



MEMORANDUM - RESPONSE BY UKELA to the House of Commons Communities Local Government & Environmental Audit Select Committees' EXAMINATION OF THE DRAFT National Planning Policy Framework ('NPPF')

The UK Environmental Law Association ('UKELA')

1. This response has been prepared by the permanent Working Party established by UKELA which deals with Planning and Sustainable Development. The UK Environmental Law Association aims to make the law work for a better environment and to improve understanding and awareness of environmental law. UKELA's members are involved in the practice, study or formulation of Environmental Law in the UK and the European Union. It attracts both lawyers and non-lawyers and has a broad membership from the private and public sectors. UKELA seeks to ensure that best legislation and practice are achieved across the UK jurisdictions.
2. **This memorandum addresses the questions raised by the Communities and Local Government Committee and the Environmental Audit Committee of the House of Commons. We note that the Committees do not expect to examine in detail the individual areas of planning policy. We have therefore focused on our main concerns and UKELA will be responding to CLG regarding their own consultation document in more detail in due course.**

Summary

- **UKELA welcomes the Government's objective of promoting sustainable development. Most of our response focuses on this aspect.**
- **It is important to distinguish between the two rather different tasks that the government has undertaken – simplification of the guidance and changes to the policies themselves.**
- **The draft document does represent a radical simplification of the planning policy framework, but it risks removing important areas of guidance which have stood the test of time.**

- **We are however more concerned at the drafting of the presumption in favour of sustainable development and do not believe that it will achieve its stated aim. The presumption can only work if it is linked back to an appropriate definition of sustainable development that integrates environmental, social and economic objectives. At present, it prioritises economic growth at the expense of long term environmental and social objectives.**
- **There are some legal complications which will need addressing. The presumption as drafted (para 14) does not fit with the basic statutory test that planning decisions should be determined in accordance with the development plan unless material considerations indicate otherwise (section 38(6) of the Planning and Compulsory Purchase Act 2004 – previously set out in s.54A of the TCPA 1990). The old presumption that permission should be granted unless it “would cause demonstrable harm to interests of acknowledged importance” was removed for this very reason.**
- **The presumption as drafted also misunderstands the ability of Development Plans to provide a black and white answer to planning applications. Development Plans require interpretation. They rarely provide a yes or no answer.**
- **A requirement to grant permission for applications where the plan is “absent, silent, indeterminate or where relevant policies are out of date” will simply lead to debate and challenge over whether in fact a plan is absent, silent, indeterminate or its policies are out of date. It will not lead to a simpler planning process.**
- **Local Plans have been developed to date in such a way as to avoid duplication with national and regional policies. The revocation of the PPS/PPGs and Regional Strategies will leave a vacuum in many if not all Local Plans which it will take time to fill. Development decisions must be allowed to be taken on their merits while those gaps are filled.**
- **The presumption in favour of sustainable development could be expressed to facilitate development which meets the minimum sustainable development guidelines in a revised NPPF.**
- **As drafted, the presumption is likely to lead to delays in the planning system including longer appeals and more High Court challenges as those involve debate the interpretation that should be given to the presumption.**
- **We have also addressed the points raised in the CLG Committee’s questions.**

General assessment of the fitness for purpose of the draft Framework as a whole.

3. As an organisation that brings together those with a legal interest in the environment, we are concerned about the effectiveness of the NPPF. We will need to make this new approach to planning policy work for those we advise and represent.
4. It is important to distinguish between the two rather different tasks that the government has undertaken. The first is the editorial task of summarising 1,000 pages of planning policy in 52 pages. The second is to carry out an overhaul of national planning policy, which introduces some radical changes to the substance of existing planning policies.
5. As for the substance, our main concern is that the vision of ‘sustainable development’ put forward by the government in the Framework is a flawed one [discussed below under Question 2]. There is also a significant problem with the relationship between the new presumption in favour of sustainable development and the role of Local Plans.
6. Although we are aware of the considerable criticisms that have been made of the substance of the changes proposed to the detailed policies, those areas lie largely outside our remit. We do not therefore seek to address those in our submissions to the Committees.
7. There are some legal complications as well. The presumption does not fit with the basic statutory test that planning decisions should be determined in accordance with the development plan unless material considerations indicate otherwise (section 38(6) of the Planning and Compulsory Purchase Act 2004). This is discussed further under Q2.
8. As an editorial simplification, we acknowledge that the framework of the draft NPPF is easy to read. However, because it has removed much of the supporting detail, there is a risk that the draft NPPF will act not so much as a nudge to the system to promote economic growth but as a shove, so that the system may well stumble and fall before it can find its feet.

9. Whilst all clarification is to be welcomed, there are some important areas of policy which it does not appear to have been deemed necessary to summarise. If the main basis for the simplification argument is that existing planning policy is longer than the collected works of Shakespeare, this is a poor justification. Whilst many may have enjoyed the Reduced Shakespeare Company as they romp through “The Complete Works of William Shakespeare (abridged) -All 37 Plays in 97 Minutes !”, no one is seriously suggesting that Shakespeare would be improved if his works were reduced to 52 pages. Similarly, most of the nuances and well-established detailed policies will be lost once the NPPF is adopted.

10. The dangers of poor planning are well known - it “can result in a legacy for current and future generations of run-down town centres, unsafe and dilapidated housing, crime and disorder, and the loss of our finest countryside to development”. (existing PPS 1, para 1)

The specific questions raised by the committee :

Q1. Does the NPPF give sufficient guidance to local planning authorities, the Planning Inspectorate and others, including investors and developers, while at the same time giving local communities sufficient power over planning decisions?

11. There are many unanswered matters of detail, given that national planning guidance will be reduced to 50-60 pages. Since there will be no spatial plan for England, unlike in Wales, it will be difficult to predict the outcome of significant planning decisions. Given that the government is encouraging local decision making, this is perhaps inevitable.

12. The latter part of the question picks up on one of the inherent difficulties of the neighbourhood planning agenda. It appears to be based on the premise that the local community and the local planning authority have different ambitions. In the past, the main power for local communities over planning decisions has been through their elected representatives on the planning committee. It is regrettable that the draft

Framework actually weakens the requirement for pre-application consultation (in para 57), as the LPA cannot require a developer to engage with them. On the other hand, the draft NPPF encourages the developer to engage with the local community, which would appear to duplicate work.

13. It is unclear whether neighbourhood plans will be a success. But the statement that the LPA cannot adopt policies on an area when there is a neighbourhood plan in the course of preparation would risk leaving a policy vacuum (para 51).

Q2. Is the definition of 'sustainable development' contained in the document appropriate; and is the presumption in favour of sustainable development a balanced and workable approach?

14. The definition of 'sustainable development' contained in the document is stated very simply, and repeats the high-level formulation put forward by the Brundtland Commission (para 9). This does not provide any definite answers to the issue of how to apply this in practice.
15. The Environment Audit Committee itself recommended (3rd Report, 16 March 2011, para 10) recommended that the five internationally-recognised principles of sustainable development set out in the 2005 Sustainable Development Strategy should be included in the Localism Bill – namely, living within environmental limits, ensuring a strong, healthy and just society, achieving a sustainable economy, promoting good governance and using sound science responsibly. However, the explanation given in the draft NPPF of what sustainable development means in the planning context does not acknowledge these.
16. What we have instead is an emphasis on growth. If the Foreword is as much a part of policy as the rest of the document, we can see that the Minister defines 'development' as 'growth', and states that "sustainable development is about positive growth". We recognise that economic growth is an immediate and pressing national issue but the public interest also requires decisions to be taken with a view to the long term sustainability of society. A presumption in favour of sustainable development must be

clearly linked back to an acceptable definition of what constitutes sustainable development overall – in the short, medium and long-term.

17. The current draft of the NPPF therefore appears to overlook the fact that the term ‘sustainable development’ was conceived to reconcile tension between environmental and developmental concerns. The term is used globally in policies, strategies and treaties such as UNFCCC. It is often also used interchangeably with the term ‘sustainability’ although the terms denote different things. ‘Sustainability’ is used to describe an aspiration for finding a better way for humans to live within our support system. ‘Sustainable development’ is the policy manifestation of society’s attempt to achieve that goal.

18. We accept that there is some inconsistency and vague use of language in research, standards and policy documents which often refer to ‘the principle of sustainable development’ or ‘principles of sustainable development’ or the objective of ‘sustainable development’. The lack of consistency and precision is probably a reflection of the diverse stakeholders interested in the development of sustainable development. We have responded to the Environmental Audit Committee’s recent inquiry on the UK’s preparations for ‘Rio +20: The UN Conference on Sustainable Development’ on this matter already.

19. Whilst the term ‘sustainable development’ is used in some UK and Scottish statutes, there is no definition within the statutes. One problem with an imprecise definition is that it is more difficult for the courts to interpret and enforce in a way that is consistent with the legislature’s intentions. Where duties are imposed by legislation on an agency including the terms ‘sustainability’, without an exact definition, this can give rise to issues. For example, Natural Heritage (Scotland) Act 1991 required Scottish Natural Heritage (SNH) to ‘have regard to the desirability of securing that anything done whether by SNH or any other person, in relation to the natural heritage of Scotland is undertaken in a manner that is sustainable. The Act provided no definition of ‘sustainable’ and consequently SNH had to define the term for its own purposes. Given the need for integrated solutions as a matter of public policy it is not useful for every agency to develop its own definition and approach to sustainable development.

20. **The “presumption”** [para 14 – and possibly also 110] will be made to work by those decision makers who have to apply it , but it introduces significant ambiguities. We assume that the Framework is intended to be the guidance envisaged in the new s.33A of the 1990 Act which establishes the Duty to co-operate in relation to planning of sustainable development.
21. The issue is what this presumption means? As currently framed, the presumption appears to promise an easier ride for developers - indeed it is already seen as such by many commentators. In contrast, if there were to be a focus on the global allocation of scarce natural resources to give effect to the concept of ‘inter-generational equity’ derived from the ‘Brundtland definition’ then it could justifiably limit developments to give effect to ‘sustainability’.
22. In practical terms, a planning system that is geared to achieve sustainable development needs to embody a spatial planning approach. Only such an approach is sophisticated enough to balance population patterns, societal and economic needs and market forces with all-important ecological constraints. The government’s new approach is essentially market-led, and devoid of spatial considerations. It therefore risks failing to address population imbalances, economic and social inequality and resource pressures (such as water constraints in the South East). It would have been preferable for the NPPF to include a broad spatial vision of how England should develop, which sets the priorities and key issues for planning authorities to consider in different parts of the country, from a sustainability perspective.
23. The presumption harks back to the language used before 1997, that permission should be granted unless “that development would cause demonstrable harm to interests of acknowledged importance” (PPG 1, 1988, para 15, and even in 1953 – see the discussion in the Planning Encyclopaedia at Vol.2, P70.40).
24. That policy presumption was held to be irreconcilable with the statutory duty that requires that all planning permission decisions shall be determined in accordance with the development plan unless material considerations indicate otherwise (established in s.54A of the 1990 Act, and now in s.38(6) of the 2004 Act). The same conflict will arise here.

25. We note that John Howell MP is reported in *Planning* (9th September 2011, pp.6-7) as telling the Planning Summer School that the presumption is intended to inform plan-making rather than individual decisions. That would be a welcome clarification – but that is not how para 14 currently reads.
26. There is also a difficulty in reconciling the presumption with other presumptions – in the green belt, where there is a presumption against inappropriate development, or the desirability to preserve or enhance conservation areas and protection of listed buildings and their settings.
27. The status of the local plans in relation to the ‘presumption’ is also a major challenge. The NPPF wishes to see development granted permission where local plan is “*absent, silent, indeterminate or where relevant policies are out of date*”. The planning system is used to dealing with policies which are “out of date”, and this accords with the s.38(6) duty. That is all that this part of para 14 should have said.
28. The first problem with what it currently says is that many local plans are ‘absent’. As the Impact Assessment records, only 30% of English authorities currently have a Core Strategy in place, and even fewer have adopted a detailed site allocation DPD. Perhaps the worst problem is that 47% have yet to even publish their core strategy – and these are likely to take over a year to adopt even once they are published. By contrast, the government is proposing to adopt the NPPF this year (i.e. within 3 months from now).
29. Many recent local plans will also deliberately be ‘silent’ on important points, as they will have been adopted following the advice to Inspectors to ensure that DPDs did not repeat national planning guidance. The revocation of the PPS/PPGs and Regional Strategies will leave a vacuum in many if not all Local Plans which it will take time to fill.
30. All existing plans will also be ‘silent’ on the point about the presumption. The ability to receive a certificate of conformity needs greater explanation [para 15]. Since it is impossible for existing local plans to “contain” the presumption – as the presumption was not there before - and the soundness tests for local plans have changed (para 48), how can a certificate (under para 26) ever be granted ?

31. These are practical problems, that could be resolved with time. However, there is no transitional period allowed. Does the government intend that there should be an indeterminate period of hurried plan making and unpredictable appeal decisions before the new system beds down ?

32. There is a major problem with the idea that the default answer applies when plans are “indeterminate”. This would turn the current working of the plan-led system into confusion. Many decisions in planning are made where the development plan policies are in effect “indeterminate”. The issue of conflicting policies in a development plan has been considered in the courts, and has gone all the way to the House of Lords- in *City of Edinburgh Council v Secretary of State for Scotland* [1997] 1 WLR 1447, per Lord Clyde:

“ ... In the practical application of section 18A [the equivalent to s.38(6)] it will obviously be necessary for the decision-maker to consider the development plan, identify any provisions in it which are relevant to the question before him and make a proper interpretation of them. His decision will be open to challenge if he fails to have regard to a policy in the development plan which is relevant to the application or fails properly to interpret it. He will also have to consider whether the development proposed in the application before him does or does not accord with the development plan. *There may be some points in the plan which support the proposal but there may be some considerations pointing in the opposite direction. He will require to assess all of these and then decide whether in light of the whole plan the proposal does or does not accord with it. He will also have to identify all the other material considerations which are relevant to the application and to which he should have regard. He will then have to note which of them support the application and which of them do not, and he will have to assess the weight to be given to all of these considerations. He will have to decide whether there are considerations of such weight as to indicate that the development plan should not be accorded the priority which the statute has given to it. And having weighed these considerations and determined these matters he will require to form his opinion on the disposal of the application. If he fails to take account of some material consideration or takes account of some consideration which is irrelevant to the application his decision will be open to challenge. But the assessment of the considerations can only be challenged on the ground that it is irrational or perverse.*” [emphasis added]

33. The wording at the end of para 14 is likely to be a section that is much debated – at what point is an adverse impact of a development “significant” enough to refuse permission ? and is an expert’s opinion sufficient to be “demonstrable” evidence ? and is a local agenda sufficient to outweigh the benefits ? This is likely to lead to delays in the planning system including longer appeals and more High Court challenges.

34. The presumption in favour of sustainable development could be expressed to facilitate development which meets the minimum sustainable development guidelines in the NPPF. The default answer to developments which met the guidelines would then logically be 'yes', unless there were other reasons to refuse it. For all other developments, it should be 'no' until and unless the developer can show the development satisfies the sustainable development guidelines. The sustainable development guidelines in the NPPF would set the minimum standard. Local authorities would be free to set additional guidelines to ensure that development is sustainable in terms of their local conditions. This would be the very essence of 'localism'. This is not however what the NPPF achieves.

Q3. Are the 'core planning principles' clearly and appropriately expressed?

35. Given the scope of our evidence, we do not propose at this stage to comment in detail on the "core planning principles" set out in para 19.

36. We do wonder what the status of the "key housing objective" in para 107 (to increase delivery) is intended to have.

Q.4 Is the relationship between the NPPF and other national statements of planning-related policy sufficiently clear? Does the NPPF serve to integrate national planning policy across Government Departments?

37. Once it is adopted, it is said that the NPPF will replace all PPS and PPG and most of the significant circulars – as listed in the Consultation Document. Essentially, only National Planning Statements, waste policy and procedural circulars will remain.

38. The assertion that 'stakeholders' can produce their own best practice documents is regrettable. Not only will these take time to produce, but the accumulated wisdom in the existing practice guides will be removed. Flood risk is the most obvious example.

39. The justification for removing the guidance on planning conditions is not justified in the impact assessment document. These are valuable documents, that reflect the vast experience gained whilst making the existing planning system work – in particular by the Planning Inspectorate. They should be retained, as we are otherwise being asked to re-invent the wheel.
40. Harnessing the expertise and good practice that already exist in terms of ecologically favourable and sustainable development, the NPPF should contain a clear list of guidelines for local planning authorities on what types of development are sustainable. This should include guidelines on transport access, materials and resource use, energy consumption, water consumption and waste generation.

Q5. Does the NPPF, together with the 'duty to cooperate', provide a sufficient basis for larger-than-local strategic planning?

41. This enforced co-operation is an untried area. For the most part, it can be expected that local authorities will seek to co-operate amongst themselves, and that many of the “larger-than-local” issues will be addressed without the need for a formal resolution by an outside body. The problem will come with issues where no authority wants to take the lead – for instance, gypsy site provision in the south-east, or the need for an urban extension into neighbouring authorities’ areas (e.g. at Stevenage).
42. The Secretary of State’s role appears to be limited to nationally-significant infrastructure, through the National Planning Statements, and to those applications he may deign to call-in for his own determination. Since there is no spatial plan for England, ‘larger-than-local’ may become a process of planning by appeal.
43. These needs will not resolve themselves. Whilst the local planning authorities are encouraged to draw up their plans on the basis of “objectively-assessed development needs” these will always require an element of judgment – particularly when the market is, by its very nature, only taking a short term view.

Q.6 Are the policies contained in the NPPF sufficiently evidence-based?

44. The Impact Assessment deals with some of the changes that are proposed. This provides limited detail. For instance, it is not clear why the long-term protection on employment land has been removed (see para 75) at the same time as the overall policy is to advocate economic growth. This perhaps reflects the short-term time horizon being put forward for these policies, which sacrifices long-term interests.

45. It is the role of government to set policy priorities. Indeed, many of the decisions appear to be based on opinion, rather than on 'objectively-assessed evidence'. For instance, the choice has been made to remove any target for the use of brownfield land, to remove the requirement to set maximum parking standards for non-residential parking in major development, and to weaken the 'town centre first' policy by removing office development from the sequential test, at the same time as retaining the desire to limit urban sprawl. All of these policies were previously introduced in order to promote sustainable development.