

# Welcome to Landmark Chambers' 'Development Plan Issues' webinar

The recording may be accessed [here](#).

# Your speakers today are...



**Neil Cameron QC (Chair)**



**Stephen Morgan**

**Topic:**  
Progressing  
plans in a  
COVID-19 world



**Kate Olley**

**Topic:**  
Current  
Development  
Plan Issues:  
Housing Need

# Your speakers today are...



**James Neill**

**Topic:**  
Neighbourhood  
plans



**Andrew Parkinson**

**Topic:**  
Green Belt and  
Exceptional  
Circumstances

## Progressing plans in a COVID-19 world



**Stephen Morgan**

## The Procedural Problems

These problems:

- (1) Arise from the restrictions on movement and on gatherings with people outside of your own household as per:  
*The Health Protection (Coronavirus, Restrictions)(England) Regulations 2020 (S.I. 2020 No. 350)*  
 Which came into force on 26<sup>th</sup> March 2020 (as amended for the third time on 1 June 2020 - S.I. 2020 No. 558).
- (2) For the development plan process, these restrictions impact on both:
  - (i) **Examination stage** of the plan process; and
  - (ii) **Preparation stages**

## The Context

- PINS originally **cancelled all physical events** – appeal inquiries, hearings and Examinations
- Context - statement earlier in the year stating that all Councils must have an up-to-date plan **in place by December 2023** had to be in place by the end of 2023 (Planning for the Future (March 2020, para. 11)
- Context: concern in particular **over HLS** both from local authorities and the development industry
- **RTPI** Survey of planners in *Pragmatic and Prepared for the Recovery*:
  - a desire to maintain momentum the local plan making process
  - uncertainty arising from Covid-19 over the evidence base

## Procedural Solutions

In terms of keeping Examinations moving forward:

- Using **virtual events** has been much encouraged by the Government – as per in particular Mr Jenrick’s WMS of 13 May – which was a busy day also producing new/amended PPG covering both local plans and NDPs.
- Also on that same day there was issued the **PINS statement on COVID-19 and Local Plan Examinations** referring to the WMS: working with two local authorities to explore with them how each current examination can best move forward ensuring fair participation; may mean virtual examinations in some case. PINS also said they were exploring with other local authorities.
- **PINS 28 May**: One Local Plan hearing is to take place via phone conference and one full local plan examination is to be conducted virtually in July.

## Procedural Solutions for Ever?

### PINS 28 May 2020: **Virtual events**

*“.....We are learning from each event with the aim of making virtual events our standard option for the majority of events in future. This approach covers all hearings and inquiries for our different types of casework (including planning appeals, national infrastructure, local plans) that are currently held face to face. Our working definition of virtual includes the use of video technology and phone where necessary...”*

**NOTE:** s.20(6) of the Planning and Compulsory Purchase Act 2004 provides that any person who makes representations seeking to change a development plan document **must (if he so requests) be given the opportunity to appear before and be heard by** the person carrying out the examination.



## Legal requirements (1)

**However what about carrying out consultations fairly and fully and compliant with the legislation?**

See the requirement set out in the *Town and Country Planning (Local Planning) (England) Regulations 2012*

**Two legal obstacles:**

- (1) S.19(3) of *Planning and Compulsory Purchase Act 2004* – authority must comply with the **Statement of Community Involvement (SCI)** in preparing LDDs:
  - An SCI will often require documents being made available at Council Offices and local libraries, community halls etc.
  - Revised PPG (on 13 May) – amend SCIs – consultation not required unless possibly it was previously stated that it would be undertaken.

## New PPG

- Where any of **the policies** in the **Statement of Community Involvement** cannot be complied with due to current guidance to help combat the spread of coronavirus (COVID-19), the local planning authority is encouraged to undertake **an immediate review** and update the policies where necessary so that plan-making can continue. (para. 077)
- Local planning authorities will need to assess their Statements of Community Involvement **to identify which policies are inconsistent with current current guidance on staying at home** and away from others or any superseding guidance. This could include, for example, holding face-to-face community consultation events or providing physical documents for inspection. (para. 078)
- **No statutory requirement for consultation** but where a local planning authority has made a **pledge** in their Statement of Community Involvement to consult on any changes, they may wish to take independent legal advice on how best to proceed.

## Legal requirements (2)

- (2) Documents that have to be made available during the preparation, modification and adoption stages have to be so made in accordance with **reg. 35** of the *Local Planning Regulations 2012*

### **Availability of documents: generally**

- 35(1) A document is to be taken to be made available by a local planning authority when—*
- (a) made available for inspection, at their principal office and at such other places within their area as the local planning authority consider appropriate, during normal office hours,*  
*and*
  - (b) published on the local planning authority's website,....*

## Neighbourhood Plans

- All neighbourhood planning **referendums** that have been recently cancelled, or are scheduled to take place, between 16 March 2020 and 5 May 2021 are postponed in line with the *Local Government and Police and Crime Commissioner (Coronavirus) (Postponement of Elections and Referendums) (England and Wales) Regulations 2020* until 6 May 2021) (PPG 107).
- **Examinations:** The general rule remains that examinations should be conducted by written representations. If an examiner considers that oral representations are necessary, these **should not take place in person**. Wherever possible, oral representations may still take place **using video conferencing or similar**.
- **Public participation:** It is **not mandatory** that the engagement required under the *Neighbourhood Planning (General ) Regulations 2012* is undertaken using **face-to-face methods**. However, to demonstrate that all groups in the community have been sufficiently engaged, such as with those without internet access, more targeted methods may be needed including by telephone or in writing

## Some Substantive Issues

There are potentially a whole range of issues over which there is currently much uncertainty which will impact on the evidence base, such as:

- (1) Viability – given the recession
- (2) Changes in how people can or are willing to travel, work, holiday, take leisure etc.  
Working from home – decline of office demand.
- (3) Implications for Housing Delivery Test / 5 Yrs. HLS (in England) if housing completions stall for a period of time.
- (4) Retail trends – the High Street was already in decline – but what now planning for less demand for floorspace; what to do with existing empty floorspace.

## Finally: Future Changes? – The Broader Context

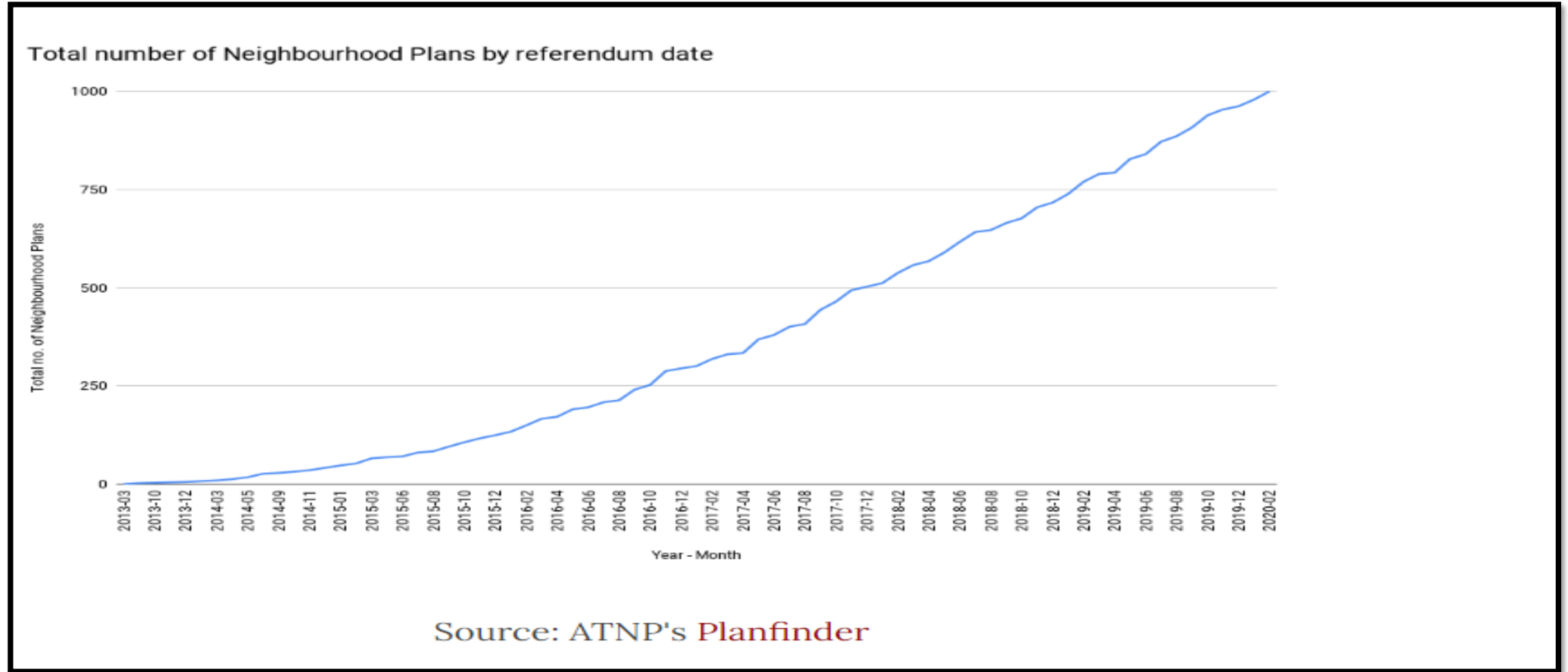
- The current pandemic and the responses to it and implications that will flow, combined with current issues and trends, are likely to influence the planning system, including the development plan regime
- Virtual Examinations
- Housing need
- Assessment of new town settlements – whether to be taken away from the plan Examination system?
- Zoning – with much simpler plans as advocated in Policy Exchange’s *Rethinking the Planning System for the 21st Century*, which notes that a local authority spends on average £2.5 million producing a local plan, £1 million of which is spent on average on the evidence base.

## Neighbourhood plans



**James Neill**

# The growth in Neighbourhood Plan Coverage





# Neighbourhood Plans – why are they so critical?

- **Policy precedence over local plans:** NPPF19 para. 30:  
*Once a neighbourhood plan has been brought into force, the policies it contains take precedence over existing non-strategic policies in a local plan covering the neighbourhood area, where they are in conflict; unless they are superseded by strategic or non-strategic policies that are adopted subsequently.*
- **Legal precedence:** conflict resolved in favour of last plan to be adopted. PPG para. 44:  
*“Should there be a conflict between a policy in a neighbourhood plan and a policy in a local plan or spatial development strategy, section 38(5) of the Planning and Compulsory Purchase Act 2004 requires that the conflict must be resolved in favour of the policy which is contained in the last document to become part of the development plan”.*

# NPs, housing allocations, and relevance to the tilted balance

- PPG para. 44: “A neighbourhood plan can also propose **allocating alternative sites** to those in a local plan (or spatial development strategy), where alternative proposals for inclusion in the neighbourhood plan are not strategic, but a qualifying body should discuss with the local planning authority why it considers the allocations set out in the strategic policies are no longer appropriate”
- “A neighbourhood development plan may include policies dealing with the use and development of land for housing, including policies dealing with the location of a proposed number of new dwellings, **even where there is at present no development plan document setting out strategic policies for housing.**” : Gladman v Aylesbury Vale DC at [58] approved by Court of Appeal in DLA Delivery v Lewes DC [2017] EWCA Civ 58
- **NPPF para 14**: adverse impact of conflict with NP likely to significantly outweigh benefits (subject to conditions)

## NPs: Examiners v Inspectors

- Key test is whether the NP meets the basic conditions (paragraphs 8(1) and (2) of Schedule 4B of TCPA 1990):
  - (a) Having regard to national policies and advice contained in guidance issued by the Secretary, **it is appropriate to make the plan...**
  - ....
  - (d) The making of the plan contributes to the **achievement of sustainable development**
  - (e) The making of the plan is **in general conformity with the strategic policies contained in the development plan for the area of the authority** (or any part of that area)
  - (f) The making of the plan does not breach, and is otherwise compatible with, **EU obligations**, and
  - (g) **Prescribed conditions** are met in relation to the plan and prescribed matters have been complied with in connection with the proposal for the order

## The low bar for NPs to pass examination

- The role/degree of scrutiny at examination is “relatively limited”: see eg Holgate J in Woodcock Holdings Ltd. v Secretary of State for Communities and Local Government [2015] EWHC 1173 (Admin), at paragraphs 61, 62, 132 and 133
- Low bar:
  - Whether or not there is **general** conformity with LP is a matter of planning judgment: DLA Delivery
  - Issue is whether NP **as a whole** complies with LP **as a whole**, tension between individual policies isn’t a matter for the NP Examiner: BDW Trading Limited v Cheshire & West and Cheshire BC [2014] EWHC 1470 (Admin)
  - No need to consider whether a draft policy is supported by a **proportionate evidence base**: *BDW* at [85] and Crownhall Estates Limited v Chichester District Council [2016] EWHC 73 (Admin)

# The tension between emerging local plans and NPs: **Landmark Chambers**

## Lochailort Investments Ltd v Mendip District Council [2020] EWHC 1146

- July 2019: NP examiner decided that designating 10 LGS met the basic conditions
- Sep 2019: Mendip LP Inspector: overall approach in LP to (some of) the same LGS was unsound and did not meet “high bar” in the NPPF re justification
- Legal challenge to the NP was unsuccessful, primarily because (1) different statutory roles of 2 inspectors and (2) local plan report post-dated NP Report
- Is this a trend? See also Wilbur Development v Hart District Council [2020] EWHC 227 (Admin) 11 Feb 2020 (coalescence/settlement gaps between villages): Examiner report July 2019, modifications published at same time on basis of indication LP Inspector at LP hearing that gap not supported by adequate evidence. Claim still unsuccessful.

## Green Belt and Exceptional Circumstances



**Andrew Parkinson**

## Policy Framework (1)

- NPPF 136: *“Once established Green Belt boundaries should only be altered where exceptional circumstances are fully evidenced and justified through the preparation or updating of plans”.*
- Need for change has to be established through strategic policies. Detailed amendments to the boundaries can be made through non-strategic policies, including Neighbourhood Plans.
- No definition of “exceptional circumstances”. However, NPPF 137: LPAs should *“examine fully other reasonable options for meeting its identified need for development”.*
- In particular: (i) availability of suitable brownfield sites/underutilised land (ii) the optimisation of density standards, particularly in town and city centres (iii) possibilities for neighbouring authorities to accommodate some of the identified need through the duty to co-operate.
- NPPF 138: *“need to promote sustainable patterns of development should be taken into account”*

## Policy Framework (2)

- NPPF 139: ensure that any new boundaries are consistent with the development plan’s strategy for meeting identified requirements for sustainable development; identifying areas of safeguarded land, where necessary; and demonstrating that Green Belt boundaries will not need to be altered at the end of the plan period.
- Paragraph 11(b):

*“Strategic policies should as a minimum provide for objectively assessed needs for housing and other uses, as well as any needs that cannot be met within neighbouring areas, unless*

*(i) the application of policies in this Framework that protect areas or assets of particular importance provides a strong reason for restricting the overall scale, type or distribution of development in the plan area; or*

*(ii) any adverse effects of doing so would significantly and demonstrably outweigh the benefits when assessed against the policies in this Framework taken as a whole”.*



*R (Compton Parish Council & Others) v  
Guildford Borough Council & others* [2019] EWHC 3242 (Admin)

- Statutory challenge to the Guildford Borough Local Plan. OAN: 10,678 dwellings. Provision for 14,602 dwellings (inc. 6,295 homes in the Green Belt).
- Inspector found exceptional circumstances existed. Relied on a number of factors including: (i) integrated nature of proposals (ii) importance of a headroom in case of slippage (iii) pressing housing need (iv) very serious shortfall in provision of affordable housing (v) meeting Woking's unmet need (vi) contribution of sites to infrastructure and other benefits (vii) sustainability of chosen locations, and contribution to a balanced spatial strategy (viii) lack of adverse impact on openness and purposes of the Green Belt.
- Claim included challenge on the grounds that exceptional circumstances could not exist where more land was released from the GB than was necessary to meet the OAN; and in any event, that the Inspector had not considered the scope for not meeting some of the need in accordance with paragraph 14 of the NPPF.

## Key Takeaways from Compton

- Claim dismissed. Useful indications on what is not necessary to demonstrate ECs:
  1. ECs do not need to be extraordinary, and are less demanding than VSC: see also (R(Luton BC) v Central Bedfordshire Council [2015] EWCA Civ 537).
  2. No requirement that GB land be released as a last resort: see also IM Properties Development Ltd v Lichfield DC [2014] EWHC 2240. Although NB NPPF, para. 137.
  3. No need for more than one EC; EC can be found in combination of circumstances of varied natures. No requirement that unlikely to occur elsewhere.
  4. ECs can include general planning needs. Need not irrelevant – and could of itself be sufficient to demonstrate EC depending on the circumstances – although again NB NPPF, para. 137.
- Providing a headroom against slippage can contribute to EC – especially where needed to achieve a sustainable pattern of development and realise site benefits.

## Practical implications from Compton

- No new law – but helpful clarity that ECs can include general planning matters including broader spatial objectives.
- Clear Courts very unlikely to intervene in EC judgment. Provides certainty for LPAs/Developers.
- Two stage approach: "Strategic Level" ECs; "Local Level" ECs.
- Checklists? No need to follow "Calverton Checklist" (see Calverton Parish Council v Nottingham City Council [2015] EWHC 1078 (Admin) at [51]). Compton at [72]:

*"There will almost inevitably be an analysis of the nature and degree of the need, allied to consideration of why the need cannot be met in locations which are sequentially preferable for such developments, an analysis of the impact on the functioning of the Green Belt and its purpose, and what other advantages the proposed locations, released from the Green Belt, might bring, for example, in terms of a sound spatial distribution strategy."*

## Current Development Plan Issues: Housing Need



**Kate Olley**

## NPPG- refresher

- SM- formula- identification of minimum number of homes
- 3 steps
  - Baseline/national household growth projections
  - Affordability adjustment
  - Cap
- Closer scrutiny at Examination if alternative approach used
- Expectation SM will be used unless exceptional circumstances
- Can plan for a higher number
- Planning for a lower number requires exceptional local circumstances- will be tested at Examination.

## Recent example: London Legacy Development Corporation

- LLDC Local Plan review- Inspector agreed exceptional circumstances existed to justify using an alternative approach to the SM
- GLA demographic projections for London are for the Boroughs and not the development corporations
- LLDC no nationally available data for its area; not possible to use the SM
- Emerging London Plan housing needs figure- 2160 dpa; LLDC OAN- 619dpa
- Identified capacity limited in LLDC's area, especially when considered alongside the need as part of the Olympic legacy to prioritise land to provide an effective employment base for the plan area

## Concerns about the standard method

- Deallocation of land from the GB- particularly in the Home Counties- to ensure the required number of new homes can be planned for.
- A different approach?
- A move away from use of household growth projections- focus on the scale of an area's housing market activity and the size of its housing stock rather than on household formation.

## *Potential change afoot*

- Government paper 'Planning for the Future' detailed a range of fresh changes to the planning system, alongside details on what will be included in the forthcoming planning White Paper.
- Includes: a plan to review the formula for calculating housing need in order to encourage "greater building in urban areas". One of the "new tools to support communities to densify and make best use of their underutilised brownfield land".
- Robert Jenrick said: "We'll be reviewing our approach to planning to ensure our system enables more homes to come forward in the places that people most want to live, with jobs, with transport links and other amenities on their doorstep. This means making the best use of land and existing transport infrastructure. To that end, I'm announcing that we will review the formula for calculating local housing need, taking a fresh approach, which means building more homes, but encouraging greater building in urban areas."
- "We will introduce a new approach which encourages greater building within and near to urban areas and makes sure the country is planning for the delivery of 300,000 new homes a year."



## contd

- Second major change to the standard method since its introduction.
  - MHCLG said when 2018 NPPF published would revise the SM in expectation of forthcoming ONS household projections that were anticipated to show a substantial drop in growth rates.
  - The revised 2016-based projections published in Sept 2018 produced large drops in local housing need in many areas.
  - MHCLG announcement October 2018 that planners should ignore the latest figures when assessing their local housing need and instead use the 2014-based figures published two years earlier. With a promise for the longer term, to "review the formula with a view to establishing a new method...by the time the next projections are issued". It said the review should meet principles including "providing stability and certainty" for local authorities and "ensuring that planning responds not only to movements in projected households but also to price signals".
- Comment that a plan for local housing need "is only as good as the results it delivers"; "we will introduce new changes to ensure that land, sites and homes come forward on time and incentivise authorities to deliver more homes"
- Include- the deadline for all local authorities to have an up to date local plan (Dec 2023), continuing to drive supply through the HDT (presumption from Nov 2020 will apply to all authorities that have delivered less than 75% of identified needs) and reforming the New Homes Bonus to reward delivery.

## Potential point of challenge

- SM only to be departed from in *exceptional circumstances*; NPPF 60

*“60. To determine the minimum number of homes needed, strategic policies should be informed by a local housing need assessment, conducted using the standard method in national planning guidance- unless exceptional circumstances justify an alternative approach which also reflects current and future demographic trends and market signals. In addition to the local housing need figure, any needs that cannot be met within neighbouring areas should also be taken into account in establishing the amount of housing to be planned for.”*

## Exceptional circumstances?

- Exceptional *local* circumstances needed to justify planning for a lower figure than that produced by the SM; NPPG para 2a-015
- Need for something unusual about the local area which could not be repeated anywhere else around the country
- Something relevantly unusual such that in order to reflect current and future demographic trends and market signals something should be done other than following the result of the application of the SM
- SM very much the 'safe zone'; stepping outside effectively means demonstrating SM not doing what it is meant to ie identifying the need
- Representations- local green groups?- alleging ELC
- Need to distinguish extent to which constitute criticism of SM itself, EiP not the forum for that

## Q&A

**We will now answer as many questions as possible.**

**Please feel free to continue sending any questions you may have via the Q&A section which can be found along the top or bottom of your screen.**

# Thank you for listening

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## London

180 Fleet Street  
London, EC4A 2HG  
+44 (0)20 7430 1221

## Birmingham

4th Floor, 2 Cornwall Street  
Birmingham, B3 2DL  
+44 (0)121 752 0800

## Contact us

✉ [clerks@landmarkchambers.co.uk](mailto:clerks@landmarkchambers.co.uk)  
🌐 [www.landmarkchambers.co.uk](http://www.landmarkchambers.co.uk)

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