



Development Involving County Matters

Guidance notes
June 2013

Working in partnership



EPOA
Essex Planning
Officers Association



Essex County Council

CONTENTS:

| | |
|---|-----------|
| 1. INTRODUCTION | 3 |
| 2. WHAT IS A 'COUNTY MATTER'? | 3 |
| 3. MINERALS | 4 |
| What are 'Minerals'? | 5 |
| 4. WASTE | 6 |
| What is 'Waste'? | 6 |
| 5. COUNTY OR DISTRICT/BOROUGH - WHICH AUTHORITY? | 10 |
| Landraising Projects - Golf Courses, Earth Bunds, Noise Attenuation Mounds etc. | 10 |
| The Afteruse of Mineral/Landfill sites | 15 |
| Windfall Mineral Sites (Reservoirs and Borrow Pits) | 16 |
| Minerals/Waste and Agricultural Permitted Development | 17 |
| Waste Management Development - B2 or Sui Generis? | 18 |
| The County Council's own waste development - Regulation 3 Applications | 19 |
| 6. KEY NOTES — MINERAL DEVELOPMENT | 21 |
| 7. KEY NOTES — WASTE DEVELOPMENT | 22 |
| 8. COUNTY MATTER ENFORCEMENT | 23 |
| County Council Development | 23 |
| Appendix 1 - Town and Country Planning Act 1990, Schedule 1 Local Planning Authorities: distribution of Functions | 24 |
| Appendix 2 - The Town and Country Planning (Prescription of County Matters) (England) Regulations 2003 | 26 |
| Appendix 3 – Letter from Dept. of Communities and Local Government “<i>Large Scale Landscaping Developments Using Waste</i>” 20 January 2009 | 28 |
| Appendix 4 - Enforcement of County Council (Regulation 3) Development | 31 |

1. INTRODUCTION

- 1.1 The first Development Involving County Matters guide was first produced by Essex County Council in 2009 and sought to clarify what was a 'county matter' for the purposes of Schedule 1 of the 1990 Act and in the Town and Country Planning (Prescription of County Matters) (England) Regulations 2003 as well as provide guidance to both City/District/Borough and County planning officers to assist in resolving cases where it may not be clear who the relevant planning authority is.
- 1.2 The development control functions carried out by the County Council either as Mineral, Waste or County Planning Authority (Regulation 3 of Town and Country Planning General Regulations 1992 e.g. school development, libraries, strategic road projects, waste recycling sites under ECC control etc) have not changed since the last guide. The County Council still has to perform its statutory duty and operate within a complex legal framework, similar, if not identical in parts, to the statutory framework for the development control functions carried out by the City/District/Borough Councils in Essex. The County Council deals with planning applications broadly relating to waste and minerals. In the case of enforcement, again the county's legal framework for its enforcement powers is similar to that of a City/District/Borough Council, however it can exercise the powers only in relation to 'county matters'.
- 1.3 As with any guidance it is good practice to review regularly to ensure that the document is still serving its purpose. Since the publication of the 2009 guidance there have been significant changes in National Guidance and Legislation. The most significant change was the Localism Act gaining Royal assent in 2011, which brought with it the abolition of regional strategies which for Essex meant the revocation of the East of England Plan and Essex and Southend Structure Plan in January 2013. In addition to this in March 2012 the collation Government published The National Planning Policy Framework (the Framework) which 1) replaced a number of national planning policy documents and guidance notes 2) introduced a presumption in favour of sustainable development and 3) introduced the concept of proportionality in relation to enforcement.
- 1.4 Therefore, due to these national changes the updated guide aims to help set out what impact they have had on County Council planning functions as a whole.

2. WHAT IS A 'COUNTY MATTER'?

- 2.1 As set out in the 2009 guide Essex County Council remains the responsible planning authority for county matters – i.e. those relating to minerals and waste. Planning Applications for such development should be made direct to the County Council. Details of the county matter planning application process, including application and validation forms can be found at www.essex.gov.uk. County matters are defined by statute and listed in:

- Schedule 1 of the Town and Country Planning Act 1990¹, and:
- Town and Country Planning (Prescription of County Matters) (England) Regulations 2003.

2.2 As noted in the introduction section, the Framework replaced a number of Planning Policy Statements/Guidance amongst which were the Mineral Planning Statement/Guidance notes. These were replaced by Section 13 of the Framework entitled "Facilitating the Sustainable Use of Minerals".. However, it should be noted that the Framework does not contain specific waste policies, since national waste planning policy will be published as part of the National Waste Management Plan². However, the County Council when preparing its waste plan and taking decisions on waste applications should have regard to policies within the Framework so far as relevant and must also be aware of and comply with the recently introduced 'duty to cooperate'. PPS10 (Planning for Sustainable Waste Management) was amended in March 2011 and not revoked therefore, remains in force (until the National Waste Management plan is produced)

3. MINERALS

3.1 Schedule 1 of the Act has not been updated since the last guidance and still defines 'mineral' related county matters in summary, as follows:

- (a) the winning and working of minerals;
- (b) the erection of any building, plant or machinery used in connection with the winning and working of minerals or for the treatment or disposal of minerals on land adjoining mineral workings;
- (c) the erection of any building, plant or machinery used in connection with the grading, washing, grinding or crushing of minerals;
- (d) the erection of any building, plant or machinery (or use of land) for any process of preparing or adapting for sale of any mineral or the manufacture of any article from a mineral where:-
 - (i) the development is on or adjoining the mineral working;
 - (ii) the mineral is brought from the mineral working by a pipeline, conveyor belt, aerial ropeway, or similar plant or machinery, or by private road, private waterway or private railway.
- (e) the use of land for any purpose required in connection with rail or water transport for aggregates (including manufactured aggregates, slags fuel ash or mineral waste) and the erection of associated buildings, plant and machinery;
- (f) the erection of buildings, plant or machinery for the coating of roadstone, producing concrete, concrete products or artificial aggregates, where:

¹ As amended by the Planning and Compensation Act 1991

² Planning Policy Statement 10 (Planning for Sustainable Waste Management) will remain in place until the National Waste Management Plan is published.

- (i) The development is on land forming part of or adjoining a mineral working, or;
 - (ii) The development is on land forming part of or adjoining land used in connection with the rail or water transportation of aggregates.
- (g) Searches and tests for mineral deposits (and the erection of associated buildings, plant and machinery);
- (h) Depositing of mineral waste;
- (i) Cement Works;
- (j) Any development, on a current or disused mineral site or current or disused landfill site which would conflict with or prejudice compliance with a restoration condition imposed in respect of the mineral working.

(see Appendix 1 for a full transcript of Town and Country Planning Act 1990, Schedule 1 Local Planning Authorities: distribution of Functions)

- 3.2 **What are 'Minerals'?:** In the UK, 'minerals' are defined in Town and Country Planning legislation as 'all substances in or under land of a kind ordinarily worked for removal by underground or surface working, except that it does not include peat cut for purposes other than for sale.' In Essex, minerals found and won from the ground are brickearth, chalk and clay with the vast majority being sand and gravel, collectively known as 'aggregate'.
- 3.3 Specific information on the Essex geology can be found in the Essex Minerals Local Plan (MLP) (adopted 1996) and the latest iteration of the Replacement Minerals Local Plan.
- 3.4 Aggregates are raw materials that are used to make construction products such as lime, mortar, asphalt and concrete. Specifically aggregates are defined as "a granular material used in construction". Aggregate may be natural, manufactured or recycled." (European Standard BSEN 12620:2002). As stated, in Essex the main primary aggregates are land won sand and gravel. Recycled aggregates in Essex are largely derived from construction and demolition waste. Other aggregates are imported into the county, such as hard rocks mined elsewhere in the country.

4. WASTE

- 4.1 Waste related development is again defined by statute in the Town and Country Planning (Prescription of County Matters) (England) Regulations 2003 which came into force on 28 April 2003. The regulations have not been updated since the last guidance note and therefore, a county matter for waste related development remains as follows:
- (i) the use of land, the carrying out of building, engineering or other operations, or the erection of plant and machinery used or proposed to be used, wholly or mainly for the purposes of recovering, treating, storing, processing, sorting, transferring or depositing of waste;
 - (ii) the use of land or the carrying out of operations for any purposes ancillary to any use or operations specified above, including the formation, laying out, construction or alteration of a vehicular access to any public highway.
- 4.2 Consideration of whether a development represents 'waste' development ultimately is still a matter for the courts, however PPS 10 provides some guidance, although the following list is not exhaustive:
- a) metal recycling sites;
 - b) energy from waste incineration and other waste incineration;
 - c) landfill and landraising sites;
 - d) landfill gas generation plant;
 - e) pyrolysis / gasification;
 - f) material recovery / recycling facilities;
 - g) combined mechanical, biological and/or thermal treatment;
 - h) in-vessel composting;
 - i) open windrow composting;
 - j) anaerobic digestion;
 - k) household civic amenity sites;
 - l) transfer stations;
 - m) sewage treatment plants;
 - n) dredging tips;
 - o) storage of waste;
 - p) recycling facilities for construction, demolition and excavation waste.
- 4.3 If in doubt, officers of the County Council will be able to provide a professional opinion on whether or not a certain type of proposal is considered to be a County Matter. Local Planning Authorities are required to consult Waste Planning Authorities on any application which could materially conflict with or prejudice the implementation of a relevant county policy³.
- 4.4 **What is 'Waste' and why is the definition of 'waste' important?**
Firstly, the Waste Framework Directive (2008/98/EC) ("the Directive") provides an overarching legislative framework for the management of waste across Europe

³ See Schedule 1 para 7 of the T&CP Act 1990 as amended by schedule 6 para 16(4) and the Planning and Compulsory Purchase Act.

and replaces the previous Waste Framework Directive (WFD) (2006/12/EC). Its transposition in England is now largely through the Waste (England and Wales) Regulations 2011 (SI 2011 No 988) ("the 2011 Regulations"), which came into force on 29 March 2011. The definition of waste has been in use in its current wording for over three decades and its wording remains the same in the current WFD (2008/98/EC) which is as follows;

"Any substance or object the holder discards intends to discard or is required to discard".

- 4.5 Once a substance or object has become waste, it will remain waste until it has been fully recovered and no longer poses a potential threat to the environment or to human health. From this point onwards, the waste ceases to be waste and there is no longer any reason for it to be subject to the controls and other measures required by the WFD.

Although the definition of waste itself remains unchanged in the revision of the WFD, there are two provisions in Directive 2008/98/EC (By-Products and End of Waste criteria) which have an impact on what is or is not classified as waste. To see these provisions in full they can be viewed at the following link: [Defra Guidance on the legal definition of waste and its application](#).

- 4.6 Ultimately, whether a material is actually waste, is still a matter for the courts to determine. However, where the person who deposits the material is depositing it for the purpose of its re-use, the true act is not one of discarding but of re-use. If the primary intention is to discard the material as a secondary intention, to re-use it, would not prevent the material being waste until the secondary intention was implemented. The case of *R v W, C and C (2010)* reinforces this principle as a large quantity of material, consisting mainly of soil and subsoil, was extracted from neighboring land during construction work there and deposited on a farm neighboring farm which did not hold a waste management license. The defendants' case was that the material was received in order to create an area of hard standing for the construction of farm facilities and that it was therefore not waste which was upheld in Court. However, on appeal the Crown submitted that "waste" did not cease to be such simply because the recipient had a use for it, as it was still waste until acceptable recovery or disposal had been achieved.
- 4.7 The question of immediate re-use of the relevant material could not be entirely determinative of the status of the material regardless of other considerations. Material might well remain as waste which had to be disposed of in some manner notwithstanding an immediate intention of the recipient to re-use it. The term "discard" was to be interpreted in the light of the aims of the Directive and material which was originally waste would continue to be so treated until acceptable recovery or disposal had been achieved in accordance with the aims of the Directive. Whether that occurred was a question of fact.
- 4.8 The possibility of re-use at some indefinite future time did not alter its status. Actual re-use might do so, but only if consistent with the aims and objectives of the 1990 Act and of the Directive to avoid harm to persons or the environment. The judge had erred in concentrating entirely upon the intentions of the

defendants as holders to put the material to immediate use after deposit and in finding that it could not be waste because there was no element of discarding in that immediate use. There was evidence on which the jury could find that the materials were waste which was required to be disposed of by the producers and hauliers transporting it and that the defendants received payment to relieve that need. If satisfied that it was waste at that stage, the further question of fact for the jury was whether, having regard to the aims of the Directive, the materials ceased to be waste, no longer being discarded by anyone, which was being subjected to acceptable recovery or disposal. All would depend on the facts of the individual case. Having regard to the definitions contained in s 75 of the 1990 Act, there was ample evidence that, if waste at all, the materials were "controlled waste" as being "industrial waste" from "premises used for agriculture" (s 75(6)(e), as inserted by the Waste Management (England and Wales) Regulations 2006 (SI 2006/937)) and or "waste arising from works of construction or demolition, including waste arising from work preparatory thereto" (s 75(7)(8) and reg 5(2) of the Controlled Waste Regulations 1992 (SI 1992/588)). For those reasons the defence submission of no case had been wrongly accepted.

- 4.9 *"The Definition of Waste: Development Industry Code of Practice (Contaminated Land: Applications in Real Environments (CL:AIRE) 2008)"* was updated in March 2011. The original code of practice attempted to define whether materials are classified as waste and in this respect sets out a number of factors to consider.

CL:AIRE 2011 highlights that one factor is that the material must be suitable for use:

"Suitability for use means that a material must be suitable for its intended purpose in all respects. In particular, both its chemical and geotechnical properties have to be demonstrated to be suitable, and the relevant specification for its use must be met.

Certain excavated materials may be suitable for their intended use in the proposed development without any treatment at all. If they are used in that way those materials are unlikely to be waste. For example some materials may be assessed as being suitable for direct use, e.g. engineered backfill beneath cover layers, capping layers, buildings and hard standing or for site regarding. Use for the purposes of reclamation, restoration or landscaping may fall within this category. Landfilling or disposal does not.

Other materials may not have the required characteristics for use without first being treated. If treatment is needed in order to make the material ready for use the materials will be waste but may cease to be waste once treated so as to be suitable for use (subject to the other criteria set out in this Section). This treatment may be biological, chemical, physical or any combination of these and will need to be carried out under an appropriate authorisation. Some materials, although they do not require treatment to make them suitable for use, may nonetheless be regraded or compacted before or during their use as part of the development of a site. This regrading or compacting does not prevent the material being regarded as a non-waste" (CL:AIRE) 2011).

- 4.10 Another relevant factor quoted and which was not updated by the 2011 guidance is that:

“Materials should be used in the quantities necessary for that use, and no more. The use of an excessive amount of material will indicate that it is being disposed of and is waste.” (CL:AIRE)2011).

- 4.11 It is worth noting that ‘topsoils’ are generally not considered to be waste by the WFD or CL:AIRE 2011, however developers will often state that the intention is to import ‘topsoils’, ‘subsoils’, ‘soils’ or ‘spoil’ when the actual intention is to import inert waste material whereby the original holder of that material has ‘discarded’ in accordance with the above definition.

The definition of waste is important because the classification of substances as waste is the basis for the formulation of waste management policy and the application of regulatory controls to protect the environment and human health. The WFD contains not only provisions which have the aim of directing waste management policy but also provisions which are regulatory in nature.

- 4.12 **Action:** When a development involves the importation of ‘soils’ or ‘spoil’, if the City/District/Borough Council is unsure whether genuine ‘soils’ or inert waste would be imported, the City/District/Borough Council should liaise with the Waste Planning Authority.

5. COUNTY OR DISTRICT/BOROUGH - WHICH AUTHORITY?

- 5.1 To protect planning permissions from procedural irregularities, it is a matter of law under S.286 of the Act that the validity of a planning consent issued by a local planning authority cannot be challenged on the ground that it should have been issued by another local planning authority.
- 5.2 Conflicts regarding "county matters" are rare, however, *R v Berkshire C.C., ex-parte Wokingham D.C. 2/7/96*, the Court of Appeal is still a relevant case where it was held that a planning application for a waste transfer station and 10 light industrial units was a county matter. The court rejected the district council's challenge which had been made on the basis that the 10 industrial units were not a county matter and therefore the county council had no jurisdiction to determine the application. The court held that where the scheme contained a **substantial element** which was a county matter, this determined the overall nature of the application and that the County Council was the appropriate planning authority (*Development Control Practice – 2008*).
- 5.3 An example of best practice in relation to the **substantial element** test can be shown when the WPA was contacted by a District Planning Authority while it was validating an application for the construction of a residential development with associated importation of topsoil's and subsoil's to facility recontouring and creation of landscaping features. The WPA reviewed the application and as the District Authority was satisfied that the development as a whole, inclusive of all the residential elements, was primarily that of a building development and engineering operations to create landscaping/recontouring the WPA agreed that the District Council should rightfully determine the application. Each case should be assessed on its own merits. In this case the circumstances related not only to the residential elements forming the substantial elements of the proposal, but also that the District Authority was best positioned to consider the planning merits of the proposal, holistically, when considering the wider impact.
- 5.4 It is important to note that it is still the case that where a mineral to be extracted would be a necessary by-product, i.e. a foundation excavation, or the waste to be imported is a necessary requirement to that development, i.e. a sub-base to floor ground stabilising, and as such is wholly subordinate and ancillary to that development, this is not considered to be a county matter. Where any proposed mineral extraction or waste importation is of such a scale that a separate operation would be created in its own right, this would require a separate application to the County Council. It is not always clear whether the scale of the activity would constitute development in its own right, however judgement on fact and degree as well as the primary purpose of the development (being, for example waste disposal or mineral extraction and not engineering) would need to be made as shown in the example above. Determining the presence of a separate mineral/waste element of a proposal should be the subject of consultation between the City/District/Borough and the County Council.
- 5.5 **Update on Landraising Projects - Golf Courses, Earth Bunds, Noise Attenuation Mounds etc:** At the time of publication of the last guide City/District/Borough Councils were tackling with the issue of whether or not golf

courses (and potentially other large-scale redevelopment) should be considered by them as the associated importation of construction and demolition wastes was for the purpose of 'recovery' (associated with a genuine use in construction) or is for the 'disposal' of waste on land i.e. landfill.

- 5.6 Since the introduction of the Landfill Tax which meant that companies have to pay tax on the waste that they dispose of at landfill sites that are controlled by a waste management licence or permit (regulated by the Environment Agency). Some developments, however, are exempt from waste management licensing – e.g. certain recreational projects – and were accordingly exempt from the landfill tax. If inert waste was being used to facilitate a land reclamation or improvement project, such as a golf course development, it would have normally been exempt from licensing and therefore would have avoided landfill tax. Naturally, this absence of tax liability leads to a marked increase of these types of developments taking place and being submitted to City/District/Borough Councils in the first instance.
- 5.7 In April 2008, new regulations came into force⁴ which stipulated the restrictive parameters covering waste permitting exemptions⁵. These regulations were updated in 2012⁶ however, these did not change the fact that for exempt activities, whilst planning permission would still be required, there would be generally less control on the material being imported to the site, as no environmental permit would be in place, although exemptions can be revoked if harm to human health or the environment takes place.
- 5.8 The relevant planning authority to determine these types of application can still be either the City/District/Borough or County Council depending upon the detail of the development. The test of whether a development involving the importation of materials is a City/District/Borough or county matter depends fundamentally on whether the proposal constitutes a 'waste disposal activity' (change of use) or is an engineering operation (operational development). The County Council would be required to deal with the former as Waste Planning Authority and the relevant City/District/Borough Council with the latter as Local Planning Authority.
- 5.9 PPS 10 states that difficulties may arise in respect of applications that are properly to be decided by a City/District/Borough planning authority which involve the use of large amounts of engineering fill for such purposes as levelling or landscaping of sites or the construction of bunds or embankments. In such cases, it would be appropriate to question developers about the purpose of certain types of proposed development.
- 5.10 Sometimes it is not always clear whether a development is operational development or material change of use. From cases such as *Northavon District Council v. Secretary of State for the Environment (1980) P. & C.R. 332* and *Macpherson v. Secretary of State for Scotland 1985 S.L.T. 134* it would seem that it depends on whether the primary purpose is the operational development

⁴ The Environmental Permitting (England and Wales) Regulations 2007 came into force on 6 April 2008.

⁵ See Schedule 3 Part 1 'Exempt Waste Operations: descriptions of The Environmental Permitting (England and Wales) Regulations 2007.

⁶ The Environmental Permitting (England and Wales) Regulations 2012 coming into force on 6 April 2012

or the use of the land for waste disposal. In *Northavon Donaldson L.J.* summed up the issue as being whether “the object of the exercise was genuinely to improve the quality of the land and not to make money out of providing a last resting place for rubbish”. The problem is that sometimes the purpose may be both to carry out operational development and to make money in the course of the exercise by using waste. Another relevant case in this respect is *Wyatt Bros (Oxford) Limited v. Secretary of State for the Environment, Transport and the Regions and Oxfordshire County Council - [2001]* where the Inspector held that the primary purpose was waste deposit rather than golf course construction and so the material was waste. In *Golf Operations Limited v First Secretary of State ex p Northamptonshire County Council [2005]* EWHC 2218 the development was labelled golf course formation but due to the import of waste was properly dealt with by the County Council as a county matter.

- 5.11 Normally for golf course proposals where ‘material’ is to be imported, most developers approach City/District/Borough councils in the first instance. The City/District/Borough Council may have less experience in the consideration of the wider issues of waste planning. The quantity/volume amount of materials proposed to be imported and deposited (often identified from the proposed contour/level drawings) for a development would provide an indication on the scale of that development, and in turn determine which is the most appropriate planning authority for its determination and the level of consultation required. This is a grey area in planning terms as a judgement will have to be made on whether the predominant purpose of the development (or substantial element) involves either waste disposal (for its own sake) or engineering. Matters of fact and degree including scale, form, volume etc are all relevant considerations. It is also important that ‘multi-phased’ developments are also considered. A development may be submitted as a proposal in singular phases - i.e. phase 1 of a 6 phase proposal may involve the importation and deposit of, say, 50,000m³ of inert waste, with future phases reserved for future applications. Merely because the development (a single phase) is relatively small scale, does not necessarily indicate that any application lodged should be properly considered to be a City/District/Borough matter. Such an application would still involve the importation and deposition of waste. A good example of a multi- phased development in practice was for a change of use of land and the importation of 65,095 cubic metres of inert waste to facilitate the construction of ‘phase one’ of a second 18 hole golf course. An appeal was lodged following refusal of planning permission by the WPA (ref: APP/Z1585/A/10/2142721/NWF). The main conclusion from the appeal was that the appellant had accepted that it would not be feasible to implement phase 1 of the development alone. The Inspector rightfully concluded that the appropriate way to ensure phase 1 did not go ahead until and unless planning permission had been granted for the remaining phases.
- 5.12 The Government is seeking to encourage the ‘recovery’ of waste including its use in construction. The overriding objective is to ensure that waste recovery and disposal are carried out so as to prevent harm to human health or pollution of the environment in accordance with Article 4 of the WFD.

5.13 The Waste Framework Directive defines recovery:

“Recovery” means any operation the principal result of which is waste serving a useful purpose by replacing other materials which would have otherwise been used to fulfil a particular function, or waste being prepared to fulfil that function, in the plant or wider economy.

- 5.14 This definition consolidates case-law by the European Court of Justice on the distinction between recovery and disposal (the Abfall test). This distinction is sometimes referred to as the ‘substitution’ principle because in waste recovery operations the waste is used as a substitute for a non-waste raw material that would otherwise be used - so conserving natural resources. Any deposit that does not constitute recovery - which includes the re-use and recycling of waste - is considered a waste disposal operation. The disposal in or on land may be subject to additional controls of the Industrial Emissions Directive (Directive 2010/75/EU which replaced the Integrated Pollution Prevention and Control Directive (24th November 2010) and the Landfill Directive depending on the size and scale of the operation.
- 5.15 The Lord Taylor review of planning practice guidance (December 2012) highlighted that the Government intends to retain the letter published by The Department for Communities and Local Government (CLG) entitled *“Large-scale Landscaping Development Using Waste”* this retention of the letter reinforces the fact that the government feels that developments of the scale of recent examples (generally in excess of 100,000 tonnes) would not have been undertaken if the material used to construct the landscaping was not waste. Therefore, it is considered they are unlikely to constitute recovery operations⁷.
- 5.16 There have been cases where City/District/Borough councils have determined applications for golf courses, landscape bunds, noise attenuation mounds etc which in fact were large scale waste disposal projects that should have been handled by the County Council because of the volume of waste materials involved (being clearly above what was necessary to bring about an improvement). Often in these cases City/Districts/Borough council planning authority had failed to carry out proper consultation with the County Council. As stated, the re contouring of a golf course could be an engineering operation for a City/District/Borough to consider as an improvement project or alternatively, the scale of the project may have much broader ramifications thereby being for the County Council to determine. The Environment Agency under Regulatory Guidance note EPR 13 “Defining Waste Recovery: Permanent Deposit of Waste on Land” has a procedure whereby they are able to decide if an activity is disposal or recovery. In addition the County Council is also able to form a judgement on whether or not the imporation of materials required for the total contouring proposed is waste disposal (rather than engineering) and in turn if the development should be treated as a waste planning application.
- 5.17 These cases as waste planning application, would have issues such as the diversion of inert waste materials from other sites (such as quarries that require

⁷ CLG Letter to Chief Planning Officers dated 20 January 2009 (attached at Appendix 3)

such material for restoration), environmental impact and waste planning policy would all need to be taken into account. For example, such an application would need to be considered against the policies contained within the Essex and Southend Waste Local Plan (2001) (until superseded by the Replacement Waste Local Plan), which amongst other matters seeks to ensure that there would be a restoration need for such a development (Policy W9B). Any application would therefore need to demonstrate that amount of material imported and deposited would be the minimum necessary to bring about any alleged improvement, not being at a scale beyond that necessary for restoration. Therefore, it is essential that the County Council is involved at the pre-application stages and should be consulted at the application stage, preferably before the validation stage to help determine whether a proposal is in fact a county matter.

5.18 The Environmental Permitting (England and Wales) Regulations 2010 resulted in landscaping developments in excess of 1000 cubic meters of waste are now required to hold an environmental permit. This means that operators are subject to much greater regulatory control by the Environment Agency through their monitoring of sites and operator permits.

5.19 The creation of mounds and embankments is normally classified as an engineering operation, and *Ewen Developments Ltd v Secretary of State for the Environment* [1980] JPL 404 is normally cited. This case established that the words 'or other means of enclosure' are governed by the rule of *eiusdem generis*, which means that where a statute lists specific classes of items and then refers to them in general, the general statements apply only to the same kind of items as those specifically listed. Therefore, the 'other means of enclosure' listed in the GPDO must have some similarity with the 'gates, walls or fences' that they follow. The courts have also held that to be permitted development, the structure must form an enclosing function. As part of the case it was also held that the creation of embankments could be an engineering operation if substantial. In this case they were not other means of enclosure and therefore not Part 2 permitted development (*Development Control Practice – 2008*). The following case is of note and one that the WPA recently successfully defended its position on at appeal (ref: APP/Z1585/C/11/2162125);

- The County Council served an enforcement notice requiring the removal of earth bunds which had been formulated using inert waste materials. The inspector considered that the main issue for the appeal was whether the bunds that had been created were authorised by the terms of Class A of Part 2 of Schedule 1 of the Town and Country Planning (General Permitted Development) Order 1995 (as amended). The inspector considered that the bunds did not fall within the GPDO definition on the grounds that the bunds were large structures that bore little resemblance to a wall or fence as they contained a significant amount of material and the engineering work associated in their creation was unlikely to meet the definition of a 'minor operation'. Furthermore, as a number of gaps existed within the bund itself the inspector found that it was not the appellant's case to form a continuous means of enclosure, as this had not happened. Consequently, the inspector found that the bunds did not fall within the development permitted by Class A of Part 2 of the GPDO as they could not be classified as 'other means of

enclosure' and therefore, planning permission would have been required to authorise them.

- 5.20 **Action:** That Essex City/District/Borough Councils should still consult the Waste Planning Authority on any application (or pre-application discussion⁸) that may involve the importation of materials to raise land levels. Examples may include recreational, habitat, land reclamation, amenity or landscaping projects which may include, but not exclusively, golf courses, landscape mounds, anti-trespass bunds, noise attenuation mounds, motor-cross tracks etc.
- 5.21 **The Afteruse of Mineral/Landfill sites:** Applications for proposals for the afteruse of mineral/landfill sites which are not related to agriculture, forestry or amenity are not county matters and should be the subject of a separate planning application to the relevant City/District/Borough in whose area the site falls. Nevertheless, it is still right for the County Council in considering an application for new extraction/landfill to investigate the suitability of the afteruse of the site so far as it affects the landform/restoration proposals. The County Council will, however, stop short of giving permission for afteruses except in the cases of agriculture, forestry or amenity. Where the proposed afteruse will dictate the landform, the prior agreement of the City/District/Borough Council needs to be established before the development is approved by the County Council, as Mineral or Waste Planning Authority.
- 5.22 Nevertheless, under the provisions of Schedule 1 of the 1990 Act⁹ a number of county councils have dealt with applications for non-agricultural/amenity/forestry afteruse proposals, such as large scale housing developments or other development that would normally be dealt with at district level. The reasoning for this approach is that the proposed development was considered to conflict with the restoration of a former or existing mineral site and therefore a county council could rightfully determine a 'built' development application on the site.
- 5.23 The example giving in the last guide is still of relevance. This was where a housing scheme (not in Essex) would impact on the restoration of an existing mineral site, where the land contours of the restored mineral site were proposed to be re-levelled to accommodate the housing. This issue was dealt with as a revision to the approved restoration scheme at county level as an application under S73 of the Act, whilst the housing development was dealt with, as a full application, by the district. A S106 agreement ensured that, if the housing development did not take place, then the site would be returned to nature conservation, as originally proposed in the mineral permission. On this occasion the County Council in question considered it necessary to devolve its powers

⁸ With the advance consent of the prospective developer if pre-application discussions are being held in confidence.

⁹ Schedule 1 of the 1990 Act states "the carrying out of operations in, on, over or under land, or a use of land, where the land is or forms part of a site used or formerly used for the winning and working of minerals and where the operations or use would conflict with or prejudice compliance with a restoration condition or an aftercare condition."

under Schedule 1 of the Act to the district council, however it is understood that the devolution of such powers can only be granted by the full council¹⁰.

- 5.24 **Action:** Should a proposal be for an afteruse, and this would interfere/conflict with a restoration /aftercare condition attached to a mineral/landfill permission, then two applications may need to be made - one to the City/Borough/District for the use proposed and the other to the County Council for the amendment/variation to the approved aftercare scheme. The County and District/Borough should consult each other to ensure co-ordination of the respective decisions.
- 5.25 **Windfall Mineral Sites (Reservoirs and Borrow Pits):** Applications for reservoirs, either for agricultural irrigation reservoirs or reservoirs for water supply, and borrow pits for road or other projects have historically been dealt with by the County Council where the development involves the extraction and exportation of mineral, normally sand and gravel. Such developments are assessed as non-preferred extraction sites or 'windfall' sites. There is a general presumption against such sites within the Minerals Local Plan except where the reserves comprising the landbank are insufficient and/or there is some overriding justification or benefit for the release of the site and the proposal would be environmentally acceptable in accordance with Policy MLP4 and emerging Replacement Mineral Local Plan Policy.
- 5.26 An agricultural reservoir, for example is used to store water which can be drawn down during the summer for the irrigation of crops. In the winter water is replenished for use during the next summer. The County Council would deal with such a proposal as a mineral extraction development provided that the mineral is exported from the site to create the reservoir. It is important to note that in *Kane Construction v Secretary of state for Communities and Local Government (2010)* it was held that planning permission for a change of use from "agricultural land/fish farm" to "use of land as lakes for breeding fish and fishing" did not give the owner permission to carry out wholesale excavation of the land to enable the lakes to be constructed, as the excavation amounted to operational development (mineral extraction) for which permission had not been granted.
- 5.27 Furthermore, if a reservoir is stocked with fish (as a fishing lake), it cannot be used for irrigation and therefore, is not fit for purpose. Under these circumstances, it would be considered that a change of use would have taken place and that it would be proper for the City/District/Borough council to consider whether a planning application would be required to regularise the development or if enforcement action should be taken if expedient to do so. Clearly, once mineral has been extracted from the land and a reservoir created (provided that the need has been justified at the time of the original application) for any other use of the water to subsequently take place, such as a fishing lake, this may not be in accordance with existing Mineral Plan Policy or subsequent Replacement Minerals Local Plan (following formal adoption post EiP). However, each application should rightfully be determined on its own merits and the final decision

¹⁰ Under Section 101(1)(b) of the Local Government Act 1972.

is likely to rest with the District Authority, being a planning matter beyond the planning control of the County.

- 5.28 **Action:** For applications where the afteruse of a windfall mineral site is proposed to change (e.g. an agricultural reservoir to a fishing lake) the City/District/Borough should consult the County Council as Mineral Planning Authority. In such circumstances the County Council may object to an alternative after-use given that the original overriding justification for the mineral extraction was agricultural need. Nonetheless, purely from a monitoring position, the MPA should be consulted.
- 5.29 **Minerals/Waste and Agricultural Permitted Development:** In sec.55(3)(b) of the 1990 Act the deposit of waste materials on land is specifically stated to be a material use of that land. However, Part 6 Class A of the GPDO, relating to holdings over 5 hectares, permits any excavation or engineering operations reasonably necessary for the purposes of agriculture within an agricultural unit, subject to the normal criteria attendant upon the class. One of these states that no waste materials shall be brought onto the land from elsewhere for deposit except for use in work described in Class A(a) (relating to farm buildings) or in the creation of hard surface, where the materials so brought are incorporated forthwith into the buildings or works in question. Part 6 Class A takes outside of permitted development any works which relate to the extraction or removal of minerals where those minerals are taken off the unit.
- 5.30 Class B relating to agricultural units between 0.4 and 5ha permits the deposit of waste, but subject to the condition that such waste materials cannot be brought onto the land from elsewhere unless required for building works, roads or hardstandings. The Class does not permit any excavations.
- 5.31 Class C refers to the winning and working on land held or occupied with land used for the purposes of agriculture or any minerals reasonably necessary for agricultural purposes within the agricultural unit of which it forms part. This class is conditional upon none of the mineral being moved off the farm or being nearer than 25m to a trunk or classified road.
- 5.32 Thus, the circumstances in which farmers may alter the shape of land either by excavation or deposition without the need for planning permission are tightly circumscribed, and even the Class A relaxation for larger holdings are subject to notification and call-in procedures. Even if it is established that no materials have been moved on or off a farm as described above, it is still necessary to show that works have been carried out for a *bona fide* agricultural purpose for them to be permitted development (Development Control Practice – 2008).
- 5.33 Hardstandings at agricultural holdings are permitted development by reason of Part 6 of the GPDO subject to the usual conditions. Class A, relating to holdings of more than 5ha allows any engineering operation. Class B relating to units of less than 5ha allows the provision of a hard surface. The Classes allow the bringing in of waste from outside the unit provided that it is incorporated into the hard surface, but a limit of 465sqm of area covered is applied. If the area to be covered exceeds 0.5 ha the prior notification procedure applies to development

otherwise allowed by Class A. If a farmer, upon the pretext of constructing hard areas for agricultural purposes, in truth uses his farm for the purpose of tipping, then that is a development which requires planning permission. The farmer's activity may constitute both an operation and a change of use. It may therefore fall within both limbs of the definition of development set out in section 55(1) of the 1990 Act. For the purpose of Class A of Part 6 of Schedule 2 to the GDPO it is necessary to determine whether a farmer's deposition of waste materials on his land was reasonably necessary for the purposes of agriculture. The correct approach for answering that question was "an objective question for the determination of the Inspector having regard to the particular needs of the particular unit for the particular development."¹¹

- 5.34 **Waste Management Development - B2 or Sui Generis?: The County Council is finding that** operators are often seeking to operate waste management (recycling/recovery or transfer) facilities under existing B2 General Industrial uses, rather than seek express planning permission from the Waste Planning Authority.
- 5.35 The Town and Country Planning (Use Classes) Order 1987 (S.I. 1987 No. 764) was amended by The Town and Country Planning (Use Classes) (Amendment) (England) Order 2010. The 2010 Order states that a change of use within the same class would not constitute development under Section 55 of the Act and as such would not require a separate planning consent for a change of use within the same or lower class. The driver behind this principle of the Use Classes Order is that where changes of uses of land within the same class would not incur any further detriment to the local amenity or the environment beyond that impact experienced from the current use being operated on the land then owners of the land will have sufficient flexibility to make minor changes to the permitted use of the land.
- 5.36 Waste transfer activities cause considerable difficulty when it comes to determining whether development has occurred by reason of being materially different from previous uses of land. The type of sites suitable for this use tend to have a chequered history, and often have been utilised for a variety of ill defined and overlapping activities such as haulage or skip hire depots, scrap yards, and other open storage/industrial uses, some of which may be lawful and others not. In such cases definition of the correct planning unit may be a particular problem, and in dealing with previous *sui generis* uses, the concept of intensification may come into play. The encyclopaedia of planning law¹² makes some commentary on the determination of what constitutes a material change of use. In addition City/District/Borough Authority's should use the materiality test in aiding their decision making on whether or not a change of use has occurred. The basic tests derive from early court decisions, notably *East Barnet UDC v British Transport Commission* 1962 where it was held that not every change will be a material one as "material" means "material for planning purposes", and *Palsar v Grinling* 1948 where it was stated that for a material change of use to have occurred the new activity must be substantially different from that which preceded it. A number of

¹¹ This test was formulated by Judge Rich in *Richard Scott v. SSETR*[2000] J.P.L. 833 at 837. It was in substance the test applied by the Divisional Court in *Northavon District Council v. SSE*[1980] 4 P. & C.R. 332.

¹² Sweet and Maxwell

recent cases highlight conflicting opinions on whether a Waste Management Development (not involving the final demolition of waste) could operate under B2 of The Use Classes Order.

- 5.37 Acting on advice and statute, whilst accepting that waste activities related to tipping or incineration are '*sui generis*' under the Use Classes Order, Waste Management or Waste Transfer Facilities can be included within the B2 General Industrial Use class of the Town and Country Planning (Use Classes) Order 1987 (S.I. 1987/No. 764) as amended, although each case should be considered on its own merits.
- 5.38 Nevertheless, every change of use involving *sui generis* uses still has to be subject to the normal materiality test as shown above. This viewpoint was taken in (Derbyshire CC 19/2/03 DCS No. [030-716-302](#)) which involved a *sui generis* materials recycling facility from a *sui generis* use involving the screening and stockpiling of coal. An inspector concluded that the fact that two uses were *sui generis* did not of itself necessarily mean that they were materially different. The following waste uses have been accorded *sui generis* status at appeal or by the courts.
- Waste transfer/recycling depot (Rochdale BC10/3/92 DCS No. [053-188-711](#)), (Humberside CC18/10/93 [031-509-992](#)), (Fife Council 28/6/99 [041-436-724](#)) and (Derbyshire CC 19/2/03 DCS No. [030-716-302](#)), (Bridgend 5/1/99 [039-990-754](#))¹³ (*Development Control Practice – 2008*).
- 5.39 **Action:** For B2 permissions to be granted by City/District/Borough Councils, consideration must be given to a condition restricting the use to that applied for. When developers seek a waste management development under the exiting use class (e.g. B2), the County Council as Waste Planning Authority should still be notified to form a view of whether a change of use would take place and whether express permission would be required as a waste related (*sui generis*) development. Where the new use would be for waste development and this would need planning permission, the relevant planning authority is likely to be the Waste Planning Authority, even if the existing site benefits from a historical B2 designation. In all cases the Waste Planning Authority will seek background and site history information from the City/District/Borough.
- 5.40 **The County Council's own waste development - Regulation 3 Applications:** Waste Disposal Authority sites such as recycling centres for household waste (formerly civic amenity sites) and bulking up facilities are able to be dealt with under the procedures laid down in the Town and Country Planning General Regulations 1992, e.g. by the Waste Planning Authority under Regulation 3 of the aforementioned regulations. As part of the County's
- 5.41 For mineral and waste development carried out by District Councils in respect of carrying out their own statutory functions, City/District/Borough authority's are

¹³ Summaries of Cases extracted (with permission) from Development Control Practice Notes online version 2008. Development Control Services Ltd (DCS) Haymarket Publishing Group. Full Cases available under reference no. from Development Control Casebook.

able to deal with such applications under the procedures laid down in the Town and Country Planning General Regulations 1992 (i.e. Regulation 3), however the County Council, as mineral and waste planning authority, will be able to provide specialist advice on consideration of the development as well as advise on the appropriate use of planning conditions.

- 5.42 Mineral and waste development proposals by a City/District/Borough planning authority are not county matters, although the county council should be consulted on such proposals. Again, such applications are able to be dealt with under Regulation 3 of Town and Country General Regulations 1992 (explained in Circular 19/92). The Regulations set out two different procedures a) where a local authority is to be the developer and b) where a local authority is not to be the developer. In the circumstance where a local authority is to be a joint developer of its own land, the procedure falls within a) where the interest in developing the land is significant in terms of its financial commitment; and b) where this interest is not significant.
- 5.43 Where a local authority is to be the developer or significant joint developer the procedure to be followed is the passing of a resolution, the undertaking of specified notification and publicity measures and the entering of the matter in a planning register. After these steps have been undertaken a further resolution is required affirming intention to proceed, and at this point planning permission is deemed to be granted. This permission enures only for the benefit of the authority and may not be made by officers or members who are responsible for the management of land and buildings the subject of the application.
- 5.44 Where a local authority is not to be the developer an application has to be made in exactly the same fashion required of any developer. If the development is a county matter, the application would have to be made to the County Council. If the County Council is the developer, the application would have to be made to the City/District/Borough Council, unless the development is a county matter. This procedure ensures that all the relevant statutory procedures relating to publicity and consultation are followed, and that at the end of the day a decision is made formally by the appropriate planning committee of the council or the full council itself. Such a permission runs with the land to which it refers. (*Development Control Practice – 2008*).

6. KEY NOTES — MINERAL DEVELOPMENT

- Applications for proposals where the afteruse of mineral/landfill sites is not related to agriculture, forestry or amenity remain to be not county matters;
- Should a proposal for an afteruse conflict with a restoration/aftercare condition attached to a mineral/landfill permission, then two applications would need to be submitted;
- Built or other development (temporary or permanent) on an operational site, for a proposal not related to the mineral/waste operations, would not be a County matter (unless it potentially conflicted with an aftercare or restoration condition);
- Where a mineral is to be extracted as a by-product and as such is wholly subordinate and ancillary to that development, this is not considered to be a county matter. Where any proposed extraction or importation is of such a scale as to establish a separate operation altogether, the extraction element would be a county matter;
- In the case of agricultural reservoirs, the principal need has to be established to determine the type of development. There are essentially two types of this form of development:
 - 1) Excavation of mineral with afteruse as reservoir, and;
 - 2) Agricultural reservoir with mineral as by-product.

The first is a county matter. The second strand may or may not be a county matter dependant upon what is done with the mineral post-excavation and its final destination. If the mineral is kept on site and used in engineering operations at the reservoir (stabilising the banks etc), this is not a county matter. However, if the material is being stored on site (stockpiled), processed or treated on site in any way, or being exported from the site, then this is a county matter.

7. KEY NOTES — WASTE DEVELOPMENT

- Planning Policy Statement 10 is still enforce and clearly states that all planning applications relating to the use of land (and buildings) or the erection of buildings, plant or machinery for the purposes of waste management are 'county matters' and are to be determined by the County Council.
- There is still no definition of waste in the Town and Country Planning Act 1990. The term 'waste' is defined in the updated Waste Framework Directive (European Directive 2008/98/EC) as "any substance or object the holder discards intends to discard or is required to discard";
- Applications for hazardous substances consent should be to the County Council only where the land is used for mineral working or for waste disposal. In all other cases, the City/Borough/District are the appropriate hazardous substances authority;
- Leachate treatment plants and landfill gas generator operations, at or adjacent to waste operation sites, remain county matters where they comprise part of the management scheme for the operations and/or where they would affect the approved restoration scheme for the site;
- Difficulties still arise however, in determining whether or not an object can be classified as a waste. There are also sometimes difficulties in distinguishing waste management facilities (sui generis) from general industrial manufacturing uses (B2). Each case must be determined on its own merits, however where a new waste management development is proposed the County Council is likely to consider is sui-generis and a matter for the Waste Planning Authority to determine. For all cases it is important for the County and City/District/Borough Council to liaise.

8. COUNTY MATTER ENFORCEMENT

- 8.1 The allocation of functions in respect of the enforcement provisions within the Town and Country Planning Act 1990 is set out in Schedule 1, para. 11. The County Council has produced a Local Enforcement Plan (LEP) in accordance with paragraph 207 of the Framework. The LEP sets out how the County Council will manage enforcement proactively within our it's area, will monitor the implementation of planning permissions and site monitoring and investigate alleged cases of unauthorised development taken action when appropriate to do so. These functions in general would be exercisable by the City/District/Borough Planning Authority subject to the following:
- i) in a case where it appears to the City/District/Borough Planning Authority that enforcement would relate to a County matter, they shall not exercise those functions without first consulting the County Planning Authority;
 - ii) subject to the following paragraph, enforcement functions shall also be exercised by the County Planning Authority in a case where it appears to the County Authority that they relate to a matter which should properly be considered a County matter, and;
 - iii) in relation to a matter which is a County matter by virtue of any of the provisions of Schedule 1 para. 1(1) (a) to (h) the functions of a local planning authority shall only be exercised by the County Council in their capacity as the Minerals and Waste Planning Authority.
- 8.2 **County Council Development:** The County's Enforcement Protocol in relation to Regulation 3 Developments has not changed since the original guide. A copy of the protocol can be found at Appendix 4

Appendix 1

TOWN AND COUNTRY PLANNING ACT 1990, SCHEDULE 1 LOCAL PLANNING AUTHORITIES: DISTRIBUTION OF FUNCTIONS

1 (1) In this Schedule “county matter” means in relation to any application, order or notice—

- (a) the winning and working of minerals in, on or under land (whether by surface or underground working) or the erection of any building, plant or machinery—
 - (i) which it is proposed to use in connection with the winning and working of minerals or with their treatment or disposal in or on land adjoining the site of the working; or
 - (ii) which a person engaged in mining operations proposes to use in connection with the grading, washing, grinding or crushing of minerals;
- (b) the use of land, or the erection of any building, plant or machinery on land, for the carrying out of any process for the preparation or adaptation for sale of any mineral or the manufacture of any article from a mineral where—
 - (i) the land forms part of or adjoins a site used or proposed to be used for the winning and working of minerals; or
 - (ii) the mineral is, or is proposed to be, brought to the land from a site used, or proposed to be used, for the winning and working of minerals by means of a pipeline, conveyor belt, aerial ropeway, or similar plant or machinery, or by private road, private waterway or private railway;
- (c) the carrying out of searches and tests of mineral deposits or the erection of any building, plant or machinery which it is proposed to use in connection with them;
- (d) the disposal of mineral waste;
- (e) the use of land for any purpose required in connection with the transport by rail or water of aggregates (that is to say, any of the following, namely—
 - (i) sand and gravel;
 - (ii) crushed rock;
 - (iii) artificial materials of appearance similar to sand, gravel or crushed rock and manufactured or otherwise derived from iron or steel slags, pulverised fuel ash, clay or mineral waste),or the erection of any building, plant or machinery which it is proposed to use in connection with them;
- (f) the erection of any building, plant or machinery which it is proposed to use for the coating of roadstone or the production of concrete or of concrete products or artificial aggregates, where the building, plant or machinery is to be erected in or on land which forms part of or adjoins a site used or proposed to be used—
 - (i) for the winning and working of minerals; or
 - (ii) for any of the purposes mentioned in paragraph (e) above;
- (g) the erection of any building, plant or machinery which it is proposed to use for the manufacture of cement;

- (h) the carrying out of operations in, on, over or under land, or a use of land, where the land is or forms part of a site used or formerly used for the winning and working of minerals and where the operations or use would conflict with or prejudice compliance with a restoration condition or an aftercare condition;
- (i) the carrying out of operations in, on, over or under land, or any use of land, which is situated partly in and partly outside a National Park;
- (j) the carrying out of any operation which is, as respects the area in question, a prescribed operation or an operation of a prescribed class or any use which is, as respects that area, a prescribed use or use of a prescribed class.

Appendix 2

STATUTORY INSTRUMENTS

2003 No. 1033

TOWN AND COUNTRY PLANNING, ENGLAND

The Town and Country Planning (Prescription of County Matters) (England) Regulations 2003

| | |
|-------------------------------|------------------------|
| <i>Made</i> | <i>7th April 2003</i> |
| <i>Laid before Parliament</i> | <i>7th April 2003</i> |
| <i>Coming into force</i> | <i>28th April 2003</i> |

The First Secretary of State, in exercise of the powers conferred on him by paragraph 1(1)(j) of Schedule 1 to the Town and Country Planning Act 1990^[1] and of all other powers enabling him in that behalf, hereby makes the following Regulations:

Citation, commencement, interpretation and extent

1. - (1) These Regulations may be cited as the Town and Country Planning (Prescription of County Matters) (England) Regulations 2003 and shall come into force on 28th April 2003.

(2) These Regulations apply in England only.

Operations and uses prescribed as county matters

2. The following classes of operations and uses of land are prescribed for the purposes of paragraph 1(1)(j) of Schedule 1 to the Town and Country Planning Act 1990: -

(a)

(i) the use of land;

(ii) the carrying out of building, engineering or other operations; or

(iii) the erection of plant or machinery used or proposed to be used,

wholly or mainly for the purposes of recovering, treating, storing, processing, sorting, transferring or depositing of waste;

(b) the use of land or the carrying out of operations for any purposes ancillary to any use or operations specified in paragraph (a) above, including the formation, laying out, construction or alteration of a vehicular access to any public highway.

Revocation and transitional provisions

3. - (1) Subject to paragraph (2), the Town and Country Planning (Prescription of

County Matters) Regulations 1980^[2] ("the 1980 Regulations") are hereby revoked, so far as they apply in England.

(2) Any application to which the 1980 Regulations applied which has been made but not determined on the date when these Regulations come into force shall continue to be dealt with in accordance with the 1980 Regulations.

Signed by authority of the First Secretary of State

Tony McNulty

Parliamentary Under Secretary of State, Office of the Deputy Prime Minister

7th April 2003

Appendix 3



www.communities.gov.uk
community, opportunity, prosperity

20 January 2009

The Chief Planning Officer:
County Councils in England
District Councils in England
Unitary Authorities in England
London Borough Councils
Council of the Isles of Scilly;

The Town Clerk, City of London;

The Chief Planning Officer,
National Park Authorities in England;
The Broads Authority

Dear Chief Planning Officer,

Large-scale Landscaping Development Using Waste

Ministers in Communities and Local Government have recently been made aware of cases where planning approval has been given to large-scale landscaping developments using waste, which may be wrongly classed as waste recovery operations. This practice is primarily associated with golf course development but other examples are now being noted. The cases involve planning permission being granted for such development without properly considering whether the landscaping proposals are needed for the development, and whether the associated importation of construction and demolition wastes is for the purpose of 'waste recovery' (associated with a genuine use in construction) or is for the 'disposal' of waste on land i.e. landfill. There are a number of concerns surrounding this issue, including which planning authority should consider such proposals in two-tier areas, in particular the need for closer liaison between District councils and the waste planning authority, and the need for closer liaison with the Environment Agency.

Planning Policy Statement 10: Planning for Sustainable Waste Management states that all planning applications relating to the use of land (and buildings) or the erection of buildings, plant or machinery for the purposes of waste management are 'county matters' and are to be determined by the County Council. The development of a waste facility by a district council on its own land would remain a district function. PPS10 also states that difficulties may arise in respect of applications that are properly to be decided by a district planning authority but which involve the use of large amounts of

engineering fill for such purposes as levelling or landscaping of sites or the construction of bunds or embankments. In such cases, it may be appropriate to question developers about the purpose of certain types of proposed development.

The Government's policy is to encourage the recovery of waste (which includes the re-use and recycling of waste, e.g. for construction), with an overriding objective to ensure that waste recovery and disposal are carried out so as to prevent harm to human health or pollution of the environment in accordance with Article 4 of the Waste Framework Directive. The Directive makes it clear that any deposit of waste that does not constitute recovery is considered a waste disposal operation. The disposal in or on land may be subject to additional controls of the Integrated Pollution Prevention and Control Directive and the Landfill Directive depending on the size and scale of the operation and subject to the grant of a permit by the Environment Agency.

Both CLG and Defra consider that landscaping developments of the scale of the current examples involving importing over 100,000 tonnes of waste would not have been undertaken if the material used to construct the landscaping were not waste. Therefore, given the quantity of waste being used such developments are unlikely to constitute recovery operations, but are more likely to be waste disposal operations.

If such developments *are* considered to be waste disposal operations, then in two-tier authority areas there is a clear case for the decision for applications to be considered by the waste planning authority – i.e. the County Council. In unitary authorities it is equally important that such applications are considered in the context of the authorities' planning policies for waste. Planning authorities should also ensure any proposal meets the environmental objectives of Article 4 of the Waste Framework Directive and Article 5 (establishment of an adequate and integrated network of disposal installations) and Article 7 (waste management plans) insofar as is appropriate in carrying out their functions.

If there is any doubt as to whether a proposed development constitutes waste disposal then in two-tier areas the District council should liaise closely with the waste planning authority. All planning authorities are advised to ensure they consult the Environment Agency in advance of approving these developments.

Clearly for some developments there may be a degree of judgment to be made regarding the detail and scale of the proposed development, and whether the predominant purpose of the development involves either waste disposal (for its own sake) or engineering. The quantity and volume of materials proposed to be imported and deposited for a development would provide an indication on the scale of that development, and in turn determine the most appropriate planning authority for its determination.

You will also wish to note that Defra has recently completed a consultation on revised exemptions to environmental permitting that proposes to significantly restrict the scope of the current exemption from the need for an environmental permit. This can be found at:

<http://www.defra.gov.uk/corporate/consult/waste-exemption-review/consultation.pdf>

Subject to the outcome of the consultation, it is proposed that revised exemptions will be introduced in October 2009.

If you have any queries, then please contact Charlotte Palmer at Communities and Local Government on charlotte.palmer@communities.gsi.gov.uk or 0207 9443865.

Yours faithfully,

Dr Stephanie Hurst
Deputy Director
Planning – Resources and Environment Policy

Department for Communities and Local Government
1/J4 Eland House
Bressenden Place
London
SW1E 5DU

Tel 020 7944 3870
Email stephanie.hurst@communities.gsi.gov.uk

Appendix 4

ENFORCEMENT OF COUNTY COUNCIL (REGULATION 3) DEVELOPMENT

Introduction

This document sets out how the County Planning Authority (CPA) would regulate any breaches of planning control relating to development undertaken by County service providers under Regulation 3 of the Town and Country Planning General Regulations 1992.

Where development is approved the CPA is obliged to ensure that all planning conditions attached to planning permissions are complied with in full. In addition, the CPA is obliged to investigate any allegation that a County Council development is taking or has taken place without the pre-requisite deemed planning permission.

The Town and Country Planning Act 1990 gives local authorities a discretion to enforce breaches of planning control where action is 'expedient'. The Framework in addition requires that the enforcement response be proportionate to the breach.

Accordingly, because there is an element of discretion as to whether or not it might be expedient to take appropriate action, there is a need for procedures to be adopted and followed to ensure that the CPA's approach is consistent and effective when deciding what action should be taken.

This protocol for Regulation 3 planning matters establishes formal procedures to enable the CPA, both the Development and Regulation Committee (the Committee) and officers acting under delegated powers to be consistent and effective in their approach. Additionally, promoting service providers would understand that should there be any breaches of planning control the CPA would take action under the terms of the protocol to remedy them.

The protocol would make the processes involved transparent, and would, if followed in full, avoid the need for ombudsman or District/Borough Council intervention.

Breaches of Planning Control

Breaches of planning control are likely to be brought to the attention of the CPA either by routine site monitoring inspections or following a complaint from a member of the public or other third party.

All complaints received from the general public would be logged on the complaints database and acknowledged within 2 working days. The complainant should, if the complaint is accepted, expect a response within 14 working days setting out how the CPA intends to deal with the matter. The matter would then be dealt with, in the first instance, in the same manner as for non-County Council development, i.e. in accordance with Development Control Enforcement Policy, Complaints Code of Practice.

Site Monitoring and Gathering of Information

The CPA has the responsibility for determining all Regulation 3 development the County Council wishes to carry out. Officers acting for the CPA may need to investigate alleged breaches of control once informed about them. In addition, in respect of planning permissions, officers may undertake routine monitoring to ensure planning conditions are met. County Council officers and contractors working with or for the County Council shall enable site inspections to take place and assist in providing any necessary information.

Regulation of Breaches

The Head of Environmental Planning has delegated powers to initiate enforcement action, although matters will be referred to the Committee if a Member decision is desired. For clarity, where a complainant brings a confirmed breach of planning control to the attention of the CPA and, in officer's opinion, it would not be expedient to seek remedial action, then this would be referred to the Committee for a final decision.

Remedial Action Procedure

Initial Action: The investigating officer will, under normal circumstances, visit the site in question to determine whether or not a breach of planning control has taken place. Reference will need to be made to extant planning permissions (where they exist) and to the General Permitted Development Order 1995 to ascertain if permitted development rights exist. When necessary, District/Borough Councils will be consulted to determine if they have granted planning permission.

If no breach of planning control were found the complainant would be informed accordingly. Additionally, the local member would be informed of the complaint and the outcome of the investigation.

Follow-up Action: Upon concluding there has been a breach of planning control: negotiation would be the first step in addressing the situation. The investigating officer will discuss the situation with the relevant officer(s) acting for the promoting service provider and try to reach an agreed settlement including a timescale to carry out any remedial works, make any rectifying application, etc. Where the promoting department is willing to comply with an agreed way forward and agreed time periods, this will usually result in no further action being required.

Where remedial action is agreed to address the breach of planning control, the investigating officer will write to all parties involved setting out what has been agreed to correct the situation, including timescales.

The service provider should respond in writing stating that they are willing to carry out these works and in the time period.

If the works do not progress, or a commitment is not received to carry out the necessary remedial works, the investigating officer will then consider taking a more formal approach to resolving the situation.

At all times, any complainant would be kept informed as well as the Local Member.

Committee Involvement: Should the necessary action not be agreed, or the agreed action not be undertaken in full, then the matter would be brought to the attention of the Development and Regulation Committee for resolution.

If the Committee consider that remedial action is not necessary then no further enforcement action is required. The complainant and the Local Member would be informed accordingly.

If the Committee determine that the breach of planning control does justify remedial action, then it would also determine any necessary action to overcome the breach, and refer the matter to the relevant Cabinet Member for action. The complainant and the Local Member would be informed accordingly.

Cabinet Member Involvement

Service providers may wish to involve the relevant Cabinet Members throughout the whole process. However, Cabinet Members will be brought formally into the process at the stage of the Committee determining action needs to be taken.

Should the Cabinet Member determine that it would be appropriate to take the action recommended by the Committee, and then this should proceed.

Should the Cabinet Member determine that different or no action is required, then the Committee will be informed.

Final Resolution: The final decision will have the choice selected on behalf of the Cabinet or Cabinet Member. There are two possibilities, as follows:

1. Subject to any legal advice, the Cabinet Member's decision shall be final.
2. If the Committee accept this determination, then accordingly the matter will be resolved, subject to the completion of any agreed action. If the Committee consider this would not resolve the issue satisfactorily, then the matter would be referred to the Cabinet and/or full Council for a decision, which shall be final.

This document is published by
Essex County Council Minerals and Waste Planning

You can contact us in the following ways:

By email:
MineralsAndWasteDM@essex.gov.uk

By Telephone:
Helpline: 01245 435 555 (during office hours, Monday to Friday)
Contact Essex: 0845 603 7624 or Minicom:0845 758 5592
(8 am to 8 pm, Monday to Friday; 9 am to 12 noon, Saturday)

By post:
Minerals and Waste Planning
Environment, Sustainability and Highways
Essex County Council
E3 County Hall
CHELMSFORD CM1 1XZ

This document is available electronically at www.essex.gov.uk

The information contained in this document can be translated
and/ or made available in alternative formats, on request.

Published June 2013

