The Planning & Environment Bar Association

Ministry of Housing, Communities and Local Government
2 Marsham Street
London
SW1P 4DF
By email to: PlanningPolicyConsultation@communities.gov.uk

23rd September 2024

Dear Sirs,

RESPONSE TO THE CONSULTATION ON AMENDMENTS TO THE NATIONAL PLANNING POLICY FRAMEWORK

ABOUT PEBA

The Planning & Environment Bar Association (PEBA) is a specialist bar association comprising practising barristers who specialise in the areas of planning, the environment, local government, and related matters in England and Wales. PEBA members advise and act for clients in all of these areas of law, including landowners, developers, local authorities, Government departments, statutory agencies, non-governmental organisations, charities, and private individuals. PEBA members appear as advocates in all levels of the courts and tribunals, and at planning inquiries and hearings, local plan examinations, and development consent order examinations. Membership of PEBA is open to all barristers who have a significant part of their practice in the fields of planning, the environment, and local government law.

PEBA is a non-political entity. It is regularly consulted by Government departments (notably the Department for Levelling Up, Housing & Communities) and by the Planning Inspectorate in relation to proposals for reform of either policy or legislation within its specialist areas. PEBA sees its role as seeking to inform decision makers as to the practical implications of proposed reforms to regulatory regimes or relevant guidance, based on the experience of its membership within its areas of practice, with a view to facilitating reforms that will enable better and more effective regulatory regimes or

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guidance and (hopefully) discouraging or modifying reforms that would work against such outcomes.

SCOPE OF THE RESPONSE

This response is to selected parts of the consultation document. PEBA has not responded to those questions which are primarily concerned with policy judgements on which there may be a range of opinions. Rather, the focus has been to seek to assist on those areas where the law is relevant and where the proposed changes may have an impact on the process of decision-making, both in respect of development plans and decision taking.

Yours faithfully,

Richard Kimblin

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Head NPPF Consultation Working Party*

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This submission has been seen by and is endorsed by **Tom Cosgrove KC**, Chair of PEBA, by **Melissa Murphy KC**, Vice-Chair of PEBA, and by the PEBA Committee.

CHAPTER 3: PLANNING FOR THE HOMES WE NEED

SECTION 3(1): ADVISORY STARTING POINT AND ALTERNATIVE APPROACHES

Question 1: Do you agree that we should reverse the December 2023 changes made to paragraph 61?

As outlined in our introductory remarks, PEBA's response is focussed purely on the clarity of the policy wording with a specific focus on those areas which have historically given rise to litigation/appeal disputes.

Questions 1 – 4 all relate to reversals/removals and accordingly PEBA makes no detailed response either in respect of (1) the current wording to be replaced and (2) the remaining text.

Question 2: Do you agree that we should remove reference to the use of alternative approaches to assessing housing need in paragraph 61 and the glossary of the NPPF?

See Question 1

SECTION 3(2): URBAN UPLIFT

Question 3: Do you agree that we should reverse the December 2023 changes made on the urban uplift by deleting paragraph 62?

See Question 1

SECTION 3(3): CHARACTER AND DENSITY

Question 4: Do you agree that we should reverse the December 2023 changes made on character and density and delete paragraph 130?

See Question 1

<u>Question 5: Do you agree that the focus of design codes should move towards supporting spatial visions in local plans and areas that provide the greatest opportunities for change such as greater density, in particular the development of large new communities?</u>

PEBA makes no detailed comment on the merits of this proposal.

We do however note that there is a *potential* distinction with the approach currently provided for under the Levelling-up and Regeneration Act 2023, Schedule 7, paragraph 15F:

> ***<u>15F Design code for whole area</u>***
>
> *(1) A local planning authority must ensure that, for **<u>every part of their area</u>**, the development plan includes requirements with respect to design that relate to development, or development of a particular description, which the authority consider should be met for planning permission for the development to be granted.*
>
> *(2) Subsection (1) does <u>not</u> require the local planning authority to ensure—*
>
> *(a) that there are requirements for <u>every description of development for every part of their area</u>, or*
> *(b) that there are requirements in relation to every aspect of design.*

If Schedule 7 were to be brought force in its entirety, the duty to publish design codes would therefore *appear* to operate LPA-wide, notwithstanding the limitation under paragraph 2(a).

Government may therefore wish to explore a clarificatory provision in any commencement regulations.

SECTION 3(4): STRENGTHENING AND REFORMING THE PRESUMPTION IN FAVOUR OF SUSTAINABLE DEVELOPMENT ('THE PRESUMPTION')

Question 6: Do you agree that the presumption in favour of sustainable development should be amended as proposed?

PEBA recognises that there has been a considerable amount of litigation in respect of earlier versions of this wording, arising from the 2012 and 2018 updates. PEBA's addresses the clarity of the three main changes, such that there is as little ambiguity as possible – principally from the sentence structure.

> (1) The addition of "Policies for the supply of land" to replace "most important policies" (in place since 2018)
>
> (2) Restoring a single 5YHLS test (plus HDT), thereby removing the previous 4 year exemption (2023 version)
>
> (3) The addition of the rider "*in particular those for the location and design of development (as set out in chapters 9 and 12) and for securing affordable homes.*" (a new provision)

NPPF 11d: Change 1: "Policies for the Supply of Land" and Footnote 8

Preliminary Points

"Out-of-Date"

PEBA makes no detailed comment on the retention of the pivotal adjective "out-of-date". It is presumed that MHCLG intends to retain the broad approach explained in *Bloor Homes East Midlands Limited v SSCLG* [2014] EWHC 754 (Admin); [2017] PTSR 1283, [45] and not to tie datedness to any specific chronology:

> "*And if the plan does have relevant policies these may have **been overtaken by things that have happened** since it was adopted, either on*

the ground or in some change in national policy, or for some other reason, so that they are now "out-of-date"."

"Most Important Policies"

The replacement of the "most important policies" provision has some clear practical benefit in removing some of the disputes that have arisen as to the extent of its operation, for example:

(a) *Wavendon v SSCLG* [2019] EWHC 1524 (Admin): "most important policies" as a basket to be assessed holistically, thereby bringing into play a wide range of policies;

(b) *Paul Newman Homes v SSCLG* [2021] EWCA Civ 15: one policy can be sufficiently up-to-date to disengage the test

Footnote 8

PEBA notes that footnote 8 is intended to avoid the kinds of dispute that culminated in *Hopkins Homes Limited v Secretary of State for Communities and Local Government* [2017] 1 WLR 1865, see [57]-[58] looking at the NPPF (2012) term "policies for the supply of housing"

"I would have regarded the meaning of paragraph 49 itself, taken in context, as reasonably clear, and not susceptible to much legal analysis. It comes within a group of paragraphs dealing with delivery of housing. The context is given by paragraph 47 which sets the objective of boosting the supply of housing. In that context the words "policies for the supply of housing" appear to do no more than indicate the category of policies with which we are concerned, in other words "housing supply policies"."

58. In so far as the paragraph 47 objectives are not met by the housing supply policies as they stand, it is quite natural to describe those policies as "out-of-date" to that extent.

PEBA recognises that the presumption is now intended to apply to a far wider range of development than housing, for example employment land where there is no specific 5YHLS trigger. The central practical question is therefore whether there is any residual ambiguity which might be "ironed out". For ease of reference, we have broken up the sentence as follows:

> *8. Policies for the supply of land are those which* [1] *set an overall requirement and/or* [2] *make allocations and* [3] *allowances for windfall sites* [A] *for the area and* [B] *type of development concerned.*

The footnote is not punctuated. The key area of ambiguity would therefore appear to be exactly which part [A] and [B] relate to, whether simply to [3] or to the wider list of policies [1]-[3]. The intention appears to be that [A] and [B] apply to everything beforehand, i.e. both requirement and allocations. However, begin placed at the end, it is possible that they are restricted purely to the "allowances for windfall sites" component. This would benefit from clarification (see further below).

PEBA therefore recommends that MHLCA take the content of footnote 8 and move it to substantive, subsequent paragraphs. This could provide additional clarity, which has possibly become lost with the compression to a footnote alongside many other important policies.

<u>Suggested redraft of Footnote 8 as a new Paragraph 12</u>

> [New paragraph 12] Policies for the supply of land are those **<u>which in respect of the area and type of development proposed</u>**:
>
> **(a)** set an overall requirement and/or
> **(b)** make allocations and/or
> **(c)** make allowances for windfall sites **<u>(sites not specifically identified in the development plan)</u>** and/or

(2) NPPF 11d: Footnote 9

PEBA has no detailed comments on this second change, save that the specification of "substantially below" as a specific figure (less than 75%) avoids any further dispute and ambiguity of the kind that has resulted in historic litigation.

(3) NPPF 11d Ending: "*in particular those* [policies] for *the location and design of development (as set out in chapters 9 and 12) and for securing affordable homes.*"

PEBA expresses some concern about the clarity of this addition.

The policy intention is explained at Chapter 3, paragraph 17, to make "explicit reference":

> *17. We have also heard concerns that some developers have used the presumption to promote low quality, unsustainable development. We are clear that the presumption cannot offer a route to creating poor quality places, and so we are proposing changes to the presumption to add* ***explicit reference*** *to the need to consider locational and design policies, as well as policies relating to the delivery of affordable housing, when the presumption is engaged. These safeguards will mean that schemes that rely on the presumption to secure approval will meet the high standards we expect of all development.*

The current position is that any or all relevant elements of the NPPF carry equal weight under the "Framework taken as a whole" component.

The proposed wording "in particular" would appear to add additional/enhanced weight to the identified factors. However, this is not explicit in the consultation text, and does not appear to be the intention: merely to make the emphasis "explicit". There is an obvious risk of ambiguity and thus potential litigation, concerning whether the threshold for activation of the tilted balance has been lowered or not, and could the potential effect of disrupting that necessary flexibility.

PEBA also notes the phrase: "*<u>location</u>…of development*". The term "location" is a very broad one, extending both from micro-siting questions of design to entire spatial strategies. The term is not fully explained in either Chapter 9 (Promoting Sustainable Development) or Chapter 12 (Achieving well-designed places).

PEBA suggests that MHCLG should therefore delete the whole of the additional text. Considerations of "design", "affordable housing" and "sustainable location" will still be protected by the "Framework taken as a whole" element.

<u>NPPF 11d "No Relevant Policies"</u>

Consultees have not been asked specifically to address the rest of NPPF 11d. However, this is the best place ahead of Q14 to note that the retention of "no relevant policies" can promote legal error in certain cases where "no relevant" is read as meaning "no policies on the specific development type".

As the Court of Appeal clarified in *Paul Newman Homes* case [2021] EWCA Civ 15 that "relevant" is not "determinative":

> *39. I respectfully agree with the Judge that the concept of "relevance" means that the policy or policies must have a real role to play in the determination of the application, but <u>there is no requirement that it or they should be enough in themselves to enable the decision maker to grant or refuse that application</u>. <u>"Relevant" does not mean, and cannot mean, "determinative". The first trigger cannot be activated if there is a relevant policy in the local plan, as there was here.</u> Mr Lockhart-Mummery's suggested interpretation would involve doing violence to the language of paragraph 11d) by reading it as if it said: "where the local plan does not contain a body of policies sufficient for determining the application in principle."*
>
> *40. <u>I also agree with the Judge that in a case that involves a housing application, there is no reason to restrict the concept of "relevance" to policies that are specifically targeted at the type of development under</u>*

<u>consideration (such as affordable housing, or a block of flats) or the location of the proposed development (such as policies about building in the countryside)</u>. A general development control policy may be capable of having a real role to play in the outcome of an application; its importance is a different matter, which will depend on the facts and circumstances of the particular case, and is a matter of value judgment on which the expertise of a planning inspector will carry significant weight.

Given this settled interpretation of the provision, it is hard to envisage any case in which there will no "relevant policy" at all. The retention of this term is therefore a potential distraction from the pivotal "policies for the supply of land" component.

<u>NPPF 11b and Footnote 7</u>

MHCLG should also explore the retention of "Green Belt" within NPPF 11b's footnote 7, given the reforms later in the document [addressed below at Q [x]

Following the *Monkhill* case, the retention of "Green Belt" in the NPPF 11d(i) list for applications is however relatively clear – i.e. where very special circumstances have not been demonstrated.

Please see further our response to Qn 23 on the same topic.

SECTION 3(5): RESTORING THE 5-YEAR HOUSING LAND SUPPLY (5YHLS)

Question 7: Do you agree that all local planning authorities should be required to continually demonstrate 5 years of specific, deliverable sites for decision making purposes, regardless of plan status?

PEBA makes no comment on the substance, but the text is clearer. A single test for all LPAs generally removes ambiguity and the scope for dispute.

Question 8: Do you agree with our proposal to remove wording on national planning guidance in paragraph 77 of the current NPPF?

"Over-supply" was the subject of contest and dispute, for example *Tewkesbury BC v SSHCLG* [2021] EWHC 2782 (Admin), and thus in line with our response to Question 7, this removal promotes clarity.

SECTION 3(6) RESTORING THE 5% BUFFER

Question 9: Do you agree that all local planning authorities should be required to add a 5% buffer to their 5-year housing land supply calculations?

PEBA makes no comment on Questions 9-10 which are inevitably a policy/technical question.

Question 10: If yes, do you agree that 5% is an appropriate buffer, or should it be a different figure?

See Question 10.

Question 11: Do you agree with the removal of policy on Annual Position Statements?

PEBA notes that the APS process saw very low uptake. The removal of this provision therefore helpfully shortens the policy wording.

SECTION 3(7): MAINTAINING EFFECTIVE CO-OPERATION AND THE MOVE TO STRATEGIC PLANNING

Question 12: Do you agree that the NPPF should be amended to further support effective co-operation on cross boundary and strategic planning matters?

Cross-boundary cooperation under the Duty to Cooperate and general soundness is a major topic, and PEBA therefore confines this response to certain narrow questions of clarity:

NPPF 24

We have broken down NPPF 24 into the following parts (with our underlining and emphasis):

> *24.* [1] *Effective strategic planning across local planning authority boundaries will play* [A] *a vital and increasing role in how sustainable growth is delivered and key spatial issues, including* [B] *meeting housing needs, delivering strategic infrastructure, and building economic and climate resilience, are addressed.* [2] *Local planning authorities and county councils (in two-tier areas) continue to be under a duty to cooperate with each other, and with other prescribed bodies, on strategic matters that cross administrative boundaries.*

PEBA notes that the wording remains relatively general in character. The word "increasing" at [A] is unclear, given that the duty applies from the point of publication, or via the existing Section 33A PCPA duty.

NPPF 27

NPPF 27 contains a number of words that raise potential ambiguity that would either benefit from clarification in this text, or an early commitment to publish clarificatory PPG text:

> *27. Once the matters which require collaboration have been identified, strategic policy-making authorities should make sure that their plan policies are consistent with those of other bodies where a strategic relationship exists on these matters, and with the relevant investment plans of infrastructure providers, unless there is* [A] *a clear justification to the contrary. In particular their plans should ensure that:*

> *a)* [B] *a* <u>*consistent approach*</u> *is taken to planning the delivery of major infrastructure, such as major transport services/projects, utilities, waste, minerals, environmental improvement and resilience, and strategic health, education and social infrastructure (such as hospitals, universities, major schools, major sports facilities and criminal justice accommodation);*
>
> *b) unmet development needs from neighbouring areas are* [C] <u>*accommodated*</u> *in accordance with paragraph 11b; and*
>
> *c) any allocation or designation which cuts across the boundary of plan areas, or has significant implications for neighbouring areas, is* [D] <u>*appropriately managed*</u> *by all relevant authorities.*

In the lead paragraph 27, [A] “a clear justification” is somewhat open: specifically how the justification should this be presented. MHCLG may wish to explore immediate PPG on this.

In paragraph 27(a) [B]“consistent approach” also requires further explanation. The PPG may be used to confirm that this will need to be addressed through an SoCG or MoU perhaps prior to plan submission.

In paragraph 27(b), [C] the term “accommodated” appears to denote full provision, i.e. through allocation. If that is the intent, then a more specific word may be used.

Finally, in paragraph 27(c) “appropriately managed” is also unclear, i.e. whether this denotes pure plan-making cooperation (and if so how) or development management (the latter being a much later stage issue)

NPPF 28

Finally, NPPF 28's additional wording is noted, but provides little clarity on the timetable for submission and may have the unwanted prospect of encouraging delay:

> *Plans come forward at different times, and there may be a degree of uncertainty about the future direction of relevant development plans or plans of infrastructure providers. In such circumstances strategic policy-making authorities and Inspectors will need to come to an informed decision on the basis of available information, rather than waiting for a full set of evidence from other authorities.*

MHCLG has stated that it expects all authorities to be working now, in order to hit the rapidly approaching December 2026 deadline. Government might therefore wish to re-state in this paragraph the importance of early plan submission.

Question 13: Should the tests of soundness be amended to better assess the soundness of strategic scale plans or proposals?

PEBA makes no substantive comment on this as an expressly open policy question, save that the soundness tests need very careful drafting to avoid introducing new uncertainty, disputes, and consequent delay.

It is noted that the text to Chapter 3, paragraph 29 suggests an alternative approach for larger sites:

> *29. Over recent years there have been concerns that plans containing strategic scale proposals and associated infrastructure can require implementation over a long period, making it more difficult to provide evidence of deliverability and viability. We want the planning system to enable such long term and ambitious planning, while recognising that such plans need to be grounded and realistic.*

If it is intended to have separate, additional soundness requirements for proposals that will come forward over a longer time period, say 10 years, 15 years or even beyond the plan period, then rather than change NPPF 36, MHLCG may wish to add a separate paragraph around NPPF 22 and 23.

In general, the addition of new paragraphs to deal with specific cases is likely to remove ambiguity, rather than seeking to redraft longer-established paragraphs of central importance (such as NPPF 11 and 36).

SECTION 3(8): CONSULTATION CHAPTER 3 OR NPPF PLAN-MAKING CHAPTER 3

Question 14: Do you have any other suggestions relating to the proposals in this chapter?

PEBA is aware of some concern about potential ambiguity in the retained NPPF 14 for neighbourhood plans. NPPF 14 covers neighbourhood plans that were made up to five years prior, with an "identified housing requirement" established under different national policy requirements, for the purposes of NPPF 67 and 68. These plans will contain "policies for the supply of land" as defined in footnote 8 which may therefore have become "out-of-date" irrespective of the broader 5YHLS position.

Five years remains considerably longer than the original 2 year period proposed in 2018, which reflected the very specific nature of the neighbourhood plan examination process. PEBA recognises that this is a policy choice, but nonetheless notes this exceptional position raises a real prospect of dispute as to the correct interpretation of the provisions.

If MHLCG wishes to retain the 5 year duration (as opposed to a return to 2 years), one would expect significant questions to arise in respect of the interpretation of both the term "likely to significantly and demonstrably outweigh [etc]" and the parallel wording of NPPF 67 "significant change of circumstances that affects the requirement".

PEBA does not seek to redraft NPPF 14 in full, however simply flags this paragraph and NPPF 67 and 68 which would merit further review.

Chapter 5 – Brownfield, grey belt and the Green Belt

Question 20: Do you agree that we should make the proposed change set out in paragraph 124c, as a first step towards brownfield passports?

The change proposed (shown here in **bold**) is: *Planning policies and decisions should:...(c) give substantial weight to the value of using suitable brownfield land within settlements for homes and other identified needs, **proposals for which should be regarded as acceptable in principle**, and support appropriate opportunities to remediate despoiled, degraded, derelict, contaminated or unstable land*.

The proposed insertion into what is presently para. 124(c) is on its face significant and far-reaching. It is not, for example, simply concerned with statutory permission in principle or land on a brownfield register (for the NPPF definition of "brownfield land" see "previously developed land" in the Glossary). Due to this, and due to its insertion into a paragraph that is initially concerned with (merely) the substantial weight to be given to the value of using suitable brownfield land, the proposal has potential to cause confusion. Should such proposals be regarded as *'acceptable in principle'* regardless of other, e.g. protective, policies in the NPPF that might apply to the land in question? If not, the proposed text requires amendment. If so, then such a significant and far-reaching new provision might be better placed alone, to provide decision-makers with clarity.

Question 21: Do you agree with the proposed change to paragraph 154g of the current NPPF to better support the development of PDL in the Green Belt?

The proposed change does reduce the obstacle to development of PDL in the Green Belt presented by the present para.154(g), so in terms of the drafting it is agreed it better supports the development of PDL in the Green Belt. PEBA offers no view on on the merits in planning policy terms.

Question 22: Do you have any views on expanding the definition of PDL, while ensuring that the development and maintenance of glasshouses for horticultural production is maintained?

The Consultation text at Chapter 5, para.7, states the Government *'want to understand how expanding (the definition of PDL to include hardstanding and glasshouses) might affect the availability of horticultural land, so would welcome views on how to ensure that there remains sufficient incentive for the development and maintenance of glasshouses for horticultural production'*. The Government will have access to land value data in any event, but PEBA's experience is that land value for horticultural land will be lower than that for e.g. housing land. It would appear difficult to make the change to the definition of PDL outlined without affecting the availability of horticultural land for e.g. glasshouses. PEBA cannot comment on whether there would remain "sufficient incentive" for the development and maintenance of horticultural glasshouses. We are also conscious that the Government is proposing (Consultation Question 82) to remove the present text at footnote 63 to NPPF para.182 which requires consideration of 'the availability of agricultural land for food production' when deciding what sites are most appropriate for development.

Question 23: Do you agree with our proposed definition of grey belt land? If not, what changes would you recommend?

The PDL part of the definition is clear. Therefore, we perceive two limbs to this:

(a) The "test" set by the proposed definition of "grey belt" for '*any other parcels and/or areas of Green Belt land'* by reference to *'limited contribution to the five Green Belt purposes'*; and

(b) The extent of the exclusions.

As regards (a), the proposed test allows for a very broad range of responses from decision-makers, which will likely lead to inconsistency in its application. That may be intentional.

Related to this, the test is unclear whether the 'limited contribution' is to be judged against the five Green Belt purposes taken as a whole, or whether, for example, a more than limited contribution to one Green Belt purpose is sufficient to mean land is not "grey belt" (unless it is PDL), even if taken across the five Green Belt purposes as a whole the decision-maker would judge the land's contribution as only limited.

For both these reasons, we agree it would be desirable to further define “limited contribution” or at least give decision-makers additional guidance, which issue is identified (and a solution suggested) at Consultation Chapter 5 para.10.

As regards (b), the Consultation text (Chapter 5, para.8) asks whether *‘additional exclusions are necessary, such as areas identified in draft or published Local Nature Recovery Strategies, that could become of particular importance for biodiversity’*. As no Local Nature Recovery Strategies (“LNRSs”) have yet been published (or, so far as we are aware, circulated as drafts), we cannot say definitively that areas in the Green Belt identified within them (as e.g. part of their “biodiversity priorities”) will not also fall within the list at NPPF footnote 7 (the Green Belt limb excluded), but it seems likely at least some areas identified as part of e.g. their “biodiversity priorities” will fall outside NPPF footnote 7 (the Green Belt limb excluded). So if Government wishes to afford those areas “protection” from the loosening of policy regarding Green Belt, they would need to be specifically included in the exclusions. Please see our response to Qn 6 on the same topic.

Question 24: Are any additional measures needed to ensure that high performing Green Belt land is not degraded to meet grey belt criteria?

As noted, the “grey belt” criteria require land be either PDL, or “other...land” that makes a “limited contribution” to the five Green Belt purposes.

We take the reference to “degraded” to refer to acts or omissions touching the land that are either not development for the purposes of s.55 TCPA, or if they are, are authorised by planning permission (development in breach of planning control that “degrades” Green Belt should not be disregarded unless it has acquired immunity from enforcement or the LPA has precluded enforcement).

Development authorised by planning permission, whether granted on application or by development order, is a matter that either the LPA/Inspector has decided merits grant, or the Government has decided merits grant on a blanket basis by permitted development rights, so we do not consider it further. This will be particularly relevant to PDL, though also potentially to “other...land”.

Acts or omissions touching the land that are not development appear to be the focus of this question concerning “degraded”.

Tt might be thought that such acts or omissions would be unlikely to impinge on the Green Belt purposes. However, whilst the Green Belt is a spatial designation, the courts have held that decision-makers may (not must) lawfully have regard to its visual qualities when assessing e.g. openness. In addition, from our experience, visual quality frequently features in strategic reviews of Green Belt against the five purposes (whether it should feature in such reviews is moot). The addition of “grey belt” and the accompanying encouraging policy that would apply to it does give rise to a greater risk that landowners will perceive benefit in allowing Green Belt land to become e.g. unsightly. Though that risk is already present to some degree. Whether this increase in risk is acceptable is a policy matter, we do not comment.

Question 25: Do you agree that additional guidance to assist in identifying land which makes a limited contribution of Green Belt purposes would be helpful? If so, is this best contained in the NPPF itself or in planning practice guidance?

Yes (and see answer to Question 23 above). The NPPF, as a definition (see Consultation Chapter 5, para.10 which takes this approach).

Question 26: Do you have any views on whether our proposed guidance sets out appropriate considerations for determining whether land makes a limited contribution to Green Belt purposes?

The “proposed guidance” is that at Consultation Chapter 5, para.10, which proposes wording for insertion into the NPPF Glossary.

As to that:

(a) No comment.

(b) As to (b) as a whole, we note this would tend to favour the inclusion in "grey belt" of Green Belt land surrounding cities/larger metropolitan areas. Whether this is desirable is a policy matter on which we offer no comment.

As to the list at (b):

(i) Note that "substantial" has a particular meaning in present NPPF Green Belt policy, by reason of NPPF para.155(d) concerning 'buildings...of permanent and substantial construction'. By contrast, "substantial" in this proposed wording appears to be used in a spatial or volumetric sense. Clarity required.

(ii) No comment save for the general comment against (b) above.

(iii) The phrase "urban land uses" is vague.

(iv) No comment save for the general comment against (b) above.

Question 27: Do you have any views on the role that Local Nature Recovery Strategies could play in identifying areas of Green Belt which can be enhanced?

It is unclear what is meant by "enhanced". If what is meant is "enhanced" by reference to the five Green Belt purposes, then it is not obvious that LNRSs would have much if any role to place in identifying areas of Green Belt which could be enhanced. Albeit LNRSs are in their infancy (see above; to our knowledge no LNRS has been publicly circulated in draft form, let alone published), the statutory framework relevant to LNRSs requires them to identify priorities that would not obviously involve e.g. clearing land of built form to improve its "openness".

If by "enhanced" is meant something broader than enhanced by reference to the five Green Belt purposes, then this question appears to indicate a shift from the Green Belt as a spatial designation, not e.g. a landscape or ecological designation. In which event, LNRSs, draft or published, could probably play a helpful role in identifying areas of Green Belt which could be enhanced.

Question 29: Do you agree with our proposal to make clear that the release of land should not fundamentally undermine the function of the Green Belt across the area of the plan as a whole?

The test is inherently vague, so will likely produce a range of (reasonable) responses from decision-makers and so variation in its application. We presume that is deliberate. The substantive merits and risks of such a test are of such a test are a policy matter, on which PEBA makes no comment.

Question 30: Do you agree with our approach to allowing development on Green Belt land through decision making? If not, what changes would you recommend?

We are concerned that the Consultation text that underpins this Question 30 is based on a misunderstanding.

Consultation Chapter 5 paras.19-20 misunderstand present Green Belt policy, and potentially also misunderstand the text of proposed Green Belt policy. When development is deemed “not inappropriate” in the Green Belt, and permitted, or when “inappropriate development” is permitted in the Green Belt on the basis of “very special circumstances”, that land is not “released” from the Green Belt, contrary to what is said at Consultation Chapter 5 paras.19-20. The land remains Green Belt.

There is a very important difference between allowing development on Green Belt through decision-making, with the land remaining Green Belt despite the development, and allowing release of land from Green Belt through decision-making. The latter would be a very significant departure, and the practical difficulty with it, is that: (a) release of land from Green Belt is best considered on at least a plan-area basis, and often best considered on a basis that spans more than one plan-area (as Green Belt often extends and functions across more than one plan-area); (b) releasing land from Green Belt on an individual-permission basis creates uncertainty, as presumably the land would only be released if the permission was fully implemented.

However, if the proposed text that Consultation Question 30 is referred to is that at new NPPF para.152 (beginning *In addition to the above, housing, commercial and* *other development in the Green Belt should not be regarded as inappropriate where:...*) then the proposal is not to release land from Green Belt, but to widen the circumstances in which development will not be inappropriate. As to that proposed new NPPF para.152:

(a) The first term of art in this proposed sub-paragraph (a) is “grey belt”. We have commented on that above. The next proposed term of art is “sustainble locations”. That is undefined and inherently vague, so will likely produce a range of (reasonable) responses from decision-makers and so variation in its application. We presume that is deliberate. The same is true of the final term of art in this sub-paragraph “fundamentally undermine”. We do not comment further on the substantive merits and risks of the terms of art and the overall proposed approach, as that would be stepping into policy matters.

(b) This proposed sub-paragraph introduces the concept of *‘demonstrable need for land to be released for development of local, regional or national importance’*. This is open ended, vague and will likely produce a range of (reasonable) responses from decision-makers and so variation in its application. We presume that is deliberate. We do not comment further on the substantive merits and risks of this approach, as that would be stepping into policy matters.

(c) We comment on new proposed NPPF para.155 and the planning policy requirements set out there, later.

Question 31: Do you have any comments on our proposals to allow the release of grey belt land to meet commercial and other development needs through plan-making and decision-making, including the triggers for release?

We repeat our response to Question 30 above regarding the confusion in the Consultation between “release” of Green Belt land through decision-making, and permitting development on Green Belt land through decision-making.

We also repeat our response to Question 30 above regarding the various terms of art in proposed NPPF para.152.

In addition, we are unclear how the proposed NPPF para.155 planning policy requirements would apply to non-housing development. Only the requirement at proposed NPPF para.155(b) would appear a natural fit with non-housing developments: it may be difficult to combine non-housing developments with the accessible green space requirements of proposed NPPF para.155(c).

Question 32: Do you have views on whether the approach to the release of Green Belt through plan and decision-making should apply to traveller sites, including the sequential test for land release and the definition of PDL?

We repeat our comments on the technical and definitional matters common to this proposed policy approach above. Otherwise, this is a policy matter, on which PEBA makes no comment.

Question 36: Do you agree with the proposed approach to securing benefits for nature and public access to green space where Green Belt release occurs?

This appears to be a reference to the new text at proposed NPPF paragraphs 147, 152 and 155. There is considerable ambiguity and imprecision across that text, which we consider requires clarification, in particular:

(1) Read as a whole, it appears that the proposed NPPF para.155 planning policy “contribution” requirements should apply to both land released from Green Belt through ‘plan preparation or review’ (next text at NPPF para.147) and land in the Green Belt on which development is permitted under proposed NPPF para.152. However, the stem text of proposed NPPF para.155 is confusing, and on one reading refers only to development on land released from Green Belt. The text requires additional wording to tie the second clause more clearly to major development permitted on land that remains in the Green Belt.

(2) Question 36 refers to ‘securing benefits for nature’ and ‘public access to green space where Green Belt release occurs’, as to which:

(a) As above, it seems to be the intention that permission for major development on land that remains in the Green Belt should also secure the “contributions” required by proposed NPPF para.155, but that is not clear and Question 36 suggests that should only apply to land released from the Green Belt.

(b) The “contributions” required by proposed NPPF para.155 appear very heavily focussed on benefits in terms of public access to green space, as opposed to benefits for nature (and public access to green space might cut against benefits for nature).

(3) In order that the proposed NPPF para.155 “contributions” do not fall foul of Regulation 122 of the Community Infrastructure Levy Regulations 2010, it might be wise to tighten the wording and make clear the contributions meet the tests.

Chapter 9 – Supporting green energy and the environment

Question 72: Do you agree that large onshore wind projects should be reintegrated into the s NSIP regime?

Yes, it is appropriate for all forms of (renewable) energy generation above a certain threshold to fall within the NSIP regime.

Reintegration of onshore wind generation into the NSIP regime will not be a matter of amending the NPPF. PEBA notes that an amendment to s.15 Planning Act 2008 will be required. Government may consider a new s.15(3D) to explicitly provide for onshore wind generation if it intends to impose any further or difference criteria on onshore wind schemes. Alternatively, repeal of s.15(2)(aa) would mean that an onshore wind scheme of over 50 MW would be an NSIP.

Question 73: Do you agree with the proposed changes to the NPPF to give greater support to renewable and low carbon energy?

The amendment to NPPF 160 imposes a duty on plans to identify suitable areas for renewable and low carbon energy sources and supporting infrastructure where this would help secure their development. If the amendment is made, the final clause "where this would help secure their development" is redundant and could be removed as it is difficult to imagine how identifying an area would not help secure their development. The text is framed as a requirement to identify. There may be instances where certain plans struggle to identify suitable areas. Equally, it is possible to pay lip service to the policy intention and identify few or small areas. While the amendment is likely to give greater support to renewable and low carbon energy schemes, it is unlikely to drive significant change.

The amendment to existing NPPF 163 does not do what the consultation document suggests. The amendment directs LPAs to support planning applications for all forms of renewable and low carbon development. That direction is problematic as presumably Government still expects LPAs to resist energy generation development, for example, on significant heritage sites. Given the policy intention expressed in the consultation document, PEBA does not consider that the amended first sentence of the paragraph is necessary and it should be removed.

The support for renewable and low carbon schemes comes from the amendment to sub-paragraph (a) which affords significant weight to the proposal's contribution to renewable energy generation. PEBA is unclear what "a net zero future" means in policy terms: it may be that it is sufficient to simply afford significant weight to renewable energy generation in order to achieve the policy goal. Alternatively, if that phrase is intended to provide additional policy support to low carbon development, it would be better to say that explicitly: to give significant weight to any reductions in carbon emissions occasioned by the proposed development.

Government may wish to consider some criteria in respect of the level of renewable energy contribution and/or carbon emission reduction, as otherwise there is a risk that schemes paying lip service to renewable energy generation or carbon emission reduction will benefit from significant weight in the planning balance which would be argued to outweigh other potentially significant planning harms.

Question 74: Some habitats, such as those containing peat soils, might be considered unsuitable for renewable energy development due to their role in carbon sequestration. Should there be additional protections for such habitats and/or compensatory mechanisms put in place?

To some extent, the amendment to refer to carbon emissions suggested by PEBA in respect of Q73 above may go some way to mitigating harms to carbon sequestrating habitats, as schemes which damage such habitats would not benefit from significant weight in reducing carbon emissions. The significant weight which would be given to renewable energy generation would be balanced by the (presumably) significant weight which would be afforded to protected habitats.

If Government is concerned about the risk to habitats, a footnote to existing NPPF 163 could be considered to define what a "suitable area" might be in the negative. For example: "a suitable area is an area which is not [a key habitat/peatland/site benefitting from environmental designation]".

The further protection then built into the NPPF would be in NPPF 165, which provides that once suitable areas are identified, commercial scale projects windfall renewable energy projects would need to demonstrate that the proposed location meets the suitable areas criteria.

Given the wide scope of potentially valuable habitat, PEBA considers it unlikely that a compensatory mechanism would be an appropriate mechanism to control development in valuable habitat.

Question 78: In what specific, deliverable ways could national planning policy do more to address climate change mitigation and adaptation?

PEBA agrees that the planning system can play a key role in addressing climate change mitigation and adaptation.

Energy efficiency

There is currently some tension between the NPPF and written ministerial statement 2023. For example para 158 NPPF states that the planning system should "help to: shape places in ways that contribute to radical reductions in greenhouse gas emissions…" (in line with the Climate Change Act) and the PPG provides that ***Addressing climate change*** *is one of the* ***core land use planning principles*** *which the National Planning Policy Framework expects to underpin both plan-making and decision-taking. To be found sound, Local Plans will need to reflect this principle and enable the delivery of sustainable development in accordance with the policies in the National Planning Policy Framework. These include the requirements for local authorities to adopt proactive strategies to mitigate and adapt to climate change in line with the provisions and objectives of the Climate Change Act 2008, and co-operate to deliver strategic priorities which include climate change* but the WMS2023 appears to suggest that local authorities should not go further than current building regulations in development plan documents that seek construction/energy efficiency standards.

Given section 1 of the Planning and Energy Act 2008 and section 19 of the Planning and Compulsory Purchase Act 2004, the NPPF should be clear that, subject to viability, local authorities can mandate for the highest energy efficiency in residential construction possible. Many local authorities have declared climate emergencies and aim for net zero by 2030 but are confused by the mixed messaging.

In decision making, it could be made clear that where radical carbon reduction is achieved in construction, the weight to be given to such a benefit. The NPPF does not reference Net zero.

Question 80: Are any changes needed to policy for managing flood risk to improve its effectiveness?

Recent case law (*Mead Realisations and Redrow Homes Ltd v SOS* [2024] EWHC 279) concerned challenges where housing had been refused planning permission on appeal on grounds of a failure to satisfy the Sequential Test in NPPF and PPG. It provided clarity on how to apply the sequential test for decision makers.

NPPF/PPG could now be amended to be clearer regarding possible parameters for the assessment of reasonably available sites such as form, quantum and type of development and connection between sites. There could also be clarification to deal with the apparent inconsistency between the *Mead Realisations* case (about planning applications) and the *Substation Action Save East Suffolk Ltd v SOS* [2024] EWCA Civ 12 case which was specifically in the context of nationally significant infrastructure.

Policy/guidance could clarify why the sequential test applies to the site prior to any assessment of the scheme and/or mitigation.

Question 81: Do you have any other comments on actions that can be taken through planning to address climate change?

<u>Infrastructure</u>

Community Benefits Programme to be a mandatory requirement within the NPPF so that where renewable infrastructure is built local communities benefit to reduce objections and ensure that new energy technology is accelerated.

<u>Retrofitting</u>

Policy directing re-purposing existing buildings (subject to criteria including viability).

Question 82: Do you agree with removal of this text from the footnote?

PEBA does not have a view on the broader policy question whether the NPPF should give additional protection to agricultural land which is available for food production and/or whether that additional protection is beneficial.

The footnote (as currently drafted) is unclear - both for the reasons identified in the consultation document, and because it is uncertain what is meant by "the availability of agricultural land used for food production". That criterion is not necessarily the same as the quality/grading of the land. Agricultural land which is not best and most versatile could be used/available for food production; conversely, BMV land may not be "available" for food production (for example, due to ownership issues). Therefore, the additional text aims to provide further protection compared to paragraph 180 and the remainder of footnote 62, both of which speak to the quality/grading of the land only. Whilst PEBA agrees that the removal of the additional text would clarify the policy protections for agricultural land, it would also seem to reduce them.

See further the response to question 83, below.

Question 83: Are there other ways in which we can ensure that development supports and does not compromise food production?

Development of land used for food production will inevitably compromise it. If Government decides to protect agricultural land which is available for food production, that category of land should be given specific protection. The NPPF would need to be clear as to (i) what is meant by "the availability of agricultural land used for food production" and how that is to be assessed (ii) the weight to be given to (e.g.) preserving availability/any harm arising from the loss of such land and (iii) when the issue is relevant (plan-making, decision-taking).

Question 84: Do you agree that we should improve the current water infrastructure provisions in the Planning Act 2008, and do you have specific suggestions for how best to do this?

The header for paragraph 25 refers to the "thresholds" for water resources development in the NSIP regime, but the text in paragraphs 25-26 relate to categorisation/definitions rather than thresholds, strictly speaking. If the thresholds themselves are to be changed (for example the 80 million litres per day deployable output threshold for desalination plants at section 28A), then this ought to be done having regard to the scale of projects currently in the RAPID Gated pipeline.

It is agreed that the Planning Act 2008 should be amended in the manner suggested at paragraph 26 of the consultation page - to bring other categories of water infrastructure within the NSIP regime. This would go some way to removing or at least reducing the need to rely upon Section 35 directions for projects in the near and medium term pipeline for water undertakers, a process that can unnecessarily extend the process of delivering schemes, and which can be perceived as lacking transparency. In respect of 26(a), it should be made clear whether this will include all manner of water infrastructure projects, including desalination. In respect of 26(d) it should be made clear whether this extends to un-treated water that will be treated at its reception point, as well as treated drinking water. There appears no logic to creating a distinction between the two types of transfer for these purposes.

Question 85: Are there other areas of the water infrastructure provisions that could be improved? If so, can you explain what those are, including your proposed changes?

The publication of the National Policy Statement for Water Infrastructure in 2023 was a positive step forward for infrastructure in this area. The Government should commit to reviewing this NSP within a set period of time (say, 5 years), once emerging NSIP water schemes have proceeded further, and scrutinising its performance in the light of the progress of those schemes and any issues they have faced.

CHAPTER 10 – CHANGES TO LOCAL PLAN INTERVENTION CRITERIA

Question 87 Do you agree that we should we replace the existing intervention policy criteria with the revised criteria set out in this consultation?

Our response: No, with qualification.

The proposed intervention policy criteria are not sufficiently precise to provide meaningful guidance on the circumstances in which intervention may occur.

s.21(1) of the Planning and Compulsory Purchase Act 2004 (‘the 2004 Act’) allows the Secretary of State to intervene if they think that a local development plan document is “*unsatisfactory*”. The NPPF as currently drafted, and the consultation version, which is the primary document against which development plan documents are assessed and so would be a material consideration when the Secretary of State considers using intervention powers, requires Local Authorities to plan to meet their needs. It is clear that a plan that is failing to have regard to its “*local development needs*” (proposed criteria (a)) is one that is likely to be “*unsatisfactory*”. We do not consider that proposed criteria (a) adds anything to the existing situation. If the Secretary of State had particular concerns regarding local needs which may lead to the use of intervention powers, then there could be merit in identifying these in the intervention criteria. However, simply stating regard will be had to “*local development needs*” is too broad to provide any meaningful guidance.

The NPPF is less explicit with regards to “*sub regional, regional, and national development needs*” (proposed criteria b) and so there could be merit in identifying this as a factor that will be had regard to when considering intervention. However, these are again very broad terms, and it is unclear what it is about these that regard would be had to. Again, if there are particular concerns regarding such needs that may lead to intervention then there could be merit in identifying them in the intervention criteria.

Proposed intervention criteria (c) is “*plan progress*”. As the consultation document at Chapter 10, paragraph 5 points out, section 27(1) of the 2004 Act sets out that intervention action may be taken if the Secretary of State thinks that a local planning authority "*are failing or omitting to do anything it is necessary for them to do in connection with the preparation, revision, or adoption of a development plan document*". This power plainly allows for intervention when insufficient progress has been made in respect of the preparation of a plan. We do not consider that proposed criteria (c) adds anything to this legislative power.

Question 88 Alternatively, would you support us withdrawing the criteria and relying on the existing legal tests to underpin future use of intervention powers?

Ultimately this is a policy question. The statutory powers to intervene are drafted in relatively broad terms and intervention criteria cannot broaden them further as a matter of law. Conversely the imposition of criteria that the Secretary of State will have particular regard to could be useful in informing Local Planning Authorities of particular issues that are seen as a high priority which, if they don't address, could result in an intervention. This, however, can only be achieved if there is sufficient precision in the intervention criteria to provide meaningful guidance on the particular issues that are of concern to the Secretary of State.

CHAPTER 12 – THE FUTURE OF PLANNING POLICY AND PLAN-MAKING

Question 103 Do you agree with the proposed transitional arrangements? Are there any alternatives you think we should consider?

Question 104 Do you agree with the proposed transitional arrangements?

Our response, 103/104: Yes, with qualification.

Decision-making

Annex 1 does not contain any transitional arrangements for ongoing s.78 appeals. The Secretary of State should offer parties an opportunity to comment on the impact of any changes to national policy in the course of any ongoing appeal, prior to any decision being taken.

Plan-making

The stated aim in the consultation document is to provide "*absolute clarity to local planning authorities preparing local plans*".

In contrast to the more commonly utilised "[publication date + one month]" (see draft paragraphs 226, 228, 229), the "*expectation*" to commence plan-making in the new plan-making system "*at the earliest opportunity*" in draft paragraph 227 is inherently uncertain.

First, there is no definition of "*earliest opportunity*" in the draft Framework. The consultation document indicates that this may be replaced by a requirement to begin preparation of a plan under the new system "*in line with any subsequent arrangements set out to manage the roll-out of the new system*". As a policy decision, it will be for others to decide precisely what a clearer definition would look like, but greater certainty – and absolute clarity to local planning authorities preparing local plans – could be better achieved with reference to a more precise timetable for preparing a new plan upon or within a set period following adoption.

Second, the language of "*expectation*" used in draft paragraph 227, i.e., a strong belief that something will happen or be the case, is likewise a policy choice. Whilst indicating a steer of what could happen, such "*expectation*" would not necessarily impose any requirement or imperative on plan-makers, and we note that it is not commonly found elsewhere in the draft Framework.

Question 105 Do you have any other suggestions relating to the proposals in this chapter?

Our response: Yes

Although the further changes to the NPPF will no doubt be considered further in due course, it is important that planning legislation and policy should be easily accessed by all stakeholders and the general public; practical to operate at inquiries, hearings and in court; and well-understood. These principles – of accessibility, practicality and comprehensibility – are paramount in an area of legislation and policy that is already complex and multi-faceted.