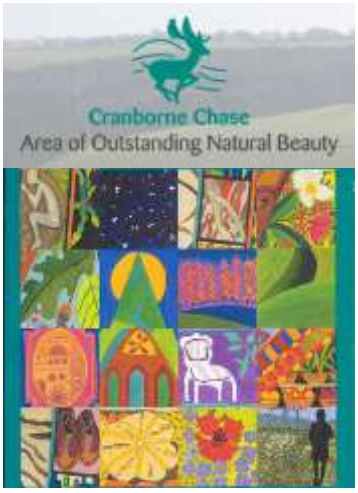
Planning Issues & *'Material Planning Considerations'* Guidance Note for Elected Members on Town & Parish Councils – 2019



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MATERIAL PLANNING CONSIDERATIONS –
Guidance Note for Elected Members on Town & Parish Councils - 2019

GUIDANCE NOTE FOR
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MATERIAL PLANNING CONSIDERATIONS - GUIDANCE NOTE FOR MAKING REPRESENTATIONS ON PLANNING APPLICATIONS

1 INTRODUCTION

This note is intended to provide guidance to local authorities at all levels and also to those making representations on planning applications, on the question of what are *"material planning considerations"* and related matters.

It is important to appreciate that when the local planning authority makes decisions on planning applications, or considers representations submitted relating to planning applications, it must only take into account national and local planning policies and ***"material planning considerations".*** In order to help provide some guidance on what such material considerations are, the following notes have been prepared. They include reference to matters that *are* material considerations, as well as those which *are not*, and include items that are often referred to in letters of representation received by Planning Authorities.

The basic requirement of planning legislation is that planning applications should be considered in accordance with the Development Plan, i.e. the Local Plan or Development Framework, unless specific material considerations dictate otherwise. This stems from the Planning legislation and is re-emphasised in the **National Planning Policy Framework** which in 2012, replaced a plethora of previous government planning guidance; Planning Policy Documents and Statements. The NPPF was subsequently updated in 2018 and more recently in February 2019.

There are no longer Structure or Regional Plans as there were some years ago and therefore, the National Framework guidance and relevant Local Plan [or in some cases, still Core Strategy policies], therefore carry significant weight when planning applications are considered and determined. **These policies should not be overridden without serious consideration and this should only happen in exceptional circumstances and when sound material planning reasons can be used to justify such a decision.**

In addition, the local planning authority has to have regard to the outcome of planning appeals which address similar issues to those under consideration, other government legislation, regulations, circulars and most importantly; Case Law, i.e. decisions on planning law which have been determined in the High Court, Court of Appeal or the Supreme Court.

2 FACTORS THAT *ARE* MATERIAL PLANNING CONSIDERATIONS

Residential Amenity – Living Conditions/Quality of Life

This is a very broad based factor which can encompass many issues, but essentially involves the consideration of the impact of a proposed development on the 'quality of life' of existing residential properties and their occupants; for example the potential for overlooking, impacts of noise and disturbance, whether the development might be overbearing due to mass and scale proximity to boundaries, dominance and/or overshadowing; all of which could affect the quality of life of existing and new residents.

It has to be appreciated however, that it is almost inevitable, particularly in respect of residential development and extensions to existing residential properties, that such development will nearly always have *some* impact on adjoining owners and occupiers, but the 'test' the local planning authority has to apply is whether that impact is significant and so great as to warrant the refusal of planning consent. Effects can be mitigated on some occasions by the use of planning conditions. For example; conditions are often imposed in respect of windows requiring obscure glass, so as to help to prevent or reduce the potential for overlooking from a new development into existing residential properties. The legitimate aspirations and desires of property owners to extend their property therefore have to be carefully balanced against the concerns that might be raised by adjoining owners, neighbours or indeed the wider community.

Traffic and Parking Issues

These are legitimate considerations and are taken into account in very many planning applications considered. The impact of traffic generated by the proposed development is a material factor, as well as the provision or otherwise of parking on site. Consultations are undertaken with the **Highway Authority** on most planning applications and they provide advice on all applications where highway safety, visibility and traffic or parking is an issue.

It should be noted that there has over many years, been a policy of relaxation on parking provision associated with new development in town centre or other urban locations, and/or where there are good bus services. However there is also evidence that this matter has been reviewed recently, with a view to ensuring that adequate parking is provided with development, to meet the aspirations of new residents and requirements of house builders.

Noise, Vibration, Soundproofing, Contamination, Land Stability & Flood Risk

These are all factors that are material considerations, and where relevant, they should be taken into account when assessing development proposals. They are also legitimate issues for those commenting on applications to refer to if appropriate, in their representations.

Consultation is undertaken with the Local Authorities Environmental Health Units on applications where noise, contamination and related issues may arise. In particular situation the Environment Agency and/or the Health & Safety Executive may also be involved; for example where pollution or chemicals are involved. If there are issues or concerns to address, appropriate conditions or requirements in a Section 106 Agreement can be imposed, in order to ensure that restrictions are in place to minimise the impact of noise, to address contamination concerns through site survey work, or to address vibration and ensure the provision of soundproofing, as required.

Some of these matters may also dealt with at Building Control stage, when detailed plans showing the particular construction of a development have to be submitted to and approved by the Building Control Officers, although it should be noted that approval of Building Regulation plans is quite separate from those plans submitted for planning permission.

Advice on Land Stability is provided by the Council Engineers who also advise on flood risk together with the Environment Agency. However specialist reports on all of these matters are often required to be commissioned by applicants involving specialist consultants, with their reports submitted with planning applications, when the issue is an important and material factor.

Hours of Operation – Restrictions

This is a legitimate consideration and a restriction is often imposed on developments which might be acceptable in principle, but where they could become unacceptable if the hours of operation extended beyond a reasonable period; for example late into the evening. Conditions are therefore imposed in order to limit the hours of operation on some town centre activities, and such conditions are also used in respect of industrial units on some occasions so as to, for example, prevent/restrict working on a Saturday afternoon and on Sundays.

Design, Materials, Windows etc.

These are very much material considerations, and are detailed factors that are given considerable attention when Full/Detailed Planning Applications are determined. The importance of good design is emphasised in the NPPF and usually in Local Plan Policies and potentially Supplementary Guidance documents on Design. There is now evidence that planning applications which are refused because of poor design are also being dismissed by Inspectors at planning appeals.

It should be noted that *Outline* Planning Applications are submitted to establish whether or not development on a particular site might be acceptable *in principle* only. An outline planning consent does not, in itself, grant consent for the development to actually take place; this has to be achieved through the submission of a further "Reserved Matters" Planning Application, when matters such as design are then considered. This is an alternative procedure to submitting a Full Planning Application at the outset, when these detailed matters would be included in the application.

The local planning authority applies conditions to very many planning applications which relate to design details, the use of particular materials; such as bricks, render, windows; all of which should be agreed with the authority, before the new development proceeds.

Harm to the Natural & Historic Environment

This would be particularly significant in cases where development might adversely affect a Site of Special Scientific Interest (SSSI), part of the Area of Outstanding Natural Beauty (AONB), or be damaging to a Listed Building or a Conservation Area. Like local plans the NPPF is strong on this issue and where necessary, planning authorities require Heritage Assessments, Biodiversity Appraisals and for major schemes, full Environmental Impact Statements to be submitted with planning applications. In larger schemes, the aim will be to secure net benefits to the natural environment as an integral part of the development

It should noted that Bats are protected species and where any disturbance to a roof space is involved the planning authority may well require a bat survey to be submitted with the planning application. This is especially so in the case of old buildings and barns etc.

3 FACTORS WHICH *ARE NOT* MATERIAL PLANNING CONSIDERATIONS

Property Values

Letters of representation received by the local planning authority often express the view that the letter writer objects to a particular development because it would affect the value of their property. This may or may not be the case, but is not a factor that the local planning authority should or can take into account when assessing whether or not a development is acceptable in land use planning terms.

Land Ownership

Land ownership itself is not a consideration that the local planning authority takes into account when determining applications. Planning applicants are required to indicate on their application form, whether or not they are the owner of the land, and if not, they have to submit a notice to the landowner indicating that they have applied for permission on land which is not in their ownership. This usually arises where a development may be proposed on land, where the prospective developer does not wish to purchase the land until such time as a planning consent may have been granted. In such situations applicants may secure an 'option' to purchase 'subject to planning consent'. This can also arise in major town centre development locations, where there may be complex and multiple ownerships involved.

It should be noted that any person may apply for planning consent on land which is not in their ownership, although it is very unusual for this to be done without the knowledge and close cooperation of the owners themselves. There are notification procedures in place to address the circumstances where land ownership is unknown.

Boundary Disputes

Linked into the question of land ownership, is that of boundaries between sites. Again, this is often an issue that arises in letters of representation on planning applications. It is not the role of the local planning authority to act as an arbiter between adjacent landowners on the question of boundary disputes. Local Planning Authorities do not undertake any checks of land ownership when planning applications are submitted. They rely upon the information submitted by the planning applicant as being correct and accurate, with other owners of land within the application boundary, being identified and notified where necessary by the applicant.

When plans are submitted for planning consent, the actual site where development is proposed is edged in red on the plan, whilst any adjoining land owned by the applicant should be shown in blue. In some cases neighbours and others dispute the accuracy of these red or blue lines, but these are matters that need to be taken up privately between the various parties, if necessary using legal or surveying representatives.

Party Wall & 'Joining On'

Where there are concerns about development which might affect adjoining neighbour's property in some way, for example where there may be some impact on a neighbour's foundations or drains etc. In such situations, these are matters dealt with under the Party Wall Act 1996 and not through planning legislation. Information about this is usually available from the local planning authority. Other issues, such as the need for a developer to access a neighbour's property in order to construct the proposed building, are covered by the Access to Neighbouring Land Act 1992.

It is also perfectly acceptable for a planning applicant to apply to "join on" to an existing property; for example to add an additional house to the end of an existing terrace or an extension to a neighbouring dwelling. The local planning authority considers this application in the context of land use planning matters, planning policy and other material considerations referred to in this report. Whether or not the applicant has the agreement of the existing property owner they wish to join onto, is a private matter between the 2 parties. If no agreement can be reached, then the development cannot be implemented. This does not mean that in principle, planning consent cannot be granted if planning policies and other material considerations do not preclude it. The Party Wall Act comes into play in such situations.

Private Views

The impact of a new development on private views from a neighbour's property is a very common issue raised in representations on planning applications. It is important to appreciate that the effect of a development on such a private view is not a material planning consideration. When purchasing a house, residents may well say …*'they paid for the view'* …but they did not buy it! This applies to whether the view is obtained from residential or commercial properties, whether in private ownership or used by the public. Although not the same as a view, the undue blocking of sunlight or extreme overshadowing to a property can be a material consideration as noted under 'Residential Amenity' above.

'There are Too Many Already'

This comment is often received when applications are submitted for uses/development such as additional cafes, takeaways or betting offices in the town centre area or elsewhere. The fact that the area may already be served by the proposed service or use which is envisaged in a new application, is not, in itself, a reason for refusing permission, unless there are particular policies applying, such as Town Centre Shopping areas or for example, when an out of town retail proposal might totally undermine the viability and vitality of a town centre as a whole.

However, other factors, such as the cumulative impact of noise, disturbance, traffic etc., could be material planning considerations which will be taken into account, but the fact that there is another operation or retail outlet of a similar nature nearby *is not in itself,* a material factor. Potential competition between individual businesses and the financial impact on existing businesses, is therefore not a material planning consideration.

4 FACTORS WHICH ARE USUALLY NOT MATERIAL CONSIDERATIONS BUT WHERE THERE MAY (ON OCCASIONS) BE EXCEPTIONS

These notes are intended for guidance, and cannot be absolutely prescriptive. There are some issues which are usually not material planning considerations, but where there can be some exceptions and guidance on some of these is set out below.

Public Views

Although views from private properties are not a material consideration, an exception where views may be a material consideration can be in relation to wider public views from within the public realm. If, for example, an office block or a block of flats were proposed to be built in a prominent location, which directly affected the public vista and view of an important building; say a cathedral or other prominent public building, then this can be a material consideration, as it would affect the public realm and townscape, rather than private/personal views. For example, views of St Paul's Cathedral, the Monument, the Tower of London and other landmarks on the City skyline are protected by planning controls.

Preferred Alternative Land Uses

The consideration of some alternative land use or development which might be considered preferable on a site where there is a planning application, is not normally a material consideration. The local planning authority has a duty to consider the application that has been submitted, and not some other form of development or application which the local planning authority, neighbours or the public might consider preferable. The same consideration should apply to those making representations on applications.

However, taking account of the importance of the Development Plan, an exception to this principle is the situation where a site is specifically allocated, or covered by a specific policy in the Local Plan for a particular use – housing, employment etc. In such cases, if an application were to be submitted which conflicted with that allocation or policy, then that would be a material consideration which could legitimately be taken into account when determining the application and indeed should be given considerable weight, with the potential for refusal of consent on this basis.

In such situations however, especially at a Planning Appeal, it would be expected that the Planning Authority could demonstrate that there was a good chance of the planned and preferred use or allocation actually coming forward for development in a reasonable timescale; say 5 years.

Personal Circumstances

Again, this is a factor that is often highlighted by applicants when submitting some applications, when they make reference to personal domestic circumstances which, in their view justifies why a particular development should be approved. This is not normally a factor which is taken into consideration by the local planning authority as, although the applicant applies for permission in person, any consent granted applies to the land and property itself, and passes with the property, should it be sold. The local planning authority therefore has to have regard to this

wider and longer term consideration, rather than any personal factors or characteristics that might apply to the particular applicant, at any one point in time.

There may, however, be some exceptions to this general rule; for example where an application might involve a particular form of development to specifically accommodate the needs of a person employed in agriculture or someone with disabilities. In the former situation evidence of absolute need for the accommodation on the farm has to be provided, whilst in the latter case, the advice of Social Services is taken to establish whether special circumstances apply which might influence the local planning authority's views and justify an exceptional decision.

Other situations where personal circumstances might come into force are where, for example, an application might involve some form of small scale industrial workshop use in an area where such an activity might not normally be considered appropriate, due to the potential for noise, disturbance etc. If however, the activity was particularly small scale and unobtrusive, the Council would consider conditioning any permission to that individual person. (This means that if another person wished to carry out the same activity on the site, then a new planning application or a relaxation of the condition would be required). In such circumstances, the consent might also be of a temporary nature, in order to allow a trial period, to establish whether there were in fact any detrimental impacts on local amenity.

Economic Viability

This did not used to be a material consideration, but where public and or regeneration benefits are being achieved as a result of the development, it can be considered as being material; something that the High Court has deliberated upon in the past. In such situations details of the costings associated with a scheme and viability assessments have to be submitted for independent scrutiny, so that the Local Planning Authority can be satisfied that a case is justified.

This has for example been used in cases where exceptional costs have resulted in some affordable housing being off rather than on site or not provided at all, or in major city centre redevelopments, where costs are exceptionally high and viability doubtful. More recently, following government statements on the issue and in the NPPF, some developers have appealed against what they consider to be onerous requirements in an earlier 106 agreement for affordable housing, claiming that this makes the scheme unviable. These attempts have met with mixed outcomes, depending upon the particular circumstances.

5 PLANNING CONDITIONS AND LEGAL AGREEMENTS

Planning Conditions

In addition to the importance of planning decisions being based on material planning considerations, it is important to appreciate that Planning Conditions which are attached to planning consents also have to be rigorously assessed before being imposed. The National Planning Policy Framework reiterated previous longstanding Government Planning Guidance and which emphasises that:

Planning Conditions should be:

1. **Necessary**
2. **Relevant to Planning**
3. **Relevant to the Development to be Permitted**
4. **Enforceable**
5. **Precise &**
6. **Reasonable in all other aspects**

All planning conditions should be cross referenced to relevant National [NPPF], and/or Local Plan Policies, which support the reasons for the conditions.

Legal Agreements & Community Infrastructure Levy

Section 106 of the Town and Country Planning Act 1990 enables local planning authorities to enter into legal agreements, or to accept 'Unilateral Obligations' from planning applicants which set out in a legally binding manner, the requirements of a local planning authority to address the issues associated with a planning application, and which cannot be dealt with by way of planning conditions. This applies particularly to major applications and often to those accompanied by an Environmental Statement.

Although many requirements relating to proposed development are dealt with by planning conditions – design, materials, access etc., in situations where for example, affordable housing is required, or financial contributions towards off-site highway contributions which are outside the planning application site are needed, these can be dealt with by way of legal agreements.

Section 106 is the section in the Planning Act under which such agreements are permitted to be entered into. Section 106 also allows for developers to submit *'Unilateral Obligations'* which are essentially a one sided commitment, but submitted to the planning authority together with a planning application, again setting out obligations that will be undertaken by the developer/applicant.

Whilst planning conditions have to meet the tests highlighted above, matters in a Section 106 agreement can extend beyond these restrictive requirements, but should still address matters which, if not included, would lead to a refusal of planning consent. The agreement may require that:

- Specific works be done,
- Certain restrictions on development come into force when the development starts, e.g. phasing of development
- Financial contributions are made towards local infrastructure and community benefits etc. that may not be covered by the Community Infrastructure Levy.

Following a Planning Committee meeting where an application may be *…'delegated for approval subject to a 106 agreement',* a legal agreement is then prepared in consultation with the Council's Legal Section and applicants solicitors. This can be a very protracted process as negotiations take place. However, once completed and signed, the 106 agreement is then a binding document, and the planning consent itself is then issued. The 106 agreement is tied to the land itself, and is a 'charge' on the land, so that the requirements of such an agreement pass to future owners or occupiers, in the event of the land being sold.

There has been widespread concerns about the time it takes to finalise such 106 agreements and good practice suggests that rather than simply submitting 'Heads of Terms' for the agreement with the planning application, much more work should be undertaken on the draft 106 agreement at Pre-Application stage. This will help ensure that all parties have a much firmer understanding of what is to be included in the agreement in detail, in advance and this approach would also provide for greater openness and transparency for the public. There has however been resistance to this approach from the development industry.

In many areas, use of 106 Agreements for securing financial contributions has now been overtaken by the **Community Infrastructure Levy**. This has been introduced by Local Planning Authorities so that there is a standard payment required to support local facilities by most and especially larger, planning applications, with a gradation of charges, depending upon the nature and scale of the proposed development. In February 2019, the government published further guidance encouraging local authorities to 'pool' CIL contributions to help provide more strategic infrastructure such as road bypasses.

Reasons for Refusal

Like Planning Conditions, Reasons for Refusal of a Planning Application (quite reasonably and properly) also have to be based on sound and material planning considerations, which can be supported by National [NPPF], and/or Local Plan Policies which should be specifically referred to in the Reasons for Refusal.

Planning Appeals, Costs and the High Court

It is important to appreciate that refusals of planning applications can be subject to Planning Appeals which are heard on behalf of the Secretary of State by an appointed, independent Planning Inspector. Appeals can be considered by way of either:

- Written Representations,
- A Local Hearing
- A Full Public Inquiry.

At a Planning Appeal, the appellants can apply for 'costs' against the Local Planning Authority if they consider that the reasons for refusal are not reasonable and/or cannot be substantiated by firm evidence and are not based on planning policies or material considerations. This becomes critical when the reasons for refusal are tested through the Full Public Inquiry process; a situation which can be most exacting when the planning witness (usually a Planning Officer), is subject to Cross Examination by a barrister. It is important therefore that when applications are refused, Elected Members are satisfied that there is sufficient **evidence** available to substantiate the decision.

Planning Applicants or any other third party can also apply to the High Court on **a point of law**, with a view to the decision being quashed, if they consider that an application has not been considered properly on the basis of planning considerations, that proper procedures have not been followed, or if they consider that the Local Planning Authority has not acted reasonably.

If such an application were to be successful, the Local Planning Authority would probably have to pay all the legal and other costs associated with the application to the High Court. Decisions made by the High Court on Planning matters provide *'Case Law'* which helps guide future

decisions by Planning Authorities and by Planning Inspectors at Planning Appeals. Such Case Law is also a Material Consideration which Planning Authorities should have regard to when making decisions. It should be noted that there is no *'Third Party Right of Appeal'* if an application is approved, contrary to the wishes of objectors. This means that no-one, other than the applicant, can submit an appeal in relation to the refusal of a planning application.

These factors therefore help emphasise the importance of all planning decisions being based on *'material planning considerations'* only.

6 HOUSING & PLANNING ACT UPDATE

The 2016 Housing & Planning Act contains numerous changes related to housing tenancy arrangements but also has some proposed changes to the planning system these include the following:

'Permission-in-principle' can be granted for housing-led development on sites chosen and allocated by local authorities, parish and neighbourhood groups, they must be in a qualifying document – a brownfield register; a Local Plan document, and a neighbourhood development plan. PIP can be granted in two ways: on allocation in plans and registers or on direct application to the local authority.

'Permission in Principle', can almost automatically receive the equivalent of outline planning permission, simply by filling a form in with the landowner or developer effectively, telling the Authority that they plan to develop the land for housing.

Technical Details Consent' would have to be submitted for the detailed design of the site etc. This is all aimed at apparently speeding up the planning process and the delivery of housing. In determining an application for technical details consent, local authorities cannot re-open or reconsider the 'principle of the development'.

Applications for technical details consent must be determined in accordance with 'permission in principle' previously granted; the result of permission in principle together with a grant of technical details consent is a grant of full planning permission.

The government also reviewed the National Planning Policy Framework in 2018 and in 2019 and introduced a national methodology for calculating housing land supply figures for local areas.

7 CONCLUDING COMMENTS

The list of issues and factors highlighted above in this guidance note is not intended to be exhaustive, but does hopefully provide some additional assistance to the Elected Members/Councillors as well as both Council Officers and Clerks at all levels, and members of the public, in helping to understand the way in which planning decisions should be made, and the limitations and restrictions within which local planning authorities have to operate.

8 FURTHER INFORMATION

General advice on the planning system is available in Planning Practice Guidance from the *'Planning Portal'*, which is a national web based information system which can be accessed direct on:

https://www.gov.uk/government/collections/planning-practice-guidance

This provides advice on all subject matters from Advertisements to Waste.

Further information is available on the Government's Planning Portal: www.planningportal.gov.uk which also has useful information and illustrated guidance sheets about what is **Permitted Development**. This is development that can be undertaken without the end to apply for formal planning permission.

This note has been prepared and updated to reflect recent changes to the planning system, although it needs to be appreciate that changes in planning legislation are being brought forward on a regular a basis.

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