

# Green Belt Constraint

## 1. Introduction

This document sets out the legal case for use of the green belt constraint and infrastructure constraints when preparing a Local Plan. The circumstances of Basildon Borough Council are considered in detail, but the same principles apply to any other local planning authority that is similarly constrained with insufficient potential development sites outside the green belt or other constrained areas.

Tackling the housing shortage and ensuring economic growth are priority policies of central government, but the benefits must also be weighed against the harm of over-development to strike the right balance according to the needs and priorities of local communities. Protection of the green belt has been repeatedly confirmed by the government as desired policy. There are cases where development within the green belt is acceptable, but its characteristics and purposes must be respected.

Local Planning Authorities are required to prepare up-to-date Local Plans in line with legislation and planning policy. They must be positively prepared with a presumption in favour of sustainable development. The condition of sustainability is a double-edged sword. Councils must make efforts to enable development in patterns that are sustainable. They must set the right balance of housing types according to needs and permit construction in the right place. Infrastructure must be ready when it is needed. The amount of development should attempt to meet assessed needs, including any unmet need that neighbouring authorities cannot meet, but it should not exceed the limits of what would be sustainable.

The scope of what considerations can be included when determining sustainability is set out in the National Planning Policy Framework (NPPF). This is covered in 13 topic sections under the heading *Delivering Sustainable Development* covered by paragraphs 18 to 149 of the framework. Of these, section 9 sets out the policies for Protecting Green Belt land. The purposes of the green belt are therefore a constraint on development that comes under sustainability.

Paragraph 83 of the NPPF provides that green belt boundaries should only be altered in exceptional circumstances when preparing a Local Plan. The phrase “exceptional circumstances” is not defined in the framework, but paragraph 84 indicates that the need to promote sustainable patterns of development must be taken into account. Here the role of sustainability again implies that steps should be taken to achieve sustainability for enough development, but also that development should not exceed the limits of what can be sustainable.

The policy framework only sets out the requirements for the planning system to the extent that it is relevant, proportionate and necessary to do so. This deliberate incompleteness applies to the meaning of terms such as exceptional circumstances and the weight to be given to different elements of sustainability, including the purposes of the green belt. Paragraph 1 explains that this flexibility provides scope for councils who are accountable to local people to produce Local Plans which reflect the needs and priorities of their communities.

It follows that the criteria that determine exceptional circumstances or the balance of sustainability can be different for different local authorities according to the priorities of local communities, even under otherwise similar circumstances. The public responses to matters put out to consultation can therefore have significant implications for the preparation of a Local Plan.

When the Local Plan is submitted to the Secretary of State and comes under examination before a planning inspector, many elements will be tested for soundness. It can fail because not enough has been done to meet the assessed needs for housing development, but it can also fail if the limits of sustainability have been exceeded. This includes either the release of too much or too little green belt. The planning authority must be able to support its decisions with prepared evidence including where required, green belt reviews, sustainability reports, needs assessments and the outcomes of public consultations .

## **2. Decision making**

Planning policy for England is set out in the National Planning Policy Framework. The policies framework must be taken as a whole (paragraph 6). Be wary of arguments that rely of selectively quoting the legislation. The NPPF must be taken into account in preparing Local Plans (paragraph 2).

The NPPF paragraph 1 states that:

*“The National Planning Policy Framework sets out the Government’s planning policies for England and how these are expected to be applied. It sets out the Government’s requirements for the planning system **only to the extent that it is relevant, proportionate and necessary** to do so. It provides a framework within which **local people and their accountable councils** can produce their own distinctive local and neighbourhood plans, which reflect the **needs and priorities** of their communities.”*

It follows from this that where the NPPF is non-specific or calls for a subjective judgement, it is left to elected councillors to direct the planning officers who will thereby make planning judgements based on the needs and priorities of local people in addition to the governments planning policy. This process takes place through public consultations, election campaigns and public representations to the council and the planning inspectorate as well as in decisions taken by Councillors under their obligation to represent local residents.

In particular, when testing the policies of a Local Plan the planning inspectorate, Secretary of State or judge should give weight to decisions taken by a council in accordance with the priorities of residents, and therefore **a judgement in a case where a council makes a decision to release green belt for development does not set any kind of precedent for a council that decides to preserve its green belt under circumstances that are otherwise similar.**

Paragraph 1 specifically mentions “local people” implying that the voice of people living near the area is given more weight than the needs of those who do not, except possibly in the case where there are nationally significant infrastructure projects (paragraph 3). This also reflects legislation under the Localism Act which also allows for the needs of neighbouring communities to be taken into account where they would be affected.

### 3. Sustainable Development

The Local Plan must be positively prepared with a presumption in favour of sustainable development (paragraph 14 and 151). From paragraph 14:

*“For plan-making this means that:*

*Local Plans should meet objectively assessed needs, with sufficient flexibility to adapt to rapid change, 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; or*

*– specific policies in this Framework indicate development should be restricted.”* including “land designated as green belt” (footnote 9)

The planning authority should plan to meet assessed housing needs **unless certain constraints would make development unsustainable**. The constraints fall in to two categories. The first is where evidence can demonstrate that adverse impacts outweigh the benefits. This could include pollution and infrastructure constraints. The second category of constraints are more specific and include green belt policies. Further policies of the NPPF specify the details of how this should be determined.

This paragraph tells us that constraints such as the need to protect green belt place a limit on the obligation to plan in favour of development. This has been clarified in planning practice guidance Paragraph: 044 Reference ID: 3-044-20141006:

***“Do local planning authorities have to meet in full housing needs identified in needs assessments?***

*Local authorities should prepare a Strategic Housing Market Assessment to assess their full housing needs.*

*However, assessing need is just the first stage in developing a Local Plan. Once need has been assessed, the local planning authority should prepare a Strategic Housing Land Availability Assessment to establish realistic assumptions about the availability, suitability and the likely economic viability of land to meet the identified need for housing over the plan period, and in so doing take account of any constraints such as Green Belt, which indicate that development should be restricted and which may restrain the ability of an authority to meet its need.”*

Paragraph 17 sets out 12 core principles. The 3<sup>rd</sup> principle states that in the context of *sustainable* economic development land prices and housing affordability should be taken into account when allocating land suitable for development. The 5<sup>th</sup> principle includes protection of the green belt. The 8<sup>th</sup> encourages the effective use of brownfield sites.

### 4. Green Belt Constraint

Paragraphs 18 to 149 of the NPPF are under the heading “Delivering Sustainable Development” and are divided into 13 headed sections. Section 9 consisting of paragraphs 79-92, sets out legislation on protection of the green belt. Paragraphs 79-81 define its characteristics, purpose and use. Paragraph 82 is relevant to the situation where new green belt might be established. Paragraphs 87-92 are concerned with the rules governing development within the green belt once it is established. The

remaining paragraphs 83-86 deal with setting green belt boundaries in the Local Plan and are therefore relevant to the release of green belt for development.

Paragraph 83 provides:

*“Local planning authorities with Green Belts in their area should establish Green Belt boundaries in their Local Plans which set the framework for Green Belt and settlement policy. Once established, Green Belt boundaries should only be altered in exceptional circumstances, through the preparation or review of the Local Plan.”*

This makes it clear that the green belt boundaries should only be altered in “exceptional circumstances” when a Local Plan is updated. Neither the NPPF nor PPG gives any further guidance on what constitutes exceptional circumstances, except that they are clearly less stringent than the “very special circumstances” required for allowing inappropriate development in the green belt once established (paragraph 87).

Paragraph 1 of the NPPF can be invoked to conclude that it is for councils to decide what the exceptional circumstances are taking into account their own needs and priorities. This view has been corroborated by decisions made by planning inspectors and the Secretary of State in which they have accepted the planning authority’s case for exceptional circumstances when the council has used unmet housing need as the justification (e.g. for Leeds and Birmingham). However, this does not mean that similar levels of unmet housing need implies exceptional circumstances in the case of another council who chooses not to release green belt. That council will have set different priorities. The Secretary of State in justifying his decision to allow Birmingham to release green belt did not say that he agreed with that the case for exceptional circumstances had been met. Instead he said “Where local councils come forward with sensible, robust local plans – and are willing to take the tough decisions – I will back them all the way” This confirms that the planning authority has considerable flexibility when making such judgments.

Paragraph 83 continues:

*“At that time, authorities should consider the Green Belt boundaries having regard to their intended permanence in the long term, so that they should be capable of enduring beyond the plan period.”*

The implication here is that the green belt is not to be used as a mechanism for controlled release of land for development, where boundaries are changed each time the Local Plan is reviewed by the amount required to meet the housing needs of the plan. The boundaries should instead be changed to fit the five green belt purposes defined in paragraph 80 of the NPPF with an intended permanence beyond the life of the Local Plan.

Paragraph 84 of the NPPF is often cited by developers as a directive that planning authorities have to release green belt for development. Although it does confer a positive obligation on planning authorities, the limitations and the nature of the obligations needs to be understood. The first sentence of paragraph 84 says:

*“When drawing up or reviewing Green Belt boundaries local planning authorities should take account of the need to promote sustainable patterns of development.”*

The words “take account of” imply that this need could be one of possibly many things that the authority needs to take into account. No indication of how much weight should be given is provided. Furthermore it is the need for *sustainable* patterns of development that need to be taken into account, not simply the need for development of any sort. Sustainability is a “golden thread” running through the NPPF (paragraph 14) The bulk of the policy from paragraphs 18 to 149 come under the heading of promoting sustainable development, including the section on protecting the green belt. This statement is therefore saying that all of those policies must be taken into account and weighed up when reviewing green belt boundaries including the characteristics and purposes of the green belt (paragraphs 79 and 80).

The rest of paragraph 84 says:

*“They should consider the consequences for sustainable development of channelling development towards urban areas inside the Green Belt boundary, towards towns and villages inset within the Green Belt or towards locations beyond the outer Green Belt boundary.”*

Again this is merely telling authorities that they should consider how revised boundaries would affect where development goes. Sustainability is again part of what should be considered. It is a very open directive which allows the planning authority to make its own decisions so long as they are based on considerations which include but are not necessarily limited to these matters. It could imply that evidence such as sustainability assessments and green belt reviews could be produced to support whatever decisions are made, but there is no explicit directive to do so here.

In summary, paragraph 84 is not simply a directive to promote development by reviewing green belt boundaries. It is also a directive to ensure that any development enabled by a review of boundaries should not exceed the limits of sustainability.

## **5. Public Consultation**

A Local Planning Authority’s statutory duties to prepare a Local Plan are set out in Part 6 of the Town and Country Planning, England Act (regulations 17 to 31.) Regulation 18 applies to the requirement to consult with concerned bodies and individuals. Paragraph (3) reads

*(3) In preparing the local plan, the local planning authority must take into account any representation made to them in response to invitations under paragraph (1).*

Paragraph (2) specifies that bodies, businesses and residents such as the council consider appropriate are to be included in the invitations to make such representations.

Basildon Borough Council have carried out a number of public consultations under regulation 18 including:

- Core Strategy Revised Preferred Options – early 2014
- Draft Local Plan – early 2016
- New and Alternative Sites – late 2016

In addition there was consultation held jointly with Brentwood Borough Council under the terms of the Duty to Cooperate which is relevant because under its terms it was intended to inform the emerging Local Plans of both boroughs

- Dunton Garden Suburb – early 2015

Individual responses and Statements of Consultation have been published following these consultations and they have been the subject of council scrutiny which is still ongoing.

Regulations 19, 20 and 23 indicate that further consultation will be necessary prior to submission of the Local Plan and related evidence to the Secretary of State. Any person can make representations and the assigned Planning Inspector must take those representations into account before making any recommendations. It follows that if Basildon Council do not properly take into account valid representations to the earlier consultations when preparing the Local Plan, there could be repercussions when similar representations are viewed by the planning inspector. This could lead to late changes to the Local Plan under the recommendations of the Planning Inspector. This could require further consultation and delay before adoption can take place.

Residents responded in significant numbers to the consultations therefore their comments as reflected in the statements of consultation should be used to help set the councils priorities for the Local Plan. Topics of wide concern included:-

- A need for housing affordable to local residents including social housing.
- A widely held and strong wish to continue to protect areas currently designated as green belt.
- A need to upgrade infrastructure before any development takes place. This includes road, rail, health services and schools.
- The risk of flooding and pollution.
- Protection of wildlife and biodiversity.

It is now a matter for Councillors representing residents to direct planning officers in setting out priorities in accordance with these views. The planning officers must make balanced and legal planning judgements consistent with these priorities and the government's policies set out in the NPPF.

## **6. Green Belt Review**

Basildon Council has invested considerable effort in preparing a Green Belt Review and Landscape Appraisals. These can be used in conjunction with other criteria including consultation responses and information from developers about deliverability. However, the goal is not simply to determine which parcels of land are most suitable to fulfil the Boroughs assessed need for housing. It is important to determine whether any green belt land can be released dependent on the extent to which it is required to meet the purposes of green belt, conservation or other constraints.

It is beyond the scope of this report to fully assess the conclusions of the Green Belt Review, but a clear result is that all areas of the green belt meet some of the purposes and the green belt as given in paragraph 80 of the NPPF. Therefore any release of land from the green belt in Basildon will cause harm to its purposes which must be weighed against the benefits and other harms of development. The appropriate balance should be determined by Councillors representing residents subject to advice on legal requirements.

The fifth purpose of the green belt (NPPF paragraph 80) is “to assist in urban regeneration, by encouraging the recycling of derelict and other urban land.” The Basildon Green Belt Review acknowledges that this purpose is independent of location and therefore applies equally to all green belt in the borough. It is therefore dismissed because it is unable to help determine which areas of green belt are most suitable for release. This relativistic approach is not applicable if the possibility of exercising the green belt constraint is considered. The role of the green belt in prioritising brownfield development is then very much relevant. This purpose should therefore be re-included into the assessment of circumstances when interpreting the Green Belt Review.

Basildon has limited brownfield sites but is undertaking important regeneration projects in Craylands, Fryerns and Five Links with further scope for regeneration around other older parts of the main town and Wickford, including Vange for example. Construction companies have limited resources, especially the work force, and are known to favour development on green field sites when given the opportunity. Therefore if Basildon is to progress its regeneration projects it is important not to release too much green belt at an early stage of the plan. Indeed the need to hold back green belt release to priorities brown field development goes well beyond Basildon to brownfield sites such as Purfleet and Ebbsfleet where development has been slower than desired. Releasing too much green belt in South Essex would severely hamper the prospects of progress in these locations.

## **7. Exceptional Circumstances**

Paragraph 83 of the NPPF says that “green belt boundaries should only be altered in exceptional circumstances”. This is a *prohibition* on altering green belt boundaries when exceptional circumstances *are not* present. It is not an *instruction* to alter the boundaries when exceptional circumstances *are* present. Furthermore, the meaning of “exceptional circumstances” is not defined in the policy framework.

Paragraph 84 says that the need to promote sustainable development must be taken account of reminds us that when defining boundaries local authorities must ensure consistency with the Local Plan strategy for meeting identified requirements for sustainable development. The framework must be read as a whole and clearly there are indications that both encourage and limit the release of green belt. This requires weighing considerations of a different nature against each other so the outcome will depend on the priorities of local communities.

The logic implied by the policy is that green belt boundaries should be altered when and only when *all* the following four conditions are met:

- The assessed housing need cannot be delivered without altering the boundaries.
- There are exceptional circumstances.
- The benefit of the development outweighs the harm to the purposes of the green belt.
- Development promoted by the change of boundaries would be sustainable.

Although no definition of exception circumstances is given the High Court judgement of *Calverton vs Nottingham* has been used to throw some light on this. The judge listed five matters “at least ideally” be identified and considered. Nevertheless, little indication was given as to how these should be weighed up. Naturally any planning officer could weigh them and conclude that the exceptional circumstances exist in his estimation, but paragraph 1 indicates that it is the priorities of

the local community that should determine the case through the representation of the local Councillors.

## **8. Infrastructure Constraints**

A Local Plan must be prepared with a presumption in favour of sustainable development. If development would be unsustainable then the presumption does not apply and the Planning Authority is permitted to limit development below the amount required to meet its assessed needs.

In particular, if there are insufficient funds for infrastructure that would be required to ensure sustainability then development should not be enabled. Through public consultation, Basildon residents have expressed concerns about different types of infrastructure including

- Road
- Rail
- Health services
- Schools
- Flood management

Paragraph: 017 Reference ID: 12-017-20140306 of PPG gives guidance on deliverability of infrastructure. It states that:

*“The Local Plan should make clear, for at least the first 5 years, what infrastructure is required, who is going to fund and provide it, and how it relates to the anticipated rate and phasing of development. This may help in reviewing the plan and in development management decisions. For the later stages of the plan period less detail may be provided as the position regarding the provision of infrastructure is likely to be less certain. If it is known that a development is unlikely to come forward until after the plan period due, for example, to uncertainty over deliverability of key infrastructure, then this should be clearly stated in the draft plan.”*

Some elements of infrastructure in Basildon may be critical constraints during the first five years after adoption. In particular Hospitals including those in Southend and Basildon have been on black or critical alert for more than half the year indicating a degradation of critical care. This would worsen if the population increases without a corresponding increase in capacity. At present capacity is set to decrease with the closure of Orsett Hospital.

Road infrastructure is also a significant constraint and the Local Plan must be realistic about the options for road improvements, especially to the A127. Any plans to increase capacity would take at least ten years to come about. The level of funding from developer contributions is very limited and cannot address all the funding shortfalls. It is not reasonable to aim for more development to provide funding needed to support more development because there is an overall deficit in such increased funding verses increased need for infrastructure. Only significant levels of funding from central government or other external sources can overcome any shortfall, but so far offers of such funding have been insufficient.

It is beyond the scope of this document to analyse infrastructure delivery in details, but it is important to recognise the importance of infrastructure constraints as a limit on sustainability of development that must be taken into account in the Local Plan in order for it to be sound.

## **9. Duty to Cooperate**

When a Local Authority cannot meet its assessed needs due to constraints on green belt or infrastructure, it is required under the principle of Duty to Cooperate to ask its neighbours if they can help meet the need.

Legislation regarding Duty to Cooperate was introduced in the Localism Act. Planning Practice Guidance ref ID: 9-0xx-20140306 provides an adequate summary of the rules.

The duty to cooperate is not a duty to agree but it places a legal duty on local planning authorities, to engage constructively, actively and on an ongoing basis to maximise the effectiveness of Local Plan preparation. Local planning authorities should make every effort to secure the necessary cooperation on strategic cross boundary matters before they submit their Local Plans for examination.

If Basildon council identifies a need to use constraints to ensure sustainability shortly before submission it will not have much time to comply with the Duty to Cooperate requirements. A MoU already covers cooperation with neighbours within the Housing Market Area (Castle Point, Thurrock, Rochford and Southend), but these authorities are also under very similar constraints. It is therefore essential that Basildon opens discussion with its other neighbours and near neighbours, particularly Brentwood, Chelmsford and Maldon. These councils can either agree to meet some of the need or can provide evidence that they are also constrained.

The condition of DtC is hard to meet when targets are constrained below assessed needs. The test of DtC can proceed soundness tests in the public examination and halt progress at an early stage before other matters are resolved. Given the lack of time to prepare and the likelihood that neighbours will resist against helping a good strategy will be required. For example it may be possible to mitigate against the issue if Basildon can meet its needs for the first few years from the date of adoption allowing time for discussions to take place and a Local Plan review for the end of that time.

## **10. Housing Trajectory**

Paragraph 47 of the NPPF states that Local Plans should meet the full assessed needs as far as is consistent with the policies in the framework. This is consistent with the use of constraints as described elsewhere. It continues with the instruction that there needs to be a five year supply of deliverable sites for housing with an additional 5% buffer, to be updated annually. For later years broad locations for growth are sufficient.

The nature of constraints is that they result from the amount of housing built more than the rate at which they are built. It is therefore more sound to apply the constraint unevenly over the period of the plan so that more houses are provided at the beginning and less later on as the constraints become more significant due to the increased number of houses. This strategy also gives time for discussions under Duty to Cooperate to take place increasing the likelihood that the Local Plan will be found to meet the condition at examination with an option to review the plan after about five years.

With this in mind a model trajectory will be proposed here.

year	2014-15	2015-16	2016-17	2017-18	2018-19	2019-20	2020-21	2021-22	2022-23	2023-24
target	765	765	973	973	1022	1022	1022	1022	1022	500
unmet	85	-55	0	0	-49	-49	-49	-49	-49	473

year	2024-25	2025-26	2026-27	2027-28	2028-29	2029-30	2030-31	2031-32	2032-33	2033-34
target	200	200	200	200	200	200	200	200	200	200
unmet	773	773	773	773	773	773	773	773	773	773

This trajectory would provide a housing target of 10,064 homes and an unmet need of 7988 based on an OAN of 973. Assuming that urban capacity for housing is 6561 and windfall is 50 for the last 15 years of the plan this leads to a target to build 2573 homes on green belt. These are example figures only.

In the 2016 Basildon Draft Local Plan the allocation of green belt housing throughout the settlement hierarchy was 55% in Basildon, 24% in Wickford, 20% in Billericay and 1% in other serviced settlements. If for the purposes of illustration we keep these proportions which also correspond to the community size then the distribution of green belt development would be 1416 in Basildon, 617 in Wickford, 514 in Billericay and 26 elsewhere. These numbers could be accommodated with relatively little harm to the green belt especially if higher density housing is used on selected sites.

## 11. Case Law

Examination by the planning inspectorate is a quasi-judicial process which can be referred to the Secretary of State or to judicial review in the High Court, Appeal Court or the Supreme Court. Past decisions by a planning inspector or the Secretary of State, provided they are recent, can be useful indications of how particular circumstances will be considered in future. Decisions in the courts set legal precedents. It is therefore useful to review relevant cases.

### Reigate and Banstead.

The Reigate and Banstead Core Strategy was submitted for examination in 2012. The planning inspector criticised the plan for not releasing enough green belt to meet housing need and asked the council to consider additional sites.

There are several reasons why this case is of limited relevance to present cases:

- It took place soon after the new NPPF and Localism Act came into effect and may not reflect more recent interpretations of the legislation. For example it made a crucial reference to "The Planning System: General Principles" which is no longer current.
- The case was not referred to judicial review where it might have been overturned.
- Although the council did consider green belt sites and include them in its Core Strategy, there was no land released from the green belt because it was not a complete Local Plan. The policy states that the sites will only be released if exceptional circumstances are met.

In view of these deficiencies this case is not a relevant precedent.

## **Lichfield**

In the case of Lichfield District the council had both green belt and green field sites not designated as green belt available as potential development sites. Their proposed Local Plan did not meet assessed needs for housing. The Planning Inspector asked them to find sites for another 900 homes but did not instruct them to release green belt. The council decided that sites in the green belt were the most sustainable and said that exceptional circumstances existed for changing the green belt boundaries. The Inspector accepted the decision.

This was challenged in the High Court by a developer who wanted a non-green belt site to be used instead but the high Court accepted the conclusions of the Inspector. Nevertheless the decision does not mean that a plan is unsound if it does not release green belt to meet housing need. Furthermore it does not test the case of soundness when a council provides evidence that its green belt constraint is applicable. Indeed the high court judge ended by saying *"The lack of housing supply should not be underestimated but it is unlikely that sites that have a strong green belt pedigree will readily be released, even in the light of a significant housing shortage, given current local plan trends,"*

## **Redbridge**

The examination of the Redbridge Local Plan is now almost complete. Redbridge is a London Borough with 37% of its area designated as green belt and the rest urban. The Redbridge Council submitted a Local Plan meeting 53% of its assessed housing need. The Planning Inspector has asked them to continue working with councils such as Epping Forest outside its Housing Market Area in order to try to meet more of its housing need.

Despite the low sub-OAN target the inspector took notice of resident campaign groups and instructed the council that it could not release green belt sites at Oakfield and Ford.

Modifications to the Local Plan have been put to public consultation after which it is expected that the plan will be found sound. There may further conditions such as a requirement to hold an early review.

## **Hounslow**

The Local Plan for the London Borough of Hounslow was adopted in 2015 with a target equal to about 60% of its assessed need for housing. The land area of the Borough is 22% green belt. There was a condition that a partial review focusing on the Great West Corridor and the West of the Borough would follow.

## **Conclusion**

The green belt constraint and infrastructure constraints remain a legitimate reason to lower housing targets below assessed needs. There have been no cases where this has been contradicted in Local Plan examinations. Duty to Cooperate remains a hurdle that can make it difficult for local authorities to pass examination when they have not been well organised.

