No allowance for windfalls any more

The PPS3 stance on windfalls can only undermine politicians' and planners' desire for sustainable development, concluds Christine Field.

A guiding principle of planning is the need to balance competing demands – on the one hand meeting residents' needs for homes and jobs and on the other protecting precious natural resources.

One of the ways we can achieve this critical balance is by making the best use of land when we plan developments. However, new Government rules are preventing local authorities putting this into practice. Planning Policy Statement 3 (PPS3) on housing prevents councils planning for new homes on hundreds of 'windfall' areas of brownfield land.

For years local authorities have been able to make an allowance for sites that become available over the life of their development plans, ensuring that brownfield development opportunities are exploited before greenfield sites are considered. Known as windfall sites, they can range in size from large scale factory closures to individual homes that are sub-divided into flats.

However, the new rules mean that local authorities can no longer make that allowance for windfall sites in their forward plans and will have to identify more greenfield sites for development. The only exception is where local planning authorities can provide 'robust evidence of genuine local circumstances' that prevent specific sites being identified. But this 'robust evidence' is as yet undefined, making it difficult for councils to argue their case.

A moratorium on using windfall sites will cause serious problems in the South East England Regional Assembly's area, where they are an integral part of the land supply and some councils build all or most of their homes on windfall land. For example:

• Elmbridge Borough Council (Surrey): 100 per cent of housing has come from windfall sites in the past three years.

• Hastings Borough Council (East Sussex): Nearly 50 per cent of housing has come from windfall sites over the past three years.

• New Forest District Council (Hampshire): Windfalls made up over 80 per cent of housing completions in 2005/06.

• Sevenoaks District Council (Kent): In 2003 99 per cent of housing completions were on windfall sites, in 2004 the figure was 93 per cent, in 2005 96 per cent and in 2006 72 per cent.

The new approach in PPS3 makes for bad planning. It will become much harder for councils to deliver the Government's aim of sustainable development when forced into unnecessary development of greenfield sites. In addition, local authorities will find it more difficult to plan for urban renaissance and regeneration.

Using windfall sites will not diminish the responsibilities of local authorities to plan positively.

Frustratingly, we all know that windfall sites will continue to come forward, but councils will have to exclude them from forward plans. Councils will waste time and money developing unrealistic plans, knowing that they will not be able to phase release of greenfield land accurately and plan ahead for supporting infrastructure.

At a regional level agreement on the future spread of house building will be undermined, as the region's 20 year planning vision – the South East Plan – takes account of the significant contribution that windfall sites make to development. The new rules will also threaten the region's aim of building 60 per cent of homes on previously developed land.

Government needs to address the obvious contradiction in its planning policies as a matter of urgency. The PPS3 stance on windfalls can only undermine politicians' and planners' desire for sustainable development.

Christine Field is chairman of the South East England Regional Assembly planning committee.
READ Will Teasdale's article in this issue.

Starting the clock: when is an application properly made?

Simon Ricketts shows how new rules make even validating your planning application more complicated and calls for a rethink.

Any financial incentive is likely to lead to perverse effects on behaviour and the planning delivery grant has certainly been no exception. Authorities' attention is now focused on all stages of the application process so as to maximise the prospect of a determination within the statutory period.

Whilst much has been written about the implications for applicants (and for good planning) of authorities' increased unwillingness to entertain negotiations or amendments, and the pressure placed on applicants at the end of the process - with a typical section 106 negotiation now along the lines of "sign on the basis of this (inadequate) draft by Friday or we refuse the application" - the outset of the process causes equivalent difficulties. I recently acted for an applicant whose application was initially returned by an outer London borough

because the authority required a financial appraisal to be submitted to justify affordable housing aspects of the proposal. London boroughs such as Camden and Islington have lengthy checklists of information which they require - of no legal effect pending forthcoming legislative changes.

So, what does comprise a valid application for planning permission? What are the proposed legislative changes? To what extent can authorities delay starting the clock? What is the minimum necessary to avoid legal challenge, given the new duty in section 327A of the Town and Country Planning Act 1990 upon authorities not to entertain an application that fails to comply with statutory requirements as to its form or the manner in which it is to be made? What can be done if an authority refuses to register an application? And is "front-loading" such a good thing?

The current position on validation

Before amended by section 42 of the 2004 Act, section 62 of the 1990 Act required applications to be "in such manner as may be prescribed in regulations under the Act" and that they "shall include such particulars as may be required by the regulations or by directions given by the local planning authority under them".

Regulation 3 of the Town and Country Planning Applications Regulations 1988 sets out the basic requirements for a valid application form, particulars specified in the form and plans necessary to identify the land in question and any other plans, drawings or information necessary to describe the proposed development. Article 5(4) of the Town and Country Planning (General Development Procedure) Order 1995 requires that an authority, where it considers that the application is invalid by reason of a failure to comply with Regulation 3 "or any other statutory requirement", shall as soon as reasonably possible notify the applicant that his application is invalid.

But then confusion arises. Regulation 4 of the 1988 Regulations allows authorities to direct applicants to "supply any further information and, except in the case of outline applications, plans and drawings necessary to enable them to determine the application". With regard to outline applications, authorities are able to require submission of further details where they are of the opinion that the application ought not to be considered separately from all or any of the reserved matters (article 3(2), Town and Country Planning (General Development Procedure) Order 1995). It has been unclear whether failure to comply with such requests invalidates an application (assuming it complies with Regulation 3).

The changes

From 1 October 2007 (recently delayed from 6 April), the position will be clearer. The Government proposes to implement procedural changes set out in the DCLG's July 2006 consultation paper, "Validation of Planning Applications". When taken with the impending Standard Application Form, the use of which will be mandatory from the same date, the procedures will certainly be clearer. However, will they be more onerous for applicants? The Government's proposal is that a validation checklist should be adopted by each authority. Under the new version of section 62, authorities will be able to seek "such particulars as they think necessary" and "such evidence in support of anything in or in relation to the application as they think necessary" to the extent that it is required by legislation. For the purposes of validation, authorities should only be able to seek information which is on the checklist.

The consultation paper states that the Government wishes to "ensure that the amendments... provide clarity over what an authority requires for a valid application for planning permission whilst ensuring that there are no opportunities for delaying the validation of applications merely in order to meet performance targets".

There will be two parts to the validation checklist: a core, mandatory, national list (which will be incorporated into the Standard Application Form) and each local planning authority's own local list.

The national list is uncontroversial: a completed form, scale plans, agricultural holdings certificate, ownership certificate, design and access statement (if required) and application fee - although those in the private sector may not yet have had cause to see the proposed Standard Application Form and eyebrows may be raised at a number of the additional questions which will now need to be answered, for example with regard to flood risk, trees and hedges, biodiversity and geological conservation and, in the case of residential proposals, details of proposed affordable housing provision, broken down by unit size tenure.

However authorities' local lists have the potential for going much further. Although there is little evidence of it on London boroughs' websites, authorities should now be undertaking consultation with regard to their own draft lists, having regard to a model checklist prepared by DCLG.

The model checklist contains no fewer than 30 potential pieces of additional information which it suggests that authorities may choose to require. Many reflect existing good practice with regard to larger schemes (for example, a supporting planning statement, transport assessment, sustainability statement, section 106 heads of terms etc). Others go beyond what is commonly required, for example utilities statements, photographs and photomontages and site waste management plans and, it is to be hoped, will remain confined to larger and more sensitive schemes.

All of this is in addition to the requirement, introduced in August 2006, for design and access statements and for increased categories of information to be included in support of applications for outline planning permission. In the case of applications subject to environmental impact assessment it is also in addition to the onerous requirements of the 1999 EIA Regulations and the authority's power to "stop the clock" by requesting further environmental

information under Regulation 19.

Disputes

An applicant's right of appeal in respect of non-determination within the statutory period arises once the relevant period (whether 8, 13 or 16 weeks depending on the nature of the application) has passed from receipt by the authority of a valid application. The clock does not start from the date of registration or confirmation of validation (although that can in itself sometimes be some cause for celebration!) but when a valid application was first received. This position is not affected if the authority has returned the application as in its view invalid. The Court of Appeal has confirmed that it is for the Secretary of State in the case of an appeal to determine whether the right of appeal has arisen, rather than for the authority.

Accordingly, whilst not the speediest way of resolving a dispute as to validation and one that will always be risky if the information sought is in fact material to the determination of the application, it is always open to an applicant resort to appeal.

The future?

We currently "look forward" to a Planning White Paper but I suspect that we will see little further to reduce the level of information which authorities can require at the outset of the application process. Indeed, the widely trailed planning delivery agreements (or planning project agreements as they may be restyled) for major applications could further institutionalise the widespread assumption that more detail at the outset necessarily leads to better decision-making.

I worry that we risk over-specifying what is needed at application stage, adding to the already increasing level of information that is commonly duplicated and re-stated in a variety of overlapping documents, or being required for a wider category of proposals than is really necessary. Authorities' pleas for extra resources are in part due to the sheer scale of the application packages that have been provided - and the variety of technical disciplines covered. What is so wrong with leaving some matters, not going to the principle of the scheme, to be left for subsequent determination through precise conditions? Or to be dealt with by separate legislation? And what can be done to reduce the length of application documentation: word-counts anyone?

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When impact may not mean a collision

Impact (n): the impulse resulting from collision; strong effect, influence.

Andrew Rogers ponders the meaning of impact-based planning.

I have just received a letter from my local authority asking for my views on a planning application for a neighbour's ground floor rear extension. Not so remarkable, you might think – except that this extension is at the back of the house opposite to mine, on the other side of a wide road lined with several large oak trees. I don't know why the Council needs to solicit my opinion on a proposal that cannot possibly have any effect on me or my property, but it made me wonder why I'm not consulted about changes that do.

For example, a nearby conservation area has been devalued by the installation of tall traffic lights (for the use of riders on horseback) and associated signage, without any reference to local inhabitants or even the Council's own conservation officer.

For example, a client asks me whether she needs to apply for permission to convert a tumbledown outbuilding into changing rooms and excavate for a swimming pool. This is by no means clearcut as readers of Planning magazine's Casebook files will know – but in this case I was tempted to advise unequivocally that permission won't be required, simply because her nearest neighbour is about a mile away.

For example, my cycle route to the local shops has just been complicated by the installation of a new "traffic-calming" raised platform that narrows the road to a single carriageway; with no opportunity for comment, such as to ask why there is no provision for cyclists to avoid head-on confrontations with motorised traffic.

There are many instances of local impacts that occur without consultation and even more wide-ranging impacts that happen incrementally (think of concreted front garden areas). Which is why the Householder Development Consents Review has been wrestling with the problem of how to define "impact" in a new permitted development order for more than two years now. In March 2005 the HDCR had already defined the impacts of householder development at four levels, from the first (no impact on anything other than the host property), which would always be permitted development, to the last, which would always require a full planning application. Their difficulty comes in defining how impacts can be measured and any suggestions will be gratefully received.

The latest draft we have returns to measurements, with deemed-to-satisfy diagrams, which is surely not what is required because the same problems that arise with the current order are bound to return (ie what happens if the site is on a corner, on sloping ground, in a compact terrace, not on a street at all, includes a flat, etc, etc). Self-certification is on the agenda, but the proposed rules are as elusive as to a definition of amenity.

Perhaps we need to turn to nuclear physics, which defines the "impact parameter" as "the distance at which two particles which collide would have passed if no interaction had occurred between them". Then again, perhaps not. Meanwhile, planning consultants (and their insurers) seem to be travelling inexorably towards a collision with development control regimes.

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READ Zoë Cooper's and Brian Waters' articles in this issue.