

Planning Note on behalf of Colchester Borough Council

Introduction

- 1.** This note is provided further to the Inspector's request, dated 7 August 2018, to submit with the relevance of the revisions made to the 2012 edition of the National Planning Policy Framework ("NPPF").

- 1.1.** It is also in response to Document NR138 submitted by Network Rail which comprises a note on the relevance of the revised NPPF) and planning policy notes.

References in this planning note to;

- 1.2.** The NPPF' are to the National Planning Policy Framework July 2018 edition.
- 1.3.** The 'Act' are to the Town and Country Planning Act 1990 (as amended).
- 1.4.** The 'TWA' are to the Transport and Works Act 1992 (as amended).
- 1.5.** 'CBC' is to Colchester Borough Council.
- 1.6.** 'The Applicant' is to Network Rail.
- 1.7.** 'Local Plan' is to CBC's development plan comprising the Core Strategy (2008, amended 2014) and the Development Policies DPD (2010, amended 2014)
- 1.8.** 'ETS' is to be Essex Transport Strategy.

2. Legal Background

- 2.1.** In seeking an Order under the TWA, the Applicant requests a Direction from the Secretary of State under Section 90(2A) of the Act. Namely that, on making an Order under the TWA which includes provision for development, the Secretary of State may direct that planning permission for that development shall be deemed to be granted, subject to such conditions (if any) as may be specified in the Direction.
- 2.2.** Section 57 of the Act confirms that planning permission is required for development. Section 55 of the Act prescribes the meaning of "development". It is undoubtedly the case that the Applicant seeks to take development within the meaning of section 55 of the Act.
- 2.3.** In consequence (i.e. per section 57), planning permission is required for the development that the Applicant wishes to carry out.
- 2.4.** Section 38(6) of the Planning and Compulsory Purchase Act 2004 confirms that, in deciding if to grant planning permission, any determination must be made in accordance with the development plan unless material considerations indicate otherwise.

2.5. In this case the development plan is the “Local Plan”. Material considerations would include the Emerging Policy, the NPPF, the ETS and the Essex Design Guide.

2.6. In light of the above it is apparent that permission should be first determined having regard to the Local Plan before then considering the other material considerations. Analysis follows.

2.7. In Document NR138 the Applicant identifies only three policies within CBC’s Local Plan, namely;

2.7.1. Policy TA2 – Walking and Cycling; and

2.7.2. Policy ENV1 – Environment; and

2.7.3. Policy DP1 – Design and Amenity.

It is a considerable surprise to CBC that the Applicant fails to mention, let alone address (among others), CBC Local Plan policy TA1 which strives to enhance sustainable transport links.

2.8. Moreover, in Document NR138, there is no discussion by the Applicant as to the provisions of the above policies nor is there any specific reference to those documents other than in paragraph 22.

2.9. It is therefore CBC’s case that the Applicants’ fail to undertake an appropriate assessment of the proposed development as against the Local Plan policies.

2.10. Furthermore, no consideration is to emerging policy, notwithstanding that appropriate weight may be given to those policies (as per Paragraph 48 NPPF).

3. Consideration of Local Plan Policies

3.1. Policy ENV1 concerns the Environment. It prescribes, amongst others, that CBC will conserve and enhance the natural environment and countryside. CBC say that the removal of, or harm to, “important” hedgerows is in conflict with ENV1 – this is dealt with more fully at section 7 below. CBC comment that the Applicant has not proposed any compensatory, or mitigating, measures if these “important” hedgerows are to be removed.

3.2. Policy TA1 of the Local Plan concerns accessibility and changing travel behaviour. The policy specifically provides that CBC will approve accessibility by enhancing sustainable transport links and encouraging development that reduces the need to travel. Furthermore, TA1 confirms that sustainable transport will be improved to provide better connections between the communities and their needs.

3.3. In the supporting text to TA1 it is confirmed that “good accessibility means that the community can access their needs (e.g. shopping, schools, employment) can access these and without always needing a car”. Furthermore, the same guidance notes that “improving accessibility and reducing car dependence helps to improve equality, reduce congestion and respond to the challenges with climate change and environmental sustainability. It also helps to promote a healthy and active population...”.

3.4. CBC maintain that the development proposed in respect of E41 (Pagets), E51 (Thornfield Wood) and E52 (Golden Square) do not accord with policy TA1. More specifically CBC say;

3.4.1. E41 – the proposal is to take away an existing and well used transport link within the community. Not only would the crossing appear to facilitate the most direct route for many residents between the Co-Op to the north and those dwellings to the south of the railway line but also as a general amenity and leisure route through Wivenhoe. Evidence has been given before the Inquiry as to the importance of this link to existing residence and visitors to Wivenhoe. Indeed, one local resident (Mrs Clark) indicated that should Pagets be closed, this may lead her to abandoning walking which is, obviously, contrary to the aims of Policy TA1.

3.4.2. Furthermore, the alternative proposed is not considered to provide a better connection on the basis that it not only takes away an existing crossing but also diverts (more) people onto busier roads and, particularly, a restricted and potentially route along the High Street bridge.

3.5. Policy TA2 concerns the promotion of walking and cycling within the Borough. It is therefore somewhat surprising that the Applicant does not appear to have considered TA2, nor made any reference to it in document NR138. Indeed, TA2 is perhaps the most significant Local Plan policy in these circumstances.

3.6. Policy TA2 promotes walking (and cycling) as an integral and highly sustainable means of transport. To this end, priority is given to those mode of transport (n.b. also consistent with Paragraph 110 NPPF – see below).

3.7. Here, whilst the development does concern the railway, its impact is on those seeking to walk across an existing railway crossing.

3.8. TA2 further confirms that the design and construction of facilities and infrastructure will be improved to make walking and cycling more attractive, direct and safe. Furthermore, although specific references made to the town centre of Colchester, it is not unreasonable

to suggest that TA2 seeks to provide excellent walking and cycling connections into and through all urban connections within the Borough.

3.9. The guidance notes to TA2 explain its rationale which sets out that “people are less likely to walk to a local shop or bus stop if the pedestrian is poor or appears threatening”.

3.10. CBC say that policy TA2 is not met in the circumstance for the following reasons;

3.10.1.E41 – removal of the existing crossing takes away an existing transport link. It is highly doubtful that any proposal could further improve connectivity within the town of Wivenhoe. The diversion is not direct and adds, in an urban context, significant journey time. Furthermore, the proposed alternative routes are either up roads with unmade surfaces or via busier vehicular routes. Neither are satisfactory.

3.10.2.E51 and E52 – the diversions in both instances are both considerable and in the order of (and in one case in excess of), one kilometre. This does not render the (alternative) route direct. The diversionary route includes “pushing walkers onto” roads used by vehicular traffic with, in some cases, undesirable sight lines. Therefore, apparently the closure of these routes will lead to less direct and potentially unsafe diversions. Furthermore, owing to the length added it is unclear whether the closure will make walking etc, more attractive – CBC say this is doubtful.

3.11. Policy TA3 concerns public transport. Whilst not strictly “on point” it strives to promote sustainable travel behaviour. In that regard CBC repeat their comments above about the potential closure of routes but also length and characteristics of the proposed alternatives/diversions may undermine sustainable travel behaviour and, instead, lead people to decide to either not walk at all or use a private motor car as alternative.

3.12. Policy TA4 concerns road and traffic. Again, TA4 confirms that priority should be given to sustainable development and in its notes comments that “growing levels of car use in congestion are having a negative impact on all [urban areas]”. To that end, CBC repeats its comments above.

3.13. Policy DP1 concerns design and amenity. Within policy DP1 there are 7 criteria that new development should meet. Of note, criterion (iv) confirms the creation of a safe and secure environment. Whilst the closure of a crossing over the railway network is accepted to negate any risk from using the same, CBC are not satisfied that the risk is not simply transferred elsewhere. Furthermore, the proposed alternative routes are over land with steeper gradients, unmade surfaces and roads used by vehicular traffic. It is therefore doubtful whether the alternatives do facilitate the creation of a safe and secure environment.

3.14. Criterion (iii) provides that existing public and residential amenity should be protected. Whilst CBC has no concerns in respect of likely privacy, overlooking, security, noise or disturbance arising from the Applicant's current proposals, for the reasons outlined above, the loss of the crossing would cause detriment to the amenity of the public as a whole by closing an existing and well-used crossing.

3.15. More generally, CBC wishes to record that because no specific designs/details have been put forward by the Applicant is unable to ensure whether scale, form, materials etc are compliant with Local Plan policy.

4. Essex Transport Strategy ("ETS")

4.1. The Essex Transport Strategy seeks to overcome 5 key challenges which can be paraphrased as;

4.1.1. Providing connectivity for Essex communities and beyond.

4.1.2. Reducing the carbon-intensity of travel in Essex and reducing pollution from transport generally.

4.1.3. Improving safety.

4.1.4. Securing and maintaining all transport assets to an appropriate standard.

4.1.5. Providing sustainable access and travel choice.

4.2. Of the last (i.e. providing sustainable access and travel choice), it is recognised that there is a challenge to "maintain the vitality of rural communities" and "encouraging healthier travel and leisure activities". The ETS then prescribes 15 County Council transport policies to address those the challenges identified.

4.3. Considering the above aims, it is therefore surprising that the Applicant has not referred to any policies contained within the ETS in its planning note. This would appear to be an oversight.

4.4. Notwithstanding the above, CBC comment as follows.

4.5. Policy 4 concerns public transport and confirms that Essex County Council will work in partnership with train operating companies and Network Rail to improve rail services. However, in this Inquiry, no quantitative evidence has been given of improvements brought to the rail service offered simply by the closure of various crossings including E41, E51 and E52. This, CBC says is not sufficient to meet the aims of Policy 4 ETS at this moment in time.

4.6. Policy 5 concerns connectivity to support a vibrant, successful and sustainable future for Essex. In the notes to it, it is confirmed that "encouraging people to consider walking or

cycling is important to reducing traffic congestion, as well as improving health and reducing emissions of CO2. Improving the pedestrian environment is also a significant component of wider initiatives to revitalise and regenerate our town centres". Accordingly, emphasis is, or must, be placed on walking and cycling as a means of getting from one place to another.

4.7. Again, CBC repeats its comments above in respect of the closure of the various crossings in addition to unsuitable and/or lengthy alternative routes as undermining such aims. In consequence, CBC says that Policy 5 ETS is not met.

4.8. Policy 8 then seeks to promote sustainable travel choices. In the notes to that policy the ETS acknowledges the "if we are to encourage gradual use of more sustainable forms of transport we must therefore aim to improve the end-to-end journey experiences (i.e. by ensuring that from the point of which people leave their door, through their point of arrival at their destination, their journey can be undertaken with minimal difficulty)". The ETS acknowledges that most trips involve walking at some stage. Any approach should therefore focus on "...better linking walking and cycling routes with public rights of way network... and improving crossing facilities...".

4.9. Yet again, the removal of a crossing facility does not amount to its improvement. Nor does the removal of a crossing ensure that the links with the public right of way network are improved. For these reasons, CBC says that the proposal is not compliant with ETS Policy 8.

4.10. Section 8 of the ETS concerns the provision of sustainable access and travel choice. At page 105, it is stated that "our green spaces, countryside and coast line are a fundamental part of what makes Essex an attractive place to live. Enabling people to enjoy these is therefore an important factor in promoting well-being and encouraging healthy leisure pursuits... many of the solutions to this will be well beyond the strategy [i.e. the ETS] so this serves to emphasise the importance of maintaining access provided by the rights of way network and maximising the amount of network that it is to use as well as enhancing it where appropriate".

4.11. Again, the ETS is placing emphasis on the importance of maintaining access provided by the existing network and not causing detriment. Yet again, CBC says that the closure of various crossing does have the effect of undermining such an objective which, in consequence, may have a negative impact on a wellbeing and the encouragement of a healthy leisure pursuits.

5. The Essex Design Guide

5.1. The Essex Design Guide seeks to reinforce principles of, and encourage, high-quality development by design. CBC support the design principles endorsed by the Essex Design Guide.

5.2. However, CBC will wish to note that the details of design will be subject only to the determination of the relevant Highway Authority (in this case Essex County Council); Therefore, CBC are in a position whereby they have to take on faith that the Essex Design Guide as a material consideration will be properly considered as/when detailed design of the various schemes is provided.

6. The National Planning Policy Framework (July 2018 edition);

6.1.1. The NPPF sets out the Government's planning policies for England and how these should be applied (per Paragraph 1 NPPF).

6.1.2. The NPPF re-confirm that the purpose of the planning system is to contribute to the achievement of sustainable development. Further at "a very high level, the objective of sustainable development can be summarised of meeting the needs of the present without compromising the ability of future generations to meet their own needs" (per Paragraph 7 NPPF). In achieving sustainable development 3 overarching objectives are identified – an economic objective, a social objective and environmental objective (per Paragraph 8 NPPF).

6.1.3. Accordingly, the benefits that may accrue to the applicant to permitting the closure of various crossings and the associated operational development arising needs to be balanced against the public benefit (or dis-benefit) of so permitting.

6.1.4. In the first instance CBC query whether this has been done.

6.1.5. The commentary on the NPPF provided by the Applicant is very "Network Rail-centric" - it appears to give very little weight or credence to the existing benefit or amenity with that the public at large derive from the existing crossings.

6.1.6. There is no "balancing exercise" in a planning sense of how the proposals amount to sustainable development.

6.1.7. Chapter 9 of the NPPF concerns the promotion of sustainable development. More specifically, Paragraph 110 confirms that application for development should "...*(a) give priority first to pedestrian and cycle movements, both within the scheme and*

with neighbouring areas; and second – so far as possible – to facilitating access to high quality public transport...” (emphasis added).

6.1.8. From Paragraph 110 NPPF it is therefore apparent that pedestrian and cycle movements should have priority over any other forms of transport. In respect of those “other forms of transport” put simply, priority is then given to public modes of transport (i.e. rail and bus) before other modes.

6.1.9. In that regard, there is considerable doubt as to whether the needs of pedestrian or cyclists are being put first in this matter. In many instances - but CBC say in particularly in respect of E41, E51 and E52 - considerable detriment to pedestrians (and potentially cyclists) arises from what appears, at its very highest, to give limited/modest benefit to the rail network.

6.1.10. However, there is no immediate benefit that the Applicant identifies from closing the crossings now (i.e. to facilitate a more frequent rail service or larger/faster trains). CBC therefore believe that the proposal does not align with Paragraph 110 NPPF and may be viewed as premature.

6.1.11. Whilst it is acknowledged that Network Rail may seek to make improvements in the future, no assurance is given. Moreover, at no point does the Applicant “point to” how closure of a specific crossing is or will benefit a development that will or is likely to come forward in the future. It is all very vague.

7. Hedgerow Regulations (relevant only to E51 and E52)

7.1. The hedgerows that the Applicant seeks to “cut through” on proposed diversionary routes for E51 and E52 have been classified by CBC as “Important”.

7.2. The significance of this is that there arises a presumption in favour of protecting and retaining important hedgerows (see clause 1.6 to DEFRA’s “The Hedgerows Regulations - guide to the Law & Good Practice”).

7.3. The effect of such a presumption is, CBC says, as follows:

7.3.1. These “important” hedgerows should not be destroyed but, instead, retained.

7.3.2. The diversions should accommodate the retention of these important hedgerows.

7.3.3. The access onto the highway should therefore be moved to an appropriate point (i.e. the end of the hedgerow).

7.3.4. Moving the access/egress point onto the highway may have safety advantages – these need to be assessed.

7.3.5. However, the diversionary routes are likely to become even longer – CBC therefore repeat submissions made about the proposed diversionary routes for E51 and E52 being too long and unsatisfactory.

7.4. CBC therefore invite the Inspector to not allow harm to come to the Important hedgerows that the Applicant wishes to remove (in part) or “punch through” and, thus, to refuse planning permission in the form sought by the Applicant.

8. Conditions

8.1. Without prejudice to the above CBC do wish to make representation as to appropriate conditions – these shall follow by separate cover.

9. Conclusion/Planning Balance

9.1. As outlined above, CBC identify several policies with which the proposal does not accord. In consequence, the development in respect of E41, E51 and E52 is not in accordance with the Local Plan.

9.2. In consequence, a grant of planning permission (in this case by order pursuant to Section 90[2A] of the Act) should not granted unless material considerations indicate otherwise.

9.3. Of those other material considerations, the ETS is one. The Applicant makes no reference to the ETS – it is invited to do so. That said, CBC identify a number of ETS policies with which the Applicant’s proposal(s) appear to not comply.

9.4. The Essex Design Guide is also another material consideration. However, given the lack of detailed design it is not possible, at this stage, to confirm whether the proposals will be compliant.

9.5. Where E51 and E52 are concerned the Applicant is seeking to remove/harm “Important” hedgerows. There exists a presumption in favour of protecting such hedgerows and thus harm will arise by virtue of the Applicant’s proposals. Such is a further material consideration which weighs against the Applicant’s proposal(s).

9.6. The NPPF seeks to promote sustainable development. It is accepted that rail transport does represent a (more) sustainable mode of transport – however, such is not the most sustainable; walking and cycling are the most sustainable modes of transport.

9.7. More specifically, Paragraph 110 NPPF confirms the priority should first be given to pedestrian movements. The Applicant is seeking to promote rail travel above pedestrian movements which, CBC says, is contrary to Paragraph 110 NPPF.

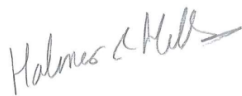
9.8. The Applicant's proposals seek to reduce the amenity offered to those wishing to walk or cycle either by providing alternative routes which are longer and/or by diverting over less favourable (i.e. steeper, slipperier and/or more dangerous) routes.

9.9. The dis-benefits to the most sustainable forms of transport need to be weighed against the benefits that may accrue to rail travel however.

9.10. It is CBC's position that the Applicant has not identified a compelling case for the closure of E41, E51 or E52 at this moment in time. In other words, CBC do not accept that Network Rail have demonstrated that the proposal is sustainable development and will be of benefit to the public transport network as a whole.

9.11. In the round, CBC invite the Inspector to find that the proposal is not in accordance with planning policy.

9.12. Accordingly, it will be a matter for the Secretary of State to determine whether there are any other material considerations that should lead to a grant of planning permission (deemed consent for "development") in this case.



HOLMES & HILLS LLP

On behalf of Colchester Borough Council

29th January 2019

APPENDIX 1 TO PLANNING NOTE

Please note that these materials were produced before the recent creation of the Department for Environment, Food & Rural Affairs.

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Extract

The Hedgerows Regulations 1997

A Guide to the Law and Good Practice



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CHAPTER 1

Hedgerow protection system -- in brief

Aim: To protect important hedgerows in the countryside by controlling their removal through a system of notification.

COVERAGE

1.1 The system applies to most countryside hedgerows in England and Wales. In particular, it affects hedgerows which are 20 metres or more long, or which meet another hedgerow at each end. All these hedgerows must be on, or adjoining, land used for agriculture or forestry, the breeding or keeping of horses, ponies or donkeys; common land, village greens; Sites of Special Scientific Interest or Local Nature Reserves. Garden hedges are not affected.

REMOVAL

1.2 The system is concerned with the removal of these hedgerows, either in whole or in part. 'Removal' includes not only grubbing up, but also other acts which result in the destruction of a hedgerow.

NOTIFICATION SYSTEM

1.3 The procedure in the Regulations is triggered only when land managers (the freehold owner and, in the case of agricultural holdings or farm business tenancies, the tenant) or utility operators want to remove a hedgerow. They must first notify the local planning authority, setting out their reasons for wanting to remove the hedgerow.

1.4 Certain removals, such as to allow necessary access, do not have to be notified.

1.5 The local planning authority generally has 42 calendar days from receipt of notification in which to give or refuse consent to the notified

work, taking account not only of whether the hedgerow is important but also of the reasons given for removing it. If the authority does not respond within this period, the hedgerow may be removed.

1.6 The presumption is in favour of protecting and retaining important hedgerows, though the local planning authority cannot refuse consent if the hedgerow is not important.

IMPORTANT HEDGEROWS

1.7 The Regulations set out criteria that must be used by the local planning authority in determining which hedgerows are important. The criteria relate to the value of hedgerows from an archaeological, historical, landscape or wildlife perspective. They exclude hedgerows that are less than 30 years old. If a hedgerow is at least 30 years old and qualifies under any one of the criteria, then it is important.

APPEAL RIGHTS

1.8 Applicants who have been refused consent by the local planning authority have a right of appeal, in England, to the Secretary of State for the Environment or, in Wales, to the Secretary of State for Wales.

ENFORCEMENT

1.9 Removal of a hedgerow in contravention of the Regulations is a criminal offence, punishable in some cases in the Magistrates' Court by a fine of up to £5,000. For anyone convicted on indictment in the Crown Court, the fine is unlimited.

1.10 The local planning authority may require replacement of a hedgerow removed in contravention of the Regulations. An appeal may be made against this.

CHAPTER 2

Introduction to the Hedgerows Regulations

VALUE OF HEDGEROWS

2.1 Hedgerows are distinctive features of the countryside of England and Wales. As the most traditional type of field boundaries in many areas, hedgerows, and the field banks on which they often run, are often of considerable historic interest. Many date back to the first enclosure of the land and may incorporate other historic features such as ancient earthworks, parish or old property boundaries. They thus contribute positively to the character and interest of the landscape.

2.2 Hedgerows, particularly older hedgerows, often contain a great diversity of plant and wildlife species. Their role in conserving and enhancing biological diversity is recognised in the UK Biodiversity Action Plan¹, which includes a costed habitat action plan for ancient and/or species rich hedgerows. The part played by hedgerows in nature conservation is also reflected in the Conservation (Natural Habitats, etc.) Regulations 1994, which acknowledge that such linear features are essential for the migration, dispersal and genetic exchange of wild species. In England, Planning Policy Guidance Note 9 (Nature Conservation, 1994), and in Wales, Technical Advice Note 5 (Nature Conservation and Planning, 1996) further encourage the development of policies for the management of hedgerows.

HEDGEROW LOSS

2.3 Loss of hedgerows from the countryside landscape has been a continuing cause for concern.

2.4 In particular, the report by the Institute of Terrestrial Ecology (ITE) on hedgerow changes in Great Britain between 1984 and 1990,² revealed that the total hedgerow length in England had fallen in the period by over 20%, and in Wales by 25%. In both England and Wales, over 9% of hedgerows had been removed or destroyed. 5% of the total hedgerow length in 1990 was the result of new planting since 1984. Between 1984 and 1990, 19% of hedgerows in England and 23% in Wales had ceased to be classified as hedgerows as a result of neglect or conversion into another form of boundary.

2.5 A further survey into hedgerow changes for the years 1990 to 1993 compared the results with those obtained from the previous survey³. It showed that the rate of hedgerow removal had more than halved from 9,500 to approximately 3,600 km per year. In addition, the rate of gains from new planting had increased from 1,900 to 4,400 km per year, more than outweighing the losses from removal in numerical terms.

2.6 A two-pronged approach has been developed to tackle the problems identified by these surveys. On the one hand, new grant schemes were introduced. In England, the Hedgerow Incentive Scheme, introduced in 1992, was designed to combat the problem of losses through neglect. It is now part of

¹ Biodiversity: The UK Steering Group Report 1995. Volume 2: Action Plans. HMSO, London.

² Barr, C; Howard, D; Bunce, B; Gillespie, M; Hallam, C. 1991. Changes in Hedgerows in Britain between 1984 and 1990. Contract report for the Department of the Environment. Institute of Terrestrial Ecology, Merlewood, Grange-over-Sands, Cumbria LA11 6JU.

³ Barr, C; Gillespie, M; Howard, D. 1994. Hedgerow Survey 1993. Contract report for the Department of the Environment. Institute of Terrestrial Ecology, Merlewood, Grange-over-Sands, Cumbria LA11 6JU.

the Countryside Stewardship Scheme, administered by the Ministry of Agriculture, Fisheries and Food, which offers grants for the planting and restoration of hedges. In Wales, the Countryside Council for Wales operates Tir Cymen and the Hedgerow Renovation Scheme.

2.7 On the other hand, section 97 of the Environment Act 1995 ('the 1995 Act') empowers Ministers to introduce regulations to protect important hedgerows from removal.

THE HEDGEROWS REGULATIONS 1997 (THE REGULATIONS)

2.8 The Hedgerows Regulations 1997 (SI 1997/1160) contain the detailed arrangements for a system to protect those important hedgerows for which no amount of replanting can substitute.

2.9 The hedgerow protection system set out in the Regulations is administered by local planning authorities. For the purposes of these Regulations, the local planning authority in England is usually in county areas, the District Council or the Borough Council, or in non-county areas the unitary authority; or in Wales the unitary County Council or County Borough Council, except:

- in a National Park, it is the National Park Authority;
- in the Broads, it is the Broads Authority; and
- in the Isles of Scilly, it is the Council of the Isles of Scilly.