

**IN THE MATTER OF:**

**5 YEAR HOUSING LAND SUPPLY  
TORBAY COUNCIL**

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**ADVICE**

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**Introduction**

- 1 I have been asked to advise Torbay Council (“the Council”) in relation to the, as yet unpublished, final version of their Five Year Housing Land Supply Statement (“the Statement”). The Statement sets out an assessment of the housing supply position from April 2019 to March 2024, concluding that the Council can demonstrate 2.5 years’ of deliverable housing supply.
- 2 The Council has sought a review of the Statement following representations from Neighbourhood Forums asserting that the Council had taken an overly restrictive approach to the concept of deliverability. The Council is concerned to ensure that its assessment of the housing supply position is sufficiently robust to withstand a challenge at a planning appeal, whilst also confirming that it has not excluded sites which could properly be categorised as deliverable and thereby suppressing the overall calculation of housing land supply.
- 3 In particular, I am asked to advise on the following specific questions:
  - (1) Whether the list of factors to be taken into account when determining the deliverability of sites which do not have permission/detailed planning permission contained in Annex 2 of the NPPF and the PPG is exclusive, or whether other factors and categories of site may be taken into account when assessing deliverability. If other factors may be taken into account, what might these factors reasonably be?
  - (2) Whether some or all of the CSM Land and/or the PDR Sites and/or the VC Land may reasonably be included in the Statement. Whether sites identified in Appendix C of the Local Plan may be considered to be site allocations.
  - (3) Whether the sites identified in Appendix C of the Local Plan may be considered to be site allocations.
  - (4) Whether the Local Planning Authority could produce separate five-year housing land supply figures for each of its three Neighbourhood Plan areas, and whether this would afford that area resilience to a district-wide housing supply shortfall.
  - (5) Generally on the implications of a shortfall against five year supply in the context of paragraph 11 of the (2019) NPPF.

- 4 The background to this matter, and in particular the history of the production of the Statement, has been helpfully set out in my instructions which I do not repeat.
- 5 My advice is structured as follows. First, I consider the general principles applicable to the concept of 'deliverability' in light of the relevant policy, guidance and case-law. Second, I address the specific questions raised in my instructions. Third, I make a number of observations in relation to the Statement.
- 6 At the outset of this advice I emphasise that, as the Court of Appeal<sup>1</sup> has recently affirmed in the strongest of terms, the assessment of housing land supply, and in particular the question of whether sites are "deliverable", is ultimately a matter of planning judgment. Further the Court clarified that in the exercise of that planning judgment decision-makers are free to determine how circumspect or otherwise they wish to be in their approach to deliverability, so long as they properly understand the policy that they are applying and their judgment falls within the generous scope that public law permits.
- 7 It follows that whilst I can - and do - provide advice as to the proper approach to the issue deliverability, as well as making observations on the robustness or otherwise of the evidence supporting the inclusion or non-inclusion of sites in the five year supply, ultimately the question of whether a particular site is considered to be deliverable is a matter of judgement, not law, and one to be made by the Council in the first instance (and in planning appeals/examinations by the Secretary of State and his inspectors).

### **Deliverability – General Principles**

#### ***Policy and Guidance***

- 8 Paragraph 73 of the NPPF requires local planning authorities to "*identify and update annually a supply of specific deliverable sites sufficient to provide a minimum of five years' worth of housing against their housing requirement set out in adopted strategic policies, or against their local housing need where the strategic policies are more than five years old*". The supply of deliverable sites is to include a buffer, moved forward from later in the plan period, of either 5%, 10% or 20% depending on the circumstances.
- 9 'Deliverable' is defined in the NPPF as follows:

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<sup>1</sup> In *R(oao East Bergholt Parish Council) v Babergh District Council* [2019] EWCA Civ 220

*“To be considered deliverable, sites for housing should be available now, offer a suitable location for development now, and be achievable with a realistic prospect that housing will be delivered on the site within five years. In particular:*

*a) sites which do not involve major development and have planning permission, and all sites with detailed planning permission, should be considered deliverable until permission expires, unless there is clear evidence that homes will not be delivered within five years (for example because they are no longer viable, there is no longer a demand for the type of units or sites have long term phasing plans).*

*b) where a site has outline planning permission for major development, has been allocated in a development plan, has a grant of permission in principle, or is identified on a brownfield register, it should only be considered deliverable where there is clear evidence that housing completions will begin on site within five years.*

10 Further guidance on the concept of “deliverability” is given in the PPG under the heading “What constitutes a ‘deliverable’ housing site in the context of plan-making and decision-taking?”<sup>2</sup>

*“In order to demonstrate 5 years’ worth of deliverable housing sites, robust, up to date evidence needs to be available to support the preparation of strategic policies and planning decisions. Annex 2 of the National Planning Policy Framework defines a deliverable site. As well as sites which are considered to be deliverable in principle, this definition also sets out the sites which would require further evidence to be considered deliverable, namely those which:*

- have outline planning permission for major development;*
- are allocated in a development plan;*
- have a grant of permission in principle; or*
- are identified on a brownfield register.*

*Such evidence, to demonstrate deliverability, may include:*

- current planning status – for example, on larger scale sites with outline or hybrid permission how much progress has been made towards approving reserved matters, or whether these link to a planning performance agreement that sets out the timescale for approval of reserved matters applications and discharge of conditions;*
- firm progress being made towards the submission of an application – for example, a written agreement between the local planning authority and the site developer(s) which confirms the developers’ delivery intentions and anticipated start and build-out rates;*
- firm progress with site assessment work; or*

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<sup>2</sup> Paragraph: 007 Reference ID: 68-007-20190722. Revision date: 22 July 2019

- *clear relevant information about site viability, ownership constraints or infrastructure provision, such as successful participation in bids for large-scale infrastructure funding or other similar projects.*

11 Guidance on assessing availability, the suitability of a site for development and achievability are set out in the ‘Housing and economic land availability assessment’ section of the PPG.<sup>3</sup>

### ***Case-law***

12 As far as I am aware there are no judgments of the higher courts which directly grapple with the definition of deliverable under the NPPF 2019.<sup>4</sup> However, there are two judgments which addressed the definition of deliverable under the NPPF 2012 and, in my view, they remain of relevance to the proper interpretation under the NPPF 2019.

13 This is because, although the definition in the 2019 NPPF has been expanded to include the evidential presumptions set out in a) and b), the core of the definition – i.e, that the site be available now, offer a suitable location for development now, and be achievable with a realistic prospect that housing will be delivered on site within five years – is consistent with the earlier definition.

14 The first of those cases was *St Modwen Developments v SSCLG* [2017] EWCA Civ 1643. The following propositions, still relevant to the 2019 NPPF definition, can be drawn from the judgement of the Court of Appeal:

(1) Each of the three elements of the definition – i) available now; ii) offer a suitable location for development now; and iii) be achievable with a realistic prospect that housing will be delivered on site within five years – is relevant to the site’s capability of being delivered within five years: at §38<sup>5</sup>

(2) A site can be considered “deliverable” without there being certainty, or even a probability, that it will actually be delivered within five years: at §38. I consider that

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<sup>3</sup> See in particular, “What factors can be considered when assessing the suitability of sites / broad locations for development?” (Paragraph: 018 Reference ID: 3-018-20190722); “What factors can be considered when assessing availability?” (Paragraph: 019 Reference ID: 3-019-20190722); What factors should be considered when assessing achievability including whether the development of the site is viable? (Paragraph: 020 Reference ID: 3-020-20190722)

<sup>4</sup> I appreciate that there are a large number of inspector and Secretary of State decisions which have considered, and applied the 2019 NPPF definition. However, these are not binding as to the proper interpretation of the policy. Moreover, they do not espouse a consistent approach.

<sup>5</sup> The Court identified the 2012 NPPF definition containing four elements, as that definition included, as a separate element, that “development of the site is viable”. The 2019 NPPF has removed that element from the definition, although it is clear from the PPG’s guidance that viability will be a central factor in assessing on ‘achievability’.

this proposition holds true for the definition in the 2019 NPPF. The requirement that there is “clear evidence” for certain categories of site goes to the standard or quality of evidence required. It does not change the threshold that is to be applied when judging whether a site is deliverable, namely that there is a “realistic prospect”.

(3) There is a distinction between the concept of “deliverability” – which is to be judged when calculating a five-year supply of housing - and the “expected rate of delivery” – which is employed when calculating housing trajectories: at §35

(4) The evaluation of housing land supply involves the exercise of planning judgment: at §43

15 As *St Modwen* demonstrates, it is possible for a local planning authority to conclude that a site is deliverable – and include it in its five year supply – even if it is not shown as being expected to deliver within the first five years in its housing trajectory. This is because the question of deliverability is judged *inter alia* on whether a site has a *realistic prospect* of being delivered in the first five years; whereas the housing trajectory assessed the *expected rate* of delivery.<sup>6</sup>

16 In the more recent case of *R(oao East Bergholt Parish Council) v Babergh District Council* [2019] EWCA Civ 220 the Court of Appeal was again considering the 2012 NPPF, albeit by the time of the judgment the 2019 NPPF had been published, and the court made passing reference to its expanded definition of ‘deliverable’.

17 The following propositions can be derived from *East Bergholt*:

(1) The whole exercise of assessing “deliverability” of sites “*is replete with planning judgment and must always be sensitive to the facts....this may be said, in particular of the question of “achievability” – whether there is a “realistic prospect” of housing being delivered on the site within five years*” at §49.

(2) The Court held that “realistic prospect” is not a legal concept. Instead it is “*a broad concept of policy, which gives ample scope for a decision-maker’s reasonable planning judgment on the likelihood of development proceeding on site within five years*” at §49

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<sup>6</sup> That said, if there are distinctions between the LPA’s housing trajectory and its 5 year housing land supply calculations, it would be good practice for those distinctions to be explained.

(3) It is a matter for the decision-maker, exercising his or her planning judgment, to determine what level of circumspection or otherwise to apply when assessing whether a site is deliverable: at §48-§51; §53 & §60. As the Court concluded, “[p]ut simply, the degree of confidence required in the “deliverability” of sites is for the decision-maker to decide within the bounds of reasonable planning judgment”: at [51]

(4) The Court noted that in neither the original NPPF, nor the two revisions since, nor in the PPF, has the Government defined exactly what it meant by a “realistic prospect”: at §53.

18 The upshot of *East Bergholt* is that different decision-makers may apply different levels of circumspection or optimism when assessing whether there is a “realistic prospect” of sites delivering within five years. So long as the approach adopted does not fall “outside the generous scope that public law permits” – that is, so long as it is not irrational – it will not be unlawful.

### **Response to Questions**

**(1) Whether the list of factors to be taken into account when determining the deliverability of sites which do not have permission/detailed planning permission contained in Annex 2 of the NPPF and the PPG is exclusive, or whether other factors and categories of site may be taken into account when assessing deliverability. If other factors may be taken into account, what might these factors reasonably be?**

19 As I understand it, this question raises two principal issues.

20 First, whether categories of sites listed in a) and b) of the definition of ‘deliverable’ constitute a ‘closed-list’. That is, whether they are exhaustive of the types of site which are capable of being considered ‘deliverable’.

21 Second, whether the factors/types of evidence identified in the PPG<sup>7</sup> as being relevant to the issue of whether a site is deliverable are exhaustive.

22 The first issue turns on a proper interpretation of the NPPF, which is ultimately a matter of law. Unfortunately the position is far from clear.

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<sup>7</sup> As set out at paragraph 10 above.

23 On the one hand, there are a number of factors which suggest that the categories are a 'closed-list'. In particular:

- a) The PPG appears to treat the definition as applying a closed-list, distinguishing between sites which are "*considered to be deliverable in principle*" - namely those which fall within (a) - and sites "*which would require further evidence to be considered deliverable*" - namely those which fall within (b). The PPG is capable of being an aid to understanding the policy or policies to which it corresponds in the NPPF: *Braintree DC v SSCLG* [2018] EWCA Civ 610 at [36]
- b) It is unclear what standard of evidence would be apply to a site which falls neither in a) or b). It would appear unlikely that it would benefit from the evidential presumption (ie be considered deliverable in principle) which is afforded to the sites in (a). But does that mean "clear evidence" of its deliverability is needed, even though it is not mentioned in (b)? Or does some other standard of evidence apply?

24 On the other hand, there are a number of factors which suggest that the categories are not a 'closed-list'. In particular:

- a) The language of the definition is ambiguous at best. Had the Government intended that only certain categories of site were capable of being considered deliverable, then they could have easily said as much.
- b) A closed-list approach would undercut the operation of the core definition of deliverable. If the list was closed, it is possible that there could be a site which was undoubtedly available, suitable and achievable with a realistic prospect of housing being delivered within five years, but which could not be considered deliverable if it did not come within the pre-defined list in (a) or (b).
- c) There are obvious anomalies. For example, a site which benefits from a resolution to grant does not come within (a) or (b). Nor does an allocation in emerging local plan. Notwithstanding that, in certain cases, such sites could be far more likely to meet the core definition of deliverable, than a site which has merely been identified on a brownfield register.

- 25 Given this uncertainty it is unsurprising that inspectors' decisions on this issue have not been consistent.<sup>8</sup> The same ambiguity is found in a recent decision of the Secretary of State<sup>9</sup>. In that case the inspector had concluded the definition was not exhaustive and, on the facts, the sites not falling within (a) or (b) could be considered deliverable. The Secretary of State disagreed, stating that: *"since they do not fall within category a or b of the Framework's definition of deliverable, and he does not consider that there is clear evidence of deliverability within five years as required by the Framework, given the outstanding issues of the need for legal agreements and agreements on reserved matters."*<sup>10</sup> The Secretary of State's statement is ambiguous because it is not clear whether he discounted the sites on the basis that they did not fall within either category a or b (ie treated it as a closed-list) or treated them as capable of being deliverable (ie not treating it as a closed list), but finding on the specific evidence that they were not, in fact, deliverable. Either way, the Secretary of State's view on the matter is not determinative.
- 26 My view, albeit very much on balance, is that on a proper interpretation of the NPPF the list is not closed. Given the anomalies such an approach would throw up, and how it would undercut the operation of the core definition, in my view if the Government had wanted to restrict the category of deliverable sites to an exhaustive category this would have been made clear in the language of the definition.
- 27 Thankfully, the second issue raised by this question is far more straightforward. The factors/types of evidence identified in the PPG<sup>11</sup> as being relevant to the issue of whether a site is deliverable are plainly not exhaustive. This much is clear from the wording of the PPG itself, which states that the list of evidence to demonstrate deliverability *"may include..."*.
- 28 In my view, any evidence which is relevant to the question of whether a site is available, suitable and achievable with a realistic prospect of housing being delivered within five years can be taken into account. Whether a factor is relevant to the deliverability of a particular site, and what weight to give to that factor in assessing deliverability, is

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<sup>8</sup> For instance, in Woolmer Green (APP/C1950/W/17/3190821) the Inspector found the list was closed; whereas in Grange Road, Lawford (APP/P1560/W/18/3201067) this was rejected.

<sup>9</sup> LAND OFF DARNHALL SCHOOL LANE, WINSFORD, CHESHIRE (APP/A0665/W/14/22126)

<sup>10</sup> *Ibid* at [18]

<sup>11</sup> As set out at paragraph 10 above.



particularly fact-sensitive. In light of *East Bergholt* it is likely that a court would consider this to be primarily a question of planning judgment for the decision-maker.

**(2) Whether some or all of the CSM Land<sup>12</sup> and/or the PDR Sites<sup>13</sup> and/or the VC Land<sup>14</sup> may reasonably be included in the Statement.**

29 I reiterate that, whether or not a particular site is deliverable is a matter of planning judgement, not a matter of law. Therefore, in many ways, the planning officers who drew up the Statement – and who will have a better knowledge of the sites in question and their context – are in a better position than me to come to a judgment on that issue. I trust that the advice I set out above as to the proper approach to assessing deliverability will assist in making that judgement.

30 Nevertheless, for what it is worth, I provide my views on the likelihood of the Council being able to defend the inclusion of each of these three sites in its Statement – that is, a conclusion that these sites are deliverable – before an inspector on a section 78 appeal.

***CSM Land***

31 The site in question is, as I understand it, Collation St Mary (Little Blagdon). It was originally included in the draft Statement as being deliverable, and in particular having a realistic prospect of delivering 65 units with the five years.

32 The site is owned by the Council. It forms part of the Future Growth Area at Collation St Mary, an area which is the subject of a masterplan adopted in 2016. Policy SS1 of the Torbay Local Plan explains that there “*will be some initial delivery of development in the Future Growth Areas, within the first 10 years, if required to meet demand for new employment space and homes. Development in these areas will be set out in detail via masterplanning, concept plans and/or in neighbourhood plans*”. Delivery of some housing from this source in the 2019-2024 period would be consistent with the estimates identified in Policy SDP1 (Table 12) and SDP3 (Table 16).

33 I am instructed that the Council is in receipt of grant funding for the CSM (I assume for the entirety of the masterplanned area, rather than the particular site itself). Furthermore permission has been granted for the construction of a spur road to service

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<sup>12</sup> Land owned by the Council in the Collaton St Mary area of Paignton

<sup>13</sup> Two sites owned by the Council at Preston Down Road in Paignton

<sup>14</sup> Land at Victoria Square in Paignton

- future development on the CSM land, albeit that decision is the subject of a judicial review challenge (I am unsure whether the spur road is necessary to access the site in question).
- 34 No application for planning permission has yet been submitted, although one is expected in 2020.
- 35 The site was removed from the Statement following representations from Alder King and PBA that (a) the site did not fall within any of the categories required by the NPPF and (b) in the absence of a planning application, there was no clear evidence of delivery.
- 36 In my view, for the reasons I set out above, even if it is correct to conclude that the site is not allocated, this is not an insuperable barrier to it being considered deliverable. Moreover, given the policy context, and in particular, the expectation of Policy SS1 that development in these areas will be set out in detail via *inter alia* masterplanning, it is clear that the planning status of the site is, at the very least, akin to an allocated site.
- 37 The real issue is whether there is clear evidence that housing completions will begin on the site within five years.
- 38 This is a classic example where different decision makers may quite reasonably (and lawfully) take a different view of the deliverability of a site. However, in my view, it is likely that more evidence would need to be provided in order to defend any judgment that it was deliverable before a planning inspector. The existence of grant funding, and the permission for the spur road, are both relevant factors, as is the fact that the Council owns the site. They all point towards its deliverability. However, these factors alone are unlikely to persuade an inspector that "*there is clear evidence that housing completions will begin on site within five years.*"
- 39 It is highly relevant that a planning application is expected in 2020. However, in order to persuade an inspector of the site's deliverability, more evidence is likely to be needed. When is that permission expected to be received? What pre-application discussions have there been? Is it likely that the application will be in conformity with the adopted masterplan? Will the application be in outline or full? Is there a written agreement between the local planning authority and the site developer(s) which confirms the developers' delivery intentions and anticipated start and build-out rate? And what evidence does the developer have to support their position?

40 If these factors are addressed, and if they support the conclusion that housing completions will begin on site within five years, then it may be possible to persuade an inspector that the Council has provided the requisite clear evidence, and the site is deliverable. Without such evidence, the Council faces an uphill task.

### ***PDR Sites***

41 There are two sites owned by the Council at Preston Down Road. Each has been assessed as having a capacity for 50 homes. The PDR sites were identified in the Local Plan within a pool of sites identified as “Possible Neighbourhood Plan housing sites” in Appendix C, Table 26. The plan explains that these were sites which, based on the SHLAA, have potential for development. Policy SS1 explains that *“The pool of developable housing sites is included in Appendix C (Table 26) to this Plan. If Neighbourhood plans do not identify sufficient sites to provide the housing requirements of the Local Plan, the Council will bring forward sites through site allocations development plan documents”*

42 The PDR sites also benefit from grant funding (although, again, I am not sure whether this funding only applies to the two sites or a wider area).

43 The PDR sites were not allocated in the Paignton Neighbourhood Plan, which unlike Torquay and Brixham Peninsula NPs, did not allocate any housing land. I am instructed that the Council intends to allocate the PDR sites in the next Local Plan update.

44 They were not included in the draft Statement.

45 Without any further evidence, it is very unlikely that including a contribution from the PDR sites in a five year housing would be defensible. Even if they are available now and offer a suitable location for development now, there appears to be little evidence – let alone clear evidence - that housing completions will begin on site within five years.

### ***VC Site***

46 Land at Victoria Square is on the brownfield register. Like the PDR Sites, it forms part of the pool of sites identified in Appendix C of the Local Plan. It is the subject of grant funding to help deliver the site. No planning application has been made, although a design brief is under preparation.

47 It was included within the draft Statement with an indication that “Developer intends to deliver on site within 5 years”, although it is not clear what evidence had been obtained from the developer. It was removed in the Statement following objections on the basis that there was no clear evidence that housing completions will begin on site within five years (see representations of Alder King and PBA).

48 On the basis of the evidence before me I consider it unlikely that an inspector would find that there was clear evidence of a realistic prospect of housing development taking place on the site within five years. However, if further evidence were available, including from the developer, of the type that I outline above in respect of the CSM Land, and that evidence pointed towards the possibility of housing development taking place within five years, it might be possible to persuade an inspector of its deliverability.

49 Finally, it is sometimes said by developers – often based on the inspector’s decision in the Woolpit case<sup>15</sup> - that evidence of a site’s deliverability must (a) have been available at the base date of the five years in question (ie here as at April 2019) and/or (b) included in its Annual Monitoring Statement. In my view this is wrong. It conflicts with the fundamental principle of public law that decision-makers are entitled to take into account all relevant considerations at the date of their decision. Therefore, if new evidence has become available which is relevant to a site’s deliverability within the five year period in question, this should be taken into account.

**(3) Whether the sites identified in Appendix C of the Local Plan may be considered to be site allocations?**

50 In short, no.

51 Whatever the arguments for considering the CSM Land – and other Future Growth Areas subject to masterplanning – as allocations, in my view the mere identification of a site in Appendix C of the Local Plan cannot be considered to be an allocation.

52 Policy SS1 explains that:

*“In years 6-10 of the Plan (2017/18-2021/22), development will come from completion of committed and developable sites identified in Neighbourhood Plans. The pool of developable housing sites is included in Appendix C (Table 26) to this Plan. If*

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<sup>15</sup> APP/W3520/W/18/3194926

*Neighbourhood Plans do not identify sufficient sites to provide the housing requirements of the Local Plan, the Council will bring forward sites through site allocations development plan documents”*

- 53 The introductory text to Table 26 confirms that the sites identified in the table have been identified, principally through the SHLAA, as having the “potential for development”, however that they “are subject to consideration in Neighbourhood Development Plans”.
- 54 It is clear that Appendix C merely identifies sites as having potential for development. It does not, of itself, allocate them for development. This is to be achieved through further development documents, whether neighbourhood plans or a site allocation DPD brought forward by the Council.
- 55 Moreover, when a development plan document allocates a site for development it, almost invariably, provides a framework establishing how that site should be developed, e.g the type of development for which it is allocated; indicative requirements for houses/floorspace; site-specific criteria against which a planning application can be judged. This is absent from Table 26, which identifies no more than its location, name and SHLAA reference.
- 56 Following my advice above regarding the issue of closed lists, the fact that the inclusion of a site in Appendix C does not of itself constitute an allocation does not necessarily prevent such sites from being considered deliverable. However, in order to demonstrate its deliverability, clear evidence would be needed that the site was available now, suitable now, and had a realistic prospect of delivering housing within 5 years.

*(4) Whether the Local Planning Authority could produce separate five-year housing land supply figures for each of its three Neighbourhood Plan areas, and whether this would afford that area resilience to a district-wide housing supply shortfall.*

- 57 Although there is no rule of law or policy which would preclude such an assessment being undertaken, I doubt that an inspector on a planning appeal would give significant weight to such an assessment. I say that for the following reasons:

- (1) National Policy establishes the concept of a 5-year supply of deliverable housing, as well as providing the ramifications if such a supply cannot be demonstrated. It

is not a free-standing concept. As the requirement for, and calculation of, a five years supply derives solely from policy, it is at least arguable that it cannot be applied, or calculated, otherwise than in accordance with that policy.

- (2) The NPPF places the obligation on Local Planning Authorities to *“identify and update annually a supply of specific deliverable sites sufficient to provide a minimum of five years’ worth of housing against their housing requirement” (emphasis added)*. When the NPPF 2019 was drafted neighbourhood planning was well-established. The Government could have chosen to require Local Planning Authorities to determine the housing supply with respect to neighbourhood plan areas. It did not.
- (3) The ramifications of not being able to demonstrate a 5-year supply (on which see Q5 below) would apply regardless of the performance of the individual areas with neighbourhood plans.
- (4) There may be some difficulties in calculating a “5 year supply” for neighbourhood area, eg in relation to which buffer to apply; how to assign shortfall; what windfall figure should be included etc

58 This is not to say that the performance of particular neighbourhood area in delivering housing – or the amount of housing identified as deliverable in a particular area – is irrelevant to the question of weight which should be afforded to the District’s overall shortfall in deliverable housing.

59 Plainly if an area with a neighbourhood plan has (a) a good track record of delivering housing and/or (b) sufficient deliverable/developable sites to meet the housing requirement identified in the Neighbourhood Plan, then these are relevant – and potentially highly relevant – factors, in assessing what weight to give to a District-wide shortfall. However, they can be taken into account without having to undertake a quasi-five year housing supply exercise for each area. Indeed, in my view, it may be preferable not to undertake such an analysis, as an inspector may well chose to dismiss evidence presented in such a way as being of limited relevance. In contrast if the Council or Neighbourhood Forum can point to the track record of housing delivery in the particular area and/or the amount of deliverable/developable sites in the area, such evidence may well have more resonance.

**(5) Generally on the implications of a shortfall against five year supply in the context of paragraph 11 of the (2019) NPPF**

60 The implications of a shortfall against a five-year supply are likely to be as follows:

(1) The presumption in favour of sustainable development as set out in paragraphs 11(c) and (d) of the NPPF will apply;

(2) For decision taking, the presumption in favour of sustainable development means that:

a) permission should be granted for housing proposals that accord with the development plan (Para 11(c))

b) permission should be granted for housing proposals that do not accord with the development plan, unless:

i. the application of policies in this Framework that protect areas or assets of particular importance provides a clear reason for refusing the development proposed (ie, the application of policies identified in footnote 6) or

ii. any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole – the so-called ‘tilted balance’ (Para 11(d))

(3) Where the ‘tilted balance’ applies, paragraph 14 of the NPPF provides some ‘protection’ for areas which have neighbourhood plans, where four criteria are met.<sup>16</sup> One of those criteria is that the local planning authority has at least a three

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<sup>16</sup> Paragraph 14 provides:

*“In situations where the presumption (at paragraph 11d) applies to applications involving the provision of housing, the adverse impact of allowing development that conflicts with the neighbourhood plan is likely to significantly and demonstrably outweigh the benefits, provided all of the following apply [subject to transitional arrangements]:*

*a) the neighbourhood plan became part of the development plan two years or less before the date on which the decision is made;*

*b) the neighbourhood plan contains policies and allocations to meet its identified housing requirement;*

*c) the local planning authority has at least a three year supply of deliverable housing sites (against its five year housing supply requirement, including the appropriate buffer as set out in paragraph 73); and*

*d) the local planning authority’s housing delivery was at least 45% of that required over the previous three years.*

year supply of deliverable housing sites (against its five year housing supply requirement, including the appropriate buffer). Where this cannot be shown, the 'protection' potentially provided by paragraph 14 will not apply.

- (4) As a matter of generality (although not a rule of law), if a Local Planning Authority is unable to demonstrate a 5-year supply of housing, a planning inspector or Secretary of State on appeal, is likely to give greater weight to proposals for housing, particularly those that can start delivering within in five years. Ordinarily, the greater the shortfall, the greater weight that will be attached to the delivery of housing.

### **Observations on the Statement**

61 For the purposes of this advice I have concentrated on the specific questions asked of me, rather than undertaking a comprehensive review of the deliverability of each of the sites included in, or excluded from, the Statement. In order to have undertaken such a review, it would have been necessary to have further information on each of sites in question. Moreover, as I explain above, ultimately whether or not a site is deliverable is a matter of judgment and is not a question of law.

62 That said, I make the following observations in respect of the Statement:

- (1) It would be helpful to expressly identify which sites/category of sites are considered "deliverable in principle" - ie fall into (a) within the NPPF definition - and which sites/category of sites require clear evidence of deliverability - ie fall into (b) within the NPPF definition.
- (2) For those falling into (b), I would suggest that each of the elements of deliverability is addressed - ie available now, suitable now, and achievable with a realistic prospect of delivering within five years. I appreciate that most of the debate is likely to surround the final element;



- (3) For those falling into (b), it is important that the “clear evidence” on which the Council relies to support its judgements of deliverability is identified (particularly in relation to the realistic prospect of delivering within five years)
- (4) I note that a significant number of sites were deleted from the draft Statement on the basis that there was “not sufficient evidence of progression/delivery within 5 years”. I do not know the details of these sites, but it may be worth officers checking whether this judgement still stands, having regard to my advice above about the meaning of “realistic prospect” – see §14(2). I note that a number of representations argued that sites should not be included within the Statement because there was no ‘certainty’ of delivery within 5 years – but as *St Modwen* demonstrates this is a too exacting standard to apply. Obviously, if the deleted sites fall within category (b) – which I believe most, if not all of them do, then it would be necessary to identify “clear evidence” of their being a realistic prospect of delivery within 5 years (eg site specific evidence from developers/promoters).

### **Conclusion**

63 I hope my advice will assist the Council in assessing its five-year housing land supply for the purposes of the Statement, and fully addresses the questions I have been asked. Should you require any further advice please do not hesitate to contact me.

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