Members' Guide to the Planning System and Planning Law

Introduction

The following guide has been produced to assist Members in understanding the context in which they may take decisions at Planning and Rights of Way Committee. It also provides assistance in understanding the planning system as it impacts on the County Council in general, from the policy context to the effects of a refusal on third parties and the applicant.

Purpose

The purpose of this guidance is to set out the law relating to the more common types of matters determined by the Planning and Rights of Way Committee and officers under delegated powers and to give general guidance on the application of the law. Members are therefore asked to consult this booklet when considering Committee agenda items and to bring it with them to each Committee. This guide should be read in conjunction with the Protocol on Public Participation at Planning and Rights of Way Committee contained in the West Sussex County Council Constitution (Part 5, Section 3, Appendix). Where necessary, more detailed consideration of the law will be provided by officers at Committee and/or in the Committee reports themselves.

Every effort will be made to ensure that the information provided in this Guide is current. The date on the front page indicates when the document was last updated.

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Legal Services

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1. Background to the Planning System

Members need to be aware of the basic structure of the planning system. The summary below sets out the context within which the Planning and Rights of Way Committee takes its decisions.

1.1 National Context

The National Planning Policy Framework (NPPF) (first published on 27 March 2012 with subsequent updates, most recent being February 2019) sets out government policy at the national level. This is supported by Planning Practice Guidance (PPG) which is regularly amended and updated.

It sets out the Government's planning policies for England and how they are expected to be applied. Issues not covered include planning for waste and some parts of planning for minerals extraction, which are covered in other national planning policies.

The policies within the NPPF must be taken into account in the preparation of local and neighbourhood plans and the NPPF is a material consideration in planning decisions.

1.1.1 Presumption in favour of Sustainable Development

The golden thread running through the NPPF is the presumption in favour of sustainable development. For decision taking (i.e. approving/refusing planning applications) this means approving development 'without delay' where it accords with the development plan (i.e. the neighbourhood, district and county level plans for the area in which the site is located). Where the development plan is absent/silent/out of date, it means granting permission unless any adverse impacts of allowing development would "significantly and demonstrably" outweigh the benefits, when assessed against the policies in the NPPF taken as a whole; or where specific policies in the NPPF, such as those relating to the ecological designations, flood risk, or Areas of Outstanding Natural Beauty indicate that development should be restricted.

For plan-making, the presumption in favour of sustainable development means that Local Planning Authorities (LPAs) should positively seek opportunities to meet the development needs of their area and local plans should meet objectively assessed needs, with sufficient flexibility to adapt to rapid change (e.g. through population forecasting to identify likely future infrastructure needs).

The weight to be given to policies in the development plan should be based upon their degree of consistency with the NPPF.

LPAs may give weight to relevant policies in emerging plans. The weight they may give will depend on the stage of preparation of the emerging plan, the extent to which there are unresolved objections to relevant policies and the degree of consistency of the relevant policies in the emerging plan with the policies in the NPPF.

For decision-taking, the presumption means that LPAs should approve development proposals that accord with the development plan without delay and LPAs should grant permission where the development plan is absent or silent or where relevant policies are out of date.

1.1.2 National Planning Practice Guidance (NPPG)

This is published on-line only and in force from 6 March 2014. The guidance is updated to reflect changes in government policy, legislative changes and case law. The NPPGs provide more detailed guidance on a number of the matters considered in the NPPF such as the use of conditions, minerals (including oil and gas), transport, air quality and biodiversity. The NPPGs are a material consideration in decision taking. The Government has also published National Planning Policy for Waste dated 16 October 2014, the Waste Management Plan for England (revised edition published January 2021) and a Policy Statement on Planning for Schools Development (August 2011).

1.1.3 Duty to Co-operate

Many planning issues cross administrative borders. A duty to co-operate was, therefore, introduced by the Localism Act 2011 to ensure that local planning authorities and other public bodies work together to ensure sustainable development extends beyond their own administrative boundaries. Compliance with this duty is required when a Local Plan is examined.

1.2 Local Context

At the local level, there is a requirement for local planning authorities to prepare local plans. Local planning authorities have to prepare a local plan that accords with the NPPF and sets out how the development and infrastructure needs of their area can be met over a 15 year period. The County Council, as a mineral and waste planning authority, has to prepare minerals local plans and waste local plans.

Local plans must be:

- Positively prepared
- Justified
- Effective
- Consistent with national policy

A local plan should indicate the broad locations for strategic development and allocate specific sites for development. It should also indicate where there may be restrictions on certain types of forms of development.

Once adopted, a local plan will replace any previously-adopted local plans and it will become part of the statutory 'development plan' for that area.

The 'development plan' is an umbrella term for the adopted or approved plans and policies that are in place at the time that a planning application is determined. It will include any adopted Development Plan Document (DPD).

In addition, communities, usually town and parish councils, can also prepare neighbourhood plans that have to be in conformity with the NPPF and local plans, but do not relate to minerals or waste development. Once adopted, a neighbourhood plan forms part of the statutory 'development plan' (see page 6) and is used for decision-making.

1.3 Other Statutory Documents

- Local Development Scheme (LDS) – a public 'project plan' identifying which plans will be produced, in what order, and when. It outlines the timetable for production of all policy documents. The County Council prepares a Minerals and Waste Development Scheme (MWDS) which sets out the programme for the development of waste and minerals local plans and the Shoreham Harbour Joint Area Action Plan;

- Annual Monitoring Report (AMR) – report to assess the progress on local plan preparation as set out in the MWDS and the effectiveness of the policies; and

- Statement of Community Involvement (SCI) – details how and when the local community and interested stakeholders will be consulted when local plans and supplementary documents are prepared. It also outlines how they will be involved in the consultation of planning applications.

1.4 Optional Documents

- Supplementary Planning Documents (SPD) – these expand or add details to policies set out in an adopted plan.

2. The County Council's Role

The County Council is the Waste Planning Authority (WPA) and Mineral Planning Authority (MPA) for those areas of West Sussex which are not included in the South Downs National Park.

The South Downs National Park Authority (SDNPA) is the statutory Planning Authority for the National Park area, including the mineral and waste planning authority. The role of the SDNPA is to control and influence the development of land and buildings within its boundaries. The SDNPA deals with all planning work relating to areas inside West Sussex that falls within the boundary of the SDNP.

This means that the County Council and SDNPA are both responsible for preparing a mineral and waste local plan and for determining planning applications which relate to waste and minerals within the County of West Sussex (also known as 'County Matters').

The County Council also determines 'Regulation 3' applications which relate to the County Council's own development which is within that part of the County that is outside the National Park (e.g. extensions to schools and libraries). Planning applications made by the County Council for development within the National Park boundary are determined by the SDNPA.

The County Council is also responsible for controlling development that is permitted and for investigating 'unauthorised' development and taking appropriate enforcement action (see section on Compliance and Enforcement).

For applications that will not be determined by the County Council e.g. residential, the District and Borough Councils in West Sussex and/or the SDNPA must consult the County Council before determining the application.

2.1 County Council Documents and Policies

The current Minerals Local Plan was adopted in July 2018, with formal revisions being adopted in March 2021. It was prepared jointly with the SDNPA and will run until 2033. It sets out a county wide vision, strategic objectives, a strategy for minerals planning and a monitoring and implementation framework. It is the statutory development plan for minerals in West Sussex.

The County Council and the SDNPA have produced a Waste Local Plan. The WLP was adopted by both authorities in April 2014 and therefore forms part of the statutory development plan. The Plan sets out four key areas which will help shape plans for managing waste in West Sussex in the future:

- A vision and strategic objectives for sustainable waste management.
- Nine policies to achieve strategic objectives for the management of different waste types.
- 13 development management policies to ensure no unacceptable harm to the environment, economy or communities of West Sussex.
- Six site allocations to help meet the need for new facilities.

The Plan will run until 2031.

The current approved Minerals and Waste Development Scheme (MWDS) covers the period 2020-2023 and details the consultation procedures that the County Council will undertake when fulfilling its planning functions, together with the timetable for the preparation and adoption of the new local plans and other key documents.

3. The need for Planning Permission

3.1 Is it development?

There is a standard approach used to determine if a planning application needs to be submitted to secure planning permission for an activity.

The first question to be asked is whether the operation in question constitutes 'development'. For the purposes of the Town and Country Planning Act 1990 ('the 1990 Act'), there are two types of 'development':

- operational development: an act that changes the physical characteristics of the land i.e. physical alteration that has some degree of permanence to it e.g. the installation of a building; and
- material change of use: e.g. the change from use of land at an airfield to a waste recycling centre.

If the activity is 'development', planning permission will be required. Therefore, the next question that should be asked is whether the operation is 'permitted development'. This means that the operation in question is still development but it is permitted by the General Permitted Development Order 2015 and, therefore, an application for permission is not required.

If the operations are not permitted development, planning permission is likely to be needed.

3.2 Certificates of Lawfulness of Existing Use or Development (CLEUD)

Any person can apply to the LPA to establish whether an existing use or operation is lawful for planning purposes, or whether failure to comply with any conditions or limitation imposed on a planning permission, is lawful. Applications relating to minerals or waste development will come to the County Council.

The burden of proof rests with the applicant and the relevant test is the 'balance of probability'. The County Council needs to consider whether, on the facts of the case and relevant planning law, the specific matter is lawful. Planning merits are not relevant. If the County Council is satisfied that the appropriate legal tests have been met it will grant a lawful development certificate.

Once a certificate is granted, the lawfulness of any use, operation or other matter to which it relates is conclusively presumed and the use, operation or other matter is immune from enforcement action (where no enforcement notice is in force). The grant of a certificate applies only to the lawfulness of development in accordance with planning legislation.

3.3 Certificates of Lawfulness of Proposed Use or Development (CLOPUD)

Anyone wishing to ascertain whether any proposed use or operation would be lawful can apply to the County Council for a CLOPUD. This will establish whether any proposed use or operation would constitute development and require planning permission.

The burden of proof rests with the applicant and the relevant test is the 'balance of probability'. The County Council needs to consider whether, on the facts of the case and relevant planning law, the specific matter is lawful. Planning merits are not relevant. If the County Council is satisfied that the appropriate legal tests have been met it will grant a lawful development certificate.

The grant of a certificate applies only to the lawfulness of development in accordance with planning legislation.

3.4 Outline or Full Planning Permission?

There are two main types of application - an applicant may decide to submit an application either for 'outline' planning permission' or for 'full' planning permission.

An application for outline planning permission is only permitted when the application is for the erection of a building. All other forms of development require an application for full planning permission.

The purpose of outline planning permission is to allow the developer to find out at an early stage whether or not a proposal is acceptable in principle by the County Council. Outline planning permission is granted subject to conditions requiring the subsequent approval of one or more 'reserved matters'. 'Reserved matters' are those aspects of a proposed development which an applicant can choose not to submit details of with an application i.e. they can be reserved for later determination, and include the following:

- access
- appearance
- landscaping
- layout
- scale.

No development can commence until all reserved matters have been approved.

Applications to the County Council are unlikely to be outline applications. The nature of waste and minerals sites means that only an application for full planning permission can realistically be considered. An application for full permission results in a decision on the detailed proposals of how a site can be developed.

Full and outline planning permissions will be for the benefit of the land.

4. Types of Planning Applications

4.1 Minerals and Waste Applications

For *most* waste and minerals operations, they will constitute either operational development or a material change of use and, therefore, require planning permission from the County Council.

An application may be made by anyone to the County Council for the determination of minerals or waste development.

Mineral working is a very specialised area. Planning for the supply of minerals (including oil and gas) has a number of special characteristics that are not present in other development:

- minerals can only be worked where they naturally occur;
- working is a temporary use of land, although often takes place over a long period of time;
- working may have adverse and positive environmental effects;
- since extraction of minerals is a continuous process of development there is a requirement for routine monitoring, and if necessary, enforcement to secure compliance; and
- following working, land should be restored to make it suitable for beneficial after-use.

As a result, the Government has decreed that particular controls are exercised over such development, in particular with regard to the environmental effects of such workings.

Every planning permission for mineral working is subject to a time limit. If the Mineral Planning Authority ('MPA') does not impose a time limit, a 60 year time limit is automatically imposed. The 60 year time limit is also made to apply to existing planning permissions granted before 22 February 1982 and to run from that date.[1]

Since some permission last for many years there is a duty on each MPA to review every site in its area, after specified periods, to determine whether the permission should be revoked or modified, or discontinued. The purpose is to ensure that sites operate to continuously high working and environmental standards. Under legislation[2], an initial review of mineral permissions (ROMP) granted between 1948 and 1982 was carried out, and periodic reviews of all minerals permissions will take place or have taken place.

Minerals extraction may only take place if the operator has obtained the necessary planning permission along with other permits and approvals e.g. Environment Agency permits, Natural England licences.

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[1] Paras 1-6 of Sch 5 to the 1990 TCPA

[2] Sections of the Planning and Compensation Act 1991 and the Environment Act 1995

Waste development and regulation is a strategic matter and there needs to be cross-authority working between counties and districts when considering how to deal with waste. There is a 'waste hierarchy' set out in the National Planning Policy for Waste at Appendix A which shows that prevention is the best outcome, and goes down to disposal at the bottom, with other means of dealing with waste in between.

The County Council is also required to monitor all minerals and waste sites to check whether operations are undertaken in accordance with the relevant planning permission.

4.2 Regulation 3 Applications

The procedures dealing with development undertaken by local authorities are contained in the Town and Country Planning General Regulations 1992 (as amended). The principle underlying these regulations is that local authorities must make planning applications in the same way as any other person and must follow the same procedures as would apply to applications by others.

Local authority development proposals, like those of other persons applying for planning permission, must be determined in accordance with the development plan unless material considerations indicate otherwise.

Local Authorities benefit from permitted development rights whereby certain minor developments can be carried out without needing to apply for specific consent.

Applications for 'County Council' development within that part of the County that is outside the SDNP such as schools, libraries and care homes can be dealt with under Regulation 3 of the 1992 'General' Regulations ('Regulation 3' applications). Regulation 3 permits a local authority to make an application to itself for planning permission to develop land within its area and to then also determine the application itself. The development must be carried out by (or on behalf of) the County Council and may be on land in the Council's ownership or on any other land. The County Council would need to have some significant interest in a proposal if the application is a joint application – this is usually determined by the funding arrangements of a project.

Following amendments to the 1992 Regulations in 2018, it is now the case that Regulation 3 permissions run with the land: the benefit of planning permission passes on if ownership of the land changes.

4.3 Regulation 4 Applications

Regulation 4 applications are where the County Council owns the land but it does not intend to develop the land in question itself (either on its own or jointly with another party). In such cases, if the land was not owned by the County Council, the application would fall to be determined by the relevant District or Borough Council or where applicable the SDNPA.

This means that, for example, if the County Council wanted to make an application for housing on land that it owns, and did not want to develop the land itself or with another party, the application would have to go to the appropriate District or Borough Council or where applicable the SDNPA for determination.

A Regulation 4 permission will run with the land. This enables the County Council to dispose of land for private development (such as for housing) with the benefit of planning permission.

4.4 Section 73 Applications and non-material amendments

When planning permission is granted, development must take place in accordance with the permission and conditions attached to it, and with any associated legal agreements. New issues may arise after planning permission has been granted which require modification of the approved proposals. Where these modifications are fundamental or significant a new full planning application will need to be submitted. Where less substantial changes are proposed, there are the following options:

- making a non-material amendment; and
- vary or remove the conditions attached to the planning permission.

There is no statutory definition of a 'non-material amendment'. It will be dependent on the context of the overall scheme – an amendment that is non-material in one context may be material in another. The County Council must be satisfied that the amendment sought it non-material in order to grant an application. No consultation is undertaken. It is not a re-issue of the original planning permission.

Where amendments are more significant, applications can be made under Section 73 of the Town and Country Planning Act 1990 to vary or remove conditions associated with a planning permission. This process can be used where there is a minor material amendment e.g. where a proposals scale and/or nature results in a development which is not substantially different to the one which has been approved.

It is important to note that the effect of such an application is not merely an amendment to the existing permission. If such an application is granted, the effect is to grant a new permission. The applicant, therefore, could have two or more permissions and they can choose which one to implement. This is because an application under Section 73 does not change the existing permission. [3]

The County Council must consider the application in the same manner as any other application at the time the application is considered and can grant permission subject to conditions that are different to those to which the previous permission was granted. However, it may not re-write the permission altogether. In the case of a refusal, the planning permission stands with the conditions as previously attached but the applicant can appeal against the decision.

4.5 Section 73A Applications

An application for planning permission under Section 73A of the Town and Country Planning Act 1990 is where the development has already been carried out. This is used where planning permission is to be granted retrospectively in order to 'regularise' a breach of planning control, or where a temporary permission has expired.

[3] Powergen UK Plc v Leicester City Council (Court of Appeal May 19,2000); R v East Sussex County Council ex p Reprotech (Pebsham ltd) (Court of Appeal; June 16, 2000).

The County Council need to take into account the planning considerations existing at the time the decision is being made.

5. Environmental Impact Assessments (EIA)

Certain applications for planning permission are subject to an Environmental Impact Assessment (EIA). EIA is best viewed as an extra process that the applicant has to undertake before submitting an application. An EIA will be necessary if the proposed development falls into Schedule 1 of the EIA Regulations or if the development is likely to have a significant effect on the environment or it is in a sensitive area (as governed by Schedule 2 of the Regulations).

Applications for EIA development require additional publicity and have an extended target determination time of 16 weeks.

5.1 Screening and Scoping

The County Council can 'screen' proposals to confirm whether an EIA is required and it can also 'scope' the content of the Environmental Statement (ES) at the request of the applicant. This will often be the focus of pre-application discussions. The applicant can ask for a screening opinion either before they submit the application, or the County Council can issue one once the application has been received.

Officers' decision reports for major applications (i.e. all minerals/waste proposals and large Regulation 3 proposals) need to document the County Council's consideration of EIA and whether or not it was deemed necessary and the reasons why.Failure by the LPA to properly screen applications to determine whether an EIA is required can result in planning permission being quashed by the courts.

5.2 Environmental Statement

The applicant must prepare a report that identifies, describes, and assesses the effects that the project is likely to have on the environment. This report, called an Environmental Statement (ES), is submitted to the County Council with the application.

The ES has to address the direct and indirect effects of the development on a number of factors including the population, fauna, flora, soil, air, water, climatic factors, landscape, and archaeology.

An application to vary conditions attached to an existing planning permission is in effect an application for a new planning permission. The County Council, therefore, has to consider the need for EIA in exactly the same way as for any other application.

5.3 Decision-Making

Once the ES has been submitted and the County Council is happy it has all the information it requires, it will evaluate the information presented and make a decision on the planning application based, in part, on the content of the ES.

In some cases, additional information may be required from the applicant before the application is determined. If insufficient information is provided and a full assessment of the significance of the environmental impacts cannot be made, the ES may fail to meet the requirements of EIA Regulations.

5.4 EU Waste Directive Framework

The Waste (England and Wales) Regulations 2011[4] make specific reference to determining applications for waste management or landfill. The regulations set out that authorities will have regard to the EU Waste Directive Framework. These provisions continue to apply since the UK left the European Union (with some minor amendments). Case law has established that the provisions referred to in the Directive and the Regulations are objectives and as such are more than material considerations. They must be kept in mind during the assessment of the application and although some applications may not further the objectives, provided they have been considered, any decision following a recommendation to permit, may still be lawful.

The objectives for waste management are the protection of human health and the environment and self-sufficiency and proximity and for landfill are locational requirements and minimisation of hazards arising from traffic beyond the site of the landfill.

[4] SI 2011/988, as amended by the Waste (Circular Economy) (Amendment) Regulations 2020

6. Planning Applications Process

6.1 Pre-Application Discussions

For many applications, especially for larger potential projects, it is likely that there will be some pre-application discussions between the allocated planning officer from the County Council and the applicant. This is to establish the kind and depth of information that will be required to enable the County Council to determine the application properly.

Pre-application discussions are encouraged in the NPPF: *"Local planning authorities have a key role to play in encouraging other parties to take maximum advantage of the pre-application stage… they should encourage take-up of any pre-application services they do offer."*. They help to establish the kind and depth of information that will be required to enable the County Council to determine the application properly.

Any advice offered is subject to the qualification that it is without prejudice to the ultimate decision on any application which may be made, particularly as no consultation will have been undertaken. Officers will however be able to guide the applicant as to the likely acceptability of the proposal.

6.2 Validation of Planning Applications

Once a planning application has been received and checked that it has included all information required to determine the application (known as 'validation'), it will be formally registered and the publicity process will be started.

6.3 Timetable for Decision-Making

Once a planning application has been validated, the County Council should make a decision on the proposal as quickly as possible, and in any event within the statutory time limit unless a longer period is agreed in writing with the applicant.

The statutory time limits are:

- Where the development requires an Environmental Impact Assessment (EIA), the time period for determination is extended to 16 weeks.
- For 'major development' (i.e. all minerals and waste development; other development with a site area of more than 1ha or creating more than 1,000m2 of additional floorspace): 13 weeks.
- For 'minor' development: 8 weeks.

If a decision on the application is not given by the County Council by the statutory deadlines or the mutually agreed extension date, then the applicant can appeal to the Secretary of State for non-determination of the application[5]. The applicant has six months from the statutory deadline or mutually agreed deadline in which to do this.

[5] Under section 78 of the Town and Country Planning Act 1990

6.4 Advertising and Consultation

Applications need to be advertised – this is done by a site notice and, for major applications, by advertisement in a local newspaper.

The County Council must take into account any representations made within 21 days from the date notice of the application is given or 14 days from the date any advertisement appeared in a local newspaper. A decision on the application cannot be made until these periods have expired.

Statutory consultees include the relevant District or Borough Council, the Parish Council, statutory bodies such as the Environment Agency, Highways England, and Natural England. Statutory Consultees are given 21 days after receipt of the consultation to respond[6]. This period can be extended by agreement, particularly for major and/or complex applications.

Once the responses are received, the case officer will consider them and it is usually at this point that the decision will be made as to whether the application should be determined by Planning and Rights of Way Committee or by the case officer under delegated powers.

An application will be reported to Planning and Rights of Way Committee for determination in the following circumstances:

- If there are substantive material objections to the application
- If a statutory consultee objects to a Regulation 3 planning application, the application will also go to Planning and Rights of Way Committee for determination.
- A member of the County Council has requested, with reasons, that the application be considered by the Planning and Rights of Way Committee

6.5 Assessing the Application (Material Considerations)

The planning system is plan led. A decision on an application must be taken in accordance with the development plan (local and neighbourhood plans) unless material considerations indicate otherwise.

The law states that "… if regard is to be had to the development plan for the purpose of any determination to be made under the planning acts the determination must be made in accordance with the development plan unless material considerations indicate otherwise." [7]

It also states "… in dealing with [an application for planning permission] the authority shall have regard to the provisions of the development plan, so far as material to the application, and to any other material considerations."

[6] Article 20 Town and Country Planning (Development Management Procedure) (England) Order 2010

[7] Section 38(6) Planning and Compulsory Purchase Act 2004

The NPPF stresses the importance of having a planning system that is plan-led. Where a proposal accords with an up to date development plan the NPPF states that it should be approved without delay, as required by the presumption in favour of sustainable development.

There has been much case law and judicial discussion as to what can be termed a 'material consideration' and each material consideration will not necessarily be relevant to every application. A material consideration is one which is relevant to making the planning decision in question. The scope of what can constitute a material consideration is very wide and the courts have taken the view that planning is concerned with land use in the public interest.

Factors that **are** material considerations include:

- the statutory 'development plan' – adopted plans and policies
- development plan documents in the course of preparation;
- central Government guidance – e.g. the NPPF and the NPPG; and
- responses from consultees, owners of the land, affected parties, and members of the public (where relevant to the application and related to issues directly linked to the application).

Different 'weight' will be attached to published documents depending on whether the document has been formally adopted by the relevant authority and the age and date of the document. For example, less weight should be attached to documents that have not been formally adopted and greater weight should be attached to documents that have been through the public consultation and Secretary of State processes and have been formally adopted.

Factors **capable** of being material considerations include, but not exclusively:

- Siting
- Area
- Height
- Mass
- Design
- External appearance
- Means of access
- Landscaping
- Impact on neighbouring land e.g. noise, disturbance, loss of sunlight
- Availability and capacity of infrastructure
- Traffic considerations
- Communications
- Precedent including previous appeal decisions and case-law
- Objectives in relation to waste

Factors that are **not** capable of being a material consideration include:

- Private issues between neighbours, including covenants on the land which may mean that a planning permission cannot be implemented.
- Loss of view.
- Value.
- Finance – whether a development is financially viable (but may be rendered material by a formula contained in the development plan).
- Cost to County Council of modifying or revoking a planning permission.
- Applicants personal circumstances e.g. the contractual position of the County Council's waste management arm in connection with contracts to run waste sites or any other contractual information relating to the running of sites.

The above lists are liable to change through evolving case law and, therefore, will be updated accordingly.

It is for the decision maker to determine the weight that is to be given to a material consideration.

6.6 Prematurity

In a limited number of cases, planning permission should be refused where it would predetermine decisions (about the scale, location, or phasing of new development) that should be made through the preparation of a development plan document. Pre-maturity should not be used as the sole reason for refusing planning permission. Note that the more advanced a plan is, the more weight can be attached to it when determining a planning application, making the pre-maturity reason for refusal less likely.

The NPPG states[8] that:

> "Annex 1 of the National Planning Policy Framework explains how weight may be given to policies in emerging plans. However in the context of the Framework and in particular the presumption in favour of sustainable development – arguments that an application is premature are unlikely to justify a refusal of planning permission other than where it is clear that the adverse impacts of granting permission would significantly and demonstrably outweigh the benefits, taking the policies in the Framework and any other material considerations into account. Such circumstances are likely, but not exclusively to be limited to situations where both:
>
> (a) the development proposed is so substantial, or its cumulative effect would be so significant, that to grant permission would undermine the plan-making process by predetermining decisions about the scale, location or phasing of new development that are central to an emerging Local Plan or Neighbourhood Planning; and

[8] NPPG Determining a planning application paragraph 014

(b) the emerging plan is at an advanced state but is not yet formally part of the development plan for the area.

Refusal of planning permission on grounds of prematurity will seldom be justified where a draft Local Plan has yet to be submitted for examination, or in the case of a Neighbourhood Plan, before the end of the local planning authority publicity period. Where planning permission is refused on grounds of prematurity, the local planning authority will need to indicate clearly how the grant of permission for the development concerned would prejudice the outcome of the plan making process."

6.7 Human Rights

There has been extensive litigation in the courts as to whether the English planning system is compliant with both the Human Rights Act 1998 and the European Convention on Human Rights (from which the 1998 act is derived). In particular, Article 8 (right to a private and family life) and Article 6 (right to a fair trial) and First Protocol Article 1 (protection of property) have been raised in relation to the constraints and workings of the planning system.

The latest view on human rights and the planning system is that the planning system is generally compliant with the ECHR and HA 1998.

The officer's report will always need to fully consider the Articles and Protocol above and there will be paragraphs in the report confirming that they have been taken into consideration and the conclusions drawn.

7. Determining Planning Applications

Section 70(1) of TCPA 1990 sets out that when determining an application, whether by Planning and Rights of Way Committee or by officers under delegated powers, the County Council can:

- grant permission unconditionally; or
- grant permission subject to appropriate conditions; or
- refuse permission.

Planning applications must be determined in accordance with the development plan unless 'material considerations' indicated otherwise. There is scope in the legislation[9] that allow other factors to mean that the application is considered and recommended for approval despite not complying with the development plan (i.e. 'contrary to the development plan'). This is likely to be rare, and only in cases where plans/policies are outdated or other material considerations outweigh the terms of the development plan.

7.1 Who takes the decision? Planning and Rights of Way Committee or Delegated Decision?

The Constitution of the County Council sets out the criteria for deciding if a planning application should go to Planning and Rights of Way Committee for consideration and a decision, or whether it can be decided by officers. The following table shows the instances when a matter will go to Committee or where officers will be capable of determining the application.

	Substantive material objections and contrary to development plan	**Substantive material objections and not contrary to Development Plan**	**No substantive material objections but contrary to Development Plan but material considerations outweigh the development plan provisions**	**No substantive material objections and not contrary to Development Plan**
Determination by Planning Committee	✓	✓	✓	✓
Determination by Officers	X	X	✓	✓

[9] Section 72 TCPA 1990, Section38(6) PCPA 2004

Although the Planning and Rights of Way Committee can determine all applications, in practice if there are no substantive material objections the matter is usually determined by officers. In respect of applications for Regulation 3 development, where, as a result of the consultation process, a statutory consultee objects in writing to a proposal, the matter will automatically be considered by Planning and Rights of Way Committee.

Members are able to consult The Bulletin, the members' newsletter published weekly, about forthcoming planning applications. The application will not be determined for a period of 21 days from the date of notification in The Bulletin. If a Member feels that a matter has a lot of local interest, or is particularly controversial, they may ask for it to be considered by the Planning and Rights of Way Committee rather than under delegated powers. This is the case even if there are no adverse comments or if the matter is not contrary to the 'development plan'.

7.2 Officer Reports

Regardless of whether the application will end up before Planning and Rights of Way Committee or will be determined by officers, a report will be prepared detailing the history of the site, the policy context, the statutory consultee responses, the public representations, and the key planning considerations, before arriving at an overall conclusion and a recommendation (if the report is going to Committee) or a delegated decision, both with reasons.

Reports that go to Planning and Rights of Way Committee will document the following:

- Executive summary detailing the key issues, the overall conclusion, and a recommendation.
- Planning background/history.
- Details of the proposal.
- Details of the relevant planning policies.
- Summary of the statutory consultees' responses.
- Summary of public representations.
- Consideration of key issues (and conclusion on those issues).
- Overall conclusion and recommendation.
- Human rights considerations.
- Equality Act 2010 considerations.
- Suggested conditions (only if the recommendation is for approval).
- Informatives (information for the applicant on any other permits or licences that may be required that are not the responsibility of the County Council such as Environment Agency permits).
- Reasons for refusal (only if the recommendation is for refusal).

7.3 Decisions by Planning and Rights of Way Committee

It is an essential requirement to give reasons for a decision – there is a clear duty on the County Council to give clear reasons for the grant of permission or for the refusal of permission.

Reasons must be intelligible and adequate. Case law on the issue includes the following: "[Reasons]… must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the principal important controversial issues disclosing how any issue of law or fact was resolved. The reasons need refer only to the main issues in the dispute, not to every material consideration." [10]

7.4 Overturning Officer Recommendations

If the Committee comes to a different decision to that of the officer in the recommendation, it will be necessary for the Committee to give clear reasons for either their decision to grant or to refuse permission. These reasons for refusal (or grant) must relate to the material considerations of the application and generally have a link to a relevant policy.

For example, the Committee may decide, contrary to the report, that the surrounding infrastructure to the proposed development will not be able to cope, and therefore the application should be refused. Accordingly, a 'reason for refusal' would be that 'the surrounding infrastructure is already at capacity and cannot cope with the increase in traffic the proposal will generate'. Members will need to consider whether they consider they have empirical evidence to conclude differently to that of the officer and will need to base this on sound policy.

Another example is if the proposed development is within an Area of Outstanding Natural Beauty. A reason for refusal may read that 'the proposed development is within an AONB and so the development would be contrary to development plan policy'.

Officers will assist the Committee in formulating specific wording to support the reasons given by members.

7.5 Different or Additional Reasons for Refusal or Granting Planning Permission

The Committee can decide it wants to give different or additional reasons for resolving to refuse or grant planning permission. Guidance will be available from officers, but any new reasons for refusal or permission need to relate to a material consideration and be linked to policy.

Committee needs to note that if the decision is appealed, additional reasons cannot be later added. Therefore, Committee Members must carefully consider the pertinent issues before resolving to remove or alter any suggested reasons.

[10] Per Lord Brown of Eaton –Under –Heywood at [36] South Bucks DC v Porter (no 2) [2004] UKHL 33

Committee may also decide that it wants to add in extra reasons for granting permission. Again the reasons must be relevant and linked to a material consideration. Officers will advise and assist if this option is exercised.

7.6 Refusal of Planning Permission for Regulation 3 Applications

There is a distinct procedure within the Council's Standing Orders to be followed if the Planning and Rights of Way Committee is minded to refuse a Regulation 3 application for the County Council's own development or intends to impose a condition which may be unacceptable to the applicant.

If the Planning and Rights of Way Committee signals that it is their intention to refuse the application/impose an unacceptable condition, the Committee will not determine the application but will indicate its decision in principle. It is important that the Committee identify the issues of concern so that the applicant and planning officers can try to overcome the objections that have been raised. The matter will then be reported back to Planning and Rights of Way Committee.

If Members are satisfied that the issues they raised have been resolved, then the Committee can resolve to grant permission. If Members are not convinced that the issues have been resolved, the Committee will give their indication of a refusal in principle and the reasons for this.

This then becomes a recommendation that must go before full County Council. Full County Council will act as the Planning Authority under its statutory powers and the Chair of Planning and Rights of Way Committee will introduce the item.

7.7 Conflicts of Interest, Pre-Determination, and Bias

The Planning and Rights of Way Committee is, and must be seen to be, independent of the applicant. First, this means that Members must pay attention to whether they have a personal or disclosable pecuniary interest (DPI) in such applications, and second, and perhaps more importantly, that Members must consider the issues of pre-determination and bias.

This is particularly important for Regulation 3 applications for the County Council's own development which the County Council is permitted to determine but in so doing must wear two separate 'hats' – that of applicant and that of determining authority.

Members must also give careful consideration to any roles they may hold outside of Planning and Rights of Way Committee. This includes advising the property or resources portfolio holder, or sitting on steering groups through which the Member might have access to information that could influence the way in which they consider the application at committee (such as being a member of a County Local Committee).

Members should not make a decision on a planning application prior to the vote at the Committee meeting. This means that Members should not make any public proclamations as to their views on the application that would lead the public to think that the Member had already made up his or her mind on the merits of the application prior to Committee.

The basic proposition is that a Member cannot be party to a decision in relation to which s/he is actually biased (in that he/she has a 'closed mind', i.e. that they have pre-determined the outcome of any matter despite the presence of contrary evidence

before them) or gives the appearance of being biased, as it would appear to the outside reasonable observer[11].

Members must keep open minds, be prepared to listen to all sides of the arguments presented, and be able to justify why they have taken a particular decision or voted in a particular manner, based on the facts as presented to them.

Further advice can be obtained from the County Council's Monitoring Officer (currently the Director of Law and Assurance).

7.8 Departures

The County Council may depart from development plan policy where material considerations indicate that the plan should not be followed, subject to any conditions prescribed by the Secretary of State. In 2009 a Secretary of State Direction provided guidance on which applications local authorities must notify the Secretary of State of prior to a decision being taken.

The 2009 direction requires the County Council to notify the Secretary of State before approving certain types of very significant development. Currently these are where proposals are:

i) Green belt development and development outside town centres where certain thresholds are met.

ii) World heritage site development - development would have an adverse impact on the outstanding universal value.

iii) Playing field development, and such development is the land of the local authority or currently used for education purposes or has at any time in the five years before the application been used by an educational institution as a playing field and Sport England has objected to the development subject to certain criteria;

iv) Flood risk development where the Environment Agency has made an objection

The Secretary of State will decide whether to call in the application to determine or leave the decision to the planning authority.

7.9 Secretary of State Call In

Under section 76A of the Town and Country Planning Act 1990 if an application is likely to have national or regional importance, the Secretary of State may direct that the application be referred to him rather than by the local planning authority. Anyone can request that an application is called-in. The secretary of state will normally only do this if the application conflicts with national policy in important ways, or is nationally significant. An inspector will be appointed to consider the application.

[11] Appearance of bias in Porter v Magill [2002] 3 AC 357, para 103, per Lord Hope

8. Granting Planning Permission

Planning permission is granted or refused when the 'decision notice' is signed and dated by the County Council and issued to the applicant.

In some cases, the Planning and Rights of Way Committee may resolve to grant planning permission subject to the completion of a Section 106 legal agreement. In such cases, the permission is not granted until the agreement is completed, which may be some weeks or months after the Committee meeting.

8.1 Different 'Types' of Planning Permission

Broadly, there are three types of planning permission:

1. The first is the most often seen type of planning permission. This is when permission is granted with no end date attached by way of condition and will specify that development must commence within a number of years, typically 3 years, of the grant of permission.

2. The second is when permission is granted but has an end date attached. Often such permissions are known as 'temporary permissions.' Legislation gives the County Council authority to impose conditions e.g. that buildings be removed or a use is discontinued after a specified period. All minerals permission and reviews of mineral permissions will have an end date attached.

   Temporary permissions can also be used where there is insufficient evidence to enable the County Council to determine the exact effects or the character of the application when the application may be detrimental to existing nearby uses. These permission are often referred to as 'Trial Runs'.

   A temporary permission, however, cannot be granted because of the known detrimental effect of the development on nearby amenities.

3. The third is when the permission is personal to the applicant (a 'personal permission'). This means that the planning permission is not attached to the land, as it is usually. It also means that the permission does not run with the land, so that the applicant cannot pass on the permission by selling on the land. There needs to be a good reason for a permission to be personal.

8.2 Granting Planning Permission subject to Conditions

Conditions can be attached to a grant of planning permission to help ensure that the impact of the development will be controlled or mitigated. Conditions compel the applicant to do or take measures to render the development acceptable in planning policy terms. Conditions are tailored to tackle specific problems rather than standardised or used impose broad unnecessary controls.

Planning conditions should only be imposed where they are:

1. **necessary,** [a condition must not be imposed unless there is a definite planning reason for it];
2. **relevant to planning and** [a condition must not be used to control matters that are subject to other controls e.g. advertisement control];

3. **to the development to be permitted**; [the condition must be justified by the nature or impact of the development permitted. It cannot be imposed to remedy a pre-existing problem];
4. **enforceable** [would it be possible to detect a contravention or remedy any breach of condition?];
5. **precise** and [the condition must be written in a way which makes it clear what must be done to comply.]; or
6. **reasonable in all other aspects**. [conditions must be reasonable and proportionate].

The 6 tests must all be satisfied each time a decision to grant planning permission subject to conditions is made. A condition that fails to meet any of the 6 tests must not be used. A reason must be given for the imposition of each condition.

The officer's report to Planning and Rights of Way Committee will, more often than not, contain suggested conditions to mitigate the impact of the development if the recommendation is to grant permission.

Planning and Rights of Way Committee has discretion to add remove or amend proposed conditions if it considers it appropriate. If Planning and Rights of Way Committee is minded to add conditions, the conditions must adhere to the guidance set out above and must be supported with a reason. Officers can assist with the drafting of any additional or amended conditions.

Specific circumstances where conditions should not be used include:

- positively worded conditions requiring a financial contributions to mitigate the impact of the development;
- conditions which unreasonably impact on the deliverability of a development;
- conditions requiring the development to be carried out in its entirety;
- conditions requiring compliance with other regulatory regimes; and
- conditions requiring land to be given up.

Conditions requiring works on land that is not controlled by the applicant, or that requires the consent or authorisation of another person or body often fail the test of reasonableness and enforceability. It may be possible to achieve the same result using a condition worded in a negative form (a Grampian condition) i.e. prohibiting development authorised by the planning permission until a specific action has been taken e.g. provision of supporting infrastructure. Government advice is that such conditions should not be used where there are no prospects at all of the action in question being performed within the time-limit imposed by the planning permission.

Note also that since 2018, planning permission for the development of land may not be granted subject to a pre-commencement condition without the written agreement of the applicant to the terms of the condition (except in the case of a condition imposed on the grant of outline planning permission, or if the applicant does not respond by a set deadline to the proposed condition). An example of a pre-commencement condition is 'no development shall take place until…' certain works have taken place or surveys have been submitted.

It is also common to see informative notes on a planning decision. Informative notes allow the County Council to draw an applicant's attention to other relevant matters – for example the need to see additional consents under other regimes. These notes do not carry and legal weight and cannot be used in lieu of planning conditions.

8.3 Granting Planning Permission subject to a Legal Agreement

Planning permission can be granted subject to the completion of a legal agreement by the applicant with the County Council.

Section 106 of the TCPA 1990 allows for the County Council to require the applicant to enter into an agreement with the County Council to govern the use of the land in some way. These agreements assist in mitigating the impact of unacceptable development to make it acceptable in planning terms. For example financial contributions can be required in a Section 106 agreement to mitigate the impact of the development on infrastructure such as roads, libraries, civic amenity sites or schools.

Planning agreements can only constitute a reason for granting planning permission if they meet statutory tests. These are as follows:

(a) it is necessary to make the development acceptable in planning terms;

(b) it is directly related to the development; and

(c) it is fairly and reasonably related in scale and kind to the development.

Section 106 agreements may be made with both the County Council and the applicant land-owner signing up to them, or with just the applicant landowner signing the deed (known as a 'unilateral undertaking'). Both forms of agreement are equally valid. Unilateral undertakings tend to be used where there is a one-off contribution to be paid; they are not appropriate when there are more complicated requirements to be signed up to.

Mineral and waste developments and developments for schools or libraries do not incur contributions for education or libraries or household waste recycling sites. This is because the calculations for such contributions are based on the increase in population that the development will generate. Such contributions apply to developments for housing.

The use of Section 106 agreements by the County Council is generally to govern the movement of large vehicles associated with a development or works that are required to take place within the public highway for highway safety purposes. A lorry routing agreement will specify the route to be taken by lorries under the applicant's control to and from the site. The agreement may also require the applicant to place signs on the application site informing the drivers of such vehicles to use a specific route. Such agreements are likely to be required when the Highways Authority as consultee has raised concerns about the capacity of the roads surrounding the development.

For developments that will use very large or numerous vehicles, there may also often be a requirement to enter into an agreement under Section 59 of the Highways Act 1980 with the County Council to pay for any extraordinary damage to the highway that will be affected by the development. This can be done as part of the Section 106 agreement process.

If an applicant doesn't agree to enter into a Section 106 agreement it could lead to a refusal of planning permission or non-determination of their planning application. Members may wish to consider whether a time-frame should be placed on the completion of any Section 106 agreement.

8.4 Limitations on Granting Planning Permission

The grant of planning permission by the County Council cannot permit something outside the proposed development that has been applied for in the planning application.

Case law has held that it is possible to grant permission subject to a condition that only a reduced development was to be carried out provided that the result did not differ substantially from the development proposed in the original application.

The main criterion to which the County Council has to have regard, is whether the development would be so changed that it would, in substance, no longer be what was applied for. In this case, granting planning permission would deprive those who should have been consulted on the changed development of the opportunity to comment.

An amendment to an application that would have the effect of altering its whole character cannot be done.

For a full planning permission, a condition will be attached stating that the permission must be implemented within three years of it being granted. Applications to extend the time limit for implementation of the permission cannot be used where the permission has already expired or the consent was granted after 1 October 2010.

8.5 What if the applicant does not like the conditions imposed?

If the applicant is granted planning permission and decides that they do not like the conditions that have been imposed on the permission, it is possible to 'appeal' these conditions to the Secretary of State. It is also possible for an applicant to make an application to the County Council to remove or vary a condition.

8.6 Application to remove or vary a condition

Under Section 73 of the TCPA 1990, the applicant can submit a further application to the County Council specifying the condition/s that the applicant wants to see removed or varied. Officers must treat the application in the same way as an entirely 'new' application.

If the application is granted, what results is an entirely new planning permission although it does not cancel out the previous permission. This means that the applicant can decide whether to continue with the 'old' permission or implement the new permission.

A common example of such an application on a waste site is for the applicant to apply for a variation of the opening hours of the site to that granted in the original permission.

9. Planning Appeals

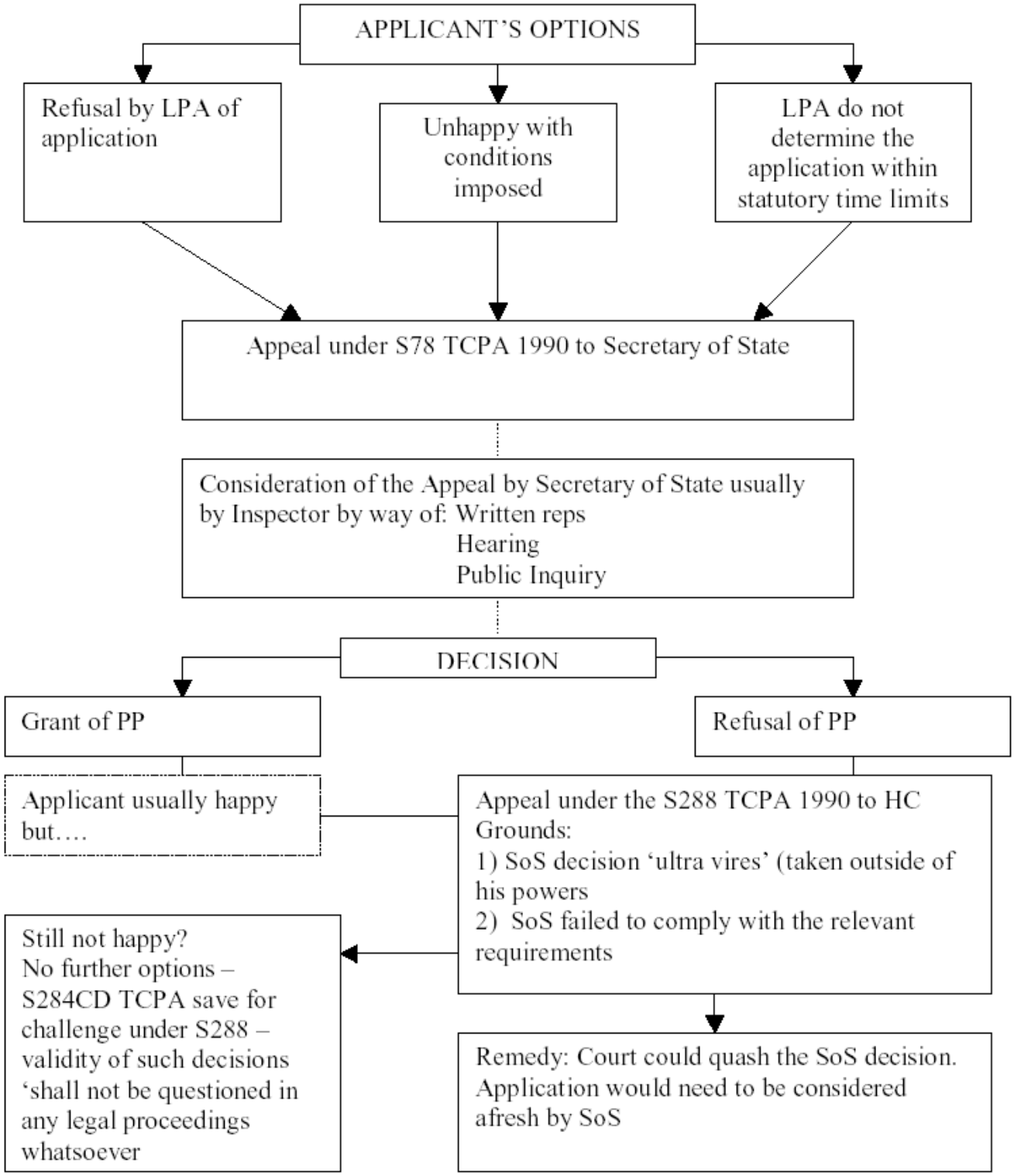
There is a right of appeal against most planning decisions to the Secretary of State by the applicant. Appeals must be submitted to the Planning Inspectorate within 6 months of a decision being taken by the County Council – i.e. either a refusal, or approval with conditions that the appellant wishes to appeal.

The applicant also has a right to appeal to the Secretary of State (SoS) via the Planning Inspectorate if the County Council takes too long to determine an application. Most appeals are determined by Planning Inspectors on behalf of the Secretary of State. However, the Secretary of State has the power to make the decision on appeal rather than a Planning Inspector. This is known as a 'recovered appeal'.

Different deadlines apply to different appeals.

The appeal may take the form of written representations, an oral hearing, or a public inquiry. It depends on the complexity of the issues involved. Appeals are determined as if the application for permission has been made to the Secretary of State in the first instance – the Inspector will come to a view based on the merits of the application.

The process is outlined on the next page:


APPLICANT'S OPTIONS
Refusal by LPA of application
Unhappy with conditions imposed
LPA do not determine the application within statutory time limits
Appeal under S78 TCPA 1990 to Secretary of State
Consideration of the Appeal by Secretary of State usually by Inspector by way of: Written reps
Hearing
Public Inquiry
DECISION
Grant of PP
Refusal of PP
Applicant usually happy but….
Appeal under the S288 TCPA 1990 to HC
Grounds:
1) SoS decision 'ultra vires' (taken outside of his powers
2) SoS failed to comply with the relevant requirements
Still not happy?
No further options – S284CD TCPA save for challenge under S288 – validity of such decisions 'shall not be questioned in any legal proceedings whatsoever
Remedy: Court could quash the SoS decision. Application would need to be considered afresh by SoS

9.1 Section 288 Appeal

After an appeal to the Secretary of State, should the applicant not be content with the decision s/he has one more option – a further appeal to the High Court against the Secretary of State decision under Section 288 of the TCPA 1990.

The grounds of challenge come under two branches:

- if the decision is thought to be 'ultra vires' or outside the powers of the decision-making authority;
- if the decision is thought not to comply with the 'relevant requirements'. The defect must have resulted in substantial prejudice to the applicant.

Such an appeal must be submitted within 6 weeks of the decision.

9.2 Appeals by Third Parties

Often in planning applications, outside interest groups become involved. Such groups may already exist (such as Greenpeace) or come into being as a result of the proposed development (local pressure groups for example). These groups often have firm views about the impact and desirability of the proposed development. Such groups are often referred to as 'third parties'. Third parties don't have the ability to challenge a decision to the Secretary of State in the same way as applicants.

One of their options if they are unhappy with the grant of a permission by the planning authority is for judicial review (dealt with below).

The other option is contained in section 288 of the TCPA 1990. If an application has been appealed by the applicant to the Secretary of State following the refusal of permission by the County Council, and the Secretary of State has issued a decision whether to grant permission or not following the appeal, *that* subsequent decision may be appealed. Appeal is to the High Court for quashing the Secretary of State decision and remitting to him/her for reconsideration.

A category known as 'Persons aggrieved' by the decision of the Secretary of State may appeal; this category can include those who had appeared and made representations at the appeal inquiry, such as local interest groups, as well as the party against whom the decision of the Secretary of State went.

Third parties would need to show that they had a significant enough interest in the matter and that they had been materially affected by it and such application must be made within six weeks of the Secretary of State's decision.

9.3 Judicial Review

First, the claimant needs to make an application to the High Court for permission to proceed with the claim. They need to show sufficient standing (that the claimant has sufficient interest in the matter and is not merely a vexatious litigant), and that the claimant has acted promptly.

9.4 Time Limits

The claimant will need to apply to the High Court not later than 6 weeks of the

decision to refuse (or grant in the case of third parties) planning permission.

9.5 Effect of Judicial Review

A claim for judicial review tends to be on the following grounds:

- illegality: a claim that the decision is illegal needs to show that the County Council took a decision contrary to law;
- irrationality: a claim that the decision is irrational must show that the County Council acted unreasonably – such that any reasonable authority would not have taken the decision in the manner that the defendant authority did; or
- procedural impropriety: a claim that the decision was taken as a result of procedural impropriety must show that the decision was not taken in accordance with the County Council's Constitution or prescribed steps in the planning process were not adhered to.

If the High Court finds the claim has merit, there are five remedies that the Court can order.

(i) a mandatory order – that the County Council must do something to remedy the decision;

(ii) a prohibiting order – that the County Council must refrain from doing something concerned with the decision;

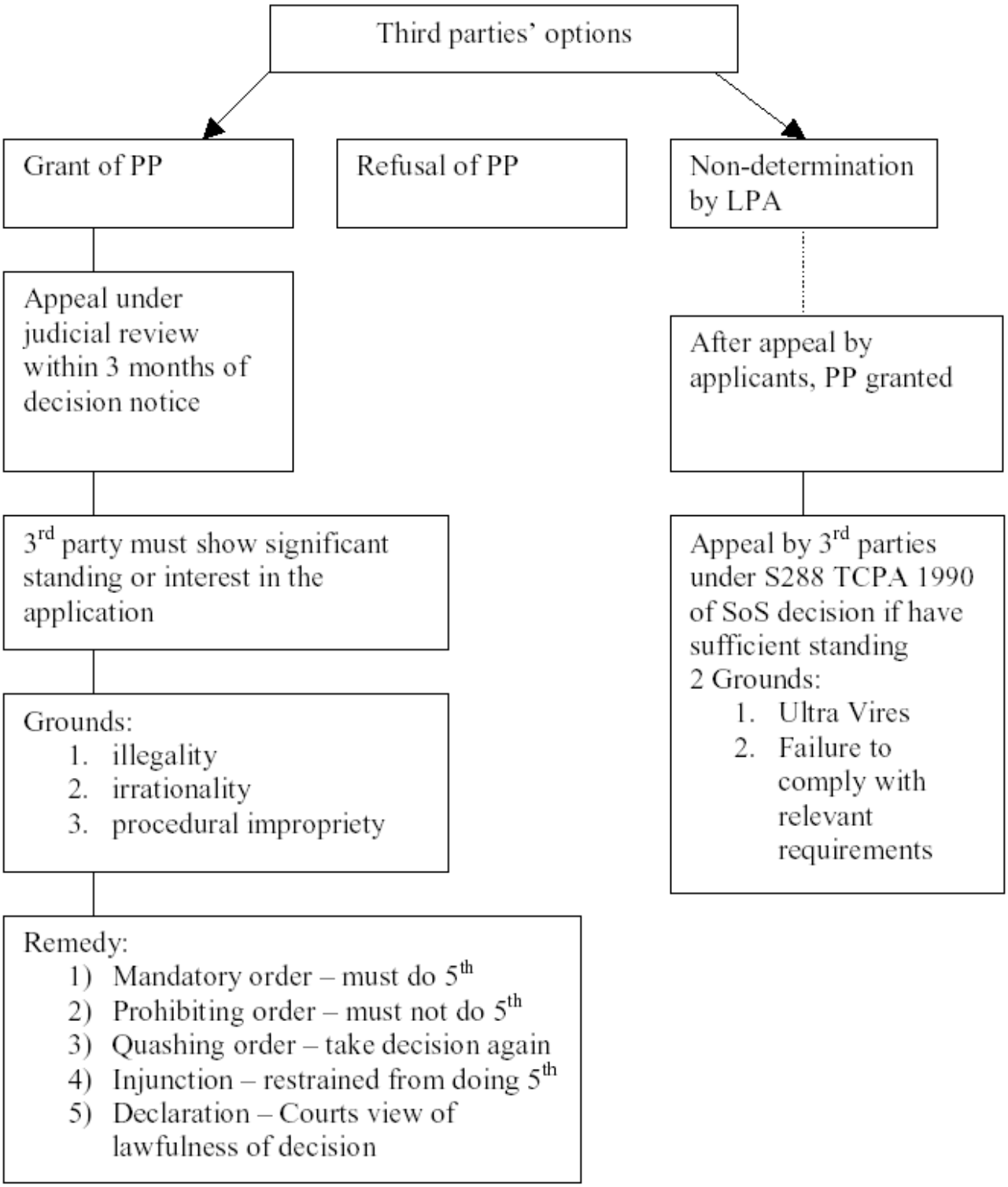
(iii) a quashing order – that the decision of the County Council is quashed and needs to be taken again;

(iv) an injunction – that the County Council is restrained from doing something;

(v) a declaration – the court will take a view on the lawfulness of the County Council's actions.

The Court will not make a decision that the County Council is required to make. Its powers are to take a view on the mechanisms taken to reach the County Council decision.

The flowchart on the next page illustrates the process.


Third parties' options
Grant of PP
Refusal of PP
Non-determination by LPA
Appeal under judicial review within 3 months of decision notice
After appeal by applicants, PP granted
3rd party must show significant standing or interest in the application
Appeal by 3rd parties under S288 TCPA 1990 of SoS decision if have sufficient standing
2 Grounds:
1. Ultra Vires
2. Failure to comply with relevant requirements
Grounds:
1. illegality
2. irrationality
3. procedural impropriety
Remedy:
1) Mandatory order – must do 5th
2) Prohibiting order – must not do 5th
3) Quashing order – take decision again
4) Injunction – restrained from doing 5th
5) Declaration – Courts view of lawfulness of decision

9.6 Local Government Ombudsman

All parties involved in a planning application have the option of applying to the Local Government Ombudsman if they think that there has been maladministration by the County Council.

10. Other Regulatory Regimes

Minerals and waste developments are often complex in nature and the processing of planning applications often requires close liaison with other regulatory regimes.

The main body involved is the Environment Agency (EA), which plays an intrinsic role in establishing the permits and licences for waste or minerals sites, once permission has been granted.

The EA operates under separate powers and legislation to the County Council. Its role usually comes into play once permission is granted. An example of EA involvement is the granting of an Environmental Permit (replaces the former system of waste management licences, or pollution prevention and control permits).

Even if planning permission is granted by the County Council, the applicant will have to satisfy the EA that it should grant an Environmental Permit. Without such permits, the site cannot become operational.

There are several concordats or protocols established between the EA and the Local Government Agency to encourage 'working better together'.

Other regulatory regimes include those operated by Natural England, the District and Borough Councils (e.g. building regulations), and the Health and Safety Executive.

Outside agencies such as the EA are statutory consultees on the planning applications determined by the County Council.

11. Compliance and Enforcement

11.1 Monitoring and Compliance (Authorised Development)

Monitoring on all mineral and waste sites that have planning permission is carried out to ensure that the development takes place in 'compliance' with the permission and the planning conditions attached to the permission. In this way, the impact of the authorised development e.g. on the environment and local amenity, can be controlled.

11.2 Unauthorised Development

Unauthorised developments, i.e. those that do not have the necessary planning permission, can occur. Although it is not a criminal offence to carry out development without first obtaining planning permission, it is a contravention of the planning laws.

The County Council has powers to enforce those laws although the decision to take enforcement action is discretionary and must be well-founded. It must decide on the evidence presented, following a complete investigation, whether it is expedient and in the public interest to take action.

11.3 Investigation

Development that does not comply with the terms of a planning permission or development that is unauthorised (e.g. it does not have planning permission) is known as a 'breach of planning control'. All possible breaches of planning control are investigated thoroughly and consistently.

The following range of 'tools' are available to the County Council when investigating potential breaches of planning control:

- **Statutory power to enter land:** An authorised officer of the County Council has the right to enter land when investigating alleged breaches of planning control. Any person who prevents an authorised officer gaining access to land to obtain information required for enforcement purposes may be liable to prosecution.
- **Planning Contravention Notice (PCN):** Where there is good reason to believe a breach may have occurred, a PCN can be issued to gather information about either the unauthorised development and/or land ownership. Subsequent discussions may lead to the submission by the developer/operator/landowner of a retrospective planning application under Section 73A so that the matter can be formally considered by the County Council. This tool is discretionary. Failure to respond to a PCN is a criminal offence.
- **Requisition Notice:** This Notice requires the person on whom it is served, to provide the County Council with details about land use/ownership, and may be the precursor to the issue of a formal notice. It also warns the recipient that enforcement action is being considered, and is often enough to satisfactorily resolve the breach of control.

Following investigation, the decision to take, or not to take, formal enforcement action is within the discretion of the County Council. The decision must be rational and must accord with policies in the 'development plan' unless there are good reasons that indicate otherwise. The decision must also be capable of public scrutiny.

Particular attention must be paid to the need to protect sensitive areas, sites and features that are an important part of the natural and historic environment from any actual or potential harm.

For authorised development, particular regard must be had to any conditions imposed on the planning permission to protect or mitigate environmental or amenity impacts, and without which planning consent would not have been granted.

If there has been a breach of planning control, the County Council can 'invite' a planning application under Section 73A to be made to 'regularise' unauthorised development or to take enforcement action to control or stop the development.

11.4 Enforcement

Formal enforcement action will only be taken when the breach of planning control is unacceptable on planning grounds and it is in the public interest to do so. For example, formal enforcement action should not be taken against a minor or technical breach of control which causes little or no harm to the environment or to local amenity and where development is acceptable on its planning merits.

The precise form of any action taken against a breach of planning control is at the discretion of the County Council, subject to Judicial Review.

Any formal action that is taken must be appropriate and proportionate. The scale and persistence/repetition of a breach of planning control must be taken into account in determining the nature of any enforcement action.

The following range of enforcement 'tools' are available to the County Council when it decides to take formal enforcement action to deal with breaches of planning control.

- **Breach of Condition Notice (BCN):** A BCN is only used when there is non-compliance with a condition attached to a planning permission. The recipient has a minimum of 28 days in which to carry out the steps required by the notice. There is no right of appeal, other than on a point of law, and failure to comply is a criminal offence.
- **Enforcement Notice:** The Enforcement Notice can be used where there is a breach of condition on authorised development or where there is unauthorised development (if the County Council decides a retrospective planning application is not appropriate or an application has been refused). This Notice must be served on the owners, occupiers, and all other parties who have an interest in the land affected by the Notice. It specifies what the problem is, what must be done to put it right, and gives a time period for completion of the remedial works. It comes into effect not less than 28 days after it is issued unless an appeal is made against it. Any appeal stops the Notice taking effect until the appeal is determined and, if successful, leads to the notice being quashed. A Stop Notice can be issued to prevent continuation of any activity up to the period of confirmation or otherwise of any Enforcement Notice.
- **Temporary Stop Notice (TSN):** A TSN can be issued if it is believed that there has been a breach of planning control, and it is necessary to stop the activity, or any part of it that amounts to the breach, immediately. It is effective the moment it is served and can be used for a maximum of 28 days, during which

time further enforcement action, if any can be considered. There is no right of appeal against a TSN, other than by way of Judicial Review.

- **Stop Notice:** A Stop Notice can only be used where an Enforcement Notice has been served or when an appeal has been lodged against the Enforcement Notice. It is used where it is necessary to stop activities immediately where there is particular harm to the environment or to local amenity. As compensation can be sought against the County Council against a Stop Notice, a financial cost benefit analysis is required prior to the serving of the Notice.
- **Injunction:** Notwithstanding any other actions being taken, an injunction (interim/emergency or final version) can be sought in order to restrain any breach of planning control that is causing significant harm to the environment.
- **Direct Action/Rights of Entry:** If an operator or landowner continues the operation or refuses to comply with the requirements of an Enforcement Notice, the Council can, in exceptional circumstances, take direct action to secure compliance. Direct action is a last resort and may include the County Council:

  1. entering the land and taking the necessary steps specified in the notice; and
  2. recovering from the person who is the owner of the land any expenses reasonably incurred by us doing so; or registering a charge on the land.

12. Appendix A: Principal Legislation

Historically, town and country planning legislation has been subject to frequent amendment and this has resulted in complex and non-user friendly legislation. The decision was taken in 1989, by the Government of the day, to consolidate the existing legislation. Four consolidating Acts were introduced and these still form the basis of planning law today:

- **Town and Country Planning Act 1990** (often referred to as 'the 1990 Act') – consolidated certain enactments relating to development control;
- **Planning (Listed Buildings and Conservation Areas) Act 1990**;
- **Planning (Hazardous Substances) Act 1990**; and
- **Planning (Consequential Provisions) Act 1990** – dealt with transitional provisions, consequential amendments and repeals to ensure continuity.

Although some minor substantive changes were made to the law by the four consolidating Acts, more substantial changes were required and these were introduced by the **Planning and Compensation Act 1991**. As its name suggests, this Act amended the law relating to planning and compensation for compulsory acquisition of land. The Planning and Compensation Act 1991 made important changes to the law relating to development plans, the definition of development, appeals and enforcement notices.

Since 1991, substantial changes to planning law have been made by the following acts:

- **Environment Act 1995** – established the Environment Agency and National Park Authorities. It also provided for the review and updating of existing mineral planning permissions;
- **Human Rights Act 1998** – incorporated the European Convention on Human Rights into UK law. Local authorities must have regard to human rights when determining planning applications; and
- **Planning and Compulsory Purchase Act 2004** – as well as changing the development plan system, this Act made numerous other changes to planning law.
- **Planning Act 2008**
- **Localism Act 2011**
- **Planning and Infrastructure Act 2015**
- **Housing and Planning Act 2016**
- **Business and Planning Act 2020**

As well as the Acts mentioned above, secondary legislation (Regulations and Orders such as the General Permitted Development Order 1995 as amended), European

legislation (Regulations and Directives), statutory guidance, all have an important role to play in continuing to shape planning law in the UK.

13. Appendix B: Further Reading

1. WSCC Constitution – standing orders, code of conduct
2. Code of Practice on Probity in Planning and Rights of Way in the WSCC Constitution
3. WSCC Guide to Public Participation at Planning and Rights of Way Committee
4. National Planning Policy Framework (on-line)
5. National Planning Practice Guidance (on-line)