

## Response to Document EXD/076

Matthew O'Connell, February 2020

Document EXD/076 is a note on the meaning of “deliverable” in the context of the NPPF (2012), by Charles Banner QC, relying on a combination of the ordinary language meaning of “deliverable” and the comments from Lindblom LJ in the Court of Appeal’s judgement on *St Modwen v. Secretary of State for Communities and Local Government* [2018] PTSR 746 (“St Modwen”). The note concludes that the proper interpretation of the test in NPPF (2012) para 182, 3<sup>rd</sup> bullet is “*whether the local plan is capable of delivery over its period – not whether it is certain to be delivered, likely to be delivered, or expected to be delivered over that period*”.

I have the following observations in relation to this legal opinion:

1. It has regularly been made clear in a legal context that the NPPF is a policy document, not a commercial (legal) document and therefore there is no reason to assume that terms are not to be taken in their ordinary course meanings, taking into account any specific clarifications made by the policy makers. There is also no reason to assume that the policies should be interpreted as expressing anything other than their *prima facie* meaning, but that of course needing to be understood within the context of the policy document more broadly. I do not believe this is inconsistent with Mr Banner’s position.
2. There is no need to take a dictionary-type definition for “deliverable” in the context of the NPPF (2012), for its meaning is specifically defined within the document, in footnote 11 to paragraph 47, specifically:

*“To be considered deliverable, sites should be available now, offer a suitable location for development now, and be achievable with a realistic prospect that housing will be delivered on the site within five years and in particular that development of the site is viable. Sites with planning permission should be considered deliverable until permission expires, unless there is clear evidence that schemes will not be implemented within five years, for example they will not be viable, there is no longer a demand for the type of units or sites have long term phasing plans”*

3. Paragraph 47 is the most relevant one in relation to *St Modwen* and indeed also the more recent Court of Appeal decision in *R (on the application of East Bergholt Parish Council) v Barbergh District Council and others* [2019] EWCA Civ 2200 (“East Bergholt”) as both of these related to planning applications in the context of the 5 Year Supply identified by a local planning authority. Paragraph 47 also defines another term, “developable”, in relation to local authorities identifying sites or locations for years 6-15 of a 15 year period:

*“To be considered developable, sites should be in a suitable location for housing development and there should be a reasonable prospect that the site is available and could be viably developed at the point envisaged”*

4. An examination of the specified definitions of these two terms, “deliverable” and “developable”, shows that the differential is more one of timing than suitability and viability. Specifically, “suitable location” is clearly to be understood in the context of sustainable development (NPPF (2012) para 49, *inter alia*), while viability is required to be a “realistic prospect” and a “reasonable prospect” respectively.
5. The clear implication is that while there is (as is logical) additional certainty around sites in the 1-5 year period – driven by availability now and achievability being intrinsically interlinked – suitability (i.e. potential for sustainable development) and viability are key requirements when identifying sites, whether those sites are classified as “deliverable” or “developable”.
6. Turning to para 182, it does not – and of course it could have done if the policy makers had wished – use the term “developable” at all; rather one of the “limbs” of its four-pronged soundness test for Local Plans is:

*“Effective – the plan should be deliverable over its period and based on effective joint working on cross-boundary strategic priorities”*

7. It is clear to observe that sites identified as “developable” for the 6-15 year period would need to be able to become “deliverable” at the point in the plan period where they are 1-5 years out in order for the Plan to be deliverable over its period. This would need to be underpinned by an upfront examination of sustainability and viability, and a high likelihood of evolution of certainty around availability from reasonable to realistic, and a corresponding certainty around achievability. This runs contrary to Mr Banner’s paragraph 4: *“Given that deliverability is to be assessed over the long timeframe of a plan period, that assessment involves inherent uncertainty and therefore requiring more than capability of delivery would be unrealistic.”*
8. Sustainability is a key component of the Local Plan examination and the importance of upfront confidence around sustainability rather than sustainability being dependent upon the potential but not the certainty of on- and off- site transport infrastructure, as one example, is clear from the emphasis on cross-period deliverability in para 182.
9. Viability is equally core in its significance to the examination and the only real evolution of viability across a plan period should be increasing certainty around inputs (including for example potential delivery rates and infrastructure costs), such that appropriately conservative inputs and contingencies at the Local Plan stage are replaced by increasingly refined and more granular detail up until the point when planning permission is granted.

10. Sustainability and viability are linked with availability and achievability in a real-world context by delivery mechanism/approach: without a valid mechanism through which to deliver the site in question, land may not be available (including for price reasons), or sustainable and viable development may not be achievable. Indeed, as the Examination in Public for the North Essex Authorities' Section 1 Local Plan has shown, it is not clear that private sector developers (with low quantum and late-phased infrastructure spend in their viability analyses) can deliver a site sustainably, while it is similarly not clear that the public sector or a public-private partnership can achieve the Plan's sustainable policies whilst demonstrating viability.
11. EXD/076 appears to rely on *St Modwen* to lend a hypothetical overlay to "deliverable", effectively implying that a site needs to be theoretically capable of delivery but with little or no requirement for this being realistic over a local plan period in a practical context. But it is clear from *East Bergholt* (para 46 of decision) that *St Modwen* did not change the law nor bring new interpretation to "deliverable" in the context of the NPPF (2012) (see para 54 of the decision in particular which (re)emphasises the four elements of deliverability set out in footnote 11 of NPPF (2012) para 47). Sites must have a suitable level of certainty around sustainability and viability, and must have an appropriate mechanism for delivery – within the context of that sustainability and viability – in order that the development has a realistic prospect of becoming practically achievable on land made available during the plan period, such that the plan can be *deliverable over its period*.
12. Lending further support to this point is the fundamental question of why policy makers would have intended to lend a hypothetical overlay or aspect to Local Plan delivery in para 182: when the emphasis is on securing housing supply, why would the "Effective test" contain a concept of (paraphrasing EXD/076) "delivery is possible but it does not matter if it is actually likely to happen in practice"? The purpose and context of both paragraphs 47 and 182 are actually directly contrary to such uncertainty or ambiguity.
13. Indeed it merits additional consideration that in the context of the specific Plan under examination here, rather than there being an argument for 'lowering the bar' the unquestionable importance of sustainability and viability if anything 'raises the bar', for there is a clear reliance on the fully built-out viability and achievability of these sites to deliver development which is sustainable. If there is any reason for concern (for example viability) that the sites would not be able to form components of an Effective (para 182) plan in future iterations of local plans for the area, then it follows that the implied deficiency in sustainability would mean that they cannot be components of a sound local plan at the present time.