

A Local Plan for

Lancaster District

2020 – 2031

Plan period 2011 - 2031



Viability Protocol Supplementary Planning Document **CONSULTATION STATEMENT** [February 2022]

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1. Introduction

- 1.1 The Consultation Statement has been prepared in accordance with Regulation 12 of the Town and Country Planning (Local Development) (England) (Amendment) Regulations 2012. The Consultation Statement sets out how the Council considers it has fulfilled its duty to consult and engage with the stakeholders in the preparation of a Viability Protocol Supplementary Planning Document (SPD).
- 1.2 Supplementary Planning Documents (SPDs) relate to specific sites or specific planning issues. Unlike Development Plan Documents, they are not subject to Independent Examination and do not have Development Plan status. However, SPDs are given due consideration within the decision-making process and provide more detailed advice and guidance on policies in the adopted local plan.
- 1.3 The SPD sets out overarching principles for how the Council will approach development viability, where this is a consideration as part of the planning process. It provides guidance on the details that should be included in Viability Assessments and the Council's approach to considering viability matters. The guidance and the approach are consistent with the National Planning Policy Framework (NPPF), national Planning Practice Guidance (PPG) and the RICS - Assessing viability in planning under the National Planning Policy Framework 2019 for England 1st edition, March 2021

2. Purpose of this document

- 2.1 This Consultation Statement provides a summary of the stages of engagement and consultation which the Council has undertaken to inform the preparation of the SPD.
- 2.2 The Consultation Statement outlines:
 - Section 3: Who we consulted
 - Section 4: What we consulted on
 - Section 5: How we have engaged
 - Section 6: What issues were raised at the pre-Regulation 12 consultation stage and how the issues have been addressed

3. Who we consulted

- 3.1 The Council has sought to engage with the widest range of individuals, communities, organisations and stakeholders who may hold an interest in, or may be affected by the content of the SPD and make clear:
 - The purpose of the SPD, the process of preparing it and how and when they may be affected.
 - How and when they can comment on and get involved and what they can and can't influence.
 - How and when their comments will be taken into account by the Council; and
 - The remaining stages in preparing of the SPD and further opportunities to comment.
- 3.2 The Statement of Community Involvement (SCI) was reviewed and adopted in January 2019 and reflects the 2012 Regulations. Temporary COVID-19 and social distancing related updates were made in June 2020. The SCI sets out the Council's approach to engaging in preparing planning document and in considering planning applications. It identifies who we engage with. The table below is not exhaustive and is amended or added to as required.

3.3 In addition to the organisations set out in the table below, the Council also consulted with the general public, all Council Members, agents, developers, education establishments, 3rd sector and local businesses who sign up to the Council’s Planning Consultation Database.

Who we consulted	
Specific Bodies	
The Coal Authority	
The Environment Agency	
Historic England (Historic Buildings and Monuments Commission for England)	
Marine Management Organisation	
Natural England	
Office of Rail and Road (now called Office of Rail Regulation)	
Highways England	
Homes England	
Secretary of State for Housing, Communities and Local Government	
Adjoining Local Planning Authorities	Barrow Council Craven District Council Lake District National Park Authority Ribble Valley Borough Council South Lakeland District Council Wyre Borough Council Yorkshire Dales National Park Authority
Area of Outstanding Beauty	Arnside and Silverdale AONB Forest of Bowland AONB
County Council	Cumbria County Council Lancashire County Council
Parish Councils	
Lancaster City Councillors	
Local policing body	Lancashire Police and Crime Commissioner Lancashire Constabulary
Relevant telecommunications companies	PO Broadband, BT Openreach, Vodafone, O2, EE
Primary Care Trust or successor body	Clinical Commissioning Group
Relevant electricity and gas companies	National Grid (Electricity) National Grid (Gas) Electricity North West e.on British Gas
Relevant water and sewerage companies	United Utilities
Others	Members of public Developer / Agents Landowners Businesses 3 rd Sector Advocate groups Educational establishments Government organisations (NHS) Lancaster University Homes

4. What we consulted on

Pre-Regulation 12 Consultation

- 4.1 For a six-week period between 5th February and 9th March 2021 the Council carried out public consultation on the draft SPD.
- 4.2 The aim was to carry out consultation with stakeholders and provide an opportunity for comments on the draft SPD. The aim was to gather feedback on the content of the SPD and how this may be amended to better address the way in which viability assessments in respect of planning applications can be dealt with.

Regulation 12 Consultation

- 4.3 The consultation took place for a six-week period between 25th October and 6th December 2021. The aim was to gather feedback on the content of the SPD and the ways it had been revised to address representations previously received.

5. How we have engaged

- 5.1 Table 5.1 below outlines the consultation methods adopted for consultation.

Requirements of Regulation	How the Council satisfied the requirement
Which bodies and persons the local planning authority invited to make representations	<p>Consultation Database (www.lancaster.gov.uk/ppcl) consultees were notified on the opportunities to participate in preparation of the SPD.</p> <p>The database consisted of residents and organisations who had been consulted on previous policy matters, those that had requested for inclusion and statutory bodies for which the Council must satisfy commitments to engage in ongoing duty to co-operate obligations.</p>
<p>How those bodies and persons were invited to make representations.</p> <p>Pre-Reg 12 Consultation – February 2021</p> <p>Reg 12 Consultation – October 2021</p>	<p>The Pre-Regulation 12 consultation ran for 6 weeks, between 5th February and 9th March 2021.</p> <p>The Regulation 12 Consultation ran for 6 weeks, between 25th October and 6th December 2021.</p> <p>Emails were sent to over 2,200 consultees on the planning policy consultation database.</p> <p>An Climate Emergency Local Plan Review viability event was held for Developers and Agents on 4th March 2021. Attendees were given the opportunity to ask questions about the SPD. (This event was run during the Pre-Reg 12 Consultation only).</p> <p>Information on the consultation was published on the Council webpages and copies of the consultation documents were made available at the 'Principal Offices' on request.</p>

Requirements of Regulation	How the Council satisfied the requirement
	Further details on the publicity methods are set out in more detail within Appendix A
Pre-Reg 12 Consultation A summary of the main issues raised by the representations made How the Council has responded	The main issues raised in the representations during the Pre-Regulation 12 Consultation and the Council's responses are summarised in Section 6 of this document. Section 6 also outlines how the issues raised were addressed in the Regulation 12 version of the SPD.
Reg 12 Consultation A summary of the main issues raised by the representations made How the Council has responded	The main issues raised in the representations during the Regulation 12 Consultation and the Council's responses are summarised in Section 7 of this document. Section 7 also outlines how the issues raised were addressed in the Regulation 12 version of the SPD.

6. What issues were raised at in the Pre-Regulation 12 Consultation Stage and how have they been addressed?

- 6.1 The consultation on the draft SPD provided the first opportunity for interested parties to comment on the content of the document. Ten separate responses were received. Eight of these responses were received on behalf of developers or agents. These responses include a legal opinion and two responses from consortium of developers. A total of fourteen developers and agents have been represented. Responses have also been received from Lancashire County Council and the House Builders Federation.
- 6.2 The issues raised are summarised below and a response has been given to each issue. Where necessary the SPD has been amended to address the issues raised. However, in some cases, the Council is of the opinion that the content of the SPD is appropriate. In these cases, an explanation why the SPD has not been altered has been given.

1. Legality of the Document as an SPD

Representation	SPD sets out new requirements not found in the local plan or national policy and falls outside the boundaries of SPD.
Council Response	Section 19 of the of the Planning and Compensatory Purchase Act 2004 provides the basis for the provision of SPDs. Regulation 2 of the Town and Country Planning (Local Development) (England) Regulations 2012 Regulations set out SPDs as, 'supplementary planning document" means any document of a description referred to in regulation 5

	<p><i>(except an adopted policies map or a statement of community involvement which is not a local plan’.</i></p> <p>The 2012 Regs lay down the procedure for adoption and regulation 5(1)a provides criteria for local plan documents. SPDs fall within regulation 5(1)(a)(iii) where the document contains statements regarding: <i>‘(a)(iii) any environmental, social, design and economic objectives which are relevant to the attainment of the development and use of land mentioned in paragraph (i);’</i></p> <p>Reg 8 of the 2012 Regs states, <i>‘Any policies contained in a supplementary planning document must not conflict with the adopted development plan’.</i></p> <p>The NPPF defines SPDs as: <i>‘Documents which add further detail to the policies in the development plan. They can be used to provide further guidance for development on specific sites, or on particular issues, such as design. Supplementary planning documents are capable of being a material consideration in planning decisions but are not 73 part of the development plan’.</i></p> <p>The SPD includes statements with regard to ensuring social and economic objectives within policies in the development plan are achieved, in particular the affordable housing and infrastructure requirements. It does not add new policies or additional policy requirements but adds further detail and guidance about policies in the local plan which require viability assessments. It provides advice for applicants about how the local authority will consider viability assessments and the information it requires to be able to do this. Specifically, it provides guidance on the viability assessments referred to in policies DM3: Affordable Housing and DM58: Infrastructure Delivery and Funding. Policy DM3 specifically refers to the provision of a Viability Protocol SPD stating, <i>‘Such evidence must include an open book financial viability appraisal which will need to accord with guidance in the emerging Viability Protocol SPD’.</i> Policy DM58 states, <i>‘Once the Viability Protocol SPD has been adopted FVAs submitted alongside planning applications will need to accord with the principles of this SPD’.</i></p> <p>(Also read the Legal Opinion at Appendix B)</p>
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2. When Viability Assessments are Justified

Representation	<p>Paragraph 1.6 implies that the majority of sites should be viable ‘by default’ and that only in exceptional circumstances related to abnormal costs can a viability assessment be justified.</p> <p>The SPD refers to viability assessments being submitted in ‘exceptional cases’ but does not explain what these are.</p>
Council Response	<p>The PPG states, <i>‘Where up-to-date policies have set out the contributions expected from development, planning applications that fully comply with them should be assumed to be viable.’</i>(Paragraph: 007 Reference ID: 10-007-20190509).</p>

	As the contributions are set out in an up-to-date Local Plan, they are assumed to be viable. The phrasing in paragraph 1.6 is therefore in accordance with the PPG. The paragraph has been amended to clarify that that the reference to abnormal costs is an example of when a viability assessment may be justified, rather than the only circumstance. A footnote has also been added to draw attention to the section of the PPG which identifies potential exceptions.
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3. Independent Review

Representation	Reviews should be carried out within 10-15 working days of instruction with no unreasonable delays.
Council Response	The commission with the consultant agrees that the independent viability assessment will be provided within 12 working days of instruction. However, this will depend upon the quality of the information and supporting evidence submitted by the applicant. Where engineer and QS reviews are also required, the assessment may take longer. The timing of the instruction will also depend on the information and evidence submitted with the application and negotiations with regard to the scheme.

Representation	Schemes should be reviewed by a RICS qualified viability consultant and build costs should be appraised by an engineer or quantity surveyor.
Council Response	Appraisal by an engineer and/or quantity surveyor will not be required in every case. The consultant engaged to carry out the independent viability assessments has the expertise and experience to make a high-level judgement on whether costs are reasonable and the impact they should have upon benchmark land values and EUV+. An engineer or QS will be engaged to review costs and associated evidence where necessary.

Representation	It is commonplace for Council's to commissions independent reviews and for an applicant to pay for this. There has however been no scope to agree costs in this consultation. An arrangement should be made to agree upon a consultant and fee taking capacity into account.
Council Response	The costs associated with the independent review were not available at the Regulation 12 consultation. The Council has carried out a tender exercise and has now commissioned a consultant to carry out the independent reviews. The cost incurred for viability assessments are be published on the Council website a link to which is included in Appendix B of the SPD. The tender process included consideration of the fees proposed by the consultants. The fees included reflect best value and the cost is reasonable and similar to those other authorities charge.

	<p>The Council has not engaged an engineer or quantity surveyor through the tender process. Each assessment will therefore need to be procured on an application basis.</p> <p>The Council has previously agreed independent assessments on a case-by-case basis. It has found that this adds delay and an inconsistent approach. The engagement of a single consultant with agreed fees and timescale will create a degree of certainty for developers and the Council with regard to the approach, timescales and fees. This approach has been undertaken by other Council's and has been found to be effective.</p>
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Representation	As pre-application can take several months, agreeing the scope of the viability assessment at this stage is not a viable option.
Council Response	Applicants are encouraged to undertake pre-application discussions, however, there is no requirement for them to do so. Where an applicant carries out pre-application discussions, the scope of the viability assessment information can be determined at that stage if adequate information is available to do so. Where they do not it will be determined during the application.

4. Transparency

Representation	It is unreasonable to require that agent's fees are not increased where they are successful in reducing planning contributions and affordable housing provision. A viability assessment would always seek to reduce such contributions.
Council Response	<p>It is agreed that the point of a viability assessment is to reduce planning contributions and affordable housing provision for viability reasons. This does not necessitate an increased reward for an agent where contributions are reduced. The costs associated with the production of a viability assessment will not differ depending upon the outcome. It is therefore reasonable to ensure that agents are not put under pressure to reduce contributions where this may not be justified.</p> <p>The approach is similar to that of other Councils.</p>

5. Restriction of inputs to accord with the Council's own expectations

Representation	The restriction of inputs differ from the existing evidence base (the Local Plan Viability Assessment 2019) and there is a lack of evidence to support the inputs.
Council Response	<p>The assumptions have been omitted from the SPD, apart from reference to the affordable housing discount.</p> <p>The affordable housing discount has been informed by recent feedback from Registered Providers. While the percentages for each tenure may differ from the Local Plan Viability Assessment (2019), the overall blended percentage</p>

	discount remains the same. The SPD does however refer to alternative discounts where evidence is supplied to support this.
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6. Land Value

Representation	<p>The SPD includes contradictions with regard to the use of market value. Clarification is required to support cross checking of appropriately adjusted market value against benchmark land value.</p> <p>Paragraph 2.25 (now 3.10) states that a market-based approach to value is not an acceptable, however, policy compliant market transactions should be analysed as part of the BLV approach and consistent with the PPG. Market evidence is an important component in establishing minimum premiums.</p>
Council Response	<p>The SPD has been amended to provide clarification with regard to cross checking between appropriately adjusted market values and benchmark land value.</p> <p>A purely market-based approach to land valuation is not acceptable and the comment made at paragraph 3.10 (formally 2.25) is in line with the PPG and RICS guidance. Clarification has been added to paragraphs 3.8 and 3.9 to highlight this and that market evidence, where adjusted to reflect policy requirements can be used as a cross check when determining land value.</p> <p>The EUV+ and BLV approach accords with the PPG and RICS guidance.</p>

Representation	<p>The SPD misrepresents the guidance and implies that landowners would receive what is left once policy requirements have been met. It fails to recognise the incentive required for landowners to release land for development. The SPD implies that the BLV and landowner premiums could be reduced so that the residual land value is based on a default position of policy compliance. This may reduce the landowner premium to such a level that it reduces land value below the minimum required to incentivise a land sale. The approach does not follow the requirements of the PPG.</p> <p>True BLDs in the Lancaster area are likely to significantly exceed the figures generated by the EUV+ approach. Land values are increasing locally through the lack of suitable allocated sites to meet demand.</p>
Council Response	<p>The PPG, RICS guidance and recent appeals are clear that the premium should reflect the minimum required to incentivise a landowner and that <i>'policy commitments are central to establishing a reasonable price'</i>¹. The PPG states, <i>'The premium should provide a reasonable incentive for a landowner to bring forward land for development while allowing a sufficient contribution to fully comply with policy requirements.'</i> (Paragraph: 016 Reference ID: 10-016-20190509). The Inspector in the Trafford appeal acknowledged that in the past benchmark land value and premiums have been inflated by non-policy compliant developments and that when using these, they should be adjusted to</p>

¹ Appeal Ref: APP/Q4245/W/19/3243720 Land at Warburton Road, Trafford, para 115

	<p>reflect a policy complaint scheme and costs. <i>‘A landowner should not expect to receive the same price for a site where the development costs are high to one where they are much lower’.</i></p> <p>Deducting abnormal and policy costs should be the starting point when determining a policy complaint scheme. It is acknowledged that in some cases, policy requirements and site-specific costs could result in a negative value or a value which would be insufficient to incentivise release of land for development. In these cases, the costs cannot be fully deducted from the land value. Paragraphs 3.6 and 3.8 (formally 2.21 and 2.23) has been amended to better reflect the PPG and now refer to the minimum incentive for landowners to bring forward land and provide a policy compliant scheme. It is however important that the SPD emphasises the need to reflect costs and policy requirements when determining benchmark land value and the premium to ensure that previous open market values do not continue to undermine policy requirements.</p>
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Representation	A 10-15% multiplier for land value is not regarded as sufficient incentivisation for landowners.
Council Response	Reference to a specific multiplier for the premium or ‘plus’ has been removed.

Representation	<p>The LPVA suggest a minimum BLV across Lancaster.</p> <p>The land purchase price may have been agreed based upon the land value within the Local Plan Viability Assessment. Using BLV rather than the price paid for land on an allocated site would conflict with the LPVA and scheme viability.</p>
Council Response	<p>The PPG and RICS guidance are clear that an EUV+ approach should be used for site specific viability assessments and that this should take into account all costs including those required by policy and abnormal costs.</p> <p>The Local Plan Viability Assessment (2019) was produced prior to the 2019 NPPF, the PPG and the most recent RICS guidance. The land values used only reflect basic costs, they do not reflect specific infrastructure contributions required by policies in the Local Plan or evolving national policy requirements such as biodiversity net gain or abnormal costs and are based on a range of typologies in accordance with guidance.</p> <p>The LPVA also states at paragraph 4.20, <i>‘the approach advocated in the Harmon Report risks ignoring the workings of the property market, where almost all willing landowners are driven by achieving the best return for land sales. Judgements on the potential return will in the vast majority of cases be based upon market evidence of what has been achieved in other recent sales’.</i> This approach is not consistent with the most recent PPG and RICS guidance. It should also be noted that the LPVA does not suggest a minimum land value but uses a land value which, in the majority of cases, based on costs and values available at the time, and without abnormal costs, produces a viable development in the majority of typologies assessed. The LPVA does not set out</p>

	<p>minimum values or assumptions which must be used for all site-specific viability assessments.</p> <p>The PPG states, <i>'The price paid for land is not relevant justification for failing to accord with relevant policies in the plan'</i>. (Paragraph:002 Reference ID: 10-002-20190509). The RICS Guidance states, <i>'This means that the actual price paid for a site cannot be used to reduce developer contributions'</i>.²</p>
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Representation	The SPD does not include reference to overage clauses which will affect the price to be paid for land.
Council Response	Any overage clause should take into account the purchase price the buyer is willing to pay for the land based upon the costs and policy requirements associated with the development.

7. Impact on Deliverability

Representation	The SPD will adversely impact the delivery of housing in Lancaster.
Council Response	<p>Viability assessments and supporting evidence are already required where affordable housing and contributions are proposed to be reduced. Additional information and evidence frequently need to be requested causing delays in the processing of viability assessments. The Council already requires applicants to confirm that they will pay for the independent assessment prior to commissioning the assessment.</p> <p>The SPD provides guidance upon the information and processes associated with viability assessments. It will not increase the amount of evidence or information required. The SPD therefore will therefore provide applicants with an upfront and clear approach. The SPD should therefore support applicants to provide the necessary information and limit delays during the application.</p> <p>The requirements in the SPD will therefore not affect housing delivery.</p>

8. Build Costs

Representation	No evidence has been provided to justify a requirement for the use of the Lower Quartile build costs.
Council Response	BCIS data is derived from samples provided by the development industry. However, between 2015 and 2020, nearly 70% of schemes which contributed comprised 20 houses or less and less than 10% comprised of 50 dwellings or more. It is understood that volume house builders do not contribute to the database. The data on which BCIS is based therefore does not tend to reflect the economies of scale derived by larger house builders. Use of the Lower Quartile build costs are therefore justified as a

² Assessing viability in planning under the National Planning Policy Framework 2019 for England 1st edition, March 2021

	base point. It is acknowledged that the use of the Lower Quartile will not be appropriate in all cases and this requirement has been removed from the SPD, however justification for the BCIS used by a developer will be required.
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Representation	Provision of evidence to use higher costs would be overly onerous. Costs for small house builders and those in high value areas will be higher due to specifications.
Council Response	<p>The RICS guidance (para 4.2.15) provides a list of evidence required to support assumptions. These include, '<i>expected build cost (a full quantity surveyor's cost report showing how costs have been estimated should be made available for site-specific information)</i>'. This should be the starting point for the submission of evidence. It is not unreasonable to require developers to provide evidence to support the costs used in their viability assessments.</p> <p>The SPD provides greater flexibility than the RICS guidance and acknowledges that in some circumstances, a Quantity Surveyors Cost Report may not be available. It is only in these circumstances, where costs are not evidenced by a developer, that the SPD advocates the use of the Lower Quartile BCIS. The SPD also provides for cases, where a developer may wish to use a higher BCIS figure. The use of such costs cannot be accepted without evidence to support them and in line with the RICS guidance. It may be that there are specific parts of a development, such as the use of natural stone or bespoke design features to reflect a sensitive location which will increase costs. In these cases, the cost evidence can be contained to those areas.</p>

Representation	A third-party Quantity Surveyor Cost Report is not always necessary, many developers have in house expertise and the requirements goes beyond the PPG and NPPF.
Council Response	Paragraph 4.2.15 of the RICS guidance outlines the evidence which should be used to support assumptions. This includes a full quantity surveyors cost report for site specific information. It is however acknowledged that developers may have inhouse expertise. Paragraph 3.16 (formally 2.31) has been amended to refer to provision of a costs report in a QS format rather than necessarily by a QS.

Representation	The SPD makes no reference to the increased costs associated which will arise from the changes to the Building Regulations.
Council Response	The costs associated with the changes in the Building Regulations will be included within a quantity surveyors cost report or similar. If a developer

	seeks to use BCIS, any additional costs can be quantified within the submission.
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Representation	There is no reference to plot connection costs.
Council Response	Plot connections should be included as an external cost.

Representation	Paragraph 2.32 fails to recognise that abnormal costs can include aspects other than those associated with brownfield land and contamination, it must be recognised that greenfield sites also incur abnormal costs.
Council Response	The list of abnormal costs at paragraph 3.17 (formally 2.32) is simply a list of examples. The list has been expanded and reference to the list not being exhaustive has been added.

Representation	Build costs should include a contingency allowance.
Council Response	The inputs referred to at section 3 outline some of the basic requirements, providing additional guidance. Further detail including reference to contingency on build costs is included with the example Viability Assessment Template at Appendix C.

9. Other Costs

Representation	Allowances are also required for professional fees, disposal costs and finance.
Council Response	The detail within Section 3 is not exhaustive. Allowances for professional fees, disposal costs and finance costs are included at Section 5 and within the example Viability Assessment Table at Appendix C.

Representation	The SPD does not take into account additional costs associated due to the delays in processing pre-application requests and planning applications. Delays have recently coincided with significant increases in build costs which are ignored by the SPD.
Council Response	Viability assessments include an allowance for contingency to address changes in costs and delays. The independent viability assessments is not usually commissioned at the time of submission but once a design and layout have reached a point where they are likely to proceed to a decision and once infrastructure requirements and contributions have been established. If the assumptions in the viability assessment have altered

	since submission, the applicant will have the opportunity to update these if necessary prior to the independent assessment being commissioned.
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10. Affordable Housing Discounts

Representation	It is not feasible to provide a transfer agreement with the application. Transfer agreements are usually not reached at such an early stage. A more appropriate requirements would be for evidence of an informal offer or indicative values from RPs.
Council Response	The requirement for a transfer agreement has been expanded to include informal offers from Registered Providers.

Representation	It is not clear whether the affordable values are given as a percentage of open market value.
Council Response	Paragraph 3.20 (formally 2.34) has been amended to clarify that the affordable housing values given are as a percentage of open market value.

Representation	Indicative ranges, 40-50% for affordable rented and 60-70% for shared ownership should be used.
Council Response	Whilst the specific discounts differ from the LPVA, the overall blended discount remains the same. The discounts used also reflect the responses from Registered Providers. The SPD does however acknowledge that these values may not be achieved in every case. In such cases, evidence will be required to ensure that a developer does not propose a lower figure and later sell at a higher rate.

11. Climate Emergency Review of the Local Plan

Representation	No reference is made to the Climate Emergency Review of the Local Plan and the additional costs that may be generated by requirements for higher standards.
Council Response	Reference to planning policy costs, including carbon reduction costs has been added into Section 3, the table of requirements at paragraph 5.1 of the SPD and within the example Viability Assessment Table at Appendix C.

12. Negotiations to Improve Viability

Representation	Paragraph 2.5 assumes viability can be improved but provides no guidance on how this can be achieved.
Council Response	Guidance has been added to paragraph 2.5 to explain how the viability on sites may be improved. The circumstances described may not be applicable in all cases but such options may be explored.

13. Phased Approach to Viability Assessments

Representation	A phased approach adds uncertainty for developers. If such an approach is included, it should be ensured that it is not an upward review only.
Council Response	A phased approach is likely to be used for large scaled phased developments. These will be determined on an application basis.

14. Information Requirements

Representation	The information required should not represent an exhaustive list.
Council Response	The information requirements highlighted within the SPD provide examples only they are not exhaustive.

Representation	<p>It is inappropriate to require information such as details of company overheads, financier's offer letter, board report and auditor land values. This information goes beyond the provision of industry benchmarks referred to in the RICs guidance.</p> <p>Neither national or local polies or guidance require the submission of confidential information.</p>
Council Response	<p>The additional information which may be requested to support a viability assessment included within paragraph 5.3, would not be required as a matter of course. It is anticipated that such information would usually only be requested where there was a significant divergence between the figures proposed by the applicant and evidence of costs available to the Council's independent consultant.</p> <p>The submission of such information may help support the assumptions submitted by an applicant where these differ from the evidence used by the independent consultant in assessment of viability. Any confidential information would not be required to be provided on an open book basis.</p> <p>(Please also read the Legal Opinion at Appendix B)</p>

Representation	The SPD should confirm that commercially sensitive information will not be published.
Council Response	Paragraph 5.3 confirms that commercially sensitive information will not be published.

Representation	Paragraph 2.11 states that the information provided should reflect the information used by the applicant whether to proceed with the development. This conflicts with the approach to land value advocated within the SPD.
Council Response	<p>It is important that the information submitted is consistent with the information used by the applicant whether to proceed. It is reasonable for example that where BCIS are used, the range is consistent with actual costs and the costs used by a developer to determine whether to go ahead with a development. Reference to this consistency has been added at section 3.0. The SPD has been amended to refer to information supplied being consistent with that used to make decisions.</p> <p>When agreeing the purchase price for land applicants should ensure that all costs are taken into account. Where they have failed to take these costs into account, land values will need to be renegotiated to ensure that they are consistent with the land value approach in the NPPF and PPG. This will ensure land value information can be consistent with agreements. Both the agreed value and the EUV+ should be provided as part of the information submitted.</p> <p>(Also read the Legal Opinion at Appendix B)</p>

15. Template Format

Representation	The template is not a recognised industry template and has not been tested.
Council Response	<p>The SPD has been amended to clarify that the table at Appendix C provides a preferred rather than required template.</p> <p>The template is an example only and includes the information that the Council requires as a minimum to assess viability. Whilst it is recognised that there are industry models such as the 'Argus Developer' software and that these provide a suitable template, not all applicants use such software.</p>

16. Formula

Representation	The formula should be – net development value, less costs, less planning contributions, less profit/risk equals residual value compared to benchmark land value.
Council Response	The formula includes the above, it is simplified within the table to include all costs. Gross has been amended to Net.

17. Warranties in Relation to the Information Submitted

Representation	The clauses at 2.11 and in the warranty are excessive and should be removed from the SPD. RICS already provides guidance on professional standards.
Council Response	Not all viability assessments are submitted with RICS professionals, in many cases the applicant will submit the information directly and will not be bound by the RICS professional standards. Where a viability assessment is provided by a RICS professional this will be based upon the information supplied by the applicant. The warranty seeks to ensure that the applicant provides accurate information. (Also read the Legal Opinion at Appendix B)

Representation	There is a conflict between the acknowledgement that commercially sensitive information will not be made publicly available and the requirement for information to be the same as that used to make commercial decisions.
Council Response	Information should be consistent with that used to make commercial decisions to ensure viability assessments are accurate. Where detailed information is commercially sensitive it will not be published however, the use of BCIS figures for example which are consistent with actual build figures will not be commercially sensitive as they rely on standard inputs. (Also read the Legal Opinion at Appendix B)

18. Drafting

Representation	It is inappropriate to state at 2.2 that applicants may 'not wish' to meet affordable housing and contributions requirements. An applicant may wish to meet the requirements but is unable to do so due to viability.
Council Response	Reference to applicants 'not wishing' to meet affordable housing and contribution requirements has been removed.

19. References to RIS Research

Representation	Reference is made at paragraph 2.25 to RICS research, but the referencing provided is insufficient to trace the document.
Council Response	The full reference to the RICS research referred to at paragraph 3.10 (formally 2.25) has been added to the footnote.

7. What issues were raised at in the Regulation 12 Consultation Stage and how have they been addressed?

- 7.1 The consultation was the second opportunity for interested parties to comment on the content of the document. The consultation sought the opinions on the content of the revised SPD and how the issues raised at the Pre-Regulation 12 stage had been addressed.
- 7.2 Nine separate responses were received. Six of these responses were received on behalf of developers or agents. These responses include a response from a consortium of nine developers which incorporates a legal opinion, which argues that the content of the SPD is not lawful. A total of fourteen developers and agents have been represented. Responses have also been received from Homes England, Natural England and the Coal Authority.
- 7.3 Issues raised have been summarised below and a responses have been provided. Where comments have previously been made and have been responded to above, they have not been reiterated in each case.

1. Justification for Viability Assessments

Representation	The nature of local plan viability testing is high level and over a 15 year period. It is inherent there will be tension between market realities and government aspirations for viability testing at plan making stage.
Council Response	The PPG is clear that where there are up to date policies a site should be assumed to be viable. This is currently the case in Lancaster District. There are provisions within the SPG for applicants to justify circumstances where a viability appraisal is needed. There is therefore no further to the SPD is amendment required.

Representation	It is not reasonable to require viability assessments where the Council's evidence demonstrates obligations would render a development unviable. To oblige developers to commit resources to and justify obligations need to be reduced is an antithetical to the advice of the NPPF paragraph 34 and renders the approach unsound.
Council Response	The Local Plan was found sound and adopted in 2020, it therefore provides up to date policies. The requirement for viability assessments where these policies will not be met accords with the PPG. The CELPR will be subject to further consultation and examination. Should the proposed policies be found sound and the plan adopted, a requirement for viability assessments where policies will not be met will accord with the PPG.

Representation	Clarification is needed that viability assessment justification is not restricted to abnormal costs.
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Council Response	Paragraph 1.6 refers abnormal costs as one such case, it also refers to the circumstances within the PPG. No further clarification is therefore required.
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2. Fees for Independent Assessment

Representation	There has been no scope to agree and appropriate fee and capacity for the independent assessment.
Council Response	The Council has appointed an independent viability assessor through a competitive tender process. The fees, capacity and timescale for assessment were considered as part of that process and the most appropriate assessor appointed.

Representation	CP Viability Ltd's fees for the reviews have been formulated based on the assumption that they will be carrying out the cost review in many instances. There should be a commensurate reduction in CP Viability Ltd's fees when a quantity surveyor is appointed.
Council Response	The high-level assessment forms an overview of abnormal costs in relation to the type and scale of development and the impact this may have upon land values. This will be carried out in all cases and incurs a fixed price fee.

3. Inputs

Representation	The SPD is largely silent on the inputs which makes the scope of the consultation limited and raises concerns with regard to process.
Council Response	Specified inputs were included within the first draft of the SPD and resulted in significant objections (see responses to the Pre-Reg 12 consultation). Specified quantities for the inputs were therefore removed.

4. Inconsistency between Requirements and Use of Standardised Inputs

Representation	There is inconsistency between the requirement to use of standardised inputs and paragraph 3.1 which states 'assumptions used ... should be sourced from evidence from an independent expert or publicly accessible source'. Developer specific information used to inform commercial decisions would not be available to an independent expert – commercially sensitive information conflicts with warrantee.
Council Response	There is no inconsistency as publicly accessible source includes standardised inputs such as BCIS.

Representation	<p>Paragraph 5.4 states, ‘The approach is supported by RICS guidance which states, ‘The applicant could be required to provide detailed evidence of actual income and expenditure to support the review’.</p> <p>This is misleading as taken from RICS guidance on S106 agreements where inputs are known.</p>
Council Response	The paragraph has been removed from the SPD.

Representation	The SPD is not requiring an independent FVA prepared in line with the NPPF and NPPG but rather each applicant’s (commercially sensitive) internal appraisal. A RICS member would not be acting appropriately if they were to use none standardised inputs.
Council Response	<p>The SPD refers to the submission of standardised inputs <u>or</u> actual costs. There are applicants who prefer to submit actual inputs and the SPD provides the opportunity for them to do this.</p> <p>The RICS document at para 4.2.15 states that “expected build costs” can be used in the form of a QS report, with site specific information.</p>

Representation	The requirements at paragraph 5.3 and any similar requirements throughout the SPD should be removed as they require a developer to provide confidential information.
Council Response	Reference to financiers offer letter, board report on scheme and letter/report from auditor re land values has been removed. A developer’s market analysis report may be requested to support submission details as this should align with the assessment of the scheme made by the developer. Sensitivity analysis is a requirement in the RICS guidance and non-residential uses would always be required where such uses are required within a scheme.

5. Assessment of Abnormal Costs

Representation	It is crucial that both the submitted FVA and the abnormal cost assumptions are reviewed by suitably qualified professionals. The Council’s appointed viability consultant, CP Viability Ltd, are not qualified quantity surveyors and, therefore, would not meet the definition of “suitably qualified professional” to assess the abnormal costs. It is not possible to provide a “high level” view on the reasonableness of complex site-specific abnormal costings.
Council Response	Additional independent assessment of the abnormal costs assumptions may not always be necessary. A high-level assessment may conclude that the abnormal costs are considered reasonable and/or are not complex in which case, requiring assessment and additional expense to the applicant would be unreasonable. CP Viability will determine whether sites have complex or

	unreasonable abnormal requirements, and, in these cases, a separate independent assessment of these costs will be required.
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6. Land Value

Representation	Whilst the drafting with regard to landowner premium has been amended there is still ambiguity which could imply that the Council may adjust/reduce the premium value to reflect full policy requirements. Transparency and clarity is needed to ensure a sufficient premium is available to landowners to bring forward land rather than reducing BLV to ensure policy compliance in every instance.
Council Response	This is sufficiently referred to in paragraphs 3.6 and 3.8.

Representation	Further amendment is required at 3.10 to allow a market-based approach based on policy compliant land transactions or adjusted transactions where no policy compliant evidence exists.
Council Response	The adjustment of market transactions is referred to within paragraph 3.9.

Representation	A market approach is not un-acceptable, it is the foundation for establishing market value as per the RICS guidelines.
Council Response	Paragraph 3.10 specifies that a market-based approach based on <u>non-policy compliant schemes</u> is not acceptable. Paragraph 3.9 refers to how market evidence may be used. This accords with the RICs guidance.

7. Build Costs

Representation	The drafting confusing (3.16 conflicts with 5.1). The SPD requires actual build costs to be based on evidence. However, the BCIS are based on actual build cost therefore confirmation is required that the use of BCIS will suffice.
Council Response	The SPD provides the opportunity for the submission of either BCIS or actual build costs based on QS evidence. BCIS may be based on actual build costs but to not provide those for a specific development. There is therefore not conflict between the paragraphs. The bullet points within paragraph 3.16 have been amended to refer to BCIS first.

Representation	The expanded list of potential build costs is acknowledged but it should be made clear that this list is not exhaustive.
Council Response	Paragraph 3.3 makes it clear the list is not exhaustive.

8. External Costs and Evidence

Representation	Paragraph 3.19 requires abnormal and external costs to be supported by evidence. It is agreed this should be the case for abnormal costs but external costs are usually a % allowance. Evidence should therefore not be required to support such costs.
Council Response	The percentage approach can only be a high-level indication. If a cost plan is being used this should include all the construction costs for the development, including externals.

Representation	The requirement for the provision of evidence to support assumptions should be clarified to ensure that this is where appropriate rather than for all information.
Council Response	The SPD highlights circumstances where evidence would be required to support assumptions.

9. Contingency

Representation	Contingency should be applied to base build costs, external works, plot service connection, garages and abnormal costs as there is risk and potential for unforeseen costs and inflationary pressures.
Council Response	Appendix C is an example table only, providing the minimum information required. For clarity the table at Appendix C has been amended to refer to contingency for base build costs, external works and garages. If contingency is applied to abnormals, this must be included as a separate figure.

10. Affordable Housing Transfer Values

Representation	There is no evidence to support the affordable housing transfer value of 70% at 3.5. Values of less than 50% OMV are frequently seen. Provision of a fixed % in the SPD is inflexible and does not reflect market evidence.
Council Response	The information was collected in consultation with Registered Providers during the preparation of the Local Plan and the CELPR. This commercial information was provided in confidence and is therefore not published.

	The SPD sets out the percentages in accordance with the information provided to the Council. It does however, provide the opportunity for the percentages to be altered where evidence and justification for a lower figure is provided.
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Representation	A requirement for submission of price paid is not feasible as the sale will not be agreed with RP before planning permission is granted.
Council Response	The SPD provides for the submission of the price paid or informal offers. While it is appreciated developers may not have agreed a sale of affordable homes at submission, they should have discussed the proposals with RPs to inform the type and mix of affordable housing to the provided and potential transfer values to inform their own commercial decisions.

11. Developers Profit

Representation	Paragraph 5.1 requires profit to be supported by an explanation of what it is made up of. Profit should reflect the standardised principles in the NPPG and RICS guidance, this is therefore unnecessary.
Council Response	While standardised profit can be used, an explanation of what the profit is made up of is necessary to ensure that the standardised input is the same as the requirements of the PPG / RICS guidance.

Representation	The SPD cannot be used to lower developer profit to 15%. This has not been tested and would impact on delivery.
Council Response	Reference to a specified % for profit was removed from the draft SPD prior to the Reg 12 consultation.

12. Viability Phasing

Representation	The SPD should make it clear that there will be an opportunity to revisit viability at reserved matters on large schemes.
Council Response	Paragraph 4.3 refers to the potential for revisiting viability.

13. Viability Assessment Template

Representation	The requested information is appropriate and the removal of specific inputs is welcomed. However, the template is not the industry standard. Clarification is required that the template at Appendix C is an example and not mandatory.
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Council Response	Appendix C is clearly labelled as an example, no amendment is therefore necessary.
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14. Warrantee

Representation	<p>Warrantee that the information submitted is true to the best of the applicant's knowledge should be sufficient.</p> <p>The requirement for the warrantee should be removed, in particular point b) which requires confirmation that the information submitted is consistent with the information that has informed its own commercial decisions. This inconsistent with the use of standardised inputs within the NPPG and RICS guidance.</p>
Council Response	It is understood that applicants would be unwilling to sign the warrantee as drafted. Requiring the warrantee could result in excessive time being spent on this matter rather than the detail of the application. The requirement for a warrantee has therefore been amended to a requirement for a declaration and point b with regard to commercial decision has been removed.

15. Area Covered by the SPD

Representation	It is not clear whether the SPD relates to South Lancaster.
Council Response	Unless otherwise stated SPDs relate to the district. The process required for viability assessments does not alter depending upon location. It is therefore not necessary to refer to specific areas within the SPD.

16. Planning Balance

Representation	The plan recognises that some development is unviable. The SPD should acknowledge this and undertake a planning balance exercise to reconcile which of the competing objectives is given principal weight.
Council Response	<p>Each application should be determined on its own merits. Where proposals are demonstrated to be unviable, this be weighed in the planning balance together with the policies within the local plan to ensure that development is sustainable.</p> <p>The SPD provides guidance on the process for the submission of viability assessments. Consideration of the planning balance comes after the submission of a viability assessment, it is therefore not necessary to expand of the balance and priorities within the SPD.</p>

17. Non-Standard House Types

Representation	As the local plan viability assessment does not examine non-standard house types, a section should be included within the SPD which references the NPPG section on this matter.
Council Response	The approach to viability and specialist housing is addressed in the NPPG. The SPD provides guidance on the approach to site specific viability assessments. The principles and requirements will remain the same, it will be the specific inputs which may differ and consideration of planning balance. There is no need to address this matter specifically in the SPD.

18. Emerging Policy

Representation	Query how emerging policy can be considered when the principles of valuation are, 'as at that point in time', therefore not generally allowing for events that are uncertain. (para 3.12)
Council Response	Where emerging policies are a material consideration and have weight, they should be taken into account when determining an application. It may also be the case, that a decision on an application submitted prior to the adoption of the plan will be determined after adoption. The emerging policy context should therefore be taken into account when determining viability and the planning balance. Emerging policies are publicly available and can be taken into account when producing the viability appraisals. Appraisals should be carried out on the basis of existing and emerging policy to ensure that where the policies are a material consideration or are adopted by the point of decision, the consideration of viability is made and balanced against a policy compliant assessment.

7.4 The comments with regard to the legality of the SPD have previously been addressed. Together with the additional amendments made, the SPD provides guidance on the approach to viability assessments, a requirement for proportionate information and neither adds to or amends policy.

7.5 Further amendments made to the SPD include:

- Amendments to ensure that the requirements for the Viability Assessment Executive Summary are consistent within the SPD Executive Summary and paragraphs 2.4 and 5.2.
- Paragraph 3.2 has been amended to explain how the use of standardised inputs can be consistent with the information used to decide whether to proceed with development – i.e. BCIS figures used should reflect the expected build cost.

Appendix A: Publicity Methods

Methods	Main consideration
Documents made available for inspection	This is a minimum requirement as set out in the Regulations. Relevant documents will be made available for inspection during consultation period at the Council's offices in the Lancaster and Morecambe Town Hall and libraries in the Lancaster District. Public access to these documents is available via PCs in the reception areas
Website	Each consultation stage will feature prominently on the homepage of the council's consultation ¹ and planning policy webpages. This will link directly to information on document production, providing access to the consultation material and advice on how and when comments can be made. Articles providing updates on plan production, which may include consultation and engagement opportunities, may be published in the Council's online news section periodically but it will not be solely relied upon as a means of communication.
Adverts/public notices	Notices will be placed in a local newspaper advertising consultation and engagement opportunities, where appropriate. Statutory requirements to publish notices advertising certain planning applications
Mailing List – Email / Letter	The Council operates a database of individuals and organisations that have expressed an interest in the plan-making process, have previously been actively involved in policy development or are statutory consultees. Those who wish to be involved will be directly notified at each stage either through email or letter of opportunities to comment. Those who are interested in planning policy development and wish to be notified can be included on the Council's mailing list at any time ²
Press release	To be undertaken in accordance with the Council's media team, Media briefings/press releases will be issued to local media. Although items may only be reported if they are considered newsworthy by the newspaper editors, therefore publication is not guaranteed.
Parish and Town Council and Community Group publications	These types of publications are distributed to local residents at least quarterly. The Council will work with relevant organisations to utilise these publications to notify residents of consultation and engagement opportunities, where possible. Consideration will need to be given to the timing of the consultation, and the timing and circulation of any publications outside the Council's control.
Posters	Posters may be sent to relevant Parish and Town Councils and libraries to be displayed on notice boards to raise awareness of any public consultation and engagement opportunities. Posters may also be displayed in other appropriate locations across the District.
Leaflets	Leaflets may be used to gain wider public awareness of a consultation or engagement opportunity, for example leaflets may be distributed at key attractors/destinations such as train stations and local schools.
Social Media	Media such as Twitter and Facebook will be used to highlight public consultations on planning policy documents with direct links to the Council's website and information on how to comment, and any engagement events. Such

Methods	Main consideration
	messages may be retweeted periodically throughout the consultation period ³ . However, comments will not be accepted via social media.
Events	Such events may include drop-in sessions, public exhibitions and/or targeted workshops. Parish and Town Council meetings will be utilised where possible. The type of event undertaken will be dependent on a number of factors, including the consultation stage, and time and resource constraints. Careful consideration will be given to the timing, venue and format of events to ensure accessibility and inclusivity.
Key stakeholder Groups	We will liaise with key stakeholder groups at key stages in the plan making process, to discuss issues and keep them informed of progress.
Questionnaires / surveys	Questionnaires / surveys may be used to focus comments and to help ensure that feedback relates to issues that are within the scope of the document being consulted upon.

Appendix B: Legal Opinion on the Validity of the SPD

RE: LANCASTER DRAFT VIABILITY PROTOCOL SPD

OPINION

Introduction

1. We are asked to advise Lancaster City Council (“the Council”) in relation to the proposed adoption of a draft viability protocol supplementary planning document (“the SPD”). The SPD is intended to set out the Council’s expectations for viability assessments which are submitted to it as part of the planning process. In particular, it is intended to guide the contents of assessments which are frequently submitted by developers seeking to demonstrate that provision of a policy-compliant level of affordable housing (of itself or together with other obligations) would render a particular scheme unviable.
2. A draft version of the SPD was published for consultation on 5 February 2021 and the consultation ran until 9 March 2021. The Council received a number of responses to the consultation and has considered such responses within the Viability Protocol Supplementary Planning Consultation Statement dated September 2021.
3. As part of the consultation, the Council received a joint objection from a consortium of housebuilders operating in the local area. The objection included the submission of a legal opinion from Christopher Katkowski QC and Piers Riley-Smith dated 17 March 2021 (“the Opinion”). The Opinion concludes that the SPD is “unlawful because it does not meet the legal definition of an SPD”.
4. We are asked to consider the conclusions reached within the Opinion and set out whether, and to what extent any changes might be required to be made to the SPD to address the concerns raised within it.

Relevant Law

5. Section 38 of the Planning and Compulsory Purchase Act 2004 (“PCPA 2004”) defines a development plan as consisting of:

- i) The regional strategy (if any), and
- ii) The development plan documents (“DPD”s) (taken as a whole) which have been adopted or approved.

6. A DPD is defined in s.37 of the PCPA 2004 as:

“a local development document which is specified as a development plan document in the local development scheme.”

7. Section 17(7) of the PCPA 2004 states that regulations may prescribe which descriptions of documents are to be prepared as local development documents. A document can only be a local development document if adopted as such by the local planning authority, or approved by the Secretary of State under sections 21 or 22.

8. The Regulations made under s.17 are the Town and Country Planning (Local Planning) (England) Regulations 2012 (“the 2012 Regulations”). Regulation 5 provides, in so far as is relevant:

“(1) For the purposes of section 17(7)(za)1 of the Act the documents which are to be prepared as local development documents are—

(a) any document prepared by a local planning authority individually or in cooperation with one or more other local planning authorities, which contains statements regarding one or more of the following—

- (i) the development and use of land which the local planning authority wish to encourage during any specified period;*
- (ii) the allocation of sites for a particular type of development or use;*
- (iii) any environmental, social, design and economic objectives which are relevant to the attainment of the development and use of land mentioned in paragraph (i); and*
- (iv) development management and site allocation policies, which are intended to guide the determination of applications for planning permission;*

...”

9. Regulation 6 provides that:

“Any document of the description referred to in regulation 5(1)(a)(i), (ii) or (iv) or 5(2)(a) or (b) is a local plan.”

10. Regulation 2 defines “supplementary planning document” as:

“... any document of a description referred to in regulation 5 (except an adopted policies map or a statement of community involvement) which is not a local plan”

11. The requirements for the preparation, publication and adoption of local plans are materially different to the requirements for the adoption of an SPD.

Discussion

12. The Opinion argues that the SPD somehow manages to be both a DPD by including “development management policies” (para 21) and fall outside the scope of an SPD by falling outside Regulation 5(1)(a)(iii). The Opinion states at paragraph 20 that *“in every instance where the Purported SPD sets out requirements of its own making which are not found in local or national planning policies...[the SPD falls outside Regulation 5(1)(a)(iii) and is not an SPD].”* We do not agree.
13. First, simply including additional detail as to what the Council will require in order for a policy within the Local Plan to be met cannot, without more, be a criticism of and SPD. By their nature, they are intended to supplement, not merely repeat.
14. Specifically, the Opinion criticises requests in the SPD for certification that an applicant has provided the same information used by them to decide whether to proceed with the development, and the suggestion in paragraph 5.3 that further information may include board reports, financiers’ offer letters and other information specific to the scheme. This is criticised for being contrary to paragraph 10-021 of the PPG which states that *“information used in viability assessment is not usually specific to that developer and thereby need not contain commercially sensitive data.”* We do not consider that there is in fact any conflict with the PPG in this regard. Paragraph 10-021 concerns the publication of the viability assessment itself whereas paragraph 5.3 of the SPD addresses what additional evidence may be supplied to the Council in order to support the inputs used in a given viability assessment. Paragraph 5.3 is clear that this will not be in all cases. Even if paragraph 10-021 of the PPG was said to be engaged; the PPG itself notes that inputs are not “usually” site specific. As such, there is clear

scope within the guidance for a different approach to be taken only where it can be justified in a given case and not as a matter of course.

15. Second, the SPD is truly supplementary in our view; it is plainly additional detail tied to the assessment of compliance with DM3 of the Development Management DPD and other local plan policies governing infrastructure contributions such as DM27 and DM58. In relation to affordable housing, for example, it is policy DM3 which sets out the Council's "*statements regarding... the development and use of land which the local planning authority wish to encourage during any specified period*" in relation to the encouraging the delivery of affordable dwellings. The SPD adds detail as to how DM3 is to be applied in practice when a derogation from its terms is sought. Further, DM3 on its own terms provides that evidence will need to be submitted in order to justify an exemption based on viability and that "*such evidence must include an open book financial viability appraisal which will need to accord with guidance in the emerging Viability Protocol SPD.*" The examining Inspector was therefore well aware that further detail would be set out within an accompanying SPD. Accordingly, the SPD cannot sensibly be said to fall within Regulation 5(1)(a)(i).

16. To the contrary, we consider that the SPD falls squarely within Regulation 5(1)(a)(iii) in that it contains further statements in relation to "*... social...and economic objectives which are relevant to the attainment of the development and use of land mentioned in paragraph (i)*" i.e. the provision of affordable dwellings in line with DM3. The SPD is in line with the type of document envisaged by the court in R(Skipton Properties) v Craven District Council [2017] EWHC 534 Admin at paragraph 90:

*"The purpose of regulation 5(1)(a)(iii) is to make clear that a local planning authority may introduce policies which are supplementary to a DPD subject only to these policies fulfilling the regulatory criteria. The Defendant has made clear that it may introduce an SPD, supplementary to its new local plan, which sets out **additional guidance** in relation to affordable housing."* (emphasis added)

This is precisely what the Council has done.

17. Third, it cannot sensibly be said that the SPD falls within Regulation 5(1)(a)(ii) since it does not contain site allocations.

18. Fourth, in our view the SPD does not contain statements falling within Regulation 5(1)(a)(iv) as none of the statements are in the nature of development management policies or site allocation policies. At paragraph 37 of R (Miller Homes) v Leeds City Council [2014] EWHC

82 Admin), Mr Justice Stewart held that the development management policies are intended to regulate the development or use of land generally and the material word was “regulate”. Here, the SPD is exclusively associated with providing the promised additional information to supplement DM3 and does not itself directly regulate the development or use of land.

Conclusions

19. In our view, the SPD does not contain any statements falling within Regulation 5(1)(a)(i), (ii) or (iv) and does fall within Regulation 5(1)(a)(iii). Therefore, we disagree with the conclusions of the Opinion and consider that the SPD falls within the definition of an SPD for the purposes of the 2012 Regulations.

Kings Chambers

Birmingham, Leeds, Manchester

Paul G Tucker QC

Stephanie Hall

11th October 2021