition' is defined in s100ZA(8) of the TCPA90 as meaning:

'*a condition imposed on a grant of planning permission (other than a grant of outline planning permission within the meaning of section 92) which must be complied with—*

(a) before any building or other operation comprised in the development is begun, or

(b) where the development consists of a material change in the use of any buildings or other land, before the change of use is begun'.

182 Development is taken to be **begun** when 'material operations' or 'material development' as described by s56 of the TCPA90 have taken place in accordance with the development permitted[70].

[68] PPG paragraph 21a-006-2014030
[69] See also PINS Note 13/2018r2
[70] The term 'implementation' is not defined in statute and '*can be used to refer to the beginning of the development authorised by a planning permission…[or] more generally to the carrying out or completion of the development authorised by a planning permission*'; *R (oao) Robert Hitchens Ltd v Worcestershire CC* [2015] EWCA Civ 1060 and see also the Enforcement chapter.

183 As noted above, s100ZA(5) and (6) of the TCPA90 provide that planning permission for the development of the land may not be granted subject to a pre-commencement condition without the written agreement of the applicant to the terms of the condition. An Inspector should have regard to any agreement already gained and seek agreement to the imposition of any different (or differently-worded) pre-commencement conditions.

184 The PPG describes that a planning authority may serve notice on an applicant to seek the written agreement to a pre-commencement condition[71]. The Town and Country Planning (Pre-Commencement Conditions) Regulations 2018 provide that the Secretary of State may also serve such notice, and the 'Regulation 2(4) Notice' must include:

(a) the text of the proposed pre-commencement condition,

(b) the full reasons for the proposed condition, set out clearly and precisely,

(c) the full reasons for the proposed condition being a pre-commencement condition, set out clearly and precisely, and

(d) notice that any substantive response must be received…no later than the last day of the period of 10 working days beginning with the day after the date on which the notice is given.

185 The Regulations provide that the applicant or appellant may give written agreement to the terms of the proposed pre-commencement condition, or a 'substantive response' whereby they do not agree to the imposition of the proposed condition or provide comments on the proposed condition.

186 The PPG gives more information on these options available to the applicant or appellant[72]. If they provide a 'substantive response', the pre-commencement condition cannot be imposed.

187 Paragraph 55 of the Framework advises that conditions which are required to be discharged before development commences should be avoided, unless there is a clear justification. The PPG also explains that:

'*pre-commencement conditions should only be used where there is a clear justification, which is likely to be mean that the requirements of the condition (including the timing of compliance) are so fundamental to the development permitted that it would otherwise be necessary to refuse the whole permission*'[73].

188 Where the requirements are 'fundamental', a pre-commencement condition will amount to a 'condition precedent' for enforcement or other purposes. A condition precedent is essentially characterised by:

- Prohibiting **any** development authorised by the permission from taking place until the condition is complied with; **and**
- Going to the heart of the permission[74].

'Grampian' Conditions

189 The key features of a Grampian condition are:

- It is negatively-worded, to prohibit the commencement or occupation of (part of) the development until some specified action takes place; **and**

[71] PPG paragraph 21a-037-20180615. This refers to paragraph 019 but that has now been deleted.
[72] PPG paragraph 21a-038-20180615
[73] PPG paragraph 21a-007-20180615
[74] Further advice on conditions precedent is contained in the Enforcement chapter

- The required action must be on land that is not controlled by the applicant and/or must be authorised by another person or body.

190 Conditions which [positively] require works on land that is not controlled by the applicant and/or works to be authorised by another person or body are often unreasonable and unenforceable. However, it may be possible to achieve the same result by imposing a Grampian condition[75].

191 Grampian conditions derive from *Grampian Regional Council v Aberdeen CC* [1983] P&CR 633, which concerned whether permission should be refused on highway safety grounds or granted subject to a negatively-worded condition that would prohibit development from taking place until a road had been closed. The land lay outside of the applicant's control and consent for the works would be required from the highways' authority.

192 It was held in the House of Lords that the works would be necessary for the development to proceed – and whether any condition is reasonable depends on the circumstances. In this case, the Reporter had found the development to be in the public interest, so it was appropriate to grant permission subject to the condition.

193 It was also held that negatively-worded conditions are enforceable – and imposing such a condition with respect to land outside of the applicant's control would not create unacceptable uncertainty, since there is nothing to compel any applicant to implement a permission in any event.

194 However, the PPG advises that Grampian conditions should not be used where there are 'no prospects at all' of the action being performed within the time-limit imposed by the condition[76].

195 If it is unclear as to whether there are any such prospects, you may exercise discretion and not impose a suggested Grampian condition, but must give a sound planning reason. It must be more than unlikely or uncertain that the action would be achieved to justify refusing permission for development which would be acceptable with the condition in place[77].

196 Failure to consider imposing a suggested Grampian condition, or indeed any other suggested condition, would be considered procedurally unfair[78].

'Phasing' Conditions

197 The PPG advises that, where necessity and the other policy tests are met, conditions may be imposed to ensure that the development is carried out in a certain sequence – and/or that some specified element(s) of the scheme are provided by a particular time or at a particular stage[79]. For example, conditions may require that:

- The site access is completed before the approved buildings are begun;
- The approved parking spaces are laid out before the development is brought into use.

198 The PPG advises that planning authorities and applicants should discuss and agree such conditions before permission is granted, to understand

[75] PPG paragraph 21a-009-20140306
[76] PPG paragraph 21a-009-20140306
[77] *Bellway Homes Ltd v SSCLG & Cheshire East Council* CO/302/2015
[78] *Engbers v SSCLG* [2016] EWCA Civ 118
[79] PPG paragraph 21a-008-20140306

how the requirements would fit with the developer's planned sequence of development, the impacts of the requirements on viability, and whether the requirements would be necessary and reasonable. Inspectors should consider – and test at hearing or inquiry – evidence on those matters.

Retrospective Permission

199 Conditions may be imposed on any planning permission being granted retrospectively, whether the application was made under s78, s73A or, in an enforcement appeal, s174 and s177 of the TCPA90. However:

- The standard commencement condition should not be imposed.
- Other standard conditions may be unnecessary, for example, requiring the use of matching materials.

200 Some standard conditions require action, such as the submission and approval of a landscaping scheme, before the development is begun or occupied. In retrospective cases, such conditions must be adapted to set a timetable for action, and a 'sanction' for non-compliance in order to be enforceable. The PINS suite of planning conditions and DRDS include conditions that require action in simple and complex retrospective cases[80]; both must be drafted with particular care.

201 The standard 'sanction', in both the simple and complex conditions, is that the use being granted permission must cease or the building being granted permission must be demolished in the event of failure to take the required action by the specified time. If the condition is not complied with, the Council would only be able to enforce against the breach of condition; they could not enforce against development without permission at all. However, the consequences would still be serious because:

- Where permission is granted for a use of land, enforcing against a breach of the condition would mean that the use must cease and so it would be impossible to exercise the benefit of the permission;
- Where permission is granted for a building or other operational development, enforcing against a breach of condition would mean that the works must be removed, and the permission would be 'spent'.

202 In some cases, you may be able to draft the condition so that there is a lesser sanction. You should consider what is proportionate in the case and whether the action required would go to the heart of the permission. You may even be able to draft the condition so that it simply requires that the action is undertaken by a specified date, and then the Council could use their powers under s172 or s187A of the TCPA90 to enforce against the action rather than development as a whole.

203 If you are imposing one of the standard retrospective conditions, you should therefore explain not only the reason for requiring the action, but also how the condition would operate and what its effects would be. You should give the following reason for imposing the standard condition which requires the carrying out of action in a **simple** retrospective case:

[80] Details – retrospectively where PP is granted for development already carried out (long form)(34) and 'Details – retrospectively where PP is granted for development already carried out (short form) (35)'

Condition XX is imposed to ensure that [the required details] are submitted, approved and implemented so as to make the development acceptable in planning terms. There is a strict timetable for compliance because permission is being granted retrospectively, and it is not possible to use a negatively-worded condition to secure the approval and implementation of the [outstanding matter] before the development takes place. The condition will ensure that the development can be enforced against if the requirements are not met.

204 You should give the following reason for imposing the standard condition which requires action in a **complex** retrospective case:

Condition XX is imposed is to ensure that [the required details] are submitted, approved and implemented so as to make the development acceptable in planning terms. There is a strict timetable for compliance because permission is being granted retrospectively, and so it is not possible to use a negatively-worded condition to secure the approval and implementation of the [outstanding matter] before the development takes place.

The condition will ensure that the development can be enforced against if the [required details] are not submitted for approval within the period given by the condition, or if the details are not approved by the local planning authority or the Secretary of State on appeal, or if the details are approved but not implemented in accordance with an approved timetable.

205 Whether imposing the long or short-form retrospective condition, it is essential to consider not only whether it is necessary and reasonable to require the further details, but also whether the timeframe being given for the submission of those details is reasonable in the circumstances.

Changes of Use and PD Rights

206 Paragraph 53 of the Framework states that planning conditions should not be used to restrict national PD rights unless there is clear justification to do so. The PPG also advises that conditions restricting the future exercise of PD rights **and** conditions restricting future changes of use may not pass the test of reasonableness or necessity[81].

207 However, if a proposed development would only be acceptable if certain PD rights are not exercised in the future, it may be necessary and reasonable to impose a condition to withdraw those rights[82].

208 Similarly, if permission is granted for a use which falls within a use class set out in the Schedule to the Town and Country Planning (Use Classes) Order 1987 (UCO) such as a funeral director's (class A1) or crèche (class D1), a condition would have to be imposed if it is necessary to prevent a change of use to another use within the same class taking place without permission, given the provisions of s55(2)(f) of the TCPA90[83].

209 The PPG advises that the scope of conditions which restrict PD or change of use rights must be precisely defined by reference to the relevant provisions in the GPDO. Again, this applies to s55(2)(f) and the UCO.

81 PPG paragraph 21a-017-20190723
82 See, for example, model conditions 31, 32 and 33.
83 S55(2)(f) provides that 'in the case of buildings or other land which are used for a purpose of any class specified in an order…the use of the buildings or other land…for any other purpose of the same class shall not be taken to involve the development of land'; see model condition 9.

210 PD and change of use rights cannot be removed by implication; a condition stating '*no further extensions shall be made*' or '*the use is limited to…'* would not prevent the operation of the GPDO or s55(2)(f). The condition must contain some explicit restriction. The Courts have held that conditions requiring that land is 'only' used for a particular use; or is used for a particular use and 'no other'; or is used for a specific use and 'for no other purpose' do restrict change of use rights[84].

211 However, it is helpful to refer in the condition to the relevant legislative provisions so as to meet the tests of necessity and reasonableness as well as precision. This will help you to be clear as to what rights are being withdrawn, and help you ensure the appellant loses no rights beyond what is needed to make the development acceptable.

212 For example, if it is necessary to remove PD rights set out under Article 3, Schedule 2 and Part 1 of the GPDO so as to prevent the construction of further extensions to a dwellinghouse, consider whether this applies to extensions to the house permitted under Class A, extensions to roof permitted under Class B, a porch permitted under Class D and/or separate curtilage buildings permitted under Class E.

213 The PINS suite of planning conditions and DRDS include model conditions to withdraw PD and change of use rights[85]. Crucially, these conditions are carefully worded to survive any future replacement of the GPDO or UCO. They can be tailored in other respects in response to the case.

214 Any PD rights that are withdrawn by condition may be exercised before the permission is commenced – unless there is a completed planning obligation to the effect that the appellant would forego their PD rights upon the grant of the permission. If there is no such obligation but, for example, the proposed house extension subject to the appeal would only be acceptable provided that other extensions are not constructed first, the only way to prevent that would be to dismiss the appeal.

Housing Cases

Extensions and Annexes

215 See above for advice on withdrawing PD rights for extensions and alterations to dwellinghouses.

216 PD rights set out under Article 3 and Schedule 2, Part 1 of the GPDO may apply to Houses in Multiple Occupation (HMOs) with up to six (C4 use) or more than six (sui generis use) occupiers. The question is whether the HMO is a 'dwellinghouse' as a matter of fact and degree.

217 The owners of neighbouring properties will occasionally extend their houses such that each extension would be, more or less, a mirror image of the other. If it is necessary that the two houses continue to have a symmetrical or cohesive appearance, each extension may only be acceptable if the other would be carried out.

218 However, if neither of the appellants has control over the other's land, it would be unreasonable to impose conditions which require the completion

[84] *Dunoon Developments v Poole BC* [1992] JPL 936, *Royal London Mutual Insurance Society Ltd v SSCLG* [2013] EWHC 3597, *Dunnett Investments Ltd v SSCLG* [2017] EWCA Civ 192.
[85] For example, model conditions 9, 31, 32, 33, 37 and 97.

of both extensions or would prevent the occupation of one until both are completed. If it is essential that both extensions are completed, probably on visual grounds, then such appeals are likely to fail unless there is a completed planning obligation signed by the appellants in which both undertake to carry out the development as a single scheme.

219 Where it is proposed to construct an extension to or a separate building in the curtilage of a dwellinghouse, the use of the structure will normally be:

- To provide additional living space, which would be part and parcel of the primary dwellinghouse use; or
- For purposes incidental to the use of the dwelling – meaning a use that is not 'part and parcel' of but has a normal functional relationship with the primary dwellinghouse use. Examples of incidental uses are parking/garaging, garden buildings, home gyms etc.

220 As described further in the Housing chapter, where it is proposed to construct an extension or outbuilding to provide living space for a relative or other person, the use will normally be:

- Still part and parcel of the primary dwellinghouse use, because the use of the extension or annexe would be physically and/or functionally connected to the use of the main house and a new planning unit would not be created[86].
- Use as a separate dwellinghouse in a separate planning unit.

221 If an extension or outbuilding is proposed for incidental use, or for use as part of the dwelling, a condition to restrict the use will rarely be needed. Even if the development could be used as a separate dwelling and a party has raised sound planning objections to such a use, it should suffice to point out that there is no separate dwelling before you.

222 Furthermore, if following a grant of permission, the structure is not built or used as proposed, or if there is a future material change of use to create a separate dwelling, then another grant of permission would be required, and the building or use would be at risk of enforcement action if such permission is not granted.

223 There can be cases where it is proposed to construct an extension or annex that is capable of being used a separate dwelling but would in fact remain part of the main dwellinghouse because the space is required for occupation by a particular individual who is connected with (usually a relative of) the occupiers of the main house. The development will remain in place long after the need which gave rise to the application has gone. Imposing a condition to restrict the use may make the development acceptable in planning terms and thus ensure that your decision is proportionate. An appropriate condition might be:

The [extension/building] hereby permitted shall not be used other than as [part of] [and/or] [for purposes incidental to the use of] the dwelling known as [**][87].

[86] It was held in *Uttlesford DC v SSE & White* [1992] JPL 171 that self-contained accommodation with facilities for independent living was not a separate planning unit as a matter of fact and degree because it functioned as an annex with the occupant sharing living activity with her family in the main dwelling.

[87] This is a modified version of model condition 24 in the PINS suite of planning conditions and DRDS.

224 It is useful to bear in mind that the word 'ancillary' is commonly used interchangeably with 'incidental' but 'incidental' is preferred since that is used in s55(2)(d) of the TCPA90 and Schedule 2, Part 1 of the GPDO.

225 Further advice is given in the Housing and Enforcement chapters.

Affordable Housing

226 Advice on the use of conditions and planning obligations to secure affordable housing is set out in the Housing chapter.

Housing Standards

227 National planning policy is set out in:

- Paragraph 127 and footnote 46 of the Framework;
- The Written Ministerial Statement of 25 March 2015 – see paragraphs on zero carbon homes, housing standards and plan-making;
- The PPG chapter on Housing: optional technical standards – covering accessible and adaptable homes, water efficiency and space standards
- Technical Housing Standards – Nationally Described Space Standard.

228 The Housing chapter advises on the application of the above and development plan policies on housing standards in appeals casework.

229 Conditions requiring compliance with housing standards should only be imposed so far as is necessary to make the development acceptable in planning terms. For example, if the requirement is to remedy harm relating to space standards, it would be unreasonable to impose conditions relating to energy efficiency.

230 It is also important to bear in mind that conditions would be unreasonable if they would negate the benefit of the permission or could not achieved without significantly amending the scheme. If compliance with space standards is necessary but cannot be physically achieved, you may need to refuse permission.

231 PINS does not have model conditions relating to housing standards, but conditions should be drafted along the following lines bearing in mind that implementation is secured through the Building Regulations:

- **Accessibility and adaptability:** *The dwelling(s) shall not be occupied until the Building Regulations Optional requirement [x] has been complied with.*
- **Water efficiency:** *The dwelling(s) shall not be occupied until the Building Regulations Optional requirement [x] has been complied with.*
- **Space standards:** *The dwelling(s) shall not be occupied until the nationally described space standard [ref] has been complied with and the details of compliance provided to the local planning authority.*
- **Energy performance**[88]: *The dwelling(s) shall not be occupied until the relevant requirements of level of energy performance equivalent to ENE1 level*

[88] The WMS allows planning authorities to apply existing (as of March 2015) development plan policies which require compliance with (the equivalent of) Level 4 in the Code for Sustainable Homes until s43 of the Deregulation Act 2015 comes into force, serving to amend the Planning and Energy Act 2008.

4 of the Code for Sustainable Home have been met and the details of compliance provided to the local planning authority[89]*.*

Car-free Housing

232 The term 'car-free housing' is sometimes used to describe housing developments that are designed without on-site car parking spaces or facilities, and occupiers would also be prevented from applying for a permit to park nearby on-street.

233 Such developments are typically proposed in locations:

- Where the demand for on-street parking has reached a critical 'saturation' point, perhaps in a controlled parking zone **and**
- There is good access to public transport and local services, meaning that the occupiers would not be reliant on a car.

234 It should be remembered that car 'ownership' is not the same as car 'use'. People may own a car and want to park it locally even though they may not use it much and undertake most of their journeys on public transport. If it is argued that the development should be 'car free' then you will need to consider:

- What harm would arise if the development was not car-free, and whether the harm would be unacceptable, such that it is necessary to require that the development would be car-free.
- If so, whether that requirement could and should be achieved by imposing a planning condition, through a planning obligation or – if the site is in a Controlled Parking Zone – through the use of non-planning powers.

235 Car-free housing is normally secured through planning obligation. The judgments in *Westminster CC v SSCLG & Acons* [2013] EWHC 690 (Admin) and *R (oao Khodari) v Kensington and Chelsea RBC & Cedarpark Holdings Inc* [2017] EWCA Civ 333 highlight difficulties in wording obligations to directly restrict use of 'the land' to this end[90], but it is not impossible to draft an obligation so as prohibit occupation by any person holding a permit; see the Planning Obligations chapter.

236 The PPG advises that, in exceptional circumstances and where there is clear evidence that the delivery of the development would otherwise be at serious risk, a negatively-worded condition can be imposed which requires that a planning obligation is entered into the effect that the proposed housing would be car-free; this may apply in the case of particularly complex development schemes[91]. As always, the condition would have to be necessary and meet the other policy tests.

[89] Building Regulations Part L 2013 is equivalent to the former Code level 3 on energy performance.
[90] 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.
[91] PPG paragraph 21a-010-20190723

Other Conditions

Construction Management

237 It is common for planning authorities to request the imposition of a condition that requires the submission and approval of details regarding activities on the site during the construction phase.

238 There is a model condition which sets out the typical requirements for a construction management plan[92]. However, as with all conditions, the Inspector should always consider the necessity not only of the condition itself, but also of the specific requirements:

- The requirements must be relevant to planning, so you may need to consider whether appropriate control would be provided under other legislation.
- Consider whether requirements to provide, for example, wheel-washing or operatives' parking facilities would be reasonable given the size of the site and/or scale of development.
- The operatives may be able to control the use of their own vehicles on the public highway, but not how deliveries from other companies should be routed or the times such deliveries would arrive.

Opening Hours

239 It is not unusual to impose opening hours conditions, particularly on food and drink uses, but care should still be taken when drafting such conditions. Inspectors must:

- Address whether it is necessary to restrict opening hours at all and, if so, whether to restrict the hours to those suggested by the authority;
- Address whether the restriction should apply to the use or just to specific aspects of it – for example, the hours that customers are on the premises;
- Address whether the condition would be reasonable, and ensure it would not negate the benefit of the permission;
- Word the condition to be clear as to exactly what opening hours are allowed on what days – using the 24 hour clock, noting where the hours on one day would spread across to the following day, and specifying the hours where necessary for Sundays and/or public holidays.

240 There are three PINS model conditions for food and drink uses:

- Model condition 17 restricts the hours that the use would be open to customers; 'reasonable time' should be allowed for people on the premises to finish their meals and leave; *Miah v SSE & Hillingdon LBC* [1986] JPL 756.
- Model condition 18 limits the hours that customers may be on the premises, but allows for staff to remain in the building, for example, to prepare for the use or wash and clear up.
- Model condition 19 simply restricts the hours of the use. It was held in *Rees v SSE & Chiltern DC* [October 11 1994] (CO/2719/93) that this condition relates to the 'total use', meaning that no activities connected with the use can take place outside of the specified hours, including cleaning and tidying.

241 PINS has other model conditions designed where hours restrictions are required for: construction and/or demolition activities (14), industrial uses (15), deliveries (16), the playing of music (20), the illumination of adverts

[92] Condition 29 in the PINS suite of planning conditions and DRDS

(42), the use of noisy machinery or equipment (92 and 95), aircraft movements (99), petrol filling station uses (132) and commercial activities on traveller sites (171).

Caravan Sites

242 The stationing of a caravan on land is normally a material change of use of the land – as opposed to a building operation – and it is therefore crucial to define the user. Caravans may be used for residential purposes, with or without occupancy restrictions, or they may be used for storage or for purposes incidental to another use such as farming; it is also possible to use land for the storage of caravans.

243 Since the use of land will be the same regardless of the number of caravans, it may be necessary to impose a condition which restricts the number of caravans on the land; see PINS model condition 155[93].

244 Conditions may be imposed to control the occupation of caravans in residential use cases, where or how caravans are stationed on the site, and the type of caravans; see PINS model conditions 154, 156, 157, 163, 164, 165, 166, 167, 179 and 180. Some of those conditions are drafted with reference to traveller sites but could be adapted to other casework.

Ground or Finished Floor Levels

245 Where there is uncertainty about existing ground levels and/or finished floor or slab levels, particularly where the site slopes and/or in relation to adjoining buildings, this may give rise to concern about the impacts of the development – for example, on living conditions or the character and appearance of the area. In such cases, a condition may be imposed which requires the submission and approval of details of the finished levels, or even a full site survey[94].

Public Rights of Way

246 If the proposed development in a planning appeal would conflict with a public right of way (PROW), you may be asked to impose a condition which would prevent the development from taking place or being occupied until the PROW has been stopped up or diverted.

247 Such a condition would fail the test of relevance to planning and be unnecessary because any grant of planning permission does not authorise any obstruction to or interference with any PROW – whether the PROW is or is not recorded on the Definitive Map and Statement.

248 S257(1) of the TCPA90 provides for the stopping up or diversion of any footpath, bridleway or restricted byway, if necessary, to enable the carrying out of development in accordance with a planning permission by way of a Public Path Order (PPO).

249 PPOs are subject to separate regulations. Even if a PPO has been 'made' by the time of an appeal, Inspectors should not speculate as to whether the order would be 'confirmed' so as to remedy any obstruction caused by

93 If you wish to permit any use of land where the terms of the permission would otherwise allow the scale of the use to fluctuate, any limitation to numbers should be contained in a condition.

94 Model conditions 11, 12 in the PINS suite of planning conditions and DRDS

the development in the event that permission is granted; see the Public Rights of Way chapter.

250 However, paragraph 98 of the Framework requires that planning decisions should protect and enhance PROW. Subject to the usual assessments of what is necessary and reasonable in the circumstances of the case, and with regard to the restrictions to use of pre-commencement conditions, you may be able to impose a condition requiring the submission and approval of details of a PROW management scheme.

Costs Awards

This chapter deals with costs applications and costs decisions in relation to planning appeals dealt with by written representations, hearings and inquires.

What's New since the last version

Changes highlighted in yellow made on 21 February 2018:

Paragraph 15 – clarification added that when a LPAs decision making is plan-led, such a decision is unlikely to meet the test of being 'unreasonable'.

New section added clarifying the position with regard to High Court re-determinations of either the appeal or costs decisions (paragraphs 31 – 32).

Annex C1 template updated to include a revised PPG paragraph about when may costs may be awarded.

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Information Sources

Planning Practice Guidance: Appeals – The award of costs - general

Gov.uk – Claiming Planning Appeal Costs

Legislation and guidance

1. The legislation underpinning costs awards in planning-related proceedings under the Town and Country Planning Act 1990 is:

   Section 320 – This section incorporates s250(5) of the Local Government Act 1972 into the 1990 Act[1] and by doing so allows orders as to costs to be made by Inspectors in circumstances where a **local inquiry** has been held.

   Section 322 – this section applies the costs regime (as set out in s320 above) for orders as to costs to be made by Inspectors in **hearings and written representations** appeals in the same way as it applies to local inquiries.

   Section 322A – this section allows orders as to costs to be made where a local inquiry or a hearing has been scheduled but the inquiry or hearing does not take place.

   Section 322B – this section applies the costs regime (as set out in s320 above) for orders as to costs to be made by Inspectors in circumstances where a local inquiry is held as a result of the London Mayor directing refusal of a planning application.

2. Guidance can be found in the Planning Practice Guidance (PPG) Section 16: Appeals, The award of Costs – general[2].

Introduction

3. This chapter deals with costs applications and costs decisions in relation to planning appeals by written representations, hearings and inquiries cases. The principles governing applications for an award of costs and the basis of such an award are the same irrespective of how the appeal is processed. Please note that costs applications for other casework types dealt with by PINS may proceed under different legislation/guidance.

4. This training material applies to English casework only[3].

What is an award of costs?

[1] For the Planning (Listed Buildings and Conservation Areas) Act 1990, section 89 incorporates s250(5) of the Local Government Act 1972.

[2] Which replaced DCLG Circular 03/2009: Costs Awards in Appeals and Other Planning Procedures

[3] In Wales WO Circular 23/93 applies and PINS Wales have produced separate material on the policy differences. Any guidance required in addition to WO Circular 23/93 should be raised direct with PINS Wales.

5. An award of costs is an order which states that one party shall pay to another party the costs, which may be in full or in part, which have been incurred by the receiving party during the process by which the Secretary of State's or Inspector's decision is reached. The costs order states the broad extent of the expense the party can recover from the party against whom the award is made. It does not determine the actual amount[4].

General Principles

6. Parties in planning appeals and other planning proceedings normally meet their own expenses.

7. The costs regime is intended to support a well-functioning appeal system and encourage proper use of the right of appeal. It is aimed at ensuring that all those involved in the appeal process behave in an acceptable way and are encouraged to follow good practice, whether in terms of timeliness or in quality of case.

8. The appeal decision will not be affected in any way by the fact that an application for costs has been made; the two matters are entirely separate. Accordingly, it is possible for costs to be awarded against the 'winning' party to an appeal.

When can costs be awarded?

9. Costs will normally be awarded where the following conditions have been met:

    - a party has made a timely application for an award of costs;
    - the party against whom the award is sought has **behaved unreasonably**; and
    - the unreasonable behaviour has caused the party applying for costs to incur **unnecessary or wasted expense** in the appeal process.

What are the deadlines for making an application?

10. The procedures for costs applications are not statutory, so while there are strict deadlines[5] for making an application for costs there is discretion to accept applications outside the time limits set. However, anyone making a late application for an award of costs will need to show good reason for having made the application late, if it is to be accepted for consideration.

[4] Planning Practice Guidance ID: 16-027-20140306.
[5] PPG ID: 16-035-20140306

For a costs application to be timely it should be made:

- orally at a hearing or inquiry – before it closes;
- in writing[6] – at the same time as a householder, commercial or tree preservation order appeal is made by the appellant (14 days from the 'start date' letter for the LPA) – or no later than the final comments stage for all other appeals determined via written representations;
- In relation to conduct at a site visit – no later than 7 days from the date of the site visit; and
- In relation to a withdrawn appeal or enforcement notice – no later than 4 weeks from the Inspectorate's notification of the withdrawal.

Who can apply for an award of costs and who can have costs awarded against them?

11. Local planning authorities, appellants and interested parties who have taken part in the process, and exceptionally the Mayor of London. Also statutory consultees where the power to direct a planning authority to refuse permission has been exercised or where they are party to an appeal. A party applying for costs may have costs awarded against them, if they themselves have behaved unreasonably.

12. An application for an award of costs may be for a full award of costs, or a partial award of costs.

What is unreasonable behaviour?

13. "Unreasonable" is used in its ordinary meaning as established by the Courts in Manchester City Council v SSE & Mercury Communications Limited [1988] JPL 774, and not in the stricter public law definition of "Wednesbury" unreasonable.[7]

14. Unreasonable behaviour can be either substantive (relating to the merits of the appeal) or procedural (relating to the process) in nature. The Inspector has discretion when deciding an award to take into account extenuating circumstances.

[6] While a form for use in applying for costs in writing is available on .GOV.UK, this is not a requirement and applications can be made by letter.
[7] TM: "The role of the Inspector", paragraph 13 sets out what Wednesbury unreasonableness is ie a decision that is so unreasonable that no reasonable authority would ever consider taking it.

15. Examples of unreasonable behaviour that may lead to an award of costs against appeal parties (LPA, appellant, Statutory consultees and interested parties) are given in the PPG[8] and may concern (this list is not exhaustive):

- non-compliance with procedural requirements;

- failure by the planning authority to substantiate a stated reason for refusal of planning permission (the planning authority must be able to show that it had a reasonable basis for its stance, even though it may have lost the appeal or failed to win on that particular ground). When an LPA refuses a planning application because it is contrary to the provisions of the development plan (for example, retail to restaurant in a prime shopping frontage) the LPA is exercising its Planning and Compulsory Purchase Act 2004 section 38(6) duty, giving reasons which are entitled to some weight and such a decision is therefore unlikely to meet the test of being 'unreasonable'[9];

- planning authority clearly failing to have regard to government policy or its own adopted policies;

- appellant pursuing a clear "no hope" case, for instance inappropriate development within the Green Belt without very special circumstances advanced, or development plainly in conflict with the development plan without material considerations to the contrary; and

- the withdrawal of an appeal, late cancellation of an event or withdrawal of an enforcement notice.

What is unnecessary or wasted expense?

16. Applicants[10] will need to demonstrate clearly how any alleged unreasonable behaviour has also resulted in unnecessary or wasted expense - in order for an application to succeed. No details of actual expenditure are required but the kind of expense or time should be identified in broad terms to assist the parties in settling the amount:

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[8] PPG ID: 16-046-20140306 to 16-056-20140306

[9] A recent Court case, where the Secretary of State submitted to judgment, illustrates that an Inspector exercising planning judgement and weighing all matters in the balance can take a different view from the LPA on the same planning decision and (in this respect) the main appeal decision was not challenged. However, in determining a linked costs application it was incumbent on an Inspector to remember that the starting point of decision-making is plan led, and where that was shown to be the case, a Court challenge to an Inspector's award of costs against the Council on grounds of unreasonable behaviour was considered likely to succeed.

[10] Note: in costs decisions "the applicant" is the party applying for costs and can be either party.

- expense should be identifiable or capable of being quantified;
- expense may be wasted because the entire appeal could have been avoided;
- expense may be unnecessary because time and effort was expended on a part of the case that should not have had to be pursued;
- the power to award costs relates to costs necessarily and reasonably incurred in the appeal process[11]. For an appellant, typically the costs of employing an agent to submit the appeal and represent them throughout the process. For a planning authority, costs will be typically incurred in resisting the appeal and defending its decision (or stance, in "failure to determine" cases);
- awards cannot extend to compensation for indirect losses (eg delay in obtaining planning permission); and
- any unnecessary costs should relate to the appeal process.

17. Annex A provides some key judgments concerning the general principles outlined above.

When may Inspectors initiate[12] an award of costs?

18. In order to support an effective and timely planning system in which all parties are required to behave reasonably, you may on your own initiative[13] make an award of costs, in full or in part, if you consider a party has behaved unreasonably resulting in unnecessary expense and another party has not made an application for costs against that party.

19. You must not announce at the hearing or inquiry that you are considering making an award of costs as this may be perceived as pre-determination of the appeal.

20. After the event, if you are considering an award of costs, you should contact the Costs and Decisions Team (CDT) at the same time as sending

[11] Costs of the planning application are ineligible, but the LPA behaviour in dealing with the application may have a bearing on the award of costs. Advice about the role of the Local Government Ombudsman in relation to allegations against LPAs is in Annex B.
[12] Note - Costs may be awarded at the initiative of the Inspector in relation to planning appeals received on or after 1 October 2013 (including appeals relating to lawful development certificates, listed buildings, enforcement and planning obligations) and called-in planning applications where the date of the call-in letter is 1 October 2013 or later.
[13] PPG ID: 16-036-20140306

the appeal decision in for issuing. CDT should be provided with a draft letter stating that you are considering whether to make an award of costs against a party and setting out the reasons for considering that there may have been unreasonable behaviour leading to unnecessary or wasted costs, and inviting comments by a deadline to be set by CDT. CDT will issue letters to the parties and monitor the timetables. This letter should be sent for comment to the relevant party only, within one week of the issue of the appeal decision, at the latest.

21. If you are a Salaried Inspector you must inform your case officer so that you can be allocated the appropriate reporting time. Any Non-Salaried Inspectors will need to ask NSI CMU to authorise allocation of the appropriate reporting time.

22. Any costs award should be drafted in the usual way using the most up-to-date guidance. A dummy Inspector initiated cost award is at Annex C1.

23. CDT will write to the relevant party to confirm the decision to award costs and copy any party who has the benefit of the award. It is important that if, having initiated the costs award process, you decide not to make an award, you should ask CDT to write to the party to confirm that, having considered all of the evidence, no award is being made.

24. To date this power has been rarely used and it is advisable to discuss with your SGL first.

An application for a full award of costs

25. An application for a full award of costs:

- relates to the applicant's whole costs of the statutory process, including submission of the appeal statement and supporting documentation (including the expense of making the costs application); and

- could be granted in full, refused or allowed in part *(even if the applicant has applied for a full award and has made no specific reference to a partial award).*

An application for a partial award of costs

26. An application for a partial award of costs:

- may be made in appropriate circumstances, for instance where the application relates only to one ground of refusal, or to a particular

aspect or part of the appeal process up to (or after) a specified date;

- in such cases, an award of costs would be limited to the expense caused by the unreasonable behaviour identified, e.g. the time and effort expended on pursuing that particular part of the case (you do not have to define the specific amount of any award); and

- may be allowed in the terms of the application; refused; or allowed in part (ie a smaller partial award than that sought may be made).

Costs Order

27. A costs award, where justified, is an order which can be enforced in the Courts:

    - it states that one party shall pay to another party the costs, in full or in part, which have been incurred during the appeal process;

    - the costs order states the broad extent of the expense the party can recover from the party against whom the award is made;

    - it does not determine the actual amount (however, where a full award has been sought but partial costs awarded, you must be specific as to what failing is being awarded against); and

    - settling the amount is for subsequent agreement between the parties. In the event of failure to agree a sum, the successful party can apply to the Senior Courts Costs Office for independent assessment[14].

Inspector's Task

28. Assuming that an application has been made in a timely fashion the task before you is to judge whether there has been unreasonable behaviour on the grounds claimed, resulting in unnecessary or wasted expense with reference to the guidance in the PPG. Costs decisions are taken on the balance of probability. This is an entirely separate matter to the appeal decision, although a costs decision should be logically consistent with the appeal decision.

29. You are only concerned with the principle of whether costs should be awarded and not the amount. Should one party deny that the other has incurred unnecessary expense, you need to be satisfied that it has occurred because even if unreasonable behaviour is evident, both tests need to be met.

[14] PPG ID: 16-044-20140306

Costs and Decisions Team

30. Most costs applications are determined by Inspectors in conjunction with transferred appeals. However, the Costs and Decisions Team (CDT) also deal with a range of costs casework in England on behalf of the Secretary of State under delegation arrangements[15] following an exchange of written comments from the parties. CDT make decisions on costs applications in a variety of circumstances including:

    - the admissibility of "late" applications for costs[16];
    - where an appeal or enforcement notice has been withdrawn and the appeal is not decided[17] or circumstances leading to no further action being taken on an appeal;
    - where the appellant (or LPA) fails to attend the hearing/inquiry/site visit;
    - where there are unusual or novel issues indicating that the costs decision is more appropriately taken by the Secretary of State on the basis of an Inspector's costs report;
    - when the party against whom the application is made is not present[18];
    - re-determination of a freestanding costs application resulting from a successful High Court challenge[19].

[15] In Wales these duties are carried out by the Wales Assembly Government.
[16] PPG ref ID: 16-035-20140306– applications made after the stated time limits, summarised in "What are the deadlines for making an application" within this TM.
[17] PPG ref ID: 16-042-20140306 – If the appeal or enforcement notice is withdrawn without sound reason (ie a material change in circumstances relevant to the planning issues) or with avoidable delay, giving rise to unnecessary or wasted expense for another party, an application for costs can be made. Such applications should be made in writing to CDT no later than 4 weeks after receiving confirmation from PINS or the local planning authority that no further action is being taken.
[18] PPG ref ID: 16-047-20140306 and 16-052-20140306
[19] Please note that where successful High Court challenges have been made to **both** an appeal decision and a related costs decision C&DT do not need to get involved in the re-determination of a costs application – the relevant Inspector can deal with it with a view to issuing the re-determined costs decision at the same time as the decision on the re-determination of the appeal. But please bear in mind that Inspectors are also responsible, via a separate decision letter, for deciding any fresh application for costs made solely in connection with appeal re-determination proceedings e.g. procedural misconduct at an inquiry (see section below on High Court Re-determinations).

High Court Re-determinations

31. Appeal and costs decisions are two separate decisions for which (usually) separate challenges must be made if both the decisions are to be quashed and re-determined. If only the appeal decision is successfully challenged, and unless the Court judgment clearly states that the Inspector's costs decision is also being quashed and remitted to the SoS for re-determination, **the original costs decision remains extant and cannot be revisited** even if, in the context of re-determining the appeal, it seems odd.

32. However, you can entertain a fresh costs application made solely in connection with the re-determination of the appeal decision (as opposed to the need for the original costs decision to be re-determined following a successful challenge to that costs decision). It is important that any such costs determination does not stray into matters previously addressed in the earlier, and still extant, costs decision. In practice this is likely to relate only to procedural misconduct for the period post the High Court in the re-determination proceedings.

33. Re-determination of costs applications where there is no related redetermination of an appeal are usually dealt with by CDT.

Can a claim for an award of costs be withdrawn?

34. Yes, if the party who applied for an award of costs formally notifies the Planning Inspectorate of the withdrawal. However, this does not prevent another party from seeking costs, nor the potential for an Inspector to initiate an award against either party.

Procedural matters (written representations: PCO)

35. The costs application will be made by written submissions and all the costs correspondence will be found in the 06 Costs Folder of the Inspector E File. For hearing appeals the costs correspondence may also be placed in a yellow folder on the right hand side of the paper file.

36. When a timely costs application is made, the Case Officer will invite the other party to respond within 7 days, giving the applicant a further 7 days for final comment on the response, before the decision can be issued (the applicant always has the opportunity to make a final reply in writing).

37. The Case Officer will check correspondence received to identify either an application for costs or any costs response and, where possible, this will be

added separately to the 06 Costs Folder (yellow folder within paper file for hearing/inquiry cases). If the costs application or response is contained within another document such as the full statement of case then the case officer will rename the document to include COSTS as a suffix i.e: 02 STATEMENT AND APPENDICES AND COSTS (or attach a costs flag to the hard copy document on the paper file for hearing/inquiry cases).

38. Whilst the Case Officer will aim to identify and put all of the costs application material in the 06 Costs Folder/yellow folder, you will need to satisfy yourself that you have had regard to all the relevant costs material when writing the decision.

39. Costs applications in relation to appeals following the expedited written representations "householder appeal" procedures (HAS) and the "minor commercial appeal" procedures - including advertisement appeals (CAS) are dealt with by Inspectors within the time allocated for the HAS/CAS appeal. However, if dealing with a costs application takes a substantial amount of time – then additional time can be charted (discuss you're your SGL/SIT).

40. You should decide all costs applications in non-HAS/CAS cases where the application has been received by the deadline for final comments. Applications received after this deadline will be dealt with by CDT. CDT will also deal with any applications which concern conduct at the site visit whether or not received within 7 days of the event. To assist CDT you should record in a file note what happened at the event.

41. It is usual practice, where possible, to issue the appeal and costs decisions at the same time. However, given the tight targets for HAS/CAS appeals, it can be acceptable although not advisable (because of the associated risk of prompting further costs submissions) to issue the appeal decision first, so that the target is met.

Procedural matters (inquiries and hearings)

42. The PPG[20] states that all costs applications must be formally made and heard before the inquiry or hearing is closed. You should therefore indicate in opening the event that any such application should be made before closure of the inquiry/hearing or before departure to a site visit. Before closing the inquiry/hearing ask if there are any applications for costs (unless advanced written warning of a costs application has already been made – see paragraphs 43 to 45 below). Check that the parties have nothing further to add and that there are no other matters they wish to

[20] PPG ref ID: 16-035-20140306, 3rd bullet

raise. It is not advisable to try and hear a costs application on site and it is best to avoid the inconvenience of having to return to the venue.

43. **Oral applications** – ideally, as a matter of best practice, the grounds for seeking an award of costs should be made in writing (see paragraph 43 below). However, if an application is made orally without prior written warning it must still be raised and dealt with at the inquiry/hearing, and it may be necessary to allow the parties a short period of thinking time (eg 10/15 minutes) to prepare their oral response. If both parties make applications these should be heard or taken one after the other.

44. When a costs application is made, or an advance application supplemented in the light of events 'on the day', the other side should always be given the chance to respond - ensuring that the party against whom the costs application is being made is able/capable of responding (ie where a junior officer is present and is not able/authorised to respond). The costs applicant should be given the chance to make any final comments on any new points raised. You will need to take full notes. In most cases this process need not lead to an adjournment for a response to be prepared, but it may be necessary, in certain instances, in the interests of fairness.

45. Only in **very exceptional** circumstances where a different approach is required (ie where it is not practical to hear an application and/or response at the event) you may use your discretion (sparingly) to allow written costs submissions - the PPG being guidance not statute. In such exceptional cases you should give very clear guidance as to what is required, what will be accepted and by when. This avoids a paper chase and or revisiting any of the appeal evidence. **You will also need to ensure that the appeal decision is not issued before the costs submissions process is complete.**

46. **Advance written submissions on costs received from both sides** – Where a party has indicated their intention to make a costs application during the processing of the appeal the case officer will invite written submissions before the event. If it is not possible to complete the process of receiving a response/final response the case officer will inform the parties that responses can be provided at the oral event. You should review the relevant costs correspondence in the 06 Costs Folder/yellow folder

47. Check if the submissions have been fully exchanged and that there is nothing to add. If you and both sides have had adequate opportunity to read and understand the written submissions there is no need for these to be read out as a matter of course. The making of a costs application should not take up hearing or inquiry time because the written submissions can simply be taken as read and appended to the file.

48. **If only the applicant has produced something in writing in advance** (see paragraph 43 above) - if given to the other party beforehand you should check that there is nothing to add before inviting the respondent to reply orally and then allowing the applicant to have the 'final say' on any new point raised. Should the respondent not have received the written submission in advance you should ensure that sufficient time is allowed for this to be absorbed and a response prepared. Time may also be needed for you to read it and, in these circumstances, an adjournment may be required.

49. **Application at site visit** – where an inquiry or hearing is kept open for a site inspection and a party then makes an application, in the interests of fairness you would have to determine if the relevant party could reasonably hear and respond to the application on site. If not, and they require time to consider the application, it may be that an adjournment is required before meeting back at the original venue or somewhere else suitable to properly hear the application and response.

50. **Hearing or inquiry resumed on another day** - any costs applications should be heard at the end of the resumed event. It should also be briefly recorded in the Preliminary Matters section (this is to assist CDT if any costs application is made after the close of the hearing). If the appeal is withdrawn before it resumes then a note should be placed on the file to also cover this eventuality.

51. **Costs application made against a party who fails to attend the inquiry/hearing** – you should hear the costs application but it would be unfair to proceed, in the absence of hearing a response to the costs application, to decide the costs application yourself. In such cases you should submit a costs report (to the Secretary of State) for the attention of the CDT (for more information see paragraph 30). The report should summarise the costs application and record (if appropriate) your tentative conclusions, however, you should **not** make any recommendation on costs – no firm conclusions can be drawn in the absence of considering any response to the costs application.

Charting arrangements

52. You will normally be charted half a day per costs application (except for HAS/CAS appeals).

53. For inquiry and hearings cases where applications are not known about in advance of the event, you should 'claim' reporting time by e-mailing the Case Officer and by adding an entry to your Movement and Work Record (MWR). This will be added to your work programme at the earliest available opportunity.

54. For inquiry and hearings cases where costs applications are made in advance, time will be allocated as part of the reporting on the case.

55. In written representations cases, costs reporting time will be added as soon as the Case Officer is made aware of the costs application. The reporting will be charted as close to the site visit as possible taking into account the latest deadline for comments on the costs application.

Writing the Decision

56. The appeal decision should include a reference to the costs decision at the outset. This is to indicate that an application for costs has been made and is (or will be) the subject of a separate decision.

57. The relevant costs decision template can be selected from DRDS (see "Which decision template should I use?"), and a costs decision template is shown at Annex C.

58. If a late application has been accepted the decision should say why.

59. Costs do not follow the appeal outcome. However, costs decisions should be consistent with the appeal decision. Address the points made by the applicant one by one and reach a view on them, referring to, where necessary, relevant sections of the PPG.

60. For an award to be made the two parts of the test have to be met – unreasonable behaviour that also results in unnecessary or wasted expense. It therefore follows that the costs decision must specifically address, and clearly conclude on, these two questions.

61. In written representations cases the application and response[21] will have been submitted in writing and will already be a matter of record. There is therefore no need to rehearse the cases of the parties before setting out the reasoning.

62. Your reasoning should address the applicant's arguments as to why costs should be awarded, taking into account the counter arguments made in response by the other party. This reasoning should lead logically to your conclusion

63. The same principle applies in hearing and inquiry cases. However, the gist of any additional oral submissions should be noted. It may also help the

[21] Where a party has given advance written warning of an intention to apply for costs and has clearly set out the basis for the claim, their case will be strengthened if the opposing party is unable to, or does not offer evidence to counter the case (PPG ID: 16-038-20140306).

sense of the decision if a very brief indication is given of the matters raised but this is not essential.

64. If both submissions were made verbally then these should be summarised as part of the decision to ensure that there is a record of them.

65. In Secretary of State casework, as well as following the above advice, the costs report should also record any written submissions in the list of inquiry documents appended to the main report. These should be cross-referenced at the start of the costs report and placed on the file.

66. If an application is made for a full award but does not succeed, then consideration should also be given in the same decision as to whether only a partial award is justified. As a general rule guard against making a full award of costs (as opposed to a partial award) against a successful appeal party[22].

67. If full and partial awards are sought as alternatives, deal with these in one decision but distinguish clearly between them.

68. You may have to disentangle the moment at which unreasonable actions 'kicked in' as opposed to the normal costs of undertaking an appeal. Specify in your decision in broad terms, what were the matters on which costs were expended unnecessarily or were wasted. If a partial award is made then the extent of that award should be clearly specified - this may require explanation about the time in the appeal process when the unreasonable behaviour led directly to unnecessary expense.

69. If both main parties apply for an award against each other you can deal with these in one decision letter (but remember to conclude separately in relation to each application and to give a separate decision on each application). Alternatively, it might be more straightforward to deal with them as separate decisions.

70. Give clear reasons for your findings and be sensitive to the losing party (if they have lost the planning appeal this will be an added blow). Bring in the evidence given to you to back up what you say and ensure that your costs decision is 'on all fours' with the appeal decision.

Statutory consultees

[22] For example it would seem illogical to make a full award of costs against an appellant, on grounds of an unreasonable appeal, in circumstances where the appeal is allowed. But a partial award could be made for an element of unreasonable behaviour e.g. causing an adjournment of a hearing/inquiry.

71. Statutory consultees[23] play an important role in the planning system: local authorities often give significant weight to the technical advice of the key statutory consultees. Where a local planning authority has relied on the advice of the statutory consultee in refusing an application, they may wish to request that the consultee in question attends the event, or makes written representations to substantiate its advice as an interested party. In doing so this would make the statutory consultee a party to the appeal.

72. When the statutory consultee is a party[24] to the appeal, they may be liable to an award of costs to or against them. However, if they have not been party to the appeal then usually the LPA are the only party against whom an award can be made. You may wish to discuss the matter with the CDT before proceeding to a decision on the costs application.

Mayor of London Direction

73. Where the Mayor of London[25] (or any other statutory consultee) exercises a power to direct a planning authority to refuse planning permission, this party will be treated as a principal party at the appeal, and may be liable for an award of costs if they behave unreasonably or have an award of costs made to them.

Third parties

74. The definition of a third party[26] includes a participating Government Department[27].

75. Interested parties who choose to be recognised as Rule 6 parties under the inquiry procedure rules may be liable to an award of costs if they behave unreasonably. They may also have an award of costs made to them. See the Planning Inspectorate guide on Rule 6 for more detail.

76. It is not anticipated that awards of costs will be made in favour of, or against, other interested parties, other than in exceptional circumstances[28]. An award will not be made in favour of, or against interested parties, where a finding of unreasonable behaviour by one of

[23] PPG ID: 16-055-20140306
[24] s322(2) of the 1990 Act now states "The Secretary of State has the same power to make orders under section 250(5) of the Local Government Act 1972 (orders with respect to the costs of the parties) in relation to proceedings in England to which this section applies which do not give rise to a local inquiry as he has in relation to a local inquiry"
[25] S322B of the 1990 Act makes special provision for a award in the circumstances of a direction to refuse planning permission by the Mayor of London.
[26] PPG ID: 16-056-20140306
[27] Following commencement of Part 7, Chapter 1 of the Planning and Compulsory Purchase Act 2004, which ended the Crown's immunity from the planning system, Crown bodies are no longer immune in principle to an award of costs.
[28] PPG ID: 16-056-20140306

the principal parties relates to the merits of the appeal. However an award may be made in favour of, or against, an interested party on procedural grounds, for example where an unnecessary adjournment of a hearing or inquiry is caused by unreasonable conduct. In cases dealt with by written representations, it is not envisaged that awards of costs involving interested parties will arise.

Called-in planning applications

77. A "called-in" planning application places the parties in a different position from that in a planning appeal. The local planning authority is not defending a decision to refuse planning permission, or a failure to determine the application within the prescribed period.

78. In these circumstances, it is not envisaged that a party would be at risk of an award of costs for unreasonable behaviour relating to the substance of the case or action taken prior to the call-in decision. However, a party's failure to comply with the normal procedural requirements of inquiries, including aborting the process by withdrawing the application without good reason, risks an award of costs for unreasonable behaviour[29].

Non-planning casework

79. It may be possible to apply for an award of costs in regard to appeals under legislation made by other Government departments. An illustrative list of case types (covering most planning and examples of other case types) where costs may be sought is available on the GOV.Uk site (here) and is reproduced at Annex D.

Which decision template should I use?

80. The appeal decision should refer to the costs application (using the standard paragraph) making clear costs is the subject of a separate decision.

81. The relevant costs decision template should be selected from DRDS options:

    Costs Decision – w rep
    Costs Decision – I/H

[29] PPG: Reference ID: 16-034-20140306

Costs report

An example decision template is shown at Annex C.

Annex A: Relevant Court decisions

Meaning of 'unreasonable' in the costs context

Manchester CC v SSE and Mercury Communications, 1988 JPEL 774. This case established that the word "unreasonable" has its ordinary meaning for the purposes of a costs award. It can be distinguished from the higher public law test for the courts namely unreasonable in the Wednesbury sense taken from the case of **Associated Provincial Picture Houses v Wednesbury Corporation (1948 1 QB 223).**

Ealing R v Secretary of State for the Environment ex parte London Borough of Ealing [1999] EWHC Admin 345, in which Sullivan J stated that because of the discretionary nature of the award of costs by an Inspector, and the fact that the Inspector would be in the best position to judge whether a party had acted unreasonably, it would only very rarely be proper for this court to intervene and strike down a decision.

The Ealing case was followed by a number of cases including;

R (Mole Valley DC) v SSETR [2000] WL and R v SSCLG ex parte Stratford upon Avon DC [2014] unreported – The court approved the Ealing case stating the Inspector is best placed to advise whether a party has acted unreasonably

Partial awards and reasons

R v SSE, ex Parte North Norfolk DC (12 July 1994) - In dismissing the appeal on one main ground the Inspector had nevertheless awarded (partial) costs in relation to the Council's refusal of the other two main grounds (density and amenity). But there were no clear and intelligible reasons for the award. The question for the Inspector should have been not just that there was insufficient evidence to substantiate those two grounds but also how it was that the Council had acted unreasonably. (Link to judgment)

Scrivens v SSCLG [2013] unreported - In making a partial award of costs to the Council on the basis of (an unreasonably large) quantity of evidence produced by the Appellant, the Inspector should have indicated the proportion of evidence upon which that award was based. In the absence of such an indication the decision had to be quashed.

Annex B: The Local Ombudsman

Role of the Local Ombudsman

There may be allegations which suggest the basis of a complaint to the Local Ombudsman - on grounds of alleged maladministration by the LPA at the planning application stage or in handling a previous application; or perhaps the appellant says they have already made a formal complaint.

The Local Ombudsman regards the costs regime as a way of enabling complaints against an LPA's handling of a planning application to be resolved satisfactorily. This is because at that stage the applicant still has the remedy of exercising their statutory right of appeal against a refusal or failure to determine, and can apply for an award of costs as part of that statutory process.

For this reason, if allegations are included in a costs application suggesting maladministration by the LPA, they should not simply be "ruled out" on the ground that they are a matter for the Local Ombudsman. However, if an applicant for costs does not mention the Local Ombudsman, neither should the Inspector. If the Local Ombudsman is referred to then this should be recorded (unless the application is made in writing) but need not be specifically referred to in the Inspector's conclusions. However, any allegations should be considered against the advice in the PPG[30].

The power to award costs is limited to those necessarily and reasonably incurred in the appeal process (see PPG[31]). So expense incurred at application stage, or any indirect expenses, cannot be recovered by an award of costs in any event.

[30] Planning Practice Guidance ID 16-046-20140306 to 16-050-20140306
[31] Planning Practice Guidance ID 16-032-20140306

Annex C: Costs Decision Template

The Planning Inspectorate

Costs Decision

Site visit made on [insert date]

by [insert Inspector's name and qualifications]

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

Decision date:

Costs application in relation to Appeal Ref: [insert ref]
[insert address]

- The application is made under the Town and Country Planning Act 1990, sections 78, 322 and Schedule 6, and the Local Government Act 1972, section 250(5).
- The application is made by Name 1 for a [partial] [full] award of costs against Name 2.
- The hearing was in connection with an appeal against the [refusal of] [failure of the Council to issue a notice of their decision within the prescribed period on an application for] [grant subject to conditions of] planning permission for [ ].

Decision

The application for an award of costs is allowed in the terms set out below. – **Or**:

The application for an award of costs is refused.

Reasons

The Planning Practice Guidance advises that costs may be awarded against a party who has behaved unreasonably and thereby caused the party applying for costs to incur unnecessary or wasted expense in the appeal process. (DRDS, *PINS Help menu - Costs Circulars – England)*

[insert reasoning]

I therefore find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the Planning Practice Guidance, has been demonstrated and that a [full][partial] award of costs is justified. – **Or**:

I therefore find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the Planning Practice Guidance, has not been demonstrated.

Costs Order [where awarding costs]

In exercise of the powers under section 250(5) of the Local Government Act 1972 and Schedule 6 of the Town and Country Planning Act 1990 as amended, and all other enabling powers in that behalf, IT IS HEREBY ORDERED that [full name or respondent] shall pay to [full name of applicant], the costs of the appeal proceedings described in the heading of this decision [limited to those costs incurred in]; such costs to be assessed in the Senior Courts Costs Office if not agreed.

The applicant is now invited to submit to [person/body awarded against], to [whom] [whose agents] a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount.

[insert name] INSPECTOR

Annex C1: Inspector initiated Costs Award template

The Planning Inspectorate

Costs Award

Inquiry opened on [insert date]

Site visit made on [insert date]

by [insert Inspector name and qualifications]

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

Award date:

Costs award in relation to Appeal Ref: [insert ref]
[insert address]

- The award is made under the Town and Country Planning Act 1990, sections 174, 320 and Schedule 6, and the Local Government Act 1972, section 250(5).
- The appeal was made by YYYY against an enforcement notice issued by ZZZZ District Council.
- The inquiry was in connection with an appeal against an enforcement notice alleging the erection of rear roof extensions to the main roof of the dwelling house and to the roof of the two storey rear wing, including raising the ridge of the main roof of the property, and the erection of a roof extension on the rear wing.
- The inquiry sat for[x] days from [x] to [x] 20xx.
- **Summary of award: A partial award is made against the appellant.**

Procedural matters

1. Following the issue of my decision on [x] the Planning Inspectorate's Costs and Decision Team (CDT) wrote to the appellant to say that I was considering whether to make an award of costs against the appellant, because the appellant had pursued an appeal on ground (c) where there was no evidence to support the appellant's case, and in consequence there was no need for a Public Inquiry. Ground (c) is concerned with whether the matters alleged in the enforcement notice (if they occurred) do not constitute a breach of planning control.

2. The appellant responded in accordance with the timetable CDT set out.

The response by the appellant

3. The appellant had raised all along the fact that the Council had never responded to any correspondence, and for that reason an Inquiry was necessary, to find out what the evidence really was.

4. The appellant agreed that ground (c) should not have been pursued if there was compelling evidence that it was not permitted development. It was for the Council to have supplied this evidence in advance so that a sensible appellant would have said they would not continue. The Council did not do so and the appellant had no choice but to continue with the Inquiry.

Reasons

5. The Planning Practice Guidance advises that costs may be awarded against a party who has behaved unreasonably and thereby caused another party to incur unnecessary or wasted expense in the appeal process.

6. It is clear from the evidence that …

7. … For all of these reasons the development cannot be considered to be permitted development under The Town and Country Planning (General Permitted Development) (England) Order 2015.

8. I therefore conclude that the appellant had no reasonable prospect of success on the ground (c) appeal, and I therefore find that unreasonable behaviour resulting in unnecessary or wasted expense has been demonstrated, and that a partial award of costs is justified. As the consequence of pursuing the ground (c) appeals an Inquiry was held; it was the sole reason for holding an Inquiry, a request which was made by the appellant and for the reasons given accepted by The Planning Inspectorate. In the event, based on the Criteria set out in Annexe K of Planning Appeals – England dated 23 March 2016, the appeal on the planning merits would normally have been dealt with by Written Representations, and I therefore consider that the unnecessary and wasted expense for the Council in preparing for and attending a Public Inquiry is also to be part of the award of costs.

Costs Order

9. In exercise of the powers under section 250(5) of the Local Government Act 1972 and Schedule 6 of the Town and Country Planning Act 1990 as amended, and all other enabling powers in that behalf, IT IS HEREBY ORDERED that [the appellant] shall pay to [the Council] the costs of the appeal proceedings described in the heading of this award limited to those costs incurred in dealing with the appeal on ground (c), and the costs of preparing for and attending a Public Inquiry over and above preparing for and attending a Written Representations appeal; such costs to be assessed in the Senior Courts Costs Office if not agreed.

10. [The Council] is now invited to submit to [the appellant], to whose agent a copy of this award has been sent, details of those costs with a view to reaching agreement as to the amount.
[insert name] INSPECTOR

Annex D: Illustrative list of case types for which costs awards are available

It may be possible to apply for an award of costs in regard to appeals under legislation made by other Government Departments. An illustrative list of case types (covering most planning and examples of other case types) where costs may be sought is available on the GOV.Uk site (here) and is reproduced below:

Case types under the Planning Acts
Unless otherwise stated, costs applications can be made irrespective of procedure

1. Planning appeals under section 78 Town and Country Planning Act 1990 [TCPA]
2. Planning applications referred to the Secretary of State under section 77 TCPA
3. Enforcement appeals under section 174 TCPA
4. Listed building enforcement appeals under section 39 Planning (Listed Buildings and Conservation Areas Act 1990 [P(LB&CA)A]
5. Lawful development certificate appeals under section 195 TCPA
6. Advertisement appeals under 78 TCPA and the Town and Country Planning (Control of Advertisements) (England) Regulations 2007
7. Tree preservation order appeals under section 78 TCPA and Regulations
8. Tree replacement enforcement notice appeals under section 208 TCPA and Regulations
9. Listed building consent appeals under section 20 P(LB&CA)A
10. Listed building enforcement notice appeals under section 39 P(LB&CA)A
11. Listed building consent applications referred to the Secretary of State under section P(LB&CA)A
12. Conservation area consent applications referred to the Secretary of State under section 74 (2)(a) P(LB&CA)A
13. Conservation area consent appeals under section 74 (3) P(LB&CA)A
14. Conservation area enforcement appeals under section 74 (3) P(LB&CA)A
15. Purchase notices referred to the Secretary of State under sections 139 and 140 TCPA
16. Listed building purchase notices referred to the Secretary of State under sections 33 and 34 P(LB&CA)A
17. Orders under section 257 or 258 TCPA relating to public rights of ways affected by development (*Note: exceptionally, awards are available in these cases only if inquiry or hearing is held)*
18. Appeals under section 22 of, and Schedule 2 to, the Planning and Compensation Act 1991 against determination of conditions to be attached to a registered old mining permission
19. Prohibition orders and orders (after suspension of winning and working of minerals or the depositing of mineral waste) for the protection of the environment, under Schedule 9 to the Town and Country Planning Act

1990, as amended by Town and Country Planning (Environmental Impact Assessment) (Amendment) (England) Regulations 2008
20. Appeals under Section 96 of, and Schedules 13 and 14 to, the Environment Act 1995 against, respectively, an initial determination of conditions to be attached to a mineral site or the terms of a working rights notice accompanying an initial determination, and a periodic determination of conditions to be attached to a mining site
21. Appeals under section 106B TCPA in respect of planning obligations
22. *Orders under sections 97 and 98 of, and Schedule 5 to, TCPA, revoking or modifying a planning permission
23. *Orders under sections 23 and 24 P(LB&CA)A, revoking or modifying listed building consent
24. *Orders under sections 220 TCPA and Regulations revoking or modifying a grant of advertisement consent
25. *Discontinuance orders under sections 102 and 103 of, and Schedule 9 to, TCPA
26. Completion notices requiring confirmation by the Secretary of State under section 95 TCPA
27. Hazardous substances applications referred to the Secretary of State under section 20 Planning (Hazardous Substances) Act 1990 [PHSA] and Regulations;
28. Hazardous substances consent appeals under section 21 PHSA and Regulations
29. Appeals under section 25 PHSA and Regulations against hazardous substances contravention notices
30. *Orders under section 14 and 15 PHSA and Regulations, revoking or modifying hazardous substances consent
*These cases are regarded as analogous to compulsory purchase orders.

Examples of case types under non-planning legislation
Awards are available only if inquiry or hearing held, except where stated Otherwise

31. Appeals under section 18 Land Compensation Act 1961 (*Note: awards available only if inquiry held)*
32. Opposed definitive map orders under sections 53 and 54 Wildlife and Countryside Act 1981 relating to public rights of way
33. Opposed public path and rail crossing orders under sections 26, 118 to 119A Highways Act 1980 (as amended)
34. Applications referred under section 36 of the Electricity Act 1989 (*Note: awards available only if inquiry held)*
35. Appeals concerning integrated pollution control authorisations and waste management licenses under the Environmental Protection Act 1990, waste carrier licenses under the Control of Pollution (Amendment) Act 1989, and abstraction licenses and discharge consents under the Water Resources Act 1991;
36. Opposed compulsory purchase orders *[Note: awards may also be made if the written representations procedure is followed*

Design

What's New since the last version

Last updated: **27 November 2019**.

- Updated to reflect revised PPG Chapter – 'Design: process and tools'
- To include reference to the National Design Guide published October 2019

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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 updated revised National Planning Policy Framework (NPPF), the Government's Planning Practice Guidance (PPG) and National Policy Statements (NPS) will still be relevant in all cases.

2. This training material applies to casework in England only.[1]

What is design?

3. PPG1, although now superseded, gave a useful definition of urban design:

"*the relationship between different buildings; the relationship between buildings and the streets, squares, parks, waterways and other spaces which make up the public domain; the nature and quality of the public domain itself; the relationship of one part of a village, town or city with other parts".*

4. CABE[2] defines design as being about *how places work*.

Design in the wider context

How are well-designed places achieved through the planning system?

The *Design: Process and Tools* Planning Practice Guidance (PPG) chapter (PPG) provides advice on the key points to take into account on design, which supports the NPPF.

5. The PPG chapter sets out that well-designed places can be achieved by taking a proactive and collaborative approach at all stages of the planning process, from policy and plan formulation through to the determination of planning applications and the post-approval stage. As set out in paragraph 130 of the National Planning Policy Framework, permission should be refused for development of poor design.

6. The National Design Guide (NDG), published in October 2019, should be read alongside the PPG and it sets out the ten characteristics of good design, each of which is expanded upon within the NPG:

[1] In Wales, policy and guidance on design can be found in Planning Policy Wales: Edition 10 (WG, Dec 2018) and TAN 12: Design (WG, March 2016).
[2] The Commission for Architecture and the Built Environment; merged into the Design Council in 2011.

Context: is the location of the development and the attributes of its immediate, local and regional surroundings.

Identity: The identity or character of a place comes from the way that buildings, streets and spaces, landscape and infrastructure combine together and how people experience them. Local identity is made up of typical characteristics such as the pattern of housing, and special features that are distinct from their surroundings.

Built form: is the three-dimensional pattern or arrangement of development blocks, streets, buildings and open spaces. It is the interrelationship between all these elements that creates an attractive place to live, work and visit, rather than their individual characteristics. Together they create the built environment and contribute to its character and sense of place.

Movement: Patterns of movement for people are integral to well designed places. They include walking and cycling, access to facilities, employment and servicing, parking and the convenience of public transport. They contribute to making high quality places for people to enjoy. They also form a crucial component of urban character. Their success is measured by how they contribute to the quality and character of the place, not only how well they function. Successful development depends upon a movement network that makes connections to destinations, places and communities, both within the site and beyond its boundaries.

Nature: contributes to the quality of a place, and to people's quality of life, and it is a critical component of well designed places. Natural features are integrated into well designed development. They include natural and designed landscapes, high quality public open spaces, street trees, and other trees, grass, planting and water.

Public spaces: are streets, squares, and other spaces that are open to all. They are the setting for most movement. The quality of the spaces between buildings is as important as the buildings themselves.

Uses: Sustainable places include a mix of uses that support everyday activities, including to live, work and play. Well-designed neighbourhoods need to include an integrated mix of tenures and housing types that reflect local housing need and market demand. They are designed to be inclusive and to meet the changing needs of people of different ages and abilities. New development reinforces existing places by enhancing local transport, facilities and community services, and maximising their potential use.

Homes and buildings: Well-designed homes and buildings are functional, accessible and sustainable. They provide internal environments and associated external spaces that support the health and wellbeing of their users and all who experience them. They meet the needs of a diverse range of users, taking into account factors such as the ageing population and cultural differences. They are adequate in size, fit for purpose and are adaptable to the changing needs of

their occupants over time. Successful buildings also provide attractive, stimulating and positive places for all, whether for activity, interaction, retreat, or simply passing by.

Resources: Well-designed places and buildings conserve natural resources including land, water, energy and materials. Their design responds to the impacts of climate change. It identifies measures to achieve mitigation, primarily by reducing greenhouse gas emissions and minimising embodied energy; and adaptation to anticipated events, such as rising temperatures and the increasing risk of flooding.

Lifespan: Well-designed places sustain their beauty over the long term. They add to the quality of life of their users and as a result, people are more likely to care for them over their lifespan. They have an emphasis on quality and simplicity.

The issues covered include:

- **Context**: the existing character, movement patterns, appearance and other attributes of the area, while not preventing appropriate innovation.
- **Sustainability**: structure, layout and design of buildings and places that help reduce energy demand and support ecosystems.
- **Environmental considerations**: landscape, nature conservation, future occupiers and neighbours living conditions: daylight, sunlight/shadowing, aspect, privacy, overlooking, noise, smells, outlook.
- Creating successful places that contribute to local identity and are attractive spaces for formal and/or informal social interaction.
- Safety/crime reduction through connectivity and usability of public space.
- Road safety for traffic and pedestrians.
- Public realm – the space between buildings. Public spaces should be designed to deliver a range of social and environmental goals.
- Inclusivity-creating buildings and places that are for everyone.

National Policy on Design

National Planning Policy Framework

7. The updated revised Framework places a greater emphasis on the importance of high-quality design, and provides detailed guidance as to how this can be achieved, in the following paragraphs:

NPPF Para 124: "*The creation of high-quality buildings and places is fundamental to what the planning and development process should achieve. Good design is a key aspect of sustainable development, creates better places in which to live and work and helps make development acceptable to communities. Being clear about design expectations, and how these will be tested, is essential for achieving this. So too is effective engagement between applicants, communities, local planning authorities and other interests throughout the process.*"

NPPF Para 125*: "Plans should, at the most appropriate level, set out a clear design vision and expectations, so that applicants have as much certainty as possible about what is likely to be acceptable. Design policies should be developed with local communities so they reflect local aspirations, and are grounded in an understanding and evaluation of each area's defining characteristics. Neighbourhood plans can play an important role in identifying the special qualities of each area and explaining how this should be reflected in development."*

NPPF Para 126: "*To provide maximum clarity about design expectations at an early stage, plans or supplementary planning documents should use visual tools such as design guides and codes. These provide a framework for creating distinctive places, with a consistent and high quality standard of design. However their level of detail and degree of prescription should be tailored to the circumstances in each place, and should allow a suitable degree of variety where this would be justified*".

NPPF Para 127: In determining planning appeals, Para 127 of the updated revised Framework is the key paragraph, setting out in detail a number of factors which should be taken into account and which will provide a useful starting point for assessing the acceptability of the design before you. It states that:

"*Planning policies and decisions should aim to ensure that developments:*

a) will function well and add to the overall quality of the area, not just for the short term but over the lifetime of the development;

b) are visually attractive as a result of good architecture, layout and appropriate and effective landscaping.

c) are sympathetic to local character and history, including the surrounding built environment and landscape setting, while not preventing or discouraging appropriate innovation or change (such as increased densities);

d) establish or maintain a strong sense of place, using the arrangement of streets, spaces, building types and materials to create attractive, welcoming and distinctive places to live, work and visit;

e) *optimise the potential of the site to accommodate and sustain an appropriate amount and mix of development (including green and other public space) and support local facilities and transport networks; and*

f) *create places that are safe, inclusive and accessible and which promote health and well-being, with a high standard of amenity for existing and future users; and where crime and disorder, and the fear of crime, do not undermine the quality of life or community cohesion and resilience".*[3]

NPPF Para 128: "*Design quality should be considered throughout the evolution and assessment of individual proposals. Early discussion between applicants, the local planning authority and local community about the design and style of emerging schemes is important for clarifying expectations and reconciling local and commercial interests. Applicants should work closely with those affected by their proposals to evolve designs that take account of the views of the community. Applications that can demonstrate early, proactive and effective engagement with the community should be looked on more favourably than those that cannot".*

NPPF Para 130: "*Permission should be refused for development of poor design that fails to take the opportunities available for improving the character and quality of an area and the way it functions, taking into account any local design standards or style guides in plans or supplementary planning documents. Conversely, where the design of a development accords with clear expectations in plan policies, design should not be used by the decision-maker as a valid reason to object to development. Local planning authorities should also seek to ensure that the quality of approved development is not materially diminished between permission and completion, as a result of changes being made to the permitted scheme (for example through changes to approved details such as the materials used)".*

NPPF Para 131: "*In determining applications, great weight should be given to outstanding or innovative designs which promote high levels of sustainability, or help raise the standard of design more generally in an area, so long as they fit in with the overall form and layout of their surroundings".*

NPPF Para 132: "*The quality and character of places can suffer when advertisements are poorly sited and designed. A separate consent process within the planning system controls the display of advertisements, which should be operated in a way which is simple, efficient and effective.*

[3] Note also the content of footnote 46 of the updated revised NPPF.

Advertisements should be subject to control only in the interests of amenity and public safety, taking account of cumulative impacts".

Design and Access Statements

8. In recent years the importance of design in planning has come to the forefront of government policy. The importance of seeking to ensure good design is now a statutory requirement, set out in section 42(1) of the Planning and Compulsory Purchase Act 2004.[4] This section amends section 62 of the principal Act[5] such that a planning application must now be accompanied by *'a statement about the design principles and concepts that have been applied to the development'* and *'a statement about how issues relating to access to the development have been dealt with'*. However, the standard of Design and Access Statements varies. Some provide a useful starting point; many merely set the site context and provide little analysis as to how this site context has informed the design.

    - Beware post-rationalisation (making up the process after the event).
    - Statement should *explain* why design is good (or bad).
    - A good DAS provides a starting point for your consideration of the proposal. Are the design objectives valid/relevant to the development proposed and its context? Does the proposal achieve the stated objectives?

9. Design and Access Statements are normally fairly uninformative as to why a development has been designed the way it has been. They do not generally look at the design process itself and what principles were adopted, but rather just describe the proposal. If it is being argued that the proposal is appropriate to its context and there is no information in the Design and Access statement that analyses the context and explains how that has led to the design of the proposal, it is quite legitimate for the decision-maker to say that.

Local Policy

10. Typically includes Design Guides as Supplementary Planning Guidance (SPG) or Supplementary Planning Documents (SPDs), often aimed at householder applications.

Factors to consider

11. The National Design Guide indicates that "A well-designed place is unlikely to be achieved by focusing only on the appearance, materials and detailing of

[4] The PCPA 2004
[5] The Town and Country Planning Act 1990

buildings. It comes about through making the right choices at all levels…" The Guide indicates that factors to consider include:

- **Layout (or Masterplan)** is the framework of routes and blocks of development that connect locally/more widely, and the way development is arranged to create streets, open spaces and buildings and how these relate to one other.

- **Landscape** is the character and appearance of land, including its shape, form, ecology, natural features, hard and soft landscape, and the way these components combine.

- **Form** is the three-dimensional shape and modelling of buildings and the spaces they define and can take many forms. The form of a building or a space has a relationship with the uses and activities it accommodates, and also with the form of the wider place where it is sited.

- **Scale** is the height, width and length of each building proposed within a development in relation to its surroundings. This relates both to the overall size and massing of individual buildings and spaces in relation to their surroundings, and to the scale of their parts

- **Appearance** is the aspects of a building or space which determine the visual impression the building or space makes, such as its architecture, building techniques, decoration, colour, texture, and lighting.

- **Materials** used for a building or landscape affect how well it functions and lasts over time. They also influence how it relates to what is around it and how it is experienced.

- **Detailing** affects the appearance of a building or space and how it is experienced. It also affects how well it weathers and lasts over time.

For a more detailed explanation of 'factors to consider' in design, see paragraph 23 – 31 on pages 6-7 of the NDG.

Requirement for Good Design

12. Section 183 of the Planning Act 2008 amended section 39 of the Planning and Compulsory Purchase Act 2004, supplementing the original objective of planning decisions to contribute to the achievement of sustainable development, with *the duty to have regard to the desirability of achieving good design*.

How to identify it

13. Good design will usually:

- Demonstrate an understanding of its context and shows how it has learnt from it (the design is rooted in place).
- Respond favourably to a good environment.
- Aim to lift a poor environment.
- Promote or reinforce local distinctiveness

14. The approach adopted may:

- Be subservient to adjoining/adjacent buildings; aim to echo or blend harmoniously and unobtrusively - a side extension might be set back and down, be narrower and have smaller windows.
- Create a fresh confident entity which contrasts appropriately with its neighbours.[6]
- Be well articulated in relation to existing built forms.
- Be well proportioned in itself and in the spaces it creates.
- Distinguish public and private spaces.
- Have a clear imagery and be easy to understand. Typically, its purpose and function will be self-evident – a house looks like a house, an office like an office etc. (exceptions would include conversions which try to keep the original character or deliberately light-hearted designs).
- Be legible – e.g. the entrance is clearly identified by the architecture.

15. A scheme which is reliant on conditions to make it acceptable should be examined very carefully. Would it meet the fundamental objectives of good design which go beyond style or ornament?

Writing about design in decisions

16. This section deals with how to write about design in appeal decisions. Addressing design matters as part of the decision-writing process can be challenging. However, as with most areas of casework, articulating the arguments in a comprehensive and well-reasoned manner will assist the decision-writing process. Understanding and utilising design terminology and applying it correctly can often assist this process and a number of key terms are set out as an annex to this chapter.

17. Publications like the Urban Design Compendium and Manual for Streets are useful. The Manual for Streets can be used in connection with highways issues and visibility splays but it also covers street design and the elements that make

[6] But be wary of proposals which fall between two stools, and are neither subservient nor self-confident.

up residential streets. An architectural dictionary can also be very helpful. There's no one way to objectively assess design quality. There will necessarily always be a degree of subjective judgement.

18. Everyone's perception is slightly different. All development will alter the appearance and/or the character of an area in some way. Whether that's positive, negative or neutral is nearly always subjective. This does not matter, as long as you are able to clearly justify your assessment

19. It is clear from the updated revised NPPF, that 'design' should go beyond aesthetic considerations. It should take into account the way that an area functions and how the proposal would relate to those functions, as well as what a scheme may look like.

20. Therefore, planning policies and decisions should address the connections between people and places and the integration of new development into the natural, built and historic environment.

21. The effect of a scheme upon the character and appearance of an area comes down to context and how a proposal relates to what is around it. It's equally valid to have a contrasting architectural style as one which reflects the surrounding architecture. A useful assessment method is to consider the design cues of the surrounding area.

    For example:

    - roof forms;
    - horizontal or a vertical emphasis of the buildings;
    - window shapes and forms;
    - solid to void ratios;
    - height and width of the buildings around the site;
    - any distinctive design rhythms (e.g. uniformly designed terraces; consistent spaces between buildings; dominant materials).

    and even small details such as brick bond patterns. It is also worth considering whether a building will look like what it is meant to be. Does a house look like a house, rather than an office block, for example.

22. When considered in isolation, the design of a building may not be fundamentally bad, but the design may not have taken cues from the surroundings and, as a result, won't integrate well. If a contemporary design incorporates similar design elements as the existing buildings around it then it is more likely to successfully integrate into the surrounding area.

Useful recent publications:

Building for Life 12: Third edition - January 2015

23. Published by Building for Life partnership (Cabe at Design Council, the Home Builders Federation and Design for Homes). It provides a framework and traffic

light scoring system to assist in design assessment of housing schemes. A completed assessment may be submitted, which can be carried out by anyone, normally the applicant/appellant. Conclusions should be supported by evidence. It does not provide a definitive judgment on the scheme but enables discussion about design and may provide a useful tool for exploring the design merits of the proposal.

Historic England Advice Note 4: Tall Buildings

24. Historic England published its Tall Buildings - Historic England Advice Note 4 in December 2015. This Advice Note supersedes 'Guidance on Tall Buildings' which was produced by English Heritage and CABE in 2007. The advice is intended for developers, designers, local authorities and other interested parties. It seeks to guide people involved in planning for and designing tall buildings so that they may be delivered in a sustainable and successful way through the development plan and development management process.

Annex 1

Glossary of urban design terms

Authenticity - The quality of a place where things are what they seem: where buildings that look old are old, and where the social and cultural values that the place seems to reflect did actually shape it.

Background building - A building that is not a distinctive landmark.

Bay – vertical subdivision of a building elevation.

Block - The area bounded by a set of streets and undivided by any other significant streets.

Bonding pattern – the way in which bricks or blocks are laid i.e. Flemish, English, English Garden Wall, Stretcher bond, stack bonding etc.

Building element - A feature (such as a door, window or cornice) that contributes to the overall design of a building.

Building line - The line formed by the frontages of buildings along a street.

Building shoulder height - The top of a building's main facade.

Bulk - The combined effect of the arrangement, volume and shape of a building or group of buildings. Also called massing.

Context - The setting of a site or area and the features of a site or area (including land uses, built and natural environment, and social and physical characteristics).

Desire line - An imaginary line linking facilities or places which people would find it convenient to travel between easily.

Enclosure - The use of buildings to create a sense of defined space.

Facade - The principal face of a building.

Fenestration - The arrangement of windows on a facade.

Figure/ground diagram - A plan showing the relationship between built form and publicly accessible space (including streets and the interiors of public buildings such as churches) by presenting the former in black and the latter as a white background, or the other way round.

Fine grain - The quality of an area's layout of building blocks and plots

having small and frequent subdivisions.

Height to width ratio – determines the degree of enclosure of a street or space, the height of the buildings compared to the distance between buildings facing each other.

Landmark - A building or structure that stands out from the background buildings.

Legibility - The degree to which a place or building can be easily understood by its users and the clarity of the image it presents to the wider world.

Live edge - Provided by a building or other feature whose use is directly accessible from the street or space which it faces; the opposite effect to a blank wall.

Local distinctiveness - The positive features of a place and its communities which contribute to its special character and sense of place.

Massing - The combined effect of the arrangement, volume and shape of a building or group of buildings.

Node - A place where activity and routes are concentrated.

Perimeter block – a block with the buildings situated around the edges which may or may not be continuous.

Permeability - The degree to which a place has a variety of pleasant, convenient and safe routes through it.

Plot ratio - A measurement of density expressed as gross floor area divided by the net site area.

Proportion – the relationship of two or more elements in a design and how they compare with one another. Good proportion adds harmony, symmetry, or balance among the parts of a design.

Rhythm – in design, rhythm is the regular, harmonious recurrence of a specific element, often a single specific entity coming from the categories of line, shape, form, color, light, shadow, and sound.

Solid to void ratio – the proportion of a building elevation that is wall compared to the proportion that is windows or other openings.

Uniformity - defined as the state or characteristic of being even, normal, equal or similar. Uniformity and consistency help users extract meaning from the design of an application, keeping them focused on the tasks and not distracted by design ambiguities. Elements such as visual hierarchy,

proportion, alignment, and typography play major parts in the uniformity of a design.

Urban grain - The pattern of the arrangement and size of buildings and their plots in a settlement; and the degree to which an area's pattern of street-blocks and street junctions is respectively small and frequent, or large and infrequent.

Urban structure - The framework of routes and spaces that connect locally and more widely, and the way developments, routes and open spaces relate to one another.

Vernacular - The way in which ordinary buildings were built in a particular place before local styles, techniques and materials were superseded by imports.

Annex 2

Suggested reading List

Online publications:

Active by design – Designing places for healthier lives [Design Council, 2014]

Building for Life 12 – The sign of a good place to live (Third Edition), [Cabe Design Council, Jan 2015]

Creating successful masterplans - a guide for clients [Cabe, 2008]

Design and access statements: How to write, read and use them [Cabe, 2007]

Design in and around heritage assets by D McCallum, M Harlow [Pins Training 18th March 2013]

Design Review Principles and Practice [Design Council, 2013]

Design Reviewed Masterplans: Lessons learnt from projects reviewed by CABE's expert design panel [Cabe, 2004]

Good design: the fundamentals [Cabe, 2008]

Green space strategies a good practice guide" [Cabe, 2008]

Manual for Streets 2 [CIHT, 2010]

Manual for Streets [DfT/DCLG, 2007]

Planning for places - delivering good Design through core strategies [Cabe, 2009]

Tall Buildings - Historic England Advice Note 4 [HE, December 2015]

Urban Design Compendium, (Second Edition) [EP, 2007]

The Essex Design Guide (Online Edition) [EPOA, 2019]

Hard Copy publications:

Architecture and the urban environment - a vision for the new age by D Thomas [Jan 2002]

The Penguin Dictionary of Architecture by J Fleming, H Honour & N Pevsner (Fourth Edition) [Jan 1991]

Oxford Dictionary of Architecture (Third Edition) by J Stevens Curl & S Wilson [2016]

The Concise Townscape by G Cullen [1961]

The Image of the City by K Lynch [1960]

Guidelines for landscape and visual impact assessment (Third edition) [Landscape Institute, Jan 2013]

The Essex design guide [Essex CC / Planning Officers Association, 2005]

Visual dictionary of Architecture by F Ching [Jan 1995]

Design - the key to a better place by J Smit [Jan 2009]

Designing community - charrettes, masterplans and form-based codes by D Walters [Jan 2007]

Vernacular Architecture – an illustrated handbook by R W Brunskill (Fourth Edition) [2000]

Design Champions:

PINS Intranet Design Champions page [*PINS intranet > People > Design Champions*]

Environmental Impact Assessment

What's New since the last version

Changes highlighted in yellow made on 20 September 2018:

Comprehensive update to reflect the changes introduced by the Town and Country Planning (Environmental Impact Assessment) Regulations 2017.

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Information Sources

EIA Directive (85/337/EEC) (as amended)

Directive 2011/92/EU

Directive 2014/52/EU

Town and Country Planning Act 1990 (as amended)

National Planning Policy Framework

The Town and Country Planning (Environmental Impact Assessment) Regulations 2017

Planning Practice Guidance – Environmental Impact Assessment

The Town and Country Planning (Environmental Impact Assessment) Regulations 2011 (as amended)

Planning Practice Guidance – Environmental impact Assessment (2011 Regulations)

Introduction

1. Environmental Impact Assessment (EIA) is an iterative assessment process required for projects that are likely to have significant effects (positive or negative) upon the receiving environment. The EIA process serves a number of purposes important to the design and promotion of certain projects. A main purpose of EIA is to provide the decision maker and members of the public with a clear description of what the likely significant environmental effects of a project would be and how they have been assessed; this is provided within an Environmental Statement (ES). Another main purpose is public participation, and it is a requirement for the ES to be published to afford the consultation bodies, as defined by the EIA Regulations[1], the opportunity to comment on the anticipated likely significant effects of the development. Best practice dictates that public participation/consultation is undertaken at an early stage and that regard is had by applicants to comments received, adapting the design of the development as appropriate, but it is not a statutory requirement to do so.

Legislative Context

2. The European Union (EU) EIA Directive (85/337/EEC) (as amended) applies to a wide range of defined public and private projects. The initial EIA Directive of 1985 has been amended three times. The amendments have been codified by Directive 2011/92/EU of 13 December 2011. Directive 2011/92/EU was amended in 2014 by Directive 2014/52/EU. The most recent amendments to the Directive were transposed into UK law in 2017.

3. The EIA Regulations implement the requirements of the EIA Directive for projects for which an application is made under the Town and Country Planning Act 1990 (as amended). In England, the current EIA Regulations came into force on 16 May 2017; Wales[2], Scotland and Northern Ireland are subject to separate Regulations.

4. References in this chapter to specific Regulations are to the 2017 EIA Regulations only.

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

[2] Guidance on EIA for Inspectors undertaking casework in Wales can be found in Wales Inspector Guidance: Environmental Statements

The EIA Regulations

5. The 2017 EIA Regulations revoke the 2011 EIA Regulations but also include transitional provisions, which continue to apply the 2011 EIA Regulations (in full or in part) in certain circumstances. These are set out in Regulations 76(2) and 76(3) and apply when the following has occurred before the commencement of the 2017 Regulations:

    - the LPA has initiated the adoption of a screening opinion;
    - the Secretary of State (SoS) has initiated the making of a screening direction.
    - an applicant has requested a screening opinion or a screening direction;
    - the LPA has adopted a screening opinion;
    - the SoS has adopted a screening direction;
    - an applicant has requested a scoping opinion; or
    - an applicant has submitted an ES.

6. Regulation 18 of the EIA Regulations establishes the minimum information that is necessary for inclusion within the ES in order for it to be considered as such. Regulation 18 (3)(f) refers to the requirement to include any additional information specified in Schedule 4 (Information for inclusion in environmental statements) which is relevant to the characteristics of the development and the environmental features that are likely to be significantly affected.

7. It is a requirement for the ES to include a description of the main measures necessary to avoid, reduce and if possible offset significant adverse effects derived from a development. These measures are commonly referred to as 'mitigation' and can be delivered in a number of ways including through specific input to design, e.g. siting and arrangement. Such measures are normally referred to as 'inbuilt', 'inherent' or 'embedded' mitigation and are very typical in EIA. It is rare for this type of mitigation to require any specific condition to secure it.

8. Mitigation which is not inherent, embedded or inbuilt, but necessary and relied upon to mitigate significant adverse effects, will need to be adequately secured; otherwise it must not be relied upon in the ES. It is typical for such measures to be secured by suitable conditions, e.g. timing/characteristics of specific works or preparation of specific post-consent plans (see Conditions).

9. Where a consent procedure involves more than one stage (ie a 'multi-stage consent'), it is typical for outline planning consents to be restricted by reference to parameters plans. This approach has been derived in case law (*R. v Rochdale MBC ex parte Tew and Others* [1999] 3 PLR 74[3] and *R. v Rochdale MBC ex parte Milne* [2000] EWHC 650 (Admin)) and is used to establish an envelope in which the detailed design and discharge of reserved matters can be agreed (sometimes known as 'the Rochdale Envelope'). These court judgments have been used to establish an assessment approach, based on defined parameters, for ESs prepared in support of outline planning applications. The key points to note are that:

    - the permission (whether in the nature of the application or achieved through 'masterplan' conditions) must create 'clearly defined parameters' within which the framework of development must take place; and,

    - the accompanying ES must take account of the need for such evolution, within those parameters, and present the likely significant effects of such a flexible project.

10. Unlike Habitats Regulations Assessment (HRA), EIA is a tool to aid decision-making, but is not a process designed to introduce an environmental "veto" power into the planning process. On that basis the EIA Regulations do not preclude a decision-maker from permitting development with significant environmental effects. However, they do require that such decisions are taken with full knowledge of the environmental consequences[4].

Guidance

11. More information on EIA, including the approach typically adopted in response to the Rochdale cases discussed above, is available in the Environmental Impact Assessment section of the Planning Policy Guidance. For cases subject to transitional provisions, the guidance relevant to the 2011 Regulations can be accessed via the National Archives.

[3] The *Tew* judgment established that outline applications involving EIA development should acknowledge clearly defined parameters and ES should takes account of these parameters. Parameters could be defined by the nature of the application (and the use of parameters plans), planning obligations and/or planning conditions.
[4] Regulation 3, The Town and Country Planning (Environmental Impact Assessment) Regulations 2017

Procedures

EIA Screening

12. Planning authorities and the SoS have a duty to consider if EIA is necessary for certain types of development as specified by the EIA Regulations. Determining the need for EIA is a process referred to within the Regulations as 'screening' and is typically undertaken by the local planning authority before an application is made. Relevant appeals and applications, including those with EIA screening opinions adopted by local authorities, are routinely screened by PINS' Environmental Services Team (EST).

13. If at any time during the progress of an appeal/application the Inspector is concerned that the proposed development may be EIA development then the Inspector may request a screening direction is provided by the SoS (see Regulation 14). Before making this request Inspectors should contact EST to discuss the relevant issues. Any screening direction required would be issued by EST on behalf of the SoS, not the Inspector.

14. It is not mandatory for an applicant to seek a screening opinion from the local planning authority and an applicant may instead elect that the proposal is 'EIA development' through the unilateral submission of an ES[5].

Environmental Statements

15. Where it has been determined that the appeal/application is EIA development (see 'EIA Screening' above) either by a local planning authority or the SoS, or in the event that an appellant/applicant has chosen to elect that their development is EIA development, an ES must be produced and submitted to accompany the appeal or application.

16. If during the course of an appeal/application that is EIA development it becomes apparent or there is concern that the ES is deficient, the Inspector has powers to request 'further information'. However, before doing so, the Inspector should consult with both their Group Manager and EST to ensure that the request is consistent with the requirements of the EIA Regulations and recent applicable case law. It if is appropriate EST, acting as an officer of the SoS, will prepare and issue the formal request on behalf of the Inspector.

[5] Regulation 5(2)(a), The Town and Country Planning (Environmental Impact Assessment) Regulations 2017

Presentation of an Environmental Statement

17. The EIA Regulations stipulate that the ES must include the information referred to in Regulation 18 and any additional relevant information set out in Schedule 4 as is reasonably required to assess the environmental effects of the development and which the appellant/applicant can, having regard in particular to current knowledge and methods of assessment, reasonably be required to compile. It is often the case that during the course of the application or any subsequent appeal process further information is provided as to the likely significant environmental effects. This can occur as a result of formal requests for 'further information' made under Regulation 25 or information being voluntarily submitted by the appellant/applicant. It is important to the process that it is clear to all parties what information reasonably constitutes the ES and that the publication requirements under the EIA Regulations have been met.

18. In *Berkeley v. Secretary of State for the Environment*[6] the House of Lords delivered a landmark decision for EIA. The key messages to be taken from the judgment are as follows:

    - the ES does not need to be a single document (indeed they often comprise many thick volumes) but the public should not be expected to engage in a 'paper chase' to piece an ES together;
    - it is accepted by the courts that an ES may be a large and complex document;
    - however, if an appellant/applicant submits 'further information' in connection with their ES, it will be important to ensure that it is properly integrated with the previous information in the ES and that the ES non-technical summary is updated to reflect this.

19. Advice on addressing EIA in decisions and reports is available in the Approach to Decision Making chapter.

[6] *Berkeley v. Secretary of State for the Environment* [2001] 2 AC 603; [2000] 3 All ER 897; [2000] 3 WLR 420; (2000) 81 P 7 CR 492; [2000] 3 PLR 111; [2001] JPL 58.

Annex A

The role of the Environmental Services Team

EIA screening

Screening is undertaken by EST with delegated authority from the SoS. Where there is a screening opinion issued by the local planning authority EST revisit the determination. Where there is no screening opinion at all EST conduct a separate screening review. This review is carried out for a number of reasons, eg the relatively high number of successful challenges; as the baseline conditions may have changed; and as there may be potential for new cumulative effects with other development that was not previously within the planning system and therefore not considered in the assessment of cumulative effects.

If EST is content that the local planning authority's screening opinion is robust, EST will not issue a formal screening direction but will place the completed screening matrix on the Horizon file for the Inspector's consideration. If, as is often the case, there is no screening opinion from the local planning authority or EST as a result of the review disagrees with the planning authority's screening opinion, then EST will issue a formal letter to the appellant and the relevant local planning authority. The letter will include the SoS's reasons and constitutes the formal screening direction on behalf of the SoS. The screening matrix is not routinely provided to appellants but can be (and is) made available on request and on occasion has been submitted as evidence to the Courts in s288 challenges.

In the event that the screening direction is positive then the appellant/applicant will be asked to undertake EIA and provide an ES, before the appeal/ application can proceed to an event. Where an appellant/applicant has been notified of the need to undertake EIA and provide an ES but does not submit one the Inspector can only determine the appeal / application by refusing permission.

Environmental Statement Reviews

In order to support Inspectors, EST will routinely review an ES accompanying an appeal/application to ensure it is adequate and in accordance with Regulation 18 of the 2017 EIA Regulations. In the event that an ES is found to be deficient, a request for 'further information' will be made by EST in accordance with Regulation 25. In carrying out the ES review, EST will complete a standard ES review matrix and will bring to the Inspector's attention pertinent issues, including any requests made for further information.

Environmental Permitting

England and Wales

What's New since the last version

Changes highlighted in yellow made 16 Nov 2018:

- Paragraph 2.26 updated to include reference to MCP Directive entering into force, transposed through EPR amendment regulations;
- Reference to the Conservation of Habitats and Species Regulations 2017 in Paragraph 2.28.
- Paragraph 2.29 EA Guidance on Discharges to surface Water & Groundwater [replaces withdrawn water technical guidance]; associated EPR guidance updated – 8 May 2018
- Paragraph 2.32, footnote 44, reference to the revised NSIPs Advice Note 11.
- Paragraph 2.34 refers to the implications of Brexit on BAT/IED and the Defra guidance on a 'no deal' scenario

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1 Introduction

1.1 Inspectors make their decisions on the basis of the evidence before them. Consequently, they may, where justified by the evidence, depart from the advice given in this training material. The applicable legislation and statutory guidance will still be relevant in all cases.

1.2 This chapter is concerned with Environmental Permitting casework only. Related environmental licensing specialist casework under environmental legislation is currently not covered in this Chapter, but is likely to be included in future editions. Appeals under the planning regime and applications under the national infrastructure regime are addressed in the Waste Planning ITM and Water Related Casework CL&PG. In simple terms planning is concerned with the suitability of use of the land for a particular development proposal, whereas permitting/licensing is concerned with the operation of the facility and its potential effect on the environment and human health.

1.3 This training material applies to casework in England and Wales.

What is Environmental Permitting?

1.4 Certain types of facility have the potential to harm the environment or human health unless they are controlled. The Environmental Permitting Regime (EPR) requires operators of these facilities to obtain permits and to register others as exempt in order to provide for monitoring and supervision by the appropriate regulator. The aim of the EPR regime is to:

- Protect the environment in order to achieve statutory and Government policy targets to be met;
- Deliver permitting and compliance with permits and environmental targets effectively and efficiently to provide maximum clarity and minimise the administrative burden on both the operators and regulators;
- Encourage regulators to promote best practice in the operation of permitted facilities; and
- Continue to fully implement relevant European Legislation (Directives, Regulations)

Scope of the EPR regime

1.5 The EP regime covers those facilities previously regulated under the Pollution Prevention and Control Regulations 2000[1]; the Waste Management Licensing and exemption schemes[2]; some parts of the Water Resources Act 1991[3]; the Radioactive Substances Act 1993; the

[1] SI 2000/1973
[2] Part 2 of the Environmental Protection Act 1990 and the Waste Management Licensing Regulations 1994, SI 1994/1056.
[3] In relation to discharge consenting and flood defence consents.

Groundwater Regulations 2009[4]. The EP regime covers England and Wales. It also applies to the adjacent sea as far as the seaward boundary of the territorial sea[5].

Activities covered under the EP Regime

1.6 The EP regulations specify the facilities that require an environmental permit and those that are exempt from requiring a permit (see section 2.21). The facilities that require a permit are known as 'regulated facilities'. The ten classes of regulated facility are:

i) **an installation** (regulation 8 (1)(a)) – consists of any 'stationary technical unit' where activities listed in Schedule 1 to the Regulations, and any directly associated activities are carried on;

ii) **mobile plant** (regulation 8(1)(b)) – plant designed to move or be moved and used to carry on either one of the Schedule 1 activities or a waste operation;

ii) **a waste operation** (regulation 8(1)(c)) – defined as a waste recovery or disposal operation;

iv) **a mining waste operation** (regulation 8(1)(d)) – the management of extractive waste, whether or not involving a mining waste facility[6];

v) **a radioactive substances activity** (regulation 8(1)(e)) – involving the keeping and use of radioactive material (including mobile radioactive apparatus) or the accumulation and disposal of radioactive waste;

vi) **a water discharge activity** (regulation 8(1)(f)) – includes the discharge of any poisonous, noxious or polluting substances, waste, trade effluent or sewage effluent to controlled waters; the discharge from land through a pipe into the sea of trade effluent or sewage effluent; the cutting or uprooting of large amounts of vegetation in inland freshwaters and failure to take reasonable steps to remove the vegetation from the waters; or the operation of a highway drain or discharge of trade or sewage effluent into lakes or ponds which are not inland freshwaters, where a notice has taken effect;

vii) **a groundwater activity** (regulation 8(1)(g)) – includes the discharge of a pollutant that will or may lead to a direct or indirect input to groundwater; any other discharge that may lead to direct or indirect input of a pollutant to groundwater; an activity subject to a notice under schedule 22 has taken

[4] SI 2009/2982.
[5] 12 nautical miles (13.8 miles) from the baseline (usually the mean low water mark).
[6] Does not include activities in Article 2(2)(c) of the Mining Waste Directive 2004/21/EC.

effect; or an activity, as a part of the operation of a 'regulated facility' that may lead to any discharge mentioned above;

viii) **a small waste incineration plant** (regulation 8(1)(h)) – all waste incineration plants or co-incineration plants with a capacity less than thresholds listed in Chapter III of the Industrial Emissions Directive (IED) and subject to Schedule 13 of EPR2016;

ix) **a solvent emission activity** (regulation 8(1)(i)) – an activity listed in Annex VII of the IED[7] and subject to Schedule 8 of EPR 2016;

x) **a flood risk activity** (regulation 8(1)(j)) – an activity listed in Schedule 25 of EPR 2016[8].

2 Policy, Legislation and Guidance

The Integrated Pollution Control Regime: Brief history of the EPR regime and future of EPR

2.1 First introduced by the UK Environmental Protection Act 1990, the concept of Integrated Pollution Control (IPC) ensures that all emissions to media (i.e. water, air, land) are considered simultaneously and not in isolation as, for example, the reduction of pollution in one environmental medium can have an effect on another.

2.2 Under IPC, Best Available Techniques Not Entailing Excessive Cost (BATNEEC) is required to minimise pollution of the environment as a whole, using the most effective techniques for an operation at the appropriate scale and commercial availability, where the benefits gained by using the technique should bear a justifiable relationship to the cost (unless emissions are very toxic).

2.3 The IPC concept was enshrined in the Integrated Pollution Prevention and Control (IPPC) Directive[9] which came into force in 1996. Integrated permits are required for certain listed activities such as the energy and chemical industries, waste management, animal rendering, various food processes and intensive poultry and pig-rearing. This required that installations be regulated in an integrated way, controlling emissions to air and water and the management of waste. IPPC also requires that other environmental issues are taken into account, such as energy efficiency, consumption of raw materials, prevention of accidents and restoration of the site. This process encourages industry and regulators to consider the whole process and adopt 'cleaner technology' rather than just adding 'end-of-pipe' controls.

[7] Directive 2010/75/EU
[8] Previously regulated as Flood Defence Consents, existing consents automatically transferred to Environmental Permits on 6 April 2016.
[9] Directive 96/61/EC

2.4 The IPPC Directive was transposed into UK Law mainly by the Pollution Prevention and Control Act 1999 and the Pollution Prevention and Control (England and Wales) Regulations 2000 (PPCR)[10]. The concept of Best Available Techniques (BAT) was applied to the operation of installations covered by IPPC, a similar requirement to BATNEEC.

2.5 In 2007 the PPCR was expanded and replaced by the Environmental Permitting (England and Wales) Regulations 2007 (EPR2007)[11]. The EPR2007 introduced a streamlined permitting and compliance regime covering waste management licensing (WML) and PPCR.

2.6 The PPC regime was further expanded in 2010, through the Environmental Permitting (England and Wales) Regulations 2010 (EPR2010)[12], which largely replaced the EPR2007. Since 2010 the EPR regime has expanded further to include the classes of regulated facility described in paragraph 1.6 above, whilst incorporating further environmental Directive provisions[13].

2.7 On 1 January 2017 a consolidated and updated version of the EPR came into force[14], which revoked (almost all of) the 2007, 2010 and 15 amendment regulations and made some minor amendments. These are the current EP regulations (EPR2016).

Future of Environmental Permitting

2.8 Abstraction regime - Under the provisions of the Water Act 2014, there are plans to expand the EPR regime in the future by the inclusion of the water abstraction and impoundment regime, currently regulated under the Water Resources Act 1991.

2.9 Circular Economy[15] - In December 2015 the European Commission (EC) adopted a Circular Economy package[16], emphasising the use of waste as a resource, which means a greatly increased attention to economic benefits of waste management, rather than relying solely on original principles of environmental protection and human health.

2.10 As well as creating new opportunities for growth, a more circular economy will:

- reduce waste
- drive greater resource productivity
- deliver a more competitive UK economy.
- position the UK to better address emerging resource security/scarcity issues in the future.

[10] SI 2000/1973.
[11] SI 2007/3538.
[12] SI 2010/676.
[13] Primarily including the Industrial Emissions Directive 2010/75/EU (IED), which recasts the IPPC and 6 other environmental directives, following extensive review of the existing policy.
[14] SI 2016/1174.
[15] Closing the loop – An EU action plan for the Circular Economy [EC, December 2015]
[16] Includes revised legislative proposals on waste detailed in the factsheet 'Clear Targets and Tools for Better Waste Management' [EC, December 2015]

- help reduce the environmental impacts of our production and consumption in both the UK and abroad

Schedule 1 Activities, Installations and Mobile Plant (Parts A & B)

2.11 The regulator for these classes of facility are defined in regulation 32 of EPR2016. For the industrial and waste management processes the activities are described in schedule 1, based on risk and are as follows:

Part A(1) – high risk activities, regulated by the Environment Agency (EA)/Natural Resources Wales (NRW) (sometimes known as IPPC activities);

Part A(2) – medium risk activities, regulated by the Local Authority (sometimes known as LA-IPPC activities).

Part B - low risk activities, regulated by the Local Authority (sometimes known as LA-PC activities, concerned with air emissions only)[17].

2.12 The full list of the types of activities regulated by the EA/NRW and the Local Authority is below:

i) The Environment Agency/Natural Resources Wales regulates:

- Part A(1) installations
- waste mobile plant
- waste operations, including those carried on at a Part B installation or by Part B mobile plant (unless the waste operation is a Part B activity)

[17] Previously regulated under Part 1 of the EPA1990 Air Pollution Control Regime.

- mining waste operations, including any carried on at a Part B installation
- radioactive substances activities
- water discharge activities, including those carried on at a Part B installation
- groundwater activities, including those carried on at a Part B installation.
- flood risk activities described under schedule 25 of EPR2016.

ii) The relevant Local Authority regulates:

- Part A(2) installations including any waste operations, water discharge activities or groundwater activities carried on as part of the installation or mobile plant
- Part B installations and Part B mobile plant (except as set out above)
- Small waste incineration plants
- Solvent emission activities.

Best Available Techniques (BAT), BAT reference and BAT Conclusion documents

2.13 An overarching principal in EPR is that all activities must use BAT principles to prevent or minimise emissions. BAT is defined in Article 3 of the IED and in basic terms is "use of the available techniques which are the best for preventing or minimising emissions and impacts on the environment". 'Techniques' include both the technology used and the way an installation is designed, built, maintained, operated and decommissioned. The permit conditions will tell the operator what BAT they must use or they may set emission limit values (ELV) or other environmental outcomes, based on BAT. If the permit says the operator must follow BAT or 'appropriate measures' to achieve an outcome or ELV, they will need to check the BAT guidance for that activity. The operator may have to decide which BAT to use if the permit doesn't tell them. They may also need to take additional measures to meet the conditions in the permit.

2.14 The European Commission (EC) produces best available technique reference documents or BREF notes. They contain BAT for installations. For example, there is a BREF for intensive agriculture which contains BAT for housing for pig rearing units and a BREF for the textiles industry which contains BAT for selecting materials for textile manufacture.

2.15 The EC is updating BREF notes and the updated versions also include 'BAT conclusion documents'[18]. These contain emission limits associated with BAT (BAT AELs) which must be complied with unless the EA/NRW agrees certain criteria have been met. The guide for a particular activity will include a link to the BREF note or BAT conclusion document for each activity (if there is one available).

Permit Types – Standard/bespoke:

2.16 Depending on the proposed activity, one of the following must be obtained:

- a **regulatory position statement** – would state that the EA/NRW does not currently require a permit for that activity (usually because it has been assessed as unlikely to cause environmental pollution or harm to human health)
- an **exemption** – a permit is not required for the activity, but the operator must still register with the EA/NRW. The exemption has specific limits and conditions but is a 'light touch' form of regulation as the activity is classed as low risk
- an **exclusion** – applies to certain flood risk activities, where the flood defence consent has lapsed and there is no longer a need for consent and other listed activities. The activity will still need to be operated within the description and conditions of the exclusion
- a **standard rules permit** – a set of fixed rules for common activities
- a **bespoke permit** – tailored to the operators business activities.

2.17 The two forms of environmental permit (standard/bespoke) are based on the risk to the environment and human health from the particular activity. A standard rules or bespoke permit will be required for all those activities listed in paragraph 2.9 above.

Standard Rules Permit

2.18 The Secretary of State, the Welsh Ministers and the EA/NRW can make standard rules for certain activities[19] under regulation 26 of EPR2016. These rules consist of requirements common to the type of facilities subject to them and can be used instead of site-specific permit conditions. Standard rules are suitable for sectors where a number of regulated facilities share similar characteristics in relation to environmental hazards.

[18] Article 14(3) of IED – BAT conclusions shall be the reference for setting the permit conditions to installations covered by the Directive.
[19] EA Standard rules permits

2.19 The standard rules must achieve the same high level of environmental protection as site-specific conditions. There is no right of appeal under regulation 31(2)(b) or (c) against the imposition of standard rules as permit conditions (regulation 27(3)) since applying for a permit subject to the rules is voluntary and the conditions have been under consultation and agreed with the relevant industries. All other rights of appeal are unaffected.

2.20 It is the operator's decision as to whether they wish to operate under standard rules. The generic risk assessments for standard facilities should be made available to applicants to assist them in determining whether their activity is within the scope of the standard rules and, if they apply for a standard permit, in the adoption of suitable control measures to meet those rules. Regulated facilities that require a location specific assessment of impact and risk are not suitable for standard rules.

2.21 Standard rules can be revised and there is a duty imposed by the Regulations to keep the rules under review under regulation 26(3) of EPR2016. Standard rules can also be revoked under regulation 29. For cost reasons, standard permits tend to be more attractive to operators of smaller, non-specialist facilities such as waste transfer stations.

Bespoke Permit

2.22 A bespoke permit is required if the activity does not fit the conditions of a standard rules permit (i.e. unusually complex or novel, higher risk activities and multi-functional installations). The following must be completed by the applicant before an application is made:

- check if a conservation risk assessment is needed (heritage and nature conservation screening)
- check that the legal operator and competency requirements (including technical competency) are met
- develop a management system (a written set of procedures that identifies and minimises the risks of pollution)
- complete a risk assessment
- design the facility to avoid and control emissions
- check the relevant technical guidance

2.23 The conditions and requirements on the operator for a bespoke permit are tailored to suit that particular activity.

Permit Exemptions and Exceptions

2.24 Certain low risk activities can be classed as exempt from the need to hold a permit, but only where the relevant EU Directive allows this. A waste operation, water discharge, flood risk or groundwater activity must fulfil certain criteria to qualify as exempt, these activities are listed in Schedule 2 of EPR2016. The activity must be registered with the EA and are still subject to certain conditions, limits, other requirements and subject to periodic inspection and the same compliance principles as permitted activities.

2.25 Specific flood risk activities, e.g. emergency work, minor works or temporary works and where the flood defence consent has lapsed and there is longer a need for a consent are not required to have a permit and are excluded from the regulations, but must be operated within the description and conditions of the exclusion. These activities are listed under Part 2 of Schedule 25.

Environmental Permitting Legislation

2.26 **EU Directives:**

i) EU Industrial Emissions Directive 2010/75/EU[20](IED) (recast IPPC Directive)

Implemented through amendments to the Environmental Permitting Regulations 2010, incorporates the Waste Incineration / Large combustion Plant Directives & 5 others related Directives - requiring strict emission limits for e.g. Incinerators.

Other relevant EU Directives[21]:

ii) EU Directive 2008/98/EC on Waste (the Waste Framework Directive) (WFD)

Member states must ensure that waste is recovered or disposed of without endangering human health and by using processes/methods which do not harm the environment. Obligations are imposed on those dealing with waste, including holders, collectors and transporters of waste.

iii) EU Directive 99/31/EC on Landfill of Waste (the Landfill Directive)

This Directive complements the WFD and seeks to prevent/reduce the harmful effects of the disposal of waste by landfilling. It sets uniform technical standards and requirements for landfill sites and requires the progressive diversion of biodegradable municipal waste from landfill.

iv) EU Directive 2000/53/EC on End of Life Vehicles (the ELV Directive)

This also supplements the WFD. It prevents waste from vehicles through the re-use, recycling/recovery of end-of life vehicles and their components, at all stages of a vehicle's life.

[20] The following Directives were repealed and encompassed within the IED – 2008/1/EC, 99/13/EC, 2000/76/EC, 2001/80/EC and 3 other environmental directives concerning Titanium Dioxide production.

[21] All these Directives make provisions in relation to pollution of the environment. The EPR2016 re-transposes those parts of the Directives which must be transposed through permits and those provisions capable of being transposed through permits.

v) EU Directive 2012/27/EU on Energy Efficiency

This establishes binding measures to help the EU reach its 20% energy efficiency target by 2020 by requiring all EU countries to use energy more efficiently. On 30 November 2016 the Commission proposed an update including a new 30% energy efficiency target for 2030.

vi) EU Directive 2012/19/EU on Waste Electrical and Electronic Equipment (the WEEE Directive)

The WEEE Directive also supplements the WFD and makes provisions for the waste prevention, reuse, recycling/recovery of WEEE, reducing the disposal of this waste stream. It also specifies treatment requirements.

vii) EU Directive 2006/66/EC on Batteries and Accumulators and Waste Batteries and Accumulators (the Batteries Directive)

The Batteries Directive seeks to minimise the negative impact of batteries and accumulators. It makes producers responsible for the waste management of batteries and accumulators that they place on the market.

viii) EU Directive 2000/60/EC on Water (the Water Framework Directive)[22]

This Directive integrates requirements of a number of existing Directives and introduces new ecological objectives to prevent further deterioration of aquatic ecosystems; to protect and enhance their status; to promote sustainable water use and mitigate the effects of floods and droughts.

ix) EU Directive 2006/118/EC on the protection of groundwater against pollution and deterioration (the Groundwater Daughter Directive)

Establishes a regime which sets out groundwater quality standards and introduces measures to prevent or limit pollution into groundwater. The directive sets out quality criteria taking account of local characteristics and allows for further improvements based on monitoring data and new scientific knowledge.

x) EU Directive 2006/21/EC on management of waste from the extractive industries (the Mining Waste Directive)

As its name suggests, this Directive provides for measures to prevent or reduce any adverse effects from the management of waste from mining and other extractive industries.

[22] The following Directives were repealed and encompassed within the WFD – 75/440/EEC, 77/795/EEC, 79/869/EEC, 78/659/EEC, 79/923/EEC, 80/68/EEC and 76/464/EEC.

xi) EU Directive (EU)2015/2193 on limitation of certain air pollutants from medium combustion plants (the Medium Combustion Plant Directive)

This regulates emissions of SO_2, NO_X and dust from the combustion of fuels in plants with a rated thermal input greater than 1 MWth and less than 50MWth. All plant must be registered and permitted. The permitting provisions have been transposed into the EPR through amendment regulations[23] and will apply to new plants from December 2018 and existing plants in stages up until 1 January 2029.

2.27 **Primary UK Legislation**

i) Pollution Prevention and Control Act 1999[24]

This Act contains enabling provisions for making regulations to cover a wide range of waste management purposes. The Act transposed the Integrated Pollution Prevention and Control Directive 96/61EC, which required certain industrial processes to be licensed in an integrated manner, therefore controlling emissions to air, water and the management of waste to protect the environment as a whole.

ii) Environmental Permitting (England and Wales) Regulations 2016[25]

Supersedes the provisions of the Environmental Protection Act 1990 and implements the permitting requirements under the Industrial Emissions Directive (and other relevant Directives) for certain categories of waste management sites and many other types of industrial installation with potentially harmful consequences for human health and/or the environment. A permit must be obtained from the Environment Agency for all such development as defined in the Regulations. There are powers of enforcement by the Agency, and rights of appeal to the Secretary of State, against refusal or revocation of a permit or the grant of a permit subject to conditions. A permit cannot be granted unless the regulator is satisfied that the applicant is a fit and proper person to carry out the activity. An important concept is that Best Available Techniques (BAT), defined in the Industrial Emissions Directive (IED)[26] shall be used to prevent pollution. Schedules to the regulations identify precise requirements, article by article for each Directive, which must be delivered through the permitting regime. Each Directive has a specific schedule.

[23] SI 2018/110
[24] 1999 (c.24)
[25] SI 2016/1154
[26] Article 1(10) of Directive 2010/75/EU

2.28 **Other relevant UK Legislation**

i) Environmental Protection Act 1990[27]

Part I sets out provisions for the Air Pollution Control (APC) regime Part 2 sets out the provisions for waste management licensing (WML). This has been extensively amended and largely replaced by the Environmental Permitting Regulations 2016.

ii) Environment Act 1995[28]

Part I established the Environment Agency as the responsible body for waste and water regulation in England and Wales, in particular with respect to pollution control. The Agency administers the environmental permitting system and other regulatory functions. Part IV, section 80 introduces the requirement for a national air quality strategy and Part V, Section 92 introduces the requirement for a national waste strategy.

iii) Water Resources Act 1991[29]

This Act is the key piece of legislation governing discharges to surface waters from non-prescribed processes under Integrated Pollution Control (IPC) in England and Wales. The Act consolidated much of the legislation governing water pollution which was previously contained in, for example, the Water Act 1989 and the Control of Pollution Act 1974. Some of the main provisions relevant to water quality in estuaries and coastal waters are: Definition of controlled waters, Water Protection Zones and Nitrate Sensitive Areas, Offences of Polluting Controlled Waters, Discharge Consents[30], Abstraction licences.

iv) Waste (England and Wales) Regulations 2011[31]

Transposes the WFD into UK law to apply the revised 'waste hierarchy' (Article 4); to impose duties to improve the use of waste as a resource; requires waste management 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).

v) The Control of Pollution (Amendment) Act 1989[32]

This Act contains provisions for the registration of waste carriers and further provision with respect to powers in relation to vehicles shown to have been used for illegal waste disposal.

[27] 1990 (c.43)
[28] 1995 (c.25)
[29] 1991 (c.57)
[30] Now encompassed within the EPR regime under Schedule 21.
[31] SI 2011/988
[32] 1989 (c.4)

vi) Scrap Metal Dealers Act 2013[33]

This Act repeals the Scrap Metal Dealers Act 1964 and Part 1 of the Vehicles (Crime) Act 2001, creating a revised regulatory regime for the scrap metal recycling and vehicle dismantling industries. The Act maintains local authorities as the principal regulator but gives them the power to better regulate these industries by allowing them to refuse to grant a licence to unsuitable applicants and a power to revoke licences if the dealer becomes unsuitable. The Act aims to raise trading standards across the scrap metal industry by requiring more detailed and accurate records of transactions to be kept. Scrap metal dealers will also be required to verify the identity of those selling metal to them.

vii) End of Life Vehicles Regulations 2003[34]

These Regulations partially implement the ELV Directive. End-of-life vehicles are defined in regulation 2. Part III covers the design requirements for materials and components of vehicles. Part V introduces the Certificate of Destruction (CoD). Regulation 27 provides that when an end-of-life vehicle is transferred to it for treatment, an authorised treatment facility (defined in regulation 2) may issue a CoD to the last holder/owner of the end-of-life vehicle. All site licences (being a type of waste management licence) are issued and monitored under the EPR regime[35].

viii) Hazardous Waste Regulations 2005[36]

These set out the regime for the control and tracking of the movement of hazardous waste. Part 4 bans the mixing of hazardous waste unless permitted as part of a disposal or recovery operation in accordance with the WFD. Parts 5 & 6 relate to the movement of hazardous waste.

ix) Animal By-Products (Enforcement) (England) Regulations 2013[37]

These regulations are intended to prevent ABPs (which are not intended for human consumption) ending up in the human food chain and strengthen the previous regulations. They lay down health rules associated with ABPs and their use/disposal following BSE and foot & mouth outbreaks.

x) The Conservation of Habitats and Species Regulations 2017[38]

Transposes EU Directive 92/43/EEC 'the Habitats Directive' requiring public bodies to exercise nature conservation functions in order to

[33] 2013 (c.10)
[34] SI 2003/2635
[35] Schedule 11 of EPR2016.
[36] SI 2005/894
[37] SI 2013/2952
[38] SI 2017/1012

comply with the Habitats Directive and Wild Birds Directive. Regulation 63 requires that the effect on a European site is considered before granting consents or authorisations, including environmental permits.

2.29 **Environmental Permitting Policy and Guidance**

i) Core Environmental Permitting Guidance, Defra

The scope of this guidance is to provide comprehensive advice to those operating regulated facilities covered by the EP Regulations and regulated by the Environment Agency. It sets out the provisions of the regulations and the views of the SoS for Defra and the Welsh Assembly Government on how it should be applied and interpreted. The relevant guidance for appeals is at Chapter 12.

ii) Secretary of State's Guidance: General Guidance Manual on Environmental Permitting Policy and Procedures for A2 and B Installations, Defra

This manual is the principle guidance issued by the SoS and Welsh Government on activities regulated by Local Authorities and gives practical advice on the operation of the LA regulated pollution control regime and how it should be applied and interpreted. The guidance for appeals can be found at Chapter 30.

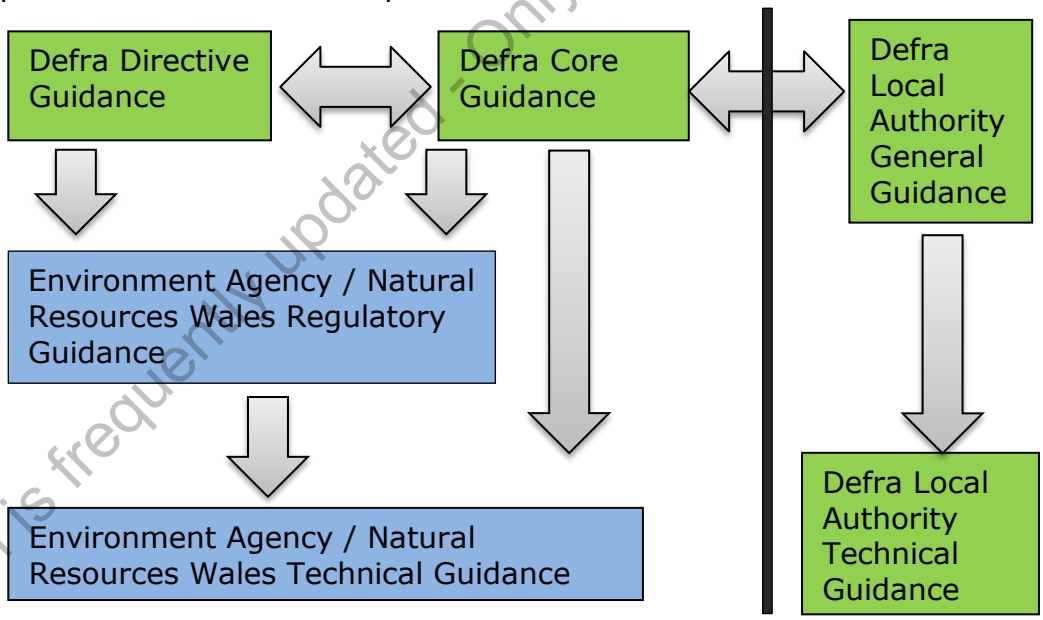

Fig. 1 – Illustration of EP guidance relationships

iii) Specific Guidance:

Part A1: (These should be read in conjunction with the EP Core Guidance)

Regime Specific Guidance (RSG), Defra

These describe the general permitting, compliance requirements and guidance for specific regimes. They include exempt waste

operations, Radioactive Substances Regulation (RSR)[39], Water Discharge Activities[40] and flood risk activities.

Directive Specific Guidance Notes (DGN), Defra

These describe the general permitting, compliance requirements and guidance on each of the EU Directives implemented through the EP regime. Examples include IED EPR Guidance on Part A Installations; LFD EPR Guidance; Mining Waste Directive EPR Guidance.

iv) Sector/Issue Specific Guidance:

Part A1:

Horizontal Guidance Notes (HGN),
Environment Agency/Natural Resources Wales

A series of guidance notes applying to all sectors and relating to specific issues such as odour emissions, Environmental Risk Assessment, noise and site conditions reports. In England only H3 (Part 2) Noise Assessment and Control, H4 Odour Management and H5 Site Condition Report are extant as H1 and H2 have been replaced by 'risk assessments for specific activities: environmental permits' and 'Energy efficiency standards for industrial plants to get environmental permits'. In Wales all horizontal guidance is still extant.

Regulatory Guidance Notes (RGN),
Environment Agency/Natural Resources Wales[41]

This is a series of guidance notes on interpretation of the regulations and regulatory issues produced for Agency staff to assist them in determining EP applications. Most of the RGNs were withdrawn in England in February 2016 and reclassified as internal guidance following a 'Smarter guidance' review Those that remain extant in England are:

i) RGN 2 – Understanding the meaning of regulated facility, Appendices 1-4 cover Interpretation of Schedule 1 EPR;– Defining the scope of the Installation; Interpretation of Intensive Farming Installations; and – The scope of Mobile Plant.

ii) RGN 9 – Surrender guidance on how land and groundwater should be protected at permitted facilities before surrender of a permit is considered.

[39] RSR for non-nuclear sites; RSR for nuclear sites.
[40] To surface water and groundwater.
[41] In Wales, RGNs remain largely extant.

iii) RGN 13 – Waste recovery plans and permits (permanent deposit of waste on land).

Technical Guidance Notes (TGN) and Sector Guidance Notes (SGN), Environment Agency/Natural Resources Wales

These guidance notes provide advice on indicative standards of operation and environmental performance relevant to specific sectors, allowing assessment of compliance with regulations and setting out BAT for that sector to be taken into account when deciding applications and are gradually being updated; e.g. EA Guidance on Discharges to surface Water & Groundwater replaces the withdrawn water technical guidance, and is now located in the associated EPR guidance. These need to be read alongside the generic guidance[42], which has been updated. There is also a series if guidance specifically for landfill operators on the technical standards required to meet Directive requirements and permit conditions. In Wales TGNs/SGNs also remain extant.

Part A2:

Local Authority Sector Guidance Notes (SG Notes), Defra

Statutory guidance issued by SoS for specific LA-IPPC Part A2 industrial activities, giving details of mandatory requirements affecting emissions and impacts from installations and general BAT assessments. These are currently being updated but the SGNs remain extant as at March 2017. If in doubt, you should check with the Knowledge Centre on the current status of these documents.

Part B:

Local Authority Process Guidance Notes (PG Notes), Defra

Statutory guidance issued by SoS for specific industrial activities giving details of mandatory requirements affecting emissions to air from LAPPC Part B installations and guidance on BAT/BATNEEC assessment. These are currently being updated but the PGNs remain extant as at March 2017. If in doubt, you should check with the Knowledge Centre on the current status of these documents.

v) Monitoring Guidance (MCERTS), Environment Agency/Natural Resources Wales

Businesses either monitor their emissions all the time, known as continuous monitoring, or at times defined in their permit, known as spot tests or periodic monitoring. In both cases they must meet

[42] The 'How to comply with your environmental permit' has been withdrawn and replaced with new guides – 'system' and 'Controlling and monitoring emissions'. The H1 risk assessment overview guidance has been withdrawn and replaced with 'Risk assessments for your environmental permit'.

the EA's quality requirements. MCERTS is the Environment Agency's Monitoring Certification Scheme. It provides the framework for businesses to meet their quality requirements. The guidance covers emissions to air, land and water.

Interaction of Planning and Pollution Control Regimes

2.30 The Core EP Guidance advises that if a regulated facility also needs planning permission, it is recommended that the operator should make both applications in parallel whenever possible. This will allow the environmental regulator to start its formal consideration early on, thus allowing it to have a more informed input to the planning process.

2.31 The Environment Agency have produced guidance for developments requiring planning permission and environmental permits[43], which covers how the EA will advise on permitting issues as part of a planning application.

2.32 Advice on the role of the EA and NRW with regard to the Nationally Significant Infrastructure Project (NSIP) regime[44], the requirement for an Environmental Permit for certain projects covered under the regime and interface with Development Consent Orders (DCO) and Environmental Permitting can be found in Annexes A & D to Advice Note 11[45].

2.33 The Planning Practice Guidance (PPG) on waste[46] also advises on the relationship between planning and other regulatory regimes and re-iterates that it is important that the EA are involved in the pre-application stage of proposals for waste management facilities and how they can advise on key environmental issues affecting both planning and/or permitting decisions.

Implications of Brexit

2.34 When Brexit occurs on 29 March 2019, the current draft agreement would see the UK bound by EU law until end of 2020 or longer under transition arrangements. After the UK fully withdraws from the EU, Defra would need to ensure the operability of the EPR and ensure domestic legislation implements the IED. The forthcoming environmental governance Bill would enshrine environmental principles into UK law and hold the government to account. In the event of a 'no deal' scenario, environmental standards would need to be maintained. As mentioned above, the EU Withdrawal Act 2018[47] would establish environmental principles and ensure that existing EU environmental law will continue to have effect in UK law, including the IED and BAT Conclusions, based on BREFs made under it through a UK BAT regime, which is currently being

[43] Guidance for developments requiring planning permission and environmental permits [EA, October 2012]
[44] Under the Planning Act 2008 (c.29)
[45] Advice Note 11: Working with Public Bodies v4 [PINS, Nov 2017], Annex A – Natural Resources Wales v2 & Annex D – Environment Agency v2 [PINS, Nov 2015].
[46] Waste PPG, Paragraph 052 [DCLG, October 2015].
[47] 2018 (c. 18)

consulted on as part of the draft Clean Air Strategy[48]. More details on the 'no Brexit deal' scenario can be found in the Defra 'No deal BAT' guidance[49].

3 Regulation of permitted activities

Application process

3.1 An operator needs to obtain a permit for each regulated facility that it operates[50]. One of the classes of regulated facility under regulation 8 is an 'installation'. An installation may include one or more regulated facilities, e.g. a waste operation and/or water discharge activity, but will only require one permit unless different parts of the installation are operated by different operators, in which case each part with a separate operator will require its own permit. There should be no ambiguity over which operator has responsibility for which part of the installation.

3.2 Pre-application discussions between operators and regulators are encouraged.

3.3 The requirements for applications are set out in Schedule 5 of EPR2016. Amongst other things, an application must:

- include the information required by the application form (and any other requirements) to be 'duly made' and determined. The regulator can issue a notice requiring further information[51]
- regulators must carry out consultation as required under Schedule 5(6). The scope of the required consultation is determined by the type of application and activity applied for.

3.4 Determination periods for permit applications are set out in Schedule 5(15) and vary depending on the type of application and type of activity. The operator and regulator can agree extensions to the determination period. The operator may appeal against non-determination (deemed refusal) or deemed withdrawal under regulation 31 – see paragraph 6.2 below.

Types of application

3.5 The following types of application apply to all classes of activity (unless stated otherwise):

i) an application for a **grant of an environmental permit** under regulation 13(1) – authorising the operation of a regulated facility and the named operator as the person authorised to operate the facility

[48] Section 8.3 of the Draft Clean Air Strategy 2018 – Consultation document [Defra, May 2018]
[49] Industrial emissions standards ('best available techniques') if there's no Brexit deal – Guidance [Defra, September 2018]
[50] Regulation 12(1) of EPR2016.
[51] Schedule 5(4) EPR2016.

ii) an application for **variation of an environmental permit** under regulation 20(1) – does not apply where the variation would reduce the extent of the site of regulated facility unless it applies to a Part B installation (except waste operations) or a stand-alone water discharge or groundwater activity. It should be noted that the regulator can vary an environmental permit as it sees fit, regardless of any application for variation[52]

iii) an application for the **transfer (full or in part) of an environmental permit** under regulation 21(1) – except where the permit relates to a stand-alone water discharge, groundwater or flood risk activity. Where the facility is subject to any enforcement or suspension notice the duty to comply also transfers to the new operator[53]

iv) an application for the **surrender (full or in part) of an environmental permit** under regulation 25(2) – does not apply to Part B installations (except waste operations), mobile plant, solvent emission activity or stand-alone water discharge, groundwater or flood risk activity[54].

Commercial Confidentiality and the Public Register

3.6. The EA publishes a range of information under the duty to maintain a public register[55]. The applicant can ask the EA not to make public any information that is commercially sensitive.

3.7 There is a right of appeal if the request is denied – see paragraph 6.20-21 below.

Decision-making process

3.8 The regulator must decide whether to grant or refuse the proposal in an application (or decides to make a regulator-initiated variation)[56] and, where applicable, what permit conditions to impose. For all applications made under the Regulations, the regulator must ensure that its decision delivers the necessary directive and other requirements and provides the required level of protection to the environment. This will include assessment of the following:

Environmental risk - in particular the adequacy of the impact assessment including whether the control measures proposed by the operator are appropriate for mitigating the risks and their potential impact[57].

[52] Except where this relates to a stand-alone water discharge facility, without prior agreement with the operator if within 4 years of the grant of the permit (the so-called 4-year 'hands off' rule – see regulation 20(4) and exceptions at 20(5)).
[53] Regulation 21(7).
[54] These activities must notify the regulator of their intention to surrender under regulation 24.
[55] Regulation 46 of EPR2016
[56] Schedule 5(17) of EPR2016
[57] EA risk assessment guidance.

EU Directive requirements - EU Directives set out most of the requirements to be met through environmental permitting. Schedules 7 to 24 set out those parts of the Directives that the regulator must take into account.

Operator competence - whether the operator[58] cannot or is unlikely to operate the facility in accordance with the permit – see paragraph 3.14. The regulator might doubt whether the operator could or is likely to comply with the permit conditions, taking into account the following:

- the adequacy of the operator's management system[59]
- the adequacy of the operator's technical competence[60]
- the operators record of compliance with previous regulatory requirements (which includes previous relevant convictions) and
- the adequacy of the operator's financial competence

3.9 The regulator may take into account various factors[61] when considering an application or revocation[62] of a permit, particularly:

- the adequacy of the management system
- the technical or financial competence of the operator
- the record of compliance, including repeated failures of procedures or other management controls, permit breaches, failure to comply with advice, warning(s) and notice(s)
- criminal convictions for relevant offences
- whether the applicant or holder has been uncooperative or abusive/hostile
- whether there is a repeat pattern of offending
- impact on local amenities, local residents or legitimate businesses
- likelihood of re-offending
- the applicant will not operate the facility in accordance with the permit

3.10 The regulator may refuse or revoke on the basis of a single offence, depending on severity.

Structure of a Permit and Decision document

3.11 A permit usually contains information such as[63]:

- details of the regulated facility which has been authorised and the operator

[58] Regulation 7 of EPR2016
[59] Prepared to recognised standards e.g. ISO 14001, EMAS – linked to OPRA scores.
[60] CoTC, WAMITAB, 'Qualified expert' provisions of Euratom Basic Safety Standards Directive.
[61] EA Internal Instruction Document No 194_03 – Refusing and revoking environmental permits (V10).
[62] Regulation 22 of EPR2016.
[63] Regulation 13 of EPR2016.

- a description of the main features of the permit and status log of the permit (permitting history)
- Conditions (general requirements) dealing with:
  - Management
  - Operations
  - Emissions and Monitoring
  - Information
- Schedules (site-specific descriptions, limits and requirements):
  - permitted activities (description and limits, improvement programme)
  - permitted waste types[64], raw materials and fuels
  - emissions and monitoring (emission source(s), limits and monitoring requirements)
  - reporting requirements
  - notification requirements
  - interpretation (definitions)
  - site plan

3.12 Accompanying the permit will usually be a decision document[65], which sets out in detail the EA's process for determining the application, how all the relevant factors were taken into account in reaching the decision and why specific conditions have been included in the permit.

Duty of Care

3.13 The duty of care provisions[66] make provision for the safe management of waste to protect human health and the environment and applies to operators involved in the following:

- Importation;
- Production;
- Carriage;
- Keeping;
- Treating;
- Disposal of waste.

Or as a dealer or broker of certain waste in England and Wales. Failure to comply with the duty of care is an offence[67]. The EA produce a code of practice[68], which sets out practical guidance on how to meet the duty of care requirements.

Operator Competence

3.14 One of the main requirements of the EPR is to examine and maintain an operator's ability to operate a regulated facility to fulfil the requirements

[64] Under List of Waste Regulations 2005, SI 2005/895, which implement the European Waste List (European Waste Codes) set out in Decision 2000/532/EC.
[65] Do not normally apply to local authority regulated activities or standard rules permits.
[66] Under s34 of the EPA1990.
[67] S34(6) EPA 1990.
[68] Waste Duty of Care Code of Practice [EA, March 2016], Issued under s34(9) EPA1990.

of the permit. The legal operator, i.e. having sufficient control over the facility is also considered to be the competent operator. Operator competence is frequently identified as a reason to refuse or revoke a permit. When assessing operator competence, the following considerations may be relevant:

- **Technical Competence**[69] – has the operator demonstrated the technical competence to carry out the permitted activity for example in relation to the operation of equipment; fulfilling their statutory obligations; minimising the risk to human health and the environment; has the operator recognised or acknowledged any past failings in the management of the site? How does the operator propose to address them?

- **Environmental Record** – how responses to any accidents at sites in the past have been dealt with; are there any previous convictions for environmental offences; record of compliance with the permit or other permits (e.g. if the operator has received warnings or enforcement notices and how they have responded to them); whether the operator acknowledges any environmental harm which may have resulted from previous breaches (actual or risk of harm).

- **Financial Competence** – the operator should be able to demonstrate that there are adequate finances to carry out the operations and meet the permit conditions.

- **Financial Provision** – the operator will need to make a 'financial provision' (a guarantee) for certain activities, i.e. a landfill site and a Category A or hazardous waste mining facility. If the business ceases operating there needs to be enough money to carry out the actions needed before a permit can be surrendered or a closure notice issued.

Monitoring

3.15 The level of monitoring is usually based on an assessment of the level of risk (the Opra score) based on:

- an assessment - a desk-based check of compliance, e.g. checking that required information has been provided;
- an inspection[70] - where an officer visits a site – this is normally recorded on a Compliance Assessment Report (CAR) form;
- sampling of the permitted water discharge

3.16 Waste operations, installations, complex flood risk activities and complex water discharges activities, e.g. large sewage treatment plants, will definitely be assessed or inspected. Other sites may be assessed or inspected if there is:

[69] Includes necessary qualifications, e.g. WAMITAB or EU Skills required for permitted waste activities.
[70] Regulation 34(2) EPR2016.

- a pollution incident at the site, or in the area;
- a flood incident at the site (for flood risk activities);
- a complaint about the activity

3.17 If Environment Agency staff carry out an assessment, inspection or attend an incident, they will complete a CAR form. The CAR will record activities on site, any breaches of the permit and actions required. It will contain a score[71] for any permit conditions breached. This score feeds in to the overall compliance score (Opra)[72] which, in turn, influences the annual permit fee (subsistence fee).

3.18 Permits are reviewed to check that they reflect the latest regulations and environmental standards. Individual permits will also be reviewed if they are not being complied with. The operator may have to apply for a change to the permit, or new conditions may be applied by the regulator (a regulator-initiated variation). For standard rules permits, the EA can change the conditions of its rule set, following consultation.

Enforcement

3.19 The regulator may take action if it is suspected that the operator has committed an offence, or it is thought the operator is about to. This might include:

- giving advice
- changing the permit conditions
- serving an enforcement notice[73], and for flood risk activities a remediation notice[74], which will state what actions are required and by when
- serving a suspension notice[75] if there's a risk that pollution might occur
- serving a revocation notice[76] revoking the permit, in whole or in part where appropriate. This should only occur if all other enforcement tools have failed
- Serving a prohibition notice[77] to stop offending from a specific groundwater activity
- Serving a notice requiring a permit[78] to either stop offending for a specific groundwater activity or to prevent discharge of

[71] Compliance Classification Scheme (CCS) – to record non-compliance with permit conditions, 1-4 points system, where 1 – non-compliance that could result in major pollution incident (category 1 incident under the Common Incident Classification Scheme [CICS]) to 4 – non-compliance that could not have any impact on the environment.

[72] Operational Risk Appraisal (Opra) score, which combines five 'attributes' i) Complexity – type of activities covered by the permit; ii) Emissions and inputs – the amounts allowed to be put into and released from an activity; iii) Location – the state of the environment around the permitted site; iv) Operator performance – the management systems and enforcement history; and v) Compliance rating – how well the conditions on the permit are complied with, using the CCS scores. The scores total over a year to provide an Opra Banding system – scores falling within Band A being fully compliant to Band F being extremely non-compliant.

[73] Regulation 36 EPR2016

[74] Schedule 25, Part 1(8) EPR2016

[75] Regulation 37(2) EPR2016

[76] Regulation 22 EPR2016

[77] Schedule 22(9) EPR2016

[78] Schedule 22(10) or Schedule 21(5) EPR2016

trade or sewage effluent by requiring the person(s) to hold a permit.

- prosecuting the operator[79] if the EA think it is in the public interest.

4 Casework Considerations

4.1 **Operator Competence / Non-compliance history** – this often arises in waste EPR casework in relation to appeals against revocation or enforcement notices or decisions to refuse. The inspector will need to review CAR forms which record past non-compliance. There may also be a high Opra score. It may also be argued that the operator would be unlikely to operate the facility in accordance with the permit, based on e.g. lack of evidence of likely compliance in the permit application or past history at the application site or another related site. Decisions are issued for the reasons as outlined in paragraphs 3.8-9 & 3.14 above. The CAR form may identify problems with the condition of the building(s) or other aspects of site maintenance.

4.2 **Air emissions / odour / dust** - Considerations may include the proximity of sensitive receptors, including ecological as well as human receptors, (e.g. deposition of nitrogen on special protection areas [SPA] from ammonia emissions from intensive poultry facilities), and the extent to which adverse emissions can be controlled through the use of appropriate and well-maintained and managed equipment, which must conform to BAT requirements. This will be considered as part of the permit risk assessment process. EPR guidance is contained within the Defra/EA Guidance notes or the EA risk assessment guidance and EA Horizontal Guidance on Odour Management (H4). Odour Management Plans[80] may be necessary for some facilities handling waste likely to emit noxious odours, e.g. wastewater treatment or waste facilities handling biodegradable waste.

4.3 **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. EPR guidance is contained within the Defra/EA Guidance notes or the EA Horizontal Guidance on Noise (H3 Part 2).

4.4 **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

[79] Regulation 38 EPR2016, s33 EPA1990 or other offence.
[80] See Appendix 4 of H4 Odour Management guidance

areas. EPR guidance is contained within the Defra/EA Guidance notes or the EA risk assessment guidance.

4.5 **Pollution of controlled waters** – most industrial facilities, waste facilities, water/wastewater treatment facilities and private 'package' treatment systems will need to discharge to 'controlled waters'[81] with the risk of pollution of freshwater and marine habitats (particularly bathing waters), SACs and SPAs. The operator needs to limit the potential for pollution in the receiving waters and ensure the waters achieve the objectives set by the legislation to ensure protection of the environment and human health. Guidance can be found in the relevant Defra/EA sector guidance, the Defra Water Discharge Activities Guidance[82] and the EA Discharge to surface water and groundwater guidance and Additional (point source) Guidance[83].

Water:

4.6 **Water Framework Directive issues**[84] – permitting requirements (including the Environmental Quality Standards [EQS]) are derived from the relevant Directives and implemented (in part) through permit conditions. The aims of the Directive are:

- prevent further deterioration of aquatic ecosystems;
- to protect and enhance their status;
- to promote sustainable water use;
- to provide further protection to the aquatic environment; and
- for groundwater, to ensure the progressive reduction of the present level of pollution and prevent its further pollution;
- to contribute to mitigating the effects of floods and droughts.

4.7 The Water Framework Directive has further aims relating specifically to surface water. These include:

- implementing necessary measures to prevent deterioration of the status of all bodies of surface water;
- protecting, enhancing and restoring all surface water bodies (other than heavily modified or artificial) with the aim of achieving good status by 2015 at the latest;
- in relation to artificial or heavily modified water bodies, protecting and enhancing them with a view to achieving good ecological potential and good surface water chemical status by 2015 at the latest; and
- phasing out discharges of priority hazardous substances and progressively reducing the pollution from priority substances.

[81] Defined in s104 of the Water Resources Act 1991 as relevant territorial water and coastal waters within 3 miles from the baselines; inland freshwaters (includes lakes, ponds, reservoirs, rivers and other watercourses) and groundwaters.
[82] Environmental Permitting Guidance: Water Discharge Activities [Defra, v2 Dec 2010]
[83] How to comply with your environmental permit. Additional guidance for water discharge and groundwater (from point source) activity permits (7.01) [EA, 2012]
[84] Schedules 21-22 EPR2016

4.8 In order to achieve the first of these, the Directive establishes a demanding water classification system to identify pressures that may lead to a deterioration in ecological status of water bodies.

4.9 River Basin Management Plans (RBMPs) detail the measures that must be taken to improve or maintain the ecological status of water bodies. Some of these measures can be achieved by controlling environmental emissions. It is these measures that are delivered through the Environmental Permitting Regulations, by means of environmental permits for water discharge activities. RBMP were originally published in 2009 and have been reviewed in 2015. There are 11 river basin districts (RBDs) in England and Wales. The Environment Agency manage the 7 RBDs in England. Natural Resources Wales (NRW) manage the Western Wales RBD. NRW and the Environment Agency jointly manage the Dee and Severn RBDs[85]

4.10 **Water Quality issues: dangerous substances** - the Water Framework Directive aims to eliminate very toxic substances and to reduce pollution from other less severely toxic substances. For any discharges to inland, coastal and territorial surface waters, it is necessary to obtain prior authorisation if the discharge is likely to contain dangerous substances. The directives set emission limit values and environmental quality objectives. It also establishes EQSs for a list of 33 prioritised substances, and includes the required standards for those substances.

4.11 **Urban Waste Water Treatment Directive**[86] – The UWWTD aims to protect the environment from the adverse effects of the discharge of waste water. The Directive includes requirements for the collection and treatment of urban waste water and so mainly affects the statutory water and sewerage companies, since they own and operate the public sewerage system and the urban waste water treatment works. Discharges from certain industrial sectors such as food and drink processing plants can have a similar polluting effect to untreated sewage, so some of these are also covered by the Directive.

4.12 The Directive broadly sets treatment levels for discharges on the basis of the size of the discharge and the sensitivity of the waters receiving the discharge. Most discharges will require secondary treatment, which is usually a biological process. Discharges into 'Sensitive Areas'[87] will require more stringent treatment than this ordinary secondary treatment. All sewerage systems that also collect rainwater (combined sewers) need overflow outlets (combined sewer overflows (CSO)[88]) to deal with the extra water collected during some rainstorms. Without these safety valves both domestic, other properties, and sewage treatment works would be at risk of flooding. The Directive recognises that although sewage in these

[85] River Basin Management Plans [Defra/EA, 2015]
[86] Directive 91/271/EEC
[87] waters that are eutrophic or may become eutrophic if protective action is not taken; waters that exceed or could exceed a specified concentration of nitrate; and waters receiving discharges that are subject to more than secondary treatment under the requirements of other EU Directives.
[88] Prevents overflows of the sewerage network in storm events by diverting excess rainwater mixed with untreated sewage into a separate pipe which runs off the main sewer and directly to a river or the sea.

overflow discharges is diluted with significant amounts of rainwater, it can affect the environment. The legislation therefore requires that pollution from these overflows is limited. There are up to 30,000 CSOs in the UK and they are gradually being phased out or, where practical, alternative storage methods are being constructed to limit their spill frequency. Water company appeals may relate to permit revocations or variations relating to CSOs and technical, practical and economic arguments for and against their retention.

4.13 **Economic: Asset Management Plans and Periodic Review** - Water companies operating the public water networks hold appointments as water undertakers and those operating the public wastewater networks hold appointments as sewerage undertakers. There are currently 10 regional companies that provide water and sewerage services and 9 water only companies. Price limits for water and sewerage company services are set by the Water Services Regulation Authority (Ofwat) on a 5 yearly basis. The next price review (periodic review 18) is in 2019 for the period 2020-25 (AMP 7 period). As part of the price review each company is required to submit its Asset Management Plan (AMP), which details:

- the company's overall strategy and the implications for price limits and average bills;
- its strategic objectives in terms of service performance, quality, environmental and other outputs
- the activities necessary in the period to meet these objectives
- the scope for improvements in efficiency
- Water company performance is monitored against the AMP output objectives

4.14 In terms of environmental permits, water companies may cite the AMP and price review in terms of the amount they can spend on infrastructure improvements that may be necessary following variations in permit conditions (e.g. to enable tighter water quality limits to be met).

Waste:

4.15 **Waste Framework Directive requirements**[89] – The *Waste Hierarchy* (Article 4) – the hierarchy gives top priority to waste prevention, followed by preparing for re-use, then recycling, other types of recovery (incl. energy recovery), and the least desirable being disposal (e.g. via landfill). The 2011 Regulations[90] require those involved in waste management (and waste producers) to take all 'reasonable' measures to apply the hierarchy (except where justified). Regulators under the Environmental Permitting regime must ensure the hierarchy is applied when exercising their functions. Defra have published guidance on the application of the waste hierarchy[91].

[89] Schedule 9 EPR2016
[90] SI 2011 No. 988
[91] Guidance on applying the waste hierarchy [Defra, June 2011].

4.16 *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).

4.17 **Landfill Directive requirements**[92] - under the Landfill Directive there are targets that member states should meet in order to reduce the amount of biodegradable municipal waste (BMW) sent to landfill – landfill diversion. In England these targets, together with the UK Landfill Tax and the now cancelled Landfill Allowance Trading Scheme (LATS), has (in part) led to a substantial growth in waste management technologies that can now process waste, rather than being sent to landfill (e.g. Anaerobic digestion, incineration, mechanical biological treatment (MBT) plants etc. It should be noted that as there are currently no new landfill sites being applied for and the landfill diversion targets are being met there are likely to be very few cases where this issue arises, only perhaps extension of existing sites.

4.18 **Definition of terms** - issues have arisen in EP appeals relating to the legal interpretation of standard terms used in activities covered under EPR, e.g. 'waste'[93]; waste types[94], activities[95], recovery/disposal[96], which require careful scrutinising and legal advice as a decision may need to be recovered due to potential national impact on the industry concerned and European Directive legal implications.

4.19 **Measures to raise standards** - periodically, there will be pressure to address particular aspects of waste management activities. For example, in recent years the EA has taken action to improve the storage arrangements on sites in order to reduce the risk of fire. This has been implemented through a requirement for *Fire prevention plans (FPP)*[97].

[92] Schedule 10 EPR2016
[93] Article 3(1) of Directive 2008/98/EC
[94] European Waste Codes, transposed by the List of Wastes (England) Regulations 2005, SI 2005/895
[95] Under Schedule 1 EPR2016
[96] Article 3(15) & (19) of Directive 2008/98/EC.
[97] Required where storage of combustible materials occurs at permitted waste sites. There have been many high profile fires occurring at waste sites in the UK recently e.g. Averies recycling, Swindon, where 3,000

This has resulted in many enforcement notices being issued by the EA. Operators need to ensure they have adequate measures in place to prevent fires and to contain fires and firewaters in the event of a fire happening. These measures are often quite specific such as specifying maximum stack sizes of waste; minimum separation distances; quarantine area; monitoring and suppression systems. They also address the business model, so that the operator must be able to demonstrate that the business is capable of maintaining a rapid throughput of wastes. At appeal the likely issues are: operator competence (technical or financial) and record of compliance; that the requirements are new or have changed recently[98]; that it is not the EA's role to regulate fire prevention; EA Staff are not qualified or competent; there is no data to show potential impact; or that the EA also has a duty to promote economic growth.

5 Case Law

5.1 *R.(on the application of Tarmac Aggregates Ltd [formerly Lafarge Aggregates Ltd]) v SoS for EFRA and The Environment Agency*

Date: 17 November 2015; Ref: [2015] EWCA Civ 1149

5.2 The Court of Appeal considered an appeal from a decision in the High court in which the Judge dismissed an application by the Appellant for judicial review of a decision dated 29 January 2015 by the Inspector, who dismissed an appeal[99] by Tarmac against a refusal by the EA to grant a standard rules environmental permit for 'recovery' of waste (in this case spoil from quarrying operations). Tarmac intended to use the waste to remodel the landscape at the quarry to comply with a condition imposed on a planning permission. Both the EA and the Inspector concluded that the proposed operations did not constitute 'recovery operations' under Directive 2008/98/EC. The central issue in this case was the interpretation of the terms 'recovery' (as opposed to disposal) and 'recovery operations' under Article 3(15) and Annex II of Directive 2008/98/EC. 'Recovery' means any operation the principle result of which is waste serving a useful purpose by replacing other materials which would otherwise have been used to fulfil a particular function. It was argued that the operations could fall to be defined either as a disposal or a recovery operation, as listed in Annexes I and II of the Directive

5.3 The Inspector concluded that the case turned on '*… whether the reinstatement of an excavated section of a footpath would be likely to occur if waste were not to be used…. …Both the scale of the landform, and the resulting cost of using non-waste materials, would make it likely that alternative approaches would be considered for the reinstatement of the footpath. These approaches would reasonably be expected to include the redesign of the proposed landform and its construction, which could*

tonnes of waste caught fire in July 2014 and was burning for 2 months. These fires can cause significant damage not just to the site, but environmental damage to the surrounding areas from e.g. firewater run-off.

[98] Fire Prevention plans: environmental permits [EA, November 2016]

[99] APP/EPR/13/118 – Appeal against refusal of a standard rules permit (SR2010 No8_100Kte) at Methley Quarry, Green lane, Methley, Leeds LS26 9AH.

include the use of a footbridge or permanent diversion of the footpath…' This would not be replacing other materials so would not be an act of recovery.

5.4 The Court of Appeal disagreed with Inspector's assessment on the facts of the case. The Council had confirmed it would still require the Appellant to complete the approved restoration scheme, which was covered by a Planning Obligation. As the scheme would proceed anyway, the waste would replace primary materials. Therefore it was a recovery rather than a disposal operation.

5.5 *R.(on the application of Rockware Glass Ltd) v Chester City Council & Quinn Glass Ltd*

Date: 15 June 2006; Ref: [2006] EWCA Civ 992

5.6 This case concerned the emission limits for NOx and the approach taken with regards to consideration of BAT for glass manufacture. Quinn Glass Limited built the largest glass container work factory in Europe. Chester City Council issued an IPPC permit[100] which imposed requirements in relation to the emissions from the plant of NOx. Rockware Ltd, a competitor challenged the legality of the permit in relation to air emissions and the permit was quashed in the High Court.

5.7 Quinn Glass appealed to the Court of Appeal, which upheld the Judge's reasoning. The Court of Appeal considered one of the issues raised by Quinn Glass fundamental to the case was the implications for decisions under the IPPC Directive of the requirements of Environmental Quality Standards (EQS) laid down under other parts of the EC law (in this case Directive 96/62/EC on ambient air quality. Quinn Glass argued that it was not the objective of the IPPC Directive to reduce emissions as far as possible, but to reduce emissions to a level where a high level of protection of the environment as a whole is reduced. One this point is reached there is no requirement to go further even if this was technically possible.

5.8 The Court of Appeal rejected this argument and took the view that those who introduced a potentially polluting situation had to be controlled and not escape control by stating that the EQS had been achieved. The legislation set up stringent limits on pollution on a plant-by-plant basis and Quinn had been wrong to contend that it should not be required to do anything if the limits from plants as a whole stayed below the EQS values.

6 Environmental Permitting Appeals

6.1 The rights of appeal and appeal procedures to be followed are set out in EPR2016 at regulation 31 and Schedule 6. You should familiarise yourself with these regulations before dealing with an appeal.

[100] Appeals by Rockware Glass against Doncaster MBC issuing an Enforcement Notice (APP/PPCL/06/160) and their refusal of permit variation (APP/PPCL/07/192) under PPCR2000 were received after the Judgment and decided on 27 November 2007.

Appeal Types

6.2 Regulation 31 gives the following persons the right of appeal against the decision made by the regulator:

R31.-(1) a) a person whose application is refused;

b) a person who is aggrieved by a decision to impose an environmental permit condition following that person's application;

c) a person who is aggrieved by a decision to impose a condition on an environmental permit held by that person—

(i) as a result of a regulator-initiated variation, or

(ii) to take account of the partial transfer, partial revocation or partial surrender of that environmental permit;

d) a person who is aggrieved by the deemed withdrawal under paragraph 4(2) of Part 1 of Schedule 5 of that person's duly-made application;

e) a person who is aggrieved by a decision relating to an environmental permit held by that person not to authorise the closure procedure mentioned in—

(i) Article 13 of the Landfill Directive after a request referred to in Article 13(a)(ii) of that Directive, or

(ii) Article 12 of the Mining Waste Directive after a request referred to in Article 12(2)(b) of that Directive;

f) a person on whom an enforcement notice, a revocation notice, suspension notice, prohibition notice, landfill closure notice, mining waste facility closure notice, flood risk emergency works notice, flood risk activity notice of intent or flood risk activity remediation notice is served.

6.3 Appeals cannot be made under the following circumstances:

i) where a decision or notice that implements a direction of the SoS given under EPR2016 r62(1), r63(1) or (6), or r31(6);

ii) where an application for the grant or variation of a permit for Category A mining waste facility that is an existing facility is refused under paragraph 14(2) of schedule 20;

iii) where a revocation or suspension notice is served in relation to non-payment of subsistence fees under r66(1);

iv) where it relates to conditions on a 'standard permit'[101]

Appeals Process:

6.4 Appeals are submitted on an appeal form (akin to the planning appeal form, adapted for EPR appeals), although this is not a legal requirement. For an appeal to be valid[102] the following should be provided by the appellant:

i) written notice of appeal/appeal form;

ii) statement of the grounds of appeal;

iii) statement indicating whether you wish the appeal to be dealt with by the written representations procedure or otherwise to be heard by an Inspector at a hearing or inquiry;

iv) copy of the relevant application (if any);

v) copy of the relevant environmental permit (if any);

vi) copy of any relevant correspondence, plans etc. that you exchanged with the regulator; and

vii) copy of the decision or notice which is the subject of the appeal.

6.5 The grounds of appeal should explain, in full, why the appellant is aggrieved by the regulator's decision. It should describe those aspects of the decision which the appellant would wish to change and how the change should be effected. It should also state whether any of the information enclosed with the appeal has been the subject of a successful application for commercial confidentiality[103], and provide relevant details. Unless such information is provided, all documents submitted will be in the public domain and open to inspection.

Appeal Time Limits

6.6 Notice of appeal must be given, i.e. received by both the Inspectorate and the regulator, within the following time-scales[104]:

a) in relation to an appeal against a revocation notice, before the revocation notice takes effect;

[101] R27(3) of EPR2016
[102] Schedule 6(2) of EPR2016
[103] R48 of EPR2016
[104] Schedule 6(3) of EPR2016

b) in relation to the withdrawal of a duly-made application under paragraph 4(2) of Part 1 of Schedule 5, not later than 15 working days after the date of the further notice served by the authority stating that the application is deemed to be withdrawn;

c) in relation to an enforcement notice, a regulator-initiated variation, suspension notice, mining waste facility closure notice or landfill closure notice, not later than 2 months after the date of the variation or notice;

d) in relation to a prohibition notice, not later than 21 days after the date of the notice; or

e) in any other case, not later than 6 months after the date of the decision or deemed decision.

6.7 Appeals made outside the time limits are only accepted in very exceptional circumstances, for appeals outlined in b) to e) above. Appeals in relation to revocation notices cannot be accepted if they are submitted outside the time limit.

The effect of making an appeal

6.8 The acceptance of a valid appeal has the following effects[105]:

- Where an appeal is lodged against a revocation notice, the revocation will not take effect until the decision is issued or the appeal is withdrawn (unless the regulator deems it necessary to prevent or minimise pollution).

- If an appeal is made in relation to refusal of a permit, transfer, surrender, variation or conditions, the lodging of an appeal will not suspend the decision or the operation of the conditions.

- Where an appeal has been made against a variation notice, enforcement notice, suspension notice or deemed withdrawal of an application, the appeal will not suspend the notice.

- Where an appeal is brought against a closure notice or to initiate a closure procedure, the appeal will not suspend the notice.

- Where an appeal is brought against a condition on a permit for a water discharge activity, the condition will not take effect until the determination or withdrawal of the appeal (unless the condition is deemed necessary by the regulator to prevent or minimise pollution).

[105] R31(7)-(10) of EPR2016

Notification requirements[106]

6.9 Within 10 days of receipt of the notice of appeal the regulator must inform:

- any person who made representations to the regulator about the subject matter of the appeal; and
- any person who appears to the authority to have a particular interest in the appeal; and
- relevant national consultees (generally those consulted at the application stage).

6.10 The regulator must notify the above parties that an appeal has been made and by whom, describe the application or permit to which the appeal relates, and state that representations must be made in writing to the Planning Inspectorate within 15 working days of the date of the notification. The notification should also explain that any representations made to the Inspectorate will be copied to the appellant and the regulator and will be entered on the public register. The regulator will confirm to the Inspectorate that this has been done.

Appeal Procedures

6.11 The procedure timetable for appeals under r31 broadly follow 'in the spirit of' the 2000 Planning appeals regulations and rules. These are detailed in the Appeals Procedure Guide[107]. Normally, a hearing is held in public. There is however provision for the Inspector to decide that the hearing, whole or in part, may be held in private. This applies in cases where commercial confidentiality is raised in appeals under r53.

Costs

6.12 The award of costs applies to hearings and inquiries in appeals under EPR, by virtue of Schedule 6(6), which applies s250(2)–(5) of the Local Government Act 1972. Schedule 20 of the Environment Act 1995, which has effect by virtue of S114(2)(viii) in relation to 'appointed persons' also applies costs provisions to hearings and inquiries. Following an application for costs the Inspector can act 'in the spirit of' and apply the general principles of the Award of Costs section of the Planning Practice Guidance on Appeals'[108]. An application for costs can only be considered where an 'event' (i.e. a hearing or inquiry) has been held.

Powers of Inspector

6.13 The Inspector is appointed under r31 (and Schedule 6) on behalf of the Secretary of State for Environment, Food and Rural Affairs (Defra) and has wide powers under r31(5) and has in effect the same powers as the

[106] Schedule 6(4) of EPR2016
[107] Environmental Permits: The Appeal Procedure Guide [PINS, Feb 2017].
[108] Planning Appeals PPG – Award of Costs

regulator had when making the decision. This means that the powers in Schedule 5 also can also be used by an Inspector in relation to an appeal. For example Schedule 5 Para 12(2) states that "the regulator may grant an application subject to such conditions as it sees fit" and Schedule 5 Para 12(3)(a) states that "variations of an environmental permit in relation to the grant of an application for variation… must be in consequence of the variation".

Appeals – Points to note

6.14 Waste management proposals and some proposals dealing with water quality on any significant scale are likely to go to inquiry because of the degree of public interest, and to be of a sufficient complexity and duration as to require a PIM. Guidance on the conduct of these is in ITM Chapter on Inquiries. There may also be an accompanied planning application/appeal proceeding at the same time, possibly with an EIA, which in such cases is likely to be complex, so you should be familiar with the ITM Chapter on EIA. Also adding to the bulk of the file there may be lots of plans (especially in landfill cases, although these will be unlikely), and perhaps a copy of the planning application, draft working plan; previous Permit decision documents and for landfill cases a hydrogeological risk assessment.

6.15 As with all casework, the simplest cases tend to be dealt with by the written representations (WR) procedure. However, these used to be rare, but are now increasing. For the more complex cases, involving multiple issues, local/national interest and/or legal issues a hearing or inquiry is the norm. Defra will on rare occasions 'recover' cases where there is a national or novel technical and/or legal issue(s) involved.

6.16 In the past, it has sometimes been necessary to go back to the parties for more information on WR cases, because the parties have assumed that Inspectors have access to a wealth of relevant documentation. Now, the parties are increasingly realising that they must provide PINS with the relevant parts of any documents that they wish to rely on - Inspector's decisions will be based on what is before them.

6.17 For appeals involving water companies, negotiations between the appellant and the Environment Agency are often at a critical stage when a hearing or inquiry opens. There is a real risk that the proceedings will be adjourned for long periods to allow those negotiations to be completed. A complicating factor is that regional Agency staff may need to discuss the position with national staff; this can cause delays.

6.18 For these reasons:

- If there is a PIM, it may be helpful to encourage the parties to consider whether a suitable compromise can be reached and to identify the areas of disagreement (as well as agreement) in the statement of common ground. Make it clear that you intend running the proceedings as efficiently as possible and that you

expect any negotiations to be completed before the inquiry opens.

- If there is no PIM, but there is a request for an adjournment during the proceedings, point out that you do not intend adjourning more than once and that the parties should therefore use the break to complete all outstanding discussions.

6.19 A written reps case may require more site visit time than normal, especially in a landfill case. The site may cover a large area and you should ensure that there is no ambiguity about the meeting place, asking the office to liaise with the parties about this if necessary. Sometimes the parties will offer to convey you around the site by vehicle, it is for you to decide whether this is appropriate, balancing the savings in time against the better impression that might be gained on foot.

Commercial Confidentiality

6.20 If the regulator has decided that information should be placed on the Public Register, any objector who has a commercial interest that may be affected by the inclusion of certain information may appeal to the SoS under regulation 53, on the grounds that it should be considered commercially confidential. Appeals should be submitted within 15 working days from the date the notice of determination was given. The regulator must not include the information that is the subject of the appeal on the public register until the appeal is decided.

6.21 The procedures for this type of appeal will follow the same procedure as appeals under r31, except that hearings will be conducted wholly or partly in private[109] The Inspector will determine whether:

(a) the relevant information is to be classified as commercially confidential and therefore should not be published on the regulator's Public Register (status reviewed after 4 years in certain cases); or

(b) the relevant information is not commercially confidential, in which case the regulator should place it on the Public Register.

Test Cases

6.22 In general waste cases and those involving 'private' or commercial discharge consents involve a single site and relates to a single permit, but may involve both a permit application/variation and or revocation/enforcement notice. In contrast discharge consents from water/sewerage undertakers may involve multiple sites (sometimes involving hundreds of sites spread over a wide area and may involve multiple companies as it relates to a nationally imposed condition). In these cases they are usually placed in abeyance until either the companies come to an agreement with the EA and Defra and withdraw

[109] Paragraph 4(3)(d) of Schedule 20 of the Environment Act 1995.

the appeals or if there is no agreement it may be necessary to consider using 'test cases' to cover issues that occur at multiple similar sites or sites within the same catchment area at a single event, which can then be applied to other similar sites. This approach has been used successfully on a few occasions[110]. Some waste cases have had issues which also relate to national discussions on a particular permitting issue in the waste industry and 'test cases' have been used to resolve these cases.

Health and Safety

6.23 Site visits will normally be to waste facilities, water treatment works, riverbanks, discharge pipes etc., but occasionally Inspectors have to visit something that cannot be seen, such as a leaky pipe. You will usually need to use your PINS-provided hard hat, protective footwear and high-viz clothing. Before visiting, make sure you are fully aware of the protective clothing requirements – in some cases this may extend to face masks, safety boots etc. and where additional protection is required (e.g. eyewear) this should be provided by the site operator or the regulator. Be mindful that any open wounds/areas of broken skin should be covered when visiting a site where bio-aerosols are likely to be present.

Decisions

6.24 As mentioned in paragraph 6.13 above the powers of the Inspector are wide-ranging, but should be used with caution as any change to conditions needs to conform to the necessary Directive provisions and Defra and EA guidance, in particular any BAT Reference/BAT conclusions documents enshrined within the EA Sector Guidance. Principles of framing planning conditions, i.e. the 'Tests' set out in the Conditions PPG can also be applied where relevant. You are likely to be presented with a set of suggested conditions by the parties (normally the regulator) which may need to be scrutinised.

6.25 Particular care needs to be exercised when deciding on enforcement or revocation notices as these may be linked to pollution events and risk of pollution which should not be prolonged by 'generous' timescales for completion. The same applies to water company 'test cases' and occasionally waste industry cases as any decision may affect many hundreds of sites nationally.

6.26 It should be noted that the EA have been asked by Defra to target waste sites that are in continued non-compliance (Opra Bands E & F in particular) and decisions on appeals at these sites need to be consistent with this approach to enforcement. Inspectors decisions that are not consistent with this approach could be perceived as sending out the

[110] **APP/WQ/10/2770-71 and 30 others** – r31(2)(b) appeals by Anglian Water, South West Water and Yorkshire Water against EA imposed conditions on permits for stand-alone discharges associated with water/wastewater treatment works and CSOs at sewage pumping stations to controlled waters; various conditions in dispute including those relating to general management, operating techniques and emissions. The 32 appeals raised matters of law, risk and environmental impact. Six 'test cases' were chosen which represented common issues, but all the sites also had site specific considerations. The EA were directed to vary conditions of each permit. The appellants applied for costs against the EA, which were allowed.

wrong message to the waste management industry and may result in challenges where it could be argued the decision may hinder the EA's approach to enforcement and prolong risk to the environment and human health. In these cases the progress towards compliance that the operator has made/appears to have made and the relative risk to the environment of continued non-compliance needs to be taken into account as part of the decision-making process.

6.27 In order to assist Inspectors in the decision-making process a 'checklist' which covers points that may need to be addressed in the decision:

a) Does the decision adhere to the principles of the EP regime, particularly as regards giving primacy to the protection of the environment?

b) Is the decision internally consistent as regards any finding of operator competency?

c) Where a decision addresses a novel issue, or takes a novel approach, has specialist advice been sought?

d) Does the decision header refer to the correct department, legislation and regulations?

e) With enforcement and revocation notices, have the 'steps to be taken' been reviewed and updated?

6.28 It should be noted that with regard to training in EPR the level of training inspectors receive is sufficient to equip them to review the merits of the EA's actions but not to become directly involved in detailed matters of site management. As a result, the standard approach is to review whether the EA's actions are reasonable and proportionate, so that it is rare to exercise the Inspector's powers under Reg 31(5). If a situation arises where an Inspector is considering such action, this should be aired at the event. Also, the Inspector should be confident that s/he has sufficient information as to the detailed situation and should demonstrate that particular consideration has been given to the implications in respect of the principles of the EP regime – i.e. protection of the environment and prevention of harm to human health by use of use of BAT, where necessary, and in compliance with the relevant EU Directives.

Annex A

Example Environmental Permitting Decisions

i) **Permit refusal: APP/EPR/12/81 – S31(2)(a) appeal by Mr N Stoker, Unit 1, Farrar Mills, Farrar Mills Lane, Siddal, Halifax HX3 0PY** – Site Visit 20 June 2013, decision dated 2 August 2013. Refusal of 'Standard rules' [SR2008No3 75kte] permit application for the operation of installation for a household, commercial and industrial waste transfer station with treatment (<75,000tpa throughput).

Reasons for refusal: EA concluded that the appellant would not be the operator; the appellant would not be able to comply with certain permit conditions as borne out by a long history of non-compliance.

Grounds of appeal: appellant would be in control of operations on the site as he currently lives at the site; granting of an operators licence to the appellants at another site.

Inspectors decision: not convinced that the appellant would be likely to have the authority to control the site activities or to make financial decisions and therefore could not be the operator; current state of site and history of non-compliance that would breach the permit upon issue and concluded that the appellant would not operate the facility in accordance with the permit. Appeal dismissed: permit application refused.

ii) **Conditions: APP/EPR/13/87 – S31(2)(c)(i) appeal by Omega Proteins Ltd, Wildriggs, Greystoke Road, Penrith, Cumbria, CA11 0BX** – Hearing 15 October 2013, decision dated 5 December 2013. Regulator-initiated variation by Eden DC to impose conditions in relation to effluent discharge to a sewer (other conditions appealed were agreed and appeal withdrawn with regard to those aspects) to a permit for an A2 (s6.8, Schedule 1) animal by-product rendering process to turn category 3 material into meat and bone meal (MBM) and tallow.

Reasons for variation: following review of the permit, conditions varied to incorporate all variation applications made, advances in BAT, reviewed sector guidance and general guidance.

Grounds of appeal: Examples of dual regulation, which we do not believe are in alignment with the Government's stance and current policy on 'deregulation and better regulation' and also result in dual enforcement at an additional cost to Local Government. Additional controls being imposed over and above what is required in current guidance (specifically Sector Guidance Note IPPCSG8 Integrated Pollution Prevention and Control (IPPC) - Secretary of State's Guidance for the A2 Rendering Sector). The cost/benefit of imposing the additional controls. Insufficient scientific explanation of the reasons for the additional controls on the odour abatement equipment.

Inspectors decision: concluded that many of the monitoring requirements in the disputed conditions are already included in other EP conditions. Other conditions appealed changed and agreed between the parties. Inspector allowed the appeal (as reduced in scope) and modified the consolidated permit by deleting 3 conditions and modifying the thermal oxidiser monitoring condition.

iii) **Permit transfer, surrender: APP/EPR/12/42 – S31(2)(a) appeal by Clive Hurt (Plant Hire) Ltd, Great Knowley and Gorse Hall Landfill Site, Blackburn Road, Chorley, Lancashire PR6 8TH** – Site Visit 24 July 2012, decision 17 August 2012. Application for surrender of a permit for a non-hazardous landfill site

Reasons for refusal: following review of the permit, conditions varied to incorporate all variation applications made, advances in BAT, reviewed sector guidance and general guidance. The EA considered that the appellant had failed to adequately demonstrate that the deposits of waste within the site are no longer resulting in generation of excess landfill gas and not giving rise to groundwater pollution.

Grounds of appeal: the appellant maintained that the landfill gas monitoring results show that there is no gas flow at the site boundary and no gas migration off-site; the results of groundwater monitoring meet the completion criteria in the EA Guidance; and there is sufficient landfill monitoring infrastructure to enable closure of the site.

Inspectors decision: concluded that although the information submitted as part of the application with regard to monitoring has been taken from several points around the site (predominantly the Southern part), given the time period of operation and the waste characteristics, the information is insufficient to show that the waste mass is sufficiently stable and does not present an undue risk to the surrounding area. The appeal was therefore dismissed.

iii) **Revocation of permit 1: APP/EPR/15/401 – S31(2)(f) appeal by Metropolitan Waste Management Ltd, 185 Manor Road, Erith, Kent DA8 2AD** – Hearing held 23 September 2015, decision 19 November 2015. Permit revoked in its entirety and steps required for a waste transfer station and soil screening facility.

Reason for revocation: EA considered the operator is not competent and will not operate the facility in accordance with the permit. In particular persistent failure to comply with the permit conditions; non-compliance with previous enforcement notice; inadequate technical competence; historical prosecution demonstrating non—competence. The Notice required various steps to be taken to bring the facility back into compliance including prevention of emissions & monitoring; removal of all waste from site and empty/clean all drainage systems.

Grounds of appeal: revocation was unreasonable and disproportionate and the EA is wrong to consider the appellant is not a competent operator. The appellant has endeavoured to comply with all CAR's and enforcement notices (although not always within the timescales due to mitigating circumstances); the company does have a person who has a Certificate of Technical Competence (CoTC) who has increased his level of attendance and the current site manager is in the process if gaining CoTC. Historical prosecution does not have any bearing on the current situation.

Inspectors decision: concluded that continued poor performance of the operator indicates that he is not competent and was not convinced that the appellant could comply in the future and the was satisfied that the revocation of the permit was proportionate in this case. The Notice was affirmed with modifications.

iv) **Revocation of permit 2: APP/EPR/15/443 – S31(2)(f) appeal by Wasteology Ltd, Greenham Quarry, Wellington, Somerset TA21 0JU** – Hearing held 19 April 2016, decision 1 July 2016. Permit revoked in its entirety and steps required for a waste transfer station facility.

Reason for revocation: EA considered the operator is not competent and will not operate the facility in accordance with the permit. In particular the company has a poor record of compliance; the banding for Opra compliance was the lowest rating (Band F) for 2011-2015; the company received advice and guidance on compliance as well as warning letters, 19 Enforcement Notices and 2 formal cautions which have failed to secure compliance; inadequate working plan; inadequate infrastructure and drainage at the site; site has impacted on the local amenity with regard to noise; occasions where the technically competent management cover has been inadequate. The Notice required various steps to be taken to bring the facility back into compliance including prevention of emissions & monitoring; removal of all waste from site and empty/clean all drainage systems.

Grounds of appeal: the notice of revocation was unreasonable and disproportionate and the EA has not acted consistently or transparently and has failed to take all of the relevant considerations into account. On 27 November 2014 the EA advised the company that it had 18 months to achieve compliance or the permit would be revoked (until 27 May 2016); the company relied upon that assurance and invested significant money in the redevelopment of the site to ensure its future compliance within the timeframe; however, in serving the Notice on 20 August 2015, the EA has unfairly reneged upon its previous position to the serious detriment of the company.

Inspectors decision: concluded that there does not remain a significant risk of pollution from the appeal site and the revocation is not justified in the interests of the protection of the environment;

Inspector was not convinced that there was such a change in circumstances or any other trigger to issues a revocation Notice prior to the end of the 18 month period. Although there is continued poor performance there have been recent improvements which indicate that the operator is capable of operating the site in compliance with the permit. The appeal was allowed and the Revocation Notice was quashed.

v) **Enforcement Notice: APP/EPR/15/462 – S31(2)(f) appeal by T K Lynskey (Excavations) Ltd, Clifton Works, Neepsend Lane, Sheffield, South Yorkshire S3 8AW** – Site visit 14 April 2016, decision 13 May 2016. Notice and steps required related to permit for waste transfer station for non-hazardous waste.

Reason for Enforcement Notice: breach of permit conditions – activities not managed in accordance with the management system as there is no written management system which identifies and minimises the risks of pollution; waste is not being kept in a building/secure container and on impermeable surface with sealed drainage; acceptance of waste not authorised by the permit (waste from mechanical treatment of waste). The notice required submission of a written management system; movement of all waste to secure containment with suitable surface and drainage; removal of all non-authorised waste from the site.

Grounds of appeal: appellant disputes alleged breaches of permit; Notice not justified – based on flawed reasoning with no supporting evidence; EA acted unreasonably and prematurely in issuing the Notice; the conditions are unreasonable and unnecessary; timescale for compliance insufficient.

Inspectors decision: concluded that absence of written management system breaches permit condition; evidence of contraventions of waste storage conditions; CARs and on-site evidence proves contravention of permit conditions on waste acceptance and unacceptable risk of pollution and nearby river; EA enforcement action was reasonable and justified; steps and timescale for compliance necessary and reasonable. Appeal was dismissed and Notice upheld.

vi) **Commercial Confidentiality: APP/EPR/12/52, S53(1) appeal by JBMI Group Ltd, Kingsilver Refinery, Hixon, Staffordshire ST18 0PY** – site visit deemed not necessary, decision 12 March 2013. Rejection of request to grant commercial confidentiality for reporting of performance indicators relating to waste removed from site and Pollution Inventory return relating to off-site waste transfers in respect of varied permit for recovery of contaminated aluminium and production and processing of secondary aluminium.

Reasons for refusal: request not granted as the information has appeared in the public domain in previous years without a confidentiality request.

Grounds of appeal: the EA are required to exclude information that is commercial and industrial as it relates to commercial activities and processes of the company; the information is already subject of legal confidentiality in order to protect legitimate economic interests, via contractual confidentiality which applies non-disclosure agreements to all aspects of the company's processes; there is no significant public interest in having this information disclosed, but there is public interest in maintaining commercial confidences.

Inspectors decision: no evidence that the appellants marketplace is any more competitive than others or requires any greater level of sensitivity; the existence of the non-disclosure agreements are a matter between those parties involved and is not an overriding indication of necessity of commercial confidentiality. The appeal site lies close to housing and a school and the appeal information give an indication of the activity level of the site, which is in the public interest. The EPR carries a presumption in favour of disclosure and this together with the other points does not provide a convincing argument for excluding the information from the public register. The appeal was rejected.

Annex B

Environmental Permitting – Glossary of Terms

Term	Abbreviation	Explanation
Activated Carbon	AC	Very porous carbon, acts as adsorbent for aromatic organic pollutants – can adsorb large quantities of gases, extensively used for odour control.
Activated sludge		Sludge removed from the activated sludge sewage treatment process. Consists of bacteria and protozoa which can live on the sewage and requires continuous removal. Part of the still active sludge is returned to the raw sewage (hence 'activated sludge') and the majority (about 90%) is sent for disposal to land, sea or incineration.
Activity		In schedule 1 of EPR2016. Activity as listed in Part 2 of the Schedule. An activity is carried on at an installation or mobile plant. For an activity carried on at an 'installation', the place where the activity is carried on forms part of the installation.
Advanced Thermal Treatment	ATT	A generic term to describe energy from waste technologies (primarily those that use Gasification or Pyrolysis) which are more efficient at recovering energy than conventional methods. See separate definitions of Gasification, Pyrolysis and Thermal Treatment for further details.
Anaerobic Digestion	AD	Biological treatment for organic wastes such as food and green garden/ horticultural waste, where plant and animal materials (biomass) are broken down by micro-organisms in the absence of oxygen, using an enclosed system, under controlled conditions. The main end products are "biogas" which can be used to generate heat or power, and "digestate" (a compost-like material that can be used as a fertiliser). As the process is enclosed in a building, AD does not require a large site, but must be an appropriate distance away from "sensitive receptors" such as housing and community facilities, because

		of potential health risks.
Asset Management Plan	AMP	Tactical plan for managing the water industry infrastructure to a methodology that drives continuous improvement on a 5-year cycle (currently AMP6 covering 2015-2020, i.e. the 6th AMP period since privatisation in 1989). The expenditure is linked to the OFWat periodic price review (currently PR18)
Best Available Techniques	BAT	Means the most effective and advanced stage in the development of activities and their methods of operation which indicates the practical suitability of particular techniques for providing the basis for emission limit values and other permit conditions designed to prevent and, where that is not practicable, to reduce emissions and the impact on the environment as a whole: (a) 'techniques' includes both the technology used and the way in which the installation is designed, built, maintained, operated and decommissioned; (b) 'available techniques' means those developed on a scale which allows implementation in the relevant industrial sector, under economically and technically viable conditions, taking into consideration the costs and advantages, whether or not the techniques are used or produced inside the Member State in question, as long as they are reasonably accessible to the operator; (c) 'best' means most effective in achieving a high general level of protection of the environment as a whole - from Article 3 of the Industrial Emissions Directive 2010/75/EU (formally the IPPC Directive), BAT reference documents for the basis for setting of permits/licence conditions under the Environmental Permitting Regime and EPR 2016.
Best Available Techniques Not Entailing Excessive Costs	BATNEEC	The most effective techniques for an operation at the appropriate scale and commercial availability, where the benefits gained by using the technique should bear a justifiable relationship to the cost (unless emissions are very toxic) – an updated version of Best Practicable Means (BPM).

BAT Reference Notes	BREF Notes	Documents published by the C, which follow from an exchange of information on BAT between the member states. These form the basis for the BAT Conclusion documents, which in turn feed into permit conditions.
Best Practicable Environmental Option	BPEO	Establishes the option which provides the least damage to the environment as a whole at an acceptable cost. BPEO was included in Pt I of the Environmental Protection Act 1990 as basis for the IPC authorisation process.
Biodegradable Waste		Waste that is subject to being broken down by microbial action.
Biological Treatment		A method of treating waste that uses biological processes, involving micro-organisms, to break down the waste. Examples of this form of treatment include Anaerobic Digestion and Composting. Treatment of waste water and sewage, and some specialised methods of contaminated soil treatment, also involve biological treatments.
Biomass		Biological materials (i.e. derived from plants or animal sources) which are used as a source of fuel to generate energy. Biomass energy generating plants do not all use waste as feedstock: some generate energy from energy crops grown specifically for the purpose, whereas others may use a combination of biomass crops and pre-treated waste wood and/ or Refuse Derived Fuel (RDF). See separate definition of Refuse Derived Fuel.
By-Product		The term "by-product" is defined in Article 5 of the Waste Framework Directive (2008/98/EC) as a "substance or object, resulting from a production process, the primary aim of which is not the production of that item," where the following conditions are met: (a) Further use of the substance or object is certain; (b) The substance or object can be used directly without any further processing other than normal industrial practice; (c) The substance or object is produced as an integral part of a production process; and

		(d) Further use is lawful, i.e. the substance or object fulfils all relevant product, environmental and health protection requirements for the specific use and will not lead to overall adverse environmental or human health impacts. Such a product is not regarded as "waste" if these conditions are met. It is implicit that if these conditions are not met, the product is likely to be a "waste." Quality Protocols have been developed by the Environment Agency in association with the Waste and Resources Action Programme (WRAP) for various products, to establish the conditions that must be met for them to qualify as a product rather than as a "waste".
Ceramic filter		Method of 'cleaning' waste gases from treatment processes, where particles are collected on the surface of the element, as filtration continues the layer of particle deposits becomes thicker, forming a 'cake'. The cake is removed for disposal.
Chemical Treatment		A method of treating waste that uses chemicals to treat waste to neutralise or reduce its harmfulness, prior to further treatment, recovery or disposal. These methods are often used to treat Hazardous Wastes (see separate definition) but chemical treatments are also applied in waste water treatment.
Circular Economy		An alternative to a traditional linear economy (make, use, dispose) in which we keep resources in use for as long as possible, extract the maximum value from them whilst in use, then recover and regenerate products and materials at the end of each service life.
Civic Amenity Site	CA	See Household Waste Recycling Centre.
Clinical Waste		Waste generated by healthcare activities (hospitals, GPs surgeries, vets, laboratories, may range from plasters, used needles to drugs and body parts).
Coastal Waters		Waters within the area extending landward from those baselines as far as the high tide limit, or in the case of freshwater, the

		freshwater limit of the river or watercourse and any waters within an enclosed dock adjoining waters within that area.
Co-mingled Waste		Mixed Waste stream, where waste has not been segregated at source (kerbside collection). Is easier for households and has been shown to boot overall recycling rates, but increases cost and increases contamination risk.
Commercial and Industrial Waste	C&I	Waste generated by industry and by businesses. The fraction of C&IW that is similar in nature to household waste (for example, food, green waste, paper, card, cans, glass and plastics) is "municipal" waste according to the definition in Article 2 (b) of the Landfill Directive – see definition of Municipal Waste below for details.
Composting		A method of biological treatment that involves breaking down organic waste into a soil-like substance, using various micro-organisms in the presence of oxygen. Can be done in "open windrows" or "in-vessel" (see separate definitions). The end-product is compost which has various horticultural and agricultural uses. As there are potential risks to health from "bio-aerosols" and in some cases, animal by-products, composting is normally only allowed on sites that are an appropriate distance away from away from "sensitive receptors" such as housing and community facilities. The Environment Agency has issued guidance on developments that require both planning permission and environmental permits, which explains the risks.
Construction and Demolition Waste	C&D	Waste generated by the construction and demolition process. This waste stream therefore includes various building materials, including concrete, bricks, gypsum, wood, glass, metals, plastic, solvents, asbestos and excavated soil, many of which can be recycled.
Controlled Waste		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.

Controlled Waters		Relevant territorial waters, coastal waters, inland freshwaters, ponds, lakes and groundwaters as defined in s104 WRA 1991.
Combined Heat and Power	CHP	A term used to describe the process of capturing and using heat that is a by-product of the electricity generation process (for example, heat generated by energy from waste facilities). It involves putting into place infrastructure (e.g. pipework) to supply the surplus heat to developments nearby (such as an industrial estate or housing estate), that have a demand for it, which otherwise have to be met by a conventional boiler or energy generating system.
Combined sewer overflow	CSO	An overflow pipe, legally allowed to operate during storm events, directly connected to sewers and/or sewage pumping stations, they are designed to operate at times of heavy rainfall to release pressure in the network and reduce the risk of flooding. However as this is effectively untreated sewage mixed with storm waters there is a risk of pollution (with concerns in particular around bathing waters).
Directly associated activity		An activity that could have an effect on pollution that is carried on the same site as an installation and is technically connected with an activity carried on at the same installation.
Disposal		Defined in Article 3 (19) of the Waste Framework Directive (2008/98/EC) as "...any operation which is not recovery even where the operation has as a secondary consequence the reclamation of substances or energy." A detailed (but non-exhaustive) list of the operations that fall under the definition of "recovery" is set out in Annex I of the Directive. In other words, it means any waste management operation whose main purpose is to get rid of the waste, even if some value is recovered in the process. Therefore, incineration may be disposal if the main purpose is not energy recovery. The deposit of excavation waste onto or into land (landfill or land-raising) is also usually regarded as waste disposal although there are "grey areas" where material is being used for land remediation or landscaping purposes.
Duty of Care		Applicable to those who import, produce, carry, keep, treat or dispose of controlled waste or as brokers have control of such

		waste must take all reasonable measures to achieve protection of the environment and prevention of harm to human health by measures outlined in s34 of the Environmental Protection Act 1990.
Energy from Waste / Energy recovery	EfW	Use of residual waste as a fuel to generate energy (see below for definition of Residual Waste). There are various types of facility for generating energy from waste or from "refuse derived fuel" (see below for definition). These include municipal energy from waste facilities for incineration of waste with energy recovery, and more advanced technologies which are more efficient at recovering energy, for example, by generating energy from gas produced by other waste treatment processes such as pyrolysis, gasification and anaerobic digestion (AD). Defra has produced guidance (2014) on the issues around energy from waste and the options available.
Emission Limit Value	ELV	The mass concentration or level of an emission which may not be exceeded over a given period.
Environment Act 1995		Act which established the Environment Agency (EA) and SEPA and set out their functions, rights and liabilities and made provisions on contaminated land, control of pollution, conservation, fisheries and National Parks.
Environmental Permitting Regulations 2016 [SI2016/1744]	EPR2016	Regulations made under powers in the Pollution Prevention and Control Act 1999, transpose various EU Directives – IPPC, Waste. Landfill, Incineration, End of Life Vehicles, Large Combustion Plants & others, which extended the EP regime under the previous 2007 regulations, which streamlined the Waste Management Licensing and Pollution Prevention and Control regimes into one permitting and compliance system. The 2010 regulations added water discharge consenting, groundwater authorisations, radioactive substances regulations to the regime and transposed the permitting parts of the Mining Waste and Batteries Directives. The 2016 regulations consolidated and updated the EPR2010, with amendments and came into effect from 1 Jan 2017.
Environmental		Act which made provision for improved

Protection Act 1990		pollution control, re-enact provisions of the Control of Pollution Act 1974 with respect to waste, modifications to functions of the regulatory bodies. Introduced Integrated Pollution Control regime – all major emissions are considered simultaneously and not in isolation – see IPPC.
Environmental Quality Standards	EQS	Values, defined by regulation that specifies the maximum permissible concentration of a potentially hazardous chemical, generally in air or water. For water these are defined in the Water Framework Directive (2000/60/EC) and for Air in the Ambient Air Quality Directive (2008/50/EC).
European Waste Catalogue	EWC	Established by Commission Decision 2000/532/EC a harmonized, non-exhaustive list of waste types. Each waste type is given a 'six digit' code, made up of 'two digit' sub-codes. In general the catalogue describes the type of process and the industry/sector from which the waste type arises. Hazardous wastes are assigned an asterisk '*' after the code. These codes are used in permits to set out the permitted waste types for relevant waste installations. The list was transposed under the List of Waste Regulations 2005.
Gasification		A type of Advanced Thermal Treatment/ Energy Recovery technology, which under strictly controlled temperature conditions, converts biomass and/ or pre-treated wastes into gas (syngas), which can then be either used as a source of energy or converted into electricity. The other main product is a solid ash residue. This method of treatment is only suitable for pre-treated wastes, such as Refuse Derived Fuel (RDF), which may be generated on-site from residual waste, or be imported from another facility which processes residual waste into RDF. See also separate definitions of Advanced Thermal Treatment, Biomass, Energy Recovery, Refuse Derived Fuel, Residual Waste and Thermal Treatment.
Groundwater		All water below the surface of the ground in the saturation zone and in direct contact with the ground or subsoil.
Hazardous Waste		Defined in Article 2 (2) of the Waste Framework Directive (2008/98/EC) as

		"...waste which displays one or more of the hazardous properties listed in Annex III." In other words, waste whose properties are likely to cause risks to health, the environment or water quality. Annex III of the Directive provides a (non-definitive) list of properties that render waste "hazardous," and the Environment Agency has produced guidance on the types of waste that are likely to be hazardous.
Household Waste		There is no standard definition of household waste but in general it means waste generated by households. Most of this waste is collected from local councils from households through kerbside collections or household waste recycling centres (HWRCs), although some household waste is also dealt with by the commercial waste sector (e.g. skip hire).
Household Waste Recycling Centre	HWRC	Facility operated by or on behalf of a local council, where local residents can bring waste (also referred to as a Civic Amenity Site or a "tip").
Incineration		The combustion of waste, either with or without energy recovery. Municipal energy from waste plants tend to be referred to as "incinerators" although they normally recover some energy, and the most recently developed plants are efficient enough to qualify as a waste "recovery" operation (see separate definition of Recovery).
Industrial Emissions Directive	IED	EU Directive which recasts the IPPC and 6 other existing directives, following extensive review of the existing policy. Aims to achieve high level of protection of the environment and human health taken as a whole by reducing emissions across the EU, in particular better application of BAT. Environmental permits should set conditions in accordance with the principles and provisions of the IED. Transposed through amendments to the EPR2010.
Inert Waste		Waste that does not undergo any significant physical, biological or chemical changes likely to cause risks to health or to the environment or to affect water quality – the legal definition of "inert waste" can be found in Article 2 of the Landfill Directive (1991/31/EC). This type

		of waste can be disposed of at any permitted Landfill site. Certain types of inert waste such as clean waste soils may also be disposed of onto land for the legitimate purpose of restoration, land remediation or landscaping.
Inland freshwaters		Rivers, streams, watercourses and lakes or ponds that are above the freshwater limit, i.e. not tidal – see s104 WRA 1991.
Integrated Pollution Prevention and Control	IPPC	The IPPC Directive 96/31/EC sets out an integrated environmental approach to the regulation of certain industrial activities. This means that emissions to air, water (including discharges to sewer) and land, plus a range of other environmental effects, must be considered together. It also means that regulators must set permit conditions so as to achieve a high level of protection for the environment as a whole. These conditions are based on the use of the Best Available Techniques (BAT), which balances the costs to the operator against the benefits to the environment. IPPC aims to prevent emissions and waste production and where that is not practicable, reduce them to acceptable levels. IPPC also takes the integrated approach beyond the initial task of permitting through to the restoration of sites when industrial activities cease. Covers Part A(1) – EA Regulated (IPPC) and Part A(2) – LA Regulated (LA-IPPC) installations, but not Part B – LA Regulated (LA-PPC) installations (which concerns lower risk installations that concern emissions to air only). Note that all regulated under the EPR2010.
Installation		A 'stationary technical unit' where one or more activities listed in Schedule 1, Part 2 of EPR2016 are carried on and any other location on the same site where any directly associated activities are carried on.
In-Vessel Composting	IVC	See separate definition of Composting. This method involves composting in an enclosed environment, allowing greater control over the process than "open windrow" composting. The waste is usually shredded before processing. There are various systems available using containers, silos, bays or tunnels, rotating drums, or an enclosed hall. The end-product is compost which has various

		horticultural and agricultural uses. This method can be used to compost food and green garden/ horticultural waste mixtures, because composting takes place in an enclosed environment, with accurate temperature control and monitoring. The end-product is compost which can be used by farmers and gardeners to improve soil. There are various systems depending on the type of container or building used. It does not require such a large site as Open Windrow Composting but must still be an appropriate distance away from "sensitive receptors" such as housing and community facilities, because of potential health risks from "bio-aerosols" and animal by-products.
Landfill		Defined in Article 2 (g) of the Landfill Directive (1991/31/EC) as: "A waste disposal site for the deposit of the waste onto or into land (i.e. underground), including: Internal waste disposal sites (i.e. landfill where a producer of waste is carrying out its own waste disposal at the place of production), and A permanent site (i.e. more than one year) which is used for temporary storage of waste but excluding: Facilities where waste is unloaded in order to permit its preparation for further transport for recovery, treatment or disposal elsewhere; Storage of waste prior to recovery or treatment for a period less than three years as a general rule, or storage of waste prior to disposal for a period less than one year.
Landfill Diversion		Ways of recovering value from waste instead of disposing of it to landfill – see separate definition of Landfill.
Landfill Gas	LFG	Generated in Landfill sites by anaerobic decomposition of municipal waste – consists of predominantly Methane (CH_4) and Carbon dioxide (CO_2). Directed through system of pipes to vents and maybe used as fuel for

		onsite boilers for site energy needs. Needs to be monitored for many years after site is closed and capped.
Leachate		Seepage of liquid through a waste disposal site or spoil heap (mainly from municipal waste landfill sites). Leachate characterized by high Biological Oxygen demand (BOD), high ammonia, organic nitrogen, volatile fatty acids, has high pH – requires collection (from sumps) and treatment before being discharged to controlled waters. May need to be monitored for many years after landfill site is closed and capped. Should be prevented from entering controlled waters by use of low permeable barrier i.e. geological and synthetic liner.
Material Recycling Facility / Materials Recovery Facility.		Facility that uses mechanical techniques to sort, separate and recover raw materials from mixed household wastes, such as paper, card, cans, glass and plastics, which can then be re-used by industry, or recycled into new products. It therefore fits into either the "Preparing for Re-use" or "Recycling" steps of the "waste hierarchy." Other more specialised materials recovery techniques can also be used to recover value from other types of waste generated by households and businesses, such as waste electrical and electronic equipment (WEEE).
Mechanical and Biological Treatment	MBT	Use of a combination of techniques to extract as much value as possible from mixed wastes. This involves two or three stages of treatment on the same site. There is often an initial mechanical sorting and separation stage to recover materials suitable for recycling, followed by processing and/ or treatment of the residue, to prepare it for a final treatment stage, when any remaining residual waste is used to recover energy and/ or prepared for disposal. In this combination the final stage involves some form of biological treatment.
Mechanical Heat Treatment	MHT	Use of a combination of techniques to extract as much value as possible from mixed wastes. This involves two or three stages of treatment on the same site. There is often an initial mechanical sorting and separation stage to recover materials suitable for recycling, followed by processing and/ or treatment of the residue, to prepare it for a final treatment

		stage, when any remaining residual waste is used to recover energy and/ or prepared for disposal. In this combination the final stage involves some form of thermal or heat treatment.
Mobile Plant		Plant which is designed to be moved and used to carry on an activity or waste operation.
Municipal Waste		Defined in Article 2 (b) of the Landfill Directive 1991/31/EC as "…waste from households, as well as other waste which, because of its nature or composition, is similar to waste from household."
Non-Hazardous Waste		Waste that is neither inert nor hazardous (see separate definitions), which can include pre-treated organic wastes and stabilised residues from waste treatment. This type of waste can only be disposed of at a permitted Non-Hazardous Landfill site or another facility permitted to accept it.
Non-Controlled Waste		Waste arising from municipal (waste from household and small businesses), commercial and industrial, construction and demolition activities. These wastes account for 40% of the total and contain environmentally damaging by-products when they degrade. Other substances may be toxic or hazardous to health in other ways.
Operator		The person who has control over the operation of the regulated facility.
Operational Risk Appraisal	Opra	Methodology for formal risk assessment for processes subject to EPR2016. Environment Agency assess the risk to the environment of the running of the process and to target resources and charges as appropriate, dependent on the risk – consists of three 'Tiers' Tier 1 being the simplest processes with the lowest risk, Tier 3 being the most complex with high risk activities. A permit can cover more than one activity and in more than one tier.
Plume		Steam of gas issuing from a stack which retains its identity and is not completely dispersed in the surrounding air. Near the stack the plume Is often visible due to water droplets, smoke or dust that it contains, but often persists downwind after it has become invisible to the naked eye (albeit in much less concentrations).

Preparing for Re-Use		Defined in Article 3 (16) of the Waste Framework Directive (2008/98/EC) as "...checking, cleaning or repairing recovery operations, by which products or components of products that have become waste are prepared so that they can be re-used without any other pre-processing."
Proximity Principle		One of the principles to be applied to the disposal of residual waste and recovery of mixed municipal waste from households and other sources where collected as part of the same collection arrangements, under Article 16 of the Waste Framework Directive (2008/98/EC) – the other principle to be applied in parallel is "self-sufficiency" (see separate definition). The objective is to enable these wastes to be managed at "one of the nearest appropriate installations, by means of the most appropriate methods and technologies, in order to ensure a high level of protection for the environment and public health" – in other words, that waste facilities should be appropriately located in relation to the sources of waste, so that the impacts on the environment and health are minimised.
Pyrolysis		A type of Advanced Thermal Treatment/ Energy Recovery technology, which under strictly controlled temperature conditions, converts biomass and/ or pre-treated wastes into gas, which can then be either used as a source of energy or converted into electricity. Other by-products include liquid and solid residue ("char") which can be used as fertiliser. This method of treatment is only suitable for pre-treated wastes, such as Refuse Derived Fuel (RDF), which may be generated on-site from residual waste, or be imported from another facility which processes residual waste into RDF. See also separate definitions of Advanced Thermal Treatment, Biomass, Energy Recovery, Refuse Derived Fuel, Residual Waste and Thermal Treatment.
Radioactive Waste		Waste that undergoes radioactive decay (may be from laboratories, health facilities or the nuclear energy industry).
Recovery		Defined in Article 3 (15) of the Waste Framework Directive (2008/98/EC) as "...any operation the principal result of which is waste serving a useful purpose by replacing

		other materials which would otherwise have been used to fulfil a particular function, or waste being prepared to fulfil that function, in the plant or in the wider economy." A detailed (but non-exhaustive) list of the operations that fall under the definition of "recovery" is set out in Annex II of the Directive. Essentially, "recovery" of waste is the same as "Landfill Diversion" (see separate definition). The generation of energy from waste may qualify as "recovery," but only where the technology achieves the levels of efficiency required by the Directive (see Annex II, R1).
Refuse Derived Fuel	RDF	Residual waste which has been pre-treated (for example by being screened and shredded) to produce a fuel which can then be used to generate energy at a Biomass, Energy from Waste or Advanced Thermal Treatment facility. Refuse Derived Fuel is still technically a "waste" and not a product. Operations that involve the processing of residual waste into RDF may qualify as "recovery" but do not fall within the definition of "recycling" (as is sometimes claimed). See separate definitions of Advanced Thermal Treatment, Biomass, Energy from Waste, Recycling, Recovery and Residual Waste.
Residual Waste		Waste left over from treatment or recovery processes, once the re-useable and recyclable waste has been removed.
Recycling		Defined in Article 3 (17) of the Waste Framework Directive (2008/98/EC) as "...any recovery operation by which waste materials are reprocessed into products, materials or substances whether for the original or other purposes. It includes the reprocessing of organic material but does not include energy recovery and the reprocessing into materials that are to be used as fuels or for backfilling operations."
Re-Use		Re-use is defined in Article 3 (13) of the Waste Framework Directive (2008/98/EC) as "...any operation by which products or components that are not waste are used again for the same purpose for which they were conceived."
Scrubber		Device for flue gas cleaning e.g. spray towers,

		packed scrubbers and jet scrubbers – removes particles down to 1 micrometre in diameter when used with water. Can also control gaseous pollutants (used with alkaline solution). Scrubbers produce sludge, that requires dewatering and disposal.
Self-Sufficiency Principle		One of the principles to be applied to the disposal of residual waste and recovery of mixed municipal waste from households and other sources where collected as part of the same collection arrangements, under Article 16 of the Waste Framework Directive (2008/98/EC) – the other principle to be applied in parallel is "proximity" (see separate definition). The objective is for Member States to "to establish an integrated and adequate network of waste disposal installations and of installations for the recovery of mixed municipal waste" taking into account "best available techniques" – in other words that within the UK an adequate network of facilities should be developed so that each area should have enough capacity to meet its requirements.
Stack gases		The gases discharged up a chimney stack for dispersion into the atmosphere. May also be termed 'Flue gases' or 'Exhaust gases'.
Tallow		Animal fat obtained from animal rendering processes, which can be used as fuel in boilers – will need to conform to Waste Incineration Directive emission limits, now applied through the Industrial Emissions Directive.
Thermal Treatment		A method of treating waste that involves heating it. Examples of thermal treatment are Anaerobic Digestion, Energy Recovery and Incineration – see separate definitions of these technologies.
Treatment		Defined in Article 3 (14) of the Waste Framework Directive (2008/98/EC) as "...recovery or disposal operations, including preparation prior to recovery or disposal." See separate definitions for the meaning of "recovery" and "disposal."
Waste		Defined in Article 3 (1) of the Waste Framework Directive (2008/98/EC) as "any substance or object which the holder discards or intends or is required to discard." As it is

		not always easy to determine whether material is a "waste" or a "by-product," Defra has issued guidance (2012) on the legal definition of waste.
Waste Hierarchy		The waste hierarchy is a system for ranking methods of managing waste by preference, according to how efficiently they make use of resources - see Figure 1 for details. The legal definition of the waste hierarchy can be found in Article 4 of the Waste Framework Directive (2008/98/EC), which states that it is to be applied as a priority order in waste prevention and management legislation and policy. Defra has issued guidance (2012) on applying the "waste hierarchy" when considering waste management options. There is separate guidance (2011) on applying the "waste hierarchy" when considering options for hazardous waste.
Waste Management Industry Training and Advisory Board	WAMITAB	Awarding organisation that develops qualifications for those working in the 'Waste' industry for operatives through to management. Specific Waste Management qualifications under the WAMITAB (Certificate of Technical Competence - CoTC) are required in order to be classed as 'competent operator' for regulated facilities under the Environmental Permitting Regime and EPR2016.
Waste Operation		Any recovery or disposal of waste.
Waste Projections		Forecasts or predictions of the amounts of waste likely to arise over a given period. The estimates are usually calculated by "projecting" from estimated current arisings (the "baseline"), and applying assumptions about how waste is likely to grow or fall over time, which may relate to the amount of new development expected to take place and other factors such as economic trends.
Windrow Composting		See separate definition of Composting. This method of composting is carried out in the open air or in a large covered area, and is only suitable for green garden or horticultural waste, such as grass cuttings, tree and shrub pruning's and leaves. The waste is shredded and laid out in long piles called "windrows," which are mechanically turned from time to

		time to aid the process of breakdown of material. The end-product is compost, which has various horticultural and agricultural uses. This type of operation requires a large site that is an appropriate distance away from "sensitive receptors" such as housing and community facilities, because of potential health risks from "bio-aerosols."

Selected definitions adapted from:
Dictionary of Environmental Science and Technology (Fourth Edition), Porteous, Andrew, Wiley 2008

Enforcement


Status of this Chapter

This chapter has mainly been written with England in mind. Although much of the guidance applies to Wales, Inspectors should be alive to the differences that exist.

What's New since the last version

Changes highlighted in yellow made **20 September 2018**:

Updated the Glossary of Abbreviations, paragraphs 100 and 101, and paragraph 375 to reflect the changes introduced by the Environmental Impact Assessment Regulations 2017.

Main Enforcement Sources referred to in the Guide

England

Legislation

Caravan Sites and Control of Development Act 1960 (CSCDA)

Caravan Sites Act 1968 (CSA)

The Town and Country Planning Act 1990 (TCPA90)

The Localism Act 2011

The Town and Country Planning (Use Classes) Order 1987

The Town and Country Planning (General Permitted Development) (England) Order 2015

The Town and Country Planning (Enforcement Notices and Appeals) (England) Regulations 2002

The Town and Country Planning (Enforcement) (Written Representations Procedure) (England) Regulations 2002

The Town and Country Planning (Enforcement) (Hearings Procedure) (England) Rules 2002

The Town and Country Planning (Enforcement) (Determination by Inspectors) (Inquires Procedure) (England) Rules 2002

The Town and Country Planning (Enforcement) (Inquires Procedure) (England) Rules 2002

The Town and Country Planning (Temporary Stop Notice) (England) (Revocation) Regulations 2013

The Town and Country Planning (Development Management Procedure) (England) Order 2015

Town and Country Planning (Environmental Impact Assessment) Regulations 2011

The Localism Act 2011 (Commencement No. 4 and Transitional, Transitory and Saving Provisions) Order 2012

The Town and Country Planning (Fees for Applications, Deemed Applications, Requests and Site Visits) (England) Regulations 2012

Circulars and Policy

General development order consolidation 1995 – Appendix D only extant

Circular 11/95: Use of conditions in planning permission – Appendix A only extant

Planning-related Fees

National Planning Policy Framework

Wales

Legislation

Caravan Sites and Control of Development Act 1960 (CSCDA)

Caravan Sites Act 1968 (CSA)

The Town and Country Planning Act 1990 (TCPA90)

The Town and Country Planning (Use Classes) Order 1987 (UCO)

The Town and Country Planning (General Permitted Development) Order 1995 including later Amendment Orders (GPDO)

Town & Country Planning (Fees for Applications and Deemed Applications) Regulations (and subsequent Amendment Regulations) – see EPL 3B-449

Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 – see EPL 3B-949.588

Town and Country Planning (Enforcement) (Written Representations Procedure)(Wales) Regulations 2003

Town and Country Planning (Enforcement Notices and Appeals) (Wales) Regulations 2003

Town and Country Planning (Enforcement) (Hearings Procedure) (Wales) Rules 2003

Town and Country Planning (Enforcement) (Determination by Inspectors) (Inquiries Procedure) (Wales) Rules 2003

Town and Country Planning (Enforcement) (Inquiries Procedure) (Wales) Rules 2003

Circulars & TANs

24/87 Change of Use of Buildings and Other Land: Town and Country Planning (Use Classes) Order 1987

23/93 Awards of Costs Incurred in Planning and other (including Compulsory Purchase Order) Proceedings

29/95 General Development Order Consolidation 1995

31/95 Planning Controls over Demolition

35/95 The use of conditions in planning permissions

24/97 Enforcing Planning Controls: Legislative Provisions and Procedural Requirements

02/99 Environmental Impact Assessment

08/03 Enforcement Appeals Procedures

CL 08/04 Town and County Planning (fees for application and deemed applications) (amendment) (Wales) Regulations 2004

CL 03-04 The Town and Country Planning (General Development Procedure) (Amendment) (Wales) Order 2004

CL 03-06 The Town and Country Planning (General Permitted Development) (Amendment) (Wales) Order 2006: Revised Part 1. H and 25 Permitted Development Rights.

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Glossary of Abbreviations

BCN	Breach of Condition Notice
CSA	Caravan Sites Act 1968
CSCDA	Caravan Sites and Control of Development Act 1960
DMPO	The Town and Country Planning (Development Management Procedure) (England) Order 2010
EHPR	The Town and Country Planning (Enforcement) (Hearings Procedure) (England) Rules 2002
EIA	Environmental Impact Assessment
EIAR	The Town and Country Planning (Environmental Impact Assessment) Regulations 2017 (in Wales, The Town and Country Planning (Environmental Impact Assessment) (Wales) Regulations 2017)
EIPR	The Town and Country Planning (Enforcement) (Determination by Inspectors) (Inquires Procedure) (England) Rules 2002
EN	Enforcement Notice
ENAR	The Town and Country Planning (Enforcement Notices and Appeals)(England) Regulations 2002
ENAWR	The Town and Country Planning (Enforcement Notices and Appeals) (Wales) Regulations 2003
ES	Environmental Statement
EWRPR	The Town and Country Planning (Enforcement) (Written Representations Procedure) (England) Regulations 2002
LDC	Lawful Development Certificate
LPA	Local Planning Authority
mcu	Material Change of Use
NPPF	National Planning Policy Framework
PPG	Planning Practice Guidance
PCN	Planning Contravention Notice
PDRs	Permitted development rights
SoS	Secretary of State
TCPA90	The Town and Country Planning Act 1990
UCO	The Town and Country Planning (Use Classes) Order 1987
WHPR	The Town and Country Planning (Enforcement) Hearings Procedure (Wales) Rules 2003

WIPR	The Town and Country Planning (Enforcement) Inquiry Procedure (Wales) Rules 2003
WWRPR	The Town and Country Planning (Enforcement) (Written Representations Procedure) (Wales) Regulations 2003

1. Introduction

1. This is a guide to the work of PINS in planning enforcement and LDC proceedings.

2. This training manual chapter is not a substitute for the legislation or Government guidance, but should be read in conjunction with it and source material. It is always good practice when interpreting and applying legislation or case law to go back to the actual text of the Act, SI or judgment.

Applicability to Welsh casework

3. This guide has mainly been written with England in mind. Although much of the guidance applies to Wales, Inspectors should be alive to the differences that exist. Provisions in the various Planning Acts are not always brought in at the same time as in England, and there may be separate commencement orders.

4. In Wales policy consists of that contained in Technical Advice Note (Wales) 9: Enforcement of Planning Control, read in conjunction with Planning Policy Wales Edition 9 - 2016: Chapter 3 and Welsh Office Circular 24/97. Advice on the enforcement of listed buildings and conservation area controls is to be found in Planning Policy Wales Edition 9 - 2016: Chapter 6 and Technical Advice Note 24: The Historic Environment.

5. There are separate procedure rules in Wales; see the National Assembly for Wales Circular 08/2003. Proceedings in certain LPAs may need to be conducted in Welsh with translation facilities provided. The equivalent to the Secretary of State in Welsh appeals is the Welsh Minister for Environment and Sustainable Development. See Annex 1 for legislation and guidance for England and Wales.

2. Types of Enforcement Action

Legal Framework

6. S57(1) of the TCPA90 provides that planning permission is required for the carrying out of any development of land. S171A(1)(a)-(b) provides that carrying out development without planning permission, or failing to comply with a condition subject to which planning permission has been granted, or with a limitation imposed on a permission deemed to have been granted under the GPDO, constitutes a breach of planning control.

7. Any breach of planning control is unlawful, unless and until it becomes lawful in accordance with s191(2)-(3) TCPA90. However, the breach is not illegal, even if permission has been applied for and refused – and an appeal has been dismissed. A criminal offence is committed when an enforcement notice has taken effect, after all the appeal procedures have been exhausted, and the requirements have not been complied with at the expiry of the period specified.

8. The position is different from that in the cases of unauthorised works to a listed building, or the felling of protected trees, where criminal liability arises directly from the unauthorised action. It is also a criminal response to fail to respond to, or give false information in response to, a Planning Contravention Notice, or to comply with a Stop Notice or Injunction is also a criminal offence.

LPA Powers

9. An LPA has discretionary powers to take action against "development", as defined in s55, for which planning permission is required and has not been obtained, or against a failure to comply with a condition or limitation, whether imposed on an express grant of planning permission or permission granted by the GPDO.

10. The main powers, which may be used singly or in appropriate combinations, are as follows (all section numbers refer to TCPA 90):

Planning Enforcement Orders (PEO) ss171BA, 171BB , 171BC

11. The "planning enforcement order code" in ss171BA, 171BB and 171BC is a supplementary procedure, widening the powers of LPAs. It is not an exhaustive replacement for the principle in *Welwyn Hatfield BC v SSCLG* [2011] 2 AC 304 in relation to the deliberate concealment of breaches of planning control.

Planning Contravention Notice (PCN) s171C-D

12. This is a preliminary investigation procedure to obtain information as to activities on land, and the nature of the recipient's interest, serving both as a warning of, and preliminary to, the issue of an enforcement notice. It must appear to the LPA that a breach of planning control may have taken place before they are justified in issuing a PCN; *R v Teignbridge DC ex*

parte Teignbridge Quay Co Ltd [1996] JPL 828. There is no right of appeal, but there are penalties for false information or failure to respond.

13. In *Meecham v SSCLG & Uttlesford DC* [2013], it was held that an Inspector was entitled to take account of responses to PCNs, although it was claimed that they related to a different breach, when finding that there had been deliberate concealment of the alleged breach. The PCNs and answers to them needed to be read as a whole.

14. The PPG advises that effective enforcement action relies on accurate information about an alleged breach of planning control. In many instances, comprehensive information about the planning history of the site and the alleged breach of planning control is readily available from the LPA's own records, site visits and other publicly available information. A PCN is one option in a range of investigative powers for planning enforcement purposes; it is a discretionary procedure (paragraph ref ID: 17b-014-20140306 and 17b-015-20140306).

15. Thus, the PPG advises that a LPA is at risk of an award of costs if more diligent investigation could have avoided a need to serve the notice, or ensure that the notice was accurate – but it does not suggest that such investigation ought to necessarily include the service of a PCN.

16. It is vital for LPAs to keep documentary evidence of any investigation; this may include records of the post or service of a PCN.

Enforcement Notice (EN): s172-190 & s289

17. A notice may require the cessation of, removal of or remedial action in respect of an unauthorised operational development or material change of use, or the compliance in whole or in part with a condition. There is a right of appeal under s174 and, in the event that an appeal is made on ground (a), an appellant is deemed to have made an application for planning permission in respect of the matters stated as constituting the breach of planning control under s177(5), subject to the payment of the appropriate fees.

18. There is a further statutory right of appeal to the High Court on a point of law under s289 against a decision on an appeal against an EN, subject first to obtaining the leave of the Court. There are penalties for failure to comply with the notice once it has taken effect following the final determination of any appeal; see paras 218.

Tree Replacement Notice (TRN): s207-214A

19. S207 provides an exclusive enforcement system for the replanting duty imposed by s206, modelled on planning enforcement system and provisions similar to notices issued under s172 apply.

20. *Distinctive Properties (Ascot) Ltd v SSCLG* [2015] EWHC 729 (Admin) concerned a notice which alleged that an area of woodland covering about 0.8ha had been "*removed, uprooted or destroyed*" in contravention of a TPO. The notice specified the species to be planted and the planting density, namely, a uniform spacing of 2.5m x 2.5m amounting to 1280 trees in total. Although the woodland had included some substantial trees, the notice only required the planting of trees 60cm to 90cm in height, that is to say saplings or "*whips*". The notice added a requirement for the trees

to be maintained and allowed for a mortality rate of up to 15%. The TPO covered "*all trees of whatever species*".

21. The CoA held that ss206 and 207 confirm that a TRN cannot require more trees to be replaced than have been removed, but there may be problems in arriving at a figure for the number of trees lost when woodland has been cleared, and it may be necessary for an estimate to be used. It is the landowner who is in the best position to provide reliable evidence to assist in making such an estimate; the burden of proof is on them to establish that the number of trees in a TRN exceeds the number lost. If the burden is not discharged, a challenge to the number of trees specified in a TRN might be rejected.

22. There was nothing improper in the Inspector's reference to "*potential trees*", or in his finding that "*woodland*" needed to be replaced, rather than "*trees*", because the purpose of the TPO was to protect woodland, and that would be reinstated by the replacement of lost trees. It was not accepted that the Inspector failed to focus on the number of trees lost, rather than the number of trees to be replanted, as there was clear evidence in the DL of consideration of that issue. In determining the number of trees lost the Inspector had clearly relied on the estimate provided by the Council and there was no error in his approach.

23. The appellant argued that *"tree"* includes saplings but not shrubs, bushes, scrub or seedlings. There is no definition in statute, but the Court accepted the finding in the case of *Palm Developments Ltd v SSCLG* (2009) that a tree should be regarded as a tree at all stages of its life, subject to the exclusion of a mere seed. A seedling would fall within the statute once it was capable of being identified as of a species which normally takes the form of a tree. This would accord with the purpose of a TPO that seeks to protect woodland over a period of time as trees come and go, as they die and as they are regenerated.

Breach of Condition Notice (BCN): s187A

24. This is a notice requiring compliance with a condition contained in any express permission, or permission granted by a development order. It can relate to any condition when served on any person who has carried out or is carrying out the development but may only be served in relation to conditions regulating the use of the land when served on any person having control of the land; s187A(4).

25. There is no right of appeal to the SoS, but a BCN is susceptible to an application for judicial review or to defence in the Magistrates or Crown Court. Non-compliance is a criminal offence under s187A, punishable by fine. There are no default powers for the LPA to take physical steps to enforce compliance. A prosecution is defensible if the person charged can prove that he or she took all reasonable measures to secure compliance with the conditions specified in the notice, or was not in control of the land when the notice was served.

Stop Notice: s183-4

26. This is a notice requiring the prohibition of a "relevant activity" before the expiry of the period for compliance with an enforcement notice. It can be served simultaneously with an EN, or before an EN takes effect. It may

cover uses or operations including the siting of residential caravans, but not use as a dwelling house.

27. A stop notice may only be served within 4 years of the activity being carried out. There is no right of appeal, and failure to comply is a separate criminal offence (s187). A stop notice can however be challenged by way of application for judicial review. A stop notice is discharged when an EN is quashed, or the period for compliance expires. Where the EN is quashed on legal grounds, compensation may be payable under s186.

Temporary Stop Notice: s171E-H & T&CP (Temporary Stop Notices)(England) Regulations 2005 (SI 2005/206).

28. A Temporary Stop Notice can be served independently of an enforcement notice. It provides the LPA with a 28 day breathing space to consider what enforcement procedure would be appropriate, and an alternative to a injunction. It cannot be used in relation to use as a dwellinghouse and the Regulations prescribe the circumstances in which it does not prohibit the stationing of caravans. Compensation may be payable if it is withdrawn or the use or operations found to be lawful. These sections of the Act have not been commenced in Wales.

Injunction: s187B

29. An LPA may apply to the High Court for an injunction to restrain an actual or apprehended breach of planning control without prejudice to the use of their other powers. Failure to comply places the injunctee in contempt of court. S214A extends the powers to actual or apprehended offences in respect of protected trees.

Rights of Entry: s196A-C & s324

30. Rights of entry for enforcement purposes are governed by s196A-C and s324, as well as s214B-214D in respect of trees. Any person authorised in writing by an LPA (s196A-C) or the SoS (s324) may enter land and premises to ascertain whether a breach of planning control has taken place, whether and how enforcement powers should be exercised, and whether requirements have been complied with.

31. These powers do not appear to extend to the situation experienced by an Inspector when dealing with an appeal. However, experience has shown that rights of entry can usually be arranged to enable a site visit to take place in difficult circumstances.

3. Enforcement Notice Procedures

LPA Powers

32. S172(1)(b) empowers an LPA to issue an EN when it "appears" to them that there has been a breach of planning control and they consider it "expedient", having regard to the provisions of the development plan and other material considerations. However, it was held in *Britannia Assets v SSCLG & Medway Council* [2011] EWHC 1908 (Admin) that there is no jurisdiction for an Inspector to determine whether the LPA had complied with its obligation under s172. The issue of whether it was 'expedient' for the LPA to issue an EN is to be dealt with by way of judicial review.

33. Furthermore, the LPA does not have to satisfy itself beyond doubt that a breach has occurred, or that there are no possible grounds of appeal; it is for an appellant to establish such grounds; *Ferris v SSE* [1988] JPL 777[1]. However, the matters the subject of the action must have taken place. A prospective breach is not sufficient; *R v Rochester-upon-Medway CC ex parte Hobday* [1990] JPL 17.

34. Given that enforcement action is discretionary, paragraph 207 of the National Planning Policy Framework (Framework) requires LPAs to act proportionately in responding to suspected breaches of planning control. In accordance with s172(1)(b), it is for the LPA to decide whether enforcement action is expedient. The Planning Practice Guidance (PPG) draws attention to para 207 of the Framework and the fact that LPAs have discretion (paragraph ref ID: 17b-003-20140306).

35. The PPG explains that enforcement action should be proportionate to the breach of planning control to which it relates and taken when it is expedient to do so. It also advises that the provisions of the European Convention on Human Rights (ECHR) [as incorporated into the Human Rights Act 1998] are relevant when considering enforcement action. LPAs should, where relevant, have regard to the potential impact on the health, housing needs and welfare of those affected by the proposed action, and those who are affected by the breach of planning control.

36. Regulations 4(a) and (b) of the ENAR (ENAR4(a) and 4(b)) and Regulations 3(a) and (b) of ENAWR (ENAWR3(a) and 3(b) provide that an EN shall specify the reasons why it was considered expedient to issue the notice and refer to the relevant development plan and proposals. The model forms in the PPG include the reasons as one of the operative paragraphs and it is usual for LPAs to include reference to the development plan policies there.

37. It is a requirement of s173(10) that notices shall specify such matters as may be prescribed, including those in the ENAR. Omission is likely to lead to the finding that the notice is a nullity; see paras 126 and 283.

38. S173(10) states that regulations may require every copy of an EN to be accompanied by an explanatory note giving prescribed information as to

[1] J.634

the right of appeal under s174. The information required by ENAR5 or ENAWR4 include details of the right of appeal, the appeal process and a list of names and addresses of the persons on whom a copy of the EN has been served.

39. Where the explanatory note is incomplete or even missing entirely, it is unlikely to be regarded as being so fundamental as to render the notice itself a nullity. Furthermore, if the appellant has been able to make a valid appeal, it is unlikely to have caused any injustice or prejudice when considering the application of s176(1) or (5).

40. There is no reason why an EN should not be issued whilst a planning or LDC application or appeal remains undetermined; *Davis v Miller* [1956] 6 P&CR 410. However, the courts tend to deprecate prosecutions for non-compliance with an enforcement notice whilst there is still a pending planning appeal; *R v Newland* [1987] JPL 851.

41. There is no requirement that all breaches of planning control must be enforced against consistently. In *Donovan v SSE* [1987] JPL 118, Otton J stated "The fact that others got away with an unauthorised use cannot put Mr Donovan in the right, or make his uses lawful".

42. However, the issue of a notice can be challenged on the basis of bad faith or improper motive, and unfair or improper discrimination could be a material consideration on appeal; *Davey v Spelthorne BC* [1984] AC262). Although such a challenge can be made by way of s288 application for judicial review, an appeal will also have to be lodged against the notice under s289 to prevent it taking effect, and Inspectors may have to deal with such issues in the context of validity.

43. A second notice may be issued even if there is already an existing notice in similar terms; *Edwick v Sunbury on Thames UDC* [1964] 63 LGR 204. S172 imposes no restriction on the number of enforcement notices that the LPA may issue in respect of the same brea1ch nor to subsequent ones covering a more extensive area; *Biddle v SSE* [1999] 4 PLR 31[2].

44. An LPA may encounter difficulties in prosecuting for non-compliance with a notice which became effective some time ago and where there has been no further action in the intervening period; see also para 79. It is open to a landowner to take proceedings for judicial review to prohibit an LPA from issuing a notice at any time before it is actually issued; *R v Basildon DC ex parte Martin Grant Homes* [1987] JPL 863.

45. Once the notice is issued, however, any challenge other than by way of appeal under s174 is precluded by s285. This applies where proceedings for a declaration have already begun; *Square Meals Frozen Foods v Dunstable Corporation* [1973] JPL 709.

Power to Decline to Determine Retrospective Planning Applications: s70C

46. S123(2) of Localism Act 2011 added s70C to the 1990 Act, giving powers to LPAs to decline to determine applications in certain circumstances.

[2] J.1017

47. S70C(1) allows LPAs (in England) to decline to determine a retrospective planning application if an enforcement notice has already been issued and a grant of permission would involve, whether in relation to the whole or any part of the land to which a pre-existing enforcement notice relates, granting permission in respect of the whole or any part of the matters specified in the notice as constituting the breach of planning control.

48. In other words, the planning application doesn't have to be identical to the allegation in order for the LPA to decline to determine it. S70C(2) defines a pre-existing enforcement notice as one issued before the application was received by the LPA.

49. In addition, the Localism Act removes the right to appeal under s78 where the LPA decline to determine a retrospective planning application. S123(4), (5) and (6)of the Localism Act limit ground (a) appeals through the addition of sub-sections (2A) and (2B) to s174, the addition of sub-section (c) to s177(1), and amendments to s177(5).

50. Thus, s174(2A) states that (in England) an appeal cannot be lodged under s174(2)(a) if the enforcement notice was issued after the related planning application was made but before the end of the applicable period under s78(2) for its determination (*usually 8 weeks*). S177(1)(c) and (5) are amended so that a deemed planning application will only occur and planning permission can only be granted if there has been an appeal made under s174(a).

51. In respect of s78 appeals received where the LPA declined to determine the application, it should be noted there is no right to 'appeal' the LPA decision not determine an application. Consequently, case officers have been instructed to turn away appeals in such circumstances and Inspectors should be vigilant as to any such cases that slip through.

52. In the scenario involving appeals including ground (a) merits, the case officer will, if necessary, write out to the appellant making the Inspectors inability to consider this ground clear without a fee being paid; see para 2711. If the inclusion of ground (a) arguments is not discovered until the hearing or inquiry the Inspector should make clear the position in respect of ground (a) and include this in their decision; see also from para 238.

Power to Withdraw or Vary an EN: s173A

53. S173A provides powers to the LPA to withdraw an EN or to waive or relax any requirement of an EN, and in particular they may extend the compliance period. The power to waive or relax a requirement of an EN does not include extending the date when the notice takes effect or any other element of the notice that is not a "requirement" of the notice.

54. These powers may be exercised whether or not the notice has taken effect. They are not suspended once an appeal is made and the LPA can exercise them at any time. If they do so they are required to notify immediately everyone served with a copy of the notice or who would be served with a re-issued notice. S173A(4) specifically provides that the withdrawal of a notice does not fetter their power to issue a further notice; see also the second bite provisions of s171B(4)(b) at para 73.

55. Such a withdrawal does not give rise to a claim for compensation, nor any estoppel, but could be regarded as "unreasonable" within the criteria in the PPG which includes withdrawing an enforcement notice without good reason as an example of behaviour that might lead to a procedural award of costs against an LPA.

56. In *O'Connor v SSCLG* [2014] EWHC 3821 (Admin), Mr Justice Wyn Williams commented, in relation to the LPA's power to extend the time for compliance with the EN under s173A of the 1990 Act, that strictly it was not part of the Inspector's remit to draw attention to the possibility that the Council had power to extend the time for compliance with the EN, although, in cases of this type, it was not uncommon for such references to be made. He concluded that it was not for the SoS to offer an opinion (since that was all it could be) upon the desirability of the Council invoking s173A(1)(b) at the expiry of the period for compliance. Whether or not to invoke that section was entirely a matter for the Council.

57. In the light of this judgment, it is best to avoid references to s173A in appeal decisions where possible. If it is necessary to note the availability of the LPA's powers, this should be done neutrally and with recognition that exercise is for the discretion of the LPA; see para 933.

Time Limits for Issue

58. The time limits in s171B, operative from 27 July 1992, are:

S171B(1): the carrying out of building, engineering, mining or other operations in, on, over or under land – after the end of the period of 4 years beginning with the date on which operations are "substantially completed"; see para 693

S171B(2): the change of use of any building, to use as a single dwellinghouse – after the end of the period of 4 years beginning with the date of the breach. S171B(2) applies to a change of use of part of a building to a single dwelling, given s336 TCPA 90 – and to breaches of condition which prevent a change of use to a single dwelling; *Arun DC v FSS & Brown* [2005][3] and see para 684.

S171B(3): in the case of any other breach of planning control – after the end of the period of ten years beginning with the date of the breach. This includes all breaches of condition except as in (b) above. In *Newbury BC v SSE* [1994] JPL 136[4], the Court of Appeal held that occupancy conditions were subject to the 10-year immunity period.

The *Arun* case relates only to conditions preventing use as a separate dwellinghouse. If a dwellinghouse is erected unlawfully and used as a dwellinghouse from the outset, the unlawful use can still properly be the subject of enforcement action within 10 years, even if the building, itself, as a structure, becomes immune from enforcement action after 4 years; *Welwyn Hatfield v SSCLG v Beesley* [2011] UKSC 15.

59. The previous provision that enforcement of conditions on mining permissions could take place at any time within four years of the non-

[3] J.1158
[4] J.861

compliance coming to the LPA's notice was revoked by the Town and Country Planning (Minerals) Regulations 1995 (SI 95/2863).

Concealed Breaches of Planning Control and Time Limits: s171BA, BB and BC

60. Powers for LPAs in respect of concealed breaches of planning control are contained in s124 of the Localism Act 2011. These changes augment the public policy elements of the judgments in the recent high profile Court cases of *Welwyn Hatfield* and *Fidler.* They offer an alternative means of response (see also from para 107 and para 716) in cases where those involved seek immunity from prosecution for development in breach of planning control on the grounds of the expiry of the relevant time limits set out in s171B(1) to (3).

61. S124 (1) of the Localism Act adds s171BA, 171BB and 171BC to s171B, setting out powers for enforcement action when the usual time limits have expired and the breach has been deliberately concealed. S171BA(1) allows a LPA to apply to magistrates' court for a "planning enforcement order" (PEO) in relation to the "apparent" breach of planning control. S171BA(2) provides that a PEO made would enable the LPA to take enforcement action in respect of the apparent breach or any matters constituting the breach at any time in the "enforcement year", defined in S171BA(3).

62. S171BB and BC set out further procedural matters, including that an application for a PEO must be made within 6 months of the date on which evidence of the apparent breach came to the LPA's knowledge.

63. A magistrates' court will not issue a PEO unless it is satisfied that the apparent breach has been 'deliberately concealed' by any person or persons, to any extent, and that it is just to make the PEO having regard to all the circumstances. What constitutes 'deliberately concealed' is not defined in the Act, although it is likely that over time this will be proven via case law, to relate only to the most flagrant cases of abuse.

64. S124(3) adds s(3A) to s191, such that the introduction of s171BA, 171BB and 171BC has implications for the issue of a LDC. S191(3A) states that the time for taking enforcement action will not expire (a) if the time for applying for a PEO has not expired; (b) an application for a PEO has been made but not decided or withdrawn; and (c) a PEO has been made and not rescinded, and the enforcement year has not expired.

Uses Existing before 27 July 1992

65. The transitional provisions of the Planning and Compensation Act 1991, (SI 91/2905 Commencement No. 5 Order) postponed the coming into operation of the revised enforcement time limits until 27 July 1992, to allow enforcement action to be commenced on outstanding cases. However, the previous immunity periods can still be relevant since the provisions were not retrospective.

66. Prior to 1992, the limitation period was 4 years for operations and conditions relating to operations, and for a change of use to a single dwellinghouse and conditions precluding such a change ; s172(4) as originally enacted.

67. For all other uses, it was necessary to show that the breach of planning control had taken place prior to 1 January 1964 and that it had continued from then; s174(2)(e) as originally enacted. Such a use could have obtained an Established Use Certificate (EUC) before the introduction of the LDC regime; s191 as originally enacted.

68. Before 27 July 1992, such uses were unlawful but immune from enforcement action. Existing EUCs continue to have effect and the immunity they grant was carried forward by the transitional provisions (SI 92/1630 Commencement No. 11 Order). Thus, by virtue of s191(2) where enforcement action may not be taken, including by reason of immunity, the use is lawful, subject only to s191(2)(b).

69. The ten-year rule does not apply to periods of active use that commenced after the end of 1963 and ceased before 27 July 1992; *R (oao Colver) v SSCLG & Rochford DC* [2008] EWHC 2500 (Admin) . An unauthorised use which had continued for ten years, but was begun after 31 December 1963 and ceased to be active before 27 July 1992 would not have been immune or lawful at the time it ceased. Since, at that time, it would not have accrued any use rights, it could not have continued as a "dormant" use, as envisaged in *Panton & Farmer v SSETR & Vale Horse DC* [1999] JPL 461[5]. Its cessation would simply have meant that the particular breach of planning control had come to an end.

70. If the use began before 1964 and continued for at least four years after then, it would have gained rights under the previous "established use" provisions which would have been retained. Once immune, the use would have remained immune unless it was abandoned or supplanted following a material change of use or, possibly, extinguished by a requirement of a subsequent planning permission which had been implemented.

71. So, even if the use had become dormant by 27 July 1992, it would have become lawful on that date, whether or not an EUC had been granted, provided only that it had not been abandoned, supplanted etc. This was identified as the distinguishing feature in *Panton* by the CoA in *Thurrock BC v SSE & Holding* [2002] EWCA Civ 226[6]. In *Panton*, the LDC application was made in 1997 for a business and storage use that had commenced before 1964 and continued until 1987 before becoming inactive.

72. The same principle applies to a pre-appointed day (1 July 1948) use, except that it would have been lawful from the outset. Its use rights could only be lost as a result of abandonment, a subsuming material change of use, by exercising a planning permission for something different that required the lawful use to cease, or by condition.

Second Bite Provision: s171B(4)

73. S171B(4)(b) provides that if within the appropriate 4 or 10-year period the LPA have taken or "purported to take" enforcement action in respect of a breach of planning control they have a further 4 years in which to issue a subsequent notice, provided always that the first was not already out of time and the matter constituted a breach of planning control. It may be deemed that the LPA "purported" to take action where, for example, they

[5] J.1013
[6] J.1080

issued a defective notice which had to be withdrawn, or the notice was quashed on ground (e) or a validity or nullity point.

74. Clearly, however, it would not be open to the LPA to take enforcement action under this "second-bite" provision if an appeal against a previous notice relating to the same matter had succeeded on grounds (c) or (d), or planning permission had since been granted for the matter in question.

75. It has been argued that the second bite provision of s171B(4)(b) does not apply when the notice is a nullity. The basis of the argument is that a null notice was not of legal effect and thus did not amount to enforcement action. However, such an approach would unnecessarily restrict the purpose of s171B(4), which is to stop the clock where LPAs have issued a faulty notice, or need to issue another so as to protect their position. The Courts have taken a liberal view of "purported", so as to encompass the nullity situation; *R (oao Lambrou) v SSCLG* [2013] EWHC 325 (Admin).

76. This "second bite" provision has been tested in the Courts. In *Jarmain v SSETR* [2002] PLR 126[7], a pragmatic approach was to be adopted in preference to "arid technicalities" which the 1991 amendments to TCPA90 had sought to remove. It was held that the breach referred to in s171B(4)(b) was the physical reality of the breach. So the second bite could be taken even if the first EN had described the breach as a breach of condition when it was in reality unauthorised development, as long as the facts were the same.

77. In *R (oao Romer) v FSS* [2006] EWHC 3480 Admin[8], it was held that the second EN was dealing with the same development, albeit described differently, and served on the same owner; that the first EN incorrectly referred to adjacent land did not remove it from the ambit of s171B(4)(b).

78. The second-bite provisions do not apply to circumstances where matters alleged in the two notices are less a misdescription, but more an accurate reflection of the range and nature of uses or operations on the site at the times when the two notices were issued; *Saunders & Saunders v FSS & Epping Forest DC* [2004] EWHC 1194 (Admin).

79. Nor do the second-bite provisions apply where the second notice encompasses a wider range of components than the aggregate of the ones covered by several earlier notices and is directed at additional facts. In *Fidler v FSS & Reigate and Banstead BC* [2003] QBD 1/10/03 and [2004] EWCA[9], it was held that even if the LPA had intended to direct the first notice at the whole of the mixed use on the site the first notices fell materially short of doing so, whether viewed individually or collectively and the second notice was thus not a second-bite notice.

80. Where there has been a long delay and an appeal has not determined, there is a danger that the development will gain immunity from enforcement action unless the LPA issues a further notice, within four years of the date of the first notice, to prevent the unauthorised development from becoming lawful.

[7] J.1019
[8] J.1169
[9] J.1123

81. S191(2)(b) and 3(b) provide that uses, operations and failures to comply with conditions are lawful at any time if they do not constitute a contravention of any of the requirements of any enforcement notice then 'in force'. The PPG (paragraph 17c-003-20140306) states that an enforcement notice is not in force when an enforcement appeal is outstanding or an appeal has been upheld and the decision has been remitted to the SoS for re-determination, and that is still outstanding[10].

82. The LPA would thus protect their position by issuing a second notice in accordance with the provisions of s171B(4)(b), in order to prevent any possibility of the use becoming lawful under s191(2) or (3) for another 4 years. Otherwise, it may be necessary for to address whether immunity has been acquired during appeal proceedings.

Crown Land

83. S84(2) of the Planning and Compulsory Purchase Act 2004 brought about major changes in enforcement as it relates to Crown land. The PPG explains that enforcement action is possible in relation to Crown Land, but there are some restrictions which do not apply elsewhere; see s296A and 296B of the 1990 Act. There is no requirement to obtain consent of the Crown body with the interest in the land to take action against such occupiers.

84. A LPA can serve a notice or make an order, other than a court order, intended to enforce compliance on Crown land according to the normal enforcement procedures. Trespassers on Crown land served with an enforcement notice have no right of appeal because they would not have an interest in the land or be a "relevant occupier".

85. SI 2006/1281 brought the provisions in the 2004 Act relating to Crown land fully into force for both England and Wales. The enabling provisions were ss84(1), (2) and (3). An LPA still needs consent to enter land, bring proceedings or make applications to court. They do not need consent to issue an enforcement notice, but if it comes into force they need consent to take further action if it is not complied with. The Crown is immune from prosecution under these provisions.

Issue of the Notice: Internal Procedures

86. A notice is susceptible to challenge on grounds that the "standing orders" of the LPA, under s101 *et seq* of the Local Government Act 1972, have not been followed, and the correct authorities to issue the notice were not obtained. There is no power to delegate the power to issue notices to a single Authority member, but many LPAs delegate to officers, sometimes conditional on approval by a committee chairman; *Fraser v SSE* [1988] JPL 344[11]. Such duties may be performed by subordinates. However, in the light of *Britannia Assets (UK) Ltd v SSCLG* [2011] EWHC 1980 (Admin), especially the observations of Wyn Williams J at [24]-[26] and [33]-[34] it may be that the proper course would be to bring that complaint by way of judicial review. Where an Inspector determines an enforcement notice is not a nullity (if the point is raised) their jurisdiction is confined to assessing the scope of the appeal under s.174. The Inspector does not

[10] PPG paragraph ID 17c-003-20140306 (LDC chapter)
[11] J.603

have jurisdiction to deal with submissions as to whether the LPA acted outside their powers by issuing the notice. Therefore, legal submissions and advice should be sought where the point is raised by parties.

87. Costs may be awarded against an LPA if a notice is quashed because it is found not to have been properly authorised; see [1997] JPL 1081. In *R v SSE ex parte Hillingdon LBC* [1986] JPL 363[12], doubts were expressed as to whether an *ultra vires* action could be validated retrospectively, but in *Webb v Ipswich BC* [1989] EGCS 27 this was considered possible where no parties' existing rights were substantially prejudiced.

88. S330 of the 1990 Act gives an LPA power to serve a notice requiring details of interests, uses and purposes for which land is being used; wider powers are contained in the PCN Procedure under s171C, while s16 of the Local Government (Miscellaneous Provisions) Act 1976 gives another more limited power. An LPA which issues an enforcement notice without adequate preliminary investigation is at risk of error and an award of costs.

89. On the facts of *R v Basildon DC Ex Parte Martin Grant Homes* [1987] JPL 863, a planning permission was held to extend to include amendments to the plans that had been required in accordance with building regulations consent, so that no enforcement notice could be issued.

90. A Local Government Ombudsman report dated 15 July 1992 indicated that there was maladministration when no liaison took place; Manchester CC Ref GO/C/2240, 91/C/2240, 91/C/1726. See also the case reported at [1993] JPL 1064 involving the need for Listed Building Consent, and [1999] JPL 206 (Local Government Ombudsman Complaint 96/B/1071, former Woodspring DC).

91. However, this does not mean that building regulation consent estops a LPA from taking enforcement action, particularly when such consents carry express disclaimers that they do not apply to planning legislation. Where an Inspector feels that an appellant is genuine in claiming he or she has been misled, this may justify sympathetic consideration of personal circumstances, rather than support on legal grounds.

Service of the Notice

92. S172(2) provides that a copy of the notice shall be served on the owner and occupier of the land to which it relates, and any other person having an interest in the land, including mortgagees, tenants and sub-tenants, being an interest which, in the opinion of the LPA, is materially affected. It is for the LPA to decide who is materially affected, but they risk an appeal on ground (e) if they exercise their discretion wrongly; see para 622.

93. The term "owner" is defined in s336 but "occupier" is not. Occupiers may be lessees, licensees by virtue of an oral or written licence, or trespassers whose occupation is sufficiently settled to confer a degree of control even if they lack *locus standi* to make an appeal; para 226. Relevant factors are degree of control, duration of occupation and the nature of the occupancy.

[12] J.537

94. Caravan dwellers are occupiers where they have occupied a site for some time; *Stevens v Bromley LBC* [1972] 23 P&CR 142. The same is true of residents of bed sitting room accommodation; [1976] JPL 116 and [1990] JPL 861. In the case reported at [1976] JPL 113, market stall holders were not regarded as occupiers, although in such cases the procedures for service in s329 should be followed so far as possible, in particular by affixing a copy to some object on the land.

95. S179(4) limits criminal liability for carrying on, or causing or permitting the continuance of an activity which the notice requires to cease, to those who have control of the land, or an interest in it. S179(7) provides a defence against prosecution for anyone not served if particulars of the notice are not entered in the LPA's enforcement and stop notice register kept under s188 and he can claim he was not aware of its existence.

96. The notice is a single entity. The LPA retain the original, and any number of copies may be served. The notice must be served not more than 28 days after the date of issue, but not necessarily contemporaneously on every person affected.

97. A notice should allow a minimum of 28 clear days between the date of the service of copies and the date it takes effect, but an inadvertent shortening of the period to 27 days, when a valid appeal was received in time, can be the subject of correction under s176(1)(a); *Porritt v SSE* [1988] JPL 414[13], see also para 625. Each copy of the notice must show the same date of issue, and the same date on which it takes effect.

The Regulations – What the EN should Contain

98. ENAR4 (ENAWR3) provides that a notice shall specify the LPA's reasons for issue, all relevant development plan policies and proposals and the precise boundaries, by reference to a plan or otherwise see para 126. ENAR5 (ENAWR4) provides that every notice must be accompanied by an explanatory note; see para 36.

99. The PPG advises that the LPA must enclose with the enforcement notice information about how to make an appeal. The LPA should enclose an information sheet with the notice; this is accessible via the gov.uk website. Notices should be served in duplicate so that one copy can be submitted to the SoS with any appeal; see also para 126.

100. Regulations 34-46 of the EIAR[14] extend the EIA requirements to the deemed planning application in enforcement cases where relevant. This takes the form of an environmental statement (ES) to be attached to an appeal against the notice. It is for the LPA to serve with the notice a statement that the unauthorised development is likely to have a significant effect on the environment, such that any appeal must be accompanied by an ES.

101. If an appeal is submitted without an ES then the SoS will determine whether one is required, and if it is required but not provided then any ground (a) and the deemed application will lapse. The categories of

[13] J.605
[14] In Wales, Regulations 42-54

development requiring an ES are mostly of a substantial nature, and are set out in Schedules 1 and 2 of the Regulations. The PPG explains the requirements to The Town and Country Planning (EIA) Regulations 2017[15].

4. Estoppel and Legitimate Expectation

The Principle

102. "Estoppel", derived from a Norman French word meaning to stop, bar or preclude, is a long-established concept of English private law. Generally it prevents a person who causes another to rely upon their acts or words from later denying or going back on those acts or words.

103. The concept of estoppel may arise in enforcement and LDC casework in relation to representations made by or on behalf of a local planning authority (*Estoppel by representation*), the conduct of an appellant (*Estoppel by conduct*), where there has been a previous legal determination of a relevant issue (*Issue estoppel*), or where one party seeks to alter a previously agreed assumption (*Estoppel by convention*).

Estoppel by Representation

104. The House of Lords held in *R v E Sussex CC ex parte Reprotech (Pebsham) Ltd* [2002] UKHL 8[16] that concepts of private law should not be introduced into the public law of planning control, which binds everyone. The general principle is that public authorities cannot be estopped from performing their statutory duties.

105. Thus, it is a fundamental principle that an LPA may not fetter its discretion to issue an EN by any form of agreement; *Southend-on-Sea Corporation v Hodgson (Wickford)* [1961] 12 P & CR 165. Any representation by a local planning authority as to how it will or will not exercise its powers under s172 will not give rise to a binding estoppel by representation; *Reprotech*.

106. In *Saxby v SSE & Westminster CC* [1998] JPL 1132[17] it was held that under the revised provisions for certificates of lawfulness, that is, ss191-196, it was no longer possible to have an informal determination of whether planning permission is required; the new provisions are "an entirely new and fully comprehensive code"; see also *Flattery & Japanese Parts Centre Ltd v SSCLG & Notts CC* [2010] EWHC 2868 (Admin).

Estoppel by Conduct

107. In LDC or ground (d) enforcement cases where immunity is claimed because the time limits for enforcement have expired, it may be suggested that an appellant is estopped from denying the truth of false statements made to the LPA at an earlier stage. This type of estoppel may be referred to as estoppel *en päis* or estoppel by conduct.

108. Whilst the onus is on the LPA to detect unauthorised development within the 4 or 10-year period, the principle that no one should benefit from their

[15] In Wales, the Development Management Manual and WO Circular 11/99 explain the requirements to The Town and Country Planning (Environmental Impact Assessment) (Wales) Regulations 2017.

[16] J.1081
[17] J.1005

own wrong was applied in the context of the Planning Acts in *SSCLG & Beesley v Welwyn Hatfield BC* [2011] UKSC 15. This case also resulted in the response contained in s124 of the Localism Act 2011, which inserted ss171BA-171BC relating to cases involving concealment into TCPA90.

109. In the *Welwyn* case, the deception of the Council involved the obtaining of false planning permissions which Mr Beesley never intended to implement, but which were designed to, and did, mislead the LPA into thinking that the building was a genuine hay barn and so into taking no enforcement step for over four years. This was a deception in the planning process and directly intended to undermine its regular operation.

110. Whether conduct will, on public policy grounds, disentitle a person from relying upon an apparently unqualified statutory provision must be considered in context and with regard to any nexus existing between the conduct and the statutory provision. The statutory immunity periods must have been conceived, in part, as sufficient for a planning authority to normally discover an unlawful operation or use, and after which the general interest in proper planning control should yield and the status quo prevail. Positive and deliberately misleading false statements by an owner successfully preventing discovery take the case outside that rationale.

111. The immunity periods set out in the Act could not be relied upon where there was a positive deception in matters integral to the planning process which was directly designed to avoid enforcement action within the relevant period and succeeded in doing so. Where the conduct does not achieve the *Beesley* standard of deception, it may still be taken into account when judging the veracity of and weight to be given to evidence. An Inspector can have regard to the likelihood of a witness being truthful now when he admits to having lied in the past when to his advantage.

Issue Estoppel

112. Issue Estoppel or Estoppel *per rem judicatam* arises to prevent a party from re-opening legal issues which have previously been determined and when there has been no material change in circumstances; *Thrasyvoulou v SSE, No 2* [1990] 2 WLR 1[18]. It does not apply to judgements on the planning merits, where an Inspector is free to disagree with a previous decision so long as the reasons for such disagreement are made clear, and general policies requiring consistency in decision making are not offended; *Rockhold v SSE* [1986] JPL 130[19]; *North Wilts DC v Clover* [1992] JPL 955.

113. Where a notice is quashed on procedural grounds under s176(3)(b), no issue estoppel arises and a further notice can be issued; *R v Wychavon DC & SSE ex parte Saunders* [1991] EGCS 122[20], see also para 251.

114. In *Watts v SSE & South Oxfordshire DC* [1991] 1 PLR 61[21], it was held that for an earlier appeal decision to operate as an issue estoppel, and where the relevant issue was determined on the basis of both fact and law, the whole matter must have been fairly and squarely before the previous Inspector, who must have fully addressed the matter and made an

[18] J.735
[19] J.554
[20] J.783
[21] J.771

unequivocal decision on it. That these three conditions had been fulfilled should be clear on the face of the decision.

115. In *A & T Investments v SSE* [1996] JPL B94[22], it was said that where issue estoppel arising from a previous decision was relied upon, it was necessary to identify the question determined by the previous Inspector; the findings of fact – or of fact and law – which provided the essential foundation for that determination; and then consider whether such findings would be expressly contradicted by contentions in the subsequent proceedings.

116. Further criteria were laid down in *Porter v SSETR* [1996] 3 All ER 693, followed in *Forrester v SSE & South Bucks DC* [1997] JPL B154[23]:-

    i. The issue must have been decided by a Court, or a Tribunal of Competent Jurisdiction (i.e. a previous Inspector).

    ii. The issue must be one between parties who are parties to the decision.

    iii. The issue must have been decided finally and be of a type to which issue estoppel can apply.

    iv. The issue in respect of which issue estoppel is claimed must be the same as that previously decided.

117. Issue estoppel, as considered in *Thrasyvoulou* and the line of cases referred to above, is still applicable to decisions by Inspectors determining appeals against enforcement notices on grounds (b) to (d); *R (oao East Herts DC) v FSS* [2007] EWHC 834 (Admin)[24]. Inspectors should avoid where possible making determinations on issues of legal right which are not crucial to the decision in hand. Where it is helpful to the logic of the reasoning of the decision to state a view which might give rise to a claim of issue estoppel at a later stage, it should be subject to a disclaimer that no formal finding has been made on the point.

Estoppel by Convention

118. This form of estoppel can occur in situations where the parties conducted their dealings on the basis of an agreed set of facts or assumptions and one of the parties subsequently seeks to change its position.

119. In *Hillingdon LBC v SSE* (1999), the authority had approved details of an incinerator on the assumption by both parties that non-statutory arrangements for Crown development applied. Later it transpired that they did not. The Court found that the LPA could not resile from views previously expressed and were therefore estopped from issuing an enforcement notice. They had been in possession of all the facts and the procedures had been followed which also gave similar protection to third parties whether the non-statutory or statutory process was followed.

120. In *R v Caradon DC, ex parte Knott* [2000] 3 PLR 1, the LPA had made both a revocation order and a discontinuance order. Both were confirmed and discussions on compensation were proceeding. The LPA discovered that the dwelling had been erected outside the boundaries of the permission and issued an enforcement notice on the grounds that it was a dwelling

[22] J.959
[23] J.990
[24] J.1164

without permission. The Court held that the avoidance of compensation was not a proper planning purpose making it expedient to issue the notice.

121. Sullivan J. held that estoppel was made out on three grounds. (1) By representation – the appellants had relied on the LPA's representations when they withdrew a s73 application and their objection to the revocation order. A ground of objection would have been that the permission was not implemented or capable of implementation. (2) By issue estoppel – in earlier HC proceedings, to which the LPA were a party, the judge had reached a clear conclusion that the permission was alive and capable of implementation. (3) By estoppel by convention – the parties had conducted their dealings on the basis that the permission had been implemented and it would be unjust for the LPA to proceed otherwise.

122. The finding of estoppel by representation in *Knott* does not conflict with *Reprotech*. The LPA's actions concerned actions of the authority itself in making formal decisions under various statutory powers and were not informal assurances by an officer.

Legitimate Expectation

123. It is sometimes argued by appellants that the issue of an enforcement notice would constitute an abuse of power, as a result of there being a legitimate expectation that such action would not be taken. In *Henry Boot Homes Ltd v Bassetlaw DC* [2002] EWCA Civ 983[25], the developer had begun work pursuant to a planning permission without complying with conditions precedent. The CoA determined that the appellant had no legitimate expectation that the LPA would treat the planning permission as having been implemented, despite the LPA having indicated over a number of years that the permission had indeed been implemented.

124. The Court emphasised the statute-based nature of the planning system and the public interest that compliance with conditions should only be waived through the statutory process. It declined to say that legitimate expectation could *never* operate in such circumstances, but suggested that such cases would be very rare.

125. In the more recent case of *Thomas Flattery, Japanese Parts Centre Ltd v SSCLG and Notts CC* [2010] EWHC 2868 (Admin), the High Court held that legitimate expectation was irrelevant in deciding lawfulness. Only a formal decision made by a LPA in the proper exercise of its statutory powers would represent a conclusive assessment of the status of a use. This case is perhaps the final nail in the coffin of estoppel by representation; see *Coghurst Wood Leisure Park Ltd v SSETR* [2002] EWHC 1091 (Admin).

[25] J.1114

5. Enforcement Notices

Contents of the Notice

General

126. Every notice shall specify:

a. The matters alleged to constitute the breach of planning control; s173(1)(a).

b. Whether, in the opinion of the LPA, the breach of planning control is within s171A(1)(a) or s171A(1)(b) – ie, whether the allegation is development without planning permission, or a breach of condition or limitation on a planning permission, including as granted by the GPDO; s173(1)(b).

c. The steps required to be taken, or the activities which the LPA require to cease; s173(3).

d. The date on which the notice is to take effect; s173(8).

e. The period for compliance; s173(9).

127. In addition, any notice shall:

a. Specify the LPA's reasons for issue; s173(10) and ENAR4(a).

b. Specify all relevant policies and proposals in the development plan; s173(10) and ENAR4(b).

c. Specify the precise boundaries of the land to which the notice relates, whether by reference to a plan or otherwise; s173(10) and ENAR4(c).

d. Be accompanied by an explanatory note which is to include a copy of ss171A, 171B and 172 to 177 – or a summary of those sections. The note must set out information relating to the right to appeal; the means and grounds of appeal; the fee payable with reference to the appropriate sections of the Act; the need to provide a statement stating the facts the appellant wishes to rely upon in support of each ground; and details of those served; s173(10) and ENAR5.

See below for advice as to where failure in respect of any of these requirements would render the notice null or invalid.

The PPG contains model forms of enforcement notice in clear and simple terms. It is likely that most LPAs will use these but they have no statutory force and other forms may be used. A notice does not necessarily have to be signed or sealed; a facsimile signature is also in order.

Plan

Notices in the Alternative

128. Notices are sometimes served in the alternative, one alleging a breach of condition, the other a material change of use. There is no objection to this, providing it is made clear in a covering letter that this is the intention; *Britt v Bucks CC* [1964] 14 P&CR 318. Generally the Inspector will be able to decide which notice is correct and quash the inappropriate one, since there is a risk of uncertainty and injustice if two notices subsist in respect of what is essentially the same breach of planning control.

129. It may be that both notices are technically correct: there has been a material change of use and a breach of a condition. If so, it will probably be preferable to pursue the 'use' notice because of the implications for the DPA; see para 811. There may also be cases, for example, when there are over-lapping planning units, when it would be right to uphold both notices.

130. The criminal defence of "double jeopardy" would arise only if and when an LPA prosecuted for contravention of both; *Ramsey v SSE, No 1* [1991] JPL 1148. Where one notice duplicates another, the Inspector should clarify the situation by quashing the duplicate as such. A notice should not be corrected when the result will be duplication.

The Allegation

Satisfy s173

131. S173(2) says that a notice complies with s173(1)(a) if it "enables any person on whom a copy of it is served to know what those matters are", being the matters alleged to constitute the breach, with the test being as described in *Miller-Mead v MHLG* [1963] 1 A11 ER 459[26] – whether an enforcement notice tells the recipient "fairly what he has done wrong and what he must do to remedy it"; see below.

132. Where the allegation is of unauthorised development, the notice should distinguish between operations and a material change of use, not least because of the different periods during which enforcement action may be taken; see para 58). Where a notice relies on a material change of use by intensification it must say so; *Kensington and Chelsea RBC v Mia Carla Ltd* [1981] JPL 50[27], see also para 341).

133. The Courts encourage a very wide-ranging use of the power to correct even such fundamental and basic errors; see *R v SSE ex parte Ahern (London) Ltd* [1989] JPL 757[28] and para 318 *et seq*. Subject to the test of injustice under s176, it is possible to correct a notice which alleges a material change of use rather than breach of condition or vice versa; see below. However, the powers of correction are not available where the notice is a nullity, since it does not exist to be corrected. Failure to comply with s173 can render the notice a nullity; see para 283 onwards).

134. There is no reason why allegations of operational development and a material change of use should not be combined in one notice, provided

[26] J.14
[27] J.305
[28] J.686

they relate to connected matters, and it is made clear which development is alleged to have taken place within four years and which within ten; *Valentina of London v SSE & Islington LBC* [1992] JPL 1151[29]. The heading of the notice must be correct and the allegation and requirements clearly structured to reflect the different types of development being alleged.

Previous Use

135. A notice alleging a material change of use need not recite the previous use; *Westminster CC v SSE & Aboro* [1983] JPL 602; *Ferris v SSE* [1998] JPL 777. However, it is better if it does so, so that it will be more obvious why the LPA considers there has been a material change. Where the notice does recite the previous use, this should be correct but is open to correction on appeal, including omission where there is uncertainty.

136. Generic descriptions such as "shop" or "office" are sufficiently clear; over particularisation might defeat the purpose of the notice. Operations can also be the subject of an overall general description; *Bristol Stadium v Brown* [1980] JPL 107. Misstatements of fact in the allegation can be the subject of an appeal on ground (b), but do not necessarily defeat the notice, given the power to correct any "misdescription" in s176(1)(a).

Mixed Use

137. In mixed use cases, the allegation should refer to all the components of the mixed use, even if it is considered expedient that only one should cease. In the case of *R (oao) East Sussex CC v SSCLG* [2009] EWHC 3841 (Admin), it was held that where there is a single mixed use it is not open to the LPA to decouple elements of it. The use of the site is the single mixed use with all its component activities.

138. For example, a single planning unit may be used as a haulage depot, for vehicle repairs and as a scrapyard, but it is only the recently introduced scrapyard use which is objectionable. The planning merits will need to be judged on the basis of the mixed use, not use of the whole site as a scrapyard. The implications of s173(11), where a notice is corrected in these circumstances, are dealt with at paras 207 and 335 below.

Breach of Condition

139. Where a breach of condition is alleged, details of the relevant permission and condition should be recited, so that it is clear what the allegation is; see Model Breach of Condition Notice – PPG Ensuring Effective Enforcement). However, any omission could probably be corrected if a valid appeal had been made and the parties were under no illusion as to the basis of the allegation.

140. Only an express condition can be enforced, there is no concept of conditions being implied from the description of what is permitted. While the description of development permitted could limit the scope of the permission, it does not the same effect as imposing a condition; *Wilson v West Sussex CC* [1963] 2QB 764.

[29] J.802

141. Where the permission specifies a type of development or constraint to which the way the development would take place, but fails to include a condition which sets out the constraint or prevents any other type of development, the implementation of the permission must be as in the description – but the absence of a limiting condition could potentially allow the development to be changed subsequently.

142. For example, a grant of planning permission that is specifically described as the use of a building as a crèche would not prevent the operation of s55(2)(f) and the UCO, allowing a change of use to another use within use class D1, unless a condition is imposed to limit the use of the building to a crèche and no other purpose within use class D1.

143. In *I'm Your Man Ltd. v SSE* (The Times, 25 September 1998), permission was granted for a particular use of a building for "a period of seven years" but no express condition had been imposed requiring cessation of the use or reinstatement after seven years. It was held that, in the absence of a specific condition, the permission was a permanent permission and not restricted to a temporary period of seven years.

144. In the case of *Winchester City Council v SSCLG* [2013] EWHC 101 (Admin) and [2015] EWCA Civ 563, however, the LPA had granted permission for a change of use from agricultural land to a "*travelling showpeoples' site*". There was no condition expressly limiting the occupation of the site to travelling showpeople. The Inspector found that the permission was for the use of the land as a residential caravan site, with no restrictions on the occupation of the land, relying upon the principle in *I'm Your Man*.

145. The High Court and CoA held, however, that a travelling showpeoples' site may be a significant and separate land use in planning terms. In this case, everything including the conditions imposed pointed to the planning permission being one to use the land as a travelling showperson's site. In *I'm Your Man*, the restriction related to the manner in which the use could be exercised, not the extent of the use itself.

146. The *I'm Your Man* principle was further considered in *Cotswold Grange Country Park LLP v SSCLG & Tewkesbury BC* [2014] EWHC 1138 (Admin)*;* the question which arose was whether the siting of 6 caravans would be in conflict with the terms of the permission granted for a site office and wardens static caravan and the replacement and re-siting of 40 static caravans and the provision of 14 additional static caravans and ancillary works for year round holiday use on an existing holiday caravan park. No condition had been imposed restricting the number of caravans.

147. The Court held that the '*I'm Your Man'* principle is whether a limitation is imposed in the form of a condition. The Inspector failed to respect the difference between a limitation in the number of caravans in the description of development permitted, and a limitation in the form of a condition. He materially erred in law because only the latter was capable of imposing a limitation at law.

148. Planning permission is required for a material change of use from that for which permission is granted. If a LPA wishes to control any change that is not material, it is open to them to restrict the use within the prescribed development but, following *I'm Your Man*, only by way of condition.

149. *I'm Your Man* was also raised in *Wood v SSCLG & the Broads Authority* [2015] EWHC 2368 (Admin). The Court held that the principle that "*if a limitation is to be imposed on a permission granted pursuant to an application, it has to be done by condition*" extends beyond limitations of a "*temporal*" nature; it applies to "*substantive*" limitations as well.

150. However, the *I'm Your Man* principle does not displace the effect of s75(3) of the 1990 Act. It cannot enlarge the scope of a planning permission for the construction of a building such that the permission can be taken to authorise the use of that building for a purpose other than that for which it is designed. The absence of a condition precluding a use materially different in character from the use for which the building is designed cannot serve as approval for that materially different use.

151. The correct approach in such cases is therefore to take the question articulated at para 27 of the High Court judgment in *Winchester:* What was the use permitted by the permission? If considering whether what is taking place is or is not authorised by a permission pose the question - what would be the breach of planning control? What functional significance does the wording of the permission have? What use was permitted by the permission and does that differ from what is now being sought?

152. In *London Borough of Lambeth v SSCLG and Aberdeen Asset Management and Nottinghamshire County Council and HHGL Limited* [2017] EWHC 2412 (Admin) no condition was imposed on the 2014 permission to restrict the nature of the retail use to specific uses falling within Use Class A1 of The Town and Country Planning (Use Classes) Order 1987 (as amended). The dispute centred on how the 2014 permission should be lawfully read and applied.

153. The High Court held that on reading the 2014 permission, it seems probable that the Claimant's intended purpose was to vary the condition so as to widen the range of goods which could be sold from the premises (not limiting it to the specific list of goods in the 2010 permission), whilst retaining the restriction on the sale of food items. However, the Claimant's intended purpose was not given legal effect by the wording of the 2014 permission, because of flawed drafting.

154. As a matter of interpretation, a reasonable reader of the 2014 permission, aware of the principle established in *I'm Your Man*, would conclude that there were no restrictions on retail sale. Without a condition limiting the use, the permitted use is a retail use, subject to appropriate conditions. This outcome did not lack "commercial or practical coherence" even though it is probably not that which the Claimant intended. The Claimant's submission that a condition could properly be implied into the 2014 permission to limit retail sales to non-food goods was also rejected.

155. It is very unlikely that the statutory scheme allows for what can be described as a permanent condition on a temporary planning permission, other than the time condition itself. This was the *obiter* view of Sir David Keene giving the leading Court of Appeal judgment in the case of *Avon Estates Ltd v the Welsh Ministers & Ceredigion CC* [2011] EWCA Civ 553.

156. In that case, a seasonal use condition was found to apply through the life of the time limited permission but not beyond. It would have been illogical

and internally inconsistent when construing the permissions to give the seasonal use condition a life after the specified date. The condition only applied during that period for which the holiday bungalows were permitted by the temporary permission granted.

157. There is a longstanding approach in planning law whereby a condition cannot be enforced if the landowner does not need to rely on the permission to authorise the development. It is difficult to conceive of a condition on a temporary permission under s72 which could sensibly relate to a development that had ceased to be authorised by the permission. If any breach of the time-limiting condition becomes immune from enforcement action, such that the development is not subject to the permission but is lawful, other conditions on the permission cannot bite.

158. Where development is commenced without complying with a "Grampian" type condition, so called from the decision in *Grampian Regional Council v City of Aberdeen DC* [1984] 47 P&CR 633, requiring something to be done before the permission is implemented, such as the submission and approval of further details, then the permission and its conditions need to be examined with care. It may be that the condition is a true condition precedent and the development as a whole is unlawful – or there has been a breach of condition which is enforceable on a lawful development; see conditions precedent and the discussion of *Hart Aggregates* at para 570).

159. The continuation of a use after the expiry of a planning permission granted for a limited period – a temporary permission – is not development. An enforcement notice directed against the continuing use should allege a breach of the condition that required the use to cease at a specified time.

160. In such cases, the DPA under s177(5), by analogy with s73A(3)(b), will be for the development originally permitted but without the condition, with effect from the day following the date when the limited period expired. The time-limiting condition should not be discharged since that could give rise to a question as to whether the original permission subsists without the condition. This is different to other breach of condition cases where the DPA is to carry out the development without compliance with the condition from the date on which the development was carried out, as under s73A(3)(a); see para 796.

161. In cases where the use has ceased for a significant time after the expiry of the temporary period, but it is subsequently resumed, an allegation of material change of use is correct. The evidence needs to support this conclusion that the condition had been complied with and the use brought to an end in accordance with the limited period permission; the later resumption being a fresh breach of planning control.

162. Correction of the allegation could almost certainly be made without injustice since the appellant is likely to have been in no doubt as to what activity was being attacked; see also para 326 onwards, and *Simms v SSE & Broxtowe BC* [1998] JPL B98[30].

The Steps Required to be Taken

The Purpose of the Requirements

[30] J.987

163. S173(3) provides that a notice should set out the steps which the LPA require to be taken, or the activities which they require to cease. In deciding what they are seeking to achieve through the requirements in an enforcement notice the LPA must have regard to the provisions of s173(3)-(6). By the words "wholly or partly", s173(3) makes it clear that the LPA may "under-enforce" in specifying the steps they require to be taken in order to achieve either of the purposes specified in s173(4).

164. S173(4) enables the LPA to specify different categories of remedial requirement in an enforcement notice to either:-

(a) Remedy the breach by:

- making any development comply with the terms (including conditions and limitations) of any planning permission which has been granted in respect of the land,
- discontinuing any use of the land, or
- restoring the land to its condition before the breach took place. OR

(b) Remedy any injury to amenity which has been caused by the breach.

165. The enforcement notice should clearly disclose exactly what the LPA seek to achieve by their notice – and, in particular, whether the purpose of the requirements falls under s173(4)(a), (4)(b) or both. In most cases, the purpose will be clear from the way the requirements of the notice are expressed, because they will normally indicate the intention to remedy the breach (s173(4)(a)) or to remedy any injury to amenity (s173(4)(b)).

166. However, the Courts have held that the "or" that separates s173(4)(a) from (4)(b) is not entirely disjunctive. LPAs are not required to formulate their remedial requirements so that they correspond solely with either one purpose or the other; see *SSTLR v Wyatt Brothers (Oxford) Ltd and Oxfordshire CC* [1997] QBD[31].

167. There may be circumstances where a LPA may require within one enforcement notice that part of the site is restored to its previous condition in order to remedy the breach, coupled with other works on a different part of the site designed to remedy the injury to amenity caused by the breach there. However, in most cases the purpose will fall wholly within one or other part of subsection (4).

168. The provisions of s174(2)(f) should be interpreted in the wider context of this part of the 1990 Act and in particular section 173(4). The words "as the case may be" distinguish between requirements derived from (a) and (b) of subsection 173(4); see para 844.

Removal of Works in an MCU Notice

169. S173(5) gives power to require the alteration or removal of buildings or works, or the carrying out of building or other operations, for the purposes of remedying the breach.

170. A notice directed at a material change of use may require the removal of works integral to and solely for the purpose of facilitating the unauthorised use, even if such works on their own might not constitute development, or be permitted development, or be immune from enforcement, so that the

[31] J.1102

land is restored to its condition before the change of use took place; *Murfitt v SSE* [1980] JPL 598[32], *Somak Travel v SSE* [1987] JPL 630[33].

171. However, it is worth noting that the appellant in *Murfitt* case had agreed that the only purpose of the hardcore on the site was to enable it to be used for the purpose of parking of heavy goods vehicles (the unauthorised use). The placing of the hardcore was simply part and parcel of that use.

172. The application of *Murfitt* and *Somak Travel* was considered in the case of *Bowring v SSCLG & Waltham Forest BC* [2013] EWHC 1115 (Admin). The Court explained that the decision in *Somak Travel* supported the view that, where a notice is served alleging a material change of use and requiring that certain works be removed, those works must have been integral to or part and parcel of the making of the material change of use. It will not be sufficient if the works had been undertaken for a different and lawful use and could be used for that other lawful use if the unauthorised use ceased.

173. *Murfitt* is only authority for the proposition that a notice which alleges a material change of use may require the removal of works in respect of which the four year time limit for enforcement against operational development has passed. The CoA essentially rejected the submission that such a requirement could not be included in a MCU notice if the works could have been subject to a notice as operations, but the time limit had passed. The CoA did not address what the test is for determining whether works carried out for some other, lawful use may be required to be removed when a notice alleging a material change of use is served.

174. Where operational development was installed as part of the material change of use, the question of what was necessary to prevent the unauthorised use would depend on the facts of each particular case. It would be open to the Inspector to form the view that they would impose the least excessive or onerous requirements to prevent the resumption of the unauthorised use.

175. The process of reaching a lawful decision could be expected to satisfy the requirement that the restriction on the use of property and any removal of works is proportionate: *Lough & Others v FSS* [2004] 1WLR 2557. It is likely that the minimum necessary to remedy the breach would be proportionate; see *Makanjuola v SSCLG & Waltham Forest BC* [2013] EWHC 3528 (Admin); *Kestrel Hydro v SSCLG* [2015] 1654 (Admin).

176. In such cases, it is not necessary for the works to be referred to in the allegation but when they are, and the notice is not alleging both a material change of use and operational development, clarity is ensured if it is phrased in terms of, "*the making of a material change of use to use X and the construction of Y to facilitate that change of use*". This means that the terms of any DPA will include the facilitating works. S173(5)(c) provides power to require that an activity be carried on only to some limited extent.

177. In recent appeals concerning 'beds in sheds', where the building has been put to residential use from the outset – such that there had not been a *change of* use of the building to a dwellinghouse – some LPAs have opted to enforce against a material change of use of the land on which the building is sited. This gives the LPA a ten year period in which to take

[32] J.285
[33] J.581

enforcement action under s171B(3). Cases of this type have arisen where the notice requires that the building is removed, even where the erection of the building would be immune under s171B(1) and the four year rule.

178. There are two difficulties with this approach which suggest that it is unlikely to be successful. The first is identifying a breach of planning control that does not invoke s171B(1) in the situation where the land is already in lawful residential use in association with the original dwellinghouse. That can be distinguished from the situation in *Welwyn Hatfield BC v SSCLG and Beesley* [2011] UKSC 15 where the land on which the building was sited was formerly in agricultural use. In that instance there would be a 10 year immunity period applicable to the material change of use of the land to residential.

179. The second difficulty is that it is doubtful that the *Murfitt* principle extends to the removal of the unauthorised building that has been used as a dwellinghouse where that structure would otherwise be immune from enforcement action under the four year rule. In the light of the comments of Waller LJ in that case, such works are likely to represent obvious and permanent operational development that should clearly be dealt with within a period of four years rather than operational development which serves an ancillary purpose in circumstances where the land would otherwise be left in a useless condition for any purpose. In the case of the 'bed in shed' situation, the building could potentially be used for incidental residential purposes following the cessation of the dwellinghouse use. Since there is no settled law on this particular topic legal submissions should be sought and legal advice obtained on a case by case basis subject to GM approval.

Particular Types of Requirements

180. The scope of the EN is limited by s173(4)(a) and (b). Where planning permission has not been granted for the development, the power is simply to restore the land to its previous condition. There is no statutory power to require the appellant to undertake works which would result in an improvement to that previous condition.

181. This is applicable to ENs where the requirements potentially leave the building open to the elements or insecure – for example, where the unauthorised development is the installation of uPVC windows and the requirements are solely to remove the windows. An EN cannot be regarded as null or invalid if it merely requires the removal of unauthorised works without specifying their replacement. ENs which under-enforce by merely requiring the removal of the offending development should not be quashed. It will be for the appellant to seek planning permission for any further works that may be required.

182. Steps to be taken to remedy injury to amenity should not impose a more onerous requirement than to restore the land to its condition before the breach took place; *Bath CC v SSE* [1983] JPL 937[34]. In cases where there has been intensification of use, a requirement to reduce the level of activity to that pertaining on a certain date may be appropriate. Requirements must always respect lawful use rights, including rights to

[34] J.457

revert to any lawful use, in accordance with the principles laid down in *Mansi v Elstree RDC* [1964] 16 P & CR 153[35]; see para 905.

183. In some cases, even a requirement to restore the land to its previous condition may be considered excessive or too wide in its application, and therefore varied to something less onerous. In such circumstances, care should be taken to avoid statements that the requirement is 'ambiguous' or 'vague', since such assertions could be held to render the notice a nullity; see *Miller-Mead* and below.

184. A requirement to cease the use for any but a specified purpose such as agriculture would be excessive because this could ostensibly prohibit other lawful uses or as yet unsubstantiated future breaches of planning control.

185. In general, requirements should not conflict with or be dependent on consents under other legislation, although these will not necessarily invalidate the notice. See *Mackay v SSE* [1994] JPL 806[36] and para 295, as to the Ancient Monuments and Archaeological Areas Act 1979 – and contrast with *South Hams DC v Halsey* [1996] JPL 761 as to the concurrent need for Listed Building Consent.

186. Where there has been a change of use of a single dwellinghouse has been changed to a use for multiple occupation, a requirement simply to cease the use is sufficient. A positive requirement to restore the use as a single dwellinghouse would be excessive.

187. Requirements to remove fixtures and fittings such as separate kitchens, WCs or meters may be appropriate in some circumstances and bearing in mind Use Class C3; *Bowring v SSCLG & Waltham Forest BC* [2013] EWHC 1115 (Admin). This is a matter for the Inspector's judgement; *Hereford CC v SSE & Davies* [1994] JPL 448[37]. A requirement to cease a use as (eg) 'five' flats presents problems, since this could allow use as four or six flats. The appropriate wording is to cease the use as separate flats.

188. Sometimes an LPA will include requirements akin to planning conditions with a continuing requirement, for example, to maintain planting for a period of years or to carry out planting in the next planting season. Although the requirement may be formulated in a precise way, it is important that it does not impose a requirement that extends beyond the period for compliance in the notice.

189. In some instances, any such problem can be overcome by using staged compliance periods – but an open-ended requirement will never be appropriate; one of the objectives of an enforcement notice is to bring certainty and finality to an unlawful event. Moreover, where under-enforcement is involved, s173(11) will not be satisfied until all the requirements have been complied with and yet there could be an unacceptable degree of uncertainty with a requirement for future maintenance as to whether it had in fact been complied with.

190. Nevertheless, in some situations, requirements can be worded as 'negative conditions', so as to define the extent of a use that might represent an acceptable solution short of a complete remedy. Examples of such requirements are "cease the stockpiling of materials above a height of 5m

[35] J.32
[36] J.850
[37] J.843

above ground level" or "cease to permit more than one crusher and one screener to be on the site".

191. In such cases, it is advisable to also include a requirement along the following lines: "Cease to the use the land for …… save in accordance with the requirements listed above." Accordingly, all of the requirements could be complied with by the end of the specified period for compliance, so as to bring s173(11) into play, but a subsequent breach after the notice had taken effect would remain enforceable; see para 207.

Vague and Uncertain Requirements

192. In *Miller-Mead v MHLG* (para 131), Upjohn LJ also ruled that "The recipient of an enforcement notice is entitled to say that he must find out from within the four corners of the document what he is required to do or abstain from doing". Vague requirements offend that rule – and an example is to "comply or seek compliance"; see *Hounslow LBC v SSE & Indian Gymkhana Club* [1981] JPL 510[38]. Such wording also conflicts with penal provisions of s179(1)-(4). The oft-used standard wording "to restore the land to its condition before the development took place" is sufficient for validity purposes; *Lipson v SSE* [1976] 33 P and CR 95[39].

193. In many cases the landowner will be the person with the best knowledge of what that previous condition was; *Ormston v Horsham RDC* [1965] 17 P&CR 105, and *Al-Najafi v SSCLG & Ealing LBC* [2015] (CO/4899/2014)). Where evidence is available a notice should be corrected to refer to specific steps, so long as they are not more onerous than the original. Requirements should not be based on potentially subjective judgements such as "to leave in a clean and tidy condition", nor include works to be carried out "to the satisfaction of the LPA" because that is open-ended.

194. Requirements in the alternative are at risk of being found to be uncertain. However, in condition cases it may be appropriate to give the landowner a choice of how to comply; see para 837). It may be appropriate to give a choice as to the total removal of a fence or wall, or the reduction to limits permitted by the GPDO, so long as the minimum requirement is quite clear. Requirements must not conflict; e.g. "reduce the height of the wall to 1m and restore the land to its previous condition…", because the second requirement could imply removal of the whole wall.

195. The judgment in *Payne v NAW & Caerphilly CBC* [2007] JPL 117[40] held that in those circumstances where a notice required the subsequent submission and approval of a scheme of works, and it was found that the requirement would not comply with s173, the notice was a nullity and not, therefore, correctable. Thus, even where there is an 'either/or' requirement, and only one 'optional' element falls foul of *Payne*; the 'scheme' option would still render the notice uncertain and a nullity on its face. See below for a full discussion of this case.

Differences from Approved Plans

[38] J.338
[39] J.191
[40] J.1157

[**NB**. – This section includes text previously in GPDO section of this chapter but not relevant to The General Permitted Development Order & Prior Approval Appeals chapter]

196. Where a notice is directed at a buildings which differs materially from approved plans, in the absence of a condition requiring the development to be carried out strictly in accordance with such plans, it will allege the construction of a building without planning permission, in accordance with *Copeland BC v SSE* [1976] JPL 304[41].

197. In this situation, the requirements of the notice should be to make the development comply with the terms of the permission which has been granted. S173 (4) provides that a purpose of the requirements may be to make any development comply with the terms "(including conditions and limitations)" of any planning permission which has been granted in respect of the land. S336 defines "planning permission" as meaning permission under Part III, meaning that it will include a permission granted by a development order as well as on application.

198. If development is not built as permitted, but the requirements are directed only to putting right the offending differences, and the notice is then complied with, the whole building will benefit from the grant of a deemed planning permission under s173(11) as discussed below, and this will serve to remove the effect of any conditions on the original permission.

199. Thus, where the requirements are directed only to making the building accord with the plans, and there are continuing requirement conditions on the original permission, it would be appropriate, whether or not there is a ground (f) appeal, to vary the requirements to something like "the dwellinghouse shall be altered to comply with the terms of the planning permission dated … including the conditions subject to which that permission was granted …" The reason for varying the requirements should be explained in the decision.

200. The aim of this approach is to avoid the grant of an unconditional permission. However, it has not been tested in the Courts and it is open to question as to whether conditions containing continuing requirements can be "re-imposed" and subsequently enforced though a variation to the notice. Such matters are best dealt with under ground (a) if possible, because the conditions could be re-imposed on the planning permission granted in response to a deemed application.

201. It is necessary to address whether the planning permission is still extant, with which the development could be required to comply. In *Elmbridge BC v SSCLG & Giggs Hill Green Homes* [2015] EWHC 1367 (Admin), a notice was varied to require compliance with a planning permission, but there was no part of the decision which addressed whether the permission remained capable of implementation in accordance with its conditions. If there had been evidence and the Inspector had found that a valid permission still existed, the notice could have been varied and upheld, but that situation did not pertain.

202. Another point to note, in cases where there has been a deviation from approved plans, is that permitted development (PD) rights will apply to lawful uses or development. So, for example, where a dwellinghouse is not

[41] J.175

built in accordance with the approved plans, but the notice does not require compliance with the terms of the permission, it might be possible for the developer to utilise Part 1 permitted development rights in order re-instate the prohibited deviations and override the intent of the notice.

203. In such a situation, Article 3(5)(a) of the GPDO – which provides that PD rights do not apply to unlawful development – would not bite because, at the date of the re-instatement, the building will have become lawful in accordance with s173(11). S181(5) provides that the re-instatement or restoration of buildings removed or altered in compliance with a notice is an offence if the work is done "without planning permission". This cannot apply to works permitted under the GPDO.

204. Where the original permission did not include a condition to remove PD rights, it would not be possible to vary notice so as to prevent the exercise of PD rights, even if that would lead to reinstatement of the offending details. Again, therefore, the need for any such conditions is best dealt with under ground (a) where possible.

205. What can be done in accordance with PD rights is always a material consideration in considering the planning merits; *Burge v SSE* [1988] JPL 497[42]. When taking such rights into account the Inspector will need to make a finding as to the realistic likelihood of those rights being exercised; *Brentwood DC v SSE and Gray* [1996] JPL 939[43].

206. In minerals and waste disposal cases where there is a deviation from approved plans, the requirements of a notice may well be limited to re-grading, (s173(5)(d)), or even just to cessation of the activity, as removal of large quantities of material may be both undesirable and impractical.

S173(11)

207. S173(11) provides that, where an enforcement notice in respect of any breach of planning control could have required buildings or works to be removed, or an activity to cease, but has stipulated some lesser requirement which has been complied with, then, so far as the notice did not so require, planning permission shall be deemed to be granted under s73A for that operation or use.

208. In the case of a breach of condition, the deemed permission is for the development originally permitted without complying with the relevant condition, once the notice has been fully complied with. The deemed permission is dependent on full compliance with the requirements of the notice and, in the case of continuing requirements, intermittent further breaches can negate the deemed permission; see SoS decision at [1996] JPL 873 and above for the implications for PD rights.

209. The Court of Appeal in *Fidler v FSS* [2004] EWCA Civ 1295 held that s173(11) had effect only in relation to works mentioned in the EN as constituting a breach of planning control; it is a prerequisite that the notice "could have" required removal of works or activities to cease – and this is contingent upon the terms of the allegation. Where unlawful activities or works on the land are not referred to in the allegation, the notice could not have required them to cease or be removed and s173(11) does not impact on them.

[42] J.594
[43] J.962

210. The exception is where works have facilitated and been part and parcel of the change of use. The removal of such works can be required, even though not specifically itemised in the change of use allegation; see para 169). Where there is a lawful activity referred to in the allegation – say as part of a mixed use – the notice could not have required it to cease and thus s173(11) has no bearing upon it.

211. S173(11) can also cause problems, as in *Millen v SSE & Maidstone BC* [1996] JPL 735[44]: two notices alleged the same mixed use, but each required that only one element should cease, and both notices were upheld on appeal. The Court found this resulted in a situation where each element could gain a deemed permission once the notice requiring the other to cease had been complied with, and this resulted in uncertainty.

212. The Court also held that in the particular circumstances one notice could have been corrected to include both requirements and the other quashed. Any such changes to the allegation and requirements should normally only be made after the matter has been canvassed with the parties; see para 334). However, the correction would be unlikely to cause injustice since the totality of the matters and the outcome would remain the same.

213. S173(6) and (7) can require the construction of a replacement building where unlawful demolition has taken place; see para 366. S173(12) grants a deemed planning permission for such a building once the notice has been complied with in full.

Time for Taking Effect and Period for Compliance

214. There are four dates to be noted in connection with any enforcement notice: the date of issue, the date of service of copies, the date it takes effect, and the date or dates by which the requirements have to be complied with. These dates must not be confused. The purpose of the 28 day period between the second and third dates is to give time to appeal. If there is no valid appeal, the notice takes effect on the specified date, and the period for compliance begins to run.

215. The period for compliance must be separate from the 28 day period. A notice which contained no period whatever for compliance would be a nullity as would one which specified "immediately" since that is not a "period" for the purposes of s173(9); *R (oao Lynes & Lynes) v W Berkshire DC* [2003] JPL 1137[45]). Even if there are a series of requirements and only one of which is to be carried out "forthwith" or "immediately", the notice would still be a nullity.

216. However, where a period can be deduced by a little mental arithmetic, the notice can be corrected to provide for a revised timetable without injustice; *King & King v SSE* [1981] JPL 813[46]. For example, where there are two dates in the notice, it should be possible to decide, within the four corners of the document, the time within which a recipient is required to take the necessary steps. This can be done by subtracting one date from the other which is not a very difficult exercise.

217. A calendar year runs from 1 January to 31 December. Where a notice requires the cessation of a use for more than 28 days in any calendar

[44] J.953
[45] J.1120
[46] J.333

year, as permitted by Article 3 and Schedule 2, Part 4 of the GPDO, then the unlawful (permitted) use could continue up to the expiry of the period for compliance but thereafter only take place on however many days were left of the 28 allowed in that calendar year; *Attorney General's Reference No 1 of 1996* [1996] JPL 749.

Continuing Effect of the Notice and Penalties

218. S181(1) provides that compliance with any of the requirements contained in an enforcement notice "shall not discharge the notice"; s181(2) further provides, without prejudice to the generality of s181(1), that the resumption of a use which has been discontinued in compliance with an enforcement notice shall be a contravention of the notice – and thus a criminal offence under s179. The requirements of a notice are not discharged as of the deadline for compliance, but have enduring effect.

219. The effect of s181(1) and 181(2) would be that, if the requirements were complied with by the deadline given in the notice, permission would be granted under s173(11) for the development enforced against in accordance with the requirements. If there was a subsequent breach of the requirements, or a resumption of the use in a manner that was not in accordance with the requirements, s181(1) and (2) would mean that this remains enforceable under s179.

220. A notice is entered on the register of enforcement and stop notices which is maintained by the LPA, and should be disclosed on any local land charges search. If the notice is complied with but the development is subsequently resumed, then there is a contravention of the notice; *Klein v Whitstable UDC* [1958] 10 P&CR 60.

221. S180 provides that where a planning permission is subsequently granted for the same development or some part of it, the permission overrides the notice to the extent that its requirements are inconsistent with the permission but the notice does not cease to have effect altogether; para 312. Where a temporary permission is granted the prohibition contained in the notice does not revive upon the expiry of the temporary permission; *Cresswell v Pearson* [1997] JPL 860. This does not prevent the LPA serving a fresh notice once the temporary permission has expired.

Penalties for Non-Compliance

222. S178 gives power to the LPA to enter land and carry out works themselves or take any other steps to secure compliance with the notice, and to recover the cost from the "owner", as defined in s336. The owner is entitled to recover the cost from the person who actually carried out the breach of planning control; s178(2). Obstruction of those exercising the power is a criminal offence under s178(6); see PPG Ensuring Effective Enforcement – Local Authority default powers).

223. S179(2) imposes a criminal liability on the owner of land for failure to comply with a notice. It is a defence that the owner did everything possible which could be expected of him or her to secure compliance, or that he or she was not served, and the notice was not entered on the statutory register.

224. S179(4)-(5) create a second offence by anyone other than the owner, who has control of or an interest in the land – and carries on, causes or permits the prohibited activity to be carried on. Fines may be imposed of up to

£20,000 on summary conviction, and of unlimited sums on indictment in the Crown Court. The "financial benefit" from the breach can be taken into account in fixing the amount.

225. S66 and s67(9) of the Police and Criminal Evidence Act 1984 require that potential offenders should be cautioned, but although the absence of a caution could result in a prosecution eventually failing, it does not affect the validity of the notice or the appeal process.

6. Appeals against Enforcement Notices

Who can Appeal

226. S174(1) provides that a person, which includes a limited company or unincorporated body, having an interest in the land to which an EN relates, or a "relevant occupier" may appeal to the SoS, whether he she or it has been served with the notice or not. An interest may be freehold or leasehold, or that held by a person with a mortgage, a periodic tenancy or legal easement or right of way. It includes any equitable or legal estate in the land as opposed to a mere contractual right.

227. The wording of s174(1) requires the interest in the land to exist at the time the appeal is made; a lease which expires between the service of the notice and the date of the appeal does not provide the basis for an appeal. "Relevant occupier" is defined in s174(6) as someone with a licence, either with written, oral or implied consent, who occupies the land both at the date the EN is issued and at the date the appeal is made; *Flynn & Anor v SSCLG & Anor* [2014] EWHC 390 (Admin).

228. Whether there is such an implied licence will depend upon all the relevant circumstances including the particular relationship between the parties involved and the circumstances in which the premises were occupied. The relevant occupier or person with the interest in the land must appeal, a director of a company has no right of appeal on the Company's behalf; *Bucks CC v SSE & Brown* [1997] QBD 19.12.97[47].

The Validity of an Appeal

229. Points on "*locus standi*", i.e. the rights of a person to make an appeal, and other challenges to the validity of an appeal, should be resolved at procedure stage. There are further restrictions resulting from the Localism Act 2011; see also para 49. In general it is only trespassers who have no rights of appeal; *R v SSE & South Shropshire DC, ex parte Davies* [1991] JPL 540[48]. However an occupier who had been settled on land for 12 years (now 10 years for registered land) and could claim title by adverse possession was accepted as having a right of appeal; [1991] JPL 190. A trespasser with no right of appeal could still contest the validity of a notice in the courts; *Scarborough BC v Adams* [1983] JPL 673.

[47] J.995
[48] J.748

230. It is not for the Inspector to challenge an appellant's *locus standi* or the validity of an appeal, and he or she should not raise these points at an inquiry unless the parties do so. Where parties raise them, they must be treated in the same way as any other legal issues. At the inquiry, the Inspector should hear any submissions made and then the remainder of the cases, unless all parties request an adjournment to consider their positions, in which case it may be appropriate to grant one.

231. If it is found that the appellant had no right of appeal, or the appeal was invalid, the Inspector will conclude accordingly in the decision letter, and explain that there is no appeal to be determined, and he or she will take no further action. Such a decision could be the subject of an application for judicial review. Inspectors should take advice from their SGL or Group Manager in such cases.

232. In the case of *R (oao McKay) v FSS* [2006] JPL 52, concerning an appeal made in error against a withdrawn rather than an extant EN, the CoA held that the correct approach to procedural irregularities is to decide what the legislator intended to be the consequence of non-compliance. That would depend on the facts of the case and the nature of the requirement. It was important not to attach too much significance to procedural requirements where that would lead to grave injustice.

Form of the Appeal

233. S174(3) and ENAR6-10 (ENAWR5-9) set out the appeal procedure[49]. The appeal must be received in writing before the date on which the notice takes effect. The SoS has no power, as exists in s78 cases, to extend the period during which an appeal may be made, because this would alter the date on which the notice took effect; *R v SSE ex parte JBI Financial Consultants* [1989] JPL 365[50].

234. Once a valid appeal has been made, under s175(4), the notice is of no effect until the appeal is finally determined, which means the date that the appeal process is exhausted, including rights of appeal to the courts and subject to any order of the court under s289(4A) giving interim effect to the notice. Since a notice is not in force during the appeal proceedings, there is a danger that the development will gain immunity from enforcement action unless the LPA issues a further notice within four years of the date of the first notice as described above.

Changes of Appellant

235. Once an appeal has been validly made and accepted, it can be continued by a subsequent owner provided he or she has a letter of consent from the original Appellant. If this is not on the file at the time of an inquiry or visit, the Inspector should ask for it. If such consent cannot be obtained then the appeal will have to be determined in the name of the original appellant, and any subsequent owner treated as a third party.

236. An executor, mortgagee, receiver, liquidator or administrator may continue with an appeal, subject to giving proof of the relevant interest in the subject thereof.

[49] See also https://www.gov.uk/government/publications/enforcement-appeals-procedural-guide
[50] J.668

Grounds of Appeal

237. An appeal may be brought on all or any of the seven grounds of appeal contained in s174(2):-

(a) That planning permission ought to be granted in respect of any breach of planning control which may be constituted by the matters stated in the notice, or that the condition or limitation concerned ought to be discharged.

(b) That those matters, (mentioned in the allegation), have not occurred.

(c) That those matters, (if they occurred), do not constitute a breach of planning control.

(d) That at the date when the notice was issued, no enforcement action could be taken in respect of any breach of planning control which may be constituted by those matters.

(e) That copies of the notice were not served as required by s172.

(f) That the steps required by the notice to be taken, or the activities required by the notice to cease, exceed what is necessary to remedy any breach of planning control which may be constituted by those matters or, as the case may be, to remedy any injury to amenity which has been caused by any such breach.

(g) That any period specified in the notice in accordance with s173(9) falls short of what should reasonably be allowed.

Deemed Planning Application

Appeals in England

238. Sections 123 (5) and (6) of the Localism Act 2011 amended s177 of the TCPA90 such that, in relation to England only, planning permission may only be granted pursuant to s177(1)(a) if the enforcement appeal was made under ground (a); only ground (a) appeals result in a deemed planning application. This was commenced by SI 2012/628 for appeals where the notice was issued on or after 6 April 2012; see para 49.

239. If the fee has not been paid by the date specified the ground (a) will lapse and it cannot be reinstated. A success on ground (a) results in planning permission being granted on the deemed application. The terms of the deemed application are derived directly from the terms of the allegation and should be determined on its merits.

240. If an appellant chooses to withdraw ground (a) and the deemed planning application contained within it, this carries a risk of an application for costs in respect of abortive preparatory work by the LPA. In an inquiry or hearing the Inspector should point out, however, that fees cannot be refunded in these circumstances; see paras 272 and 754.

Appeals in Wales

241. Every enforcement appeal gives rise to a deemed planning application, (s177(5)) which runs concurrently with the appeal on ground (a). A success on ground (a) results in planning permission being granted on the deemed application. The terms of the deemed application are derived directly from the terms of the allegation. Even if ground (a) is not specifically pleaded, the deemed application will subsist, and should be determined on its merits unless the fee has not been paid by the date specified, in which case it will lapse.

242. There is no provision for the deemed application to be withdrawn, although an appellant may choose to produce no evidence in support of it, and withdraw ground (a). This carries a risk of an application for costs in respect of abortive preparatory work by the LPA.

243. If the appellant agrees that the deemed application should not be determined, then it is open to the Inspector to say that no further action is being taken in respect of it, otherwise it will need to be determined. In an inquiry or hearing the Inspector should point out, however, that fees cannot be refunded in these circumstances; see paras 272 and 754).

Rights and Obligations of Parties to an Appeal

244. The appeal form should state the grounds upon which the appeal is made, with the facts on which the appellant proposes to rely in support of each ground set out briefly; ENAR6. If such information is not given when making the appeal, the SoS may require it to be supplied within 14 days. If the appellant fails to comply, the SoS may summarily dismiss the appeal under s176(3)(a), or determine the appeal without considering any grounds for which no facts have been given; s174(5).

245. These powers are not transferred to Inspectors under Schedule 6 and in practice are little used. Once ground (a) has lapsed because the fee has not been paid, it cannot be revived unless there has been some mistake in procedure. If the Inspector considers there has been such a mistake, the case officer should be alerted, but no concessions should be made at the inquiry or hearing. If there is an unresolved dispute concerning a lapsed ground (a) it may be appropriate to hear the evidence at the inquiry; Inspectors should seek further guidance in such an unusual circumstance.

246. Only one of the persons served need appeal for the effect of the notice to be suspended, but multiple appeals, e.g. by a landlord and tenants, or a husband and wife are common. Different appellants may appeal on different grounds against the same notice – but each ground can only be determined in the same way, so individual appeals on the same ground can never be treated differently.

247. S175(1)(d) and ENAR8 provide that where an appeal is lodged against an EN, and on receiving notice of the appeal from the SoS, the LPA shall supply a certified copy of the EN and a list of the names and addresses of the persons served to the SoS within 14 days of the notification. S319A of the TCPA90, inserted by section 196 of the Planning Act 2008, has been partially commenced and gives the SoS the power to determine the procedure for dealing with enforcement appeals.

Disputed Evidence as to Fact

248. Where there is likely to be a dispute as to fact on the legal grounds of appeal, an inquiry may be the most appropriate procedure. Evidence on oath concerning matters of fact in dispute is best tested through cross-examination and this is not usually appropriate to the hearing procedure. Furthermore, evidence on oath can only be taken at an inquiry and not at a hearing; see para 1058.

249. The same standard of proof applies regardless of procedure. In those cases that proceed by WR, Inspectors will need to be at pains not to use phrases that indicate a different approach to the evidence. Written evidence should not be dismissed as untested and therefore accorded little

weight when there had not been an oral procedure, and without apparent regard to the source, content, consistency or probable reliability of the evidence. It must be properly analysed and balanced on the probability test; *Mahajan v SSTLR & Hounslow LBC* [2002] JPL 928[51].

Information to be Provided

250. S175(1)(a) and (b) and ENAR9 provide that when an appeal has been made, the LPA shall submit to the SoS a statement indicating the submissions they propose to put forward on the appeal. It should include a summary of their response to each ground of appeal, a statement as to whether planning permission ought to be granted and, if so, subject to what conditions. This is to be served within six weeks of the starting date.

251. S176(3)(b) provides that the SoS may allow the appeal and quash the notice if the requirements of s175(1)(a), (b) or (d), and the procedure regulations and rules made under s175 are not complied with. This power is not transferred to Inspectors under Schedule 6 despite a suggestion to the contrary in *Barraclough v SSE & Leeds CC* [1990] JPL 911[52].

252. If at an inquiry or hearing, it is argued that the s176(3)(b) power should be exercised and a ruling sought, the Inspector may have to adjourn to enable the matter to be dealt with by the SoS. If a notice is quashed under these powers this does not affect the LPA's powers to issue another.

253. With the exception of introducing ground (a) after the DPA has lapsed, grounds of appeal may be added or withdrawn at any time up to or during an inquiry or hearing. According to the circumstances, this may amount to unreasonable conduct causing wasted expense, justifying a costs award.

254. Normally the introduction of grounds (f) and (g) at the inquiry or hearing can be accommodated without need for a lengthy adjournment. That is unlikely to be the case with other grounds, but the substitution of one ground for another, where the initial selection of grounds is incorrect but the substance of the evidence remains the same may be appropriate; this commonly occurs with grounds (b) and (c).

255. Upon complete withdrawal of an appeal, the notice comes into effect. An appeal cannot be re-instated; *R v SSE ex parte Crossley* [1985] JPL 632[53].

Appeal Procedure Regulations and Rules

256. The current Written Representation Procedure Regulations and Hearing and Inquiries Procedure Rules date from 2002 (2003 in Wales). Prior to that there was only a Code of Practice for Hearings and no Regulations for written representation cases.

257. In WR cases, EWRPR7 provides that the notice of appeal, the documents accompanying it and any statement provided under ENAR6 shall comprise the appellant's representations in relation to the appeal. They may make further representations within six weeks of the starting date. The LPA may elect to treat the questionnaire, submitted within 2 weeks of the starting date), the documents submitted with it and their ENAR9 statement as their representations.

[51] J.1083
[52] J.708
[53] J.503

258. Where the LPA indicates an intention to submit further representations, these must be submitted within six weeks of the starting date. PINS sends a copy of the representations to the opposing party; comments are required to be made within nine weeks of the starting date. The SoS may disregard information not submitted within nine weeks, unless it was requested by him, and proceed to a decision.

259. As with written reps, PINS sets a "starting date" after receipt of the appeal for hearings and inquiries; the timetable proceeds on that basis.

260. With hearings, the six and nine week stages apply to the submission of statements and comments on the opposing party's statement; EHPR5. The Rules define a hearing statement as:

> "a written statement which contains full particulars of the case which a person proposes to put forward at a hearing and copies of any documents which that person intends to refer to or put in evidence."

261. A "document" is further defined to include a photograph, map or plan; thus, all material which the parties intend to rely on should be available at the nine week stage. There is no requirement in the EHPR to provide a Statement of Common Ground for a hearing[54].

262. Within two weeks of the starting date the LPA is required to give notice of the appeal to anyone upon whom a copy of the notice was served, occupiers of property in the locality and others whom the LPA consider are affected by the alleged breach of planning control. It must inform them of the period in which they can make representations; EHPR Rule 4(2)(b). Not later than two weeks before the date of the hearing, the LPA is required to publish a notice of the details of the hearing and notify those who were notified at the two week stage.

263. With inquiries there are two sets of rules; for transferred and non-transferred appeals. The early stage of the procedure is much the same as for hearings. The statement of case is required from both parties at the six week stage. The SoS may require anyone who has notified him of an intention or wish to appear at the inquiry to provide him with their statement of case within four weeks.

264. The statement of case is defined in the Rules as:

> "a written statement which contains full particulars of the case which a person proposes to put forward at an inquiry and a list of any documents which that person intends to refer to or put in evidence."

265. A "document" is defined as in the EHPR. Annex D to the Procedural Guide: Enforcement Appeals – England further requires that statements of case should set out the planning and legal arguments which a party intends to put forward at the inquiry, and cite the statutory provisions and case law they intend to call in support of its arguments. A "statement of common ground" is defined; it is required four weeks before the date of the inquiry and the appellant is responsible for sending a copy to the SoS.

266. Also four weeks before the inquiry, anyone entitled or permitted to appear, who proposes to give or call another person to give evidence, shall give the SoS a written estimate of the time required to present their evidence and the number of witnesses they intend to call; EIPR12.

[54] See also the Procedural Guide: Enforcement Notice Appeals – England (23 March 2016), Annex C

267. EIPR6 provides for the LPA's documents and those sent to them to be available for inspection, and disclosure and supply of copies of documents between parties on request. The SoS may require notices of the inquiry to be published in the press, served on occupiers in the locality, and posted on or near the site by the LPA; EIPR 9(5). The appellant is required to display the site notice where the land is under his control; EIPR 9(6).

268. EIPR7 allows an Inspector to hold a pre-inquiry meeting. Rule 7 of the SoS Rules allows the SoS to serve a statement of matters on which he particularly wishes to be informed in connection with the appeal on the appellant, the LPA, any other party whom the SoS has required to serve a statement under Rule 8(4), and any other person on whom a copy of the notice has been served. There are no similar provisions in the Inspector Rules but an Inspector may request further information about the matters in the statement of case under EIPR6(8), or at the PIM under EIPR7(5).

269. EIPR15 requires that proofs of evidence and summaries where appropriate be supplied to the Inspector and the other parties four weeks before the date of the Inquiry. This rule applies where a person proposes to give, or to call another person to give evidence at the inquiry by reading a proof of evidence, regardless of the grounds of appeal.

270. There is no obligation to provide evidence which might not be in the form of a proof of evidence, but it is clear from the definition of a statement of case and the Procedural Guide that parties are expected to make a full disclosure of all aspects of their case prior to the inquiry. The sanction against production of new evidence at a late stage prior to or during the inquiry lies in an award of costs on the grounds of unreasonable behaviour, where unnecessary expense has been incurred as a result of last minute preparation, wasted time at the inquiry, or an adjournment.

Fees for Enforcement Notice Appeals

271. A fee, calculated in accordance with the current fees regulations, is payable to the LPA in respect of ground (a); it is only by pleading ground (a) and paying the fee that the deemed planning application exists under s177(5). The fee structure is contained in s303 and current Fees Regulations. The reason for the fee is to prevent anyone carrying out development without planning permission, and then obtaining permission retrospectively without payment of a fee on a successful appeal against the enforcement notice. DCLG Circular 04/2008 sets out the fees regime in relation to deemed applications under s177(5) at para 108 (England only).

272. S177(5A) provides that if the correct fees are unpaid within the stipulated period, then the ground (a) appeal and the deemed planning application will lapse, although it should be noted that in some circumstances appeals may be fee exempt; see t case officer desk instructions. If only ground (a) has been pleaded, there will be nothing left to determine, but if other grounds are pleaded then they will still be determined in the normal way.

273. No fee is payable if, before the date the notice was issued, a valid planning application had been made by the appellant for the development enforced against **and** the period applicable under s78(2) in the case of that application has elapsed; s174(2A)(ii) and Fees Regulations, Reg 10(7)(a)). No fee is payable if, before the notice takes effect, a s78 appeal had been made, again by the appellant, against a decision to refuse permission for

that development **and,** at the date the notice was issued, the application or s78 appeal had not been determined; Fees Regulations, Reg 10(7)(b).

274. S123(4) of the Localism Act 2011 introduced s174(2A), preventing an appeal on ground (a) if a related application for planning permission has been made and the LPA issued an enforcement notice before the time for determining the application has expired. An appeal on ground (a) is not possible if, before the notice takes effect, a s78 appeal had been made, again by the appellant, against a decision to refuse permission for that development, and at the date the notice was issued the application or s78 appeal had not been determined; Fees Regulations, Reg 10(5)(b).

275. Only one of any number of persons served need appeal and pay the fees to postpone the coming into effect of the notice. Where more than one appeal is made on the same grounds, the fee request letter sent by procedure branch contains a note explaining that, where more than one person has appealed against the same notice, only one need pay the fee for the ground (a) appeal, and the deemed application to which it gives rise, to be considered. The ground (a) would then lapse on the other appeals which would still be determined on any other grounds.

276. However, if the appeal for which the fee was paid is subsequently withdrawn then the ground (a) will lapse – and there is no provision for it to be re-instated on one of the other outstanding appeals. PINS is responsible for setting the payment period if the fee has not been received with the appeal forms.

277. Fees are refundable in respect of appeals withdrawn 21 days or more prior to the inquiry, hearing or site visit date, but the whole appeal must be withdrawn, not just ground (a). Fees are also refundable if the appeal succeeds on any of grounds (b)-(e), or the notice is quashed on legal grounds, except in cases involving caravan sites, or where the Inspector exercises the discretionary power under s177(1)(c) to issue an LDC.

278. It is the Inspector's responsibility to verify whether the fee has been paid and, if ground (a) has been pleaded, whether the deemed application is to be considered before the inquiry, hearing or visit. The case officer should make the fee situation clear on the front of the file. However, if any arguments about fees arise at an inquiry, the Inspector should make it clear that these are procedural matters, over which he or she has no jurisdiction; see *Geall v SSE* [1998] JPL B16.

279. Likewise, at a site visit, the Inspector should say that any points about fees must be put in writing to PINS. If the Inspector considers that there has been a misunderstanding about the correct amount of the fee, or the area of the site, he or she should liaise with the case officer and initiate correspondence to resolve the point. In no circumstances should the Inspector say anything at the inquiry or site visit which might commit PINS or the SoS to any particular course of action.

280. Once a ground (a) appeal and/or DPA within it have lapsed, they cannot be re-instated, except possibly by Procedure in the event of a mistake. There is a comment to the contrary made by the judge in *Dyer v Purbeck DC* [1996] JPL 740, though this particular point is not reported. In no circumstances should an Inspector accept late fees offered at the inquiry or hearing, and the appellant must be advised that the only way forward is to make a new planning application.

281. If ground (a) has been pleaded and there is still an on-going dispute about fees, but the parties have come to an inquiry or hearing prepared to deal with planning merits issues, it would always be better to hear the cases, to avoid the possibility of the inquiry or hearing having to be re-opened later. The Inspector must however make it clear that this is without prejudice to the SoS's eventual decision on the fees issue.

282. Where notices are corrected or varied, other than in the case of partial success on the merits, the area covered by the DPA may be reduced, or the category of development changed – and this may have implications for fees. In the case of development in any category in Part 2 of Schedule 1 to the Fees Regulations, where the amount of the fee depends on the area, Inspectors should ascertain any reduced area to the nearest 0.1ha and mention this in the decision. An appropriate refund can then be made.

Nullity and Invalidity

283. Defects in enforcement notices fall into two main categories: those that make it a nullity and those that may make it invalid. In the former there is in effect no notice at all and therefore nothing that can be corrected or, indeed, form the basis of an appeal. In the latter there will be those defects that are capable of being corrected under the Inspector's powers in s176(1)(a) and those that are too fundamental to be corrected without causing injustice and lead to the notice being quashed.

284. In many cases where a notice contains a serious defect, this will have been pointed out to the LPA at an early stage by the case officer, and it is likely that the notice will be withdrawn and a fresh one served. If the LPA dispute the matter, however, the appeal may have to proceed to the Inspector to decide on nullity or invalidity.

285. At an inquiry an Inspector could be asked to make a ruling on nullity at the outset so that the parties do not waste time presenting their case on the grounds of appeal. Where possible, it would be appropriate to do that, closing or continuing with the inquiry as the case may be, and setting out details of the ruling in the decision. Circulation of a pre-inquiry note may obviate the need for the inquiry at all.

286. A notice is a nullity if it is missing some vital element, such as requirements, or a date for compliance and so is "defective on its face"; *R v Wicks* [1996] JPL 74, CA; [1997] JPL 1049, HL. S173 proscribes matters that a notice "shall" state, including matters specified in the ENAR4, and failure to meet those requirements is likely to create a nullity; see para 126). The position can be summarised as follows.

S173(1)(a): *the matters constituting the breach of planning control*. Complete omission would render the notice a nullity; see below for advice on ambiguity in the framing of the allegation with regard to s173(2).

S173(1)(b): *the paragraph of s171A(1) which applies*. Specification of the wrong paragraph or failure to specify any paragraph is not likely to create a nullity provided it is clear from within the notice whether it alleges development without planning permission or a breach of condition. Provided no injustice would be caused the defect should be corrected.

S173(3): *specifying the steps*. Complete omission would render the notice a nullity but see below for further discussion.

S173(8): *date upon which the notice takes effect*. Failure to state this renders the notice a nullity.

S173(9): *the period for compliance*. Failure to specify a period renders the notice a nullity. The terms "immediately" and "forthwith" are not "periods" for the purpose of this section. However, where it is possible to deduce a period from within the notice, it can be corrected subject to the usual injustice consideration; see para 1266.

S173(10) and ENAR: *the notice shall specify such matters as may be prescribed in regulations.*

ENAR4(a): *the reasons why the LPA consider it expedient to issue the notice*. Complete omission would render the notice a nullity, not least since it is a prerequisite to taking enforcement action that it should appear expedient to the LPA to issue the notice; s172(1)(b). Minimal, incomplete or incorrect reasons for issue would be unlikely to justify a finding of nullity. The notice should, nevertheless, do more than recite that there has been a breach of planning control since that is an additional prerequisite under s172(1)(a), and does not go to expediency

ENAR4(b): *all policies and proposals in the development plan which are relevant to the decision to issue an enforcement notice*. There may be no policies that are relevant and even if there are, failure to specify them or incorrect or incomplete specification is unlikely to give rise to a nullity.

The late introduction of development plan policies has the potential to cause injustice to the appellant, but can be dealt with by allowing an adjournment which is open to an application for costs. Since the purpose of ENAR4(b) – to inform the appellant of the policy objection to what he has done – has passed by the time of the appeal decision, however, there is no need to correct defects in that part of the notice.

ENAR4(c): *the precise boundaries of the land to which the notice relates, whether by reference to a plan or otherwise*. The lack of a plan, or a seriously incorrect plan, does not make the notice a nullity; it would however constitute a defect if the notice does not otherwise specify the precise boundaries of the land to which it relates. It may or may not be possible to correct that defect without injustice.

A failure to state the street number of the premises enforced against, or an incorrect address does not render the notice a nullity nor invalid so long as the recipient is not misled; see *Coventry Scaffolding Co (London) Ltd v Parker* [1987] JPL 127. But failure to provide any sensible indication of the land to which the notice relates would be likely to constitute a nullity.

287. A notice which merely lacks a signature, or a date of issue which can be ascertained from other evidence, or contains some clerical error, is not a nullity. However, a notice which purports to take effect before its date of issue will be null. A notice issued without proper resolutions or authority or otherwise *ultra vires* should also be considered a nullity since a notice issued without the proper authority cannot be an enforcement notice; see para 86.

288. A notice should be drafted so as to tell the recipient fairly, what he has done wrong and what he must do to remedy it. The appropriate test is derived from *Miller-Mead v MHLG* [1963] 2 WLR 225 – whether a notice is "hopelessly ambiguous and uncertain so that the owner or occupier could

not tell in what respect it was alleged that he had developed the land without permission or in what respect it was alleged he had failed to comply with the condition or again, that he could not tell with reasonable certainty what steps he had to take to remedy the alleged breaches". In such circumstances a notice may be found to be a nullity.

289. For a notice to be "hopelessly ambiguous and uncertain", much must be wrong with it. It is a conclusion which should not be reached too readily in the light of later judgments by the Courts, such as *Ahern* and *Simms*, to encourage a move away from strict adherence to formalities.

290. In *Ahern,* the Inspector quashed a notice because the allegation was wrongly described as a material change of use instead of breach of condition. The Court held that this was incorrect; the Act could be read to mean what it says, namely that the SoS may correct any defect or error if he is satisfied that there would be no injustice. It is in the public interest to avoid setting the nullity test too low, since the result is normally the issue of another notice under s171B(4) and further appeal.

291. The principle set out in the *Miller-Mead* case was reinforced by the decision of the Court of Appeal in *Davenport v The Mayor and Citizens of the City of Westminster* [2011] EWCA Civ 458. The issue in that case was whether citation of and purported reliance in the notice on a condition which was no longer operative rendered the notice a nullity. Such a decision was to be made on a case by case basis by reference to the requirements of s173 of the 1990 Act. It was held on the facts that the notice complied with the requirements of s173: a person on whom the notice was served would know the matters which appeared to the LPA to constitute the breach of planning control. The activities which the LPA required to cease were also plainly stated. The date on which the notice was to take effect was stated, as was the compliance period.

292. Thus, the notice was not "*waste paper*" within the meaning of *Miller-Mead v MHLG* [1963] 2QB 196. It was not rendered so by the references to the condition and the restriction it contained. The reference in the EN should have been to s57(2) of the 1990 Act and not to the condition but the notice was also accurate as to what permission existed for the use of the property and that use, and the LPA's requirement, were plainly stated in the notice. Although the allegation was wrongly expressed as a breach of condition, the notice still accurately conveyed the extent of the use to which the property could be put.

293. Furthermore, the EN was not a nullity because it included the expression of "opinion" that the breach was of failure to comply with a condition; s171A(1)(b). *Davenport* shows that the courts are determined not to go back to the bad old days of "pettifogging" and will not allow very technical issues to undermine the enforcement of planning control. (See also *Wokingham BC v Scott* [2017] EWHC 294)

294. In *Louis Silver v SSCLG & Camden LBC & Tankel* [2014] EWHC 2729 (Admin), the claimant submitted that the notice was a nullity because the reasons set out in the notice did not express why the Council considered it to be expedient to issue the notice. The Court held that it was impermissible to look beyond the notice where the reasons for the notice were maintained by the Council in substance and had been articulated as required by s172(1)(b). A notice may be vulnerable to appeal on grounds

within s174(2) but this does not mean that it is a nullity or invalid. The matters in which the Claimant relied were not matters which were within the four corners of the notice as *Miller-Mead* requires.

295. In *Koumis v SSCLG* [2014], the CoA held that although a variation notice issued by the LPA which purported to vary the compliance period of an EN was a nullity – it failed to specify a period – this did not render the original EN null. The flaw was not apparent on the face of the varied EN and the *Miller-Mead* approach to nullity should be confined to cases where the error is apparent on the face of the EN itself. An LPA which erroneously issues a s173A variation notice that fails to achieve its desired purpose ought to be able to withdraw it and replace it with an effective EN, without the first EN having to be quashed by a court.

296. In *McKay v SSE* [1994] JPL 806[55] a notice which was valid on its face included requirements which would themselves have been a breach of s2 of the Ancient Monuments and Archaeological Areas Act 1979, and so a criminal offence. It was held to be a nullity and so not correctable or variable. However, the CoA in *South Hams DC v Halsey* [1996] JPL 761 disagreed with the decision in *McKay*. They held that if the requirements of a notice did put the recipient in that position, which he was unable to resolve, he would have a defence to the notice if prosecuted. Such a notice was therefore valid and not a nullity. The notice would be variable.

297. One area of difficulty remains. That is where the LPA imposes a step that requires a scheme to be submitted for their approval. This is distinguishable from the situation where a notice alleges a breach of a condition which itself requires the submission of a scheme for approval and the step, in effect, does no more than require compliance with the condition through the submission of the scheme.

298. In *Payne v NAW and Caerphilly CBC* [2007] JPL 117[56], the notice required the submission of a scheme of levelling and planting to be submitted to the LPA for approval. The Inspector found the requirement insufficiently specific to comply with s173(3), and described the notice as "*unacceptable because of the uncertainty it introduces*." Nevertheless, he substituted precise requirements. The judge concluded that having found that the notice did not comply with s173, the Inspector had erred in varying its terms. He had no power to do so because the notice was a nullity.

299. *Payne* was not taken to the Court of Appeal and it is noteworthy that *Ahern* and the approach that flows from that, as described above, were not argued before the Court. In light of the differing approaches in *Payne* and *Ahern* extra care should be taken when considering whether a notice is invalid but capable of correction. Where an express finding is made that the notice fails to comply with s173, then, on the basis of *Payne,* it would be difficult to avoid the conclusion that it is a nullity.

300. For that reason, if it intended to amend a notice that is merely considered to be invalid, such an express finding would be inappropriate. The circumstances of the case in question should be examined in order to determine whether injustice would be caused by correcting an invalid notice. If no injustice would be caused it is advisable merely to state that, with reasons, and correct the notice accordingly.

[55] J.850
[56] J.1157

301. Nullity and validity arguments are often advanced under grounds (b) or (c) because there is no specific ground under s174 relating to validity. The effect of s285 is, in essence, that an appeal under s174 is the only way to challenge the validity of a notice other than through Judicial Review.

302. A decision that a notice is a "nullity" means that, in law, it does not exist. Thus there is nothing to quash and the correct decision on determining that a notice is a nullity is to say that no further action is taken. However, in the interests of clarity the decision should also require the LPA to remove the notice from the Register. A form of words might be, "*Since I find the notice to be a nullity I take no further action in connection with this appeal. In the light of this finding the Local Planning Authority should consider reviewing the register kept under section 188 of the Act*".

303. The decision could still be challenged in the High Court by way of application for judicial *review; Rhymney Valley DC v SSW* [1985] JPL 27. If a notice is invalid because of some fundamental misunderstanding or illogicality, and cannot be corrected without causing injustice it must be quashed; the detailed grounds of appeal and the planning merits are not considered. Fees can be refunded in both these circumstances.

7. Powers of the Secretary of State and Inspectors

Powers Transferred to Inspectors

304. Schedule 6 to the TCPA 90 and the various T&CP (Determination of Appeals by Appointed Persons)(Prescribed Classes) Regulations transfer all appeals under s174 to Inspectors, except cases linked with other non-transferable appeals, and cases which raise complex or highly sensitive issues where the SoS recovers jurisdiction.

305. Jurisdiction in respect of claims for costs is transferred by Schedule 6, paragraphs 6.4-6.5. For administrative reasons, all claims arising in whole or part from the late withdrawal of an appeal, or appeals under s322A (but not individual grounds of appeal) are determined in PINS Costs Branch.

306. The power for the SoS to recover jurisdiction is contained in paragraph 3(1) of Schedule 6. Paragraph 4(1) of Schedule 6 gives a further power to "de recover" an appeal if, for example, an associated non-transferable appeal is withdrawn. Guidelines for recovery are revised from time to time to accommodate sensitive issues, but as a general rule Inspectors should only consider recommending recovery in the face of intransigent legal problems, novel issues of development control, or where they propose to go against firmly held views of another Government Department.

307. Paragraph 2(8) of Schedule 6 provides that any challenge to the effect that a decision should be made by the SoS, rather than by an appointed person, must be made before the appeal decision is given. It is not open to the parties to demand as of right that a particular case within the transferred classes be recovered.

308. The powers transferred to Inspectors are as follows:-

    i. To correct any defect, error or misdescription in the enforcement notice under s176(1)(a) or to vary the terms of the enforcement notice under s176(1)(b), if in each case he or she is satisfied that the correction or variation will not cause any injustice to the appellant or the LPA.

    ii. To quash the notice; s176(2).

    iii. To give any directions necessary to give effect to the determination on the appeal; s176(2A).

    iv. To disregard the failure to serve a person required to be served with the notice under s172(2), if neither the appellant nor that person has been substantially prejudiced by the failure to serve him or her; s176(5).

    v. To grant planning permission in respect of the matters stated in the enforcement notice as constituting the breach of planning control, whether in relation to the whole or any part of those matters, or in relation to the whole or any part of the land to which the notice relates; s177(1)(a). The permission which may be granted is any which may be granted on an application under Part III; s177(3). This imports s70 and 72 (conditions), s73 (relaxation or discharge of conditions) and s73A (permission for development already carried out).

vi. To discharge any condition or limitation subject to which planning permission was granted under s177(1)(b), and to substitute another condition or limitation for it, whether more or less onerous under s177(4).

vii. To determine whether, on the date the appeal was made, any existing use or operations which have been carried out, or matters resulting from the failure to comply with a condition or limitation, were lawful, and if so to issue an LDC under s191; s177(1)(c). An LDC which is issued under this power should therefore include the date of determination that something is lawful, in these cases this is the date of the s174 appeal. The date on which the LDC is issued corresponds to the date of the decision and is inserted by Despatch team.

Quashing the Notice

309. Where an appeal is wholly allowed on any legal ground or ground (a), the notice is quashed. In respect of ground (a), planning permission is granted under s177(6) on the application deemed to have been made by the appellant under s177(5) – provided that did not lapse.

310. Where an appeal is dismissed the notice is upheld, after any appropriate correction or variation. Under s176(1), (2) and (2A), combinations of these powers are appropriate, e.g. to allow the appeal and grant planning permission on part of the site, and to uphold the notice in respect of the other part. An appeal can succeed on one or other of the legal grounds, as well as on the merits, in respect of part of the site, or one part of the development enforced against.

311. In a breach of conditions case, the appeal can succeed in respect of one condition and fail in respect of another. Where any part of the notice survives it will be upheld. A notice can only be quashed in its entirety, never in part.

Split Decisions

312. In cases involving split decisions, the possible impact of s173(11) needs to be borne in mind, particularly where the appeal is allowed in part on ground (a) but subject to conditions. It was previously advised that the requirements of the notice should be varied before being upheld, to exclude that part of the development being expressly permitted. That could give rise to two inconsistent permissions, the conditional one being granted, and an unconditional one deemed to have been granted under s173(11) as a result of the variation cutting down the requirements.

313. To avoid this possibility the notice should not be varied; reliance should be placed on s180 to mitigate the effect of the notice so far as it is inconsistent with the permission; *R v Chichester Justices Ex Parte Chichester DC* [1990] 60 P&CR 342. This reasoning should be explained in the decision letter; see para 794 for further discussion of s180.

314. Simple rules apply to the practicality of making the split decision in s174 appeals. The following steps should be followed:-

CORRECT any defect(s) in the notice.

ALLOW the appeal for part of the site or part of the development. Clearly define which part you are allowing and if necessary prepare a new plan identifying which area etc. (*allow the appeal in so far as it ….*)

GRANT planning permission for the part you are allowing with any conditions if necessary.

VARY any part of the notice such as requirements or compliance period. As outlined above, however, **do not delete requirements relating to the part you are allowing**.

DISMISS the appeal in respect of the remaining part of the development or site, clearly identifying the element being dismissed.

UPHOLD the notice as corrected and/or varied.

REFUSE to grant planning permission for the part you are upholding.

Correction and Variation of Notices

Difference between Correction and Variation

315. It has also been suggested that variation of the terms implies amending the requirements. While s176(1)(a) and (b) give separate powers, the test as to when they may be used is the same: whether injustice would be caused. Thus the Courts are now unlikely to place much weight on whether an Inspector has "corrected" or "varied" the notice. For the purposes of consistency the following distinction should be followed.

316. A defect, error or misunderstanding in the recital of the breach of planning control should be "corrected". There could be consequential corrections in the notice heading and, if cited, whether four or ten years apply. Such a correction could stem from partial success on grounds (b), (c) or (d), or the Inspector identifying errors independently of the grounds of appeal. Typing mistakes should be "corrected" wherever they occur.

317. If there are errors in the requirements or period for compliance, perhaps in consequence of a correction to the allegation, these would be corrected. However, if the requirements or periods are to be modified, it would be appropriate to "vary the terms" of the notice. This could arise from success on grounds (f) or (g) or the Inspector's awareness of an excessive requirement or unreasonable period.

Interpretation of the Power to Correct and Vary

318. The Courts interpret the power to correct notices very widely; see *Ahern* case and para 131. In *Simms v SSE & Broxtowe BC* [1998] PLCR 24[57], it was held that the words of s176 propound only one test, namely whether the change would cause injustice. There is no further test, as implied by earlier cases on the previous legislation, that the correction should not go to the substance of the matter, or should not be material.

319. In the *Simms* case the Inspector corrected an allegation of "the change of use for the purposes of several businesses engaged in a multiplicity of commercial activities" to specific uses in three separate specified buildings. For a summary of cases on correction of notices, see EPL P176.04.

320. The powers in s176(1) extend to making significant changes to the terms of the notice to provide an accurate description of the alleged breach as a basis for considering the DPA when there is an appeal on ground (a), and for formulating specific requirements. They go further than the power under previous legislation which allowed the SoS or Inspector to "change the label" and imposed a duty to "get the notice in order if he can"; *Hammersmith LBCv SSE & Sandral* [1975] 30 P&CR 19[58].

[57] J.987
[58] J.164

321. Inspectors can make any correction which will put a notice on a proper footing, so long as it is not a nullity, including broadening the scope of the notice; *Lynch v SSE* [1999] JPL 354[59] subject only to ensuring that the correction does not cause injustice to the appellant or the LPA. However, the allegation cannot be granted in order to enable a grant of planning permission for something different to that enforced against; see below.

322. Furthermore, care should be taken to allow the parties the opportunity to comment on proposed corrections and variations to the notice. In *Brian Marston Burgoyne and Sarah Burgoyne v SSCLG and Malvern Hills District Council v SSCLG* (Consent Order 3/1/17), it was conceded that by correcting the EN and thus widening the allegation of breach without first giving the Claimants the opportunity to comment, the Inspector had caused injustice to the Claimants in breach of s.176 of the Act.

The Plan

323. The power can extend to the substitution of a correct plan but, if the site area is to be enlarged, care should be taken to ensure that in so doing no new issues or interest in land are introduced. An inaccurate plan can be deleted altogether, leaving the site to be described in words alone, without offending ENAR 4(c); *Wiesenfeld v SSE* [1992] JPL 556[60].

324. Where no part of the development alleged falls within the plan area it is sometimes better to quash the notice as invalid and not correctable so that the LPA can start again. This will be the most appropriate course of action where identification of the wrong area has caused misunderstanding for the recipients of the notice, or the correct area includes land in which others not served with the notice have an interest.

325. Where it is obvious that the plan has been coloured in error but the notice is otherwise clear and the parties are in full agreement that the plan should be amended, doing so is unlikely to result in any injustice. In *Howells v SSCLG* [2009] EWHC 2757 (Admin)[61] it was held that the power is not constrained to reducing the area to which the plan relates. There was no objection in that case to the Inspector extending the notice area in two directions; the only test was one of injustice.

The Allegation

326. It is important to get the allegation right, subject to there being no injustice, even if quashing the notice, so that the breach is correct against which to assess the appeal on grounds (b), (c), (d), (f) and especially (a) as the terms of the DPA derive from the allegation.

327. An allegation of a material change of use can be corrected to refer to a breach of condition, when there has in fact been a temporary permission. This was the situation in *Ahern*. When making this correction there will be a consequential correction to the relevant paragraph in s171A(1) cited in the notice. Similarly a breach of condition allegation can be changed to a material change of use if it is clear that the new use is being attacked.

328. In *Reed v SSCLG* [2014] JPL 725, a personal planning permission had been granted to the appellant in 2007 for a caravan site for one Gypsy family. The conditions imposed included an occupation condition and one

[59] J.1014
[60] J.770
[61] J.1196

limiting the number of caravans to not more than two caravans. The EN alleged a material change of use of the land. There was a lawful equestrian use on part of the site and so the Inspector corrected the alleged breach to:

"*Without pp, change of use of the land from mixed use for equestrian purposes and the stationing of one number static mobile home for residential use and one number touring caravan to a mixed use for equestrian purposes and the stationing of two number static mobile homes for residential use, touring caravans and one number storage unit.*"

329. However, on the facts of the case, the only change was from one static caravan and one touring caravan to two static mobile homes, touring caravans and a storage container. The Inspector concluded, on a fact and degree basis, that the alleged material change of use set out in the corrected notice had taken place and dismissed the appeal.

330. The Court of Appeal held, *inter alia*, that the conclusion that the 2007 planning permission had been implemented and the acceptance by the LPA that there had not been a material change of use from agriculture to use for the stationing of caravans, raised the question as to whether the breach of planning control was a breach of condition or development without planning permission; see also para 457.

331. An allegation of operational development within the four year period can be corrected to refer to a material change of use within the ten year period, and vice versa, so long as the appellant is not thereby deprived of the opportunity to argue ground (d); see *Hughes v SSE & Fareham BC* [1985] JPL 486[62].

332. When a notice alleges the stationing of a caravan it should be corrected to specify the purpose for which the caravan is used; *Woodspring DC v SSE & Goodall* [1982] JPL 784[63] and *Hammond v SSE & Maldon DC* [1997][64]. A notice which alleged stationing and storage of a caravan could be corrected to refer to a residential use, provided that the appellant had put the case on the basis of that use, or was given every opportunity to do so.

333. Difficulties may arise when the Inspector discovers, during the inquiry or a site visit that the allegation is incorrect, because it does not refer to all the activities being carried out on the site at the time it was issued. The effect of s173(11) is that any unauthorised elements specified in the allegation but not covered by the requirements obtain a deemed planning permission (see para 207) if the notice is corrected, as it should be. The deemed application will change, and this may affect the way the parties present their cases.

334. The following courses of action may be appropriate, depending on the particular circumstances:

    i. To invite the LPA to withdraw the notice and re-issue.

    ii. To quash the notice as inaccurate and incapable of correction without injustice to the appellant or, other relevant occupiers, as defined in s174(6). The "second bite" provisions of s171B(4)(b) will generally ensure that the LPA are still in time to enforce again. This option should be followed if it is clear that the LPA have unintentionally omitted an element of the mixed use which

[62] J.515
[63] J.465
[64] J.1031

they would want to cease and arguments based on *Tandridge DC v Verrechia* below are likely to arise.

iii. To leave the notice unaltered. It may be that the additional elements were not in fact taking place at the date the notice was issued or that there are other breaches that are completely unrelated to the ones covered in the notice. Counsel has advised that a notice which does not include a particular activity in the allegations is not a notice which "could have" required that activity to cease for the purposes of s173(11).

The disadvantages of this option are (i) that the uncorrected notice could still be liable to challenge on the basis that the Inspector failed to correct an inaccurate allegation and, (ii) that if planning permission is granted for only those elements cited in the notice the actual mixed use still remains unauthorised, posing further problems as to implementation and enforceability of conditions.

This approach also does not accord with the judge in *R (oao E Sussex CC) v SSCLG & Robins* [2009][65], which, although a permission hearing and therefore not forming a binding precedent, nevertheless strongly supported the Inspector's approach that the notice failed to accurately describe the breach, as it did not fully reflect all the components of the single mixed use of the planning unit. Thus, it did not specify clearly what was alleged and what action was required. A LPA was not able to specify only part or aspects of a breach of planning control, particularly where the breach comprised a single mcu[66]. Therefore, where a single mixed use comprised the sole breach alleged, it was not open to the authority to decouple elements of it which were considered to fall within the jurisdiction of another planning authority.

In the light of this judgment, this option is best avoided and the notice should only be left unaltered where it is clear that the additional elements commenced after the notice was issued.

iv. To correct the allegation and requirements to refer to all elements of the mixed use. This could only be done if the parties were given a full opportunity to make representations. In an inquiry or hearing case an adjournment might be necessary. In written representations cases it may be necessary to go back to the parties. The Inspector will need to be convinced that in the particular circumstances no injustice will be caused, and if there is any doubt the notice should be quashed.

v. To correct the allegation only and not the requirements, reflecting the option to "under enforce". This will result in the notice being legally correct, but it will also result in deemed planning permission being granted under s173(11).

In *Tandridge DC v Verrechia*, (EPL P173.20), it was held that s173(11) did not apply in those circumstances and that the corrections were themselves a nullity. The Court adopted the approach that the mixed use consisted of two separate uses: first the car parking use that was primarily the responsibility of the District Council and second the waste dumping use that was the sole responsibility of the County Council. The Inspector's amendment of the EN by adding the car parking element to the waste dumping use had resulted in the addition of a new and separate breach. The power of correction under s176(1) does not permit to be added to the EN anything that the LPA could not have included in the first place.

Moreover, s173(11) only applies if the notice could have specified remedial steps, which were not, in the event, specified. To have added any steps at all would have been an injustice in the circumstances of the case. On the facts of the case, the notice could not, at any stage of its existence, have included

[65] J.1209
[66] *Fidler v FSS* [2004] EWCA Civ 1295 distinguished.

a requirement that the car parking use cease. It follows that since the notice could not have required the activity to cease, s173(11) never came into play so far as the car parking use was concerned. The Inspector's amendment was not an effective exercise of the s.176(1) power.

This judgement does not accord with the specific power to under enforce in s173(3) nor with the judgement in *Millen v SSE and Maidstone BC* (para 211) and should be treated with a degree of caution given the particular circumstances of the case. However, the option to under enforce should generally only be followed (i) if no injustice would be caused to any party or (ii) if the additional elements of the use are already lawful.

vi. To cut down the ambit of the notice by redefining the planning unit so as to exclude those elements not covered by the allegation. However, this poses difficulties. Where there are shared accesses and communal areas and the matter is best dealt with on the basis of a single planning unit in mixed use, it could be that any permission granted could then only be exercised on the basis of continued unauthorised development on those communal areas.

335. Where an allegation is corrected to add uses which are existing lawful uses, s173(11) does not apply so as to grant those uses unconditional deemed planning permission. S173(11) says "where an EN ...could have required ... any activity to cease but does not do so...". Clearly, no EN could require an existing lawful activity to cease, so s173(11) does not apply to existing lawful uses or operations. There is therefore no problem about adding lawful uses to allegations, so long as they are not required to cease). It is only when consideration is being given to adding existing unlawful uses to an allegation or to the requirements that special care, and the question of injustice, need to be considered.

336. Notices are frequently corrected to refer to a mixed use, e.g. where a dwelling is also being used as an office. The correct breach of planning control is a material change of use to a mixed use of residential, or use as a dwellinghouse, and office purposes, with a requirement to discontinue only the office element. It may be that a separate planning unit has been created and the use is not a mixed use, for example where part of a garden now has physical and functional separation from the dwelling, and thus the area of the notice and allegation should be corrected to simply relate to the new planning unit.

337. An obvious error on the face of the notice, as when the recitals refer to a material change of use, but the particulars of the breach recited in the schedule refer to a breach of condition, can be corrected so that the notice is internally consistent; *Epping Forest DC v Matthews* [1986] JPL 132.

Requirements

338. A variation which enlarges the scope of the requirements may well cause injustice. This is likely to be the case if, as a result of the variations made, the appellant ends up in a worse position than if there had been no appeal. However consequential changes to requirements arising from a corrected allegation, even though prima facie more onerous, are within the Inspector's powers, provided he or she has addressed the issue of injustice; *Lynch v SSE & Basildon* [1999] JPL 354[67].

339. Similarly, where there is a clear inconsistency, for example a requirement to restore land to open pasture but not to remove the fence that had

[67] J.1014

caused the loss of openness, the Inspector should consider whether injustice would be caused by widening the scope of the notice; *Dacorum BC v SSETR & Walsh* [2000] QBD[68].

340. A notice which was varied so that the only requirement was to cease a use as two separate dwellinghouses, when only the annexe was unsatisfactory as a separate dwelling, became uncertain because it was not clear which unit had to be vacated, and cessation of the use of the main house would not achieve what was intended. In those circumstances, a variation to require only the cessation of the use of the annexe was held not to cause injustice in the circumstances; *Bennett v SSE* [1993] JPL 184[69].

Limitations of Power to Correct and Vary

341. The power cannot be used in such a way as to change the planning unit, if that could involve different arguments from those already put forward as to the materiality or merits of a change of use; *T L G Building Materials v SSE* [1981] JPL 513[70].

342. Nor, according to the long-standing authority of *Kensington and Chelsea RBC v SSE & Mia Carla Ltd* [1981] JPL 50[71], can the power be used to represent a complete change of mind by the LPA, for example, by the change of an allegation of material change of use to one of intensification; para 450. However, that case predates the 1990 Act and much depends on the way the appellant's case is put as to whether there is any risk of injustice. See the case reported at [1997] JPL 492, where such a correction was made in respect of a seasonal caravan site.

343. When quashing the notice, there is little point in spending time getting the requirements right when they will be of no effect. It is important to get the allegation right, subject to there being no injustice, so that the breach, against which to assess grounds (b), (c), (d), (f) and especially (a), is correct, as the terms of the DPA derive from the allegation.

Exercise of Power to Correct and Vary

344. At any inquiry or hearing, it is open to the Inspector to suggest any correction or variation to the notice which appears necessary, and to invite comments. If an Inspector contemplates making any correction or variation which has not been discussed at the inquiry or hearing, or mentioned in the written representations, and which is likely to come as a surprise to the parties, then the matter must be referred back to the parties for further representations.

345. Although not a pre-requisite for correction or variation under s176(1), the interests of natural justice suggest that some additions to requirements, even though not causing injustice to an appellant or LPA, could still cause injustice to a third party using the planning unit, who had deliberately not appealed against an enforcement notice because his activities were unaffected by it, as originally issued.

[68] J.1045
[69] J.818
[70] J.328
[71] J.305

8. Definition of Development: General Considerations

The Requirement for Planning Permission

346. This involves a two stage analysis. The structure of decisions where there are legal issues on grounds (b), (c) or (d) should reflect these separate stages. The first is whether the subject of the appeal constitutes development, as defined in s55 TCPA 90.

347. S55(1) TCPA 90 defines the two limbs of development, namely operational development, which means the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of a material change of use. The first comprises activities which result in some physical alteration to the land with some degree of permanence, whilst the second comprises activities which are carried out in, alongside or on the land, but do not interfere with the actual physical characteristics of it; *Parkes v SSE* [1979] 1 All ER 211[72].

348. There is a further definition of "building operations", s55 (1A), inserted by the 1991 Act, to include demolition, rebuilding, structural alterations or additions, and other operations normally carried on by a person in business as a builder.

349. S55(2) contains specific exclusions from the definition of development; note that the enabling power for the Use Classes Order is s55(2)(f) which removes changes of use within the same Class from the definition of development. S55(3)-(4) contain specific inclusions. These include several important topics which are dealt with separately below.

350. The second step is to decide whether planning permission is required. S57(1) provides that planning permission is required for development, subject to the exclusions in s57(1)-(7) and Schedule 4 (special provisions as to land use on 1 July 1948). In particular, it is necessary to have regard to the terms of any existing planning permission, EUC or LDC; the effects of s57, allowing reversion to former "normal" or lawful uses; and of s58-61D including the provisions of the GPDO, any SPZ or Enterprise Zone Scheme or local development order, see EPL P58.03 - P61D.02.

351. Permission for a change of use does not carry with it any permission for ancillary operational development; see definition of "use" in s336(1), and *Wivenhoe Port v Colchester BC* [1985] JPL 396. However, a permission for a building carries with it the right to use it for the purposes specified in the permission, or if none is specified in the permission, the purposes for which it is designed; s75 TCPA 90.

352. In *Mid Suffolk DC v FSS & Lebbon* [2005] EWHC 2634 (Admin) [2006] JPL 859[73] , it was held that s75 applied only to buildings built with planning permission and not to buildings which had become lawful through the passage of time; s171B(1) and 191(2). In *University of Leicester v SSCLG & Wigston BC* [2016] EWHC 476 (Admin), it was held that if permission is granted for the erection of a building with specification of the purposes for which the building may be used, s75(3) has no application.

[72] J.255
[73] J.1160

353. Where the construction of a farm reservoir also involved the extraction of gravel, permission was required for both engineering and mining operations; *West Bowers Farm Products v Essex CC* [1985] JPL 857[74].

Buildings and Building Operations

354. A building is defined by s336 of the TCPA 90 as including any structure or erection and any part of a building, but not plant or machinery comprised within a building.

355. In *Cardiff Rating Authority v Guest Keen Baldwin's Iron and Steel Co Ltd* [1949] 1QB 385, endorsed by CoA in *Skerritts of Nottingham Ltd v SSETR (No.2)* [2000] 2 PLR 102[75], three primary factors were identified as decisive of what was a building (a) that it was of a size to be constructed on site, as opposed to being brought on to the site, (b) permanence, (c) physical attachment. No one factor is decisive.

356. See also *James v Brecon CC* [1963] 15 P&CR 20[76]; *Chester CC v Woodward* [1962] 2 QB 126[77]; *Barvis v SSE* [1971] 22 P&CR 710[78]; *R (oao Hall Hunter Partnership) v FSS* [2006] EWHC 3482 (Admin)[79] (polytunnels); *R (Save Woolley Valley Action Group Ltd) v Bath and North East Somerset Council* [2012] EWHC 2161 (Admin) (poultry units) and the EPL at P55.14.

357. Other objects deposited on land, such as a caravan body with wheels removed (*Wealden DC v SSE & Innocent* [1983] JPL 234[80]), an ex-railway box van ([1986] JPL 462), a substantial radio aerial (1990 JPL 604), a plastic "Herbie Tree", a play frame and slides ([1986] JPL 637, [1996] JPL 1162), have all been found to have constituted operational development.

358. By contrast, a freestanding lorry van body or container stood on land could be part and parcel of the main use; [1982] JPL 202, [1983] JPL 134. Wooden chalets supported by pillars which had been in position as permanent holiday homes for more than 40 years were held to be buildings; *R v Swansea CC ex parte Elitestone* [1993] JPL 1019. See also para 428 for a discussion on portable buildings and caravans.

Works not Materially affecting External Appearance

359. S55(2)(a) excludes from the definition of development works for the maintenance, improvement, or other alteration of any building which:-

    i. affect only the interior, and

    ii. do not materially affect the external appearance of the building.

    For example, interior works providing for the re-arrangement of living arrangements within a house would not themselves constitute development, even where there was a material change of use – the creation of self-contained flats, for example. However, where there has been a material change of use an enforcement notice can require those facilitating works to be removed, notwithstanding they did not constitute

[74] J.524
[75] J.1036
[76] J.42
[77] J.21
[78] J.108
[79] J.1165
[80] J.434

development in themselves; *Somak Travel v SSE* [1987] JPL 630[81] and the *Murfitt* and *Bowring* cases.

360. In deciding whether works materially affect the external appearance, a measure of subjective judgement is involved. Stone cladding of elevations is not excluded; *Bradford MBC v SSE* [1977] 35 P&CR 387[82]. Neither is painting the exterior excluded, *Windsor and Maidenhead RBC v SSE* [1988] JPL 410, although permitted in respect of any building or work under Schedule 2, Part 2, Class C of the GPDO.

361. The installation of floodlights on the façade of a hotel has been found not to materially affect the external appearance of a building even though the actual lights had such an effect when switched on; *Kensington and Chelsea RBC v SSE and CG Hotels* [1981] 41 P&CR 40[83].

362. The test raises subjective and aesthetic issues. A French door of different dimensions from the window it replaces may have a material effect, but a stable door carefully designed to match the existing brickwork was found not to do so, despite the difference in appearance when the door opened. Replacement uPVC windows are normally found to have a material effect when compared to,say, original traditional wooden vertical sliding sash windows through the appearance of the materials, arrangement of glazing bars and meeting rails and possibly opening method. Where such works to a dwellinghouse would amount to development, however, they can be permitted under Part 1 of the GPDO.

363. In one case, it was found that the installation of railings around a flat roof was an attachment rather than an integral part of the structure and did not materially affect the external appearance – whereas in another case boundary railings and a trellis, converting a flat roof to a terrace, with an external staircase for access, constituted development; *Hammersmith LBC v SSE and Davison* [1994] JPL 957[84]. Again, the latter operations were permitted under the GPDO.

364. The changes must be visible from a number of vantage points and be material to the appearance of the building as a whole; *Burroughs Day v Bristol CC* [1996] EGCS 126. The starting point is determining what is the "building" for the purposes of s55(2)(a). Although individual units within a shopping mall are separate planning units, alterations to dividing walls within the overall main building are excepted; [1995] JPL 643.

365. With replacement structures, there is a point where works do not amount to maintenance, improvement or alteration but to rebuilding. Rebuilding of a dwellinghouse is outside the permission granted by Article 3 and Schedule 2, Part 1, of the GPDO; *Sainty v MHLG* [1963] 15 P&CR 432[85]; *Larkin v SSE & Basildon DC* [1980] JPL 407[86]; and *Hewlett v SSE* [1983] JPL 155[87]. Rebuilding will also put the change of use of an agricultural building to a dwelling outside of the permission granted by Article 3 and Schedule 2, Part 3, Class Q; *Hibbitt v SSCLG* [2016] EWHC 2853. The approach set out in *Hibbitt* that it is possible to conclude that there is a

[81] J.581
[82] J.221
[83] J.314
[84] J.876
[85] J.35
[86] J.308
[87] J.317 and J.428

"new building" even where parts of the "old" building remain as opposed to being demolished was affirmed by the High Court in the case of Graham *Oates v SSCLG and Canterbury City Council* [2017] EWHC 2716 (Admin).

Demolition of Buildings

366. Demolition of buildings is brought expressly within the definition of "building operations" in s55(1A). S55(2)(g) then excludes from the definition of development any description of buildings specified in a direction given by the SoS. The current Direction[88] and exclusions are contained in Appendix A of DoE Circular 10/95 [WO 31/95][89] and provide that the demolition in their entirety of almost all buildings does not constitute development.

367. The exceptions are dwellinghouses and buildings adjoining them outside conservation areas, and gates, fences, walls etc within conservation areas. However, the judgment by the CoA in *SAVE Britain's Heritage v SSCLG & Lancaster City Council* [2011] JPL 1429 has quashed paragraphs 2(1)(a)-(d) of the Direction, declaring them unlawful.[90] This ruling found that this part of the Demolition Direction was in breach of the EIA Directive and, as such, is unlawful and no longer is in effect.

368. This means that the demolition of the structures mentioned in this part of the Direction are now development; the demolition of buildings and structures will now need approval through the planning process and might also require an EIA. Two elements of paragraph 2(1) remain in place – sub sections (e) and (f). Paragraph 2(1)(e) applies to any building having a cubic content of less than 50m^3 when measured externally, while 2(1)(f) applies to the demolition of the whole or any part of any gate, fence, wall or other means of enclosure. Part 11, Classes B and C of Schedule 2 to the GPDO gives PDRs for any building operation consisting of the demolition of a building [in whole], and gates, fences, walls or other means of enclosure in whole or part, as described further in The General Permitted Development Order & Prior Approval Appeals chapter.

369. The CoA in *Cambridge City Council v SSE* [1991] 1 PLR 109[91] established, amongst other things, that works for the demolition of a building constituted development only if they were properly to be regarded as building, engineering or other operations. "Whether works of demolition were within any of these categories were a question of fact for the decision-maker; … and whether particular works of demolition constituted development had to be decided in relation to those works alone and not to other projected works to which the decision was a preliminary act."

370. The nature and consequences of the works involved have to be assessed alongside the provisions of s.55(2)(a)(ii). To constitute development for the purposes of the Act, works of partial demolition to a building must, as a result, materially affect the external appearance of the building involved.

371. S196D(1) of the Act makes it an offence to fail to obtain planning permission for the demolition of unlisted buildings in conservation areas in England. In *Karen Barton v SSCLG and Bath and North East Somerset*

[88] Town and Country Planning (Demolition – Description of Buildings) Direction 2014
[89] C10/95 is now cancelled by the PPG, except the Direction at Appendix A is retained in England until replaced.
[90] DCLG's letter to Chief Planning Officers
[91] See EPL P55.28

Council [2017] EWHC 573 it was held that the definition of "building" in s336(1) of the Act applied to the word "building" in s196D of the Act. Demolition of part of a gate or wall in a conservation area was therefore "relevant demolition" within the meaning of s196D and was not therefore PD.

372. It therefore follows that demolition of part of a wall, gate fence etc in a conservation area does not need to be considered in the context of the whole because demolition of the part is not permitted either.

373. That contrasts with what led the House of Lords in *Shimizu* to conclude that a different interpretation of the statutory provisions then under consideration was indicated in that case. However, this is a matter of interpreting the statutory provisions rather than assessing the need for consistency between the control of conservation areas and listed buildings. There is a difference of principle between listed buildings, where one part of a building is under consideration, and conservation areas where a wider area is under consideration.

374. The demolition of listed buildings is subject to separate controls under the Listed Buildings Act with regard to the need for listed building consent.[92] [93] In terms of EIA development, the effect of the CoA judgment in *R (oao Save Britain's Heritage) v SSCLG & Lancaster CC* [2011] is that where demolition works are likely to have significant effects on the environment, the LPA must issue a screening opinion as to whether EIA is required.

375. Article 3(10) of the GPDO excludes development which falls within Schedules 1 or 2 of the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 (or the 2011 or 1999 versions of the Regulations, depending on when the application was made) from PD unless a screening opinion or direction has been made that the development is not EIA development. If a screening opinion confirms that EIA is not required, the PD can go ahead. Where there is a requirement for EIA, the development cannot be PD, and express planning permission will be required.

Engineering, Mining and "Other" Operations

376. Engineering operations involve works with some element of pre-planning, which would normally but not necessarily be supervised by a person with engineering knowledge; *Ewen Developments v SSE* [1980] JPL 404[94] and *Fayrewood Fish Farms v SSE* [1984] JPL 587[95]. S55(4A) specifically includes fish tanks in waterways, but limited PD rights are granted by Schedule 2, Part 6 of the GPDO.

377. S336 includes within the definition of engineering works the formation and laying out of means of access to highways, for which again there are limited PD rights, under Schedule 2, Part 2, Class B of the GPDO, in respect of accesses to unclassified roads when, and only when, required in connection with other permitted development. There are exceptions in s55(2)(b) and (c) TCPA 90 for highway works and maintenance of services by highway authorities and statutory undertakers.

[92] Further information is in Listed Building Enforcement.
[93] See EPL P55.27 and 3B-2192.2 for detailed comment on demolition.
[94] J.275
[95] J.476

378. The formation and laying out a means of access to a highway involves more than merely driving onto land; some works amounting, as a matter of fact and degree, to "formation" or "laying out" of that means of access need to be involved. The works need not be very substantial.

379. Where a wall, gate, fence or other means of enclosure has been demolished as part of the operation of forming the means of access, the 1995 Demolition Direction is sometimes argued as removing the works from the definition of development. However, the correct approach is to look at the development as a whole and not its component parts; *Caradon* – see above – was a LDC where the component parts had been split up.

380. Where the development is properly characterised as the formation of the means of access to a highway, the 1995 Direction will not be relevant. Under s173(4)(a), a requirement to rebuild the wall would not exceed what is necessary to restore the land to its condition before the breach took place.

381. The formation of a means of access may be PD if required in connection with the other PD, such as a hardstanding or the erection of a garage; Class B in Part 2. However, the PD rights in Part 2 are subject to the provisos in Article 3(6) of the GPDO – trunk and classified roads or creating a dangerous obstruction to the view of persons using the highway. When other works, such as excavating soil and laying bricks or adapting a wall or fence, are also carried out, the scheme as a whole is likely to involve building or engineering operations; eg, [1985] JPL 658.

382. Alterations to an existing access, such as widening a gateway, will be development if something is done which amounts as a matter of fact and degree to a building or engineering operation. Again subject to Article 3(6), it may be PD under Class A in Part 2 of Schedule 2 to the GPDO. The breaking and digging up of tennis courts to clear a site for redevelopment was held to be an "engineering or other operation" and not demolition; *Coppen v Bruce-Smith* [1998] JPL 1077, CoA.

383. Mining operations involve the working of minerals, as defined in s336, and s55(4) expressly includes the removal of all materials from a mineral working deposit or slag heap and the extraction of minerals from a disused railway embankment. All mining operations are treated as continuous, with each successive shovelful constituting a further act of development; *Thomas David (Porthcawl) Ltd v Penybont RDC* [1972] 3 All ER, 1092[96].

384. The definition of mining operations in Article 1(2) GPDO is for the purposes of the Order only. In Schedule 9 TCPA 90, relating to Discontinuance Orders, mineral working and the deposit of mineral waste are referred to as uses, but only in that particular context.

385. "Other" operations could include such works as the formation of earth banks, where this was undertaken without the degree of pre-planning and skill constituting engineering operations. In *R (oao Beronstone Ltd) v FSS* [2006] EWHC 2391 & [2007] JPL 471[97], it was held that hammering into the ground 554 marker stakes in a field so as to define the boundaries of 40 plots of land and a network of access ways was capable as a matter of

[96] J.118
[97] J.1162

fact and degree of being "other" operations. There was an obvious degree of permanence and it took two men two days to carry it out.

386. "Other" operations can also include tipping which has some purpose other than the disposal of waste, e.g. the raising of land levels. There are no PD rights for "other" operations for agriculture, but there are limited rights in connection with forestry.

Material Change of Use

387. The concept of material change of use is not defined in statute or statutory instrument; it is a question of fact and degree in each case. A summary of relevant factors and an approach to the analysis of whether there has been or would be a material change of use is at EPL P55.34. For there to be a material change of use, there needs to be some significant difference in the character of the activities from what has gone on previously.

388. A change may be *de minimis,* meaning that it is on too small a scale for the law to take account of it. A change in the identity of the person carrying out the use, or the source or the destination of vehicles coming to and from a site will not be material; *Lewis v SSE* [1971] 23 P&CR 125[98]. Nor will a change in the nature of goods stored be material if the overall activity and general implications for the area remain the same; *Snook v SSE* [1976] JPL 303[99].

389. Whether a MCU has occurred is an objective test, the application of which is unaffected by the circumstances (e.g. health or infirmity) of the user; *Stewart v FSS & Cotswold DC* [2004] EWHC[100]. The concepts of the planning unit and primary and ancillary uses are fundamental. However this is not an exact science; there will be times when what exists on the ground does not fall neatly into one formulation or another. The basic concepts should be applied in a common sense way according to the facts of each case, and the conclusion fully reasoned.

The Planning Unit

Basic Concept

390. In cases where there is a dispute as to whether a material change of use has occurred, it is first necessary to ascertain the correct planning unit, and the present and previous primary (as opposed to ancillary) uses of that unit. The leading case on the subject is *Burdle and Williams v SSE and New Forest DC* [1972] 1 WLR 1207[101].

391. The tests for determining the unit laid down in that case are summarised at EPL P55.44. 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; the concept of physical and functional separation is key. In *Thames Heliport Ltd v Tower Hamlets LBC* [1997] JPL 448[102] it was said that planning legislation was not simply concerned with the use made of a particular part of the surface of land, but also the area affected by the activity. Activities taking place on the water could amount to a material change in the use of the land.

[98] J.116
[99] J.160
[100] J.1144
[101] J.133
[102] J.916 & J.985

392. The simplest case is a dwellinghouse where the householder is carrying out car repairs on a significant scale in the garage. In such a case the planning unit is generally the unit of occupation, i.e. house and garage together. The contravening use is a mixed use for residential purposes (or use as a dwellinghouse) and car repairs because the functional relationship remains although there might be a degree of physical separation between the uses. The appropriate requirement is then to discontinue the use of the unit as a whole, not just the garage, for car repairs.

393. The concept of a mixed use is one of two or more primary uses existing within the same planning unit or unit of occupation. One is not ancillary to the other, although there may be ancillary uses associated with each primary use. In a complicated mixed use site it is necessary to distinguish in the allegation which uses are primary and ancillary; see below.

394. A different situation would be where the householder had let the garage, to an entirely different operator, for car repairs. Here the garage would have become a separate planning unit being a separate unit of occupation with both physical and functional separation, and the notice should not extend to the dwellinghouse unless there were substantial shared facilities.

395. In the case of a large factory complex, the planning unit will likely be the whole premises. The various subsidiary activities, such as canteens, offices and car parks will be ancillary uses, between which changes can be made without there necessarily being a material change of use of the planning unit as a whole; see *Vickers-Armstrong Ltd v CLB* [1957] 9 P&CR 33.

396. The area to be looked at is the whole of the area which is used for a particular purpose, including any part of that area the use of which is incidental to or ancillary to the achievement of that purpose; *G Percy Trentham Ltd v MHLG and Glos. CC* [1966] 1 ALL ER 701[103]. The area covered by a planning permission is not necessarily determinative of the planning unit, although it is a factor to be taken into account and may be a good starting point; *Hertsmere BC v SSE & Percy* [1991] JPL 552[104].

397. In *Stone & Stone v SSCLG & Cornwall Council* [2014], the Court held that whether or not an occupier of land which is the subject of a notice has created a new planning unit is essentially a question of fact and degree to be resolved by the primary decision-maker. The Inspector was entitled to conclude that there were two planning units within the site and that these were *"new units"* when compared with what had existed previously. In the light of various authorities, it was clear that an existing lawful use which is authorised by permission is capable of being extinguished by the creation of a new planning unit in respect of the land in question.

398. In *Westminster CC v SSCLG & Oriol Badia and Property Investment (Development) Ltd* [2015] EWCA Civ 482, the EN alleged *"… the material change of use of the Property from a hotel (Class C1) to a mixed use hotel and hostel (sui generis)".* A change of use from a hotel to a mixed hotel and hostel use will require PP only if it is a MCU. The CoA held that the question the Inspector asked herself was whether part of the premises was in exclusive use as a hostel and part was in exclusive use as a hotel. On the face of it, it was an error of law to address the matter in that way.

[103] J.47
[104] J.751

The SoS accepted that a mixed use can subsist where the different elements are not associated with particular parts of the premises.

399. It was also submitted that, in considering whether there had been a change in the character of the use, the Inspector failed to have regard to a relevant matter: the off-site effects of the current use on residential amenity. She did not mention complaints about noise and disturbance when considering whether, if there was a mixed hotel and hostel use, it involved sufficient change to the character of the use to amount to a MCU. By focussing on the position inside the premises, not on external effects, the Inspector erred in law by failing in this respect to have regard to a material consideration.

Multiple Occupiers on Sites in Single Ownership

400. Often several activities are carried on within one unit of occupation. It will be a question of fact and degree, according to the *Burdle* principle, as to whether these constitute one planning unit in a mixed use or separate planning units, each with an individual primary use.

401. In *Johnson v SSE* [1974] 28 P&CR 424[105], individual garages or blocks of garages within an overall complex of 44 units, were treated as separate planning units on the basis of the occupancies. Individual flats within a block let to different tenants will normally be separate planning units.

402. However, where a single area was occupied as an encampment by a number of gypsy families and the ownership was divided, although the premises still appeared as a single entity, a separate notice was served on each occupier but in each case the site area was the whole of the site; this was considered valid by the Court of Appeal. An owner or occupier of one plot could not be prosecuted for what occurred on another plot and the Inspector could consider circumstances peculiar to the occupier of one plot. No unfairness was involved; *Rawlins v SSE* [1989] JPL 439[106].

403. In *Church Commissioners v SSE* [1996] JPL 669[107] a single unit within the Gateshead Metro Centre shopping mall, occupied by an individual trader, was held to be a separate planning unit, with its own individual primary use, despite the fact that the whole centre could be said to be occupied for retail purposes by the landowners. So whereas a change of use of one shop might not be sufficiently material to change the character of a planning unit based on the centre as a whole, it was much more likely to be material in relation to the smaller unit based on the individual shop.

404. Where there are multiple breaches of planning control, involving several buildings within a single complex having a common access and circulation areas, it can be difficult to decide on the correct planning unit. The choice between a single planning unit in mixed use and several planning units will usually depend upon a number of factors including the following:

(a) the form of tenancy and the legal relationship between the landlord and tenants including degree of control exercised by the site owner;

(b) the ease with which tenants may switch sites or expand or contract their areas of occupation;

[105] J.156
[106] J.670
[107] J.942

(c) the extent to which individual sites are ill-defined or have changing boundaries;

(d) the proportion of the site which is given to communal uses such as access, parking, landscaping etc, and the rights of use by the occupiers over them.

LPAs may serve individual notices, which are vulnerable to subsequent changes between units, or a composite notice which may or may not identify the individual activities; see *Simms v SSE & Broxtowe BC,* para 318). The LPA may serve both notices in the alternative, leaving the Inspector to determine the correct planning unit or units.

405. It is not necessarily incorrect to serve notices either in relation to individual units or the site as a whole. Notices in cases of this kind should only be quashed on the ground that the planning unit is incorrect if the case for doing so is clear cut and strong.

406. Where notices are clearly served in the alternative and the LPA leave it to the Inspector to select which is correct and quash the other, prior to considering planning merits or appeals on other grounds, it will usually be preferable to accede to that request, as long as there is a sound reason for doing so, and particularly if supported by the appellant. The Inspector should be clear, however, that such a decision is specific to the facts of the case – and should set out the reasons for taking the decision.

407. This course of action will often be appropriate if permission is to be granted since it avoids the granting of two or more permissions relating to the same site, possibly with different provisions and conditions.

408. If the arguments are well balanced, and there are no clear cut reasons to justify one or other alternative, then there is no legal reason, having regard to *Rawlins* and *Church Commissioners*, why both notices should not be upheld; see also *Ramsey v SSE* [1991] JPL 1148[108]. *Rawlins* and *Church Commissioners* should be seen as complementary since each turned on the facts of the case.

409. If upholding both notices, particular care should be exercised in two areas. Firstly, it is essential that there remains no significant inconsistency between their requirements. It would be unacceptable for an appellant to subsequently comply with all requirements of one notice and then be prosecuted for failure to comply with a second notice dealing with essentially the same matters, albeit in the context of a notice relating to a different area.

410. The second area of concern stems from the judgement in *Reed v SSE* [1993] JPL 329[109]. In that case the Inspector had to deal with one notice directed at the whole site and nine others against individual buildings. She found that all of the uses contributed to the overall traffic problem, and that it would therefore be unjust to single out some only for approval. The Court criticised that approach, emphasizing that each individual notice gave rise to an entirely separate DPA which could not be dealt with on the basis chosen by the Inspector.

411. Although this judgement is not entirely in accord with previous judicial decisions, see *Collis Radio v SSE* [1975][110], it should be treated as giving

[108] J.762
[109] J.810
[110] J.158

reliable guidance for cases of this kind. It does not mean that the effect of precedent must be ignored, but any precedent arguments must be clearly distinguished from the argument criticised by the Court.

412. In *Bruschweiller v SSE* [1996] JPL 292[111], see para 775, which followed the *Reed* judgment, it was indicated that it would be possible to conclude that the cumulative effect would be such as to lead to refusal of each application, having been considered separately, since granting permission in any one case would make it difficult to refuse the others.

413. There may be special circumstances, say if there are appeals against some or all notices on grounds (b), (c) or (d). The outcome of those appeals may radically alter the approach to the remainder of the appeal decision.

Subdivision of the Planning Unit

414. The mere sub-division of the planning unit, when the uses of both parts remain within the same Use Class, is expressly excluded from the definition of development by s55(2)(f) TCPA90. The exception to that is the subdivision of a dwellinghouse to separate dwellings; s55(3)(a). It is not open to an LPA to divide up a planning unit artificially so as to achieve a more restrictive effect than would result from a notice directed at the unit as a whole; *De Mulder v SSE* [1973] 27 P&CR 369[112].

Identifying the Whole Unit

415. Whilst it is essential to identify the planning unit in order to determine whether there has been a material change of use, a notice does not have to be directed at the whole unit, nor indeed to identify it; see *Hawkey v SSE* [1971] 22 P&CR 610[113]; *Richmond on Thames LBC v SSE* [1988] JPL 396[114]. In many cases the activity complained of only takes place on a small area, but the LPA is entitled to anticipate changes to defeat the operation of the notice by enforcing against the planning unit as a whole.

416. Where markets or other leisure uses take place on farmland, the planning unit will normally be the farm as a whole rather than individual fields or blocks of land. Where boot fairs were held on adjacent parcels of land in different ownerships, the Inspector's finding that the planning unit was the whole area put to the co-ordinated use was accepted by the CoA; *Ralls v SSE* [1998] JPL 444[115].

Ancillary or Incidental Uses

417. The terms incidental and ancillary have in general become interchangeable in their use although s55(2)(d) and Part 1 Class E of the GPDO specifically use the term "incidental". Both terms refer to a use or activity that would not be expected to be found as an integral part of a use. Thus a distinction is to be drawn between ancillary or incidental uses, and uses which are part and parcel of an existing or permitted use.

418. If a householder converts his garage to a bedroom, or uses a flat roof as a terrace or roof garden for sitting out, such activities would be part and parcel of the residential use within the same planning unit. Development would take place, however, if the roof or garage is not part of a residential

[111] J.919
[112] J.152
[113] J.106
[114] J.593
[115] J.1002

planning unit. Similarly, works to facilitate the activities may amount to development, see para 499 – but these may be permitted by the GPDO.

419. Activities which are not integral to the use as a dwellinghouse, but which are incidental to it and within its curtilage are excluded from development by virtue of s55(2)(d); see para 485. The erection of buildings within the curtilage of a dwellinghouse and for ancillary use represents development but may be PD under Article 3 and Schedule 2, Part 1, Class E.

420. PD rights under Class E extend only to buildings required for a purpose incidental to the enjoyment of the dwellinghouse as such, not to buildings required for a purpose integral to the use as a dwellinghouse. Whether that is the case will depend on a fact and degree assessment; *Pêche d'Or Investments v SSE* [1996] JPL 311[116]. A subsequent change from a use incidental to the enjoyment of the dwellinghouse to a use integral to it would not involve development.

421. Ancillary uses are not distinguished by scale, although that may be relevant. The essential feature is that there should be some functional relationship between the ancillary use and the primary use. That functional relationship should be one that is normally found; it is not based on the personal choice of the person carrying out both activities together.

422. Thus, in *Harrods v SSETR* [2002] JPL 1258[117], it was held that landing a helicopter on the roof was not ordinarily incidental to the use as a retail department store in Class A1. One had to look at what shops in general had as reasonably ancillary activities. Extraordinary activities, though subordinate to the lawful use, are excluded if their introduction amounts to a material change of use of the planning unit; see also Schieman LJ in *Millington v SSE* [1999] s PLR 118[118].

423. Incidental uses may change, expand or decrease without constituting a material change, so long as they remain subsidiary to the primary purpose of the planning unit as a whole; *Brazil (Concrete) Ltd v MHLG & Amersham RDC* [1967] 18 P&CR 396[119]. A non-residents bar can be incidental to a hotel use, so long as the overall character of the whole planning unit remains one of a hotel; *Emma Hotels v SSE* [1981] JPL 283[120].

424. The stationing of a caravan may be ancillary to residential, agricultural and other lawful uses. It is essential that a use of land is alleged and not simply the "stationing" of the caravan. In *Deakin v FSS* [2006] EWHC 3402 (Admin), [2007] JPL 1073[121], it was held that the correct approach is to establish the lawful use of the planning unit, establish the effect of the caravan and its use on the character of the lawful use, and conclude whether there was a MCU. It is not enough to simply examine the physical characteristics of the caravan and its use; see further guidance on caravans below.

425. If a site is used for separate activities, e.g. scrapyard, haulage and skip hire, one or more of those activities should not be regarded as ancillary simply because they are small in relation to the others; *Main v SSETR & S*

[116] J.932
[117] J.1085
[118] J.1029
[119] J.62
[120] J.332
[121] J.1163

Oxon DC [1999] JPL 195. Where there are a number of activities on a site, analysis of the physical and functional relationships could lead to different conclusions on a fact and degree basis: more than one planning unit each with primary and ancillary uses; a mixed use of the whole area with primary and ancillary uses; or a single primary *sui generis* use comprised of a number of disparate but related activities, for example a builders yard with workshop, office and storage activities.

426. Once an ancillary or incidental use expands to a point where it becomes a primary use on its own, within a separate planning unit, or the planning unit takes on a new mixed use, then it is likely that there will have been a material change of use; see *Wood v SSE* [1975] 25 P&CR 303[122] and *Trio Thames Ltd v SSE* [1984] JPL 183[123].

427. Ancillary or incidental use rights do not continue after the cessation of the primary use; *Barling v SSE* [1980] JPL 594). Activities carried on within a single planning unit cannot be incidental to activities carried on outside that unit; *Essex Water Co v SSE* [1989] JPL 914[124].

Portable Buildings

428. The setting up of a portable building on land, including shipping containers used as portable buildings, is generally regarded as a building operation. Where there is a dispute, it will be necessary to make a fact and degree assessment in each case. It is necessary to apply the established tests for a building operation; see para 354. All three factors need to be applied and considered, but it may be appropriate to give greater weight to one over another in reaching a conclusion:

    Size: It is likely that most portable buildings will not be of a size to have been constructed on site but that is not, by itself, a decisive factor.

    Permanence: How long has it been in one position? Has it been moved, or is it capable of being moved readily? Does it require lifting apparatus to be moved?

    Physical attachment: How is it fixed to the ground - affixation through its own weight may be sufficient. Is it mounted on a permanent base? Is it attached to services? Has the placing of the portable building resulted in any physical change in the characteristics of the land?

429. Nevertheless, the general approach to this type of structure remains that, unless it can be shown the stationing of a portable building is simply a temporary use of land, as in the case of a contractor's site hut or a mobile chicken ark etc, such development should be regarded as a building and/or engineering operation, where the facts can justify this conclusion.

430. This approach is reinforced by the case of *Scott v SSE & Bracknell DC* [1983] JPL 108[125], where the SSE had held that the erection of a portakabin had involved operations. The Court took the view that this was a justifiable conclusion on the facts of that case; see also the *R (oao Hall Hunter Partnership) v FSS & Waverley BC* [2006] case relating to polytunnels on farmland.

[122] J.139
[123] J.453
[124] J.687
[125] J.419