



The Law Society
of England and Wales

Draft National Planning Policy Framework

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supporting
solicitors

Law Society response to the Draft National Planning Policy Framework

The Law Society is the representative body of over 140,000 solicitors in England and Wales. The Society negotiates on behalf of the profession and lobbies regulators, governments and others.

This consultation response has been prepared by members of the Law Society's Planning and Environmental Law Committee. The Committee comprises 20 practitioners expert in these areas of law from a cross section of the profession, both public and private sectors, and from across the UK nations.

The Society welcomes the opportunity to reply to this important consultation.

General comments

The Society supports the Coalition's aim to condense existing policy into a concise and cogent single National Planning Policy Framework (NPPF), however we suggest that further consideration is given to the matters highlighted below if the NPPF is to succeed in its goal of helping achieve sustainable development through a quicker, more efficient planning system at the same time as facilitating economic growth.

Our reservations arise from the fact that, in addition to replacing some 1,000 pages of current policy, the NPPF proposes a number of important policy changes not least the introduction of a presumption in favour of sustainable development.

Our main reservations fall into the following broad categories:

1. **The operation of the policy presumption** – there are two main issues here. First, how the presumption is to apply given the decision-making duties (affecting the Secretary of State as well as planning authorities) contained in statute, most notably in Section 70 of the 1990 Act and Section 38(6) of the 2004 Act. Second, the possibility that the NPPF must itself be subject to Strategic Environmental Assessment (SEA).
2. **The meaning of "sustainable development"** - whether a clearer definition is desirable and necessary.
3. **Transition management** – the need to bring forward the NPPF in a manner which leads to quicker and better policy making and decision taking and less "back end" costs and delays from an increased number of appeals and court challenges.

1. The operation of the presumption

We believe that a presumption in favour of development or sustainable development can work – it has done so on many previous occasions in the past – however we have the following reservations arising from the current drafting.

a. Tension with Section 70 of 1990 Act & Section 38(6) of 2004 Act

Planning applications must be decided by the Secretary of State and local planning authorities in accordance with the principles contained in Section 38(6) and Section 70 and related case law.

It is trite law that planning authorities are duty bound to consider all material considerations when determining planning applications although they have a degree of flexibility in the manner in which they do so (see, for example, *Simpson v Edinburgh Corp 1960*).

The development plan need not be followed slavishly. However, regard must be had to it when decisions are made. It cannot be set aside altogether in favour of some other consideration (see, for example, *Camden LBC v Secretary of State 1989*, *Nottinghamshire CC v Secretary of State 1999*).

We suggest that further consideration is given to how the proposed presumption will be applied in situations where the statutory development plan is considered to be "out of date". What, for example, is meant by "out of date"?

More generally, we suggest that further consideration is given to the wording of the proposed presumption insofar as it seeks to alter the balancing exercise which authorities are obliged to carry out under Section 70 when deciding planning applications.

Paragraph 14 of the NPPF states that the proposed presumption, when it applies, means that planning permission should be granted unless:

"... the adverse impacts of allowing development would **significantly and demonstrably** outweigh the benefits when assessed against the policies in this Framework taken as a whole" (our emphasis).

We have strong reservations about the introduction of a concept of "significance" into the balancing exercise which is to be carried out by planning authorities when determining planning applications. Outside of EIA and Habitats sensitive developments, we believe this to be novel, unclear and most likely difficult for authorities to grapple with.

Does this wording mean, for example, that if a development is moderately, as opposed to significantly, harmful when weighed against its benefits, then planning permission should still be granted? Does it mean that if a development is suspected of being significantly harmful but this cannot be proven, for example because communities lack the resources to do so, then planning permission should still be granted?

We suggest that further thought is given to how the concept of "significant and demonstrable" harm sits with authorities' statutory duties under Section 70 and other legislation and how the presumption sits generally with key safeguarding policies contained elsewhere in the NPPF (for example, those guarding against Green Belt development).

b. Tension with other statutory presumptions/duties

As indicated above, the presumption must apply in a manner which is clear and consistent with a number of other presumptions and duties, notably:

- The statutory duty to pay regard to listed buildings (Sections 66 & 67 of the Listed Buildings Act);
- The statutory duty concerning conservation areas (Sections 72 & 73 of the Listed Buildings Act);

- The statutory duties to be observed through European led environmental, habitats and similar laws;
- Human Rights Act duties; and
- The policy presumption relating to Green Belt land

We note the significant volume of historic litigation over the status and effect of earlier presumptions in favour of development. Case law has established that the language of policy must always give way to the requirements of statute.

We suggest that further consideration is given to the application of the proposed presumption in cases which may conflict with other statutory or policy duties or presumptions.

In this context, we note that one consequence of former presumptions in favour of development was to make more exacting the duty upon the Secretary of State to make clear his reasons, especially for refusing planning permission, on appeal (see, for example, *Thornville Properties v Secretary of State* 1981).

On the other hand, the presumption did not as a matter of law impose any burden of proof on local planning authorities in the event of an appeal against their decisions (see, for example, *Pye v West Oxfordshire DC* 1982).

c. The need for Strategic Environmental Assessment (SEA)

The wording of the presumption strongly suggests that the Secretary of State and a good many local planning authorities will regard the NPPF as the default plan where existing development plan policies are absent, silent, indeterminate or they are considered to be "out of date".

The NPPF envisages that core strategies, local plans and other development plan documents (it is not clear at present what the various local policy documents are to be called) must conform with the NPPF otherwise they will not be certified or – in the case of the majority of areas – found to be "sound".

Although the NPPF is not specifically referred to in current or emerging statute, we consider that there is a good case to argue that it should be subject to SEA requirements for the above reasons.

We recommend that further thought is given to this to avoid protracted delays in implementing the NPPF from court proceedings testing the point.

2. **The meaning of "sustainable development"**

Case law has established that sound, adequate and clear cut reasons must be given by a decision maker either to follow or not to follow relevant planning policy. This is to ensure that the basis for a decision is well understood and it is a requirement applied by the Courts with equal vigour in relation to the Secretary of State.

The Courts have ruled that if a decision maker fails properly to understand the relevant policy, his decision will be defective (see, for example, *Surrey Heath BC*

v Secretary of State 1987). The proper interpretation of policy is therefore a matter of law.

These principles suggest that, in order to avoid a substantive period of litigation over one of the core concepts underpinning the NPPF, the term "sustainable development" should be specifically defined in the Glossary of the NPPF rather than interpreted by reference to the NPPF as a whole.

If not so defined, authorities and the Secretary of State are likely to adopt inconsistent approaches, the system will be left in a state of uncertainty and the result will be an increased number of appeals and court challenges as parties with differing interests seek to test the matter or delay developments from coming forward, see further our comments under Q1b below.

3. Transitional arrangements

We believe that it will be necessary to transition the move from the existing suite of policy documents to the NPPF carefully if uncertainty, inconsistency and other difficulties are to be avoided.

a. Relationship with existing statutory development plans

The Government remains committed to the plan-led system and the introduction of the NPPF is clearly regarded as an incentive to local planning authorities to ensure that they have in place an up to date local plan.

At present, only one third of authorities have core strategies in place with a number of others approaching the final stages of adoption. That still leaves perhaps the majority of authorities without up to date core strategies and others who will have to undertake a thorough review of their draft plans to ensure conformity with the NPPF.

For those authorities with an adopted core strategy, the NPPF will arguably have the effect of "trumping" these to the extent that they are not in conformity with the NPPF.

Although the NPPF does not require it, in practical terms many authorities will feel the need to redraft potentially large parts of their adopted core strategies to ensure conformity, planning certainty and confidence in decision making.

As a result, there will be a period during which many local authorities will not have local policies in place which they feel confident in making decisions upon and they will have to determine applications in accordance with the NPPF.

Some developers are undoubtedly regarding that window as an opportunity to bring forward applications and appeals in the hope that they can secure consent during a period of unsettled policy. It is not unreasonable to guess that many authorities will adopt a safety-first approach during this period, fearing that refusal could lead to a successful appeal and the potential for an award of costs against the authority should the courts find the refusal to be non-conforming with the NPPF.

There is a strong case for providing a breathing space between publication of the NPPF and its coming into operation to enable local authorities to catch up.

We urge the Coalition to consider providing transitional arrangements to assist local authorities, many of whom have been awaiting the NPPF before progressing their local policies.

In our experience, the process for producing core strategies typically takes about 18-24 months. A breathing space of that length ought to provide a reasonable incentive for local authorities to bring their local policies up to date.

It would also be useful for there to be greater clarity on the circumstances when it would be appropriate for planning authorities to resort to supplementary planning documents.

b. Cancellation of current suite of policy and guidance

The NPPF – in its highly condensed form - proposes the cancellation of the existing suite of policy documents and also a great deal of useful technical guidance and codes of practice.

We understand that consideration is still being given as to whether and to what extent further guidance should or will be produced by central government.

There is a strong case for providing a breathing space between publication of the NPPF and the cancellation of some of the more useful technical guidance and codes of practice if the NPPF is to be applied in a sensible manner and consistently in different geographical areas.

We respond below to certain of the questions in the consultation.

1a The Framework has the right approach to establishing and defining the presumption in favour of sustainable development.

We disagree for the reasons given above.

1b Do you have comments?

Our reservations are expressed above. We are concerned that the result will be an inconsistent application of the presumption as between different local planning authorities, undermining the certainty on which the development industry depends. Local planning authorities are likely to need guidance on how they are to integrate competing economic, social and environmental considerations when determining development proposals.

The definition of sustainable development offered in paragraph 9 refers to the Brundtland Report 1987, which is a very fair and equitable statement. However, the statement is quoted incomplete. It can be seen from page 43 of the Brundtland Report that the form of development discussed is unlikely to be that anticipated by the NPPF. We annex page 43 of the Brundtland Report for your information.

Moreover, the Ministerial foreword in the draft NPPF conflicts with the general approach to sustainable development in the main body of the text. Our view is that any reference to sustainable development in any foreword should follow that set out in the main body of the text.

Our view on balance is that the definition of sustainable development contained

in the UK Strategy 2005 is a fair definition of sustainable development and should be referred to in the Glossary or in an Annex to the NPPF.

As indicated above, the reference in paragraph 14 of the NPPF to "significantly and demonstrably" is a new concept in planning decision making and could have the unwanted effect of undermining the protections provided elsewhere in the NPPF.

It could be argued, for example, that a particular development outweighs the need to protect the Green Belt because the harm from the development is not demonstrably significant when weighed against the benefits of the scheme.

That argument might find favour in one local authority when it is rejected by a neighbouring authority. There is a real risk of a patchwork and inconsistent application of the presumption.

2a The Framework has clarified the tests of soundness, and introduces a useful additional test to ensure local plans are positively prepared to meet objectively assessed need and infrastructure requirements.
Do you: Strongly Agree/Agree/Neither Agree or Disagree/Disagree/Strongly Disagree

We disagree for the reasons given above.

Although we welcome the simplified tests for assessing "soundness", we are concerned that policy making will become more difficult and more resource intensive if draft policies are to be examined by reference to whether their adverse impacts "significantly and demonstrably" outweigh their benefits.

We foresee that, in some cases, this may act to exclude community participation in the local plan process where community resource is lacking.

We believe that the Localism Bill in combination with the NPPF will require a significant adjustment to the plan making process. The absence of a Regional Strategy will remove plan certainty and will ensure that examinations may provide the first opportunity to assess, for example, housing need and employment need. These findings would then inform site allocations and must inevitably extend the plan making process. These arrangements will both prolong the plan making process and ensure inherent uncertainty which will dramatically impact on the local planning authority's ability to address SEA issues. One solution might be to have a two stage process requiring the inspector to make a finding as to need and then a second allocation/plan making stage.

In the context of the important relationship between neighbourhood plans and local plans, we suggest that paragraphs 51 and 52 of the NPPF could be clarified so that, for example, it is stated more clearly when neighbourhood policies might take precedence over local policies with which they must be in "strategic" conformity.

2c The policies for planning strategically across local boundaries provide a clear framework and enough flexibility for councils and other bodies to work together effectively.

We neither agree nor disagree.

2d Do you have comments?

We remain concerned that the provisions relating to cross boundary strategic planning will prove to be inadequate.

3a In the policies on development management, the level of detail is appropriate.

We disagree.

3b Do you have comments?

As indicated above, we are concerned about the loss of technical guidance and codes of practice which has proved invaluable to delivering consistent, sound decision making.

We understand the Government's objective of reducing the volume of such guidance and recognise that not all of the issues currently covered need to be imported into the NPPF. Several of the PPGs/PPSs could be cancelled without loss. However, we do see a continuing need for some of the existing guidance. We consider that its absence is likely to lead to an increase in appeals and legal challenges. The consequential result will be delay within the planning system.

We suggest that in areas where there is an absence or shortage of guidance, the Courts may well condone the use of the current (to be cancelled) guidance and related judicial precedent. In our view, this reinforces our suggestion that there is at least a breathing space between publication of the NPPF and the cancellation of some of the more useful technical guidance and codes of practice.

We note also that there is no reference in the NPPF to the concept of prematurity, a legal concept stemming from a line of cases in the mid-1980s which has been long recognised in national planning policy, currently paragraphs 17-19 of PPS1.

We consider that it would be useful to retain this policy, particularly during this period of flux in the planning system.

4a Any guidance needed to support the new Framework should be light-touch and could be provided by organisations outside Government.

We disagree.

4b What should any separate guidance cover and who is best placed to provide it?

There are a number of areas on which the NPPF is silent, notably the increasingly prominent issue of financial viability.

While there is merit in looking to planning stakeholders (presumably the professional bodies of the key players in the planning system) to provide best practice guidance, they are unable to produce authoritative guidance which is binding on professionals appointed by authorities or developers.

It is not inconceivable that competing guidance will be published on an issue by several different bodies. In such cases, parties will follow the guidance which is best suited to their agenda and the Courts will have difficulty attaching greater weight to one than the other.

These matters can only lead to uncertainties and inconsistencies, delays and less development.

In our view, there should be a minimum level of guidance supplementary to the NPPF which is issued by DCLG, perhaps on those areas which are most contentious in the planning system.

There may be good legal reasons for retaining some of the current guidance, given that the NPPF is intended to be largely a condensation of existing national planning policy.

When a planning application is determined by the Secretary of State, the general administrative law principle of consistency in decision-making suggests that where his policy has been interpreted by him in a certain manner in the past in accordance with the guidance now proposed to be cancelled, it should be determined by him in the future in the same manner unless there are good reasons not to.

This suggests that certain key guidance ought to be retained to enable the Secretary of State to reach decisions in a manner consistent with past decisions. Also, to help local planning authorities understand the Secretary of State's approach on appeal so that they are best able to decide their own approach at the local level.

There is, for example, substantive technical guidance relating to flood risk, noise and unstable land. It would be helpful to developers and decision makers to retain and update their technical guidance.

We suggest that there is supplementary guidance in the following areas in particular:

- Housing
- Retail/town centres
- Heritage
- Enforcement
- Forward planning
- Flood risk
- Noise, unstable land

5a The 'planning for business' policies will encourage economic activity and give business the certainty and confidence to invest.

We neither agree nor disagree.

5b Do you have comments?

We recognise the Government's commitment to business. However, we do have reservations about likely short term uncertainties and inconsistencies, as referred to above.

6a The town centre policies will enable communities to encourage retail, business and leisure development in the right locations and protect the vitality and viability of town centres.

We neither agree nor disagree.

6b Do you have comments?

We recognise that it is the Government's aim to encourage development in town centres. We believe that in the absence of technical guidance, the town centre first policy may be eroded. It could lead to inconsistent approaches to retail development being adopted by different authorities. We are particularly concerned about the penultimate bullet point in paragraph 76 – "allocate appropriate edge of centre sites where suitable and viable town centre sites are not available, and if sufficient edge of centre sites cannot be identified, set policies for meeting the identified requirements in other accessible locations".

9a The policies on minerals planning adopt the right approach.

We disagree strongly.

9b Do you have comments?

Minerals planning is an area which will be adversely affected by the scrapping of existing minerals planning guidance notes and statements.

There are 15 Minerals Policy Guidance Notes (MPGs) nearly all of which contain substantive and detailed technical guidance of the winning and working of minerals and after use restoration.

In our view, Mineral Authorities will face substantial difficulty in dealing with mineral applications in the absence of these MPGs.

10a The policies on housing will enable communities to deliver a wide choice of high quality homes, in the right location, to meet local demand.

We neither agree nor disagree.

10b Do you have comments?

We recommend that reference to an additional 20% allowance is clarified. If, as we assume, this is meant to mean 6 years supply then this should be stated.

13a The policy on planning and the Green Belt gives a strong clear message on Green Belt protection.

We disagree.

We recommend that the relationship between the presumption in favour of sustainable development and the Green Belt presumption against inappropriate development is clarified (paragraph 142).

If "very special circumstances" do not exist but at the same time the presumption in favour of sustainable development applies and the adverse impacts from a

development do not "significantly and demonstrably" outweigh the benefits, should planning permission be granted (under the presumption in favour of sustainable development) or refused (under the Green Belt presumption)?

13b Have you comments to add?

As indicated above we are concerned that some of the wording of the NPPF, particularly paragraph 14, will undermine the intention to preserve the protection of the Green Belt.

15a Policy relating to the natural and local environment provides the appropriate framework to protect and enhance the environment.

We disagree for the reasons stated above.

15b Do you have comments?

We are concerned that the abolition of targets for the re-use of brownfield sites will undermine the progress that has been achieved in this respect. We believe that the NPPF should expressly encourage use of brownfield sites over greenfield.

16a This policy provides the right level of protection for heritage assets.

We strongly disagree.

16b Do you have comments? (Please begin with relevant paragraph number)

Paragraph 187 of the NPPF appears to go beyond PPS 5 as it engages paragraph 184. It may well be that Government considers that heritage and cultural assets require increased additional protection than the guidance presently provides. However, it appears that paragraph 187 could have consequences beyond what Government intends.