

# Appendix C

## TOWN LEGAL ADVICE NOTE



## EXAMINATION INTO THE ST HELENS LOCAL PLAN

### ADVICE NOTE

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1. Town Legal is instructed on behalf of Murphy Group Ltd to provide this advice note to guide the examination inspectors engaged in the examination of the above-named plan. This note addresses Green Belt (“GB”) policy, guidance and jurisprudence relating to exceptional circumstances (“EC”) in paragraph 136 of the NPPF 2019, against which the plan is being examined. Unless otherwise stated references to the NPPF are to the 2019 version.
2. Paragraph 136 advises “Once established, Green Belt boundaries should only be altered where exceptional circumstances are fully evidenced and justified, through the preparation or updating of plans”. This policy approach is distinct from the longstanding development management approach to development in the Green Belt. As paragraph 143 states, inappropriate development is by definition harmful to the GB. The advice in 144 is that permission for inappropriate development should not be approved except in very special circumstances (“VSC”). The courts have recently commented on these different two approaches which I set out below.
3. The NPPF does not define what does or does not amount to EC; nor does the planning practice guidance which was first published in 2014 provide any further guidance on this issue. Whether EC exist is a matter of planning judgement. In the first place this question is for a plan making authority to consider and justify through the evidence base supporting the Local Plan.
4. Section 39 (2) of the Planning & Compulsory Purchase Act 2004 requires that the plan making function must be exercised with the objective of contributing to the achievement of sustainable development having regard both to the desirability of achieving good design and having regard to national policy and guidance.
5. The NPPF in section 13 sets out policy on the GB. The fundamental aim is to prevent urban sprawl by keeping land permanently open; “the essential characteristics of Green Belts are their openness and their permanence.” The NPPF identifies [134] the familiar five purposes of the GB, pointing out that their general extent is already established. At 136 and following, it states:

“136. Once established, Green Belt boundaries should only be altered where exceptional circumstances are fully evidenced and justified, through the preparation or updating of plans. Strategic policies should establish the need for any changes to Green Belt boundaries, having regard to the intended permanence in the long term, so that they can endure beyond the plan period. Where a need for changes to Green Belt boundaries has been established, through strategic policies, detailed amendments to those boundaries may be made through non-strategic policies, including neighbourhood plans.

137. Before concluding that exceptional circumstances exist to justify changes to Green Belt boundaries, the strategic policy making authority should be able to demonstrate that it has examined fully all other reasonable options for meeting its identified need for

development. This will be assessed through the examination of its strategic policies, which will take into account the preceding paragraphs and whether the strategy:

- a) makes as much use as possible of suitable brownfield sites and underutilised land;
- b) optimises the density of development in line with the policies in chapter 11 of this Framework, including whether policies promote a significant uplift in minimum density standards in town & city centres and other locations well served by public transport; and
- c) has been informed by a discussion with neighbouring authorities about whether they could accommodate some of the identified need for development, as demonstrated through the statement of common ground.

138. When drawing up or reviewing Green Belt boundaries the need to promote sustainable patterns of development should be taken into account. Strategic policy making authorities should consider the consequences for sustainable development of channelling development towards urban areas inside the Green Belt boundary, towards towns and villages inset within the Green Belt boundary or towards locations beyond the outer Green Belt boundary. Where it has been concluded that it is necessary to release Green Belt land for development, plans should give first consideration to land which has been previously-developed and/or is well served by public transport. They should set out ways in which the impact of removing land from the green Belt can be offset through compensatory improvements to the environmental quality and accessibility of remaining Green Belt land.”

6. In *Calverton Parish Council v Nottingham City Council* [2015] EWHC 1078, an unsuccessful attempt at challenging the adoption of a local plan in a case where EC were found to exist to warrant alterations to an established Green Belt boundary, Mr Justice Jay stated :

“In a case such as the present, it seems to me that, having undertaken the first-stage of the Hunston approach (sc. assessing objectively assessed need), the planning judgments involved in the ascertainment of exceptional circumstances in the context of both national policy and the positive obligation located in section 39(2) should, at least ideally, identify and then grapple with the following matters:

- (i) the acuteness/intensity of the objectively assessed need (matters of degree may be important);
- (ii) the inherent constraints on supply/availability of land *prima facie* suitable for sustainable development;
- (iii) (on the facts of this case) the consequent difficulties in achieving sustainable development without impinging on the Green Belt;
- (iv) the nature and extent of the harm to *this* Green Belt (or those parts of it which would be lost if the boundaries were reviewed); and
- (v) the extent to which the consequent impacts on the purposes of the Green Belt may be ameliorated or reduced to the lowest reasonably practicable extent.”

7. This list was later described by Mr Justice Ousley in *Compton Parish Council V Guildford BC* [2019] EWHC 3242<sup>1</sup> at [68] as deliberately broad and not susceptible to dictionary definition. In [72] Sir Duncan Ousley opined:

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<sup>1</sup> URL: <http://www.bailii.org/ew/cases/EWHC/Admin/2019/3242.html>

“The analysis in *Calverton PC* of how the issue should be approached was described by Jay J as perhaps a counsel of perfection; but it is not exhaustive or a checklist. The points may not all matter in any particular case, and others may be important especially the overall distribution of development, and the scope for other uses to be provided for along with sustainable infrastructure”.

8. The *Compton* case was another unsuccessful attack on the lawful adoption of a local plan following an examination inspector’s report which had concluded that, subject to specified main modifications, the plan was sound and there were EC for releasing land from the GB. In *Compton*, the difference between the OAN of 10,678 homes over the plan period, and the plan’s potential to deliver 14,602 homes over that period was a central topic which the Inspector addressed as it was suggested there could not be EC justifying the release of GB land in these circumstances. The examination inspector introduced the need for that level of housing in IR 42-46. I set it out:

“This is dealt with in more detail under Issue 5. But purely in terms of housing supply, there is enough headroom to ensure that the Plan remains robust in the event that there is slippage in the delivery of housing from the allocated or committed sites, avoiding the need to allocate reserve sites; and enough headroom to provide for the anticipated level of unmet need from Woking, bearing in mind that there would be a continuing level of undersupply over the period of Woking’s newly reviewed plan. The overall plan provision would also provide more affordable housing and go further to address serious and deteriorating housing affordability.

43. The reduced housing requirement in MM2 enables the plan to proceed without the [4] additional sites allocated by [Main Modifications], but it is not of an order that would justify the deletion of any of the strategic sites which, in addition to their substantial housing contributions, bring other significant benefits to the Borough through their critical mass and well-chosen locations. Again, this is discussed in more detail under Issue 5.

44. No further sustainability appraisal is required in respect of the requirement of 562 dpa because the overall housing delivery figure of 14,602 homes falls within the range of eight delivery scenarios that were considered as reasonable alternatives, ranging from 13,600 homes to 15,680 homes and the housing allocations remain the same as in the submitted Plan except for [one].

45. The trajectory indicates a 5 year housing land supply on adoption of 5.93 years rising to 6.74 years in year 5. The 5 year supply calculation includes a 20% buffer for past persistent under-delivery and uses the Liverpool method [spreading the catchup evenly over the plan period] in recognition of the contribution made by the strategic locations which typically have a longer lead-in time. These are the Council’s figures and it is recognised that slippage could reduce this supply, but there is enough flexibility built in to the trajectory to maintain a rolling 5 year housing land supply.

46. In conclusion, whilst the submitted plan’s figure of 654 dpa is not sound because it does not reflect the most recent evidence, the Council’s calculated housing requirement of 562 dpa, or 10,678 dwellings over the life of the plan, as set out in the revised version of MM 2 is sound. It reflects the latest evidence and is based on sound analysis. The overall level of housing delivery, currently calculated at 14,602 homes, will ensure that an adequate 5 year supply of land will be maintained and will ensure that the plan is robust; it will deliver sufficient housing to help address the pressing issues of affordability and affordable housing need, and contribute towards addressing unmet housing need in the housing market area.”

9. Most recently Mr Justice Holgate in *Keep Bourne End Green V Buckinghamshire Council et al* [2020] EWHC 1984 dismissed a challenge to a plan based on an allegation that the 2016-based household projections produced by ONS should have been taken into account in the assessment of OAHN.

10. On the facts the 2016 projections produced a 42 % reduction in the number of households as compared to the 2014 based projections upon which the plan was submitted of examination. In reply to a question about whether the 2016 figures represented a “meaningful change” and would have any bearing on the soundness of the plan the Council replied in the negative, based on doubts about the reliability of the projections for plan making, which the inspector accepted. The claimants contended these should have been taken into account and that would have led to a reduction in the need for housing and so removing the case for exceptional circumstance. The plan was being examined under the transitional arrangements and they pointed to the Compton case where the Council had sought to rely on the 2016 household figures (with a range of appropriate adjustments) which that examination inspector had endorsed, as being not in conflict with the letter or spirit of national policy.
11. Holgate J summarised the principles set out by Sir Duncan Ouseley in Compton Parish Council v Guildford Borough Council [2020] JPL 661 at [68]-[72]:-
- “(i) There is no definition of the policy concept of “exceptional circumstances”. The expression is deliberately broad and not susceptible to dictionary definition. The matter is left to the judgment of the decision-maker in all the circumstances of the case;
  - (ii) Whether a factor is *capable* of being an exceptional circumstance may be a matter of law, as an issue of legal relevance. But whether it amounts to such a circumstance in any given case is a matter of planning judgment;
  - (iii) But the suggestion that a factor is legally incapable of amounting to an exceptional circumstance will generally require caution and judicial restraint. The breadth of the phrase and the array of circumstances which may qualify as “exceptional” indicate that judicial emphasis is very much more on the rationality of the judgment made by the decision-maker than on seeking to define what can or cannot amount to “exceptional circumstances”;
  - (iv) “Exceptional circumstances” is a less demanding test than the “very special circumstances” test (as explained in paragraphs 87-88 of NPPF 2012 and now paragraphs 143-144 of NPPF 2019) used in development control in the green belt;
  - (v) There is no requirement that green belt land may only be released as a last resort;
  - (vi) There is no requirement to show that the assumptions upon which a green belt boundary was originally drawn up have been falsified by subsequent events;
  - (vii) Exceptional circumstances may comprise one factor or a combination of factors of varying natures;
  - (viii) General planning needs, for example general housing, are not excluded from amounting to exceptional circumstances. The need does not have to relate to a special form of housing or to a particular level of intensity.”

12. Both the Council and the examination inspector will need to have regard to the PPG that accompanies the NPPF 2019. Under the heading “what is the housing need ?” the PPG advises:

**What is housing need?**

Housing need is an unconstrained assessment of the number of homes needed in an area. Assessing housing need is the first step in the process of deciding how many homes need to be planned for. It should be undertaken separately from assessing land availability, establishing a housing requirement figure and preparing policies to address this such as site allocations. For further details on how constraints should be considered once a housing need figure has been identified, please see [Housing and economic land availability assessment guidance](#).

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13. The Council’s evidence base includes a 2018 Green Belt Review and the Housing Need and Supply Background Paper. As the authorities make clear the need housing is capable of being an exceptional circumstance warranting the alteration of Green Belt boundaries.

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