

# The Five Year Housing Land Supply

## Issues and implications of 5-year HLS

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1. The starting point is the present National Planning Policy Framework ('FW') at 14, 47 and 49. Likely to be amended by Consultation Draft of March 2018.

- I will deal with the changes..
- Health warning: these may not be the final changes!!

2. FW 47: the objective is to “boost significantly the supply of housing” by -

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- Meeting FOAN for market and AH in the HMA by way of Local Plans
  - Identify and update annually 5 years supply of specific deliverable sites plus a 5% buffer for choice and competition
  - If persistent under-delivery increase the buffer to 20%.
3. FW 49: relevant policies for the supply of housing should not be considered up-to-date if there is no 5 year HLS.

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#### 4. FW 14:

For **decision-taking** this means:

- approving development proposals that accord with the development plan without delay; and
- where the development plan is absent, silent or relevant policies are out-of-date, granting permission unless:
  - any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole;

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or

- specific policies in this Framework indicate development should be restricted.

- If relevant policies out of date:
- apply significantly and demonstrably OR
- Look for specific FW policies.
- See: *FODDC v. SSCLG* [2016] EWHC 421 Admin

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5. The Consultation draft FW at 11 provides a similar but not identical approach:
  6. Plans and decisions should apply a presumption in favour of sustainable development.

For **plan-making** this means that:

- a) plans should positively seek opportunities to meet the development needs of their area, and be sufficiently flexible to adapt to rapid change;

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- b) strategic plans should, *as a minimum, provide for objectively assessed needs for housing and other development, 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 impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole.

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For **decision-taking** this means:

- c) approving development proposals that accord with an *up-to-date* development plan without delay; or
- d) where there are no relevant development plan policies, *or the policies which are most important for determining the application are out-of-date*, granting permission unless:
  - i. the application of policies in this Framework that *protect areas or assets of particular importance* provides a *clear reason* for refusing the development proposed;



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or

ii. any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole.

There are similarities but note the words italicised.

There is a footnote reference which makes it clear that this does not refer to policies in the DP and also sets out the policies under i above. It is an expanded list.

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As to HLS itself the Consultation Draft is broadly unchanged.  
Thus:

- There should be specifically deliverable sites for years 1 to 5 [68];
- These should be, as before, identified and up-dated annually
- to provide specifically deliverable sites for a minimum 5-year HLS against the requirement plus
- A 5% buffer as before
- A 10% buffer [74(b)]; annual position statement
- A 20% buffer where there is significant under-delivery over the previous 3 years (no period given before).

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- And 20% at least of the sites should be small sites: i.e. 0.5 ha. or less [69].
  - Finally, FW 11(d) will apply where there is no deliverable 5 year HLS (plus buffer) or where the Housing Delivery Test indicates that delivery of housing has been substantially (75%) below the housing requirement over the previous 3 years [75]. (In effect follows *Suffolk Coastal*, below).
  - Whereas it was FOAN previously, now there is to be a standard methodology based on: setting the baseline; adjusting for market signals; capping any increase (Consultation draft [61] and draft NPPG).

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- Thus need is likely to be quicker and easier to calculate and, hopefully, to keep up to date.

## 6. Cases and further comment

- *Suffolk Coastal DC v Richborough Estates* [2017] UKSC 37
- FW is guidance and does not displace the primacy given by the TCPAs to the DP.
- ‘Policies for the supply of housing’ [FW 49] were to be construed narrowly. Is there a lack of a 5 year HLS? If so, the tilted balance in FW 14 applies.

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- See now para. 75 of the Consultation Draft which takes this on board and applies para. 11(d) directly.
  - Note also that the draft FW, in dealing with policies which ‘protect areas or assets of particular importance’, excludes DP policies, contrary to the suggestion in *Suffolk Coastal* [at 85].
  - *Barwood Strategic Land v. East Staffs BC & SSCLG* [2017] EWCA Civ 893.
  - Interprets *Suffolk Coastal* [22].
  - SC dealt with a lack of 5-year HLS: *Barwood* deals with a 5-year HLS & an up-to-date DP.
  - There is no general ‘free-wheeling discretion’ to find the development sustainable.
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- Only presumption in favour of sustainable development is in FW 14 (now FW 11). Thus a development which accords with an up-to-date DP is likely to be sustainable.
  - But note that a development which does not carry the presumption in favour of sustainable development may still be granted permission; contrariwise a development which has the presumption may still be refused. It is, as always, a matter of balance and planning judgment [35(3)]. Planning is not a mechanistic exercise [50].
  - *Bloor Homes East Midlands v. SSCLG* [2014] EWHC 754 Admin -

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- Worth noting because it deals with the buffer and persistent under-delivery: as to the buffer, does not have to be fixed to 5% or 20% (and 10% now perhaps) but can be above or below or in-between [121].
  - As to persistent under-delivery, that suggests something that has continued for a long time (not necessarily with fault) [122] and is a matter of planning judgment [NPPG 035].
  - *St. Modwen Developments Ltd. v. SSCLG* [2017] EWCA Civ 1643 – a short point:
  - ‘deliverability’ is not the same as delivery. It was not necessary for it to be certain or

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or probable that housing would in fact be delivered on a site, or delivered to the fullest extent possible, within 5 years. The test is ‘realistic prospect’.

- The definition of deliverability is now in the Glossary in the FW Consultation Draft and is broadly the same: but note the difference for outline permissions.
- *St. Modwen* (Ouseley J) [2016] EWHC 968 Admin at [59] dealt with a recurring problem. Housing may not come forward even if judged to be ‘deliverable’. Actual delivery may be due to market factors outwith the control of the LPA. The solution is not an increase in supply.



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- This problem is briefly addressed in the Consultation Draft: conditions could require start before the expiry of the relevant default period [78] and of course there is the emphasis on the provision of small sites [69a].
  - *Wokingham BC v. SSCLG* [2017] EWHC 1863 Admin – in addition to applying the 20% buffer for under-delivery the Inspector applied a ‘lapse rate’ of 10% in finding there was no 5-year HLS.
  - Held: he was wrong. There was no proper reason to do so (and the LPA had been given no opportunity of dealing with the point).

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- *Jelson Ltd. v. SSCLG* [2018] EWCA Civ 24 – FOAN assessment and affordable housing (AH).
  - Not necessary to meet fully the need for AH. The LPA's range (less than the full need for AH) took account of the substantial need for AH and was sound.
  - The CA held that the Inspector had considered all relevant factors, had exercised her planning judgement and was right to conclude that it was impractical or unreasonable to take the appellant's top of the range figure.
  - In the FW Consultation draft the definition of AH is widened (Glossary) and includes LCMH by way of starter homes and discounted market sales housing as part of the definition.

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- At least 10% of major sites (10+ homes or +0.5 ha) should be 'affordable home ownership' [65].
  - There do not appear to be rural exception sites for AH but instead entry level exception sites which will be 'adjacent to existing settlements' [72] and a high proportion of which will be for 'discounted sale' or 'affordable rent'.
  - The problem of AH identified by the Inspector in *Jelson* - that the actual need for AH may not be met in the LP - is not directly dealt with by the Consultation draft.

# Thank you for your time

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