Consultation response form

This is the response form for the consultation on the draft revised National Planning Policy Framework. If you are responding by email or in writing, please reply using this questionnaire pro-forma, which should be read alongside the consultation document. The comment boxes will expand as you type. Required fields are indicated with an asterisk (*)

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Are the views expressed on this consultation your own personal views or an official response from an organisation you represent?*

Organisational response

If you are responding on behalf of an organisation, please select the option which best describes your organisation. *

Trade association, interest group, voluntary or charitable organisation

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Professional association

Please provide the name of the organisation (if applicable)

The Planning and Environment Bar Association (PEBA)

Chapter 1: Introduction

Question 1

Do you have any comments on the text of Chapter 1?

PEBA has no comments on the drafting of this short introductory chapter.

Chapter 2: Achieving sustainable development

Question 2

Do you agree with the changes to the sustainable development objectives and the presumption in favour of sustainable development?

Not sure

Please enter your comments here

Chapter 2, specifically CDT-NPPF 11 and 12 ("Consultation Draft Text NPPF paragraphs 11 and 12"), raises drafting issues of considerable importance given the scale of historic litigation.

Whilst PEBA recognises several improvements in the drafting and structure of this Chapter, there are certain elements which should be given detailed further consideration.

Q2.1.1: CDT-NPPF 7: "*At a very high level*"

PEBA agrees with this qualification of the status of the objectives and similar additions under CDT-NPPF 8 and 9, which stress that the objectives are not "*criteria against which every decision can or should be judged*".

Q2.1.2: CDT-NPPF 8: "*net gains*"

The term "*to secure net gains across the different objectives*" is however slightly harder-edged and may provoke arguments and related litigation that a "*net loss*" under any heading disqualifies a proposal from qualifying as sustainable development. The concept of "*netting*" stands at odds with the open-textured, inter-dependent nature of the objectives, suggesting a quasi-mathematical calculation.

There is an echo here of the NPPF 14-related litigation about the need for a prior finding of sustainability prior to engagement of the presumption following *William Davis v SSCLG* [2013] EWHC 3058 (Admin), a matter promoted by the Secretary of State's submissions recorded at [37]. This was only definitively ended in *Cheshire East v SSCLG and Renew* [2016] EWHC 571 (Admin).

The Secretary of State may also be inadvertently exposed to reasons challenges in the manner temporarily threatened by the High Court judgment in *East Staffordshire v SSCLG* [2016] EWHC 2973 (Admin), [52], not subsequently followed in the Court of Appeal.

It is respectfully suggested that the more familiar and more general term "*overall benefits*" may align more closely with Government's intention to simplify the policy text at this introductory stage and avoid satellite disputes on the route to the presumption, for example:

"…*(so that opportunities can be taken to secure overall benefits across the different objectives)"*

Q2.1.3: CDT-NPPF 9: "preparation of the policies in this Framework"

The noun "*preparation*" extends to "*this Framework*" in this sentence and an additional noun (either "application" or "implementation") should be inserted before "*the policies*", as the Framework will be published and in force at this point:

"*These objectives should be delivered through the preparation and implementation of plans and the application of the policies in this Framework*"

Q2.1.4: CDT-NPPF 10: "*pursued in a positive way*"

MHCLG's intention to remove the "*golden thread*" litigation in *Wychavon DC v SSCLG* [2016] EWHC 592 (Admin) and subsequent cases up to *East Staffordshire DC v SSCLG* [2017] EWCA Civ 893 is noted (Trustees of the Barker Mill Estates v Test Valley BC [2016] EWHC 3028 (Admin); Reigate and Banstead BC v SSCLG [2017] EWHC 1562 (Admin)).[1]This was heralded in the Housing White Paper ("HWP"), Box 2, page 95.

CDT-NPPF 10's introduction: "*So that sustainable development is pursued in a positive way…*[there is] *a presumption in favour of sustainable development*" is not entirely consistent with MHCLG's apparent intention to develop a very simple pathway through the presumption, in the manner described by Jay J as an "*algorithm*" (*Cheshire East Council v SSCLG* [supra], [24]). The sentence would read more simply if it commenced at "*At the heart*", just as HWP, Box 2 did.

Q2.2.1: CDT-NPPF 11: The Presumption and Plan-Making

The overall structure of CDT-NPPF 11 is logical and an improvement to the comprehensibility of the policy.

We note that 11b has a number of component parts, including at least four new terms/concepts (1) "*strategic plans*", (2) "*statement of common ground*" (via footnote

1

6), (3) "*areas and assets of particular importance*" and (4) "*strong reason for restricting*".

We have made some commentary on the first and second of these terms in Chapter 3 on Plan-Making, Q5 and Q6. In short, MHCLG needs to give very careful consideration to how both terms sit within the existing primary legislation within sections 19, 20 and 33A PCPA 2004.

As to the third new term: "*areas and assets of particular importance*" we strongly welcome the confirmation that CDT-NPPF footnote 7 (replacing the current NPPF footnote 9) is a closed list, as first confirmed in the HWP. This has given rise to considerable complexity in interpretation and argument at inquiry in the last two years: for example, Forest of Dean v SSCLG [2016] EWHC 421 (Admin).This approach will undoubtedly reduce the scope for disagreement and assist in the consistent application of the Secretary of State's policy.

We further welcome the final sentence that confirms that footnote 7 does not extend to policies in development plans.

The only minor drafting point is the distinction between 11b(i)'s "*strong reason*" [for restricting] and 11d(i)'s "*clear reason*" [for refusing]. The HWP, Box 2 (page 95) used the first term, but not the second, merely using the section 38(6) language: "*indicates*". Our point is that it is preferable to ensure consistency of language unless a distinction is intended (in which cases greater clarity is needed).

The first adjective "*strong*" denotes weight or the robustness of the underlying evidence. The second adjective "*clear*" is less obviously connected with pure weight, but *how* the particular reason is presented, and may be perceived as inviting a lower threshold to the refusal of permission. It invites consideration of the jurisprudence on adequacy of reasons, both at first instance by Committees (CPRE v Dover CC [2017] UKSC 79) and on appeal (South Bucks v Porter (No. 2) [2004] 1 WLR 1953).

MHCLG might explore aligning the adjectives wording thus, lest there be arguments that different standards apply at plan examination as against application:

"*The application of policies in this Framework that protect areas of assets of particular importance provide a strong reason for refusing the development proposed*"

Q2.2.2: The Presumption and Decision-Taking: Absence of Relevant Strategic Policies

The drafting of CDT-NPPF 11d has resolved several the ambiguities/lacunae in the "*absent, silent or relevant policies out of date*" triad, explored in *Bloor Homes East Midlands v SSCLG* [2014] EWHC 754 (Admin), [45] and [48]-[53].

The removal of "absent" is welcomed, as there should be few (if any) examples of any complete absence of relevant policies of a development plan in England after

summer 2018 and none likely during the lifetime of the CDT-NPPF. The focus should be on the age and on the relevance of the development plan policies.

Q2.2.3: The Presumption and Decision-Taking: "*Most Important*"

The innovation of a relative (or superlative) qualification to NPPF 14's "*relevant policies are out of date*" is theoretically workable, but may present practical difficulties in the drafting of Applicant's Planning Statements, LPA's Officer Reports, Appeal parties' Statements of Case, Proofs of Evidence and Appeal Decision Letters.

The innovation was not included in HWP, Box 2, so the precise rationale is unclear. The drafting amendment is presumably intended to simplify matters and perhaps to prevent the engagement of the presumption by more tangential policies, for example, a pre-NPPF heritage policy where the scheme has some very limited impact upon the setting of a designated heritage asset. The Secretary of State needs to give careful thought as to whether this will promote simplicity, or simply encourage detailed argument and thence litigation.

The statutory starting point is that regard must be had to the development plan as a whole. (R v Rochdale MBC (2001) P&CR 27, [44]-[50], applied in Stratford on Avon DC v SSCLG [2013] EWHC 2074 (Admin)).

The proposed "*most important*" component therefore directs an exercise of according relative 'value' to individual policies in a manner that will provoke legal challenge where a decision-maker either adopts too narrow a focus (i.e. limiting to a single determinative policy) or too wide a range (i.e. including the afore-mentioned heritage policy on the basis that any harm to heritage assets is important in the light of the statutory duty under section 66(1) of the Planning (Listed Buildings etc) Act 1990).

On the information presented to date, there is a strong case for simply retaining the existing wording, thus:

"(d)*…or the policies relevant to the determination of the application are out-of-date*"

Q2.3: CDT-NPPF 12: "*not usually be granted*"

The additional wording in CDT-NPPF 12: "*Where a planning application conflicts with an up-to-date development plan…permission should not usually be granted*" has not previously been consulted upon in the HWP, and is likely to prove highly controversial.

NPPF 198, the similarly worded provision covering neighbourhood plans ("*not normally*") was subject to consideration in *Woodcock Holdings v SSCLG* [2015] EWHC 1173 (Admin):

"*24 Mr. Honey emphasised those parts of the NPPF which attach importance*

> *to neighbourhood plans and planning (e.g. paragraphs 183 to 185). Paragraph 198 provides that "where a planning application conflicts with a neighbourhood plan that has been brought into force, planning permission should not normally be granted". However, the Secretary of State accepts through Mr. Honey, that paragraph 198 neither (a) gives enhanced status to neighbourhood plans as compared with other statutory development plans, nor (b) modifies the application of section 38(6) of the Planning and Compulsory Purchase Act 2004 ("the 2004 Act"). Moreover, housing supply policies in neighbourhood plans are not exempted from the effect of paragraph 49 and the presumption in paragraph 14 of the NPPF (see paragraph 21 above).*"

Notwithstanding that clear concession, we are aware that it is regularly argued that current NPPF 198 does indeed modify the application of s.38(6) and sets a higher bar than would otherwise be the case where there is a conflict with a neighbourhood plan.

The following sentence in CDT-NPPF 12 appears to indicate that there is no intention to disrupt section 38(6) of the Planning and Compulsory Purchase Act 2004 ("PCPA"), although we note that a similar gloss on the statutory wording is applied: "*should not be followed*".

That would align with the description of the presumption in City of Edinburgh Council v Secretary of State for Scotland [1997] 1 WLR 1447, 1458 (NB followed in *Suffolk Coastal* at [8]):

> "*It has introduced a requirement with which the decision-maker must comply, namely the recognition of the priority to be given to the development plan. It has thus introduced a potential ground on which the decision-maker could be faulted were he to fail to give effect to that requirement. But beyond that it still leaves the assessment of the facts and the weighing of the considerations in the hands of the decision-maker."*

However, if that is the case, then it is unclear why the term "*not usually*" is necessary.

There is a real danger of a misconstruction of the statutory scheme: see for example the "*exceptionality*" threshold described by Green J in *East Staffordshire DC v SSCLG* [2016] EWHC 2973 (Admin), [31], expressly disavowed by Holgate J in *Trustees of the Barker Mill Estates*, [143] [supra]. Similar issues arose in certain of the judgments that followed *William Davis v SSCLG* [2013] EWHC 3058 (Admin).

Whilst acknowledging that MHCLG plainly wish to strengthen the weight to be accorded to an "up-to-date" plan and thus incentivise plan-making, the notion of a "*usual*" position, does not sit easily with the more balanced position adopted in section 38(6), which permits of a wide range of material considerations. It is therefore respectfully submitted that CDT-NPPF 12 should simply retain the statutory wording:

"*Where a planning application conflicts with an up-to-date development plan as a whole (including any neighbourhood plans that have been brought into force), permission should be refused, unless material considerations indicate otherwise*."

Question 3

Do you agree that the core principles section should be deleted, given its content has been retained and moved to other appropriate parts of the Framework?

Yes

Please enter your comments here

The deletion and export to the specific parts of the Framework has improved clarity and navigability of the document. A good example is in Chapter 15, CDT-NPPF 168a and b where "valued landscapes" are considered alongside "the countryside", making clear the hierarchy of landscape protection.

Question 4

Do you have any other comments on the text of Chapter 2, including the approach to providing additional certainty for neighbourhood plans in some circumstances?

We have set out above additional comments on CDT-NPPF 12, as an adjunct (or postscript) to CDT-NPPF 11 and the presumption. If MHCLG intended that this should be dealt with under Q4, then this should be addressed here.

The only remaining provisions of Chapter 2 that gives rise to clear drafting issues are CDT-NPPF 13 and 14 on neighbourhood plans.

Q4.1: CDT-NPPF 14: "*Recently brought into force*"

For consistency, MHCLG should include a footnote in the same terms as CDT-NPPF 212a: "up to and including 11 December 2018", see also the Consultation Proposals document, page 25, Q40.

Q4.2: CDT-NPPF 14: "*Identified housing requirement*"

The new provision for providing additional certainty for neighbourhood plans will only provide the requisite certainty where the "indicative housing requirement" under CDT-NPPF 66 and 67 is limited to two options: (1) a strategic plan housing requirement figure (i.e. tested for soundness under CDT-NPPF 36) or (2) an LPA-provided figure (in the absence of the "request" threshold/gateway requirement in CDT-NPPF 67).

Draft PPG NP2 and NP3 (Neighbourhoood Planning Chapter Questions NP2 and NP3: please refer to our Annex of PPG paragraphs attached to our covering letter) allude to a third way, where a qualifying body might determine their own housing requirement figure. This is initially limited in PPG NP2 to circumstances where the LPA fail to provide a figure within a reasonable time. However NP3 then opens up

the prospect of an "*alternative figure*" where the strategic policy has set the minimum figure. It continues with the wording:

"*Indicative housing requirement figures are <u>not binding</u> on the neighbourhood plan, but will be important considerations during examination of the plan.*"

However, NP4 then re-confirms: "*the housing requirement figure provided by the local authority should be regarded as a <u>minimum</u>.*"

This PPG drafting touches upon circumstances where the LPA is preparing a development plan document for a given settlement with a specific housing requirement and/or allocations and the qualifying body (often a parish council) disputes that figure, as part of its objections to the emerging development plan document. In such cases, unless the LPA (exercising its general statutory duty under paragraph 3 of Schedule 4B) discourages the submission of the neighbourhood plan, then these disagreements are required to be fought out through the examination process.

The intention of PPG NP4, coupled with CDT-NPPF 14, is tolerably clear that MHCLG does not wish to allow the preparation of neighbourhood plans to become an alternative route by qualifying bodies to the object to housing figures in development plan documents. PPG NP3 and NP4 should therefore be drafted in a more absolute manner:

"*The only circumstances where a NP can include an alternative housing requirement figure to that figure (a) set out in an adopted strategic policy* [under CDT-NPPF 66] *or (b) provided by the local planning authority in advance of adoption of the strategic plan* [under CDT-NPPF 67]*, is where the alternative housing requirement figure exceeds that figure. This is a mandatory national policy requirement for the purposes of paragraph 8(2)(a) and (e)*"

Chapter 3: Plan-making

Question 5

Do you agree with the further changes proposed to the tests of soundness, and to the other changes of policy in this chapter that have not already been consulted on?

Not sure

Please enter your comments here

Under Q5, we will address the key changes to the soundness criterion under CDT-NPPF 36.

We have addressed all other changes in a single, continuous text under Q6, as it is difficult to extract out the issues listed under the Consultation Document's page 11, from the text changes proposed on pages 10-11.

Q5.1: CDT-NPPF 36a: “Positively prepared”

The phrase “*strategy which will, as a minimum, meet as much as possible of the area’s objectively assessed needs*” must be rendered consistent with CDT-NPPF 11b: “*as a minimum, provide for objectively assessed needs*”.

A similar issue arises out of the addition of “*where it is practical to do so*”
The reference to “*possibility*” and “*practicality*” may be an attempt to refine CDT-NPPF 11b(i) and (ii). If that is the case, this should be footnoted below the text of CDT-NPPF 36a.

By the same token, “*clear and justified method*” may benefit from clear sign-posting to Chapter 5, notably CDT-NPPF 61: “*standard method in national planning guidance = unless there are exceptional circumstances that justify an alternative approach…*”. An additional footnote reference to this provision would assist.

Q5.2: CDT-NPPF 36c: “Effective”

We note that the term “dealt with rather than deferred” has been defined in the Draft PPG at P4. That choice of words is imprecise and would be better expressed by reference to the statutory scheme (e.g. in sections 19 and 33A PCPA) or expressed in concrete language, by reference to the contents of the plan documents rather than the more abstract concept of “dealing with”:

“*addressed in adopted policies*, *without deferral to subsequent plan review*”.

Question 6

Do you have any other comments on the text of chapter 3?

Under this heading, we have addressed a range of provisions within Chapter 3, not directly covered by Q5.

Q6.1.1: CDT-NPPF 16a: “*Objective of contributing to sustainable development*”

Footnote 11 should directly reference section 39(2) PCPA 2004, rather than refer generally to “*a legal obligation*”.

This point is of wider application in the footnotes/Glossary. Members of the public, without access to legal advice, occasionally make reference to this general duty at local plan examinations, in both written and oral submissions, so it is helpful that there is precision here.

Q6.1.2: CDT-NPPF 16c: “*Meaningful engagement*”

The additional adjective “*meaningful*” is redundant here. A better description may be “*effective*” as used at PPG P25’s first paragraph: “*effective discussion and consultation with local communities, businesses and other interested parties*”.

Q6.2: CDT-NPPF 18: "*Where more detailed issues need addressing*"

The term "*local policies*" is a notable innovation in the CDT-NPPF text. It replaces what has conventionally been understood throughout the PCPA 2004 era as "policies in the local plan". This is also closely related to the statutory term: "*local development documents*" under section 17 PCPA 2004.

The term also overlaps two entirely different statutory plans: development plan documents assessed for soundness under section 19 and 20 PCPA 2004 and neighbourhood development plans subject to the lighter touch regime under section 38A PCPA 2004 and paragraph 8 of Schedule 4B of the Town and Country Planning Act 1990 ("TCPA").

MHCLG plainly seek to introduce greater flexibility to the plan-making process. However particular care should be taken in the definition of the appropriate plan content, given the level of existing controversy in this area and the particular nature of the local planning authority's role under Schedule 4B.

The term "*detailed issues*" should therefore be accompanied wherever possible by wording that fits the statutory scheme, notably where this relates to "*allocations*" or "*development management policies*": see Regulation 5 of the Town and Country Planning (Local Planning) (England) Regulations 2012.

Q6.3.1: CDT-NPPF 20a: "*Pattern and scale of development*"

Precision in the terminology of CDT-NPPF 20 is vital, given that this is presented as the irreducible minimum of plan content.

CDT-NPPF 20(a)'s term "*pattern…of development*" is not a well-established term and potentially extends further into questions of allocation than appears to be intended. It may be easier to delete the term to avoid confusion and consequent litigation, or at the least add an explanation in a manner similar to the glossary of the current NPPF.

A preferable term might be "*settlement hierarchy*" within rural districts with multiple settlements or "*directions of growth*" in urban or mixed urban-rural districts/boroughs.

Q6.3.2: CDT-NPPF 20c: "*Appropriate*"

Following the same theme, CDT-NPPF 20c should make clear whether the minimum policy content is a requirement figure, i.e. "*sufficient retail, leisure and other commercial development*": see notably the text at CDT-NPPF 24 referring to objectively assessed needs (NB without specific reference to housing). Similar issues were explored in the context of B8 development in Trustees of the Barker Mill Estates v Test Valley BC [2016] EWHC 3028 (Admin).

Q6.4.1: CDT-NPPF 21: "*Should not extend to detailed matters…*"

The prohibition upon strategic policies covering detailed matters which are more appropriately addressed by (first-named and thus emphasised) neighbourhood plans or other local policies is not as clearly drafted as may be necessary to avoid a tussle over allocations and development management policies.

Whilst accepting that the Framework simply seeks to set out a general principle at this stage, MHCLG should carefully consider how it wishes to guide plan-makers at all levels, to ensure that this prohibition is not read as a soundness objection (under CDT-NPPF 36d) to the inclusion of allocations in strategic plans nor to development management policies that seek to direct growth to particular settlements. In this respect, see our concerns in respect of CDT-NPPF 14 and 66-67 and PPG NP3 that national policy should not inadvertently result in drawn-out dispute between strategic and neighbourhood level as to the correct apportionment for a given settlement within the settlement hierarchy.

Q6.5: CDT-NPPF 23: Reviews

The statutory duty under Regulation 10A of the Town and Country Planning (Local Planning) (England) Regulations 2012 (as amended) specifies that the review must be "*completed*" within the 5 year period.

There is some vagueness in the policy wording as to how early the relevant local planning authority should commence the review process, and in particular, how far the introduction of the present CDT-NPPF should be seen as a trigger for such commencement: see CDT-NPPF 207 and 208. This is important as certain authorities with plan adoption dates in 2012, 2013 and 2014 will be very shortly approaching the relevant completion dates.

Equally, there is a lack of clarity as to how MHCLG seeks to ensure compliance with Regulation 10A, as supplemented by CDT-NPPF 23 and PPG P39. PPG P39 merely makes reference to CDT-NPPF 75 activating 11d.

One answer, outside the current text of NPPF, but mandated within PPG would be a single schedule of dates for all local planning authorities' respective documents specifying (a) the review completion date; (b) the LPA's progress with the review, as attested by the most recent LDS or a bespoke document.

If, on the other hand, MHCLG intend to impose any form of sanctions or corrective action for failure to carry out a review, then they should be transparent about this position at the earliest possible opportunity.

Q6.6: CDT-NPPF 29: Statement of Common Ground

Statements of Common Ground ("SoCG") are another major innovation through the CDT-NPPF. PEBA welcomes this innovation, which follows the detailed recommendations of the Local Plan Expert Group and as set out in the PRHRP Consultation in 2018.

The text of CDT-NPPF 29 is fairly sparse, and a significant amount of detail has been deferred to the Draft PPG: P6 to P24. SoCGs do not have any specific statutory status, save through section 19(2)(a) PCPA 2004, so the PPG will become a document of very considerable importance.

This is the first of the five main PPG Chapters (excluding the Build to Rent Chapter which is fairly narrow in scope and which has not been expressly raised in a specific Question within the Consultation Proposals document), where no specific comment has been sought but the present consultation presents the last opportunity prior to publication to address specific drafting points. For this sub-section we have only a few short observations.

The overriding absence from CDT-NPPF 29 and from P7-P12 is the specific point at which a SoCG should be commenced. P7 requires publication "*following publication of the revised Framework*" but it is unclear if that means within a short timeframe, i.e. before the end of 2018, or whether publication can be deferred substantially into 2019, depending upon the particular stage that the development plan preparation/submission has reached.

This is not an academic issue, given the CDT-NPPF 11b/Footnote 6 reference to statements of common ground and the inevitable arguments by development promoters that the extent of unmet need from neighbouring authorities may amount to a material consideration within a given application.

There is merit in excluding neighbourhood plan qualifying bodies from the list of "*additional signatories*" under P13 and P14. It is important that the process of production of SoCGs should be conducted wherever possible by professionals with expertise in strategic planning or specific technical subject matter.

Q6.7: CDT-NPPF 30 and 33: "*Local policies*"

The new terminology: "*local policies*" will prove challenging for both specialists and non-specialists.

Our recommendation is that this hybrid term should be removed. The term "*local plan policies*" should be restricted to those within a development plan document, and the term "*neighbourhood plan policies*" to those within a neighbourhood plan. Where both are grouped together in the CDT-NPPF policy, both terms should be used separately.

The distinction matters, both as a matter of law and of practicality.
Within Chapter 3, read as whole, there appears to be a faint suggestion that the twin tiers of "strategic" and "local" should be met only by development plan documents covering the matters set out under CDT-NPPF 20, with all remaining detail to be addressed by neighbourhood plans. In short, there is an apparent suggestion that the development plan document that deals with "*local policies*" may be redundant. This did not form a prominent part of the HWP or PRHRP consultations and has plainly not been subject to Parliamentary scrutiny.

There remain clear reasons, firmly rooted in the existing PCPA 2004 (sections 17 and 38) and the 2012 Regulations, notably Regulation 5, for ensuring that non-strategic policy content is retained in borough-wide/district-wide policies, for example: landscape, heritage, ecology and recreational policies. Equivalent neighbourhood plan policies are rarely drafted to the requisite precision.

More directly in the context of housing which forms the major theme of the present CDT-NPPF, there remain strong reasons for ensuring that the bulk of the allocation and development management policy-making process is concentrated at the LPA level. It is understood that there is political interest in support for the neighbourhood plan process, but there is no substitute for qualified professional involvement by trained officers, familiar with the legislative requirements under PCPA 2004 and the technical demands of the plan-making process.

The removal of the fused terminology of "local policies" would go some way towards respecting the current statutory scheme.

Q6.8.1: CDT-NPPF 34: Viability

CDT-NPPF 34 sets out the fundamental principle that the majority of viability assessment should be conducted at the plan-making stage: see also CDT-NPPF 58. This is a significant change to development management and raises substantial questions of resourcing, timetabling and expertise.

In that latter respect, MHCLG will be provided with abundant specialist advice on these issues from RICS, RTPI, LGA and related specialist associations such as the HBF on how viability assessment can operate at a technical level.

PEBA has not conferred directly with those organisations and its position is solely confined to the text of the CDT-NPPF and PPG as presently drafted. Viability is of course not specifically a statutory matter and therefore PEBA does not say that there is any specific statutory problem that arises.

However, from the information provided to date, PEBA has significant practical concerns that the effect of CDT-NPPF 34 and 58, read together with the Draft PPG Chapter on Viability could be substantially to prolong the strategic plan examination process, and to generate further disputes at the application and appeal stage. As Draft PPG V19 records: "*Complexity and variance is inherent in viability assessment*".

We have focussed our answer here initially on PPG V3 to V6 covering plan-making, extending to V11 to V18 on standardised inputs.

We have addressed the specific questions on public availability under Q7 and individual applications under Q8 below.

6.8.2: V3: "*Iterative*"

This adjective is already well-established in the plan-making context in respect of

SEA (Cogent Land LLP v Rochford DC [2012] EWHC 2542 (Admin), [98] and Ashdown Forest Economic Development LLP v SSCLG , [4] and [96]). It is apt to an evidentially complex process. Nonetheless it assumes that cut-offs can be imposed for that evidence.

A particular problem with viability evidence is that it is often time-dependent, being subject to recent valuation/market data, and subject to prevailing economic conditions. The problem is arguably more acute in respect of viability (than other time-dependent evidence,e.g. ecological data) because of the direct relationship between the given policy requirement and the financial position of the landowner/promoter who benefits from an allocation. This direct financial interest will inevitably drive the timing and amount of plan submissions.

For the Draft PPG on Viability to operate effectively during the plan preparation and examination phase, MHCLG will need to take particular care to ensure that Inspectors are provided with a clear framework for dealing with viability subject matter within an appropriate timeframe, commensurate with its complexity but not subject to inordinate delay, requiring re-submission of evidence.

Q6.8.3: V4: Typology Approach

PEBA defers to the specialist professional consultees in property valuation in respect of the merits and procedural practicality of a typology approach. For present purposes, we simply note that the guidance requires precision in respect of certain key terms: namely "*comparable case study sites*", "*outliers*" and "*masterplan approach*", as well as properly distinguishing elements that are advisory: "*may be used*" and those elements which are more optional: "*can be helpful*". Such narrow linguistic definitions can be extremely hard-fought at examination, with consequent risk of s113 PCPA challenge.

Q6.8.4: V5: "*Sites that provide significant portion of planned supply*"

MHCLG should consider whether this covers only large single sites or a category of smaller sites that collectively contribute a significant portion.

Q6.8.5: V11: "*Average figures*"

The definition here of standardised inputs as "*average figures*" and "*adjustment*" will require further explanation to provide a transparent and practical test at examination.

Q6.8.6: V12: "*Costs*"

As identified above, the difficulty in respect of costs will arise from lapse of time – especially those which may be related to ongoing negotiation with other parties: such as infrastructure costs, finance costs and abnormal costs.

There is a tension here with the overriding principle in CDT-NPPF 11b: "*plans should be sufficiently flexible to adapt to rapid change*".

Q6.8.7: V13-V17: EUV+

RICS and equivalent specialist practitioners will be best placed to advice on the definition of "*existing use value plus premium*" (EUV+) that has been used in PPG V13 and V14, and whether this reflects the best industry practice.

On the face of V16, it appears that the recommended assessment approach may be over-dependent upon the availability of comparable date in assessing the appropriate minimum premium.

Within V17, MHCLG may also wish to review the language that accompanies the suitable return to developers: "*may be considered*", as to whether the numbers provided are fixed tests, and whether this approach applies merely for plan-making or to decision-taking as well.

Chapter 4: Decision-making

Question 7

The revised draft Framework expects all viability assessments to be made publicly available. Are there any circumstances where this would be problematic?

Not sure

Please enter your comments here

PEBA has no comment on this proposal.

Question 8

Would it be helpful for national planning guidance to go further and set out the circumstances in which viability assessment to accompany planning applications would be acceptable?

Please select an item from this drop down menu

Please enter your comments here:

Q8: Viability Assessment of Individual Applications

PEBA's position here overlaps with that under Q6.8 above in respect of viability assessment at the plan preparation and examination stage, with the reservations expressed above under Q6.8.1.

Given the angle of the question, whether further guidance is needed, the fundamental question is perhaps whether Draft PPG V7 to V9 currently provide sufficient detail to provide landowners with the certainty as to whether their

application will be considered by the local planning authority, and that any grant on such an application would not be the subject of third party objection and potential legal challenge.

Expressed another way, would LPA case officers know with certainty how to accept and then consider such an application and how to advise a planning committee accordingly?

On the face of the guidance, as presently drafted, there is a clear need to provide a full explanation of the applicable circumstances and the considerations that an authority should take into account.

V7 simply lists examples, with very limited detail. It is a wide list, for example: “unallocated sites”, variation from standard models, and “significant change in economic conditions”.

V8 appears to delegate elements of the specification exercise to the development plan, although this will in turn be strongly guided by the CDT-NPPF and PPG. Without wishing to specify the precise figures that would apply or the processes that should be followed, it would appear that each of the circumstances described in V7 should be amplified with a description of the kind of evidence documents that should be presented to LPAs, for example: details of the infrastructure costs or changes in economic conditions.

This is particularly important if there were any intention to include such viability evidence on a local list, pursuant to section 62 (4A) of the Town and Country Planning Act 1990 Article 11(3)(c) of the Town and Country Planning (Development Management Procedure) (England) (Order) 2015.
It is therefore important that MHCLG expedite the standard template under V20 currently described as [template under development].

Question 9

What would be the benefits of going further and mandating the use of review mechanisms to capture increases in the value of a large or multi-phased development?

Please enter your comments below

PEBA’s position here is similar to that for Q6 and Q8 in respect of the need for clarity in guidance, whilst observing that the use of mandatory review mechanisms is a matter best addressed by the development sector and its specialist advisers, coupled with the local government sector.

Draft PPG V9 and V10 are fairly sparse on detail. V10 does little more than cite the resulting “certainty”, so will need expansion.

Question 10

Do you have any comments on the text of Chapter 4?

PEBA welcomes the fact that much of Chapter 4 echoes existing national policy, and will therefore give rise to fewer transitional issues than those listed under Chapter 2 and 3 above, and Chapter 5 which follows.

In particular, we welcome the retention of the guidance on emerging plans at CDT-NPPF 49 and the guidance on prematurity at CDT-NPPF 50. These have stood the test of time without giving rise to substantial legal challenge in their own right and are well-understood across the sector.

Q10.1: CDT-NPPF 39: Sustainable Development

The final sentence of CDT-NPPF 39 "*Decision-makers at every level should seek to approve applications for sustainable development where possible*" recalls elements of the "presumption outside NPPF 14" which was considered in *Wychavon DC v SSCLG* [2016] EWHC 592 (Admin) and *East Staffordshire DC v SSCLG* [2016] EWHC 2973 (Admin) and [2017] EWCA Civ 893.

Such issues will arise for as long as the CDT-NPPF contains three separate references to the "sustainable development", first within Chapter 2 in advance of CDT-NPPF 11, second within CDT-NPPF 11 itself and third, here in the decision-taking chapter.

This connects with the concerns addressed above in respect of CDT-NPPF 12 "*not usually*".

If Government's position remains that an application can amount to sustainable development (a) where the presumption is not engaged and (b) the proposal is in conflict with the development plan, then no change is required to the CDT-NPPF text. The general "sustainability" of the proposal is a material consideration weighing in favour of the proposal.

If Government intends some form of alternative position, relying upon the new wording of CDT-NPPF 12, that an application that conflicts with a development plan is necessarily "*unsustainable*" or incapable of amounting to sustainable development, then that gives rise to considerable conceptual problems and additional text would be required for CDT-NPPF 39.

The correct position is that CDT-NPPF 11 cannot "cover the field" in respect of what amounts to an application for sustainable development. An application that conflicts with an up-to-date development plan is not "by definition" unsustainable. There is no presumption in favour of such an application being granted, however the sustainable nature of an application is still capable of amounting to a material consideration in favour of grant.

Q10.1: Planning Conditions

There is value in publicising model conditions within the PPG or via PINS. Inspectors often refer "PINS model conditions" which is either a reference to those in the old

11/95 or the PINS Inspector's Training Manual. There is a real need for model conditions to once again be widely promulgated.

Section 100ZA (2) TCPA 1990 will codify the tests for conditions, alongside forthcoming secondary legislation, such that CDT-NPPF 56 may need slight amendment, see notably (2)(b) and (c), in particular that there will technically be four tests (rather than six):

> "*(2) Regulations under subsection (1) may make provision only if (and in so far as) the Secretary of State is satisfied that the provision is appropriate for the purposes of ensuring that any condition imposed on a relevant grant of planning permission for the development of land in England is—*
>
> > *(a) necessary to make the development acceptable in planning terms,*
> > *(b) relevant to the development and to planning considerations generally,*
> > *(c) sufficiently precise to make it capable of being complied with and enforced, and*
> > *(d) reasonable in all other respects*."

Q10.2: CDT-NPPF 57: Planning Obligations

This paragraph would perhaps benefit from a footnote reference to Regulation 122(2) of the Community Infrastructure Levy Regulations 2010, consistent with the above-stated principle that legislative references should be sign-posted for members of the public, who do not always have access to legal advice.

Chapter 5: Delivering a wide choice of high quality homes

Question 11

What are your views on the most appropriate combination of policy requirements to ensure that a suitable proportion of land for homes comes forward as small or medium sized sites?

Please enter your comments here

PEBA has no formal view on the merits of the policy proposals under CDT-NPPF 69, and sub-paragraphs (a) and (b), or their drafting. This also applies to Q12 and Q13 below.

It is anticipated that detailed responses will be made by the HBF and individual housebuilders and certain local planning authorities.

Question 12

Do you agree with the application of the presumption in favour of sustainable development where delivery is below 75% of the housing required from 2020?

Please select an item from this drop down menu

Please enter your comments here

PEBA has no formal position on the merits and percentage levels within the Housing Delivery Test.

It should be noted, however, that LPAs are increasingly referring to the HDT (as a draft) expressing confusion as to whether or not the yardstick is the annualised annual requirement or that requirement plus backlog. Further clarity is required.

Question 13

Do you agree with the new policy on exception sites for entry-level homes?

Please select an item from this drop down menu

Please enter your comments here

PEBA has no formal view on the merits of the proposal or the drafting of CDT-NPPF 72.

Question 14

Do you have any other comments on the text of Chapter 5?

PEBA has identified several further issues across the text of Chapter 5 and the explanatory Draft PPG Chapters for Local Housing Need Assessment (LHNA), Housing Delivery (HD), Plan-Making (P) and Neighbourhood Plans (NP).

Q14.1: CDT-NPPF 61: Standard Method

PEBA welcomes the introduction of a standard method for local housing need assessment.

This moves beyond the lack of precision in the current policy and guidance, which was identified as arguably the central problem facing LPAs in the preparation of their development plan documents, including a number of soundness/duty to cooperate failures. It has also occupied a disproportionate amount of inquiry time.

It is however imperative that some of the old ambiguity is not permitted to return through the Draft PPG text.

Q14.2: CDT-NPPF 64: Affordable Housing Provision: "*Major housing development*"

MHCLG may wish to confirm that the term "*major housing development*" is that in the Glossary, perhaps by footnoting Article 2 of the Town and Country Planning (Development Management Procedure) (England) Order 2015:

"major development" means development involving any one or more of the following— (c) the provision of dwellinghouses where— (i) the number of dwellinghouses to be provided is 10 or more; or (ii) the development is to be carried out on a site having an area of 0.5 hectares or more and it is not known whether the development falls within sub-paragraph (c)(i).

The immediate context "*proposed*" could be read as suggesting larger allocations than 10 units or the 0.5 hectare criterion. The Glossary definition has traditionally been applied in NPPF to landscape designations, e.g. AONB at NPPF 116.

Q14.3: CDT-NPPF 66: Strategic Plans and Indicative Requirement

We have set out above under Q4 that CDT-NPPF 66 and 67 must ensure that both LPAs and Neighbourhood Plan qualifying bodies have a limited range of options for setting the "*indicative housing requirement*".

The text of CDT-NPPF 66-67 and Draft PPG NP2, NP3 and NP4 need to operate seamlessly. That is not clear on the current text. CDT-NPPF 66 provides that the primary example of a failure to follow the strategic policy figure is "*a significant change of circumstances*", whilst NP3 refers to "*compelling evidence to support a departure*". These are not the same, the first denoting a concrete, physical question of process, the latter being more open, including potentially a difference of view from the LPA on the position that a settlement occupies within a settlement hierarchy. NP3 should so far as possible use the CDT-NPPF 66 wording, rather than divert from it.

Q14.4: CDT-NPPF 74 and HD10: Past Shortfalls

The confirmation that the preferred approach to addressing past shortfall is the 'Sedgefield' approach, within the first five years, is welcomed in terms of clarity.

HD10 however refers to the LPAs "*may need to reconsider their approach*". It is not entirely clear at what stage this process of reconsideration would take place: whether in the Action Plan or as part of a plan review, and consequently at what stage an LPA should then take steps to revise their policies. MHLCG may wish to clarify this here or elsewhere in the new PPG Chapter on Housing Delivery.

Q14.5: CDT-NPPF 75: Annual Position Statements

CDT-NPPF 74b and 76 refer to Annual Position Statements ("APS").
APSs are unprecedented in the context of Housing Land Supply assessment in the way in which they involve detailed procedural steps: consultation, submission, a form of examination/recommendation, and publication without any of the statutory framework that supports the preparation and examination of development plan documents and neighbourhood development plans.

MHCLG appears to consider that these documents can perform a central function in

the 5YHLS process, potentially reducing the extent of debate on housing land supply at application and appeal.

If that is the intention then the Draft PPG (HD21 to HD28) that supports this process needs to be drafted with maximum clarity in respect of timing and procedural requirements.

MHCLG will recall that the Local Plans Expert Group proposed a staged approach with fixed timescales: Report, paragraph 42:

> *iii….Local authorities will be responsible for preparing their trajectory drawing on information gathered from known landowners/site promoters, and this should then be used to set out the Five Year Housing Land Supply Statement, which should be submitted to PINS (or a suitable alternative independent body) for it to be formally tested by an Examiner (who may be an PINS Inspector or relevant qualified professional). It is important that the views of relevant organisations are addressed as part of this process, so this could involve one or both of the following:*
>
> > *• The Five Year Housing Land Supply Statement is prepared by the local authority in collaboration with a Working Group drawn from relevant organisations, including representatives of the development industry, with a statement of common ground setting areas of agreement or disagreement on the trajectory being submitted to the Examiner for consideration, and*
> >
> > *• The trajectory is published for a consultation period of four weeks, inviting representations to be made that are then considered by the Examiner. The Examiner will normally rely on written representations but may at their discretion schedule an examination hearing session to consider specific matters.*
>
> *iv. Based on the trajectory within the submitted Five Year Housing Land Supply Statement, the statement of common ground and/or any representations received, the Examiner will adjudicate on the matters of dispute and arrive at a 'concluded' trajectory and five year land supply position, including specifying the number of years supply as at the preceding 1st April. This 'concluded' figure that should be reported within the local authority's AMR. If no representations are received and there is a statement of common ground agreeing all aspects of the trajectory, the Examiner need simply validate the Five Year Housing Land Supply Statement and 'conclude' it.*
>
> > *v. Where a Local Plan (with its Housing Implementation Strategy and five year land supply trajectory) has been examined and found sound in the period up to December based on a land supply position as at 1st April of that year, this is assumed to be the 'concluded' five year land supply position for that year and there is no need for a separate Five Year Housing Land Supply Statement to be submitted for examination.*
> > *The concluded trajectory and five year land supply position following*

examination should be considered as the 'concluded' five year land supply position for the purpose of decision taking for a twelve month period from its publication by the Planning Inspectorate, including at s.78 appeals. Over the twelve month period this will remain the case even if circumstances are considered to have changed, for example due to new planning permissions being granted or sites becoming unavailable. Such changes would need to be reflected in the subsequent year's Statement. Where the Council does not produce a trajectory for determination by the Examiner, the 'default' position is that there is no five year land supply. The attachment of substantial weight to either default or 'concluded' position should be reflected in the NPPG, consistently with paragraph 49 of the NPPF.

This was considered in the HWP at A.79 and A.80 but the procedure was less clear-cut than the LPEG suggestions:

A.79 In addition, to ensure the approach is clearer and more transparent, guidance will set out more detail on how 5 year land supply should be calculated, including making appropriate allowance for the fact that smaller sites tend to be built out more quickly than larger ones. We also propose that guidance would make clear that local planning authorities would need to publish their assessment in draft, which would then need to be considered and agreed by the Planning Inspectorate.

A.80 We are interested in views on whether the Inspectorate's consideration of the draft should be confined to whether the approach pursued by the authority in establishing the land supply position is robust, or whether the Inspectorate should also make an assessment of the supply figure itself. If, following this process, a five year housing land supply has been established, national policy would make clear that relevant plan policies for the supply of housing should not be deemed out of date due to a lack of five year land supply for the ensuing year.

Question 16
Do you agree that:
…
b) the Planning Inspectorate should consider and agree an authority's assessment of its housing supply for the purpose of this policy? c) if so, should the Inspectorate's consideration focus on whether the approach pursued by the authority in establishing the land supply position is robust, or should the Inspectorate make an assessment of the supply figure?

The HWP Consultation response to Q16(b) and (c) does not address procedure beyond general references to resourcing:

Government response (question 16 b and c)

We have noted the support for the Inspectorate's role in this approach and

are setting out the details in guidance. The resource requirements and capacity of the Inspectorate have been a key consideration in the development of this policy and guidance. We have also considered the concerns about the interaction of this proposal with local plan preparation, and about the workability of the proposal. We are proposing to make clear in policy and guidance that the demonstration of a five year land supply with a 10% buffer can be part of a local plan examination. We are committed to encouraging plan-making and to reducing the number of appeals brought on the basis of a lack of five year supply where there is a newly made plan. We are providing more detailed guidance on the assessment of five year land supply to ensure that assessments are more consistent, transparent and robust.

The APS proposal is replacing a process that at s78 appeal has often been subject of detailed cross-examination of expert witnesses on a site-by-site basis, occupying substantial inquiry time, site visits, tabulation and closing submissions. Even Inspector-led hearings have often taken a site-by-site basis, with substantial frontloading of the evidence through statements of case and statements of common ground.

The APS processes are going to become a lightning rod for disputes over housing supply, and we have therefore scrutinised the explanatory PPG text closely, to consider whether LPAs, the development industry and other participants have been provided with clear and consistent guidance to understand how this will operate in practice. If the process is to be robust, then it needs a tightly defined set of procedural controls to ensure that the strengths of the existing system are retained, and that LPAs' assessments, assumptions are properly tested and are based upon clear and transparent evidence. We recognise that for authorities which have received a number of housing appeals that this provides a means by which the LPA will not have to repeatedly address the 5 year supply issue and it will therefore assist in the consistency of decision making and avoiding the duplication of resources.

Unless these provisions are introduced with the greatest care and the opportunity for rigorous independent testing is provided then there is a danger of this becoming a fertile area for litigation.

Q14.6: PPG HD21, H22, HD27: Timescales

The APS process is intended to be an annual process, akin to Annual Monitoring Reports ("AMR") and the proposed Housing Delivery Test. There is however very little clarity in the PPG as to what the relevant timescale will be for publication.

PPG HD22 provides the only indication that an intention to submit an APS must be issued by 1 April in each year. HD21 refers to the publication of a single Inspector's Report with recommendations, repeated in HD28. There is little assistance from CDT-NPPF 74's footnote 28, which simply records the cut-off dates for "recently adopted plans".

Precise timescales are important given the extent to which applicants and appellants will be looking to the publication of the APS to determine what the formal 5YHLS position is. Such individuals will also by definition be consultees under PPG HD23, HD24, HD26 and HD28.

There would seem to be logic in simultaneous publication of all APS recommendations nationally on the same date, as per the HDT, to ensure consistency in MHCLG's approach to the respective policy tests. That may however be dependent on the availability of Inspectors, if that is the mechanism intended.

Q14.7.1: CDT-NPPF 77: Action Plans

HD40 specifies that Action Plans must be issued within six months of the HDT result, i.e. in April or May of the following year, dependent on date.

As set out above, there will be a need for coordination between the three documents now proposed: Annual Monitoring Reports, Annual Position Statements and Action Plans, with a clear timetable for publication.

Q14.7.2: CDT-NPPF 77 and PPG HD38 and HD39 "*Identify actions*"

PPG HD38 records a long list of different causes of under-delivery that may form part of the Action Plan. PEBA does not seek to prioritise any, recognising that there are strong differences of view across the sector.

However, it is a matter of record that the issue of greatest practical importance in the decision-taking context is the 7th bullet-point: "*Whether enough planning permissions are being granted to meet the required levels of housing…*".
There is no matching action in PPG HD39: i.e. granting applications (irrespective of their allocation status), although various bullet-points hint at this.

An action plan that does not at least contemplate that an LPA should identify boosting delivery through granting such applications, would likely omit a major practical issue.

Q14.8: PPG HD41: Consultation

Although consultation is suggested as discretionary under H41, a specification as to timing will ensure that LPAs do not conduct such an exercise too close to the HD40 deadline.

Q14.9: CDT-NPPF 78: Implementation and Commencement

PEBA supports the lighter-touch approach to encouraging timely delivery proposed in CDT-NPPF 78. Earlier proposals in the HWP to investigate the track record of delivery of individual developers ran a real risk of both complicating the system and potentially unfairly prejudicing certain interests. As CDT-NPPF 78 recognises the principal questions on delivery are normally site-specific.

Equally, we welcome the recommendation that developers should explore shortening the timescale for commencement on a voluntary basis.

We would recommend that MHCLG consider how it might address conditions on completion, which are currently prohibited by PPG 21a-005's third bullet-point:

> *Are there any circumstances where planning conditions should not be used?*
>
> *Any proposed condition that fails to meet any of the 6 tests should not be used. This applies even if the applicant suggests it or agrees on its terms or it is suggested by the members of a planning committee or a third party. Every condition must always be justified by the local planning authority on its own planning merits on a case by case basis. Specific circumstances where conditions should not be used include:*
>
> *…*
> *[3] Conditions requiring the development to be carried out in its entirety:*
> *Conditions requiring a development to be carried out in its entirety will fail the test of necessity by requiring more than is needed to deal with the problem they are designed to solve. Such a condition is also likely to be difficult to enforce due to the range of external factors that can influence a decision whether or not to carry out and complete a development.*

Section 72(1) TCPA 1990 is fairly broad, and would technically permit stricter controls on completion:

> "*72(1) Without prejudice to the generality of section 70(1), conditions may be imposed on the grant of planning permission under that section—*
>
> > *(a) for regulating the development or use of any land under the control of the applicant (whether or not it is land in respect of which the application was made) or requiring the carrying out of works on any such land, so far as appears to the local planning authority to be expedient for the purposes of or in connection with the development authorised by the permission;"*

This is however a matter that would best be explored through consultation, regulations and guidance under section 100ZA(2), (3) and (10) TCPA 1990 (once in force).

Q14.10: CDT-NPPF 79: "*Identified local needs*"

MHLCG should consider the integration of this term with the neighbourhood plan specific elements under CDT-NPPF 66-67, through cross-reference or PPG guidance. Given Government's aim of widespread national coverage by neighbourhood plans, especially in rural areas, there are strong practical reasons for recommending that NPs (with LPA assistance) grapple with the task of identification of local needs for affordable housing and recognise their responsibility in making provision for such sites through allocations.

Chapter 6: Building a strong, competitive economy

Question 15

Do you agree with the policy changes on supporting business growth and productivity, including the approach to accommodating local business and community needs in rural areas?

Yes

Please enter your comments here

Q15.1: CDT-NPPF 82 and 83: Economic Development

MHCLG will likely receive detailed specialist consultation responses from the RTPI, the development industry and consultancies on the policy changes. PEBA's position is that the wording used is broadly clear and consistent with the rest of the document. The NPPF Chapters covering economic development have only rarely been subject to s288, s113 and judicial review litigation, by comparison with housing and retail development, which may reflect both the consensus on these issues and/or the clarity of the initial drafting.

The only significant potential gap in the list at CDT-NPPF 83 is clear reference to storage/distribution uses and the logistics industry (Use Class B8). The expansion of this sector through online retailing is very well-documented, including tensions with traditional B1 and B2 allocated uses.

CDT-NPPF 20b merely refers to "the workplaces needed" and 20b to "other commercial development". CDT-NPPF 83b is more general still "to meet anticipated needs over the plan period" The definition of "economic development" has been removed.

By contrast, the Glossary to current NPPF referred to "*Economic development: Development, including those within the B Use Classes,*" and NPPF 161 currently also contains a specific reference to both floorspace requirements and reviews:

> *161. Local planning authorities should use this evidence base to assess:*
>
> ● *the needs for land or floorspace for economic development, including both the quantitative and qualitative needs for all foreseeable types of economic activity over the plan period, including for retail and leisure development;*
>
> ● *the existing and future supply of land available for economic development and its sufficiency and suitability to meet the identified needs. Reviews of land available for economic development should be undertaken at the same time as, or combined with, Strategic Housing Land Availability Assessments and should include a reappraisal of the*

suitability of previously allocated land;

The Industrial Strategy referred to at CDT-NPPF 82's footnote 31 captures some of the importance of this sector of economic activity, but it has been produced in a different way to a national planning policy document and therefore does not profess the same precision.

Q15.2: CDT-85: Rural Economy

CDT-NPPF 85 would benefit from some tightening of the prepositions and adjectives in the light of the *Braintree DC v SSCLG* [2018] EWCA Civ 610 "isolated homes" litigation. The term "*outside existing settlements*" might be rendered "adjacent to or beyond settlement boundaries". The term "*well-related to*" would perhaps be better expressed in respect of physical proximity or travel: "well-connected to".

Question 16

Do you have any other comments on the text of chapter 6?

No further comments.

Chapter 7: Ensuring the vitality of town centres

Question 17

Do you agree with the policy changes on planning for identified retail needs and considering planning applications for town centre uses?

Not sure

Please enter your comments here

Q17.1: CDT-NPPF 86(d): "*Allocate…looking at least ten years ahead*"

Given the pace of change within the retail sector and the 5 year timeframe under section 19(1B)-(1C) PCPA 2004, MHCLG should consider whether additional policy text or guidance might specify when reviews should take place within the plan period.

Q17.2: CDT-NPPF 87: "*Reasonable period"*

MHCLG should consider how the reasonable period specified in this paragraph connects with the ten year period specified in CDT-NPPF 86d, listed above, and again the 5 year review provisions under section 19(1B)-(1C).

Q17.3: CDT-NPPF 90: "*One or more of above considerations*"

This paragraph should make express reference to CDT-NPPF 90, i.e. the considerations immediately above (as opposed to the range of issues described in CDT-NPPF 86).

Question 18

Do you have any other comments on the text of Chapter 7?

No further comments.

Chapter 8: Promoting healthy and safe communities

Question 19

Do you have any comments on the new policies in Chapter 8 that have not already been consulted on?

Within Q19, we have addressed issues that arise under CDT-NPPF 92 to 96. Under Q20, we have addressed subsequent paragraphs.

Q19: CDT-NPPF 92a: "*Opportunities for people who might otherwise not come into contact with each other*"

This is an interesting and innovative description but may be regarded by some decision-takers as vague and difficult to apply as a national policy test. Its deletion – leaving the text simply at "promote social interaction" may be more straightforward.

Question 20

Do you have any other comments on the text of Chapter 8?

Q20.1: CDT-NPPF 100: Local Green Space: "*Consistent with the local planning of sustainable development*"

This test is not always easy to apply when dealing with Local Green Space designation at the neighbourhood plan level. Given the strength of the protection (CDT-NPPF 102), and the light-touch approach of neighbourhood plan examination – there can be a tension with the wording of the presumption: now rendered in CDT-NPPF 11a: "*plans should positively seek opportunities to meet the development needs of their area, and be sufficiently flexible to adapt to rapid change*". This connects with CDT-NPPF 13 and the continuing emphasis that neighbourhood plans should support the delivery of strategic policies.

Q20.2: CDT-NPPF 101c: "*Not an extensive tract of land*"

This test is in practice the most controversial and difficult to apply in the LGS context, especially in neighbourhood plan preparation. The adjective in question is occasionally considered in relative terms: i.e. by reference to the total neighbourhood

plan area, rather than at an absolute level. It is important that there is consistency, to guide all stakeholders and not least plan authors and NP Examiners.

Chapter 9: Promoting sustainable transport

Question 21

Do you agree with the changes to the transport chapter that point to the way that all aspects of transport should be considered, both in planning for transport and assessing transport impacts?

Please select an item from this drop down menu

Please enter your comments here

PEBA has no detailed comments on these changes.

The sentence at the end of CDT-NPPF 105(e) is incomplete; the full stop before "*For example*" should be a comma.

Question 22

Do you agree with the policy change that recognises the importance of general aviation facilities?

Please select an item from this drop down menu

Please enter your comments here

PEBA has no formal position on this policy change, in particular its merits. It is recognised that there will be a wide range of views expressed by different consultees in respect of the General Aviation Strategy. However, the text of CDT-NPPF 105f does not give rise to any lack of clarity or consistency.

Question 23

Do you have any other comments on the text of Chapter 9?

No other comments.

Chapter 10: Supporting high quality communications

Question 24

Do you have any comments on the text of Chapter 10?

Q24.1: CDT-NPPF 114: New Telecommunications Development

A minor grammatical point: the individual phrases after "*not impose a ban…in certain areas*" should commence with "nor", to continue the prohibition.

Q24.2: CDT-NPPF 116: "*Planning grounds*"

A further grammatical observation: the first sentence should perhaps read: "*only on planning grounds*" or "*on planning grounds only*", to add force to the prohibition.

Chapter 11: Making effective use of land

Question 25

Do you agree with the proposed approaches to under-utilised land, reallocating land for other uses and making it easier to convert land which is in existing use?

Not sure

Please enter your comments here

Q25.1: CDT-NPPF 117: Footnote 35: "*Habitats of high environmental value*"

The wording used in CDT-NPPF 117's Footnote 25 should match CDT-NPPF 11b exactly: "*areas or assets of particular importance*".

If the wording is intended to refer to habitats, then the wording should match that used in the Glossary: "Priority habitats", but it is assumed that the CDT-NPPF 11b coverage is what is intended.

Q25.2: CDT-NPPF 118a: "*Encourage multiple benefits from both urban and rural land*"

This phrase appears to be missing a noun: "from the development of" (and perhaps also "allocation of").

Q25.3: CDT-NPPF 119: Brownfield land register

There is a potential opportunity here or in the Glossary to address the mandatory statutory duty to publish the register (by 31 December 2017), pursuant to Regulation 3(2) of the Town and Country Planning (Brownfield Land Register) Regulations 2017. It is understood that there are still some authorities that have not completed this requirement, and it is presently unclear how the Secretary of State will seek to enforce this, especially bearing in mind the additional Information power under Regulation 8(1) to require the updating of the register.

Q25.4: CDT-NPPF 120a: "*Regular reviews*"

As explored extensively within Chapter 3 above, MHCLG needs to be clear about the level of regularity expected, in particular whether the reviews are to be covered by the Annual Monitoring Report, the Annual Position Statement, the Action Plan or on some other basis less regular than annually. This is important given the likely argument by those seeking a change of use or development contrary to the allocation, that the relevant plan policy is out-of-date pursuant to CDT-NPPF 11d, due to the absence of plan review under CDT-NPPF 120a. An added complication will be the precise definition of "*unmet need*" in 120b, in respect of housing development.

That is not to suggest that CDT-NPPF 120 will be unworkable as a policy test, but the lack of clarity combined with the novelty of other parts of the CDT-NPPF text is likely territory for arguments of misinterpretation of the policy by both promoters and LPAs.

Question 26

Do you agree with the proposed approach to employing minimum density standards where there is a shortage of land for meeting identified housing needs?

Not sure

Please enter your comments here

Q26.1: CDT-NPPF 123: "*Optimal use*", "*Significant uplift*", "*Efficient use*"

Whilst we recognise MHLCG's reluctance to fix densities with precise figures at the national level, it is inevitable that the adjectives "optimal", "significant uplift" and "efficient use" will require some further definitional precision through PPG.

Question 27

Do you have any other comments on the text of Chapter 11?

No other comments.

Chapter 12 : Achieving well-designed places

Question 28

Do you have any comments on the changes of policy in Chapter 12 that have not already been consulted on?

Q28.1: CDT-NPPF 131: Advertisements

We have no comment on the new policy wording on advertisements, save that the

Consultation Proposal refers to removal of text into guidance. As that guidance has not been provided in draft it is not possible to comment.

Question 29

Do you have any other comments on the text of Chapter 12?

No other comments.

Chapter 13: Protecting the Green Belt

Question 30

Do you agree with the proposed changes to enable greater use of brownfield land for housing in the Green Belt, and to provide for the other forms of development that are 'not inappropriate' in the Green Belt?

Please select an item from this drop down menu

Please enter your comments here

Q30.1: CDT-NPPF 144b and 145e: "*Appropriate facilities*"

The additional wording in CDT-NPPF 144b and 145e are improvements in terms of clarity.

Question 31

Do you have any other comments on the text of Chapter 13?

Q31.1.1: CDT-NPPF 136: "*All other reasonable options*"

CDT-NPPF 136a and c describes a strict process of assessment that reflects the common position in plan preparation. CDT 136b is more novel.

Given the cumulative and specific nature of the tests under 136a-c, there will be a need for further detailed PPG guidance.

Q31.1.2: CDT-NPPF 136c: "*accommodate some of the identified needs*"

The term "*some*" does not sit easily with CDT-NPPF 11b, which stresses the importance of minimum need and the comprehensive nature of the SoCG process. It suggests a lower amount. Clearer wording might be "*all or part of the unmet need*".

Q31.2: CDT-NPPF 143: "*any other harm resulting from the proposal*"

This additional wording is a helpful addition, clarifying the position explored in *Redhill Aerodrome v SSCLG* [2014] EWCA Civ 1386, [18]-[21] and *Brown v Ealing LBC*

[2017] EWHC 467 (Admin), [28].

Chapter 14: Meeting the challenge of climate change, flooding and coastal change

Question 32

Do you have any comments on the text of Chapter 14?

Q32.1: CDT-NPPF 148

There is a stray comma in the third line.

Q32.2: CDT-NPPF 148 and 150: "*Plans*"

The text may wish to specify "strategic and local plans" in the light of CDT-NPPF 20f, which renders climate change mitigation and adaptation a strategic priority mater for the purposes of section 19(1B) and (1C) PCPA 2004.

Q32.3: CDT-NPPF 153b, footnote 40: "*fully addressed*"

The verb "*addressed*" is unclear. MHCLG should confirm in the text whether "have their backing" is in fact intended as a test: see the discussion of the Court of Appeal in R(Holder) v Gedling BC [2018] EWCA Civ 214, [22]-[33].

Question 33

Does paragraph 149b need any further amendment to reflect the ambitions in the Clean Growth Strategy to reduce emissions from building?

Not sure

PEBA has no formal position on this wording or the need for further amendment.

Chapter 15: Conserving and enhancing the natural environment

Question 34

Do you agree with the approach to clarifying and strengthening protection for areas of particular environmental importance in the context of the 25 Year Environment Plan and national infrastructure requirements, including the level of protection for ancient woodland and aged or veteran trees?

Not sure

Please enter your comments here

PEBA's primary concern here is to ensure a clear pathway through CDT-NPPF 11b and 11d (the presumption) and CDT-NPPF 36a and 36d (soundness). Whilst the Environment Plan provision could perhaps be better sign-posted, the informed reader using both documents should be able to trace the overlap.

Question 35

Do you have any other comments on the text of Chapter 15?

Q35.1: CDT-NPPF 169: "*Allocate land with the least environmental or amenity value*"

MHCLG will need to check carefully the compliance with CDT-NPPF 11b, CD35 and CD36a in the light of CDT-NPPF 3 "general references". This paragraph relates to all plans (strategic, local (DPD) and neighbourhood) and it appears to introduce a hierarchy or process of elimination. The wording is slightly stricter on its face than CDT-NPPF 35, so a cross-reference through a footnote or additional explanatory text may be necessary to confirm which standard prevails.

Q35.2: CDT-NPPF 170: "*Scope for developing outside the designated area*"/"*some other way*"

Although the term "*scope*" is presently used in NPPF 116's second bullet-point, it can in practice generate significant dispute about the geographical range in question and the extent of the alternatives that must be presented in evidence: see for example Thorpe-Smith v SSCLG [2017] EWHC 356 (Admin), [52]. The term "*meeting the need in some other way*" is also very vague.

MHCLG may therefore wish to consider, in the same manner as the sequential test in the retail context, whether additional guidance might be provided through the PPG to explain what kind of evidence applicants and appellants should provide.

Q35.3: CDT-NPPF 173(c) and footnote 49: Habitats and trees: "*Wholly exceptional*"

The distinction between loss of irreplaceable habitats: "*wholly exceptional*" (FN49: "*public benefit would clearly outweigh the loss or deterioration*") and that for trees: "*need for, and benefits of, development in that location would clearly outweigh the loss*" may be clearer expressed in a single paragraph with sub-bullet-points.

Q35.4: CDT-NPPF 175: "*considered*"

It is unclear what this verb refers to, bearing in mind that the presumption in CDT-NPPF 11 applies to plan-making and decision-taking, and thus encompasses any preparatory steps.

Q35.6: CDT-NPPF 179: "*national objectives for pollutants*"

These should be defined or sign-posted in the Glossary.

Chapter 16: Conserving and enhancing the historic environment

Question 36

Do you have any comments on the text of Chapter 16?

Q36.1: CDT-NPPF 183a: "Viable uses"

Given the publication of new PPG on viability, MHCLG should be specific about what is meant by this term in the heritage context – see also CDT-NPPF 188a and 191b.

Q36.2: CDT-NPPF 184

"Information" has been erroneously capitalised.

Q36.3: CDT-NPPF 191b: "*Medium term*"

This duration should be clarified, through PPG or Glossary addition.

Chapter 17: Facilitating the sustainable use of minerals

Question 37

Do you have any comments on the changes of policy in Chapter 17, or on any other aspects of the text in this chapter?

PEBA has no formal comments on this Chapter.

Question 38

Do you think that planning policy in minerals would be better contained in a separate document?

Yes

Please enter your comments here

Yes, minerals development is covered by different plans and plan-making bodies to conventional development. The PPG on Minerals is also presently very long. Separation of minerals national policy, with cross-reference back to Chapter 15 in particular would be preferable.

Question 39

Do you have any views on the utility of national and sub-national guidelines on future aggregates provision?

No

Please enter your comments here

PEBA has no position on this.

Transitional arrangements and consequential changes

Question 40

Do you agree with the proposed transitional arrangements?

No

Please enter your comments here

Q40.1: Appeals

There are no transitional arrangements for ongoing s78 appeals. It is necessary that the Secretary of State offer parties the opportunity to comment on the impact of any changes to national policy where thee inquiry/hearing is taking place before publication and the decision will be issued afterwards.

Q40.2: "Revised
As we set out in Chapter 3 above, there needs to be clarity from MHCLG as to whether it expects a detailed survey of existing policies immediately publication.

Q40.3: Transition for Plans

PEBA has concerns about this transitional provision will work in practice.

The effect of NPPF 209 (as presently drafted) is to attempt to render the entirety of CDT-NPPF and potentially the PPG an immaterial or irrelevant consideration in such examinations.

Annex 1 is therefore internally inconsistent, as LPAS would be required to look ahead to immediate revision: see CDT-NPPF 207.

The logic of CDT-NPPF 208 appears to be that such plans will be adopted with short timeframes for reviews, to bring them into compatibility with the CDT-NPPF. However, if that is the intention, then the provision needs to be substantially re-

worded in a positive direction to promore early review in line with CDT-NPPF, not to prohibit its consideration.

Question 41

Do you think that any changes should be made to the Planning Policy for Traveller Sites as a result of the proposed changes to the Framework set out in the consultation document? If so, what changes should be made?

Please select an item from this drop down menu

Please enter your comments here

PEBA has no formal position on whether changes are required.

Question 42

Do you think that any changes should be made to the Planning Policy for Waste as a result of the proposed changes to the Framework set out in the consultation document? If so, what changes should be made?

Please select an item from this drop down menu

Please enter your comments here

PEBA has no formal position on whether changes are required.

Glossary

Question 43

Do you have any comments on the glossary?

Affordable Housing for rent

MHCLG should explain or sign-post the “Government’s rent policy”

Brownfield land registers

Express reference should be made to the 31 December 2017 deadline for publication

Deliverable

The term “small sites” should be defined with a numerical threshold.

Development Plan

Section 38(2) and (3) PCPA 2004 should be recorded here.

Environmental impact assessment

"Town and Country Planning (Environmental Impact Assessment) Regulations 2017" should be recorded here.

Heritage Asset

A definition should be provided for non-designated heritage asset matching current PPG: Paragraph: 039 Reference ID: 18a-039-20140306

Housing Delivery Test

"Every November" should specify the individual target date.

Local Housing Need

After justified alternative approach, there should be reference to "exceptional circumstances" to match PPG LHNA 6 and 7.

Local Plan

Section 17 PCPA 2004 should be recorded here.